PHYLLIS TEBAULT, PATRICIA DELAVALLADE, ALMERIA WILLIAMS, ANTHONY JACKSON, EILEEN JONES, ZAKIYA JACKSON, AND DORIS MONCONDUIT, INDIVIDUALLY AND AS HEIRS OF THELMA JACKSON	NO. 18-C-539 FIFTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

VERSUS

EAST JEFFERSON GENERAL HOSPITAL, DR. ARZU HATIPOGLUGREEN, DR. RENE DEBOISBLANC, AND DR. CHRISTIAN SCHEUERMANN

March 25, 2019

Susan Buchholz
First Deputy Clerk

IN RE EAST JEFFERSON GENERAL HOSPITAL

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE MICHAEL E. KIRBY, AD HOC, DIVISION "E", NUMBER 708-607

Panel composed of Judges Fredericka Homberg Wicker, Jude G. Gravois, and Stephen J. Windhorst

WRIT GRANTED; RELIEF DENIED

This matter comes before us on supervisory review of the district court's August 31, 2018 judgment denying relator's, East Jefferson General Hospital's, "Motion for Summary Judgment Regarding Immunity." As the issue reviewed here presents to the Court a question of law *res nova*, this writ is granted. However, for the reasons fully discussed below, we find no error in the district court's judgment and deny relief.

This matter arises from the August 31, 2007 death of Thelma Jackson which occurred while she was a patient at East Jefferson General Hospital (EJGH). Her heirs timely filed a petition for damages on November 18, 2011, stating claims against EJGH, Dr. Christian Scheuermann, and two other physicians arising out of malpractice. In an amended petition, plaintiffs asserted, in relevant part, an additional cause of action against EJGH for negligently credentialing Dr. Christian Scheuermann.[1]

[1] This is the second occasion in this case on which we have been called upon to address the district court's action on a motion for summary judgment filed by relator. *See* 13-C-722 (where we opined "summary judgment in favor of East Jefferson General Hospital is not appropriate at this stage of the proceedings.").

After filing its answer and affirmative defense, EJGH filed a "Motion for Summary Judgment Regarding Immunity," arguing that in this case, in which the plaintiffs seeking redress are the children of a deceased patient, defendant hospital and physician are immunized from damages as to the negligent credentialing claim under La. R.S. 13:3715.3(C) and 42 U.S.C. § 11101, the federal Health Care Quality Improvement Act (HCQIA). On August 22, 2018, the district court heard argument on the motion, denying it based on the Louisiana Supreme Court's *Gauthreaux v. Frank*, 95-1033 (La. 6/16/95) decision cautioning against reading privileges afforded hospitals in La. R.S. 13:3715.3 too broadly,[2] specifically stating, "the Motion for Summary Judgment is denied on the basis of the *Gauthreaux* decision that I just read." It is from this ruling relator seeks supervisory review.

In this writ application, EJGH asserts that, as La. R.S. 13:3715.3 and 42 U.S.C. § 11101 *et. seq.* (HCQIA) provide EJGH immunity from damages for plaintiffs' claims against it arising from negligent credentialing, the district court committed an error of law when it denied EJGH's current motion for summary judgment as to those specific claims. EJGH argues that the credentialing process is defined by the statutes and jurisprudence as "peer review" and that both statutes grant immunity to the hospital and others for peer review, which, by statute includes credentialing. Thus, EJGH argues the hospital is entitled to have the negligent credentialing cause of action against it dismissed with prejudice.

While summary judgment is favored, movant bears the burden of proving at the outset not only that there are no genuine issues of material fact, but also that it is entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1). The party seeking immunity pursuant to statute, here relator, also bears the burden of proving that the statutory immunity in question applies to the particular set of facts currently at issue. *See generally, Champagne v. American Alternative Insurance Corporation*, 12-1697 (La. 3/19/13), 112 So.3d 179, 183.

The question before us is simply, does either the 1986 HCQIA or La. R.S. 13:3715.3 immunize hospitals from suits brought by or on behalf of patients alleging negligent credentialing, i.e., that the hospital negligently afforded the opportunity to the health care professional to engage in patient care within the hospital. As the issue comes before us as a matter of first impression, we are called upon to engage in the statutory interpretation of the HCQIA and La. R.S. 13:3715.3.

When interpreting a statute, the paramount consideration is ascertainment of the legislative intent and the reason or reasons which prompted the legislature to enact the law. *Wiltz v. Bros. Petroleum, L.L.C.*, 13-332 (La. App. 5 Cir. 4/23/14), 140 So.3d 758, 784, citing *State v. Johnson*, 03-2993 (La. 10/19/04), 884 So.2d 568, 575. As a general rule, statutory interpretation begins with the language of the statute itself. *David v. Our Lady of the Lake Hosp., Inc*., 02-2675 (La. 7/2/03), 849 So.2d 38, 46. La. R.S. 1:3 directs that words and phrases in a statute "shall be read with their context and shall be construed according to the common and approved usage of the language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

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[2] *Gauthreaux v. Frank*, 95-1033 (La. 6/16/95), 656 So.2d 634 (per curiam).

