

IN THE SUPREME COURT OF THE STATE OF MONTANA

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NO. DA 08-0397

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**JOHN DOE, M.D.,**

Plaintiff and Appellee,

v.

**COMMUNITY MEDICAL CENTER, INC.,**  
a Montana Public Benefit Nonprofit Corporation,

Defendant and Appellant.

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**APPELLANT'S REPLY BRIEF**

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On Appeal from the Montana Fourth Judicial District Court  
Missoula County Cause No. DV 08-269  
The Honorable John W. Larson, Presiding

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## INTRODUCTION

This appeal seeks to ensure that decisions about physician behavior and medical judgment are first made in a completed peer review process before the matter is reviewed by a court. The District Court orders in this case should be reversed because the Court improperly intruded into the peer review process, which is entrusted to hospitals under federal and state law.

Dr. Doe states that this case “is procedurally unusual, in that CMC seeks reversal of the denial of summary judgment.” Ans. Br. 18. There is nothing unusual about an appeal authorized by the Rules of Appellate Procedure. Mont. R. App. P. 6(3)(c), (e) allows an appeal from a denial of dismissal for lack of subject matter jurisdiction and from a grant of an injunction.

Dr. Doe claims there are issues of material fact. CMC’s dismissal request is based on Dr. Doe’s failure to exhaust his CMC remedies, a fact that is undisputed. CMC App. 29-30. The injunction barring reports to the NPDB and the BME present questions of law about the District Court’s authority to override federal and state law.

**I. DR. DOE'S INVOLVEMENT IN THE CARE OF HIS FAMILY PRESENTS ISSUES THAT MUST FIRST BE EVALUATED DURING THE MANDATORY PEER REVIEW PROCESS.**

Dr. Doe disrupted the peer review process by filing a lawsuit without first exhausting his CMC remedies. This cut short development of a factual record and interrupted the ability of CMC's Medical Staff to apply its expertise and discretion to determine Dr. Doe's competency and medical judgment.

Dr. Doe's unsanctioned testing of his family, without the oversight of independent physicians, raises issues of medicine, medical ethics, and interpretation of Medical Staff policies that should first be reviewed within the mandatory peer review process.

**A. Information Learned During the District Court Proceedings Confirms CMC's Concerns.**

When Dr. Doe filed this lawsuit, CMC's Medical Staff was in the process of evaluating serious concerns about his medical judgment. Without attempting to be exhaustive, the following information that first came to light during the District Court proceedings confirms CMC's concerns and underscores the need for peer review of Dr. Doe's medical judgment:

1. Dr. Doe refused to disclose to CMC the identities of medical providers he claims were involved in the treatment of his children. Under questioning by the District Judge, Dr. Doe finally disclosed that his children were under the care of Dr. Heath (a family doctor) and Dr. Corsi (an adult endocrinologist) and testified that he had sent both doctors copies of all the tests he ordered at CMC. Opening Brief (Op. Br.) 15. Drs. Heath and Corsi testified in their depositions (which Dr. Doe attempted to prevent from being taken, D.C. Doc. Nos. 35, 36) that they did not receive copies of the tests Dr. Doe ordered at CMC. Op. Br. 15-16.

2. Dr. Doe told Dr. Randall (a CMC pediatrician who saw Dr. Doe's daughter once, in May 2007) that Dr. Hassing of Spokane recommended a steroid prescription for his daughter. Randall Dep., Ex. 124 , 42. When Dr. Randall contacted Dr. Hassing (a pediatric endocrinologist who saw Dr. Doe's daughter once, in April 2007), she denied having recommended steroids and stated that she made no diagnosis that would warrant steroid treatment. Randall Dep. 40. Dr. Doe's wife (who is also a physician) later admitted that she wrote the initial prescription for her daughter's steroid medication. Tr. 255.

3. Dr. Doe testified that Dr. Corsi recommended steroid treatment for his daughter. Tr. 113, 275-76. Dr. Corsi denied making that recommendation. Corsi Dep. 40-41.

4. In January 2008, Dr. Doe told Dr. Randall's nurse that his daughter no longer was taking any medications. Randall Dep. 27.<sup>1</sup> In fact, she has been on steroids without interruption since April 2007. Tr. 304.

