STATE OF SOUTH DAKOTA	) : SS	IN CIRCUIT COURT
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

KRISTI LAMMERS **Plaintiff,** **v.** **ALLEN A. SOSSAN, DO, AND RECONSTRUCTIVE SPINAL SURGERY AND ORTHOPEDIC SURGERY, PC,** **Defendants.**	**CIV. 13-456** **MEMORANDUM DECISION: PLAINTIFFS' MOTION TO COMPEL DISCOVERY PLAINTIFFS' MOTION ON CONSTITUTIONALITY OF PEER REVIEW STATUTE SDCL 36-4-26.1 PLAINTIFFS' MOTION AND ARGUMENT CONCERNING HOSPITAL LIABILITY AND NEGLIGENT CREDENTIALLING**

This Memorandum Decision shall apply to all cases against Dr. Sossan, Lewis & Clark Specialty Hospital, LLC, Sacred Heart Health Services, Avera Sacred Heart Hospital and Avera Health, or against similar defendants, in all of the following cases:

Judy K. Robertson v. Allen A. Sossan, et al, 66CIV13-118; Kim Andrews v. Allen A. Sossan, et al, 66CIV13-445; Kristi Lammers v. Allen A. Sossan, et al, 66CIV13-456, Valerie Viers v. Allen A. Sossan, et al, 66CIV14-214; Judy K. Robertson v. Allen A. Sossan, et al, 66CIV14-215; Kristi Lammers v. Allen A. Sossan, et al, 66CIV14-216; Kim Andrews v. Allen A. Sossan, et al, 66CIV14-217; Richard Fitzsimmons v. Reconstructive Spinal Surgery and Orthopedic Surgery P.C., et al, 66CIV14-224; Donald Bowens v. Allen A. Sossan, et al, 66CIV14-225; Kelli J. Tjeerdsma v. Allen A. Sossan, et al, 66CIV14-226; Rodney Gene Hrdlicka v. Allen A. Sossan, et al, 66CIV14-227; Leo J. Payer v. Allen A. Sossan, et al, 66CIV14-228; Vanessa Callahan v. Allen A. Sossan, et al, 66CIV14-229; Edward Janak v. Allen A. Sossan, et al, 66CIV14-230; Melvin D. Birger v. Allen A. Sossan, et al, 66CIV231; Thomas R. Hysell, Junior v. Allen A. Sossan, et al, 66CIV14-232; Cathy Kumm v. Allen A. Sossan, et al, 66CIV14-233; Shelly L. Jones-Hegge v. Allen A. Sossan, et al, 66CIV14-234; Ryan Novotny v. Allen A. Sossan, et al, 66CIV14-235; Dawn Anderson v. Allen A. Sossan, et al, 66CIV14-237; Renee Praeuner v. Allen A. Sossan, et al, 66CIV14-238; Bernadine Pinkelman v. Allen A. Sossan, et al, 66CIV14-243; Larry Lieswald v. Allen A. Sossan, et al, 66CIV14-244; Bridget Zweber v. Allen A. Sossan, et al, 66CIV14-245; Audrey Smith v. Allen A. Sossan, et al, 66CIV14-258; Susan Sherman v. Allen A. Sossan, et al, 66CIV14-259; Christa Dejong v. Allen A. Sossan, et al, 66CIV14-263; Laurie Strate v. Allen A. Sossan, et al, 66CIV14-296; Jean Wildermuth v. Allen A. Sossan, et al, 66CIV14-298; Brett McHugh v. Allen A. Sossan, et al, 66CIV14-303; and Valerie Viers v. Allen A. Sossan, et al, 66CIV12-90.

Consequently, this memorandum decision will be filed in each of these cases to which this Judge has been assigned and will be treated as the decision in each case referenced above collectively known as the "Sossan Litigation."

Background

Various Plaintiffs, as set forth in the cases cited above, filed actions against Dr. Allen Sossan, his private medical clinic, Avera Sacred Heart Hospital (ASHH) and Lewis and Clark Specialty Hospital (LCSH) and other Defendants, as named in the various cases, alleging various claims including fraud, deceit, RICO violations, negligence, negligent credentialing, bad faith credentialing as well as other claims. Shortly after this litigation commenced the various Plaintiffs filed discovery requests including extensive interrogatories and requests for production of documents. Defendants responded to those discovery requests providing little useful information to the Plaintiffs, and on numerous occasions objected on the grounds that the materials sought were protected under the South Dakota Peer Review Confidentiality and Privilege statute SDCL 36-4-26.1. The Defendants also filed a motion for summary judgment alleging that the Plaintiffs' claims were barred by the applicable statute of limitations. Defendants claim that Plaintiffs have sued for medical malpractice or otherwise with relation to the delivery of medical services and that such claims are outside the 2 year statute of limitations. The Plaintiffs countered by arguing that their causes of action are not for medical malpractice or the delivery of medical service, but rather allege negligent credentialing of Dr. Sossan, malicious or bad faith credentialing of Dr. Sossan, (asserting that the various Defendants violated their fiduciary duty and that greed was the motive for allowing Dr. Sossan privileges), RICO claims, and other causes of action. At the hearing on the motion for summary judgment this Court ruled that the gravamen of the Plaintiffs claims sounded in fraud and deceit and were not actions for medical malpractice, that alternatively, if the gravamen of the cases are later determined to involve negligent delivery of medical services that the statute of limitations is tolled as genuine issues of material fact existed as to fraudulent concealment, and denied all Defendants' motion for summary judgment on that basis.

Left unresolved at that hearing was the present motion concerning discovery disputes with relation to immunity of peer review members and the privilege and confidentiality of the peer review process. Following the hearing the Defendants requested that this Court make a specific ruling, as to each item of evidence, concerning their Motion to Strike the Affidavits of Counsel[1], and that they be given the opportunity to submit a supplemental brief on the issues presented in this decision. Both of these requests were granted. Plaintiffs were also given an opportunity to reply to the supplemental brief. Substantial briefing has occurred in all of the cases on these issues.

Factual Background

The Court has on this same day ruled upon the Defendants' Motion to Strike the various affidavits of counsel and the exhibits attached thereto, which were filed in response to the Defendants' motion for summary judgment. Plaintiffs' counsel filed affidavits with voluminous

[1] There were 8 affidavits filed, each containing numerous voluminous exhibits consisting of almost 900 pages of materials, consisting of transcripts, scientific/medical journals and national medical data compliations.

attachments. Those affidavits and attachments are the basis of the facts of this decision except as limited by the ruling on the Motion to Strike.

Each Plaintiff or their surviving children have provided their own independent affidavit concerning the facts of their particular case. Each affidavit, in summary, recites a brief history of the Plaintiff's dealings with Dr. Allen Sossan, information they gained about Dr. Sossan since their relationship with him, and a claim that if they would have known of Dr. Sossan's history they would have never allowed him to provide medical services concerning their medical care.

The affidavits also contain information that numerous physicians or other professional health care providers who have subsequently treated most of the Plaintiffs have personally told those patients that the surgeries that Dr. Sossan performed were not necessary, were not justified by the medical tests or were performed improperly.[2]

Dr. Sossan grew up in Florida and attended two post-secondary educational institutions in Florida. While in Florida he was convicted of a felony burglary charge as well as felony bad check charges. Thereafter he changed his name from Alan Soosan to Allen Sossan. After changing his name he applied for and was admitted to medical school, obtaining his Doctor of Osteopathic degree and eventually becoming an orthopedic surgeon.

Ultimately, Dr. Sossan ended up practicing medicine at Faith Regional Hospital in Norfolk, Nebraska. He also owned and operated a clinic business known as Reconstructive Spinal Surgery and Orthopedic Surgery, PC, a New York Professional Corporation. After a short period of time in Norfolk, Nebraska issues began to arise concerning Dr. Sossan's medical care, medical testing practices, and his personality as it reflected on his fitness to practice medicine. He eventually lost privileges at Faith Regional Hospital in Norfolk, Nebraska.