When the wording of a statute is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit. La. R.S. 1:4. Nevertheless, the legislative history of an act and contemporaneous circumstances may be helpful guides in ascertaining legislative intent. *Billeaudeau v. Opelousas Gen. Hosp. Auth.*, 16-0846 (La. 10/19/16), 218 So.3d 513, 516.

Common sense is also a permissible consideration in statutory interpretation, even when the statute is penal in nature or requires a strict construction for other reasons. *See and compare U.S. v. Picquet*, 963 F.2d 54, 56 (5th Cir. 1992), *cert. denied*, 506 U.S. 902, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992) (criminal statute) and *Haynes v. Mangham*, 375 So.2d 103, 105 (La. 1979) (adoption statute). When interpreting a law that must be strictly construed, courts should not interpret it in a way that makes it meaningless and ineffective. *Haynes*, 375 So.2d at 106, citing *In re Ackenhausen*, 244 La. 730, 154 So.2d 380 (1963).

As a general rule, statutes granting immunities or advantages to a special class in derogation of the general rights available to tort victims must be strictly construed against limiting the tort claimants' rights against the wrongdoer. *Williams v. Jackson Parish Hosp*., 00-3170 (La. 10/16/2001), 798 So.2d 921, 926 citing *Branch v. Willis-Knighton Medical Center*, 92-3086 (La. 4/28/94), 636 So.2d 211, 215, 217. Immunity statutes, therefore, are strictly construed against the party claiming immunity. *Weber v. State*, 635 So.2d 188, 193 (La. 1994). Any doubts as to the application must be construed against the application to a specific set of facts.

The federal qualified immunity provision was approved on November 14, 1986 and enacted as part of the 1986 Health Care Quality Improvement Act (HCQIA), providing states the opportunity to enact their own statutes which could be broader in scope. The HCQIA did not become effective in Louisiana until July 15, 1988. *See* La. Acts. No. 690 of 1988.

The purpose of both the federal and Louisiana statutes is to incentivize and protect physicians engaging in effective professional peer review thereby reducing medical malpractice, improving the quality of medical care, and preventing incompetent physicians' movements from state to state without disclosure of previous incompetent performance. 42 U.S.C. § 11101; *Granger v. Christus Health Central Louisiana*, 12-1892 (La. 6/28/13), 144 So.3d 736. The United States Supreme Court, in *Patrick v. Burget*, described the effects of the federal statute as it relates to the actions of peer-review bodies.[3] The Court stated that the federal statute "essentially immunizes peer-review action from liability if the action was taken 'in the reasonable belief that [it] was in the furtherance of quality health care.'" *Patrick v. Burget*, 486 U.S. 94, 106, 108 S.Ct. 1658, 1665, 100 L.Ed.2d 83, 95 n. 8 (1988). The Court pointed out that states are free to expand the scope of the state immunity statutes beyond the scope of the federal statute. *Id*.

Louisiana jurisprudence addressing the breadth of HCQIA and La. R.S. 13:3715.3(C) has been confined to physician filed suits against a credentialing

[3] In *Patrick*, a physician filed an antitrust action against the partners of a competing clinic after disciplinary proceedings which he alleged to be maliciously based, for the purpose of limiting competition. The partners alleged that as they were acting in the context of peer review, they were immune. The United States Supreme court reversed the Ninth Circuit, finding that the federal statute did not immunize the hospital, under the facts of that case.

institution or body in instances in which the institution has refused to credential or has suspended or revoked the physician's credentials or privileges.[4]

In *Smith v. Our Lady of the Lake Hospital*, 93-2512 (La. 7/5/1994), 639 So.2d 730, 742, a case in which a disciplined physician brought suit against the members of the medical peer review board and hospital which terminated his staff privileges, the Louisiana Supreme Court was called upon for the first time to address the breadth of La. R.S. 13:3715.3(C). The Court granted certiorari on the *res nova* issue presented to construe La. R.S 13:3715.3(C), and to enunciate an analytical framework to facilitate the pre-trial disposition of the applicability of the statutory immunity from liability it provides peer review committee members.[5] In that case, applying the rules of statutory interpretation and construction and applying conditional privilege analysis, the Court arrived at a narrow or restricted interpretation of the breadth of the state statute.

Evaluating the protections afforded by the state immunity statute, the Court recognized the statute's shared common purpose with the HCQIA to encourage the medical profession to police its own ranks, and honed in on the conflict between disgruntled disciplined doctors and peer review bodies, seeking to achieve balance between the need for effectiveness of peer review bodies in carrying out their task of protecting patients from less than competent physicians while protecting the rights of the disciplined doctor. *Id*. at 743.

