IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * * *

RYAN NOVOTNY, Plaintiff and Respondent, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a/ AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Petitioners, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Respondents.	)	#27615 (CIV 14-235)
* *	)	
CLAIR ARENS AND DIANE ARENS, Plaintiffs and Respondents, vs. CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETIL and DAVID WITHROW, Defendants and Petitioners,	)	#27626 (CIV 15-167)

)
and)
)
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DANIEL JOHNSON, NUETERRA HEALTHCARE)
MANAGEMENT, and VARIOUS JOHN DOES)
and VARIOUS JANE DOES,)
)
Defendants and Respondents.)
)
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CLAIR ARENS AND DIANE ARENS,) #27631
) (CIV 15-167)
Plaintiffs and Respondents,)
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and)
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M.D., CURTIS ADAMS, DAVID BARNES,)
THOMAS BUTTOLPH, MARY MILROY,)
DOUGLAS NEILSON, ROBERT NEUMAYR,)
MICHAEL PIETILA, CHARLES CAMMOCK,)
DAVID WITHROW, VARIOUS JOHN DOES,)
and VARIOUS JANE DOES,)
)
Defendants and Respondents.)

* * * * *

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

* * * * *

THE HONORABLE BRUCE V. ANDERSON
CIRCUIT COURT JUDGE, PRESIDING

* * * * *

BRIEF OF AMICUS CURIAE

* * * * *

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DECEMBER 15, 2015

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Defendants and Respondents.

INTEREST OF *AMICUS CURIAE*

The South Dakota State Medical Association is a professional organization of nearly 1800 active physicians, as well as residents and medical students, all of whom are dedicated to protecting the health care interests of patients and advancing the effectiveness of physicians throughout South Dakota. The Medical Association believes that the Court's decision in this matter will have a profound effect on the willingness of physicians to participate in the peer review process, and in turn will determine whether the peer review process will continue to be a viable tool for monitoring and improving the quality of health care in South Dakota.

INTRODUCTION

At issue before this Court is a broad public policy concern of central importance to the quality of health care in the State of South Dakota. The South Dakota Legislature, in order to facilitate and promote medical peer review in this state, enacted certain laws to protect peer review activities from disclosure and litigation. SDCL 36-4-25, 36-4-26.1, 36-4-42, 36-4-43. Plaintiff in this case seeks to erode these important protections. Medical peer review serves an important public interest of improving the quality of health care in South Dakota. Accordingly, the Medical Association respectfully requests

the Court to uphold the express statutory protections, and reject Plaintiff's attempts, and the ruling of the Circuit Court, to circumvent these vital safeguards.

ARGUMENT AND AUTHORITIES

The term "medical peer review" describes a variety of processes through which physicians and other medical professionals evaluate their colleagues' work. South Dakota law defines peer review activities to include matters affecting membership or employment with medical facilities or organizations, review and evaluation of qualifications, conduct and performance of medical professionals, and review of the quality, type, or necessity of services provided by one or more medical professionals individually or as a group. SDCL 36-4-43. Any of these activities, if conducted to "improve the delivery and quality of services," may fall under the statutory definition of "peer review activity." *Id.*

Medical peer review has been "universally accepted as the means by which a hospital and its medical staff scrutinize a physician's credentials and monitor the quality of care that is provided." Jeanne Darricades, Comment, Medical Peer Review: How is it Protected by the Health Care Quality Improvement Act of 1986?, 18 J. of Contemp. L. 263 (1992). At the level of the individual medical professional, peer review enhances the quality of patient care "through effective supervision of health care professionals, elimination from the health care system of those who should not practice, and treatment of those whose abilities are impaired and in need of rehabilitation." Peer Review Immunity Task Group, American Hospital Association, Immunity for Peer Review Participants in Hospitals: What Is It? Where Does it Come From? 9 (1989). Moreover, modern peer review processes emphasize not only identifying and removing substandard

practitioners, but also making "good clinicians better." Norman Weinberg & William Stason, Managing Quality in Hospital Practice, 10 Int'l J. for Qual. in Health Care 295, 301 (1998). At the institutional level, peer review serves as a unique tool to address systemic problems that affect quality of care by identifying latent system failures before harm occurs. *See* Institute of Medicine, To Err is Human, 2 (Nov. 1999) (noting that most commonly, "errors are caused by faulty systems, processes, and conditions that lead people to make mistakes or fail to prevent them"); Lucian L. Leape, Error in Medicine, 272 J. Am. Med. Assoc. 23, 1851 (Dec. 21, 1994); s*ee also* Liang & Ren, Medical Liability Insurance and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare, 30 Am. J. L. and Med. 501, 523.

There is no suitable alternative to peer review available to medical facilities for effectively identifying and addressing safety concerns, reducing preventable injuries, or improving the overall quality of health care delivered to patients. *See Kibler v. Northern Inyo County Local Hospital Dist.*, 138 P.3d 193, 199 (Cal. 2006) ("[P]eer review …is essential to preserving the highest standards of medical practice."); *Sevilla v. United States*, 852 F. Supp. 2d 1057, 1060 (N.D. Ill. 2012) (further citations omitted) ("Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care.").

Effective peer review requires competent and willing participants. Because of the complex nature of health care, doctors and other medical professionals are the only individuals suited to appropriately evaluate the effectiveness of medical care provided and actively participate in peer review. *See Young v. Western Pa. Hosp.*, 722 A.2d 153,

156 (Pa. Super. Ct. 1999) (further citations omitted) ("Because of the expertise and level of skill required in the practice of medicine, the medical profession itself is in the best position to police its own activities."); *Cameron v. New Hanover Mem'l. Hosp.*, 293 S.E.2d 901, 922 (N.C. Ct. App. 1982) (further citations omitted) (noting that where "human lives are at stake … [t]he evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers.") Accordingly, medical institutions must be able to find competent medical professionals willing to participate in peer review.

Furthermore, effective peer review also requires that those participating in the reviewing activities engage in a frank, candid exchange of ideas. Full and fair evaluation of the quality of care of either an individual or an institution requires that the reviewing parties freely discuss and criticize, if necessary, the actions taken by their colleagues. If committee members fail to engage in a candid evaluation of their peers' qualifications and actions, errors will not be identified, substandard procedures will not be addressed, and the quality of overall patient care will suffer. In short, the system will not work.

Despite the important role peer review plays in delivering quality health care, recruiting competent peer reviewers and getting those reviewers to engage in meaningful review can be difficult. One major barrier to accomplishing this participation is fear of potential negative repercussions. As one commentator noted, "[p]hysicians, for example, may be fearful of losing referrals from other physicians, becoming involved in a malpractice action as an involuntary expert witness, or in many cases, may have a realistic fear of being sued themselves for action taken or opinions stated in the committee proceeding." Charles David Creech, The Medical Review Committee Privilege: A Jurisdictional Survey, 67 N.C.L. Rev. 179, 185, 33 (1988).

Because of these fears, it is widely accepted that open and honest peer review only occurs when participants are assured that the proceedings of, and information relied upon by, the peer review committee will be kept confidential. *See, Wesley Medical Center v. Clark*, 669 P.2d 209, 216 (Kan. 1983) ("[If hospitals] are to be effective in this endeavor they cannot and must not have their consideration subject to scrutiny by outsiders."); *Trinity Medical Ctr. v. Holum*, 544 N.W.2d 148, 155 (N.D. 1996) ("[P]hysicians would not feel free to openly discuss the performance of other doctors practicing in the hospital, without assurance that their discussions in committee would be confidential and privileged."); *Stevens v. Lemmie*, 40 Va. Cir. 499, 506 (Va. Cir. Ct. 1996) (further citations omitted) ("Indeed, without protection from disclosure such discussions would probably be meaningless and without substance."); *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 691 (Mass. 2005) ("Physicians would be far less willing candidly to report, testify about, and investigate concerns of patient safety if their actions would be subject to later scrutiny and possible litigation.").

Empirical evidence supports the conclusion that disclosure of peer review proceedings in litigation undermines the efficacy of those proceedings. Specifically, a study conducted by Harris Interactive reveals that concern about use in litigation is cited by physicians and hospital administrators as the leading factor that discourages medical professionals from openly discussing and thinking of ways to reduce medical errors. *See* Common Good, Fear of Litigation Study, The Impact on Medicine Final Report, study no.15780 (2002). The same study also revealed that no more than 5% of physicians, nurses, and hospital administrators think that their colleagues are very comfortable discussing medical errors with them. *Id.* *See also* L. Leape & D. Berwick, Five Years

After To Err Is Human: What Have We Learned?, 293 JAMA 2384, 2387 (2005) (concluding that fear of medical malpractice liability remains a major impediment to the adoption of "a nonblaming systems-oriented approach to errors," as recommended in *To Err Is Human*).

Physicians are concerned about use of medical peer review documentation, proceedings, and results in litigation for several reasons. First, physicians fear the personal exposure that may result from participating in peer review proceedings. Personal liability is possible if a physician whose conduct has been criticized brings defamation, discrimination, or antitrust claims against the members of a peer review committee. The possibility of personal liability in these actions is an obvious deterrent to physicians asked to join peer review committees, and is something at least one member of the Medical Association has already raised with the Medical Association's leadership as a reason not to serve on a peer review committee. *See* Affidavit of Tim Ridgway, MD, in support of Motion and Application of the South Dakota State Medical Association to Appear as Amicus Curiae.

Second, physicians are concerned that their analysis of a colleague's conduct may later be used in court against that colleague. The possibility that comments, records, and recommendations will later be used against the physician under review in a malpractice action is an obvious deterrent to providing frank and unrestrained criticism of a colleague. Peer review participants do not wish to become involuntary experts for the plaintiff in a malpractice action. Indeed, if the documentation, findings and suggestions of a peer review proceeding may later be used in malpractice or other actions against the individual whose performance is being reviewed, many physicians will not serve as peer

reviewers at all – or will dilute their comments in a manner that detracts from the usefulness of the process.

Third, physicians fear that disclosure of peer review materials will lead to a loss of referrals or to strained relations with colleagues. *See* Owens, Peer Review: Is Testifying Worth the Hassle?, Med. Econ. Aug. 20, 1984, at 168 (noting that 21% of physicians had lost referrals or had antagonized colleagues because of their participation in peer review procedures). The loss of referrals is an especially serious concern as an increasing number of physicians practice in referral specialties that leave them dependent on the goodwill of their colleagues. *See* P. Scibetta, Note, Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review, 51 U. Pitt. L. Rev. 1025, 1034-35 (1990). Put simply, the threat of disclosure undermines the collegiality upon which effective peer review depends.

Finding physicians willing to participate in peer review activities is especially difficult in small communities, many of which already suffer from a shortage of physicians. If the few who are available to serve are further disincentivized for the reasons set out above, it may well become impossible to staff the peer review activities required of local hospitals by ARSD 44:75:04:02, which in turn may force those hospitals to close.

The Medical Association asserts that these fears exist regardless of what others might consider to be limitations on the exceptions to the privilege, such as the exception carved out by the Circuit Court. From the peer-reviewing physician's point of view, the documents subject to the physician's review, as well as his or her comments and actions, are no longer absolutely exempt from disclosure, but instead are subject to review and

disclosure to the public and the physician's colleagues, which in turn is a substantial deterrent to service on a peer review committee.

All fifty states have enacted privileges or other laws to protect the activities of peer review committees from litigation. *See Adkins v. Christie*, 488 F.3d 1324, 1327 (11th Cir. 2007). Similarly, Congress' enactment of the Patient Safety and Quality Improvement Act of 2005 ("the Act") demonstrates Congressional recognition of the importance of confidentiality and privilege protections for medical peer review proceedings. The Act creates a system of voluntary medical error reporting that encourages health care providers to report medical errors to a centralized database where researchers will analyze the information and provide recommendations for improving patient safety. The Act establishes "Patient Safety Organizations" as the means of conducting these "activities that are to improve patient safety and the quality of health care delivery." 42 U.S.C. § 299b-24(b)(1)(A). The efforts of Patient Safety Organizations are complementary to those of medical peer review committees; Patient Safety Organizations will do on a national and system-wide level what medical peer review committees do on a local and individual level.

Significantly, the Act provides privilege and confidentiality protections for all "patient safety work product" used to conduct patient safety activities. *Id.* at § 299b-21(7)(A). Patient safety work product is broadly defined to include "any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" that are "assembled or developed" by a provider or a patient safety organization for "the conduct of patient safety activities." *Id.* (emphasis added) By including broad confidentiality and privilege protections in the Act, Congress

acknowledged that medical error reporting - and medical peer review activities – are compromised when there is a threat of disclosure in discovery proceedings and when medical peer reviewers are subject to potential liability. *See* S. Rep. No. 108-196, at 4 (2003) ("The purpose of this legislation is to encourage a 'culture of safety' and quality in the U.S. health care system by providing for broad confidentiality and legal protections of information collected and reported voluntarily for the purposes of improving the quality of medical care and patient safety.")

In addition, the Act addresses the need for confidentiality and privilege protections for state-mandated and institutionally-mandated medical peer review proceedings by providing that the Act does not "limit the application of other Federal, State, or local laws that provide greater privilege or confidentiality protections than the privilege and confidentiality protections provided for in this section." 42 U.S.C. § 299b-22(g)(1). This language ensures that confidentiality and privilege protections provided by state statutes are not limited by the Act, and further demonstrates Congress' recognition that these protections are essential to medical peer review activities.

The South Dakota Legislature has also recognized the value of medical peer review. In order to facilitate full participation by medical professionals, the South Dakota Legislature implemented two important protections to reassure peer review committee members of the confidentiality of the peer review process.

First, South Dakota law provides that materials from peer review activities are privileged and not subject to discovery. SDCL 36-4-26.1. Second, South Dakota law provides immunity to peer review members for actions taken without malice within the scope of the peer review process. SDCL 36-4-25. For decades, these laws have

provided a predictable and safe environment in which medical professionals could engage in difficult peer review activities without fear that those activities would be subject to discovery and scrutinized in litigation. *See* South Dakota Sess. Laws 1977, Ch. 291; South Dakota Sess. Laws 1966, Ch. 151.

In this case, Plaintiff is attempting to erode these important protections. The Medical Association believes that removing the evidentiary privilege protection from peer review activities in South Dakota will have an immediate negative effect on the quality of health care in South Dakota. It is well recognized that removing privilege protection from peer review activities has a noted chilling effect on those activities. *See Cruger v. Love*, 599 So. 2d 111, 114-15 (Fla. 1992) ("The privilege afforded to peer review committees is intended to prohibit the chilling effect of the potential public disclosure of statements made to or information prepared for and used by the committee in carrying out its peer review function.")

As explained above, complete confidentiality of the entire peer review process is key to the free flow of documentation and sensitive communication necessary for effective peer review. Without that absolute confidentiality, medical professionals will not feel comfortable actively participating by engaging in a frank and honest discussion. To put it plainly, "[p]hysicians 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." Kenneth Kohlberg, The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures, 86 Mass. L. Rev. 157, 162 (2002). The quality of peer review activities will decrease as the free flow of documentation is restricted and conversations become more limited. Moreover, many medical

professionals will likely be deterred from joining peer review committees altogether. Without individuals willing to serve on peer review committees, valuable feedback will be lost and the overall quality of health care will suffer.

The Medical Association recognizes that the cost of any evidentiary privilege is the limiting of a party's ability to gain potentially relevant information related to their legal claims. A privilege limits the individual's search for truth. However, it is within the power of the legislature to limit discovery and provide a privilege. *See Jaffee v. Redmond,* 116 S. Ct. 1923, 1929, 518 U.S. 1, 12, 135 L. Ed. 2d 337, 346, (1996) (categorizing state law evidentiary privileges as "policies of the state" arising out of "reason and experience"); *Lee v. Clark Implement Co.*, 141 N.W. 986, 988 (SD 1913) ("It is conceded, of course, that the Legislature may change rules of evidence and of procedure[.]"). This is especially fitting when an important public interest is at stake.

In this case, eroding or destroying the long-standing privilege granted to peer review activities threatens to destroy the most beneficial review tool available to medical professionals in the State of South Dakota. Without peer review, medical institutions lack important feedback necessary to make life-saving changes in the delivery of care. This in turn threatens the very health and well-being of every citizen seeking medical care in the State of South Dakota.

The Legislature contemplated and weighed the competing interests of discovery and the confidentiality of peer review, and found protecting medical peer review to be the greater good. As a result, the Legislature created the protections challenged by Plaintiff in this case. The Medical Association strongly encourages this Court to honor the intent of the Legislature, recognize the important public interest behind this statutory scheme,

and reject Plaintiff's attempts to erode protections given to peer review committees in this State.

CONCLUSION

For the reasons stated above, the Medical Association respectfully requests that this Court uphold the privilege granted by statute and reverse the decision of the Circuit Court.

Dated this 24th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the Brief of Amicus Curiae in the above-entitled action were duly served upon the parties by electronic mail on the 24th day of February, 2016, to the following named persons at their last-known addresses as follows, to-wit:

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The undersigned further certifies that a true copy of the Brief of Amicus Curiae in the above entitled action was sent by electronic mail to the Supreme Court Clerk at SCClerkBriefs@ujs.state.sd.us, and that the original and two (2) copies of the Brief of Amicus Curiae in the above entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, the date above written.

/s/Timothy M. Engel
TIMOTHY M. ENGEL

CERTIFICATE OF COMPLIANCE

Timothy M. Engel, attorney for Amicus Curiae, hereby certifies that the foregoing Brief of Amicus Curiae complies with the type volume limitation imposed by the Court by Order. Proportionally spaced typeface Times New Roman has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance, the Brief of Amicus Curiae contains 3,562 words and does not exceed 16 pages. Microsoft Office Word 2007 word processing software has been used.

Dated this 24th day of February, 2016.

MAY, ADAM, GERDES & THOMPSON LLP

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STATE OF SOUTH DAKOTA	) : SS	IN CIRCUIT COURT
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

KRISTI LAMMERS **Plaintiff,** **v.** **ALLEN A. SOSSAN, DO, AND RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, PC,** **Defendants.**	**CIV. 13-456** **MEMORANDUM DECISION: PLAINTIFFS' MOTION TO COMPEL DISCOVERY PLAINTIFFS' MOTION ON CONSTITUTIONALITY OF PEER REVIEW STATUTE SDCL 36-4-26.1 PLAINTIFFS' MOTION AND ARGUMENT CONCERNING HOSPITAL LIABILITY AND NEGLIGENT CREDENTIALLING**

This Memorandum Decision shall apply to all cases against Dr. Sossan, Lewis & Clark Specialty Hospital, LLC, Sacred Heart Health Services, Avera Sacred Heart Hospital and Avera Health, or against similar defendants, in all of the following cases:

Judy K. Robertson v. Allen A. Sossan, et al, 66CIV13-118; Kim Andrews v. Allen A. Sossan, et al, 66CIV13-445; Kristi Lammers v. Allen A. Sossan, et al, 66CIV13-456, Valerie Viers v. Allen A. Sossan, et al, 66CIV14-214; Judy K. Robertson v. Allen A. Sossan, et al, 66CIV14-215; Kristi Lammers v. Allen A. Sossan, et al, 66CIV14-216; Kim Andrews v. Allen A. Sossan, et al, 66CIV14-217; Richard Fitzsimmons v. Reconstructive Spinal Surgery and Orthopedic Surgery P.C., et al, 66CIV14-224; Donald Bowens v. Allen A. Sossan, et al, 66CIV14-225; Kelli J. Tjeerdsma v. Allen A. Sossan, et al, 66CIV14-226; Rodney Gene Hrdlicka v. Allen A. Sossan, et al, 66CIV14-227; Leo J. Payer v. Allen A. Sossan, et al, 66CIV14-228; Vanessa Callahan v. Allen A. Sossan, et al, 66CIV14-229; Edward Janak v. Allen A. Sossan, et al, 66CIV14-230; Melvin D. Birger v. Allen A. Sossan, et al, 66CIV231; Thomas R. Hysell, Junior v. Allen A. Sossan, et al, 66CIV14-232; Cathy Kumm v. Allen A. Sossan, et al, 66CIV14-233; Shelly L. Jones-Hegge v. Allen A. Sossan, et al, 66CIV14-234; Ryan Novotny v. Allen A. Sossan, et al, 66CIV14-235; Dawn Anderson v. Allen A. Sossan, et al, 66CIV14-237; Renee Praeuner v. Allen A. Sossan, et al, 66CIV14-238; Bernadine Pinkelman v. Allen A. Sossan, et al, 66CIV14-243; Larry Lieswald v. Allen A. Sossan, et al, 66CIV14-244; Bridget Zweber v. Allen A. Sossan, et al, 66CIV14-245; Audrey Smith v. Allen A. Sossan, et al, 66CIV14-258; Susan Sherman v. Allen A. Sossan, et al, 66CIV14-259; Christa Dejong v. Allen A. Sossan, et al, 66CIV14-263; Laurie Strate v. Allen A. Sossan, et al, 66CIV14-296; Jean Wildermuth v. Allen A. Sossan, et al, 66CIV14-298; Brett McHugh v. Allen A. Sossan, et al, 66CIV14-303; and Valerie Viers v. Allen A. Sossan, et al, 66CIV12-90.

Consequently, this memorandum decision will be filed in each of these cases to which this Judge has been assigned and will be treated as the decision in each case referenced above collectively known as the "Sossan Litigation."

Background

Various Plaintiffs, as set forth in the cases cited above, filed actions against Dr. Allen Sossan, his private medical clinic, Avera Sacred Heart Hospital (ASHH) and Lewis and Clark Specialty Hospital (LCSH) and other Defendants, as named in the various cases, alleging various claims including fraud, deceit, RICO violations, negligence, negligent credentialing, bad faith credentialing as well as other claims. Shortly after this litigation commenced the various Plaintiffs filed discovery requests including extensive interrogatories and requests for production of documents. Defendants responded to those discovery requests providing little useful information to the Plaintiffs, and on numerous occasions objected on the grounds that the materials sought were protected under the South Dakota Peer Review Confidentiality and Privilege statute SDCL 36-4-26.1. The Defendants also filed a motion for summary judgment alleging that the Plaintiffs' claims were barred by the applicable statute of limitations. Defendants claim that Plaintiffs have sued for medical malpractice or otherwise with relation to the delivery of medical services and that such claims are outside the 2 year statute of limitations. The Plaintiffs countered by arguing that their causes of action are not for medical malpractice or the delivery of medical service, but rather allege negligent credentialing of Dr. Sossan, malicious or bad faith credentialing of Dr. Sossan, (asserting that the various Defendants violated their fiduciary duty and that greed was the motive for allowing Dr. Sossan privileges), RICO claims, and other causes of action. At the hearing on the motion for summary judgment this Court ruled that the gravamen of the Plaintiffs claims sounded in fraud and deceit and were not actions for medical malpractice, that alternatively, if the gravamen of the cases are later determined to involve negligent delivery of medical services that the statute of limitations is tolled as genuine issues of material fact existed as to fraudulent concealment, and denied all Defendants' motion for summary judgment on that basis.

Left unresolved at that hearing was the present motion concerning discovery disputes with relation to immunity of peer review members and the privilege and confidentiality of the peer review process. Following the hearing the Defendants requested that this Court make a specific ruling, as to each item of evidence, concerning their Motion to Strike the Affidavits of Counsel[1], and that they be given the opportunity to submit a supplemental brief on the issues presented in this decision. Both of these requests were granted. Plaintiffs were also given an opportunity to reply to the supplemental brief. Substantial briefing has occurred in all of the cases on these issues.

Factual Background

The Court has on this same day ruled upon the Defendants' Motion to Strike the various affidavits of counsel and the exhibits attached thereto, which were filed in response to the Defendants' motion for summary judgment. Plaintiffs' counsel filed affidavits with voluminous

[1] There were 8 affidavits filed, each containing numerous voluminous exhibits consisting of almost 900 pages of materials, consisting of transcripts, scientific/medical journals and national medical data compliations.

attachments. Those affidavits and attachments are the basis of the facts of this decision except as limited by the ruling on the Motion to Strike.

Each Plaintiff or their surviving children have provided their own independent affidavit concerning the facts of their particular case. Each affidavit, in summary, recites a brief history of the Plaintiff's dealings with Dr. Allen Sossan, information they gained about Dr. Sossan since their relationship with him, and a claim that if they would have known of Dr. Sossan's history they would have never allowed him to provide medical services concerning their medical care.

The affidavits also contain information that numerous physicians or other professional health care providers who have subsequently treated most of the Plaintiffs have personally told those patients that the surgeries that Dr. Sossan performed were not necessary, were not justified by the medical tests or were performed improperly.[2]

Dr. Sossan grew up in Florida and attended two post-secondary educational institutions in Florida. While in Florida he was convicted of a felony burglary charge as well as felony bad check charges. Thereafter he changed his name from Alan Soosan to Allen Sossan. After changing his name he applied for and was admitted to medical school, obtaining his Doctor of Osteopathic degree and eventually becoming an orthopedic surgeon.

Ultimately, Dr. Sossan ended up practicing medicine at Faith Regional Hospital in Norfolk, Nebraska. He also owned and operated a clinic business known as Reconstructive Spinal Surgery and Orthopedic Surgery, PC, a New York Professional Corporation. After a short period of time in Norfolk, Nebraska issues began to arise concerning Dr. Sossan's medical care, medical testing practices, and his personality as it reflected on his fitness to practice medicine. He eventually lost privileges at Faith Regional Hospital in Norfolk, Nebraska.

The record discloses that at the same time Dr. Sossan was having problems in Nebraska, ASHH and LCSH began courting him to join their medical facilities in Yankton, South Dakota. By that time, based upon a fair reading of all the information in the exhibits and other information in the numerous Affidavits of Counsel, Plaintiffs believe they can establish that the

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[2] Upon the Court's review of the various materials in response to the motion for summary judgment, the Court has observed that all of the following doctors are quoted by Plaintiffs' as having made a statement that Dr. Sossan's treatment and surgeries were unnecessary or otherwise improper in some manner. The exhibit and page are referenced: Lawrence Rubens; Ex 22; p 15; Patrick Tryance; Ex 22; p 15;John McClellan; Ex 26-27; p 15;Michael Longley; Ex 32; p 16; Dan Wilk; Ex 21; p 16; Quentin Durward; Ex 21, 70; p 16, 37; Dan Johnson; Ex 16; p 18; Robert Neumayr; Ex 16; p 18; Lars Aanning; Ex 16; p 18, 58; Robert Suga; Ex 41, 67; p 21, 35; Dr. Jensen; Ex 49; p 25; Geoffrey McCullen; Ex 50; p 26; Wade K. Jensen; Ex 54; p 27; Brent Adams; Ex 55; p 28; Eric Phillips; Ex 58; p 29; Kynan Trial; Ex 64; p 33; Richard Honke; Ex 64; p 33; Mitch Johnson; Ex 65, 71, 72; p 34, 38; Michael T. O'Neil; Ex 68; p 35; Dr. Bowdino; Ex 68; p 35; Dr. Megard; Ex 74; p 40; Dan Noble; Ex 75; p 41; Gregg Dyste; Ex 76; p 41-42; Wade Lukken; Ex 77; p 42; Kent Patrick; Ex 77; p 42; Bonnie Nowak; Ex 79, p 44; Troy Gust; Ex 81; p 46.

Defendants knew or should have known Dr. Sossan had a terrible reputation among the Northeast Nebraska, Northwest Iowa, and Southeast South Dakota medical community and that there were serious questions as to his fitness to practice medicine. Some of this knowledge was based upon reports from doctors and other medical providers who had worked with Dr. Sossan, and other knowledge is based upon doctors who subsequently treated his patients. Other information came from general discussion among the medical community concerning his competency, demeanor, comportment, professionalism, and medical practice style.

In order to practice medicine in the Yankton area Dr. Sossan was required to obtain a medical license from the South Dakota Board of Medical and Osteopathic Examiners (SDBMOE). He was also required to obtain privileges from the peer review committees of Avera Sacred Heart Hospital (ASHH) and Lewis & Clark Specialty Hospital (LCSH). Ultimately, Dr. Sossan received a license from the SDBMOE. However, with regard to his practicing privileges, initially he was denied same by the peer review committees in Yankton. Because of the fact that no information has been disclosed as to what kind of information the peer review committees considered there is a complete absence of information in the record to document what the peer review committees considered in denying him privileges at that time. Ultimately, after consultation with legal counsel, at least some of the peer review committee members changed their votes to grant Dr. Sossan privileges. According to the information and evidence provided to the court thus far, legal counsel advised the peer review Defendants that if they did not grant Sossan privileges, they would be sued by him. There is a complete absence of evidence in this record at this time indicating that Dr. Sossan had made any claim or threatened any legal action against any Defendant here, or even if so, the basis for such claims.

Within the information submitted by Plaintiffs in response to the motion for summary judgment there is an affidavit from Dr. William B. Winn. Dr. Winn was employed at the Faith Regional Hospital in Norfolk, Nebraska, knew Dr. Sossan, and practiced within that medical facility with him. He was also associated with ASHH in Yankton at that time. He testified in his affidavit that he was aware of serious issues regarding Dr. Sossan and that these issues were well known among the Faith Regional Hospital administration and management. He testified that he has personal knowledge that Dr. Sossan falsified patients' medical charts in order to justify unnecessary medical procedures on his patients, among other serious concerns with regard Dr. Sossan. Most importantly for this case, Dr. Winn testified in his affidavit that when he learned of Dr. Sossan's attempt to secure medial privileges in Yankton he personally intervened to report these serious concerns regarding Dr. Sossan, and his firm opinion that Dr. Sossan posed a danger to the public. He claims he talked directly to Dr. Barry Graham, MD, (who held a position on one of the peer review boards), about these serious concerns and that he strongly encouraged that Sossan not be granted privileges.

Other physicians have given testimony in malpractice cases against Dr. Sossan that question his fitness as a licensed physician. For example, Dr. Robert Suga, and orthopedic surgeon of Sioux Falls, testified in a deposition that in his opinion Dr. Sossan performed

unnecessary surgeries with the motive of generating bills and income for himself. (Affidavit of Counsel, Exhibit 41) Dr. Quentin Durward, an orthopedic surgeon from Dakota Dunes, had similar opinions and findings with his patients treated subsequent to Dr. Sossan. See Affidavit of Plaintiff's Counsel. In general, Plaintiffs have amassed a significant amount of evidence that, if proven to be true at trial, would raise a serious question if Dr. Sossan should have never been licensed, granted privileges, or that when he was, action should have been taken promptly to revoke or restrict his privileges, and that any reasonable person responsible for his medical practice supervision should have known he may have posed a danger to patients and taken appropriate action. This court finds such to be the case even after screening out and ignoring the strong characterizations put upon the facts by the Plaintiffs. (See generally the various Affidavits of Plaintiff's Counsel, Plaintiff's Brief in Opposition to Defendant's Motion For Judgment on The Pleadings, Dated October 30th, 2014, and Plaintiff's General Recitation of Facts Regarding Various Motions Set for Hearing, Dated October 23rd, 2014.)

According to the evidence presented by the Plaintiffs thus far, soon after Dr. Sossan was granted privileges in Yankton, issues and complaints began to arise that should have made it obvious to doctors and other persons in the medical field that there was a serious and substantial question as to Soosan's fitness, competency and ability to practice medicine in his specialty prompting further inquiry. Numerous witnesses have provided affidavit testimony that they personally reported, (some on an anonymous basis), Dr. Sossan's problems to the SDBMOE and to the peer review Defendants in this case. Other witnesses observed assaultive behavior and claim to have reported those incidents. Minutes of Lewis & Clark Specialty Hospital, submitted in response to the Summary Judgment Motion, show that Dr. Sossan's problems and credentials were discussed. Those minutes also show that prior to Dr. Sossan being hired LCSH was required to borrow $200,000 for certain capital expenditures. Following the hiring of Dr. Sossan minutes reflect the business was declaring dividends for its physician members.

According to the evidence submitted by the Plaintiffs, despite the fact that there were numerous complaints and much discussion among the medical community about Dr. Sossan, no action was taken to limit, modify, or otherwise terminate his privileges in the Yankton medical community by those who had the authority to do so.

Plaintiffs retained an expert on medical credentialing and patient safety by the name of Arthur Shore. Mr. Shore is a well credentialed and heavily experienced health care administrator. He has a degree from George Washington University School of Public Health and Health Services. He is a life fellow of the American College of Health Care Executives and is a board certified hospital administrator. He has served as a member of the board of trustees of a number of hospitals and health care institutions across the country. He has authored numerous articles in nationally recognized peer-reviewed professional healthcare administration journals. He has testified concerning health care liability as a qualified expert in legions of cases throughout the country.

Mr. Shore submitted an expert report in this case (Exhibit 15). In that report he states:

"the behavior of the governing body, senior leadership including the chief executive officers, and the medical leaderships clearly reflected willful, wanton, and malicious disregard of the standards of care and administrative community standards applicable to the initial granting privileges and credentials, as well as the subsequent renewal of Sossan's privileges at the hospitals in spite of readily available incontrovertible evidence that Sossan was a convicted felon, engaged in acts of moral turpitude, was unable to work collaboratively with other professionals, performed unnecessary surgery, and lacked the competence to safely perform spine surgery." He goes on to conclude "the complex and compounding failures imposed on unsuspecting patients who relied on the hospital in this regard, commencing with the failure to disqualify an applicant with demonstrable moral turpitude, a convicted felon, failure to conduct proper due diligence and original source information, portion of medical staff leadership recommend granting privileges for inappropriate reasons, failure to initially proctor and monitor Sossan's surgical competence and interpersonal behavior, failure to monitor his disproportionately voluminous surgical escapades, and interpersonal interaction with hospital staff and colleagues, all of which contributed to inflicting serious injuries to patients served by the hospitals, demonstrate gross and wanton disregard for the fiduciary duty obliged of the governing bodies to the communities and in specific the patients they serve."

Numerous other applicable facts will be discussed when necessary in this Decision.

Analysis

The Plaintiffs' main theory of liability in this case is that the Defendants conspired to improperly grant Sossan privileges in violation of their fiduciary duty out of a sense of greed and in disregard of the rights and safety of their patients. They allege that the Defendants committed fraud and deceit upon their patients and the public in doing so. The voluminous record here shows that there were questions presented which indicated that Dr. Sossan was a convicted felon and otherwise indicate he may not have been suitable to be licensed as a physician or granted privileges at either of Defendant medical facilities. Later, administrative action against his medical license in Nebraska had been commenced based upon his activities in Nebraska. Ultimately, Dr. Sossan gave up his license in Nebraska. Numerous lawsuits have been filed against him for malpractice, which he has either substantially lost or settled, including cases in South Dakota and Nebraska. Plaintiff's claims are based primarily upon the theory of improper, negligent and/or bad faith credentialing and fraud, among other claims.

In order to proceed on the various discovery requests based upon this theory, the court must first determine if a new cause of action for wrongful credentialing is or will be recognized in South Dakota.

Is Wrongful or Improper Credentialing a Valid Cause of Action in South Dakota?

The Defendants argue in their briefs that Plaintiff's attempt to obtain the peer review information fails because South Dakota does not recognize a cause of action for negligent or bad faith credentialing. The Defendants argue that the South Dakota Supreme Court "strongly endorsed the effect of the peer review privilege" in *Shamburger v. Beherns*, 380 N.W.2d 659 (SD 1986), and that the court "found the privilege bans the prosecution of an improper credentialing claim"[3]. *Shamburger* was a run of the mill malpractice claim where the plaintiff claimed that Dr. Beherns was an alcoholic or otherwise afflicted with habitual intemperance. Shamburger filed suit against the doctor and the hospital for negligence. The entirety of the Court's analysis in Schamburger on that issue is as follows:

> "Shamburgers also claim error in the granting of summary judgment for Hospital. In their claim against Hospital, Shamburgers alleged Hospital was negligent in allowing Behrens to remain on staff. Shamburgers claim Hospital knew or should have known Behrens had a drinking problem and was incompetent, which manifested itself in a problem with Elston's care.
>
> "The trial court held that the evidence, viewed in the light most favorable to Shamburgers, presented no evidence to show Hospital knew or had any reason to believe that Behrens was incompetent, and that Hospital had not breached any of its medical staff review procedures.
>
> In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally. *Fjerstad, supra.* We note that hospital records concerning staff competency evaluations are not discoverable materials. SDCL 36-4-26.1. Shamburgers cannot obtain the records which would show whether or not the hospital considered or knew of Behrens' drinking problems when Hospital considered his staff privileges. The trial court was correct in determining that Shamburgers had presented no evidence pertaining to Hospital's alleged negligence. Mere allegations in the pleadings cannot thwart summary judgment. *Boone v. Nelson's Estate,* 264 N.W.2d 881 (N.D.1978). Once the motion has been made and supported, the nonmoving party has the burden of showing a genuine issue exists for trial. *Olesen v. Snyder,* 249 N.W.2d 266 (S.D.1976). Trial court found, and we agree, that Shamburgers presented no evidence to support an issue for trial."

The only ruling that *Shamburger* made with respect to privileged records concerned the Plaintiff's request to obtain Dr. Behern's alcohol treatment records from another provider. The

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[3] See joint brief, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC Joint Supplemental Brief in Opposition to the Various Plaintiffs' Motion For Summary Judgment on the Constitutionality of SDCL36-4-26.1, Dated May 11th, 2015 and filed with the Court.

court ruled those records privileged by the physician - patient privilege, and the peer review privilege was not analyzed or mentioned in that part of the Courts analysis. This Court is hard put to find that the above analysis in *Shamburger* is a "strong endorsement" of peer review generally or that South Dakota's peer review statute "bans" a claim of improper credentialing. Improper credentialing was not at issue in Shamburger as it was not pleaded as a cause of action, rather it was a claim of general hospital negligence. SDCL 36-4-26.1 is cited by the Court in its analysis, but it does not appear from reading the above passage that plaintiff's counsel made any argument that the trial court erred in not granting the plaintiff access to the peer review information. That question does not appear to have been presented. Further, Shamburger did not involve claims as are presented in the cases presently before this court where the Plaintiffs allege fraud, deceit, bad faith or RICO claims against the peer review committees involving the peer review process. *Shamburger* does not directly address, approve or reject improper credentialing claims, nor does it directly address the issue of discovery of peer review materials. *Shamburger* does not help the Defendants here and the court is not persuaded that it has much applicability, if any at all, to the present cases.

The Plaintiff's rely upon a number of cases from around the country to support their argument that in a case similar to that presented to this court, that negligent or improper credentialing is a well-recognized cause of action in a majority of states. It does not appear that the South Dakota Supreme Court has had the opportunity to address the issue directly.

This Court has carefully considered legions of cases on improper credentialing and is much persuaded by the authorities and arguments within pages 17 through 21 of the Plaintiffs Brief In Support Of Motion To Compel and Motion for Partial Summary Judgment On The Constitutionality of The South Dakota Peer Review Statute, SDCL 36-4-26.1, which is dated October 23rd, 2014 and filed the same date. Footnote 4 of that brief contains a sample list of cases from a wide variety of jurisdictions that have adopted the theory of improper credentialing claims (all of which this court has carefully read and considered) and these cases, although interpreting different statutory language in many forms, are based upon sound reasoning, analysis and policy considerations.

In *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) the Montana Supreme Court took up the issue for the first time. In approving the cause of action in Montana the Court found that modern medical practices have changed the landscape where new principals can and should be applied. They stated that "When asked to recognize a new cause of action, the Court will review "our own caselaw and the authorities from other jurisdictions" to determine if the "gradual evolution" of the common law supports recognition of the new claim." (Citing *Sacco*, 271 Mont. at 220, 234, 896 P.2d at 418, 426.). In their analysis they reviewed a case from 40 years prior and went on to state:

"However, in doing so, we acknowledged that the rise of the "modern hospital" imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges:

> [T]he integration of a modern hospital becomes readily apparent as the various boards, reviewing committees, and designation of privileges are found to rest on a structure designed to control, supervise, and review the work within the hospital. The standards of hospital accreditation, the state licensing regulations, and the [hospital's] bylaws demonstrate that the medical profession and other responsible authorities regard it as *212 both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.

Hull, 159 Mont. at 389, 498 P.2d at 143. This reasoning is even more persuasive 40 years later, with the development of hospitals into "comprehensive health care" facilities. *Butler,* ¶ 41 (citation omitted)."

To move on this court must determine, in a case of first impression, if the South Dakota Supreme Court would join a majority of other states/jurisdictions that adopt a new cause of action for improper credentialing. Based upon this Court's review of the law and the briefs presented in these cases it appears that South Dakota has all the necessary legal precedents as ingredients other courts have found prerequisite to adopting such a claim including a hospitals duty of care for patient safety, ("In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally", *Shamburger,* ¶8), as well as the concepts of negligent hiring and/or negligent selection of independent contractors. *Kirlin v. Halverson,* 758 NW2d 436 (SD 2008).

Additionally, when read in the negative, the South Dakota peer review statute tends to support such a claim. At least in part, liability against the Defendants here, with respect to the improper credentialing claims, is governed by SDCL 36-4-25. That statute provides:

> There is no monetary liability on the part of, and no cause of action for damages may arise against, any member of a duly appointed peer review committee engaging in peer review activity comprised of physicians licensed to practice medicine or osteopathy under this chapter, or against any duly appointed consultant to a peer review committee or to the medical staff or the governing board of a licensed health care facility for any act or proceeding undertaken or performed within the scope of the functions of the committee, **IF** the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, and acts in reasonable belief that the action taken is

warranted by those facts. The provisions of this section do not affect the official immunity of an officer or employee of a public corporation. (Emphasis added by Court).

Malice is defined as:

> "Malice is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.
>
> Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill will toward that person. Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other's rights. Hatred or ill will is not always necessary." Source South Dakota Pattern Jury Instruction 50-100-20.

"A claim for presumed malice may be shown by demonstrating a disregard for the rights of others." *Flockheart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991).

This Court's reading of the peer review immunity statute cited above indicates that peer review committees are immune **IF** they meet the conditions subsequent as laid out in the statute. In other words, they are immune if they act without malice, if the committee has made a reasonable effort to obtain the facts of the matter under consideration, and if they act in reasonable belief that the action taken was warranted by those facts. A similar finding has been made in the context of physicians bringing action against the peer reviewers by the courts applying the Health Care Quality Improvement Act: "the consequence of failing to satisfy the standards of 42 U.S.C.A. § 11112(a) is merely that the peer reviewers lose the immunity provided by the Act". Construction and application of Health Care Quality Improvement Act, 121 A.L.R. Fed 255, §2.

Consequently, according to this Court's interpretation of the statute, if it can be preliminarily established that a peer review committee acted maliciously or in bad faith, if they failed to make a reasonable effort to obtain the facts of the matter under consideration, or if they act unreasonably based upon those facts, the immunity disappears and there is a cause of action that can be brought against members of a professional peer review committee for the improper credentialing. This interpretation is consistent with most other jurisdictions that have adopted the theory of improper credentialing.[4] Consequently, this Court finds that wrongful or improper

[4] It may be argued that the last half of SDCL 36-4-25 was intended only to protect peer review members from suit filed by physicians who were denied privileges, which can be tied into the primary policy behind the peer review immunity statute so as to promote a free and open dialogue when discussing and deliberating peer review matters with other members. However, nothing in the plain language of the statute limits the scope of the statute to those circumstances. If that was the intent of the legislature, language could have easily been added to limit the applicability of the exception.

credentialing is a valid cause of action in South Dakota and that our Supreme Court would most likely adopt this new common law theory as a basis for recovery based upon existing law and the facts that have been thus far presented in this case.

Is South Dakota's Peer Review Privilege Statute, SDCL 36-4-26.1, Absolute?

The South Dakota peer review confidentiality and privilege statute is set forth in SDCL 36-4-26.1, which provides:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

In the event a sufficient preliminary showing is made to avoid the immunity provided for in SDCL 36-4-25, common sense directs that a plaintiff must be able to obtain some information about how the peer review committee did its work. Without such information it would be impossible to determine if the committee "made a reasonable effort to obtain the facts of the matter under consideration" or otherwise if the peer review committee acted with malice or otherwise improperly. The Defendants here have argued that the statute is constitutional, is absolute, and that there are no exceptions. The Plaintiffs have argued persuasively that to accept the defendants assertion that peer review information is absolutely privileged and confidential no matter what the basis for the need or claim for such information, whether by law enforcement, the government, or private litigants, would eviscerate the entire last clause of SDCL 36-4-25 and leave the peer reviewers to do as they please behind a cloak of absolute privacy.

Viewed in the light most favorable to the Defendants here, the facts in the present cases clearly show that the peer review committees involved had certain factual information concerning Dr. Sossan that warranted a denial of privileges, and in fact, it appears from this record that is how they initially voted. Dr. Anning, a retired physician from the Yankton community, interviewed and recorded Dr. Neumayr, who sat on the peer review committee at

ASHH concerning Dr. Sossan. It has not been argued that the recording of that conversation was illegal, but it has been argued that the substance of the conversation being used here, by its self, violates the peer review privilege statute.[5] That conversation discloses that the peer review committee had information that Dr. Sossan should not have been credentialed and initially voted to deny privileges. According to the evidence and that recorded conversation the peer review committee consulted with Avera Health's legal counsel who advised them that if they did not credential Sossan they would be sued by him.[6] It was only after this conversation with counsel that another vote was taken and Dr. Sossan was granted privileges.

Furthermore, during the interview Dr. Neumayr told Dr. Anning that despite the fact that the committee had denied him privileges, one of the administrators of ASHH had legal counsel for Avera attend a meeting to persuade the committee to grant Sossan privileges because ASSH and LCSH needed him, and that in his opinion at least one peer review member would lie about the matter if when comes to court. (Exhibit 16 A to First Affidavit of Counsel).

According to Plaintiffs, this discussion ensures that the Defendants in this case will perjure themselves at trial and during discovery. The court notes that this discussion raises substantial concerns in that regard. However, this court tempers that concern with the understanding that there is a lack of evidence to support the opinion of the person being interviewed (Dr. Neumayr) to establish the person mentioned will lie about anything. It is a matter of speculation on the part of the declarant at this point in time, but the concern is nonetheless raised by his comment.

SDCL 36-4-26.1 provides a very broad grant of privilege and confidentiality to peer review materials generally, and leaves little room for judicial interpretation. Consequently, if this court is correct that South Dakota will adopt a cause of action for wrongful or improper credentialing and that SDCL 36-4-25 implies such a cause of action, this Court must determine if the plaintiff in such as case has access to any information from the peer review committee to determine if the peer review members acted improperly or with malice, bad faith, fraud or deceit. Plaintiffs argue that because of this conflict between the statutes the peer review privilege statute can otherwise be overcome by a newly recognized exception, but if not, it is unconstitutional.

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[5] Based upon the ultimate ruling in this decision the Court finds that it does not violate the privilege. Furthermore, there is authority that a physician who participates in the peer review process may voluntarily disclose peer review information, see: Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 A.L.R.4th, 1273.

[6] As previously stated, there is a complete absence in the present record of any evidence that any of the Defendants here had been threatened with any legal action by Dr. Sossan at the time counsel for Avera allegedly made these statements or gave this advice.

Courts in other states have found exceptions applicable to the peer review privilege under certain circumstances, including when the peer reviewers have acted improperly or when the court finds that the privilege is applied in a manner that is contrary to public policy.[7]

Many courts have held that peer review materials are absolutely privileged, but that in order to establish liability in a case of wrongful credentialing, the plaintiffs can rely upon independent source information. Suffice it to say that after this court has read many cases on the topic, one conclusion is clear: depending upon the precise statutory language, the particular facts and circumstances presented in the case, and the precise type of information or reports at issue, the courts are all over the board as to whether independent source information is privileged or not privileged and how it can be used. For an excellent summary of those issues this court has relied upon, see Scope and Extent of Protection From Disclosure of Medical Peer Review Proceedings Relating To Claim in Medical Malpractice Action, 69 A.L.R.5th 599 (1999); *see also, Trinity Medical Center v. Holum*, 544 NW2d 148 (ND 1996) at ¶7 ("the caselaw interpreting these widely varying statutes has been described as 'creating a crazy quilt effect among the states'"). During the hearing on this matter and in their supplemental brief the Defendant's seemed to take the position that IF South Dakota adopts improper credentialing as a cause of action under an extension of the common law, the Plaintiffs would be allowed to use some independent source information to prove their claims.[8] This leaves several questions remaining: what type of independent source information would be privileged and what would not? Can the Defendant's then rebut such evidence by using the privileged peer review materials? If not, does the privilege statute "make it impossible for a hospital to defend against such a claim" (*Wasemiller, infra.*)? Is there a point in the process where the Defendants may open the door so that all peer review materials become relevant, discoverable and admissible at trial? If the answer to the latter question is yes, then how long will the trial be delayed to allow

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[7] As quoted in 41 C.J.S Hospitals, §16: "The peer review privilege is intended to benefit the entire peer review process, not simply the individuals participating in the process.[33] Moreover, the statutory privilege for communications on the evaluation of medical practitioners is qualified, rather than absolute, and may be defeated by proof that the person or entity asserting the privilege, when it made the communication, knew the information was false or otherwise lacked a good faith intent to assist in the medical practitioner's evaluation.[34]

The failure of a professional peer review to comply in full with applicable bylaws does not render the fact-finding process unreasonable.[35]

In some states, the peer review process is considered an administrative action.[36] A court is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determine if the administrative decision is premised upon an erroneous conclusion of law; the court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record.[37] However, there is no absolute prohibition of judicial review of hospital peer review decisions, and although courts may not have jurisdiction to review purely administrative decisions of private hospitals, courts do have jurisdiction to hear cases alleging torts, breach of contract, violation of hospital bylaws, or other actions that contravene public policy." (emphasis added)

[8] See, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC's Joint Supplemental Brief In Opposition to the Various Plaintiff's Motion For Summary Judgment on the Constitutionality of SDCL 36-4-26.1 ,at pp 6-7.

Plaintiffs sufficient time to review the materials and prepare to present further evidence? Up to this point, the Defendants have argued very broadly that all information touching upon the peer review process is protected by the privilege and that the court can determine what independent source information is admissible evidence. Rulings on specific items of evidence in this regard are best left for another day when a more complete record can be made.

Cases presented in the briefs by the parties which have found exceptions to the peer review privilege allow information from opposite ends of the spectrum and in between. In *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001) the court held that only the final action or result (modification, restriction, termination of privilege) taken as a consequence of peer review proceedings are discoverable and admissible. *In Estate of Krusac v. Covenant Medical Center*, (cited by Defendants in their supplemental brief and quoted without citation) the Michigan Supreme Court ruled that the scope of the privilege was broad but not without limits and concluded that "objective facts" within the peer review materials were privileged. In contrast to the above cases, in *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987) the Wyoming Supreme Court appears to have gone the opposite direction and ruled that the privilege protects the "internal proceedings" (the deliberative process) but does not "exempt from discovery materials which the committee reviews in the course of carrying out its function, nor action which may be taken thereafter." In *Greenwood*, the court went on to provide that "in short, privileged data does not include the materials reviewed by the committee, only those documents produced by the committee as notes, reports and findings in the review process". Id. At 1089.

This Court has been most persuaded by the rationale in *Greenwood* as persuasive authority. The purpose of the peer review privilege has been stated may times in the cases presented in the briefs as promoting a policy to allow candid and open discussions among peer review committees to encourage doctors to engage in the process so as to *improve the delivery of health care*. Doctors were reluctant to do so in the past for fear of being ostracized from other practitioners, losing patient referrals, and subjecting themselves to lawsuits. In order to encourage doctors to participate in the process and improve the delivery of health care, the law gave them immunity from lawsuits and protected their files and deliberations from discovery, use at trial, or dissemination. That information consists of both objective facts and the subjective deliberations and comments of the participants. SDCL 36-4-25 grants them immunity if they make a reasonable effort to obtain the objective facts concerning the matter under consideration. It makes little sense to put the objective facts beyond the reach of allegedly injured patients or others when the primary intent of the law is to protect the private comments and deliberations of the committee, especially in light of the language of the immunity statute. In a case such as this the information they had and the decision they reached are the crux of the case and go to the heart of the issue.

In the end, carving out an exception to the peer review privilege is a matter of first impression in South Dakota. This Court is reluctant to carve out a new exception, (other than to adopt the independent source rule which Defendants have agreed upon), without statutory or

other binding precedent. Although adopting the holdings in *Greenwood*, supra, is inviting to this Court, there are also good reasons to adopt any of the many other doctrines laid out in cases from a multitude of other jurisdictions. Consequently, this Court rules that the peer review privilege is absolute and subject only to the independent source exception and the crime fraud exception discussed further below.

The Constitutionality of SDCL 36-4-26.1

Is SDCL 36-4-26.1 Unconstitutional As Not Being Rationally Related To a Legitimate Governmental Purpose?

The Plaintiffs have argued that the privilege statute is unconstitutional because it is not rationally related to the purpose for which it was enacted, that being to encourage physicians to deliberate and discuss the abilities and qualifications of other physicians in an open and candid forum with the ultimate goal of improving health care services overall. By making such information privileged and confidential, more physicians would participate in the process and when they did, they would be more honest. The overall policy of the group of statutes passed in the mid to late 1970s to protect the peer review process and the medical industry in this regard was previously considered by the South Dakota Supreme Court as a state "interest in preserving and promoting adequate, available and affordable medical care for its citizens" and was upheld within the context of the medical malpractice damages cap. *Knowles*, 1996 SD 10, 544 N.W.2d 197.

The Plaintiffs have submitted substantial scientific and medical peer reviewed articles, journals and data compilations in support of their argument which were attached to the various affidavits of counsel and argued in their briefs. These articles were allowed and not stricken in the court's ruling on that matter as they are relevant to the argument here. Those articles and journals are from nationally recognized publications relied upon by the medical industry as a whole and conclude that peer review immunity, and granting privilege to all information considered by peer review committees, has harmed the overall goal of improving the safe delivery of medical care and patient safety, as opposed to improving it. The Plaintiffs argue that by denying them access to critical evidence for their cases, the statute violates their right to due process by putting relevant evidence beyond their reach because of a statute that is not rationally related to its intended purpose.

There is a strong presumption that the laws passed by the legislature are constitutional and the presumption is only rebutted when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. *Green v. Siegel Barnett & Schutz*, 1996 SD 147 ¶7, 557 N.W.2d 396, 398. The plaintiffs must demonstrate that the statute does not bear a "real and substantial relation to the objects sought to be obtained" *State v. HyVee Food Stores, Inc.*, 533 N.W.2d 147, 148 (SD 1995).

The scientific/medical data articles submitted by the Plaintiffs and the facts presented and as characterized by the Plaintiffs here cast a dark shadow over the peer review process. Some of the articles submitted by the Plaintiffs bring the legitimacy of confidential and privileged peer review process into serious doubt. However, the policy behind the concept of encouraging physicians to participate in a candid open discussion about the competence of their colleagues and the safety of their patients is a matter of legislative prerogative. If there is some question among the medical industry on a national basis as to the effectiveness or legitimacy of the previously adopted legislative policy, that is an issue best left to the legislature and not the courts. This court finds that the plaintiffs have not clearly, palpably and plainly shown that the statute does not bear a real and substantial relationship to furthering the objective of encouraging physicians to participate in a candid and open discussion as to their colleagues' competence. The Plaintiff's motion in this regard is denied.

Does SDCL 36-4-26.1 Violate the South Dakota Open Courts Provision?

Plaintiffs claim that the statute, if applied broadly without exception, denies them the right to due process and access to the courts under Article VI §20 of the South Dakota Constitution . It does so, they argue, by depriving them of the best and most relevant information to establish their claims of fraud and deceit or that the peer review committees here acted improperly or in bad faith.

It has been held that the Open-court's provision of the South Constitution cannot become a sword to create a cause of action or become a shield to prohibit statutory recognized barriers to recovery and cannot be interpreted to overcome the doctrine of sovereign immunity. *Hancock v. Western South Dakota Juvenile Services*, 647 N.W.2d 722 (SD 2002).

Restrictive statutes of limitations in favor of medical providers, accountants and lawyers have been found to be within the legislature's prerogative, and although limiting a plaintiff's ability to take their case to court, do not violate the open courts provision. *Peterson v. Burns*, 635 N.W.2d 556 (SD 2001); *Witte v. Godley*, 509 N.W.2d 266 (SD 1999) and *Green v. Siegel Barnett*, 557 N.W.2d 396 (SD 1996). Statutes limiting damages in medical malpractice cases similarly have been found not to violate the open courts provision. *Matter of Certification of Question of Law from US Court of Appeals for the Eighth Circuit*, 544 NW2d 183 (SD 1996) and *Knowles v. US*, 544 NW2d 183 (SD 1996).

All parties here rely upon cases from other states to support their position that denying access to peer review materials in discovery does or does not violate constitutional rights. The Defendants argue that despite the fact that the materials are not available for Plaintiff's use in preparation or for trial, the door to the courtroom remains open for the Plaintiffs. The Plaintiffs argue that in the case of fraud, deceit or wrongdoing by the Defendants, depriving them access to the most relevant and material evidence in the case is tantamount to closing the courthouse door, especially when hospitals and clinics are allowed to shelter the evidence of their wrongdoing

behind a cloak of secrecy. Both parties rely upon *Larson v. Wasemiller*, 738 NW2d 300 (Minn. 2007) to support their arguments.

Wasemiller involved a medical malpractice action where the Plaintiff claimed that the hospital was negligent in credentialing the physician defendant. After adopting the cause of action for negligent credentialing the court had to determine if the new cause of action conflicted with the Minnesota peer review privilege statute, which is quite similar to its South Dakota counterpart. The Minnesota Supreme Court found that the privilege statute did not conflict with the newly recognized tort of negligent credentialing but did consider the problems associated with a case when the trial is focused on what facts the peer reviewers actually considered in making their decision. As to the more precise issue of whether the peer review privilege statute denied due process, the Court concluded that the "confidentiality provisions of the peer review statute do not preclude the presentation of evidence in defense of a negligent-credentialing claim" and "that the confidentiality provision is not facially unconstitutional". They left "for another day the question of whether circumstances might arise that would render the provision unconstitutional as applied". *Wasemiller*, ¶15. Consequently, *Wasemiller* left the issue unresolved.

Plaintiffs have relied upon *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996). This case provides the most comprehensive analysis of the interplay between the privilege/confidentiality statute and the constitutional claims that denying plaintiffs access to the peer review materials violates due process and access to the courts. In the end, the Kansas Supreme Court was required to balance the various interests at stake. In finding the privilege/confidentiality statute unconstitutional the court stated:

> In the present case the legislature granted a peer review privilege to health care providers to maintain staff competency by encouraging frank and open discussions and thus improving the quality of medical care in Kansas. We must weigh that privilege against the plaintiffs' right to due process and the judicial need for the fair administration of justice. There can be no question that in granting the privilege, the legislature did not intend to restrict or eliminate a plaintiff's right to bring a medical malpractice action against a health care provider. To allow the hospital here to insulate from discovery the facts and information which go to the heart of the plaintiffs' claim would deny plaintiffs that right and, in the words of the federal court, "raise significant constitutional implications." 129 F.R.D. at 551. The constitutional implication was stated by this court in *Ernest v. Faler*, 237 Kan. 125, 131, 697 P.2d 870 (1985):
>
> > "The right of the plaintiff involved in this case is the fundamental constitutional right to have a remedy for an injury to person or property by due course of law. This right is recognized in the Kansas Bill of Rights § 18, which provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay." *Adams*, Id, ¶16

The Plaintiffs argue that an overly broad application of SDCL 36-4-26.1 violates due process and the open courts provision unless an exception applies or it is judicially reformed to comply with due process.

In *Moretti v. Lowe*, 592 A.2d 855, 857–858 (R.I.1991) the Rhode Island Supreme Court also addressed the issue and concluded:

> "In enacting our peer-review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance."

A similar ruling was made in *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1997) (finding Kentucky's privilege statute facially unconstitutional because there was no relationship between peer review privilege and quality health care)

Consequently, based upon this Courts review of the numerous authorities, it has concluded that Courts have found that a plaintiff's right to discover material in the peer review files is based upon a finding that the privilege/confidentiality statute is unconstitutional or an exception has been judicially created. This court must, if possible, interpret the statute reasonably to find it constitutional. *In Re Davis*, 681 NW2d 454 (SD 2004). As a result, this Court finds that SDCL 36-4-26.1 is not unconstitutional, but in order to reach that result, an exception must be applied in a reasonable fashion, based on existing law, to allow Plaintiffs access to the information and evidence that forms the crux of their cases. The Plaintiff's Motion for Summary Judgment declaring SDCL 36-4-26.1 unconstitutional in violation of the South Dakota Open Courts Provision is denied.

The Crime-Fraud Exception

Courts have long held that privileges applied to evidence and information are subject to various exceptions when the privilege or confidentiality provision is abused. Most cases apply to the attorney-client privilege, but the same or similar concepts have also been applied to other privileges and circumstances. Further, it has long been repeated that privileges created by statute are to be strictly construed to avoid suppressing otherwise competent evidence." *State v. Catch the Bear*, 352 N.W.2d at 640, 646-47[9]. Evidentiary privileges in litigation are not favored and

[9] *Catch the Bear* also quoted the US Supreme Court: "The United States Supreme Court has forcefully supported strict construction: 'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'" *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974).

even those rooted in the Constitution must give way in proper circumstances. Herbert v. Lando, 441 U.S. 153 (1979).

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting). Accord, *United States v. Nixon*, 418 U.S. 683, *51 709–710, 94 S.Ct. 3090, 3108–3109, 41 L.Ed.2d 1039 (1974). *Trammel v. United States*, 445 U.S. 40,50 (1979) All privileges limit access to the truth in aid of other objectives but virtually all are limited by countervailing limitations. *United States v. Textron*, 577 F.3rd 21,31 (1st Cir. 2009)

One of the most significant historical privileges found to have an exception was the juror privilege against being compelled to disclose deliberations and comments among the jurors. In *Clark v. United States*, 289 U.S. 153 S.Ct. 465 77 L.Ed. 993 (1933), a juror was suspected of fraud and deceit upon the trial court for perjuring herself during jury selection. In *Clark* the court considered similar policy considerations supporting juror privilege that form the basis of peer review privilege. The court found that "freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid". *Clark* went on to find that "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy."

Clark went on to find that the privilege does not apply where "the relation giving birth to it has been fraudulently begun or fraudulently continued". The *Clark* Court continued: "The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth."

The Presidential executive privilege was also found to be subject to an exception in *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, *(1974)*. In *Nixon* the Special Prosecutor sought information from the President of the United States that was clearly protected by executive privilege. The *Nixon* court found that "the President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises..." In finding that the executive privilege was not absolute, the *Nixon* court decided that the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *Id.*

The attorney-client privilege, one of the most guarded privileges in history, is also overcome upon a proper showing. *State v. Catch the Bear*, 352 N.W.2d at 640, 646-47. All jurisdictions recognize the exception. The Eight Circuit Court of Appeals has recognized the exception on numerous occasions. *In Re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 50 Fed.R.Serv.3d 1336 *(8th Cir, 2001)* ("The attorney-client privilege encourages full and frank communication between attorneys and their clients so that clients may obtain complete and accurate legal advice. But the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing. Thus, it is well established that the attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554, 563, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989))

The spousal privilege has also been subject to exceptions when crime or fraud are properly asserted. At one point in history it too was considered absolute. In finding an exception to the spousal privilege, in *Trammel v. United States*, 445 U.S. 40,50 (1979) the court stated:

> "No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.
>
> The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime." *Trammel* at 51-52

Numerous other courts have found that in various circumstances that the crime-fraud exception applies not only in criminal cases but in various civil tort cases. Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

On a limited basis, the South Dakota Supreme Court has ruled that the attorney-client privilege is overcome in civil cases involving claims of insurance bad faith. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity,* 2009 S.D. 69, 771 N.W.2d 623.

The plaintiffs have argued here that these traditional privileges above described are rooted deeply in either our constitution (attorney-client privilege) or otherwise in American jurisprudence, and that the peer review privilege/confidentiality statute, SDCL 36-4-26.1, is of modern creation (adopted in 1977) with shallow roots. They argue strenuously that the policy considerations behind the privilege are unsound and consequently erode the strength of such privilege. They further argue that the peer review privilege should be more susceptible to an exception than those more deeply rooted exceptions. Without agreeing that the policy behind the privilege is questionable, the court finds this argument and reasoning sound. There is no compelling or otherwise sufficient basis offered by the Defendants here showing why the crime-fraud exception should not apply to the peer review privilege or that it should be treated any differently that other more firmly rooted privileges. In the appropriate case, like the present case, the balancing required by the law tips in favor of overcoming the privilege and disclosure of the information. All other privileges have been eroded in such a manner. Granted, there is sound policy behind the privilege in facilitating frank and honest discussion among peer review members. However, in certain circumstances, when claims of fraud or deceit are properly presented, the courts have a duty and obligation to allow claimants access to crucial and important evidence. If the privilege in such a case is not overcome, imprudent decisions and wrongdoing in the peer review process would never be brought to light and patient safety and the delivery of medical care would suffer in contravention of the stated public policy. Furthermore, without such an exception to counterbalance the privilege, the statute could be rendered unconstitutional. *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996).

By not allowing access to this information there is no way for a plaintiff, or anyone else for that matter, to determine if the peer review committee members acted without malice; if the peer review committee made a reasonable effort to obtain the facts of the matter under consideration; or if the peer review committee acted in reasonable belief the action taken was warranted by those facts. Without giving Plaintiffs access to this important peer review information, the second clause of the first sentence of SDCL 36-4-25 is rendered completely meaningless and the legislature would have been well served to end that sentence as such: "within the scope of the functions of the committee." The legislature obviously did not do so. They made peer review immunity conditional upon following the rules. These committees owe a substantial and important fiduciary obligation to the entire community, and in order for the public to be satisfied that they are properly carrying out that important fiduciary obligation, when the appropriate case arises, the plaintiffs should have access to the information to make sure the legislative intent as expressed in the statute is upheld.

This Court rules that the peer review privilege, SDCL 36-4-26.1, is not absolute, but is subject to the long recognized crime-fraud exception.

However, the analysis does not stop there. In *Clark* the Supreme Court recognized that it would be absurd to say that the privilege "could be got rid of" merely by making a charge of fraud. (citing, O'Rourke v. Darbishire, (1920) A.C. 581, 604). Clark went on to rule that "there must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in". Clark further stated "To drive the privilege away, there must be 'something to give colour (sic) to the charge'; there must be 'prima facie evidence that it has some foundation in fact."

In *US v. Zolin,* the Supreme Court clarified the procedure that district courts should adopt in deciding motions to compel production of allegedly privileged documents under the crime-fraud exception. First, the Court resolved a conflict in the circuits by holding that the district court has discretion to conduct an *in camera* review of the allegedly privileged documents. Second, concerned that routine *in camera* review would encourage opponents of the privilege to engage in groundless fishing expeditions, the Court ruled that the discretion to review *in camera* may not be exercised unless the party urging disclosure has made a threshold showing "of a factual basis adequate to support a good faith belief by a reasonable person" that the crime-fraud exception applies. *Zolin,* 491 U.S. at 572, 109 S.Ct. 2619. Third, if the party seeking discovery has made that threshold showing, the discretionary decision whether to conduct *in camera* review should be made "in light of the facts and circumstances of the particular case," including the volume of materials in question, their relative importance to the case, and the likelihood that the crime-fraud exception will be found to apply. *Id.* at 572, 109 S.Ct. 2619.

A number of circuits have adopted somewhat different standards regarding the quantum of proof required to satisfy the crime-fraud exception, an issue the Supreme Court declined to reach in *Zolin,* 491 U.S. at 563 n. 7, 109 S.Ct. 2619. *See In re Sealed Case,* 107 F.3d at 50 (D.C.Cir.) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent fraud); *In re Grand Jury Proceedings,* 87 F.3d at 381 (9th Cir.) (reasonable cause); *In re Richard Roe, Inc.*, 68 F.3d at 40 (2d Cir.) (probable cause); *In re Int'l Sys. & Controls Corp.*, 693 F.2d 1235, 1242 (5th Cir.1982) (evidence that will suffice until contradicted and overcome by other evidence).

Sufficient evidence to warrant finding that legal service was sought or obtained in order to enable or aid commission or planning of crime or tort, as required for crime–fraud exception to attorney–client privilege under Kansas law, is that which constitutes prima facie case; prima facie case consists of evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue it supports. K.S.A. 60–426(b)(1). *Berroth v. Kansas Farm Bureau Mutual Ins. Co., Inc.*, 205 F.R.D. 586 (D. Kan. 2002) (applying Kansas law)

To this Courts knowledge, South Dakota has not adopted a similar legal foundation as was laid out in the authorities above. However, South Dakota does require that in order to claim privilege, a privilege log is necessary and required. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623. In Acuity, the court stated:

> "The failure of a party to provide a court with sufficient information to determine the question of privilege raises substantial questions concerning the efficacy of the objection: As a starting point, it is clear that ultimately a party asserting privilege must make a showing to justify withholding materials if that is challenged. The question whether the materials are privileged is for the court, not the party, to decide, and the court has a right to insist on being presented with sufficient information to make that decision. It is not sufficient for the party merely to offer up the documents for in camera scrutiny by the court. Ultimately, then, *637 a general objection cannot suffice for a decision by a court although it may suffice for a time as the parties deal with issues of privilege in discovery."

No privilege log was presented here for a couple reasons. First, the Defendants asked the Court to stay discovery and for protective orders pending their motion for summary judgment on the statute of limitations issue as granting that motion would moot the need for the information. Second, their claim of absolute privilege and the broad scope of the privilege excused them of any obligation to provide a privilege log. Due to the procedural posture of this case at the time of the motion hearing, their failure to provide the privilege log is excused under the circumstances. The parties here were dealing with this issue in discovery and the court was required to give some guidance.