5. In April 2007, Dr. Corsi recommended that a single endocrine test promptly be conducted on Jane Doe. Corsi Dep. 30. The Does did not schedule this test until March 2008, after CMC suspended Dr. Doe. *Id.* 30-31. During this time, Dr. Doe ordered hundreds of tests on his daughter at CMC and St. Patrick's, tr. 298-99, none of which included the test recommended by Dr. Corsi. Corsi Dep. 31.

6. In May 2007, Dr. Randall recommended that Jane Doe establish a relationship with a local endocrinologist. Randall Dep. 18, 20. Dr. Doe canceled an appointment with one endocrinologist and discontinued his daughter's relationship with another. Randall Dep. 59-60; Corsi Dep. 39; Tr. 300-01.

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<sup>1</sup> Dr. Doe's statement that "Randall made no effort to call Dr. Doe to discuss the situation" is inaccurate. Ans. Br. 12. Dr. Randall had instructed his nurse to call Dr. Doe to find out who was seeing his daughter for her endocrine care and what medications she was taking. Randall Dep. 27.

No endocrine specialist was involved in Jane Doe's treatment from April 2007 until Dr. Doe's suspension in January 2008, during which time Dr. Doe ordered hundreds of tests on his daughter. Tr. 298-99; Corsi Dep. 19-20, 25-27, 39, 56.

B. Dr. Doe's Inaccurate Recitation of the Facts and Law is an Attempt to Obscure the Legitimacy of CMC's Concerns about Dr. Doe's Medical Judgment.

In his Answer Brief, Dr. Doe provides an inaccurate, incomplete, and misleading version of both the facts and the law in an attempt to show that CMC somehow treated him unfairly. CMC had no ulterior motive for evaluating concerns raised about Dr. Doe, nor did CMC conduct a flimsy, "drive by" evaluation.<sup>2</sup> CMC was performing its duty to investigate a legitimate concern about one of its hospitalists, who appeared to be engaging in unethical behavior. Dr. Doe's affect and refusal to answer questions contributed to CMC's concerns about Dr. Doe's medical judgment.

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<sup>2</sup>Dr. Doe states that "Dr. Hiller based her conclusions solely on Dr. Doe's demeanor and refusal to disclose his family's medical information." Ans. Br. 15-16. Dr. Doe's demeanor and inability coherently to answer routine questions caused Dr. Hiller to have serious concerns about his mental health and ability to exercise good judgment. Dr. Hiller concluded that it would be unsafe for Dr. Doe to care for sick patients in the hospital. CMC App. 28; Tr. 165-66, 362-67. This conclusion was unanimously affirmed by the MEC following its meeting with Dr. Doe on February 14, 2008. Op. Br. 11.

1. Under Montana law, “unprofessional conduct” includes “prescribing for one’s self or a close family member.”

Dr. Doe inaccurately states that “Montana law does not generally prohibit physician treatment of self or family.” Ans. Br. 14. Dr. Doe selectively quotes a BME statement that there is not a “specific” prohibition on physician prescribing for family members. Doe App. 23. What Dr. Doe conceals is that this statement contains a footnote that reads as follows:

One section of Montana Code Annotated defines “unprofessional conduct” as “conduct that does not meet the generally accepted standards of practice.” Mont. Code. Ann. Section 37-1-316. Arguably, prescribing for one’s self or a close family member does not meet the generally accepted standards of practice, and is therefore unprofessional conduct which may subject the physician to license discipline.

Doe App. 23 (emphasis added). The “standard of practice” referred to is the AMA ethical rule that prohibits physicians from diagnosing or treating themselves or their family members. Op. Br. 5-6.

2. CMC was entitled to review the records of Dr. Doe’s tests; CMC did not make an overbroad request for medical information.

Dr. Doe implies that CMC acted wrongfully in reviewing its records of the tests Dr. Doe ordered on his family. CMC had the right to review these records for its own “health care operations,” which include “[r]eviewing the competence

or qualifications of health care professionals.” 45 C.F.R. §§ 164.501(2), 164.502(a)(1)(ii) and 164.506(c)(1).<sup>3</sup>

Dr. Doe suggests that his refusal to provide information to CMC was a legitimate protection of his family’s medical privacy and that the Assistance Committee “broadly sought the private medical information of the Doe family.”

