2008

# Tina Archuleta v. St. Marks's Hospital : Reply Brief

Utah Supreme Court


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| IN THE UTAH SUPREME COURT | |
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| TINA ARCHULETA,<br><br>Plaintiff/ Appellant,<br><br>vs.<br><br>ST. MARKS'S HOSPITAL,<br><br>Defendant/ Appellee. | Utah Supreme Court Case No.: 20080580-SC<br>Trial Court No.: 070911953 |

# REPLY BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT
HONORABLE PAT BRIAN

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## ARGUMENT

St. Mark's seeks a bright line rule whereby they can never be held accountable for the people they allow to perform surgery on patients. Under St. Mark's analysis, the statutes completely shield and insulate them from the decision to entrust an unqualified or incompetent surgeon to command their surgical facilities. St. Mark's may freely open their surgical facilities to unqualified, unskilled or incompetent surgeons without restriction. St. Mark's can invite known narcotic abusers, formerly sanctioned physicians, untrained surgeons, or even physicians with inadequate or non-existent insurance coverage to perform surgery. St. Mark's reaps all the financial benefits derived by throwing the doors to their surgical facilities open to all comers, while suffering none of the consequences when their chosen surgeon injures or kills a patient. However, neither the plain language of the Peer and Care Review statutes nor the Open Courts Clause permit such a stunning legal precedent to be created.

### I. THE CARE AND PEER REVIEW STATUTES PRESERVE PATIENT RIGHTS, PROHIBITING ONLY RETRIBUTIVE LAWSUITS BY A FALLEN HEALTHCARE PROVIDER.

#### A. The Plain Language Supports Recognition and Preservation of Patient Claims.

Privileges and immunities are to be construed narrowly. "We previously have concluded that because a privilege has the undesirable effect of excluding relevant evidence, the term 'privileged' should be strictly construed in accordance with its

object."[1] "We must not give the [statutory immunity] a broader interpretation than is necessary to effectuate its purpose."[2] St. Mark's nonetheless cuts a broad swath with the immunities and privileges at issue in Utah's Care and Peer Review statutes. "By their plain language, Utah Code Ann. § 58-13-4(2) and 58-13-5(7) **grant broad immunity** to health care providers." (Appellee's Brief at p. 12)(emphasis added). However, a careful review of the statutory language and the decisions of this Court and the Court of Appeals reveals St. Mark's position to be unsupportable.

Utah's Care Review statute, § 26-25-1, offers an immunity only for *providing* information to a discreet set of entities and committees.[3] The immunity attaches only for providing information to a specific and limited number of entities.[4] Importantly, a claim that the hospital negligently allowed an incompetent surgeon to use their facilities does not turn on whether individuals provided information, but only on whether the hospital exercised reasonable care in selecting and credentialing a physician. The immunity for simply providing the information does not represent an absolute immunity against every conceivable claim or cause. Nothing in Utah's Care Review statute prohibits or even mentions negligence claims which may be brought by patients against hospitals for allowing an unqualified or incompetent surgeon access to the surgical theatre. The Utah

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1 *Munson v. Chamberlain*, 2007 UT 91, ¶ 14, 173 P.3d 848 (citation omitted).

2 *Allen v. Ortez*, 808 P.2d 1307, 1310 (Utah 1990).

3 *See*, Utah Code Ann. § 26-25-1(1) "provide the following information;" (4) "provide information;" (5)(a) "providing information."

4 *Id.*

Court of Appeals recognized the liability and discovery limitations of the Care Review statute as peculiar and specific, applying only to those limited circumstances enumerated in the statute itself.[5]

Similarly, this Court also refused to interpret the scope of the privilege broadly, applying only to documents or material prepared specifically for submission under either a care or peer review. *Benson v. I.H.C. Hospitals, Inc.* restricted application of the statute to "only material and information prepared *specifically* for submission to a peer review committee."[6] The court further found that, as regards the Care Review statute, the documents were indeed discoverable.[7] Subsequent to this decision, the legislature amended the Care Review privilege to preclude discovery of documents prepared specifically for the purposes of care or peer review.[8]

However, the legislature made no attempt to restrict or undermine the common law claims for negligence which were at issue in that case. Had the legislature wished to restrict common law claims as part of the Care Review statute, as they did with discovery, they could easily have included such restrictions in the revised statutes. The fact that the legislature let those claims stands undermines St. Mark's assertion of a broad statutory privilege and immunity for providing information which somehow operates to foreclose claims based on their negligent selection and retention of unqualified surgeons.

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5 *Cannon v. Salt Lake Regional Med. Ctr.*, 2005 UT App 352, ¶ 23, 121 P.3d 74.