As the Court explained, both the federal and state statutes were enacted because:

> The individual members of peer review committees are increasingly becoming the targets of legal activity directed against them by disgruntled doctors whose staff privileges have been suspended upon the recommendation of the committee.
>
> *Id.*

The Court turned for guidance and comparison in framing the limited and conditional nature of the statutory qualified immunity to the special-interest, conditional privilege recognized in defamation cases brought by disciplined physicians against peer review bodies and in analogous suits arising out of an employer-employee relationship. The Court pointed out that in each context "the conditional privilege is an affirmative defense provided by law for one who establishes that he made a statement '(1) in good faith (2) on a matter in which he had an interest or duty 3) to another person with a 'corresponding interest or duty.'" *Id*. citing *Madison v. Bolton*, 234 La. 997, 102 So.2d 433 (1958), and *Rouly v. Enserch Corp*., 835 F.2d 1127, 1130 (5th Cir. 1988). The Court pointed out that the conditional privilege applies to disciplined physicians' defamation

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[4] *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512 (La. 7/5/94), 639 So.2d. 730; *Gauthreaux v. Frank*, 95-1033 (La. 6/16/95), 656 So.2d 634; *Driscoll v. Stucker*, 04-0589 (La. 1/19/05), 893 So.2d 32; *Crafton, M.C. v River West Medical Center, et al*, 08-0348 (La. App. 1 Cir. 10/31/2008), 08-0349, 2008 WL 476337; *Manasra v. St. Francis Med. Ctr., Inc*., 33,312 (La. App. 2 Cir. 6/23/00), 764 So.2d 295; *Doe v. Grant*, 01-0175 (La. App. 4 Cir. 1/29/03), 839 So.2d 408; *Knatt, M.D. v. Hospital Service District No. 1 of East Baton Rouge Parish, et al*., No. 03-442 (U.S.D.C. M.D. La. 08/04/2005), 05-351, 2005 WL 8155168; *Rogers v. Columbia/HCA of Central Louisiana, Inc*., 96-2839 (U.S.D.C. W.D. La. 6/9/1997), 971 F. Supp. 229.

[5] The Court in *Smith* specifically did not interpret the HCQIA but did refer to the legislative purpose and function of the federal statute in analyzing La. R.S. 13:3715.3(C). *See Id*. at 742.

claims against peer review bodies because "a hospital's proper investigation of complaints about its physicians is necessary to ensure that its physicians are competent, and **the hospital's failure to investigate complaints could expose it to liability**," *citing Soentgen v. Quain & Ramstad Clinic, P.C.,* 467 N.W. 2d 73, 79 (N.D. 1991) (emphasis added) indicating that the qualified immunity, like the conditional privilege, is limited to suits brought by disciplined physicians against peer review bodies which have acted in good faith when investigating the physician.

The Court discussed the identical policy underpinnings of both the conditional privilege and the qualified immunity, "'the social necessity of permitting full and unrestricted communication concerning a matter in which the parties have an interest or duty, without inhibiting free communication in such instances by the fear that the communicating party will be held liable in damages if the good faith communication later turns out to be inaccurate.'" citing *Carter v. Catfish Cabin*, 316 So.2d 517, 522 (La. App. 2d Cir. 1975).

The Court in *Smith* gave no indication that either the privilege or the qualified immunity apply in the context of a patient suit against a health care institution for its alleged failure to properly investigate a physician before credentialing the physician. To the contrary, the underpinning of both is the protection of those who properly investigate from the ire of the investigated, not to protect those who fail to investigate from complaints of later victims of physician incompetency.[6]

In laying out the appropriate analytical framework required of the trial court and the trier of fact to address the peer review board members' affirmative defense of good faith and absence of malice, the Court reiterated the public policy behind the enactment of La. R.S. 13:3715.3(C); "…of encouraging good faith peer review and discouraging retaliatory suits by disciplined doctors." *Id*. at. 747.

In 1995, one year after the Court's decision in *Smith*, in its per curiam opinion in *Gauthreaux v. Frank*, 95-1033 (La. 6/16/95), 656 So.2d 634, the Supreme Court in a case which addressed the confidentiality provision contained in La. R.S. 13:3715.3(A), reiterated its general caution given the year before in the *Smith* case "against reading the privilege created by La. R.S. 13:3715.3 too broadly...."

In 2013 the Louisiana Supreme Court in *Granger, M.D. v. Christus Health Central Louisiana, et al.*, 12-1892 (La. 6/28/13), 144 So.3d 736 again granted certiorari in a 2003 case brought by a disciplined physician against the hospital which revoked his staff privileges to address the breadth of the limited immunity granted via both the Federal HCQIA and La. R.S. 13:3715.3(C).

