

MINNESOTA

Defense

WINTER 2023



**MDLA'S NEW AFFINITY BAR FEE
STRUCTURE**

**SUPREME COURT WILL HEAR CASE
ON NURSING HOMES & FEDERAL
FUNDING**

**TELLING YOUR STORY: USING THE
DOCTOR DEPOSITION OFFENSIVELY**

**EVALUATING EXCULPATORY CLAUSES
AFTER JUSTICE & RUGGED RACES**

**A BREAKDOWN OF MINNESOTA'S PEER
REVIEW STATUTE**

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Articles from Past Issues 3

Join a Committee 3

The President's Column

By Tammy Reno 4-5

MDLA's New Affinity Bar Fee Structure

By Stephanie Angolkar and Cally Kjellberg-Nelson 6-7

Telling Your Story: Using the Doctor Deposition Offensively

By Kevin McCarthy 9-13

Under (Peer) Pressure: A Breakdown of Minnesota's Peer Review Statute

By Ryan Paukert 15-18

Supreme Court Will Hear Case on Nursing Homes & Federal Funding

By Mollie Buelow and Pat Skogland 20-24

Evaluating Exculpatory Clauses After *Justice & Rugged Races*

By Patrick H. O'Neill III and Samuel H.J. Schultz 25-28

DRI Corner

By Jessica Schwie 29

MDLA Congratulates 31

The Editorial Committee welcomes articles for publication in *Minnesota Defense*. If you are interested in writing an article, please contact the Chief Editor or call the MDLA office at 651-290-6293.

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ARTICLES FROM PAST ISSUES

Members wishing to receive copies of articles from past issues of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of \$5 for postage and handling. In addition to the articles listed below, articles dating back to Fall '82 are available. Direct orders and inquiries to the MDLA office, 1000 Westgate Drive, Suite 252, St. Paul, MN 55114.

Fall 2022

Finding the Balance between Trial Life and Home Life

Sheina Long

The Widening Path to Criminal Liability for Medical Negligence

Anu Chudasama

Supply Chain Disruptions & Breach of Contract Claims

Elizabeth Roff

Spring/Summer 2022

Preventing a Nuclear Attack: Recommended Strategies in

Responding to Nuclear Verdict Tactics

Rylee Retzer and Shannon Nelson

Untangling the Web of an Employer's Obligation to Provide

Employees Leave: The Minnesota Parental Leave Act

Michelle Christy

Navigating the Changes to the Rules Governing Miller-

Shugart Settlement Agreements in Minnesota

Beth A. Prouty and Lance D. Meyer

Fall 2021

A Tale of Two Pandemics: COVID-19 and Multi-Million-Dollar Verdicts

Elena D. Harvey

"Construction" Re-Defined: Demolition Work Now Potentially Subject to the Improvement To Real Property Statute of Limitations

Elizabeth Roff

Why Women Lawyers Lead

Stacy Lundeen and Elle Lannon

JOIN A COMMITTEE

MDLA committees provide great opportunities for learning and discussion of issues and topics of concern with other members in similar practices. Activity in committees can vary from planning CLE programs, to working on legislation, to informal gatherings that discuss updated practice information or changes in the law. Serving on a committee is one of the best ways to become actively involved in the organization and increase the value of your membership.

If you would like to join a committee's distribution list, please update your member profile on mdla.org specifying the appropriate committee under the "Practice Type" section. You will be automatically added to the distribution list.

To learn more about an MDLA committee, please visit www.mdla.org. Meeting times and dates for each committee are listed online.

Committees available include:

- Amicus Curiae
 - Construction Law
 - Diversity
 - Editorial
 - Employment Law
 - Events Committee
 - Governmental Liability
 - Insurance Law
 - Law Improvement
 - Law Practice Management
 - Long-Term Care
 - Membership Committee
 - Medical Liability and Health Care
 - New Lawyers Committee
 - Motor Vehicle Accident
 - Products Liability
 - Retail and Hospitality
 - Technology
 - Workers' Compensation
 - Women in the Law
-



Tammy Reno

NILAN JOHNSON LEWIS

Happy New Year! 2022 flew by at record speed. It is hard to believe it is 2023 already. I hope everyone had a wonderful holiday season and that 2023 is starting off splendidly! Are you someone who enjoys winter in Minnesota and embraces everything it has to offer like skiing, snowboarding, snowshoeing, and ice fishing, or are you like me and you enjoy it by looking at the snow and cold from the comforts of home with a good Netflix series (or ten)? Either way, I hope you are making the best of it. Summer is only about four short months away!

The annual MDLA/MAJ judicial reception at Allianz Field in October was a great success. It is always nice to socialize with MAJ folks outside of the courtroom. Many judges from across the bench joined and provided us with updates from their courts. We are lucky they take time out of their busy schedules to socialize with us. It is always an honor to hear how much they appreciate what an amicable group of attorneys we are and how professional and prepared we are when we appear before them. That is something to be proud of.

We started the year with our Mid-Winter Conference at Grand View Lodge. It just took place from January 27–29, 2023. The conference title was: “That Settles It! – Conflict Resolution Strategies for Civil Defense Attorneys.” The conference addressed conflict resolution strategies, from arbitrations and mediations, to nuts and bolts of settlement, diverse perspectives, and even settling yourself. The conference also highlighted and encouraged members to check out MDLA’s various committees. Congratulations to Stephanie Angolkar on a successful conference! Our committees are a crucial part of our organization, and we are grateful for the committee chairs and work they do. We encourage everyone to attend committee meetings, which most often are free CLEs. What firm leaders do not like free CLEs?

In 2023 we will roll out what we are calling the “Associates Series.” We will be looking to some of our esteemed members to do presentations on a variety of topics to gear associates up for the Trial Academy we are planning for

January 2024. We are excited to bring the Trial Academy back and will use the Associates Series as preparatory educational experiences which will culminate in the Trial Academy. Please watch for the announcement of the dates and topics and encourage your associates to participate. Others will also find these topics useful. The presentations are not just for associates. We could all use refreshers! Our educational content is one of the most valuable aspects of MDLA membership. Take advantage of it!

The biggest, and most exciting, announcement I have since my last letter is that we have hired Lisa Mortier as our organization’s Executive Director. Lisa has nearly 20 years of SLDO director experience. She has been in that role for Indiana. She will be the director for both of our organizations, and we have no doubt she will bring great ideas to ours. Some of you may have met her at DRI events. She has a plethora of knowledge and is excited to get to work for us. We are, of course, sad to end our relationship with Ewald Consulting. Ewald Consulting has done a great job for us for the past ten years or so. Many thanks to Ewald Consulting staff for everything they have done for us. The transition will occur in February, and we know it will be seamless (well, I do not want to jinx it—so I will say it will be smooth with maybe a wrinkle or two). We look forward to a fresh set of eyes and new ideas that help us grow and continue to be the amazing organization we are. Let me know if anyone has any questions about the transition.

This year marks MDLA’s 60th year! Our plan is to celebrate it at TTS this summer. Brendan Tupa is planning TTS. We will roll out an updated Release Deskbook with the help of co-editors Rich Scattergood and Jessica Richardson from Tomsche, Sonnesyn & Tomsche. Stay tuned for the conference’s theme and schedule of speakers. It will be held August 17 to 19. Save the date now and get your room in Duluth booked. Some other events to watch out for are our Diversity Event that is likely to take place in May or June and our Women’s Breakfast in July. Both events are always well attended and very enjoyable. Keep in mind the Women’s Breakfast is not just for women! We encourage everyone to attend.

The President’s Column continued on page 5

The President's Column continued from page 4

If you are interested in writing an article for this publication, let us know! It is a great way to educate your colleagues and is a good marketing tool. We encourage attorneys of all levels to bring important issues to our attention. If you are interested in becoming a member, adding new members from your firm, or becoming a committee chair, please contact me at treno@nilanjohnson.com or our director at director@mdla.org, and we will help you get involved to contribute to the success of our thriving civil defense community.

Best of luck to you all as you tackle the final months of winter. Hopefully there are warm weather vacations in your future. I look forward to a successful 2023 and am excited to see what the year has in store for MDLA!

JOIN ONE OF MDLA'S COMMITTEES

WOMEN IN THE LAW

The mission statement of the Women in the Law Committee is to connect the more than 200 women who are MDLA members by:

- Providing opportunities to develop and strengthen relationships, facilitating business growth and professional development;
- Supporting women's career advancement by providing a forum for leadership and professional development; and
- Raising awareness about issues of interest to women lawyers.

For more information, email committee chairs Sarah Hoffman at shoffman@bassford.com, Jessie Sogge at jsogge@quinlivan.com, or Lauren Nuffort at lnuffort@lommen.com.

RETAIL AND HOSPITALITY

Focused on the defense of retailers, restaurants, and hospitality businesses against suits for:

- Minnesota Civil Damage Act
- Premises liability
- Falling merchandise
- Negligent security
- Food-borne illnesses
- Americans with Disabilities Act
- Minnesota Human Rights Act

For more information, email committee chair Steven Bader at sbader@rajhan.com.

MDLA'S NEW AFFINITY BAR FEE STRUCTURE

BY STEPHANIE ANGOLKAR AND CALLY KJELLBERG-NELSON

If you are reading this article, you are probably already a member of MDLA. Thank you for being a valuable part of the organization! And, to keep this organization vibrant and growing, please consider spreading the word about the many benefits and supports found through your MDLA membership.

You may know another attorney who currently finds support through one of Minnesota's affinity bar associations and may be hesitant to join another bar association. This could be for a variety of reasons. Perhaps a law firm limits the number of memberships it is willing to cover for an attorney. Naturally, an attorney may then select memberships in groups where there is a familiar support network. And starting out as an attorney, it may be easier to gravitate toward familiarity and support in smaller, more focused organizations, rather than the unknown in larger professional organizations. This is an issue faced by many larger organizations.

Speaking from personal experience, Ms. Angolkar has been a member of Minnesota Women Lawyers since law school. Minnesota Women Lawyers provided (and still does) an invaluable network of female attorneys for support and professional growth. Ms. Angolkar then began to attend

MDLA Government Liability Committee events, which were her first introduction to MDLA. The Government Liability Committee provided a network of support and professional growth that she could not find in her affinity association, because it focused on a substantive legal area that complemented her practice. Through the Government Liability Committee, Ms. Angolkar found out about many other opportunities in MDLA. Both memberships have been important, by serving different professional and personal needs. We suspect this may be a similar experience among attorneys who are involved with affinity bar associations but may be considering whether to also explore membership in MDLA. To promote and grow MDLA, we have created a new "affinity bar fee structure" to help lawyers explore the benefits, support, and community available through MDLA.

