IN THE SUPREME COURT OF OHIO

LORETTA SCHELLING, et al.,	)	**On Appeal From the Williams**
	)	**County Court of Appeals, Sixth**
Plaintiff/Appellee	)	**Appellate District**
	)	
-vs-	)	
	)	**Court of Appeals**
STEPHEN HUMPHREY, M.D., et al.,	)	**Case No. WM-07-001**
	)	**Trial Court Case No. 05CI000035**
Defendant/Appellant	)	
	)	

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MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE LORETTA SCHELLING

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TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

ARGUMENT IN OPPOSITION OF PROPOSITION OF LAW 5

Appellee Loretta Schelling's Response to Proposition of Law:

The Appellate court properly evaluated and applied Ohio law, which allows for a negligent credentialing claim against a hospital to proceed in the absence of a prior finding of negligence of the physician 5

CONCLUSION 12

PROOF OF SERVICE 13

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case calls into question well established principles of Ohio Law. The main issue raised by the Appellant is whether a plaintiff can proceed on a negligent credentialing claim against a hospital without a prior finding of negligence against the physician. Appellant essentially is asserting that an individual, who reaches a settlement agreement with a physician, should then be barred from bringing suit against a hospital that negligently credentialed that very same physician.

If this were the case, then individuals pursing medical malpractice claims would be required to make a choice, either settle with the physician and lose their valid negligent credentialing claim, or be forced to adjudicate their claims (even if the physician is willing to settle) in order to protect their negligent credentialing claims. Further, physicians will often settle but not stipulate to negligence.

Appellant's proposition is in direct conflict with current Ohio law. Appellant's proposition would effectively erode and practically eradicate the tort of negligent credentialing altogether, despite the fact that Ohio law has long recognized the tort of negligent credentialing as a distinct and separate cause of action. Ohio courts have consistently held that negligent credentialing is necessary so that hospitals may be held accountable when they breach their duty to hire competent physicians. See *Albain v. Flower Hosp.* (1990), 50 Ohio St.3d 251, paragraph two of the syllabus.

Appellant's proposition, however, would fail to hold hospitals accountable. It would allow hospitals to escape accountability every time a doctor and a patient settle a claim without a stipulation as to negligence. This directly conflicts with the purpose of having a negligent

credentialing tort. Hospitals should be held liable, as they are now, when they fail to properly credential physicians and their failure leads to injury. They should be held accountable, as they are now, notwithstanding whether or not there is a stipulation or adjudication to negligence with the physician prior to the negligent credentialing claim going forward.

This issue has already been settled in Ohio's lower courts. Both the Fourth District and the Sixth District (in this case), have addressed this exact issue. *Dicks v. U.S. Health Corporation* (May 10, 1996), 4th Dist. No. 95-CA-2350, and *Schelling v. Humphrey* (Oct. 12, 2007), 6th Dist. No. WM-07-001. Both courts have plainly held that a finding of medical malpractice is not a prerequisite to a claim for negligent credentialing. *Id.* Additionally and more significantly, both have allowed a negligent credentialing claim to continue against a hospital despite the fact that the physician, against whom malpractice was originally claimed, was no longer a party to the litigation (due to the physician settling without stipulating to negligence). *Id.* Notably, there are no district courts that have disagreed. Despite Appellant's claim that ambiguity exits, there is no confusion under the current law.

The Sixth District Court of Appeals, in deciding this case, followed and properly applied the law of Ohio. Since Ohio law already provides an answer to Appellants inquiry, this issue in no way warrants the attention of this Honorable Court.

STATEMENT OF THE CASE

Appellee filed the original complaint on February 10, 2005 naming as defendants Dr. Stephen Humphrey and Community Hospitals of Williams County (hereinafter Community

Hospital). An amended complaint was filed on April 20, 2005. The complaint advanced a claim of medical malpractice against Dr. Humphrey and a claim of negligent credentialing against Community Hospital. Both claims relate to surgeries Dr. Humphrey performed on January 23, 2003 and February 20, 2003 at Community Hospital.