Addressing first the purpose and function of the HCQIA, the Court stated,

> Congress enacted HCQIA to facilitate the frank exchange of information among professionals conducting peer review inquiries and to ensure that some minimal amount of information regarding a physician's previous

[6] At the time the Louisiana Supreme Court handed down the *Smith* decision, La R.S. 13:3715.3(C) provided a qualified immunity to only peer review committee members individually. Following the Louisiana Supreme Court's 1994 *Smith* decision, however, the legislature amended La. R.S. 13:3715.3 to apply to as well to the peer review committee, itself, as a body and to the health care institution on whose behalf the peer review committee acted. See La. Act No. 1073 of 1995.

> damaging or incompetent performance will follow the physician when he moves from state to state.

Id. at 747 (citations omitted). Further stating:

> The purpose of this legislation is to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior. **Under this law, hospitals and physicians that conduct peer review will be protected from damages in suits by physicians** who lose their hospital privileges, *provided* the peer review actions meet the due process and other standards established in the bill. House Report 99-903 of the Energy and Commerce Committee, 1986 U.S. Code Congressional and Administrative News 6384. HCQIA attempts to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action. Accordingly, Congress granted immunity from monetary damages to participants in properly conducted peer review proceedings, while preserving causes of action for injunctive or declaratory relief for aggrieved physicians.

Id. (Italics in original, bold emphasis added).

In neither *Smith* nor *Granger* did the Louisiana Supreme Court indicate that the qualified immunity afforded by the HCQIA and La. R.S. 13:3715.3 extends beyond suits brought by disciplined physicians against hospitals to suits brought by or on behalf of patients who are injured as a result of a hospital's negligent credentialing.

Likewise, in *Rogers v. Columbia/HCA of Central Louisiana, Inc.*, 971 F. Supp. 229, 236 (W.D. La. 1997), the United States District Court for the Western District of Louisiana, in a case in which a disciplined physician sued both the disciplining hospital and its peer review committee, the court, in granting summary judgment for defendants stated,

> This case requires the court to apply a maxim stated by the English philosopher John Donne: 'I observe the physician with the same diligence as he the disease.' We apply the ….HCQIA…, which establishes immunity for physician peer review committee actions in qualifying circumstances. **This suit is precisely the type that the HCQIA is intended to prevent….** (emphasis added).

Over the years, numerous negligent credentialing cases have been brought by or on behalf of patients. In none did a defendant raise or a court address the affirmative defense of qualified peer review immunity pursuant to either the HCQIA or La. R.S. 13:3715.3. While courts reached varying results as to whether negligent credentialing cases state a cause of action which arises within the Louisiana Medical Malpractice Act or in general tort, in no case was the qualified immunity affirmative defense raised by a defendant or addressed by a court.[7]

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[7] *Plaissance v. Our Lady of Lourdes Regional Medical Center, Inc.,* No. 10-348 (La. App. 3d Cir. 10/06/10) 47 So.3d 17 (In patient's suit against hospital alleging negligent credentialing, the Third Circuit found the patient's negligent credentialing claim arose in LMMA. Defendant raised no affirmative qualified immunity defense); *Dinnat v. Texada,* 09-665 (La. App. 3d Cir. 2/10/10) (The Third Circuit found patient's claim to allege negligent supervision rather than negligent credentialing, meaning the cause of action arose in LMMA. The Defendant asserted no qualified immunity affirmative defense); *Eusia v. Blanchard*, 04-1885 (La. App. 1 Cir. 2/11/05), 899

No Louisiana trial or appellate court has examined whether the federal or state immunity statute should be so broadly construed as to apply to patient claims against hospitals for negligent credentialing, nor has a trial court or appellate court addressed the notion that the immunity statutes extend to patient suits against the institution which credentialed the treating physician.

In 2016, in *Billeaudeau v. Opelousas General Hospital Authority*, 16-0846 (La. 10/19/16), 218 So.3d 513, a suit filed on behalf of a patient for medical malpractice and negligent credentialing, the Louisiana Supreme Court resolved the conflict between the Louisiana circuit courts as to whether negligent credentialing causes of action arise in general negligence or within the purview of the Louisiana Medical Malpractice Act. The Louisiana Supreme Court, with Justice Knoll as organ of the court, joined by Justices Hughes and Crichton, with Justice Weimer concurring, found that the cause of action for negligent credentialing sounds in general negligence rather than within the purview of the Louisiana Medical Malpractice Act.

In her discussion, Justice Knoll emphasized the trial judge's reasoning that through four separate bills filed between 2005 and 2008, the Louisiana Legislature sought unsuccessfully to amend the definition of malpractice to include negligent credentialing. *Id.* at 516-517. *See* 2005 House Bill No. 257 (HB257); 2006 House Bill No. 260 (HB 260); 2008 Senate Bill No. 509 (SB 509); 2008 House Bill No. 70 (HB 70).