In order to determine if the Plaintiff has met the necessary threshold to properly present the crime-fraud exception the court must consider the law and evidence in this case. Questions of fraud and deceit are generally questions of fact and as such are to be determined by the jury." *Ehresmann v. Muth*, 2008 S.D. 103, ¶ 20, 757 N.W.2d 402, 406 (citing *Laber v. Koch*, 383 N.W.2d 490, 492 (S.D.1986)). To recover on a claim of constructive fraud or deceit a plaintiff must establish that a duty existed between themselves and the defendant." *Sejnoha v. City of Yankton*, 2001 S.D. 22, ¶ 15, 622 N.W.2d 735, 739 (citing *Sabhari v. Sapari*, 1998 S.D. 35, ¶ 17, 576 N.W.2d 886, 892).

Deceit, under SD law is defined by SDCL 20–10–2 as:

A deceit within the meaning of § 20–10–1 is either:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing

SDCL 53–4–5 defines actual fraud as follows:

Actual fraud in relation to contracts consists of any of the following acts committed by a party to the contract, or with his connivance, *with intent to deceive another party* thereto or to induce him to enter into the contract:

(1) The suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true;

(3) The suppression of that which is true by one having knowledge or belief of the fact;

(4) A promise made without any intention of performing it; or

(5) Any other act fitted to deceive.

Actual fraud is always a question of fact. *Arnoldy v. Mahoney*, 791 NW2d 645 (SD 2010)

(SDCL 53–4–6 provides the following definition of constructive fraud:

Constructive fraud consists:

(1) In any breach of duty which, without any actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

2) In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

In this court's ruling on the motion for summary judgment it found that a fiduciary relationship exists between a hospital, clinic, or doctor and the patient. Such a finding is made because many patients go to the hospital in a weakened condition, many suffering from mental and physical limitations due to age, disease, pain or other disability. They are somewhat limited in their choices due to financial constraints placed upon them by their lack of recourses, insurance provider or public assistance. They are required to put their faith and trust in the medical providers who have superior knowledge and skill in making and keeping them healthy. This is especially the case when you consider the fact that medical staff has the ability to render them unconscious and perform significantly invasive medical procedures upon them. There is little room for doubt that a significant fiduciary duty exists on behalf of the Defendants and in favor of their patients in the context of the hospital/physician – patient relationship. *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) ("we acknowledged that the rise of the 'modern hospital' imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges")

When considering the important duty a medical facility or doctor has to the patient, it is imperative that the medical providers are bound to disclose important information. Suppression of information the patient has a right to know, and in fact should know, falls within the

definitions above as both a fraud and a deceit. It also noted in the various materials submitted here that allegedly, the various medical facility Defendant's held Dr. Sossan out as a highly qualified and accomplished surgeon and advertised him as such during his tenure at their facilities. There is other evidence presented indicating some of the Defendants here advised their patients who they had referred to Dr. Sossan that he was a competent and accomplished surgeon. Meanwhile, there is significant evidence submitted by the Plaintiffs that other physicians and medical facilities felt very strongly Dr. Sossan was not competent, was a "danger to the public" and took action against his privileges. Dr. Sossan's alleged lack of competence and ability was not a secret among the medical community in the southeast South Dakota and northern Nebraska area. Dr. Winn, according to his affidavit, made this clear to the Defendants.

Once he was in Yankton a short time nurses, physicians assistants, clerical staff, patients and other doctors made their complaints known as to his lack of competency and ability. Plaintiffs have submitted information that Dr. Sossan allegedly manipulated medical tests, falsified medical records and performed unnecessary medial procedures including substantial surgery, on some patients multiple times. Physicians and other medical providers have "broke rank", so to speak, in this case and have provided evidence and information to Plaintiffs in an effort to assist them. It is hard to believe, although it is possible, that supervisors and staff that had the ability to take action to make sure patients were safe were completely unaware of these significant issues concerning Dr. Sossan.

This Court is cognizant of the fact that the Defendants have not yet attempted to counter or refute the voluminous pile of exhibits and evidence submitted by the Plaintiffs in response to the various motions. They did so for the reason that they considered their motions for summary judgment dispositive. The court is fully aware that at this early stage of the proceedings the court has essentially one side of the story and if given ample opportunity the Defendants may be able to refute or rebut the evidence submitted by the plaintiff up to this point in time. However, despite this, it is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants. Alternatively, the court makes the same finding if the standard to be applied is "of a factual basis adequate to support a good faith belief by a reasonable person" or "evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue", or any other applicable standard needed to pass the threshold required.

In *Zolin* and other cases, the courts have indicated that an *in camera* inspection of the records is left to the sound discretion of the court. *Zolin*, at 572, 109 S.Ct. 2619. This court has given serious thought to an *in camera* inspection in this particular case. In the exercise of that discretion the Court has determined that an *in camera* review of all the materials is not necessary. With regard to peer review materials they are protected by a broad grant of privilege and confidentiality based upon a plain reading of the statute. The purpose of the statute is obviously to protect the private, frank and honest discussions and deliberations of the peer

review committee. Despite this court's ruling here that they are discoverable under the crime-fraud exception, that primary objective needs to be upheld and protected.

A decision to wrongfully grant medical privileges to an errant doctor can be done either negligently, maliciously or in bad faith. If it is done negligently it is done without prudence of a reasonable person; if it is done maliciously or in bad faith, it is more than mere negligence, but rather, action is taken to grant privileges to a doctor unworthy of such, based upon some improper, illegal or illegitimate motive, or otherwise in disregard of the rights or safety of patients.

So here, if it was done negligently the Plaintiffs would have the right to discover the objective facts and knowledge that existed and that which were available to the respective peer review body, including independent source material, in making their decision. If it appears the decision was made in bad faith or for some improper, illegal or illegitimate motive, then the plaintiffs may, only upon further showing, probe deeper into the peer review process. Upon a showing of illegality or improper motive, Plaintiffs may possibly probe into the actual deliberative process of the members of the peer review body. The court will need to address these issues on a case by case basis after a privilege log is submitted. Consequently, as to objective information gathered or considered by the peer review committees the court orders that such information shall be disclosed and copies provided to Plaintiff's counsel under a protective order without *in camera* inspection, as that information is not considered private deliberative information as contemplated by the statute. *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987). The remaining materials will be submitted to the court for *in camera* inspection with a privilege log as required. The Defendants shall have those materials delivered to the Court at is chambers in Armour, South Dakota as ordered below.

The Court has otherwise considered all of the arguments presented as to the specific discovery requests. Most of those requests were not responded to because of this present motion as well as the possibility that the summary judgment motion would moot the need to respond. The Motions to Compel are granted in all respects, subject to the Defendant's right to raise additional objections that are not redundant. Defendants argued at the hearing on this matter that the Plaintiffs discovery requests ask for voluminous records. In that regard, the court shall allow Defendants an additional forty-five (45) days to supplement their discovery responses with full and complete responses. Since this is a case of first impression, any requests for costs or attorney fees are denied.

ORDER

Consequently, based upon all of the above and foregoing it is hereby

ORDERED, that the Plaintiffs Motion to Compel is granted, in part and denied in part, and it is further

ORDERED, that the Plaintiffs Motion for Summary Judgment on the constitutionality of SDCL 36-4-26.1 is denied, and it is further

ORDERED, that the peer review committee, medical executive committee, and any other board of Avera Sacred Heart Hospital (ASHH) or Lewis & Clark Specialty Hospital (LCSH) having peer review responsibilities, shall produce to the Plaintiffs, without the need of further *in camera* review, the applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration,"; and it is further

ORDERED that the peer review committees, medical executive committees, or any other board of ASHH or LCSC shall produce to the Plaintiffs, without the need for further *in camera* inspection, all complaints filed against Dr. Sossan by any person or other medical provider, **with the name and other identifying information of such person or medical provider redacted,** between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other action taken as a result of such complaint; and it is further

ORDERED, that in disclosing the materials described above, Defendants shall have the duty and the right to redact information that can be considered deliberative or which bears upon a member of the peer review committees private discussions or deliberations, so long as a copy of such materials are submitted to the court for *in camera* inspection with a privilege log; and it is further

ORDERED that the subjective deliberations of the above named peer review committees shall not be subject to discovery unless the Plaintiffs make further application to the Court and can establish, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges, and it is further

ORDERED, that complete copies of all peer review materials of any Defendant hospital or clinic that made peer review decisions concerning Dr. Sossan shall be delivered to the Court, by US mail or otherwise, in its chambers in Armour, South Dakota, within twenty (20) days from the date of this order, and it is further

ORDERED that the information ordered to be produced to the Plaintiffs shall be produced under the provisions of a protective order based upon a stipulation to be resolved by the parties, and in the event no stipulation as to the protective order can be reached within 20 days, each party shall submit their version of such protective order to the Court with a brief in

support of their position and the Court will decide, without hearing, the terms of such protective order; and it is further

ORDERED, that this Memorandum Decision shall constitute the Court' Findings of Fact and Conclusions of Law and that no further findings or conclusions shall be necessary.

Dated this 23 day of October, 2015.

BY THE COURT:

Hon. Bruce V. Anderson
First Circuit Court Judge

Attest:
CLERK OF COURTS

By_____

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Nos. 27615, 27626, 27631

RYAN NOVOTNY,

Plaintiff and Respondent,

vs.

SACRED HEART HEALTH SERVICES, a South Dakota Corporation, d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,

Defendants and Petitioners,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendants and Respondents,

* * * * * * * * * * * * * * *

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Respondents,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA, and DAVID WITHROW,

Defendants and Petitioners,

and

ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NEUTERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Respondents.

* * * * * * * * * * * * * * *

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Respondents.

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendant and Petitioner,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.O., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Respondents.

Appeal from the Circuit Court
First Judicial Circuit
Yankton County, South Dakota

The Honorable Bruce V. Anderson, Presiding Judge

BRIEF OF APPELLANTS CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA AND DAVID WITHROW

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Defendants Curtis Adams, David Barnes, Mary Milroy, Robert Neumayr, Michael Pietila and David Withrow Petitioned the Court for Permission to Take Discretionary Appeal on November 3, 2015.
The Order Granting the Petition was filed December 15, 2015

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JURISDICTIONAL STATEMENT

Plaintiffs moved the trial court for an order compelling production of peer review materials from Defendants. By Memorandum Decision dated October 23, 2015 the Honorable Bruce V. Anderson granted Plaintiff's Motion and ordered production of the peer review materials. Defendants petitioned the Court for permission to take discretionary appeal of the Circuit Court's Order pursuant to SDCL § 15-26A-13 on November 3, 2015. By Order dated December 15, 2015 this Court granted Defendants' Petitions to Take Discretionary Appeal.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in requiring the disclosure of peer review information protected by SDCL § 36-4-26.1 under a judicially created "crime fraud exception" and under an "independent source" exception.

The Circuit Court ordered Defendants to produce to Plaintiffs *without in-camera review* all "objective information" generated or obtained by the peer review committee in considering the application of Dr. Alan Sossan to obtain privileges.

The Circuit Court ordered Defendants to produce to Plaintiffs, *without in-camera review*, all complaints filed against Dr. Sossan by any person or medical provider between the time Dr. Sossan was granted privileges and his

termination including any resolution or action taken as a result of the complaint.

The Circuit Court ordered that Defendants produce to the Court for in-camera review all information containing the subjective deliberations of the peer review committees, including private discussions or deliberations of the peer review committee members, and that such material would be subject to further application by Plaintiffs for its discovery.

Shamburger v. Behrens, 380 N.W.2d 659 (S.D. 1986)
Martinmaas v. Engelmann, 2000 SD 85, 612 N.W.2d 600 (2000)

Pawlovich v. Linke, 2004 SD 109, 688 N.W.2d 218 (2004)

Irving Healthcare System v. Brooks, 927 S.W.2d 12 (Tex. 1996)

SDCL § 36-4-26.1

STATEMENT OF THE CASE

The various Plaintiffs, all represented by attorneys from James & Larson Law Firm and the Cutler Law Firm, have commenced over thirty lawsuits against numerous defendants arising out of treatment provided by Dr. Alan Sossan. Appendix at 1.[1] These lawsuits have been consolidated for purposes of the appeal. Each of the lawsuits allege nearly identical claims against Defendants asserting various claims including fraud, deceit,

[1] Citations to "Novotny S.R." are to the settled record of *Novotny v. Sossan, et al*, #27615; citations to "Arens S.R." are to the settled record of *Arens v. Sossan, et al*, #27626; citations to the Appendix are to the Circuit Court's October 23, 2015 Memorandum Decision.

RICO violations, negligence, negligent credentialing, bad faith credentialing and other claims. Arens S.R. 52 (Amended Complaint). Plaintiffs served interrogatories and requests for production of documents requesting all information related to the credentialing of Dr. Sossan at Avera Sacred Heart Hospital and Lewis & Clark Specialty Hospital, LLC. Defendants objected to production of peer review materials pursuant to SDCL § 36-4-26.1. Plaintiffs moved to compel production of these peer review materials arguing that the materials were subject to discovery pursuant to a "crime fraud exception" and an "independent source exception." By Order dated October 23, 2015, the Honorable Bruce V. Anderson granted Plaintiffs' Motion to Compel and directed Defendants to produce the following:

> The applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration";
>
> All complaints filed against Dr. Sossan by any person or other medical provider, with the name and other identifying information of such person or medical provider redacted, between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other actions taken as a result of such complaint;

> That in disclosing the materials described above, Defendants shall have the duty and the right to redact information that can be considered deliberative or which bears upon a member of the peer review committee's private discussions or deliberations, so long as a copy of such materials are submitted to the court for *in camera* inspection with a privilege log;
>
> That the subjective deliberations of the above named peer review committees shall not be subject to discovery unless the Plaintiffs make further application to the Court and can establish, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges;
>
> That complete copies of all peer review materials of any Defendant hospital or clinic that made peer review decisions concerning Dr. Sossan shall be delivered to the Court, by US mail or otherwise, in its chambers in Armour, South Dakota, within twenty (20) days from the date of this order.

Appendix at 26-27.

Defendants petitioned this Court for permission to take a discretionary appeal pursuant to SDCL § 15-26A-13. By Order dated December 15, 2015, this Court granted Defendants' Petitions to take discretionary appeal of Judge Anderson's ruling. Arens S.R. 745 (Order Granting Petition for Permission to Appeal from Intermediate Order).

STATEMENT OF FACTS

This appeal arises out of the Circuit Court's October 23, 2015 Memorandum Decision directing the discovery of peer review materials in over thirty pending suits filed by former patients of Allen A. Sossan, D.O.

(collectively "Plaintiffs") against Dr. Sossan and varying combinations of Lewis & Clark Specialty Hospital, LLC, Sacred Heart Health Services, Avera Sacred Heart Hospital and Avera Health, and other similar defendants, including the individual members of the medical executive committees of Avera Sacred Heart Hospital and Lewis & Clark Specialty Hospital (collectively "the Sossan Litigation").[2] The claims of the Plaintiffs arise out of allegedly negligent medical care and treatment provided by Dr. Sossan and the allegation that all of the Defendants conspired to improperly grant Dr. Sossan privileges at Avera Sacred Heart Hospital and Lewis & Clark Specialty Hospital. Arens S.R. 101 (Amended Complaint).

Following commencement of their claims, the Plaintiffs served Defendants Avera Sacred Heart and Lewis & Clark Specialty Hospital with extensive written discovery seeking information and documents protected by South Dakota's peer review statute, SDCL § 36-4-26.1. Appendix at 2. On October 23, 2014, Plaintiffs filed a Motion to Compel and Motion for Partial Summary Judgment on the Constitutionality of the South Dakota Peer Review Statute, SDCL § 36-4-26.1. Novotny S.R. 969 (Motion to Compel). In this motion, the Plaintiffs requested relief in the form of (1) an order

[2] This appeal is made on behalf of the Avera Sacred Heart MEC committee members who are employees of Yankton Medical Clinic, P.C.: Drs. Adams, Barnes, Milroy, Neumayr, Pietila and Withrow.

compelling Defendants to disclose full and complete responses to Plaintiff's written discovery requests for peer review materials, and (2) an order declaring that the South Dakota peer review statute, SDCL § 36-4-26.1, is unconstitutional. *Id.*

On April 24, 2015, a hearing was held before the Honorable Bruce V. Anderson on various pending motions, including Plaintiff's Motion to Compel and Motion for Partial Summary Judgment. After hearing the parties' arguments and taking the peer review matter under advisement, the Circuit Court issued a Memorandum Decision and Order dated October 23, 2015. Appendix at 1. The Memorandum Decision and Order indicated that it was intended to apply to all of the cases in the Sossan Litigation.[3] *Id.* In its decision, the Circuit Court denied Plaintiff's Motion for Summary Judgment requesting the Court to declare SDCL § 36-4-26.1 unconstitutional. Appendix at 18. However, after denying the Plaintiffs' Motion, the Court made a *defacto* determination that the absolute protection

[3] In its Memorandum Decision and Order, the Circuit Court did not list the cases of *Mary Weibel v. Allen A. Sossan, D.O., et al*, CIV. 15-65, and *Clair and Diane Arens v. Allen A. Sossan, D.O., et al*, CIV. 15-167, as part of the pending Sossan litigation. Appendix at 1. At the April 24, 2015 hearing, however, Judge Anderson specifically noted that the Circuit Court's ruling on the peer review issue would apply to the *Weibel* case. Novotny S.R. 1728 (*Hearing Transcript* at 222). On December 15, 2015 this Court issued an Order consolidating all of the Sossan cases including *Arens* and *Weibel* for review. Arens S.R. 745 (Order Granting Petition for Permission to Appeal from Intermediate Order).

of SDCL § 36-4-26.1 was unconstitutional as written. The Circuit Court ruled that South Dakota's peer review statute, SDCL § 36-4-26.1, is subject to an "independent source exception" and/or "crime-fraud exception." Appendix at 18, 22, 26.

Pursuant to this ruling, the Circuit Court ordered that "the peer review committee, medical executive committee, and any other board of Avera Sacred Heart Hospital or Lewis & Clark Specialty Hospital having peer review responsibilities," would be required to produce in the Sossan Litigation "the applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration." Appendix at 27. The Circuit Court further ordered that the same parties were required to produce "all complaints filed against Dr. Sossan by any person or other medical provider, with the name and other identifying

information of such person or medical provider redacted, between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other action taken as a result of such complaint." *Id.* The Court ordered production of these peer review materials without ordering an in-camera review of these materials and before any significant discovery had taken place regarding Plaintiffs' claims of crime/fraud. Appendix at 25, 27.

While the Circuit Court ruled that Defendants would have the right to redact information that "can be considered deliberative or which bears upon a member of the peer review committees private discussions or deliberations," it further ordered that the prohibition on discovery of those subjective deliberations could be overcome by a future application to the Court establishing, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges. Appendix at 27.

ARGUMENT

I. SDCL § 36-4-26.1 creates an absolute protection of all peer review materials from discovery.

A. The statutory interpretation of the South Dakota Peer Review statutes are reviewed by the Supreme Court *de novo*.

This Court should review the Circuit Court's decision regarding the construction and interpretation of SDCL § 36-4-26.1 *de novo*. As set forth by the South Dakota Supreme Court in *Martinmaas v. Engelmann*, 2000 S.D. 85, 612 N.W.2d 600:

> Questions of law such as statutory interpretation are reviewed by the Court *de novo* … the purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute.

Id. at ¶ 49, 611 quoting *Moss v. Guttormson*, 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17 (*citing U.S. West Communications, Inc. v. Public Util. Comm'n*, 505

N.W.2d 115, 122-23 (S.D. 1993) (citations omitted)). In this case, the South Dakota Legislature has created an absolute protection of all peer review materials from discovery, disclosure and admission as evidence.

B. The purpose of peer review.

The purpose of peer review statutes is well established in the law. Under South Dakota law, hospitals are required to establish peer review committees whose purposes are to reduce morbidity and mortality and to ensure quality of care. Included in this duty is the obligation to review the professional practices of licensees, granting staff privileges consistent with each licensee's qualifications. South Dakota Administrative Rules 44:75:04:02. Quoting the United States District Court for the District of Columbia, the Michigan Supreme Court explained the purpose of protecting the confidentiality of peer review committees:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practice is a *sine qua non* of adequate hospital care. To subject the discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations.

Attorney General v. Bruce, 369 N.W.2d 826, 830 (Mich. 1985) quoting *Bredice v. Doctors Hospital, Inc.*, 50 FRD 249, 250 (D. D.C. 1970), *aff'd without opinion* 156 U.S. App. D.C. 199, 479 F.2d 920 (1973).

In *Stewart v. Vivian*, 212 Ohio 228, 212 WL 195020, the Ohio Court of Appeals explained the importance of peer review protection:

> The general public has a great interest in the continuing improvement of medical and health care services as delivered on a daily basis. Thus, through [the Ohio peer review statute] the legislature enacted a privilege giving complete confidentiality to the peer review process. The legislature's enactment determined that the public's interest was to be protected from the particular interest of the individual litigant. Therefore, this statutory privilege is unlike other general privileges arising out of common law. It is designed to protect the overall *process* of peer review, including all the administrators, nurses, doctors, committees, and various entities who participate in the gathering of information, fact-finding, and formation of recommendations, to advance the goal of better services with better results. Protecting the process is imperative for peer review to meet its paramount goal of improving the quality of healthcare. The privilege provides those in the medical field the needed promise of confidentiality, the absence of which would make participants reluctant to engage in an honest criticism for fear or loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions.

Id. at ¶ 25, *5 (citations omitted; emphasis in original). The overriding public policy of peer review statutes is to encourage healthcare professionals to monitor the competency and professional conduct of their peers, to safeguard and improve the quality of patient care. The purpose behind the statute is to promote complete candor and open discussion among participants in the peer review process. *McGee v. Bruce Hospital System*, 312 S.C. 58, 61, 439 S.E.2d 257, 259 (1993). The protections of peer review statutes are designed not only to encourage candor among the reviewing

physicians, but also to promote truthfulness by applicants. Physicians who fear that information provided to a peer review committee might someday be used against them by a third party will be reluctant to fully detail matters that should be considered by the committee. *Id*. at 62, 260 *citing Cruger v. Love*, 599 So.2d 111 (Fla. 1992).

Participation in the peer review process negatively affects physicians as it requires criticizing one's peers, loss of time spent participating, fear of loss of patient referrals and the fear of possible legal repercussions both from plaintiffs and from the doctors who are being reviewed. Limiting the absolute peer review protection created by the South Dakota legislature will discourage participation in the peer review process by physicians, or worse, chill frank and effective participation in the process.

C. The language of SDCL § 36-4-26.1 provides peer review materials with absolute protection from discovery.

SDCL § 36-4-26.1 provides:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting or any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision

> regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

The statute provides absolute protection for all documents related to peer review activities both from discovery and from admission into court except as specifically provided. The scope of the documents it protects are broad and include "the proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities …." It would be difficult to construct a statute that provides a broader definition of the materials to be protected. This unambiguous language of the statute protects "any data whatsoever" … "relating to peer review activities." SDCL § 36-4-26.1. The statute contains no exception for discovery of documents that are used by a peer review committee during the course of their deliberations. Had the legislature intended to protect only materials that contain subjective information such as the mental impressions of the committee, the legislature could have so indicated. Certainly, if the legislatures' intent was to protect only the subjective materials, it would not have used the words "any other data whatsoever" or "related to peer review activities" to describe the materials

protected. The plain language of the statute unambiguously protects all documents related to the credentialing process.

SDCL § 36-4-26.1 provides protection both through exclusion from discovery and from admission at trial. The statute provides that peer review materials "are not subject to discovery or disclosure under chapter 15-6 or any other provision of the law." The statute places an absolute prohibition on discovery of these materials in civil lawsuits. The language of the statute is clear and unambiguous and does not provide for a "crime-fraud exception" or "independent source exception" as found by the Circuit Court. The statute does provide specific exceptions allowing access to materials for a physician regarding the physician's staff privileges or any person or the person's counsel in defense of an action against that person.[4] Since the legislature provided these specific exceptions within the language of SDCL § 36-4-26.1, it would certainly have provided for other exceptions had it so intended.

Finally, in addition to a prohibition against discovery, SDCL § 36-4-26.1 provides that peer review materials "are not admissible as evidence in *any* action of *any* kind in *any* court or arbitration forum except as hereinafter

[4] SDCL § 36-4-26.1 also states that "no person in attendance at any meeting of any committee described in § 36-4-42 is *required* to testify as to what transpired at such meeting." (emphasis added).

provided." (emphasis added). Although the statute provides for the exceptions for physicians in defense of an action or for use of information by the physician regarding the physician's privileges, it provides absolutely no "crime-fraud" or "independent source" exceptions. Moreover, the legislature's decision to include the "except as hereinafter provided" language and thereafter specify the limited exceptions to the peer review protection evinces that the legislature considered exceptions and included all exceptions in the language of the statute. It would take extreme statutory construction to construe that the legislature intended to create exceptions beyond that specifically set forth in the statute.

Since the enactment of SDCL § 36-4-26.1, this Court has recognized the broad protections of the statute. In *Shamburger v. Behrens*, 380 N.W.2d 659 (S.D. 1986) a patient sued his physician and Rapid City Regional Hospital for medical malpractice. The plaintiffs alleged that the hospital was negligent in allowing the doctor to remain on staff because the hospital knew or should have known that the doctor had a drinking problem and was incompetent. *Id*. at 665. The Circuit Court dismissed the claim finding that there was no evidence to show the hospital knew or had any reason to believe that the doctor had breached any of the medical staff review

procedures. *Id*. The Supreme Court affirmed the Circuit Court's dismissal of the Hospital stating:

> We note that hospital records concerning staff competency evaluations are not discoverable materials. SDCL § 36-4-26.1. Shamburgers cannot obtain the records which would show whether or not the hospital considered or knew of Behrens' drinking problems when hospital considered staff privilege. The trial court was correct in determining that [plaintiffs] had presented no evidence pertaining to Hospital's alleged negligence.

Id.

Shamburger demonstrates the broad protection provided by SDCL § 36-4-26.1. The court reasoned that because SDCL § 36-4-26.1 prevented the plaintiffs from obtaining the records which would show whether or not the hospital was aware of the doctor's drinking problem, they were unable to present a factual basis for their claims. Much like the allegations in this case, the plaintiff in *Shamburger* alleged that the hospital had knowledge of conduct which could be dangerous to patients. Despite plaintiffs' allegation in *Shamburger* that the hospital knew or should have known of the doctor's alleged use of alcohol while caring for patients, the court followed the plain language of SDCL § 36-4-26.1 and did not allow plaintiffs to obtain the records which would show whether the hospital knew of the doctor's alleged drinking problems when considering his staff privileges.

In *Martinmaas v. Engelmann*, 2008 S.D. at ¶ 2, 612 N.W.2d at 603, the plaintiffs were patients of physician Gary Engelmann who alleged that Engelmann had inappropriate sexual contact with them. During the trial the trial court allowed admission of a transcript from Engelmann's hearing before the South Dakota Board of Medical and Osteopathic Examiners on Engelmann's application for reissuance of his medical license. *Id*. at ¶ 45, 610. Engelmann argued that SDCL § 36-4-31.5, which restricts the discovery and admissibility of evidence presented before the Board of Medical Examiners prohibited the use of the transcript at his trial. *Id*. at ¶ 46, 610. The Supreme Court found that Engelmann's claim that admission of portions of the hearing transcript violated the confidentiality statutes of SDCL Chapter 36-4 had merit:

> Applying these rules of statutory construction to this case, Engelmann's claim, that the introduction of the hearing transcript violated the confidentiality statutes, has merit. A review of SDCL 36-4-31.5 in the overall context of SDCL Chapter 36-4 reveals that the goal of the legislature was to protect all confidential information that surfaces during this type of proceeding – not only the physician's information, but the patient's information as well. SDCL 36-4-26.1 is especially enlightening. …
>
> This provision indicates that anything related to the "quality, type or necessity of care rendered" or to the "competency, character, experience or performance" of a physician is to remain confidential. When SDCL 36-4-31.5 is considered in pari materia to the rest of SDCL ch. 36-4, it becomes clear that

> the legislature intended for a re-application hearing to remain confidential.

Id. at ¶ 50-51, 611-12. The court found that notwithstanding the mandate of the confidentiality statute, that Engelmann had failed to show prejudice from the error and affirmed the trial court's decision. *Id*. at ¶ 55, 612.

In *Uhing v. Callahan*, 2010 WL 23059 (D.S.D.) plaintiffs moved to compel Yankton Medical Clinic to produce peer review documents related to a physician who was a member of the Clinic. *Id*. at *3. The U.S. District Court for the District of South Dakota denied plaintiffs' motion to compel stating that South Dakota's peer review privilege "precludes discovery of documents or any other data whatsoever generated by any peer review committee engaging in peer review activities." *Id*. at *3. The Court further stated that "[r]elevancy and good cause are trumped by the *absolute peer review privilege* of SDCL 36-4-26.1 with respect to documents which fall within the umbrella of the peer review privilege." *Id*. at *7. (emphasis added). The U.S. District Court denied plaintiffs' attempts to obtain minutes about discussions of patients; documents reviewed by quality management committee; documents discussing Dr. Callahan's employment status or performance; documents of the executive committee in which Dr. Callahan's employment status or performance were discussed; documents in which Dr. Callahan's employment status or performance were discussed by

shareholders of the Yankton Medical Clinic; documents reviewed by the recruiting committee, executive committee, board of directors and shareholders concerning Dr. Callahan's qualifications; documents provided to the South Dakota State Medical Association, South Dakota Board of Medical and Osteopathic Examiners; and documents related to Dr. Callahan's application for privileges to practice at Avera Sacred Heart Hospital. *Id*. at *5-7.

Likewise, in *Pawlovich v. Linke*, 2004 S.D. 109, ¶¶ 14-16, 688 N.W.2d 218, 233, the South Dakota Supreme Court acknowledged the absolute privilege accorded to peer review proceedings. "We have recognized the important role played by doctors, attorneys and other professionals in reviewing members of their respective profession. "Professional societies, through peer review, can and do perform a great public service by exercising control over those persons placed in a position of public trust. It is beyond dispute that communications initiated during such proceedings are an indispensable part thereof … . We agree that public policy justifies an *absolute privilege* in the context of official *quasi judicial* proceedings as well as statutorily authorized professional peer review … ." 2004 S.D. 109, ¶¶ 14-16, 688 N.W. 218, 223 (citations omitted, emphasis added).

This Court's interpretation of the clear and unambiguous language of SDCL 36-4-26.1 consistently interprets the peer review protection in South Dakota to be absolute. The exceptions created by the Circuit Court are not supported by either the language of the statute or this Court's prior interpretations of that statute.

D. Other states with similar peer review statutes have also found the protection to be absolute.

When looking to the decisions of courts of states other than South Dakota, it is important to recognize that each state has its own peer review statute. Because of the different protections offered by each state, the decisions from other jurisdictions interpreting statutes that do not offer the broad protections of the South Dakota peer review statute, must be distinguished. As noted by the North Dakota Supreme Court in *Trinity Medical Center, Inc. v. Holum*, 544 N.W.2d 148 (N.D. 1996):

> [B]ecause of the lack of uniformity among the various states' peer review privilege statutes, caselaw interpreting those statutes is not highly persuasive in our interpretation of [the North Dakota statutes]. It has been noted that "there is extremely wide variation in the privilege granted by the states," and that there is little consistency in the entities covered or types of information protected. As a result, the caselaw interpreting these widely varying statutes has been described as "creating a crazy quilt effect among the states." Thus, although nearly every state has some form of statutory privilege for medical peer review, it also appears that no two statutes, or courts' interpretations of them, are alike.

Id. at 153 (citations omitted). The North Dakota Supreme Court then noted that the North Dakota statutory language creates a privilege much narrower than those in most other states. *Id*.

Like South Dakota, other states have also determined that based upon the language of their peer review statutes, the privilege is also absolute. In *McGee v. Bruce Hospital System*, 439 S.E.2d at 259, the court considered the question of whether credentialing files, clinical privileges and policies and procedures involved in evaluation of medical staff were immune from discovery under the South Carolina peer review statute. *Id*. The court first determined that the executive committee of the medical staff at Bruce Hospital was a committee within the purview of the peer review privilege. *Id*. The court stated:

> "[T]he underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process … We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source.
>
> We interpret the legislative intent to protect not only documents generated by the committee, but also documents acquired by the committee in the course of its proceedings. The express language of the statute provides that "all proceedings of and all data and information *acquired* by the committee … are confidential." (emphasis added). Accordingly, we hold that the privilege provided by [the South Carolina peer review statutes] protects all information, documents, or records acquired by the

> committee as part of its decision-making process. Thus, the physicians' applications for staff privileges and supporting documentation submitted to the committee are records of the committee for purposes of the statutory privilege.

Id. at 260.

In *Huntsman v. Aultman Hospital,* 2008 Ohio 2554, 2008 WL 2572598, the plaintiff commenced a malpractice action against a physician and a negligent credentialing claim against the hospital where he practiced. *Id*. at ¶¶ 2-5, *1. Plaintiff claimed that her physician's medical staff privileges had not been renewed at another hospital, at least 12 medical negligence lawsuits had been filed against him and that the hospital failed to consider these facts when granting privileges. *Id*. at ¶ 5, *1. Plaintiff sought documents to support her negligent credentialing claim. The trial court ordered Aultman Hospital to produce a list of the documents which had been considered by Aultman in granting the doctor privileges. *Id*. at ¶ 6, *1. The Ohio Court of Appeals reversed the trial court and found that any information produced during the peer review process was protected and could not be disclosed, even as a "list of documents." *Id*. at ¶ 7, *2. The court determined that although the plaintiff could not request the documents from the hospital, they could request the documents from original sources outside the scope of the peer review process. *Id*. at ¶ 7, *2. In response to the appellate court's order, the plaintiff requested documents in the

physician's possession related to his credentialing from the hospital. *Id*. at ¶ 8, *2. The trial court then entered an order directing the physician to produce any documents in his possession related to his application for medical privileges at any healthcare facility, all documents in the physician's possession related to his accreditation or credentialing as a member of any hospital or staff, along with several other documents related to filings with agencies such as the National Practitioners Database and insurance companies. *Id*. at ¶¶ 22-28, *3-4. The Ohio Court of Appeals found that the court's order directing the physician to produce information that he provided to a peer review committee was in error. *Id*. at ¶ 40, *5. The Ohio Court of Appeals found that the Ohio peer review statutes "provides an umbrella protection to information which is collected and maintained by peer review committee during the peer review process. *Id*. at ¶ 41, *6. The court stated:

> The language of the statute does not prohibit the discovery of information made available to a healthcare facility, a liability carrier or network provider during the peer review process if that information can be obtained from an original source. *A party interested in obtaining the information used by a peer review committee must seek the information from the original source and not from the records of the committee's proceedings*.

Id. at ¶¶ 47, 48, *7 (citations omitted; emphasis added). The Court concluded that the documents prepared by the physician and provided to the

peer review committee were protected under the Ohio peer review statute. *Id*. at ¶ 56, *8.

In *Stewart v. Vivian*, 2012 Ohio 228, 2012 WL 195020, the Ohio Court of Appeals considered the scope of the Ohio peer review statute:

> The general public has a great interest in the continuing improvement of medical and health care services as delivered on a daily basis. Thus, through [the Ohio peer review statute] the legislature enacted a privilege giving complete confidentiality to the peer review process. The legislature's enactment determined that the public's interest was to be protected from the particular interest of the individual litigant. Therefore, this statutory privilege is unlike other general privileges arising out of common law. It is designed to protect the overall *process* of peer review, including all the administrators, nurses, doctors, committees, and various entities who participate in the gathering of information, fact-finding, and formation of recommendations, to advance the goal of better services with better results. The privilege provides those in the medical field the needed promise of confidentiality, the absence of which would make participants reluctant to engage in an honest criticism for fear of loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions.
>
> In order to preserve the integrity of this process with meaningful self-examination and frank recommendations, the peer review process and its resulting information are clearly intended to have a privilege of confidentiality providing a "complete shield to discovery."
>
> We also note that other Ohio courts have recognized that Ohio's peer review statute clearly creates an impenetrable protection of confidentiality.

Id. at ¶¶ 25-28. (citations omitted). *See also Ex Parte Krothapalli*, 762 So.2d 836, 839 (Ala. 2000) ("It seems clear to us, as it did to the Supreme

Courts of Florida and South Carolina, that the purpose of a peer-review statute is to encourage full candor in peer-review proceedings and that this policy is advanced only if all documents considered by the committee or board during the peer review of credentialing process are protected."); *Cawthorn v. Catholic Health Initiatives Iowa Corp*, 806 N.W.2d 282, 289 (Iowa 2011) (finding a broad statutory privilege for the writings and records generated by peer review committee which provides that peer review records are privileged, confidential, not subject to discovery and not admissible in evidence).

E. There is no crime fraud exception to the peer review protections.

The trial court found that a crime fraud exception existed to the peer review protections of SDCL 36-4-26.1. The peer review statute does not contemplate such an exception.

The statutory scheme of SDCL Ch. 36-4 provides protection to peer review proceedings in three ways. First, SDCL 36-4-25 provides immunity for acts of members of professional committees for hospital officials. Second, SDCL § 36-4-26.1 provides protection from discovery of peer review material. Finally, SDCL § 36-4-26.1 provides protection from admissibility of peer review materials into evidence. The immunity provision of SDCL 36-4-25 provides that the immunity applies if the

committee member acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration and acts and reasonable belief that the action is warranted by those facts. Therefore, if the statute creates a cause of action for negligent credentialing as Plaintiffs argue, the immunity protection of SDCL § 36-4-26.1 does have an exception for malice. To the contrary, the discovery and evidentiary protections of SDCL 36-4-26.1 specifically do not include a malice exception. The only exceptions to 36-4-26.1 are in favor of the Defendant physicians with regard to defense of an action against that person ("the prohibition relating to discovery evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section."). Had the legislature intended an additional exception for

"crime fraud" or malice, the legislature would certainly have included that additional exception in the discovery and evidence protections of SDCL § 36-4-26.1 as they specifically did within SDCL 36-4-25 relating to the immunity protection. Moreover, SDCL § 36-4-26.2 makes clear that the protections of 36-4-26.1 do not apply to patient records or observations made by a health care professional during the time of a patient's treatment. In considering the statutory scheme of Ch. 36-4 as a whole, the legislature

undoubtedly considered exceptions to the discovery and evidentiary provisions of the peer review protection and did not include those protections within the discovery portions of that statutory scheme.

This statutory construction is consistent with the court's holding in *Shamburger*, 380 N.W.2d at 665. In *Shamburger*, the plaintiffs' claim against the hospital rested on whether the hospital knew or should have known that the defendant physician had a drinking problem and was incompetent to care for patients. The Supreme Court upheld the trial court's granting of summary judgment on the claims against the hospital on the grounds that plaintiffs could produce no evidence that the hospital knew or should have known of the physician's alcohol problem. The court stated that pursuant to SDCL 36-4-26.1, the plaintiff could not obtain the records which would show whether the hospital knew of the doctor's drinking problem when it considered his staff privileges and therefore had no basis on which to assert such a claim against the hospital. *Id*. In short, the decision of the *Shamburger* court on this issue confirms the extent of the absolute protections of SDCL 36-4-26.1. Certainly, allegations that a hospital knew that a surgeon had an alcohol problem which affected his care of patients would be just as or more concerning than the allegations made against Dr. Sossan in this case. Yet in *Shamburger*, the court upheld the protections of

the peer review statute with absolutely no suggestion that there were exceptions to the peer review protections even when plaintiff claimed that the hospital knew or should have known of the significant allegations made against the doctor defendant.

The question of a malice exception to peer review protection was discussed in depth in *Irving Health Care System v. Brooks*, 927 S.W.2d 12 (Tex. Sup. Ct. 1996). In *Irving,* a physician claimed that false information was supplied to a hospital medical peer review committee with malice resulting in denial of his staff privileges. *Id*. The Texas Supreme Court was asked to consider whether documents and communications related to proceedings of a medical peer review committee were protected from discovery in a suit alleging malice. *Id*. The Texas Supreme Court explained the differences in protections extended to the peer review process under the Texas statute which provided separate protections from discovery of peer review materials and through qualified immunity from civil liability. *Id*. at 16. The Texas Supreme Court stated:

> There are two intertwined but succinct protections extended to the peer review process under [the Texas peer review statutes]. The first is protection from discovery of the records and proceedings of and communications to a medical peer review committee. The second is a qualified immunity from civil liability.

> The provisions of Section 5.06 providing immunity from civil liability draw the line at malice. However, it does not follow that an allegation or even proof of malice that would negate a qualified immunity negates the separate discovery exemption under the statute. The extension of civil immunity and the exemption of matters from discovery are related but distinct.
>
> …
>
> Section 5.0 of Article 4495b does not provide an exception to its confidentiality provisions whenever a plaintiff presents a prima facie case of malice. Read as a whole, the statute reflects the Legislature's conscious decision to allow an affected physician to bring claims against those who participate in the peer review process maliciously and without good faith, but nevertheless to maintain the confidentiality of the peer review process. That choice is a logical one. If a litigant could overcome the barrier to discovery by merely alleging malice, the privilege would be substantially emasculated. Requiring a prima facie showing of malice adds little protection. The overarching purpose of the statute is to foster a free, frank exchange among medical professionals about the professional competence of their peers. The Legislature recognized the chilling effect that would be engendered by enfeebling confidentiality.
>
> The Legislature has drawn a careful balance between the competing policy considerations of ensuring confidentiality for effective peer review and the scope of discovery in suits bringing legally cognizable claims. Courts should not disturb that balance or graft additional exceptions onto the statute absent constitutional concerns.

Id. at 16-17 (citations omitted, footnote omitted). The court also noted that the plaintiffs did not raise constitutional challenges to the statute. *Id*. at n. 2.

The court succinctly described the dangers of creating exceptions to a statute where none exist:

> "Once a state has made the policy decision to afford privilege status for certain hospital records, the Legislature and the court should not undermine the policy objectives by circumventing or weakening the privilege status with exceptions not mandated by constitutional considerations or the long-run interests of justice. *Nothing is worse than a half-hearted privilege; it becomes a game of semantics that leaves parties twisting in the wind while lawyers determine its scope.*

Id. at 17 (emphasis added) quoting *Creech*, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C.L. Rev. 179, 181-82 (1988). *See also Freeman v. Piedmont Hospital*, 444 S.E.2d 796, 798 (Ga. 1994) ("Allowing an allegation of malice to trigger the applicability of the exception to the confidentiality requirement would result in the opportunity for full discovery of peer review material in every such case."); *Patton v. St. Francis Hospital*, 539 S.E.2d 526, 528-29 (Ga. App. 526) (finding that *Freeman* does not support the creation of a malice exception and noting that the Georgia Supreme Court "has held that both peer review and medical review proceedings are *absolutely privileged*") (emphasis in original, footnote omitted).

F. Independent source documents must be obtained from their original sources and not from the peer review process.

The trial court erred to the extent that it ordered production of objective documents considered by the peer review committee and/or complaints about Dr. Sossan from the Defendants. Although most courts

recognize that materials obtained from "independent sources" are not privileged simply because they were considered by the peer review committee, the documents must be obtained from the original sources and not from the peer review committee. [5]

In *Qureshi v. Vaughan Regional Medical Center*, 768 So.2d 374 (Ala. 2000) plaintiff sued her physician and Vaughan Regional Medical Center claiming malpractice and negligence in hiring and credentialing the physician. Plaintiffs issued a notice of deposition to Vaughan Regional Hospital requesting any investigations or evaluations of the physician as well as his qualifications, training, education and board certification conducted or received by Vaughan Regional Hospital before the doctor was granted privileges. *Id*. at 375. The plaintiffs also sought documents related to the information considered by Vaughan Regional Hospital before it entered into a contractual relationship with the physician. *Id*. The trial court entered an order granting plaintiffs' motion to compel most of the items requested. The hospital petitioned the Alabama Supreme Court for *writ of mandamus* seeking relief from the order. *Id*. at 376. The Alabama Supreme Court determined that the trial court erred in directing the hospital to

[5] The Circuit Court misinterprets Defendants' arguments on the use of independent source documents, Appendix at 13. Although Defendants agree that some original source documents are not protected from discovery under SDCL § 36-4-26.1, the documents must be obtained from the independent source and not the peer review committee.

produce documents that had been furnished to the hospital by outside sources. *Id*. at 380. The court noted the overriding public policy of the peer review statutes and distinguished between seeking original source information from the peer review committee and seeking the same information from alternative sources.

The Alabama Supreme Court explained that the peer review privilege protected discovery of the documents sought from the hospital. The court further distinguished independent source documents explaining that a plaintiff seeking discovery cannot obtain documents directly from the hospital review committee but may seek the documents from their original source. *Id*. at 378.

See also Huntsman, 2008 Ohio 25541, ¶ 48 ("A party interested in obtaining the information used by a peer review committee must seek the information from the original source and not from the records of the committee's proceedings."); *McGee*, 439 S.E.2d at 63-4 ("the plaintiff seeking discovery cannot obtain documents which are available from the original source directly from the hospital committee, but may seek them from alternative sources.").

II. SDCL 36-4-26.1 is constitutional.

Plaintiffs contend that SDCL §§ 36-4-26.1, 42 and 43 are unconstitutional as violative of the due process and access to courts provisions of the Constitution of the State of South Dakota; the Seventh Amendment of the United States Constitution granting Plaintiff a right to jury trial; and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The trial court properly denied Plaintiffs' motion for summary judgment declaring SDCL § 36-4-26.1 as unconstitutional. However, the Court erred in finding that it must create exceptions to find the statute constitutional. Appendix at 16, 18. It is not clear whether the Circuit Court believed the exceptions it created were necessary under the due process, or open court provisions of the United States or South Dakota Constitutions.

A. The Protections of SDCL § 36-4-26.1 do not violate due process.

The protections of the South Dakota peer review statutes do not violate the due process provisions of either the South Dakota Constitution or the United States Constitution. A statute meets the due process test requirements of the United States Constitution if the statute has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 398

(1937). The U.S. Supreme Court stated that courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the adequacy or practicability of a law enacted. *Id*.

> [T]he legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be involved unless palpably in excess of legislative power.

Id.

The South Dakota Supreme Court has adopted a slightly different and more stringent test of constitutionality under the due process clause. The standard under the due process clause of the South Dakota Constitution is that the statute must "bear a real and substantial relation to the objects sought to be obtained." *Katz v. South Dakota State Board of Medical and Osteopathic Examiners*, 432 N.W.2d 274, 278 n.6 (S.D. 1988). The South Dakota peer review statutes meet both the federal and state due process standards in that the peer review statutes are reasonably related to a proper legislative purpose and bear a real and substantial relation to the objects sought to be obtained.

Although the issue of whether South Dakota peer review statutes satisfy constitutional due process has not been addressed by the South Dakota Supreme Court, numerous other jurisdictions have found that peer

review statutes do satisfy constitutional due process. In *Filipovic v. Dash*, 2006 Ohio 2809, 2006 WL 1521468 (Ohio App. 5 Dist.), a patient brought a malpractice action against a physician and hospital alleging that the physician was negligent and that the hospital had negligently credentialed the physician. *Id*. at ¶ 3, *1. During discovery, plaintiff sought records of the hospital credentialing committee. *Id*. at ¶ 5, *1. Defendants objected to production of these records based upon the Ohio peer review privilege. Plaintiff contended that the Ohio peer review privilege violated her due process rights. The Ohio Court of Appeals held that the peer review privilege did not violate the plaintiff's due process rights. The court stated:

> The test to measure the validity of the statutes in question, under the Due Process Clause, is whether said statutes have a reasonable relation to a proper legislative purpose without being arbitrary or discriminatory. In light of our analysis above, we conclude that said statutes are reasonably related to the legitimate purpose of improving public health care. We do not accept plaintiffs' contention that the application of [peer review statutes] denies plaintiffs in medical malpractice cases access to the courts. While said statutes do make certain types of evidence inadmissible, plaintiffs in medical malpractice cases are not now faced with an insurmountable burden of proof, nor barred from introducing other types of relevant evidence to meet such a burden. Accordingly, said statutes do not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Id. at ¶ 28, *2 (citations omitted).

The court noted that even though the legislature had placed great, but not impossible, restrictions on access to peer review and credentialing committees' records to protect free discussion at such committees' review process, the peer review privilege also did not violate the due process clause or Constitution. *Id*. at ¶ 31, *3.

In *Jenkins v. Wu*, 468 N.E.2d 1162, 1164-5 (Ill. 1984), a husband and wife brought a medical malpractice action against numerous physicians, nurses and hospital support personnel along with the University of Illinois Medical Center. During the discovery process, the plaintiffs served a subpoena which included a request for documents that fell within the Illinois peer review privilege. In holding the peer review statutes constitutional, the court noted that the purpose of the legislation was not to facilitate the prosecution of malpractice cases:

> Rather its purpose is to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of healthcare. The Act is premised on the belief that, absent the statutory peer- review privilege, physicians would be reluctant to sit on peer review committees and engage in frank evaluations of their colleagues.

Id. at 1168.

In this case, the protections of the peer review statute as written meet the due process requirements of both the United States Constitution and the South Dakota Constitution. As recognized by the South Dakota Supreme

Court in *Pawlovich,* peer review performs a great public service by exercising control over those persons in the position of public trust and that communications initiated during peer review proceedings are an indispensable part of those proceedings. The legislature's desire to enact legislation providing for candid and unfettered discussion of physicians as set forth in the South Dakota peer review statutes forms a rational basis for the peer review statutes and further bears a real and substantial relationship to the object sought to be obtained, i.e., a forum for confidential discussions among physicians to candidly evaluate their peers to improve health care without the concern that such discussion will later be disclosed for use in malpractice litigation. The peer review protections of SDCL 36-4-26.1 do not violate the due process clause of either the South Dakota or U.S. Constitutions.

B. SDCL § 36-4-26.1 does not violate Article VI, Section 20 of the South Dakota Constitution or the Seventh Amendment to the United States Constitution.

Plaintiffs allege that SDCL §§ 36-4-26.1, 36-4-42 and 36-4-43 are unconstitutional pursuant to the access to the courts provision of the South Dakota Constitution and the Seventh Amendment to the United States Constitution providing a right to a jury trial. The South Dakota peer review

statutes do not eliminate Plaintiff's access to courts or right to a jury trial and are constitutional.

It is well established that the Seventh Amendment to the United States Constitution does not apply to lawsuits brought in state court. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916). *See also Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 853 (Iowa 2001) (U.S. Supreme Court precedent "supports the conclusion that the Seventh Amendment does not apply to state court proceedings."); *Anderson v. Elliott*, 555 A.2d 1042, 1043 n.1 (Maine 1989) (noting that the right to a jury trial under the Seventh Amendment to the United States Constitution applies only to proceedings in courts of the United States and "does not in any manner whatever govern or regulate trials by jury in state courts.")

Article VI, Section 20 of the South Dakota Constitution, commonly referred to as the "open courts" provision of the Constitution provides that the courts shall be open and afford a remedy "for such wrongs as are recognized by the laws of the land …." *Green v. Siegel, Barnett & Schutz*, 1996 SD 146, 557 N.W.2d 396, 399. The South Dakota Supreme Court has held that the open courts provision means that "where a cause of action is implied or exists at common law without statutory abrogation, a plaintiff has a right to litigate and the courts will fashion a remedy." *Id*. at 400 (quoting

Behrens v. Burke, 89 SD 96, 229 N.W.2d 86, 88 (1975)). "Article VI, Section 20 provides a right of access to the courts for causes of action recognized by common law or statute. It does not create rights of action." *Id*. "We have held that reasonable conditions on a cause of action are not unconstitutional." *Id*. The South Dakota Supreme Court explained the open courts provision:

> 'Open courts' is not a guarantee that all injured persons will receive full compensation or that remedies once existent will always remain so. Nor does this provision assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination. Otherwise, the state of tort law would remain frozen in the nineteenth century, immutable and eventually, obsolete. Reasonable restrictions can be imposed upon available remedies. Our function is not to elevate common-law remedies over the legislature's ability to alter those remedies, but rather, we are to interpret the laws as they affect the 'life, liberty, or property of the citizens of the State.' Taking guidance from the United States Supreme Court in its interpretation of the federal constitution, we see that the 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'

Id. at 403 (quoting *Matter of Certif of Questions of Law*, 1996 SD 10, ¶ 83, 544 N.W.2d 183, 203 (citations omitted)).

In *Green*, 1996 S.D. 146 at ¶ 3, 557 N.W.2d at 397, the defendant law firm drafted trusts for the Estate of Mayme C. Green in 1976 and in 1983. The administrator of the Green Estate brought a legal malpractice action

against the law firm alleging that the firm had committed legal malpractice. Defendants moved for summary judgment on plaintiff's claims on the grounds that plaintiff's claims were barred by the statute of limitations for legal malpractice claims. The statute of limitations for legal malpractice actions ran from the date of occurrence rather than the discovery of the malpractice. *Id*. at ¶ 10, 389. Defendants argued that the action commenced in 1995 was barred by either the six year statute of limitations that existed prior to 1977 or the three year statute of limitations that was enacted in 1977. *Id*. at ¶ 9, 397-8. Plaintiffs contended that because the statute of limitations on these claims ran before the negligent act or omission could have later been cured, the occurrence rule statute of limitations was unconstitutional under Article VI, Section 20, the open courts provision of the South Dakota Constitution. *Id*. at ¶ 5, 399. The South Dakota Supreme Court upheld the occurrence statute of limitations under the open courts provision. The court concluded that the open courts provision of the South Dakota Constitution did not preclude the legislature from setting reasonable conditions on lawsuits, including time limitations on a plaintiff's right to bring an action for injury. *Id*. at ¶ 30, 404. The court held that it was up to the legislature to determine the appropriate rule to trigger the running of the statute of limitations and there was no legal basis to hold that the statute of limitations

clearly, palpably and plainly violated the open courts provision of the South Dakota Constitution. *Id*. at ¶ 32, 405. Because the statute of limitations did not restrict or destroy the right to bring a cause of action for legal malpractice, but rather only established the period of time by which the plaintiff must assert their claim, it is a reasonable restriction upon an available remedy which the legislature may constitutionally impose. *Id.*

In *Behrens v. Burke*, 229 N.W.2d 86 (1975), plaintiff alleged that the South Dakota guest statute which barred most causes of action for damages by a guest in a motor vehicle against the owner or operator of the motor vehicle was unconstitutional under several provisions of the South Dakota Constitution including Article VI, Section 20. The South Dakota Supreme Court held that plaintiff's claim that the South Dakota guest statute violated the open courts provision of the South Dakota Constitution was without merit and deserved little attention. *Id*. at 87. The court found that the open courts provision was inapplicable to the guest statute, finding that injuries suffered by a guest because of host negligence are not caused by wrongs as are recognized by the law of the land. *Id*. at 88.

Although the South Dakota Supreme Court has not addressed the applicability of the open courts provision with regard to the peer review privilege, several other jurisdictions have considered this issue and rejected

claims that peer review statutes violate similar open courts and/or trial by jury provisions in state constitutions. In *Quresh*, 768 So.2d at 374, the plaintiff claimed that the Alabama peer review statute violated the open courts provision of the Alabama Constitution. The court rejected the plaintiff's claim, finding that the peer review privilege did not deny the plaintiff access to the courts with regard to her negligent credentialing claim. *Id*. at 380. The court noted that plaintiff could prove her case through information that originated outside the peer review process. *Id*. at 379. Notably the court stated that it appeared that the plaintiff had already obtained portions of outside information that could be used to prosecute its case. *Id*. at 380. The Alabama Supreme Court upheld the peer review privilege and directed the trial court to vacate its order requiring that peer review documents be produced. *Id*.

In *Humana Hosp. Desert Valley v. Edison*, 742 P.2d 1382 (Ariz. 1987), the plaintiff in a malpractice action served a doctor, hospital and non-party hospitals with subpoena duces tecum requesting the defendant doctors' application for staff privileges and any records reflecting hospital investigation into the doctor's application for staff privileges. *Id*. at 1383. The plaintiff claimed that she was entitled to the peer review documents based upon Arizona's open courts provision, despite the Arizona peer review

privilege.[6] *Id*. at 1385. The Arizona Supreme Court rejected the plaintiff's argument and held that the Arizona peer review privilege was constitutional. The Arizona Supreme Court discussed the distinction between abrogation and regulation:

> The legislature may *regulate* the cause of action for negligence so long as it leaves a claimant *reasonable alternatives or choices which will enable him or her to bring the action*. It may not, under the guise of "regulation" so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action.

Id. at 1385 (emphasis in original). The court found that the peer review privilege did not violate the anti-abrogation clause, stating that the plaintiff was "left with ample alternatives" to prove her negligent supervision theory against Humana without obtaining access to the privileged information. *Id*. at 1386. Information which originated outside the peer review process is not subject to the privilege and, if otherwise admissible, could be used to prove Edison's case." *Id*. The court found that the legislative regulation of the peer review protections did not deprive the plaintiff of her right to bring a claim. *Id*. at 1386.

In this case, the statute, as written provides absolute protection from discovery in civil actions. These absolute protections do not violate the open

[6] In Arizona the open courts provision is referred to as the anti-abrogation clause which provides "the right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."

courts provision of the South Dakota Constitution because they do not eliminate Plaintiffs' ability to prosecute such an action. The Plaintiffs in this case have shown the ability to locate information regarding Dr. Sossan from independent sources. Upholding the peer review protections will not deprive Plaintiffs of their ability to prosecute their action.

CONCLUSION

Defendants respectfully request that this Court reverse the Circuit Court's October 23, 2015 Memorandum Decision and direct the Circuit Court to enter an order denying Plaintiffs' motion to compel production of peer review materials.

Dated at Sioux Falls, South Dakota, this _____ day of March, 2016.

EVANS, HAIGH & SMITH, L.L.P.

_____

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APPENDIX

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 27615
APPEAL NO. 27626
APPEAL NO. 27631

RYAN NOVOTNY,
Plaintiff and Appellee,
v.

SACRED HEART HEALTH SERVICES,
a South Dakota Corporation d/b/a
AVERA SACRED HEART HOSPITAL, AVERA
HEALTH, a south Dakota Corporation,

Defendants and Appellants.
and

ALLEN A. SOSSAN, D.O., also known
as ALAN A. SOOSAN, also known as
ALLEN A. SOOSAN, RECONSTRUCTIVE
SPINAL SURGERY AND ORTHOPEDIC
SURGERY, P.C., a New York
Professional Corporation, LEWIS
& CLARK SPECIALTY HOSPITAL, LLC, a
South Dakota Limited Liability
Company,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,
v.

CURTIS ADAMS, DAVID BARNES,
MARY MILROY, ROBERT NEUMAYR,
MICHAEL PIETILA and DAVID WITHROW,
Defendants and Appellants,

and

ALAN A. SOOSAN, also known as
ALLEN A. SOOSAN, also known as

ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Appellees,

v.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendant and Appellant,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.M., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NIELSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Appellants.

Appeal from the Circuit Court, First Judicial Circuit
Yankton County, South Dakota

The Honorable Bruce V. Anderson
Circuit Court Judge

APPELLANT BRIEF OF SACRED HEART HEALTH SERVICES d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH AND ITS INDIVIDUALLY NAMED COMMITTEE MEMBERS AND PERSONNEL

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PETITION FOR PERMISSION TO TAKE A CONSOLIDATED APPEAL OF AN INTERMEDIATE ORDER
FILED: NOVEMBER 3, 2015
ORDER GRANTING THE PETITION WAS FILED: DECEMBER 15, 2015

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PRELIMINARY STATEMENT

Appellant Sacred Heart Health Services d/b/a Avera Sacred Heart Hospital will be referred to herein as "ASHH." ASHH and Appellant Avera Health will collectively be referred to as "Avera." Appellant Lewis & Clark Specialty Hospital, LLC, will be referred to as "L&C." Any of the other individually named Defendant parties or entities will be referred to as Defendant, followed by the party's last name. For example, Allen A. Sossan will be referred to as "Defendant Sossan." At times, all of the Appellants will be referred to collectively as "Appellants" or "the Defendants." The consolidated cases noted in this Court's December 15, 2015 Order Granting Petition for Permission to Appeal will be referred to collectively as "the Sossan Litigation." The various plaintiffs in the Sossan Litigation will be discussed collectively and referred to as "the Plaintiffs" or "Plaintiffs."

References to the Circuit Court Record from the *Novotny v. Sossan, et al*, matter (Appeal No. 27615; CIV 14-235) shall be denoted as "Novotny R., ____" and references to the Circuit Court Record from the *Arens v. Sossan, et al*, matter (Appeal No. 27626 and 27631; CIV 15-167) shall be denoted as "Arens R., ___." References to the Appendix of this Brief, which includes the pertinent Circuit Court Order and five relevant statutes, are designated by "App., Pg. __." References to the transcript of the relevant April 24, 2015 motions hearing, found in the record, are designated by "HT, Pg. __."

JURISDICTIONAL STATEMENT

Avera respectfully appeals from the Honorable Bruce V. Anderson's October 23, 2015, "Memorandum Decision: Plaintiffs' Motion to Compel Discovery – Plaintiffs' Motion on Constitutionality of Peer Review Statute SDCL 36-4-26.1 – Plaintiffs' Motion

and Argument Concerning Hospital Liability and Negligent Credentialing" ("the Peer Review Order"). (App., Pg. 1-28). The Peer Review Order was an intermediate order, however, this Court granted permission to appeal by its Order Granting Petition for Permission to Appeal from Intermediate Order, dated December 15, 2015.

STATEMENT OF THE LEGAL ISSUES

I. Whether the circuit court erred in requiring the disclosure of information protected by SDCL 36-4-26.1?

The Circuit Court ordered:

- Without *in camera* inspection, that the Appellants produce information potentially held by their peer review committees relating to Defendant Sossan's credentialing and privileging, including things like Defendant Sossan's application for privileges, documents gathered by the committees relating to Defendant Sossan's background, materials the committees received from the National Practitioners Databank, and "any other objective information" the committees received for purposes of the credentialing process;

- Without *in camera* inspection, that the Appellants produce all complaints filed against Defendant Sossan by any person or other medical provider during the time he had hospital privileges and any final resolution or other action taken as a result of such a complaint;

- For *in camera* inspection, that the Appellants produce the entirety of Defendant Sossan's credentialing and privileging files, including the subjective deliberations of the peer review committees and noting that the entirety of the credentialing and privileging files may later be discoverable if Plaintiffs make a further showing that fraud, deceit, illegality, or other improper motive influenced the committee members in granting or maintaining Defendant Sossan's privileges.

(See App., Pg. 27 for full ruling).

Most Relevant Authorities

- *Shamburger v. Behrens*, 380 N.W.2d 659 (S.D. 1986)

- *Pawlovich v. Linke*, 2004 S.D. 109, 688 N.W.2d 218

- SDCL 36-4-26.1

STATEMENT OF THE CASE

The Honorable Bruce V. Anderson, Circuit Court Judge for the First Judicial Circuit, erred in requiring the Defendants to disclose information undisputedly protected by South Dakota's peer review protection statute, SDCL 36-4-26.1.

Peer review is the process by which medical professionals and hospitals seek to improve quality patient care through self-regulation. It serves as "one of medicine's most effective risk management and quality improvement tools." *Rechsteiner v. Hazelden,* 753 N.W.2d 496, 505 (Wis. 2008) (citations omitted). South Dakota law recognizes its importance, requiring it of hospitals, ARSD 44:75:04:02, and providing protection to the process and immunity for participants. SDCL 36-4-26.1 and 36-4-25. Federal regulations also recognize its importance, requiring it of providers desiring to participate in Medicare programs, 42 C.F.R. § 482.22, and also providing federal immunity for participants. See 42 U.S.C. § 11111.

The peer review process does not work without complete candor of both those being reviewed and those doing the reviewing. Recognizing this fact, South Dakota's Legislature enacted robust peer review protection in 1977. SDCL 36-4-26.1. South Dakota was not alone in doing so; instead, it was alike every other state in the Country. *Sevilla v. U.S.,* 852 F.Supp.2d 1057, 1060-61 (N.D.Ill. 2012).

In reviewing the Plaintiffs' attack of the peer review protection statute, the Circuit Court first found that SDCL 36-4-26.1's protection was, indeed, "absolute," in cases like this one. However, it proceeded based on constitutional grounds to undercut the Legislature's prerogatives by imposing two exceptions to the statute: 1) an original source exception; and 2) a crime/fraud exception. (App., Pg. 15, 18, and 26-27).

The constitutional theories advanced by the Plaintiffs (due process and open courts) did not warrant the drastic action taken by the Circuit Court. SDCL 36-4-26.1 survives constitutional scrutiny because it bears a real and substantial relation to the goal of improving the quality and availability of medical care (due process)[1], the Plaintiffs have no constitutional right to evidence from the most convenient source (due process), and it does not deprive the Plaintiffs of a path to the courthouse (open courts).

"Nothing is worse than a half-hearted privilege; it becomes a game of semantics that leaves parties twisting in the wind while lawyers determine its scope." *Irving Healthcare System v. Brooks*, 927 S.W.2d 12, 17 (Tex. 1996). The Circuit Court's ruling, if upheld, will result in exactly this type of half-hearted peer review protection. SDCL 36-4-26.1 must remain intact as the Legislature intended. The Peer Review Order should be overturned.

STATEMENT OF THE FACTS

I. Basis for the Lawsuits

The Sossan litigation, for the most part, began in the summer of 2014. It arises out of Defendant Sossan's surgical practice in Yankton, South Dakota during the 2008 to 2012 time period. During this time period, Defendant Sossan, a spine surgeon, was a shareholder at L&C and he had privileges to perform surgery at L&C's facility from mid 2008 through mid 2012. (Novotny R., 931). He also had privileges, but was not employed, at the local community hospital, ASHH, for about 3 years, from early 2009 through early 2012. (Id. at 881).

[1] The Circuit Court agreed with this contention. (App., Pg. 16).

The Plaintiffs in the Sossan Litigation asserted similar causes of action, each claiming to have been harmed by Defendant Sossan's medical malpractice, allegedly committed when he negligently or intentionally performed one or more unnecessary procedures upon them. (See, Novotny R., 3-29 (reflecting a typical Complaint in the Sossan Litigation)). Each Plaintiff had at least one procedure at ASHH or L&C, and a few had procedures at both. Almost every procedure was performed outside of the medical malpractice two year statute of limitations.

As the basis for attempting to attach liability to Avera and L&C, the Plaintiffs asserted that peer review committees at ASHH and L&C negligently and/or maliciously (in the pursuit of money) credentialed Defendant Sossan knowing that he was a danger to patients. (See, Arens R., 101-149 (reflecting a typical Complaint in the Sossan litigation, which also included claims against the individually named Defendants)). Based upon the same theory, the Plaintiffs also sought to attach personal liability to the individually named Defendants for their peer review committee work. (Id.)

II. Procedural Background

Because each suit hinges upon a given Plaintiff's ability to prove malpractice at the outset, and because almost every Plaintiff's procedure(s) occurred outside of the two year malpractice statute of limitations (SDCL 15-2-14.1), one of the first motions filed in almost every case was a motion for summary judgment by the various Defendants. (Novotny R., 186-87; 1768-1778). A hearing on the summary judgment motions was first set for Thursday, November 6, 2014. (Id. at 184-185).

Prior to that time, Plaintiffs served extensive discovery asking for a variety of information having nothing to do with malpractice, but instead directed at the

credentialing claims against the facilities. Almost all of the information requested was protected by SDCL 36-4-26.1. Some of the Appellants proposed staying the discovery until the Circuit Court ruled upon the dispositive statute of limitations issue, however, the Plaintiffs refused. (Id. at 168-183). The Appellants then sought protection orders. (Id.)

10 business days before the November 6, 2014 hearing, the Plaintiffs served and filed 44 page briefs, 60 page factual recitations, and affidavits with 99 exhibits, all supporting their Motion to Compel and Motion for Partial Summary Judgment on the Constitutionality of the South Dakota Peer Review Statute, SDCL 36-4-26.1 ("the Peer Review Motion"). (Id. at 234-971). On the day before the November 6, 2014 hearing, the Circuit Court informed all counsel that the hearing would not proceed because the Court had no chance of getting through all of the filings dumped into the record just before the hearing. The Circuit Court indicated it would set a new hearing and directed that no more motions could be filed. The Plaintiffs' counsel, nonetheless, filed nine more affidavits and numerous exhibits, filling the record with inadmissible evidence like newspaper articles. (E.g., id., 394-95).[2]

A hearing finally did occur in April of 2015. Most notably, the Circuit Court

[2] The Plaintiffs' counsel have continued this practice in front of this Court, recently improperly submitting the Affidavit of Lars Aanning in Response to the SDSMA's Amicus Petition, said affidavit being almost entirely premature appellate argument of counsel, as compared to an actual affidavit, and attaching inadmissible evidence that was not in the settled circuit court record. (Filed 2/8/16).

denied the statute of limitations dispositive motions[3] and it took the Peer Review Motion under advisement. After another six months and some supplemental briefing, the Circuit Court issued the Peer Review Order. (App., Pg. 1-28).

In the Peer Review Order, the Circuit Court first concluded that improper credentialing is a valid cause of action in South Dakota. (Id. at 6-10). Some states do not recognize this cause of action[4] and South Dakota case law provides a similar conclusion.[5]

The Circuit Court next found SDCL 36-4-26.1, as written, was absolute in its protection. (Id. at 15, 18). The Circuit Court then concluded that SDCL 36-4-26.1 was not unconstitutional, but only remained so after applying two judicially created exceptions to it. (Id. at 18). In accord with these exceptions, the Circuit Court then ordered disclosure of information undisputedly protected by SDCL 36-4-26.1. (Id. at 26-27). The Defendants challenged this holding and its basis.

