THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2002 TERM

JANUARY SESSION

EXETER HOSPITAL MEDICAL STAFF, ET AL

V.

BOARD OF TRUSTEES OF EXETER HEALTH RESOURCES, INC., ET AL

NO. 2001-134

BRIEF FOR AMICUS CURIAE AMERICAN HOSPITAL ASSOCIATION AND N.H. HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS

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I. QUESTION PRESENTED

The question presented by this case which brings the American Hospital Association (hereinafter "AHA") and the N.H. Hospital Association (hereinafter "NHHA") (collectively hereinafter the "Hospital Associations") to participate in this appeal is the question of whether or not a hospital's medical staff has the legal capacity, as an entity, to bring suit against the hospital of which it is a constituent part.

II. STATEMENT OF THE CASE

One of the Plaintiffs in this case purports to be the "Exeter Hospital Medical Staff" (hereinafter the "Medical Staff"). The Medical Staff identified itself in the original Petition in Equity as "a self-governing body that has primary authority and responsibility for the delivery and quality of medical care to patients in the hospital". Appendix to Notice of Appeal, p. 1. Another of the purported Plaintiffs is the Exeter Hospital Medical Staff Executive Committee (hereinafter the "Executive Committee"), which identifies itself in the Petition as "duly elected by the Medical Staff with duties and responsibilities which are delineated in the Medical Staff Bylaws". Ibid. The third Plaintiff is Dr. Mark R. Windt, who identifies himself in the Petition as the President of the Medical Staff. Ibid.

The Defendants filed a motion to dismiss the Petition which, among other things, contended that the Medical Staff and the Executive Committee had no legal capacity to sue in this case and should be dismissed as parties. Id. at 13-15. The Trial Court (Coffey, J.) granted the Motion to Dismiss, finding that "the Medical Staff and its Executive Committee have failed to sufficiently demonstrate a right to claim relief on their own behalf." Appendix to Brief of Medical Staff, p. 46.

The Medical Staff and Dr. Windt appeal the granting of the Defendants' Motion to Dismiss as to the Medical Staff.

III. INTRODUCTION

The AHA includes among its membership thousands of hospitals throughout the United States. The NHHA has 26 acute care member hospitals and 6 specialty care member hospitals, all of which are

located in New Hampshire. Each of these member hospitals operates under licensing laws that in virtually every state, as in New Hampshire, place direct responsibility for the quality of hospital services and the care rendered therein upon the hospital's governing body.

As representatives of hospitals across New Hampshire and the nation, the Hospital Associations have a legitimate interest in the role and authority of a board of trustees to operate, manage, and govern a hospital. It is of the Hospital Associations' position that it is the board of trustees of a hospital which carries the ultimate responsibility for the hospital's accomplishment of its mission. Because granting a hospital's medical staff standing to sue the hospital itself interferes with the board's authority to meet that responsibility, the Hospital Associations believe that the Trial Court's ruling in this case should be sustained.

In general, hospitals are corporations and they are governed by a board of directors generally called a board of trustees. [1] The role of such boards in the United States has gradually changed from 1900 to the present. From 1900 to the 1960's, the role of the hospital boards of trustees was more symbolic than substantive. Being a hospital board trustee was considered an honor. One of the main functions of a board member was fund-raising for the hospital. Beyond fund-raising, hospital boards were responsible for the construction and maintenance of the hospital's physical facilities. All other responsibilities in that early stage of hospital governance were divided between management and the medical staff.

During the 1960's and 1970's, boards became more involved in the actual governance of the hospitals. While several economic factors triggered this transitional role, one of the key catalysts was the Darling malpractice case. The case of Darling v. Charleston Community Memorial Hospital, 211 N.E.2d 253 (Ill. 1965), involved a father who brought suit against his son's treating physician and the hospital for negligent emergency treatment that necessitated amputation of the son's right leg from casting the leg too

[1] For the background on the general role and authority of hospital boards, the Hospital Associations rely heavily upon a publication entitled "The Guide to Governance for Hospital and Health Systems Trustees," written by Mark K. Totten and James E. Orlikoff, published by the Health Research and Educational Trust, an affiliate of the American Hospital Association, Copyright 1990 and 1999.

tightly. The basic dispute in the case centered around the duty that rested upon the defendant hospital. The court affirmed a jury verdict and damage award against the defendant hospital on the ground that it had a duty to supervise the competence of its medical staff members. Id. at 260-261. This case caused hospital boards to re-examine their roles as governors and their relationships with the medical staff and to gradually increase their involvement in the administration of their institutions.