Significantly, neither the majority opinion nor the dissents in the *Billeaudeau* case raised the possible application of the qualified immunity statute to a patient plaintiff's cause of action for negligent credentialing. Furthermore, it is unlikely that the Louisiana Legislature would have so diligently sought to move negligent credentialing into the LMMA tent with its cap on damages in the face of statutory immunity, if the legislature had already intended to immunize the defendant institutions and bodies from patient plaintiff's negligent credentialing suits when it enacted La. R.S. 13:3715 during the 1988 session or amended it in 1994.

After the Louisiana Supreme Court rendered the *Billeaudeau* decision on October 19, 2016, the circuit courts continued to address numerous patient-brought negligent credentialing claims. Again, in none of those cases did the defendant

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So.2d 41. (In plaintiff/patient's negligent credentialing case, the First Circuit looked to the date of patient's injury to determine whether the claim arose within the LMMA or was a general tort claim. No affirmative immunity defense was raised); *Bickham v. InPhynet, Inc.*, 03-1897 (La. App. 1 Cir. 9/24/04), 899 So.2d 15 (The First Circuit addressed which version of the LMMA statute applied to a defendant's prematurity exception in a plaintiff's suit for negligent credentialing and negligent supervision. The defendants asserted no qualified immunity defense); *Scott v. Dauterive Hosp. Corp.*, 02-1364 (La. App. 3 Cir. 4/23/03), 851 So.2d 1152 (Patient-plaintiff sued hospital alleging negligent credentialing as part of its various medical malpractice claims. The Third Circuit affirmed the jury's verdict for the defense with no discussion of either whether the negligent credentialing claim properly falls within the LMMA, or was a general tort claim, or whether there was a question of qualified immunity); *Scales v. Rapides Reg'l Med. Crt.,* 01-1147 (La. App. 3 Cir. 2/6/02), 815 So.2d 925. (The Third Circuit applied the doctrine of *contra non valentum* to patient's negligent credentialing claim, which it implied arose within the LMMA. Defendant asserted no qualified immunity defense); *Fusilier v. Dauterive*, 99-692 (La. App. 3 Cir. 12/22/99) 759 So.2d 821 (The Third Circuit affirmed trial court's grant of summary judgment as to patient's negligent credentialing claim brought within a medical malpractice suit. The defense raised no qualified immunity defense); *Gladney v. Sneed*, 32,107 (La. App. 2d Cir. 8/18/99), 742 So.2d 642 (The Second Circuit amended in part and affirmed as amended the jury's verdict in a patient's malpractice suit which included a negligent credentialing claim. Neither the nature of the cause of action (LMMA or general tort) nor an affirmative qualified immunity defense was addressed).

raise the affirmative qualified immunity defense.[8] Interestingly, in *Matranga v. Parish Anesthesia of Jefferson*, 17-73 (La. App. 5 Cir. 8/29/18), 254 So.3d 1238, while the defendant-hospital East Jefferson General Hospital, relator in the case before the court today, raised an exception of prescription, it did not raise an affirmative qualified immunity defense.[9]

A focused review of the fifty states' jurisprudence addressing the efficacy of the defense of immunity in suits brought by patients or their families against a health care institution for negligent credentialing of a treating physician reveals that the greatest number of states have not yet decided whether either the federal or particular state immunity statute applies in patient brought suits for negligent credentialing.[10] However, in most cases, courts have interpreted the federal or state statute to protect the health care institution from suits brought by disgruntled disciplined physicians.[11]

After a thorough review of both the Louisiana jurisprudence and legislative intent as to the enactment of the immunity provisions of the HCQIA and La. R.S. 13:3715.3(C) as it relates to hospital immunity, and jurisprudence from the other forty-nine states, as well as a *de novo* review of the record before us, we find that the federal and state immunity provisions do not provide EJGH immunity in patient-brought suits for causes of action arising from negligent credentialing of a healthcare professional. Therefore, the relief requested in relator's writ application is denied.

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[8] In the *Billeaudeau* case, 17-895 (La. App. 3 Cir. 4/18/18), 2018 La. App. LEXIS 753, after the Supreme Court rendered its 2016 opinion, the parties returned to the trial court for further pre-trial proceedings which resulted in a second appeal to the Louisiana Third Circuit Court of Appeal. Neither party, during this later phase of litigation, addressed to the trial court or the Louisiana Third Circuit Court of Appeal the issue of the breadth of La. R.S. 13:3715 and the HCQIA or the applicability of qualified immunity in a suit brought on behalf of a patient.

[9] *See also Crockerham v. Louisiana Medical Mutual Insurance Company*, 17-1590 (La. App. 1 Cir. 6/21/18), 255 So.3d 604.