MDLA is an organization that can supplement and build on the support found in the affinity bar organizations through connecting civil defense attorneys with other practitioners, experts, and professionals in similar practice areas. MDLA currently has approximately 460 members with several committees including:

Affinity Bar Fee continued on page 7



Stephanie Angolkar is partner at Iverson Reuvers. Stephanie's practice focuses on the defense of government liability, products liability, and complex litigation. She was named a Super Lawyers Rising Star in 2019 and 2020. Before joining Iverson Reuvers in 2008, she clerked for the Honorable Harriet Lansing and Kevin G. Ross of the Minnesota Court of Appeals.



Cally Kjellberg-Nelson is a partner at Quinlivan & Hughes, P.A. and practices in the area of civil litigation, with a focus on employment and governmental liability. She is active with the MDLA, where she recently ended a term on the Board of Directors. Kjellberg-Nelson was named to the Minnesota Super Lawyers list in 2020 & 2021 and was previously named a Rising Star in 2017-2019.

Affinity Bar Fee continued from page 6

- » Construction
- » Employment Law
- » Government Liability
- » Insurance
- » Long-Term Care
- » Medical Liability
- » Motor Vehicle Accident
- » Products Liability
- » Retail & Hospitality
- » Workers Compensation

MDLA also has mission support committees such as Amicus Curaie, Diversity, Editorial, Law Improvement, Law Practice Management, Membership, New Lawyers, and Women in the Law.

At the MDLA Board of Directors April 2021 meeting, the Board approved a membership fee structure proposed by the Membership Committee, in conjunction with the Diversity Committee, in an effort to improve diversity within our membership. The rate structure will provide a discounted rate for affinity bar members to join MDLA. The purpose of the discounted rate is to introduce new members to MDLA and provide the opportunity to increase outreach while diversifying membership.

The discounted rate will make MDLA more accessible to more potential members, and will also make MDLA more representative of the Minnesota legal community. If a lawyer is a member of an affiliate bar association, such as Minnesota Association of Black Lawyers, Minnesota Hispanic Bar Association, Minnesota Lavender Bar Association, Minnesota Asian Pacific American Bar Association, Minnesota Women Lawyers, etc., and not yet a member of MDLA, they may join MDLA for a reduced rate of \$100. This will give attorneys who are not new lawyers an opportunity to attend committee meetings and events and to learn about the benefits and community that MDLA provides. We hope increased access to the benefits and opportunities that MDLA provides will improve our membership numbers and diversity.

Please assist us in sharing this exciting opportunity to introduce other attorneys to MDLA. Invite someone new to a committee meeting and introduce them to another attorney. Share the affinity fee structure and this article with affinity bar association members you know and help increase the strength and diversity of MDLA.

Thank You

for your service

Practice Areas

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Shayne Hamann



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Arthur Chapman is proud to have two shareholders on the MDLA Board of Directors. Shayne's practice is focused in automobile and No-Fault litigation and Steve's practice focuses in the areas of commercial transportation and general liability.

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TELLING YOUR STORY: USING THE DOCTOR DEPOSITION OFFENSIVELY

BY KEVIN MCCARTHY

Historically, depositions of defendant medical providers have been an exercise in defensive maneuvers. The mantra of “less is more” has been the guiding principle in these depositions. Attorneys train their medical provider to answer the question, and only answer the question, offering as few details as possible while remaining truthful. This approach certainly has benefits. The less a provider says, the less opportunity for follow-up questions or for a plaintiff’s attorney to be educated on the medicine. The “less is more” approach also offers medical providers an easy escape rope when wrangling with answers to the ill-defined hypothetical questions they all face during depositions in malpractice litigation.

But depositions of medical providers have changed in the last decade. Minnesota Rule of Civil Procedure 32.01 states that the “deposition of a party . . . may be used by an adverse party for any purpose.” Minn. R. Civ. P. 32.01(b). Moreover, Rule. 32.05 provides, “[v]ideo depositions may be used in court proceedings to the same extent as stenographically recorded depositions.” Minn. R. Civ. P. 32.05. Although Minnesota district courts continue to state a preference for live testimony, the use of video depositions as substantive testimony, and not simply for impeachment purposes, has grown significantly, irrespective of the availability of the defendant medical provider.

Indeed, plaintiffs’ attorneys are regularly approaching depositions of medical providers as a first attempt at trial cross examination rather than a discovery mechanism. More

importantly, those attorneys are using the traditional defense deposition strategy of “less is more” advantageously. They use snippets of the video deposition to present the testifying provider as evasive, afraid to answer questions about his or her care, or failing to have adequate knowledge of the medicine.

In this article, we propose a more affirmative approach to the medical provider deposition, using early development of defense themes and image messages to testify offensively, rather than defensively, in those depositions. To be clear, we are not advocating for a complete retirement of the “less is more” approach in the appropriate scenario. It certainly has benefits for limiting follow-up questions and prevents medical provider deponents from testifying outside of their respective scopes of expertise. Rather, we are proposing that we work with our medical provider clients to find appropriate opportunities during the deposition to explain the care provided, and more importantly why it was appropriate, through the lens of developed themes and image messages.

THE “GESTALT” OF LITIGATION

Dr. Melissa Gomez, a psychologist and jury consultant from Philadelphia, has published on a theory that she refers to as the “gestalt” of trial. Melissa M. Gomez, Ph.D., *Jury Trials Outside In: Leveraging Psychology from Discovery to Decision*, pp. 1-4 (2016). In her book, Dr. Gomez discusses Gestalt psychology, which is the study of “the human

Telling Your Story continued on page 9



Kevin McCarthy focuses his practice in the areas of professional liability, product liability, and catastrophic personal injury, as well as insurance matters, such as coverage disputes and claims of bad faith. Kevin holds leadership roles in both the Minnesota Defense Lawyers Association, where he serves on the Events Committee, and in the Defense Research Institute, where he is the acting Chair of the Young Lawyers Seminar Planning Subcommittee.

response to the entirety of an experience.” *Id.* Dr. Gomez uses the example of a song to explain Gestalt psychology, explaining that humans, when listening to a song, do not hear separate instruments or vocal sounds, but instead hear the collection of those individual sounds as one piece of music. *Id.* She then extends this theory to litigation, stating that successful litigators tell one “consistent” story at trial to build credibility with the jurors. *Id.* Dr. Gomez explains that a consistent story is built by ensuring that all of the separate parts—arguments, behaviors, demeanor, and tactics by attorneys, clients and witnesses—are all aligned.

A primary goal in any medical malpractice litigation is to show that the medical provider defendant is competent in his or her field, thorough in practice, and cares for patients. Conversely, the plaintiff wants the jury to perceive the defendant as incompetent, complacent, uncaring, arrogant, or any other number of adjectives that portray the medical provider in a negative light. Dr. Gomez refers to these critical, but non-substantive, witness messages as “image messages.”

The first real opportunity to demonstrate positive image messages of competency and compassion, and for the plaintiff to attack those images, comes during the medical provider’s deposition. Unlike written discovery, during the deposition the provider is directly faced with questions and must answer those questions without his or her attorney’s assistance, other than to state objections.

The portrayal of the defense images, and the rebuttal of those images by plaintiff, is case specific, and the strategy for presenting the images will depend upon the medical facts and provider in each case. What is not case specific, however, is that the medical provider’s behaviors and demeanor, and the litigation tactics employed by counsel, should be consistent with the desired image messages of a competent, compassionate, and caring provider.

EARLY DEVELOPMENT OF IMAGE MESSAGES AND DEFENSE THEMES

Successful presentation of defense themes and images in medical defendant depositions requires early work with our clients, and to a lesser degree our experts, to develop those themes and images. In other words, it requires that we collaborate early in litigation with our clients and experts to develop both themes and accompanying image messages based upon the medical evidence and decision-making, the claims being asserted against our clients, and, importantly, our clients’ own respective personalities.

IMAGES AND THEMES MUST BE CONSISTENT WITH THE PROVIDER’S PERSONALITY

It is not novel that humans are different. Each of us has a unique personality, a unique way of problem-solving, and a unique form of communication. Medical professionals are no different. Dr. Gomez has seen this in the witnesses she works with and has concluded, “witnesses too will resort to what has made them successful in the past and apply that to the manner in which they navigate their testimony.” Gomez, *supra*, p. 95. Dr. Gomez bases this upon psychological research on core personality traits performed in 1994 by Dr. David Buss, from which Dr. Buss concluded that an individual’s personality remains stable because “people, over time, develop psychological mechanisms or patterns of interactions to adapt to life situations or solve problems.” *Id.* (citing David M. Buss, *Personality Evoked: The Evolutionary Psychology of Stability and Change*, in *CAN PERSONALITY CHANGE?* (T.F. Heatherton & J.L. Weinberger eds. 1994)).

Based upon this research, and her own experiences, Dr. Gomez explains that the themes developed by trial counsel are often wholly incompatible with who the defendant is in terms of core personality traits. Gomez, *supra*, pp. 95-96. Dr. Gomez provides an example of a hyper-intelligent physician she worked with in a malpractice suit. *Id.* at 101. The physician provided excellent answers in support of his care, but his demeanor indicated that he was nervous, constantly fidgeting in his seat and whispering his answers. *Id.* Dr. Gomez had a blunt conversation with the physician about the source of his nerves, during which she discovered two important pieces of information: (1) the physician was dyslexic and worried about looking unintelligent if he mixed up words; and (2) he had a prostate condition and was worried that jurors would think his frequent breaks were intended to obtain answers to difficult questions. *Id.* at 101-02. Using these traits, which were unique to this physician, the defense decided that the physician would advise the opposing attorneys and the court of his conditions up front to avoid any misperception, and that the defense would not hide, but instead highlight the physician’s dyslexia to emphasize that he was able to attain tremendous academic and professional achievements despite his learning disability. *Id.* at 102.

Likely, all of us have been in a similar circumstance. Our medical provider client is intelligent and provides thoughtful answers when discussing the care at issue. But when confronted with confrontational mock deposition questions, the provider loses that clear thought process and testifies in a way that is wholly inconsistent with the thoughtful answers provided during general discussion of the care.

To be successful in the medical provider deposition, we should meet with our clients not only to discuss their care and the issues in the case, but to also understand the provider's personality and natural response to confrontation. Discussion of how the provider's natural tendencies mesh with our overall defense themes and image messages will put potential issues on the table before they are on the record. If the case theme we, as counsel, have developed is inconsistent with a provider's personality or understanding of the case, open dialogue is needed to come to a common understanding. What we, as attorneys, must keep in mind is that it is not always the medical provider who must make a change. We must be willing to listen and account for what we hear from our client as well. Development of themes or image messages that are inconsistent with the provider's personality will feel unnatural for the provider and will make it difficult for them to testify clearly and effectively during the deposition.