The Plaintiffs have not filed a notice of review of the Circuit Court's conclusion that SDCL 36-4-26.1, as written, provides absolute protection. (Id. at 15). They have also not filed a notice of review for their due process claim, challenging the Circuit Court's conclusion that they failed to demonstrate that SDCL 36-4-26.1 "clearly, palpably and plainly" does not have a "real and substantial relation" to the legitimate

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[3] This decision was based, in part, upon tolling concepts and the Circuit Court's mistaken conclusion that hospitals owe an independent physician's patients more than a reasonable hospital duty, but actually owe those patients a fiduciary duty. (Novotny R., 2046-48, ¶¶ 12. 18-20, 22). This contention has been rejected. *Moore v. Regents of Univ. of Cal.,* 793 P.2d 479 (Cal. 1990); *Moore v. Burt*, 645 N.E.2d 749 (Ohio Ct. App. 1994). If necessary, this fiduciary duty issue may be another issue brought to this Court in the future.

[4] Arkansas - *Paulino v. OHG of Springdale, Inc.*, 386 S.W.3d 462, 469 (Ark. 2012). Utah – Utah Code § 78B-3-425.

interest of improving the availability of quality medical care across South Dakota. (Id. at 16).

STANDARD OF REVIEW

This Court interprets statutes under a "de novo standard of review without deference to the decision of the trial court." *Matter of Estate of Jetter*, 1997 S.D. 125, ¶ 10, 570 N.W.2d 26, 28 (citations omitted). This Court's review of the constitutionality of a statute is also de novo. *Green v. Siegel, Barnett & Schutz,* 1996 S.D. 146, ¶ 7, 557 N.W.2d 396, 398 (citations omitted). Moreover:

> 'There is a strong presumption that the laws enacted by the legislature are constitutional and the presumption is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision.'

Id. (citations omitted).

ANALYSIS

I. The Purpose and Background of Peer Review Protection

Because of its recognized effectiveness in improving medical care, South Dakota, like every other state in the nation, requires that hospitals undertake medical peer review.[6] ARSD 44:75:04:02. To encourage its effectiveness, South Dakota's Legislature, like every other legislature in the nation, provides protection to the peer review process and its participants. *Sevilla,* 852 F.Supp.2d at 1060. South Dakota's protection is provided by an immunity statute (SDCL 36-4-25), as well as a protective statute (SDCL

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[5] *Shamburger v. Behrens,* 380 N.W.2d 659 (S.D. 1986).

[6] *See,* George E. Newton II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52 Ala. L. Rev. 723, 726 (2001) (noting that every state in the nation has adopted statutory provisions requiring minimum

36-4-26.1) which, subject to an exception delineated in the statute, completely shields peer review information from discovery *and* disqualifies that information, if it is released, from admissibility. Federal law, which also requires peer review for participation in Medicare, 42 C.F.R. § 482.22, likewise, provides another level of protection through the Healthcare Quality Improvement Act ("HCQIA"), giving immunity to participants in the peer review process, including those that report information to a peer review committee. 42 U.S.C. § 11111.

Peer review protection reflects a legislative policy decision between competing interests, said decision having been made by South Dakota's Legislature in the mid-1970s. The decision has been described as:

> [The privilege] evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality. This confidentiality exacts a social cost. . . . It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.

Matchett v. Superior Court, 115 Cal.Rptr. 317, 320-21 (Ct. App. Cal. 1974).

> We have already pointed out that [the privilege] reflects the General Assembly's considered judgment that the harm caused by disclosure of peer review information exceeds the benefit to be gained by permitting disclosure of the information. It is not our prerogative to second-guess the manner in which the General Assembly has balanced these competing interests.

Powell v. Community Health Systems, Inc., 312 S.W.3d 496, 512 (Tenn. 2010).

Prior to its nationwide statutory enactment, the peer review privilege was occasionally applied based upon the "public interest" exception under the common law, and the seminal case on the issue is generally considered *Bredice v. Doctor's Hospital, Inc.* 50 F.R.D. 249 (D.D.C. 1970). In *Bredice,* the plaintiff filed a malpractice suit and

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standards of monitoring in order for hospitals to qualify for state licensure).

then sought discovery of minutes and reports of the boards and committees of the hospital. *Id.* at 250. Relying on the "public interest" exception to discovery, the court laid the groundwork for statutory peer review protection:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.
>
> The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.

Id. at 250.

As the privilege has been challenged and considered over the years, courts have clung to rationale similar to the *Bredice* common law analysis:

> Moreover, the purpose of this legislation is not to facilitate the prosecution of malpractice cases. Rather, its purpose is to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care. The Act is premised on the belief that, absent the statutory peer-review privilege, physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues. . . .

Jenkins v. Wu, 468 N.E.2d 1162, 1168 (Ill. 1984).

Numerous cases from across the country have noted these compelling interests as a basis for the need for confidential peer review. *See, e.g., Krusac v. Covenant Medical Center, Inc.,* 865 N.W.2d 908 (Mich. 2015) ("Essential to the peer review process is the

candid and conscientious assessment of hospital practices" and finding that Michigan's peer review statutes protected not only documents containing deliberations of peer review committees, but also the "objective facts" considered during the peer review process); *Larson v. Wasemiller,* 738 N.W.2d 300 (Minn. 2007) (noting that the purpose of Minnesota's peer review statute is to promote the strong public interest in improving health care, recognizing that peer review does not work to improve patient care if fellow professionals are reluctant to participate "fully," and ultimately holding that a negligent credentialing claim could only proceed with the use of evidence gathered from outside of the peer review committee itself); *Ex Parte Krothapalli,* 762 So.2d 836, 839 (Ala. 2000) ("It seems clear to us . . . that the purpose of a peer-review statute is to encourage full candor in peer-review proceedings and that this policy is advanced only if all documents considered by the committee or board during the peer-review or credentialing process are protected."); *Claypool v. Mladineo,* 724 So.2d 373, 388 (Miss. 1998) ('The self-evaluation of medical staff by medical providers can only be fully utilized where members of peer review committees or those present during committee proceedings are assured of confidentiality so that they will feel free to enter into uninhibited discussions of their peers.").

Secondary literature has also strongly favored the use of confidential peer review because the complex nature of the practice of medicine leaves fellow physicians in a position best suited to critique each other's work. Medical peer review is considered the "most effective and efficient method of professional self-regulation in the field." William P. Gunnar, *The Scope of a Physician's Medical Practice: Is the Public Adequately Protected by State Medical Licensure, Peer Review, and the National*

Practitioners Data Bank?, 14 Arm. Health L. 329, 349 (2005). It is more effective than the tort system because, unlike civil litigation, evaluation by fellow physicians "encourages practices that seek to avoid preventable adverse events in the first place." Patricia A. Sullivan and Jon M. Anderson, *The Health Care Debate: If Lack of Tort Reform is Part of the Problem, Federalized Protection of Peer Review Needs to be Part of the Solution,* 15 Roger Williams U. L. Rev. 41, 50 (2010). The secondary sources and the studies noted in them make clear that confidentiality is key to the effectiveness of the peer review system. *See, e.g.,* Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis"*, 23 Stan. L. & Pol'y Rev. 477, 503-504 and FN 156 (2012) (discussing the importance of *confidential* peer review and noting seven other sources/articles endorsing the importance of *confidential* peer review to the improvement of medical care).

This Court has also endorsed the importance of peer review in the medical profession, stating:

> We have recognized the important role played by doctors, attorneys and other professionals in reviewing members of their respective profession. Professional societies, through peer review, can and do perform a great public service by exercising control over those persons placed in a position of public trust. It is beyond dispute that communications initiated during such proceedings are an indispensable part thereof.

Pawlovich v. Linke, 2004 S.D. 109, ¶ 14, 688 N.W.2d 218, 223 (internal citations omitted). Moreover, this Court has noted that the peer review process must be protected. *See Flugge v. Wagner,* 532 N.W.2d 419, 421 (S.D. 1995) (citations omitted) (discussing the importance of peer review, applying an "absolute" privilege, and stating,"'[i]t is hardly open to dispute that [such] communications . . . are to be protected. . . .").

This Court has noted the Legislature's legitimate "interest in preserving and promoting adequate, available and affordable medical care for its citizens." *Knowles v. U.S.*, 1996 S.D. 10, ¶ 66, 544 N.W.2d 183, 197 (citations omitted). To further this interest, our Legislature enacted the peer review protections found in Chapter 36-4. Authorities from across the country have endorsed this action and every state legislature has, likewise, protected peer review. The Plaintiffs seek to destroy this protection.

II. SDCL 36-4-26.1's Protection is Absolute

The Circuit Court concluded that SDCL 36-4-26.1's protection is "absolute," that the statute leaves "little room" for judicial interpretation, and it indicated that carving out an exception is not supported by the language of the statute. (Id. at 12 and 14-15). The Circuit Court noted on the record at the hearing that the statute contains no "relief valve" exception. (HT, Pg. 188-190). This conclusion is correct and has not been challenged by the Plaintiffs through notice of review. SDCL 15-26A-22. Nonetheless, the scope of SDCL 36-4-26.1 shall be addressed to confirm the Circuit Court's conclusion, to distinguish the Circuit Court's exceptions, and to provide context for constitutionality considerations.

A. SDCL 36-4-26.1 Unambiguously Provides Absolute Protection that only Yields to the Exception Found in that Statute

As with any statutory analysis, review of the reach of a statute must begin with the language of the statute itself. (See App. 29-33 (containing SDCL 36-4-25, 26.1, 26.2, 42 and 43)). SDCL 36-4-26.1 provides, in full:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration

> forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

A court's obligation is to "interpret statutes in accord with legislative intent," said intent being "derived from the plain, ordinary and popular meaning of statutory language." *Wiersma v. Maple Leaf Farms,* 1996 S.D. 16, ¶ 4, 543 N.W.2d 787, 789. (citation omitted). "When a statute's language is clear, certain and unambiguous, [the court's] function confines [it] to declare [the statute's] meaning as plainly expressed." *Id.* at ¶ 6, at 790 (citations omitted). Even when a court is attempting to interpret a statute in a constitutional manner, it can only do so if the interpretation remains "consistent with the will of Congress." *Eagleman v. Diocese of Rapid City,* 2015 S.D. 22, ¶ 12, 862 N.W.2d 839, 846 (citations omitted).

Per a plain meaning review of SDCL 36-4-26.1, except for the specific exception found in the last two sentences, the statute absolutely protects both the deliberations of peer review committees *and* all the information the committees possess relating to the peer review, credentialing, or privileging of a practitioner. In drafting SDCL 36-4-26.1, the Legislature expressed the extensiveness it intended for this protection by concluding the list of protected items listed in the statute with the all encompassing category of "any other data whatsoever" relating to privileging or credentialing work done by a peer review committee. (Id.) The statute then goes further, deeming the information not only inadmissible in "any court or arbitration forum," but it also makes the information un-

disclosable and un-discoverable. (Id.) The long reach of the protection is furthered by SDCL 36-4-42 and 36-4-43.

SDCL 36-4-26.2 further evidences that the Legislature is cognizant of the reach of SDCL 36-4-26.1. SDCL 36-4-26.2 expressly delineates information the protection does *not* apply to, including first hand accounts of medical care and medical records generated during the at-issue treatment and care.

Case law has interpreted SDCL 36-4-26.1's protection as "absolute." *Uhing v. Callahan,* 2010 WL 23059, *7 (D.S.D. 2010). Moreover, in *Martinmaas v. Engelman,* this Court reviewed Chapter 36-4 and noted the broadness of SDCL 36-4-26.1's comprehensive protection. 2000 S.D. 85, ¶¶ 46-51, 612 N.W.2d 600, 610-12. It concluded that in enacting SDCL 36-4-31.5 and the broad scope of the protections in Chapter 36-4 as a whole, the Legislature's goal was to protect all confidential information that surfaces during a physician's hearing for the re-issuance of his medical license, even if such proceeding was not identified by name in that statute. *Id.* This Court concluded that introduction or use of the protected information during a trial, even if just for purposes of impeachment, was error. *Id.* at ¶¶ 50-52, at 611-12.

Had the Legislature intended to include more exceptions to SDCL 36-4-26.1, it would have. *See State v. Young,* 2001 S.D. 76, ¶12, 630 N.W.2d 85, 89 (citations omitted) ("the Legislature knows how to exempt or include items in its statutes."). SDCL 36-4-26.1 itself proves this because the last two sentences already contain an exception. Said exception contemplates an employment or privileging claim brought by a physician, where the basis for the adverse employment or privileging decision would be found in the otherwise protected peer review files. *See Wojewski v. Rapid City Regional Hospital,*

Inc., 2007 S.D. 33, 730 N.W.2d 626 (reflecting the type of lawsuit contemplated by the exception found in SDCL 36-4-26.1). In including this exception within SDCL 36-4-26.1, the Legislature also expressed an intent that this be the only exception, indicating that the protection was absolute but for the exception "hereinafter provided."

Case law from this Court also reflects agreement that other judicially created exceptions should not be added to SDCL 36-4-26.1. *Shamburger*, 380 N.W.2d at 665. Specifically, in *Shamburger*, a malpractice plaintiff like the Plaintiffs here, brought an improper credentialing claim against a hospital who had granted privileges to a physician with an alcohol problem. *Id.* In granting summary judgment against the plaintiff, this Court's held that SDCL 36-4-26.1's protection did *not* yield to the plaintiff's need or right to discover evidence to support an improper credentialing claim. *Id.*

The Circuit Court's exceptions, in contrast, force SDCL 36-4-26.1's protection to yield to the Plaintiffs' request for discovery they claim they need to prove their claims. The Peer Review Order thereby flies in the face of this Court's precedent (*Shamburger*) and completely contradicts the plain language of SDCL 36-4-26.1.

B. The Circuit Court's Two Exceptions Contradict SDCL 36-4-26.1

1) The Circuit Court's Independent Source Exception does not Comply with SDCL 36-4-26.1

The Circuit Court applied its version of the independent source rule to SDCL 36-4-26.1, which it held requires disclosure, *by the committees*, without *in camera* inspection, of the objective or independent source information gathered or considered in the process of credentialing, privileging, or peer reviewing Defendant Sossan. (App., Pg. 26-27). As noted above in Argument, Section II, Subsection A, this is not an exception found within SDCL 36-4-26.1.

SDCL 36-4-26.1 broadly protects "[t]he proceedings, records, reports, statements, minutes, or any other data whatsoever" of a committee. The statute does not differentiate between information generated by a committee versus information generated or originating from an outside source. Rather, the statute indicates that once the information comes to a review committee, it becomes part of the peer review process and it falls under the protection of SDCL 36-4-26.1. Case law interpreting SDCL 36-4-26.1 agrees. *See, Uhing*, 2010 WL 23059 (addressing the discoverability of items protected by South Dakota's peer review statues and denying discovery requests for a number of categories of information, including independent source information held by the committees like the physician's application for privileges and other objective documents).

This is a very important aspect of the protection because, for peer review to work, independent sources must be able to fully and frankly provide honest, complete, and un-sanitized information to peer review committees without fear of reprisal. Consideration of this concern is apparent from the broad scope of SDCL 36-4-26.1 and is also reflected by the HCQIA, which provides immunity to not only committee members, but also those that provide information to peer review committees. 42 U.S.C. 11111(a)(1)(D).

While the Circuit Court's version of the independent source rule contradicts with SDCL 36-4-26.1, a slightly altered version of the independent source concept would comply. Under the alternative version of the concept, applied in jurisdictions across the country, independent or objective source information can be obtained and used by a plaintiff, however, it must be obtained *from the independent sources* outside of the peer review process. *State ex rel. Wheeling Hosp., Inc. v. Wilson*, ---S.E.2d---, 2016 WL

595873 (W.Va.); *Larson*, 738 N.W.2d 300; *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 260 (Tex. 2005); *Ex Parte Qureshi*, 768 So.2d 374 (Ala. 2000); *McGee v. Bruce Hospital System*, 439 S.E.2d 257, 260 (S.C. 1993); *Day v. The Finley Hosp.*, 769 N.W.2d 898 (Iowa Ct. App. 2009); *Huntsman v. Aultman Hospital*, 2008 WL 2572598, *7 (Ohio Ct. App.); *See also, Krusac*, 865 N.W.2d at 912-914 (deciding, on an interlocutory appeal less than a year ago, that objective facts found in peer review materials are privileged and noting that these objective facts could still be gathered from sources outside of the committee's protected documents).

This concept falls in line with SDCL 36-4-26.1. Just like the West Virginia Supreme Court did earlier this month in *Wheeling*, South Dakota's peer review protection can be plainly read and applied as follows: information created by or at the behest of a peer review committee, including a physician's application for privileges, is protected and remains protected at all times, regardless of who obtains it; items from independent sources, not generated at the behest of a committee, which were gathered and/or reviewed by a peer review committee do not become privileged simply because a committee gathered and/or reviewed them; and such independent source items are discoverable "from the *original, external sources*, but not from the peer review committee, itself." *Wheeling Hosp.*, ---SE2d---, 2016 WL 595873 (citations omitted) (emphasis in original).

South Dakota precedent interpreting SDCL 36-4-26.1 also supports this analysis. *Shamburger*, 380 N.W.2d at 665. In *Shamburger*, this Court first noted that, because of the peer review protection, the plaintiff could not "obtain the records which would show whether or not the hospital considered or knew of [the provider's] drinking problems when [it] considered his staff privileges." *Id.* Nonetheless, this Court did *not* conclude

the protection barred the claim altogether, but it instead dismissed the claim because the plaintiff presented no other evidence obtained from non-protected sources as support. *Id.*

One additional issue relating to the independent source rule must be discussed. At page 14 of the Peer Review Order, the Circuit Court noted that the Appellants agreed with the Circuit Court's version of the independent source rule. (App., Pg. 14). This is incorrect.

The Appellants did put forth, in their supplemental Circuit Court briefing, the assertion that Plaintiffs could gather information and attempt to prove up an improper credentialing claim with evidence from independent sources. (Novotny R., 1423). The Appellants argued that under this rule, the Plaintiffs *could not*, however, gather this independent source information from the peer review committees themselves and it cited cases supporting this concept. (Id. at 1423-1426). This was also the Appellants' position at the hearing. (HT 179-180; 206). This is a very important distinction. The Circuit Court's version of the independent source rule, allowing Plaintiffs to obtain independent source documents *from the peer review committees*, conflicts with SDCL 36-4-26.1. The independent source rule proposed by the Defendants at the Circuit Court level and again now, requiring the Plaintiffs to gather the independent information *from the external source*, does not.

The Peer Review Order's version of the independent source exception contradicts SDCL 36-4-26.1. It should be overturned. The Plaintiffs can proceed in compliance with SDCL 36-4-26.1, based upon information obtainable from outside, independent sources not under the peer review protection umbrella.

2) The Crime/Fraud Exception is not Supported by SDCL 36-4-26.1

The second exception the Circuit Court applied to SDCL 36-4-26.1 is the crime/fraud exception, which it relied upon to require disclosure, for *in camera* review, of items reflecting the actual deliberative process of the peer review committees. (App., Pg. 26-27). It noted that it may require complete disclosure of this information and allow the Plaintiffs to probe deeper into the peer review process if it appears the decision to grant privileges to Defendant Sossan was made in bad faith or for some improper, illegal, or illegitimate motive. (Id. at 26). The Circuit Court plowed into untouched ground here. In its entire crime/fraud analysis, it did not cite one case wherein any court applied the crime/fraud exception to undercut medical peer review protections. (Id. at Pg.18-26).

As noted above in Argument, Section II, Subsection A, this is not an exception found within SDCL 36-4-26.1. Had the Legislature intended to include a crime/fraud exception to the statute, it would have done so. *Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d at 89 (citations omitted). Its decision to *not* include this exception should be given deference. *See South Dakota Subsequent Injury Fund v. Heritage Mut. Ins. Co.*, 2002 S.D. 34, ¶ 19, 641 N.W.2d 656, 660 (finding that the Legislature's decision not to exempt something from the reach of a statute must be given deference).

SDCL 20-11-5 is informative on this point. At SDCL 20-11-5, the Legislature enacted privileges for defamation cases, two of which yield to a malice exception and two of which are absolute, regardless of proof of malice. *See Peterson v. City of Mitchell*, 499 N.W.2d 911, 915 (S.D. 1993) (discussing the difference between the sections of SDCL 20-11-5). This is important here because SDCL 20-11-5 evidences that when the Legislature wants a privilege or protection to yield to something like a consideration of malice or crime/fraud, it knows exactly how to draft such a statute. In

contrast, when it wants a privilege or protection to be absolute, it will *not* include such an exception. *Peterson* demonstrates that this Court is bound to acknowledge those legislative prerogatives.

The Circuit Court also tried to support the concept of a crime/fraud exception by discussing how the exception applies to other types of privileges and by reasoning that SDCL 36-4-25 is meaningless without such an exception. Such analysis does not change the clear language of SDCL 36-4-26.1, which does not include a crime/fraud exception.

a. Comparing the Peer Review Protection to other, Evidentiary Privileges, is Unconvincing

Much of the Circuit Court's crime/fraud analysis came from attorney client privilege cases like *U.S. v. Zolin.* 491 U.S. 554 (1989). This law is unhelpful to undercutting the absolute peer review protection in South Dakota for multiple reasons. First, in South Dakota, like in the federal code, the crime/fraud exception is specifically codified as an exception to the attorney client privilege. See SDCL 19-19-502(d)(1) (directing that the attorney client privilege is inapplicable when it is used for the furtherance of crime or fraud). In contrast, crime/fraud is *not* codified as an exception to SDCL 36-4-26.1.

Second, the attorney client privilege, like the other privileges analyzed by the Circuit Court in this part of its opinion, has its roots in the common law, is found in the evidence code, and its contours have been shaped over time by the courts. In contrast, South Dakota's peer review protection is not found in South Dakota common law and it is a creature of statute, shaped completely by the Legislature, and not found in the evidence code. In other words, it was not enacted by this Court as part of the evidence code or as a recognition of common law principles. *See Cawthorn v. Catholic Health*

Initiatives Iowa Corp., 806 N.W.2d 282, 289 (Iowa 2011) (noting that Iowa's peer review privilege was a statutory privilege, not a "common law" privilege, and reviewing the presented issue not based upon how it would apply to a typical privilege, but based upon the language of the statute itself). The Circuit Court's decision to create a crime/fraud exception to South Dakota's completely *statutory* peer review protection, said exception having no basis in the language the Legislature chose to use in SDCL 36-4-26.1, implicates serious separation of powers concerns.

Further evidencing the difference between the typical privileges in the evidence code and the peer review protection is the fact that peer review protection, by its terms, cannot be waived. SDCL 36-4-26.1. Indeed, subject to its legislatively delineated exception, the peer review protection is both a privilege *and* a complete bar to admissibility. Id.*; See, Cawthorn*, 806 N.W.2d at 289-90 (finding, and citing a number of cases as support, that Iowa's peer review protection was not waivable in large part because the peer review information was also not admissible). In contrast, the privileges in the evidence code, like the attorney client privilege and the spousal privilege, are subject to waiver. SDCL 19-19-510.

The Circuit Court's analogy of common law privileges from the evidence code, to South Dakota's completely statutory peer review protection, is unpersuasive as a basis for applying the crime/fraud exception to SDCL 36-4-26.1.

b. Concerns over SDCL 36-4-25's Viability should also not Change the Result of a Plain Reading of SDCL 36-4-26.1

The Circuit Court expressed concern that without a crime/fraud exception, SDCL 36-4-25, which allows for immunity if a peer review participant acts without malice, would be rendered meaningless. This concern is unfounded.

As an initial matter, even without a crime/fraud exception, the Plaintiffs would still have the ability under the independent source doctrine to gather evidence to support their case and prove malice or improper motive on the part of the individual defendants. *See Freeman v. Piedmont Hosp.*, 444 S.E.2d 796, 797-98 (Ga. 1994) (concluding that a malice claim did not pierce the peer review protection privilege and noting that the plaintiff could discover information to support the claim from independent sources). The fact that the peer review protection would make the evidence unavailable from the "most convenient source" does not merit the Circuit Court's drastic decision to sterilize the protection altogether. *See McGee*, 439 S.E.2d at 260 (citations omitted) ("We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source").

The Texas Supreme Court addressed exactly this issue in a lawsuit brought by a physician claiming that false information about him was maliciously supplied to a hospital medical peer review committee, resulting in the hospital denying him admittance. *Irving Health Care System*, 927 S.W.2d at 14-15. Just like in South Dakota, at play in *Irving Health* were two peer review statutes, one making the peer review documents undiscoverable and a second providing immunity for peer review participants as long as they did not act maliciously. *Id.* at 16. The Texas Supreme Court addressed the issue, reasoning:

> There are two intertwined but distinct protections extended to the peer review process under section 5.06 article 4495b. The first is protection from discovery of the records and proceedings of and communications to a medical peer review committee. *See* Tex.Rev.Civ.Stat.Ann. art. 4495b, § 5.06(g),(j), (s)(3) (Vernon Supp.1996). The second is a qualified immunity from civil liability. *See id.* § 5.06(*l*), (m), (t). . . .

> The provisions of section 5.06 providing *immunity* from civil liability draw the line at malice. Art. 4495b, § 5.06(*l*),(m), (t). However, it does not follow that an allegation or even proof of malice that would negate a qualified immunity negates the separate *discovery* exemption under the statute. The extension of civil immunity and the exemption of matters from discovery are related but distinct.
>
> . . . .
>
> Section 5.06 of article 4495b does not provide an exception to its confidentiality provisions whenever a plaintiff presents a prima facie case of malice. Read as a whole, the statute reflects the Legislature's conscious decision to allow an affected physician to bring claims against those who participate in the peer review process maliciously and without good faith, but nevertheless to maintain the confidentiality of the peer review process. That choice is a logical one. If a litigant could overcome the barrier to discovery by merely alleging malice, the privilege would be substantially emasculated. Requiring a prima facie showing of malice adds little protection. The overarching purpose of the statute is to foster a free, frank exchange among medical professionals about the professional competence of their peers. The Legislature recognized the chilling effect that would be engendered by enfeebling confidentiality.
>
> The Legislature has drawn a careful balance between the competing policy considerations of ensuring confidentiality for effective peer review and the scope of discovery in suits bringing legally cognizable claims. Courts should not disturb that balance or graft additional exceptions onto the statute absent constitutional concerns.

Id. at 16-17. *See also, Freeman,* 444 S.E.2d at 797-98 (examining the interplay between peer review "without malice" immunity statutes and peer review protection statutes in Georgia and concluding that a malice claim did not allow for discovery of privileged information).

Moreover, the typical type of malicious privileging case, as recently denoted by the District Court of South Dakota, proves that SDCL 36-4-25 has meaning without needing to apply a judicially created crime/fraud exception. The typical malicious privileging case involves a physician suing a committee or hospital for the alleged improper denial or revocation of his or her privileges. This is the type of situation

excepted from SDCL 36-4-26.1 and the type of case where SDCL 36-4-25 often plays a major role without the need for a judicially created exception. *See Miller v. Huron Regional Medical Center, Inc.*, 2015 WL 6811791 (D.S.D. 2015) (involving claims by a physician against a hospital and members of its medical executive committee for breach of contract, negligence, defamation, and interference with business relationship, and holding that SDCL 36-4-25 provided immunity to all the committee members).

The Circuit Court's concerns about the interplay between SDCL 36-4-25 and SDCL 36-4-26.1 are unfounded and did not give it a basis to create exceptions not contemplated by our Legislature.[7]

III. The Peer Review Protection Passes Constitutional Scrutiny

Since the Circuit Court noted SDCL 36-4-26.1 is absolute and leaves no room to carve out exceptions, it was only able to enact its exceptions by concluding "that SDCL 36-4-26.1 is not unconstitutional, *but* in order to reach that result, an exception must be applied . . . to allow Plaintiffs access to the information and evidence that forms the crux of their cases." (App., Pg. 18). In coming to this holding, which was basically that SDCL 36-4-26.1 is unconstitutional *as written*, the Circuit Court considered due process and open courts doctrine and expressed concern that the statute deprives the Plaintiffs of the "best and most relevant information" to prove up their claims. (Id. at 16-18).

[7] Should this Court be inclined to create and apply a crime/fraud exception to SDCL 36-4-26.1, it should still temper the Peer Review Order in light of the significant policy issues at play here and the clear language of SDCL 36-4-26.1. Specifically, even if this Court adopted the exception, all the peer review information should be released for *in camera* review and consideration before it is disclosed to the Plaintiffs. In this fashion, the Circuit Court would have the ability to further confirm or deny the existence of facts supporting the crime/fraud exception before, rather than after, the protected information has been disclosed.

Under either concept, due process or open courts, the Circuit Court's concern does not result in SDCL 36-4-26.1 being unconstitutional as written.

A. Other Courts Have Upheld Peer Review Protection in the Face of Constitutional Challenges

Another South Dakota Circuit Court has already specifically noted that "SDCL 36-4-26.1, SDCL 36-4-42, and SDCL 36-4-43 *are* constitutional." *Kostel v. Schwartz*, 2006 WL 6606463 (S.D.Cir. May 5, 2006) (emphasis added). Likewise, courts from across the country have declined various forms of constitutional challenges to their states' peer review protections. *See Ex Parte Qureshi*, 768 So.2d at 380 (denying an open-courts/anti-abrogation type constitutional challenge to Alabama's peer review protection because the plaintiff still had other sources from which to obtain documents to prove the claim); *Humana Hospital Desert Valley v. Superior Court*, 742 P.2d 1382 (Ariz. Ct. App. 1987) (same); *Claypool*, 724 So.2d 373 (upholding Mississippi's peer review statutes when they were challenged as being unconstitutional for violating separation of powers); *Dellenbach v. Robinson*, 642 N.E.2d 638, 650 (Ohio Ct. App. 1993) (noting that Ohio's peer review scheme passed a due process challenge because it was reasonably related to the legitimate purpose of improving health care); *Jenkins*, 468 N.E.2d at (denying an equal protection claim to Illinois' peer review protection statutes); *Eubanks v. Ferrier*, 267 S.E.2d 230, 232-233 (Ga. 1980) (finding that Georgia's peer review scheme did not violate due process, equal protection, and access to courts and noting that the privilege "certainly has a real and substantial relation" to the object of preserving the candor necessary for effective peer review).

Courts "are not legislative overlords empowered to eliminate laws whenever [they] surmise they are no longer relevant or necessary. . . . The law has long recognized

that a determination of policy and the duration of that policy remains within the purview of the Legislature." *Veeder v. Kennedy,* 1999 S.D. 23, ¶ 23, 589 N.W.2d 610, 616 (citations omitted). "In matters of economics and social welfare, courts must defer to our democratically elected representatives unless their enactments patently conflict with some constitutional provision." *Knowles,* 1996 S.D. 10, ¶ 59, 544 N.W.2d at 195 (citation omitted). This Court can "sympathize with those who find [a] statute unjust, but [a court is] bound to exercise judicial restraint ... and not substitute [its] judgment and wisdom for that of the legislature." *Green,* 1996 S.D. 146, ¶ 32, 557 N.W.2d at 405.

B. Plaintiff's Due Process Challenge is Without Merit

1) SDCL 36-4-26.1 Bears a Real and Substantial Relation to Improving the Quality and Availability of Healthcare in South Dakota

In South Dakota, to survive a due process challenge, a statute must "bear a real and substantial relation to the object sought to be obtained." *Knowles,* 1996 S.D. 10, ¶ 73, 544 N.W.2d at 199 (citations omitted). The Plaintiffs carry the burden to show that SDCL 36-4-26.1 "clearly, palpably and plainly" does not. *Id.* at ¶ 58, at 196 (citations omitted). The Circuit Court concluded that the Plaintiffs failed to carry this burden. (App., Pg. 16). This conclusion was correct and has not been challenged by Plaintiffs through notice of review or otherwise. Consequently, the Plaintiffs' due process claim is settled and any argument they make on due process grounds should be disregarded as waived. *City of Chamberlain v. R.E. Lien,* 521 N.W.2d 130, 131 n.1 (S.D. 1994).

Should this Court nonetheless wish to further consider the due process issue, the result will remain unchanged. The Circuit Court's conclusion is supported by the discussion in Analysis, Section I of this Brief above. As discussed in that Section, confidential peer review is crucial to improving medical care. This Court, numerous

other courts, every legislature in the Country, and numerous secondary sources agree. (See Analysis, Section I above). Consequently, it cannot be disputed that South Dakota's Legislature enacted SDCL 36-4-26.1 to reasonably pursue a legitimate state interest[8] – that of "preserving and promoting adequate, available and affordable medical care for its citizens." *Knowles,* 1996 S.D. 10, ¶ 66, 544 N.W.2d at 197 (citations omitted).

In an attempt to discredit the viability of confidential peer, the Plaintiffs submitted articles into the record and argued in their briefing that peer review does not actually work. (Novotny R., 304-06). This does not change the result for four clear reasons.

First, this Court's consideration of these articles would judicially encroach on the Legislature's policy decisions. Per the majority rationale in *Knowles:*

> Quoting studies from other states, the writing of Justice Sabers appears to take issue with our Legislature's findings in 1976. I repudiate this as judicial encroachment.
>
> > Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.

1996 S.D. 10, ¶ 67, 544 N.W.2d at 197 (citation omitted).

[8] Also, of note, the date of this legislation is key. The legislature made the choice to protect peer review in the mid-1970s, when it was gravely concerned about the availability of quality medical care throughout South Dakota. *Knowles,* 1996 S.D. 10, ¶¶ 59-67, 644 N.W.2d at 195-197. It was around this time that medical malpractice damage caps were enacted and the medical malpractice statute of limitations was clarified to *not* include a discovery rule. *See id.* (discussing damages caps); *See Peterson v. Burns,* 2001 S.D. 126, ¶¶ 34-35, 635 N.W.2d 556, 568-570 (discussing the malpractice statute of limitations).

Second, just as many, or more, peer review studies and articles can be cited for a view contrary to those expressed in the Plaintiffs' articles. (See citations in Analysis, Section I above).

Third, the Plaintiffs' articles are recent, shedding no light on what was considered when the Legislature first created or later examined the peer review protection statutes. If this Court determines it proper to review outside studies, it should attempt to consider what the Legislature relied upon when it considered the statute, not articles from decades later. This point was driven home by the majority in *Knowles*:

> *Perhaps this predicament has been partially ameliorated today*. Nonetheless, we are not legislative overlords empowered to eliminate laws whenever we surmise *they are no longer relevant or necessary*. The law has long recognized that a determination of economic policy *and the duration* of that policy remains within the purview of the Legislature. . . . . South Dakota's interest in preserving and promoting adequate, available and affordable medical care for its citizens *was* a legitimate legislative objective which should not be thwarted by judicial intrusion. We owe deference to 'the peoples' right to govern themselves;' it is not our privilege to 'supervise that process.'

Id., at ¶ 66, at 197 (emphasis added) (citations omitted).

Fourth, an issue not addressed by the Plaintiffs' articles, but one of great concern to South Dakota's Legislature, is the *availability* of medical care. This was of utmost importance in the 1970s when the protection was originally adopted. *Id.* at ¶¶ 60-65, at 195-197. It remains a problem today and our state government is attempting to address it through the FARM program, SSOM program, and by the Primary Care Task Force set up by Governor Daugaard in 2012.[9] Other rural states are struggling with the same

[9] See http://doh.sd.gov/PrimaryCare/ (providing the task force's purpose and its reports, which touch on the FARM and SSOM programs and the general problem of physician shortage throughout South Dakota).

issue.[10] Gutting peer review protection, as Plaintiffs request, would most certainly have a negative effect on the already difficult task of attracting physicians to South Dakota.

This analysis demonstrates that any re-calibration of the peer review protection should be done by the Legislature, not by the courts based upon one presented set of facts. *See Knowles,* 1996 S.D. 10, ¶ 67, 544 N.W.2d at 197 (citation omitted) (warning courts not to reach conclusions contrary to those reached by the Legislature based upon "the existence of [certain] facts"); *See also, Krusac,* 865 N.W.2d at 914 (noting that "if a litigant remains unsatisfied with the statutory balance struck between disclosing information to patients and protecting peer review materials, any recalibration must be done by the Legislature.").

Policy should be left to our elected officials. They have clearly spoken on this issue.[11] The Circuit Court correctly found that the Plaintiffs failed to show that SDCL 36-4-26.1 "clearly, palpably and plainly" does not have "real and substantial relation" to the legitimate interest of improving the availability of quality medical care across South Dakota. (App., Pg. 16). The Plaintiffs have not challenged that conclusion and, furthermore, the Circuit Court's conclusion on this issue was correct.

2) Assuming, *arguendo,* that the Peer Review Protection had no Relation to the Legislative Goal of Improving Healthcare, Plaintiffs still have no Viable Due Process Claim

In addition to the relation to a legitimate interest analysis, for purposes of their due process claim the Plaintiffs would also need to show that the peer review protection

[10] Thomas F. Martin, *The Stark Inaccessibility of Medical Care in Rural Indiana: Judicial and Legislative Solutions,* 11 Ind. Health L. Rev. 831 (2014).

[11] Our legislature has been resoundingly clear with its intent to protect medical practitioners in order to address its concern for the availability of quality medical care in South Dakota. *Peterson,* 2001 S.D. 126, ¶¶ 34-38, 635 N.W.2d 556, 568-70.

deprives them of "life, liberty, or property." *State v. Hy Vee Food Stores, Inc.*, 533 N.W.2d 147, 148 (S.D. 1995). It does not. SDCL 36-4-26.1 merely limits the sources from which the Plaintiffs can obtain evidence. The right to discover evidence from the most convenient source is not a substantial or fundamental constitutional right. Even in criminal cases, "[t]here is no general constitutional right to discovery[;] . . . [Indeed] 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.'" *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (citations omitted); *See also Com., Cabinet for Health and Family Services v. Chauvin*, 316 S.W.3d 279, 289 (Ky. 2010) ("[t]here is no due process right to get all possible evidence in the civil context, which has long been shown by the use of evidentiary privileges, first at common law, then as codified by rule or statute").

Constricting the sources of the Plaintiffs' evidence simply does not impinge upon constitutionally protected due process right to life, liberty, or property. The Plaintiffs' due process challenge is without merit on these grounds, and, for this alternative reason, the Circuit Court's due process conclusion is supported.

C. Plaintiffs Open Court Challenge is also Baseless

This Court has generally indicated that Article VI, §20 of the South Dakota Constitution affords the following: "where a cause of action exists at common law without statutory abrogation a plaintiff has a right to litigate and the courts will fashion a remedy." *Green*, 1996 S.D. 146, ¶ 23, 557 N.W.2d at 403 (citations omitted). However, this provision does not restrict the Legislature from shaping or even abrogating common law rights over time. The open courts provision "cannot override an otherwise valid act of the Legislature." *Hancock v. Western South Dakota Juvenile Services Center*, 2002

S.D. 69, ¶14, 647 N.W.2d 722, 725. Indeed, "[t]he [L]egislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not. . . . [t]he open courts provision 'does not prevent the [L]egislature from changing the law which creates a right. . . .'" *Id.* at ¶15, at 725-26 (citations omitted). In other words, the Legislature logically has the power to adjust common law causes of action, ultimately abolishing them, limiting them, or adjusting them, otherwise "'[t]he state of tort law would remain frozen in the nineteenth century, immutable and eventually, obsolete.'" *Wegleitner v. Sattler,* 1998 S.D. 88, ¶ 34, 582 N.W.2d 688, 689 (citations omitted).

The Plaintiffs' first hurdle for this challenge is to demonstrate that an improper credentialing claim against a hospital or its peer review committee was a cause of action recognized back in the 19th century, at common law. *See Green,* 1996 S.D. 146, ¶23, 557 N.W.2d at 403 (indicating the cause of action must have been one existing at common law and indicating that the open court provision cannot be used as a sword to create a new cause of action). Since medical peer review did not become the norm until the mid 1950s and was not protected in South Dakota until the 1970s, the Plaintiffs cannot clear this hurdle.

Second, assuming, *arguendo,* that the Plaintiffs' claim for improper credentialing was a recognized cause of action at common law, the Legislature's creation of peer review protection at SDCL 36-4-26.1 would still not violate the open courts provision because SDCL 36-4-26.1 does not bar them from the courthouse altogether. Instead, it simply adjusts the sources of evidence they can use to support their claim. This Court has previously approved, under open courts analysis, legislation that has significantly affected a cause of action much more than SDCL 36-4-26.1's limit on the source of

available evidence for a credentialing claim. *See, e.g., Knowles,* 1996 S.D. 10, ¶ 83, 844 N.W.2d at 203 (denying an open courts challenge to the medical malpractice cap on damages). Likewise, under the theory that the courthouse doors remain open to a litigant, other jurisdictions have dismissed similar open courts challenges. In *Humana Desert Valley,* the Arizona Court of Appeals reasoned:

> Contrary to her assertion, [the plaintiff] is left with ample alternatives to prove her negligent supervision theory against Humana without obtaining access to privileged information. Information which originated outside the peer review process is not subject to the privilege and, if otherwise admissible, could be used to prove Edison's case. [citation omitted] . . . . *See also Jenkins v. Wu,* 102 Ill.2d 468, 82 Ill.Dec. 382, 468 N.E.2d 1162 (1984); *Good Samaritan Hosp. Ass'n v. Simon,* 370 So.2d 1174 (Fla.App.1979). Such original sources include court records about previous malpractice claims and administrative records or testimony about a physician's education and training.

742 P.2d at 1386; *Ex Parte Qureshi,* 768 So.2d at 380 (rejecting a constitutional challenge because the statute did not disallow the cause of action from proceeding).

Third, assuming, *arguendo,* that the Plaintiffs' could show their claim was recognized at common law and that SDCL 36-4-26.1 does, in fact, bar them from the courthouse, SDCL 36-4-26.1 would still not violate the open courts provisions because the Legislature is entitled to abolish causes of action if it deems fit. As noted by this Court, in taking guidance from the U.S. Supreme Court, the "'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized at common law, *to attain a permissible legislative intent*." *Green,* 1996 S.D. 146, ¶ 25, 557 N.W.2d at 403 (emphasis added). As discussed at length above in this Brief, in enacting peer review protection, the South Dakota Legislature was attempting to further the "permissible legislative intent" of improving the quality and availability of health care in South Dakota.

In other words, if the enactment of SDCL 36-4-26.1 did, in fact, completely bar a claim for improper credentialing altogether, such act would still *not* give rise to an open court challenge. Precedent from this Court confirms, in response to open courts challenges, that the Legislature has the power to set parameters under which a cause of action may never see the inside of a courtroom. *See, e.g., Cleveland v. BDL Enterprises, Inc.,* 2003 S.D. 54, ¶¶ 33-46, 663 N.W.2d 212, 220-25 (denying an open courts challenge to a statute that barred a claim for contribution and indemnity *before* it ever accrued); *Hancock,* 2002 S.D. 69, ¶¶ 11-15, 647 N.W.2d at 724-26 (denying an open courts challenge to two South Dakota statutes that provided immunity); *Vilhauer v. Horsemens' Sports, Inc.,* 1999 S.D. 93, 1999 S.D. 93 (denying an open courts challenge to a statute that abolished a negligence cause of action relating to certain equine activities).

One last point must be noted here. An open courts challenge is futile when other remedies at law exist to redress a given injury. *Hancock,* 2002 S.D. 69, ¶ 16, 674 N.W.2d at 726. In the Sossan litigation, for any of the Plaintiffs to succeed on a claim for improper credentialing, they must first demonstrate that Defendant Sossan did, in fact, commit medical malpractice. *E.g., Schelling v. Humphrey,* 916 N.E.2d 1029, 1033-34 (Ohio 2009). SDCL 36-4-26.1 does not protect the evidence the Plaintiffs would need malpractice claims. SDCL 36-4-26.2 confirms this. Ultimately, any harm caused by Defendant Sossan's alleged malpractice would be the exact same harm caused by the other Defendants' allegedly improperly credentialing him. Consequently, a successful malpractice action puts each Plaintiff in the same position as a successful improper credentialing action, mooting any open courts challenge they may have.

The Plaintiffs' open courts challenge is defective, and, therefore, the Circuit Court's decision to re-write SDCL 36-4-26.1 was baseless and should be overturned.

CONCLUSION

The Circuit Court's exceptions to SDCL 36-4-26.1 are not supported by a plain meaning interpretation of that statute. Furthermore, SDCL 36-4-26.1 does not violate the Plaintiffs' due process or open courts rights. Consequently, the Circuit Court erred by creating exceptions to SDCL 36-4-26.1. The Peer Review Order should be overturned.

Dated this 26th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said Brief totaling 9,757 words, which count excludes the Preliminary Statement, Jurisdictional Statement, Statement of the Legal Issue sections, and the Certificates, Signature blocks, and Appendix, as permitted by SDCL 15-26A-66(b)(3). I have relied on the word and character count of the word-

processing system used to draft this Brief in preparing this certificate as permitted under SDCL 15-26A-66(b)(4).

Dated this 26th day of February, 2016.

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CERTIFICATE OF SERVICE

I, Matthew D. Murphy, do hereby certify that I am a member of Boyce Law Firm, L.L.P. attorneys for Appellees/Defendants, and that on the 26th day of February, 2016, I served a true and correct copy of the within and foregoing Appellant Sacred Heart Health Services d/b/a Avera Sacred Heart Hospital and Avera Health's Brief via email upon:

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APPENDIX

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Judy K Johnson Judy K Johnson

Yankton County Clerk of Courts Yankton County Clerk of Courts

Fifth Judicial Circuit Court of South Dakota

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

KRISTI LAMMERS **Plaintiff,** **v.** **ALLEN A. SOSSAN, DO, AND RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, PC,** **Defendants.**	**CIV. 13-456** **MEMORANDUM DECISION; PLAINTIFFS' MOTION TO COMPEL DISCOVERY PLAINTIFFS' MOTION ON CONSTITUTIONALITY OF PEER REVIEW STATUTE SDCL 36-4-26.1 PLAINTIFFS' MOTION AND ARGUMENT CONCERNING HOSPITAL LIABILITY AND NEGLIGENT CREDENTIALLING**

This Memorandum Decision shall apply to all cases against Dr. Sossan, Lewis & Clark Specialty Hospital, LLC, Sacred Heart Health Services, Avera Sacred Heart Hospital and Avera Health, or against similar defendants, in all of the following cases:

Judy K. Robertson v. Allen A. Sossan, et al, 66CIV13-118; Kim Andrews v. Allen A. Sossan, et al, 66CIV13-445; Kristi Lammers v. Allen A. Sossan, et al, 66CIV13-456, Valerie Viers v. Allen A. Sossan, et al, 66CIV14-214; Judy K. Robertson v. Allen A. Sossan, et al, 66CIV14-215; Kristi Lammers v. Allen A. Sossan, et al, 66CIV14-216; Kim Andrews v. Allen A. Sossan, et al, 66CIV14-217; Richard Fitzsimmons v. Reconstructive Spinal Surgery and Orthopedic Surgery P.C., et al, 66CIV14-224; Donald Bowens v. Allen A. Sossan, et al, 66CIV14-225; Kelli J. Teerdsma v. Allen A. Sossan, et al, 66CIV14-226; Rodney Gene Hrdlicka v. Allen A. Sossan, et al, 66CIV14-227; Leo J. Payer v. Allen A. Sossan, et al, 66CIV14-228; Vanessa Callahan v. Allen A. Sossan, et al, 66CIV14-229; Edward Janak v. Allen A. Sossan, et al, 66CIV14-230; Melvin D. Binger v. Allen A. Sossan, et al, 66CIV231; Thomas R. Hysell, Junior v. Allen A. Sossan, et al, 66CIV14-232; Cathy Kumm v. Allen A. Sossan, et al, 66CIV14-233; Shelly L. Jones-Hogge v. Allen A. Sossan, et al, 66CIV14-234; Ryan Novotny v. Allen A. Sossan, et al, 66CIV14-235; Dawn Anderson v. Allen A. Sossan, et al, 66CIV14-237; Renee Praeuner v. Allen A. Sossan, et al, 66CIV14-238; Bernadine Pinkelman v. Allen A. Sossan, et al, 66CIV14-243; Larry Lieswald v. Allen A. Sossan, et al, 66CIV14-244; Bridget Zweber v. Allen A. Sossan, et al, 66CIV14-245; Audrey Smith v. Allen A. Sossan, et al, 66CIV14-258; Susan Sherman v. Allen A. Sossan, et al, 66CIV14-259; Christa Dejong v. Allen A. Sossan, et al, 66CIV14-263; Laurie Strate v. Allen A. Sossan, et al, 66CIV14-296; Jean Wildermuth v. Allen A. Sossan, et al, 66CIV14-298; Brett McHugh v. Allen A. Sossan, et al, 66CIV14-303; and Valerie Viers v. Allen A. Sossan, et al, 66CIV12-90.

Consequently, this memorandum decision will be filed in each of these cases to which this Judge has been assigned and will be treated as the decision in each case referenced above collectively known as the "Sossan Litigation."

EXHIBIT

A

Background

Various Plaintiffs, as set forth in the cases cited above, filed actions against Dr. Allen Sossan, his private medical clinic, Avera Sacred Heart Hospital (ASHH) and Lewis and Clark Specialty Hospital (LCSH) and other Defendants, as named in the various cases, alleging various claims including fraud, deceit, RICO violations, negligence, negligent credentialing, bad faith credentialing as well as other claims. Shortly after this litigation commenced the various Plaintiffs filed discovery requests including extensive interrogatories and requests for production of documents. Defendants responded to those discovery requests providing little useful information to the Plaintiffs, and on numerous occasions objected on the grounds that the materials sought were protected under the South Dakota Peer Review Confidentiality and Privilege statute SDCL 36-4-26.1. The Defendants also filed a motion for summary judgment alleging that the Plaintiffs' claims were barred by the applicable statute of limitations. Defendants claim that Plaintiffs have sued for medical malpractice or otherwise with relation to the delivery of medical services and that such claims are outside the 2 year statute of limitations. The Plaintiffs countered by arguing that their causes of action are not for medical malpractice or the delivery of medical service, but rather allege negligent credentialing of Dr. Sossan, malicious or bad faith credentialing of Dr. Sossan, (asserting that the various Defendants violated their fiduciary duty and that greed was the motive for allowing Dr. Sossan privileges), RICO claims, and other causes of action. At the hearing on the motion for summary judgment this Court ruled that the gravamen of the Plaintiffs claims sounded in fraud and deceit and were not actions for medical malpractice, that alternatively, if the gravamen of the cases are later determined to involve negligent delivery of medical services that the statute of limitations is tolled as genuine issues of material fact existed as to fraudulent concealment, and denied all Defendants' motion for summary judgment on that basis.

Left unresolved at that hearing was the present motion concerning discovery disputes with relation to immunity of peer review members and the privilege and confidentiality of the peer review process. Following the hearing the Defendants requested that this Court make a specific ruling, as to each item of evidence, concerning their Motion to Strike the Affidavits of Counsel[1], and that they be given the opportunity to submit a supplemental brief on the issues presented in this decision. Both of these requests were granted. Plaintiffs were also given an opportunity to reply to the supplemental brief. Substantial briefing has occurred in all of the cases on these issues.

Factual Background

The Court has on this same day ruled upon the Defendants' Motion to Strike the various affidavits of counsel and the exhibits attached thereto, which were filed in response to the Defendants' motion for summary judgment. Plaintiffs' counsel filed affidavits with voluminous

[1] There were 8 affidavits filed, each containing numerous voluminous exhibits consisting of almost 900 pages of materials, consisting of transcripts, scientific/medical journals and national medical data compilations.

attachments. Those affidavits and attachments are the basis of the facts of this decision except as limited by the ruling on the Motion to Strike.

Each Plaintiff or their surviving children have provided their own independent affidavit concerning the facts of their particular case. Each affidavit, in summary, recites a brief history of the Plaintiff's dealings with Dr. Allen Sossan, information they gained about Dr. Sossan since their relationship with him, and a claim that if they would have known of Dr. Sossan's history they would have never allowed him to provide medical services concerning their medical care.

The affidavits also contain information that numerous physicians or other professional health care providers who have subsequently treated most of the Plaintiffs have personally told those patients that the surgeries that Dr. Sossan performed were not necessary, were not justified by the medical tests or were performed improperly.[2]

Dr. Sossan grew up in Florida and attended two post-secondary educational institutions in Florida. While in Florida he was convicted of a felony burglary charge as well as felony bad check charges. Thereafter he changed his name from Alan Scosan to Allen Sossan. After changing his name he applied for and was admitted to medical school, obtaining his Doctor of Osteopathic degree and eventually becoming an orthopedic surgeon.

Ultimately, Dr. Sossan ended up practicing medicine at Faith Regional Hospital in Norfolk, Nebraska. He also owned and operated a clinic business known as Reconstructive Spinal Surgery and Orthopedic Surgery, PC, a New York Professional Corporation. After a short period of time in Norfolk, Nebraska issues began to arise concerning Dr. Sossan's medical care, medical testing practices, and his personality as it reflected on his fitness to practice medicine. He eventually lost privileges at Faith Regional Hospital in Norfolk, Nebraska.

The record discloses that at the same time Dr. Sossan was having problems in Nebraska, ASHH and LCSH began courting him to join their medical facilities in Yankton, South Dakota. By that time, based upon a fair reading of all the information in the exhibits and other information in the numerous Affidavits of Counsel, Plaintiffs believe they can establish that the

[2] Upon the Court's review of the various materials in response to the motion for summary judgment, the Court has observed that all of the following doctors are quoted by Plaintiffs' as having made a statement that Dr. Sossan's treatment and surgeries were unnecessary or otherwise improper in some manner. The exhibit and page are referenced: Lawrence Rubens; Ex 22; p 15; Patrick Tryance; Ex 22; p 15;John McClellan; Ex 26-27; p 15;Michael Longley; Ex 32; p 16; Dan Wilk; Ex 21; p 16; Quentin Durward; Ex 21, 70; p 16, 37; Dan Johnson; Ex 16; p 18; Robert Neumayr; Ex 16; p 18; Lars Aanning; Ex 16; p 18, 58; Robert Suga; Ex 41, 67; p 21, 35; Dr. Jensen; Ex 49; p 25; Geoffrey McCullen; Ex 50; p 26; Wade K. Jensen; Ex 54; p 27; Brent Adams; Ex 55; p 28; Eric Phillips; Ex 58; p 29; Kynan Trial; Ex 64; p 33; Richard Henke; Ex 64; p 33; Mitch Johnson; Ex 65, 71, 72; p 34, 38; Michael T. O'Neil; Ex 68; p 35; Dr. Bowdino; Ex 68; p 35; Dr. Mogard; Ex 74; p 40; Dan Noble; Ex 75; p 41; Gregg Dyste; Ex 76; p 41-42; Wade Lukkon; Ex 77; p 42; Kent Patrick; Ex 77; p 42; Bonnie Nowak; Ex 79, p 44; Troy Gust; Ex 81; p 46.

Defendants knew or should have known Dr. Sossan had a terrible reputation among the Northeast Nebraska, Northwest Iowa, and Southeast South Dakota medical community and that there were serious questions as to his fitness to practice medicine. Some of this knowledge was based upon reports from doctors and other medical providers who had worked with Dr. Sossan, and other knowledge is based upon doctors who subsequently treated his patients. Other information came from general discussion among the medical community concerning his competency, demeanor, comportment, professionalism, and medical practice style.

In order to practice medicine in the Yankton area Dr. Sossan was required to obtain a medical license from the South Dakota Board of Medical and Osteopathic Examiners (SDBMOE). He was also required to obtain privileges from the peer review committees of Avera Sacred Heart Hospital (ASHH) and Lewis & Clark Specialty Hospital (LCSH). Ultimately, Dr. Sossan received a license from the SDBMOE. However, with regard to his practicing privileges, initially he was denied same by the peer review committees in Yankton. Because of the fact that no information has been disclosed as to what kind of information the peer review committees considered there is a complete absence of information in the record to document what the peer review committees considered in denying him privileges at that time. Ultimately, after consultation with legal counsel, at least some of the peer review committee members changed their votes to grant Dr. Sossan privileges. According to the information and evidence provided to the court thus far, legal counsel advised the peer review Defendants that if they did not grant Sossan privileges, they would be sued by him. There is a complete absence of evidence in this record at this time indicating that Dr. Sossan had made any claim or threatened any legal action against any Defendant here, or even if so, the basis for such claims.

Within the information submitted by Plaintiffs in response to the motion for summary judgment there is an affidavit from Dr. William B. Winn. Dr. Winn was employed at the Faith Regional Hospital in Norfolk, Nebraska, knew Dr. Sossan, and practiced within that medical facility with him. He was also associated with ASHH in Yankton at that time. He testified in his affidavit that he was aware of serious issues regarding Dr. Sossan and that these issues were well known among the Faith Regional Hospital administration and management. He testified that he has personal knowledge that Dr. Sossan falsified patients' medical charts in order to justify unnecessary medical procedures on his patients, among other serious concerns with regard Dr. Sossan. Most importantly for this case, Dr. Winn testified in his affidavit that when he learned of Dr. Sossan's attempt to secure medial privileges in Yankton he personally intervened to report these serious concerns regarding Dr. Sossan, and his firm opinion that Dr. Sossan posed a danger to the public. He claims he talked directly to Dr. Barry Graham, MD, (who held a position on one of the peer review boards), about these serious concerns and that he strongly encouraged that Sossan not be granted privileges.

Other physicians have given testimony in malpractice cases against Dr. Sossan that question his fitness as a licensed physician. For example, Dr. Robert Suga, and orthopedic surgeon of Sioux Falls, testified in a deposition that in his opinion Dr. Sossan performed

unnecessary surgeries with the motive of generating bills and income for himself. (Affidavit of Counsel, Exhibit 41) Dr. Quentin Durward, an orthopedic surgeon from Dakota Dunes, had similar opinions and findings with his patients treated subsequent to Dr. Sossan. See Affidavit of Plaintiff's Counsel. In general, Plaintiffs have amassed a significant amount of evidence that, if proven to be true at trial, would raise a serious question if Dr. Sossan should have never been licensed, granted privileges, or that when he was, action should have been taken promptly to revoke or restrict his privileges, and that any reasonable person responsible for his medical practice supervision should have known he may have posed a danger to patients and taken appropriate action. This court finds such to be the case even after screening out and ignoring the strong characterizations put upon the facts by the Plaintiffs. (See generally the various Affidavits of Plaintiff's Counsel, Plaintiff's Brief In Opposition to Defendant's Motion For Judgment on The Pleadings, Dated October 30th, 2014, and Plaintiff's General Recitation of Facts Regarding Various Motions Set for Hearing, Dated October 23rd, 2014.)

According to the evidence presented by the Plaintiffs thus far, soon after Dr. Sossan was granted privileges in Yankton, issues and complaints began to arise that should have made it obvious to doctors and other persons in the medical field that there was a serious and substantial question as to Soosan's fitness, competency and ability to practice medicine in his specialty prompting further inquiry. Numerous witnesses have provided affidavit testimony that they personally reported, (some on an anonymous basis), Dr. Sossan's problems to the SDBMOE and to the peer review Defendants in this case. Other witnesses observed assaultive behavior and claim to have reported those incidents. Minutes of Lewis & Clark Specialty Hospital, submitted in response to the Summary Judgment Motion, show that Dr. Sossan's problems and credentials were discussed. Those minutes also show that prior to Dr. Sossan being hired LCSH was required to borrow $200,000 for certain capital expenditures. Following the hiring of Dr. Sossan minutes reflect the business was declaring dividends for its physician members.

According to the evidence submitted by the Plaintiffs, despite the fact that there were numerous complaints and much discussion among the medical community about Dr. Sossan, no action was taken to limit, modify, or otherwise terminate his privileges in the Yankton medical community by those who had the authority to do so.

Plaintiffs retained an expert on medical credentialing and patient safety by the name of Arthur Shore. Mr. Shore is a well credentialed and heavily experienced health care administrator. He has a degree from George Washington University School of Public Health and Health Services. He is a life fellow of the American College of Health Care Executives and is a board certified hospital administrator. He has served as a member of the board of trustees of a number of hospitals and health care institutions across the country. He has authored numerous articles in nationally recognized peer-reviewed professional healthcare administration journals. He has testified concerning health care liability as a qualified expert in legions of cases throughout the country.

Mr. Shore submitted an expert report in this case (Exhibit 15). In that report he states:

"the behavior of the governing body, senior leadership including the chief executive officers, and the medical leaderships clearly reflected willful, wanton, and malicious disregard of the standards of care and administrative community standards applicable to the initial granting privileges and credentials, as well as the subsequent renewal of Sossan's privileges at the hospitals in spite of readily available incontrovertible evidence that Sossan was a convicted felon, engaged in acts of moral turpitude, was unable to work collaboratively with other professionals, performed unnecessary surgery, and lacked the competence to safely perform spine surgery." He goes on to conclude "the complex and compounding failures imposed on unsuspecting patients who relied on the hospital in this regard, commencing with the failure to disqualify an applicant with demonstrable moral turpitude, a convicted felon, failure to conduct proper due diligence and original source information, portion of medical staff leadership recommend granting privileges for inappropriate reasons, failure to initially proctor and monitor Sossan's surgical competence and interpersonal behavior, failure to monitor his disproportionately voluminous surgical escapades, and interpersonal interaction with hospital staff and colleagues, all of which contributed to inflicting serious injuries to patients served by the hospitals, demonstrate gross and wanton disregard for the fiduciary duty obliged of the governing bodies to the communities and in specific the patients they serve."

Numerous other applicable facts will be discussed when necessary in this Decision.

Analysis

The Plaintiffs' main theory of liability in this case is that the Defendants conspired to improperly grant Sossan privileges in violation of their fiduciary duty out of a sense of greed and in disregard of the rights and safety of their patients. They allege that the Defendants committed fraud and deceit upon their patients and the public in doing so. The voluminous record here shows that there were questions presented which indicated that Dr. Sossan was a convicted felon and otherwise indicate he may not have been suitable to be licensed as a physician or granted privileges at either of Defendant medical facilities. Later, administrative action against his medical license in Nebraska had been commenced based upon his activities in Nebraska. Ultimately, Dr. Sossan gave up his license in Nebraska. Numerous lawsuits have been filed against him for malpractice, which he has either substantially lost or settled, including cases in South Dakota and Nebraska. Plaintiff's claims are based primarily upon the theory of improper, negligent and/or bad faith credentialing and fraud, among other claims.

In order to proceed on the various discovery requests based upon this theory, the court must first determine if a new cause of action for wrongful credentialing is or will be recognized in South Dakota.

Is Wrongful or Improper Credentialing a Valid Cause of Action in South Dakota?

The Defendants argue in their briefs that Plaintiff's attempt to obtain the peer review information fails because South Dakota does not recognize a cause of action for negligent or bad faith credentialing. The Defendants argue that the South Dakota Supreme Court "strongly endorsed the effect of the peer review privilege" in *Shamburger v. Behrens*, 380 N.W.2d 659 (SD 1986), and that the court "found the privilege bans the prosecution of an improper credentialing claim"[3]. *Shamburger* was a run of the mill malpractice claim where the plaintiff claimed that Dr. Behrns was an alcoholic or otherwise afflicted with habitual intemperance. Shamburger filed suit against the doctor and the hospital for negligence. The entirety of the Court's analysis in Schamburger on that issue is as follows:

> "Shamburgers also claim error in the granting of summary judgment for Hospital. In their claim against Hospital, Shamburgers alleged Hospital was negligent in allowing Behrens to remain on staff. Shamburgers claim Hospital knew or should have known Behrens had a drinking problem and was incompetent, which manifested itself in a problem with Elston's care.
>
> "The trial court held that the evidence, viewed in the light most favorable to Shamburgers, presented no evidence to show Hospital knew or had any reason to believe that Behrens was incompetent, and that Hospital had not breached any of its medical staff review procedures.
>
> In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally. *Fjerstad, supra.* We note that hospital records concerning staff competency evaluations are not discoverable materials. SDCL 36-4-26.1. Shamburgers cannot obtain the records which would show whether or not the hospital considered or knew of Behrens' drinking problems when Hospital considered his staff privileges. The trial court was correct in determining that Shamburgers had presented no evidence pertaining to Hospital's alleged negligence. Mere allegations in the pleadings cannot thwart summary judgment. *Boone v. Nelson's Estate*, 264 N.W.2d 881 (N.D.1978). Once the motion has been made and supported, the nonmoving party has the burden of showing a genuine issue exists for trial. *Olesen v. Snyder*, 249 N.W.2d 266 (S.D.1976). Trial court found, and we agree, that Shamburgers presented no evidence to support an issue for trial."

The only ruling that *Shamburger* made with respect to privileged records concerned the Plaintiff's request to obtain Dr. Behern's alcohol treatment records from another provider. The

[3] See joint brief, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC Joint Supplemental Brief in Opposition to the Various Plaintiffs' Motion For Summary Judgment on the Constitutionality of SDCL36-4-26.1, Dated May 11th, 2015 and filed with the Court.

court ruled those records privileged by the physician - patient privilege, and the peer review privilege was not analyzed or mentioned in that part of the Courts analysis. This Court is hard put to find that the above analysis in *Shamburger* is a "strong endorsement" of peer review generally or that South Dakota's peer review statute "bans" a claim of improper credentialing. Improper credentialing was not at issue in Shamburger as it was not pleaded as a cause of action, rather it was a claim of general hospital negligence. SDCL 36-4-26.1 is cited by the Court in its analysis, but it does not appear from reading the above passage that plaintiff's counsel made any argument that the trial court erred in not granting the plaintiff access to the peer review information. That question does not appear to have been presented. Further, Shamburger did not involve claims as are presented in the cases presently before this court where the Plaintiffs allege fraud, deceit, bad faith or RICO claims against the peer review committees involving the peer review process. *Shamburger* does not directly address, approve or reject improper credentialing claims, nor does it directly address the issue of discovery of peer review materials. *Shamburger* does not help the Defendants here and the court is not persuaded that it has much applicability, if any at all, to the present cases.

The Plaintiff's rely upon a number of cases from around the country to support their argument that in a case similar to that presented to this court, that negligent or improper credentialing is a well-recognized cause of action in a majority of states. It does not appear that the South Dakota Supreme Court has had the opportunity to address the issue directly.

This Court has carefully considered legions of cases on improper credentialing and is much persuaded by the authorities and arguments within pages 17 through 21 of the Plaintiffs Brief in Support Of Motion To Compel and Motion for Partial Summary Judgment On The Constitutionality of The South Dakota Peer Review Statute, SDCL 36-4-26.1, which is dated October 23rd, 2014 and filed the same date. Footnote 4 of that brief contains a sample list of cases from a wide variety of jurisdictions that have adopted the theory of improper credentialing claims (all of which this court has carefully read and considered) and these cases, although interpreting different statutory language in many forms, are based upon sound reasoning, analysis and policy considerations.

In *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) the Montana Supreme Court took up the issue for the first time. In approving the cause of action in Montana the Court found that modern medical practices have changed the landscape where new principals can and should be applied. They stated that "When asked to recognize a new cause of action, the Court will review "our own caselaw and the authorities from other jurisdictions" to determine if the "gradual evolution" of the common law supports recognition of the new claim." (Citing *Sacco*, 271 Mont. at 220, 234, 896 P.2d at 418, 426.). In their analysis they reviewed a case from 40 years prior and went on to state:

"However, in doing so, we acknowledged that the rise of the "modern hospital" imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges:

> [T]he integration of a modern hospital becomes readily apparent as the various boards, reviewing committees, and designation of privileges are found to rest on a structure designed to control, supervise, and review the work within the hospital. The standards of hospital accreditation, the state licensing regulations, and the [hospital's] bylaws demonstrate that the medical profession and other responsible authorities regard it as *212 both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.

Hull, 159 Mont. at 389, 498 P.2d at 143. This reasoning is even more persuasive 40 years later, with the development of hospitals into "comprehensive health care" facilities. *Butler*, ¶ 41 (citation omitted)."

To move on this court must determine, in a case of first impression, if the South Dakota Supreme Court would join a majority of other states/jurisdictions that adopt a new cause of action for improper credentialing. Based upon this Court's review of the law and the briefs presented in these cases it appears that South Dakota has all the necessary legal precedents as ingredients other courts have found prerequisite to adopting such a claim including a hospitals duty of care for patient safety, ("In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally", *Shamburger*, ¶8), as well as the concepts of negligent hiring and/or negligent selection of independent contractors. *Kirlin v. Halverson*, 758 NW2d 436 (SD 2008).

Additionally, when read in the negative, the South Dakota peer review statute tends to support such a claim. At least in part, liability against the Defendants here, with respect to the improper credentialing claims, is governed by SDCL 36-4-25. That statute provides:

> There is no monetary liability on the part of, and no cause of action for damages may arise against, any member of a duly appointed peer review committee engaging in peer review activity comprised of physicians licensed to practice medicine or osteopathy under this chapter, or against any duly appointed consultant to a peer review committee or to the medical staff or the governing board of a licensed health care facility for any act or proceeding undertaken or performed within the scope of the functions of the committee, IF the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, and acts in reasonable belief that the action taken is

warranted by those facts. The provisions of this section do not affect the official immunity of an officer or employee of a public corporation. (Emphasis added by Court).

Malice is defined as:

> "Malice is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.
>
> Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill will toward that person. Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other's rights. Hatred or ill will is not always necessary." Source South Dakota Pattern Jury Instruction 50-100-20.

"A claim for presumed malice may be shown by demonstrating a disregard for the rights of others." *Flockheart v.Wyant*, 467 N.W.2d 473, 475 (S.D. 1991).