[10] Nine of the fifty states found the immunity did not extend to patient brought negligent credentialing claims against a health care institution, twelve states found that the immunity did extend to patient brought suits, and twenty-nine states have not squarely ruled on the issue.

[11] The states which have found that the immunity extends to patient brought suits for negligent credentialing are: California, Delaware, Kansas, Maine, Mississippi, Missouri, New York, Ohio, South Carolina, Tennessee, Texas, and Utah. The states which found that the immunity does not extend to patient brought suits for negligent credentialing are: Alabama, Arizona, Colorado, Georgia, Idaho, Illinois, Michigan, Minnesota, and Rhode Island. The states which have not ruled on the issue are: Alaska, Arkansas, Connecticut, Florida, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See Appendix.

Negligent Credentialing and Hospital Immunity Across the Fifty States			
State	**Does the State Provide an Immunity?**	**Relevant Cases & Legislation**	**Additional Comments**
Alabama	No	*See Ex parte Qureshi*, 768 So.2d 374 (Ala.2000) (citing Const. Art. 1, §§ 10, 13; Code 1975, § 22–21–8)	"[The immunity] Statute ... did not unconstitutionally bar patient from prosecuting her claim against hospital for negligence in hiring and credentialing physician."
Alaska	Undecided	*But see* Alaska Stat. § 09.65.096; and *Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833 (Alaska2003), reh'g denied (07/10/03)	State statute grants immunity to hospitals under specific circumstances involving independent contractor physicians
Arizona	No	*Kopp v. Physician Grp. of Arizona, Inc.*, 244 Ariz. 439, 421 P.3d 149 (2018)	----------
Arkansas	Undecided	*But see Paulino v. QHG of Springdale, Inc.*, 2012 Ark. 55, 386 S.W.3d 462, 469–70 (2012)	"Because we decline to recognize a cause of action for negligent credentialing, we need not address NMC's claim of immunity under the Arkansas Peer Review Statute or the federal HQIA."
California	Yes	*Inland Empire Health Plan v. Superior Court*, 108 Cal.App.4th 588, 133 Cal.Rptr.2d 735 (2003); *see also* Cal. Gov't Code § 818.4 (West).	"Public entity health maintenance organization's (HMO) decision to credential physician was a discretionary one, and thus, HMO was immune from liability to patient for negligent credentialing, where among other things, HMO was called upon to determine whether physician met requirements for HMO reimbursements."
Colorado	No	*Hickman v. Catholic Health Initiatives*, 328 P.3d 266, 273 –274 (Colo. App.2013); *see also* Colo. Rev. Stat. § 12-36.5-203(2)	C.R.S.A §12-36.5-203: ("...nothing in this article relieves an authorized entity that is a healthcare facility ... of liability to an injured person or wrongful death claimant for the facility's independent negligence in the credentialing…").
Connecticut	Undecided	*But see Kenneson v. Johnson & Johnson, Inc.*, 3:14-CV-01184 MPS, 2015 WL 1867768 (D. Conn. Apr. 23, 2015); and *Neff v. Johnson Mem'l Hosp.*, 93 Conn.App. 534, 889 A.2d 921 (2006) (finding that no standard of care has been established in re neg.	----------

		credentialing such that it's impossible to find a breach)	
Delaware	Yes	*Svindland v. A.I. DuPont Hosp. for Children of Nemours Found.*, 05-0417, 2006 WL 3209953 (E.D. Pa. Nov. 3, 2006), unpublished	Implied immunity- nearly impossible to prove a negligent credentialing claim.
Florida	Undecided	*Insinga v. LaBella*, 543 So.2d 209, 211–14 (Fla.1989)	"In *Insinga v. LaBella*, 543 So.2d209, 211–14 (Fla.1989), the Supreme Court held that a hospital could be liable for negligently granting privileges to independent contractor doctors. The Court concluded hospitals have a duty to ensure that the doctors providing medical care have "sufficient skill and qualifications." *Maksad v. Kaskel*, 832 So.2d 788, 792 (Fla. Dist. Ct. App.2002) HOWEVER, the court in *Insinga* imposes liability under a theory of corporate negligence. In *Maksad* they discuss negligent credentialing but the court denies a motion for a directed verdict on the claim (after jury says hospital not liable) because plaintiff failed to prove proximate causation.
Georgia	No	*McCall v. Henry Med. Ctr., Inc.*, 250 Ga.App. 679, 551 S.E.2d 739 (2001), reconsideration denied, (07/19/01), cert denied, (01/09/02).	----------
Hawaii	Undecided	--------	----------
Idaho	No	*Harrison v. Binnion*, 147 Idaho 645, 214 P.3d 631 (2009), reh'g denied (08/20/09)	----------
Illinois	No	*Frigo v. Silver Cross Hosp. & Medical Center*, 377 Ill. App. 3d 43, 876 N.E.2d 697 (2007), *as modified* (Sept. 20, 2007) and appeal denied, 226 Ill. 2d 614, 317 Ill. Dec. 503, 882 N.E.2d 77 (2008).	----------
Indiana	Undecided	*But see Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824 (Ind. Ct. App.2000)	Did not directly address immunity; just recognized negligent credentialing claim against a hospital as a valid malpractice claim subject to the requirements of the state MMA
Iowa	Undecided	---------	----------