DEVELOPMENT OF IMAGE MESSAGES

Dr. Gomez refers to image messages throughout her book. Again, these are the images that the medical provider defendant and defense counsel want the jury to perceive of the defendant. *Id.* at 1-4, 98. Image messages, she explains, must be associated with the witness' substantive or "content messages." To develop content messages aligned with the desired image messages, Dr. Gomez recommends starting deposition preparation by asking the provider, "If I were a juror in your case, what are the three main concepts or ideas I need to learn *from you and your testimony.*" *Id.* at 98. The answers may be about the medicine, or they may not. They may be consistent with the themes developed by defense counsel, or they may be different. However, it is an important starting point to understand what the defendant medical provider wants the jury to know.

From here, Dr. Gomez recommends that defense counsel work with the provider to reduce the broader content messages to their key points. *Id.* For instance, we recently defended a case involving an allegation that the physician missed the appropriate diagnosis for the patient, leading to injury. One of Plaintiff's arguments was that the provider relied solely on the patient's history of similar symptoms, which resulted from a benign condition, and did not perform an adequate examination to determine if something more serious was occurring. Using the information provided by the client, we developed a core image message that the physician valued the physician-patient relationship and listening to the patient's report was, to him, an important part of the evaluation. The patient report was not the end of the evaluation, but it provided important evidence that helped guide his objective examination, consideration of diagnostic testing, and differential diagnostic process.

Equally important to the development of these core content messages is discussing the limitations of those messages. *Id.*

This is particularly important in cases involving medical professionals. These witnesses are different than typical fact witness because they have experience in the subject area of medicine. As a result, their testimony has a tendency to bleed into expert testimony. This exposes the defendant medical provider to additional cross examination on issues that may be at the periphery of the provider's direct knowledge and are better left to experts. Dr. Gomez highlights another potential area of danger specific to medical professionals—intentionally or unintentionally pointing the finger at other providers. *Id.* at 99. Irrespective of what the medical evidence suggests, such testimony plays directly into the images that plaintiffs' attorneys seek to portray of physicians—arrogant, selfish, unaccountable. Again, it is testimony better left to experts.

Developing core content messages with a medical provider defendant, and establishing the limits of those messages, is key to the provider's success in a medical malpractice deposition. Having the foundation of these messages allows the medical provider to understand how his or her testimony fits into the overall structure of the case. *Id.* Dr. Gomez explains that humans naturally organize the information they receive as a mechanism to remember the information. *Id.* Working with medical provider defendants to develop core messages allows them to organize the plethora of medical facts that support their care, as they will understand which facts support each message, and allows those providers to offer clear testimony in support of their medical decision-making. *Id.* It not only helps the provider navigate cross examination, but also allows the provider to offer clear explanations to the jury.

DEPOSITIONS: BALANCE IS KEY

There are two ends to the spectrum of testimony that can be offered in a deposition: offering as little information as possible and offering too much information. Offering little to nothing in response to questions allows the attorney to control the substance of the deposition. Gomez, *supra*, p. 103. Stated differently, the only substance in the deposition transcript is the question asked by the plaintiff's attorney followed by a "yes," "no," or non-answer from the medical provider defendant. Additionally, providing these short answers does not reflect the image of a detailed and competent physician that we want our clients to project. Finally, medical providers are often uneasy when instructed to answer deposition questions with curt responses, as they often feel that they are not providing important information that supports their care. That discomfort can shine through in their expressions and body language. Especially in video depositions, image messages may be negatively impacted even further.

On the other end of the spectrum, witnesses can provide long-winded answers that ramble and do not provide clear messages that will eventually be heard by the jury at

trial. Providing these long explanations can also educate opposing counsel on the defense theory of the case and open up additional lines of questions.

As Dr. Gomez recommends in her book, the key is to find balance between those two extremes. *Id.* at 103-06. She offers three points to help witnesses achieve this balance when facing cross examination: (1) understand the difference between answering versus explaining; (2) make sure the witness understands that certain rules discussed in preparation are meant to be broken; and (3) work with the provider so he or she knows which battles to pick.

PROVIDING CONTEXT VERSUS PROVIDING AN EXPLANATION

On cross examination, there is a difference between providing context to an answer and providing an explanation rather than an answer. Providing context means providing a direct answer to the question asked, but with context around the answer based upon the image messages developed with the provider and the medical facts that support the provider's care. For example, imagine the following exchange in a case involving a claim of intrapartum hypoxic ischemic injury:

Question: Would you agree with me that the presence of late decelerations during X's labor were a sign of fetal intolerance to labor?

Explanation: Well, there are many things that we look at when evaluating a fetal heart strip. You need to look at the strip in its entirety and look at all the evidence of fetal status. Reactivity in the heart rate, like good heart rate variability and accelerations, show us that the baby is well-oxygenated and is handling labor well. When you see those signs on the fetal heart strip, it reassures us that the baby is getting adequate oxygen even if there are decelerations . . . (continue the general discussion of fetal heart rate interpretation that does not answer the specific question).

Answer (with context): I disagree. When I look at the strip as a whole, I see that X recovered from the decelerations, had good heart rate variability and intermittent accelerations throughout. That tells me X was receiving adequate oxygen and was not in distress.

Both the "explanation" and the "answer with context" include the same content message that the presence of late decelerations, alone, is not a sign of fetal intolerance to labor when there are other reassuring signs on the fetal heart strip. However, the explanation wanders into generalized discussion of fetal heart strip interpretation, whereas the answer with context provides a direct and concise answer to the question with context included to support the answer.

The same strategy can be employed in response to the broad hypothetical questions that medical providers face during depositions. After being asked the same hypothetical several

times, many providers are uncomfortable offering the same answer of, "it depends upon the clinical circumstances." In some instances, the plaintiff's attorney will ask the doctor to explain what they mean by "it depends on the clinical circumstances." In these situations, an answer with context based upon the core image messages can be helpful. For instance, put the above example into a hypothetical context:

Question: Would you agree that late decelerations are a sign of fetal intolerance to labor?

Answer (with context): Not necessarily. If there is good heart rate reactivity with moderate variability and accelerations, then the presence of some late decelerations would not be a sign of fetal distress.

In the context of a medical malpractice deposition, the answer with context allows the provider defendant to offer support for his or her care, and avoid feeling or looking evasive, without over-educating the opposing attorney on defenses and defense themes. If the plaintiff chooses to play the deposition for the jury at trial, the answer provides the jury with a clear and concise explanation of the provider's medical reasoning, which helps the jury understand the provider's position before the provider is able to further explain on direct examination.

RULES ARE MEANT TO BE BROKEN

We have all provided clients with advice or best practices for depositions, and we have all had clients follow those rules to the extreme. Dr. Gomez's second point of advice for finding appropriate balance in a witness' deposition testimony is "helping witnesses use their own good judgment about when to use a strategy [rule] and when to let it go." Gomez, *supra*, at 105-06 (bracketed language added). With adequate practice, medical provider defendants are usually able to navigate when best practices apply, and when they do not. They exercise this type of judgment every day in medical practice when evaluating patient symptoms and comparing them to the potential diagnoses.

Practicing and developing this judgment is particularly important within medical malpractice cases, as it will assist medical providers in determining appropriate questions for providing additional context. For example, in response to the broad hypothetical questions, the correct response is often that the answer depends upon the clinical presentation and circumstances. Medical providers simply cannot answer those overbroad questions without additional clinical information about the hypothetical patient such as medical history, vital signs, examination findings, and other clinical evidence obtained by medical professionals in everyday practice. However, as discussed in the preceding section, there may be opportunities for the provider to offer helpful context with his or her answer when the provider is faced with repetitive hypothetical questions.

The key to medical providers' successfully exercising this judgment is practice. Mock deposition questions in advance of the actual deposition help the providers determine when the general rules and best practices are meant to be broken.

PICK YOUR BATTLES

Dr. Gomez's final point to help witnesses succeed is that witnesses should understand how to pick their battles during cross examination. Gomez, *supra*, at 106. To do this, Dr. Gomez recommends that the attorneys have open dialogue with the witness such that the witness can gain "a better understanding of the lawsuit and [his or her] place in it." *Id.* (bracketed language added). With this foundation, witnesses are able to understand which cross examination questions are relevant to the subject matter of the litigation and which are not. It also helps witnesses understand their role with respect to the issues in the case, and thus helps the witness navigate cross examination questions based upon their involvement in the case, knowing what to concede and what not to concede.

Establishing this foundation in advance of the deposition is vital for success in a medical provider defendant's deposition. As discussed *supra*, medical providers are different than many fact witnesses in that medical providers often have some level of expertise and experience in the subject matter of the case. If not adequately prepared, a provider's testimony can trend toward expert testimony or into other areas of medicine on the periphery of the provider's practice. This is avoided by meeting with the medical provider early and often to discuss the issues in the case, the arguments being made by both sides, and how the provider fits into those arguments.

When the provider understands the medical issues involved in the case, and how their care relates to those issues, the provider is better able to determine which cross examination questions allow for an answer with context.

CONCLUSION

With depositions of medical providers being used more commonly as a first attempt at trial cross examination, medical provider defendants should be prepared to testify more offensively during depositions in defense of their care. The mantra of "less is more" still has value, certainly, but it should be appropriately balanced with answers that provide context for the provider's care and medical decision-making. Providing answers with context allows the provider to offer clear testimony to support defense themes and image messages.

To successfully achieve this balance, attorneys should meet with their medical provider clients early and often in litigation. Through these meetings, attorneys should work with their clients to develop defense themes and image messages consistent with the medical care involved and the provider's own personality traits. Once this foundation is established, attorneys should practice mock deposition questions with their medical provider clients to help them exercise judgment and determine when it is appropriate to offer context with answers and when it is not. This preparation gives providers the foundation to testify in support of defense themes and images and frustrates the opposing attorney's attempts to portray the provider as evasive, arrogant, or unknowledgeable on camera.

I would like to give special thanks to Dr. Melissa Gomez for providing input and feedback on this article. Dr. Gomez can be contacted through her business, MMG Jury Consulting, LLC.

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UNDER (PEER) PRESSURE: A BREAKDOWN OF MINNESOTA'S PEER REVIEW STATUTE

BY RYAN PAUKERT

Minnesota's statutes governing peer review for health care entities are embodied in Minnesota Statute § 145.61 through § 145.66. "To encourage robust peer review, all states and the federal government have enacted statutes that protect peer review participants through immunity, privilege, confidentiality, or some combination of the three." *Larson v. Wasemiller*, 738 N.W.2d 300, 314 (Minn. 2007) (Anderson, J. concurring). On multiple occasions, the Minnesota Supreme Court has held "the statutes providing for confidentiality and immunity for peer review organizations and persons involved in the peer review process reflect a legislative intent both to improve the quality of health care by providing for confidentiality of review organization information and to encourage self-monitoring in the medical profession." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 383 (Minn. 1999). What follows is a review of the key provisions of the Peer Review statute and some questions frequently raised regarding the statute's applicability.

WHAT IS A REVIEW ORGANIZATION UNDER THE STATUTE?