This Court's reading of the peer review immunity statute cited above indicates that peer review committees are immune IF they meet the conditions subsequent as laid out in the statute. In other words, they are immune if they act without malice, if the committee has made a reasonable effort to obtain the facts of the matter under consideration, and if they act in reasonable belief that the action taken was warranted by those facts. A similar finding has been made in the context of physicians bringing action against the peer reviewers by the courts applying the Health Care Quality Improvement Act: "the consequence of failing to satisfy the standards of 42 U.S.C.A. § 11112(a) is merely that the peer reviewers lose the immunity provided by the Act". Construction and application of Health Care Quality Improvement Act, 121 A.L.R. Fed 255, §2.

Consequently, according to this Court's interpretation of the statute, if it can be preliminarily established that a peer review committee acted maliciously or in bad faith, if they failed to make a reasonable effort to obtain the facts of the matter under consideration, or if they act unreasonably based upon those facts, the immunity disappears and there is a cause of action that can be brought against members of a professional peer review committee for the improper credentialing. This interpretation is consistent with most other jurisdictions that have adopted the theory of improper credentialing.[4] Consequently, this Court finds that wrongful or improper

[4] It may be argued that the last half of SDCL 36-4-25 was intended only to protect peer review members from suit filed by physicians who were denied privileges, which can be tied into the primary policy behind the peer review immunity statute so as to promote a free and open dialogue when discussing and deliberating peer review matters with other members. However, nothing in the plain language of the statute limits the scope of the statute to those circumstances. If that was the intent of the legislature, language could have easily been added to limit the applicability of the exception.

credentialing is a valid cause of action in South Dakota and that our Supreme Court would most likely adopt this new common law theory as a basis for recovery based upon existing law and the facts that have been thus far presented in this case.

Is South Dakota's Peer Review Privilege Statute, SDCL 36-4-26.1, Absolute?

The South Dakota peer review confidentiality and privilege statute is set forth in SDCL 36-4-26.1, which provides:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

In the event a sufficient preliminary showing is made to avoid the immunity provided for in SDCL 36-4-25, common sense directs that a plaintiff must be able to obtain some information about how the peer review committee did its work. Without such information it would be impossible to determine if the committee "made a reasonable effort to obtain the facts of the matter under consideration" or otherwise if the peer review committee acted with malice or otherwise improperly. The Defendants here have argued that the statute is constitutional, is absolute, and that there are no exceptions. The Plaintiffs have argued persuasively that to accept the defendants assertion that peer review information is absolutely privileged and confidential no matter what the basis for the need or claim for such information, whether by law enforcement, the government, or private litigants, would eviscerate the entire last clause of SDCL 36-4-25 and leave the peer reviewers to do as they please behind a cloak of absolute privacy.

Viewed in the light most favorable to the Defendants here, the facts in the present cases clearly show that the peer review committees involved had certain factual information concerning Dr. Sossan that warranted a denial of privileges, and in fact, it appears from this record that is how they initially voted. Dr. Anning, a retired physician from the Yankton community, interviewed and recorded Dr. Neumayr, who sat on the peer review committee at

ASHH concerning Dr. Sossan. It has not been argued that the recording of that conversation was illegal, but it has been argued that the substance of the conversation being used here, by its self, violates the peer review privilege statute.[5] That conversation discloses that the peer review committee had information that Dr. Sossan should not have been credentialed and initially voted to deny privileges. According to the evidence and that recorded conversation the peer review committee consulted with Avera Health's legal counsel who advised them that if they did not credential Sossan they would be sued by him.[6] It was only after this conversation with counsel that another vote was taken and Dr. Sossan was granted privileges.

Furthermore, during the interview Dr. Neumayr told Dr. Anning that despite the fact that the committee had denied him privileges, one of the administrators of ASHH had legal counsel for Avera attend a meeting to persuade the committee to grant Sossan privileges because ASSH and LCSH needed him, and that in his opinion at least one peer review member would lie about the matter if when comes to court. (Exhibit 16 A to First Affidavit of Counsel).

According to Plaintiffs, this discussion ensures that the Defendants in this case will perjure themselves at trial and during discovery. The court notes that this discussion raises substantial concerns in that regard. However, this court tempers that concern with the understanding that there is a lack of evidence to support the opinion of the person being interviewed (Dr. Neumayr) to establish the person mentioned will lie about anything. It is a matter of speculation on the part of the declarant at this point in time, but the concern is nonetheless raised by his comment.

SDCL 36-4-26.1 provides a very broad grant of privilege and confidentiality to peer review materials generally, and leaves little room for judicial interpretation. Consequently, if this court is correct that South Dakota will adopt a cause of action for wrongful or improper credentialing and that SDCL 36-4-25 implies such a cause of action, this Court must determine if the plaintiff in such as case has access to any information from the peer review committee to determine if the peer review members acted improperly or with malice, bad faith, fraud or deceit. Plaintiffs argue that because of this conflict between the statutes the peer review privilege statute can otherwise be overcome by a newly recognized exception, but if not, it is unconstitutional.

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[5] Based upon the ultimate ruling in this decision the Court finds that it does not violate the privilege. Furthermore, there is authority that a physician who participates in the peer review process may voluntarily disclose peer review information, see: Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 A.L.R.4th, 1273.

[6] As previously stated, there is a complete absence in the present record of any evidence that any of the Defendants here had been threatened with any legal action by Dr. Sossan at the time counsel for Avera allegedly made these statements or gave this advice.

Courts in other states have found exceptions applicable to the peer review privilege under certain circumstances, including when the peer reviewers have acted improperly or when the court finds that the privilege is applied in a manner that is contrary to public policy.[7]

Many courts have held that peer review materials are absolutely privileged, but that in order to establish liability in a case of wrongful credentialing, the plaintiffs can rely upon independent source information. Suffice it to say that after this court has read many cases on the topic, one conclusion is clear: depending upon the precise statutory language, the particular facts and circumstances presented in the case, and the precise type of information or reports at issue, the courts are all over the board as to whether independent source information is privileged or not privileged and how it can be used. For an excellent summary of those issues this court has relied upon, see Scope and Extent of Protection From Disclosure of Medical Peer Review Proceedings Relating To Claim in Medical Malpractice Action, 69 A.L.R.5th 599 (1999); *see also, Trinity Medical Center v. Holum*, 544 NW2d 148 (ND 1996) at ¶7 ("the caselaw interpreting these widely varying statutes has been described as 'creating a crazy quilt effect among the states'"). During the hearing on this matter and in their supplemental brief the Defendant's seemed to take the position that IF South Dakota adopts improper credentialing as a cause of action under an extension of the common law, the Plaintiffs would be allowed to use some independent source information to prove their claims.[8] This leaves several questions remaining: what type of independent source information would be privileged and what would not? Can the Defendant's then rebut such evidence by using the privileged peer review materials? If not, does the privilege statute "make it impossible for a hospital to defend against such a claim" (*Wasemiller, infra.*)? Is there a point in the process where the Defendants may open the door so that all peer review materials become relevant, discoverable and admissible at trial? If the answer to the latter question is yes, then how long will the trial be delayed to allow

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[7] As quoted in 41 C.J.S Hospitals, §16: "The peer review privilege is intended to benefit the entire peer review process, not simply the individuals participating in the process.[33] Moreover, the statutory privilege for communications on the evaluation of medical practitioners is qualified, rather than absolute, and may be defeated by proof that the person or entity asserting the privilege, when it made the communication, knew the information was false or otherwise lacked a good faith intent to assist in the medical practitioner's evaluation.[34]

The failure of a professional peer review to comply in full with applicable bylaws does not render the fact-finding process unreasonable.[35]

In some states, the peer review process is considered an administrative action.[36] A court is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determine if the administrative decision is premised upon an erroneous conclusion of law; the court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record.[37] However, there is no absolute prohibition of judicial review of hospital peer review decisions, and although courts may not have jurisdiction to review purely administrative decisions of private hospitals, courts do have jurisdiction to hear cases alleging torts, breach of contract, violation of hospital bylaws, or other actions that contravene public policy." (emphasis added)

[8] See, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC's Joint Supplemental Brief In Opposition to the Various Plaintiff's Motion For Summary Judgment on the Constitutionality of SDCL 36-4-26.1 ,at pp 6-7.

Plaintiffs sufficient time to review the materials and prepare to present further evidence? Up to this point, the Defendants have argued very broadly that all information touching upon the peer review process is protected by the privilege and that the court can determine what independent source information is admissible evidence. Rulings on specific items of evidence in this regard are best left for another day when a more complete record can be made.

Cases presented in the briefs by the parties which have found exceptions to the peer review privilege allow information from opposite ends of the spectrum and in between. In *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001) the court held that only the final action or result (modification, restriction, termination of privilege) taken as a consequence of peer review proceedings are discoverable and admissible. *In Estate of Krusac v. Covenant Medical Center*, (cited by Defendants in their supplemental brief and quoted without citation) the Michigan Supreme Court ruled that the scope of the privilege was broad but not without limits and concluded that "objective facts" within the peer review materials were privileged. In contrast to the above cases, in *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987) the Wyoming Supreme Court appears to have gone the opposite direction and ruled that the privilege protects the "internal proceedings" (the deliberative process) but does not "exempt from discovery materials which the committee reviews in the course of carrying out its function, nor action which may be taken thereafter." In *Greenwood*, the court went on to provide that "in short, privileged data does not include the materials reviewed by the committee, only those documents produced by the committee as notes, reports and findings in the review process". Id. At 1089.

This Court has been most persuaded by the rationale in *Greenwood* as persuasive authority. The purpose of the peer review privilege has been stated may times in the cases presented in the briefs as promoting a policy to allow candid and open discussions among peer review committees to encourage doctors to engage in the process so as to *improve the delivery of health care*. Doctors were reluctant to do so in the past for fear of being ostracized from other practitioners, losing patient referrals, and subjecting themselves to lawsuits. In order to encourage doctors to participate in the process and improve the delivery of health care, the law gave them immunity from lawsuits and protected their files and deliberations from discovery, use at trial, or dissemination. That information consists of both objective facts and the subjective deliberations and comments of the participants. SDCL 36-4-25 grants them immunity if they make a reasonable effort to obtain the objective facts concerning the matter under consideration. It makes little sense to put the objective facts beyond the reach of allegedly injured patients or others when the primary intent of the law is to protect the private comments and deliberations of the committee, especially in light of the language of the immunity statute. In a case such as this the information they had and the decision they reached are the crux of the case and go to the heart of the issue.

In the end, carving out an exception to the peer review privilege is a matter of first impression in South Dakota. This Court is reluctant to carve out a new exception, (other than to adopt the independent source rule which Defendants have agreed upon), without statutory or

other binding precedent. Although adopting the holdings in *Greenwood*, supra, is inviting to this Court, there are also good reasons to adopt any of the many other doctrines laid out in cases from a multitude of other jurisdictions. Consequently, this Court rules that the peer review privilege is absolute and subject only to the independent source exception and the crime fraud exception discussed further below.

The Constitutionality of SDCL 36-4-26.1

Is SDCL 36-4-26.1 Unconstitutional As Not Being Rationally Related To a Legitimate Governmental Purpose?

The Plaintiffs have argued that the privilege statute is unconstitutional because it is not rationally related to the purpose for which it was enacted, that being to encourage physicians to deliberate and discuss the abilities and qualifications of other physicians in an open and candid forum with the ultimate goal of improving health care services overall. By making such information privileged and confidential, more physicians would participate in the process and when they did, they would be more honest. The overall policy of the group of statutes passed in the mid to late 1970s to protect the peer review process and the medical industry in this regard was previously considered by the South Dakota Supreme Court as a state "interest in preserving and promoting adequate, available and affordable medical care for its citizens" and was upheld within the context of the medical malpractice damages cap. *Knowles*, 1996 SD 10, 544 N.W.2d 197.

The Plaintiffs have submitted substantial scientific and medical peer reviewed articles, journals and data compilations in support of their argument which were attached to the various affidavits of counsel and argued in their briefs. These articles were allowed and not stricken in the court's ruling on that matter as they are relevant to the argument here. Those articles and journals are from nationally recognized publications relied upon by the medical industry as a whole and conclude that peer review immunity, and granting privilege to all information considered by peer review committees, has harmed the overall goal of improving the safe delivery of medical care and patient safety, as opposed to improving it. The Plaintiffs argue that by denying them access to critical evidence for their cases, the statute violates their right to due process by putting relevant evidence beyond their reach because of a statute that is not rationally related to its intended purpose.

There is a strong presumption that the laws passed by the legislature are constitutional and the presumption is only rebutted when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. *Green v. Siegel Barnett & Schutz*, 1996 SD 147 ¶7, 557 N.W.2d 396, 398. The plaintiffs must demonstrate that the statute does not bear a "real and substantial relation to the objects sought to be obtained" *State v. HyVee Food Stores, Inc.*, 533 N.W.2d 147, 148 (SD 1995).

The scientific/medical data articles submitted by the Plaintiffs and the facts presented and as characterized by the Plaintiffs here cast a dark shadow over the peer review process. Some of the articles submitted by the Plaintiffs bring the legitimacy of confidential and privileged peer review process into serious doubt. However, the policy behind the concept of encouraging physicians to participate in a candid open discussion about the competence of their colleagues and the safety of their patients is a matter of legislative prerogative. If there is some question among the medical industry on a national basis as to the effectiveness or legitimacy of the previously adopted legislative policy, that is an issue best left to the legislature and not the courts. This court finds that the plaintiffs have not clearly, palpably and plainly shown that the statute does not bear a real and substantial relationship to furthering the objective of encouraging physicians to participate in a candid and open discussion as to their colleagues' competence. The Plaintiff's motion in this regard is denied.

Does SDCL 36-4-26.1 Violate the South Dakota Open Courts Provision?

Plaintiffs claim that the statute, if applied broadly without exception, denies them the right to due process and access to the courts under Article VI §20 of the South Dakota Constitution . It does so, they argue, by depriving them of the best and most relevant information to establish their claims of fraud and deceit or that the peer review committees here acted improperly or in bad faith.

It has been held that the Open-court's provision of the South Constitution cannot become a sword to create a cause of action or become a shield to prohibit statutory recognized barriers to recovery and cannot be interpreted to overcome the doctrine of sovereign immunity. *Hancock v. Western South Dakota Juvenile Services*, 647 N.W.2d 722 (SD 2002).

Restrictive statutes of limitations in favor of medical providers, accountants and lawyers have been found to be within the legislature's prerogative, and although limiting a plaintiff's ability to take their case to court, do not violate the open courts provision. *Peterson v. Burns*, 635 N.W.2d 556 (SD 2001); *Witte v. Godley*, 509 N.W.2d 266 (SD 1999) and *Green v. Siegel Barnett*, 557 N.W.2d 396 (SD 1996). Statutes limiting damages in medical malpractice cases similarly have been found not to violate the open courts provision. *Matter of Certification of Question of Law from US Court of Appeals for the Eighth Circuit*, 544 NW2d 183 (SD 1996) and *Knowles v. US*, 544 NW2d 183 (SD 1996).

All parties here rely upon cases from other states to support their position that denying access to peer review materials in discovery does or does not violate constitutional rights. The Defendants argue that despite the fact that the materials are not available for Plaintiff's use in preparation or for trial, the door to the courtroom remains open for the Plaintiffs. The Plaintiffs argue that in the case of fraud, deceit or wrongdoing by the Defendants, depriving them access to the most relevant and material evidence in the case is tantamount to closing the courthouse door, especially when hospitals and clinics are allowed to shelter the evidence of their wrongdoing

behind a cloak of secrecy. Both parties rely upon *Larson v. Wasemiller*, 738 NW2d 300 (Minn. 2007) to support their arguments.

Wasemiller involved a medical malpractice action where the Plaintiff claimed that the hospital was negligent in credentialing the physician defendant. After adopting the cause of action for negligent credentialing the court had to determine if the new cause of action conflicted with the Minnesota peer review privilege statute, which is quite similar to its South Dakota counterpart. The Minnesota Supreme Court found that the privilege statute did not conflict with the newly recognized tort of negligent credentialing but did consider the problems associated with a case when the trial is focused on what facts the peer reviewers actually considered in making their decision. As to the more precise issue of whether the peer review privilege statute denied due process, the Court concluded that the "confidentiality provisions of the peer review statute do not preclude the presentation of evidence in defense of a negligent-credentialing claim" and "that the confidentiality provision is not facially unconstitutional". They left "for another day the question of whether circumstances might arise that would render the provision unconstitutional as applied". *Wasemiller*, ¶15. Consequently, *Wasemiller* left the issue unresolved.

Plaintiffs have relied upon *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996). This case provides the most comprehensive analysis of the interplay between the privilege/confidentiality statute and the constitutional claims that denying plaintiffs access to the peer review materials violates due process and access to the courts. In the end, the Kansas Supreme Court was required to balance the various interests at stake. In finding the privilege/confidentiality statute unconstitutional the court stated:

> In the present case the legislature granted a peer review privilege to health care providers to maintain staff competency by encouraging frank and open discussions and thus improving the quality of medical care in Kansas. We must weigh that privilege against the plaintiffs' right to due process and the judicial need for the fair administration of justice. There can be no question that in granting the privilege, the legislature did not intend to restrict or eliminate a plaintiff's right to bring a medical malpractice action against a health care provider. To allow the hospital here to insulate from discovery the facts and information which go to the heart of the plaintiffs' claim would deny plaintiffs that right and, in the words of the federal court, "raise significant constitutional implications." 129 F.R.D. at 551. The constitutional implication was stated by this court in *Ernest v. Faler*, 237 Kan. 125, 131, 697 P.2d 870 (1985):
>
> > "The right of the plaintiff involved in this case is the fundamental constitutional right to have a remedy for an injury to person or property by due course of law. This right is recognized in the Kansas Bill of Rights § 18, which provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay." *Adams*, Id, ¶16

The Plaintiffs argue that an overly broad application of SDCL 36-4-26.1 violates due process and the open courts provision unless an exception applies or it is judicially reformed to comply with due process.

In *Moretti v. Lowe*, 592 A.2d 855, 857–858 (R.I.1991) the Rhode Island Supreme Court also addressed the issue and concluded:

> "In enacting our peer-review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance."

A similar ruling was made in *McCuffey v. Hall*, 557 S.W.2d 401 (Ky. 1997) (finding Kentucky's privilege statute facially unconstitutional because there was no relationship between peer review privilege and quality health care)

Consequently, based upon this Courts review of the numerous authorities, it has concluded that Courts have found that a plaintiff's right to discover material in the peer review files is based upon a finding that the privilege/confidentiality statute is unconstitutional or an exception has been judicially created. This court must, if possible, interpret the statute reasonably to find it constitutional. *In Re Davis*, 681 NW2d 454 (SD 2004). As a result, this Court finds that SDCL 36-4-26.1 is not unconstitutional, but in order to reach that result, an exception must be applied in a reasonable fashion, based on existing law, to allow Plaintiffs access to the information and evidence that forms the crux of their cases. The Plaintiff's Motion for Summary Judgment declaring SDCL 36-4-26.1 unconstitutional in violation of the South Dakota Open Courts Provision is denied.

The Crime-Fraud Exception

Courts have long held that privileges applied to evidence and information are subject to various exceptions when the privilege or confidentiality provision is abused. Most cases apply to the attorney-client privilege, but the same or similar concepts have also been applied to other privileges and circumstances. Further, it has long been repeated that privileges created by statute are to be strictly construed to avoid suppressing otherwise competent evidence." *State v. Catch the Bear*, 352 N.W.2d at 640, 646-47[9]. Evidentiary privileges in litigation are not favored and

[9] *Catch the Bear* also quoted the US Supreme Court: "The United States Supreme Court has forcefully supported strict construction: 'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'" *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974).

even those rooted in the Constitution must give way in proper circumstances. Herbert v. Lando, 441 U.S. 153 (1979).

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting). Accord, *United States v. Nixon*, 418 U.S. 683, *51 709--710, 94 S.Ct. 3090, 3108–3109, 41 L.Ed.2d 1039 (1974). *Trammel v. United States*, 445 U.S. 40,50 (1979) All privileges limit access to the truth in aid of other objectives but virtually all are limited by countervailing limitations. *United States v. Textron*, 577 F.3rd 21,31 (1st Cir. 2009)

One of the most significant historical privileges found to have an exception was the juror privilege against being compelled to disclose deliberations and comments among the jurors. In *Clark v. United States*, 289 U.S. 153 S.Ct. 465 77 L.Ed. 993 (1933), a juror was suspected of fraud and deceit upon the trial court for perjuring herself during jury selection. In *Clark* the court considered similar policy considerations supporting juror privilege that form the basis of peer review privilege. The court found that "freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid". *Clark* went on to find that "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy."

Clark went on to find that the privilege does not apply where "the relation giving birth to it has been fraudulently begun or fraudulently continued". The *Clark* Court continued: "The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth."

The Presidential executive privilege was also found to be subject to an exception in *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, *(1974)*. In *Nixon* the Special Prosecutor sought information from the President of the United States that was clearly protected by executive privilege. The *Nixon* court found that "the President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises..." In finding that the executive privilege was not absolute, the *Nixon* court decided that the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *Id.*

The attorney-client privilege, one of the most guarded privileges in history, is also overcome upon a proper showing. *State v. Catch the Bear*, 352 N.W.2d at 640, 646-47. All jurisdictions recognize the exception. The Eight Circuit Court of Appeals has recognized the exception on numerous occasions. *In Re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 50 Fed.R.Serv.3d 1336 *(8th Cir, 2001)* ("The attorney-client privilege encourages full and frank communication between attorneys and their clients so that clients may obtain complete and accurate legal advice. But the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing. Thus, it is well established that the attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554, 563, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989))

The spousal privilege has also been subject to exceptions when crime or fraud are properly asserted. At one point in history it too was considered absolute. In finding an exception to the spousal privilege, in *Trammel v. United States*, 445 U.S. 40,50 (1979) the court stated:

> "No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.
>
> The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime." *Trammel* at 51-52

Numerous other courts have found that in various circumstances that the crime-fraud exception applies not only in criminal cases but in various civil tort cases. Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

On a limited basis, the South Dakota Supreme Court has ruled that the attorney-client privilege is overcome in civil cases involving claims of insurance bad faith. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623.

The plaintiffs have argued here that these traditional privileges above described are rooted deeply in either our constitution (attorney-client privilege) or otherwise in American jurisprudence, and that the peer review privilege/confidentiality statute, SDCL 36-4-26.1, is of modern creation (adopted in 1977) with shallow roots. They argue strenuously that the policy considerations behind the privilege are unsound and consequently erode the strength of such privilege. They further argue that the peer review privilege should be more susceptible to an exception than those more deeply rooted exceptions. Without agreeing that the policy behind the privilege is questionable, the court finds this argument and reasoning sound. There is no compelling or otherwise sufficient basis offered by the Defendants here showing why the crime-fraud exception should not apply to the peer review privilege or that it should be treated any differently that other more firmly rooted privileges. In the appropriate case, like the present case, the balancing required by the law tips in favor of overcoming the privilege and disclosure of the information. All other privileges have been eroded in such a manner. Granted, there is sound policy behind the privilege in facilitating frank and honest discussion among peer review members. However, in certain circumstances, when claims of fraud or deceit are properly presented, the courts have a duty and obligation to allow claimants access to crucial and important evidence. If the privilege in such a case is not overcome, imprudent decisions and wrongdoing in the peer review process would never be brought to light and patient safety and the delivery of medical care would suffer in contravention of the stated public policy. Furthermore, without such an exception to counterbalance the privilege, the statute could be rendered unconstitutional. *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996).

By not allowing access to this information there is no way for a plaintiff, or anyone else for that matter, to determine if the peer review committee members acted without malice; if the peer review committee made a reasonable effort to obtain the facts of the matter under consideration; or if the peer review committee acted in reasonable belief the action taken was warranted by those facts. Without giving Plaintiffs access to this important peer review information, the second clause of the first sentence of SDCL 36-4-25 is rendered completely meaningless and the legislature would have been well served to end that sentence as such: "within the scope of the functions of the committee." The legislature obviously did not do so. They made peer review immunity conditional upon following the rules. These committees owe a substantial and important fiduciary obligation to the entire community, and in order for the public to be satisfied that they are properly carrying out that important fiduciary obligation, when the appropriate case arises, the plaintiffs should have access to the information to make sure the legislative intent as expressed in the statute is upheld.

This Court rules that the peer review privilege, SDCL 36-4-26.1, is not absolute, but is subject to the long recognized crime-fraud exception.

However, the analysis does not stop there. In *Clark* the Supreme Court recognized that it would be absurd to say that the privilege "could be got rid of" merely by making a charge of fraud. (citing, O'Rourke v. Darbishire, (1920) A.C. 581, 604). Clark went on to rule that "there must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in". Clark further stated "To drive the privilege away, there must be 'something to give colour (sic) to the charge'; there must be 'prima facie evidence that it has some foundation in fact."

In *US v. Zolin,* the Supreme Court clarified the procedure that district courts should adopt in deciding motions to compel production of allegedly privileged documents under the crime-fraud exception. First, the Court resolved a conflict in the circuits by holding that the district court has discretion to conduct an *in camera* review of the allegedly privileged documents. Second, concerned that routine *in camera* review would encourage opponents of the privilege to engage in groundless fishing expeditions, the Court ruled that the discretion to review *in camera* may not be exercised unless the party urging disclosure has made a threshold showing "of a factual basis adequate to support a good faith belief by a reasonable person" that the crime-fraud exception applies. *Zolin,* 491 U.S. at 572, 109 S.Ct. 2619. Third, if the party seeking discovery has made that threshold showing, the discretionary decision whether to conduct *in camera* review should be made "in light of the facts and circumstances of the particular case," including the volume of materials in question, their relative importance to the case, and the likelihood that the crime-fraud exception will be found to apply. *Id.* at 572, 109 S.Ct. 2619.

A number of circuits have adopted somewhat different standards regarding the quantum of proof required to satisfy the crime-fraud exception, an issue the Supreme Court declined to reach in *Zolin,* 491 U.S. at 563 n. 7, 109 S.Ct. 2619. *See In re Sealed Case,* 107 F.3d at 50 (D.C.Cir.) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent fraud); *In re Grand Jury Proceedings,* 87 F.3d at 381 (9th Cir.) (reasonable cause); *In re Richard Roe, Inc.,* 68 F.3d at 40 (2d Cir.) (probable cause); *In re Int'l Sys. & Controls Corp.,* 693 F.2d 1235, 1242 (5th Cir.1982) (evidence that will suffice until contradicted and overcome by other evidence).

Sufficient evidence to warrant finding that legal service was sought or obtained in order to enable or aid commission or planning of crime or tort, as required for crime–fraud exception to attorney–client privilege under Kansas law, is that which constitutes prima facie case; prima facie case consists of evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue it supports. K.S.A. 60–426(b)(1). *Berroth v. Kansas Farm Bureau Mutual Ins. Co., Inc.,* 205 F.R.D. 586 (D. Kan. 2002) (applying Kansas law)

To this Courts knowledge, South Dakota has not adopted a similar legal foundation as was laid out in the authorities above. However, South Dakota does require that in order to claim privilege, a privilege log is necessary and required. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623. In Acuity, the court stated:

> "The failure of a party to provide a court with sufficient information to determine the question of privilege raises substantial questions concerning the efficacy of the objection: As a starting point, it is clear that ultimately a party asserting privilege must make a showing to justify withholding materials if that is challenged. The question whether the materials are privileged is for the court, not the party, to decide, and the court has a right to insist on being presented with sufficient information to make that decision. It is not sufficient for the party merely to offer up the documents for in camera scrutiny by the court. Ultimately, then, *637 a general objection cannot suffice for a decision by a court although it may suffice for a time as the parties deal with issues of privilege in discovery."

No privilege log was presented here for a couple reasons. First, the Defendants asked the Court to stay discovery and for protective orders pending their motion for summary judgment on the statute of limitations issue as granting that motion would moot the need for the information. Second, their claim of absolute privilege and the broad scope of the privilege excused them of any obligation to provide a privilege log. Due to the procedural posture of this case at the time of the motion hearing, their failure to provide the privilege log is excused under the circumstances. The parties here were dealing with this issue in discovery and the court was required to give some guidance.

In order to determine if the Plaintiff has met the necessary threshold to properly present the crime-fraud exception the court must consider the law and evidence in this case. Questions of fraud and deceit are generally questions of fact and as such are to be determined by the jury." *Ehresmann v. Muth*, 2008 S.D. 103, ¶ 20, 757 N.W.2d 402, 406 (citing *Laber v. Koch*, 383 N.W.2d 490, 492 (S.D.1986)). To recover on a claim of constructive fraud or deceit a plaintiff must establish that a duty existed between themselves and the defendant." *Sejnoha v. City of Yankton*, 2001 S.D. 22, ¶ 15, 622 N.W.2d 735, 739 (citing *Sabhari v. Sapart*, 1998 S.D. 35, ¶ 17, 576 N.W.2d 886, 892).

> Deceit, under SD law is defined by SDCL 20–10–2 as:
> A deceit within the meaning of § 20–10–1 is either:
> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
> (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> (4) A promise made without any intention of performing

SDCL 53–4–5 defines actual fraud as follows:

Actual fraud in relation to contracts consists of any of the following acts committed by a party to the contract, or with his connivance, *with intent to deceive another party* thereto or to induce him to enter into the contract:

(1) The suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true;

(3) The suppression of that which is true by one having knowledge or belief of the fact;

(4) A promise made without any intention of performing it; or

(5) Any other act fitted to deceive.

Actual fraud is always a question of fact. *Arnoldy v. Mahoney*, 791 NW2d 645 (SD 2010)

(SDCL 53–4–6 provides the following definition of constructive fraud:

Constructive fraud consists:

(1) In any breach of duty which, without any actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

2) In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

In this court's ruling on the motion for summary judgment it found that a fiduciary relationship exists between a hospital, clinic, or doctor and the patient. Such a finding is made because many patients go to the hospital in a weakened condition, many suffering from mental and physical limitations due to age, disease, pain or other disability. They are somewhat limited in their choices due to financial constraints placed upon them by their lack of recourses, insurance provider or public assistance. They are required to put their faith and trust in the medical providers who have superior knowledge and skill in making and keeping them healthy. This is especially the case when you consider the fact that medical staff has the ability to render them unconscious and perform significantly invasive medical procedures upon them. There is little room for doubt that a significant fiduciary duty exists on behalf of the Defendants and in favor of their patients in the context of the hospital/physician – patient relationship. *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) ("we acknowledged that the rise of the 'modern hospital' imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges")

When considering the important duty a medical facility or doctor has to the patient, it is imperative that the medical providers are bound to disclose important information. Suppression of information the patient has a right to know, and in fact should know, falls within the

definitions above as both a fraud and a deceit. It also noted in the various materials submitted here that allegedly, the various medical facility Defendant's held Dr. Sossan out as a highly qualified and accomplished surgeon and advertised him as such during his tenure at their facilities. There is other evidence presented indicating some of the Defendants here advised their patients who they had referred to Dr. Sossan that he was a competent and accomplished surgeon. Meanwhile, there is significant evidence submitted by the Plaintiffs that other physicians and medical facilities felt very strongly Dr. Sossan was not competent, was a "danger to the public" and took action against his privileges. Dr. Sossan's alleged lack of competence and ability was not a secret among the medical community in the southeast South Dakota and northern Nebraska area. Dr. Winn, according to his affidavit, made this clear to the Defendants.

Once he was in Yankton a short time nurses, physicians assistants, clerical staff, patients and other doctors made their complaints known as to his lack of competency and ability. Plaintiffs have submitted information that Dr. Sossan allegedly manipulated medical tests, falsified medical records and performed unnecessary medial procedures including substantial surgery, on some patients multiple times. Physicians and other medical providers have "broke rank", so to speak, in this case and have provided evidence and information to Plaintiffs in an effort to assist them. It is hard to believe, although it is possible, that supervisors and staff that had the ability to take action to make sure patients were safe were completely unaware of these significant issues concerning Dr. Sossan.

This Court is cognizant of the fact that the Defendants have not yet attempted to counter or refute the voluminous pile of exhibits and evidence submitted by the Plaintiffs in response to the various motions. They did so for the reason that they considered their motions for summary judgment dispositive. The court is fully aware that at this early stage of the proceedings the court has essentially one side of the story and if given ample opportunity the Defendants may be able to refute or rebut the evidence submitted by the plaintiff up to this point in time. However, despite this, it is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants. Alternatively, the court makes the same finding if the standard to be applied is "of a factual basis adequate to support a good faith belief by a reasonable person" or "evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue", or any other applicable standard needed to pass the threshold required.

In *Zolin* and other cases, the courts have indicated that an *in camera* inspection of the records is left to the sound discretion of the court. *Zolin*, at 572, 109 S.Ct. 2619. This court has given serious thought to an *in camera* inspection in this particular case. In the exercise of that discretion the Court has determined that an *in camera* review of all the materials is not necessary. With regard to peer review materials they are protected by a broad grant of privilege and confidentiality based upon a plain reading of the statute. The purpose of the statute is obviously to protect the private, frank and honest discussions and deliberations of the peer

review committee. Despite this court's ruling here that they are discoverable under the crime-fraud exception, that primary objective needs to be upheld and protected.

A decision to wrongfully grant medical privileges to an errant doctor can be done either negligently, maliciously or in bad faith. If it is done negligently it is done without prudence of a reasonable person; if it is done maliciously or in bad faith, it is more than mere negligence, but rather, action is taken to grant privileges to a doctor unworthy of such, based upon some improper, illegal or illegitimate motive, or otherwise in disregard of the rights or safety of patients.

So here, if it was done negligently the Plaintiffs would have the right to discover the objective facts and knowledge that existed and that which were available to the respective peer review body, including independent source material, in making their decision. If it appears the decision was made in bad faith or for some improper, illegal or illegitimate motive, then the plaintiffs may, only upon further showing, probe deeper into the peer review process. Upon a showing of illegality or improper motive, Plaintiffs may possibly probe into the actual deliberative process of the members of the peer review body. The court will need to address these issues on a case by case basis after a privilege log is submitted. Consequently, as to objective information gathered or considered by the peer review committees the court orders that such information shall be disclosed and copies provided to Plaintiff's counsel under a protective order without *in camera* inspection, as that information is not considered private deliberative information as contemplated by the statute. *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987). The remaining materials will be submitted to the court for *in camera* inspection with a privilege log as required. The Defendants shall have those materials delivered to the Court at is chambers in Armour, South Dakota as ordered below.

The Court has otherwise considered all of the arguments presented as to the specific discovery requests. Most of those requests were not responded to because of this present motion as well as the possibility that the summary judgment motion would moot the need to respond. The Motions to Compel are granted in all respects, subject to the Defendant's right to raise additional objections that are not redundant. Defendants argued at the hearing on this matter that the Plaintiffs discovery requests ask for voluminous records. In that regard, the court shall allow Defendants an additional forty-five (45) days to supplement their discovery responses with full and complete responses. Since this is a case of first impression, any requests for costs or attorney fees are denied.

ORDER

Consequently, based upon all of the above and foregoing it is hereby

ORDERED, that the Plaintiffs Motion to Compel is granted, in part and denied in part, and it is further

ORDERED, that the Plaintiffs Motion for Summary Judgment on the constitutionality of SDCL 36-4-26.1 is denied, and it is further

ORDERED, that the peer review committee, medical executive committee, and any other board of Avera Sacred Heart Hospital (ASHH) or Lewis & Clark Specialty Hospital (LCSH) having peer review responsibilities, shall produce to the Plaintiffs, without the need of further *in camera* review, the applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration,"; and it is further

ORDERED that the peer review committees, medical executive committees, or any other board of ASHH or LCSC shall produce to the Plaintiffs, without the need for further *in camera* inspection, all complaints filed against Dr. Sossan by any person or other medical provider, **with the name and other identifying information of such person or medical provider redacted,** between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other action taken as a result of such complaint; and it is further

ORDERED, that in disclosing the materials described above, Defendants shall have the duty and the right to redact information that can be considered deliberative or which bears upon a member of the peer review committees private discussions or deliberations, so long as a copy of such materials are submitted to the court for *in camera* inspection with a privilege log; and it is further

ORDERED that the subjective deliberations of the above named peer review committees shall not be subject to discovery unless the Plaintiffs make further application to the Court and can establish, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges, and it is further

ORDERED, that complete copies of all peer review materials of any Defendant hospital or clinic that made peer review decisions concerning Dr. Sossan shall be delivered to the Court, by US mail or otherwise, in its chambers in Armour, South Dakota, within twenty (20) days from the date of this order, and it is further

ORDERED that the information ordered to be produced to the Plaintiffs shall be produced under the provisions of a protective order based upon a stipulation to be resolved by the parties, and in the event no stipulation as to the protective order can be reached within 20 days, each party shall submit their version of such protective order to the Court with a brief in

support of their position and the Court will decide, without hearing, the terms of such protective order; and it is further

ORDERED, that this Memorandum Decision shall constitute the Court' Findings of Fact and Conclusions of Law and that no further findings or conclusions shall be necessary.

Dated this 23 day of October, 2015.

BY THE COURT:

Hon. Bruce V. Anderson
First Circuit Court Judge

Attest:
CLERK OF COURTS

By Jony Johnson
T Deputy

36-4-25. Immunity from liability for acts of members of professional committees or hospital officials. There is no monetary liability on the part of, and no cause of action for damages may arise against, any member of a duly appointed peer review committee engaging in peer review activity comprised of physicians licensed to practice medicine or osteopathy under this chapter, or against any duly appointed consultant to a peer review committee or to the medical staff or the governing board of a licensed health care facility for any act or proceeding undertaken or performed within the scope of the functions of the committee, if the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, and acts in reasonable belief that the action taken is warranted by those facts. The provisions of this section do not affect the official immunity of an officer or employee of a public corporation.

Source: SL 1966, ch 151; SL 1975, ch 231; SL 1985, ch 297, § 22; SL 1998, ch 172, § 3.

36-4-26.1. Proceedings of peer review committees confidential and privileged--Availability to physician subject of proceedings. The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

Source: SL 1977, ch 291; SL 1998, ch 172, § 4; SL 2002, ch 176, § 1.

36-4-26.2. Patient records available to patient--Expert opinion as to care of patient--Restrictions on use of expert testimony. Section 36-4-26.1 does not apply to observations made at the time of treatment by a health care professional present during the patient's treatment or to patient records prepared during the treatment and care rendered to a patient who is personally or by personal representative a party to an action or proceeding, the subject matter of which is the care and treatment of the patient. Furthermore, no member of any committee, department, section, board of directors, or group covered by § 36-4-26.1, who has participated in deliberations under that section involving the subject matter of the action, may testify as an expert witness for any party in any action for personal injury or wrongful death, the subject matter of which is the care and treatment of the patient. Notwithstanding membership on a committee, department, section, board of directors, or group covered by § 36-4-26.1, a health care professional observing or participating in the patient's treatment and care may testify as a fact or expert witness concerning that treatment and care, but may not be required to testify as to anything protected by § 36-4-26.1.

Source: SL 1977, ch 291; SL 1998, ch 223, § 1; SL 1999, ch 191, § 1.

36-4-42. Peer review committee defined. For the purposes of §§ 36-4-25, 36-4-26.1 and 36-4-43, a peer review committee is one or more persons acting as any committee of a state or local professional association or society, any committee of a licensed health care facility or the medical staff of a licensed health care facility, or any committee comprised of physicians within a medical care foundation, health maintenance organization, preferred provider organization, independent practice association, group medical practice, provider sponsored organization, or any other organization of physicians formed pursuant to state or federal law, that engages in peer review activity. For the purposes of this section, a peer review committee is also one or more persons acting as an administrative or medical committee, department, section, board of directors, shareholder or corporate member, or audit group, including the medical audit committee, of a licensed health care facility.

Source: SL 1998, ch 172, § 1.

36-4-43. Peer review activities defined. For the purposes of §§ 36-4-25, 36-4-26.1 and 36-4-42, peer review activity is the procedure by which peer review committees monitor, evaluate, and recommend actions to improve the delivery and quality of services within their respective facilities, agencies, and professions, including recommendations, consideration of recommendations, actions with regard to recommendations, and implementation of actions. Peer review activity and acts or proceedings undertaken or performed within the scope of the functions of a peer review committee include:

(1) Matters affecting membership of a health professional on the staff of a health care facility or agency;

(2) The grant, delineation, renewal, denial, modification, limitation, or suspension of clinical privileges to provide health care services at a licensed health care facility;

(3) Matters affecting employment and terms of employment of a health professional by a health maintenance organization, preferred provider organization, independent practice association, or any other organization of physicians formed pursuant to state or federal law;

(4) Matters affecting the membership and terms of membership in a health professional association, including decisions to suspend membership privileges, expel from membership, reprimand, or censure a member, or other disciplinary actions;

(5) Review and evaluation of qualifications, competency, character, experience, activities, conduct, or performance of any health professional, including the medical residents of health care facility; and

(6) Review of the quality, type, or necessity of services provided by one or more health professionals or medical residents, individually or as a statistically significant group, or both.

Source: SL 1998, ch 172, § 2.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

RYAN NOVOTNY, Plaintiff and Appellee, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Appellants, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Appellees.	)	Nos. 27615 (CIV 14-235), 27626 (CIV 15-167), & 27631 (CIV 15-167) Appeal from the Circuit Court First Judicial Circuit, Yankton County, South Dakota The Honorable Bruce V. Anderson Circuit Court Judge **Brief of *Amicus Curiae* South Dakota Association of Healthcare Organizations**

Petition for Permission to Take a Consolidated Appeal of an Intermediate Order
Filed: November 3, 2015
Order Granting the Petition Filed: December 15, 2015

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I. PRELIMINARY STATEMENT

To the extent that SDCL §15-26A-60 is deemed applicable to this Brief, Amicus Curiae adopts and incorporates by reference herein the jurisdictional statement, statement of legal issues and statement of the case and facts set forth in the Brief of Appellant Sacred Heart Health Services d/b/a Avera Sacred Heart Hospital filed with this Court on February 26, 2016. References to the decision below will be denoted as "Circuit Court Opinion, p. __."

II. INTEREST OF AMICUS CURIAE

The South Dakota Association of Healthcare Organizations ("SDAHO") is a statewide trade association with over 200 members. SDAHO advocates for its members and works to improve the quality of health services for all South Dakotans. Effective peer review is essential if the goals of improving the quality of care and enhancing patient safety which are shared by all of SDAHO's members are to be achieved. Protections for those who perform peer review activities, such as the confidentiality and immunity provisions set forth in SDCL §§36-4-26.1 and -35, make effective peer review possible. If the circuit court's ruling in this case is allowed to stand, effective peer review will no longer be possible. This will prevent SDAHO's members from carrying out their legal obligations. It will also pose a direct threat to the health and safety of the people in this state. For the reasons set forth below, SDAHO respectfully urges the Court to reverse the decision of the circuit court and reaffirm the robust protection provided to peer review activities by the Legislature.

III. ARGUMENT

A. Effective Peer Review Is Essential To Protect The Health And Safety Of South Dakotans

Peer review, along with the tort system and state licensure of health care facilities and professionals, constitute the three main systems in the United States tasked with improving the quality of patient care. Of the three, peer review is perhaps the most effective since it is conducted in real time (as opposed to after the fact) and provides an opportunity for health care providers to work together to improve care rather than imposing penalties when adverse outcomes occur. As this Court has stated:

> We have recognized the important role played by doctors, attorneys and other professionals in reviewing members of their respective profession. Professional societies, through peer review, can and do perform a great public service by exercising control over those persons placed in a position of public trust. It is beyond dispute that communications initiated during such proceedings are an indispensable part thereof.

Pawlovich v. Linke, 688 N.W.2d 218, 223 (S.D. 2004) (citations omitted).

Peer review in hospitals and other health care facilities is conducted by physicians and other professionals exercising clinical privileges at those facilities. These professionals usually perform peer review activities on a voluntary, unpaid basis. Service on such peer review committees can be time-consuming and is often stressful. It has been observed that "[w]hile the greatest deterrent to peer review is the fear of future litigation by participants, peer review also entails criticizing peers, losing time with patients in order to participate in the peer review process and a fear of reprisals in the form of diminished patient referrals even if there is no litigation." Sullivan & Anderson, The Health Care Debate: If Lack of Tort Reform is Part of the Problem, Federalized

Protection for Peer Review Needs to be Part of the Solution, 15 Roger Williams U. L. Rev. 41, 50 (2010). Therefore, peer reviewers rely on the immunity and confidentiality protections of the peer review statutes to be able to offer frank and candid appraisals of the work of their peers.

As peer review has become more formalized and systematic over the years, so have the protections afforded to peer reviewers. As one commentator explained:

> The first peer review efforts were voluntary in nature and established by medical professionals. Recognizing that frank and open discussion of quality and safety problems is critical for improving care, Congress and most state legislatures in the 1980s and 1990s enacted statutes to encourage the process by minimizing the risk that participants in peer review activities would later be subject to litigation for those very activities. State statutory schemes grant differing levels of protection to peer review, but they all incorporate at least one of three types of protection: (1) immunity from liability; (2) evidentiary privilege for documents furnished, utilized, or created; and (3) denial of access to documents for third parties for extra-judicial purposes.

Moore *et al*., Rethinking Peer Review: Detecting and Addressing Medical Malpractice Claims Risk, 59 Vand. L. Rev. 1175, 1178-79 (2006).

The interest in promoting meaningful peer review has been echoed by courts throughout the country. See, e.g., Powell v. Cmty. Health Sys., 312 S.W.3d 496, 508 (Tenn. 2010) (the peer review privilege "reflects a legislative judgment that the public interest in promoting candor among health care providers requires an assurance of confidentiality and that 'the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.'"); Krusac v. Covenant Med. Ctr., Inc., 865 N.W.2d 908, 911 (Mich. 2015) ("[e]ssential to the peer review process is the candid and conscientious assessment of hospital practices. To encourage such an

assessment by hospital staff, the Legislature has protected from disclosure the records, data, and knowledge collected for or by peer committees."); Sanderson v. Frank S. Bryan, M.D., Ltd., 522 A.2d 1138, 1139 (Pa. Super. 1987) ("The purpose for [peer review] protection is to encourage increased peer review activity which will result, it is hoped, in improved health care.").

Virtually every state and the District of Columbia have statutes that provide some level of immunity and confidentiality protections for the peer review process.[1] South Dakota is among them, providing muscular protection for "peer review activity" – that is, "the procedure by which peer review committees monitor, evaluate, and recommend actions to improve the delivery and quality of services within their respective facilities…." SDCL §36-4-43.

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[1] See Ala. Code §§22-21-8 & 34-24-58; Alaska Stat. §18.23.030; Ariz. Rev. Stat. Ann. §§36-441, 36.445.01 & 36-2403; Ark. Code Ann. §§16-46-105(a)(1)(A), 20-9-304 & 20-9-503; Cal. Evid. Code §§1156(a) &1157(a); Colo. Rev. Stat. §§12-36.5-104.4 & 25-3-109; Conn. Gen. Stat. Ann. §19a-17b; Del. Code Ann. tit. 24, §1768; D.C. Code Ann. §44.805; Fla. Stat. Ann. §766.101; Ga. Code Ann. §§31-7-133 & 31-7-143; Haw. Rev. Stat. §624-25.5; Idaho Code §39-1392b; 735 Ill. Comp. Stat. §5/8-2101-2102; Ind. Code Ann. §§16-39-6-3(a) & 34-30-15-1, *et seq.*; Iowa Code Ann. §147.135; Kan. Stat. Ann. §65-4925; Ky. Rev. Stat. Ann. §311.377; La. Rev. Stat. Ann. §§13:3715.3, 40:2205 & 44:7; Me. Rev. Stat. Ann. tit. 32, §§2599 & 3296, tit. 24-A, §4224, tit. 24, §2510-A; Md. Code Ann., Health Occ. §§1-401 & 14-502; Mass. Gen. Laws Ann. ch. 111, §§204-205; Mich. Comp. Laws §333.21515; Minn. Stat. §145.64; Miss. Code Ann. §41-63-9; Mo. Ann. Stat. §537.035; Mont. Code Ann. §§37-2-201; Neb. Rev. Stat. Ann. §§25-12, 123, 44-32, 174; Nev. Rev. Stat. Ann. §§49.119 & 49.265; N.H. Rev. Stat. Ann. §151:13-a; N.J. Stat. Ann. §2A:84A-22.8; N.M. Stat. Ann. §41-9-5; N.Y. Educ. Law §6527; N.C. Gen. Stat. §§90-21.22A, 131E-95 & 131E-97.2; N.D. Cent. Code §23-34-02; Ohio Rev. Code Ann. §§1751.21, 2305.24 & 2305.251; Okla. Stat. Ann. tit. 63, §1-1709.1; Or. Rev. Stat. §41.675; 63 P.S. §425.4; R.I. Gen. Laws §23-17-25; S.C. Code Ann. §40-71-20; SDCL §36-4-26.1; Tenn. Code Ann. §§63-1-150 & 68-11-272; Tex. Health & Safety Code Ann. §161.032; Tex. Occ. Code §160.007; Utah Code Ann. §26-25-3; Vt. Stat. Ann. tit. 26, §§1443 & 8.01-581.17; Wash. Rev. Code Ann. §4.24.250; W. Va. Code §30-3C-3; Wis. Stat. Ann. §146.38(1m); Wyo. Stat. Ann. §35-2-910.

B. The Circuit Court's Interpretation Of The Peer Review Statute Will Prevent Health Care Facilities From Carrying Out Their Duty To Perform Effective Peer Review

All hospitals in South Dakota are required to perform peer review activities by the hospital licensing regulations promulgated by the Department of Health. ARSD §44:75:04:02 (requiring medical staffs to perform peer review activities, including the credentialing of practitioners applying for clinical privileges and medical staff appointment and the review of the care provided by members). General acute care hospitals that participate in the federal Medicare program are required to engage in peer review activities by the Medicare Conditions of Participation. 42 C.F.R. §482.22(a) (requiring the medical staff to conduct periodic appraisals of its members and to examine the credentials of all eligible candidates for medical staff membership).[2]

Critical access hospitals, on which many rural South Dakota communities rely, are also required by Medicare to periodically "evaluate the quality and appropriateness of the diagnosis and treatment furnished in the CAH and of the treatment outcomes." 42 C.F.R. §485.641. This is a special challenge to small facilities with limited resources

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[2] The Joint Commission ("TJC"), which accredits and certifies nearly 21,000 health care organizations in the United States, also requires hospitals to conduct a variety of peer review activities as a condition of accreditation. TJC, *About TJC*, http://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx (last visited Feb. 25, 2016). For TJC Standards requiring peer review activities, see, e.g., TJC, Comprehensive Accreditation Manual for Hospitals (2016) MS.06.01.01-MS.07.01.03 (the medical staff credentials and privileges applicants and recommends members for appointment to the medical staff based on enumerated criteria); MS.08.01.01 (the medical staff performs focused professional practice evaluation for initially requested privileges and for when issues arise); MS.08.01.03 (the medical staff conducts ongoing professional practice evaluation and uses such evaluation to inform decisions to maintain existing privileges, revise existing privileges, or revoke existing privileges); MS.09.01.01 (the medical staff evaluates and acts on reported concerns regarding a practitioner's clinical practice and/or competence).

and limited numbers of physicians and other professionals to call upon to perform peer review.

The circuit court's ruling that the confidentiality protections of SDCL §36-4-26.1 are subject to a "crime-fraud exception" essentially guts the statute, ignoring the law's plain language.[3] A plaintiff in a negligent credentialing suit merely has to assert "claims of fraud or deceit" in order to trigger an *in camera* review of every peer review document that pertains to the physician named as a defendant in the suit. Circuit Court Opinion, p. 21. The court would then exercise its "sound discretion" to determine what, if any, otherwise confidential peer review information to give to the plaintiff. Id., p. 25. However, the very possibility that peer review information could be given to the plaintiff to not only use against the hospital, but also against the peer reviewers who are being charged with fraud, would cause any rational physician to decline to serve as a peer reviewer, especially since the circuit court has not suggested any standards by which its discretion should be exercised. Moreover, exposing physicians participating in the peer review process to the risks of litigation would make it more difficult for hospitals in South Dakota to attract quality physicians. This is critical in states with substantial rural

[3] The statute contains two exceptions to the prohibition on the discovery of peer review information: a physician is permitted to access or use information related to a decision regarding the physician's staff privileges or employment and an individual or the individual's counsel is allowed to have access to information in the defense of an action against that person. SDCL §36-4-26.1. The fact that the legislature included these other exceptions demonstrates that it did not intend to include a "crime-fraud exception." "The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." People *ex rel*. K.D., 630 N.W.2d 492, 494 (S.D. 2001).

areas, such as South Dakota, where the recruitment of physicians to provide services to patients in these areas is already an arduous task.[4]

The understandable reluctance of physicians to volunteer to perform peer review in health care facilities would be exacerbated if the circuit court's suggestion that they have a "duty to disclose" unfavorable information about their peers is allowed to stand. In the first place, this "duty" is based on the faulty premise that peer reviewers have a fiduciary relationship to the facility's patients. This simply isn't so. As one commentator put it:

> A closer question is whether a fiduciary relationship might exist between a hospital and the public. In short, does the hospital in making credentialing decisions consider primarily its own interests or the interests of the public? In one sense, the public does rely upon hospitals to make staffing decisions and to police the quality of their staff membership. But the public does not entrust hospitals with any confidential information or property, nor does the hospital make decisions on behalf of the public. A hospital's credentialing decisions are made based on the interests of the hospital itself. ….Of course, the hospital's own interests often coincide with the public's interests. But hospital provision of health care services, although unquestionably important to the public, does not make private hospitals fiduciaries to the public. As flexible as the theory of fiduciary duties is, it should not stretch to cover a private hospital's relationship with the general public or physicians applying for privileges.

Dallon, Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions, 73 Temp. L. Rev. 597, 666 (2000).

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[4] The South Dakota Department of Health reports that most of South Dakota has been designated as a Health Professional Shortage Area and a Medically Underserved Area. South Dakota Dep't of Health, Federally Designated Health Professional Shortage Areas and Medically Underserved Areas, http://doh.sd.gov/providers/RuralHealth/Shortage.aspx (last visited Feb. 26, 2016)

C. When Peer Review Protections Are Eliminated, Legal Chaos Ensues

The notion espoused by the circuit court that health care facilities have a "duty to disclose" potentially adverse information about physicians has been adopted by one other state. In 2004, Florida voters approved a constitutional amendment – known as "Amendment 7" – stating that "patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident." Fla. Const. art. X, §25. As a direct result of this amendment, and the easy "end run" it allowed around that state's peer review protection law, meaningful peer review in Florida all but ceased, and legal chaos ensued:

> Amendment 7 has become an exemplification of the shortcomings of Florida's often criticized ballot initiative process due to the way it practically bypassed all three branches of government to allow the immediate elimination of decades long statutory peer review privileges overnight, with nothing but the broadest language to initially aid in interpreting its vague parameters. Amendment 7's passage did nothing to alter the fact that peer review, credentialing, event investigations, quality assurance, and risk management activities are still very much required of Florida hospitals and health care providers by various statutes. And while it may be impossible to maintain a precise count, between 2004 and 2014, there have been thousands of Amendment 7 discovery requests to Florida physicians, hospitals, and care providers. The resulting turmoil left Florida health care providers seeking direction on what records were discoverable, who can request records, and what the process should be for identifying and producing the records. Virtually every meaningful attempt over the past ten years to either legislatively or judicially place Amendment 7 into a workable context for Florida hospitals and health care providers in light of their mandatory federal and state obligations to maintain peer review and procedures and systems for risk management, quality improvement, and patient safety has been found to violate the comprehensive rights granted under the amendment.

Cox *et al*., The Amendment 7 Decade: Ten Years of Living With a "Patient's Right To Know" in Florida, 25 U. Fla. J.L. & Pub. Pol'y 281, 307-08 (2014). As another article noted:

> Amendment 7 states that 'patients have a right to access any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.' Amendment 7 significantly eroded longstanding privileges and immunities surrounding Florida's peer review, credentialing, investigations, quality assurance, and risk assessments as they applied to hospitals. For example, courts found that Florida Statutes, Sections 395.0191(8) and 766.101(5), once utilized to protect medical peer review records, were preempted by Amendment 7. By granting access to such documents, not only were hospitals exposed to new potential liabilities and increased financial burdens, but peer review in Florida was changed forever by new disincentives for both hospitals and its peer review committee members.

Sorg, Is Meaningful Peer Review Headed Back To Florida?, 46 Akron L. Rev. 799, 814-15 (2015).[5]

Requiring disclosure of adverse information notwithstanding the peer review statute had the predictable effect of chilling the peer review process. "Hospital insiders believe that since Amendment 7 passed, meaningful peer review has come to a screeching halt, stating further that it was already difficult to get physicians to engage in peer review prior to Amendment 7 and that it will now be impossible…." Id. at 817. "As one Florida doctor stated post-Amendment 7's passage, 'I'm afraid if I say constructive [in a peer review setting] [sic], it could be taken out of context by a plaintiff attorney, so I'm not going to render any opinion.'" Cox, *supra* at 312.

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[5] The Kentucky Supreme Court has also ruled that that state's peer review statute does not protect peer review records in medical malpractice suits. Sisters of Charity Health Sys., Inc. v. Raikes, 984 S.W.2d 464, 470 (Ky.1998).

The same thing will happen in South Dakota if the circuit court's opinion is upheld. Physicians and other health care professionals will cease to perform peer review, or simply go through the motions without making any meaningful judgments about the quality of care, if malpractice plaintiffs can demand every peer review document and ask that a court require production based on the patient's "right to know." Hospitals and other health care facilities in turn would be unable to fulfill their regulatory duties to perform peer review. Quality health care and patient safety will be the ultimate victims.

D. Effective Peer Review Is Needed Now More Than Ever Given The National Effort To Promote Quality And Patient Safety

As one commentator noted: "the increasing willingness of the courts to pierce the privilege and allow discovery into peer review activities concerns not only advocates of medical peer review, but also proponents of medical error reporting as a means to improve patient safety." Kohlberg, The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures, 86 Mass. L. Rev. 157, 158 (2002). This is so because "[t]he erosion of the medical peer review privilege leaves physicians without adequate assurance of the confidentiality of their participation in peer review activities, thereby undermining the effectiveness of peer review." Id. at 162. The Supreme Judicial Court of Massachusetts summed up the problem with judicially created exceptions like the one adopted by the circuit court in Ayash v. Dana-Farber Cancer Inst., 822 N.E.2d 667, 692 n. 28 (Mass. 2005) when it stated: "applying waiver principles to peer review communications would significantly undermine the effectiveness of the statute. Physicians could hardly be expected to volunteer information, or express honest opinions, if the confidentiality of their comments could be waived after the peer review process

were completed and, as here, their participation used as evidence in a lawsuit against them."

Destroying South Dakota's peer review protections will cause even more harm in the not-too-distant future. The Centers for Medicare & Medicaid Services ("CMS") recently announced that by 2018 it intends to have 90% of Medicare fee-for-service payments in "value-based" purchasing programs.[6] These programs either directly link reimbursement to quality indicators or indirectly link reimbursement to quality indicators. Limiting, and creating uncertainty about, the scope of statutory protections for peer review will hamper the ability of health care organizations to respond to these payment reforms, especially rural hospitals with limited resources.

IV. CONCLUSION

Allowing the circuit court's ruling to stand will make it all but impossible for health care providers in South Dakota to perform effective peer review. The quality of health care and patient safety will suffer, and legal chaos will result. Therefore, SDAHO respectfully requests that this Court reverse the circuit court's ruling.

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[6] CMS, *Better Care. Smarter Spending. Healthier People: Paying Providers for Value, Not Volume*, CMS.gov (Jan. 26, 2015), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-01-26-3.html.

Respectfully submitted on this 29th day of February, 2016.

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CERTIFICATE OF COMPLIANCE

Robert C. Riter, of Riter, Rogers, Wattier & Northrup, LLP, counsel for South Dakota Association of Healthcare Organizations, hereby certifies, pursuant to SDCL §15-26A-66, the foregoing brief is typed in proportionally spaced typeface, Times New Roman 12 point. The word-processing system used to prepare the brief indicates that there are a total of 3,426 words and 19,168 characters in the body of the brief, excluding the cover page, table of contents, table of authorities, certificate of compliance, and certificate of service.

/s/ Robert C. Riter

Robert C. Riter

CERTIFICATE OF SERVICE

Robert C. Riter, of Riter, Rogers, Wattier & Northrup, LLP, counsel for the South Dakota Association of Healthcare Organizations, hereby certifies that on February 29, 2016, he served by electronic mail, a true and correct copy of the foregoing South Dakota Association of Healthcare Organizations' *Amicus Curiae* Brief to the following:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27615
APPEAL NO. 27626
APPEAL NO. 27631

RYAN NOVOTNY
Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW,
Defendants and Appellants,

and

ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NEUTERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC,
A South Dakota Limited Liability Company
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.O., KYNAN TRAIL, M.D.,

CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellants.

Appeal from the Circuit Court, First Judicial District
Yankton County, South Dakota

The Honorable Bruce V. Anderson
First Circuit Court Judge

APPELLANT BRIEF OF LEWIS & CLARK SPECIALTY HOSPITAL, LLC, AND ITS INDIVIDUALLY NAMED COMMITTEE MEMBERS AND PERSONNEL

Petition for Permission to Take a Consolidated Appeal of an Intermediate Order filed November 4, 2015

Order Granting Defendant's Petition to Take Discretionary Appeal filed on December 15, 2015

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JURISDICTIONAL STATEMENT

Plaintiffs moved the circuit court for an order compelling production of peer review materials from Defendants. By Memorandum Decision dated October 23, 2015, the Honorable Bruce V. Anderson granted Plaintiff's Motion and ordered production of the peer review materials. Defendants petitioned the Court for permission to take discretionary appeal of the circuit court's Order pursuant to SDCL § 15-26A-13 on November 3, 2015. By Order dated December 15, 2015, this Court granted Defendants' Petitions to Take Discretionary Appeal.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court Erred in Requiring the Disclosures of Peer Review Information Protected by SDCL § 36-4-26.1 Under a Judicially Created "Crime Fraud Exception" and Under an "Independent Source" Exception

The circuit court ordered Defendants to produce to Plaintiffs, *without in camera review*, all "objective information" generated or obtained by the peer review committee in considering the application of Dr. Alan Sossan to obtain privileges.

The circuit court ordered Defendants to produce to Plaintiffs, *without in camera inspection*, all complaints filed against Dr. Sossan by any person or medical provider between the time Dr. Sossan was granted privileges and his termination including any resolution or action taken as a result of the complaint.

The circuit court ordered that Defendants produce to the court for *in camera* review all information containing the subjective deliberations of the peer review committees, including private discussions or deliberations of the peer review committee members, and that such material would be subject to further application by Plaintiffs for its discovery.

STATEMENT OF THE CASE

The various Plaintiffs, all represented by attorneys from James & Larson Law Firm and the Cutler Law Firm, have commenced over thirty lawsuits against numerous Defendants arising out of treatment provided by Dr. Alan Sossan. Appendix at 1.[1] These lawsuits have been consolidated for purposes of the appeal. Each of the lawsuits allege nearly identical claims against Defendants asserting various claims including fraud, deceit, RICO violations, negligence, negligent credentialing, bad faith credentialing, and other claims. Arens S.R. 52 (Amended Complaint). Plaintiffs served interrogatories and requests for production of documents requesting all information related to the credentialing of Dr. Sossan at Avera Sacred Heart Hospital and Lewis & Clark Specialty Hospital, LLC. Defendants objected to production of peer review materials pursuant to SDCL § 36-4-26.1. Plaintiffs moved to compel production of these peer review materials arguing that the materials were subject to discovery pursuant to a "crime fraud exception" and an "independent source exception." By Order dated October 23, 2015, the Honorable Bruce V. Anderson granted Plaintiffs' Motion to Compel and directed Defendants to produce the following:

> The applications submitted by Dr. Sossan in order obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor

[1] Citations to "Novotny S.R." are to the settled record of *Novotny v. Sossan, et al.*, #27615; citations to "Arens S.R." are to the settled record of *Arens v. Sossan, et al.*, #27626; citations to the Appendix are to the circuit court's October 23, 2015, Memorandum Decision.

> to make "reasonable effort to obtain the facts of the matter under consideration;"
>
> All complaints filed against Dr. Sossan by any person or other medical provider, with the name and other identifying information of such person or medical provider redacted, between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other actions taken as a result of such complaint;
>
> That in disclosing the materials described above, Defendants shall have the duty and the right to redact information that can be considered deliberative or which bears upon a member of the peer review committee's private discussions or deliberations, so long as a copy of such materials are submitted to the court for *in camera* inspection with a privilege log;
>
> That the subjective deliberations of the above named peer review committees shall not be subject to discovery unless the Plaintiffs make further application to the Court and can establish, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges;
>
> That complete copies of all peer review materials of any Defendant hospital or clinic that made peer review decisions concerning Dr. Sossan shall be delivered to the Court, by US mail or otherwise, in its chambers in Armour, South Dakota, within twenty (2) days from the date of this order.

Appendix at 26-27.

Defendants petitioned this Court for permission to take discretionary appeal pursuant to SDCL § 15-26A-13. By Order dated December 15, 2015, this Court granted Defendants' Petitions to take discretionary appeal of Judge Anderson's ruling. Arens S.R. 745 (Order Granting Petition for Permission to Appeal from Intermediate Order).

STATEMENT OF THE FACTS

This appeal arises out of the circuit court's October 23, 2015, Memorandum Decision directing the discovery of peer review materials in over thirty pending suits filed by former patients of Allen A. Sossan, D.O. (collectively "the Sossan Plaintiffs") against Dr. Sossan and varying combinations of Lewis & Clark Specialty Hospital, LLC

(LCSH), Sacred Heart Health Services, Avera Sacred Heart Hospital and Avera Health, and other similar Defendants, including the individual members of the medical executive committees of Avera Sacred Heart Hospital and LCSH (collectively "the Sossan Litigation").[2] The claims of the Sossan Plaintiffs arise out of allegedly negligent medical care and treatment provided by Dr. Sossan and the allegation that all of the Defendants conspired to improperly grant Dr. Sossan privileges at Avera Sacred Heart Hospital and LCSH. Arens S.R. 101 (Amended Complaint).

Following commencement of their claims, the Sossan Plaintiffs served Defendants Avera Sacred Heart and LCSH with extensive written discovery seeking information and documents protected by South Dakota's peer review statute, SDCL § 36-4-26.1. Appendix at 2. On October 23, 2014, the Sossan Plaintiffs filed a Motion to Compel and Motion for Partial Summary Judgment on the constitutionality of the South Dakota Peer Review Statute. SDCL § 36-4-26.1. Novotny S.R. 969 (Motion to Compel). In this Motion, the Sossan Plaintiffs requested relief in the form of (1) an order compelling Defendants to disclose full and complete responses to Plaintiffs' written discovery requests for peer review materials, and (2) an order declaring that the South Dakota Peer Review Statute, SDCL § 36-4-26.1, is unconstitutional. *Id.*

On April 24, 2015, a hearing was held before the Honorable Bruce V. Anderson on various pending motions, including Plaintiffs' Motion to Compel and Motion for Partial Summary Judgment. After hearing the parties' arguments and taking the peer review matter under advisement, the circuit court issued a Memorandum Decision and Order dated October 23, 2015. Appendix at 1. The Memorandum Decision and Order

[2] This appeal is made on behalf of Lewis & Clark Specialty Hospital, LLC.

indicated that it was intended to apply to all of the cases in the Sossan Litigation.[3] *Id.* In its Decision, the circuit court denied Plaintiffs' Motion for Summary Judgment requesting the court to declare SDCL § 36-4-26.1 unconstitutional. Appendix at 18. The court nevertheless ruled, however, that South Dakota's Peer Review Statute, SDCL § 36-4-26.1, is not absolute, but rather, is subject to an "independent source exception" and/or "crime-fraud exception." Appendix at 22, 26.

Pursuant to this ruling, the circuit court ordered that "the peer review committee, medical executive committee, and any other board of Avera Sacred Heart Hospital or Lewis & Clark Specialty Hospital having peer review responsibilities," would be required to produce in the Sossan Litigation "the applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration." Appendix at 27. The circuit court further ordered that the same parties were required to produce "all

[3] In its Memorandum Decision and Order, the circuit court did not list the cases of *Mary Weibel v. Allen A. Sossan, D.O., et al.*, CIV. 15-65, and *Clair and Diane Arens v. Allen A. Sossan, D.O., et al.*, CIV. 15-167, as part of the pending Sossan Litigation. Appendix at 1. At the April 24, 2015, hearing, however, Judge Anderson specifically noted that the circuit court's ruling on the peer review issue would apply to the *Weibel* case. Novotny S.R. 1728 (Hearing Transcript at 222). On December 15, 2015, this Court issued an Order consolidating all of the Sossan cases including *Arens* and *Weibel* for review. Arens S.R. 745 (Order Granting Petition for Permission to Appeal from Intermediate Order).

complaints filed against Dr. Sossan by any person or other medical provider, with the name and other identifying information of such person or medical provider redacted, between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other action taken as a result of such complaint. *Id.* The court ordered production of these peer review materials without ordering an *in camera* review of these materials and before any significant discovery had taken place regarding Plaintiffs' claims of crime-fraud. Appendix at 25, 27.

While the circuit court ruled the Defendants would have the right to redact information that "can be considered deliberative or which bears upon a member of the peer review committees private discussions or deliberations," it further ordered that the prohibition on discovery of those subjective deliberations could be overcome by a future application to the court establishing, by clear and convincing evidence, that fraud, deceit, illegality, or other improper motive influenced the committee members in granting Dr. Sossan privileges. Appendix at 27.