6 *Benson v. I.H.C. Hospitals, Inc.*, 866 P.2d 537, 540 (Utah 1993).

7 *Id.*

8 *See*, Utah Code Ann. § 26-25-3

Finally, the Peer Review immunities at issue do not foreclose all claims and offer only a narrow safe harbor for participants. In *Rees v. Intermountain Health Care, Inc.* a cardiologist brought a claim against the hospital after his surgical privileges were limited.[9] The surgeon based his claim on a denial of due process. The hospital raised the predecessor Peer Review statutes, Utah Code Ann. §§ 58-12-25, 58-12-43, as a defense and filed a motion for summary judgment that the surgeon could not bring his claim because of the immunity. The trial court held that, under the former statutes, immunity did not apply to hospitals.[10]

On review, IHC argued that the Peer Review statute was a 'broad' immunity against all claims. "IHC would have the court interpret this section to mean that any act taken by the hospital even remotely related to peer review process... is protected by statutory immunity."[11] This Court refused such argument. "[T]he plain language of the statutes indicates that their purpose is to protect health care providers who furnish information regarding the quality of health car rendered... Dr. Rees's suit against IHC does not arise out of the fact that doctors and hospital administration provided adverse information regarding his competence."[12] Even while affirming the trial court's conclusion that immunity did not apply to 'hospitals,' this Court further noted that the statutes were inapplicable because they did not involve a claim against participants in the

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9 *Rees v. Intermountain Health Care, Inc.*, 808 P.2d 1069 (Utah 1991).

10 *Id.* at 1078.

11 *Id.* at 1077.

12 *Id.* at 1078.

peer review process, but instead involved a claimed termination of privileges without due process.[13]

Subsequent to *Rees*, the legislature modified the statutory language to expressly include 'hospitals,'[14] but again did not take the opportunity to correct or clarify the interpretation that the statutory immunities only apply to prevent suit against individuals participating in or supplying information during peer review. In short, if the legislature were dissatisfied with this Court's narrow interpretation of the immunity, it could easily have broadened the language. This Court refused the position that immunity attaches to "any act taken by the hospital even remotely related to peer review process."[15] Because the legislature did not act to alter this holding as a misconception, it remains the law today that the immunity provisions only shield individuals from suit for participating in peer review proceedings.[16]

Utah's Peer review statutes, §§ 58-13-4, 5, provide only a limited immunity for participants engaged in peer review. The safe harbor offered under those statutes encourages health care providers to freely evaluate their colleagues' professional skills, ethics, and character without fear of a retributive lawsuit being filed by the individual

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13 *Id.*

14 *See*, Utah Code Ann. 58-12-43(6) (West 1991)

15 *Rees*, 808 P.2d at 1077.

16 Utah Code Ann. § 58-13-5(7) shields participants only against "liability *arising from* participation in a review." (emphasis added).

under scrutiny.[17] Here, St. Mark's attempts to leverage the narrow Peer and Care review processes and expand their coverage to include all documentation and considerations, regardless of when they are generated or the claims and parties at issue in a given case. St. Mark's interpretation of broad immunity and privilege under the statute finds no basis in the plain language and runs contrary to this Court and the Court of Appeals previous readings of the statutes.

Credentialing a physician for surgical privileges and the scope of those privileges is not the same thing as the peer and care review processes. States with peer review statutes generally conclude that any documentation or evidence generated outside the peer review process remains discoverable.[18] In *Benson v. IHC*, the court also agreed that documents outside the peer review process remain discoverable.[19] Because credentialing involves the decision to grant privileges and allow a physician to use surgical facilities based on what the hospital knew or should have known, the failure to exercise due care in making the decision may still give rise to liability. Accordingly, the statutes relied upon by St. Mark's cannot operate to shield them from liability for their poor judgment in retaining an unqualified or incompetent surgeon.

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17 *Benson*, 866 P.2d at 539-40.

18 *See*, *May v. Wood River Tp. Hosp.*, 629 N.E.2d 170 (Ill. Ct. App. 5th Dist. 1994); *Menoski v. Shih*, 612 N.E.2d 834 (Ill. Ct App. 2d Dist. 1993); *Hill v. Sandhu*, 129 F.R.D. 548 (D. Kan. 1990); *Willing v. St. Joseph Hosp.*, 531 N.E.2d 824 (Ill. Ct. App. 1st Dist. 1988).

19 *See*, *Benson*, 866 P.2d at 540 (the statute's rationale tends to favor a finding of privilege only for "documents prepared specifically to be submitted for review purposes.")

