

**A SURVIVOR'S GUIDE TO *LARSON V. WASEMILLER*:
AN AID TO ELIMINATING REVERSIBLE ERROR IN MANAGING
NEGLIGENT CREDENTIALING CLAIMS UNDER MINNESOTA LAW**

Mark R. Whitmore, Esq.^Ψ

A. INTRODUCTION

In August 2007, the Minnesota Supreme Court released its decision in the landmark case of *Larson v. WaseMiller*.¹ In *Larson*, the supreme court recognized, for the first time, that a cause of action exists against a hospital for the manner in which a hospital credentials a physician to see patients within that facility. The supreme court determined that it was appropriate to recognize the tort by applying the four-part test from *Lake v. Wal-Mart Stores*.² In so doing, the court fell in line with 30 other states that now recognize a claim for negligent credentialing, leaving only two states that have refused to recognize such a claim.³

The *Larson* court balanced a number of competing concerns in deciding to recognize the tort, including Minnesota's statutory confidentiality protections that preclude credentialing committees from submitting any documents or records generated during credentialing discussions in response to a subpoena, deposition or other discovery.⁴ The *Larson* Court also balanced the prejudice or unfairness to both hospitals and physicians who are statutorily precluded from disclosing the precise nature of the credentialing committee's deliberations without committing a crime.⁵ Finally, the court

^Ψ Mark R. Whitmore is a Partner at Bassford Remele, A Professional Association.

¹ *Larson v. WaseMiller*, 738 N.W.2d 300 (Minn. 2007).

² 582 N.W.2d 231, 231 (Minn. 1998).

³ 738.N.W.2d at 307.

⁴ See MINN. STAT. § 145.64 (2006).

⁵ See MINN. STAT. § 145.65 (2006).

evaluated the prejudice that recognizing such a claim would place on physicians who would be forced to litigate prior claims not involving the plaintiff whose care is actually at issue in the litigation.⁶

This article is intended to highlight the critical issues of *Larson* that will likely impact trial courts across the state of Minnesota. In particular, this article will summarize the decision in *Larson*, and emphasize those trial management questions left unanswered by the supreme court. This article is intended to guide lawyers and judges involved in negligent credentialing litigation, with an eye toward balancing statutory confidentiality protections, and potential prejudice to parties.

B. *LARSON v. WASEMILLER* -- A SUMMARY:

The *Larson* case stemmed from a medical malpractice claim initially asserted against two physicians who performed a gastric bypass surgery on the plaintiff, Mary Larson.⁷ The surgery was performed on April 2, 2002 by Dr. James Wasemiller with the assistance of his brother, Dr. Paul Wasemiller, at St. Francis Medical Center in Breckenridge, Minnesota.⁸ Following the surgery, Larson experienced complications, necessitating a second surgery, which was performed by Dr. Paul Wasemiller on April 12, 2002.⁹ Following the second surgery, Larson was moved to a long-term care facility.¹⁰ Her condition worsened, and she was rushed to another hospital for emergency

⁶ 738 N.W.2d at 312.

⁷ Brief, Addendum and Appendix of Appellants Mary Larson and Michael Larson at *5-6, *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007) (Nos. A05-1698, A05-1701), 2006 WL 4756186.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

surgery.¹¹ Larson experienced additional, allegedly permanent, complications and remained hospitalized for approximately three months.¹²

After initially commencing the action solely against the physicians, the Larsons amended their Complaint to assert claims against St. Francis Medical Center.¹³ The Amended Complaint did not allege that St. Francis employees who provided direct patient care to Larson were negligent, but claimed that St. Francis was negligent in credentialing Dr. James Wasemiller to perform surgery or see patients at the hospital.¹⁴

In attempting to assert their credentialing claims against St. Francis, the Larsons focused on a considerable amount of prior conduct involving Dr. James Wasemiller.¹⁵ At the trial court level, the Larsons relied on the fact that Dr. James Wasemiller had been the subject of ten prior malpractice claims or lawsuits and had struggled to find malpractice insurance.¹⁶ The Larsons noted that Dr. James Wasemiller was disciplined by the Minnesota Board of Medical Practice and failed his board certification examination three times before passing.¹⁷ Additionally, the Larsons alleged that Dr. James Wasemiller should not have been credentialed for reasons apart from his professional experience – namely, that he was behind in his child support and income taxes.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ *Larson v. Wasemiller*, 718 N.W.2d 461, 463 (Minn. Ct. App. 2006).