ARGUMENT

I. SDCL § 36-4-26.1 is an Absolute Privilege Protecting all Peer Review Materials, Regardless of the Source

A. The Supreme Court Reviews Statutory Construction and/or Interpretation *de novo*

This case presents a question regarding the circuit court's construction and interpretation of SDCL § 36-4-26.1. This Court reviews such questions *de novo*. *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (S.D. 2000). Lewis & Clark Specialty Hospital (LCSH) submits, upon such review, the Court should find SDCL § 36-4-26.1 is an absolute privilege and that it passes constitutional scrutiny,

thereby protecting from discovery, disclosure, and admission into evidence all of LCSH's peer review materials.

B. SDCL § 36-4-26.1 is Clear and Unambiguous

SDCL § 36-4-26.1 states as follows:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

SDCL § 36-4-26.1.

The legislature, when adopting SDCL § 36-4-26.1 in 1977, intentionally created a broad all-encompassing privilege. It makes clear that any and all documents of a peer review committee are not subject to discovery or admissible as evidence. Importantly, § 36-4-26.1 was adopted eleven years after § 36-4-25, which creates immunity for members of a peer review committee. The circuit court suggests that the peer review privilege cannot be as broad as the legislature wrote because of the circuit court's inverted reading of § 36-4-25 to create a negligent or wrongful credentialing cause of action. This the court is prohibited from doing. This Court has made clear that substantial discretion is to be given to the legislature. *In re: Famous Brands, Inc.*, 347 N.W.2d 882, 885-86 (S.D. 1984).

South Dakota's rules of statutory construction have been articulated in several cases:

> Questions of law such as statutory interpretation are reviewed by the court *de novo*… The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court was confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in the statute is clear, certain and unambiguous, there is no reason for construction, and the court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments related to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of the statute relating to a particular subject will prevail over the general terms of another statute.

Martinmaas, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611 (citing *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, (551 N.W.2d 14, 17).

Significant here is this Court's directive that, "statutory intent is to be determined from what the legislature said, rather than what the courts think it should have said, and that the court must confine itself to the language used." *In re: AT&T Information Systems*, 405 N.W.2d 24, 27 (S.D. 1987). The circuit court ignored this critical rule when it created exceptions to SDCL § 36-4-26.1. *See In re: Famous Brands*, 347 N.W.2d at 886 (noting the court should not amend a statute to produce or avoid a particular result).

Equally important, here, is the rule that, "when the language in the statute is clear, certain and unambiguous, there is no reason for construction, and the court's only function is to declare the meaning of the statute as clearly expressed." *Martinmaas*, 612 N.W.2d at 611. SDCL § 36-4-26.1 is unambiguous. Its words and phrases, when given

their plain meaning and effect, are clear. Thus, the court's only task is to declare its meaning. *Id.* The circuit court went far beyond simply declaring the statute's meaning by judicially creating exceptions to it.

In *Famous Brands*, the Secretary of Revenue asked the Court to read restrictions into the "grandfather clause" contained in SDCL § 35-4-5.5. *In re: Famous Brands*, 347 N.W.2d at 886. This Court was unwilling, because "to do so would constitute usurpation of the legislative function. *National College of Business v. Pennington County*, 82 S.D. 391, 398, 146 N.W.2d 731, 735 (1966). If further restrictions are to be imposed upon the right of exemptions contained in SDCL § 35-4-5.5, then it is for the legislature to say so, not the … courts." *Id*. at 886. Particularly applicable here, the *Famous Brands* Court then stated:

> This court will not enlarge a statute beyond its face where the statutory terms are clear and unambiguous in meaning and do not lead to an absurd or unreasonable conclusion. *Ogle v. Circuit Court 10th Judicial Circuit*, 89 S.D. 18, 21, 227 N.W.2d 621, 623 (S.D. 1975).
>
> The meaning must be read from the language chosen by the legislature, and the courts are not free to determine whether different provisions would have been enacted if the legislators had given some or greater attention to the application of the statute to a particular set of facts. *State ex rel. Neelen*, 24 Wis.2d 262, 268, 128 N.W.2d 425, 429 (Wis. 1964).

In re: Famous Brands, 347 N.W.2d at 886.

As noted, the circuit court concluded that an inverted reading of SDCL § 36-4-25 implies a cause of action for improper credentialing. Importantly, that statute was adopted in 1966. South Dakota's peer review privilege statute, however, was adopted in 1977. SDCL § 36-4-26.1. Thus, the legislature knew what it said regarding immunity (§ 36-4-25) when it created the privilege in 1977. If the legislature intended exceptions to peer review, it would have created them. *See State v. Young*, 2001 SD 76, ¶ 12, 630

N.W.2d 85, 89 (recognizing "that the legislature knows how to exempt or include items in statutes"); *see also In re: AT&T Information Systems*, 405 N.W.2d at 27 (statutory intent is determined by what the legislature said, not what the courts think it should have said). Here, the circuit court's attempt to add exceptions to the clear language of the statute equates to the court declaring what it believes the legislature should have said.

The circuit court stated that it must determine if plaintiffs in "wrongful or improper" credentialing cases have access to any information from the peer review committee to determine if the committee acted improperly. Appendix at 12. The court then concluded, despite the clear statutory language of SDCL § 36-4-26.1, that it was subject to exceptions for original source documents and crime-fraud, because the privilege would preclude access to evidence that goes to "the crux of the case and go[es] to the heart of the issue." *Id.* at 14.[4]

This Court specifically prohibits the circuit court's amendments to produce access to evidence where the statute clearly precludes it. *In re Famous Brands*, 347 N.W.2d at 885. "The courts are not free to determine whether different provisions would have been enacted if the legislators had given some or greater attention to the application of the statute to a particular set of facts." *Id*. at 886. The circuit court went through this very exercise to say exceptions must be created to accommodate the set of facts before the court in these matters.[5]

[4] Interpreting a comparable privilege statute, the Texas Supreme Court, in a case alleging malice, noted the statute, "may well make proof of any cause of action more difficult, but it nevertheless expressly forecloses the avenue of discovery sought in this case." *Irving Healthcare Sys. v. Brooks*, 927 S.W.2d 12,16 (Texas 1996).

[5] The circuit court's use of § 36-4-25 to bypass SDCL § 36-4-26.1's privilege violates the rule that "when two enactments apply to a particular situation, terms of the statute

The circuit court announces these exceptions for the purpose of preserving the privilege statute's constitutionality. Mem. Dec. at 18. The court is not only prohibited from creating the exceptions under this Court's statutory construction rules, but also, SDCL § 36-4-26.1 is constitutional under this Court's prior holdings.

Basic rules of statutory construction require this Court to conclude that the legislature made a conscious decision not to adopt any further exceptions to the statute because the legislature intended it to be absolute. *See State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d at 89; *see also In re: AT&T Information Systems*, 405 N.W.2d at 27. The circuit court failed to employ South Dakota's rules of statutory construction, altogether, when it concluded the privilege was not absolute because it is subject to an independent source exception and a judicially created crime-fraud exception. Indeed, no reference was made to any of South Dakota's rules of construction, whatsoever. Instead, the court relied upon authorities from other jurisdictions.

C. Independent Source Materials are Privileged

The circuit court also suggests that Defendants conceded that, "If South Dakota adopts improper credentialing as a cause of action under an extension of the common law, the plaintiffs would be allowed to use some independent source information to prove their claims." Appendix at 13. The court then ordered that all "objective information gathered or considered by the peer review committees' independent source materials" be disclosed and provided to Plaintiffs' counsel without *in camera* inspection. *Id.* at 26.

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relating to a particular subject will prevail over the general terms of another statute." *Martinmaas*, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611. The question before the Court is access to Dr. Sossan's peer review files. That is specifically governed by SDCL § 36-4-26.1. Therefore, its clear language answers the question, without the court's created exceptions. The circuit court relied heavily on the more general immunity statute to find its result.

Defendants made no such concession in their submissions to the circuit court. Rather, Defendants simply noted that other jurisdictions that have recognized a negligent credentialing cause of action have permitted plaintiffs to attempt to prove it through information they obtain from independent sources. The Michigan Supreme Court's recent decision in *Krusac v. Covenant Medical Center, Inc.*, 865 N.W.2d 908, 913-14 (Mich. 2015) is instructive. There, analyzing a comparable peer review privilege statute, the Michigan Supreme Court held that objective facts are subject to the peer review privilege. Following a complaint by the plaintiff that application of the privilege to objective facts would potentially conceal firsthand observations, the Michigan Supreme Court said:

> Moreover, while the peer review privilege may make it more difficult for a party to obtain evidence, the burden on a litigant is mitigated by the fact that he or she may still obtain relevant facts through eyewitness testimony, including from the author of a privileged incident report, and from the patient's medical record. Finally, if a litigant remains unsatisfied with the statutory balance struck between disclosing information to patients and protecting peer review materials, any recalibration must be done by the legislature.

Id.

South Dakota's peer review statute unambiguously protects "proceedings, records, reports, statements, minutes, or any other data whatsoever, of any peer review committee." SDCL § 36-4-26.1. The legislature has made clear that all data and information of a peer review committee, whether from independent sources or generated by the committee itself, are undiscoverable from the committee. As the Michigan Supreme Court noted, litigants can obtain independent source information from the independent sources. *Krusac*, 865 N.W.2d at 913-14. That plaintiffs are unable to obtain the information from the most convenient source is not dispositive. The legislature has

spoken clearly that objective facts and independent source information cannot be discovered from the peer review committees, themselves. *Id; In re: Famous Brands, Inc.*, 347 N.W.2d at 885-86.

The South Carolina Supreme Court has held similarly. *McGee v. Bruce Hosp. Sys.*, 439 S.E.2d 259-60 (S.C. 1993). It noted, "the underlying purpose behind the confidentiality statute is … to promote complete candor and open discussion among participants in the peer review process." *Id*. at 259. It then adopted the Florida Supreme Court's reasoning in *Cruger v. Love*, 599 So.2d 111 (Fla. 1992)[6] to find the public interest in candid peer review prevails over a litigant's need for information from the most convenient source:

> [t]he policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee … during the peer review or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might someday be used against them by a third party will be reluctant to fully detail matters that the committee should consider.

Id., at 259-60.

SDCL § 36-4-26.1 is clear on its face. South Dakota's legislative intent is similar to South Carolina. The peer review privilege is absolute and cannot be subjected to the circuit court's exceptions.

[6] Florida's peer review statute was very recently abrogated by an amendment to the Florida Constitution. *Bartow HMA, LLC v. Edwards*, 175 So.3d 820 (Fla. D. Ct. App. 2015).

D. The Circuit Court Improperly Disregarded *Shamburger*

In 1996, this Court decided *Shamburger v. Behrens*, 380 N.W.2d 659 (S.D. 1986). There, Dr. Behrens performed colon surgery on the plaintiff. He claimed complications following the procedure, requiring a colon resection. Plaintiff initiated suit claiming negligent pre-operative care, failure to adequately inform and disclose negligent surgery, and negligent post-operative care, against Dr. Behrens. *Id*. at 661.

Plaintiff also sued Rapid City Regional Hospital claiming the hospital was "negligent in allowing Behrens to remain on staff." *Id.* at 665. Plaintiff claimed the hospital knew or should have known Dr. Behrens had a drinking problem and was incompetent. *Id*. The circuit court, in *Shamburger*, granted the hospital's Motion for Summary Judgment because plaintiff submitted no evidence to show the hospital knew or had reason to believe Dr. Behrens was incompetent. *Id*.

Affirming the circuit court, this Court held that "… hospital records concerning staff competency evaluations are not discoverable materials. SDCL 36-4-26.1." *Id.* This Court went on to note that plaintiff was unable to obtain the records to "show whether or not the hospital considered or knew of Dr. Behrens' drinking problems when the hospital *considered his staff privileges*." *Id.* (emphasis added).

Despite this Court's effort to address the scope of SDCL § 36-4-26.1 regarding competency records for staff privileges consideration, the circuit court, here, minimized *Shamburger*'s importance. In fact, the circuit court incorrectly stated, "the only ruling that *Shamburger* made with respect to privileged records concerned the plaintiff's request to obtain Dr. Behrens' alcohol treatment records from another provider." Appendix at 7. The circuit court also suggested *Shamburger* was a run of the mill malpractice case. *Id.*

Regardless of the actual scope of the claims against the hospital, this Court did note the claim involved inquiries whether the hospital had breached any of its medical staff review procedures. *Shamburger*, 380 N.W.2d at 665. The circuit court, below, further stated that improper credentialing was not at issue in *Shamburger* as it was not pleaded as a cause of action; rather it was a claim of general hospital negligence. Appendix at 8. The circuit court further contends that *Shamburger* does not directly address the issue of discovery of peer review materials. *Id.*

The circuit court failed to give *Shamburger* its due, even after quoting the applicable language, directly. Contrary to the circuit court, *Shamburger* specifically addressed a plaintiff's inability to obtain those documents considered by hospitals when deciding staff privileges. *Shamburger*, 380 N.W. 2d at 665. (citing SDCL § 36-4-26.1 for the proposition that staff competency evaluations are not discoverable materials) (emphasis added).

Regardless of Plaintiffs' theory, the very documents they seek to obtain are those which would show what LCSH considered when it considered Dr. Sossan's staff privileges. In other words, these Plaintiffs are seeking the exact documents this Court has already held are not discoverable materials pursuant to SDCL § 36-4-26.1. LCSH respectfully disagrees with the circuit court that *Shamburger* does not have much applicability to the present cases. Quite the contrary, this Court's language in *Shamburger* is directly on point. *Id. Shamburger* controls, here, despite the circuit court's effort to minimize its importance.[7] *See also Uhing v. Callahan*, 2010 WL 23059

[7] The circuit court's analysis of *Shamburger* was limited to the portion of its ruling in which it concluded this Court would most likely adopt a new common law theory for wrongful or improper credentialing. The circuit court ignored *Shamburger*, altogether, in

(D.S.D.) at *3 ("The peer review privilege precludes discovery of documents or any other data whatsoever generated by any peer review committee engaging in peer review activities").

II. SDCL § 36-4-26.1 is Constitutional

A. SDCL § 36-4-26.1 does not Violate Article VI Section 20 of the South Dakota Constitution

Plaintiffs raised both due process and South Dakota's open courts provision as their basis to claim SDCL § 36-4-26.1 is unconstitutional. The district court held that, "the plaintiffs failed to clearly, palpably and plainly show that the statute does not bear a real and substantial relationship to furthering the objective of encouraging physicians to participate in a candid and open discussion as to their colleagues' competence." Appendix at 16. Thus, the circuit court concluded SDCL § 36-4-26.1 did not violate Plaintiffs' due process rights. Plaintiffs have not challenged that ruling on appeal.

The circuit court erred, however, in concluding that SDCL § 36-4-26.1 violates the South Dakota open courts provision, unless court-created exceptions are applied "to allow plaintiffs access to the information and evidence that forms the crux of their cases." Appendix at 18. The court, however, cites no authority supporting its conclusion. The court then creates from whole cloth two exceptions to SDCL § 36-4-26.1 … a crime-fraud exception and an independent source exception. Neither is contemplated by the South Dakota legislature.

Article IV § 20 of the South Dakota Constitution provides: "all courts shall be open, and every man for an injury done him and his property, person or reputation, shall

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the remainder of its Decision regarding the scope of the peer review privilege. LCSH believes *Shamburger* controls the analysis regarding the scope of the privilege which, as will be shown *infra*, is constitutional under an open court's provision analysis.

have remedy by due course of law, and justice administered without denial or delay." The circuit court acknowledged this Court's prior decisions declaring statutes of limitation in various contexts do not violate the open courts provision. *See Peterson v. Burns*, 2001 S.D. 126, 635 N.W.2d 556; *Witte v. Goldey*, 1999 S.D. 34, 509 N.W.2d 266 (S.D. 1999); and *Green v. Siegel Barnett and Schutz*, 1996 S.D. 146, 557 N.W.2d 396. The circuit court also acknowledged that this Court has held South Dakota's medical malpractice damages cap is not violative of the open courts provision of the South Dakota Constitution. *See Knowles v. U.S.*, 1996 S.D. 10, ¶ 84, 544 N.W.2d 183, 203 (S.D. 1996). While noting the outcomes of those cases, the circuit court ignored this Court's analysis, in exchange for reliance upon other jurisdictions; particularly Kansas. *See* Appendix at 16-18. The circuit court cited no authority from South Dakota to support a claim that Plaintiffs have some constitutional right to all evidence. In fact, the United States Supreme Court has held there is no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (criminal case).

Further, the court interpreted the open courts provision far broader than this Court has ever directed. In *Knowles*, for example, this Court stated that the open courts provision does not "assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination." *Knowles*, 1996 S.D. 10, ¶ 83, 544 N.W.2d at 203 (citing *Kyllo v. Panzer*, 535 N.W.2d 896, 901 (S.D. 1995). Whether or not this Court is willing to recognize a wrongful credentialing cause of action, "'open courts' is not a guarantee that all injured persons will receive full compensation or that remedies once existent will remain so. … Reasonable restrictions can be imposed upon available remedies." *Id.*

This Court has stated that, absent a legislature's license to restrict, modify or extinguish common law rights, "the state of tort law would remain frozen in the nineteenth century, immutable and eventually, obsolete." *Id.* This Court went on to state, "our function is not to elevate common-law remedies over the legislature's ability to alter those remedies, but rather we are to interpret the laws as they affect the 'life, liberty or property of the citizens of the state.'" *Id.*[8] "…Public policy justifies an absolute privilege in the context of official quasi-judicial proceedings, as well as *statutorily authorized professional peer review* …" *Pawlovich v. Linke*, 2004 S.D. 109, ¶ 16, 688 N.W.2d 218, 223 (emphasis added). Thus, this Court has already stated that absolute peer review protection is justified. *Id.*

South Dakota has taken its lead from the United States Supreme Court's interpretation of the federal Constitution. It has said,

> A person has no property, no vested interest, in any rule of the common law …. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

Knowles, 1996 S.D. 10, ¶ 84, 544 N.W.2d at 203 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)). "[T]he Constitution does not forbid the creation of new rights, or the abolition of the old ones recognized by the common law, to attain a permissible legislative objective." *Id*. (quoting *Duke Power Co. v. Carolina Endiron. Study Group, Inc*., 438 U.S. 59, 88 n.32 (1978)).

[8] The circuit court appears to be the first to have recognized a "wrongful credentialing" cause of action in South Dakota. Then, it purports to strike down the privilege statute as unconstitutional, absent its exceptions, to allow Plaintiffs access to the credentialing files.

"Plaintiffs are entitled to a remedy 'by due course of law.' That is all the open courts clause guarantees." *Id*. (quoting Article IV, § 20 of the South Dakota Constitution). Plaintiffs will get their day in court to assert their claims.

Plaintiffs are a far cry from those plaintiffs barred by the legal malpractice statute of repose upheld by this court in *Green*, 1996 S.D. 146, 557 N.W.2d at 403-05. There, this Court quoted the North Carolina Supreme Court, which said, "the legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Id*. at 403 (quoting *Lamb v. Wedgewood South Corp*., 302 SE.2d 868, 882 (N.C. 1983)); *see also Cleveland v. BDL Enterprises, Inc.*, 2003 S.D. 54, ¶ 39, 663 N.W.2d 212, 223 (upholding statute of repose for claims against design professionals).

The South Dakota legislature took reasonable precautions in 1977 when it enacted SDCL § 36-4-26.1, to encourage peer review and to give comfort to those placed on peer review committees that their work was protected. This Court has said,

> We have recognized the important role played by doctors, attorneys and other professionals in reviewing members of their respective profession. *See id*. at 421-22 (citations omitted). Professional societies, through peer review, can and do perform a great public service by exercising control over those persons placed in a position of public trust. It is beyond dispute that communications initiated during such proceedings are an indispensable part thereof. *Id*.

Pawlovich, 688 N.W.2d at 223.

The entire country has adopted similar protections for peer review committees. *See, e.g., Attorney General v. Bruce*, 369 N.W.2d 826, 830 (Mich. 1985) (quoting *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970); *Stewart v. Vivia*, 2012 WL 195020 (Ohio Ct. App.) at *5; *McGee*, 439 S.E.2d at 259. Much like the

damages caps at issue in *Knowles*, the peer review protection is a justifiable legislative action. *Knowles*, 1996 S.D. 10, 544 N.W.2d at 203; *Green*, 1996 S.D. 146, 557 N.W.2d at 405 (legal malpractice statute of repose "is a reasonable restriction upon an available remedy which the legislature may constitutionally impose").

The circuit court's finding that SDCL § 36-4-26.1 is unconstitutional without judicially created exceptions unduly broadened the scope of the open courts provision. This Court has limited its reach in numerous cases. *See, e.g., Cleveland*, 2003 S.D. 54, ¶ 45, 663 N.W.2d at 223-24; *Green*, 1996 S.D. 146, ¶ 33, 557 N.W.2d at 405; *Knowles*, 1996 S.D. 10, ¶ 83, 554 N.W.2d at 203 (noting series of cases setting forth the scope of South Dakota's open courts provision). Adoption of the court's findings would stand those cases on their heads.

Apparently, the circuit court reached its conclusion based largely upon the facts and circumstances presented in this case.[9] This Court, however, has cautioned against such an analysis:

> Where the constitutional validity of the statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.

[9] The circuit court went so far as to say, "viewed in the light most favorable to the defendants here, the facts in the present cases clearly show that the peer review committees involved had certain factual information concerning Dr. Sossan that warranted a denial of privileges, and in fact, it appears from this record that is how they initially voted." Appendix at 11. The court has taken substantial liberties with the facts, not the least of which is lumping Lewis & Clark Specialty Hospital into its conclusion that LCSH's peer review committee initially voted to deny Dr. Sossan privileges. There is no evidence, whatsoever, in the record to suggest LCSH had such a vote.

Cleveland, 2003 S.D. 54, ¶ 44, 663 N.W.2d at 224 (quoting *Knowles*, 544 N.W.2d at 197 (citing *Radice v. New York*, 264 U.S. 292, 294 (1924))).

The circuit court has usurped the legislature's responsibility by adding exceptions to an otherwise unambiguous statute, in reliance upon its overly broad view of the open courts provision. As this Court has said, however, "if the people of this state wish an expanded scope of our open courts constitutional provision, the amendment process provides the appropriate avenue for that change." *Cleveland*, 663 N.W.2d at 224.

SDCL § 36-4-26.1 is constitutional, as written. That peer review protection may prevent the plaintiffs from having access to the peer review committees' files does not prevent them from prosecuting their cases. The courthouse doors have not been closed to them. The statute is a reasonable restriction upon an available remedy which the legislature may constitutionally impose. *Green*, 557 N.W.2d at 405. Therefore, the circuit court erred by finding SDCL § 36-4-26.1 unconstitutional absent exceptions created by the court.

III. The Court's Use of *In Camera* Review for the Crime-Fraud Exception is Improper

LCSH has already set forth that SDCL § 36-4-26.1 is a clear and absolute protection for the peer review files at South Dakota hospitals. Even so, the circuit concluded a crime-fraud exception should be applied to it. Should this Court conclude the statute is subject to a crime-fraud exception, the circuit court misapplied it.

The circuit court also erred by concluding independent source materials are discoverable from LCSH. Those materials may be available from other sources, but they cannot be discovered from LCSH under the clear terms of SDCL § 36-4-26.1.

The circuit court actually extended the independent source concept to hold Plaintiffs have the right, without *in camera* review, to discover "the objective facts and knowledge that existed and that which were available to the respective peer review body, including independent source material, in making their decision." Appendix at 26-27. Such an extension beyond the clear terms of the statute, itself, is improper.

The circuit court purports to rely on *U.S. v. Zolin*, 491 U.S. 554, 572 (1989), to claim it has discretion to order production of documents claimed to be privileged without *in camera* review. The United States Supreme Court approved *in camera* review at the request of parties opposing attorney-client privilege when those parties meet a threshold of relevant evidence showing a reasonable belief *in camera* review will yield evidence that the crime-fraud exception applies. *Id*. at 574.

The United States Supreme Court contemplates discretion in striking a balance between preserving the privilege and avoiding abuses. *Id*. at 571. In other words, it was not contemplating courts would order production without review. It observed that "*in camera* inspection … is a lesser intrusion upon the confidentiality of the attorney-client privilege than is public disclosure." *Id*. at 572.

The public policy of promoting candor in peer review proceedings requires Plaintiffs to supply threshold evidence of a future crime or fraud before the circuit court even allows *in camera* review. The circuit court has gone directly to public disclosure regarding documents heretofore protected from discovery or admissibility. Those documents have been crafted, prepared, gathered and maintained pursuant to a legislative policy of encouraging full candor in peer review proceedings, without fear of reprisal. *McGee*, 439 Se.2d at 259-60.

Since the statute does not contemplate or allow for disclosure of "objective facts and knowledge" within the committee files, the crime-fraud exception remains. *Zolin* makes clear that documents sought under that exception should undergo *in camera* review. *Zolin*, 491 U.S. at 574. Therefore, should this court find applicable a crime-fraud exception to SDCL § 36-4-26.1, it should require the circuit court to conduct *in camera* review of all documents to determine if the crime-fraud exception even applies.

The crime-fraud exception as it relates to the attorney-client privilege exists to ensure that the "seal of secrecy between the lawyer and client does not extend to communications made for the purpose of getting advice for the [future] commission of a fraud or crime." *Zolin*, 491 U.S. at 562-63. The Court must review the entirety of the peer review files *in camera* to determine if any documents evince a purpose of fraudulent behavior by the hospitals, before any can be produced.

The backdrop for the issues before this Court is South Dakota's public policy encouraging peer review and giving comfort to those placed on peer review committees that their discussions are protected. As this Court previously noted in *Pawlovich*, "professional societies, through peer review, can and do perform a great public service by exercising control over those persons placed in a position of public trust. It is beyond dispute that communications initiated during such proceedings are an indispensable part thereof." *Pawlovich*, 688 N.W.2d at 223. The South Dakota legislature views candid communications in peer review proceedings as critical. If a crime-fraud exception is recognized, it must be applied judiciously. The circuit court has not done so. Before any documents within a peer review credentialing file are ordered for disclosure, this Court should require *in camera* review to determine if each particular document demonstrates

an intention to commit a fraud in the future. *Zolin*, 491 U.S. at 562-63. The circuit court's Memorandum Decision does not demonstrate such discretion.

CONCLUSION

The circuit court took the extraordinary step of adopting two exceptions to the peer review privilege in SDCL § 36-4-26.1, purportedly to preserve the statute's constitutionality. SDCL § 36-4-26.1 is clear and unambiguous. If the legislature intended exceptions to peer review, it would have created them. *State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89. South Dakota's rules of statutory construction prohibit the creation of exceptions for the purpose of stating what courts think the legislature should have said. *In re: AT&T Information Systems,* 405 N.W.2d at 27.

The circuit court's reliance on the open courts provision of the South Dakota Constitution is also misplaced. Its scope is far narrower than that contemplated by the circuit court. As noted, this Court has said that if the public wants "an expanded scope of our open courts constitution provision, the amendment process provides the appropriate avenue for that change." *Cleveland*, 663 N.W. at 224. SDCL § 36-4-26.1 does not violate the open courts provision. The circuit court's reliance upon it to allow for exceptions to SDCL § 36-4-26.1 is in error.

Finally, the clear language of SDCL § 36-4-26.1 encompasses "the objective facts and knowledge that existed and that which were available to the respective peer review body, including independent source material, in making their decision." Appendix at 26-27. The circuit court's declaration that such documents be produced without *in camera* review is improper. Should this Court adopt a crime-fraud exception to SDCL § 36-4-26.1, all documents within the peer review files should be reviewed *in camera* by the

Court before being produced to the Plaintiffs, to determine if each particular document somehow demonstrates an intent to commit a fraud or a crime. *Zolin*, 491 U.S. at 562-63.

LCSH requests this Court declare SDCL § 36-4-26.1 is clear, unambiguous, and constitutional such that no exceptions to it can be judicially grafted onto the statute. Should the Court find a crime-fraud exception necessary, however, all documents within the peer review and credentialing files should be reviewed *in camera* to determine if the crime/ fraud exception is met, before production is ordered.

Respectfully submitted this 29th day of February, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing Brief of Appellant and Appendix were e-mailed to the South Dakota Supreme Court at scclerkbriefs@ujs.state.sd.us, and that these documents were also e-mailed to the following counsel on this 29th day of February, 2016:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 7,238 words from the Statement of the Case through the Conclusion, including footnotes. I have relied on the word count of a word-processing program to prepare this certificate. I further certify that this brief complies with the style requirements of SDCL § 15-26A-66(b) and (b)(1), being prepared in the font *Times New Roman*, at a size of 12 points.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27615
APPEAL NO. 27626
APPEAL NO. 27631

RYAN NOVOTNY
Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW,
Defendants and Appellants,

and

ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NEUTERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC,
A South Dakota Limited Liability Company
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.O., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellants.

Appeal from the Circuit Court, First Judicial District
Yankton County, South Dakota

The Honorable Bruce V. Anderson
First Circuit Court Judge

APPELLANT APPENDIX OF LEWIS & CLARK SPECIALTY HOSPITAL, LLC, AND ITS INDIVIDUALLY NAMED COMMITTEE MEMBERS AND PERSONNEL

Petition for Permission to Take a Consolidated Appeal of an Intermediate Order filed November 4, 2015

Order Granting Defendant's Petition to Take Discretionary Appeal filed on December 15, 2015

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APPENDIX

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Judy L Johnson Judy L Johnson

Yankton County Clerk of Courts Yankton County Clerk of Courts

1st Judicial Circuit Court of South Dakota 1st Judicial Circuit Court of South Dakota

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF YANKTON) 1ST JUDICIAL CIRCUIT

KRISTI LAMMERS

Plaintiff,

v.

ALLEN A. SOSSAN, DO, AND RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, PC,

Defendants.

CIV. 13-456

MEMORANDUM DECISION: PLAINTIFFS' MOTION TO COMPEL DISCOVERY PLAINTIFFS' MOTION ON CONSTITUTIONALITY OF PEER REVIEW STATUTE SDCL 36-4-26.1 PLAINTIFFS' MOTION AND ARGUMENT CONCERNING HOSPITAL LIABILITY AND NEGLIGENT CREDENTIALLING

This Memorandum Decision shall apply to all cases against Dr. Sossan, Lewis & Clark Specialty Hospital, LLC, Sacred Heart Health Services, Avera Sacred Heart Hospital and Avera Health, or against similar defendants, in all of the following cases:

Judy K. Robertson v. Allen A. Sossan, et al, 66CIV13-118; Kim Andrews v. Allen A. Sossan, et al, 66CIV13-445; Kristi Lammers v. Allen A. Sossan, et al, 66CIV13-456, Valerie Viers v. Allen A. Sossan, et al, 66CIV14-214; Judy K. Robertson v. Allen A. Sossan, et al, 66CIV14-215; Kristi Lammers v. Allen A. Sossan, et al, 66CIV14-216; Kim Andrews v. Allen A. Sossan, et al, 66CIV14-217; Richard Fitzsimmons v. Reconstructive Spinal Surgery and Orthopedic Surgery P.C., et al, 66CIV14-224; Donald Bowens v. Allen A. Sossan, et al, 66CIV14-225; Kelli J. Tjeerdsma v. Allen A. Sossan, et al, 66CIV14-226; Rodney Gene Hrdlicka v. Allen A. Sossan, et al, 66CIV14-227; Leo J. Payer v. Allen A. Sossan, et al, 66CIV14-228; Vanessa Callahan v. Allen A. Sossan, et al, 66CIV14-229; Edward Janak v. Allen A. Sossan, et al, 66CIV14-230; Melvin D. Birger v. Allen A. Sossan, et al, 66CIV231; Thomas R. Hysell, Junior v. Allen A. Sossan, et al, 66CIV14-232; Cathy Kumm v. Allen A. Sossan, et al, 66CIV14-233; Shelly L. Jones-Hegge v. Allen A. Sossan, et al, 66CIV14-234; Ryan Novotny v. Allen A. Sossan, et al, 66CIV14-235; Dawn Anderson v. Allen A. Sossan, et al, 66CIV14-237; Renee Praeuner v. Allen A. Sossan, et al, 66CIV14-238; Bernadine Pinkelman v. Allen A. Sossan, et al, 66CIV14-243; Larry Lieswald v. Allen A. Sossan, et al, 66CIV14-244; Bridget Zweber v. Allen A. Sossan, et al, 66CIV14-245; Audrey Smith v. Allen A. Sossan, et al, 66CIV14-258; Susan Sherman v. Allen A. Sossan, et al, 66CIV14-259; Christa Dejong v. Allen A. Sossan, et al, 66CIV14-263; Laurie Strate v. Allen A. Sossan, et al, 66CIV14-296; Jean Wildermuth v. Allen A. Sossan, et al, 66CIV14-298; Brett McHugh v. Allen A. Sossan, et al, 66CIV14-303; and Valerie Viers v. Allen A. Sossan, et al, 66CIV12-90.

Consequently, this memorandum decision will be filed in each of these cases to which this Judge has been assigned and will be treated as the decision in each case referenced above collectively known as the "Sossan Litigation."

Background

Various Plaintiffs, as set forth in the cases cited above, filed actions against Dr. Allen Sossan, his private medical clinic, Avera Sacred Heart Hospital (ASHH) and Lewis and Clark Specialty Hospital (LCSH) and other Defendants, as named in the various cases, alleging various claims including fraud, deceit, RICO violations, negligence, negligent credentialing, bad faith credentialing as well as other claims. Shortly after this litigation commenced the various Plaintiffs filed discovery requests including extensive interrogatories and requests for production of documents. Defendants responded to those discovery requests providing little useful information to the Plaintiffs, and on numerous occasions objected on the grounds that the materials sought were protected under the South Dakota Peer Review Confidentiality and Privilege statute SDCL 36-4-26.1. The Defendants also filed a motion for summary judgment alleging that the Plaintiffs' claims were barred by the applicable statute of limitations. Defendants claim that Plaintiffs have sued for medical malpractice or otherwise with relation to the delivery of medical services and that such claims are outside the 2 year statute of limitations. The Plaintiffs countered by arguing that their causes of action are not for medical malpractice or the delivery of medical service, but rather allege negligent credentialing of Dr. Sossan, malicious or bad faith credentialing of Dr. Sossan, (asserting that the various Defendants violated their fiduciary duty and that greed was the motive for allowing Dr. Sossan privileges), RICO claims, and other causes of action. At the hearing on the motion for summary judgment this Court ruled that the gravamen of the Plaintiffs claims sounded in fraud and deceit and were not actions for medical malpractice, that alternatively, if the gravamen of the cases are later determined to involve negligent delivery of medical services that the statute of limitations is tolled as genuine issues of material fact existed as to fraudulent concealment, and denied all Defendants' motion for summary judgment on that basis.

Left unresolved at that hearing was the present motion concerning discovery disputes with relation to immunity of peer review members and the privilege and confidentiality of the peer review process. Following the hearing the Defendants requested that this Court make a specific ruling, as to each item of evidence, concerning their Motion to Strike the Affidavits of Counsel[1], and that they be given the opportunity to submit a supplemental brief on the issues presented in this decision. Both of these requests were granted. Plaintiffs were also given an opportunity to reply to the supplemental brief. Substantial briefing has occurred in all of the cases on these issues.

Factual Background

The Court has on this same day ruled upon the Defendants' Motion to Strike the various affidavits of counsel and the exhibits attached thereto, which were filed in response to the Defendants' motion for summary judgment. Plaintiffs' counsel filed affidavits with voluminous

[1] There were 8 affidavits filed, each containing numerous voluminous exhibits consisting of almost 900 pages of materials, consisting of transcripts, scientific/medical journals and national medical data compliations.

attachments. Those affidavits and attachments are the basis of the facts of this decision except as limited by the ruling on the Motion to Strike.

Each Plaintiff or their surviving children have provided their own independent affidavit concerning the facts of their particular case. Each affidavit, in summary, recites a brief history of the Plaintiff's dealings with Dr. Allen Sossan, information they gained about Dr. Sossan since their relationship with him, and a claim that if they would have known of Dr. Sossan's history they would have never allowed him to provide medical services concerning their medical care.

The affidavits also contain information that numerous physicians or other professional health care providers who have subsequently treated most of the Plaintiffs have personally told those patients that the surgeries that Dr. Sossan performed were not necessary, were not justified by the medical tests or were performed improperly.[2]

Dr. Sossan grew up in Florida and attended two post-secondary educational institutions in Florida. While in Florida he was convicted of a felony burglary charge as well as felony bad check charges. Thereafter he changed his name from Alan Soosan to Allen Sossan. After changing his name he applied for and was admitted to medical school, obtaining his Doctor of Osteopathic degree and eventually becoming an orthopedic surgeon.

Ultimately, Dr. Sossan ended up practicing medicine at Faith Regional Hospital in Norfolk, Nebraska. He also owned and operated a clinic business known as Reconstructive Spinal Surgery and Orthopedic Surgery, PC, a New York Professional Corporation. After a short period of time in Norfolk, Nebraska issues began to arise concerning Dr. Sossan's medical care, medical testing practices, and his personality as it reflected on his fitness to practice medicine. He eventually lost privileges at Faith Regional Hospital in Norfolk, Nebraska.

The record discloses that at the same time Dr. Sossan was having problems in Nebraska, ASHH and LCSH began courting him to join their medical facilities in Yankton, South Dakota. By that time, based upon a fair reading of all the information in the exhibits and other information in the numerous Affidavits of Counsel, Plaintiffs believe they can establish that the

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[2] Upon the Court's review of the various materials in response to the motion for summary judgment, the Court has observed that all of the following doctors are quoted by Plaintiffs' as having made a statement that Dr. Sossan's treatment and surgeries were unnecessary or otherwise improper in some manner. The exhibit and page are referenced: Lawrence Rubens; Ex 22; p 15; Patrick Tryance; Ex 22; p 15;John McClellan; Ex 26-27; p 15;Michael Longley; Ex 32; p 16; Dan Wilk; Ex 21; p 16; Quentin Durward; Ex 21, 70; p 16, 37; Dan Johnson; Ex 16; p 18; Robert Neumayr; Ex 16; p 18; Lars Aanning; Ex 16; p 18, 58; Robert Suga; Ex 41, 67; p 21, 35; Dr. Jensen; Ex 49; p 25; Geoffrey McCullen; Ex 50; p 26; Wade K. Jensen; Ex 54; p 27; Brent Adams; Ex 55; p 28; Eric Phillips; Ex 58; p 29; Kynan Trial; Ex 64; p 33; Richard Honke; Ex 64; p 33; Mitch Johnson; Ex 65, 71, 72; p 34, 38; Michael T. O'Neil; Ex 68; p 35; Dr. Bowdino; Ex 68; p 35; Dr. Megard; Ex 74; p 40; Dan Noble; Ex 75; p 41; Gregg Dyste; Ex 76; p 41-42; Wade Lukken; Ex 77; p 42; Kent Patrick; Ex 77; p 42; Bonnie Nowak; Ex 79, p 44; Troy Gust; Ex 81; p 46.

Defendants knew or should have known Dr. Sossan had a terrible reputation among the Northeast Nebraska, Northwest Iowa, and Southeast South Dakota medical community and that there were serious questions as to his fitness to practice medicine. Some of this knowledge was based upon reports from doctors and other medical providers who had worked with Dr. Sossan, and other knowledge is based upon doctors who subsequently treated his patients. Other information came from general discussion among the medical community concerning his competency, demeanor, comportment, professionalism, and medical practice style.

In order to practice medicine in the Yankton area Dr. Sossan was required to obtain a medical license from the South Dakota Board of Medical and Osteopathic Examiners (SDBMOE). He was also required to obtain privileges from the peer review committees of Avera Sacred Heart Hospital (ASHH) and Lewis & Clark Specialty Hospital (LCSH). Ultimately, Dr. Sossan received a license from the SDBMOE. However, with regard to his practicing privileges, initially he was denied same by the peer review committees in Yankton. Because of the fact that no information has been disclosed as to what kind of information the peer review committees considered there is a complete absence of information in the record to document what the peer review committees considered in denying him privileges at that time. Ultimately, after consultation with legal counsel, at least some of the peer review committee members changed their votes to grant Dr. Sossan privileges. According to the information and evidence provided to the court thus far, legal counsel advised the peer review Defendants that if they did not grant Sossan privileges, they would be sued by him. There is a complete absence of evidence in this record at this time indicating that Dr. Sossan had made any claim or threatened any legal action against any Defendant here, or even if so, the basis for such claims.

Within the information submitted by Plaintiffs in response to the motion for summary judgment there is an affidavit from Dr. William B. Winn. Dr. Winn was employed at the Faith Regional Hospital in Norfolk, Nebraska, knew Dr. Sossan, and practiced within that medical facility with him. He was also associated with ASHH in Yankton at that time. He testified in his affidavit that he was aware of serious issues regarding Dr. Sossan and that these issues were well known among the Faith Regional Hospital administration and management. He testified that he has personal knowledge that Dr. Sossan falsified patients' medical charts in order to justify unnecessary medical procedures on his patients, among other serious concerns with regard Dr. Sossan. Most importantly for this case, Dr. Winn testified in his affidavit that when he learned of Dr. Sossan's attempt to secure medial privileges in Yankton he personally intervened to report these serious concerns regarding Dr. Sossan, and his firm opinion that Dr. Sossan posed a danger to the public. He claims he talked directly to Dr. Barry Graham, MD, (who held a position on one of the peer review boards), about these serious concerns and that he strongly encouraged that Sossan not be granted privileges.

Other physicians have given testimony in malpractice cases against Dr. Sossan that question his fitness as a licensed physician. For example, Dr. Robert Suga, and orthopedic surgeon of Sioux Falls, testified in a deposition that in his opinion Dr. Sossan performed

unnecessary surgeries with the motive of generating bills and income for himself. (Affidavit of Counsel, Exhibit 41) Dr. Quentin Durward, an orthopedic surgeon from Dakota Dunes, had similar opinions and findings with his patients treated subsequent to Dr. Sossan. See Affidavit of Plaintiff's Counsel. In general, Plaintiffs have amassed a significant amount of evidence that, if proven to be true at trial, would raise a serious question if Dr. Sossan should have never been licensed, granted privileges, or that when he was, action should have been taken promptly to revoke or restrict his privileges, and that any reasonable person responsible for his medical practice supervision should have known he may have posed a danger to patients and taken appropriate action. This court finds such to be the case even after screening out and ignoring the strong characterizations put upon the facts by the Plaintiffs. (See generally the various Affidavits of Plaintiff's Counsel, Plaintiff's Brief in Opposition to Defendant's Motion For Judgment on The Pleadings, Dated October 30th, 2014, and Plaintiff's General Recitation of Facts Regarding Various Motions Set for Hearing, Dated October 23rd, 2014.)

According to the evidence presented by the Plaintiffs thus far, soon after Dr. Sossan was granted privileges in Yankton, issues and complaints began to arise that should have made it obvious to doctors and other persons in the medical field that there was a serious and substantial question as to Soosan's fitness, competency and ability to practice medicine in his specialty prompting further inquiry. Numerous witnesses have provided affidavit testimony that they personally reported, (some on an anonymous basis), Dr. Sossan's problems to the SDBMOE and to the peer review Defendants in this case. Other witnesses observed assaultive behavior and claim to have reported those incidents. Minutes of Lewis & Clark Specialty Hospital, submitted in response to the Summary Judgment Motion, show that Dr. Sossan's problems and credentials were discussed. Those minutes also show that prior to Dr. Sossan being hired LCSH was required to borrow $200,000 for certain capital expenditures. Following the hiring of Dr. Sossan minutes reflect the business was declaring dividends for its physician members.

According to the evidence submitted by the Plaintiffs, despite the fact that there were numerous complaints and much discussion among the medical community about Dr. Sossan, no action was taken to limit, modify, or otherwise terminate his privileges in the Yankton medical community by those who had the authority to do so.

Plaintiffs retained an expert on medical credentialing and patient safety by the name of Arthur Shore. Mr. Shore is a well credentialed and heavily experienced health care administrator. He has a degree from George Washington University School of Public Health and Health Services. He is a life fellow of the American College of Health Care Executives and is a board certified hospital administrator. He has served as a member of the board of trustees of a number of hospitals and health care institutions across the country. He has authored numerous articles in nationally recognized peer-reviewed professional healthcare administration journals. He has testified concerning health care liability as a qualified expert in legions of cases throughout the country.

Mr. Shore submitted an expert report in this case (Exhibit 15). In that report he states:

"the behavior of the governing body, senior leadership including the chief executive officers, and the medical leaderships clearly reflected willful, wanton, and malicious disregard of the standards of care and administrative community standards applicable to the initial granting privileges and credentials, as well as the subsequent renewal of Sossan's privileges at the hospitals in spite of readily available incontrovertible evidence that Sossan was a convicted felon, engaged in acts of moral turpitude, was unable to work collaboratively with other professionals, performed unnecessary surgery, and lacked the competence to safely perform spine surgery." He goes on to conclude "the complex and compounding failures imposed on unsuspecting patients who relied on the hospital in this regard, commencing with the failure to disqualify an applicant with demonstrable moral turpitude, a convicted felon, failure to conduct proper due diligence and original source information, portion of medical staff leadership recommend granting privileges for inappropriate reasons, failure to initially proctor and monitor Sossan's surgical competence and interpersonal behavior, failure to monitor his disproportionately voluminous surgical escapades, and interpersonal interaction with hospital staff and colleagues, all of which contributed to inflicting serious injuries to patients served by the hospitals, demonstrate gross and wanton disregard for the fiduciary duty obliged of the governing bodies to the communities and in specific the patients they serve."

Numerous other applicable facts will be discussed when necessary in this Decision.

Analysis

The Plaintiffs' main theory of liability in this case is that the Defendants conspired to improperly grant Sossan privileges in violation of their fiduciary duty out of a sense of greed and in disregard of the rights and safety of their patients. They allege that the Defendants committed fraud and deceit upon their patients and the public in doing so. The voluminous record here shows that there were questions presented which indicated that Dr. Sossan was a convicted felon and otherwise indicate he may not have been suitable to be licensed as a physician or granted privileges at either of Defendant medical facilities. Later, administrative action against his medical license in Nebraska had been commenced based upon his activities in Nebraska. Ultimately, Dr. Sossan gave up his license in Nebraska. Numerous lawsuits have been filed against him for malpractice, which he has either substantially lost or settled, including cases in South Dakota and Nebraska. Plaintiff's claims are based primarily upon the theory of improper, negligent and/or bad faith credentialing and fraud, among other claims.

In order to proceed on the various discovery requests based upon this theory, the court must first determine if a new cause of action for wrongful credentialing is or will be recognized in South Dakota.

Is Wrongful or Improper Credentialing a Valid Cause of Action in South Dakota?

The Defendants argue in their briefs that Plaintiff's attempt to obtain the peer review information fails because South Dakota does not recognize a cause of action for negligent or bad faith credentialing. The Defendants argue that the South Dakota Supreme Court "strongly endorsed the effect of the peer review privilege" in *Shamburger v. Beherns*, 380 N.W.2d 659 (SD 1986), and that the court "found the privilege bans the prosecution of an improper credentialing claim"[3]. *Shamburger* was a run of the mill malpractice claim where the plaintiff claimed that Dr. Beherns was an alcoholic or otherwise afflicted with habitual intemperance. Shamburger filed suit against the doctor and the hospital for negligence. The entirety of the Court's analysis in Schamburger on that issue is as follows:

> "Shamburgers also claim error in the granting of summary judgment for Hospital. In their claim against Hospital, Shamburgers alleged Hospital was negligent in allowing Behrens to remain on staff. Shamburgers claim Hospital knew or should have known Behrens had a drinking problem and was incompetent, which manifested itself in a problem with Elston's care.
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> "The trial court held that the evidence, viewed in the light most favorable to Shamburgers, presented no evidence to show Hospital knew or had any reason to believe that Behrens was incompetent, and that Hospital had not breached any of its medical staff review procedures.
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> In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally. *Fjerstad, supra.* We note that hospital records concerning staff competency evaluations are not discoverable materials. SDCL 36-4-26.1. Shamburgers cannot obtain the records which would show whether or not the hospital considered or knew of Behrens' drinking problems when Hospital considered his staff privileges. The trial court was correct in determining that Shamburgers had presented no evidence pertaining to Hospital's alleged negligence. Mere allegations in the pleadings cannot thwart summary judgment. *Boone v. Nelson's Estate,* 264 N.W.2d 881 (N.D.1978). Once the motion has been made and supported, the nonmoving party has the burden of showing a genuine issue exists for trial. *Olesen v. Snyder,* 249 N.W.2d 266 (S.D.1976). Trial court found, and we agree, that Shamburgers presented no evidence to support an issue for trial."

The only ruling that *Shamburger* made with respect to privileged records concerned the Plaintiff's request to obtain Dr. Behern's alcohol treatment records from another provider. The

[3] See joint brief, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC Joint Supplemental Brief in Opposition to the Various Plaintiffs' Motion For Summary Judgment on the Constitutionality of SDCL36-4-26.1, Dated May 11th, 2015 and filed with the Court.

court ruled those records privileged by the physician - patient privilege, and the peer review privilege was not analyzed or mentioned in that part of the Courts analysis. This Court is hard put to find that the above analysis in *Shamburger* is a "strong endorsement" of peer review generally or that South Dakota's peer review statute "bans" a claim of improper credentialing. Improper credentialing was not at issue in Shamburger as it was not pleaded as a cause of action, rather it was a claim of general hospital negligence. SDCL 36-4-26.1 is cited by the Court in its analysis, but it does not appear from reading the above passage that plaintiff's counsel made any argument that the trial court erred in not granting the plaintiff access to the peer review information. That question does not appear to have been presented. Further, Shamburger did not involve claims as are presented in the cases presently before this court where the Plaintiffs allege fraud, deceit, bad faith or RICO claims against the peer review committees involving the peer review process. *Shamburger* does not directly address, approve or reject improper credentialing claims, nor does it directly address the issue of discovery of peer review materials. *Shamburger* does not help the Defendants here and the court is not persuaded that it has much applicability, if any at all, to the present cases.

The Plaintiff's rely upon a number of cases from around the country to support their argument that in a case similar to that presented to this court, that negligent or improper credentialing is a well-recognized cause of action in a majority of states. It does not appear that the South Dakota Supreme Court has had the opportunity to address the issue directly.

This Court has carefully considered legions of cases on improper credentialing and is much persuaded by the authorities and arguments within pages 17 through 21 of the Plaintiffs Brief In Support Of Motion To Compel and Motion for Partial Summary Judgment On The Constitutionality of The South Dakota Peer Review Statute, SDCL 36-4-26.1, which is dated October 23rd, 2014 and filed the same date. Footnote 4 of that brief contains a sample list of cases from a wide variety of jurisdictions that have adopted the theory of improper credentialing claims (all of which this court has carefully read and considered) and these cases, although interpreting different statutory language in many forms, are based upon sound reasoning, analysis and policy considerations.

In *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) the Montana Supreme Court took up the issue for the first time. In approving the cause of action in Montana the Court found that modern medical practices have changed the landscape where new principals can and should be applied. They stated that "When asked to recognize a new cause of action, the Court will review "our own caselaw and the authorities from other jurisdictions" to determine if the "gradual evolution" of the common law supports recognition of the new claim." (Citing *Sacco,* 271 Mont. at 220, 234, 896 P.2d at 418, 426.). In their analysis they reviewed a case from 40 years prior and went on to state:

"However, in doing so, we acknowledged that the rise of the "modern hospital" imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges:

> [T]he integration of a modern hospital becomes readily apparent as the various boards, reviewing committees, and designation of privileges are found to rest on a structure designed to control, supervise, and review the work within the hospital. The standards of hospital accreditation, the state licensing regulations, and the [hospital's] bylaws demonstrate that the medical profession and other responsible authorities regard it as *212 both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.

Hull, 159 Mont. at 389, 498 P.2d at 143. This reasoning is even more persuasive 40 years later, with the development of hospitals into "comprehensive health care" facilities. *Butler,* ¶ 41 (citation omitted)."

To move on this court must determine, in a case of first impression, if the South Dakota Supreme Court would join a majority of other states/jurisdictions that adopt a new cause of action for improper credentialing. Based upon this Court's review of the law and the briefs presented in these cases it appears that South Dakota has all the necessary legal precedents as ingredients other courts have found prerequisite to adopting such a claim including a hospitals duty of care for patient safety, ("In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally", *Shamburger,* ¶8), as well as the concepts of negligent hiring and/or negligent selection of independent contractors. *Kirlin v. Halverson,* 758 NW2d 436 (SD 2008).

Additionally, when read in the negative, the South Dakota peer review statute tends to support such a claim. At least in part, liability against the Defendants here, with respect to the improper credentialing claims, is governed by SDCL 36-4-25. That statute provides:

> There is no monetary liability on the part of, and no cause of action for damages may arise against, any member of a duly appointed peer review committee engaging in peer review activity comprised of physicians licensed to practice medicine or osteopathy under this chapter, or against any duly appointed consultant to a peer review committee or to the medical staff or the governing board of a licensed health care facility for any act or proceeding undertaken or performed within the scope of the functions of the committee, **IF** the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, and acts in reasonable belief that the action taken is

warranted by those facts. The provisions of this section do not affect the official immunity of an officer or employee of a public corporation. (Emphasis added by Court).

Malice is defined as:

> "Malice is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.
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> Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill will toward that person. Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other's rights. Hatred or ill will is not always necessary." Source South Dakota Pattern Jury Instruction 50-100-20.

"A claim for presumed malice may be shown by demonstrating a disregard for the rights of others." *Flockheart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991).

This Court's reading of the peer review immunity statute cited above indicates that peer review committees are immune **IF** they meet the conditions subsequent as laid out in the statute. In other words, they are immune if they act without malice, if the committee has made a reasonable effort to obtain the facts of the matter under consideration, and if they act in reasonable belief that the action taken was warranted by those facts. A similar finding has been made in the context of physicians bringing action against the peer reviewers by the courts applying the Health Care Quality Improvement Act: "the consequence of failing to satisfy the standards of 42 U.S.C.A. § 11112(a) is merely that the peer reviewers lose the immunity provided by the Act". Construction and application of Health Care Quality Improvement Act, 121 A.L.R. Fed 255, §2.

Consequently, according to this Court's interpretation of the statute, if it can be preliminarily established that a peer review committee acted maliciously or in bad faith, if they failed to make a reasonable effort to obtain the facts of the matter under consideration, or if they act unreasonably based upon those facts, the immunity disappears and there is a cause of action that can be brought against members of a professional peer review committee for the improper credentialing. This interpretation is consistent with most other jurisdictions that have adopted the theory of improper credentialing.[4] Consequently, this Court finds that wrongful or improper

[4] It may be argued that the last half of SDCL 36-4-25 was intended only to protect peer review members from suit filed by physicians who were denied privileges, which can be tied into the primary policy behind the peer review immunity statute so as to promote a free and open dialogue when discussing and deliberating peer review matters with other members. However, nothing in the plain language of the statute limits the scope of the statute to those circumstances. If that was the intent of the legislature, language could have easily been added to limit the applicability of the exception.

credentialing is a valid cause of action in South Dakota and that our Supreme Court would most likely adopt this new common law theory as a basis for recovery based upon existing law and the facts that have been thus far presented in this case.

Is South Dakota's Peer Review Privilege Statute, SDCL 36-4-26.1, Absolute?

The South Dakota peer review confidentiality and privilege statute is set forth in SDCL 36-4-26.1, which provides:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

In the event a sufficient preliminary showing is made to avoid the immunity provided for in SDCL 36-4-25, common sense directs that a plaintiff must be able to obtain some information about how the peer review committee did its work. Without such information it would be impossible to determine if the committee "made a reasonable effort to obtain the facts of the matter under consideration" or otherwise if the peer review committee acted with malice or otherwise improperly. The Defendants here have argued that the statute is constitutional, is absolute, and that there are no exceptions. The Plaintiffs have argued persuasively that to accept the defendants assertion that peer review information is absolutely privileged and confidential no matter what the basis for the need or claim for such information, whether by law enforcement, the government, or private litigants, would eviscerate the entire last clause of SDCL 36-4-25 and leave the peer reviewers to do as they please behind a cloak of absolute privacy.

Viewed in the light most favorable to the Defendants here, the facts in the present cases clearly show that the peer review committees involved had certain factual information concerning Dr. Sossan that warranted a denial of privileges, and in fact, it appears from this record that is how they initially voted. Dr. Anning, a retired physician from the Yankton community, interviewed and recorded Dr. Neumayr, who sat on the peer review committee at

ASHH concerning Dr. Sossan. It has not been argued that the recording of that conversation was illegal, but it has been argued that the substance of the conversation being used here, by its self, violates the peer review privilege statute.[5] That conversation discloses that the peer review committee had information that Dr. Sossan should not have been credentialed and initially voted to deny privileges. According to the evidence and that recorded conversation the peer review committee consulted with Avera Health's legal counsel who advised them that if they did not credential Sossan they would be sued by him.[6] It was only after this conversation with counsel that another vote was taken and Dr. Sossan was granted privileges.

Furthermore, during the interview Dr. Neumayr told Dr. Anning that despite the fact that the committee had denied him privileges, one of the administrators of ASHH had legal counsel for Avera attend a meeting to persuade the committee to grant Sossan privileges because ASSH and LCSH needed him, and that in his opinion at least one peer review member would lie about the matter if when comes to court. (Exhibit 16 A to First Affidavit of Counsel).

According to Plaintiffs, this discussion ensures that the Defendants in this case will perjure themselves at trial and during discovery. The court notes that this discussion raises substantial concerns in that regard. However, this court tempers that concern with the understanding that there is a lack of evidence to support the opinion of the person being interviewed (Dr. Neumayr) to establish the person mentioned will lie about anything. It is a matter of speculation on the part of the declarant at this point in time, but the concern is nonetheless raised by his comment.

SDCL 36-4-26.1 provides a very broad grant of privilege and confidentiality to peer review materials generally, and leaves little room for judicial interpretation. Consequently, if this court is correct that South Dakota will adopt a cause of action for wrongful or improper credentialing and that SDCL 36-4-25 implies such a cause of action, this Court must determine if the plaintiff in such as case has access to any information from the peer review committee to determine if the peer review members acted improperly or with malice, bad faith, fraud or deceit. Plaintiffs argue that because of this conflict between the statutes the peer review privilege statute can otherwise be overcome by a newly recognized exception, but if not, it is unconstitutional.

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[5] Based upon the ultimate ruling in this decision the Court finds that it does not violate the privilege. Furthermore, there is authority that a physician who participates in the peer review process may voluntarily disclose peer review information, see: Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 A.L.R.4th, 1273.

[6] As previously stated, there is a complete absence in the present record of any evidence that any of the Defendants here had been threatened with any legal action by Dr. Sossan at the time counsel for Avera allegedly made these statements or gave this advice.

Courts in other states have found exceptions applicable to the peer review privilege under certain circumstances, including when the peer reviewers have acted improperly or when the court finds that the privilege is applied in a manner that is contrary to public policy.[7]

Many courts have held that peer review materials are absolutely privileged, but that in order to establish liability in a case of wrongful credentialing, the plaintiffs can rely upon independent source information. Suffice it to say that after this court has read many cases on the topic, one conclusion is clear: depending upon the precise statutory language, the particular facts and circumstances presented in the case, and the precise type of information or reports at issue, the courts are all over the board as to whether independent source information is privileged or not privileged and how it can be used. For an excellent summary of those issues this court has relied upon, see Scope and Extent of Protection From Disclosure of Medical Peer Review Proceedings Relating To Claim in Medical Malpractice Action, 69 A.L.R.5th 599 (1999); *see also, Trinity Medical Center v. Holum*, 544 NW2d 148 (ND 1996) at ¶7 ("the caselaw interpreting these widely varying statutes has been described as 'creating a crazy quilt effect among the states'"). During the hearing on this matter and in their supplemental brief the Defendant's seemed to take the position that IF South Dakota adopts improper credentialing as a cause of action under an extension of the common law, the Plaintiffs would be allowed to use some independent source information to prove their claims.[8] This leaves several questions remaining: what type of independent source information would be privileged and what would not? Can the Defendant's then rebut such evidence by using the privileged peer review materials? If not, does the privilege statute "make it impossible for a hospital to defend against such a claim" (*Wasemiller, infra.*)? Is there a point in the process where the Defendants may open the door so that all peer review materials become relevant, discoverable and admissible at trial? If the answer to the latter question is yes, then how long will the trial be delayed to allow

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[7] As quoted in 41 C.J.S Hospitals, §16: "The peer review privilege is intended to benefit the entire peer review process, not simply the individuals participating in the process.[33] Moreover, the statutory privilege for communications on the evaluation of medical practitioners is qualified, rather than absolute, and may be defeated by proof that the person or entity asserting the privilege, when it made the communication, knew the information was false or otherwise lacked a good faith intent to assist in the medical practitioner's evaluation.[34]

The failure of a professional peer review to comply in full with applicable bylaws does not render the fact-finding process unreasonable.[35]

In some states, the peer review process is considered an administrative action.[36] A court is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determine if the administrative decision is premised upon an erroneous conclusion of law; the court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record.[37] However, there is no absolute prohibition of judicial review of hospital peer review decisions, and although courts may not have jurisdiction to review purely administrative decisions of private hospitals, courts do have jurisdiction to hear cases alleging torts, breach of contract, violation of hospital bylaws, or other actions that contravene public policy." (emphasis added)

[8] See, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC's Joint Supplemental Brief In Opposition to the Various Plaintiff's Motion For Summary Judgment on the Constitutionality of SDCL 36-4-26.1 ,at pp 6-7.

Plaintiffs sufficient time to review the materials and prepare to present further evidence? Up to this point, the Defendants have argued very broadly that all information touching upon the peer review process is protected by the privilege and that the court can determine what independent source information is admissible evidence. Rulings on specific items of evidence in this regard are best left for another day when a more complete record can be made.

Cases presented in the briefs by the parties which have found exceptions to the peer review privilege allow information from opposite ends of the spectrum and in between. In *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001) the court held that only the final action or result (modification, restriction, termination of privilege) taken as a consequence of peer review proceedings are discoverable and admissible. *In Estate of Krusac v. Covenant Medical Center*, (cited by Defendants in their supplemental brief and quoted without citation) the Michigan Supreme Court ruled that the scope of the privilege was broad but not without limits and concluded that "objective facts" within the peer review materials were privileged. In contrast to the above cases, in *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987) the Wyoming Supreme Court appears to have gone the opposite direction and ruled that the privilege protects the "internal proceedings" (the deliberative process) but does not "exempt from discovery materials which the committee reviews in the course of carrying out its function, nor action which may be taken thereafter." In *Greenwood*, the court went on to provide that "in short, privileged data does not include the materials reviewed by the committee, only those documents produced by the committee as notes, reports and findings in the review process". Id. At 1089.

This Court has been most persuaded by the rationale in *Greenwood* as persuasive authority. The purpose of the peer review privilege has been stated may times in the cases presented in the briefs as promoting a policy to allow candid and open discussions among peer review committees to encourage doctors to engage in the process so as to *improve the delivery of health care*. Doctors were reluctant to do so in the past for fear of being ostracized from other practitioners, losing patient referrals, and subjecting themselves to lawsuits. In order to encourage doctors to participate in the process and improve the delivery of health care, the law gave them immunity from lawsuits and protected their files and deliberations from discovery, use at trial, or dissemination. That information consists of both objective facts and the subjective deliberations and comments of the participants. SDCL 36-4-25 grants them immunity if they make a reasonable effort to obtain the objective facts concerning the matter under consideration. It makes little sense to put the objective facts beyond the reach of allegedly injured patients or others when the primary intent of the law is to protect the private comments and deliberations of the committee, especially in light of the language of the immunity statute. In a case such as this the information they had and the decision they reached are the crux of the case and go to the heart of the issue.

In the end, carving out an exception to the peer review privilege is a matter of first impression in South Dakota. This Court is reluctant to carve out a new exception, (other than to adopt the independent source rule which Defendants have agreed upon), without statutory or

other binding precedent. Although adopting the holdings in *Greenwood*, supra, is inviting to this Court, there are also good reasons to adopt any of the many other doctrines laid out in cases from a multitude of other jurisdictions. Consequently, this Court rules that the peer review privilege is absolute and subject only to the independent source exception and the crime fraud exception discussed further below.

The Constitutionality of SDCL 36-4-26.1

Is SDCL 36-4-26.1 Unconstitutional As Not Being Rationally Related To a Legitimate Governmental Purpose?

The Plaintiffs have argued that the privilege statute is unconstitutional because it is not rationally related to the purpose for which it was enacted, that being to encourage physicians to deliberate and discuss the abilities and qualifications of other physicians in an open and candid forum with the ultimate goal of improving health care services overall. By making such information privileged and confidential, more physicians would participate in the process and when they did, they would be more honest. The overall policy of the group of statutes passed in the mid to late 1970s to protect the peer review process and the medical industry in this regard was previously considered by the South Dakota Supreme Court as a state "interest in preserving and promoting adequate, available and affordable medical care for its citizens" and was upheld within the context of the medical malpractice damages cap. *Knowles*, 1996 SD 10, 544 N.W.2d 197.

The Plaintiffs have submitted substantial scientific and medical peer reviewed articles, journals and data compilations in support of their argument which were attached to the various affidavits of counsel and argued in their briefs. These articles were allowed and not stricken in the court's ruling on that matter as they are relevant to the argument here. Those articles and journals are from nationally recognized publications relied upon by the medical industry as a whole and conclude that peer review immunity, and granting privilege to all information considered by peer review committees, has harmed the overall goal of improving the safe delivery of medical care and patient safety, as opposed to improving it. The Plaintiffs argue that by denying them access to critical evidence for their cases, the statute violates their right to due process by putting relevant evidence beyond their reach because of a statute that is not rationally related to its intended purpose.

There is a strong presumption that the laws passed by the legislature are constitutional and the presumption is only rebutted when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. *Green v. Siegel Barnett & Schutz*, 1996 SD 147 ¶7, 557 N.W.2d 396, 398. The plaintiffs must demonstrate that the statute does not bear a "real and substantial relation to the objects sought to be obtained" *State v. HyVee Food Stores, Inc.*, 533 N.W.2d 147, 148 (SD 1995).

The scientific/medical data articles submitted by the Plaintiffs and the facts presented and as characterized by the Plaintiffs here cast a dark shadow over the peer review process. Some of the articles submitted by the Plaintiffs bring the legitimacy of confidential and privileged peer review process into serious doubt. However, the policy behind the concept of encouraging physicians to participate in a candid open discussion about the competence of their colleagues and the safety of their patients is a matter of legislative prerogative. If there is some question among the medical industry on a national basis as to the effectiveness or legitimacy of the previously adopted legislative policy, that is an issue best left to the legislature and not the courts. This court finds that the plaintiffs have not clearly, palpably and plainly shown that the statute does not bear a real and substantial relationship to furthering the objective of encouraging physicians to participate in a candid and open discussion as to their colleagues' competence. The Plaintiff's motion in this regard is denied.

Does SDCL 36-4-26.1 Violate the South Dakota Open Courts Provision?

Plaintiffs claim that the statute, if applied broadly without exception, denies them the right to due process and access to the courts under Article VI §20 of the South Dakota Constitution . It does so, they argue, by depriving them of the best and most relevant information to establish their claims of fraud and deceit or that the peer review committees here acted improperly or in bad faith.

It has been held that the Open-court's provision of the South Constitution cannot become a sword to create a cause of action or become a shield to prohibit statutory recognized barriers to recovery and cannot be interpreted to overcome the doctrine of sovereign immunity. *Hancock v. Western South Dakota Juvenile Services*, 647 N.W.2d 722 (SD 2002).

Restrictive statutes of limitations in favor of medical providers, accountants and lawyers have been found to be within the legislature's prerogative, and although limiting a plaintiff's ability to take their case to court, do not violate the open courts provision. *Peterson v. Burns*, 635 N.W.2d 556 (SD 2001); *Witte v. Godley*, 509 N.W.2d 266 (SD 1999) and *Green v. Siegel Barnett*, 557 N.W.2d 396 (SD 1996). Statutes limiting damages in medical malpractice cases similarly have been found not to violate the open courts provision. *Matter of Certification of Question of Law from US Court of Appeals for the Eighth Circuit*, 544 NW2d 183 (SD 1996) and *Knowles v. US*, 544 NW2d 183 (SD 1996).

All parties here rely upon cases from other states to support their position that denying access to peer review materials in discovery does or does not violate constitutional rights. The Defendants argue that despite the fact that the materials are not available for Plaintiff's use in preparation or for trial, the door to the courtroom remains open for the Plaintiffs. The Plaintiffs argue that in the case of fraud, deceit or wrongdoing by the Defendants, depriving them access to the most relevant and material evidence in the case is tantamount to closing the courthouse door, especially when hospitals and clinics are allowed to shelter the evidence of their wrongdoing

behind a cloak of secrecy. Both parties rely upon *Larson v. Wasemiller*, 738 NW2d 300 (Minn. 2007) to support their arguments.

Wasemiller involved a medical malpractice action where the Plaintiff claimed that the hospital was negligent in credentialing the physician defendant. After adopting the cause of action for negligent credentialing the court had to determine if the new cause of action conflicted with the Minnesota peer review privilege statute, which is quite similar to its South Dakota counterpart. The Minnesota Supreme Court found that the privilege statute did not conflict with the newly recognized tort of negligent credentialing but did consider the problems associated with a case when the trial is focused on what facts the peer reviewers actually considered in making their decision. As to the more precise issue of whether the peer review privilege statute denied due process, the Court concluded that the "confidentiality provisions of the peer review statute do not preclude the presentation of evidence in defense of a negligent-credentialing claim" and "that the confidentiality provision is not facially unconstitutional". They left "for another day the question of whether circumstances might arise that would render the provision unconstitutional as applied". *Wasemiller*, ¶15. Consequently, *Wasemiller* left the issue unresolved.

