NO. A12-2117

State of Minnesota
In Supreme Court

Medical Staff of Avera Marshall Regional Medical Center on Its Own Behalf and in Its Representative Capacity for Its Members; Chief of Staff Steven T. Meister, M.D.; Chief of Staff-Elect Jane Willett, D.O.; and John Does and Jane Does,

Appellants,

vs.

Avera Marshall d/b/a Avera Marshall Regional Medical Center, and John Roes and Jane Roes,

Respondents.

BRIEF OF AMICI CURIAE

Sam Hanson (#41051)
Daniel J. Supalla (#0387064)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

Jon N. Ekdahl (IL #0726893)
Leonard A. Nelson (IL #2032384)
Office of General Counsel
AMERICAN MEDICAL ASSOCIATION
515 North State Street
Chicago, IL 60654
(312) 464-5532

Attorneys for Amici Curiae
American Medical Association, Minnesota Medical Association, American Osteopathic Association, American Academy of Family Physicians, Minnesota Academy of Family Physicians and the Minnesota Chapter of the American Academy of Pediatrics

(Additional Counsel continued on following page)

2013 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

OPPENHEIMER WOLFF
& DONNELLY, LLP
Kathy S. Kimmel (#268823)
Margo S. Struthers (#106719)
Campbell Mithun Tower, Suite 2000
222 South Ninth Street
Minneapolis, MN 55402
(612) 607-7000

Attorneys for Appellants

LEONARD, STREET AND DEINARD
Professional Association
David R. Crosby (#237693)
Bryant D. Tchida (#314298)
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500

Attorneys for Respondent

MASLON EDELMAN BORMAN
& BRAND, LLP
David F. Herr (#44441)
Michael C. McCarthy (#230406)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

Attorneys for Amici Curiae
Minnesota Hospital Association and American
Hospital Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, RULES & REGULATIONS

IDENTIFICATION OF *AMICI*

The American Medical Association ("AMA"), including the Litigation Center of the AMA, Minnesota Medical Association, American Academy of Family Physicians, Minnesota Academy of Family Physicians, American Osteopathic Association, and Minnesota Chapter of the American Academy of Pediatrics were identified in their Requests to Participate as *Amici Curiae* and to File Joint Brief, which was granted on October 15, 2013.[1]

ISSUES ADDRESSED IN THIS BRIEF

The issues addressed in this brief are as follows:

1. Does the Medical Staff of the Avera Marshall Regional Medical Center, either in its own name or through its officers acting in their designated official capacities, have the legal capacity and standing to sue to enforce Medical Staff Bylaws?

2. Are the Medical Staff Bylaws of Avera Marshall Regional Medical Center an enforceable contract, not subject to unilateral amendment without good cause?

RELEVANT PROCEEDINGS

The Medical Staff of Avera Marshall Regional Medical Center and various officers of the Medical Staff, acting in their capacities as officers and as individuals, filed a lawsuit against Avera Marshall Regional Medical Center ("Avera Marshall"), seeking, *inter alia*, declarations that the Medical Staff has capacity and standing, as an unincorporated association, to sue Avera Marshall (Add. 38); that the Medical Staff

[1] This brief was not authored in whole or in part by counsel for any party. The only entity that made a monetary contribution to the preparation or submission of this brief is the Litigation Center of the AMA and the State Medical Societies.

Bylaws are a contract or enforceable obligation between the Medical Staff and Avera Marshall (Add. 38); and that Avera Marshall may not unilaterally amend the Medical Staff Bylaws (Add. 38).