In the 1980's and continuing into and throughout the 1990's, hospital boards gradually developed the form of governance which characterizes the hospital of the twenty-first century. This type of governance is epitomized by boards that strive to understand their accountabilities, roles and responsibilities, and to discharge them effectively. Such boards actively direct the development of their hospitals' strategic policy, oversee their financial condition, and insure the quality of their delivery of medical care. With the many changing pressures affecting hospitals, such as managed care, capitation, competition, liability, and capital financing concerns, an active and effective governing board is critical to the successful operation and continued survival of the modern hospital.

Hospital boards have been influenced and pressured by case law, and by state statutes and rules that have often developed in response to case law, to assume active responsibility for all aspects of hospital governance. Uniformly, however, the standard is clear. It is the board of trustees that is charged with the responsibility of keeping the hospital true to its mission. As such, the board has the ultimate decision-making authority over all aspects of the hospital. The Hospital Associations are concerned that granting independent legal status to a hospital's organized medical staff will materially derogate from the unitary mission of hospitals and, quite unnecessarily, impose substantial obstacles to the performance by hospital governing boards of the functions the responsibility for which the law ultimately places upon them.

IV. ARGUMENT

A. The Medical Staff Is A Constituent Body Of The Exeter Hospital And Is Not A Separate Legal Entity With The Capacity To Sue In Its Own Name.

The Medical Staff has no legal existence separate and apart from the Exeter Hospital. If the Exeter Hospital did not exist, the Medical Staff would not exist. The Medical Staff has a life only as a constituent part of the Exeter Hospital. It is not a corporation; it is not a limited liability company; it is not a partnership; it is not a voluntary association; and it is not a natural person.

As stated in Section 8.1 of the Bylaws of the Exeter Hospital, the Medical Staff is an "administrative unit" of the Hospital. Appendix to Brief of Exeter Hospital. As provided in the Hospital's bylaws, the Board of Trustees of the Hospital has "appointed" the Medical Staff and "delegated" to it the "overall responsibility for overseeing the quality of the professional services provided by all individuals with clinical privileges at the Hospital ...." Section 8.1, Bylaws of the Exeter Hospital, Appendix to Brief of Exeter Hospital. See also, Id. at Section 8.3.

The specifics of the organization and functions of the Medical Staff are outlined in greater detail in the Medical Staff's own bylaws. On the other hand, it is the Bylaws of the Hospital which provide for the very existence of the Medical Staff Bylaws. Section 8.2, Bylaws of the Exeter Hospital, Appendix to Brief of Exeter Hospital. Among other things, the Bylaws of the Hospital require that the Medical Staff "submit [their] By-Laws, amendments and rules and regulations to the Board of Trustees for approval" and that the Board of Trustees itself "reserves the right to adopt or amend any [of the Medical Staff's] By-Laws, rules and regulations ...." Ibid.

Both the Bylaws of the Hospital and the Bylaws of the Medical Staff expressly provide that the Medical Staff is "accountable" to the Board of Trustees. For example, the Hospital Bylaws state that in the discharge of its delegated authority to oversee the quality of care rendered by clinicians having privileges at the Hospital, the Medical Staff has "the responsibility to account therefore [sic] to the Board of Trustees." Section 8.1, Bylaws of Exeter Hospital, Appendix to Brief of Exeter Hospital. Likewise, the Medical Staff Executive Committee is required to "account to the Governing Body [ie, the Board of Trustees] and the Medical Staff for the overall quality and efficiency of care rendered to patients in the Hospital." Section 9.6.1.2.7, Medical Staff Bylaws, Appendix to Brief of Exeter Hospital. See also, Id. at

Section 9.6.1.2.9.