¹⁴ *See Larson*, 738 N.W.2d at 302; (As the Supreme Court explained, a hospital's credentialing decision determines whether a physician may see patients in a hospital and which procedures a physician may perform. When a hospital grants credentials to a physician, this does not create an employment relationship between the physician and the hospital, but rather, it provides a physician with access to the hospital's facilities.)

¹⁵ Brief of Respondents Mary and Michael Larson at 9-10, *Larson v. Wasemiller*, 718 N.W.2d 461, (Minn. Ct. App. 2006) (Nos. A05-1698, A05-1701), 2005 WL 4662968, at *5-9.

¹⁶ *Id.* at *5-6.

¹⁷ *Id.* at *4-5.

¹⁸ *Id.* at *10 (The Larsons dropped this claim on appeal to the Minnesota Supreme Court).

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The trial court granted the Larsons' motion to assert the claim.¹⁹ Next, the hospital brought a Rule 12 motion to dismiss, claiming that Minnesota does not recognize a common law cause of action for negligent credentialing of a physician, and also, that the hospital's credentialing committee is immune from claims of negligent credentialing pursuant to section 145.63.²⁰ The trial court denied the hospital's motion to dismiss, and certified the following two questions to the Minnesota Court of Appeals:

1. Does the state of Minnesota recognize a common law cause of action against a hospital for negligent credentialing/privileging of a physician?
2. Do Minnesota Statutes, Sections 145.63-.64 grant immunity from or otherwise limit liability of a hospital or other review organization for a claim of negligent credentialing/privileging of a physician?²¹

The Minnesota Court of Appeals reversed the trial court, holding that Minnesota does not recognize a common law cause of action for negligent credentialing or privileging of a physician against a hospital or other review organization.²² The court of appeals held that allowing a claim of negligent credentialing would cause the hospital to be liable for the acts of an independent contractor, and that this extension of basic tort principles would impact many unrelated areas of law.²³ The court further held that allowing a claim for negligent credentialing would be inconsistent with the statutorily created strict confidentiality surrounding the decisions made by credentialing committees due to their status as review organizations.²⁴

¹⁹ *See Larson*, 718 N.W.2d at 463.

²⁰ *Id.* at 465.

²¹ *Id.* at 463.

²² *Id.* at 469-70.

²³ *Id.* at 466.

²⁴ *Id.* at 466-67 [discussing § 145.64 (stating that deliberations of review organizations "shall not be disclosed to anyone.")].

The Larsons appealed the court of appeals' decision, and the Minnesota Supreme Court reversed.²⁵ The supreme court applied the four-part analysis established in *Lake v. Wal-Mart* to recognize a common law cause of action for negligent credentialing.²⁶ The first *Lake* factor is whether a tort is a natural extension of an established common law right.²⁷ In addressing this factor, the court recognized that hospitals owe a duty of care to patients to protect them from harm by third persons.²⁸ Contrary to the court of appeals' decision, the supreme court compared the tort of negligent credentialing to one of negligent hiring, despite the court's earlier recognition that granting of hospital privileges does not create an employment relationship.²⁹ The supreme court further concluded that negligent credentialing is "more directly related" to the negligent selection of an independent contractor, despite the court's statement that Minnesota had never specifically adopted that tort.³⁰

The second *Lake* factor is whether a majority of other states recognize a common law claim for the particular tort.³¹ The court noted that at least 27 states recognize the claim of negligent credentialing, and at least three others recognize a claim for corporate negligence, even though those states had not identified a broader claim for negligent credentialing.³²

The third *Lake* factor focused on whether negligent credentialing would conflict with other statutes.³³ The *Larson* defendants and numerous *amici* argued that a tort of

²⁵ See *Larson*, 738 N.W.2d at 303.

²⁶ *Id.* at 304, citing *Lake*, 582 N.W.2d at 233.

²⁷ *Larson*, 738 N.W.2d at 304.

²⁸ *Id.* at 305.

²⁹ *Id.*

³⁰ *Id.* at 306.

³¹ *Id.* at 304.

³² *Id.* at 306-07.