The Medical Staff Bylaws, which the Hospital Board of Directors approved in 1995, set forth various conditions of organization and self-governance for the Medical Staff. (*See generally* A. 67-A. 133 (Original Medical Staff Bylaws).) In addition to establishing rules and policies for internal governance, the Medical Staff Bylaws "provide a means whereby issues concerning the Medical Staff and [Avera Marshall] may be directly discussed by the Medical Staff with the Board of Directors and the [Avera Marshall] Administration." (A. 75) Although Avera Marshall can recommend amendments to the Medical Staff Bylaws, their adoption requires approval from two-thirds of the Medical Staff. (A.132-A. 133)

On July 6, 2012, the district court ruled that the Medical Staff lacked legal capacity to sue the Hospital, either directly in its own name or indirectly through its representatives acting in their official capacities. (Add. 63-81) The district court concluded that the Medical Staff was "not voluntarily or mutually consented to" and was "not a legal entity having existence apart from the [Hospital]." (A. 78) The district court granted the Hospital's motion for summary judgment on Count I of the amended complaint. (Add. 80)

On September 24, 2012, the district court held that the Medical Staff Bylaws were not a contract between the individual members of the Medical Staff and the Hospital and entered summary judgment on Count II. (Add. 82-83) The district court ruled that Avera

Marshall could unilaterally amend the Medical Staff Bylaws, so long as it substantially complied with the Medical Staff Bylaws by giving prior notice and an opportunity to comment, which it did. (Add. 123, *see also* A. 132-133 (amendment procedures in the Original Medical Staff Bylaws).) The district court granted summary judgment in favor of Avera Marshall on Count VII of the amended complaint. (Add. 82-83)

The Medical Staff appealed the various district court rulings to the Court of Appeals, arguing that the Medical Staff had the capacity to sue and that the Medical Staff Bylaws were an enforceable contract. The court of appeals affirmed the district court on both issues. First, it held that the Medical Staff did not have capacity to sue under the common law, nor under Minn. Stat. § 540.151 (2012). Second, it held that the Medical Staff Bylaws were not an enforceable contract because Avera Marshall and the Medical Staff had a pre-existing duty to establish the Medical Staff Bylaws. Third, the court of appeals concluded that Avera Marshall could unilaterally modify the Medical Staff Bylaws without the physicians' input.

The Court of Appeals acknowledged that there are open questions that could not be conclusively solved by looking solely at Minnesota law. For example, in discussing the first issue about unincorporated associations and cases from foreign jurisdictions, the court of appeals noted that "... Minnesota law does not contain a controlling definition of an unincorporated association." *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Avera Marshall*, 836 N.W.2d 549, 557 (Minn. Ct. App. 2013), *review granted* (Oct. 15, 2013). Similarly, prior Minnesota case law like *Campbell v. St. Mary's Hosp.*, 312 Minn. 379, 387-88, 252 N.W.2d 581, 586 (1977) and *In re Peer Review Action*, 749 N.W.2d 822,

829 (Minn. Ct. App. 2008), *review dismissed* (Minn. Aug. 21, 2008) had touched upon the second issue, whether the Medical Staff Bylaws are a contract. The court of appeals correctly recognized that there is room for different treatment of the Medical Staff Bylaws and the pre-existing duty rule.

While recognizing the unsettled nature of these questions, the court of appeals resolved them incorrectly. Both the unincorporated association statute, Minn. Stat. § 540.151, and Declaratory Judgment Act, Minn. Stat. § 555.01, *et seq.*, are intended to promote the efficient resolution of legal disputes. They mandate that the Medical Staff be deemed legally capable of bringing suit. Finally, and fundamentally, both the district court and the court of appeals failed to consider the underlying purpose for the Medical Staff Bylaws and their role in protecting patient care and avoiding the prohibition against the corporate practice of medicine (*i.e.*, that patient care must be controlled by licensed medical staff). The Court of Appeals should, therefore, be reversed.

ARGUMENT

I. THE MEDICAL STAFF BYLAWS REFLECT MUTUALLY AGREED UPON RIGHTS AND DUTIES OF THE MEDICAL STAFF AND AVERA MARSHALL.

Physicians are subject to conflicts of interest, and so, too, are hospital administrators. When a physician considers whether to recommend an extra day of hospitalization, or an additional round of invasive tests, or referral to a surgeon not on a hospital's medical staff, there are financial consequences for the physician and for the hospital. The physician's decision should be based on the interests of the patient, and not on ultimate financial consequences of such decisions. *See* AMA Principle of Medical

Ethics VIII ("A physician shall, while caring for a patient, regard responsibility to the patient as paramount."), available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page. Of course, a hospital is also required, legally and morally, to consider the patient's medical needs, but the hospital also has other financial and institutional considerations.