The Plaintiffs suggest in their Brief that the Medical Staff's obligation to "account" to the Board is nothing more than a duty to report. Plaintiffs' Brief, p. 22-23. This is clearly wrong. The Medical Staff has no power within the Hospital organization to act independently. Although it may well have been delegated the responsibility to do certain things in the first instance, all of its actions are subject to the approval of the Board of Trustees. For example, one of the primary functions which is assigned to the Medical Staff is the credentialing of all physicians practicing at the Hospital. Nevertheless, although credentialing actions are initiated at the Medical Staff level, it is the Board of Trustees which must make the final decision on such matters. E.g., Section 8.5.7, Medical Staff Bylaws, Appendix to Brief of Exeter Hospital. See also, N.H. Code of Admin. Rules He-P 802.02 (d) (1996) (expired).

The Medical Staff's subordinate relationship to the Board of Trustees of the Exeter Hospital is typical of virtually every medical staff in virtually every hospital in the nation. For example, the Medicare program specifies that a hospital's medical staff shall "make recommendations" to the governing body with respect to physician credentials. 42 CFR 482.22 (a)(2). The Joint Commission on Accreditation of Health Care Organizations (JCAHO), which accredits the majority of hospitals throughout the country, requires exactly the same thing. See Standard MS.3.1.6. Although a collaborative relationship between a hospital's board and its medical staff is certainly contemplated by these provisions, there is no question that when they speak of a medical staff being "accountable" to the board, the collaboration is not meant to be between equals.

The further suggestion by the Plaintiffs that hospitals in New Hampshire are "under the supervision of physicians" (see Plaintiffs' Brief, p. 21) is seriously misleading. This phrase is taken from the definition of "hospital" in RSA 151-C, the certificate of need law, and is incorporated by reference into the RSA 151, the health facilities licensing statute. See RSA 151:2 I (a). The definition reads as follows:

"Hospital" means an institution which is engaged in providing to patients, under the

> supervision of physicians, diagnostic and therapeutic services for medical diagnosis, treatment and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of such persons.

As may clearly be seen, the phrase concerning supervision refers to the diagnostic and therapeutic services which are provided by the hospital, and not to the institution itself.

Moreover, at least as to the Exeter Hospital, its bylaws make it crystal clear that it is the Board of Trustees, not the Medical Staff, which is charged with the responsibility to supervise this institution:

> The affairs of the Corporation shall be managed by the Board of Trustees, which shall have and may exercise all the powers of the Corporation in accordance with its legal and ethical responsibilities, except for any actions inconsistent with actions taken by the Member and those powers reserved to the Member by law, the Articles of Agreement or these By-Laws. [Section 3.3, Bylaws of Exeter Hospital, Appendix to Brief of Exeter Hospital.]

The Medical Staff, therefore, is in no way an entity separate and distinct from the Hospital. Indeed, it is not even unique within the institution. For example, Article IX of the Hospital's Bylaws provides for the organization and operation of "The Exeter Hospital Associates." Appendix to Brief of Exeter Hospital. Like the Medical Staff, the Exeter Hospital Associates are a constituent body of the Hospital; they are overseen by the Board of Trustees; and they have their own bylaws, rules and regulations which are subject to approval by the Board of Trustees. Ibid. Indeed, the existence and operation of the Board of Trustees itself is also prescribed by the Bylaws of the Hospital. Article III, Bylaws of Exeter Hospital, Appendix to Brief of Exeter Hospital.

On the other hand, even the Board of Trustees is subdivided into subsidiary committees, including an executive committee which has the power to act in behalf of the Board to conduct the affairs of the Hospital between meetings of the Board. Article IV, Bylaws of Exeter Hospital, Appendix to Brief of Exeter Hospital. This organizational structure is, of course, similar to that of the Medical Staff, which is also broken down into numerous committees, the most senior of which is its Executive Committee. See generally, Article 9, Medical Staff Bylaws, Appendix to Brief of Exeter Hospital.