³³ *Id.* at 309.

negligent credentialing would directly conflict with the confidentiality provisions of Minnesota's peer review statutes.³⁴ The defendants also argued that the statutory confidentiality provisions would unfairly prejudice their case, since the provisions prevented the hospital from disclosing what actually transpired during the credentialing process.³⁵ The supreme court concluded that this *Lake* factor weighed in favor of recognizing a negligent credentialing claim because "negligence could be shown on the basis of what was actually known or what *should have been known* at the time of the credentialing decision."³⁶ While recognizing the statutory confidentiality protections, the supreme court noted that the plaintiff in a negligent credentialing action could attempt to prove her case based on information obtained from "original sources" outside the review organization.³⁷ In other words, the supreme court held that while a patient/plaintiff may not obtain the actual information considered by the credentialing committee (thereby maintaining the confidentiality protections), the plaintiff could pursue the claim by looking for information that otherwise might be available in the public domain.³⁸ While the supreme court did not provide any guidance as to what this information might include, presumably this might include information regarding a physician's claims history or other relevant background information impacting the physician's ability to practice medicine safely at a hospital.

With respect to the fourth *Lake* factor, the supreme court concluded that the policy considerations underlying the tort of negligent credentialing outweighed the policy considerations reflected in the peer review statute because the confidentiality concerns

³⁴ *Id.* (citing MINN. STAT. §§ 145.63-.64 (2006)).

³⁵ *Larson*, 738 N.W.2d at 309.

³⁶ *Id.* at 310 (emphasis in original).

³⁷ *Id.*

³⁸ *See id.*

created by the peer review statute were adequately addressed by precluding access to the confidential peer review materials.³⁹ In other words, the court seemed to find that in light of the court’s “original source” analysis, any tension created by the peer review statute’s confidentiality protections was not implicated because those credentialing committee’s materials would remain confidential.⁴⁰

C. *LARSON V. WASEMILLER* – UNANSWERED QUESTIONS.

After recognizing the claim of negligent credentialing, the supreme court provided remarkably little guidance to trial courts in dealing with these types of cases. The court specifically declined to address the fully briefed and argued question as to whether the malpractice trial against the physician with respect to the patient/plaintiff’s care needed to be bifurcated from the negligent credentialing trial.⁴¹ The defendants and *amici* argued that bifurcation was necessary to prevent the inherent prejudice that would result when a physician is unable to defend the malpractice case arising from his care to the patient because the jury hears considerable evidence about other patients who presented claims against that physician. In other words, while the relevant evidence arising from the care to other patients might be critical evidence in the credentialing aspect of the case, that same evidence is extremely and unfairly prejudicial to the physician attempting to defend his care to the actual plaintiff/patient whose care is at issue.⁴² The supreme court recognized the bifurcation issue but concluded that this was a question of trial management that should remain with the trial judge.⁴³

³⁹ *Id.* at 313.

⁴⁰ *See id.* at 310.

⁴¹ *Id.* at 313.

⁴² *See id.* at 312-13; *see infra* note 49 and accompanying text.

⁴³ *Larson*, 738 N.W.2d at 313.

The supreme court also provided no guidance to trial courts in defining the scope of discovery or how to balance the statutory confidentiality protections contained within the review organization statute.⁴⁴ The supreme court again concluded that such decisions are best left to the trial court.⁴⁵ Finally, the supreme court recognized that there was “an issue about whether a patient must first prove negligence on the part of a physician before a hospital can be liable for negligently credentialing the physician,”⁴⁶ but did not explain how this issue should be resolved. Presumably, this issue arose as the result of a considerable amount of briefing on the issue of causation – i.e., how can a hospital be liable for negligently credentialing a physician without proof that the physician violated the standard of care in the first place? Again, the supreme court concluded that such a decision was best left in the hands of the trial court judge.⁴⁷

D. LARSON V. WASEMILLER -- DEALING WITH THE UNANSWERED QUESTIONS.

While the supreme court answered the main question as to whether Minnesota law currently allows the pursuit of a common law claim for negligent credentialing, the supreme court failed to answer numerous, critical questions that will directly impact litigation of these cases. Those issues impact discovery, as well as basic trial management.