## II. ST. MARK'S CONSTRUCTION AND INTERPRETATION RUN AFOUL OF CONSTITUTIONAL RIGHTS.

Statutes are presumed to be constitutional and must be construed in a manner that avoids constitutional conflict.[20] Only by construing the statutes in the broad manner urged by St. Mark's do the statutes present a constitutional issue. There is no question that hospitals must act with reasonable care; requiring hospitals to exercise care when privileging individuals merely represents those individualized circumstances (facts/ standard of care) which give rise to liability under this well-recognized duty. Therefore, the Peer and Care Review statutes must not be construed to abrogate the remedy of individuals to bring a court action when the hospital does not exercise due care. As interpreted by St. Mark's the statutes offend both the open courts and equal protection clauses of the Utah constitution.

### A. St. Mark's Construction Eliminates a Right to a Remedy, Offers No Meaningful Alternative and Fails to Advance the Admitted Bases for the Statutory Immunities & Privileges.

At the outset, the Court should note that St. Mark's ignores the legal principle that the legislature must speak in a manner which demonstrates an intent to occupy an entire field of law before the statute may be read to eliminate individual claims.[21] St. Mark's offered no direct argument or authority in opposition to this point. St. Mark's argues their

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[20] *Laney v. Fairview City*, 2002 UT 79, ¶ 7, 57 P.3d 1007; *Utah State Road Comm'n v. Friberg*, 687 P.2d 821, 831 (Utah 1984)(Courts are "constrained to construe statutory terms to avoid an unconstitutional application of the statute.").

[21] (See, Appellant's Opening Brief at p. 17).

broad interpretation of the statutory immunity and privileges does not offend the open courts clause because: (1) the 'cause of action' for negligent credentialing did not exist at the time the statutes were enacted, the open courts claus was not violated; (2) the statutes insulating hospitals from liability and lawsuit leave patients with reasonable alternative remedies; and, (3) even if eliminating patient's rights, the statutes represent a reasonable, non-arbitrary means of eliminating a social or economic evil. Appellant will address each argument in turn.

1. St. Mark's Confuses "Cause of Action" With Right to a Remedy.

St. Mark's begins from the faulty premise that "The Open Courts Clause was not violated because negligent credentialing was not an existing cause of action." (Appellee Brief at p. 19). St Mark's variously characterizes the Open Courts Clause as requiring an "*existing* right of action" (Id. at 19)(emphasis in original); an "existing remedy or cause of action" (Id.); or, a "previously recognized cause of action." (Id. at 21).[22] St. Mark's misunderstanding springs from their reading of *Wood v. University of Utah Med. Ctr.*[23] wherein the opinion regarding an open courts analysis was sharply divided.

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22 Appellee St. Mark's repeatedly cites to a few district court decisions and claims that "all the district courts" have held a claim for negligent credentialing does not exist. (Appellee's Brief at 21). Unless St. Mark's has surveyed each and every court presented with the issue, the claim that all district courts agree is at best a stretch. Further, the district court decisions in this case have no relevance and cannot be viewed as persuasive or precedent where the standard of review grants "no deference to the decision of the trial court." *Whipple v. American Fork Irr. Co.*, 910 P.2d 1218, 1220 (Utah 1996).

23 *Wood v. University of Utah Med. Ctr.*, 2002 UT 134, 67 P.3d 436.

St. Mark's relies on the lead opinion in *Wood* to argue that the 'cause of action' must be established.[24] However, that opinion was not held by the majority of the court in *Wood*. Specifically, only two justices joined in the lead opinion on open courts analysis. Three justices joined in the separate dissenting opinion's analysis of the open courts provision. The three justice majority held that "article I, section 11 is not concerned with particular, identifiable causes of action, but rather with the availability of legal remedies to vindicate individuals' interests in the integrity of their persons, property and reputations."[25]

Moreover, in decisions and opinions subsequent to *Wood,* the principle that article I, section 11 addresses legal remedies, not causes of action, was repeatedly reinforced. For example, unanimous decision *Tindley v. Salt Lake City School Dist.*, held that "[t]he legislature remains free to abrogate or limit *claims that could not have been brought* under then-existing law" and "the mere fact that legislation abrogates an existing *legal remedy* does not render it impermissible under the open courts clause."[26] Similarly, in *State v. Merrill* the court reaffirmed the "open courts provision ensures that citizens of Utah have a right to a remedy for an injury."[27] Finally, in *Judd v. Drezga*, the court stated that "citizens of Utah have a right to a remedy for an injury."[28]

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24 *See*, Appellee Brief at p. 21 citing *Wood* at ¶¶ 14-15.

25 *Wood*, 2002 UT 134, ¶ 56 (citation and quotation omitted).