Plaintiffs have relied upon *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996). This case provides the most comprehensive analysis of the interplay between the privilege/confidentiality statute and the constitutional claims that denying plaintiffs access to the peer review materials violates due process and access to the courts. In the end, the Kansas Supreme Court was required to balance the various interests at stake. In finding the privilege/confidentiality statute unconstitutional the court stated:

> In the present case the legislature granted a peer review privilege to health care providers to maintain staff competency by encouraging frank and open discussions and thus improving the quality of medical care in Kansas. We must weigh that privilege against the plaintiffs' right to due process and the judicial need for the fair administration of justice. There can be no question that in granting the privilege, the legislature did not intend to restrict or eliminate a plaintiff's right to bring a medical malpractice action against a health care provider. To allow the hospital here to insulate from discovery the facts and information which go to the heart of the plaintiffs' claim would deny plaintiffs that right and, in the words of the federal court, "raise significant constitutional implications." 129 F.R.D. at 551. The constitutional implication was stated by this court in *Ernest v. Faler*, 237 Kan. 125, 131, 697 P.2d 870 (1985):
>
> > "The right of the plaintiff involved in this case is the fundamental constitutional right to have a remedy for an injury to person or property by due course of law. This right is recognized in the Kansas Bill of Rights § 18, which provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay." *Adams*, Id, ¶16

The Plaintiffs argue that an overly broad application of SDCL 36-4-26.1 violates due process and the open courts provision unless an exception applies or it is judicially reformed to comply with due process.

In *Moretti v. Lowe,* 592 A.2d 855, 857–858 (R.I.1991) the Rhode Island Supreme Court also addressed the issue and concluded:

> "In enacting our peer-review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance."

A similar ruling was made in *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1997) (finding Kentucky's privilege statute facially unconstitutional because there was no relationship between peer review privilege and quality health care)

Consequently, based upon this Courts review of the numerous authorities, it has concluded that Courts have found that a plaintiff's right to discover material in the peer review files is based upon a finding that the privilege/confidentiality statute is unconstitutional or an exception has been judicially created. This court must, if possible, interpret the statute reasonably to find it constitutional. *In Re Davis*, 681 NW2d 454 (SD 2004). As a result, this Court finds that SDCL 36-4-26.1 is not unconstitutional, but in order to reach that result, an exception must be applied in a reasonable fashion, based on existing law, to allow Plaintiffs access to the information and evidence that forms the crux of their cases. The Plaintiff's Motion for Summary Judgment declaring SDCL 36-4-26.1 unconstitutional in violation of the South Dakota Open Courts Provision is denied.

The Crime-Fraud Exception

Courts have long held that privileges applied to evidence and information are subject to various exceptions when the privilege or confidentiality provision is abused. Most cases apply to the attorney-client privilege, but the same or similar concepts have also been applied to other privileges and circumstances. Further, it has long been repeated that privileges created by statute are to be strictly construed to avoid suppressing otherwise competent evidence." *State v. Catch the Bear,* 352 N.W.2d at 640, 646-47[9]. Evidentiary privileges in litigation are not favored and

[9] *Catch the Bear* also quoted the US Supreme Court: "The United States Supreme Court has forcefully supported strict construction: 'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'" *United States v. Nixon,* 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974).

even those rooted in the Constitution must give way in proper circumstances. Herbert v. Lando, 441 U.S. 153 (1979).

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting). Accord, *United States v. Nixon*, 418 U.S. 683, *51 709–710, 94 S.Ct. 3090, 3108–3109, 41 L.Ed.2d 1039 (1974). *Trammel v. United States*, 445 U.S. 40,50 (1979) All privileges limit access to the truth in aid of other objectives but virtually all are limited by countervailing limitations. *United States v. Textron*, 577 F.3rd 21,31 (1st Cir. 2009)

One of the most significant historical privileges found to have an exception was the juror privilege against being compelled to disclose deliberations and comments among the jurors. In *Clark v. United States*, 289 U.S. 153 S.Ct. 465 77 L.Ed. 993 (1933), a juror was suspected of fraud and deceit upon the trial court for perjuring herself during jury selection. In *Clark* the court considered similar policy considerations supporting juror privilege that form the basis of peer review privilege. The court found that "freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid". *Clark* went on to find that "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy."

Clark went on to find that the privilege does not apply where "the relation giving birth to it has been fraudulently begun or fraudulently continued". The *Clark* Court continued: "The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth."

The Presidential executive privilege was also found to be subject to an exception in *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, *(1974)*. In *Nixon* the Special Prosecutor sought information from the President of the United States that was clearly protected by executive privilege. The *Nixon* court found that "the President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises..." In finding that the executive privilege was not absolute, the *Nixon* court decided that the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *Id.*

The attorney-client privilege, one of the most guarded privileges in history, is also overcome upon a proper showing. *State v. Catch the Bear,* 352 N.W.2d at 640, 646-47. All jurisdictions recognize the exception. The Eight Circuit Court of Appeals has recognized the exception on numerous occasions. *In Re BankAmerica Corp. Securities Litigation,* 270 F.3d 639, 50 Fed.R.Serv.3d 1336 *(8th Cir, 2001)* ("The attorney-client privilege encourages full and frank communication between attorneys and their clients so that clients may obtain complete and accurate legal advice. But the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing. Thus, it is well established that the attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin,* 491 U.S. 554, 563, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989))

The spousal privilege has also been subject to exceptions when crime or fraud are properly asserted. At one point in history it too was considered absolute. In finding an exception to the spousal privilege, in *Trammel v. United States,* 445 U.S. 40,50 (1979) the court stated:

> "No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.
>
> The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime." *Trammel* at 51-52

Numerous other courts have found that in various circumstances that the crime-fraud exception applies not only in criminal cases but in various civil tort cases. Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

On a limited basis, the South Dakota Supreme Court has ruled that the attorney-client privilege is overcome in civil cases involving claims of insurance bad faith. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity,* 2009 S.D. 69, 771 N.W.2d 623.

The plaintiffs have argued here that these traditional privileges above described are rooted deeply in either our constitution (attorney-client privilege) or otherwise in American jurisprudence, and that the peer review privilege/confidentiality statute, SDCL 36-4-26.1, is of modern creation (adopted in 1977) with shallow roots. They argue strenuously that the policy considerations behind the privilege are unsound and consequently erode the strength of such privilege. They further argue that the peer review privilege should be more susceptible to an exception than those more deeply rooted exceptions. Without agreeing that the policy behind the privilege is questionable, the court finds this argument and reasoning sound. There is no compelling or otherwise sufficient basis offered by the Defendants here showing why the crime-fraud exception should not apply to the peer review privilege or that it should be treated any differently that other more firmly rooted privileges. In the appropriate case, like the present case, the balancing required by the law tips in favor of overcoming the privilege and disclosure of the information. All other privileges have been eroded in such a manner. Granted, there is sound policy behind the privilege in facilitating frank and honest discussion among peer review members. However, in certain circumstances, when claims of fraud or deceit are properly presented, the courts have a duty and obligation to allow claimants access to crucial and important evidence. If the privilege in such a case is not overcome, imprudent decisions and wrongdoing in the peer review process would never be brought to light and patient safety and the delivery of medical care would suffer in contravention of the stated public policy. Furthermore, without such an exception to counterbalance the privilege, the statute could be rendered unconstitutional. *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996).

By not allowing access to this information there is no way for a plaintiff, or anyone else for that matter, to determine if the peer review committee members acted without malice; if the peer review committee made a reasonable effort to obtain the facts of the matter under consideration; or if the peer review committee acted in reasonable belief the action taken was warranted by those facts. Without giving Plaintiffs access to this important peer review information, the second clause of the first sentence of SDCL 36-4-25 is rendered completely meaningless and the legislature would have been well served to end that sentence as such: "within the scope of the functions of the committee." The legislature obviously did not do so. They made peer review immunity conditional upon following the rules. These committees owe a substantial and important fiduciary obligation to the entire community, and in order for the public to be satisfied that they are properly carrying out that important fiduciary obligation, when the appropriate case arises, the plaintiffs should have access to the information to make sure the legislative intent as expressed in the statute is upheld.

This Court rules that the peer review privilege, SDCL 36-4-26.1, is not absolute, but is subject to the long recognized crime-fraud exception.

However, the analysis does not stop there. In *Clark* the Supreme Court recognized that it would be absurd to say that the privilege "could be got rid of" merely by making a charge of fraud. (citing, O'Rourke v. Darbishire, (1920) A.C. 581, 604). Clark went on to rule that "there must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in". Clark further stated "To drive the privilege away, there must be 'something to give colour (sic) to the charge'; there must be 'prima facie evidence that it has some foundation in fact."

In *US v. Zolin,* the Supreme Court clarified the procedure that district courts should adopt in deciding motions to compel production of allegedly privileged documents under the crime-fraud exception. First, the Court resolved a conflict in the circuits by holding that the district court has discretion to conduct an *in camera* review of the allegedly privileged documents. Second, concerned that routine *in camera* review would encourage opponents of the privilege to engage in groundless fishing expeditions, the Court ruled that the discretion to review *in camera* may not be exercised unless the party urging disclosure has made a threshold showing "of a factual basis adequate to support a good faith belief by a reasonable person" that the crime-fraud exception applies. *Zolin,* 491 U.S. at 572, 109 S.Ct. 2619. Third, if the party seeking discovery has made that threshold showing, the discretionary decision whether to conduct *in camera* review should be made "in light of the facts and circumstances of the particular case," including the volume of materials in question, their relative importance to the case, and the likelihood that the crime-fraud exception will be found to apply. *Id.* at 572, 109 S.Ct. 2619.

A number of circuits have adopted somewhat different standards regarding the quantum of proof required to satisfy the crime-fraud exception, an issue the Supreme Court declined to reach in *Zolin,* 491 U.S. at 563 n. 7, 109 S.Ct. 2619. *See In re Sealed Case,* 107 F.3d at 50 (D.C.Cir.) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent fraud); *In re Grand Jury Proceedings,* 87 F.3d at 381 (9th Cir.) (reasonable cause); *In re Richard Roe, Inc.,* 68 F.3d at 40 (2d Cir.) (probable cause); *In re Int'l Sys. & Controls Corp.,* 693 F.2d 1235, 1242 (5th Cir.1982) (evidence that will suffice until contradicted and overcome by other evidence).

Sufficient evidence to warrant finding that legal service was sought or obtained in order to enable or aid commission or planning of crime or tort, as required for crime–fraud exception to attorney–client privilege under Kansas law, is that which constitutes prima facie case; prima facie case consists of evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue it supports. K.S.A. 60–426(b)(1). *Berroth v. Kansas Farm Bureau Mutual Ins. Co., Inc.*, 205 F.R.D. 586 (D. Kan. 2002) (applying Kansas law)

To this Courts knowledge, South Dakota has not adopted a similar legal foundation as was laid out in the authorities above. However, South Dakota does require that in order to claim privilege, a privilege log is necessary and required. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity,* 2009 S.D. 69, 771 N.W.2d 623. In Acuity, the court stated:

> "The failure of a party to provide a court with sufficient information to determine the question of privilege raises substantial questions concerning the efficacy of the objection: As a starting point, it is clear that ultimately a party asserting privilege must make a showing to justify withholding materials if that is challenged. The question whether the materials are privileged is for the court, not the party, to decide, and the court has a right to insist on being presented with sufficient information to make that decision. It is not sufficient for the party merely to offer up the documents for in camera scrutiny by the court. Ultimately, then, *637 a general objection cannot suffice for a decision by a court although it may suffice for a time as the parties deal with issues of privilege in discovery."

No privilege log was presented here for a couple reasons. First, the Defendants asked the Court to stay discovery and for protective orders pending their motion for summary judgment on the statute of limitations issue as granting that motion would moot the need for the information. Second, their claim of absolute privilege and the broad scope of the privilege excused them of any obligation to provide a privilege log. Due to the procedural posture of this case at the time of the motion hearing, their failure to provide the privilege log is excused under the circumstances. The parties here were dealing with this issue in discovery and the court was required to give some guidance.

In order to determine if the Plaintiff has met the necessary threshold to properly present the crime-fraud exception the court must consider the law and evidence in this case. Questions of fraud and deceit are generally questions of fact and as such are to be determined by the jury." *Ehresmann v. Muth,* 2008 S.D. 103, ¶ 20, 757 N.W.2d 402, 406 (citing *Laber v. Koch,* 383 N.W.2d 490, 492 (S.D.1986)). To recover on a claim of constructive fraud or deceit a plaintiff must establish that a duty existed between themselves and the defendant." *Sejnoha v. City of Yankton,* 2001 S.D. 22, ¶ 15, 622 N.W.2d 735, 739 (citing *Sabhari v. Sapari,* 1998 S.D. 35, ¶ 17, 576 N.W.2d 886, 892).

Deceit, under SD law is defined by SDCL 20–10–2 as:

A deceit within the meaning of § 20–10–1 is either:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing

SDCL 53–4–5 defines actual fraud as follows:

Actual fraud in relation to contracts consists of any of the following acts committed by a party to the contract, or with his connivance, *with intent to deceive another party* thereto or to induce him to enter into the contract:

(1) The suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true;

(3) The suppression of that which is true by one having knowledge or belief of the fact;

(4) A promise made without any intention of performing it; or

(5) Any other act fitted to deceive.

Actual fraud is always a question of fact. *Arnoldy v. Mahoney*, 791 NW2d 645 (SD 2010)

(SDCL 53–4–6 provides the following definition of constructive fraud:

Constructive fraud consists:

(1) In any breach of duty which, without any actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

2) In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

In this court's ruling on the motion for summary judgment it found that a fiduciary relationship exists between a hospital, clinic, or doctor and the patient. Such a finding is made because many patients go to the hospital in a weakened condition, many suffering from mental and physical limitations due to age, disease, pain or other disability. They are somewhat limited in their choices due to financial constraints placed upon them by their lack of recourses, insurance provider or public assistance. They are required to put their faith and trust in the medical providers who have superior knowledge and skill in making and keeping them healthy. This is especially the case when you consider the fact that medical staff has the ability to render them unconscious and perform significantly invasive medical procedures upon them. There is little room for doubt that a significant fiduciary duty exists on behalf of the Defendants and in favor of their patients in the context of the hospital/physician – patient relationship. *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) ("we acknowledged that the rise of the 'modern hospital' imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges")

When considering the important duty a medical facility or doctor has to the patient, it is imperative that the medical providers are bound to disclose important information. Suppression of information the patient has a right to know, and in fact should know, falls within the

definitions above as both a fraud and a deceit. It also noted in the various materials submitted here that allegedly, the various medical facility Defendant's held Dr. Sossan out as a highly qualified and accomplished surgeon and advertised him as such during his tenure at their facilities. There is other evidence presented indicating some of the Defendants here advised their patients who they had referred to Dr. Sossan that he was a competent and accomplished surgeon. Meanwhile, there is significant evidence submitted by the Plaintiffs that other physicians and medical facilities felt very strongly Dr. Sossan was not competent, was a "danger to the public" and took action against his privileges. Dr. Sossan's alleged lack of competence and ability was not a secret among the medical community in the southeast South Dakota and northern Nebraska area. Dr. Winn, according to his affidavit, made this clear to the Defendants.

Once he was in Yankton a short time nurses, physicians assistants, clerical staff, patients and other doctors made their complaints known as to his lack of competency and ability. Plaintiffs have submitted information that Dr. Sossan allegedly manipulated medical tests, falsified medical records and performed unnecessary medial procedures including substantial surgery, on some patients multiple times. Physicians and other medical providers have "broke rank", so to speak, in this case and have provided evidence and information to Plaintiffs in an effort to assist them. It is hard to believe, although it is possible, that supervisors and staff that had the ability to take action to make sure patients were safe were completely unaware of these significant issues concerning Dr. Sossan.

This Court is cognizant of the fact that the Defendants have not yet attempted to counter or refute the voluminous pile of exhibits and evidence submitted by the Plaintiffs in response to the various motions. They did so for the reason that they considered their motions for summary judgment dispositive. The court is fully aware that at this early stage of the proceedings the court has essentially one side of the story and if given ample opportunity the Defendants may be able to refute or rebut the evidence submitted by the plaintiff up to this point in time. However, despite this, it is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants. Alternatively, the court makes the same finding if the standard to be applied is "of a factual basis adequate to support a good faith belief by a reasonable person" or "evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue", or any other applicable standard needed to pass the threshold required.

In *Zolin* and other cases, the courts have indicated that an *in camera* inspection of the records is left to the sound discretion of the court. *Zolin*, at 572, 109 S.Ct. 2619. This court has given serious thought to an *in camera* inspection in this particular case. In the exercise of that discretion the Court has determined that an *in camera* review of all the materials is not necessary. With regard to peer review materials they are protected by a broad grant of privilege and confidentiality based upon a plain reading of the statute. The purpose of the statute is obviously to protect the private, frank and honest discussions and deliberations of the peer

review committee. Despite this court's ruling here that they are discoverable under the crime-fraud exception, that primary objective needs to be upheld and protected.

A decision to wrongfully grant medical privileges to an errant doctor can be done either negligently, maliciously or in bad faith. If it is done negligently it is done without prudence of a reasonable person; if it is done maliciously or in bad faith, it is more than mere negligence, but rather, action is taken to grant privileges to a doctor unworthy of such, based upon some improper, illegal or illegitimate motive, or otherwise in disregard of the rights or safety of patients.

So here, if it was done negligently the Plaintiffs would have the right to discover the objective facts and knowledge that existed and that which were available to the respective peer review body, including independent source material, in making their decision. If it appears the decision was made in bad faith or for some improper, illegal or illegitimate motive, then the plaintiffs may, only upon further showing, probe deeper into the peer review process. Upon a showing of illegality or improper motive, Plaintiffs may possibly probe into the actual deliberative process of the members of the peer review body. The court will need to address these issues on a case by case basis after a privilege log is submitted. Consequently, as to objective information gathered or considered by the peer review committees the court orders that such information shall be disclosed and copies provided to Plaintiff's counsel under a protective order without *in camera* inspection, as that information is not considered private deliberative information as contemplated by the statute. *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987). The remaining materials will be submitted to the court for *in camera* inspection with a privilege log as required. The Defendants shall have those materials delivered to the Court at is chambers in Armour, South Dakota as ordered below.

The Court has otherwise considered all of the arguments presented as to the specific discovery requests. Most of those requests were not responded to because of this present motion as well as the possibility that the summary judgment motion would moot the need to respond. The Motions to Compel are granted in all respects, subject to the Defendant's right to raise additional objections that are not redundant. Defendants argued at the hearing on this matter that the Plaintiffs discovery requests ask for voluminous records. In that regard, the court shall allow Defendants an additional forty-five (45) days to supplement their discovery responses with full and complete responses. Since this is a case of first impression, any requests for costs or attorney fees are denied.

ORDER

Consequently, based upon all of the above and foregoing it is hereby

ORDERED, that the Plaintiffs Motion to Compel is granted, in part and denied in part, and it is further

ORDERED, that the Plaintiffs Motion for Summary Judgment on the constitutionality of SDCL 36-4-26.1 is denied, and it is further

ORDERED, that the peer review committee, medical executive committee, and any other board of Avera Sacred Heart Hospital (ASHH) or Lewis & Clark Specialty Hospital (LCSH) having peer review responsibilities, shall produce to the Plaintiffs, without the need of further *in camera* review, the applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration,"; and it is further

ORDERED that the peer review committees, medical executive committees, or any other board of ASHH or LCSC shall produce to the Plaintiffs, without the need for further *in camera* inspection, all complaints filed against Dr. Sossan by any person or other medical provider, **with the name and other identifying information of such person or medical provider redacted,** between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other action taken as a result of such complaint; and it is further

ORDERED, that in disclosing the materials described above, Defendants shall have the duty and the right to redact information that can be considered deliberative or which bears upon a member of the peer review committees private discussions or deliberations, so long as a copy of such materials are submitted to the court for *in camera* inspection with a privilege log; and it is further

ORDERED that the subjective deliberations of the above named peer review committees shall not be subject to discovery unless the Plaintiffs make further application to the Court and can establish, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges, and it is further

ORDERED, that complete copies of all peer review materials of any Defendant hospital or clinic that made peer review decisions concerning Dr. Sossan shall be delivered to the Court, by US mail or otherwise, in its chambers in Armour, South Dakota, within twenty (20) days from the date of this order, and it is further

ORDERED that the information ordered to be produced to the Plaintiffs shall be produced under the provisions of a protective order based upon a stipulation to be resolved by the parties, and in the event no stipulation as to the protective order can be reached within 20 days, each party shall submit their version of such protective order to the Court with a brief in

support of their position and the Court will decide, without hearing, the terms of such protective order; and it is further

ORDERED, that this Memorandum Decision shall constitute the Court' Findings of Fact and Conclusions of Law and that no further findings or conclusions shall be necessary.

Dated this 23 day of October, 2015.

BY THE COURT:

Hon. Bruce V. Anderson
First Circuit Court Judge

Attest:
CLERK OF COURTS

By Jody Johnson
T Chamberlain

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RYAN NOVOTNY, Plaintiff and Appellee, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Appellants, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Appellants.	#27615 (CIV 14-235) **JOINDER IN BRIEF OF APPELLANT LEWIS & CLARK SPECIALTY HOSPITAL, LLC**
* * * * * * * * * * * * * * * * * * CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW,	#27626 (CIV 15-167)

Defendants and Appellants, and ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.L., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NEUTERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES, Defendants and Appellants, * CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. LEWIS & CLARK SPECIALTY HOSPITAL, LLC, A South Dakota Limited Liability Company, Defendants and Appellants, ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL	#27631 (CIV 15-167)

SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.O., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, and VARIOUS JOHN DOES and JANE DOES, Defendants and Appellants.	

Dr. Kynan Trail, M.D., hereby joins in the *Appellant Brief of Lewis & Clark Specialty Hospital, LLC, and Its Individually Named Committee Members and Personnel* ("LCSH") in the above-captioned consolidated appeals.

Dr. Trail is a member of LCSH and is similarly situated to those individuals who are also members of LCSH and who are also parties to Civ. 15-167 (Arens). However, Dr. Trail is represented by counsel separate from counsel representing LCSH and its similarly situated Defendant members. This Joinder is made to avoid unnecessary duplicative briefing of issues common to the similarly situated Defendant members of LCSH.

Dated this 29th day of February, 2016.

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CERTIFICATE OF SERVICE

I, Gregory J. Bernard, attorney for Defendants, hereby certify that the foregoing *Joinder in Brief of Appellant Lewis & Clark Specialty Hospital, LLC* was emailed to the South Dakota Supreme Court at scclerkbriefs@ujs.state.sd.us, and that these documents were also emailed to the following counsel on this 29th day of February, 2016:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RYAN NOVOTNY, Plaintiff and Appellee, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation, d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Appellants, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Appellees. - CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW, Defendants and Appellants,	Amicus Curiae Brief of Public Citizen No. 27615

and ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES AND VARIOUS JANE DOES, Defendants and Appellees. - CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendant and Appellant,and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDICS	No. 27626

SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a/ AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.M., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES, and VARIOUS JANE DOES, Defendants and Appellees.	No. 27631

Appeal from the First Judicial Circuit
Honorable Bruce V. Anderson, Circuit Court Judge
Petition for Intermediate Appeal granted December 15, 2015

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Table of Contents

Table of Authorities

Interest of Public Citizen

Public Citizen, Inc. and Public Citizen Foundation, Inc. (collectively "Public Citizen") are non-profit consumer advocacy organizations with a strong record as proponents of patient health and safety. With members and supporters in South Dakota and nationwide, Public Citizen appears before Congress, administrative agencies, and the courts to advocate for health and safety regulations, consumer protections, and corporate and government accountability, among other issues. Public Citizen's Health Research Group focuses on research and advocacy concerning health products and health-care delivery. Public Citizen serves as a watchdog over the Food and Drug Administration's regulation of drugs and medical devices, and it advocates before the Occupational Health and Safety Administration for reduction in worker exposures to hazardous chemicals. Public Citizen also educates the public about dangerous drugs and drug interactions, through its monthly newsletter Worst Pills, Best Pills News and the website WorstPills.org.

A vital component of Public Citizen's approach to enhancing patient safety is encouraging states to protect patients from doctors who do not satisfy reasonable standards of care. Public Citizen works for enhanced accountability in the medical field by analyzing trends in state disciplinary actions across the United States and

seeking greater disclosure of disciplinary actions taken against doctors and other health-care workers. Public Citizen has published numerous reports on physician discipline including *Hospitals Drop the Ball on Physician Oversight* (2009) and *State Medical Boards Fail To Discipline Doctors With Hospital Actions Against Them* (2011).

Introduction

At issue in this case is whether the crime-fraud exception, which is well-recognized in other evidentiary privileges including the attorney-client privilege, should apply to South Dakota's peer review privilege. Without that exception, the circuit court explained, plaintiffs who assert injuries at the hands of Dr. Allen Sossan will be obstructed in their efforts to prove the truth despite significant evidence that defendants knew of and willfully ignored Dr. Sossan's abysmal record. The court concluded that in the absence of a crime-fraud exception to the state peer-review privilege, "imprudent decisions and wrongdoing in the peer review process would never be brought to light and patient safety and the delivery of medical care would suffer." App. 21.

This Court should affirm. The peer review privilege exists to encourage candor in the credentialing process. But no privilege is absolute. There are limits to

the types of communications the privilege should protect. Where otherwise confidential credentialing communications bear directly on allegations of serious wrongdoing—such as credentialing decisions that intentionally disregard a doctor's dangerous past, or put medical providers' financial interest ahead of public safety, thereby endangering the people of South Dakota—the privilege must yield.

As Public Citizen has documented, the peer review system nationally and specifically in South Dakota has underperformed in screening out doctors who should be subject to discipline or denied credentials. Shining a light on that process in the face of good-faith allegations of fraud, negligent credentialing, and bad faith is crucial to introducing a measure of accountability into credentialing decisions, and fixing a system that does not adequately protect patient safety.

Argument

Adequate health care is a matter of life and death for each of us; for our loved ones; and for every American. Peer review is a critical tool for upholding the standard of patient care in the American health-care system. But the system's importance does not justify permitting it to operate beyond all scrutiny. To the contrary, transparency is necessary to ensure accountability and improve a system that is not living up to its promise of improving health-care quality.

I. The Peer Review System Is Not Functioning Properly

As Public Citizen has documented, peer review has not kept patients safe from substandard doctors. *See* Alan Levine & Sidney Wolfe, Public Citizen, *Hospitals Drop the Ball on Physician Oversight* (May 27, 2009) (hereinafter "*Hospitals Drop the Ball*"), *available at* http://www.citizen.org/Page.aspx?pid=585.

A useful measure of the efficacy of the peer review system is the frequency with which hospitals discipline and report doctors to the National Practitioner Data Bank (NPDB), a resource maintained by the Health Resources and Services Administration of the United States Department of Health and Human Services. The NPDB receives and maintains records of medical malpractice payments, as well as disciplinary actions against health care practitioners by state medical boards, hospitals, and other health care organizations. *Id.* at 6. Federal law requires hospitals to report a doctor to the NPDB when the hospital revokes or restricts the doctor's privileges for more than 30 days because of the doctor's incompetency or improper professional conduct, or when the hospital accepts a physician's surrender of clinical privileges while the physician is under investigation for possible incompetence or improper professional conduct, or in return for not conducting such an investigation. 42 U.S.C. § 11133.

In its report, Public Citizen found an "extremely large state-by-state variation in the rate of non-reporting hospitals." *Hospitals Drop the Ball* 9. *Among all states, South Dakota had the highest rate of hospital non-reporting to the NPDB*; Public Citizen found that in the 17 years since the NPDB was created, 75 percent of South Dakota hospitals (42 out of 56) had *never* reported a *single* physician. *Id.* at 9, 38. By contrast, only 19 percent of hospitals (3 of 16) in Rhode Island, 24 percent of hospitals (7 of 29 hospitals) in New Hampshire, 25 percent of hospitals (10 of 40) in Connecticut, and 29 percent of hospitals (68 of 239) in New York had *not* done so. *Id.* at 38.

If reporting is measured by the number of reports per number of hospital beds rather than the number of hospitals, South Dakota fares no better. Reporting per 1,000 hospital beds ranged from a high of 8.5 per 1,000 beds in Nevada down to South Dakota's rate, a *national low* of 0.7 per 1,000 beds. *Id.* at 10. In most states, Public Citizen found a reporting rate between 1.5 and 4.0 per 1,000 hospital beds—about two to six times South Dakota's rate. *Id.*

Although reporting rates vary widely, there is no evidence that the overall quality of medical practice differs dramatically from state to state. Or to put it differently, there is no evidence that medical practice in South Dakota is so vastly

superior to practice in the other 49 states as to account for the dramatic numerical disparity in reporting. The most likely explanation for the variation is that medical cultures differ from state to state in their willingness to impose and report discipline for misconduct or incompetence. *Id.* at 12. This conclusion is shared by the Health Resources and Services Administration (which operates the NPDB) and the Office of Inspector General at the Department of Health and Human Services. *Id.* at 11-12.

A study of physician attitudes published in the Annals of Internal Medicine supports the conclusion that some states underreport physician misconduct. In that study, "although 96 percent of respondents agreed that physicians should report impaired or incompetent colleagues to relevant authorities, 45 percent of respondents who encountered such colleagues had not reported them." Eric G. Campbell et al., *Professionalism in Medicine: Results of a National Survey of Physicians*, Annals of Internal Medicine, vol. 147, at 795 (Dec. 2007).

Additionally, state medical boards lag behind hospitals in terms of disciplinary actions against doctors: Public Citizen has determined that more than 5,000 physicians have had one or more clinical privilege reports but no state licensure actions. So the public cannot rely on state licensing boards as an independent check against doctors who should not be credentialed. *See* Alan Levine, Robert Oshel & Sidney Wolfe,

Public Citizen, *State Medical Boards Fail To Discipline Doctors With Hospital Actions Against Them* 1-2 (Mar. 15, 2011), *available at* http://www.citizen.org/hrg1937.

The failure of peer review can result in disastrous consequences for patients. The facts of the cases before this Court show this. Other cautionary tales abound:

At the Redding Medical Center in northern California, more than 600 patients received unnecessary cardiac surgery over a seven-year period; some suffered debilitating injuries or death. *Hospitals Drop the Ball* 19. One of the physicians involved should have been suspended years earlier based on his failure to complete medical records. Gerald N. Rogan et al., *How Peer Review Failed at Redding Medical Center* 8 (June 1, 2008), *at* http://roganconsulting.com/docs/Congressional_Report-Disaster_Analysis_RMC_6-1-08.pdf. But "motivated by income generated by its rainmaker physicians, Redding Medical Center . . . preferred to support them rather than identify quality problems." *Id.* at 31.

During a back surgery in Cambridge, Massachusetts, an orthopedic surgeon left a patient under anesthesia on the operating table with an open incision in his back for thirty-five minutes while the surgeon went to cash his paycheck. *Hospitals Drop the Ball* 20-21. The *Boston Globe* reported that despite a history of disruptive behavior

and two brushes with the law, no peer review intervention occurred before the surgery walk-out. *Id.* at 21.

In Hawaii, a surgeon could not find the titanium rod he needed to insert into a patient to stabilize a disc injury, so the surgeon used a nearby screwdriver instead. *Id.* The patient required three more surgeries to correct the problem, and ended up a bedridden, incontinent paraplegic. *Id.* At the time of the original surgery, the surgeon had been charged with drug addiction and incompetence and had his medical license suspended in two other states, yet he was still practicing in Hawaii, apparently without his surgery being monitored by peers. *Id.*

Physicians, administrators and executives at the Edgewater Medical Center in Chicago engaged in a scheme to defraud Medicare of tens of millions of dollars that involved hundreds of unnecessary heart surgeries, two of which led to deaths. *Id.* A report concluded that the scheme would not have been possible with effective peer review. Rogan et al., *How Peer Review Failed, supra*, at 5.

These data and examples suggest that the peer review system is not doing its job to protect patients. This case requires the Court to consider which approach to peer review will ameliorate the problem: total secrecy or some transparency under appropriate circumstances?

II. Transparency Will Improve the Peer Review System by Increasing Accountability

Transparency in the peer review process in instances of criminal or fraudulent conduct will improve the system by deterring decisionmaking that is adverse to patient safety, and by enhancing accountability for wrongdoing in the peer review process. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). This Court and the United States Supreme Court have applied this principle to ensure that our nation's most important systems are subject to public oversight. *See Rapid City Journal v. Delaney*, 2011 S.D. 55, ¶¶ 18-20, 804 N.W.2d 388, 395 (recognizing the public's First Amendment right to access civil trials, because open trials "protect the integrity of the system and assure the public of the fairness of the courts and our system of justice"); *Doe v. Reed*, 561 U.S. 186, 199 (2010) ("Public disclosure [of referendum petitions] . . . promotes transparency and accountability in the electoral process to an extent other measures cannot."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion) (explaining that the public nature of a criminal trial "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality");

National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (explaining that the Freedom of Information Act exists to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

The crime-fraud exception adopted by the circuit court here introduces needed transparency into the peer review process. The exception applies in limited circumstances and, as is true with exceptions to other privileges, can root out wrongdoing. In particular, the crime-fraud exception to the peer review privilege will shed light on—and thereby deter—hospital cover-ups on behalf of incompetent doctors. The possibility that wrongdoing in the peer review process will come to light is the best deterrent against participants in the process engaging in criminal or fraudulent conduct in the first place. Knowing that such acts could be uncovered raises the stakes for committing them, and puts the medical community on notice that the courts are available as checks on unlawful behavior. By contrast, blanket privilege creates both immunity and impunity for wrongdoing.

The fear of transparency expressed by amici South Dakota Association of Healthcare Organizations and South Dakota State Medical Association is unwarranted, for two reasons. First, transparency will not chill participation by honest reviewers in

the peer review process, because they are not committing fraud. The exception at issue is narrowly targeted at wrongful conduct that is not a legitimate part of the peer review process to begin with. As the American Bar Association has explained in the analogous context of the crime-fraud exception to the attorney-client privilege, "the client can, of course, prevent such disclosure by refraining from the wrongful conduct." Model Rules of Professional Conduct R 1.6, cmt. 7, *at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html; *see also In re Grand Jury Proceedings*, 183 F.3d 71, 76 (1st Cir. 1999) (explaining that "statements made in furtherance of a crime or fraud have relatively little (if any) positive impact on the goal of promoting the administration of justice").

Second, the value of encouraging candor must be balanced against other values, including the search for truth, which is promoted when courts temper privileges with legitimate exceptions that make relevant evidence available to litigants and courts. As Judge Selya explained on behalf of the First Circuit, "the crime-fraud exception reflects a policy judgment" that the benefit of secrecy "does not justify the costs of

shielding highly probative evidence of antisocial conduct from the factfinders' eyes." *In re Grand Jury Proceedings*, 183 F.3d at 76. Relatedly, the societal interest in protecting peer review communications, like the interest in protecting attorney-client communications, dissipates when the process is misused. *See In re Green Grand Jury Proceedings*, 492 F.3d 976, 980 (8th Cir. 2007) ("Although there is a societal interest in enabling clients to get sound legal advice, there is no such interest when the communications or advice are intended to further the commission of a crime or fraud."); *accord In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (same); *see also In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996) ("While there is a societal interest in enabling clients to obtain complete and accurate legal advice, which we serve by sheltering confidential communications between client and attorney from public consumption, there is no such interest when the client consults the attorney to further the commission of a crime or fraud.").

Finally, transparency is vital to holding hospitals accountable and compensating patients injured by wrongful conduct. As the circuit court found here, without the crime-fraud exception, "there is no way for a plaintiff, or anyone else for that matter, to determine if the peer review committee members acted without malice; if the peer review committee made a reasonable effort to obtain the facts of the matter under

consideration; or if the peer review committee acted in reasonable belief the action taken was warranted by those facts." App. 21. As in this case, without the exception, patients throughout South Dakota will not be able to bring to light instances in which botched medical procedures could have been prevented but for a compromised peer review process, because plaintiffs will lack access to the evidence needed to show that the process was compromised.

Conclusion

The peer review system is not operating as effectively as it should. The credentialing of negligent physicians puts patients' lives at risk—and all of us will be patients sooner or later. Transparency in the peer review process in instances of criminal or fraudulent conduct will improve the system by deterring decisionmaking that is adverse to patient safety and by enhancing accountability for wrongdoing.

This Court should affirm the decision of the circuit court to apply a crime-fraud exception to the peer review privilege.

Dated: April 18, 2016

Respectfully submitted,

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Certificate of Compliance

As required by SDCL 15-26A-66(b)(2), and excluding the matters not counted under SDCL 15-26A-66(b)(3), this brief contains 2,665 words.

Certificate of Service

I certify that on April 18, 2016, I served this document on all parties by e-mailing it to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RYAN NOVOTNY, Plaintiff and Appellee, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Appellants, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Appellees. - - - - - - - - - - - - - - - - - - CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW, Defendants and Appellants, and ALAN A. SOOSAN, also known as	Nos. 27615 (CIV 14-235), 27626 (CIV 15-167), 27631 (CIV 15-167) **BRIEF FOR AARP AS AMICUS CURIAE**

ALLEN A SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellees.

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CLAIR ARENS and DIANE ARENS,
Plaintiff and Appellee,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,
Defendant and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.M., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL

PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES, and VARIOUS JANE DOES, Defendants and Appellees.	

BRIEF FOR AARP AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan membership organization dedicated to representing the needs and interests of people age 50 and older. A high proportion of older adults live in South Dakota, as people age 50 and over comprise 34 percent of the state.[1] This Court's decision will significantly impact older South Dakotans because older adults use a greater amount of hospital services than other populations and suffer the most medical malpractice incidents.[2]

AARP supports the establishment and enforcement of laws and policies designed to protect the rights of older adults to obtain legal redress when they have been victims of medical harm, neglect or abuse. Through its charitable affiliate, AARP Foundation, AARP has filed amicus curiae briefs in courts throughout the country to promote greater transparency and accountability in the health care system.

SUMMARY OF ARGUMENT

The court should affirm the decision below finding a crime-fraud exception to the peer review privilege. The recognition of a crime-fraud exception strikes a reasonable balance between preserving the goals of the peer review privilege and providing patients with a limited waiver to hold hospitals and peer review committee members accountable for injurious, malicious conduct. The peer review privilege should not shield hospitals and physicians on peer review committees from accountability when their actions do not meet peer review goals of improving health care.

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[1] Agency on Aging, *South Dakota Policy Academy State Profile*, (June 2012), http://www.aoa.gov/AoA_Programs/HPW/Behavioral/docs2/South%20Dakota.pdf.

[2] Ctrs. for Disease Control & Prevention, *National Hospital Discharge Survey: 2010 Table – Number and Rate of Hospital Discharges* (2010), http://goo.gl/16Oy9w; Jeffrey M. Rothschild & Lucian L. Leape, AARP Pub. Policy Inst., *The Nature and Extent of Medical Injury in Older Patients* 13, 23, 26, 29 (2000), http://assets.aarp.org/rgcenter/health/2000_17_injury.pdf.

Hospitals have a duty to safeguard patients from incompetent and dangerous physicians. This duty is extremely important to older people because they use a greater amount of hospital services and suffer the most malpractice incidents. When hospitals flout this duty and a patient suffers injury, the hospitals should be held accountable to both deter future misconduct and redress the injury. Patients need access to extrinsic evidence, including evidence that the peer review privilege statute may bar from disclosure, to bring successful cases under these circumstances.

The crime-fraud exception ensures that patients, including older people, have access to the evidence they need to bring successful actions when the peer review privilege is no longer fulfilling its purpose of improving health care. Allowing for a crime-fraud exception strengthens the privilege because it ensures that the privilege is only being applied to improve health care and not to circumvent the courts. The court below set a high threshold for when this limited waiver would apply, requiring that patient-plaintiffs first establish fraud, deceit, illegality or other improper conduct on the part of the hospitals and physicians before the exception could apply. This high threshold ensures that the peer review privilege governs disclosure unless egregious circumstances warrant a limited waiver. Thus, recognizing the crime-fraud exception serves the interests of justice.

ARGUMENT

I. The Court Should Uphold the Trial Court's Decision Finding a Crime-Fraud Exception To the Peer Review Privilege Because It Strikes the Appropriate Balance Between Preserving the Goals of the Peer Review Privilege And Providing Patients With a Limited Waiver To Hold Health Care Providers Accountable for Injurious, Improper Conduct.

On October 15, 2016, the trial court ruled that South Dakota's peer review confidentiality privilege was subject to a "crime-fraud" exception. *Lammers v. Sossan et al*, Civ. No. 13-456,

slip op. at 22 (S.D. Oct. 23, 2015) [hereinafter, references to the decision below will be denoted as, "Circuit Court Opinion, p._."] Thus, the plaintiffs could have access to certain peer review information after they first established a *prima facie* case of fraud and deceit. *Id.* at 25.

The purpose of protecting peer review materials, including physician credentialing materials, is to encourage physicians to engage in rigorous quality assurance without the fear of retaliatory lawsuits. David L. Johnson and Ellis Lord, *Paring Peer Review: Implications of the Tennessee Supreme Court's Decision in Lee Medical Inc. v. Beecher,* 46 Tenn. B.J. 20 (Nov. 2010). However, the fundamental purpose of the peer review privilege is eroded where hospitals and members of peer review committees no longer use it to improve quality of care, but instead use it as a shield to avoid liability for their wrongful conduct. The crime-fraud exception remedies this abuse of the privilege by allowing a limited waiver under egregious circumstances which patients can then use to access the evidence needed to hold providers accountable for their wrongful conduct and resulting harm.

A. The Peer Review Privilege Should Not Shield Hospitals And Physicians From Accountability When Their Actions Do Not Meet Peer Review Goals of Improving Health Care.

Recognizing the crime-fraud exception permits effective peer review while preventing hospitals from abusing the privilege to conceal evidence of fraud, deceit, and other improper conduct. Peer review is the process by which the medical profession evaluates services and qualifications of physicians as a means to improve the quality of health care. Kenneth R. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157 (2003). Credentialing is a type of peer review whereby members of the hospital committees review applications of new physicians to ensure that only competent practitioners treat patients in their hospitals. SDCL § 36-4-43 (defining peer review activities as

including the grant of clinical privileges to provide health care services at a licensed health care facility); s*ee also* Craig W. Dallon, *Understanding Judicial Review of Hospital's Physician Credentialing and Peer Review Decisions*, 73 Temp. L. Rev. 597, 598-99 (2000). Peer review credentialing is one of the primary means by which hospitals promote safe and high-quality patient care and serves as the first line of protection for patient safety. Sallie Theime Sanford, *Candor After Kadlec: Why, Despite the Fifth Circuit's Decision, Hospitals Should Anticipate An Expanded Obligation To Disclose Risky Physician Behavior*, 1 Drexel L. Rev. 383, 416-417 (2009).

Peer review privilege is premised on the theory that quality of care would improve if physicians governed themselves through open review of each other's qualifications and competency without fear of reprisal in the form of lawsuits. Susan O. Scheutzow, *State Medical Peer Review: High Cost But No Benefit - Is It Time for a Change?*, 25 Am. J. L. & Med. 7, 8 (1997). As such, every state provides protection to various degrees to the members and work materials of peer review committees. *Id.* These protections address the scope of privilege, confidentiality, and immunity from liability. *Id.*

State statutes governing the peer review privilege often protect peer review participants from liability and bar conversations and materials of the peer review committee from discovery. *See e.g., Hassan v. Mercy American River Hospital*, 74 P.3d 726 (Cal. 2003)(holding peer review privilege created by California statute is not absolute, but rather limited to conversations meant to aid in an evaluation). However, state courts have not uniformly interpreted peer review privilege as absolute. In particular, courts in other jurisdictions have narrowly construed the peer review privilege, balancing the benefits of the privilege with evidentiary needs in litigation. *See e.g., Munroe Regional Medical Center, Inc. v. Rountree*, 721 So.2d 1220 (Fla. App.

1998)(determining that information available from otherwise original sources is not privileged merely because it was presented during a peer review proceeding); *Missouri ex. rel. Boone Retirement Center, Inc. v. Hamilton*, 946 S.W.2d 740 (Mo. 1997)(privileging only records created within quality assurance committee).

Consistent with other states, South Dakota peer review statutory provisions taken as a whole are not absolute. *See e.g.,* SDCL § 36-4-25, 36-4-26.1, 36-4-42, 36-4-43. For example, the South Dakota statute contemplates that some members of hospital professional committees may act with malice, SDCL § 36-4-25, and consequently, only provides immunity from liability for acts of members of professional peer review committees performed within the scope of the functions of the committee if the committee member: (1) acts without *malice*, (2) has made a reasonable effort to obtain facts of the matter under consideration, and (3) acts in reasonable belief that the action taken is warranted by those facts. SDCL § 36-4-25 (emphasis added). This provision illustrates the strong public policy that physicians are not immune from liability when they act with malice or without a reasonable belief that the action taken is warranted by the facts. *Id.*

As South Dakota's statute provides that committee members that act with malice are not immune from liability, the information needed to prove a case to hold them accountable for their actions should also not be privileged and non-discoverable. After all, a determination of whether a peer review committee member is entitled to immunity would naturally require extrinsic evidence of the motive and knowledge of the committee member.

But South Dakota's peer review confidentiality does not expressly grant access to this information. *See* SDCL § 36-4-26.1. The peer review confidentiality provision provides that proceedings, records, reports, statements, minutes, or any data of a peer review committee are

not subject to disclosure or discovery and are not admissible as evidence in any court, except if a physician seeks information upon which a decision of his staff privileges was based or if he is seeking information in his defense. *Id.* While it does not apply to the patient-plaintiff, defining access to information about staff credentialing as an express exception to the peer review privilege underscores the legislature's position that this information is discoverable under certain circumstances.

Reading the two peer review provisions together leads to the following conclusions: (1) the legislature did not want individuals who acted with malice to be immune from liability; (2) in certain situations, such as credentialing, there are exceptions to the peer review privilege; and (3) South Dakota's peer review provisions are inconsistent. Interpreting the peer review discovery privilege as absolute would deny the patient-plaintiff's ability to obtain the evidence necessary to hold providers that acted maliciously accountable, contrary to the legislature's intent. The peer review privilege is not intended to be a tool to shield hospitals and physicians from all liability, but rather a tool to promote an environment focused on improving health care and patient safety. Thus, recognizing a crime-fraud exception to peer review provisions remedies any apparent inconsistency in the provisions. It ensures that patients have access to the information needed to hold hospitals and physicians accountable for wrongful conduct while preserving the confidentiality where peer review is being used to improve health care. Moreover, it ensures that hospitals and physicians do not abuse the privilege to avoid liability when they have acted in bad faith.

Privileges in other contexts recognize a crime-fraud exception to maintain the integrity of the privilege and the legal process. *See e.g.*, Circuit Court Opinion, p. 19-23. For example, the crime-fraud exception is a well-established exception to the attorney-client privilege. Under the

exception, a client's communication to her attorney isn't privileged if she made it with the intention of committing or covering up a crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989). The spousal privilege recognizes a joint-participant exception, where marital communications are not privileged where testifying spouse was an active participant in, or in furtherance of, a criminal activity. *State v. Wichey*, 388 N.W.2d 893 (S.D. 1986). The crime-fraud exception to the priest-penitent privilege has also been recognized, where the application of the exception turns on whether the communication related to spiritual guidance. *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997).

Moreover, courts in states with privilege provisions similar to South Dakota's have narrowly interpreted their states' peer review discovery privilege so as to maintain the integrity of the peer review process. In *Moretti v. Love*, the Rhode Island Supreme Court required a hospital to provide answers to interrogatories regarding the loss of staff privileges. 592 A.2d 855, 856 (R.I. 1991). Similar to the South Dakota statute, Rhode Island's peer review statute provided that neither the proceedings nor the records of peer review boards were discoverable, save litigation arising out of the imposition of sanctions on a physician. R.I. Gen. Laws § 23-17-25 (1998).

The Rhode Island Supreme Court ruled that the peer review statute did not protect information related to the loss of hospital staff privileges from disclosure. *Moretti*, 592 A.2d at 858. The court determined that the public would not be served if the peer review privilege was used to shield wrongful conduct:

> The public purpose is not served…if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance.

Id. at 857-58.

Similarly, here, the peer review privilege should not be used as a shield to avert injured patients from obtaining necessary information once it is established that the improper motives guided the hospitals' actions that resulted in patient harm. Such result would damage the integrity of the peer review privilege and shields bad actors from being held accountable for the life-changing damage they caused. The crime-fraud exception to the peer review privilege resolves this injustice.

B. Patients Should Have Access to the Information Necessary to Pursue a Successful Lawsuit When They Are Injured As a Result of a Hospital's Flouting Its Duty to Safeguard Patients from Incompetent and Dangerous Physicians.

Most states recognize that hospitals have a duty to safeguard their patients from incompetent and dangerous physicians. *See Larson v. Wasemiller*, 738 N.W.2d 300, 306-307 (Minn. 2007) (listing states that recognize hospital's duty to patients). When hospitals breach that duty, they should be held liable under the tort of negligent credentialing, among other causes of action, for negligently granting staff privileges to incompetent physicians to treat patients at their facilities. *Id.* The tort of negligent credentialing is based on the theory that hospitals owe a duty to their patients to appropriately monitor the quality of care provided by their staff physicians and to grant privileges only to qualified practitioners. Sallie Theime Sanford, *Candor After Kadlec: Why, Despite the Fifth Circuit's Decision, Hospitals Should Anticipate An Expanded Obligation To Disclose Risky Physician Behavior*, 1 Drexel L. Rev. 383, 423-424 (2009) (discussing the development of the doctrine in various jurisdictions). Over 30 states recognize this tort. *Larson v. Wasemiller*, 738 N.W.2d at 306-307.

South Dakota should join these other states. As the Washington State Supreme Court reasoned in *Pedroza v. Bryant,* 677 P.2d 166 *(*Wash. 1984), "[t]he hospital's role is no longer limited to furnishing of physical facilities and equipment" and it "is in a superior position to monitor and control physician performance." *Id.* at 169. Therefore, "[f]orcing hospitals to assume responsibilities for their corporate negligence may also provide those hospitals a financial incentive to insure the competency of their medical staffs." *Id.*

In addition to negligent credentialing, a hospital's actions surrounding their credentialing and retention of an incompetent and dangerous physician can implicate other causes of action, such as fraudulent misrepresentation, fraudulent concealment, and conspiracy. This is particularly true where the hospitals tell patients that a physician is one of the world's best, when all the while they know he was deemed to be unfit to practice medicine and have been receiving complaints about his conduct. Regardless of the cause of action, patients cannot bring a successful case if they do not have access to the evidence needed to prove their claim. This is why the crime-fraud exception is so critical to improving patient safety and remedying patient harm.

Ensuring that injured patients have the ability to hold hospitals and physicians accountable for their wrongful acts meets the goal of improving health care by serving both deterrent and remedial functions: (1) hospitals will improve their actions related to physician credentialing and retention processes because they fear that not doing so will result in monetary and reputational loss from litigation; and (2) patients will receive legal redress for their injuries. *See, e.g., Pedroza v. Bryant*, 677 P.2d at 170 ("The most effective way to cut liability insurance costs is to avoid corporate negligence."); *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 165 (Cal. Ct. App. 1982) (stating that imposing corporate liability encourages hospitals to "oversee the

competence of their medical staff" with the intent to further "the health care interest of the patient").

Injured patients need access to the necessary evidence to bring a successful case. Here, the crime-fraud exception allows access to that information. The peer review privilege was not intended to conceal facts and shield wrongful conduct, or prevent a patient or their advocate from learning how an injury occurred. Nor did the legislature intend for the privilege to be used as a vehicle to commit a fraud on the court. Without access to critical information, patients will have no way to advocate for themselves when they suffer debilitating injuries from an incompetent physician that received privileges despite the hospital's knowledge of his/her incompetence. Such a result will be contrary to South Dakota's strong public policy of protecting older adults from abuse and improving health care.

Older South Dakotans are particularly vulnerable to the impact of this decision because of their heavy reliance on the health care system. South Dakota has a high proportion of older adults, with people age 50 and over comprising 34 percent of the state. Agency on Aging, *South Dakota Policy Academy State Profile*, 1 (June 2012), http://www.aoa.gov/AoA_Programs/HPW/Behavioral/docs2/South%20Dakota.pdf.. Adults aged 65 and older are twenty percent more likely than adults aged 18 to 44 to have visited a health professional in the past year. *See* Ctrs. for Disease Control & Prevention, *Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2012*, at 95 tbl. 33 (2014), http://goo.gl/1abcJF. Similarly, adults aged 65 and older are four times more likely than persons aged 15 to 44 to receive in-patient hospital treatment. Ctrs. for Disease Control & Prevention, *National Hospital Discharge Survey: 2010 Table – Number and Rate of Hospital Discharges* (2010), http://goo.gl/16Oy9w.

Older Americans' high utilization rate for healthcare services puts them at greater risk of harm resulting from medical care. Thirteen percent of Medicare beneficiaries hospitalized in 2008 experienced a serious adverse event—e.g., an event prolonging their hospitalization, requiring life-sustaining intervention, or resulting in permanent harm or death—during their stay. *See* Office of the Inspector Gen., Dep't of Health & Human Servs., OEI-06-09-00090, *Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries*, at ii (2010), https://goo.gl/opFO6V. Relative to the rest of the population, adults aged 65 and older are more likely to be misdiagnosed or underdiagnosed (receive a delayed diagnosis) by doctors and twice as likely to be victims of serious medical error. Jeffrey M. Rothschild & Lucian L. Leape, AARP Pub. Policy Inst., *The Nature and Extent of Medical Injury in Older Patients* 13, 23, 26, 29 (2000), http://assets.aarp.org/rgcenter/health/2000_17_injury.pdf. Altogether, older Americans' high level of interaction with the healthcare system imposes significant institutional and individual financial costs and exposes them to potential serious physical harm.

Older adults are most vulnerable to hospital credentialing and retention decisions because of their disproportionate use of health services, high population in South Dakota, and chronic medical conditions. Without the crime-fraud exception, they will have an impossible hurdle to jump to obtain the necessary evidence needed to prove their case when they are harmed by hospitals' actions related to hiring and retaining incompetent physicians. Quality assurance functions protected by peer review privilege serve an important function. However, hospitals and other providers cannot be allowed to act contrary to the peer review's goals, then turn around and use the peer review privilege to cloak evidence needed to hold them accountable. Such use of the peer review privilege does not comport with the statute's purpose, does not improve health care, and undermines hospitals' accountability for their bad acts.

C. The Integrity of the Peer Review Process Would Remain Intact With a Crime-Fraud Exception To the Privilege Because the Patient-Plaintiff Must Meet a High Threshold Before the Exception Will Apply.

This Court's recognition of the crime-fraud exception would enhance the integrity of the peer review statute. The crime-fraud exception would only apply in circumstances where the injured patient could first establish a *prima facie* case of fraud, deceit, or other improper conduct. Circuit Court Opinion, p. 23-25. This high threshold guarantees that the crime-fraud exception would only apply to the cases where the peer review privilege no longer meets its fundamental purpose to improve health care, but instead is serving as a shield to avoid accountability.

CONCLUSION

This case has far-reaching implications for South Dakota residents, including older adults who use a greater amount of health care services and suffer the most malpractice incidents. As the peer review statute was intended to improve health care, this Court should find that the crime-fraud exception strikes an appropriate balance between protecting peer review material when appropriate and empowering patients to obtain evidence when they are the victims of malice, bad faith, and other improper conduct. The trial court's decision should be upheld.

Dated: April 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail, to the following on this Monday, April 18, 2016:

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CERTIFICATE OF COMPLIANCE WITH RULE 15-26A-66

I certify that the foregoing amicus curiae brief of AARP has been prepared using proportionally spaced typeface, Times New Roman 12 point font. The word-processing system used to prepare the brief indicates that there are a total of 3,510 words and 19,885 characters in the body of the brief, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

_____

John P. Blackburn

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

RYAN NOVOTNY, Plaintiff and Appellee, vs. SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, Defendants and Appellants, and ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, Defendants and Appellees.	ORDER GRANTING IN PART AND DENYING IN PART APPELLANTS' JOINT MOTION TO STRIKE BRIEF OF APPELLEES' AND ITS APPENDIX #27615 (CIV 14-235)
- - - - - - - - - - - - - - - - - - - -	
CLAIR ARENS and DIANE ARENS, Plaintiffs and Appellees, vs. CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW, Defendants and Appellants, and ALAN A. SOOSAN, also known as ALLEN A SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South	#27626 (CIV 15-167)

Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellees.

CLAIR ARENS and DIANE ARENS,
Plaintiff and Appellee,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,
Defendant and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.M., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES, and VARIOUS JANE DOES,
Defendants and Appellees.

#27631
(CIV 15-167)

- -

Appellants by through counsel having served and filed a joint motion to strike brief of appellees and its appendix and appellees having served and filed a response thereto and the Court having considered the motion and response and being fully advised in the premises, now therefore, it is

ORDERED that said motion be and it is hereby granted in part to strike brief references and appendices in the following: Affidavit of Jacki Silvernail; Affidavit of Mark Hall; Sossan's South Dakota Indictment; Deposition of Don Swift II and Deposition of Thomas Posch.

IT IS FURTHER ORDERED that motion to strike Sossan's Criminal Record Search be denied.

IT IS FURTHER ORDERED that appellees' replacement brief shall be due for service and filing on or before June 13, 2016.

DATED at Pierre, South Dakota this 24th day of May, 2016.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

MAY 24 2016

Clerk

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 27615, 27626, 27631

RYAN NOVOTNY,

Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES,
A South Dakota Corporation, d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,

Defendants and Appellant,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendants and Appellants.

CLAIR ARENS AND DIANE ARENS,

Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY , ROBERT NEUMAYR, MICHAEL PIETIL and DAVID WITHROW,

Defendants and Appellants,

and

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Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

THE HONORABLE BRUCE V. ANDERSON
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Petition for Permission to Take Consolidated Appeal of Intermediate Order Filed November 3, 2015
Order Granting Petition Filed December 15, 2015.

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PRELIMINARY STATEMENT

Plaintiffs from all the cases consolidated in this appeal will be referred to by their name and will be referred to as either "Plaintiffs" or "Appellees" when being referred to collectively. Defendant Alan A. Soosan a/k/a Allen A. Soosan a/k/a Allen A. Soosan D.O. will be referred to as "Soosan." Appellant Sacred Heart Health Hospital services d/b/a Avera Sacred Heart Hospital will be referred to as "ASHH." Appellant Lewis & Clark Specialty Hospital, LLC, will be referred to as "LCSH." Appellants Curtis Adams, David Barnes, Mary Milroy, Robert Neumayr, Michael Pietila, and David Withrow will be collectively referred to as "Peer Review Defendants." ASHH, LCSH, and the Peer Review Defendants will be collectively referred to as "Appellants" or "Defendants." The consolidated cases noted in this Court's December 15, 2015 Order Granting Petition for Permission to Appeal will be referred to collectively as "the Soosan cases."

References to the Circuit Court Record from the *Novotny v. Soosan, et al,* matter (Appeal No. 27615; CIV 14-235) will be by the designation "*Novotny*" followed by the page number(s). References to the Circuit Court Record from the *Arens v. Soosan, et al,* matter (Appeal No. 27626 and 27631; CIV 15-167) will be by the designation "*Arens*" followed by the page number(s).

JURISDICTIONAL STATEMENT

Defendants appeal the decision of the Honorable Bruce V. Anderson's October 23, 2015, "Memorandum Decision: Plaintiffs' Motion to Compel Discovery - Plaintiff's Motion on Constitutionality of Peer Review Statute SDCL 36-4-26.1 - Plaintiff's Motion and Argument Concerning Hospital Liability and Negligent Credentialing." This Court granted Defendants an intermediate appeal on December 15, 2015.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request the privilege of appearing before this Court for Oral Argument.

STATEMENT OF THE ISSUES

I. Did the Circuit Court correctly rule that, in order to remain constitutional, SDCL § 36-4-26.1 required a crime/fraud exception

Yes. The protection of a privilege is contingent on the proper exercise of that privilege. A "privilege takes flight if the relation is abused." *Clark v. United States*, 289 U.S. 1, 15-16 (1933). Appellants used the peer review privilege to hide information from their patients and the public regarding the danger that Soosan posed to them. Appellants further used peer review to cover up their knowledge and participation in Soosan's deceptive surgery practices.

II. Did the Circuit Court appropriately require Appellants to turn over original source material to Appellees?

Yes. Peer review privilege statutes "erect an outer limit on the peer-review privilege.…" *Pastore v. Samson*, 900 A.2d 1067, 1081 (R.I. 2006). Such statutes put "limitation[s] on the scope of the privilege afforded a health-care provider, rather than a definition of [a] plaintiff's exclusive avenue of discovery." *Id.* Obtaining these outside documents from Appellants, rather than other sources, promotes judicial efficiency and has no negative impact on the strength of the underlying privilege. *Fisher v. United States*, 425 U.S. 391, 403-404 (1975).

INTRODUCTION

Appellants essentially argue that they should be allowed to lie to their patients; to defraud their patients through surgeries the patients do not need; and to commit perjury. In other words, they ask this Court for a license to lie, cheat, and steal. Appellants couch these requests in language discussing the purported virtues of peer review. Underneath that language, however, is their real request: to make sure that they can use South Dakota's peer review privilege to cover up evidence of crimes or frauds and then be allowed to lie about it under oath.

Appellants try to talk about the privilege abstractly. Most, if not all, of their studies lack data to support their conclusion that peer review promotes patient safety. The data, itself, tells a different story.[1] The data indicates that the inviolate peer review privilege Appellants seek actually *undermines quality health care*.[2]

Judge Anderson was disturbed by the Appellants' pattern of illicit behavior and their cover-up efforts. That is why he ordered that, in order to remain constitutional, South Dakota's peer review privilege required a crime/fraud exception. Judge Anderson also noted that, absent a negligent credentialing cause of action and its attendant evidence, hospitals and other medical organizations, like Appellants and their amici, will continue licensing bad, but profitable, doctors like Soosan. As the United States Supreme Court pointed out, the crime/fraud exception is necessary to prevent privileges from creating "dens of thieves." Appellants turned their hospitals into dens of thievery. The peer review privilege should not give them such license.

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[1] *See* Public Citizen Amicus.
[2] *Id*.

STATEMENT OF THE CASE

This litigation arose out of hundreds of unnecessary surgeries committed by an orthopedic surgeon, Soosan. Soosan, and the hospitals and other doctors who supported him, convinced dozens of patients to submit to surgery – usually multiple surgeries – through various pitches and artifice. Few of his patients got the relief he "guaranteed."[3] All the while, ASHH, LCSH, and the Peer Review Defendants said one thing to their patients (that Soosan was one of the top doctors in the world)[4] but had a completely different opinion behind closed doors. (*Novotny* 437) ("I felt that I was placed in a terrible situation, in that, I wanted to warn patients but was not a doctor and feared I would lose my job…. Staff members had only two choices; to either put up with Sossan's abuse and practices or leave.").

As a result, Appellees filed over thirty actions against ASHH, LCSH, the Peer Review Defendants, and others because of their participation in Soosan's illegitimate surgical practices. Appellees pled the following causes of action: deceit; fraudulent misrepresentation; fraudulent concealment; battery; respondeat superior and agency; conspiracy; RICO violations; negligent credentialing (hiring) and retention; unjust enrichment; bad faith peer review; and other causes of action related to the constitutionality of South Dakota's peer review privilege statute.[5] Appellees brought these causes of action because Appellants knew Soosan was a corrupt doctor who performed unnecessary surgeries; because Appellants worked together to enable Soosan to generate massive profits through these unnecessary surgeries; and because Appellants

[3] *See e.g.*, (*Novotny* 453, 455, 481, 519, 586, 653) (discussing Soosan's "guarantees").
[4] *See also* (*Novotny* 652).
[5] (*Novotny* 15-29).

deceived Appellees regarding Soosan's character, skill, training, and Appellees' medical conditions. (*Novotny* 1911). As Judge Anderson noted, "the gravamen of the Plaintiffs claims sounded in fraud and deceit *and were not actions for medical malpractice*…." (*Novotny* 1911) (emphasis added).

Shortly after litigation started, Appellees submitted discovery requests and, as Judge Anderson observed, Appellants provided "little useful information." (*Novotny* 1911). Appellants claimed they did not have to turn over this information, citing the peer review privilege. (*Novotny* 1911). Appellees filed a Motion to Compel. (*Novotny* 969-70). Appellees argued there should be a crime/fraud exception to South Dakota's peer review privilege, and if not, that the statute was unconstitutional. (*Novotny* 294-337). Because Appellees' causes of action sounded in fraud and deceit, Appellees argued that the crime/fraud exception should apply, and Appellants should disclose their peer review documents. *Id.* Furthermore, Appellees argued that, in order for the peer review privilege to comply with due process, there should be an independent source exception for negligent credentialing claims against hospitals or other medical facilities. *Id*. Judge Anderson granted Plaintiff's Motion to Compel, holding that in order to remain constitutional, South Dakota's peer review privilege statute needed a crime/fraud exception and an independent source exception for negligent credentialing claims against hospitals and other medical facilities. (*Novotny* 1935-37).

STATEMENT OF THE FACTS

I. Soosan has a History of Criminal, Violent, and Fraudulent Behavior

Soosan was born in Iran, but grew up in Florida. (*Novotny* 1912). While in Florida, Soosan was convicted of felony forgery, grand theft, and bad check charges and

later, felony burglary. *Id*.; Appendix 1-3. He then unofficially changed his name from Alan Soosan to "Allen Sossan." *Id*. Sossan attended medical school under his new alias. *Id*.

In 2004, Soosan applied for a medical license in Nebraska in 2004. (*Novotny* 365). In his application, Soosan lied about his true identity and his felony past. *Id*.; Appendix 4-5. After obtaining his Nebraska license, Soosan started practicing as an orthopedic surgeon specializing in spinal fusion surgeries in Norfolk, Nebraska. (*Novotny* 1912). Quickly thereafter, other physicians and staff raised concerns about Soosan's questionable medical practices and his fitness to practice medicine. *Id*.

Soosan was well known for falsifying patient charts and intentionally misreading radiology films to justify unnecessary surgeries. (*Novotny* 1291) ("The most significant problem posed by [Soosan] was that [Soosan] falsified patient charts in order to justify performing unnecessary procedures on his patients." "The most widely known of [Soosan's] fraudulent activities involved [Soosan] disregarding the opinions of the radiologists and creating erroneous chart findings from [Soosan's] personal reading of x-ray, MRI and CT scans that falsely gave [Soosan] diagnostic criteria to justify otherwise unwarranted surgeries."). In fact, several radiologists at Faith Regional Hospital "complained about [Soosan's] conduct in falsifying radiological results." *Id*. "[Soosan] also did a great deal of injection work and engaged in the performance of unnecessary injections, nerve blocks and radiofrequency ablation." *Id*. Soosan left numerous patients disabled or dead as a result. The settled record contains multiple accounts of how Soosan destroyed his patients' lives. (*Novotny* 441-42 (Dan Meyer); 445-47 (Norma Jeanne Sorenson); 434-35, 452 (Mildred Sloan).

About the same time Soosan lost his privileges in Norfolk, Appellants ASHH and LCSH courted him to come to Yankton. (*Novotny* 1913). ASHH needed an orthopedic surgeon to cover on-call support. (*Novotny* 1159, 1163). LCSH was in financial trouble. (*Novotny* 1914).

Numerous people who worked with Soosan in both Norfolk and Yankton warned ASHH and LSCH against granting Soosan privileges. *Id*. For example, Dr. William Winn, who practiced in both Norfolk and Yankton, personally warned ASHH's medical director that Soosan falsified patients' medical records to justify unnecessary medical procedures. (*Novotny* 1913). Dr. Winn further warned the medical director that Soosan "posed a danger to the public." (*Novotny* 1913, 1291-92). LCSH received similar warnings. (*Novotny* 437, 1246).

Dr. Winn's concerns were consistent with other doctors who have testified against Soosan. (*Novotny* 1913). They all questioned Soosan's fitness as a licensed physician. *Id*. For example, Dr. Robert Suga, an orthopedic surgeon from Sioux Falls, testified that Soosan performed unnecessary surgeries "with the motive of generating bills and income for himself." (*Novotny* 1913-1914). Dr. Quentin Durward, an orthopedic surgeon from Dakota Dunes, expressed similar concerns. (*Novotny* 1914).

As Judge Anderson observed when evaluating this testimony and Appellees exhibits, there was a significant amount of evidence demonstrating Soosan was a known danger to the public:

> In general, Plaintiffs have amassed a significant amount of evidence that, if proven to be true at trial, would raise a serious question if Dr. Sossan should have never [sic] been licensed, granted privileges, or that when he was, action should have been taken promptly to revoke or restrict his privileges, and that any reasonable person responsible for his medical

> practice supervision should have known he may have posed a danger to patients and taken appropriate action.

Id.

II. Appellants Knew Soosan was a Corrupt Doctor, but They Wanted the Massive Profits he Could Generate

When Soosan first applied to practice medicine in Yankton, ASHH's medical executive committee ("MEC") denied his application. (*Novotny* 1913). To date, it is unknown exactly what information ASHH's administration fed the MEC,[6] but the MEC members learned through informal channels that Soosan was a "danger to the public." (*Novotny* 1291, 1913) ("When I learned of Sossan's attempt at securing privileges at Avera Sacred Heart Hospital, I personally intervened to report the above-described problems regarding Sossan to Avera Sacred Heart Hospital in the interests of patient safety. In my opinion, Sossan posed a danger to the public."). LCSH received similar warnings. (*Novotny* 437, 1246). Like his application to practice medicine in Nebraska, Soosan submitted false answers on his South Dakota application related to his name and felony past. (*Novotny* 241. Both ASHH and LCSH had the ability to obtain Soosan's background information; they either chose not to look it up or ignored what they found. Appendix 6-7 (Soosan criminal search showing felony record).