1. To Bifurcate Or Not To Bifurcate.

Throughout the arguments to the trial court, court of appeals, and the supreme court, the parties focused considerable attention on the significant risk of unfair prejudice to the physician accused of malpractice if the negligence and credentialing claims were

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

tried together.⁴⁸ While the attorneys for the Larsons claimed the credentialing case against the hospital could be tried alongside the medical malpractice case against the physician, that issue was vehemently challenged on multiple levels by the defendants and *amici*.⁴⁹ The defendants claimed that combining the trials would be unfairly prejudicial because irrelevant issues stemming from prior lawsuits and patients whose care was not at issue in the current action would become the centerpiece of the jury's attention in the malpractice case when that evidence is wholly irrelevant and extremely prejudicial.⁵⁰

As stated by the *amici*, it is abundantly clear that the claim of negligent credentialing must be bifurcated from the traditional malpractice claim against the physician.⁵¹ Bifurcation must occur for two reasons. First, undue prejudice would fall upon the physician in the malpractice case because the irrelevant, prejudicial evidence from the credentialing case would become the centerpiece to the litigation in the malpractice case. Second, principles of judicial economy require bifurcation to eliminate much of a potentially unnecessary trial. A negligent credentialing trial should only be necessary upon a finding of negligence against the physician in the malpractice case, and a further finding by the trial court that the physician is underinsured.

a. Bifurcation prevents unfair prejudice arising from other suits/claims.

In *Larson*, the supreme court specifically held that the plaintiff in a negligent credentialing claim must prove her claim through original sources, relying on information

⁴⁸ See, e.g., Reply Brief of James Preston Wasemiller, M.D., 718 N.W.2d 461, (Minn. Ct. App. 2006) (Nos. A05-1698), 2005 WL 4662969, at *11-17; Joint Brief and Addendum of Amici Minnesota Hospital Association, Minnesota Medical Association, and the American Medical Association, 718 N.W.2d 461, (Minn. Ct. App. 2006) (Nos. A05-1698, A05-1701), 2005 WL 4662966, at *16-19; Brief of Minnesota Defense Lawyers Association, 718 N.W.2d 461, (Minn. Ct. App. 2006) (Nos. A05-1698, A05-1701), 2005 WL 4662967, at *11-12.

⁴⁹ See *supra* note 48.

⁵⁰ *Id.*

⁵¹ *Id.*

and records other than those generated by the credentialing committee.⁵² In future trials, it is likely that a considerable amount of attention will focus on the number and the merit of previous claims against the physician. While other lawsuits have nothing to do with whether the physician violated the standard of care *in the case at issue*, this claims history easily could become the most important issue in a negligent credentialing trial.

Although not specifically addressed by the Minnesota appellate courts, the rule that has consistently been applied across the country is that evidence of other lawsuits is generally not even discoverable, much less admissible.⁵³ Perhaps the most succinct analysis stems from Maryland's highest court which explained the significant prejudice that occurs when a jury in a medical malpractice case is tainted by information regarding other lawsuits. In *Lai v. Sagle*,⁵⁴ the court reversed a jury verdict for the plaintiff, holding it was reversible, prejudicial error for the trial court to allow plaintiff's counsel to refer to prior suits against the defendant physician.⁵⁵ The court held the prior suits had "little, if any, relevance to whether [the physician] violated the applicable standard of care in the immediate case,"⁵⁶ finding that evidence of prior suits does not aid the jury but "tends to excite its prejudice and mislead."⁵⁷ The court acknowledged that it could not conceive of a more damaging event in a medical malpractice trial than to disclose prior suits to the jury.⁵⁸

⁵² See *Larson*, 738 N.W.2d at 310.

⁵³ See *Wood v. McCullough*, 45 F.R.D. 41, 41 (S.D.N.Y. 1968).

⁵⁴ 818 A.2d 237 (Md. 2003).

⁵⁵ *Id.* at 249.

⁵⁶ *Id.* at 247.

⁵⁷ *Id.*

⁵⁸ *Id.* The *Lai* court cited at least six jurisdictions recognizing the fundamental principle that prior malpractice actions are neither relevant nor admissible. See *Lai*, 818 A.2d at 248. In addition to those cited in *Lai*, additional courts from across the country have reached the same conclusion. See *Weil v. Seltzer*, 873 F.2d 1453, 1461 (D.C. Cir. 1989); *Lund v. McEnerney*, 495 N.W.2d 730, 734 (Iowa 1993); *Bates v. Denney*, 563 So.2d 298, 299 (La. Ct. App. 1990); *Delgaudio v.*

The only way to prevent undue prejudice to a physician in the malpractice aspect of the case is to bifurcate the malpractice trial from the negligent credentialing trial. Absent bifurcation, the jury would likely hear considerable evidence of the physician's prior lawsuits when considering whether the physician was negligent in providing medical treatment to the patient whose care is at issue. This would shift the attention away from whether the physician violated the standard of care to the outcomes of other patients or litigation totally unrelated to the patient's case. Bifurcation is necessary to eliminate that unfair prejudice.

b. Judicial economy requires bifurcation.