After Appellee commenced the suit, Dr. Humphrey filed for bankruptcy. Because of this filing, the proceedings on Appellee's suit were stayed on November 2, 2005. Appellee subsequently dismissed Dr. Humphrey from the suit as settlement had been reached with the Bankruptcy Trustee for Dr. Humphrey. Appellee then requested the stay be lifted, and it was on November 1, 2006, at which point Community Hospital remained as the sole defendant.

Once Dr. Humphrey was dismissed, Community Hospital filed a motion to dismiss for failure to state a claim pursuant to Civil Rule 12(b)(6). The trial court granted this motion on December 26, 2006. The court reasoned that Appellee was unable to proceed in their negligent credentialing claim against the hospital because Appellee had voluntarily dismissed Dr. Humphrey without obtaining an admission of liability or a finding of negligence.

Appellee appealed this dismissal to the Sixth District Court of Appeals. The Sixth District held for Appellee, thereby reversing the decision of the trial court. The Sixth District reasoned that the trial court erred in requiring a finding of negligence, specifically explaining that a finding of negligence is not a legal prerequisite to negligent credentialing. See *Schelling v. Humphrey* (Oct. 12, 2007), 6th Dist. No. WM-07-001.

Furthermore, the court held that a determination that staff physician negligence must be proven as an element of negligent credentialing against an employer "does not interpose a legal requirement to name the staff physician as a defendant and prove the negligence claim in

the same complaint. They are separate causes of action." *Id.* at 6 (citing *Dicks*, 4th Dist. No. 95-CA-2350).

STATEMENT OF THE FACTS

At the time relevant to this matter, Dr. Humphrey was a physician licensed by the state of Ohio and in the practice of podiatry in Bryan, Ohio. Additionally, Dr. Humphrey had staff privileges at Community Hospital, which permitted him, among other things, to perform surgeries at the hospital. On January 23, 2003 and February 20, 2003, Dr. Humphrey performed surgeries on Mrs. Schelling at Community Hospital. Both surgeries were tarsal tunnel releases, performed individually on each heel. Because of Dr. Humphrey's negligent performance of these surgeries appellant Loretta Schelling now suffers permanent nerve damage to both feet and is no longer able to work. Appellee institutes this suit against both Dr. Humphrey and Community Hospital because, at the time the surgeries were performed, the hospital knew or should have known that Dr. Humphrey was not competent to practice medicine.

Community Hospital had notice as early as October 2001 that Dr. Humphrey was suffering from a psychiatric condition that impaired his ability to think and act rationally and impaired his ability to practice medicine. In October 2001, tools and equipment worth several hundreds of dollars were stolen from the hospital. Although he originally denied any knowledge about the theft, Dr. Humphrey later confessed to stealing the items when presented with video surveillance showing him backing a truck up to a maintenance entrance, carrying the items out of the hospital. Dr. Humphrey claimed he felt an overwhelming compulsion to steal the items even though he already owned some of the same tools. The hospital agreed not

to press charges against Dr. Humphrey if he sought psychiatric treatment for his mental condition, paid restitution, and provided the hospital with a monetary donation. Dr. Humphrey complied with the hospital's requests and retained his staff credentials at Community Hospital without further oversight or inquiry into his competence to continue practicing medicine.

Dr. Humphrey's police record shows that the theft of the hospital's tools was only the first documented incident in a series of irrational acts that grew markedly more bizarre as time went on. Despite Dr. Humphrey's unusual behavior and the hospital's acknowledgment and notice of his mental problems, the hospital continued to credential Dr. Humphrey and permit him hospital privileges. Had the hospital revoked Dr. Humphrey's credentials or refused to renew them, Dr. Humphrey would not have been able to perform the surgeries on the Appellee that ultimately left her with permanent injuries.