Before the Peer Review Statute will apply, it must first be determined whether the entity which received information regarding the provider in question is, in fact, a review organization. If the entity does not meet the statutory definition of "review organization," the information at issue will not benefit from the protections of the Peer Review Statute.

The statutory definition of a "review organization" is lengthy, encompassing many possible qualifying entities. "'Review organization' means ... a committee whose membership is limited to professionals, administrative

staff, and consumer directors ... which is established by one or more of the following: a hospital, a clinic, a nursing home, an ambulance service or first responder service ... to gather and review information relating to the care and treatment of patients for the purposes of: (a) *evaluating and improving the quality of health care...*" § 145.61 (emphasis added). "The definition of 'review organization' includes committees established by health care organizations for the purpose of reviewing a professional's staff privileges." *In re Fairview-Univ. Med. Ctr.*, 590 N.W.2d 150, 153 (Minn. Ct. App. 1999). "A 'review organization' under the Minnesota statute at issue ... is defined as a 'committee whose membership is limited to professionals and administrative staff ... and which is established by a hospital ... to gather and review information relating to the care and treatment of patients for the purposes of ... (b) (r)educing morbidity or mortality; ... The definition specifically includes, but is not limited to, organizations 'established pursuant to' the federal act." *Warrick v. Giron*, 290 N.W.2d 166, 170 (Minn. 1980)

Generally speaking, to be considered a "review organization" for purposes of the peer review statute, the purpose of the review *must* be to improve patient care. "The peer review privilege is designed to facilitate the frank exchange of information among professionals without fear of reprisals in civil lawsuits. The goal is the improvement of patient care." *Konrady v. Oesterling*, 149 F.R.D. 592, 595 (D. Minn. 1993). In *Konrady* the court discussed whether a hospital's Internal Review Board ("IRB") was considered a review organization for purposes of the Peer Review Statute. An IRB is defined in a federal scheme as "any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving

Under (Peer) Pressure continued on page 16



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human subjects. *The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects...*” *Id.* (citing 21 C.F.R. § 56.102(g)). In concluding IRBs are not “review organizations,” the Court cited two primary reasons: 1) the purposes of the IRBs differ from those described in the Peer Review statute; and 2) the element of confidentiality underlying the statutory privilege is absent. *Id.* “Unlike a true peer review committee, an IRB is charged with management and oversight of research involving human subjects. Rather than conduct ‘peer review,’ an IRB conducts ‘process review’ not enumerated by the Minnesota statute.” *Id.* at 596. As demonstrated in *Konrady*, attorneys should determine whether the information regarding the health care provider was collected by a true “review organization” before attempting to assert Peer Review protections.

DISCOVERABILITY OF DATA AND INFORMATION OBTAINED BY REVIEW ORGANIZATIONS

Review organization material is essentially divided into two different categories based on §§ 145.64 and 145.65, with two different degrees of confidentiality. The first category comprises data and information acquired by a review organization as well as the proceedings and records of a review organization. The second category entails guidelines established by a review organization.

As for the first category, § 145.64 states “...information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of it be prevented from testifying as to matters within the person’s knowledge, *but a witness cannot be asked about the witness’ testimony before a review organization or opinions formed by the witness as a result of its hearings.*” (emphasis added).

While the information provided to a review organization is not “immune” from discovery, the statute does provide limitations on how that information may be obtained. As noted above, a party may not ask questions at depositions which attempt to pry into the peer review process. In *Utech v. Bynum*, the plaintiff sought to depose a hospital’s corporate designee regarding “quality assurance documents related to the policies, procedures or guidelines monitoring physicians, nurses, or other health care professionals” (third topic), and all documents “generated or utilized by [SCMC’s] quality assurance division/ department regarding the monitoring, performance or qualifications of physicians, nurses, or other health care professionals” (fifth topic). No. CIV. 07-4712DWFRL, 2008 WL 6582594, at *2 (D. Minn. Nov. 14, 2008). In denying the plaintiff’s motion to compel on the third and fifth topics, the court noted these topics “seek records relating to SCMC’s peer review process”

and “directed the Plaintiff to refrain from any inquiry into SCMC’s peer review process, during the course of the Rule 30(b)(6) deposition.” *Id.*

However, in *Shellum v. Fairview Health Services*, the plaintiff argued that the Peer Review statute barred the introduction of records of medical review organizations, which the Minnesota Court of Appeals rejected. No. A18-1516, 2019 WL 2262246, at *5 (Minn. Ct. App. May 28, 2019). “While the [Peer Review] statute bars the introduction of records of review organizations and prevents witnesses from testifying about their testimony to review organizations, it does not bar the use of, ‘Information, documents or records otherwise available from original sources.’” *Id.* (emphasis added).

This principle was further clarified by the Court in *In re Fairview-University Medical Center*, where a party argued the peer review privilege only covered “documents generated by a review organization and not documents acquired by a review organization.” 590 N.W.2d 150, 154 (Minn. Ct. App. 1999). However, the court noted the “otherwise available” sentence of § 145.64 simply points out that documents available from other sources remain discoverable from those original sources. *Id.* The court held the “confidentiality provision encompasses all documents contained in review organization files, including documents a review organization obtains from other sources.” *Id.* at 155.

Further, courts have explained that even though information provided to review boards may be discoverable from original sources, the information is still not discoverable when requested in the context of these reviews as this would defeat the purpose of the statute. “Despite the explicit language privileging the hospital documents, Dr. Woodburn argues that because the documents are available from an ‘original source’ (Dr. Natale) they are discoverable. But allowing discovery, when the documents are available from a person who reported to the committee, would defeat the purpose of this provision; such documents would almost always be available from the person who provided the evidence.” *Woodburn v. St. Paul Pathology, P.A.*, No. C7-93-125, 1993 WL 267495, at *6 (Minn. Ct. App. July 20, 1993).

DISCOVERABILITY OF GUIDELINES AND POLICIES FROM REVIEW ORGANIZATIONS

As for the second category of material, § 145.65 states “No guideline established by a review organization shall be admissible in evidence in any proceeding brought by or against a professional by a person to whom such professional has rendered professional services.” This statute is designed to “serve the strong public interest in *improving the quality of health care*” by protecting guidelines developed by certain health care review organizations. *Kalish v. Mount Sinai Hosp.*, 270 N.W.2d 783, 785 (Minn.1978) (emphasis added). It was enacted in the “belief ... that health care will be fostered if review committees can carry on discussions

without the threat of malpractice and defamation actions,” and therefore “encourages the medical profession to police its own activities with minimum judicial interference.” *DeYoe v. N. Mem'l Health Care*, No. C7-99-1837, 2000 WL 1051964, at *9 (Minn. Ct. App. Aug. 1, 2000). However, the Minnesota Supreme Court has held these guidelines are discoverable despite their inadmissibility. “Section 145.65 bars the admission of such guidelines into evidence, but is silent as to any privilege barring their discovery. This clearly implies that in making a separate and different provision for ‘guidelines’ under § 145.65 the legislature intended to allow their discovery.” *Kalish v. Mount Sinai Hosp.*, 270 N.W.2d at 786.

As for policies, they receive similar treatment under the Peer Review statute. In *Damgaard v. Avera Health*, the plaintiff argued she could “elicit evidence at trial regarding the challenged policies because they ‘inform’ or are the ‘building blocks’ for the relevant standard of care.” 108 F. Supp. 3d 689, 699 (D. Minn. 2015). While the court acknowledged that the challenged policies were *discoverable*, “discoverability and admissibility, of course, are entirely separate issues, with the former far broader than the latter,” concluding the Peer Review statute “makes clear the policies in question may not be inquired into at trial.” *Id.* at 699-700.

CAN A PRIVATE CAUSE OF ACTION BE BROUGHT FOR VIOLATING THE PEER REVIEW STATUTE?

The Peer Review statute makes it unlawful to “disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization.” § 145.64. Subsequently, § 145.66 states the penalty for prohibited disclosures: “[a]ny disclosure other than that authorized by section 145.64, of data and information acquired by a review committee or of what transpired at a review meeting, is a misdemeanor.”

In *Sherr v. HealthEast Care System*, a neurosurgeon brought a private cause of action for a breach of peer review confidentiality. In dismissing the Plaintiff’s claim under the Peer Review statute, the court noted that “the Minnesota Supreme Court has repeatedly refused to recognize a private cause of action under statutes that explicitly impose criminal or civil penalties but are silent regarding a private cause of action.” 262 F. Supp. 3d 869, 880 (D. Minn. 2017) (citing *Graphic Commc’ns Local 1B Health & Welfare Fund “A” v. CVS Caremark Corp.*, 850 N.W.2d 682, 691 (Minn. 2014); *Becker v. Mayo Found.*, 737 N.W.2d 200, 208-09 (Minn. 2007); *Larson v. Dunn*, 460 N.W.2d 39, 47 n.4 (Minn. 1990)).

The plaintiff attempted to argue that the Peer Review statute supports a civil cause of action if the “unauthorized disclosure is motivated by malice,” based on § 145.63, subd. 1, which provides immunity to peer review participants unless their performance of the duty, function or activity was motivated by malice.” *Id.* However, the Court clarified

that “the immunity provision detailed in Minn. Stat. § 145.63 does not address unauthorized disclosures of peer review information. Rather, confidentiality of peer review information and the penalty for breaching such confidentiality are explicitly governed by Minn. Stat. §§ 145.64 and 145.66, respectively.” *Id.*

Therefore, as the plain language of the statute imposes a criminal penalty for breach of peer review confidentiality, but not a civil one, no private cause of action exists for a violation of § 145.64.

DOES MINNESOTA’S PEER REVIEW STATUTE CREATE A CAUSE OF ACTION FOR NEGLIGENT CREDENTIALING?

The Court in *Larson v. Wasemiller* discussed whether Minnesota’s Peer Review statute creates a cause of action for negligent credentialing. 738 N.W.2d 300, 303-04 (Minn. 2007). The portion of the statute at issue was § 145.63, subd. 1, which states in relevant part, “No review organization and no person shall be liable for damages or other relief in any action by reason of the performance of the review organization or person of any duty, function, or activity as a review organization or a member of a review committee or by reason of any recommendation or action of the review committee when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization’s action or recommendation is made...” (emphasis added).

The Court first noted that “[a]lthough stated in the negative, the language of [Minn. Stat. 145.63, subd. 1] implies that a review organization shall be liable for granting privileges where the grant is not reasonably based on the facts that were known or that could have been known by reasonable efforts.” *Larson*, 738 N.W.2d at 304. The Court found that “the immunity provision of the peer review statute contemplates the existence of a cause of action for negligent credentialing” or “there would be no need for the legislature to address the standard of care applicable to such an action.” *Id.* However, the Court ultimately determined there was no need to answer the question at that time since “at the very least, the statute does not negate or abrogate such a cause of action,” leaving the Court “free to consider whether the action exists at common law,” which it found in the affirmative. *Id.* at 304, 306.