The record discloses that at the same time Dr. Sossan was having problems in Nebraska, ASHH and LCSH began courting him to join their medical facilities in Yankton, South Dakota. By that time, based upon a fair reading of all the information in the exhibits and other information in the numerous Affidavits of Counsel, Plaintiffs believe they can establish that the

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[2] Upon the Court's review of the various materials in response to the motion for summary judgment, the Court has observed that all of the following doctors are quoted by Plaintiffs' as having made a statement that Dr. Sossan's treatment and surgeries were unnecessary or otherwise improper in some manner. The exhibit and page are referenced: Lawrence Rubens; Ex 22; p 15; Patrick Tryance; Ex 22; p 15;John McClellan; Ex 26-27; p 15;Michael Longley; Ex 32; p 16; Dan Wilk; Ex 21; p 16; Quentin Durward; Ex 21, 70; p 16, 37; Dan Johnson; Ex 16; p 18; Robert Neumayr; Ex 16; p 18; Lars Aanning; Ex 16; p 18, 58; Robert Suga; Ex 41, 67; p 21, 35; Dr. Jensen; Ex 49; p 25; Geoffrey McCullen; Ex 50; p 26; Wade K. Jensen; Ex 54; p 27; Brent Adams; Ex 55; p 28; Eric Phillips; Ex 58; p 29; Kynan Trial; Ex 64; p 33; Richard Honke; Ex 64; p 33; Mitch Johnson; Ex 65, 71, 72; p 34, 38; Michael T. O'Neil; Ex 68; p 35; Dr. Bowdino; Ex 68; p 35; Dr. Megard; Ex 74; p 40; Dan Noble; Ex 75; p 41; Gregg Dyste; Ex 76; p 41-42; Wade Lukken; Ex 77; p 42; Kent Patrick; Ex 77; p 42; Bonnie Nowak; Ex 79, p 44; Troy Gust; Ex 81; p 46.

Defendants knew or should have known Dr. Sossan had a terrible reputation among the Northeast Nebraska, Northwest Iowa, and Southeast South Dakota medical community and that there were serious questions as to his fitness to practice medicine. Some of this knowledge was based upon reports from doctors and other medical providers who had worked with Dr. Sossan, and other knowledge is based upon doctors who subsequently treated his patients. Other information came from general discussion among the medical community concerning his competency, demeanor, comportment, professionalism, and medical practice style.

In order to practice medicine in the Yankton area Dr. Sossan was required to obtain a medical license from the South Dakota Board of Medical and Osteopathic Examiners (SDBMOE). He was also required to obtain privileges from the peer review committees of Avera Sacred Heart Hospital (ASHH) and Lewis & Clark Specialty Hospital (LCSH). Ultimately, Dr. Sossan received a license from the SDBMOE. However, with regard to his practicing privileges, initially he was denied same by the peer review committees in Yankton. Because of the fact that no information has been disclosed as to what kind of information the peer review committees considered there is a complete absence of information in the record to document what the peer review committees considered in denying him privileges at that time. Ultimately, after consultation with legal counsel, at least some of the peer review committee members changed their votes to grant Dr. Sossan privileges. According to the information and evidence provided to the court thus far, legal counsel advised the peer review Defendants that if they did not grant Sossan privileges, they would be sued by him. There is a complete absence of evidence in this record at this time indicating that Dr. Sossan had made any claim or threatened any legal action against any Defendant here, or even if so, the basis for such claims.

Within the information submitted by Plaintiffs in response to the motion for summary judgment there is an affidavit from Dr. William B. Winn. Dr. Winn was employed at the Faith Regional Hospital in Norfolk, Nebraska, knew Dr. Sossan, and practiced within that medical facility with him. He was also associated with ASHH in Yankton at that time. He testified in his affidavit that he was aware of serious issues regarding Dr. Sossan and that these issues were well known among the Faith Regional Hospital administration and management. He testified that he has personal knowledge that Dr. Sossan falsified patients' medical charts in order to justify unnecessary medical procedures on his patients, among other serious concerns with regard Dr. Sossan. Most importantly for this case, Dr. Winn testified in his affidavit that when he learned of Dr. Sossan's attempt to secure medial privileges in Yankton he personally intervened to report these serious concerns regarding Dr. Sossan, and his firm opinion that Dr. Sossan posed a danger to the public. He claims he talked directly to Dr. Barry Graham, MD, (who held a position on one of the peer review boards), about these serious concerns and that he strongly encouraged that Sossan not be granted privileges.

Other physicians have given testimony in malpractice cases against Dr. Sossan that question his fitness as a licensed physician. For example, Dr. Robert Suga, and orthopedic surgeon of Sioux Falls, testified in a deposition that in his opinion Dr. Sossan performed

unnecessary surgeries with the motive of generating bills and income for himself. (Affidavit of Counsel, Exhibit 41) Dr. Quentin Durward, an orthopedic surgeon from Dakota Dunes, had similar opinions and findings with his patients treated subsequent to Dr. Sossan. See Affidavit of Plaintiff's Counsel. In general, Plaintiffs have amassed a significant amount of evidence that, if proven to be true at trial, would raise a serious question if Dr. Sossan should have never been licensed, granted privileges, or that when he was, action should have been taken promptly to revoke or restrict his privileges, and that any reasonable person responsible for his medical practice supervision should have known he may have posed a danger to patients and taken appropriate action. This court finds such to be the case even after screening out and ignoring the strong characterizations put upon the facts by the Plaintiffs. (See generally the various Affidavits of Plaintiff's Counsel, Plaintiff's Brief in Opposition to Defendant's Motion For Judgment on The Pleadings, Dated October 30th, 2014, and Plaintiff's General Recitation of Facts Regarding Various Motions Set for Hearing, Dated October 23rd, 2014.)

According to the evidence presented by the Plaintiffs thus far, soon after Dr. Sossan was granted privileges in Yankton, issues and complaints began to arise that should have made it obvious to doctors and other persons in the medical field that there was a serious and substantial question as to Soosan's fitness, competency and ability to practice medicine in his specialty prompting further inquiry. Numerous witnesses have provided affidavit testimony that they personally reported, (some on an anonymous basis), Dr. Sossan's problems to the SDBMOE and to the peer review Defendants in this case. Other witnesses observed assaultive behavior and claim to have reported those incidents. Minutes of Lewis & Clark Specialty Hospital, submitted in response to the Summary Judgment Motion, show that Dr. Sossan's problems and credentials were discussed. Those minutes also show that prior to Dr. Sossan being hired LCSH was required to borrow $200,000 for certain capital expenditures. Following the hiring of Dr. Sossan minutes reflect the business was declaring dividends for its physician members.

According to the evidence submitted by the Plaintiffs, despite the fact that there were numerous complaints and much discussion among the medical community about Dr. Sossan, no action was taken to limit, modify, or otherwise terminate his privileges in the Yankton medical community by those who had the authority to do so.

Plaintiffs retained an expert on medical credentialing and patient safety by the name of Arthur Shore. Mr. Shore is a well credentialed and heavily experienced health care administrator. He has a degree from George Washington University School of Public Health and Health Services. He is a life fellow of the American College of Health Care Executives and is a board certified hospital administrator. He has served as a member of the board of trustees of a number of hospitals and health care institutions across the country. He has authored numerous articles in nationally recognized peer-reviewed professional healthcare administration journals. He has testified concerning health care liability as a qualified expert in legions of cases throughout the country.

Mr. Shore submitted an expert report in this case (Exhibit 15). In that report he states:

"the behavior of the governing body, senior leadership including the chief executive officers, and the medical leaderships clearly reflected willful, wanton, and malicious disregard of the standards of care and administrative community standards applicable to the initial granting privileges and credentials, as well as the subsequent renewal of Sossan's privileges at the hospitals in spite of readily available incontrovertible evidence that Sossan was a convicted felon, engaged in acts of moral turpitude, was unable to work collaboratively with other professionals, performed unnecessary surgery, and lacked the competence to safely perform spine surgery." He goes on to conclude "the complex and compounding failures imposed on unsuspecting patients who relied on the hospital in this regard, commencing with the failure to disqualify an applicant with demonstrable moral turpitude, a convicted felon, failure to conduct proper due diligence and original source information, portion of medical staff leadership recommend granting privileges for inappropriate reasons, failure to initially proctor and monitor Sossan's surgical competence and interpersonal behavior, failure to monitor his disproportionately voluminous surgical escapades, and interpersonal interaction with hospital staff and colleagues, all of which contributed to inflicting serious injuries to patients served by the hospitals, demonstrate gross and wanton disregard for the fiduciary duty obliged of the governing bodies to the communities and in specific the patients they serve."