Notwithstanding the parallel moral and legal obligations of the physician and the hospital, there is a profound practical difference. The physician sees the patient personally, she talks to him, she touches him, and perhaps she meets his family. It is she who provides the professional care, and it is she who writes the orders for treatment and medication. Minn. R. 4640.0800, subps. 3, 4. The hospital can do none of these things. So, in the process of keeping the medical needs of the patient paramount over financial considerations, the physician may view the situation differently from the hospital.

The ramifications of this potentially differing viewpoint can be far-reaching. The physician may be an employee of the hospital and on that basis alone will have a powerful reason to keep the hospital happy. Even if not an employee, she will depend on the hospital for her medical staff privileges. A loss of such privileges could severely affect her medical practice. (Add. 77) Hence, physicians may be squeezed between their professional obligations to their patients and their hospital's desire for revenue.

This Court has long recognized the dangers that arise when institutions or laypersons can interfere in a physician's medical decisions. Thus, *Granger v. Adson*, 190 Minn. 23, 27, 250 N.W. 722, 723 (1933), states the following:

> What the law intends is that the patient shall be the patient of the licensed physician not of a corporation or layman. The obligations and duties of the physician demand no less. There is no place for a middleman.

In *Isles Wellness, Inc. v. Progressive Northern Ins. Co.*, 725 N.W.2d 90, 93 (Minn. 2006), the Court reiterated its adherence to the doctrine prohibiting the "corporate practice of medicine."

To resolve this dilemma, in 1951 the AMA, the American Hospital Association, the American College of Physicians, and the Canadian Medical Association established the Joint Commission on the Accreditation of Hospitals (the "Joint Commission").[2] The fact that Avera Marshall is not a member of the Joint Commission is of little moment, given the Joint Commission's clear guidance and persuasive authority in this area. A principal motivation behind the establishment of the Joint Commission was to formulate objective standards for patient care. Those standards have always endorsed a self-governing medical staff, which would enable physicians to exercise independent professional judgment for their patients, while still allowing the hospital administration to run the hospital effectively. The Joint Commission's standards achieve the longstanding

[2] The Joint Commission is a not-for-profit corporation that accredits and certifies more than 19,000 health care organizations and programs in the United States. *See* http://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx. Joint Commission accreditation standards are recognized by the Centers for Medicare and Medicaid Services, and institutions maintaining Joint Commission accreditation may be eligible to forego government inspections. The current composition of the Joint Commissioners is at http://www.jointcommission.org/assets/1/18/Facts_about_Board_of_Commissioners.pdf Minnesota recommends that the rules of Joint Commission be adopted by hospitals. Minn. R. 4640.0700, subp. 1 (2011).

balance between a medical staff and a hospital and enable the licensed medical staff to control patient care.

In essence, those standards[3] are summarized as follows:

- The medical staff should perform its duties under written bylaws, which are binding on the members of the medical staff and on the hospital.
- The medical staff oversees patient care, treatment and services provided by practitioners.
- The members of the medical staff should designate their own leaders.
- The leaders of the medical staff are to represent the medical staff as a whole before the hospital administration.
- Members of the medical staff should be allowed to retain their hospital privileges except when a peer review committee, acting under the authority of the medical-staff leadership and adhering to requirements of due process, determines otherwise, based on considerations of professional competence and abilities.
- The medical staff bylaws can be amended only with the consent of both the medical staff and the hospital.

These standards exist simultaneously and in harmony with one another; yet also recognize that the governing body of the hospital is to have ultimate responsibility for the hospital. *See* A-1 (Introduction to Standard 01.01.01). Here, the court of appeals

[3] Relevant provisions of the Joint Commission standards and commentaries are reproduced in the Appendix.

shifted all responsibility for the medical staff to Avera Marshall. While the Joint Commission does not undertake to address how medical staff rights under bylaws are reconciled with the reservation of ultimate responsibility in the hospital governing body under specific state law and statutes, the only meaningful way to achieve such a reconciliation is through an implicit requirement that the governing body can only overrule the medical staff for objectively valid reasons that do not involve patient care. Quite simply, there would be little point in having bylaws if a hospital could unilaterally violate or modify those bylaws. *See Bass v. Ambrosius*, 520 N.W.2d 625, 627 (Wis. Ct. App. 1994) ("They would then be a catalogue of rules, which, although binding on the medical staff, were merely hortatory as to St. Luke's--much 'sound and fury, signifying nothing.'").