THE PROVIDER DATA EXCEPTION

“As a general rule, all data and information discussed by a review organization is confidential and is subject to neither discovery nor subpoena.” *Amaral v. Saint Cloud Hosp.*, 586 N.W.2d 141, 143 (Minn. Ct. App. 1998), *aff’d*, 598 N.W.2d 379 (Minn. 1999). The Peer Review confidentiality provision under § 145.64 “covers all data and information acquired

by a review organization.” *In re Fairview-Univ. Med. Ctr.*, 590 N.W.2d at 154.

However, the Provider Data Exception states that the restrictions of § 145.64, subd. 1, “shall not apply to professionals requesting or seeking through discovery, data, information, or records relating to their medical staff privileges, membership, or participation status. However, any data so disclosed in such proceedings shall not be admissible in any other judicial proceeding than those brought by the professional to challenge an action relating to the professional’s medical staff privileges or participation status.” 145.64, subd. 2. But this exception only grants providers access to this confidential information under particular circumstances.

In *Amaral*, two physicians sought information about themselves from their hospital’s medical peer review organizations, but the hospital refused their requests stating the information was confidential and, further, it was only discoverable in a “court action challenging an adverse determination concerning the physicians’ staff privileges or participation status.” 598 N.W.2d at 381. While the physicians cited the Provider Data Exception in an attempt to obtain the information, the Minnesota Supreme Court affirmed the Court of Appeals and held they were not entitled to peer review materials upon request. “Access in the absence of a challenge to an action relating to staff privileges or participation status or discovery relevant to separate litigation would defeat the legislative intent of Minn. Stat. § 145.64, subd. 2 (1996).” *Amaral*, 586 N.W.2d at 144. The Minnesota Supreme Court concluded “the legislature did not intend for the provider data exception to grant professionals access to review organization information absent an adverse determination regarding their staff privileges or participation status.” *Id.* at 388.

STATUTORY IMMUNITY OF PEER REVIEWERS

The Peer Review statute provides immunity to organizations and those involved in the peer review process from “damages or other relief in any action brought by a person or persons whose activities have been or are being scrutinized or reviewed by a review organization ... unless the performance of such duty, function or activity was motivated by malice toward the person affected thereby.” § 145.63, subd. 1.

Whether this statutory immunity has been lost hinges on the presence of malice toward the provider in question. The Minnesota Supreme Court has defined malice in the context of statutory immunity as “nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.” *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991). “The question of whether a peer review inquiry was motivated by malice is an objective one, focused not on what the reviewers personally believed, but rather on *how the process was conducted.*” *Sherr v. HealthEast Care Sys.*, 999 F.3d 589,

599 (eighth cir. 2021) (emphasis added) (citations omitted). Minnesota courts ascertain malice through deviations from the procedural guidelines in place by the particular review organization. “[I]n Minnesota, judicial review of peer-review actions is properly limited ... to only whether peer reviewers abided by their own established procedures. We will infer malice only if the peer reviewers did not follow those procedures.” *Id.* (citation omitted).

In the case of *In re Peer Review Action*, the court found malice on the part of a hospital by looking at the totality of the circumstances and actions taken throughout the peer-review process. 749 N.W.2d 822, 828 (Minn. Ct. App. 2008). “The district court reached its conclusion of malice based on six findings: (1) Hospital’s peer-review process began outside Hospital’s normal channels; (2) Hospital began its investigation in contravention of the Hearing policy, which required that Hospital leadership meet with Physician to discuss his behavior before seeking discipline; (3) Hospital conducted the investigation in a manner contrary to the DAB policy, which required Hospital to give Physician an opportunity to correct his behavior before imposing discipline; (4) in charging Physician, Hospital cited incidents that were unfairly old; (5) Hospital treated Physician disparately as compared to other physicians subjected to discipline; and (6) Hospital improperly applied its power to punish Physician to ‘make a public statement.’” *Id.* While the hospital argued that these findings were insufficient to show malice, the court concluded that “each of these procedural irregularities is significant and, taken together, they clearly demonstrate that Hospital intentionally, and repeatedly, violated its own established procedural safeguards.” *Id.*

IN CONCLUSION

Minnesota’s Peer Review statute was created with the purpose of improving health care by allowing medical providers to perform peer reviews without fear of defamation suits or other retaliatory actions. Being familiar with these provisions may provide significant benefits to attorneys and their health care clients throughout the course of discovery. Therefore, these essential provisions should remain at the forefront while responding to discovery requests and defending in depositions.

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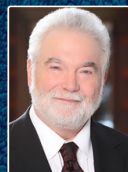
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					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28		

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SUPREME COURT AGREES TO HEAR SEVENTH CIRCUIT CASE TO DETERMINE WHETHER A PRIVATE RIGHT OF ACTION EXISTS UNDER FEDERAL CIVIL RIGHTS LAWS FOR NURSING HOMES RECEIVING FEDERAL FUNDING

BY MOLLIE BUELOW AND PAT SKOGLAND

The United States Supreme Court has accepted review of a Seventh Circuit decision that decided the Federal Nursing Home Reform Act (FNHRA) 42 U.S.C.S. Sec. 1396r did not provide a private right of action that could be redressed under 42 U.S.C.S. Sec 1983. *Talevski by next friend Talevski v. Health and Hosp. Corp. of Marion County*, 6 F.4th 713 (7th Cir. 2021). The gravity of the review can be prefaced by the Supreme Court granting cert on only three cases over the last 30 years where the issue of whether the Spending Clause provides for a private right of action. It is a high bar for the Plaintiffs seeking to gain a private right of action, which prior parties have yet to meet. The Supreme Court has amicus briefs reflecting the gravity of this decision—whether to allow a private 1983 right of action under the Medicaid Spending Clause.

HISTORY OF FEDERAL NURSING HOME REFORM ACT (FNHRA)

In 1987, Congress expanded federal regulations governing the long-term care industry when it passed the Federal Omnibus Budget Reconciliation Act (OBRA) which includes the Federal Nursing Home Reform Act (FNHRA) under the Federal Spending Clause legislation. See 42 U.S.C. § 1396. The FNHRA provides a comprehensive guidance on

the regulation and operation of nursing homes, including certain resident rights and the standards of care—which nursing-home facilities must adhere to in order to obtain federal funds in the Medicaid program. Some of the enumerated resident rights include the right to: be free from abuse, mistreatment, and neglect; freedom from physical restraints; participation in review of one’s care plan; be fully informed in advance about changes in treatment or transfers to a different facility; voice grievances; and be free from medications or other treatments. 42 U.S.C. § 1396r.

42 U.S.C. § 1983 CLAIMS

42 U.S.C. § 1983 is a federal civil rights law that creates a civil action for the deprivation of rights—both constitutional and statutory. A claim brought under 42 U.S.C. § 1983 does not come with its own tolling or statute of limitations; a state’s statute of limitations is applied to the federal claim. Furthermore, it is well established that “the characterization of civil rights statutes for limitations purposes is a federal question.” *Allen v. Hinchman*, 20 N.E.3d 863, 873 (Ind. Ct. App. 2014). Furthermore, the Supreme Court has stated that Section 1983 claims are “best characterized as personal injury actions.” *Id*; *Dixon v. Chrans*, 986 F.2d 201, 203 (7th Cir. 1993) (citing *Wilson v. Garcia*, supra, 471 U.S. 261 (1985)).

Supreme Court continued on page 21



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SPENDING CLAUSE LEGISLATION

For more than three decades, private plaintiffs have attempted to obtain a private right of action under 42 U.S.C. § 1983 regarding legislation derived from the Spending Clause of the United States Constitution. The United States Supreme Court has found that a statutory scheme implicitly forecloses 42 U.S.C.S. § 1983 liability in only three cases. See *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (comprehensive enforcement mechanisms included citizen-suit provisions); *Smith v. Robinson*, 468 U.S. 746 (1984) (statute afforded rights holders state hearings, detailed procedural safeguards, and judicial review); and *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005) (statute provided an express, private means of redress in the statute itself). The Supreme Court has never flatly ruled out private actions under statutes passed pursuant to Congress's Spending Clause powers. See *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815 (7th Cir. 2017). In 1990, in *Wilder v. Virginia Hospital Association*, a group of hospitals brought suit against the state of Virginia, under 42 U.S.C. § 1983, arguing that its reimbursement rates (which had been approved in 1982 and again in 1986 by the Secretary) were not "reasonable and adequate." 496 U.S. 498 (1990). The Supreme Court held the Boren Amendment clearly established a right to reasonable and adequate reimbursement rates for the hospitals and the requirement of reasonable rates was clearly intended to benefit the hospitals, so it amounted to a right under Section 1983. *Id.* The Court determined that without explicit language within the Amendment preventing private suits under Section 1983, or an alternative remedial scheme that would make such suits unnecessary, it was not reasonable to conclude that Congress had intended to prevent private suits to enforce the right it had created. *Id.* Therefore, the Supreme Court set the precedent that allowed private parties to sue under Section 1983 to enforce rights contained in certain federal Spending Clause legislation, even where Congress did not expressly provide for a private right of action in the statute. *Id.* Since *Wilder*, the United States Supreme Court has not recognized any new Spending Clause-based private rights. *Id.*

TALEVSKI BY NEXT FRIEND TALEVSKI V. HEALTH AND HOSP. CORP. OF MARION COUNTY

The case of *Talevski by next friend Talevski v. Health and Hosp. Corp. of Marion County* will allow the United States Supreme Court to once again evaluate whether a private right of action may be derived from spending clause legislation. 6 F.4th 713 (7th Cir. 2021). First brought before the District Court for the Northern District of Indiana, the case was appealed to the Seventh Circuit Court of Appeals and now has made its way up to the United States Supreme Court. 2:19-CV-13,

2020 WL 1472132 (N.D. Ind. Mar. 26, 2020). Plaintiff Ivanka Talevski, brought forth this matter on behalf of her now deceased husband Gorgi Talevski. *Id.* Mr. Talevski suffered from dementia and was a resident at Valparaiso Care and Rehabilitation (VCR) located in Valparaiso, Indiana. *Id.* at 715. VCR is an entity of the Health and Hospital Corporation of Marion County (HHC) which is a municipal corporation and subsidiary of the state of Indiana. HHC contracted with American Senior Communities (ASC), a privately held nursing home management corporation, to provide management services for VCR.

In plaintiff's complaint, she accused VCR of failing to adhere to FNHRA's requirements in numerous respects regarding the care of her husband including: failure to provide Mr. Talevski with adequate medical care; the administration of unnecessary psychotropic medication for the purpose of medical restraint; the discharge and transfer of Mr. Talevski without the consent of his family or guardian, etc. *Id.*

The plaintiff's allegations of FNHRA violations were brought as 42 U.S.C. § 1983 claims. Talevski's family argued that FNHRA's rights: (1) the right to be free from chemical restraints for the purpose of discipline or convenience; and (2) the right not to be transferred or involuntarily discharged unless certain criteria are met, were violated by VCR. Furthermore, not only did Plaintiff believe these rights were violated but they believe the violation created an enforceable private right under 42 U.S.C. § 1983.