Despite the known danger he posed, ASHH's CEO, Pam Rezac, had Matt Michels pressure the MEC to extend Soosan privileges. (*Novotny* 417, 442, 1181). The MEC dutifully reversed course. (*Novotny* 1913). When asked whether ASHH's administration was worried about Soosan's bad history, another Appellant and MEC member replied, "*They don't give a shit. They don't look at that stuff.*" (*Novotny* 417)

[6] (*Novotny* 1913).

(emphasis added). This same doctor noted that ASHH will have no qualms about lying under oath to protect its profits:

> Neumayr: He's gonna lie. Cause if he comes to court and you ask him that and he'll have to lie.
>
> Aaning: Of course they all lie. There's no problem with that.
>
> Neumayr: Oh sure, but then you have to make sure whoever you talk to, lies too.

(*Novotny* 415). LCSH also knew about Soosan's problems but extended him privileges because they believed Soosan would generate enormous profits. (*Novotny* 632).

Shortly after Soosan started practicing in Yankton, "issues and complaints began to arise that should have made it obvious to doctors and other persons in the medical field that there was a serious and substantial question as to Soosan's fitness, competency and ability to practice medicine in his specialty prompting further inquiry." (*Novotny* 1914). Soosan was open about the fact that he was performing unnecessary surgeries for money. (*Novotny* 603).

ASHH's and LCSH's employees became increasingly concerned about Soosan's behavior and repeatedly reported Soosan to their superiors. ASHH and LCSH, however, told these employees that Soosan was untouchable because of the money he brought in. Jennifer Coffey, a nurse who worked with Soosan at ASHH, was told that Avera kept Soosan despite the numerous complaints because he was a rainmaker. (*Novotny* 660). Kendra Krueger, Soosan's former clinical nurse at LCSH, was told that Soosan was "*untouchable* due to the amount of money [Soosan] brought into Lewis & Clark." (*Novotny* 437).

None of this behavior or any of the employee complaints had any effect on Sossan's privileges. As Judge Anderson stated, "despite the fact that there were numerous complaints and much discussion among the medical community about Dr. Sossan, no action was taken to limit, modify or otherwise terminate his privileges in the Yankton medical community by those who had authority to do so." (*Novotny* 1914). According to Appellees' credentialing expert, ASHH and LCSH demonstrated "willful, wanton, and malicious disregard of the standards of care and administrative community standards applicable to the initial granting privileges and credentials…." (*Novotny* 1915).

ARGUMENT

Appellees causes of action are grounded in fraud, deceit, conspiracy, and RICO. (*Novotny* 1911). Appellants knew about Soosan's propensity to perform unnecessary surgeries, but they gave him hospital privileges anyway. Along the way, Appellants lied to patients and the public about Soosan's skill, character, and demeanor. Appellees' evidence demonstrates that Appellants used the peer review privilege to hide damaging information about Soosan and to conceal evidence of their own culpability in his illicit practices.

Appellants used the peer review privilege in a manner inconsistent with its purpose. As the United States Supreme Court stated, when the holder of a privilege abuses that privilege, the privilege is waived. *Clark*, 289 U.S. at 15-16. That is because the protection offered by the privilege *only* extends to activities consistent with the purpose of the privilege. *Id.*

Statutory privileges are strictly construed "to avoid suppressing otherwise competent evidence." *State v. Guthrie*, 2001 SD 61, ¶ 61. That is because "[t]he very

integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed" by either party. *United States v. Nixon*, 418 U.S. 683, 709 (1974). In analyzing other statutes pertaining to the practice of medicine, this Court noted that a statute is unconstitutional where it "gives all the benefits to the wrongdoer … while it places all the corresponding detriment to the" injured victim. *Knowles v. United States*, 1996 SD 10, [33]. Furthermore, "[n]ot every exception to a privilege established by statute is legislative in origin. The judiciary has also imposed some limitations…." *Benton v. Superior Court*, 182 Ariz. 466, 469 (Az. App. 1994).

I. Judge Anderson Correctly Concluded the Peer Review Statute Must have Certain Exceptions in order to Comply with Due Process

Appellants incorrectly argue that Appellees waived all issues regarding the constitutionality of South Dakota's peer review statute. Appellees were not required to file a cross appeal because Appellees' original position is consistent with Judge Anderson's ruling: in order for South Dakota's peer review privilege statute to be constitutional, there must be certain exceptions, including a crime/fraud exception and exceptions for discovery of outside materials relied on by peer review committees in negligent credentialing cases.

A. Due Process Requires Certain Exceptions to Privileges

1. Due Process Is the Foundation of the Judicial System

Due process and access to the courts "form[] the bedrock on which the structure of our judicial system is constructed. Essential to the fabric of [these constitutional rights] is the citizen's right of access to the evidence necessary to prove his case, without

which mere access to the courts would be vain and useless." *Kammerer v. Sewerage & Water Bd.*, 633 So.2d 1357, 1362 (La.App. 1994).

Judge McMillan from the Federal District Court for the Western District of North Carolina summed up the role of due process:

> Due process -- fair procedure -- is not a bitter medicine which is reserved only for the knowingly wicked. Due process is a simple necessity of any society which believes (as did those who drew our Constitution) that the excesses of governmental power are more dangerous than the risks of personal freedom. Power tends to corrupt us all – even the "good guys" – and due process of law – the command to hear both sides before deciding – is a necessary restraint on the exercise of governmental power.

Poe v. Charlotte Memorial Hosp., 374 F. Supp. 1302 (W.D.N.C. 1974).

2. Procedural Due Process Looks to the Fairness of the Process, Including Fairness in Discovery

"Procedural fairness is provided for in civil due process…. [O]pen testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in an orderly proceeding are all elements of civil due process." *In re Moseley*, 660 P.2d 315, 318 (Wash. 1983). "Discovery is the quintessence of preparation for trial and, when discovery rights are tramped, prejudice must be presumed." *Scott v. Greenville Housing Auth.*, 579 S.E.2d 151, 158 (S.C. 2003). Discovery is a right guaranteed even in the less formal world of administrative law. *High Horizons v. State Dept. of Transp.*, 575 A.2d 1360 (N.J. 1990) (procedural fairness includes "a chance to know the opposing evidence and argument and to present evidence and argument in response."). Due process is so important it regularly requires that a contrary privilege yield to a litigant's evidentiary rights. *See United States v. Nixon*, 418 U.S. 683 (generalized assertion of Presidential privilege had to yield to the generalized, specific

need for evidence in a criminal trial); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newsman's First Amendment privilege yielded based on due process).

3. Inviolate Absolute Privileges are Questionable, at Best

"Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando*, 441 U.S. 153 (1979). Whatever "their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710.

At one point, privileges were presumed to be absolute and inviolate. Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence, Evidentiary Privileges § 5.4.4 (Richard Freedman ed., 2002). That view has since been questioned due to the problems it creates. Imwinkelried, Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges, 65 U. Pitt. L. Rev. 145, 156-73 (2004). That is because the underlying rationale behind absolute and inviolate privileges is considered untested or flawed. *Id.*

B. Due Process Requires a Crime/Fraud Exception to the Peer Review Privilege Because Appellees' Compelling Procedural Due Process Concerns Outweigh any Substantive Due Process Right

Appellants incorrectly argue that, because the peer review privilege is supposedly absolute, no crime/fraud exception should exist. First, even those privileges historically considered to be "absolute" have specific exceptions like the crime/fraud exception. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116, (1996) (spousal); *Nixon*, 418 at 705-07 (presidential); *Upjohn*, 449 U.S. at 389 (attorney-client); *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 72 (1st Cir. 1999) (psychotherapist); *Clark*, 289 U.S. 153 (juror confidentiality).

Second, where there are conflicts between procedural due process rights of remedy and discovery and substantive due process rights regarding privileges, courts regularly find that the procedural due process right to evidence trumps any competing substantive due process concern. *Branzburg*, *supra* (civil litigant's procedural due process right to evidence from a news reporter's confidential source overrides and defeats reporter's first amendment privilege). Here, Appellants have no substantive due process right under peer review. This undeniably shifts the balance in favor of Appellees' procedural due process rights. *Deming v. Jackson-Madison County Gen.*, 553 F. Supp. 2d 914 (W.D. Tenn. 2008) (holding that peer review does not affect a substantive due process right). *Benjamin v. Schuller*, 400 F. Supp. 2d 1055 (S.D. Ohio 2005) (physicians have no fundamental rights or liberty interests in peer review decisions). Third, Appellants ignore that courts created *all* of these exceptions. *Id.*; *Benton*, *supra*.

Even for privileges protected by substantive due process rights, courts require exceptions for fraudulent or criminal behavior. As Justice Cardozo stated, a "privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark*, 289 U.S. at 15. That's because a statute cannot legislate away another person's due process rights.

The crime/fraud exception is specifically allowed because the behavior associated with the exception (i.e., criminal or fraudulent acts) is inconsistent with the rights at stake in the privilege. *Clark*, 289 U.S. at 16 ("A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney."). In

fact, this Court has quoted favorably United States Supreme Court precedence addressing this issue. *See e.g.*, *State v. Catch the Bear*, 352 N.W. 2d 640, 646-47 (S.D. 1983) (*quoting Nixon*, 418 U.S. at 710) ("'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"). Privileges "must be considered in the light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in [the United States Supreme Court's] view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" *Nixon*, 418 U.S. at 709.

1. Other Privileges with Stronger Foundations than the Peer Review Privilege Require Crime/Fraud Exceptions

a. Privileges Based on Fundamental Rights Require a Crime/Fraud Exception, as Judge Anderson Properly Recognized

Appellants incorrectly claim the legislature intentionally failed to include a crime/fraud exception to the peer review privilege. As a preliminary matter, determining whether a statute is unconstitutional or requires an exception to remain constitutional is emphatically a question for the courts, not the legislature. Furthermore, Appellants' arguments are illogical. Essentially, Appellants state that the South Dakota Legislature endorsed the notion that hospitals can use peer review to cover up crimes or frauds. Such a position would be in direct conflict with South Dakota's criminal and civil statutes related to fraud and deceit. *State v. Mundy-Geidd*, 2014 S.D. 96, ¶ 11 (absurdity in result invalidates strict reading of conflicting statutes).

The Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v.*

Harker Heights, 505 U.S. 115, 125 (1992). It "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Wash v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). These fundamental rights "are, objectively 'deeply rooted in this Nation's history and tradition.'" *Id*. (citations omitted). Anything that infringes on a fundamental right must be "narrowly tailored to serve a compelling state interest." *Id*. at 722. In other words, an abridgement of a fundamental right must survive strict scrutiny.

The spousal privilege derives from the fundamental right to marriage. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).[7] As a result, the spousal privilege was considered inviolate at one point, as Appellants argue the peer review privilege should be. *Hawkins v. United States*, 358 U.S. 74, 78 (1958). That approach, however, proved problematic:

> As Jeremy Bentham observed more than a century and a half ago, such a privilege goes beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." It "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime."

Trammel, 445 U.S. at 51-52 (citations omitted).

The United States Supreme Court subsequently narrowed the spousal privilege through a crime/fraud exception to prevent its abuse. *Id*. at 35. South Dakota followed suit. *State v. Witchey*, 388 N.W.2d 893 (S.D. 1986) (recognizing the joint-participant exception to the marital privilege in criminal matters). The Supreme Court applied the exception in a way to balance the need for disclosure under certain circumstances against

[7] *See also Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (Marriage is "the most important relation in life" and "the foundation of the family and society, without which there would be neither civilization nor progress"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

the need for private communications. *Trammel*, 445 U.S. at 35. Even with the crime/fraud exception, the spousal privilege is still considered absolute.

b. As Judge Anderson Observed, Typically Absolute Privileges Protecting National Security are Subject to the Crime-Fraud Exception

Presidential, or executive, privilege derives from Article II of the United States Constitution. *Nixon*, 418 U.S. at 705-07. Like peer review, the need for candor amongst a President's advisors is an essential element of the privilege:

> [The President has] the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.

Id. at 705.

The United States Supreme Court recognized that the Presidential privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id*. at 708. Additionally, the President has certain immunities not available to the general public. *Id*. (quoting Chief Justice Marshall in *United States v. Burr*, 25 F. Cas. 187, 192 (No. 14,694)).

As the Supreme Court noted, despite its roots in the Constitution, national security, and defense, the Presidential privilege must bow to due process evidentiary needs:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process

> be available for the production of evidence needed by the prosecution or by the defense.

Id. at 709.

c. Judge Anderson Properly Noted that the Attorney-Client Privilege is Subject to a Crime/Fraud Exception

The attorney-client privilege is "the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." *United v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997). The attorney-client privilege is also "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co*, 449 U.S. at 389. It is grounded in the 5th and 14th Amendment rights to procedural and substantive due process; the 6th Amendment rights to speedy and public trial, to a trial by an impartial jury, to confront witnesses, to compel witnesses to appear in court, and for assistance of counsel; and the 7th Amendment right to a jury trial. U.S. Const. Amend. 5, 6, 7, 14.

Similar to the Presidential privilege and Appellants' arguments about the peer review privilege, the attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." *Id*. The United States Supreme Court recognized that legal and medical privileges share a general need for confidentiality. *Trammel*, 445 U.S. at 51. Appellants assertions justifying an inviolate peer review privilege apply equally to the attorney-client privilege:

> As a practical matter, if the client knows that damaging information could more easily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Fisher, 425 U.S. at 403. However, Appellants' arguments regarding the chilling effect of the crime/fraud exception are undermined by South Dakota statutes specifically permitting physicians to discover peer review material, SDCL 36-4-26.1, and by United States Supreme Court precedence explicitly rejecting the assertion that a crime/fraud exception has *any* effect on candor. *Nixon*, 418 U.S. at 712.

Like any privilege, the attorney-client privilege "is not without its costs." *United States v. Zolin*, 491 U.S. 554, 562 (1989). That is because "the privilege has the effect of withholding relevant information from the factfinder." *Id*. (citations omitted). As a result, the attorney-client privilege "applies only where necessary to achieve its purpose." *Zolin*, 491 U.S. at 562. In other words, like any privilege, it is "strictly construed." *Trammel*, 445 U.S. at 50. Thus, the attorney-client privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *Zolin*, 491 U.S. at 563 . The same logic unquestionably applies to the peer review privilege.

Like the spousal and Presidential privileges, the attorney-client privilege stems from constitutionally guaranteed rights. The crime/fraud exception to all of these privileges derived from court action, as Judge Anderson did here. Like the spousal privilege, the attorney-client privilege's underlying rights are *fundamental* to the notion of ordered liberty and thus any abridgement of those rights must be "narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 722. The crime/fraud exception both serves a compelling state interest and is sufficiently narrowly tailored to not abuse the right. Creating a crime/fraud exception to the peer review privilege, however, requires no such analysis. There is no fundamental right at stake. There is no

need for strict scrutiny. This Court can affirm a crime/fraud exception simply because there is a rational basis to do so. It should.

2. Judge Anderson Correctly Ruled that a Crime/Fraud Exception to the Peer Review Privilege Adequately Protects Appellees' Procedural Due Process Requirements

The peer review privilege is no more special than the attorney-client privilege, the presidential privilege, or the spousal privilege. It has none of the characteristics of a fundamental right or liberty. It should, therefore, not have any greater protection. The legislature could not get rid of the attorney-client privilege or the spousal privilege. Likewise, the legislature could not repeal the crime/fraud exception to the attorney-client or spousal privileges even if it wanted to. That is because the courts have said, as Judge Anderson did, that privileges like peer review must be subject to a crime-fraud exception.

The crime/fraud exception is required for public safety. Courts balance the need for secrecy with the need to prevent "dens of thieves" that members subject to the privilege can abuse. There is no doubt that privileges can be abused. Appellants knew horrific details about Soosan, yet they let him continue butchering his patients. They allowed him to keep doing it because they wanted the huge distribution checks Soosan's practice allowed. Appellants' belief that peer review would shield them from scrutiny allowed greed, rather than patient safety, to guide their decisions. *See* (*Novotny* 437, 660, 1191).

As Judge Anderson noted, the attorney-client privilege provides excellent guidance on how to apply the crime-fraud exception. Under the attorney client privilege, there is a two-step process to access privileged materials:

1) The moving party must make a threshold showing, using nonprivileged evidence "'of a factual basis adequate to support a

> good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[8]

and

> 2) The trial court may hold an *in camera* review of the privileged communication itself in the form of documents, attorney, testimony, or both.[9]

Whether to conduct the second step of the process is left to the "sound discretion" of the court. *Zolin*, 491 U.S. at 572. The exception applies regardless of whether the privilege holder was a willing or unwitting accomplice to the fraud. *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 79.

Here, independent evidence confirms that Soosan – with Appellants' participation and assistance – continued performing unnecessary surgeries for profit after he came to Yankton:

> [Soosan] was very open about the fact that procedures and surgeries he performed were all about money. When [Soosan] had a particular interest in buying something expensive he would push to schedule more procedures and surgeries. For example, [Soosan] liked fancy cars and one day brought in a picture of a foreign sports car that cost over $200,000. He told the staff to call all the patients who had surgery in the last 6 months to come in so that he could schedule new surgeries to make the money to buy the car

(*Novotny* 603) (emphasis added). Witnesses recounted how Soosan would say whatever it took to get his patients to agree to surgery:

> Many patients expressed anger and frustration about the anterior surgery because [Soosan] never told the patients that there would be two surgeries before the patient agreed to the first surgery….
>
> [Soosan] was extremely convincing and would tell patients whatever it took to get them to have a surgery.

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[8] *Zolin* 491 U.S. at 572 (citations omitted).
[9] *In re Grand Jury Subpoena*, 419 F.3d 329, 343 & n. 12 (5th Cir. 2005).

Id.

Appellants knew what Soosan was doing, but they let him keep doing it for the money. *Id*. Judge Anderson recounted some of Appellees' evidence in his opinion and concluded by stating, "it is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants." (Novotny 1934).

The United States Supreme Court created the crime/fraud exception to privileges affecting fundamental rights because the exception passes strict scrutiny. It promotes a compelling state interest (not creating a safe haven for criminal or fraudulent acts), and it uses the most narrowly tailored means to fulfill that compelling interest (there must be a baseline showing of fraudulent or criminal behavior before the privilege can be invaded). As Public Citizen points out, fraudulent or criminal conduct in a hospital setting is particularly harmful. There is a compelling state interest in making sure that criminal or fraudulent activity does not take place. There is also a compelling state interest in ensuring that peer review committees do not become shelters where corrupt individuals can hide evidence of malfeasance. That defeats the whole purpose of peer review. Medical quality is not enhanced if doctors or hospitals can commit crimes or frauds and then hide the evidence behind peer review.

3. No Crime/Fraud Exception would Lead to an Absurd Result

Appellants' interpretation of the peer review privilege as "absolute" would allow hospitals to commit crime and fraud without fear of legal repercussion. The legislature's intent would never be to condone criminal action. *See e.g., State v. Mundy-Geidd*, 2014 S.D. 96, ¶ 11 ("Under Mundy-Geidd's interpretation, numerous public safety statutes involving alcohol would have been repealed by implication."). In *State v. Mundy-Geidd*, this Court interpreted concurrent statutes where one of the statutes could preclude the enforcement of DUIs from 2012 to 2014. *Id.* This Court rejected this interpretation in part because the defendant's "interpretation leads to absurd results." Id. ¶ 7. Protecting hospitals from fraudulent and criminal activity is as equally absurd. It is also inconsistent with other statutes that condition immunity on peer review members acting in good faith and not immunizing hospitals from liability. SDCL 36-4-25, SDCL 36-4-26. Furthermore, Appellants' interpretation would effectively shield most doctors from criminal prosecution, so long as the evidence is provided to a peer review committee. Appellants' interpretation of peer review would undermine the rule of law and create a class of individuals not subject to civil – *or even criminal* – liability.

4. Judge Anderson Properly Concluded that an in-Camera Review was Unnecessary

Appellants argue that Judge Anderson erred by not performing an *in camera* review of their respective peer review records. Under existing precedence, however, that discretion is left to the trial court. *Zolin*, 491 U.S. at 572. Furthermore, according to the United States Supreme Court, where the threshold for the crime/fraud exception has been met and where there are voluminous records, it would be improper to consistently require *in camera* review:

> There is also reason to be concerned about the possible due process implications of routine use of in camera proceedings…. Finally, we cannot ignore the burdens in camera review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

Id., at 554 (internal citations omitted).

Judge Anderson also observed that, if Appellants wanted an *in camera* review, they needed to first produce a privilege log, which they failed to do. (*Novotny* 1935). As such, Appellants' arguments are both factually and legally incorrect.

C. Judge Anderson Correctly Ruled that Due Process Requires Peer Review Discovery for Negligent Credentialing Causes of Action

"It is well settled that it is the unique responsibility of the courts, not the executive or legislature, to resolve a conflict between two competing constitutional interests." *Southwest Cmty. Health v. Smith*, 755 P.2d 40, 44 (N.M. 1988) (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). A privilege violates due process when it invades the "fundamental constitutional right to have a remedy for an injury to person or property by due process of law." *Ernest v. Faler*, 237 Kan. 125, 131 (1985). The right to due process and a fair trial are "so fundamental that they even override exclusionary rules of evidence (i.e. privileges) that are *constitutionally* grounded." *Adams v. St. Francis*, 264 Kan. 144, (1998) (emphasis added); *Branzburg*, 408 U.S.665 (civil litigant's procedural due process right to evidence from a news reporter's confidential source overrides and defeats a reporter's first amendment privilege).

Appellants failed to appeal Judge Anderson's prior decision that negligent credentialing and bad faith peer review are valid causes of action in South Dakota and that the gravamen of Appellees' claims are fraud and deceit. (*Novotny* 2039). That may

be because most every state recognizes negligent credentialing as a cause of action.[10] They do so because, as occurred here, a hospital's failure to adequately screen potential doctors is disastrous for patients. As a result, many courts allow peer review discovery because due process requires it in negligent credentialing cases. For example, Kentucky allows litigants to use peer review information in medical malpractice suits. *Sister's Charity Hospital v. Raikes*, 984 S.W.2d 464 (Ky. 1998). Like South Dakota's statutes, Kentucky only confers immunity if the peer review decision was made in good faith. *Id*. *See* SDCL 36-4-26 (hospitals not immune from all lawsuits regarding peer review decisions); SDCL 36-4-25 (immunity is conferred to members of a peer review committee *only* "if the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, *and* acts in reasonable belief that the action taken is warranted by those facts.") (emphasis added).

In fact, the Kansas Supreme Court declared its peer review privilege statute unconstitutional because it failed to allow peer review discovery in negligent credentialing cases. *Adams*, 264 Kan. 144. Like South Dakota, the Kansas Constitution guarantees its citizens "due course of law." Kan. Bill of Rights § 18. Kansas, however, has a more deferential standard of review for the constitutionality of a statute than South Dakota. Unlike South Dakota's substantial relationship test, in Kansas "[a] statute must clearly violate the constitution before it may be struck down." *Id*. at 157.

The Kansas Supreme Court noted that broad application of the peer review privilege – like Appellants request here – would allow doctors and hospitals to use peer review as a black hole for evidence against them:

[10] For a list of these decisions, see (*Novotny* 312).

> The twelve definitions of peer review listed in Kan. Stat. Ann. § 65-4915 encompasses all, or almost all, aspects of the practice of medicine. Many documents and records generated in a hospital or medical practice could be useful to a peer review officer or committee in performing its duties. If a document was to be privileged solely by the virtue of it being reviewed by a peer review officer or committee and the information in those records could not be discovered or admitted into evidence at trial, it would intolerably thwart legitimate discovery and tend to eliminate medical malpractice cases and the discovery of evidence relevant to the awarding of staff privileges contained in documents, records, and papers submitted to the peer review committee. This cannot, in the court's opinion, be the result intended. Such an interpretation could raise significant constitutional implications.

Id.

As a result, the court noted that if peer review served to "insulate from discovery the facts and information which go to the heart of the plaintiff's claim [it] would deny plaintiffs that right [to due process] and, in the words of the federal court, 'raise significant constitutional implications.'" *Id*. at 173. The court held that the statute should be rejected as unconstitutional because it was overbroad:

> In the present case, we conclude that although the interest in creating a statutory peer review privilege is strong, it is outweighed by the fundamental right of the plaintiffs to have access to all the relevant facts. *The district court's protective order and order granting other discovery relief denied plaintiffs that access and thus violated plaintiffs' right to due process*….

Id. at 173-74 (emphasis added).

Judge Anderson correctly ruled that a limited exception to the peer review statute for negligent credentialing cases is consistent with the overall legislative context surrounding peer review. *See* (*Novotny* 1930) ("Without giving Plaintiff access to this important peer review information, the second clause of the first sentence of SDCL 36-4-25 is rendered completely meaningless…."). That is because peer review committee members do not have immunity if their decisions were made in bad faith. SDCL 36-4-

25. Similarly, hospitals, like ASHH and LCSH do not have immunity for their peer review decisions. SDCL 36-4-26. Appellants' interpretation of the peer review privilege would make those two statutes meaningless. *Mundy-Geidd*, 2014 S.D. 96, ¶ 11.

Further indication that the peer review privilege is not inviolate is found in the privilege itself. SDCL 36-4-26.1 provides: "No person in attendance at any meeting of any committee described in 36-4-42 is required to testify as to what transpired at such meeting." This statute provides that MEC members cannot be "required" to testify. Thus, the privilege can be waived by MEC members who are willing to testify. This is consistent with other privileges which can be waived by clients, patients, or penitents. The peer review privilege can similarly disappear if someone is willing to talk about it. Appellants ignore this inconvenient fact.

If the Legislature were so concerned about the chilling effect of any use of any peer review information, it would have banned *all* testimony in *all* instances. Furthermore, SDCL 36-4-42's permissive testimony exception to peer review is consistent with the public policy exception for whistleblowing. *See Dahl v. Combined Ins. Co.*, 2001 SD 12, ¶ 12 ("Whistleblowing or the reporting of unlawful or criminal conduct to a supervisor or outside agency, plays an *invaluable* role in society. As recognized by courts considering this issue, 'public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.'"). The crime/fraud exception and the whistleblower exception both serve the same goal: they protect the public from illegal or fraudulent acts by those in positions of power.

The crime/fraud exception is also consistent with the model rules of behavior for both lawyers and doctors. An attorney may breach the privilege to prevent the imminent commission of crimes or frauds. *See* ABA Model Rules of Professional Conduct, Rule 1.6(b)(2). The American Medical Association *requires* doctors to report the kind of behavior Soosan exhibited. *See* AMA Code of Medical Ethics, Opinion 9.031. The common denominator for lawyers and doctors is that they must all report specified criminal or fraudulent behavior. This Court should, as Judge Anderson did, require Appellants to do what their own code of medical ethics required them to do.

D. Judge Anderson's Ruling That Appellees can Obtain Original Source Information Directly from Appellants is Consistent with how Other Privileged Evidence is Obtained

Appellants argue the peer review privilege is "absolute." Yet, they concede Judge Anderson correctly ruled that Appellees are entitled to discover original source information considered by their MECs. ASHH Brief at 17-18; Adams Brief at 23. Their concession confirms that SDCL 36-4-26.1 is *not* absolute. Appellants acknowledge that the statute should only protect what the committee itself produces (ex. its proceedings, records, reports, statements, minutes) and that it *does not* protect information the committee obtained or considered from outside sources.

Paradoxically, Appellants never explain why patient complaints about Soosan are not discoverable. Appellants agree that "the protections of 36-4-26.1 do not apply to patient records or observations made by a health care professional during the time of a patient's treatment." Adams Brief at 20. Patient or staff complaints are no different than any other outside sources. Appellants cannot convince this Court that they can also hide patient complaints under the guise of peer review.

Appellants argue that Appellees should have to obtain information generated outside their peer review committees from their original sources. That proposed procedure is judicially inefficient and illogical.

If original source information is not privileged, it should be discoverable from any source that has it. That is because peer review privilege statutes "erect an outer limit on the peer-review privilege…" and any exception to the privilege stops the statutes "from functioning as a shield" for that information. *Pastore*, 900 A.2d at 1081. In other words, exceptions for original source material are "limitation[s] on the scope of the privilege afforded a health-care provider, rather than a definition of [a] plaintiff's exclusive avenue of discovery." *Id*. Courts have rejected Appellants' argument because "[t]o oblige a plaintiff to track down the original source of unprivileged information that is within the custody of a party to the dispute would be to require burdensome labor for no good reason." *Id*.

Appellants have provided no good reason why Appellees should be compelled to obtain the original source information from the various original sources. It would put Appellees in the impossible position of having to divine what original source information the MEC obtained in the first place and then force Appellees to try and track down each original source from each of the relevant jurisdictions. Appellees would then have to try and compel those sources to turn over the relevant evidence. Many of these sources are not under the jurisdiction of this Court, so any order regarding those documents could be rejected. That would require Appellees to redo this entire process for each source of information that is already in Appellants' possession.

The attorney-client and work product privileges are instructive in this regard. Any communication between an attorney and his or her client is protected by the attorney-client privilege. SDCL 19-19-502. During discovery, however, numerous documents that are discoverable are exchanged between the attorney and his or her client. *See cf. Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) ("A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system…. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.") (citations omitted). Those documents, thus, would be subject to the attorney-client privilege. *Id*. Like the peer review privilege, there is no exception in SDCL 19-19-502 for original source documents. Nonetheless, discovery documents passed from client to attorney are regularly produced in discovery. *Fisher*, 425 U.S. at 403-404 ("The Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice."). That is because it would be inefficient for litigants to have to track down all relevant documents from their original sources. Furthermore, there is no privacy interest in documents that are discoverable:

> Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered.

Id. at 404.

Like the attorney-client privilege, if a document is not protected by privilege, it is discoverable. Appellants cannot play a shell game of evidence, all because they may have made allegedly privileged decisions based on it. Likewise, Appellees should not be required to jump through myriad hoops just to get information that Appellants could provide. Appellees should be able to get original source documentation from Appellants, themselves.

E. Appellants' Purported Controlling Case Law is Inapplicable

Appellants primarily rely on three cases to discuss South Dakota's peer review privilege: *Shamburger v. Behrens*, 380 N.W.2d 659, 665 (S.D. 1986); *Martinmaas v. Engelmann*, 2000 SD 85; and, *Uhing v. Callahan*, 2010 U.S. Dist. LEXIS 70 (D.S.D. Jan. 4, 2010). None of those cases, however, are applicable here.

In *Shamburger*, the only discussion of South Dakota's peer review privilege is in dicta from a summary judgment motion. As Judge Anderson pointed out, "*Shamburger* was a run of the mill malpractice claim where the plaintiff claimed that Dr. Behern [sic] was an alcoholic or otherwise afflicted with habitual intemperance." (*Novotny* 1954). Furthermore, "[t]he only ruling that *Shamburger* made with respect to privileged records concerned the Plaintiff's request to obtain Dr. Behern's [sic] alcohol treatment records from another provider." *Id*. As Judge Anderson observed, "*Shamburger* did not involve claims as are presented in the cases presently before this court where the Plaintiffs allege fraud, deceit, bad faith or RICO claims against the peer review committees involving the peer review process…. *Shamburger* does not help the Defendants here and the court is

not persuaded that it has much applicability, if any at all, to the present cases." (*Novotny* 1955). Furthermore, there was no constitutional challenge, as there is here.

Appellants also contend that, under *Martinmaas*, peer review is an absolute privilege. Like *Shamburger*, *Martinmaas* was a case involving regular negligence claims against a doctor. 2000 SD 85, ¶ 1. The plaintiffs in *Martinmaas* wanted to use the transcript from Engelmann's application for re-issuance of his medical license as evidence that he was negligent in his care and treatment of the plaintiffs. *Id*., ¶ 45. There was no claim against the medical facility in *Martinmaas*, as there is here. There was no claim that Engelmann committed some sort of fraud or deceit, as there is here. There was no claim that the hospital used peer review to perpetuate frauds or deceits, as there is here. As such, there is no applicability of the logic of *Martinmaas* to this case. Additionally, this Court actually found no prejudice against Engelmann for the introduction of peer review evidence.

Finally, Appellants cite to *Uhing v. Callahan*, an unpublished district court case, to support its contention that the peer review privilege is absolute. *Uhing*, however, is factually inapplicable and legally incorrect.

First, *Uhing* is factually inapplicable. Like *Martinmaas* and *Engelmann*, *Uhing* is a run-of-the mill medical malpractice case. The plaintiff's need for the peer review documents had no relationship to crimes, frauds, or even negligent credentialing claims. In fact, the plaintiffs in *Uhing* argued that they needed "the disputed records because Dr. Callahan attributes errors in Plaintiff's back surgery to inexperienced staff. Plaintiffs argue that Dr. Callahan's medical history suggests he should not have been performing surgeries. The disputed records could provide evidence to refute Dr. Callahan's assertion

that he is physically capable of performing surgery." 2010 U.S. Dist. LEXIS 70, [4]-[5]. Those arguments have nothing to do with the appropriateness of the peer review committee's decisions or whether the facilities used the peer review committee to perpetuate crimes, frauds, or deceits. Factually, *Uhing* is inapplicable.

Furthermore, the *Uhing* court relied on this Court's decision in *Pawlovich v. Linke*, 2004 SD 109, for the dicta that the peer review privilege is absolute. *Pawlovich*, however, relies on *Flugge v. Wagner*, 532 N.W.2d 419 (S.D. 1995) and *Waln v. Putnam*, 196 N.W.2d 579 (S.D. 1972)) to make that dicta. Under those decisions, however, "[a]n 'official proceeding' is 'that which resembles judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings.'" *Flugge*, 532 N.W.2d at 421. (citations omitte).

This Court has *explicitly rejected* Appellants' inference that a board decision by a nonprofit constitutes an "official proceeding" which is afforded absolute privilege:

> Appellants first contend that a meeting of the board of directors of a nonprofit corporation to remove a director is an 'official proceeding authorized by law…' and therefore that the communication in issue here was absolutely privileged. We feel that this contention is without merit. Surely it was not the legislative intent to grant an absolute privilege for every defamatory utterance made in every lawful meeting. *We are persuaded that the 'official proceeding' embraced in the purview of the statute is that which resembles judicial and legislative proceedings*, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings, *not a meeting of a board of directors of a nonprofit corporation or the like*.

Waln, 196 N.W.2d at 583 (citations omitted) (emphasis added). Most, if not all, of the documents Appellees request come as the result of meetings of Appellants' boards of directors or MECs that are making routine employment decisions. Even though they perform many of these actions under the color of peer review, it lacks the imprimatur of

an official proceeding authorized by law. Even if it were, such absolute privileges require crime/fraud exceptions to comport with procedural due process. *M.L.B.*, 519 U.S. at 116 (spousal); *Nixon*, 418 at 705-07 (presidential); *Upjohn*, 449 U.S. at 389 (attorney-client); *(Violette)*, 183 F.3d at 72 (psychotherapist); *Clark*, 289 U.S. 153 (juror confidentiality).

II. Judge Anderson's Concerns Regarding Perjury Absent Peer Review Discovery are Valid

At oral argument, Judge Anderson noted his concern about Appellants' willingness to perjure themselves. Appellants' response was that South Dakota's peer review statute allows doctors and hospitals to commit perjury:

> THE COURT: What about when I add this Neumayr problem in there, that he says, you know, they'll lie? How does anybody check that? I mean, if there's perjury, shouldn't somebody be able to hold them to task?
>
> MR. EDEN: Your Honor, I think that's a question for the legislature. They've crafted this statute purposely to shield any and all evidence from any time of proceeding that would come out of the peer review process.

(*Novotny* 1707).

Absent some check on the peer review privilege, Appellants' requested interpretation would encourage rampant perjury. That is why exceptions for perjury are regularly allowed. *See e.g.*, *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980) (perjury exception to Fifth Amendment right against self-incrimination) (the Fifth Amendment "does not endow the person who testifies with a license to commit perjury."). In fact, the perjury exception is an extension of the crime/fraud exception because it relates to a litigant's abuse of a privilege. *Christenbury v. Locke Lord*, 85 F.R.D. 675, 686 (N.D. Ga. 2012).

It should come as little surprise that Appellants are willing to perjure themselves. As Judge Anderson observed, there is sufficient evidence that Appellants used their peer review process to commit and cover up acts of fraud or deceit. (*Novotny* 1934). If Appellants were willing to use peer review to commit fraud and deceit, it is reasonable to believe that they would commit perjury at trial. In fact, they admitted they will. (*Novotny* 415).

CONCLUSION

For the reasons outlined above; as outlined in Judge Anderson's opinion;[11] and, as outlined in Appellees' underlying briefs on the matter,[12] Appellees request this Court to affirm Judge Anderson's order compelling discovery.

Dated this 13th day of June, 2016.

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[11] (*Novotny* 1910-1937)
[12] (*Novotny* 234-293, 294-337, 1101-1122, 1484-1506).

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,780 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka

One of the attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2016, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 13th day of June, 2016, I sent copies of the foregoing to Appellants' counsel by email and United States Mail, first class postage prepaid, to the following address:

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/s/ Robert D. Trzynka
One of the attorneys for Appellees

INDEX TO APPELLEE'S APPENDIX

APPENDIX TAB 1

ORDER WITHHOLDING ADJUDICATION OF GUILT AND PLACING DEFENDANT ON PROBATION

STATE OF FLORIDA

Plaintiff

— vs. —

ALAN ABDAL SOOSAN

Defendant

In the CIRCUIT Court

of PINELLAS County, Florida

Case No. CRC8204985CFANO

SPN: 118358

This cause coming on this day to be heard before me, and you, the defendant, Alan Abdal Soosan, being now present before me, and you having ENTERED A PLEA OF NOLO CONTENDERE TO the offense of FORGERY (FIVE COUNTS), UTTERING A FORGED CHECK (FIVE COUNTS), GRAND THEFT, the defendant being present and with counsel, Ky Koch

FILED

It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should presently be adjudged guilty and suffer the penalty authorized by law;

Now, therefore, it is ordered and adjudged that the adjudication of guilt and imposition of sentence be hereby withheld, and that you be hereby placed on probation for a period of THREE YEARS under the supervision of the Department of Corrections and its officers, such supervision to be subject to the provisions of the laws of this State.

It is further ordered that you shall comply with the following conditions of probation:

(1) Not later than the fifth day of each month, you will make a full and truthful report to your Probation Officer on the form provided for that purpose.

(2) You will pay to the State of Florida the amount of Ten Dollars ($10) per month toward the cost of your supervision unless otherwise waived in compliance with Florida Statutes.

(3) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Probation Officer.

(4) You will neither possess, carry or own any weapons or firearm without first securing the consent of your Probation Officer.

(5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.

(6) You will not use intoxicants to excess nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

(7) You will work diligently at a lawful occupation and support my dependents to the best of your ability as directed by your Probation Officer.

(8) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you.

~~(9) You will enroll, participate in and successfully complete any program or rehabilitative activity, residential or otherwise, your Probation Officer may so direct.~~

(SEE ATTACHED SHEET FOR ADDITIONAL CONDITIONS OF PROBATION)

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation, adjudge you guilty and impose any sentence which it might have imposed before placing you on probation.

It is further ordered that when you have reported to the Probation Officer and have been instructed as to the conditions of probation you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT, this the 7th day of October, 19 81

CC: SHERIFF

Judge

I acknowledge receipt of a certified copy of this order and that the conditions have been explained to me.

Date:

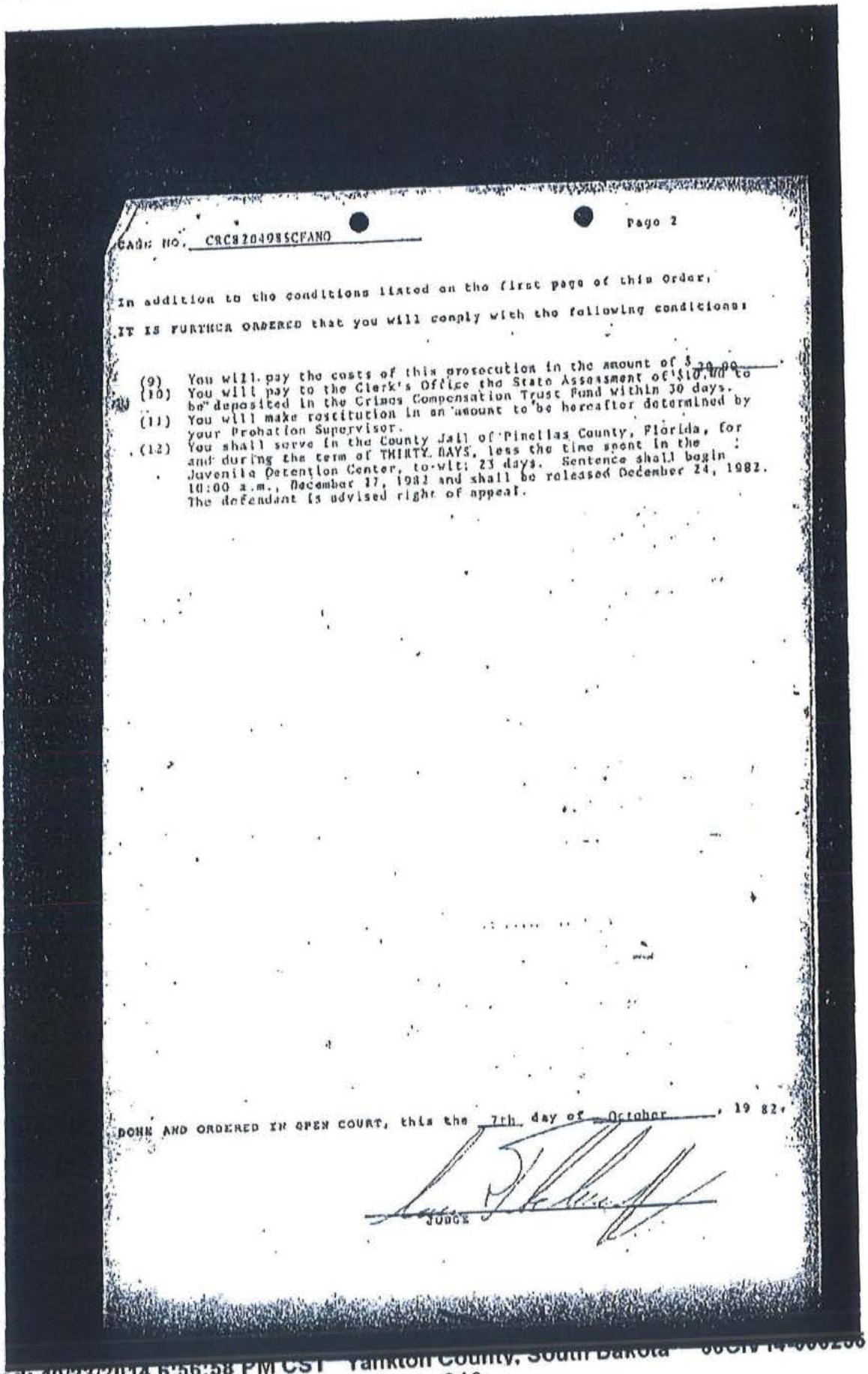
Probationer

Instructed by:

Original: Court
Copies: Probationer
File

DC# 5003
Rev. 3/78

EXHIBIT 1



Page 2

CASE NO. CRC8204985CFANO

In addition to the conditions listed on the first page of this Order,

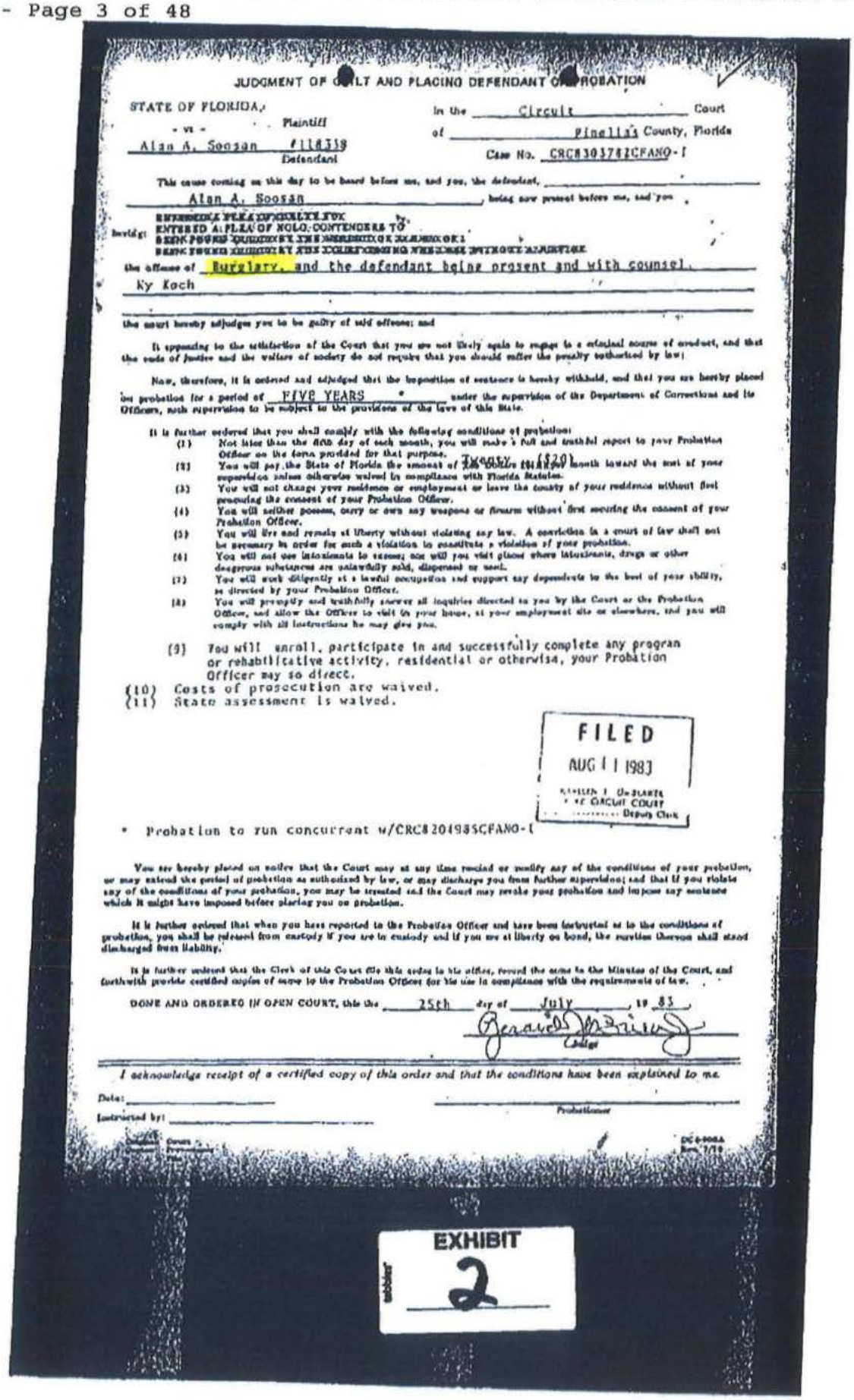
IT IS FURTHER ORDERED that you will comply with the following conditions:

(9) You will pay the costs of this prosecution in the amount of $ 20.00
(10) You will pay to the Clerk's Office the State Assessment of $10.00 to be deposited in the Crimes Compensation Trust Fund within 30 days.
(11) You will make restitution in an amount to be hereafter determined by your Probation Supervisor.
(12) You shall serve in the County Jail of Pinellas County, Florida, for and during the term of THIRTY DAYS, less the time spent in the Juvenile Detention Center, to-wit: 23 days. Sentence shall begin 10:00 a.m., December 17, 1982 and shall be released December 24, 1982. The defendant is advised right of appeal.

DONE AND ORDERED IN OPEN COURT, this the 7th day of October, 19 82.

JUDGE

APPENDIX TAB 2



JUDGMENT OF GUILT AND PLACING DEFENDANT ON PROBATION

STATE OF FLORIDA,
Plaintiff
- vs -
Alan A. Soosan #118318
Defendant

In the Circuit Court
of Pinellas County, Florida
Case No. CRC830378ICFANO-I

This cause coming on this day to be heard before me, and you, the defendant, Alan A. Soosan, being now present before me, and you having [ENTERED A PLEA OF NOLO CONTENDERE TO / BEEN FOUND GUILTY BY THE VERDICT OF A JURY OR / BEEN FOUND GUILTY AT THE COURT TRIAL HEREIN WITHOUT A JURY] the offense of Burglary, and the defendant being present and with counsel, Ky Koch

the court hereby adjudges you to be guilty of said offense; and

It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should suffer the penalty authorized by law;

Now, therefore, it is ordered and adjudged that the imposition of sentence is hereby withheld, and that you are hereby placed on probation for a period of FIVE YEARS * under the supervision of the Department of Corrections and its Officers, such supervision to be subject to the provisions of the laws of this State.

It is further ordered that you shall comply with the following conditions of probation:

(1) Not later than the 10th day of each month, you will make a full and truthful report to your Probation Officer on the form provided for that purpose.
(2) You will pay the State of Florida the amount of Twenty ($20) per month toward the cost of your supervision unless otherwise waived in compliance with Florida Statutes.
(3) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Probation Officer.
(4) You will neither possess, carry or own any weapons or firearms without first securing the consent of your Probation Officer.
(5) You will live and remain at liberty without violating any law. A conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of your probation.
(6) You will not use intoxicants to excess; nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.
(7) You will work diligently at a lawful occupation and support any dependents to the best of your ability, as directed by your Probation Officer.
(8) You will promptly and truthfully answer all inquiries directed to you by the Court or the Probation Officer, and allow the Officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions he may give you.
(9) You will enroll, participate in and successfully complete any program or rehabilitative activity, residential or otherwise, your Probation Officer may so direct.
(10) Costs of prosecution are waived.
(11) State assessment is waived.

FILED
AUG 11 1983
[illegible] CLARK
CIRCUIT COURT
Deputy Clerk

* Probation to run concurrent w/CRC820498SCFANO-I

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

It is further ordered that when you have reported to the Probation Officer and have been instructed as to the conditions of probation, you shall be released from custody if you are in custody and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of this Court file this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT, this the 25th day of July, 19 83.

Gerald [illegible]
Judge

I acknowledge receipt of a certified copy of this order and that the conditions have been explained to me.

Date: _____
_____
Probationer
Instructed by: _____

DC 6-90A

EXHIBIT
number 2

APPENDIX TAB 3

This form may be completed online, printed and mailed to the address listed below

Nebraska Department of Health and Human Services
Regulation and Licensure
Credentialing Division
P O Box 94986
301 Centennial Mall South
Lincoln, NE 68509-4986
(402) 471-2118

CREDENTIALING DIVISION

MAY 28 2004

RECEIVED

Licensure Fees:
Exam – either $302 or $301 which includes the LAP Fee
Reciprocity – either $202 or $201 which includes the LAP Fee
For LAP Fee see FEES in cover letter that is attached.

APPLICATION FOR LICENSE TO PRACTICE

(check appropriate category)

☐	MEDICINE AND SURGERY	☑	OSTEOPATHIC MEDICINE AND SURGERY

APPLYING FOR LICENSURE BY EXAMINATION:
(check appropriate item)

☐	UNITED STATES MEDICAL LICENSING EXAMINATION (USMLE)
☑	NATIONAL BOARDS OF MEDICAL EXAMINERS (N.B.O.M.E.)
☑	NATIONAL BOARDS OF OSTEOPATHIC MEDICAL EXAMINERS (N.B.O.M.E.)
☐	FLEX ENDORSEMENT (took and passed FLEX exam in state of _____)
☐	LICENTIATE OF THE MEDICAL COUNCIL OF CANADA (L.M.C.C.)
☐	COMBINATION OF USMLE AND FLEX
☐	COMBINATION OF USMLE AND NATIONAL BOARD

APPLYING FOR LICENSURE BY RECIPROCITY:

☐	RECIPROCITY BY STATE EXAMINATION (Passed State exam in the State of _____)

Reciprocity candidates must meet all the requirements for licensure by examination, except instead of a national examination, these candidates may have taken a State Board Examination.

Legal Name	Last: Sossan	First: Allen	Middle: A	Maiden:
Date of Birth (MO/DAY/YR)	10/07/65	Place of Birth	Masjedsoulaiman, Iran	
Social Security Number:	[redacted]			
Telephone: (optional)	516-773-4930	FAX: (optional)		
E-Mail Address (optional)				
Address (Dr. office or residence)	Street/PO/Route: 5 Client Road, # 3N			
	City: Great Neck	State: NY	Zip: 11021	

www.hhs.state.ne.us/crl/medical/medsur/physurapp.pdf

EXHIBIT 5

		Yes	No
11	Have you ever been convicted of a felony**?	☐	☑
12	Have you ever been convicted of a misdemeanor**?	☐	☑
13	Have you ever been denied a Federal Drug Enforcement Administration (DEA) Registration or State controlled substances registration?	☐	☑
14	Have you ever been called before any licensing agency or lawful authority concerned with DEA controlled substances?	☐	☑
15	Have you ever surrendered your State or Federal controlled substances registration?	☐	☑
16	Have you ever had your State or Federal controlled substances registration restricted in any way?	☐	☑

www.hhs.state.ne.us/crl/medical/medsur/physurapp.pdf

APPENDIX TAB 4

Background Report

Allen Abdali Sossan

Report Expiration
September 26, 2013

Name	Allen Abdali Sossan
Age	47
Date of Birth	10/7/1965
Phone Number	402-371-0839
Additional Phone Numbers	516-889-3581, 3xxx-889-3581, 4516-773-4930, 5315-735-6097
Most Recent Address	2200 N 49th St, Norfolk, NE 68701-1562
Criminal Records	1 records found
Aliases/Name Variations	Allen A Soosan, Do Allen Sossan, Sossan Allen, Allan Sossan Do

Email:

a****@yahoo.com

Allen Sossan
325 Shore Road Apt 1e
Long Beach, NY 11561

a****@excite.com

Allen Sossan
325 Shore Rd Apt 1e
Long Beach, NY 11561-4330

a****@excite.com

Allen Sossan
325 Shore Rd Apt 1e
Long Beach, NY 11561-4330

c****@axx.cxx

Allen Sossan
10 Morgan Ln
New Hartford, NY 13413

18 addresses were found

Address	City, State, Zip
Phone	
Added	
Updated	
2200 N 49th St	Norfolk, NE 68701-1562
402-371-0839	
10/2007	
1/2013	
	Norfolk, NE 68701-3188

Elmer H Saltz	75	2201 N 49th St Norfolk, NE 68701-1562
Michelle Diane Praeuner	41	2301 N 49th St Norfolk, NE 68701-1563
Jeff A Praeuner	45	2301 N 49th St Norfolk, NE 68701-1563
Doreen G Timperley	56	2620 N 49th St Norfolk, NE 68701-1593
Melvin R Ulbert	90	3404 Koenigstein Ave Apt 9 Norfolk, NE 68701-3188
Norma J Knapp	78	3400 Koenigstein Ave Apt Norfolk, NE 68701-8000
Milton A Knapp	80	3400 Koenigstein Ave Apt Norfolk, NE 68701-8000
Ida E Weich	84	3400 Koenigstein Ave Apt 3 Norfolk, NE 68701-8000
Pamela P Demaria	40	325 Shore Rd Apt 1A Long Beach, NY 11561-4330
Maria F Baraya		325 Shore Rd Apt 1A Long Beach, NY 11561-4330

Criminal Records

Name	Alan A Soosan
Birthdate	10/7/1965
Offense:	F
Offense Date:	4/21/1982
Offense Date:	4/27/1982
Offense Date:	4/28/1982
Location	Florida
Court	Department of Corrections
Case Number	8204985
Offender ID	DI233917

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Nos. 27615, 27626, 27631

RYAN NOVOTNY,

Plaintiff and Respondent,

vs.

SACRED HEART HEALTH SERVICES, a South Dakota Corporation, d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,

Defendants and Petitioners,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendants and Respondents,

* * * * * * * * * * * * * * *

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Respondents,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA, and DAVID WITHROW,

Defendants and Petitioners,

and

ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NEUTERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Respondents.

* * * * * * * * * * * * * * *

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Respondents.

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendant and Petitioner,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.O., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Respondents.

Appeal from the Circuit Court
First Judicial Circuit
Yankton County, South Dakota

The Honorable Bruce V. Anderson, Presiding Judge

REPLY BRIEF OF APPELLANTS CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA AND DAVID WITHROW

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Defendants Curtis Adams, David Barnes, Mary Milroy, Robert Neumayr, Michael Pietila and David Withrow Petitioned the Court for Permission to Take Discretionary Appeal on November 3, 2015.
The Order Granting the Petition was filed December 15, 2015

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ARGUMENT

I. The statutory peer review protections are unambiguous and provide an absolute privilege from discovery.

Plaintiffs do not, and cannot, dispute the broad and unambiguous protections afforded by SDCL § 36-4-26.1. The statute unambiguously provides that "the proceedings, records, reports, statements, minutes, or any other data whatsoever of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court …" SDCL § 36-4-26.1 (*See* Brief of Appellants Curtis Adams, David Barnes, Mary Milroy, Robert Neumayr, Michael Pietila and David Withrow (hereinafter "YMC Defendants") at pages 9-15). Rather than address the statute enacted by the South Dakota Legislature and at issue before this Court, Plaintiffs and the Amicus Curiae devote their arguments to whether peer review is beneficial to health care in South Dakota. Plaintiffs ask the Court to rewrite the clear language of SDCL § 36-4-26.1 and replace the legislature's statutory enactment with Plaintiffs' view of how the law should read. "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the court's only function is to declare the meaning of the statute as clearly expressed." *Martinmaas v. Engelmann*,

2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17 (citing *U.S. West Communications, Inc. v. Public Util. Comm'n*, 505 N.W.2d 115, 122-23 (S.D. 1993))) (citations omitted). It is hard to imagine how the protections of 36-4-26.1 could more clearly reflect the legislature's intent that peer review proceedings, including "any other data whatsoever" are absolutely privileged from discovery.

II. There is no crime-fraud exception to the peer review protections of chapter 36-4.

Defendants are aware of no court in the United States that has created a crime-fraud exception to peer review protections. Plaintiffs fail to cite a single case holding that a crime-fraud exception to peer review protections exists. The courts that have addressed the issue of a malice exception to peer review protections have rejected this exception. *See, e.g., Irving Healthcare System v. Brooks*, 927 S.W.2d 12, 16-17 (Tex. Sup. Ct. 1996) (finding that proof of malice does not negate the discovery exception under the peer review statute); *Freeman v. Piedmont Hospital*, 444 S.E.2d 796, 798 (Ga. 1994) (finding that allegations of malice do not trigger exceptions to confidentiality requirements of peer review proceedings); *Patent v. St. Francis Hospital*, 539 S.E.2d 526, 528-29 (Ga. App. 526) (finding that peer

review proceedings are absolutely privileged and not subject to a malice exception) (*See* YMC Defendants' Brief at pages 21-23).

III. The rationale behind a crime-fraud exception to the attorney-client privilege and spousal privilege does not apply to statutory peer review.

Because Plaintiffs can find no case law to support a crime-fraud exception to the protections of the peer review statutes, Plaintiffs erroneously attempt to correlate the crime-fraud exception to the attorney-client and spousal privileges.[1] The comparisons, however, are not apt.

The legislature enacted a specific crime-fraud exception to the attorney-client privilege. SDCL § 19-19-502(d)(1) provides an explicit exception to the attorney-client privilege for furtherance of crime or fraud. The crime-fraud exception is noticeably absent from the peer review protections of chapter 36-4. Had the legislature intended to create a similar

[1] *U.S. v. Nixon*, 418 U.S. 683 (1974), a case heavily relied on by Plaintiffs, provides little guidance on the issue before this Court. In *Nixon*, the U.S. Supreme Court was asked to determine whether communications of the President were entitled to an absolute common law privilege against subpoena in a *criminal* matter. *Id*. at 703. While the Supreme Court determined that the President did not have an absolute privilege against disclosure of confidential communications, the court found that the public interest required the President be afforded the greatest protection consistent with the fair administration of justice. *Id*. at 715. The court made clear that the President was not required to disclose matters in the interest of national security and that the Court would respect the need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen. *Id*. at 711, 714. The Supreme Court set up a specific detailed in-camera procedure for production of the Presidential documents and noted throughout the opinion that the decision was based upon the fact that this was a criminal proceeding. *Id*. at 713, 716.

exception to the protections of peer review materials, it most certainly would have. The lack of a crime fraud exception within the peer review statute is particularly noteworthy since the legislature did provide for other limited exceptions within SDCL § 36-4-26.1.[2]

Under South Dakota law there is no attorney-client privilege when the communication is made in furtherance of a crime or fraud. SDCL § 19-19-502(d)(1). The exception provides that the services of the lawyer obtained to enable anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud are not protected by the privilege. *Id*. Unlike the peer review protections of SDCL § 36-4-26.1, the attorney-client privilege may be claimed only by the client, his representatives, or by the lawyer or lawyer's representative on behalf of the client. SDCL § 19-19-502(c).

The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting

[2] SDCL § 36-4-26.1 provides that the prohibition relating to discovery does not apply to deny a physician access to or use of information upon which a decision regarding a person's staff privileges or employment was based and does not apply to deny any person or the person's counsel in defense of an action against that person access to the peer review materials.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The purpose of the attorney-client privilege, "ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." *Zolin*, 491 U.S. at 562-63 (quoting 8 J. Wigmore, Evidence § 2298, p. 573 (McNaughton Rev. 1961)) (emphasis in original). In the crime-fraud exception to the attorney-client privilege, the holder of the privilege – the client – forfeits the protections of the privilege "where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or fraud." *In re Grand Jury Proceedings (Gregory P. Violette*), 183 F.3d 71, 75 (1st Cir. 1999) (quoting *United States v. Rakes*, 136 F.3d 1, 4 (1st Cir. 1998)). In short, it is the client, the holder and beneficiary of the privilege, who chooses to forfeit the privilege by seeking counsel from an attorney about subjects that go beyond the purposes of the attorney-client privilege. Unlike the attorney-client privilege, the peer review protection belongs to the process and to public at large and not to any one person or entity.

Likewise, Plaintiffs' attempt to correlate the spousal privilege to the statutory protections of peer review are distinguishable. South Dakota does not recognize a crime-fraud exception to the spousal privilege. Under South Dakota law, either the accused or the spouse of the accused may claim a privilege against testimony as to any confidential communication between the accused and the spouse. SDCL § 19-13-13; 19-13-14.[3] Plaintiffs cite *State v. Witchey*, 388 N.W.2d 893 (S.D. 1986), as argument that South Dakota has recognized a crime-fraud exception to the spousal privilege. *See* Plaintiffs' Brief at 15. Contrary to Plaintiffs' argument, the South Dakota Supreme Court did not recognize a crime-fraud exception to the spousal privilege. The Supreme Court found that the spousal privilege applies only to a communication that arises from the privacy of marriage, not the joint commission of a crime. *Id*. at 895. In *Witchey*, plaintiff and his spouse were involved in the joint commission of the crime of rape. The Supreme Court stated that a spousal communication is not protected if it is one criminal talking to another. "Only communications based on or induced by the marital status alone are protected." *Id*. The Supreme Court made clear that

[3] Plaintiffs also rely heavily on *Trammel v. U.S.*, 445 U.S. 40 (1980). In *Trammel*, the Supreme Court determined that under the federal common law spousal privilege, the witness-spouse alone has the privilege to refuse to testify adversely to the spouse. *Id*. at 53. The spousal privilege under South Dakota law is statutory and provides that the privilege may be claimed by either the accused or by the spouse on behalf of the accused. SDCL § 19-19-504(c).

both the accused and the testifying spouse must have been actively involved in the patently criminal activity. *Id*. It is insufficient for the testifying spouse to be a simple receptor of a statement made by the defendant spouse. In other words, both the accused and the testifying spouse must have made the choice to be involved in a criminal act together that went beyond the purpose of the privilege, to protect the sanctity and privacy of the marriage.[4]

Unlike the attorney-client and spousal privileges, the peer review privilege protects the process as a whole. "The obvious legislative intent is to promote open and frank discussion during the peer review process among health care providers and furtherance of the overall goal of improvement of the health care system. If peer review information were not confidential, there would be little incentive to participate in the process." *Health Services of Virginia, Inc. v. Levin*, 530 S.E.2d 417, 420 (Va. 2000). In this case, the circuit court has ordered, without in-camera review, the production of peer review materials, including all complaints[5] filed against Dr. Sossan by any person or medical provider, all materials received from the National Medical

[4] In this case, unlike *Witchey*, there is no allegation that anyone providing information concerning Sossan to the Defendants were involved in the alleged "crime-fraud." Likewise, there is no evidence that the YMC Defendants participated in a criminal conspiracy.

[5] The Circuit Court Order states that the name of the complainants may be redacted; however, it seems likely that many of the complainants would be identifiable by their role in any incidents or encounters described.

Practitioners Data Bank[6] and "any other objective information they received in their due diligence endeavor to make 'reasonable effort to obtain the facts of the matter under consideration.'" SR at 001936. The circuit court also ordered the production for in-camera review of all information considered deliberative which bears upon a member of the peer review committee's private discussions or deliberations. SR 001936.

Because, unlike the attorney-client and spousal privileges, the statutory peer review protections protect the process as a whole and not an individual, they cannot be waived. "To find otherwise would allow one person who participated in a peer review process to strip the entire privilege, or destroy the confidentiality, intended to be accorded to *all* participants in the peer review process. Such a result would expose *all* who participated in the peer review process, as well as the *entire process* itself." *Stewart v. Vivien, M.D.*, 2012 WL 195020, ¶ 24 (Ohio App. 2012) (emphasis in original) (footnote omitted, appeal after remand on other issues, 2016 WL 2621524).

The Ohio Court of Appeals deftly explained the importance of the protection of the overall peer review process:

[6] Pursuant to federal law, information from the National Practitioners Data Bank is confidential and can be made available to Plaintiffs or their attorneys in a claim against a hospital only upon submission of evidence that the hospital did not request information from the NPDB as required by 45 C.F.R. § 60.17. 45 C.F.R. § 60.20; 45 C.F.R. § 60.18.

> The general public has a great interest in the continuing improvement of medical and health services as delivered on a daily basis. Thus, through [the Ohio peer review statute] the legislature enacted a privilege giving complete confidentiality to the peer review process. The legislature's enactment determined that the public's interest was to be protected from the particular interest of the individual litigant. Therefore, the statutory privilege is unlike other general privileges arising out of common law. It is designed to protect the overall *process* of peer review, including all the administrators, nurses, doctors, committees, and various entities who participate in the gathering of information, fact-finding, and formation of recommendations, to advance the goal of better services with better results. Protecting the process is imperative for peer review to meet its paramount goal of improving the quality of healthcare. The privilege provides those in the medical field the needed promise of confidentiality, the absence of which would make participants reluctant to engage in an honest criticism for fear of loss of referrals, loss of reputation, retaliation, and vulnerability to tort actions.
>
> In order to preserve the integrity of this process with meaningful self-examination and frank recommendations, the peer review process and its resulting information are clearly intended to have a privilege of confidentiality providing a "complete shield to discovery."

Id. at ¶¶ 25-26 (quoting 55 Ohio Jurisprudence 3d, Hospitals and Healthcare Providers, Section 41) (citations omitted).

In *Brem v. DeCarlo, Lyon, Hearn and Pazourek, P.A.*, 162 F.R.D. 94, 101 (D. Md. 1995), the U.S. District Court for the District of Maryland found that the waiver analysis ordinarily applied to individuals' privileged communications is inapplicable in the context of the medical review committee privilege. The court determined that peer review statutes were

enacted to improve the quality of health care by safeguarding the candor necessary to ensure effective medical review. *Id.* "Permitting waiver of the statute either by a single committee member or by the health care provider would contravene the policy underlying the statute." *Id.*

In this case, it is the process, not the individual, that is afforded protection. For decades the broad protections of the South Dakota peer review statutes have enabled physicians to police their peers offering comments, complaints, and criticisms to hospital administration with the knowledge that they can submit this information with candor because their comments were protected from discovery and admission as evidence at trial by SDCL § 36-4-26.1. The promise of confidentiality made by the legislature in exchange for their candor is abrogated by the Circuit Court's Order. Any nurses, doctors, or other practitioners who made complaints regarding Dr. Sossan will now be made a part of this litigation. Since the peer review process in this case is complete, abrogating the privilege in this case will not affect any concerns that may have been made to the Defendants about Dr. Sossan. What is clear is that creating an exception for this case will make known to all physicians and health care providers that the absolute privilege once promised is no longer absolute. Doctors will be discouraged from bringing their concerns to hospital administration. They would fear

their candor may embroil them in litigation and undermine the collegiality of their peers. "[N]othing is worse than a half-hearted privilege; it becomes a game of semantics that leaves parties twisting in the wind while lawyers determine its scope." *Irving Healthcare Systems v. Brooks*, 927 S.W.2d 12, 17 (Tex. 1996) (quoting Charles David Creech, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C.L. Rev. 179, 181-82 (1988)). If peer review protections are eroded, physicians who wish to express their concerns will be left to speculate whether the concerns expressed will be one of the exceptions to the absolute protections afforded to peer review by the legislature. The peer review process works because physicians and other medical care providers can express concerns to the administration about physicians which are then provided to the peer review committee in making decisions regarding physician privileges. The ability of a physician to express concerns to the administration to be considered in the peer review process is one of the most important aspects of the process, but was considered by the circuit court to be worthy of the least protection.