Numerous other applicable facts will be discussed when necessary in this Decision.

Analysis

The Plaintiffs' main theory of liability in this case is that the Defendants conspired to improperly grant Sossan privileges in violation of their fiduciary duty out of a sense of greed and in disregard of the rights and safety of their patients. They allege that the Defendants committed fraud and deceit upon their patients and the public in doing so. The voluminous record here shows that there were questions presented which indicated that Dr. Sossan was a convicted felon and otherwise indicate he may not have been suitable to be licensed as a physician or granted privileges at either of Defendant medical facilities. Later, administrative action against his medical license in Nebraska had been commenced based upon his activities in Nebraska. Ultimately, Dr. Sossan gave up his license in Nebraska. Numerous lawsuits have been filed against him for malpractice, which he has either substantially lost or settled, including cases in South Dakota and Nebraska. Plaintiff's claims are based primarily upon the theory of improper, negligent and/or bad faith credentialing and fraud, among other claims.

In order to proceed on the various discovery requests based upon this theory, the court must first determine if a new cause of action for wrongful credentialing is or will be recognized in South Dakota.

Is Wrongful or Improper Credentialing a Valid Cause of Action in South Dakota?

The Defendants argue in their briefs that Plaintiff's attempt to obtain the peer review information fails because South Dakota does not recognize a cause of action for negligent or bad faith credentialing. The Defendants argue that the South Dakota Supreme Court "strongly endorsed the effect of the peer review privilege" in *Shamburger v. Beherns*, 380 N.W.2d 659 (SD 1986), and that the court "found the privilege bans the prosecution of an improper credentialing claim"[3]. *Shamburger* was a run of the mill malpractice claim where the plaintiff claimed that Dr. Beherns was an alcoholic or otherwise afflicted with habitual intemperance. Shamburger filed suit against the doctor and the hospital for negligence. The entirety of the Court's analysis in Schamburger on that issue is as follows:

> "Shamburgers also claim error in the granting of summary judgment for Hospital. In their claim against Hospital, Shamburgers alleged Hospital was negligent in allowing Behrens to remain on staff. Shamburgers claim Hospital knew or should have known Behrens had a drinking problem and was incompetent, which manifested itself in a problem with Elston's care.
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> "The trial court held that the evidence, viewed in the light most favorable to Shamburgers, presented no evidence to show Hospital knew or had any reason to believe that Behrens was incompetent, and that Hospital had not breached any of its medical staff review procedures.
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> In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally. *Fjerstad, supra.* We note that hospital records concerning staff competency evaluations are not discoverable materials. SDCL 36-4-26.1. Shamburgers cannot obtain the records which would show whether or not the hospital considered or knew of Behrens' drinking problems when Hospital considered his staff privileges. The trial court was correct in determining that Shamburgers had presented no evidence pertaining to Hospital's alleged negligence. Mere allegations in the pleadings cannot thwart summary judgment. *Boone v. Nelson's Estate,* 264 N.W.2d 881 (N.D.1978). Once the motion has been made and supported, the nonmoving party has the burden of showing a genuine issue exists for trial. *Olesen v. Snyder,* 249 N.W.2d 266 (S.D.1976). Trial court found, and we agree, that Shamburgers presented no evidence to support an issue for trial."

The only ruling that *Shamburger* made with respect to privileged records concerned the Plaintiff's request to obtain Dr. Behern's alcohol treatment records from another provider. The

[3] See joint brief, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC Joint Supplemental Brief in Opposition to the Various Plaintiffs' Motion For Summary Judgment on the Constitutionality of SDCL36-4-26.1, Dated May 11th, 2015 and filed with the Court.

court ruled those records privileged by the physician - patient privilege, and the peer review privilege was not analyzed or mentioned in that part of the Courts analysis. This Court is hard put to find that the above analysis in *Shamburger* is a "strong endorsement" of peer review generally or that South Dakota's peer review statute "bans" a claim of improper credentialing. Improper credentialing was not at issue in Shamburger as it was not pleaded as a cause of action, rather it was a claim of general hospital negligence. SDCL 36-4-26.1 is cited by the Court in its analysis, but it does not appear from reading the above passage that plaintiff's counsel made any argument that the trial court erred in not granting the plaintiff access to the peer review information. That question does not appear to have been presented. Further, Shamburger did not involve claims as are presented in the cases presently before this court where the Plaintiffs allege fraud, deceit, bad faith or RICO claims against the peer review committees involving the peer review process. *Shamburger* does not directly address, approve or reject improper credentialing claims, nor does it directly address the issue of discovery of peer review materials. *Shamburger* does not help the Defendants here and the court is not persuaded that it has much applicability, if any at all, to the present cases.

The Plaintiff's rely upon a number of cases from around the country to support their argument that in a case similar to that presented to this court, that negligent or improper credentialing is a well-recognized cause of action in a majority of states. It does not appear that the South Dakota Supreme Court has had the opportunity to address the issue directly.

This Court has carefully considered legions of cases on improper credentialing and is much persuaded by the authorities and arguments within pages 17 through 21 of the Plaintiffs Brief In Support Of Motion To Compel and Motion for Partial Summary Judgment On The Constitutionality of The South Dakota Peer Review Statute, SDCL 36-4-26.1, which is dated October 23rd, 2014 and filed the same date. Footnote 4 of that brief contains a sample list of cases from a wide variety of jurisdictions that have adopted the theory of improper credentialing claims (all of which this court has carefully read and considered) and these cases, although interpreting different statutory language in many forms, are based upon sound reasoning, analysis and policy considerations.

In *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) the Montana Supreme Court took up the issue for the first time. In approving the cause of action in Montana the Court found that modern medical practices have changed the landscape where new principals can and should be applied. They stated that "When asked to recognize a new cause of action, the Court will review "our own caselaw and the authorities from other jurisdictions" to determine if the "gradual evolution" of the common law supports recognition of the new claim." (Citing *Sacco,* 271 Mont. at 220, 234, 896 P.2d at 418, 426.). In their analysis they reviewed a case from 40 years prior and went on to state:

"However, in doing so, we acknowledged that the rise of the "modern hospital" imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges:

> [T]he integration of a modern hospital becomes readily apparent as the various boards, reviewing committees, and designation of privileges are found to rest on a structure designed to control, supervise, and review the work within the hospital. The standards of hospital accreditation, the state licensing regulations, and the [hospital's] bylaws demonstrate that the medical profession and other responsible authorities regard it as *212 both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.

Hull, 159 Mont. at 389, 498 P.2d at 143. This reasoning is even more persuasive 40 years later, with the development of hospitals into "comprehensive health care" facilities. *Butler,* ¶ 41 (citation omitted)."

To move on this court must determine, in a case of first impression, if the South Dakota Supreme Court would join a majority of other states/jurisdictions that adopt a new cause of action for improper credentialing. Based upon this Court's review of the law and the briefs presented in these cases it appears that South Dakota has all the necessary legal precedents as ingredients other courts have found prerequisite to adopting such a claim including a hospitals duty of care for patient safety, ("In South Dakota, separate liability in negligence attaches to a hospital when it has breached its own standards or those available in same or similar communities or hospitals generally", *Shamburger,* ¶8), as well as the concepts of negligent hiring and/or negligent selection of independent contractors. *Kirlin v. Halverson,* 758 NW2d 436 (SD 2008).

Additionally, when read in the negative, the South Dakota peer review statute tends to support such a claim. At least in part, liability against the Defendants here, with respect to the improper credentialing claims, is governed by SDCL 36-4-25. That statute provides:

> There is no monetary liability on the part of, and no cause of action for damages may arise against, any member of a duly appointed peer review committee engaging in peer review activity comprised of physicians licensed to practice medicine or osteopathy under this chapter, or against any duly appointed consultant to a peer review committee or to the medical staff or the governing board of a licensed health care facility for any act or proceeding undertaken or performed within the scope of the functions of the committee, **IF** the committee member or consultant acts without malice, has made a reasonable effort to obtain the facts of the matter under consideration, and acts in reasonable belief that the action taken is

warranted by those facts. The provisions of this section do not affect the official immunity of an officer or employee of a public corporation. (Emphasis added by Court).

