IN THE SUPREME COURT OF OHIO

LORETTA SCHELLING,	:	Case No. 07-2202
Plaintiff-Appellee,	:	On Appeal from the Williams County Court of Appeals, Sixth Appellate District
v.	:	
COMMUNITY HOSPITALS OF WILLIAMS COUNTY,	:	Court of Appeals Case No: WM-07-001
Defendant-Appellant.	:	

MEMORANDUM OF AMICUS CURIAE, OHIO HOSPITAL ASSOCIATION, IN SUPPORT OF JURISDICTION

Catherine M. Ballard (0030731)
Anne Marie Sferra (0030855)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (facsimile)
Email: cballard@bricker.com
asferra@bricker.com
Counsel for Amicus Curiae,
Ohio Hospital Association

Jeanne M. Mullin (0071131)
Reminger & Reminger Co., L.P.A
237 W. Washington Row
Second Floor
Sandusky, Ohio 44870
(419) 609-1311
(419) 626-4805 (facsimile)
Email: jmullin@reminger.com
Counsel for Defendant-Appellant,
Community Hospitals of Williams County

Peter O. DeClark (0064663)
Chad M. Tuschman (0074534)
Williams DeClark Tuschman Co., L.P.A.
416 N Erie Street
500 Toledo Legal Building
(419) 241-7700
(419) 245-3849 (facsimile)
Counsel for Plaintiff-Appellee,
Loretta Schelling

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STATEMENT OF INTEREST OF AMICUS CURIAE

This case presents a critical issue of great importance to hospitals throughout the State of Ohio: Can a plaintiff pursue a negligent credentialing claim against a hospital in the absence of a prior determination that the physician at issue is liable to the plaintiff for medical negligence? Based on this Court's decision in *Albain v. Flower Hospital* (1990), 50 Ohio St.3d. 251, 553 N.E.2d 1038 -- in which this Court first recognized a negligent credentialing claim -- the answer should be a resounding "no." The reason for this is that *Albain* requires harm to a patient caused by a physician's medical negligence before a negligent credentialing claim arises. See *Browning v. Burt* (1993), 66 Ohio St.3d 544, 566, 613 N.E.2d 993 (Moyer, C.J., dissenting) (explaining *Albain*).

A few years after *Albain*, this Court addressed the issue of whether a one or two-year statute of limitations applies to a negligent credentialing claim in *Browning v. Burt* (1993), 66 Ohio St.3d 544, 613 N.E.2d 993. In reaching its conclusion that a two-year statute of limitations is applicable to a negligent credentialing claim, this Court determined that a claim for negligent credentialing against a hospital is separate and distinct from a claim for medical negligence against a physician. Id. at 556. Even though these claims are distinct and have different limitations periods, this Court has never overruled *Albain* or held that underlying medical malpractice is not required before a negligent credentialing claim arises.

The Sixth Circuit's decision in the instant case strays from *Albain* and misconstrues *Browning* by allowing a negligent credentialing claim to proceed without a prior determination that the plaintiff has been harmed by the medical negligence of a physician. If the decision of the Sixth District is permitted to stand, Ohio hospitals will be faced with additional litigation and forced to do what Ohio hospitals are not required to do under current Ohio law -- defend against

claims of medical negligence directed at physicians.[1] Simply put, Ohio hospitals are not in a position and should not be required to defend against claims of medical negligence directed at physicians. Although Ohio hospitals may be held liable for the negligent credentialing of a physician (or other licensed health care professional), a prerequisite to liability for negligent credentialing is a prior finding of negligence against the physician. The Ohio Hospital Association (OHA) has a strong interest in Ohio's negligent credentialing laws because every Ohio hospital is responsible for credentialing its medical staff and, therefore, faces potential negligent credentialing claims. As amicus curiae, the OHA urges this Court to clarify whether a negligent credentialing claim can be pursued against a hospital in the absence of a prior determination that a physician's medical malpractice caused harm to the plaintiff.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred seventy (170) private, state and federal government hospitals and more than forty (40) health systems, all located within the state of Ohio; collectively they employ more than 240,000 employees. The OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities.

The OHA is a strong advocate of a comprehensive solution to the significant issues facing Ohio's health care system. In this regard, the OHA actively supports patient safety

[1] The term "physician" is used herein as short-hand to describe medical practitioners who are required to be credentialed by a hospital, including allopathic and osteopathic physicians, podiatrists, dentists, and psychologists.

initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute[2] which is dedicated to improving patient safety in the State of Ohio, and created OHA Insurance Solutions, Inc.[3] which seeks to restore stability and predictability to Ohio's medical liability insurance market.

WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case is one of public or great general interest because it involves an issue critical to all Ohio hospitals: Can a plaintiff pursue a negligent credentialing claim against a hospital in the absence of a prior finding -- either by stipulation or adjudication -- that the physician who is the subject of the negligent credentialing claim is liable to the plaintiff for medical negligence? Because every Ohio hospital is responsible for credentialing its medical staff, every Ohio hospital faces potential negligent credentialing claims.

Until the court of appeals' decision in the instant case, Ohio courts have required --- as a legal prerequisite to a negligent credentialing claim -- that the plaintiff first establish medical negligence resulting in harm to the plaintiff by the physician at issue. *Albain v. Flower Hospital* (1990), 50 Ohio St.3d. 251, 553 N.E.2d 1038 (recognizing a claim for negligent credentialing in Ohio); *Ratliff v. Morehead* (May 19, 1998), Scioto App. No. 97CA2505, 1998 Ohio App. LEXIS 2271 ("in order to prove negligent credentialing, the appellants must prove the underlying medical malpractice claim against [the physician])"; *Davis v. Immediate Medical Services, Inc.* (5th App. Dist.), 1995 Ohio App. LEXIS 6088 (reasoning that a negligent credentialing claim had not become "ripe" . . . "until any medical negligence was found.").[4] Chief Justice Moyer explained this requirement as follows:

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[2] http://www.ohiopatientsafety.org/
[3] http://www.ohainsurance.com/
[4] *Davis v. Immediate Medical Services, Inc.* was reversed in part on other grounds at (1997), 80 Ohio St.3d 10.

> In order to prevail in a cause of action for negligent credentialing against a hospital pursuant to *Albain*, the plaintiff must establish not only negligent selection and/or retention of a physician, but also that but for the hospital's negligence, the plaintiff would not have been injured. That is, *Albain* requires that the underlying malpractice of the physician be proven before the plaintiff can recover damages against the hospital for its own negligence. *Without an underlying harm to the hospital's patient through medical malpractice, an action against the hospital for negligent credentialing will never arise.*

Browning v. Burt (1993), 66 Ohio St.3d 544, 566, 613 N.E.2d 993 (Moyer, C.J., dissenting) (emphasis added).

The court of appeals' decision turns the law of negligent credentialing upside-down by allowing a plaintiff to pursue a negligent credentialing claim in the absence of first establishing medical malpractice liability. That is, under the court of appeals decision, the plaintiff may proceed with a negligent credentialing claim against a hospital even though he has not obtained an adjudication or admission of liability against the physician who is the subject of the negligent credentialing claim.

If allowed to stand, the court of appeals' decision will directly impact hospitals by requiring them to defend negligent credentialing claims when there has been no prior determination that the plaintiff was harmed by the negligence of the physician who is the subject of the negligent credentialing claim. As such, the court of appeals' decision encourages additional negligent credentialing litigation -- because it allows plaintiffs to proceed even though there may be no underlying medical negligence -- and puts an unprecedented burden on hospitals to defend the acts or omissions of the physician. Hospitals do not practice medicine and are not in a position to defend a medical malpractice action against an independent physician.[5] As a

[5] See *Browning v. Burt*, 66 Ohio St.3d at 566 ("A hospital does not practice medicine and is incapable of committing malpractice.") (citing *Lombard v. Good Samaritan Medical Center* (1982), 69 Ohio St.2d 471, 199 N.E.2d 878).

result, historically Ohio hospitals have not been required to defend medical malpractice claims asserted against independent physicians.

Moreover, hospitals should not be required to expend significant resources to defend a physician's conduct when they do not and cannot control it. But, that is what hospitals will be forced to do if a plaintiff is allowed to proceed with a negligent credentialing claim before establishing that negligence by the physician caused harm to the plaintiff. More specifically, if a plaintiff is allowed to establish medical negligence in a negligent credentialing case against the hospital without the physician as a defendant, the real party in interest to the medical negligence claim (i.e., the physician) will not be there to defend against it. Without the physician there to defend against the medical negligence claim, the hospital is given the Hobson's choice of attempting to defend against the medical negligence claim or allowing the case to proceed with undisputed evidence of medical negligence.