Likewise, the federal and state laws that require hospitals to maintain medical staff bylaws, which by their nature limit hospital power in areas of medical staff governance, would have little purpose if the hospital could so readily circumvent those limitations. *See, e.g.*, 42 U.S.C. § 1395x(e)(3) (requiring all hospitals that participate in the Medicare Program to have "bylaws in effect with respect to its staff of physicians") and Minn. R. 4640.0800, subp. 2. (also requiring medical staff bylaws). Yet, the district court and court of appeals allow Avera Marshall to circumvent those important limitations.

Thus, the health care industry has recognized the need for an organized medical staff to buffer the pressures a hospital might potentially exert on a physician's professional medical judgment, even though the medical staff will act under bylaws that somewhat constrain a hospital's exercise of discretion, but not its ultimate authority. If

those bylaws are deemed to be empty shells, however, the protective function of the medical staff will fail. Moreover, if the hospital is allowed to erode the medical staff bylaws, then that is the first step toward erosion of the rights that the medical staff bylaws are designed to safeguard, including the right (and obligation) of a member of the medical staff to exercise her best clinical judgment in caring for her patients.

The organizations that establish policy for the Joint Commission (which include the American Hospital Association, the national counterpart of *amicus curiae* Minnesota Hospital Association) have for decades adhered to the belief that, while a hospital governing body has the right and the obligation to manage the affairs of the hospital, in areas of medical staff governance, as expressed in board-approved medical staff bylaws, the governing body should defer to the decisions of the medical staff itself, unless there is a valid reason why it should not.

The Medical Staff Bylaws at issue in this case are standard medical staff bylaws consistent with the Joint Commission standards. They delineate rights of self-governance, and they require approval from both the Board of Directors and the Medical Staff to amend them. Also, they make clear that the Board of Directors retains ultimate authority over the Medical Staff and the administration of the Hospital as a whole.

The lower courts in this lawsuit analyzed numerous cases, mostly from states other than Minnesota, while trying to ascertain a principled policy basis for their opinions. *But see Campbell v. St. Mary's Hospital*, 252 N.W.2d 581, 587 (Minn. 1977) (noting that bylaws created contractual rights that may be enforced by individuals against the

hospital). The majority of cases hold that medical staff bylaws should be enforced against hospitals under the law of contracts; some hold they should not.

The Joint Commission standards and the Medical Staff Bylaws at issue in this case were written by people who work in hospitals, and the Minnesota Commissioner of Health regulation and CMS *State Operations Manual* were written by hospital regulators. Those people formulated policies based on their own experience. These policies require medical staff approval of amendments to the medical staff bylaws—not just "substantial compliance" with some parts of the amendment procedure.

II. IN ORDER TO FULFILL THE LEGAL PURPOSE OF THE MEDICAL STAFF BYLAWS, THE MEDICAL STAFF MUST HAVE CAPACITY TO SUE AVERA MARSHALL AS AN UNINCORPORATED ASSOCIATION.

Whether the Medical Staff has capacity to sue is governed by the plain language of applicable Minnesota statutes and the intent of the Legislature. Here, the plain language and intent of Minnesota law is that a medical staff is an unincorporated association that has the capacity to sue a hospital to rectify a hospital's breaches of its medical staff bylaws. And there is good reason for doing so. The Medical Staff Bylaws are a contract, *infra* Section III, it should follow that the Medical Staff has legal capacity to enforce that contract in court. Any other conclusion would purport to create rights for which there is no legal remedy. Minn. Const, Art. I, § 8.