As noted above, none of the foregoing is unique to the Exeter Hospital. On the contrary, it is typical of the organizational structure that one can find in almost any hospital in the United States. Part of the reason for this is that most hospitals in this country submit to accreditation either by the JCAHO or by the American Osteopathic Association. Likewise, virtually all hospitals are participants in the Medicare program and therefore subject to the Medicare Conditions of Participation. As pointed out by

the Plaintiffs and by their Amicus, American Medical Association/New Hampshire Medical Society, in their briefs, the existence of an organized medical staff which is charged with physician credentialing and quality of patient care, but accountable to a hospital's governing body, are common requirements of both the JCAHO and the Medicare program. In New Hampshire, this is also required by the New Hampshire Code of Administrative Regulations. See generally, N.H. Code of Admin. Rules He-P 802, issued pursuant to RSA 151:9 (1996). (Note that these rules have technically expired and have not yet been reissued or replaced.)

The Plaintiffs, however, apparently take the position that the fact that an organized medical staff is a legal requirement for a hospital to be licensed, to be accredited or to participate in Medicare somehow speaks to the question of whether or not a medical staff should be recognized as a separate legal entity with the capacity to sue or be sued. It is respectfully suggested that this fact is irrelevant to the issue at hand. Suffice it to say that the federal and state regulations governing hospitals and the standards of hospital accrediting agencies mandate a virtually infinite number of things concerning the operation and structure of hospitals subject to their respective jurisdictions. With particular respect to organizational structure, these requirements apply to staff groupings other than a medical staff (for example, nursing staff, non-physician independent practitioners, etc.) and to functional groupings which include both members and non-members of a medical staff (for example, clinical departments). The mere fact that these hospital administrative units are subject to regulatory attention is not something which justifies giving each of them recognition as a separate legal entity.

If anything, the fact that the Medical Staff is *required* to exist in an organized form is a factor which militates *against* its recognition as an independent jural entity. The Plaintiffs argue that the Medical Staff is an "unincorporated association" as that term is used in RSA 510:13 and that it is therefore capable, as an entity, of suing and being sued. Although the Medical Staff is admittedly "unincorporated" and is arguably an "association", RSA 510:13 requires more of an unincorporated association than that it merely be an aggregation of similarly situated individuals. See post. The statute

speaks of "mutual" associations which connotes a *voluntary* coming together of persons sharing a common purpose. To the extent that the Medical Staff exists as a component of the Hospital because it *must* exist and to the extent that every physician having privileges at the Hospital is a member of the Medical Staff because he/she *must* be a member, the Medical Staff is not a "mutual" association.

B. The Trial Court's Ruling Should Be Sustained Because It Is Consistent With New Hampshire Precedents.

The Plaintiffs acknowledge that there is no New Hampshire Supreme Court case which holds that a medical staff of a hospital has the capacity, separate and apart from its members, to sue or be sued. On the other hand, neither the Plaintiffs nor their Amicus acknowledges the fact that, in addition to the Trial Court in this case, at least one other Superior Court has expressly ruled upon this issue and has concluded that a medical staff is *not* a separate legal entity for such purposes. See Robert H. Meyers, M.D., et al v. The Memorial Hospital, et al, Civil Action No. 82-C-127, Order on Motion to Dismiss (Carroll County, April 22, 1983), Appendix to Brief of Exeter Hospital. In the Meyers case, the Superior Court expressly held that the medical staff of the Memorial Hospital in North Conway "is in actuality an arm of the Hospital corporation .... Where such a dependent relationship exists, the dependent association should not be treated as a separate legal entity." Although that case involved the question of whether or not a medical staff had the capacity to be sued, rather than to sue, the reasoning of the Court is equally applicable to the case at bar. [2]

The Plaintiffs attempt to find support for their position in the case of Shortlidge v. Gutoski, 125 N.H. 510 (1984). That case involved a suit by an attorney against an individual member of the

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[2] Only a very few jurisdictions other than New Hampshire have considered the issue of whether or not a medical staff, per se, has the capacity to sue or be sued. Compare, Ramey v. Hospital Authority of Habersham County, 462 S.E. 2d 787 (Ga. App. 1995) (no); with Corleto v. Shore Memorial Hospital, 138 N.J. Super. 302, 350 A.2d 534 (1975) (yes); and St. John's Hospital Medical Staff v. St. John Regional Medical Center, Inc., 245 N.W. 2d 472 (S.D. 1976) (yes). Note that the Corleto case has been labeled by at least one court from another jurisdiction as "unprecedented". Johnson v. Misericordia Community Hospital, Wis. App., 294 N.W. 2d 501, 507 n. 4 (1980).