Ans. Br. 14. As Dr. Hiller explained:

We did not want details of his family’s medical history. We did not ask to see any medical records. We did not ask to even find out detail from these other physicians that he claims existed. All we wanted was verification that he was not the ordering, interpreting, and treating physician for his children.

Tr. 158-59; *see also* CMC App. 35-36. Dr. Doe’s claim of protecting the privacy of his family rings hollow in light of the ethical rule that prohibits a physician’s treatment of family members.

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<sup>3</sup> Dr. Doe asserts that CMC “also obtained tests from St. Patrick’s without consent.” Ans. Br. 12. CMC’s lab director, Dr. Muus, is also a staff pathologist at St. Patrick’s. Tr. 312. In that capacity, he independently reviewed tests Dr. Doe conducted on his family members at St. Patrick’s. Tr. 313. Dr. Muus discussed this with St. Patrick’s privacy officer, who advised that his review was appropriate. Tr. 313-14. Dr. Muus did not share the St. Patrick’s records with the CMC Assistance Committee. Tr. 336-37.

3. The tests ordered by Dr. Doe are not routine tests that can be ordered by members of the public.

Dr. Doe suggests there should be no concern about his ordering of lab tests because “CMC allows laboratory tests to be ordered by any member of the public.” Ans. Br. 12. The tests Dr. Doe ordered on his family are not routine tests CMC allows to be ordered by lay persons. See Doe App. 36 (listing menu of routine tests available without a physician’s order). On this point, Dr. Muus testified:

Q. (By Mr. Sullivan) -- As a clinical pathologist and the person who is the director of the Community Medical Center Lab, what reaction did you have when you reviewed the Doe family tests and radiology records that were ordered by Dr. John Doe on his family? . . .

A. Well, I -- I thought it was real incredible, actually. I mean the -- the number of tests. The types of tests. A lot of them were very esoteric, including some tests that I’d never seen ordered before and I really didn’t know how they were used clinically . . . .

Tr. 319.

4. CMC had the right to request that Dr. Doe submit to a psychiatric evaluation.

Dr. Doe complains that CMC “arbitrarily imposed a burden on [him] to demonstrate his mental and physical health.” Ans. Br. 32. Dr. Doe agreed, as a condition of receiving privileges at CMC, that he would bear the burden of resolving any reasonable doubts about his qualifications. Op. Br. 14. Moreover,

Dr. Doe specifically agreed to submit to a mental health examination if MEC requested it. *Id.*

Instead of abiding by the conditions of his privileges, Dr. Doe attempted to subvert the process by offering to “negotiate” about an evaluation of his actions and his health. Doe App. 32. Dr. Doe refused the MEC’s request for an independent psychiatric evaluation (which CMC agreed to pay for, tr. 381-82), instead writing his own script for an evaluation by a Colorado psychiatrist (Dr. Metzner) chosen without CMC’s input.

Dr. Hiller reviewed Dr. Metzner’s report. It was a recitation of Dr. Doe’s version of the facts and a mental status evaluation “any third year medical student could do.” Tr. 368-69. Dr. Hiller noted that the report did not “establish a basis for saying someone has no psychiatric issues.” Tr. 369. Interestingly, even Dr. Metzner advised Dr. Doe that he should not be involved in the treatment of his children by conducting the tests he ordered at CMC. Tr. 292-93.

**II. THERE IS NO MERIT TO DR. DOE’S CLAIM THAT EXHAUSTION OF CMC’S REMEDIES WOULD HAVE BEEN “USELESS.”**

Dr. Doe claims he has a constitutional right of access to the courts. The parameters of that right are not at issue. The question is not *whether* Dr. Doe has such a right of access, but *when*.

Dr. Doe claims the exhaustion doctrine does not apply because CMC is not an administrative agency. Ans. Br. 22. Dr. Doe ignores cases applying exhaustion to the peer review process. He also ignores decisions of this Court applying exhaustion to cases involving private parties. *Lueck v. United Parcel Service*, 258 Mont. 2, 7-8, 851 P.2d 1041, 1044-45 (1993); *Cotter v. Grand Lodge*, 23 Mont. 82, 90-91, 57 P. 650, 653 (1899).