To ascertain the legislative intent, one looks first at the specific statutory language, with all parts of the law to be considered. If the intent is clear from the language of the law, then it must be followed as stated. However, if the intent is not clearly discernable from the language, then the Court should consider such factors as the objects of and

necessity for the law, the consequences of the various possible interpretations, and "the mischief to be remedied." Minn. Stat. § 645.16 (2012); *Hersh Prop's, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 736 (Minn. 1999). Both the language of the statutes at issue here and the secondary indicia of intent lead to the same conclusion: medical staffs, including this Medical Staff, have the legal capacity to sue Avera Marshall.

A. Section 540.151 and the Declaratory Judgment Act Support the Medical Staff's Legal Capacity to Sue.

Several Minnesota statutes address the question of an unincorporated association's right to sue. First, Minnesota Statutes § 540.151 grants one or more persons the right to sue under a common name; it states as follows:

> When two or more persons associate and act, whether for profit or not, under the common name, ... they may sue in ... such common name. The judgment in such cases shall accrue to the joint or common benefit of ... the associates.

Minnesota's enactment of the Uniform Declaratory Judgments Act ("DJA"), which the court of appeals did not address in its opinion, further supports the conclusion that the Medical Staff has capacity to sue Avera Marshall to enforce the Medical Staff Bylaws. Minn. Stat. §§ 555.01, *et seq.* (2012). Section 555.01 states that the purpose of the DJA is to authorize "[c]ourts of record ... to declare rights, status, and other legal relations." And Section 555.02 goes on to state:

> Any person interested under a ... written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a ... contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance,

> contract, or franchise ... and obtain a declaration of rights, status, or other legal relations thereunder.

"Person", as used in Section 555.02, includes an "unincorporated association ... of any character." Minn. Stat. § 555.13 (2012).

If Sections 555.02 and 555.13 are read in isolation, then, conceivably, there might have been some basis for the district court's attempt to distinguish between voluntary and involuntary associations or between associations that bear some indicia of being a division of another entity as opposed to associations that are unambiguously free-standing. The court of appeals never addressed this part of the district court's analysis, but this Court should, keeping in mind that the purpose of the DJA is remedial:

> This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; it is to be liberally construed and administered.

Minn. Stat. § 555.12 (2012).

Both the district court and court of appeals determined that the Medical Staff was a mere department existing within and wholly dependent on Avera Marshall. But this ignores the fundamental purpose of the Bylaws, which is to establish the Medical Staff separate and apart from the hospital administrators, to allow licensed physicians to exercise their best medical judgment, and to comply with the prohibition against the corporate practice of medicine. The Medical Staff Bylaws themselves establish that the Medical Staff will function separately. The Medical Staff Bylaws can be amended only according to an established protocol that requires action and approval by the Medical Staff, not just Avera Marshall. (A. 132-133) While the Board of Directors retains the

general authority to run Avera Marshall, the Medical Staff Bylaws do *not* state (and it should not be implied) that such authority extends to unilateral amendments of those Bylaws, purely at the whim of the Board of Directors. (*See* A. 132-133) If the Medical Staff intended to allow unilateral amendments by the Board of Directors indicating that the Medical Staff was wholly subject to Avera Marshall's control, then the Medical Staff Bylaws would not include a requirement of two-thirds approval from the Medical Staff. (A. 132-133) In the experience of *Amici*, provisions that require medical staff's affirmative approval of amendments are typical for medical staff bylaws generally (in Minnesota and elsewhere). *See* A-1 (citing Joint Commission Standard 01.01.03).

Further, one of the stated purposes of the Medical Staff Bylaws is to provide for "the internal governance of the Medical Staff," another sign that the Medical Staff contemplated separateness from Avera Marshall. (A. 75) Moreover, the Minnesota Hospital Regulations require all medical staffs of two or more persons to be "an organized group," with bylaws, rules, regulations, and policies, a chief of staff, and with regular, formal meetings. Minn. R. 4640.0800, subp. 2 (2011).