26 *Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶¶ 17-18 (emphasis added).

27 *State v. Merrill*, 2005 UT 34, ¶ 23, 114 P.3d 585

28 *Judd v. Drezga*, 2004 UT 91, ¶ 10, 103 P.3d 135.

By highlighting 'legal remedy,' the post-*Wood* opinions reaffirmed the majority view in *Wood* that the Open Courts Clause preserves remedies, not 'causes of action.' Further, pointing to 'claims that could not have been brought' as areas wherein the legislature may freely work, the opinions implicitly recognize any 'cause of action' that *could* have been brought remains protected under article I, section 11. This view makes sense since litigants could have been pursuing claims and/or causes of action for years with no official appellate recognition. Under appellate law dating back to 1907, the fact pattern of negligently allowing incompetent surgeons into the surgical theatre presents a claim that 'could have been brought' under the broad theory of corporate negligence.[29] Simply because there exists no appellate decision formally naming, categorizing and placing a claim in the legal taxonomy does not mean the claim is non-existent under general law.

Additionally, it makes pragmatic sense to draw the line at 'legal remedy' because, if it were required that specific causes of action must be previously recognized, the legislature could simply craft fact specific legislation which gives a name to the cause of action and effectively narrow or eliminate entire fields of law. Such a check on legislative power would be no check at all and would fundamentally undermine the foundations of Utah's social contract with its citizens.

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[29] *See*, *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n*, 32 Utah 46, 88 P. 691, 696 (Utah 1907)(overruled on other grounds); *and*, *Sessions v. Thomas D. Dee Memorial Hospital Ass'n*, 78 P.2d 645, 652 (Utah 1938); *see*, *also*, '*Sessions I' Sessions v. Thomas Dee Memorial Hospital Ass'n,* 89 Utah 222, 51 P.2d 229, 231 (Utah 1935).

St. Mark's reliance on a minority holding undermines their broad interpretation of the Peer and Care Review statutes. St. Mark's perverts the open courts analysis to require that the specific factual circumstances be recognized as a 'cause of action.' However, were it the case that specific factual bases for generalized negligence claims must be expressly recognized and adopted as named torts, there would be no meaning to our open courts clause as the legislature could freely abrogate causes of action by enumerating those fact patterns not previously memorialized as a 'cause of action' by an appellate court opinion.

2. No Alternative Remedy Exists for A Hospital's Failure to Exercise Care In Choosing Those Who May Use Surgical Facilities.

St. Mark's lists a host of other claims and causes of action which a plaintiff may bring. However, none of these claims or causes of action recognize the breach of duty when a hospital allows incompetent and unqualified surgeons to command their surgical facilities. Because St. Mark's offers no true 'alternative' remedy for this breach, immunizing hospitals against liability eliminated the right to a remedy and offends article I, section 11's guarantee.

3. St. Mark's Interpretation Is Not a 'Reasonable' Means of Eliminating a Clear Social or Economic Evil.

Notably, nowhere does the legislature speak of eliminating a clear social or economic evil within the Peer or Care Review statutes, unlike the Architect and Builder's Statute of Repose or the Medical Malpractice Cap.[30] Because there is no legislative

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30 *See*, Utah Code Ann. §§78B-2-225, *and*, 78B-3-410 (West 2008), respectively.

expression to cure a clear social and economic evil by immunizing a hospital from liability for failing to exercise reasonable care in credentialing physicians, and because St. Mark's points to no apparent social or economic evil, the statutes cannot be construed as St. Mark's urges without violating the Open Courts provisions.

Assuming that the statutes are intended to cure a clear social evil by opening communication to further improve healthcare, such goals are not obtained by granting an absolute immunity against all claims The immunity afforded under the Peer and Care Review statutes is a limited immunity for a specific purpose, not an absolute immunity from suit. In *Allen v. Ortez*, the court held that limited immunities should be construed narrowly, with only enough breadth to accomplish their purpose. The plaintiffs in *Allen* brought claims against a social worker who made extra-judicial allegations of child abuse in letters to the mayor, an attorney and a domestic relations commissioner. The defendant relied upon Utah Code Ann. § 62A5-510 (1989) which stated: Any person, official, or institution participating in good faith in making a report [of child abuse] ... is immune from any liability, civil or criminal." The statute offered immunity only for specified information provided to a discreet set of individuals.