The issue before the Court not only has an impact on hospitals, it also impacts the communities served by hospitals. Because the court of appeals' decision expands litigation against hospitals in a way not previously allowed by Ohio courts, it will undoubtedly have an impact on the allocation of a hospital's limited financial resources. When hospitals are required to increase reserves for claims or pay additional insurance premiums to account for previously unanticipated litigation (as they would be to account for the increased risk emanating from the appellate court's decision), they need to reallocate resources. This often means cutting other programs and services offered to patients, employees, and the community at large, such as caring for the uninsured[6], community outreach and wellness programs, and medical research.

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[6] In 2005, Ohio hospitals expended more than one billion dollars' to cover Medicaid shortfalls and to provide charity care to those who could not pay for medical care. See http://www.ohanet.org/media/fact_sheets/medicaid.pdf.

STATEMENT OF FACTS

Amicus curiae defers to the Statement of Facts presented by Appellant.

ARGUMENT

Proposition of Law: A plaintiff cannot proceed on a negligent credentialing claim against a hospital in the absence of a prior finding – by adjudication or stipulation – that the plaintiff's injury was caused by the negligence of the physician who is the subject of the negligent credentialing claim.

The relationship between a hospital and the physicians who provide medical care at the hospital is unique. A physician is generally neither an employee nor an independent contractor in relation to the hospital. Despite this lack of employment or contractual relationship, a hospital cannot arbitrarily preclude a physician from practicing at the hospital.[7] Rather, R.C. 3701.351 provides that a hospital must have objectively reasonable criteria for assessing competency and, if the physician meets such criteria, the hospital must grant the physician privileges. The hospital cannot take away those privileges on the basis of quality of care or professional behavior concerns unless the physician is first provided with procedural due process as set forth in the medical staff bylaws.[8] *See, Bouquett v. St. Elizabeth Corporation* (1989), 43 Ohio St. 3d 50, 538 N.E.2d 113; *Khan v. Suburban Community Hospital* (1976), 45 Ohio St. 2d 39, 340 N.E.2d 398.

The independent duty of a hospital to appropriately credential physicians who seek to practice at a hospital was first recognized by the Ohio Supreme Court in 1990 in *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251, 553 N.E.2d 1038. In *Albain*, the Court recognized that the mere act of granting privileges to a physician was insufficient to justify holding the

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[7] There are some exceptions to this general rule. For example, a hospital is not required to grant privileges to a physician if the hospital is already a party to a contractual arrangement whereby a single physician or single physician's group has the exclusive right to provide certain services, such as anesthesia or pathology. Such exceptions are not applicable to the present case.

[8] The medical staff bylaws are the documents generated by members of the medical staff and approved by the hospital's board of directors that govern the relationship between the parties.

hospital liable for a physician's negligent acts under a theory of respondeat superior. Rather, the court held that "in regard to staff privileges, a hospital has a direct duty to grant and continue such privileges only to competent physicians." With respect to proving this newly-created negligent credentialing claim, the Court stated:

> In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured.
>
> Hospitals do not have a nondelegable duty to assure the absence of negligence in the medical care provided by private independent physicians granted staff privileges by the hospital.

Id. at paragraphs 2 and 3 of syllabus.

In elaborating upon this cause of action, the Court recognized that hospitals do not control a physician's medical treatment of his patients:

> [A] hospital is not required to pass upon the efficacy of treatment; it may not decide for a doctor whether an option is necessary, or, if one be necessary, the nature thereof; but it owes to every patient whom it admits the duty of saving him from an illegal operation [or] false, fraudulent, or fictitious medical treatment.

Id. at 259.

Thus, under *Albain*, there can be no claim by a plaintiff for negligent credentialing against a hospital unless, in fact, a physician on the hospital's medical staff has committed an act of medical malpractice on such plaintiff at the hospital. In the absence of a determination that medical malpractice has occurred, an essential element of a negligent credentialing claim is missing. See, e.g., *Ratliff v. Morehead* (May 19, 1998), Scioto App. No. 97CA2505, 1998 Ohio App. LEXIS 2271 ("in order to prove negligent credentialing, the appellants must prove the underlying medical malpractice claim against [doctor]"); *Davis v. Immediate Medical Services, Inc.* (December 12, 1995), Stark App. No. 94CA0253, 1995 Ohio App. LEXIS 6088 (reasoning

that a negligent credentialing claim had not become "ripe" . . . "until any medical negligence was found.").