Malice is defined as:

> "Malice is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.
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> Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill will toward that person. Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other's rights. Hatred or ill will is not always necessary." Source South Dakota Pattern Jury Instruction 50-100-20.

"A claim for presumed malice may be shown by demonstrating a disregard for the rights of others." *Flockheart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991).

This Court's reading of the peer review immunity statute cited above indicates that peer review committees are immune **IF** they meet the conditions subsequent as laid out in the statute. In other words, they are immune if they act without malice, if the committee has made a reasonable effort to obtain the facts of the matter under consideration, and if they act in reasonable belief that the action taken was warranted by those facts. A similar finding has been made in the context of physicians bringing action against the peer reviewers by the courts applying the Health Care Quality Improvement Act: "the consequence of failing to satisfy the standards of 42 U.S.C.A. § 11112(a) is merely that the peer reviewers lose the immunity provided by the Act". Construction and application of Health Care Quality Improvement Act, 121 A.L.R. Fed 255, §2.

Consequently, according to this Court's interpretation of the statute, if it can be preliminarily established that a peer review committee acted maliciously or in bad faith, if they failed to make a reasonable effort to obtain the facts of the matter under consideration, or if they act unreasonably based upon those facts, the immunity disappears and there is a cause of action that can be brought against members of a professional peer review committee for the improper credentialing. This interpretation is consistent with most other jurisdictions that have adopted the theory of improper credentialing.[4] Consequently, this Court finds that wrongful or improper

[4] It may be argued that the last half of SDCL 36-4-25 was intended only to protect peer review members from suit filed by physicians who were denied privileges, which can be tied into the primary policy behind the peer review immunity statute so as to promote a free and open dialogue when discussing and deliberating peer review matters with other members. However, nothing in the plain language of the statute limits the scope of the statute to those circumstances. If that was the intent of the legislature, language could have easily been added to limit the applicability of the exception.

credentialing is a valid cause of action in South Dakota and that our Supreme Court would most likely adopt this new common law theory as a basis for recovery based upon existing law and the facts that have been thus far presented in this case.

Is South Dakota's Peer Review Privilege Statute, SDCL 36-4-26.1, Absolute?

The South Dakota peer review confidentiality and privilege statute is set forth in SDCL 36-4-26.1, which provides:

> The proceedings, records, reports, statements, minutes, or any other data whatsoever, of any committee described in § 36-4-42, relating to peer review activities defined in § 36-4-43, are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any meeting of any committee described in § 36-4-42 is required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the person's staff privileges or employment was based. The prohibition relating to discovery of evidence does not apply to deny any person or the person's counsel in the defense of an action against that person access to the materials covered under this section.

In the event a sufficient preliminary showing is made to avoid the immunity provided for in SDCL 36-4-25, common sense directs that a plaintiff must be able to obtain some information about how the peer review committee did its work. Without such information it would be impossible to determine if the committee "made a reasonable effort to obtain the facts of the matter under consideration" or otherwise if the peer review committee acted with malice or otherwise improperly. The Defendants here have argued that the statute is constitutional, is absolute, and that there are no exceptions. The Plaintiffs have argued persuasively that to accept the defendants assertion that peer review information is absolutely privileged and confidential no matter what the basis for the need or claim for such information, whether by law enforcement, the government, or private litigants, would eviscerate the entire last clause of SDCL 36-4-25 and leave the peer reviewers to do as they please behind a cloak of absolute privacy.

Viewed in the light most favorable to the Defendants here, the facts in the present cases clearly show that the peer review committees involved had certain factual information concerning Dr. Sossan that warranted a denial of privileges, and in fact, it appears from this record that is how they initially voted. Dr. Anning, a retired physician from the Yankton community, interviewed and recorded Dr. Neumayr, who sat on the peer review committee at

ASHH concerning Dr. Sossan. It has not been argued that the recording of that conversation was illegal, but it has been argued that the substance of the conversation being used here, by its self, violates the peer review privilege statute.[5] That conversation discloses that the peer review committee had information that Dr. Sossan should not have been credentialed and initially voted to deny privileges. According to the evidence and that recorded conversation the peer review committee consulted with Avera Health's legal counsel who advised them that if they did not credential Sossan they would be sued by him.[6] It was only after this conversation with counsel that another vote was taken and Dr. Sossan was granted privileges.

Furthermore, during the interview Dr. Neumayr told Dr. Anning that despite the fact that the committee had denied him privileges, one of the administrators of ASHH had legal counsel for Avera attend a meeting to persuade the committee to grant Sossan privileges because ASSH and LCSH needed him, and that in his opinion at least one peer review member would lie about the matter if when comes to court. (Exhibit 16 A to First Affidavit of Counsel).

According to Plaintiffs, this discussion ensures that the Defendants in this case will perjure themselves at trial and during discovery. The court notes that this discussion raises substantial concerns in that regard. However, this court tempers that concern with the understanding that there is a lack of evidence to support the opinion of the person being interviewed (Dr. Neumayr) to establish the person mentioned will lie about anything. It is a matter of speculation on the part of the declarant at this point in time, but the concern is nonetheless raised by his comment.

SDCL 36-4-26.1 provides a very broad grant of privilege and confidentiality to peer review materials generally, and leaves little room for judicial interpretation. Consequently, if this court is correct that South Dakota will adopt a cause of action for wrongful or improper credentialing and that SDCL 36-4-25 implies such a cause of action, this Court must determine if the plaintiff in such as case has access to any information from the peer review committee to determine if the peer review members acted improperly or with malice, bad faith, fraud or deceit. Plaintiffs argue that because of this conflict between the statutes the peer review privilege statute can otherwise be overcome by a newly recognized exception, but if not, it is unconstitutional.

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[5] Based upon the ultimate ruling in this decision the Court finds that it does not violate the privilege. Furthermore, there is authority that a physician who participates in the peer review process may voluntarily disclose peer review information, see: Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 A.L.R.4th, 1273.

[6] As previously stated, there is a complete absence in the present record of any evidence that any of the Defendants here had been threatened with any legal action by Dr. Sossan at the time counsel for Avera allegedly made these statements or gave this advice.

Courts in other states have found exceptions applicable to the peer review privilege under certain circumstances, including when the peer reviewers have acted improperly or when the court finds that the privilege is applied in a manner that is contrary to public policy.[7]

Many courts have held that peer review materials are absolutely privileged, but that in order to establish liability in a case of wrongful credentialing, the plaintiffs can rely upon independent source information. Suffice it to say that after this court has read many cases on the topic, one conclusion is clear: depending upon the precise statutory language, the particular facts and circumstances presented in the case, and the precise type of information or reports at issue, the courts are all over the board as to whether independent source information is privileged or not privileged and how it can be used. For an excellent summary of those issues this court has relied upon, see Scope and Extent of Protection From Disclosure of Medical Peer Review Proceedings Relating To Claim in Medical Malpractice Action, 69 A.L.R.5th 599 (1999); *see also, Trinity Medical Center v. Holum*, 544 NW2d 148 (ND 1996) at ¶7 ("the caselaw interpreting these widely varying statutes has been described as 'creating a crazy quilt effect among the states'"). During the hearing on this matter and in their supplemental brief the Defendant's seemed to take the position that IF South Dakota adopts improper credentialing as a cause of action under an extension of the common law, the Plaintiffs would be allowed to use some independent source information to prove their claims.[8] This leaves several questions remaining: what type of independent source information would be privileged and what would not? Can the Defendant's then rebut such evidence by using the privileged peer review materials? If not, does the privilege statute "make it impossible for a hospital to defend against such a claim" (*Wasemiller, infra.*)? Is there a point in the process where the Defendants may open the door so that all peer review materials become relevant, discoverable and admissible at trial? If the answer to the latter question is yes, then how long will the trial be delayed to allow