Winchester Taxpayers Association with respect to compensation for legal services rendered by the plaintiff to that association. Although the capacity of the Winchester Taxpayers Association, as an entity, was not directly at issue in the case, Shortlidge does have something to say about this question.

In the course of discussing the types of "unincorporated associations" which are subject to suit in New Hampshire under RSA 510:13, the Court makes it quite clear exactly what groups are included within its definition of the term:

> Recognizing that the term "association" has been employed to describe a number of different types of relationships, we note that for purposes of this opinion, wherever we refer to an "association," we will be referring to *an unincorporated group of individuals voluntarily joined together for a common purpose*.

Shortlidge v. Gutoski, at 513 (emphasis supplied). The Plaintiffs suggest that this quotation is ambiguous in that it is not clear whether the Court's use of the word "voluntary" was merely descriptive of the Winchester Taxpayers Association "or was used to identify an element of voluntariness that is a New Hampshire requirement for the existence of an association or an 'unincorporated association.'" Plaintiffs' Brief, p. 28-29. It is respectfully suggested that the fact that the Shortlidge Court went on to further distinguish between for-profit unincorporated associations and not-for-profit unincorporated associations demonstrates that the Court's reference to voluntariness was indeed intended to identify it as a prerequisite for the separate legal existence of any of these types of groups. The reason for that is that *all* for-profit unincorporated associations (general partnerships, limited partnerships, joint ventures) are by definition voluntary in that they involve associations of individuals who have *agreed* to "join together for a common purpose". [3]

Moreover, the Shortlidge case also recognizes that even a voluntary unincorporated association "has no legal existence apart from the members who compose it ... except as provided for by statute".

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[3] The only other New Hampshire case cited by the Plaintiffs or their Amicus is Sununu v. Clamshell Alliance, 122 N.H. 668 (1982). This, too, clearly involved a *voluntary* unincorporated association.

Shortlidge v. Gutoski at 513. In other words, the Plaintiffs *must* point to a statute which establishes that the medical staff of a hospital has a separate legal existence. (This is because, at common law, unincorporated associations were not recognized as separate legal entities and had no standing to sue or to be sued.) Since the Plaintiffs neither do nor can point to any other statute besides RSA 510:13 which even arguably establishes the Medical Staff's capacity to sue or to be sued, they are compelled to attempt to explain the Shortlidge case away. [4]

Even if the Plaintiffs were able to successfully read a voluntariness requirement out of RSA 510:13, they still would not have established the Medical Staff as a separate legal entity having the capacity to sue. They would still have to overcome the fact that the Medical Staff is no more than a constituent part of the Hospital, having no independent existence apart from the Hospital. As to this issue, neither the Plaintiffs nor their Amicus cite any New Hampshire law.

There is, however, some New Hampshire law on this point. For example, it has been determined that towns, which "are created by the State and are within its entire control", do not have the capacity to sue the State in their own behalfs. Town of Madbury v. State, 115 N.H. 196 (1975) (noting, however, that towns might be able to sue in a representative capacity in behalf of their taxpayers). While this case obviously does not stand for the proposition that a town has no legal capacity whatsoever to sue or be sued (because it clearly can be sued in its corporate capacity by a third party [see RSA 31:1 and RSA 194:2]), the case does speak to the question of whether or not a constituent subdivision has the corporate capacity to sue the entity of which it is a constituent. In the context of the case at bar, it is respectfully suggested that allowing the Medical Staff to sue the Hospital is, in essence, authorizing the Hospital to

[4] The Plaintiffs do make an effort to try to bring themselves within Shortlidge's requirement that they be a "voluntary" association in order to be a separate legal entity. They suggest that the fact that their physician members chose to practice at the Exeter Hospital, rather than some other hospital, made their membership in the Medical Staff "voluntary". Plaintiffs' Brief, p. 31. This, however, is merely semantics; it in no way overcomes the fact that, having chosen to practice at the Exeter Hospital, such physicians had no choice whatsoever as to whether or not they would become members of Exeter's Medical Staff and, had they chosen to practice at another hospital, they would have had absolutely no choice as to whether they would become members of its medical staff.

sue itself.