In the negligent credentialing phase of a trial, the defendant physician would be forced to litigate, at least in part, the merits of the other lawsuits or to explain why those lawsuits were settled. This aspect of the litigation would be avoided if the jury in the malpractice trial against the physician finds that (a) the defendant physician complied with the standard of care, (b) the defendant physician was not the cause of harm to the patient, *or* (c) the defendant physician is adequately insured to satisfy the judgment.⁵⁹ Certainly, lawsuits can be settled for a number of reasons including cost of defense, witness unavailability or nominal amounts of money that are frequently the subject of confidentiality agreements. Indeed, the jury deciding the credentialing case would need to hear evidence explaining why/whether the other malpractice cases were settled, tried, won or lost. One can certainly conceive of a situation in which a physician or hospital defending a negligent credentialing claim would need to subpoena claims adjusters or

Rodriguera, 654 A.2d 1007, 1010 (N.J. Super. Ct. App. Div. 1995); McGarry v. Horlacher, 775 N.E.2d 865, 872 (Ohio Ct. App. 2002); McKee v. McNeir, 151 S.W.3d 268, 270 (Tex. App. 2004); Stottlemeyer v. Gramm, 597 S.E.2d 191, 194 (Va. 2004); Hicks v. Ghaphery, 571 S.E.2d 317, 325-26 (W. Va. 2002); Armstrong v. Hrabal, 87 P.3d 1226, 1241-42 (Wyo. 2004).

⁵⁹ The question of insurance would be a judicial determination not to be considered by the jury.

experts from other cases to explain why the other cases were settled, lost or dismissed. This could easily double or triple the length of a combined malpractice/credentialing trial, not to mention cause extraordinary prejudice to the physician whose care is the subject of the malpractice case.

Absent bifurcation, the negligent credentialing trial would prejudice the defendant physician and drastically expand the testimony into issues regarding prior patients or conduct that simply do not involve the patient whose care is at issue. Beyond that, in many cases, the negligent credentialing trial would not be necessary. With bifurcation the negligent credentialing trial would only be necessary if the jury finds negligence and causation against the physician *and* the physician does not have sufficient insurance coverage to satisfy the judgment.

Courts across the country have correctly held that absent a finding of fault *and* causation against the physician in the underlying malpractice claim, no cause of action exists against the hospital for credentialing that physician.⁶⁰ Courts have reached that conclusion by finding as a matter of law that causation against the hospital does not exist if the malpractice claim against the physician has failed.

Likewise, the Ohio Court of Appeals in *Davis v. Immediate Medical Services* correctly held that courts should bifurcate the credentialing action against the hospital from the malpractice claim against the physician to avoid unfair prejudice to the physician, noting “why raise the specter of an appeal issue or undue prejudice and bias if

⁶⁰ See *Trichel v. Caire*, 427 So.2d 1227, 1233 (La. Ct. App. 1983) (“Inasmuch as we find no negligence on the part of [the physician], the hospital’s granting of such privileges to [the physician] did not cause her complications.”); *Hiroms v. Scheffey*, 76 S.W.2d 486, 489 (Tex. App. 2002) (“Because the jury found [the physician] was not negligent, and we are affirming that finding there can be no negligent credentialing claim against [the hospital].”).

it can be avoided by the bifurcation of the issues?”⁶¹ The *Davis* court further noted that “[t]he matter *sub judice* did not become ripe until and if medical negligence was found on behalf of [the physician].”⁶²

The bottom line is that since any liability imposed upon the hospital would be contingent upon a finding of fault and causation against the defendant physician, it would seem a significant waste of judicial resources to drastically extend the length of trials absent the jury’s determination that the physician indeed was negligent and then a judicial determination as to whether the physician had sufficient resources to satisfy a judgment. For example, consider a hypothetical example in which a jury returns a verdict concluding the physician has violated the standard of care and that the physician’s care was a direct cause of harm to the patient. The verdict awards total damages to the patient in the amount of \$250,000, but the physician had \$1 million of insurance coverage. Given these facts, there would be no need to try the credentialing claim against the hospital. Indeed, only if the tortfeasor/physician was found liable to the patient for \$1 million *and* the physician had less than \$1 million in insurance coverage, would the credentialing trial become necessary. Bifurcation is the only possible means of attaining judicial economy *and* preventing unfair prejudice.