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[7] As quoted in 41 C.J.S Hospitals, §16: "The peer review privilege is intended to benefit the entire peer review process, not simply the individuals participating in the process.[33] Moreover, the statutory privilege for communications on the evaluation of medical practitioners is qualified, rather than absolute, and may be defeated by proof that the person or entity asserting the privilege, when it made the communication, knew the information was false or otherwise lacked a good faith intent to assist in the medical practitioner's evaluation.[34]

The failure of a professional peer review to comply in full with applicable bylaws does not render the fact-finding process unreasonable.[35]

In some states, the peer review process is considered an administrative action.[36] A court is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determine if the administrative decision is premised upon an erroneous conclusion of law; the court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record.[37] However, there is no absolute prohibition of judicial review of hospital peer review decisions, and although courts may not have jurisdiction to review purely administrative decisions of private hospitals, courts do have jurisdiction to hear cases alleging torts, breach of contract, violation of hospital bylaws, or other actions that contravene public policy." (emphasis added)

[8] See, Sacred Heart Health Services, dba Avera Sacred Heart Hospital, Avera Health, Dr. Swift, and Lewis and Clark Specialty Hospital, LLC's Joint Supplemental Brief In Opposition to the Various Plaintiff's Motion For Summary Judgment on the Constitutionality of SDCL 36-4-26.1 ,at pp 6-7.

Plaintiffs sufficient time to review the materials and prepare to present further evidence? Up to this point, the Defendants have argued very broadly that all information touching upon the peer review process is protected by the privilege and that the court can determine what independent source information is admissible evidence. Rulings on specific items of evidence in this regard are best left for another day when a more complete record can be made.

Cases presented in the briefs by the parties which have found exceptions to the peer review privilege allow information from opposite ends of the spectrum and in between. In *Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001) the court held that only the final action or result (modification, restriction, termination of privilege) taken as a consequence of peer review proceedings are discoverable and admissible. *In Estate of Krusac v. Covenant Medical Center*, (cited by Defendants in their supplemental brief and quoted without citation) the Michigan Supreme Court ruled that the scope of the privilege was broad but not without limits and concluded that "objective facts" within the peer review materials were privileged. In contrast to the above cases, in *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987) the Wyoming Supreme Court appears to have gone the opposite direction and ruled that the privilege protects the "internal proceedings" (the deliberative process) but does not "exempt from discovery materials which the committee reviews in the course of carrying out its function, nor action which may be taken thereafter." In *Greenwood*, the court went on to provide that "in short, privileged data does not include the materials reviewed by the committee, only those documents produced by the committee as notes, reports and findings in the review process". Id. At 1089.

This Court has been most persuaded by the rationale in *Greenwood* as persuasive authority. The purpose of the peer review privilege has been stated may times in the cases presented in the briefs as promoting a policy to allow candid and open discussions among peer review committees to encourage doctors to engage in the process so as to *improve the delivery of health care*. Doctors were reluctant to do so in the past for fear of being ostracized from other practitioners, losing patient referrals, and subjecting themselves to lawsuits. In order to encourage doctors to participate in the process and improve the delivery of health care, the law gave them immunity from lawsuits and protected their files and deliberations from discovery, use at trial, or dissemination. That information consists of both objective facts and the subjective deliberations and comments of the participants. SDCL 36-4-25 grants them immunity if they make a reasonable effort to obtain the objective facts concerning the matter under consideration. It makes little sense to put the objective facts beyond the reach of allegedly injured patients or others when the primary intent of the law is to protect the private comments and deliberations of the committee, especially in light of the language of the immunity statute. In a case such as this the information they had and the decision they reached are the crux of the case and go to the heart of the issue.

In the end, carving out an exception to the peer review privilege is a matter of first impression in South Dakota. This Court is reluctant to carve out a new exception, (other than to adopt the independent source rule which Defendants have agreed upon), without statutory or

other binding precedent. Although adopting the holdings in *Greenwood*, supra, is inviting to this Court, there are also good reasons to adopt any of the many other doctrines laid out in cases from a multitude of other jurisdictions. Consequently, this Court rules that the peer review privilege is absolute and subject only to the independent source exception and the crime fraud exception discussed further below.

The Constitutionality of SDCL 36-4-26.1

Is SDCL 36-4-26.1 Unconstitutional As Not Being Rationally Related To a Legitimate Governmental Purpose?

The Plaintiffs have argued that the privilege statute is unconstitutional because it is not rationally related to the purpose for which it was enacted, that being to encourage physicians to deliberate and discuss the abilities and qualifications of other physicians in an open and candid forum with the ultimate goal of improving health care services overall. By making such information privileged and confidential, more physicians would participate in the process and when they did, they would be more honest. The overall policy of the group of statutes passed in the mid to late 1970s to protect the peer review process and the medical industry in this regard was previously considered by the South Dakota Supreme Court as a state "interest in preserving and promoting adequate, available and affordable medical care for its citizens" and was upheld within the context of the medical malpractice damages cap. *Knowles*, 1996 SD 10, 544 N.W.2d 197.

The Plaintiffs have submitted substantial scientific and medical peer reviewed articles, journals and data compilations in support of their argument which were attached to the various affidavits of counsel and argued in their briefs. These articles were allowed and not stricken in the court's ruling on that matter as they are relevant to the argument here. Those articles and journals are from nationally recognized publications relied upon by the medical industry as a whole and conclude that peer review immunity, and granting privilege to all information considered by peer review committees, has harmed the overall goal of improving the safe delivery of medical care and patient safety, as opposed to improving it. The Plaintiffs argue that by denying them access to critical evidence for their cases, the statute violates their right to due process by putting relevant evidence beyond their reach because of a statute that is not rationally related to its intended purpose.

There is a strong presumption that the laws passed by the legislature are constitutional and the presumption is only rebutted when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. *Green v. Siegel Barnett & Schutz*, 1996 SD 147 ¶7, 557 N.W.2d 396, 398. The plaintiffs must demonstrate that the statute does not bear a "real and substantial relation to the objects sought to be obtained" *State v. HyVee Food Stores, Inc.*, 533 N.W.2d 147, 148 (SD 1995).

The scientific/medical data articles submitted by the Plaintiffs and the facts presented and as characterized by the Plaintiffs here cast a dark shadow over the peer review process. Some of the articles submitted by the Plaintiffs bring the legitimacy of confidential and privileged peer review process into serious doubt. However, the policy behind the concept of encouraging physicians to participate in a candid open discussion about the competence of their colleagues and the safety of their patients is a matter of legislative prerogative. If there is some question among the medical industry on a national basis as to the effectiveness or legitimacy of the previously adopted legislative policy, that is an issue best left to the legislature and not the courts. This court finds that the plaintiffs have not clearly, palpably and plainly shown that the statute does not bear a real and substantial relationship to furthering the objective of encouraging physicians to participate in a candid and open discussion as to their colleagues' competence. The Plaintiff's motion in this regard is denied.

Does SDCL 36-4-26.1 Violate the South Dakota Open Courts Provision?

Plaintiffs claim that the statute, if applied broadly without exception, denies them the right to due process and access to the courts under Article VI §20 of the South Dakota Constitution . It does so, they argue, by depriving them of the best and most relevant information to establish their claims of fraud and deceit or that the peer review committees here acted improperly or in bad faith.

It has been held that the Open-court's provision of the South Constitution cannot become a sword to create a cause of action or become a shield to prohibit statutory recognized barriers to recovery and cannot be interpreted to overcome the doctrine of sovereign immunity. *Hancock v. Western South Dakota Juvenile Services*, 647 N.W.2d 722 (SD 2002).

Restrictive statutes of limitations in favor of medical providers, accountants and lawyers have been found to be within the legislature's prerogative, and although limiting a plaintiff's ability to take their case to court, do not violate the open courts provision. *Peterson v. Burns*, 635 N.W.2d 556 (SD 2001); *Witte v. Godley*, 509 N.W.2d 266 (SD 1999) and *Green v. Siegel Barnett*, 557 N.W.2d 396 (SD 1996). Statutes limiting damages in medical malpractice cases similarly have been found not to violate the open courts provision. *Matter of Certification of Question of Law from US Court of Appeals for the Eighth Circuit*, 544 NW2d 183 (SD 1996) and *Knowles v. US*, 544 NW2d 183 (SD 1996).