Dr. Doe argues that requiring exhaustion of the CMC process would be “useless” because it “could never afford [him] the injunctive relief he seeks, much less in time to prevent the irrevocable injury that NPDB reporting would cause.” Ans. Br. 23. In fact, there was time under the CMC process for Dr. Doe to obtain relief that could have prevented the reports in question. However, even if a mandatory NPDB report was required during the peer review process, the law recognizes that protection of the public trumps the individual physician’s rights in the circumstances presented here.

A. Dr. Doe Could Have Obtained Relief in the Peer Review Process Before the Reporting Deadline.

When the MEC affirmed Dr. Doe’s suspension, it notified Dr. Doe of his right to appeal and of the reporting requirements to the NPDB and the BME if the

suspension should remain in effect for longer than thirty days.<sup>4</sup> CMC App. 34. The notice stated: “To prevent such a report, please consider an immediate response to this request.” *Id.*

If Dr. Doe had acted expeditiously, he would have had an opportunity for a full evidentiary hearing before an unbiased appellate review committee within fifteen days.<sup>5</sup> CMC App. 38. The committee would have issued its decision within ten days. CMC App. 40. Moreover, the committee could have terminated Dr. Doe’s suspension, if appropriate. CMC Medical Staff Bylaws, Article XI, Section 2:4, Ex. 117, p. 27.

An appellate review committee could have issued a decision setting aside Dr. Doe’s suspension within twenty-five days after it was affirmed by the MEC, thereby preventing a report to the NPDB and the BME. This did not occur

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<sup>4</sup> Dr. Doe wrongly asserts that Dr. Hiller’s summary suspension triggered the mandatory reporting period. Ans. Br. 15. The reporting period did not commence until MEC notified Dr. Doe of its decision affirming the summary suspension. Op. Br. 37.

<sup>5</sup>An appellate review committee is comprised of seven members who have had no prior involvement in the matter. Op. Br. 12. Dr. Doe was entitled to be represented by legal counsel during the hearing. Contrary to Dr. Doe’s representations, Ans. Br. 17, Dr. Doe was allowed to consult with his attorney during the MEC meeting and did so each time the MEC asked a question. Tr. 168. That consultation resulted in Dr. Doe’s steadfast refusal to answer the MEC’s questions. *Id.*

because Dr. Doe filed this lawsuit within days after the MEC affirmed his suspension.

B. Mandatory Reporting Does Not Excuse Exhaustion.

Dr. Doe was obligated to exhaust the peer review process even if it could not be fully completed before the mandatory reporting deadlines. When Congress and the Montana Legislature mandated reports of suspensions in excess of thirty days, they surely understood there would be situations involving those suspensions that could not be fully decided within that time. In this situation, they decided that patient safety outweighs the reputational interests of doctors.

Both federal and state law incorporate safeguards to protect the doctor's interest. Federal law requires corrective reports if a suspension is later changed. 45 C.F.R. § 60.6. Under state law the BME conducts its screening process in confidential proceedings. BME Amicus Brief 5-6.

**III. DR. DOE CANNOT EVADE THE EXHAUSTION-OF-REMEDIES PROVISION.**

Dr. Doe argues that the promise he made to exhaust CMC's remedies is unenforceable because CMC allegedly violated its own policies. Ans. Br. 25. CMC did not breach its policies. Moreover, the exhaustion requirement exists independent of any contract between Dr. Doe and CMC.

A. CMC Did Not Breach Its Policies.

There is no merit to Dr. Doe's allegations that CMC breached its own policies.

1. CMC's Assistance Committee has jurisdiction to review an issue of medical judgment and unethical conduct.

Dr. Doe suggests that the Assistance Committee lacked jurisdiction to meet with him because: (1) the Medical Staff has no jurisdiction over "the private, outpatient practice of medicine," (2) the Committee's jurisdiction is limited to matters prohibited by the CMC Code of Conduct, and (3) the complaints about Dr. Doe related to "quality of care." Ans. Br. 13. These assertions are based on opinion testimony by Dr. Hubbard, who was CMC's Medical Staff President almost twenty years ago. Tr. 35.