A few years after *Albain*, this Court addressed the narrow issue of which statute of limitations applies to a negligent credentialing claim. See *Browning v. Burt* (1993), 6 Ohio St. 3d 544, 613 N.E.2d 993. This Court held that the two-year limitations period for bodily injury applies to a negligent credentialing claim, as opposed to the one-year period applicable to medical malpractice claims. In reaching this conclusion, the Court elaborated that negligent credentialing claims are separate and distinct from claims for medical malpractice and, therefore, could have different limitations periods. Although the Court recognized that negligent credentialing and medical malpractice claims are separate and distinct, it did not overrule *Albain* and left in tact the requirement that before a hospital can be held liable for negligent credentialing, there must first be harm to the plaintiff caused by medical negligence. Despite the fact that *Browning* addressed only the statute of limitations applicable to a negligent credentialing claim, some lower courts (including the Sixth District in this case) have misapplied *Browning* to negate the requirement that there must first be medical malpractice before there can be a negligent credentialing claim.

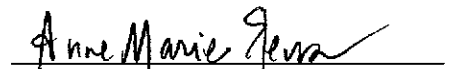
Allowing a negligent credentialing claim to proceed in the absence of a determination of medical malpractice puts the cart before the horse. In other words, if there is no harm to the patient caused by the physician's negligence, the hospital cannot be liable for negligently allowing the physician to cause harm to the plaintiff. All Ohio courts that have addressed this issue appear to agree -- without harm to a plaintiff caused by medical negligence, there can be no negligent credentialing claim.

But, Ohio courts disagree as to whether a plaintiff can establish medical negligence against the physician in a negligent credentialing case against only the hospital or whether medical negligence needs to be established before a negligent credentialing claim can be pursued. For instance, the Sixth District's decision in the instant case allows a plaintiff to proceed with a negligent credentialing claim against the hospital and to establish in the negligent credentialing case -- which does not involve the physician as a defendant -- that the physician committed malpractice. On the other hand, the Fifth District has held that a negligent credentialing claim is not "ripe" until medical negligence first has been established. *Davis v. Immediate Medical Services, Inc., supra.* Decisions from the Fourth District seem to conflict with one another on this issue. Compare *Dickes v. U.S. Health Corp. of Southern Ohio* (May 10, 1996), Scioto App. No. 95CA2350, 1996 Ohio App. LEXIS 1987 with *Ratliff v. Morehead, supra.* Ohio's lower courts and litigants need clarification from this Court and one set of rules to apply to all.

Allowing the Sixth District's decision to stand is not the right result. Permitting a plaintiff to establish medical malpractice in a case against only the hospital requires the hospital to either defend the medical malpractice claim directed at the physician or allow undisputed evidence of medical negligence to go to the trier of fact. Hospitals do not practice medicine and are not in a position to defend a medical malpractice action against an independent physician whose conduct they do not direct or control. Thus, hospitals should not be compelled to expend their limited resources to defend medical malpractice claims directed at independent physicians. Nor should plaintiffs be allowed to avoid the real party in interest in establishing medical malpractice.

Consistent with this Court's holding in *Albain*, this Court should make clear that Ohio law requires, as a legal prerequisite to a negligent credentialing claim, a prior determination of medical negligence resulting in harm to the plaintiff. The determination of medical negligence can be by adjudication or stipulation, but cannot be established for the first time in an action against only the hospital without the real party in interest to the medical negligence claim.

Respectfully submitted,



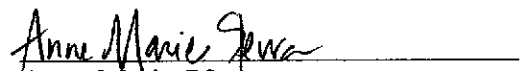
Catherine M. Ballard (0030731)
Anne Marie Sferra (0030855)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
(614) 227-2390 (facsimile)
Email: cballard @bricker.com
asferra@bricker.com
Counsel for Amicus Curiae,
Ohio Hospital Association

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Amicus Curiae, Ohio Hospital Association, in Support of Jurisdiction was sent via regular U.S. mail, postage prepaid this 26th day of November 2007, to the following:

Jeanne M. Mullin
Reminger & Reminger Co., L.P.A
237 W. Washington Row
Second Floor
Sandusky, Ohio 44870

Peter O. DeClark
Chad M. Tuschman
Williams DeClark Tuschman Co., L.P.A.
416 N Erie Street
500 Toledo Legal Building
Toledo, OH 43604-6301



Anne Marie Sferra