All of these are reasons why the Medical Staff qualified as an unincorporated association under the DJA. *Amici* believe that the text of the Medical Staff Bylaws and mandates of Sections 555.05 and, especially, 555.12 removed any ambiguity about whether the Medical Staff can sue Avera Marshall. Minn. Stat. § 645.16 (stating that "the letter of the law shall not be disregarded under the pretext of pursuing the spirit."). The court of appeals held that there is no clear definition of an "unincorporated

association" under Minnesota law. This Court should clarify that Section 540.151 allows the Medical Staff to sue Avera Marshall to enforce the Medical Staff Bylaws.

B. The Court of Appeals Incorrectly Determined that Unincorporated Associations, Like the Medical Staff, Lack Capacity to Sue to Enforce Contractual Rights.

Under the common law, unincorporated associations were incapable of bringing suit. Hence, at common law each member of such an association must be sued individually in order to secure jurisdiction over and make the court's judgment binding on that person. *Zak v. Gypsy*, 279 N.W.2d 60, 65 (Minn. 1979); *Bloom v. American Express Co.*, 222 Minn. 249, 252-53, 23 N.W.2d 570, 573 (1946). This can be an expensive and disruptive proceeding for the individuals involved and can place unnecessary burdens on the judicial system. Statutes such as Section 540.151, and Sections 555.02 and 555.13 of the DJA, which authorize suits by or against unincorporated associations, were enacted to alleviate such waste and inconvenience. *See* Prefatory Note to Unincorporated Nonprofit Association Act (1996) (U.L.A.) (explaining rationales for creating legal personage in unincorporated associations).

In this case, nothing practical would have been gained by serving process on each member of the Medical Staff. Once the Medical Staff was dismissed from the case, the suit proceeded with two individual members of the Medical Staff as litigants, and the trial court proceeded to declare their rights. Yet, the two remaining litigants had no greater or lesser legal interest in the outcome of the lawsuit than any other member of the Medical Staff. It would have made far more sense—practical and legal—to have had the Medical Staff bring suit as one entity, rather than on a physician-by-physician basis.

In fact, Section 555.11 of the DJA requires: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." *See also* Minn. R. Civ. P. 19.01 (setting forth the standards regarding joinder of parties). Because of the lower court's rulings, these procedural rules would not be followed. As a result, other members of the Medical Staff, who may be dissatisfied with the outcome, may not be bound by the judgment. If they so choose, they can sue the Hospital for similar relief. Maybe such litigants will secure the same result as the Appellants here, but maybe the case will be assigned to a different judge who will rule differently. The legal complexities and difficulties would be even greater than they were before this suit was filed.

Additionally, by denying the Medical Staff the capacity to sue, but recognizing that individual members of the Medical Staff could sue only as individuals, the lower courts undercut the expectations of all parties. As memorialized in the Medical Staff Bylaws, *e.g.*, the Chief of Staff is to enforce the Medical Staff Bylaws (A. 98 at ¶ 7.2-1(a)) *and* represent the views and policies of the Medical Staff (A. 98 at 7.2-1(g)). Thus, the district court ruling and court of appeals' affirmance creates the following results, all without a countervailing purpose, in those cases in which a medical staff brings a declaratory judgment action against a hospital administration: it adds to litigation expense, delay, and complexity; it increases the likelihood that members of the medical staff become individual litigants; it results in an incomplete and uncertain resolution of legal rights; it opens the door to multiple lawsuits on the same issue, with possibly inconsistent results; it defeats the parties' pre-litigation understanding as to how their

disputes should best be resolved; and, most importantly, it effectively eliminates the carefully crafted barriers to hospital interference in medical decisions—the corporate practice of medicine. All of these adverse effects can be avoided if this Court concludes that medical staffs are unincorporated associations, empowered to bring suit for the common interest of their members.

III. MEDICAL STAFF BYLAWS CREATE AN ENFORCEABLE CONTRACT BETWEEN THE MEDICAL STAFF, MEMBERS OF THE MEDICAL STAFF, AND THE HOSPITAL, WHICH THE HOSPITAL SHOULD NOT BE ALLOWED TO AMEND UNILATERALLY.