Kansas	Yes	*See McVay v. Rich*, 255 Kan. 371, 374–78, 874 P.2d 641 (1994); *see also* Kan. Stat. Ann. § 40-3403(h) (West) and Kan. Stat. Ann. § 65-442(b) (West)	The law is somewhat unclear here. In *McVay*, the Kansas Supreme Court held that the two statutes barred a claim of Med. Mal against a licensed hospital based on the rendering or failure to render professional services within the hospital by a physician who is licensed to practice medicine and who is covered under the Health Care Stabilization Fund if that physician is not an agent or employee of the hospital. The statutes highlighted purport to immunize med mal suits against hospitals for negligent credentialing but unclear (the notes reference *McVay* for not recognizing corporate negligence)
Kentucky	Undecided	*But see Lake Cumberland Reg'l Hosp., LLC v. Adams*, 536 S.W.3d 683 (Ky.2017), *reh'g denied* (02/15/18).	Does not recognize negligent credentialing as a cause of action.
Louisiana	Undecided	----------	----------
Maine	Yes, but depends on circumstances	Me. Stat. tit. 22 § 816 ─ "A private institution is immune from civil penalties and liability for any actions arising from … allegations of negligent hiring, credentialing or privileging, for services... in response to an extreme public health emergency" Me. Stat. tit. 14 § 8103 ─ "Except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages."	
Maryland	Undecided	---------	----------
Massachusetts	Undecided	*But see DeJesus v. Milford Reg'l Med. Ctr., Inc.*, 2012 Mass. Super. LEXIS 384	Discoverability of peer review and hiring decisions difficult, effectively heightening immunity for hospitals.
Michigan	No*	*Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663, 719 N.W.2d 1 (2006).	"the hospital does not fit within the protections afforded by the peer review immunity statute when it makes the ultimate staffing decision" *Suit was brought by doctor─ but still, defines immunity
Minnesota	No	*Larson v. Wasemiller*, 738 N.W.2d 300, 306-07 (Minn. 2007) reh'g denied (9/20/07)	----------
Mississippi	Yes, but depends	State hospitals are immune under Miss. Code. Ann. § 11-46-1 (West).	
Missouri	Yes	*LeBlanc v. Research Belton Hosp.*, 278 S.W.3d 201 (Mo. Ct. App. W.D. 2008)	Qualified, not absolute, immunity. The court addressed the issue of negligent credentialing through corporate negligence.

Montana	Undecided	*But see Brookins v. Mote*, 367 Mont. 193, 292 P.3d 347, (2012)	Court analyzes negligent credentialing claim under the consumer protection act. Finds negligent credentialing claim against hospital is a valid cause of action.
Nebraska	Undecided	-------	--------
Nevada	Undecided	--------	---------
New Hampshire	Undecided	--------	----------
New Jersey	Undecided	----------	----------
New Mexico	Undecided	*But see Diaz v. Feil*, 118 N.M. 385, 881 P.2d 745 (Ct. App.1994)	"No New Mexico case has addressed the issue of under what circumstances an injured party may invoke liability against a hospital for granting staff privileges or credentials to a physician."
New York	Yes	*Ortiz v. Jaber*, 44 A.D.3d 632, 633, 843 N.Y.S.2d 384 (2007).	Grants immunity as long as hospital is acting within its own bylaws
North Carolina	Undecided	See N.C. Gen. Stat. § 90-21-11(2) (2011); and N.C. Gen. Stat. § 90-21.12	Look at the "greater weight of evidence" that health care provider did not act in accordance with standard practices, otherwise not liable
North Dakota	Undecided	----------	----------
Ohio	Yes	*See* Ohio Rev. Code Ann. § 2305.251 (West); *See also Atwood v. UC Health*, 1:16CV593, 2018 WL 4110862 (S.D. Ohio, 8/29/18).	Must prove accreditation & compliance.
Oklahoma	Undecided	*But see Strubhart v. Perry Memorial Hosp. Trust Authority*, 903 P.2d 263 (Okla. 1995)	"Plaintiff must demonstrate that but for the hospital's lack of due care in selecting the physician, the physician would not have been granted staff privileges and the plaintiff would not have been injured."
Oregon	Undecided	---------	----------
Pennsylvania	Undecided	*But see Whittington v. Episcopal Hosp.*, 768 A.2d 1144 (Pa. Super. Ct. 2001) (citing *Thompson, infra*); *see also Thompson v. Nason Hosp.*, 527 Pa. 330, 591 A.2d 703, 708 (1991),	"In *Thompson* ... [Pennsylvania] supreme court first recognized the doctrine of corporate negligence as a basis for hospital liability. The doctrine creates a non-delegable duty upon the hospital to uphold a proper standard of care to a patient and will impose liability ... if it fails to uphold any one of the following four duties: … 2. a duty to select and retain only competent physicians; …"
Rhode island	No	*O'Brien v. Sherman,* 05-0957 (Superior Court R.I. 11/14/2008), 2008 R.I. Super. LEXIS 144	(Holding "contrary to the hospital's suggestion, §5-37.3-7(f), did not at all provide any immunity to a hospital against a negligent credentialing claim