On the face of this case, it appears to simply be about a wife trying to hold a nursing home accountable for the alleged deficient care her husband received. But, under the surface emerges a legal question with monumental implications. The legal question is more than just whether the standard of care was breached, it effectively asks whether a private citizen has the right to sue a government-owned nursing home for violating the care standard established in the Federal Nursing Home Reform Act. Therefore, implying when a private right of action can be achieved from spending clause legislation.

DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

Upon hearing this matter, the District Court for the Northern District of Indiana dismissed the claim for failure to state a claim upon which relief can be granted. *Talevski by Next Friend Talevski v. Health and Hospital Corporation of Marion Cnty.*, 2020 WL 1472132 (N.D. Ind., 2020). The District Court reasoned that the FNHRA did not provide a private right of action that may be redressed under 42 U.S.C. § 1983. plaintiff appealed to the United States Seventh Circuit Court of Appeals. *Id.*

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

On appeal, the plaintiff abandoned all but two of her numerous allegations of statutory violations. *Talevski by next friend Talevski v. Health & Hosp. Corp. of Marion Cnty.*, 6 F.4th 713 (7th Cir. 2021). The remaining allegations were violations of Sections 1395i-3(c) and 1396r(c) of the FNHRA, “Requirements relating to residents’ rights,” known as the “Resident’s Bill of Rights.” H.R. Rep. Mo. 100-391, pt. 1, at 452. *Id.* at 716. At the heart of Talevski argument was whether the FNHRA was intended by Congress as guidance for nursing homes or as an enforceable right for residents. The Seventh Circuit relied most notably on two cases, *Blessing v. Freestone* and *Gonzaga U. v. Doe*, in addressing the enforceability of a right created by an alleged statutory violation. *Blessing v. Freestone*, 520 U.S. 329 (1997), holding modified by *Harz v. Borough of Spring Lake*, 191 A.3d 547 (N.J. 2018); *Gonzaga U. v. Doe*, 536 U.S. 273, 282 (2002). The *Blessing* test, derived from *Blessing* and modified by *Gonzaga*, is applied when deciding whether a partial statutory provision creates an enforceable right through Section 1983.

In *Blessing*, the Supreme Court unanimously denied custodial parents a 42 U.S.C. § 1983 right of action to enforce a general right of “substantial compliance” by state officials with regards to Title IV-D of the Social Security Act—federally funded child-support enforcement program. 520 U.S. 329 (1997). The Supreme Court’s opinion did not exclude the possibility that certain provisions of Title IV-D may give rise to private, enforceable rights, in certain circumstances, but it criticized the Court of Appeals decision granting a “blanket approach” and for painting “with too broad a brush” in determining whether an enforceable right was created by Title IV-D. *Id.* at 342. The Court determined the status of a general right to substantial compliance by providing a three prong test—which is now known as the *Blessing Test*: “(1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.” *Blessing*, 520 U.S. at 340-41.

This three-pronged test was further applied in *Gonzaga U.*, where the Court firmly instructed the lower courts that, in order to find that Congress intended to create an enforceable federal statutory right, Congress “must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights under an implied private right of action.” 536 U.S., 282. The Court also strongly indicated that federal statutes enacted under the Spending Clause are unlikely to create private enforceable rights. *Id.* The Supreme Court in *Gonzaga* raised the bar for

plaintiffs to create a private and enforceable right of action by meeting the three-pronged *Blessing* test. *Id.*

In *Talevski*, the Seventh Circuit Court of Appeals applied the *Blessing* test to determine whether Talevski had the right to sue a government-owned nursing home for violating the care standard established in the Federal Nursing Home Reform Act. *Talevski by next friend Talevski*, 6 F.4th, at 713. The first factor states that “Congress must have intended that the provision in question benefit the plaintiff.” Here the Court evaluated whether Congress intended Sections 1396r(c)(1)(A)(ii) and 1396r(c)(2)(A) to benefit nursing-home residents. *Id.* at 718. The Court determined that in fact Congress did intend nursing homes residents to benefit as Section (c) explicitly uses the “language of rights.” *Id.* The Court states, “we do not know how Congress could have been any clearer.” *Id.* The Court then addressed the additional hurdle to satisfy the first *Blessing* factor established in *Gonzaga*. 536 U.S. at 282.

In *Gonzaga*, the Court identifies critical language required to show Congress intended to benefit the plaintiff. *Id.* The Court in *Talevski* states that “the language chosen by Congress contain[s] exactly the type of ‘rights-creating language’ *Gonzaga* described as critical: they set forth “the rights of each resident” and appear under the “specified rights” heading of 42 U.S.C. § 1396r(c).” *Talevski*, 6 F.4th at 718. Therefore, the Court was satisfied that the first factor was met by both the standard applied in *Blessing* and *Gonzaga*.

Defendant VCR argued that the statute is not individually focused because the protections at issue serve as only directives to nursing facilities and physicians. *Id.* The Court disagreed and found VCR had completely ignored the language used by Congress in drafting Sections 1396(c)(1)(A)(ii) and 1396r(c)(2)(A). Further, the Court cites to *Anderson v. Ghaly*, in stating that “[i]t has never been a requirement that a statute focus solely on individuals, to the exclusion of all others, to demonstrate congressional intent to create a statutory right.” 930 F. 3d 1066, 2074 (9th Cir. 2019); *Talevski*, 6 F.4th at 719. Ultimately, the Court, without hesitation, concluded that the first *Blessing* factor was met. *Talevski*, 6 F.4th at 719.

After finding for the plaintiff on the first *Blessing* factor, the Court turned to the second factor, which requires that the “plaintiff demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence.” *Id.* The Court found that Sections 1396r(c)(1)(A) and 1396r(c)(2)(A) do not contain such flaws as “it does not take a medical review board to determine whether these rights have been violated.” *Id.* The Court goes on to rip apart VCR’s argument that FNHRA’s use of the unidentified words “protect”, “promote”, “discipline”, and “convenience” in Section 1396r(c)(1)(A) make the statute vague and

amorphous in enforcement. The Court finds this to be an invalid argument as “these are focused, straightforward inquiries that agencies and courts are well equipped to resolve.” *Id.* Therefore, the Court closed the second factor analysis finding for *Talevski*. *Id.*

The last *Blessing* factor, “whether the provision giving rise to the asserted right is couched in mandatory rather than precatory terms,” was determined to be conclusively met. *Id.* The Court found that with a common sense reading the statute states “must protect,” “must allow,” “must not transfer,” etc., “which is a clear conclusion of mandatory rather than precatory language.” *Id.*

Based on their analysis of the three *Blessing* factors, the Court was satisfied with the plaintiff’s argument for each and determined the plaintiff’s right is presumptively enforceable under Section 1983. *Id.* But, a defendant may “rebut this presumption only by ‘showing that Congress specifically foreclosed a remedy under § 1983 ... expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.’” *Id.* at 720; *Gonzaga*, 536 U.S. at 284.

To rebut this presumption, VCR argued that the annual standard survey, the authority given the Secretary of Health and Human Services, and the statutory language providing for “fair mechanism... for hearing appeals on transfers” and “promote efforts by the facility to resolve grievances the resident may have” are all evidence of a comprehensive enforcement scheme. *Id.* at 721. The Court rejected this argument. *Id.* The Court stated, “this is not the type of comprehensive enforcement scheme, incompatible with individual enforcement.” *Id.* Furthermore, the Court concluded that VCR failed to point to any type of “unusually elaborate, carefully tailored, and restrictive enforcement schemes” that Section 1983 claims would frustrate. *Id.*; *Blessing*, 520 U.S. at 347 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)).

The Court concludes by:

“Our sister courts have agreed that FNHRA confers such rights. See *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520, 524–25, 527 (3d Cir. 2009); *Anderson v. Ghaly*, 930 F.3d 1066, 1074 (9th Cir. 2019); cf. *Concourse Rehabilitation & Nursing Center Inc. v. Whalen*, 249 F.3d 136 (2d Cir. 2001) (section 1396r(b)(4)(A) “is obviously intended to benefit Medicaid beneficiaries” and thus does not entitle health care providers to bring suit under section 1983). *Id.*

Therefore, the Seventh Circuit Court of Appeals held that the District Court for the Northern District of Indiana erred in dismissing the matter for failure to state a claim. The judgment of the district court was reversed and remanded.

WRIT OF CERTIORARI TO THE SUPREME COURT

On November 23, 2021, HHC appealed on writ of certiorari to the U.S. Supreme Court seeking review to clarify the validity of a private right of action under FNHRA. As HHC requested the appeal, dozens of amicus curiae briefs were submitted in support of both parties to the case. On May 2, 2022, the United States Supreme Court granted cert. The Supreme Court’s decision surprised many, as the courts have largely found a way to navigate the *Blessing* test and have figured out which provisions of Medicaid are enforceable in federal court and which ones are not.

AMICUS BRIEFS

Following the appeal to the Supreme Court, amicus briefs in support of both parties flooded in, pointing to the gravity of the situation. The State of Indiana filed a brief joined by several other states, supporting Marion County and noting that allowing private rights of action can upset the dynamics of the state and federal administration of grant programs. *Brief of Indiana, Alabama, Alaska, Kentucky, Mississippi, and Nebraska as Amici Curiae in Support of Defendants-Appellees, Talevski v. Health & Hosp. Corp.*, 6 F.4th 713 (7th Cir. 2021). No. 2:19-CV-00013, 2021 Lexis 2281. The American Health Care Association and Indiana Health Care Association also filed an amicus brief supporting the county, arguing that Congress did not intend to create a private right of action against public actors under Section 1983. *Brief of Amici Curiae Indiana Health Care Association, Illinois Health Care Association, and Wisconsin Health Care Association, Inc., Talevski v. Health & Hosp. Corp.*, 6 F.4th 713 (7th Cir. 2021), No. 20-1664, 2021 Lexi 2198. The brief suggests it would create disparate treatment because private entities are not subject to damages under laws governing nursing facility participation in Medicare and Medicaid programs. Therefore, public actors would be disparately affected. Robert M. Kerr, in support of HHC, asserts that reading implied rights into Section 1983 goes beyond the scope of judicial interpretation and threatens the balance of powers between the judiciary and legislature. *Brief of Robert M. Kerr, Director of South Carolina Department of Health and Human Services as Amicus Curiae in Support of Petitioners, HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, et al., Petitioners, v. Gorgi TALEVSKI, by His Next Friend Ivanka Talevski, Respondent*, 2022 WL 3006274. Numerous briefs were filed to advocate for granting a private right of action under the FNHRA. Some of the avenues of support were via the National Health Law Program (NHeLP), other advocacy organizations, professors and scholars, population groups (including the AARP, American Cancer Society and Bazelon Center), provider groups (including public hospitals and community health centers), and federal officials (former HHS officials and former / current members of Congress). The amicus briefs filed on behalf of *Talevski* argue that FNHRA is the exact type of Medicaid right enforceable under Section 1983 and, more broadly, that if

the court were to reverse roughly 50 years of precedent and eliminate access to Section 1983 in cases involving systemic state violations of federal rights secured in Spending Clause programs such as Medicaid, such a decision would leave beneficiaries and providers unable to protect themselves against injuries caused by ongoing violation, such as the loss of coverage or payment. House Speaker Nancy Pelosi and other high-profile Democrats filed an amicus brief adding that a holding in favor of HHC would leave federal-state programs with “modest oversight” and would “egregiously undermine Congress’ purpose in enacting these statutes.” *Brief of Toby S. Edelman as Amicus Curiae in Support of the Respondent Talevski v. Health & Hosp. Corp.*, 6 F.4th 713 (7th Cir. 2021), No. 20-1664, 2021 Lexi 2198. The Supreme Court heard oral argument on November 8, 2022.