ARGUMENT IN OPPOSITION OF PROPOSITION OF LAW

Appellee Loretta Schelling's Response to Proposition of Law: The Appellate court properly evaluated and applied Ohio law, which allows for a negligent credentialing claim against a hospital to proceed in the absence of a prior finding of negligence of the physician.

Appellant proposes that a Plaintiff cannot proceed on a negligent credentialing claim against a hospital in the absence of a prior finding, either 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. This proposition of law is both inaccurate and inconsistent with the doctrine of stare decisis. Ohio law clearly recognizes that a claim of negligent credentialing may go forward without negligence first being proven against the doctor. Moreover, Ohio law has also long acknowledged that a claim of negligent credentialing is

legally and factually separate from a claim of negligence against the treating physician. *Browning v. Burt* (1993), 66 Ohio St.3d 544, 563.

Under Ohio law, this Court explained the difference between medical malpractice and negligent credentialing as follows:

> Negligent credentialing claims arise out of the *hospital's* failure to satisfy its independent duty to grant and continue staff privileges only to competent physicians. This independent duty does not directly involve diagnosis or the medical care and treatment of a patient. While the acts or omissions of a hospital in granting and/or continuing staff privileges to an incompetent physician *may* ultimately lead to an act of medical malpractice by the incompetent physician, the physician's ultimate act of medical malpractice is factually and legally severable and distinct from the hospital's acts or omissions in negligently credentialing him or her with staff membership or professional privileges.

Id. at 557 (emphasis in the original). In *Browning*, this Court was asked to determine whether a negligent credentialing claim had been brought within the statute of limitations. Both parties in the matter asserted that the appropriate statute of limitations was found in R.C. 2305.11(B)(1), the statute applied to medical malpractice cases, but claimed different events as the triggering "cognizable event" needed to begin the running of the statute. *Id.* at 554.

However, the Court determined that an entirely different statute applied to negligent credentialing cases based on the inherent differences between a negligent credentialing claim and the medical claims covered by R.C. 2305.11. The Court held that a claim for negligent credentialing was subject to the general two-year statute of limitation of R.C. 2305.10. In analyzing the differing characteristics of a negligent credentialing claim the court noted: "The general duty imposed upon hospitals to grant and continue staff privileges only to competent physicians was identified in *Albain v. [Flower Hospital]*, as an 'independent' duty of care owed *directly* to those admitted to the hospital." *Id.* at 555 (emphasis in the original).

> [Negligent credentialing] claims are not claims for medical malpractice and, thus, the medical malpractice line of cases and the "cognizable event" test do not apply. A hospital does not practice medicine and is incapable of committing malpractice. [Internal citations omitted] Further, Plaintiffs' claims against the hospital have nothing to do with any issue concerning derivative liability of the hospital for the acts of its agent or employee-physicians. * * * [Plaintiffs'] negligent credentialing claims against [the hospital] are independent claims asserted directly against [the hospital] for the *hospital's* own acts or omissions in granting and/or continuing the staff privileges of the doctor(s).

Id. at 556 (emphasis in the original).

Perhaps even more telling than the majority's holding on this issue is Chief Justice Moyer's part concurrence, part dissent. The Chief Justice addressed what he believed were two fundamental flaws of the majority holding, one of which is the majority's departure from *Albain.*[1]

> [U]nder *Albain*, claims against a hospital for negligent retention or selection of a staff physician are dependent on an underlying medical malpractice claim against the staff physician. In order to prevail in a cause of action for negligent credentialing against a hospital pursuant to *Albain*, * * * the underlying malpractice of the physician [must] be proven before the Plaintiff can recover damages against the hospital for its own negligence.

Id. at 566. Although *Albain* never explicitly states that a medical malpractice action must be proven first, it was Chief Justice Moyer's belief that such a requirement was implicit and is the basis of his dissent from the majority opinion of *Browning.* If the *Browning* majority believed, as Chief Justice Moyer did, that *Albain* required a successful medical malpractice claim as a prerequisite, then Chief Justice Moyer's opinion would not have been a dissent.