Besides the apparent illogic of this proposition, it is difficult to see where one would stop if one were to adopt it. Should the Board of Trustees be recognized as an entity which could sue the Hospital? Should the Anesthesiology Department or the Accounting Department be recognized as legal entities having the capacity to sue the Hospital? Should the executive committee of the Medical Staff be able to sue the executive committee of the Board of Trustees (as was attempted here)? Should the credentials committee of the Medical Staff be permitted to sue the executive committee of the Medical Staff? Etc., etc., etc.

C. The Trial Court's Ruling Should Be Sustained Because It Is Supported By Good Public Policy.

The Plaintiffs' contention that a hospital's medical staff ought to be able to sue the hospital itself (or some other constituent part of the hospital, such as its board of trustees) is not only unsupported in law, but it is also contrary to good public policy. One of the issues to be considered in determining whether or not some group ought to be able to sue or be sued as an entity distinct from its members is whether or not a judgment for or against the entity will have a preclusive effect upon identical claims brought by or against the group's members. In that regard, the RESTATEMENT OF JUDGMENTS, SECOND provides as follows:

> §61 (2). If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation, as stated in §59.
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> §59. ... [A] judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation, nor does a judgment in an action involving a party who is an officer, director, stockholder, or member of a non-stock corporation have preclusive effects on the corporation itself.

Accordingly, if this Court were to grant the Medical Staff and/or the Executive Committee legal capacity to sue the Hospital, a judgment in the case would have no effect upon identical claims brought by

individual members of the Medical Staff against the Hospital.

The reason that the foregoing principles of res judicata make sense when applied to a corporation is because stockholders, directors and/or officers of corporations do not have any personal rights to make claims with respect to injuries to the corporation, nor do they have any personal liability arising out of the corporation's acts or omissions. See generally, RSA 293-A:3.02 (1); RSA 293-A:2.02 (b)(2)(v). See also, RSA 293-A:7.40-7.47 (stockholder derivative suits); Jenot v. White Mountain Acceptance Corp., 124 N.H. 701 (1984) (suits by shareholders of dissolved corporations).

In this case, however, the claims of the Plaintiffs - except with respect to claims which are personal to Dr. Windt, if any - could just as easily have been brought by any member of the Medical Staff. [5] The consequence of this is that if this Court were to recognize the Medical Staff and/or the Executive Committee as independent legal entities, the Hospital would have no protection from a subsequent suit involving the very same claims brought by other members of the Medical Staff, even if the Hospital were successful in this suit. [6]

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[5] Indeed, contrary to the Plaintiffs' assertion that the Medical Staff Bylaws constitute a contract between the Medical Staff, as an entity, and the Hospital (see Brief of Medical Association/New Hampshire Medical Society, p. 25-27), this contention finds no support in the law of New Hampshire. In the only case relevant to the issue, Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276 (1971), this Court merely held that, as a matter of public policy, it would review an *individual physician's* exclusion from staff privileges to determine whether or not it was done in accordance with the bylaws of the hospital and was arbitrary, capricious or unreasonable. This Court did not hold that, as a general proposition, medical staff bylaws create a contract and it certainly did not hold that they constitute a contract with the medical staff as an entity. Indeed, such a proposition finds very little support in the law of any state. In that regard, a reading of the cases cited by the Amicus in their footnote 25 will reveal that although they may stand for the proposition that medical staff bylaws are tantamount to a contractual obligation of the hospital in question, they do not stand for the proposition that that obligation runs to the hospital's medical staff as an entity.