All parties here rely upon cases from other states to support their position that denying access to peer review materials in discovery does or does not violate constitutional rights. The Defendants argue that despite the fact that the materials are not available for Plaintiff's use in preparation or for trial, the door to the courtroom remains open for the Plaintiffs. The Plaintiffs argue that in the case of fraud, deceit or wrongdoing by the Defendants, depriving them access to the most relevant and material evidence in the case is tantamount to closing the courthouse door, especially when hospitals and clinics are allowed to shelter the evidence of their wrongdoing

behind a cloak of secrecy. Both parties rely upon *Larson v. Wasemiller*, 738 NW2d 300 (Minn. 2007) to support their arguments.

Wasemiller involved a medical malpractice action where the Plaintiff claimed that the hospital was negligent in credentialing the physician defendant. After adopting the cause of action for negligent credentialing the court had to determine if the new cause of action conflicted with the Minnesota peer review privilege statute, which is quite similar to its South Dakota counterpart. The Minnesota Supreme Court found that the privilege statute did not conflict with the newly recognized tort of negligent credentialing but did consider the problems associated with a case when the trial is focused on what facts the peer reviewers actually considered in making their decision. As to the more precise issue of whether the peer review privilege statute denied due process, the Court concluded that the "confidentiality provisions of the peer review statute do not preclude the presentation of evidence in defense of a negligent-credentialing claim" and "that the confidentiality provision is not facially unconstitutional". They left "for another day the question of whether circumstances might arise that would render the provision unconstitutional as applied". *Wasemiller*, ¶15. Consequently, *Wasemiller* left the issue unresolved.

Plaintiffs have relied upon *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996). This case provides the most comprehensive analysis of the interplay between the privilege/confidentiality statute and the constitutional claims that denying plaintiffs access to the peer review materials violates due process and access to the courts. In the end, the Kansas Supreme Court was required to balance the various interests at stake. In finding the privilege/confidentiality statute unconstitutional the court stated:

> In the present case the legislature granted a peer review privilege to health care providers to maintain staff competency by encouraging frank and open discussions and thus improving the quality of medical care in Kansas. We must weigh that privilege against the plaintiffs' right to due process and the judicial need for the fair administration of justice. There can be no question that in granting the privilege, the legislature did not intend to restrict or eliminate a plaintiff's right to bring a medical malpractice action against a health care provider. To allow the hospital here to insulate from discovery the facts and information which go to the heart of the plaintiffs' claim would deny plaintiffs that right and, in the words of the federal court, "raise significant constitutional implications." 129 F.R.D. at 551. The constitutional implication was stated by this court in *Ernest v. Faler,* 237 Kan. 125, 131, 697 P.2d 870 (1985):
>
> > "The right of the plaintiff involved in this case is the fundamental constitutional right to have a remedy for an injury to person or property by due course of law. This right is recognized in the Kansas Bill of Rights § 18, which provides that all persons, for injuries suffered in person, reputation or property, shall have a remedy by due course of law, and justice administered without delay." *Adams*, Id, ¶16

The Plaintiffs argue that an overly broad application of SDCL 36-4-26.1 violates due process and the open courts provision unless an exception applies or it is judicially reformed to comply with due process.

In *Moretti v. Lowe,* 592 A.2d 855, 857–858 (R.I.1991) the Rhode Island Supreme Court also addressed the issue and concluded:

> "In enacting our peer-review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer-review meetings to ensure that medical care of high quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance."

A similar ruling was made in *McGuffey v. Hall*, 557 S.W.2d 401 (Ky. 1997) (finding Kentucky's privilege statute facially unconstitutional because there was no relationship between peer review privilege and quality health care)

Consequently, based upon this Courts review of the numerous authorities, it has concluded that Courts have found that a plaintiff's right to discover material in the peer review files is based upon a finding that the privilege/confidentiality statute is unconstitutional or an exception has been judicially created. This court must, if possible, interpret the statute reasonably to find it constitutional. *In Re Davis*, 681 NW2d 454 (SD 2004). As a result, this Court finds that SDCL 36-4-26.1 is not unconstitutional, but in order to reach that result, an exception must be applied in a reasonable fashion, based on existing law, to allow Plaintiffs access to the information and evidence that forms the crux of their cases. The Plaintiff's Motion for Summary Judgment declaring SDCL 36-4-26.1 unconstitutional in violation of the South Dakota Open Courts Provision is denied.

The Crime-Fraud Exception

Courts have long held that privileges applied to evidence and information are subject to various exceptions when the privilege or confidentiality provision is abused. Most cases apply to the attorney-client privilege, but the same or similar concepts have also been applied to other privileges and circumstances. Further, it has long been repeated that privileges created by statute are to be strictly construed to avoid suppressing otherwise competent evidence." *State v. Catch the Bear,* 352 N.W.2d at 640, 646-47[9]. Evidentiary privileges in litigation are not favored and

[9] *Catch the Bear* also quoted the US Supreme Court: "The United States Supreme Court has forcefully supported strict construction: 'Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'" *United States v. Nixon,* 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974).

even those rooted in the Constitution must give way in proper circumstances. Herbert v. Lando, 441 U.S. 153 (1979).

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting). Accord, *United States v. Nixon*, 418 U.S. 683, *51 709–710, 94 S.Ct. 3090, 3108–3109, 41 L.Ed.2d 1039 (1974). *Trammel v. United States*, 445 U.S. 40,50 (1979) All privileges limit access to the truth in aid of other objectives but virtually all are limited by countervailing limitations. *United States v. Textron*, 577 F.3rd 21,31 (1st Cir. 2009)

One of the most significant historical privileges found to have an exception was the juror privilege against being compelled to disclose deliberations and comments among the jurors. In *Clark v. United States*, 289 U.S. 153 S.Ct. 465 77 L.Ed. 993 (1933), a juror was suspected of fraud and deceit upon the trial court for perjuring herself during jury selection. In *Clark* the court considered similar policy considerations supporting juror privilege that form the basis of peer review privilege. The court found that "freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid". *Clark* went on to find that "the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy."

Clark went on to find that the privilege does not apply where "the relation giving birth to it has been fraudulently begun or fraudulently continued". The *Clark* Court continued: "The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth."

The Presidential executive privilege was also found to be subject to an exception in *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, *(1974)*. In *Nixon* the Special Prosecutor sought information from the President of the United States that was clearly protected by executive privilege. The *Nixon* court found that "the President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises..." In finding that the executive privilege was not absolute, the *Nixon* court decided that the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. *Id.*

The attorney-client privilege, one of the most guarded privileges in history, is also overcome upon a proper showing. *State v. Catch the Bear,* 352 N.W.2d at 640, 646-47. All jurisdictions recognize the exception. The Eight Circuit Court of Appeals has recognized the exception on numerous occasions. *In Re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 50 Fed.R.Serv.3d 1336 *(8th Cir, 2001)* ("The attorney-client privilege encourages full and frank communication between attorneys and their clients so that clients may obtain complete and accurate legal advice. But the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing. Thus, it is well established that the attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin,* 491 U.S. 554, 563, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989))

The spousal privilege has also been subject to exceptions when crime or fraud are properly asserted. At one point in history it too was considered absolute. In finding an exception to the spousal privilege, in *Trammel v. United States*, 445 U.S. 40,50 (1979) the court stated:

> "No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.
>
> The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime." *Trammel* at 51-52

Numerous other courts have found that in various circumstances that the crime-fraud exception applies not only in criminal cases but in various civil tort cases. Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 A.L.R.3d 861.

On a limited basis, the South Dakota Supreme Court has ruled that the attorney-client privilege is overcome in civil cases involving claims of insurance bad faith. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity,* 2009 S.D. 69, 771 N.W.2d 623.