Now Appellant argues that Chief Justice Moyer's dissent was highlighting a rule which had been established in *Albain,* and therefore should not have been dismissed simply because it was a dissent. *See* Appellants Memorandum in Support of Jurisdiction at 6. Appellant argues that the entire motivation behind Justice Moyer's dissent was because the majority

[1] At the outset of Moyer's opinion he stated he concurred with the majority's holding on another issue, a loss of consortium claim, but dissented on issues involving the negligent credentialing claim.

failed to consider the rule of law – whether or not a physician's negligence is a legal prerequisite to negligent credentialing – in reaching their decision. *Id.* However, this reasoning falls flat when Appellant fails to cite any actual language in the opinion or dissent or subsequent case law that suggests that Chief Justice Moyer was actually arguing this position. Appellant is forced to "assume" what Chief Justice Moyer may have wanted to emphasize or argue. *Id.* at 8.

Furthermore, regardless of how Chief Justice Moyer's dissent is interpreted, the doctrine of stare decisis should control. Courts have long relied on the doctrine of stare decisis to create stability and predictability within the legal system. *In re Estate of Holycross*, 858 N.E.2d 805, 2007-Ohio-1. Stare decisis requires that courts follow well established precedent when possible. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849. Here, the lower courts are in agreement on the issue at hand. The law has been established and has been followed by the courts of Ohio. In fact, courts in Ohio, on this very issue, have been following case precedent for over a decade. Stare decisis requires that this precedent be followed.

In *Dicks*, the Plaintiff brought a medical malpractice claim against a doctor and a negligent credentialing claim against the hospital where the doctor practiced. 4th Dist. No. 95-CA-2350. The Plaintiff subsequently reached a settlement with the doctor, released him from any further liability, and voluntarily dismissed him from the case. The hospital was then left as the sole defendant and successfully moved the court to dismiss the claim on several grounds including failure to state a claim upon which relief can be granted and failure to join a necessary party. On appeal, the court held that the dismissal was improper. In reaching its holding, the court noted appellee's argument that *Browning* required a finding of actual medical malpractice and explicitly rejected it, stating:

> Although appellant, in order to collect damages for negligent credentialing, must prove that she suffered **injury** at the hands of a negligently credentialed doctor, appellant need not join the doctor in the lawsuit against the hospital. Appellant may prove the negligence of the doctor without the doctor being present in the action. Indeed, in *Browning*, one of the two doctors was not present during the resolution of the negligent credentialing cause of action.

Id. at *4 (emphasis added).

The decision in *Dicks* is precisely on point. Here, the Appellant's attempt to distinguish *Dicks* was easily and justly thwarted by the Sixth District Court of Appeals. *See Schelling,* 6th Dist. WM-07-001 at ¶ 16. Appellant argued that *Dicks* was distinguishable because in *Dicks,* the doctor in his testimony admitted to negligence, while in the case at hand there is no admission of negligence. *Id.* The Court addressed this argument by explaining that in *Dicks*, the Fourth District Court of Appeals never made any actual finding of negligence. *Id.* Essentially, the court held that even if the doctor admitted to negligence in testimony, there was no official holding of negligence either through stipulation or by adjudication. *Dicks*, then, is nearly identical to the case at hand.

Appellant asserts here that the Fourth District "backtracked" on their holding in *Dicks* two years later in *Ratliff v. Morehead* (4th App. Dist), 1998 Ohio App. LEXIS 2271. *See* Appellant's Motion for Jurisdiction at 9. However, Appellant greatly misconstrues the court's ruling in *Ratliff.* In *Ratliff*, the Plaintiff was pursuing claims of medical malpractice against the physician and negligent credentialing claims against the hospital. *Ratliff*, 1998 Ohio App. LEXIS 2271. Defendants in the case moved for summary judgment on both claims and the trial court granted both motions. The court then found that the negligent credentialing claim could not proceed, because there had been an adjudication concerning the medical malpractice claim. *Id.* Unlike the facts of the case at hand, and the facts in *Dicks*, in *Ratliff*, there was a legal adjudication as to whether the physician was negligent. The physician defendant in

Ratliff was legally found to not be negligent – he won his motion of summary judgment; this finding obviously barred a continuation of the negligent credentialing claim. This holding does not in any way contradict with the holding in *Dicks,* as Appellant attempts to insinuate; in fact the *Ratliff* case simply addresses a different issue.