[6] Although this problem might be obviated if the individual members of the Medical Staff had given the Medical Staff express authority to act in their behalfs and to bind them with respect to such claims (see RESTATEMENT OF JUDGMENTS, SECOND §59 (1)), such is clearly not the case here. The most that could be said in support of such a proposition is that the Medical Staff Bylaws provide that one "purpose" of the organization is to "provide a means whereby issues concerning the Medical Staff and the Hospital may be discussed by the Medical Staff with the Governing Body and the President of the Hospital." Medical Staff Bylaws, Section 4.5, Appendix to Brief of Exeter Hospital. See also, Id. at Section 6.2.1.4 (duty of the President of the Medical Staff to "communicate and represent the opinions,

Nevertheless, both the Plaintiffs and their Amicus suggest that other public policy considerations militate in favor of this Court making new law in this area. [7] The gist of their arguments is that the members of a hospital's medical staff need to be able to sue their hospital because they are the sole repositories of society's concerns for the quality of medical care in the hospital setting. This is simply not true. Regardless of the role allocated to medical staffs by Medicare regulations, JCAHO standards and/or state statutes and regulations with respect to quality of care, the ultimate responsibility for quality assurance rests with the institution itself, acting through its board of trustees. Indeed, the primacy of hospital boards of trustees with respect to matters of quality assurance is *expressly* recognized by the law of New Hampshire. RSA 151:13-a provides generally for the confidentiality of the records and deliberations of hospital quality assurance committees. The purpose of this statute is to promote candid reviews of medical procedures and clinical performance in order to encourage corrective action by the hospital. Smith v. Alice Peck Day Mem. Hosp., 148 F.R.D. 51 (D.N.H. 1993). See also, In re K", 132 N.H. 4 (1989). On the other hand, the statute does allow hospitals to waive the confidentiality privilege. RSA 151:13-a III. The thing to note, however, is that *only* the hospital's board of trustees may execute such a waiver. In re "K", supra.

On the other side of the coin, the Plaintiffs' contention - argued most extensively by their Amicus - that hospital boards of trustees are more interested in the "bottom line" than they are in the quality of

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policies, concerns, needs and grievances of the Medical Staff to the Governing Body [etc.] ....") However, that is a far cry from stating that the Medical Staff shall have the power to *bind* individual members with respect to the determination of their personal rights under the Medical Staff Bylaws. Compare, Textile Workers Union v. Textron, 99 N.H. 385 (1955) (union designated as the "exclusive representative of each member for the purpose of collective bargaining ... [who] is irrevocably authorized and empowered by each member to present, negotiate and settle any and all grievances ...." may bring a suit as a representative of its members). Moreover, regardless of what the Medical Staff Bylaws say, since the Medical Staff is not a voluntary organization, it can hardly be argued that the members have "agreed" to relinquish their individual rights thereunder (if any)to the Medical Staff and its officers.

[7] Note that public policy considerations are only relevant insofar as they aid this Court in interpreting RSA 510:13. As noted above, the Plaintiffs have no standing to sue at common law and this Court has made it clear in the Shortlidge case that only *statutory* exceptions to the common law rule will be recognized.

medical care which their hospitals deliver is equally unsupportable. See generally, Brief of American Medical Association/New Hampshire Medical Society, p. 14-16.[8] Besides the fact that the Exeter Hospital is a not-for-profit corporation under both New Hampshire corporation law (see RSA 292) and Federal tax law (see § 501(c) 3, Internal Revenue Code), the Hospital's Bylaws state the following as the "Goals and Objectives" of the corporation as follows:

> a. To establish and maintain an institution for the provision of diagnostic facilities and Medical services for members of the community.
>
> b. To develop programs to meet the needs of the community.
>
> c. To promote and carry on such activities related to the rendering of care to the sick and injured, which shall include, among other things, medical and surgical treatment of sick adults and children; the prevention of disease; and instruction and teaching in the diseases of adults and children.

Pursuant to RSA 72:32-d V, the Exeter Hospital is also a "health care charitable trust" and is therefore required to "provide the communities [it] serve[s] with benefits in keeping with [its] charitable purposes". RSA 7:32-C. Among other things, this means that the Hospital's Board of Trustees is required to develop a "community benefits plan" in accordance with RSA 7:32-e which specifically identifies "the activities the trust expects to undertake or support which address the needs determined through the community needs assessment process or which otherwise qualify as community benefits". RSA 7:32-e III. Similarly, in order to maintain its charitable exemption from state and local real property taxes, the Hospital is required to establish that it is a "charitable organization" within the meaning of the tax law. See RSA 72:23 V.

Among other things, this means that the institution must be "established and administered for the purpose of performing ... some service of public good or welfare advancing the spiritual, physical, intellectual, social or economic well-being of the general public ...." RSA 72:23-e.