The plaintiffs have argued here that these traditional privileges above described are rooted deeply in either our constitution (attorney-client privilege) or otherwise in American jurisprudence, and that the peer review privilege/confidentiality statute, SDCL 36-4-26.1, is of modern creation (adopted in 1977) with shallow roots. They argue strenuously that the policy considerations behind the privilege are unsound and consequently erode the strength of such privilege. They further argue that the peer review privilege should be more susceptible to an exception than those more deeply rooted exceptions. Without agreeing that the policy behind the privilege is questionable, the court finds this argument and reasoning sound. There is no compelling or otherwise sufficient basis offered by the Defendants here showing why the crime-fraud exception should not apply to the peer review privilege or that it should be treated any differently that other more firmly rooted privileges. In the appropriate case, like the present case, the balancing required by the law tips in favor of overcoming the privilege and disclosure of the information. All other privileges have been eroded in such a manner. Granted, there is sound policy behind the privilege in facilitating frank and honest discussion among peer review members. However, in certain circumstances, when claims of fraud or deceit are properly presented, the courts have a duty and obligation to allow claimants access to crucial and important evidence. If the privilege in such a case is not overcome, imprudent decisions and wrongdoing in the peer review process would never be brought to light and patient safety and the delivery of medical care would suffer in contravention of the stated public policy. Furthermore, without such an exception to counterbalance the privilege, the statute could be rendered unconstitutional. *Adams v. St. Francis Regional Medical Center*, 264 Kan. 144 955 P.2d 1169 (1996).

By not allowing access to this information there is no way for a plaintiff, or anyone else for that matter, to determine **if** the peer review committee members acted without malice; **if** the peer review committee made a reasonable effort to obtain the facts of the matter under consideration; or **if** the peer review committee acted in reasonable belief the action taken was warranted by those facts. Without giving Plaintiffs access to this important peer review information, the second clause of the first sentence of SDCL 36-4-25 is rendered completely meaningless and the legislature would have been well served to end that sentence as such: "within the scope of the functions of the committee." The legislature obviously did not do so. They made peer review immunity conditional upon following the rules. These committees owe a substantial and important fiduciary obligation to the entire community, and in order for the public to be satisfied that they are properly carrying out that important fiduciary obligation, when the appropriate case arises, the plaintiffs should have access to the information to make sure the legislative intent as expressed in the statute is upheld.

This Court rules that the peer review privilege, SDCL 36-4-26.1, is not absolute, but is subject to the long recognized crime-fraud exception.

However, the analysis does not stop there. In *Clark* the Supreme Court recognized that it would be absurd to say that the privilege "could be got rid of" merely by making a charge of fraud. (citing, O'Rourke v. Darbishire, (1920) A.C. 581, 604). Clark went on to rule that "there must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in". Clark further stated "To drive the privilege away, there must be 'something to give colour (sic) to the charge'; there must be 'prima facie evidence that it has some foundation in fact."

In *US v. Zolin,* the Supreme Court clarified the procedure that district courts should adopt in deciding motions to compel production of allegedly privileged documents under the crime-fraud exception. First, the Court resolved a conflict in the circuits by holding that the district court has discretion to conduct an *in camera* review of the allegedly privileged documents. Second, concerned that routine *in camera* review would encourage opponents of the privilege to engage in groundless fishing expeditions, the Court ruled that the discretion to review *in camera* may not be exercised unless the party urging disclosure has made a threshold showing "of a factual basis adequate to support a good faith belief by a reasonable person" that the crime-fraud exception applies. *Zolin,* 491 U.S. at 572, 109 S.Ct. 2619. Third, if the party seeking discovery has made that threshold showing, the discretionary decision whether to conduct *in camera* review should be made "in light of the facts and circumstances of the particular case," including the volume of materials in question, their relative importance to the case, and the likelihood that the crime-fraud exception will be found to apply. *Id.* at 572, 109 S.Ct. 2619.

A number of circuits have adopted somewhat different standards regarding the quantum of proof required to satisfy the crime-fraud exception, an issue the Supreme Court declined to reach in *Zolin,* 491 U.S. at 563 n. 7, 109 S.Ct. 2619. *See In re Sealed Case,* 107 F.3d at 50 (D.C.Cir.) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent fraud); *In re Grand Jury Proceedings,* 87 F.3d at 381 (9th Cir.) (reasonable cause); *In re Richard Roe, Inc.,* 68 F.3d at 40 (2d Cir.) (probable cause); *In re Int'l Sys. & Controls Corp.,* 693 F.2d 1235, 1242 (5th Cir.1982) (evidence that will suffice until contradicted and overcome by other evidence).

Sufficient evidence to warrant finding that legal service was sought or obtained in order to enable or aid commission or planning of crime or tort, as required for crime–fraud exception to attorney–client privilege under Kansas law, is that which constitutes prima facie case; prima facie case consists of evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue it supports. K.S.A. 60–426(b)(1). *Berroth v. Kansas Farm Bureau Mutual Ins. Co., Inc.*, 205 F.R.D. 586 (D. Kan. 2002) (applying Kansas law)

To this Courts knowledge, South Dakota has not adopted a similar legal foundation as was laid out in the authorities above. However, South Dakota does require that in order to claim privilege, a privilege log is necessary and required. *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity,* 2009 S.D. 69, 771 N.W.2d 623. In Acuity, the court stated:

> "The failure of a party to provide a court with sufficient information to determine the question of privilege raises substantial questions concerning the efficacy of the objection: As a starting point, it is clear that ultimately a party asserting privilege must make a showing to justify withholding materials if that is challenged. The question whether the materials are privileged is for the court, not the party, to decide, and the court has a right to insist on being presented with sufficient information to make that decision. It is not sufficient for the party merely to offer up the documents for in camera scrutiny by the court. Ultimately, then, *637 a general objection cannot suffice for a decision by a court although it may suffice for a time as the parties deal with issues of privilege in discovery."

No privilege log was presented here for a couple reasons. First, the Defendants asked the Court to stay discovery and for protective orders pending their motion for summary judgment on the statute of limitations issue as granting that motion would moot the need for the information. Second, their claim of absolute privilege and the broad scope of the privilege excused them of any obligation to provide a privilege log. Due to the procedural posture of this case at the time of the motion hearing, their failure to provide the privilege log is excused under the circumstances. The parties here were dealing with this issue in discovery and the court was required to give some guidance.

In order to determine if the Plaintiff has met the necessary threshold to properly present the crime-fraud exception the court must consider the law and evidence in this case. Questions of fraud and deceit are generally questions of fact and as such are to be determined by the jury." *Ehresmann v. Muth,* 2008 S.D. 103, ¶ 20, 757 N.W.2d 402, 406 (citing *Laber v. Koch,* 383 N.W.2d 490, 492 (S.D.1986)). To recover on a claim of constructive fraud or deceit a plaintiff must establish that a duty existed between themselves and the defendant." *Sejnoha v. City of Yankton,* 2001 S.D. 22, ¶ 15, 622 N.W.2d 735, 739 (citing *Sabhari v. Sapari,* 1998 S.D. 35, ¶ 17, 576 N.W.2d 886, 892).

Deceit, under SD law is defined by SDCL 20–10–2 as:

A deceit within the meaning of § 20–10–1 is either:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing

SDCL 53–4–5 defines actual fraud as follows:

Actual fraud in relation to contracts consists of any of the following acts committed by a party to the contract, or with his connivance, *with intent to deceive another party* thereto or to induce him to enter into the contract:

(1) The suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true;

(3) The suppression of that which is true by one having knowledge or belief of the fact;

(4) A promise made without any intention of performing it; or

(5) Any other act fitted to deceive.