2. Determining what is Relevant:

The trial court also will need to decide what evidence is relevant in the credentialing trial. The trial court must determine whether a physician’s prior acts are the type of evidence that may impact a decision as to whether the physician should have been credentialed in the first place. In *Larson*, the plaintiff contended in part that the hospital

⁶¹ No. 94 CA 0253, 1995 WL 809478, at *7 (Ohio Ct. App. Dec. 12, 1995) *aff’d in part, rev’d in part*, 684 N.E.2d 292.

⁶² *Id.*

was negligent in credentialing Dr. James Wasemiller because he was behind in child support and in income taxes.⁶³ Obviously, that information has nothing to do with whether the physician violated the standard of care in providing medical services to a patient. Likewise, it would seem extraordinarily remote and prejudicial to suggest that a physician's tax status would have anything to do with whether the hospital should have allowed the physician to see patients within its facility. Trial courts must prevent the credentialing lawsuit from becoming nothing more than an effort to unfairly taint the physician in the eyes of the jury. As a result, the trial court should prevent the introduction of irrelevant evidence that has nothing to do with the physician's medical care, education, experience or credentialing history from diverting the jury's attention to irrelevant issues that are unfairly prejudicial and certainly not admissible pursuant to Rule 403 of the Rules of Evidence.⁶⁴

Trial courts will face similar challenges with respect to information such as board certification. Again, in *Larson*, the plaintiff contended that the physician should not have been credentialed because he initially had failed the board certification examination.⁶⁵

Whether a physician has become board certified is not relevant in a malpractice action.⁶⁶

⁶³ See Brief of Respondents, *supra* note 48, at *9-10 (The Larsons dropped this argument on appeal to the Minnesota Supreme Court.)

⁶⁴ See Minn. R. Evid. 403. Rule 403 states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.*

⁶⁵ *Larson*, 738 N.W.2d 300.

⁶⁶ See *Lai*, 818 A.2d at 246. The *Lai* decision is consistent with decisions from across the country that routinely hold whether a physician passed her board certification examination was not relevant in her malpractice trial. See *Campbell v. Vinjamuri*, 19 F.3d 1274, 1276-77 (8th Cir. 1994); *Douglas v. University Hosp.*, 150 F.R.D. 165, 171 (E.D. Mo. 1993); *Gipson v. Younes*, 724 So.2d 530, 531-32 (Ala. Civ. App. 1998); *Marsingill v. O’Mallley*, 58 P.3d 495, 500 (Alaska 2002); *Jackson v. Buchman*, 996 S.W.2d 30, 34 (Ark. 1999); *Williams v. Memorial Medical Center*, 460 S.E.2d 558, 560 (Ga. Ct. App. 1995); *Beis v. Dias*, 859 S.W.2d 835, 838 (Mo. Ct. App. 1993); *Hawkey v. Peirsel*, 869 A.2d 983, 988 (Pa. Super. Ct. 2005); *Burnet v. Spokane Ambulance*, 933 P.2d 1036 (Wash. 1997).

Again, the court must distinguish relevant, credentialing information from smear campaigns against physicians.⁶⁷

3. Challenges in Protecting Peer Review and Controlling Discovery.

Trial courts and attorneys involved in the litigation of negligent credentialing claims must remain consistently aware of the specific, statutorily-imposed confidentiality provisions established by the Minnesota Legislature. In 1971, the Legislature created unique confidentiality protections for information assembled by a hospital review organization.⁶⁸ Those protections dictate that peer review information “shall be held in confidence, shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization, and shall not be subject to subpoena or discovery.”⁶⁹

Further, the twenty-three recognized purposes of a review organization covered by the confidentiality protections include information and discussions regarding credentialing.⁷⁰ The Legislature directed that statutory confidentiality shall extend to information used in “determining whether a professional shall be granted staff privileges in a medical institution . . . or whether a professional’s staff privileges, membership, or participation status should be limited, suspended or revoked.”⁷¹ The *Larson* Court in its

⁶⁷ This further heightens the need to bifurcate the trials and prevent the wholly irrelevant evidence from having any opportunity to unfairly prejudice the physician in the underlying malpractice case. Since the finding of fault in the credentialing trial would be contingent upon a finding that the physician had originally violated the standard of care in a manner that was a direct cause of harm to the patient, trial courts should make certain that the underlying issues are fairly litigated and that the physician/alleged tortfeasor does not have sufficient coverage to pay the judgment before even commencing a trial on the credentialing claim.

⁶⁸ Information considered or produced by a review organization is commonly referred to as ‘peer review material’.