When construing a written instrument, all of its provisions should be given effect. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 324 (Minn. 2003). Unlike the court of appeals' analysis, one provision does not "trump" another. Thus, the Medical Staff Bylaws' reservation of power to the Board of Directors should not trump the remainder of the document. Rather, the power of the Board of Directors should be construed in the context of the Medical Staff Bylaws and limited by its agreed-upon obligation to act reasonably and consistently with the specific rights granted to the Medical Staff, including the right to approve or reject changes to the Medical Staff Bylaws. *Advantage Consulting Group, Ltd. v. ADT Security Sys., Inc.*, 306 F.3d 582, 586 (8th Cir. 2002); *Stellar v. Thomas*, 232 Minn. 275, 283, 45 N.W.2d 537, 542 (1951). Those rights of the Medical Staff include a right to reject unreasonable amendments to the Medical Staff Bylaws, not simply a right to receive prior notice of and comment upon such an amendment.

Minnesota Rule 4640.0800, subpart 2 requires that the medical staff "formulate" and "adopt" its bylaws. If the regulation had intended that a hospital board of directors could unilaterally determine the content of the medical staff bylaws, it would have said so and would not have used the quoted language. The requirement of governing body approval cannot fairly be construed as a license to amend the bylaws unreasonably and without consent from the medical staff. *See also* Centers for Medicare and Medicaid Services (CMS) *State Operations Manual, Appendix A-Survey Protocol, Regulations and Interpretive Guidelines for Hospitals: Survey Procedures*: Guideline for § 482.12(a)(4)—"Verify that any revision or modifications in the medical staff bylaws, rules and policies have been approved by the medical staff and the governing body." *Available at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf, at 47.

At least one court has recognized the potential danger that can arise when hospitals have unchecked power over their medical staffs. *Berlin v. Sarah Bush Lincoln Health Center*, 688 N.E.2d 106 (Ill. 1997), considered the legality of hospitals employing physicians. That court held that such employment was legal, in part because an organized medical staff should have sufficient independence to countervail the hospital's administrative authority.

> [W]e find the public policy concerns which support the corporate practice [of medicine] doctrine inapplicable to a licensed hospital in the modern health care industry. The concern for lay control over professional judgment is alleviated in a licensed hospital, where generally a separate professional medical staff is responsible for the quality of medical services rendered in the facility.

688 N.E.2d at 113-14; *see also St. John's Hospital Medical Staff v. St. John's Regional Medical Center, Inc.*, 245 N.W.2d 472 (S.D. 1976).

Avera Marshall's Board of Directors is legally responsible for the affairs of the hospital, and the Medical Staff Bylaws, properly interpreted, do not prevent the Board of Directors from fulfilling its responsibilities. The Medical Staff Bylaws determine and govern the exercise of the Medical Staff's collective professional judgment on matters of patient care without undue administrative and institutional interference of non-physician administrators whose obligations to the hospital may be different than the physician's duties to their patients. The Medical Staff Bylaws serve an important function in protecting patient care, which represents a balance between the needs of individual patients and the imperatives of the institution. This balance was struck by hospitals and physicians generally within the industry, long before this dispute arose, and it was reflected in the Medical Staff Bylaws in this case. And these policies were drafted in order to assure that the Medical Staff maintains control over patient care, without interference by non-physician hospital administration.

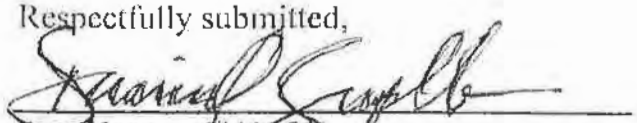
CONCLUSION

This Court should rule that the Medical Staff Bylaws are enforceable as a contract as between Avera Marshall and the Medical Staff. Such a ruling ensures that the Medical Staff Bylaws serve their intended purpose to preserve the independence and professional judgment of physicians in caring for patients. Moreover, the Court should clarify that the Medical Staff has legal capacity to sue Avera Marshall to enforce the Medical Staff

Bylaws, ensuring that their rights under the Medical Staff Bylaws have a remedy before the courts.