Actual fraud is always a question of fact. *Arnoldy v. Mahoney*, 791 NW2d 645 (SD 2010)

(SDCL 53–4–6 provides the following definition of constructive fraud:

Constructive fraud consists:

(1) In any breach of duty which, without any actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

2) In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

In this court's ruling on the motion for summary judgment it found that a fiduciary relationship exists between a hospital, clinic, or doctor and the patient. Such a finding is made because many patients go to the hospital in a weakened condition, many suffering from mental and physical limitations due to age, disease, pain or other disability. They are somewhat limited in their choices due to financial constraints placed upon them by their lack of recourses, insurance provider or public assistance. They are required to put their faith and trust in the medical providers who have superior knowledge and skill in making and keeping them healthy. This is especially the case when you consider the fact that medical staff has the ability to render them unconscious and perform significantly invasive medical procedures upon them. There is little room for doubt that a significant fiduciary duty exists on behalf of the Defendants and in favor of their patients in the context of the hospital/physician – patient relationship. *Brookins v. Mote*, 292 P3rd 247, 2012 MT 283, (MT 2012) ("we acknowledged that the rise of the 'modern hospital' imposed a duty on hospitals to take steps to ensure patient safety in the process of accreditation and granting of privileges")

When considering the important duty a medical facility or doctor has to the patient, it is imperative that the medical providers are bound to disclose important information. Suppression of information the patient has a right to know, and in fact should know, falls within the

definitions above as both a fraud and a deceit. It also noted in the various materials submitted here that allegedly, the various medical facility Defendant's held Dr. Sossan out as a highly qualified and accomplished surgeon and advertised him as such during his tenure at their facilities. There is other evidence presented indicating some of the Defendants here advised their patients who they had referred to Dr. Sossan that he was a competent and accomplished surgeon. Meanwhile, there is significant evidence submitted by the Plaintiffs that other physicians and medical facilities felt very strongly Dr. Sossan was not competent, was a "danger to the public" and took action against his privileges. Dr. Sossan's alleged lack of competence and ability was not a secret among the medical community in the southeast South Dakota and northern Nebraska area. Dr. Winn, according to his affidavit, made this clear to the Defendants.

Once he was in Yankton a short time nurses, physicians assistants, clerical staff, patients and other doctors made their complaints known as to his lack of competency and ability. Plaintiffs have submitted information that Dr. Sossan allegedly manipulated medical tests, falsified medical records and performed unnecessary medial procedures including substantial surgery, on some patients multiple times. Physicians and other medical providers have "broke rank", so to speak, in this case and have provided evidence and information to Plaintiffs in an effort to assist them. It is hard to believe, although it is possible, that supervisors and staff that had the ability to take action to make sure patients were safe were completely unaware of these significant issues concerning Dr. Sossan.

This Court is cognizant of the fact that the Defendants have not yet attempted to counter or refute the voluminous pile of exhibits and evidence submitted by the Plaintiffs in response to the various motions. They did so for the reason that they considered their motions for summary judgment dispositive. The court is fully aware that at this early stage of the proceedings the court has essentially one side of the story and if given ample opportunity the Defendants may be able to refute or rebut the evidence submitted by the plaintiff up to this point in time. However, despite this, it is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants. Alternatively, the court makes the same finding if the standard to be applied is "of a factual basis adequate to support a good faith belief by a reasonable person" or "evidence which, if left unexplained or uncontradicted, would be sufficient to carry case to jury and sustain verdict in favor of plaintiff on issue", or any other applicable standard needed to pass the threshold required.

In *Zolin* and other cases, the courts have indicated that an *in camera* inspection of the records is left to the sound discretion of the court. *Zolin*, at 572, 109 S.Ct. 2619. This court has given serious thought to an *in camera* inspection in this particular case. In the exercise of that discretion the Court has determined that an *in camera* review of all the materials is not necessary. With regard to peer review materials they are protected by a broad grant of privilege and confidentiality based upon a plain reading of the statute. The purpose of the statute is obviously to protect the private, frank and honest discussions and deliberations of the peer

review committee. Despite this court's ruling here that they are discoverable under the crime-fraud exception, that primary objective needs to be upheld and protected.

A decision to wrongfully grant medical privileges to an errant doctor can be done either negligently, maliciously or in bad faith. If it is done negligently it is done without prudence of a reasonable person; if it is done maliciously or in bad faith, it is more than mere negligence, but rather, action is taken to grant privileges to a doctor unworthy of such, based upon some improper, illegal or illegitimate motive, or otherwise in disregard of the rights or safety of patients.

So here, if it was done negligently the Plaintiffs would have the right to discover the objective facts and knowledge that existed and that which were available to the respective peer review body, including independent source material, in making their decision. If it appears the decision was made in bad faith or for some improper, illegal or illegitimate motive, then the plaintiffs may, only upon further showing, probe deeper into the peer review process. Upon a showing of illegality or improper motive, Plaintiffs may possibly probe into the actual deliberative process of the members of the peer review body. The court will need to address these issues on a case by case basis after a privilege log is submitted. Consequently, as to objective information gathered or considered by the peer review committees the court orders that such information shall be disclosed and copies provided to Plaintiff's counsel under a protective order without *in camera* inspection, as that information is not considered private deliberative information as contemplated by the statute. *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987). The remaining materials will be submitted to the court for *in camera* inspection with a privilege log as required. The Defendants shall have those materials delivered to the Court at is chambers in Armour, South Dakota as ordered below.

The Court has otherwise considered all of the arguments presented as to the specific discovery requests. Most of those requests were not responded to because of this present motion as well as the possibility that the summary judgment motion would moot the need to respond. The Motions to Compel are granted in all respects, subject to the Defendant's right to raise additional objections that are not redundant. Defendants argued at the hearing on this matter that the Plaintiffs discovery requests ask for voluminous records. In that regard, the court shall allow Defendants an additional forty-five (45) days to supplement their discovery responses with full and complete responses. Since this is a case of first impression, any requests for costs or attorney fees are denied.

ORDER

Consequently, based upon all of the above and foregoing it is hereby

ORDERED, that the Plaintiffs Motion to Compel is granted, in part and denied in part, and it is further

ORDERED, that the Plaintiffs Motion for Summary Judgment on the constitutionality of SDCL 36-4-26.1 is denied, and it is further

ORDERED, that the peer review committee, medical executive committee, and any other board of Avera Sacred Heart Hospital (ASHH) or Lewis & Clark Specialty Hospital (LCSH) having peer review responsibilities, shall produce to the Plaintiffs, without the need of further *in camera* review, the applications submitted by Dr. Sossan in order to obtain privileges, all attachments and collateral information that were attached to those applications, all documents that were generated or obtained by the peer review committees to obtain other background information of Dr. Sossan, including any criminal background checks, that contain objective information, and all materials received by the peer review committees from the National Medical Practitioners Databank, if any, as well as any other objective information they received in their due diligence endeavor to make "reasonable effort to obtain the facts of the matter under consideration,"; and it is further

ORDERED that the peer review committees, medical executive committees, or any other board of ASHH or LCSC shall produce to the Plaintiffs, without the need for further *in camera* inspection, all complaints filed against Dr. Sossan by any person or other medical provider, **with the name and other identifying information of such person or medical provider redacted**, between the time Dr. Sossan was granted privileges at their facilities and his termination, and any final resolution or other action taken as a result of such complaint; and it is further

ORDERED, that in disclosing the materials described above, Defendants shall have the duty and the right to redact information that can be considered deliberative or which bears upon a member of the peer review committees private discussions or deliberations, so long as a copy of such materials are submitted to the court for *in camera* inspection with a privilege log; and it is further

ORDERED that the subjective deliberations of the above named peer review committees shall not be subject to discovery unless the Plaintiffs make further application to the Court and can establish, by clear and convincing evidence, that fraud, deceit, illegality or other improper motive influenced the committee members in granting Dr. Sossan privileges, and it is further

ORDERED, that complete copies of all peer review materials of any Defendant hospital or clinic that made peer review decisions concerning Dr. Sossan shall be delivered to the Court, by US mail or otherwise, in its chambers in Armour, South Dakota, within twenty (20) days from the date of this order, and it is further

ORDERED that the information ordered to be produced to the Plaintiffs shall be produced under the provisions of a protective order based upon a stipulation to be resolved by the parties, and in the event no stipulation as to the protective order can be reached within 20 days, each party shall submit their version of such protective order to the Court with a brief in

support of their position and the Court will decide, without hearing, the terms of such protective order; and it is further

ORDERED, that this Memorandum Decision shall constitute the Court' Findings of Fact and Conclusions of Law and that no further findings or conclusions shall be necessary.

Dated this 23 day of October, 2015.

BY THE COURT:

Hon. Bruce V. Anderson
First Circuit Court Judge

Attest:
CLERK OF COURTS

By_____