⁶⁹ See § 145.64, subdiv. 1(a).

⁷⁰ See *id.*

⁷¹ See *id.* § 145.61, subdiv. 5(i).

decision never concluded that hospitals must disclose the actual information considered by the credentialing committee. Indeed, the supreme court seemed to largely approve negligent credentialing only because it felt confidentiality could be maintained through the use of original sources.⁷²

Trial courts must continue to follow the specific confidentiality protections established by the Minnesota Legislature in section 145.64 and the numerous decisions by the Minnesota Supreme Court that have repeatedly recognized the critical importance of encouraging the most candor possible in the course of the peer review process.⁷³ The supreme court has explained the policy behind peer review protections as follows:

In pursuit of their goal in improving the quality of health care through the use of the peer review system, state legislatures have recognized that professionals will be reluctant to participate freely in peer review proceedings if full participation includes: (1) the possibility of being compelled to testify against a colleague in a medical malpractice action, and (2) the possibility of being subjected to a defamation suit by another professional.⁷⁴

Throughout the discovery process and the eventual trial of negligent credentialing claims, it is absolutely imperative on trial court judges to maintain the confidentiality of

⁷² See *Larson*, 738 N.W.2d at 310.

⁷³ The importance of maintaining confidentiality has also been recognized by the concurring opinion in *Larson* and numerous additional academic authorities. See *Larson*, 738 N.W.2d at 314 (Anderson, J., concurring); see also Reed E. Hall, *Hospital Committee Proceedings and Reports: Their Legal Status*, 1 AM. J.L. & MED. 245, 267 (1975) (“[C]urtailing the candid deliberations of [peer review] committees because of a fear of the discovery process could eventually lead to the destruction of the benefits of committee review.”); Kenneth R. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 MASS. L. REV. 157, 162 (2002) (“Ultimately, physicians cannot be expected to participate candidly in peer review or error reporting activities if their identities, comments, records and recommendations are not afforded strict protection.”).

⁷⁴ *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 387 (Minn. 1999) (citing *Bredice v. Doctors Hosp.*, 50 F.R.D. 249, 250 (D.D.C. 1970); see also *Konrady v. Oesterling*, 149 F.R.D. 592, 596 (D. Minn. 1993); *Campbell v. St. Mary’s Hosp.*, 252 N.W.2d 581, 587 (Minn. 1977) (stating that peer review is intended to “encourage the medical profession to police its own activities with a minimum of judicial interference”); *In re Parkway Manner*, 448 N.W.2d 116, 119 (Minn. Ct. App. 1989) (stating that peer review is intended to encourage the medical profession to “police its own activities with a minimum of judicial interference”).

peer review material. While it may be tempting for attorneys representing clients who have sued hospitals in a credentialing case to try and obtain peer review information, despite its potential relevance the law in Minnesota remains clear – peer review information cannot be obtained in discovery or be admitted at trial. It would be immediate error for a trial court to force any hospital or other member of a peer review committee to disclose information in violation of section 145.64.⁷⁵ A trial court order forcing the disclosure of peer review information would and should be the subject of an immediate petition for writ of prohibition to preclude the trial court from ordering such a disclosure.⁷⁶

4. Applicability of section 145.682 of the Minnesota Code to Negligent Credentialing Claims

In 1986, the Legislature enacted section 145.682 of the Minnesota Code.⁷⁷ Section 145.682 codified the requirements for any plaintiff seeking to pursue a medical negligence claim against a healthcare professional. In particular, the statute required a series of affidavits to be signed by plaintiffs’ lawyers and ultimately by experts who will testify that the defendant physician deviated from the applicable standard of care and that the deviation from the standard of care caused harm to the patient.⁷⁸ In its decision in *Larson*, the supreme court did not decide whether section 145.682 applies to claims of

⁷⁵ The Minnesota Legislature has imposed specific criminal penalties upon any individual or entity that discloses information obtained or utilized in a peer review process, such as a credentialing committee. *See* MINN. STAT. § 145.66 (2006).

⁷⁶ *See* MINN. R. CIV. APP. P. 120.01-.03; *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 135 N.W.2d 43 (Minn. 1965) (stating that writs of prohibition are issued to prohibit trial courts from exceeding their jurisdiction or where the court was ordered production of information clearly not discoverable).

⁷⁷ *See* MINN. STAT. § 145.682, subdiv. 2 (2006).