			brought by a patient."); SeeR.I.§5-37.3-7(f), and § 5-37-1.5. (Immunity for peer review board; also doesn't implicate hospital immunity)
South Carolina	Yes	*See* S.C. Code Ann. § 44-7-390	Qualified immunity. Statute is new as of 2012; case law prior to that may have allowed for the claims but **hospitals are now explicitly immune.** Old case ex*: Holliday v. Waccamaw Cmty. Hosp.*, 2015-000331, 2015 WL 7760805 (S.C. 12/02/15)
South Dakota	Undecided	*But see Novotny v. Sacred Heart Health Servs.*, 887 N.W.2d 83 (S.D.2016)	----------
Tennessee	Yes	*Smith v. Pratt*, M200801540COAR9CV, 2009 WL 1086953 (Tenn. Ct. App. 4/22/09) Tenn. Code Ann. § 63-6-219 *See also Prince v. Coffee Cty., Tennessee*, 01A01-9508-CV-00342, 1996 WL 221863 (Tenn. Ct. App. 05/3/96)	Since *Smith*, July 1, 2017, the Tennessee legislature has renumbered the statute granting immunity to a statute which now defines "registered surgical assistants." However, there has been no subsequent jurisprudence which overturned the court's decision in *Smith*.
Texas	Yes	*St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503 (Tex.1997)*; See also Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 214 (Tex.2005); and TX OCC § 160.010 (West).	Qualified immunity- Not liable unless hospital acts with malice.
Utah	Yes	See *Waddoups v. Noorda*, 321 P.3d 1108 (Utah2013); and Utah Code Ann. § 78B-3-425 (West 1953)	"It is the policy of this state that the question of negligent credentialing, as applied to health care providers in malpractice suits, is not recognized as a cause of action." eff. (May 10, 2011).
Vermont	Undecided	*But see Wheeler v. Cent. Vermont Med. Ctr., Inc.*, 155 Vt. 85, 582 A.2d 165 (1989)	----------
Virginia	Undecided	*But see Stottlemyer v. Ghramm*, 60 Va. Cir. 474 (2001) ; *Martin v. Salvaggio*, 92 Va. Cir. 339 (2016) 2016 WL 9526924	----------
Washington	Undecided	*But see Ripley v. Lanzer*, 152 Wash.App. 296, 215 P.3d 1020, 1035 (2009); *See also Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166, 168–70 (1984)	*Ripley*: doctrine of corporate negligence "imposes on [a] hospital a nondelegable duty owed directly to the patient, regardless of the details of the doctor-hospital relationship." (citing *Pedroza*, 101 Wash.2d 226)

West Virginia	Undecided	*But see Roberts v. Stevens Clinic Hosp., Inc.*, 176 W.Va. 492, 345 S.E.2d 791, 798 (1986)	----------
Wisconsin	Undecided	*But see Johnson v. Misericordia Cmty. Hosp.*, 97 Wis.2d 521, 294 N.W.2d 501, 513 (Ct. App.1980), *aff'd*, 99 Wis.2d 708, 301 N.W.2d 156 (1981); *Prissel v. Physicians Ins. Co. of Wisconsin, Inc.*, 269 Wis.2d 541, 674 N.W.2d 680 (Ct. App.2003)	*See also* Wisconsin Adm. Code. § 227.01(9) and 805.05(2) "Corporate Negligence"
Wyoming	Undecided	*But see Greenwood v. Wierdsma*, 741 P.2d 1079, 1088 (Wyo.1987); *See also Harston v. Campbell Cty. Mem'l Hosp.*, 913 P.2d 870 (Wyo.1996).	The law changed in 1991; however, the court in *Harston* spends a few paragraphs explaining why Greenwood still applies.

Gretna, Louisiana, this 25th day of March, 2019.

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NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **03/25/2019** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

CHERYL Q. LANDRIEU
CLERK OF COURT

18-C-539

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