Date: November 21, 2013

Respectfully submitted,



Sam Hanson (#41051)
Daniel J. Supalla (#0387064)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 S. Eighth St.
Minneapolis, MN 55402
Tel. No. (612) 977-8400

and

Jon N. Ekdahl (IL #0726893)
Leonard A. Nelson (IL#2032384)
Office of General Counsel
American Medical Association
515 N. State St.
Chicago, IL 60654
Tel No. (312) 464-5532

ATTORNEYS FOR *AMICI CURIAE* AMERICAN MEDICAL ASSOCIATION, MINNESOTA MEDICAL ASSOCIATION, AMERICAN ACADEMY OF FAMILY PHYSICIANS, MINNESOTA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, AMERICAN OSTEOPATHIC ASSOCIATION, AND MINNESOTA ACADEMY OF FAMILY PHYSICIANS

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word 2007 and contains 5,841 words, including headings, footnotes and quotations.

Date: November 21, 2013

Respectfully submitted,

Daniel J. Supalla (#0387064)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 S. Eighth St.
Minneapolis, MN 55402
Tel. No. (612) 977-8400

APPENDIX

Applicable Joint Commission Hospital Accreditation Standards for the Medical Staff (2012)

Overview

The organized medical staff must create and maintain a set of bylaws that define its role within the context of a hospital setting and responsibilities in the oversight of care, treatment, and services. The medical staff bylaws, rules, and regulations create a framework within medical staff members can act with a reasonable degree of freedom and confidence.

Selection from Introduction to Standard 01.01.01: The organized medical staff and the governing body collaborate in a well-functioning relationship, reflecting clearly recognized roles, responsibilities, and accountabilities to enhance the quality and safety of care, treatment, and services provided to patients. This collaborative relationship is critical to providing safe, high-quality care in the hospital. While the governing body is ultimately responsible for the quality and safety of care at the hospital, the governing body, medical staff, and administration collaborate to provide safe, quality care.

Standard MS.01.01.01: Medical staff bylaws address self-governance and accountability to the governing body.

Elements of Performance for MS.01.01.01.

A2: The organized medical staff adopts and amends medical staff bylaws.

A7: The governing body upholds the medical staff bylaws, rules and regulations, and policies that have been approved by the governing body.

Standard MS.01.01.03: Neither the organized medical staff nor the governing body may unilaterally amend the medical staff bylaws or rules and regulations.

Standard MS.02.01.01: There is a medical executive committee.

Elements of Performance for MS.02.01.01

A5. The medical executive committee acts on behalf of the organized medical staff between medical staff meetings.

Rationale for MS.02.01.01: The organized medical staff delegates authority in accordance with law and regulation to the medical executive committee to carry out medical staff responsibilities. ... The medical staff executive committee has the primary authority for activities related to self governance of the medical staff.

Standard 03.01.01: The organized medical staff oversees the quality of patient care, treatment, and services provided by practitioners privileged through the medical staff process.

Introduction to Standard MS.06.01.05: The organized medical staff is responsible for planning and implementing a privileging process.

Standard MS.06.01.05: The decision to grant or deny a privilege (s), and/or to renew an existing privilege(s), is an objective, evidence-based process.

Standard MS.09.01.01: The organized medical staff, pursuant to the medical staff bylaws, evaluates and acts on reported concerns regarding a privileged practitioner's clinical practice and/or competence.

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **November 21, 2013**, he prepared the **Brief of Amici Curiae,** case number **A12-2117**, and served **2** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

OPPENHEIMER WOLFF
& DONNELLY, LLP
Kathy S. Kimmel
Margo S. Struthers
Campbell Mithun Tower, Suite 2000
222 South Ninth Street
Minneapolis, MN 55402

LEONARD, STREET AND DEINARD
Professional Association
David R. Crosby
Bryant D. Tchida
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

MASLON EDELMAN BORMAN
& BRAND, LLP
David F. Herr
Michael C. McCarthy
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Subscribed and sworn to before me on
November 21, 2013

Signed _____

Notary Public _____

EDWIN R. MOTCH
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2015

BACHMAN
LEGAL PRINTING
Phone (612) 339-9518 ▪ (800) 715-3582
Fax (612) 337-8053 ▪ www.bachmanprint.com
733 Marquette Avenue
Suite 109
Minneapolis, MN 55402