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[8] Likewise, it is certainly an overstatement to suggest that members of a medical staff are *exclusively* concerned with quality of care issues and that they have *no* personal stake in the financial performance of their hospitals.

The Hospital is also required to be licensed. RSA 151:1 provides that the purpose of licensing is as follows:

> [T]o provide for the development, establishment and enforcement of basic standards for the care and treatment of persons in hospital and other facilities in which medical, nursing, or other remedial care are rendered, and for the construction, maintenance and operation of such facilities, which, in the light of existing knowledge, will insure safe and adequate treatment of such persons in such facilities.

The responsibility to guarantee that a hospital meets these licensing criteria rests ultimately upon the shoulders of its board of trustees. See, e.g., N.H. Admin. Rules He-P 802.02 (a)(2) (duties of governing board include "assessment and improvement of the quality of care and services") (1996) (expired). See also, 42 CFR 482.21 (Medicare Conditions of Participation) ("The governing body must insure that there is an effective, hospital-wide quality assurance program to evaluate the provision of patient care.") Similarly, every hospital in New Hampshire is required to have in place a patient's bill of rights. RSA 151:21. Patients must be treated in accordance with these policies (RSA 151:20 I) and suits for damages may be maintained against the institution for its failure to do so (RSA 151:30 II). [9]

Accordingly, it is quite clear that hospital governing boards in New Hampshire are charged with substantial responsibilities concerning the quality of care delivered therein. Notwithstanding the Plaintiffs' suggestions to the contrary, this should align, not separate, the interests of hospital boards of trustees and hospital medical staffs. On the other hand, if hospital medical staffs are deemed to be independent legal entities capable of suing their hospitals, it is respectfully suggested that boards of trustees and medical staffs will no longer necessarily see their interests as convergent.

Finally, there is no reason to believe that granting hospital medical staffs the power to sue their

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[9] Although for-profit hospitals (of which there are several in New Hampshire) are not subject to the same requirements with respect to community benefit plans and the provision of charity care as are applicable to not-for-profit hospitals such as Exeter Hospital, they are required to comply with the provisions of RSA 151 and, when they participate in the Medicare program, the Medicare Conditions of Participation. Likewise, they are typically subject to accreditation standards such as those established by the JCAHO, which impose upon hospital governing boards the very same quality of care obligations as do the Medicare regulations.

hospitals is necessary to vindicate any public interest in patient care or safety. Hospitals in New Hampshire and elsewhere exist within a complex regulatory environment. As things already stand, hospitals can be fined, de-licensed or even shut down for violations of applicable federal and state laws and regulations. Moreover, in this era of heightened consumer involvement in the delivery of medical care, hospitals are acutely aware of their responsibilities and the consequences of a failure to live up to their community's expectations. And, finally, hanging over every hospital and its board of trustees is the ever-present specter of medical malpractice litigation.

To the extent, therefore, that public policy is relevant to the issue presented in this case, it cuts against the Plaintiffs. To allow hospital medical staffs to bring suit, eo nomine, against the very institutions of which they are a constituent part would not only be disruptive to the proper functioning of hospitals, but would tend to fragment hospitals' responsibilities to provide quality medical care to their patients. Indeed, contrary to the suggestions of the Plaintiffs, this would fly directly in the face of established public policy as universally expressed in the law and traditions of virtually every state in the union.

V. CONCLUSION

For the reasons expressed herein above, this Court should affirm the order of the Rockingham Superior Court on the defendants Motion to Dismiss and find that the Medical Staff of the Exeter Hospital has no legal capacity to be a plaintiff in this case.

Respectfully submitted,

AMERICAN HOSPITAL ASSOCIATION
and NEW HAMPSHIRE HOSPITAL
ASSOCIATION

By Their Attorneys:
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Certificate of Service

I hereby certify that two copies of the within Brief have been forwarded this _____ day of January, 2002, via first class mail, postage prepaid, to Steven W. Kasten, Esquire, Daniel P. Swartz, Esquire, Wilfred L. Sanders, Jr., Esquire, Lucy Hodder, Esquire and Michel A. LaFond, Esquire.

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Eugene M. Van Loan III