⁷⁸ *See id.* at subdiv. 3.

negligent credentialing.⁷⁹ In reviewing the statute, it seems abundantly clear that the statute should apply. Section 145.682 provides in part:

In an action alleging malpractice, error, mistake, or failure to care, whether based on contract or tort, against a healthcare provider which includes a cause of action as to which expert testimony is necessary to establish a *prima facie* case, the plaintiff must:

- (1) Unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdiv. 3; and
- (2) Serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdiv.4.⁸⁰

The statute applies to negligent credentialing claims because hospitals clearly fall under the definition of a “healthcare provider.” The statute defines “healthcare provider” not only as a physician, surgeon, or dentist, but as a “healthcare professional or hospital.”⁸¹ By the very nature of credentialing, hospitals are healthcare providers who must define and articulate whether a physician is qualified to become an appropriate member of the medical staff. In *Larson*, the supreme court held that a claim against such a healthcare provider is a recognized tort. The application of Minn. Stat. Sec. 145.682 falls squarely within the statute’s parameters and should plainly apply to the credentialing claim.⁸²

As noted previously, the statute specifies that the plaintiff pursuing the action against the healthcare provider must provide an affidavit signed by the plaintiff’s attorney stating that the facts have been reviewed with an expert whose qualifications provide a

⁷⁹ The attorneys for the plaintiff in *Larson* offered expert disclosures in an apparent attempt to comply with section 145.682. See § 145.682.

⁸⁰ *Id.* at subdiv. 2(1)-(2).

⁸¹ *Id.* at subdiv. 1.

⁸² *Larson*, 738 N.W.2d 300.

reasonable expectation that those opinions could be admissible at trial.⁸³ The statute further requires a second affidavit that must be signed by the actual expert and the plaintiff's attorney identifying the expert and his or her opinions.⁸⁴ Minnesota law also requires expert testimony in cases outside the confines of a lay person's knowledge, training and experience.⁸⁵ The requirement exists because the average juror does not have the background information about either the medical issues or the credentialing process in order to determine whether a physician on the medical staff should be credentialed.⁸⁶

Section 145.682 sets forth the requirements of expert review and its applicability to all cases against a "healthcare provider". There should be little question that a plaintiff's attorney seeking to pursue a negligent credentialing matter must comply with the expert review requirements associated with the statute. As the statute specifically states, a plaintiff's failure to comply with any of the expert affidavit requirements must result in "mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a *prima facie* case."⁸⁷

Because credentialing decisions are outside the knowledge base of an average juror, and section 145.682 specifically applies to tort claims against healthcare providers –including hospitals – trial courts should force plaintiffs seeking to pursue claims of

⁸³ See § 145.682, subdiv. 3.

⁸⁴ See *id.*

⁸⁵ See *Walstad v. Univ. of Minn. Hosp.*, 442 F.2d 634, 639 (8th Cir. 1971); *Gross v. Victoria Station Farms*, 578 N.W.2d 757, 762 (Minn. 1998); *Christensen v. Northern States Power Co.*, 222 Minn. 474, 25 N.W.2d 659 (1946); see also *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 172 (Wis. 1981) (stating that "we agree with the ruling of the Appellate Court that expert testimony was required to prove [negligent credentialing]" since such a decision is "not within the realm of the ordinary experience of mankind").

⁸⁶ See, e.g., *Quast v. Bethesda Univ. Family Practice Clinic*, No. 98-1993, 1999 WL 508369, at *2 (Minn. Ct. App. July 20, 1999) (stating that "hospital pharmaceutical standards or the measures that conform to such standards are not within the common knowledge of the average juror").

⁸⁷ See § 145.682, subdiv. 6(a) (emphasis added).

negligent credentialing to comply with the provisions of Minnesota's expert review statute. Such a result is consistent with both section 145.682 and the many cases interpreting the statute.

CONCLUSION

The supreme court's decision in *Larson v. Wase Miller* has created numerous challenges for attorneys and judges who litigate medical malpractice and negligent credentialing cases. Attorneys and trial court judges must walk a fine line between allowing the case to proceed within the parameters established by the supreme court while maintaining the strict confidentiality established by the Minnesota Legislature.

Further, for these trials to be performed in a fair, timely, and just manner, trial courts should bifurcate the trials. And finally, negligent credentialing claims should proceed only if there has been a finding of negligence and causation against the physician in the traditional medical malpractice action *and* the physician lacks adequate insurance coverage or other assets to make the negligent credentialing case necessary.