POTENTIAL OUTCOME/IMPLICATIONS

Not only are we waiting for a decision, but it is unclear how narrow or wide the approach of the Court will be. A narrow decision could only consider whether the Section 1983 claims are available for the feature of the Medicaid Act. Another possibility that would resemble a broader conclusion would be answering the question of whether Section 1983 rights of action are ever available in spending programs, which could have a huge effect on federal civil litigation because of the numerous rights that could be privately enforced if suits were to be allowed against programs created by Spending Clause legislature. For example, suits could be filed to enforce rights under the Children’s Health Program and the Supplemental Nutrition Assistance Program (SNAP), both programs created under the Spending Clause. The scope of this decision will be just as important as the decision itself.

The long-term care industry should pay close attention as a shift from public to private care could be on the horizon if the Court rules in favor of *Talevski*.

MOVING FORWARD IN THE LONG-TERM CARE INDUSTRY

The long-term care industry has been flushed with litigation on hot button issues that could send the industry into a spiral of litigation. Another blow to the protection of the long-term care industry came as the United States Supreme Court denied cert for an Eighth Circuit decision that upheld a federal rule limiting the use of arbitration agreements for new residents of nursing homes. *Northport Health Services of Arkansas, LLC v. United States HHS*, Docket No. 20-1799, 2021 U.S. App. LEXIS 36979 (8th Cir. Dec. 14, 2021). In short, the ruling stated that nursing homes cannot make signing onto an arbitration agreement a prerequisite for admission. *Id.* Furthermore, they must ensure that residents understand the terms before signing, they must keep copies for five years, and they must give new residents 30 days to rescind the agreement after signing. *Id.*

With the strict requirements surrounding arbitration language and the potential for the litigation of private rights surrounding the FNHRA, the long-term care industry could be looking at a litigious nightmare ahead.

ALLOCATING RISK FOR RUGGED RACES, PUMPED UP PARTIES, AND OTHER RECREATIONAL ACTIVITIES: EVALUATING EXCULPATORY CLAUSES AFTER JUSTICE & RUGGED RACES

BY PATRICK H. O'NEILL III AND SAMUEL H.J. SCHULTZ

Exculpatory clauses exist to allocate risk between contracting parties and are especially commonplace for physical activities and activities involving children. Exculpatory clauses allow participants and their guardians to acknowledge certain risks related to the activity and waive any right to sue related to a potential injury suffered during the activity. Exculpatory clauses and the limited liability they provide are essential for the financial viability of event operators and activity organizers.

Injured plaintiffs often challenge the enforceability of exculpatory clauses or attempt to plead around enforceable exculpatory clauses. And the language of the clauses themselves varies widely depending on the industry or activity of the organizer. The frequent legal challenges and inconsistent language have resulted in a patchwork of caselaw. Two decisions in 2022—the Minnesota Supreme Court's decision in *Justice v. Marvel, LLC*, 979 N.W.2d 894 (Minn. 2022) and the 8th Circuit's decision in *Anderson v. Rugged Races, LLC*, 42 F.4th 955 (8th Cir. 2022)—have in some ways contributed to this uncertainty and may significantly impact the landscape of enforceable exculpatory clauses and future litigation.

EXCULPATORY CLAUSES GENERALLY

Exculpatory clauses are valid and enforceable under Minnesota law. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 922–23 (Minn. 1982). However, such clauses are disfavored and must be “strictly construed against the benefited party” because they “exonerat[e] a party from liability.” *Id.* at 923. As a result,

An exculpatory clause may be unenforceable if (1) it is ambiguous in scope or purports to release a party from liability for intentional, willful, or wanton acts; (2) there was a disparity of bargaining power between the parties to the agreement; or (3) the type of service being offered or provided by the exculpated party is either a public or an essential service. *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827 (Minn. Ct. App. 2001).

Since *Spa Petite*, Minnesota courts have often grappled with the scope or alleged ambiguity of individual exculpatory agreements. In 2013, in an apparent effort to clarify this

Allocating Risk continued on page 26



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growing body of caselaw, the legislature enacted Minn. Stat. § 604.055, which provides:

An agreement between parties for a consumer service, including a recreational activity, that purports to release, limit, or waive the liability of one party for damage, injuries, or death resulting from conduct that constitutes greater than ordinary negligence is against public policy and void and unenforceable.

The agreement, or portion thereof, is severable from a release, limitation, or waiver of liability for damage, injuries, or death resulting from conduct that constitutes ordinary negligence or for risks that are inherent in a particular activity.

Minn. Stat. § 604.055, subd. 1. Since its enactment, Minnesota courts have never meaningfully interpreted the statute. And § 604.055 did not purport to create any independent cause of action.

Instead, Minnesota courts continue to rely on the *Spa Petite* line of cases and scrutinize each release based on its specific language. Generally, exculpatory clauses that expressly referred to claims of “negligence” were considered enforceable because such clauses were construed to be limited to claims of ordinary negligence. See *Spa Petite*, 326 N.W.2d at 922–23; *Anderson v. McOskar Enters. Inc.*, 712 N.W.2d 796, 801 (Minn. Ct. App. 2006) (enforcing waiver of claims involving “any act or omission, including negligence”); *Malecha v. St. Croix Valley Skydiving Club, Inc.*, 392 N.W.2d 727, 728 (Minn. Ct. App. 1986) (enforcing waiver of claims involving “any negligence implied or otherwise”); see also *Beehner*, 636 N.W.2d at 825–27; *Myers v. Lutsen Mountains Corp.*, 587 F.3d 891, 893 (8th Cir. 2009) (enforcing waiver of claims involving any “NEGLIGENT ACT OR OMISSION”).

In an attempt to plead around this developing caselaw, plaintiffs often make claims for gross negligence or greater than ordinary negligence where an otherwise enforceable exculpatory clause was involved. But Minnesota common law recognizes only one civil claim for negligence. See *Peet v. Roth Hotel Co.*, 253 N.W. 546, 548 (Minn. 1934) (“The doctrine that there are three degrees of negligence—slight, ordinary, and gross—does not prevail in this state.” (quotation omitted)). As a result, courts are only required to consider a civil claim beyond ordinary negligence where directed to do so by a statute or a contract. See, e.g., *State v. Bolsinger*, 21 N.W.2d 480, 484 (Minn. 1946) (applying a criminal negligence statute), *overruled on other grounds by State v. Engle*, 743 N.W.2d 592 (Minn. 2008). In the past, this meant those valid and enforceable exculpatory agreements that targeted “negligence claims” barred all claims sounding in

negligence. For example, in *Doub v. Life Time Fitness, Inc.*, an injured plaintiff commenced suit, alleging gross negligence, after signing an exculpatory clause that released claims related to “any negligence by Life Time.” No. A17-0322, 2017 WL 4341814, at *1 (Minn. Ct. App. 2017). The district court dismissed the claim at the pleading stage, and the court of appeals affirmed, finding that the plaintiff could not “side step the exculpatory clause by alleging something greater than ordinary negligence.” *Id.* at *5 (quotation omitted). In doing so, the court noted that “a claim for gross negligence is not recognized as a distinct cause of action, separate from a cause of action for ordinary negligence. Instead, a cause of action for negligence is recognized, and what constitutes ordinary care is determined by the circumstances.” *Id.* at *4.

As set forth in *Doub* and until recently, an exculpatory clause limited to any and all claims of negligence was valid and enforceable against claims sounding in any level of negligence, from ordinary to gross. However, the *Rugged Races* and *Justice* decisions indicate that courts are revisiting and reconsidering the scope of liability waivers and greater-than-ordinary negligence as a separate and actionable claim.

ANDERSON V. RUGGED RACES & “GREATER THAN ORDINARY NEGLIGENCE”

In *Rugged Races*, the plaintiff commenced suit in federal district court alleging that she had suffered an injury due to Rugged Races’s gross negligence and alleged careless and reckless conduct related to the Rugged Maniac event held at Wild Mountain in 2016. 42 F.4th at 957. The Rugged Maniac event is an adventure race including 26 obstacles. *Anderson v. Rugged Races LLC*, 496 F. Supp. 3d 1270, 1274 (D. Minn. 2020), *aff’d*, 42 F.4th 955 (8th Cir. 2022). The Rugged Maniac is, by design, an extreme and challenging event. Thousands of people participate in Rugged Maniac events around the country each year, and, as a result, injuries are not uncommon. *Id.* at 1273. All Rugged Maniac participants, including the plaintiff, were required to sign and execute a participant agreement twice prior to attempting to complete the race course. *Rugged Races*, 42 F.4th at 957. By signing the agreement, each participant acknowledges the extreme nature of the event and releases claims for negligence:

[T]he Event is a serious test of my physical and mental limits that carries with it inherent risks of physical injury” and that “(1) I understand the nature of the Event (2) I understand the physical and mental demands that this activity will place upon me; and (3) I understand that I may be injured by participating in the Event. I hereby assert that I knowingly assume all of the inherent risks of the activity and take full responsibility for any and all damages, liabilities, losses, or expenses that I incur as a result of participating in the Event.