The court refused to recognize this as an absolute immunity, shielding against all claims. "We must not give the statute a broader interpretation than is necessary to effectuate its purposes."[31] The court explained "[t]he narrow purpose of this scheme is to facilitate detection, investigation, prosecution, and prevention of child abuse by the

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31 *Allen v. Ortez*, 802 P.2d 1307, 1310 (Utah 1990).

governmental agencies charged with those responsibilities. Its purpose is certainly not to require, much less immunize, the general dissemination of allegations of child abuse."[32]

The recognized and admitted purpose of the Peer and Care Review statutes in this case is to improve medical care and encourage the free flow of information during Care and Peer Review.

> The purpose of these statutes is to improve medical care by allowing health-care personnel to reduce "morbidity or mortality" and to provide information to evaluate and improve "hospital and health care." Without the privilege, personnel might be reluctant to give such information, and the accuracy of the information and the effectiveness of the studies would diminish greatly.[33]

St. Mark's themselves repeatedly point out "the legislative purpose of encouraging open, frank and candid peer review without the fear of retribution and lawsuits." (Appellee's Brief at 6, 7, 23, 24, 25).

However, extending a Peer or Care Review to shield hospitals from their lack of care in credentialing incompetent surgeons advances none of the goals associated with granting a limited immunity or the purposes of the statutes. Shielding bad decisions does nothing to 'improve healthcare' or to 'decrease morbidity or mortality.' Immunizing hospitals from third-party liability simply because they participate in a Peer or Care Review proceeding, does not guarantee a free and frank exchange of information. Because providing an absolute immunity to hospitals advances none of the accepted goals

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32 *Id.*

33 *Benson*, 866 P.2d at 539-540.

for these statutes, construing them with such a broad immunity offends the open courts provision.

Further, St. Mark's offers no argument to demonstrate how eliminating the ability of a *third-party* victim to bring a claim for the decision to credential furthers the admitted legislative purpose. St. Mark's does not show how a third-party lawsuit would chill participation by individuals on Peer and Care Review committees. St. Mark's inability in this regard is simply because patients, injured by an incompetent surgeon given privileges by a careless hospital, do not bring claims against Peer or Care Review committees. Rather, the patient brings the claim against the hospital who exercised no due care in choosing those to whom they open their operating rooms.

Finally, Appellant's claim sounds generally in negligence. The 'name' negligent credentialing simply reflects those peculiar facts and circumstances giving rise to the breach of duty. Under *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n*, and *Sessions v. Thomas D. Dee Memorial Hospital Ass'n*, Utah law recognized the much broader concept of corporate negligence for hospitals. Clearly, a claim for the failure to exercise reasonable care in selecting physicians who may be privileged *could* have been brought as early as 1907 in Utah. Utah's Peer and Care Review statutes should not be construed to eliminate an individual's right to a remedy. Moreover, because no reasonable alternative remedy exists and because eliminating the claim does not further the purpose

of the statutes at issue, St. Mark's interpretation and application violates the Open Courts provision of the Utah Constitution.[34]

## CONCLUSION

The plain language of the Peer and Care Review statutes provides no basis for the absolute immunity sought by St. Mark's. Under St. Mark's analysis, they cannot be held liable under any circumstances for the surgeons they allow to control and direct their surgical facilities and staff. A surgeon could be a known drunkard, an unlicensed physician or an untrained physician and St. Mark's would still be shielded from immunity for allowing that physician into their surgery room.

St. Mark's alone acts and decides to open the doors. St. Mark's and St. Mark's alone must be held responsible for the decision as to whom they let enter. Construing the statutes to provide an absolute immunity removes any incentive for St. Mark's to act with the care, discretion and consideration required when faced with such a monumental decision. Foreclosing the possibility of those injured by St. Mark's poor decisions to seek compensation eliminates a remedy by due course of law. Accordingly, Appellant respectfully requests that this Court overturn the dismissal and give Appellant her day in Court.

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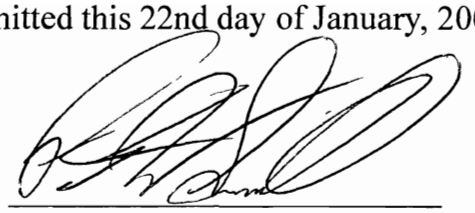
[34] St. Mark's approach to the Equal Protection Clause mirrors their approach to Open Courts. St. Mark's similarly offers no argument or authority to show that eliminating the claim for negligence in selecting surgeons who may command their surgical facilities will further a 'full and frank' discussion when it comes time to conduct either a Peer or Care Review. Accordingly, St. Mark's suggestion that their interpretation also passes scrutiny under an Equal Protection analysis fails.

Respectfully submitted this 22nd day of January, 2009.



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CERTIFICATE OF MAILING

I hereby certify that on this January 23, 2009 I mailed a true and correct copy of the above and foregoing Reply Brief, postage prepaid to:

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