IV. Documents produced for the purpose of peer review are protected.

The circuit court ordered production of all materials reviewed by the peer review committee including all National Practitioners Data Bank materials, all complaints filed against Dr. Sossan, and all documents

generated by the peer review committee to obtain background information on Dr. Sossan without in-camera review. SR 001936.[7] This portion of the order violates SDCL § 36-4-26.1 which provides that "[t]he proceedings, records, reports, statements, minutes, or any other data whatsoever" of a peer committee are not subject to discovery or otherwise admissible into evidence. The court appeared to have based this decision on Plaintiffs' argument that such documents constituted independent source documents which are not subject to the protections of the South Dakota peer review protection. Plaintiffs' interpretation of the meaning of "independent source document" is inconsistent with SDCL § 36-4-26.1 and the policies behind the protection of peer review proceedings.

Independent source documents are documents not produced by or for peer review proceedings that are specifically excepted from peer review

[7] Plaintiffs allege that Defendants "failed" to appeal Judge Anderson's Findings of Fact and Conclusions of Law, and Order Denying Defendants' Motion for Summary Judgment and surmised the Defendants' reasons for not appealing. To the extent Plaintiffs are claiming that Defendants have waived that argument, South Dakota statutes provide that interlocutory appeals are limited to the issue and order appealed and accepted by the Court. *See* SDCL § 15-26A-13, 14 and 15. "[F]ailure to raise a given issue on an interlocutory appeal made available as of right … in no way prejudices a party's ability to secure review of such an issue on appeal following final judgment." *Packaging Industries Group, Inc. v. Cheney*, 405 N.E.2d 106, 109 (Mass. 1980); *Victor Talking Mach. Co. v. George*, 105 F.2d 697, 699 (3d Cir. 1939) ("All interlocutory orders and decisions from which no appeal has been taken are merged in the final decree.")

protection under SDCL § 36-4-26.2. This statute provides that the protections of § 36-4-26.1 do not apply to

> observations made at the time of treatment by a health care professional present during the patient's treatment or to patient records prepared during the treatment and care rendered to a patient who is personally or by personal representative a party to an action or proceeding, the subject matter of which is the care and treatment of the patient.

SDCL § 36-4-26.2. In other words, the legislature, in enacting the peer review protections specifically provided which documents were exempt from those protections. This exception is expressly limited to patient medical records prepared during the treatment and care rendered to a patient. Had the legislature intended that additional independent source documents be subject to discovery, it certainly would have included additional documents in SDCL § 36-4-26.2 as documents which were not protected by the peer review protections of § 36-4-26.1. *See Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D. 1984) ("This court assumes that statutes mean what they say and that legislators have said what they meant."). The legislature's intent in allowing only this limited exception to the discovery and the admissibility of peer review materials is consistent with the policy favoring peer review protection.

Plaintiffs' argument that complaints from medical providers concerning other providers is independent source material is completely

contrary to the purpose of peer review protection. The goal of peer review is to encourage the free exchange of information including, most importantly, concerns or complaints that one medical provider may have about a colleague. Under established law in South Dakota, when a physician makes a complaint to a hospital concerning another provider, the complaint is protected by the South Dakota peer review protections. *See* SDCL § 36-4-26.1; § 36-4-42 ("for the purposes of sections 36-4-25, 36-4-26.1 and 36-4-43, a peer review committee is one or more persons acting as any … committee of a licensed health care facility or the medical staff of a licensed health care facility … that engages in peer review activity. …"). This protection promotes the expression of concerns by a physician against his colleague without fear of disclosure. If the independent source exception ordered by the circuit court and proposed by Plaintiffs were adopted, physicians would be more reluctant to express their concerns or complaints to a hospital's peer review committee. The most important part of peer review protection is that it encourages physicians to express their concerns with candor free from fear of reprisal from their colleagues. To allow an independent source exception to peer review that requires a hospital to turn over all complaints made against the physician is contrary

to the purpose of the privilege and would destroy the effectiveness of peer review.

In *Qureshi v. Vaughan Regional Medical Center*, 768 So.2d 374 (Ala. 2000), the trial court ordered the defendant hospital to provide peer review documents that were received from outside sources. *Id*. at 374-75. The Alabama Supreme Court reversed. The court held documents obtained from outside sources could not be subpoenaed directly from the hospital but could be obtained from the independent source. *Id*. at 378. The court explained:

> The overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process. …
>
> …
>
> We find that the public interest in candid professional peer review proceedings should prevail over the litigant's need for information from the most convenient source.

Id. at 378 (citing *McGee v. Bruce Hosp. System*, 439 S.E.2d 257, 259-60 (1993) (citations omitted)).

Other courts uniformly agree. In *Huntsman v. Aultman Hosp.*, 826 N.E.2d 384 (Ohio App. 2005), the Ohio Court of Appeals held that peer review records are to be held in confidence and not subject to discovery. *Id*.

at 389. The Ohio Court of Appeals overruled the trial court's order that directed the hospital to give the plaintiff information that identified the documents that were before the committee. The court of appeals stated "We find that the statute makes all information regarding such documents privileged and unobtainable from the hospital. As Aultman Hospital concedes, appellee can obtain these documents from original sources. However, pursuant to [Ohio statute], appellee cannot obtain information concerning these documents from the hospital. Therefore, we find the trial court erred when it ordered Aultman Hospital to provide a list identifying the documents to the [plaintiffs]." *Id*. at 390.

In *Krusac v. Covenant Medical Center, Inc*., 865 N.W.2d 908 (Mich. 2015), the Michigan Supreme Court held that the Michigan peer review statutes do not contain an exception for objective facts contained in an otherwise privileged incident report. *Id*. at 912. The court stated that the Michigan peer review statute protects "'records, data, and knowledge' collected **for or by** a peer review committee." *Id*. at 912. (emphasis added). The court noted that these words in the statute encompass objective facts and therefore "objective facts are subject to the peer review privilege." *Id*. The court found that the incident report fell within the peer review privilege based upon the language of the Michigan peer review statute. *Id*. at 913.

V. Upholding the absolute protections of the peer review statutes will not encourage perjury or other crimes.

Without any supporting evidence,[8] Plaintiffs argue that if the peer review statutes are not abrogated, the entire peer review system will become a "den of thieves" and perjury will run rampant. Plaintiffs' Brief at 1, 32. Plaintiffs' argument wrongfully assumes that the only check on hospitals and physicians is a private cause of action. The reality is that criminal statutes and state oversight provide sufficient protections to guard against Plaintiffs' unfounded fear of a medical community run rampant.

Defendants Avera Sacred Heart Hospital and Lewis & Clark Specialty Hospital are regulated by the South Dakota Department of Health. SDCL Chapter 34-12. The State Department of Health has broad powers to regulate hospitals including suspension or revocation of a hospital license where the hospital permits, aids or abets the commission of any unlawful act in such institution. SDCL § 34-12-19(2).

[8] The centerpiece of Plaintiffs' case, based upon the number of times it has been cited throughout the course of this litigation, appears to be the partial transcript from a surreptitiously-taped conversation of gossip between former friends. Plaintiff's Brief at 7. Although Plaintiffs have only provided excerpts of the transcript between Dr. Aanning and Dr. Neumayr, the conversation is not admissible evidence. Based on the portion of the transcript that has been provided by Plaintiffs, Neumayr speculates, based upon a hearsay statement, that a third person will have to lie about the subject matter of the hearsay conversation. A prediction by a witness that another witness may lie about a matter upon which he has no first-hand knowledge is not admissible under the South Dakota Rules of Evidence. *See* SDCL § 19-19-602, 19-19-802.

Likewise, the South Dakota Board of Medical and Osteopathic Examiners regulates physicians. SDCL Chapter 36-4. The South Dakota Board of Medical and Osteopathic Examiners also has the power to discipline physicians, including revocation of their licenses for conviction of a criminal offense arising out of the practice of medicine and for any practice which constitutes a danger to the health, welfare or safety of the public or patients. SDCL § 36-4-29; SDCL § 36-4-30(6), (22).

In addition to State agency oversight, perjury is a criminal felony. SDCL § 22-29-1; SDCL § 22-29-5. The penalty for conviction of perjury is a maximum of five years in the state penitentiary and a fine of $10,000. SDCL § 22-6-1(8). Contrary to Plaintiffs' assertions, checks on perjury and fraud under state criminal law and agency oversight impose much larger deterrents to perjury and fraud than does the threat of a private cause of action.

VI. The absolute protections of the South Dakota Peer Review Statutes are Constitutional.

Defendants' argument regarding the constitutionality of the South Dakota Peer Review Statutes are set forth on pages 24 through 33 of the YMC Defendants' initial brief. Plaintiffs largely ignore the authority and reasoning cited in Defendants' brief; thus, the arguments supporting the constitutionality of South Dakota's peer review statutes will not be repeated

here. Plaintiffs cite only three cases involving the peer review process in support of their argument that the South Dakota peer review statutes are unconstitutional.

Two of the cases cited by Plaintiffs, *SW Community Health Serv. v. Smith*, 755 P.2d 40 (N.M. 1988) and *Sisters of Charity Health Sys. v. Raikes*, 984 S.W.2d 464 (Ky. 1998) do not involve questions of constitutional due process. The issue in *SW Community Health Serv.* was whether the legislative branch could enact statutes that were inconsistent with the rules of the judicial branch. 755 P.2d at 42-44. In *Raikes*, the Kentucky Supreme Court specifically stated that "[b]ecause our decision rests entirely on statutory construction, we have no cause to reach the constitutional question." 984 S.W.2d at 468.

Plaintiffs also cite *Adams v. St. Francis*, 955 P.2d 1169 (Kan. 1998). Kansas appears to be one of the few states that has found peer review statutes to be unconstitutional. It is noteworthy that *Adams* has been cited as persuasive authority outside of the State of Kansas in a medical case on only one occasion – as a citation in a "dissenting or concurring" opinion. *See Huether v. District Court of Sixteenth Judicial District of State of Montana*, 4 P.3d 1193, 1200 (Mont. 2000). Moreover, even though the Kansas Supreme Court found that the Kansas peer review statute was

unconstitutional, it also did not order a complete disclosure of peer review materials without in-camera inspection. Unlike the Order in this case, the Kansas Supreme Court directed the district court to conduct an in-camera inspection and to craft a protective order that would permit plaintiffs access to relevant facts while directing the court to redact forms and documents containing officers' or committees' conclusions or decision-making processes. *Id*. at 1187-88. Thus, even in the only peer review case cited by Plaintiffs in support of their constitutional arguments, the court required in-camera inspection of peer review documents to protect the committees' conclusions or decision-making process. The clear intent of the legislature and unambiguous language of the statute must be upheld to provide peer review materials absolute protection from discovery.

VII. Plaintiffs seek protected peer review materials without making a prima facie case of malpractice.

Plaintiffs boldly assert that Dr. Sossan performed scores of unnecessary surgeries but have presented no medical testimony to support that allegation. At its core in these cases the essential first step to making a prima facie case is to prove the underlying medical malpractice claims. The Plaintiffs' claims in these cases arise from actions that occurred independently of the peer review proceedings. To recognize the peer review privilege in the context of this action will have little, if any, impact on the

Plaintiffs' ability to prove their underlying meritorious claim against Dr. Sossan. *See Memorial Hospital v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981) (*per curiam*). If Plaintiffs fail to prove a prima facie medical malpractice case against Dr. Sossan, their negligent credentialing claim must fail. A reasonable process would be to try the substantive, perhaps, determinative, issue of malpractice first.

CONCLUSION

Defendants respectfully request that this Court reverse the Circuit Court's October 23, 2015 Memorandum Decision and direct the circuit court to enter an order denying Plaintiffs' motion to compel production of peer review materials.

Dated at Sioux Falls, South Dakota, this _____ day of June, 2016.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 27615
APPEAL NO. 27626
APPEAL NO. 27631

RYAN NOVOTNY,
Plaintiff and Appellee,
v.

SACRED HEART HEALTH SERVICES,
a South Dakota Corporation d/b/a
AVERA SACRED HEART HOSPITAL, AVERA
HEALTH, a south Dakota Corporation,

Defendants and Appellants.
and

ALLEN A. SOSSAN, D.O., also known
as ALAN A. SOOSAN, also known as
ALLEN A. SOOSAN, RECONSTRUCTIVE
SPINAL SURGERY AND ORTHOPEDIC
SURGERY, P.C., a New York
Professional Corporation, LEWIS
& CLARK SPECIALTY HOSPITAL, LLC, a
South Dakota Limited Liability
Company,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,
v.

CURTIS ADAMS, DAVID BARNES,
MARY MILROY, ROBERT NEUMAYR,
MICHAEL PIETILA and DAVID WITHROW,
Defendants and Appellants,

and

ALAN A. SOOSAN, also known as
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ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NUETERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Appellees,

v.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendant and Appellant,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.M., KYNAN TRAIL, M.D., CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NIELSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES and VARIOUS JANE DOES,

Defendants and Appellants.

Appeal from the Circuit Court, First Judicial Circuit
Yankton County, South Dakota

The Honorable Bruce V. Anderson
Circuit Court Judge

APPELLANT REPLY BRIEF OF SACRED HEART HEALTH SERVICES d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH AND ITS INDIVIDUALLY NAMED COMMITTEE MEMBERS AND PERSONNEL

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PETITION FOR PERMISSION TO TAKE A CONSOLIDATED APPEAL OF AN INTERMEDIATE ORDER
FILED: NOVEMBER 3, 2015
ORDER GRANTING THE PETITION WAS FILED: DECEMBER 15, 2015

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PRELIMINARY STATEMENT

Appellant Sacred Heart Health Services d/b/a Avera Sacred Heart Hospital and Appellant Avera Health will collectively be referred to as "Avera." At times, all of the Appellants will be referred to collectively as "the Defendants." The various Plaintiffs in this litigation will be discussed collectively and referred to as "the Plaintiffs" or "Plaintiffs."

References to the Circuit Court Record from the *Novotny v. Sossan, et al*, matter (Appeal No. 27615; CIV 14-235) shall be denoted as "N.R., ____." References to the Avera Appellant's Opening Brief are designated by "A.O.B., ____" with references to that Brief's Appendix being denoted at "A.O.B., App. ___." References to the Appellee's Brief shall be designated by "Pls' Br., ___." References to the at issue Circuit Court Order dated October 23, 2015 and attached to A.O.B. as Appendix at Pages 1-28, will generally be denoted as the "Circuit Court's Order" with specific citations to A.O.B., App. ____.

REPLY ARGUMENT

The Circuit Court compelled disclosure of peer review materials by creating two exceptions to South Dakota's peer review protection statutes. Neither exception complies with the actual language of those statutes and the Plaintiffs made almost no attempt to argue otherwise. Moreover, the statutes survive constitutional scrutiny without the need for either exception. The Circuit Court's Order should be overturned.

I. The Circuit Court's Independent Source Exception Absolutely Clashes with the Peer Review Protection Statutes

The Circuit Court's version of the independent source rule provides that a plaintiff pursuing an improper credentialing claim is entitled to disclosure, from the peer review committees, of independent source information gathered and relied upon by those committees ("the C.C.'s Rule"). (A.O.B., App. 26-27). As discussed in A.O.B., the peer review protection statutes do *not* contain or contemplate the C.C.'s Rule and South Dakota precedent cuts against it. (A.O.B., 13 – 20).

The more appropriate form of the rule holds that independent source information can be gathered from *outside* of the peer review committees ("the Majority Rule"). This rule is supported by considerable case law and it complies with SDCL 36-4-26.1. (A.O.B., 17-20).

The Plaintiffs made little attempt to justify the C.C.'s Rule based upon statutory construction. They did, however, spend some time attempting to undercut the Majority Rule, arguing that it is: A) Inappropriate because privileges should be strictly construed; B) Unsuitable based upon one case; C) Judicially inefficient and illogical; and D) Inapplicable to complaints made against a physician. Each argument fails. If this Court

recognizes improper credentialing as a cause of action, the C.C.'s Rule should be rejected.

A. Strict Construction of Statutory Privileges must be Based upon What the Statutes Actually Say

Throughout their Brief, the Plaintiffs correctly note that statutory privileges should be strictly construed. (E.g., Pls' Br., 8-9). However, the concept of "strict construction" does not justify judicially rewriting a clear statute. *State v. Guthrie* noted the "strict construction" concept, however, the decision completely relied upon the at-issue statute's clear language to determine what the scope of a privilege actually was. 2001 S.D. 61, ¶61-67, 627 N.W.2d 401, 424-25. In the same regard, even when strictly construed, the clear language of SDCL 36-4-26.1 cannot be interpreted to support the C.C.'s Rule. The Majority Rule is, however, compliant.

B. The Case Law Strongly Cuts Against the C.C.'s Rule

Pls' Br., 27, cites *Pastore v. Samson* as opposition to the Majority Rule. 900 A.2d 1067 (R.I. 2006). However, *Pastore* interpreted Rhode Island's peer review statutes which, unlike South Dakota's, specifically mention that original source documentation is not protected. *Id.* at 1081. Because the Rhode Island statutes are different, *Pastore* has no bearing here.

Furthermore, even in states with statutes like Rhode Island's, *Pastore* does not reflect the majority. For example, West Virginia, Minnesota, Alabama, South Carolina, Iowa, Florida, and Georgia's peer review statutes specifically note that original source information is discoverable. However, in contrast to *Pastore*, courts in each of these

jurisdictions applied the Majority Rule, not the C.C.'s Rule, holding that the original source information must be gathered from outside of the committees.[1]

South Dakota's statutes are even clearer than those statutes in these other jurisdictions, because they do not carve out original source information. And, like in Michigan,[2] Arizona,[3] or Texas, [4] jurisdictions with peer review statutes like South Dakota's that do not carve out original source information at all, compelled disclosure of original source information *from* the peer review committees violates such statutes.

C. The Plaintiffs' Efficiency and Policy Arguments Should be Taken to the Legislature

Plaintiffs argue that the Majority Rule is inefficient and illogical and that the Defendants have provided no good reason for it. (Pls' Brief, 27). This argument fails.

First, it fails because it ignores the quintessential law on statutory construction: "[w]hen the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed . . . [i]t is not the task of this court to revise or amend statutes, or to 'liberally construe a statute to avoid a seemingly harsh result where such action would do

[1] *State ex rel. Wheeling Hosp., Inc. v. Wilson,* 782 S.E2d 622 (W.Va. 2016); *Larson v. Wasemiller,* 738 N.W.2d 300 (Minn. 2007); *Ex Parte Qureshi,* 768 So.2d 374 (Ala. 2000); *McGee v. Bruce Hosp. Sys.,* 439 S.E.2d 257, 260 (S.C. 1993); *Cruger v. Love,* 599 So.2d 111 (Fla. 1992) (holding subsequently altered by Florida Amendment 7); *Day v. The Finley Hosp.,* 769 N.W.2d 898 (Iowa Ct. App. 2009); *Doe v. UNUM Life Ins. Co. of America,* 891 F.Supp. 607 (N.D. Ga. 1995).
[2] *Krusac v. Covenant Med. Ctr., Inc.,* 865 N.W.2d 908 (Mich. 2015).
[3] *Humana Hosp. Desert Valley v. Super. Ct.,* 742 P.2d 1382 (Ariz. Ct. App. 1987).
[4] *In re Living Centers of Texas, Inc.,* 175 S.W.3d 253, 260 (Tex. 2005)

violence to the plain meaning of the statute under construction.'" *Moore v. Michelin Tire Co., Inc.,* 1999 S.D. 152, ¶21, 603 N.W.2d 513, 519 (citations omitted). SDCL 36-4-26.1 is clear in not supporting the C.C.'s Rule. (A.O.B., 13-20). Furthermore, even though the Defendants *have provided* "good reason" for the Majority Rule throughout their Briefing, it is not the Defendants' responsibility to provide a reason for why a statute should be interpreted in accord with how the Legislature drafted it.

Second, the fact that the peer review statutes make proving up a claim more difficult or inefficient does not justify judicially rewriting it. *Day*, 769 N.W.2d at 902; *Larson,* 738 N.W.2d at 310. This Court agreed in *Shamburger v. Behrens,* concluding that SDCL 36-4-26.1 did not yield to a plaintiff's pursuit of a direct liability claim against a hospital for credentialing a physician with drinking problems. 380 N.W.2d 659, 665 (S.D. 1986).

D. Documented Complaints and Praise about Defendant Sossan are Protected

To attempt to justify a *part* of the C.C.'s Rule, the Plaintiffs argued "Appellants cannot convince this Court that they can also hide patient complaints under the guise of peer review." (Pls' Br., 26). The Plaintiffs' argument ignores the interplay between SDCL 36-4-26.1 and 36-4-42 through 43.

SDCL 36-4-26.1 protects any data of a peer review committee whatsoever. A peer review committee is defined broadly to include even one single person undertaking peer review activities. SDCL 36-4-42. Peer review activities include a wide gambit of endeavors, including all the activities a peer reviewer or committee take to improve the delivery and quality of services at a given facility. SDCL 36-4-43. Such activities would necessarily include the gathering and consideration of items ranging from complaints and

disparaging comments, to praise, commendation, and endorsement. All of these items, along with numerous other items not actually generated by a committee itself (e.g. an application for privileges, a report from the National Practitioners Databank, etc.), play a role in peer review. Carving complaints out from the protection would ignore the very purpose for gathering and maintaining them in the first place – "to improve the delivery and quality of services" at a medical facility. SDCL 36-4-43.

Furthermore, the overwhelming purpose of the peer review protection statutes is to encourage frank and honest conversations within peer review committees *and* to encourage others from outside of the committees to report concerns they may have. Such free flow of information is vital to improving the delivery and quality of health care. The C.C.'s Rule, which would allow for discovery of complaints generated outside the committee, would substantially curtail this type of communication. As denoted in *McGee*:

> The overriding public policy of the confidentiality statute is to *encourage* health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care. [citation omitted]. The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions . . . .

439 S.E.2d at 259 (emphasis added).

Just like the plaintiffs in all the other states that have recognized the Majority Rule, the Plaintiffs here can pursue their claims by gathering evidence, including complaints, from sources outside of the peer reviewers as defined by SDCL 36-4-42.

If this Court recognizes improper credentialing as a cause of action, the Majority Rule could be applied, but the C.C.'s Rule must be rejected.

II. The Crime/Fraud Exception is not Contemplated by the Peer Review Statutes

The crime/fraud exception is not supported by a plain reading of the peer review statutes. (A.O.B., 13-16 and 20-25). Pls' Br. did not attempt to justify it based upon statutory construction, but instead moved directly into constitutional analysis, fairness arguments, and discussion of other privileges. (Pls' Br., 9-26). Therefore, the Plaintiffs concede this point. *Hart v. Miller*, 2000 S.D. 53, ¶45, 609 N.W.2d 138, 149.

Nonetheless, three concepts discussed by the Circuit Court and touched upon by the Plaintiffs in various forms shall be discussed: 1) The malice exception from SDCL 36-4-25; 2) Impeachment evidence; and 3) Other privileges. None warrant the Circuit Court's addition of the crime/fraud exception to SDCL 36-4-26.1.

E. SDCL 36-4-25's Malice Exception Has Meaning Without the Need for a Crime/Fraud Exception

In addition to the compelling discussion of this issue by the Texas Supreme Court and the other case law already noted in A.O.B., 23-25, cases from many other jurisdictions cut against the Circuit Court's reliance upon the malice exception to rewrite the peer review protection. For example, 10 cases cited above at FN 1-3 have applied the Majority Rule. Nine of them come from jurisdictions that, like South Dakota, have a malice or fraud type exception to their peer review immunity statutes. Notably, unlike the Circuit Court here, *none* of these nine courts deemed it necessary to add crime/fraud exceptions or the C.C.'s Rule into their states' peer review statutes.

The one outlier in the analysis is Arizona and that it is only because Arizona provides *absolute* immunity to its peer reviewers, rather than having a malice type exception. *Goodman v. Samaritan Health Syst.*, 990 P.2d 1061, 1066 (Ariz. Ct. App. 1999). Interestingly, an Arizona appellate court reviewed this absolute immunity in

response to an anti-abrogation/open courts, privileges and immunities, and due process challenge stemming from the plaintiff's claim that the statute stripped him of a right to seek redress for injuries. *Id* at 1065-69. That challenge was rejected in full and the court ultimately noted that the absolute immunity statute was rationally related to improving patient care. *Id.* at 1069.[5]

The Plaintiffs rely upon Kentucky law as a basis for claiming peer review information should be available to assist them in meeting the exception in SDCL 36-4-25. (Pls' Brief, 23). However, Kentucky's laws are much different. The Kentucky Supreme Court concluded that Kentucky's peer review privilege does not even apply to medical malpractice cases.[6] *Sisters of Charity Health Syst., Inc. v. Raikes,* 984 S.W.2d 464, 469-70 (Ky. 1998). The same cannot be said for SDCL 36-4-26.1. *See, Shamburger,* 380 N.W.2d at 665 (applying SDCL 36-4-26.1 in a malpractice case).

The Circuit Court erred in creating exceptions to SDCL 36-4-26.1 based upon concerns over the viability of SDCL 36-4-25's exception.

F. The Privileges Found in Chapter SDCL 36-4 Do not Yield to the Need for Impeachment Evidence

Based upon a surreptitiously recorded conversation, the Plaintiffs continue to assert that a crime/fraud exception is necessary to allow them to impeach the Defendants. (Pls' Br., 32-33). Beyond the fact that SDCL 36-4-26.1 does not allow them to ask these

[5] This analysis is equally applicable to the Constitutional considerations discussed below in Section III.

[6] Counsel believes that Kentucky is the only state where a court has read its peer review statutes in this fashion.

questions to begin with, this Court's precedent also demonstrates that such a concern does

not necessitate renouncing a privilege found in SDCL 36-4. *See Martinmaas v. Engelmann*, 2000 S.D. 85, ¶44-52, 612 N.W.2d 600, 610-12 (finding that a circuit court erred[7] in allowing a hearing transcript protected by SDCL 36-4-31.5 to be used for impeachment only).

G. Other Privileges are not Relevant to this Analysis

The Plaintiffs' attempts to analogize the statutory peer review protection to other evidentiary privileges is also unpersuasive. At the outset, such attempts fail because such an interpretation would ignore the starting point for any statutory analysis - the language of the statute. Review of SDCL 36-4-26.1 confirms that there is no crime/fraud exception. *Contra,* SDCL 19-19-502(d)(1) (codifying the crime/fraud exception to the attorney client privilege).

As further denoted in A.O.B., 20-22, and in the briefing of the other Defendants, the peer review protection is different from other evidentiary privileges because it is a creature of statute only, because it cannot be waived, and because the protection involves both a privilege *and* a complete bar to admissibility. *See Cawthorn v. Catholic Health Initiatives Iowa Corp.,* 806 N.W.2d 282 (Iowa 2011) (noting that Iowa's peer review privilege is governed completely by analysis of the peer review statutes themselves, concluding that the privilege cannot be waived, and citing a number of cases as support); *See also, Krusac,* 865 N.W.2d at 910-11 (noting that Michigan's peer review privilege is a creature of statute, not the common law, and restricting its analysis to the specific

[7] Because the defendant was not prejudiced, the error was not reversible error. *Id.* at ¶52,

language of the statute). The peer review protection statutes shield the peer review process as a whole. The other privileges the Plaintiffs rely upon are much different, often protecting only an individual who can decide to waive the privilege for him or herself.

III. South Dakota's Peer Review Statutes Survive Constitutional Scrutiny

Because the peer review statutes do not contain either of the Circuit Court's exceptions, the Plaintiffs must demonstrate that the exceptions are required to conform the statutes to the Constitution. However, the Plaintiffs have failed to show, beyond a reasonable doubt, that the statutes "clearly, palpably and plainly" violate the Constitution. *Green v. Siegel, Barnett & Schutz,* 1996 S.D. 146, ¶7, 557 N.W.2d 396, 398.

A. The Plaintiffs Ignored almost All of the Pertinent Peer Review Constitutionality Case Law

The Defendants' Briefs cited numerous decisions from across the country, including from a circuit court in South Dakota, where constitutional challenges to peer review protection statutes were rejected. (See, e.g., A.O.B., 26-27). The Plaintiffs failed to address any of them.

Instead, to support their constitutionality argument, the Plaintiffs cherry-picked quotes from cases dealing with all sorts of other non-peer review cases before ultimately pointing to one single case that addressed a peer review privilege *and* created an exception based upon its constitutional concerns. (See Pls' Br., 23-24 (citing *Adams v. St. Francis Reg'l Medical Cent.*, 955 P.2d 1169 (Kan. 1998))).

However, that one case should not alter the analysis here for four reasons. First, the *Adams* Court was concerned that the Kansas peer review privilege was so broad that it violated Kansas' Open Courts Constitutional provisions because it could be interpreted

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at 612.

as allowing a hospital to insulate facts that would go to the heart of a plaintiff's medical malpractice claim. *Id.* at 1187. This is a non-issue in South Dakota because our statutory scheme includes SDCL 36-4-26.2, which specifically delineates that SDCL 36-4-26.1 does *not* bar discovery of the evidence needed for a medical malpractice claim. Second, as noted in A.O.B., precedent interpreting South Dakota's open courts provision falls in line with the majority of cases to have rejected constitutional challenges, not the *Adams* analysis. (A.O.B., 26-27 and 31-35) *See also, Goodman,* 990 P.2d at 1065-69. Third, the *Adams* Court stopped far short of the Circuit Court's Order because it held that, even in light of its holding, information generated by the peer review process, including information reflecting the decision-making process, conclusions, and final decisions, was to remain protected. *Adams,* 955 P.2d at 1187-88. (Contra, A.O.B., App., 27). Fourth, *Adams,* the only case the Plaintiffs cited on this issue, represents the extreme minority. (Contra, Cases at A.O.B., 26-27).

Adams is unpersuasive and should not be followed here.

B. The Open Courts Provisions do not Justify the Circuit Court's Order

The body of Pls' Br. did not cite to South Dakota's open courts provisions or mention the phrase "open courts" once.[8] It also did not address South Dakota's open courts case law. (A.O.B., 31-35). That challenge appears to be conceded. *Hart,* 2000 S.D. 53, ¶45, 609 N.W.2d at 149.

Alternatively, Pls' Br. did cite the *Adams* case, which considered an open courts challenge, however, they suggested *Adams* supported their due process arguments. (Pls'

[8] It was mentioned once in the Table of Contents at Page ii.

Br., 23-24). Regardless, as noted above, *Adams* is unpersuasive here. For all the reasons stated above in Section III, A., and at A.O.B., 26-27 and 31-35, the Plaintiffs' open courts challenge, if they are still pursuing it, falls short.

C. The Plaintiffs' Muddled Due Process Claims are Meritless

Pls' Br. conflated procedural and substantive due process concepts. In doing so, it confusingly pitted the Defendants' rights against their claimed rights to discovery, ultimately asserting that their discovery rights are greater because the Defendants have no "substantive due process right under peer review." (Pls' Br., 12). This argument completely misses the mark. In accord with the due process law discussed below and in prior briefing, proper due process analysis does not consist of a comparison between one private party's rights versus another's. Instead, the analysis considers the effect of the *government's* actions upon a private party. *Holland v. FEM Elec. Ass'n, Inc.,* 2001 S.D. 143, ¶18, 637 N.W.2d 717, 722.

Based upon a proper and legally intelligible due process analysis, both forms of the Plaintiffs' due process challenges should be rejected.

1) The Plaintiffs Conceded or Failed to Carry Their Burden on Substantive Due Process

The key consideration for a substantive due process challenge under South

Dakota's Constitution is whether or not the statute bears a "real and substantial relation to the object to be obtained."[9] *Knowles v. U.S.*, 1996 S.D. 10, ¶73, 544 N.W.2d 183, 199 (citations omitted). Per its own terms, the peer review protection statutes seek to protect peer review for purposes of improving the delivery and quality of health care. SDCL 36-4-42.

The Defendants and the Amicus parties, the South Dakota State Medical Association and the South Dakota Association of Healthcare Organizations, provided extensive authority regarding the real and substantial relation of confidential peer review to the availability of quality health care. (E.g., A.O.B., 8-13 and 26-31). The Circuit Court concluded, notwithstanding its ultimate holding, that the Plaintiffs failed to carry their burden on this issue. (A.O.B., App., 16).

The Plaintiffs have again failed to carry that burden here. In no discernible way did their Brief attempt to challenge the real and substantial relationship issue. In fact, their Brief failed to utter the phrase "real and substantial relation" once. Instead, they focused on crime/fraud concepts, fairness, and comparison of their alleged rights to those of the Defendants. Their chosen course either: 1) Conceded their substantive due process

[9] This analysis can shift if a "fundamental" right is at play. *Katz v. S.D.B.M.O.E.*, 432 N.W.2d 274, 278 n.6 (S.D. 1988). It is unclear whether or not the Plaintiffs are claiming they have a "fundamental" right to the discovery of evidence. To the extent they are taking this position, they have failed to carry their burden and they are incorrect. (See Cases cited at A.O.B., 31). Moreover, even if the Legislature decided to completely ban the claims asserted by the Plaintiffs here, rather than just limiting the sources of evidence, such a decision would still not infringe upon "fundamental" rights because "the Legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." (A.O.B., 31-34); *See*, *Knowles*, 1996 S.D. 10, ¶74, n.21, 544 N.W.2d at 200, n.21 (indicating that there is no property right to be violated even in the limiting of a rule of common law).

challenge; or 2) Fell far short of carrying their burden, especially in light of the Defendants' cited authority.

2) The Plaintiffs Procedural Due Process Claim is Baseless

With regard to the procedural due process claim, the Plaintiffs must demonstrate that a governmental action deprived them of a life, liberty, or property interest without due process. *Daily v. City of Sioux Falls,* 2011 S.D. 48, ¶14, 802 N.W.2d 905, 910-11. Nowhere have they identified which form of right (life, liberty, or property) is being deprived.

Assumedly, based upon the cases they cite and the quotes from the due process sections of their Briefing, they believe the peer review statutes deprive them of a property interest because they believe those statutes, without the Circuit Court's exceptions, strip them of their ability to pursue claims. (Pls' Br., 23-29). This contention is unfounded for multiple reasons.

First, case law indicates that the right to discovery is not a right contemplated by due process analysis. (A.O.B. 31).

Second, "a property interest worthy of due process protection must be granted or defined by a source independent from the Constitution, such as state law." *Hollander v. Douglas County*, 2000 S.D. 159, ¶12, 620 N.W.2d 181, 185 (citations omitted). South Dakota law has never recognized, by case law or statute, that a plaintiff has a right to discover otherwise protected peer review information to pursue direct liability claims against a hospital. In fact, *Shamburger* came to the opposite conclusion. 380 N.W.2d at 665.

Third, assuming *arguendo* that this Court concludes the Plaintiffs' ability to pursue these claims is protected as part of procedural due process rights, the Plaintiffs still have no cognizable challenge. Specifically, per the Majority Rule, they can still discover and use original source evidence to pursue their claims. SDCL 36-4-26.1 merely limits sources of that evidence. (A.O.B., 32-34); *See*, *Knowles*, 1996 S.D. 10, ¶79, 544 N.W.2d at 201 (rejecting a procedural due process challenge because the statute did not deprive the plaintiff of an opportunity to be heard).

Fourth, per SDCL 36-4-26.2, SDCL 36-4-26.1 does not stop the Plaintiffs from pursuing malpractice claims, which would vindicate the same property rights they allege SDCL 36-4-26.1 infringes upon.

Fifth, statutes restricting a private party's property rights to a much greater extent than SDCL 36-4-26.1 have survived constitutional scrutiny. (See Cases, A.O.B., 34 (rejecting constitutional challenges to statutes capping damages, barring claims before they accrue, providing immunity, and abolishing pre-existing causes of action)). Indeed, it is within the Legislature's powers create new rights or abolish old ones. *Green*, 1996 S.D. 146, ¶25, 557 N.W.2d at 403; *See also, Knowles,* 1996 S.D. 10, ¶74, n.21, 544 N.W.2d at 200, n. 21 (indicating that there is no property right violated even in the limiting of a rule of common law).

The Plaintiffs' procedural due process challenge is meritless.

3) This Court should not Balance Policy Interests

As part of their analysis, the Plaintiffs suggest that this Court should judicially weigh the policy underlying a crime/fraud exception against the policy underlying the peer review statutes. (Pls' Br., 17-18). Based upon this balancing, they suggest the

policy supporting the crime/fraud exception is "compelling" and outweighs that of the peer review statutes, and they conclude the crime/fraud exception should be judicially enacted because there is "rational basis to do so." (Id.)

This call for judicial activism, based largely upon an inflammatory recitation of undeveloped facts,[10] caused the Circuit Court's erroneous holding. South Dakota precedent makes clear that the judiciary should not be so easily persuaded to forget its role - to interpret the laws, not to enact or rewrite them. *State v. Burdick*, 2006 S.D. 23, ¶17-18, 712 N.W.2d 5, 9-10. As noted in *Burdick*, "[w]e must accept what 'the legislature has said—and has not said—rather than attempt to rewrite the law to conform with what we or others think it should have said.'" *Id.* at ¶18, at 10.

The Plaintiffs' suggestion that this Court should balance competing policy interests as a basis to rewrite SDCL 36-4-26.1, demonstrates the feebleness of their constitutional challenges.

4) Procedural Due Process and "Fairness"

Pls' Br. often suggests that fairness mandates upholding the Circuit Court's exceptions. This argument is also misdirected. As denoted in *Knowles*, "the constitutionality of measures affecting such economic rights under the due process clause does not depend on a judicial assessment of the justifications for the legislation or of the

[10] These cases are in their infancy. The Plaintiffs' factual recitation is premature (not one deposition has been taken and written discovery was just beginning) and un-tested through full discovery and cross-examination. Moreover, not one Plaintiff has disclosed a medical expert to establish that Defendant Sossan did, indeed, breach the standard of care or that a given procedure caused harm. The Circuit Court acknowledged this limited factual development. (A.O.B., App., 25).

wisdom or *fairness* of the enactment." 1996 S.D. 10, ¶79, 544 N.W.2d at 201 (emphasis added).

Along with this fairness concept, the Plaintiffs also view the peer review protection in a vacuum, suggesting that the peer review protection "'gives all the benefits to the wrongdoer . . . while it places all the corresponding detriment to the' injured victim." (Pls' Br., 9). This argument is a self-serving contention that ignores the purpose of the statutory scheme itself. Similar to the medical malpractice caps, the purpose of the peer review protection statutes was to improve availability and quality of healthcare in South Dakota. The Legislature enacted the statutes not in a vacuum with concerns over individual litigation and effects on a single plaintiff, but with a broader view toward benefiting all who seek medical care in South Dakota. In other words, the benefits are not given to a single wrongdoer at the cost of a single litigant, but are intended for all patients in South Dakota's medical facilities. *See Knowles,* 1996 S.D. 10, ¶74 n.21, 544 N.W.2d at 200 n. 21 (reflecting a similar consideration with regard to the malpractice cap).

The Plaintiffs' general fairness arguments do not justify the Circuit Court's Order.

IV. A Crime/Fraud Exception is Not Necessary to Curb the Conduct the Plaintiffs Allege Occurred Here

The Plaintiffs imply that without a crime/fraud exception, there is no check in place to stop hospitals from improperly credentialing physicians to make money. They refer to the crisis as the creation of a "den of thieves." This is untrue.

First, the initial deterrent to credentialing or employing any bad or dishonest doctor who completes unnecessary procedures, is the fact that any patient can recover for all the harm he or she is caused through a traditional medical malpractice lawsuit.

Whether a physician is employed by a hospital or merely on staff with privileges, hospitals are often a part of these expensive lawsuits.

Second, South Dakota's laws provide additional oversite of physicians who engage in the types of schemes alleged here. SDCL 36-4-29 and 30 (dealing with physician licensing). Likewise, South Dakota laws also oversee hospitals and act as a deterrent to this type of behavior by regulating, through licensing, a hospital's ability to operate. SDCL 34-12-19. For example, intentionally participating in a criminal scheme to make money by allowing a physician to complete unnecessary procedures could put a hospital at risk of being completely shut down under multiple prongs of SDCL 34-12-19.

Third, this type of practice (profiting from unnecessary or worthless procedures) can subject all involved to numerous other penalties, like prosecution under the False Claims Act,[11] Anti-Kickback statutes and the Stark Laws,[12] along with various other types of proceedings for things like criminal conspiracy to commit healthcare fraud, money laundering, and identity theft.[13] The Federal Government has not been hesitant to use its resources to prosecute participants in these schemes. (See FN 13 herein). For example, on June 22, 2016, the U.S. Department of Justice drafted a press release regarding its largest healthcare fraud takedown to date, wherein criminal and civil charges were brought against 301 individuals, many of them physicians. (Id.) Many of

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[11] *U.S. ex rel. Rogers v. Azmat,* 2011 WL 10935176 (S.D. Ga.); *See also,* Press Release, "Redding Cardiologists Agree to Pay Millions in Settlement," McGregor W. Scott, U.S. Attorney, ED CA, November 15, 2005, available at http://mathiasconsulting.com/cases/2005/11/CA/redding (last visited 6/23/16).

[12] *U.S. v. The Health Alliance of Greater Cincinnati,* 2008 WL 5282139 (S.D. Ohio).

[13] Press Release, "National Health Care Fraud Takedown Results in Charges against 301 Individuals for Approximately $900 Million in False Billing," U.S. D.O.J., June 22, 2016, available at https://www.justice.gov/opa/pr/national-health-care-fraud-takedown-results-charges-against-301-individuals-approximately-900 (last visited 6/29/16).

the schemes targeted involved medically unnecessary treatment or treatment that was billed for but never provided. (Id.) Per its inception in March of 2007, this press release indicates that the Medicare Fraud Strike Force has charged over 2,900 defendants in these types of schemes. (Id.)

In light of all of this, it becomes even more noteworthy that, other than the Circuit Court here, the Plaintiffs have come forward with no case law showing that a court has ever judicially enacted a crime/fraud exception to a peer review protection statute in a case like this. The Plaintiffs' concerns about deterrence are being addressed in a number of other ways, none of which involves what they ask for here.

CONCLUSION

These Appellants respectfully request that this Court reverse the Circuit Court's Order.

Dated this 30th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said Reply Brief totaling 4,845 words, which count excludes the Preliminary Statement, Certificates, and Signature blocks, as permitted by SDCL 15-26A-66(b)(3). I have relied on the word and character count of the word-processing system used to draft this Brief in preparing this certificate as permitted under SDCL 15-26A-66(b)(4).

Dated this 30th day of June, 2016.

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I, Matthew D. Murphy, do hereby certify that I am a member of Boyce Law Firm, L.L.P. attorneys for Appellants/Defendants, and that on the 30th day of June, 2016, I served a true and correct copy of the within and foregoing Appellant Sacred Heart Health Services d/b/a Avera Sacred Heart Hospital and Avera Health's Reply Brief via email upon:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27615
APPEAL NO. 27626
APPEAL NO. 27631

RYAN NOVOTNY
Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW,
Defendants and Appellants,

and

ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, also known as ALLEN A. SOSSAN, D.O., SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, MATTHEW MICHELS, THOMAS BUTTOLPH, DOUGLAS NEILSON, CHARLES CAMMOCK, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company, DON SWIFT, DAVID ABBOTT, JOSEPH BOUDREAU, PAULA HICKS, KYNAN TRAIL, SCOTT SHINDLER, TOM POSCH, DANIEL JOHNSON, NEUTERRA HEALTHCARE MANAGEMENT, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellants.

CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC,
A South Dakota Limited Liability Company
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation, DON SWIFT, D.O., KYNAN TRAIL, M.D.,

CURTIS ADAMS, DAVID BARNES, THOMAS BUTTOLPH, MARY MILROY, DOUGLAS NEILSON, ROBERT NEUMAYR, MICHAEL PIETILA, CHARLES CAMMOCK, DAVID WITHROW, and VARIOUS JOHN DOES and VARIOUS JANE DOES,
Defendants and Appellants.

Appeal from the Circuit Court, First Judicial District
Yankton County, South Dakota

The Honorable Bruce V. Anderson
First Circuit Court Judge

APPELLANT REPLY BRIEF OF LEWIS & CLARK SPECIALTY HOSPITAL, LLC, AND ITS INDIVIDUALLY NAMED COMMITTEE MEMBERS AND PERSONNEL

Petition for Permission to Take a Consolidated Appeal of an Intermediate Order filed November 4, 2015

Order Granting Defendant's Petition to Take Discretionary Appeal filed on December 15, 2015

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INTRODUCTION

Lewis & Clark Specialty Hospital (LCSH), in an effort to avoid repetition, adopts the arguments submitted by the Avera and YMC Defendants in their respective Reply Briefs. LCSH will address various issues herein, but should not be thought to have waived any issues which it has not directly addressed in this Reply.

ARGUMENT

I. The Plaintiffs Waived Their Right to Argue Due Process by Failing to Appeal the Circuit Court's Holding on this Issue

The Circuit Court held that the purpose of the SDCL § 36-4-26.1 (peer review statute) is to allow candid and open discussions among peer review committees, encourage doctors to engage in the process, and ultimately improve the delivery of health care. Appendix at 14; *see* SDCL § 36-4-26.1. Although the benefits of the peer review statute are clear, Plaintiffs allege this statute denies them the right to due process and access to the courts under the South Dakota Constitution.[1] Appendix at 16. The Circuit Court articulated reluctance in creating a crime fraud exception, but did so anyway, stating that it was necessary "to allow Plaintiffs access to the information and evidence that forms the crux of their cases." *Id.* at 18. The Court did not create the exception to preserve due process, contrary to Plaintiffs' contentions. Replacement Brief at 9.

Judge Anderson specifically concluded that SDCL § 36-4-26.1 does not violate due process. Appendix at 15-16, 18. Other state courts have also held that peer review statutes do not violate due process. *See, e.g.*, *Larson v. Wasemiller*, 738 N.W.2d 300, 313

[1] Plaintiffs make no mention of the open courts provision of the South Dakota Constitution, despite the Circuit Court's reliance upon it to create the crime-fraud exception. Plaintiffs have apparently conceded that SDCL 36-4-26.1 does not violate that provision.

(Minn. 2007); *Filipovic v. Dash*, No. 2005CA00209, 2006 WL 1521468, at *3 (Ohio Ct. App. May 22, 2006); *Moore v. Burt*, 645 N.E.2d 749, 755 (Ohio Ct. App. 1994); *Frank v. Trustees of Orange Cty. Hosp.*, 530 N.E.2d 135, 138 (Ind. Ct. App. 1988). Plaintiffs ignore Judge Anderson's finding and that of the majority of courts addressing the issue.

Due process is not violated when the exercise of police power is reasonable. *Crowley v. State*, 268 N.W.2d 616, 619 (S.D. 1978) (citing *State v. Nuss*, 114 N.W.2d 633, 636 (S.D. 1962)). Furthermore, the Plaintiffs must be able to show that "the regulatory means adopted by the legislature . . . bear a real and substantial relation to some actual or manifest evil . . . ." *Id.* at 619 (citing *Nuss*, 114 N.W.2d at 636). This is because there is a strong presumption that laws enacted by the legislature are constitutional. *Specht v. City of Sioux Falls*, 526 N.W.2d 727, 729 (S.D. 1995) (citing *Oien v. City of Sioux Falls*, 393 N.W.2d 286, 289 (S.D.1986)). The Circuit Court held that "the plaintiffs have not clearly, palpably and plainly shown that the statute does not bear a real and substantial relationship to furthering the objective of encouraging physicians to participate in a candid and open discussion as to their colleagues' competence." Appendix at 16.

Plaintiffs—in their Replacement Brief—acknowledge that they did not appeal the Circuit Court's decision regarding due process, but reason they were not required to, as their argument is consistent with the Circuit Court's holding. Replacement Brief at 9. Plaintiffs do not cite any authority to support this argument.

Contrary to Plaintiffs' contention, the Circuit Court's creation of the crime-fraud exception was to preserve the statute's constitutionality under the open courts provision. Appendix at 18. The Circuit Court denied the due process challenge outright. *Id.* at 16.

Thus, without a cross-appeal, the Plaintiffs may not "attack the decree with a view either to enlarging [their] own rights thereunder or of lessening the rights of [the Defendant]." *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

In *Duit Const. Co. Inc. v. Bennett*, the defendant filed a motion to dismiss the plaintiff's due process and equal protection claims. *See* 796 F.3d 938, 941 (8th Cir. 2015). The district court dismissed the due process claim, but did not dismiss the equal protection claim. *Id.* The defendant appealed the equal protection claim, but the plaintiff did not file a cross-appeal on the due process issue. *Id.* at 940-41. The Eighth Circuit held that the Plaintiff waived all arguments on due process grounds because they failed to file a cross-appeal on the district court's due process ruling. *See Id.* at 941.

Similar to *Bennett*, the Plaintiffs argue—in their Replacement Brief—almost exclusively, that the crime-fraud exception is necessary to avoid a violation of due process. Replacement Brief at 9-11. It is a well-established principle that issues that are not appealed are eliminated from the consideration of the appellate court. *See, e.g.*, *United States v. Blackfeather*, 155 U.S. 218, 221(1894); *The Stephen Morgan*, 94 U.S. 599, 599 (1876); *Gridley v. Engelhart*, 322 N.W.2d 3, 5-6 (S.D. 1982); *St. John's First Lutheran Church in Milbank v. Storsteen*, 77 S.D. 33, 35, 84 N.W.2d 725, 726 (1957); *First Nat. Bank v. Cranmer*, 42 S.D. 404, 175 N.W. 881, 882 (1920). One of the earliest U.S. Supreme Court cases to address this issue was *The Stephen Morgan*; which held, "A party who does not appeal from the final decree of a Circuit Court cannot be heard in opposition thereto, when the case is properly brought here by the appeal of the adverse party." 94 U.S. at 599. Similarly, in South Dakota, the court cannot review the record of the trial court if the order, ruling, or determination of the trial court unless it was

appealed. SDCL § 15-26A-7 (2016). More specifically, the U.S. Supreme Court's "unwritten but longstanding [cross appeals] rule, [states] an appellate court may not alter a judgment to benefit a nonappealing party." *Bennett*, 796 F.3d at 941 (8th Cir. 2015) (quoting *Greenlaw v. United States*, 554 U.S. 237, 244-45 (2008)). Thus, since the Plaintiff did not raise the issue of due process on cross-appeal, so it must be considered waived. *The Mabey*, 80 U.S. 738, 741 (1871); *see also Sateach v. Beaver Meadows Zoning Hearing Bd. of Appeals*, 676 A.2d 747, 751 (Pa. Commw. Ct. 1996); *see also Dakota, Minnesota & E.R.R. Corp. v. Heritage Mut. Ins. Co.*, 2002 S.D. 7, ¶¶ 14-15, 639 N.W.2d 513, 516.

The Plaintiffs' due process claim is waived because they did not follow proper procedure. *See* SDCL §§ 15-26A-4, 15-26A-22. Plaintiffs cannot merely respond to the Defendant's brief; they must file notice of review specifying the judgment or order to be reviewed. *See* § 15-26A-22; *Dakota, Minnesota & E.R.R. Corp.*, 639 N.W.2d at 516; *see also Smith v. Rustic Home Builders, LLC*, 2013 S.D. 9, ¶ 5, 826 N.W.2d 357, 359 (citing *In re: Estate of Geier*, 2012 S.D. 2, ¶ 17, 809 N.W.2d 355, 360); *A.L.S. Properties, Silver Glen v. Graen*, 465 N.W.2d 783, 787 (S.D. 1991) (citing *Gratzfeld v. Bomgaars Supply*, 391 N.W.2d 200 (S.D. 1986)); *Schmaltz v. Nissen*, 431 N.W.2d 657, 661 (S.D. 1988); *Rowett v. McFarland*, 394 N.W.2d 298 (S.D. 1986); *Reuland v. Indep. Dist. of White Lake*, 269 N.W. 484, 486 (S.D. 1936). Plaintiffs made the decision not to appeal the Circuit Court's ruling and, by not filing a notice of review, are precluded from asking the Court to analyze any due process issue. SDCL § 15-26A-11; *Reuland* 269 N.W. at 486.

II. There is not a Fundamental Right to Evidence

In South Dakota, a fundamental right is defined as "enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness." S.D. Const. Art. VI, § 1. Moreover, "[n]o person shall be deprived of life, liberty or property without due process of law." *See Id.* § 2; *US W. Commc'ns, Inc. v. Pub. Utilities Comm'n of State of S.D.*, 505 N.W.2d 115, 126 (S.D. 1993). The Plaintiffs argue that the peer review statue violates their fundamental right to due process as it places relevant evidence outside their reach. Replacement Brief at 11-12, 22.

Essentially, the Plaintiffs claim they have a fundamental right to evidence. When analyzing a fundamental right, the court will apply strict scrutiny. *State v. Krahwinkel*, 2002 S.D. 160, ¶ 19, 656 N.W.2d 451, 460; *Budahl v. Gordon and David Associates*, 287 N.W.2d 489 (S.D. 1980). Plaintiffs know the peer review statute survives the rational basis test, so they seek the imposition of strict scrutiny. The peer review statute, however, does not infringe on a fundamental right as the Plaintiffs suggest; rather, it only limits evidence relating to peer review activities. SDCL § 36-4-26.1. Other states have found that there is not a fundamental right to sue. *Baker v. City of Ottumwa*, 560 N.W.2d 578, 583 (Iowa 1997); *Goodman v. Samaritan Health Sys.*, 195 Ariz. 502, 510, 990 P.2d 1061, 1069 (Ct. App. 1999). There can be no fundamental right to evidence if there are times when it would be improper to sue. Furthermore, the U.S. Supreme Court has held that there is not a fundamental right to discovery, even in criminal cases. *See, e.g.*, *Kaley v. United States*, 134 S. Ct. 1090, 1101 (2014) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)); *Gray v. Netherland*, 518 U.S. 152, 168 (1996). The right to evidence has always been subject to limits—not every piece of evidence is discoverable—and has

never been considered a fundamental right in any court. Moreover, the Plaintiffs still have access to evidence for their claim, even without obtaining the information protected by the peer review statute. *Humana Hosp. Desert Valley v. Superior Court of Arizona In & For Maricopa Cty.*, 154 Ariz. 396, 400, 742 P.2d 1382, 1386 (Ct. App. 1987); *see Shelton v. Morehead Mem. Hosp.*, 318 N.C. 76, 347 S.E.2d 824 (1986). The right to evidence is not a fundamental right, and the peer review statute passes the rational basis test. *Krahwinkel*, 2002 S.D. 160, ¶ 19, 656 N.W.2d at 460; *see State v. Geise*, 2002 S.D. 161, ¶ 30, 656 N.W.2d 30, 40.

Courts apply a rational basis test when the right is not fundamental, and a suspect class is not infringed upon. *State v. Geise*, 2002 S.D. 161, 656 N.W.2d 30, 40 n.4 (citing *Eischen v. Minnehaha County*, 363 N.W.2d 199, 201 (S.D. 1985) (citations omitted)); *State v. Baker*, 440 N.W.2d 284, 289 (S.D. 1989) (citing *Prostrollo v. University of South Dakota*, 507 F.2d 775, 780 (8th Cir. 1974)). South Dakota's rational basis test consists of a two-part test. *City of Aberdeen v. Meidinger*, 89 S.D. 412, 415, 233 N.W.2d 331, 333 (1975). The first part of the test is whether the statute subjects people to arbitrary classifications or if it applies equally to all people. *Meidinger*, 89 S.D. 412, 233 N.W.2d at 333; *see* S.D. Const. Art. VI, § 18; *Krahwinkel*, 2002 S.D. 160, ¶ 20, 656 N.W.2d at 460 (citing *Lyons v. Lederle Lab., A Div. of Am. Cyanamid Co.*, 440 N.W.2d 769, 771 (S.D. 1989). Clearly, the peer review statute applies equally as the rights of every person are "governed by the same rule of law, [and] under similar circumstances." *See Krahwinkel*, 2002 S.D. 160, ¶ 20, 656 N.W.2d at 460 (citing *Eischen v. Minnehaha County*, 363 N.W.2d 199, 201 (S.D. 1981); *Meidinger*, 89 S.D. 412, 233 N.W.2d at 333-34; *State v. King*, 82 S.D. 514, 149 N.W.2d 509, 510 (1967). The second part of South

Dakota's rational basis test is whether the classification has a rational relationship to a legitimate legislative purpose. *Meidinger*, 89 S.D. 412, 233 N.W.2d at 333 (citing *Schmitt v. Nord*, 71 S.D. 575, 27 N.W.2d 910 (1947)). Similar to the other states who found their peer reviews statutes were rationally related to a legitimate governmental purpose; South Dakota's peer review statute will survive a rational basis review because it relates to a legitimate legislative purpose—improving health care. *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Krahwinkel*, 2002 S.D. 160, ¶ 24, 656 N.W.2d at 461; *see, e.g.*, *Larson v. Wasemiller*, 738 N.W.2d 300, 312, 316 (Minn. 2007); *Montalbano v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 837, 841, 844, 264 P.3d 944, 948, 951 (2011); *Dunn v. Chen*, 2011 WL 726112, at *13 (Conn. Super. Ct. Jan. 28, 2011); *Dellenbach v. Robinson*, 95 Ohio App. 3d 358, 376, 642 N.E.2d 638, 650 (1993) (citing *Gates v. Brewer*, 2 Ohio App. 3d 347, 348, 442 N.E.2d 72, 75 (1981)).

"Under the rational basis standard, courts accord great deference to the constitutionality of a statute even if imperfect results are achieved." *Americana Healthcare Ctr., a Div. of Manor Healthcare Corp. v. Randall*, 513 N.W.2d 566, 572 (S.D. 1994) (citing *Feltman v. Feltman*, 434 N.W.2d 590, 592 (S.D. 1989)). This is because a rational basis review is intended to be a judicial restraint as it prohibits a court from substituting its wisdom or desirability of policy over legislative enactments. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993).

As previously discussed, the Circuit Court found the peer review statute was rationally related to its intended purpose and did not violate the Plaintiffs' right to due process. Appendix at 15-16; *see also Heller v. Doe*, 509 U.S. at 319. The right to

evidence is not a fundamental right as it does not affect the Plaintiffs' life, liberty, or property. Furthermore, the peer review statute is constitutional as it is rationally related to the legitimate governmental purpose of improving the delivery of health care. Appendix at 16. The peer review statute does not require a crime-fraud exception to preserve due process.

III. Plaintiffs Improperly Compare SDCL 36-4-26.1 to Other Recognized Privileges

SDCL 36-4-26.1 is a specific statutory privilege with no foundation in the common law. As noted in prior briefing, South Dakota's peer review privilege was adopted by the legislature in 1977. The privileges relied upon by Plaintiffs are all based in the common law, whether or not later codified by the legislature. Therefore, to the extent the Court might create or apply exceptions, the privileges are Court created, anyway, thereby justifying Court created exceptions to them. Statutory privileges and the alteration of common law remedies, subject to constitutional considerations already addressed here, are for the legislature to adopt, repeal, amend, or create exceptions . . . not the courts. *See Pawlovich v. Linke*, 2004 S.D. 109, ¶ 16, 688 N.W.2d 218, 273 (noting "our function is not to elevate common law remedies over the legislature's ability to alter these remedies . . ."); *see also Knowles v. U.S.*, 1996 S.D. 10, ¶ 84, 544 N.W.2d 183.

A. Presidential Privilege is Created by the U.S. Supreme Court

Plaintiffs rely heavily upon the U.S. Supreme Court's handling of the Presidential privilege in *United States v. Nixon*, 418 U.S. 683 (1974). Their reliance, however, is misplaced. Plaintiffs' strained effort to analogize the peer review privilege to President Nixon's claimed Presidential privilege falls short. Perhaps recognizing the critical

distinction between statutory privileges and common law privileges, Plaintiffs continually attempt to point out that the Presidential privilege is derived from the Constitution. While perhaps true, the Presidential privilege Plaintiffs rely upon is actually created by the United States Supreme Court, not Congress. The Supreme Court does appear to grant an absolute privilege where a need to protect military, diplomatic, or sensitive national security secrets is claimed. *Id.*, at 706. The Court noted confrontations with other values exist, however, when the Presidential privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations. *Id.* Thus, the Supreme Court refined the scope of the Presidential privilege.

Here, however, the legislature created the scope of the peer review privilege. It did so in clear and unambiguous terms. *See In re: AT&T Information Systems*, 405 N.W.2d 24, 27 (S.D. 1987) (noting the court should defer to the legislature regarding what was said as compared to what the courts think the legislature should have said); *see also Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (S.D. 2000) (setting forth South Dakota's rules of statutory construction). Unlike the Presidential privilege in *Nixon*, neither this Court nor the Circuit Court is asked to create a common law privilege and define its scope. This Court's task is solely to declare the meaning of the statute as it has been clearly expressed. *See Martinmaas*, 612 N.W.2d at 611.

In *United States v. Nixon*, the Court was concerned regarding the separation of powers. Ironically, the Circuit Court's attempt to judicially impose a crime fraud exception upon SDCL 36-4.26-1, itself, creates separation of powers concerns. This Court has been diligent in articulating judicial restraint when it comes to statutory interpretation. *In re: Famous Brands*, 347 N.W.2d 882, 886 (S.D. 1984). Plaintiffs'

efforts to turn SDCL 36-4-26.1 into something different are contrary to the function of the judiciary as compared to the legislature. *Id.*

B. ***United States v. Nixon*** **does not Create a Crime-Fraud Exception to Presidential Privilege**

Plaintiffs claim that *United States v. Nixon* created a crime-fraud exception is wrong. As noted, the U.S. Supreme Court was refining and defining the nature and scope of the Presidential privilege. The U.S. Supreme Court makes no mention of a crime-fraud exception, whatsoever. Plaintiffs suggest the absolute Presidential privilege protecting national security is subject to the crime-fraud exception. Replacement Brief at 15. Plaintiffs then quote various broad platitudes regarding the necessity of an executive privilege as compared to the integrity of the judicial system, but they do not cite any reference to a crime-fraud exception, because none exists. *Id.*

Further, the U.S. Supreme Court reiterates the absolute nature of the Presidential privilege regarding military, national security, and diplomatic secrets. *United States v. Nixon*, 418 U.S. at 706; 710; 715. The district court was specifically instructed to honor confidentiality "even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen" because it "is too obvious to call for further treatment." *Id.* at 715. Thus, while permitting *in camera* review of documents and recordings when the privilege asserted was no more than a generalized claim of the public interest in confidentiality, the U.S. Supreme Court did not create a crime-fraud exception to the absolute privilege. *Id.* Plaintiffs' claim that the Presidential privilege is subjected to a crime-fraud exception is misleading, at best.

C. Attorney/Client and Spousal Privilege

Like the Presidential privilege, Plaintiffs rely upon these common law privileges to support an improper interpretation of SDCL 36-4-26.1. As has been articulated by the other Defendants, South Dakota has codified the common law privileges, and included a statutory crime-fraud exception. SDCL 19-19-502(d)(1). Obviously, the legislature knows how to declare a crime-fraud exception to a codified privilege, but it elected not to do so here. *See State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89 (recognizing "that the legislature knows how to exempt or include items in statutes"). Simply put, none of the privileges analogized by the Plaintiffs compare when subjected to this Court's rules of statutory interpretation nor the basic separation of powers.

IV. The Applicable Statutes are Synchronized in Ch. 36-4

Plaintiffs contend the language of SDCL 36-4-25 precludes an absolute privilege because it contemplates liability for committee members acting with malice. The Circuit Court followed suit. The immunity statute and the privilege statute, however, work in perfect harmony. SDCL36-4-25; 36-4-26.1.

The immunity statute protects peer review committee members from liability for their peer review activities "if the committee member … acts without malice, has made a reasonable effort to obtain the facts … and acts in a reasonable belief that the action taken is warranted by those facts." SDCL 36-4-25. The Circuit Court believed that language justified an exception to the otherwise absolute peer review privilege.

Contrary to both the Plaintiffs and the Circuit Court, however, the South Dakota legislature carved out a specific exception from the peer review privilege statute to facilitate the stated malice exception in the immunity statute. SDCL 36-4-26.1 permits

access to peer review materials for "physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based." By adopting the peer review privilege with this exception, the legislature preserved access to peer review materials so that physicians unhappy with a privilege or employment decision could have access to his *own* records. Tied to SDCL 36-4-25, physicians, then, have evidence to determine whether peer review committee members act with malice. This is solely the legislature's prerogative. *Young*, 2001 S.D. 76, ¶ 12. The court is not permitted to extend or limit the statute beyond its plain meaning. *In re: Famous Brands*, 347 N.W.2d at 886.

The Circuit Court focused only on the language in SDCL 36-4-25 as its basis to create a crime-fraud exception. When read in concert, however, the peer review privilege statute provides a limited exception for evidence necessary to prove the claims the legislature excepted from the immunity statute.[2] The Circuit Court did not consider the link between the statutes when it found the privilege statute, if applied as written, would make malice claims impossible to prove.

Furthermore, the legislature specifically crafted an exception to the peer review privilege in SDCL 36-4-26.2. Indeed, it stated "Section 36-4-26.1 does not apply to observations made at the time of treatment or to a patient's records" regarding the care and treatment of a patient. SDCL 36-4-26.2. That exception was created at the same time the privilege was created … SL 1977, Chapter 291. The legislature knew what it was doing when it did not create a crime-fraud exception to SDCL 36-4-26.1. *State v.*

[2] This Court has declared that it will not enlarge a statute beyond its face where the terms are clear and unambiguous, and do not lead to an absurd or unreasonable conclusion. *Id.* Contrary to Plaintiffs' contentions, the legislature knew exactly what it was doing, and the statutes' clear terms, read together, are reasonable and harmonious.

Young, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89. The legislature also knew about the immunity statute when it crafted these statutes. *Id.* (Recognizing "that the legislature knows how to exempt or include items in statutes").

Section 36-4-26.1 goes beyond merely precluding discovery. It also prohibits the admission into "evidence in any action of any kind in any court or arbitration forum" those documents which are part of a peer review committee's file. SDCL 36-4-26.1. The statute also states that no persons in attendance at a peer review meeting can be required to testify as to what transpired. *Id.* Plaintiffs argue this language authorizes committee members to testify should they desire. Plaintiffs' reading is inconsistent with every other aspect of South Dakota's peer review privilege. It would be nonsensical to declare all documents precluded from discovery or admissibility at trial and all activities declared beyond discovery or admissibility, but peer review committee members could waive the privilege at their whim. To the contrary, committee members are prohibited from testifying about any aspect of the peer review process, and cannot be forced to testify.

CONCLUSION

Lewis & Clark Specialty Hospital contends the Circuit Court was in error to declare South Dakota's peer review statute unconstitutional without its judicially created crime-fraud exception. SDCL 36-4-26.1 is clear and unambiguous; it does not violate Plaintiffs' due process rights; and it does not violate South Dakota's open courts provision. This Court should find that SDCL 36-4-26.1 creates an absolute privilege, other than the specifically enumerated exceptions created by the legislature and reverse the Circuit Court's ruling in total.

Respectfully submitted this 1st day of July, 2016.

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In accordance with SDCL § 15-26A-66(b)(4) I hereby certify that this reply brief complies with the requirements set forth in the South Dakota Codified Laws. This reply brief was prepared using Microsoft Word, and contains 3,966 words, including footnotes. I have relied on the word count of a word-processing program to prepare this certificate. I further certify that this brief complies with the style requirements of SDCL § 15-26A-66(b) and (b)(1), being prepared in the font *Times New Roman*, at a size of 12 points.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RYAN NOVOTY,

Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South Dakota Corporation,

Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOOSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendants and Appellants.

* *

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES, MARY MILROY, ROBERT NEUMAYR, MICHAEL PIETILA and DAVID WITHROW,

Defendants and Appellants,

#27615
(CIV 14-235)

JOINDER IN APPELLANT REPLY BRIEF OF LEWIS & CLARK SPECIALTY HOSPITAL, LLC AND ITS INDIVIDUALLY NAMED COMMITTEE MEMBERS AND PERSONNEL

#27626
(CIV 15-167)

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Defendants and Appellants,

* *

CLAIR ARENS and DIANE ARENS,

Plaintiffs and Appellees,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC, a South Dakota Limited Liability Company,

Defendants and Appellants,

ALLEN A. SOOSAN, D.O., also known as ALAN A. SOOSAN, also known as ALLEN A. SOSSAN, RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, P.C., a New York Professional Corporation, SACRED HEART HEALTH SERVICES, a South Dakota Corporation d/b/a AVERA SACRED HEART HOSPITAL, AVERA HEALTH, a South

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(CIV 15-167)

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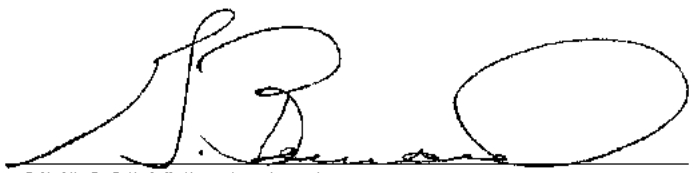
Dr. Kynan Trail, M.D., hereby joins in *Appellant Reply Brief of Lewis & Clark Specialty Hospital, LLC, and Its Individually Named Committee Members and Personnel* in the above-captioned consolidated appeals.

Dr. Trail is a member of Lewis & Clark Specialty Hospital, LLC ("LCSH") and is similarly situated to those individuals who are also members of LCSH and who are also parties to Civ. 15-167 (Arens). However, Dr. Trail is represented by counsel separate from counsel representing LCSH and its similarly situated Defendant members. This Joinder is made to avoid unnecessary duplicative briefing of issues common to the similarly situated Defendant members of LCSH.

Dated this 5th day of July, 2016.



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