I forever waive, release, covenant not to sue, and discharge Rugged Races LLC...from any and all claims from the INHERENT RISKS of the Event or the ORDINARY NEGLIGENCE of Rugged Races LLC...that I may have arising out of my participation in the event. *Id.*

It was undisputed that the plaintiff signed and executed the participant agreement on two occasions prior to the race. *Id.* The plaintiff was later injured after attempting an obstacle that involved jumping from an elevated platform into a pit of water and claimed her foot struck a rock, causing her heel to fracture. *Id.*

Rugged Races moved for summary judgment on the grounds that the plaintiff’s gross negligence claim was barred as a matter of law and that there was no evidence to support a finding of any greater-than-ordinary negligence. The district court determined that, because the exculpatory clause applied only to “ordinary negligence,” it was enforceable but required the court to consider the varying degrees of negligence, ranging from ordinary to gross. *Rugged Races*, 496 F. Supp. 3d at 1277. In so finding, the court determined that

there is room on the spectrum between negligence that is “ordinary” and negligence that is “gross.” For example, negligence that is great (but not “very great”) or somewhat higher (but not “substantially higher”) than ordinary negligence would qualify as greater-than-ordinary negligence, even though it would not reach the level of gross negligence. *Id.*

Even after discussing this spectrum of negligence, the court concluded that there was insufficient evidence to determine that Rugged Races had notice “far enough in advance of her injury to have taken preventative action” or failed to follow any of their own internal procedures. *Id.* at 1280.

On appeal, the Eighth Circuit affirmed, assuming without deciding that the district court’s “spectrum” of negligence approach was correct and finding that “Anderson failed to establish greater-than-ordinary negligence as a matter of law. Accordingly, her negligence claims are waived by the valid and enforceable exculpatory clause[.]” *Rugged Races*, 42 F.4th at 962.

The *Rugged Races* decisions demonstrate that exculpatory clauses that specify ordinary negligence remain valid and enforceable and that plaintiffs attempting to plead around—and prove—claims for greater than ordinary negligence must satisfy a high bar. However, it remains unclear what

actions or inactions could constitute greater than ordinary or gross negligence.

JUSTICE & “ANY AND ALL CLAIMS”

Soon after *Rugged Races* was decided, the Minnesota Supreme Court re-examined the boundaries of exculpatory clauses more generally in *Justice v. Marvel, LLC*, 979 N.W.2d 894 (Minn. 2022). In *Justice*, the plaintiff brought suit against the operator of an “inflatable amusement play area” for injuries he sustained as a child, including skull fractures and a traumatic brain injury. *Id.* at 896–97. Years after the injury, Justice sued in his individual capacity, alleging negligence claims related to the operation of the bounce house. *Id.* at 897.

To prevail on his claims, Justice was required to challenge the enforceability of the exculpatory clause contained in the liability waiver executed by his mother at the time of the injury. This waiver included the following exculpatory clause, in which Justice’s mother agreed, on his behalf, to

release and hold harmless MARVEL, LLC . . . from and against any and all claims, injuries, liabilities or damages arising out of or related to [Justice’s] participation in any and all Pump It Up programs, activities, parties, the use of the play area and/or inflatable equipment. *Id.* at 896.

The waiver also acknowledged the “inherent risks” associated with the inflatable equipment and that Justice and his mother assumed such risks. *Id.* at 897.

Marvel moved for summary judgment in the district court, arguing that this waiver was enforceable and precluded Justice’s negligence claim. *Id.* The district court granted summary judgment based on its conclusion that the waiver was enforceable and unambiguous. *Id.* The court of appeals affirmed. *Justice v. Marvel, LLC*, 965 N.W.2d 335, 349 (Minn. Ct. App. 2021). Although the court of appeals determined the waiver was overly broad in that it purported “to release claims of both ordinary negligence and greater-than-ordinary negligence,” through the “any and all claims” language, it affirmed summary judgment because Justice’s claim was only for “ordinary negligence.” *Id.* at 347–48.

The Minnesota Supreme Court took an expanded scope of review and chose to “define the appropriate standard by which to judge exculpatory provisions.” *Justice*, 979 N.W.2d at 898. In doing so, it recognized that the issue of “how strict construction applies” to an exculpatory clause purporting “to release all claims of liability without specific reference to negligent acts” is one of first impression. *Id.* at 899. The court reviewed existing precedent applying “strict construction” to indemnity clauses and found that because

indemnity clauses “must include an express provision that indemnifies the indemnitee for liability occasioned by its own negligence,” and that “such an obligation will not be found by implication,” this same standard should apply equally to exculpatory waivers. *Id.* (quoting *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 417 (Minn. 2018)).

The *Justice* court held that, “both indemnity clauses and exculpatory clauses are subject to the same standard of strict construction.” *Id.* at 900. It reached this conclusion for three reasons. First, previous precedent suggesting indemnity clauses and exculpatory clauses were subject to different standards “did not provide any guidance” as to “how exculpatory clauses are to be judged,” leaving the issue open to further refinement. *Id.* (citing *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 792 n.6 (Minn. 2005)). Second, the rationale underlying the strict construction of indemnity clauses—that the clauses are subject to heightened scrutiny because they may “shift liability to innocent parties”—also applies to exculpatory clauses in that exculpatory clauses may “completely bar[] recovery for an injured party,” making the injured party bear the liability of the negligent. *Id.* at 900–01 (quoting 57A Am. Jur. 2d *Negligence* § 44 (2022)). And third, because both indemnity and exculpatory clauses may shift liability onto the injured party and are disfavored, the *Justice* court determined “indemnification clauses and exculpatory clauses are not so distinguishable as to require different analyses.” *Id.* at 901.

As made clear in the *Justice* decision, “[t]o withstand strict construction,” an exculpatory clause “must use specific, express language that clearly and unequivocally states the contracting parties’ intent, regardless of whether the provision is so broad that it necessarily includes the released party’s own negligence.” *Id.* at 901–02 (quotations omitted). And because Marvel’s waiver failed to “specifically provide that it releases Marvel from liability for its own negligent acts,” did not “refer to negligence or Marvel’s own acts or omissions,” and did not state that the waiver “was releasing Marvel for Marvel’s own conduct, whether negligent or intentional” it was overbroad and unenforceable. *Id.* at 902. Noting further that “[o]perator negligence is the type of risk that this court requires to be explicitly rather than implicitly waived,” the *Justice* court concluded that “the provision—strictly construed—does not release Marvel from liability for its own negligence.” *Id.*

The *Justice* decision will have lasting implications for all businesses or persons who seek the protections afforded by exculpatory clauses. Courts applying “strict construction” as articulated in *Justice* will focus on whether the exculpatory clause “clearly and unequivocally” states that the claims being released are limited to the negligence of the released party.

The Minnesota Supreme Court in *Justice* mandated that exculpatory clauses must expressly, clearly, and unequivocally state that the claims being released include liability for the released party’s own acts and omissions to withstand “strict construction.” After *Justice*, courts will place a greater emphasis on the particular language used in addition to considering the nature of the activity as they work to apply this freshly articulated standard. As a result, business owners may need to re-evaluate and revise their liability waivers to clearly and unequivocally release themselves from liability arising from their own acts and omissions, including from their own negligence.

For its part, the *Rugged Races* decision has added some clarity: an exculpatory clause expressly waiving liability for “ordinary negligence” is valid and enforceable against negligence claims, but does not bar a claim for gross or “greater than ordinary” negligence. However, what constitutes “greater-than-ordinary negligence” remains an extremely high and as yet undefined standard.

When read together, the *Rugged Races* and *Justice* decisions indicate that it may be time to revisit and revise existing liability waivers and for event operators to expect an increasing number of lawsuits alleging levels of negligence across the “spectrum” from ordinary to gross.

TAKEAWAYS

DRI CORNER

The Voice of the Defense Bar

BY JESSICA SCHWIE

KENNEDY & GRAVEN, CHTD

MDLA DRI State Representative



Hello from DRI! DRI leaders were pleased to have an opportunity to recently work with the MDLA Amicus Committee on briefing regarding the discoverability of litigation financing to the Minnesota Supreme Court. DRI's Center for Law and Public Policy had a white paper addressing cases and nationwide legal approaches to the matter of third-party litigation funding that provided valuable information for persons considering and arguing these matters. Interested persons can find more at DRI's website under the Center's page and even sign up for email updates on the Center's activities: <https://www.centerforlawandpublicpolicy.org/center>.

Also, on the docket this past quarter was the sharing of Wellness Committee resources with MDLA leaders. The MDLA is considering forming a Wellness Committee. DRI, which created a similar committee a few years ago, put together an informational packet that can be used by state defense organizations like MDLA to get a committee going. While we always seem to find a way to roll in fun wellness activities at MDLA events, it never hurts to take a look at other fresh ideas for ways of spending time reconnecting with one another.

In that vein, I was happy to have my own personal experience of connecting with both MDLA and DRI members and resources to prepare for recent expert depositions in a matter. I truly treasure vicarious legal research and practice pointers from my esteemed colleagues. The legal issue itself was not so novel, but the twist being taken on it in my case, together with the experts being put up by the plaintiff, made the situation novel. I was well armed for the depositions and subsequent Daubert motion after consulting with DRI's expert database, fellow DRI members, and fellow MDLA members. Thank you to all helping to keep the playing field even in the bar.

I am closing out my publication corner tonight on blustery cold winter evening while under a winter storm warning. I am thankful for the return to face-to-face litigation, but the flexibility of the new tools that developed in the remote era of the recent years' passed are welcomed. An in-person deposition that had to be cancelled in the past can now be quickly and smoothly switched to remote means. Via zoom hearings, I have seen more judges across the state and had more scheduling conferences in the last few months than I did during the in-person years. The conferences are short and sweet but provide meaningful connection for the parties with each other and with the judiciary and sensible litigation plans have resulted. In closing, I look forward to seeing you at a few of the DRI events coming up in the next quarter.

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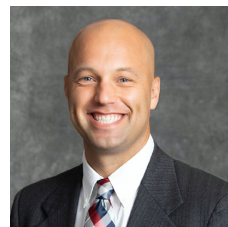
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MDLA CONGRATULATES—SEND US YOUR VICTORIES!

The “MDLA Congratulates” column recognizes significant defense victories at summary judgment, trial, or appeal by MDLA members. To be included in the next edition, send a short, one-paragraph summary of the case including the MDLA member attorneys involved, the type of victory, and the issues presented to director@mdla.org by April 1, 2023. Inclusion in the MDLA Congratulates column is subject to space limitations, and the MDLA Editorial Committee reserves the discretion to determine which cases will be included in the column and/or to shorten submissions as appropriate.

Soule & Stull welcomed Bethany Anderson as an associate attorney in September 2022. Bethany will focus her practice on civil litigation, including product liability, commercial, medical negligence, and environmental. A graduate of the University of Minnesota Law School, Bethany clerked at the Minnesota Court of Appeals in 2020-2022.

Stephanie Angolkar of Iverson Reuvers and Tim Masterson of McCollum Crowley P.A. obtained a defense verdict in Hennepin County District Court on November 21, 2022 in a products liability action. The plaintiff alleged she was injured by a pressure cooker. Plaintiff requested nearly \$31 million from the jury. The jury applied Texas substantive law to address whether there was a defect, finding no manufacturing defect, design defect, or design in labeling or warnings. The jury assigned 92.5% negligence to Plaintiff and 7.5% negligence to the Defendant Seller.



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