Appellants, also try to rely on *Davis v. Immediate Medical Services, Inc.* (1997), 80 Ohio St.3d 10, to support their proposition. However, *Davis* is easily distinguishable from the matter at hand. In *Davis*, the appeals court was asked to determine whether the trial court erred in bifurcating the trial to have the medical malpractice case heard before the negligent credentialing claim. The court found that bifurcating the trial was not an abuse of discretion by the trial court, adding, without citing any support that the matter "did not become ripe as to the issue of negligent credentialing until and if medical negligence was found on behalf of appellee." *Id.* at *19. Several issues were then appealed to the Ohio Supreme Court in *Davis v. Immediate Medical Services, Inc.* (1997), 80 Ohio St.3d 10. In the subsequent appeal, the Supreme Court overruled the 5th District on several issues, but did not address the intermediate court's erroneous holding regarding the ripeness of a negligent credentialing claim because, as the Court noted, they were not part of the appeal. *Id.* at n.2.

Appellants claim that the proposition of law that they put forward here is currently an ambiguous issue in Ohio, however, as discussed, this exact proposition has already been addressed by two Appellate Districts, the Fourth and Sixth District Courts, and both have come to the same conclusion. The Sixth District Court of Appeals in this case held:

> "The court made clear that medical malpractice and negligent credentialing, while they may be factually intertwined, are distinct claims. The element of staff physician negligence as a component of a negligent credentialing claim can be proven without the allegedly negligent physician as a named party."

Schelling, 6th Dist. No. WM-07-001 at ¶ 17 (citing *Dicks*, 4th Dist. No. 95-CA-2350 ((citing *Browning v. Burt* (1993), 66 Ohio St.3d 544)).

The Fourth District in *Dicks* held:

> "Although appellant, in order to collect damages for negligent credentialing, must prove that she suffered injury at the hands of a negligently credentialed doctor, appellant need not join the doctor in the lawsuit against the hospital. Appellant may prove the negligence of the doctor without the doctor being present in the action. Indeed, in *Browning,* one of the two doctors was not present during the resolution of the negligent credentialing cause of action."

Dicks, 4th Dist. No. 95-CA-2350 at 4.

Both courts have plainly held that a negligent credentialing claim can continue against a hospital despite the fact that the physician no longer was a party to the litigation (as in both cases the physicians had settled without stipulating and/or adjudicating negligence). *Schelling,* 6th Dist. No. WM-07-001 at ¶¶ 14-17 and *Dicks,* 4th Dist. No. 95-CA-2350 at 4-6.

Here, Appellant is attempting to create confusion under Ohio's law by searching for ambiguity where it does not exist – in a well reasoned decision supported by well established Ohio case law. There is no ambiguity in this issue, Ohio law clearly recognizes that a claim of negligent credentialing may go forward without negligence first being proven against the doctor. Thus, the Sixth District Court of Appeals Decision should be affirmed and jurisdiction should be denied.

CONCLUSION

For the foregoing reasons, Appellee, Loretta Schelling respectfully requests that this Honorable Court decline jurisdiction over this case.

Respectfully Submitted,
WILLIAMS, DECLARK, TUSCHMAN CO., L.P.A.

By: _____
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CERTIFICATION

I hereby certify that a copy of the foregoing Brief of Appellee in Opposition to Jurisdiction has been sent via ordinary U.S. Mail this 20th day of December, 2007, to:

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Respectfully Submitted,
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