As a matter of law, Dr. Hubbard's opinions cannot contradict the clear and unambiguous provisions of the current governing CMC documents, which provide that the Medical Staff's jurisdiction extends to "acts . . . or professional conduct, either within or outside of the Medical Center, that is or is reasonably likely to be . . . detrimental to patient safety . . . [or] . . . contrary to the ethical . . . mission of the medical profession. . . ." CMC App. 72 (emphasis added). *See, e.g., Martin v. Community Gas and Oil Co., Inc.*, 205 Mont. 394, 399, 668 P.2d 243 (1983)

(the terms of a written instrument that are clear and unambiguous cannot be altered by extrinsic evidence). CMC had every right to conduct peer review, especially since Dr. Doe chose to use CMC's facilities for his tests.

The Assistance Committee's jurisdiction is not limited to violations of the Code of Conduct. The jurisdiction of the Committee is broad. Its primary duty is to "receive reports related to the behavior, health, well-being, or impairment of Medical . . . Staff members and, as it deems appropriate, may gather further information relating to such reports." CMC App. 111.

As to Dr. Hubbard's opinion that this case deals with "complaints of a standard of care nature," tr. 40, Dr. Hubbard admitted that he has never seen the tests Dr. Doe ordered nor has he ever seen the complaint that initiated the Medical Staff inquiry. Tr. 63. Dr. Hubbard's opinions were rendered in a vacuum, without information sufficient to render a proper determination.

Even if Dr. Hubbard's opinions were not directly contradicted by the controlling CMC policies, the arguments Dr. Doe makes using Dr. Hubbard's opinions should have been made in the CMC hearing process so that CMC would have the first opportunity to address the interpretation of its own policies.

*Eidelson v. Archer*, 645 P.2d 171, 180-81 (Alaska 1982). In this regard, it is worth noting that four other physicians, all of whom hold current leadership positions on

CMC's Medical Staff, testified that the matter was appropriately addressed by the Medical Staff. Tr. 134-35, 150-51, 323, 362-67; Randall Dep. 43-44.

2. CMC Policies 030 and 013 do not apply to this matter.

Medical Staff Policy 030 outlines a screening procedure for “inpatients, surgical outpatients, emergency department discharges, endoscopic outpatients, outpatients receiving blood and component transfusions, and additional outpatients as defined by the departments and committees.” Doe App. 16.

Policy 030 does not apply to the tests Dr. Doe ordered on his family.

Policy 013 did not require CMC to convene the Medical Staff Ethics Committee. The Ethics Committee is available to provide “advisory” assistance in situations involving “ethical dilemmas occurring in patient care,” but does not mandate referral of matters that may involve an ethical issue. Doe App. 19-20. Moreover, as the facts developed, it became apparent that CMC was addressing more than an ethical issue. As Dr. Hiller determined, and as sixteen peer physicians unanimously affirmed, Dr. Doe's behavior gave rise to serious concerns about his mental health and medical judgment, leading to the decision that it was not safe for Dr. Doe to continue to act as a CMC hospitalist, pending the receipt and evaluation of additional information. Tr. 362-67.

B. The Exhaustion Requirement Exists Independent of Any Agreement Between CMC and Dr. Doe.

Dr. Doe is required to exhaust CMC's process even if there were not a contractual provision requiring exhaustion. None of the cases discussed in CMC's Opening Brief involves a requirement like CMC's that a physician agree to exhaust medical staff remedies before going to court. Instead, those decisions require exhaustion in peer review cases even without the benefit of the contractual commitment Dr. Doe made to CMC that he would exhaust his peer review remedies before filing suit.

None of the cases relied on by Dr. Doe for his "material breach" argument deal with peer review, nor do they involve an agreement to exhaust internal remedies before going to court. Other courts have directly rejected Dr. Doe's argument that a physician may be excused from exhausting peer review remedies merely by alleging that a hospital breached its policies. *See, e.g., Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982) ("If a party could obviate the exhaustion requirement simply by claiming that the hospital's action was improper, the doctrine would effectively be emasculated").<sup>6</sup> See MHA Amicus Brief 5-17,

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<sup>6</sup>The exhaustion rule is most familiar in the administrative law context. Under the Montana Administrative Procedure Act, an agency decision can be challenged on judicial review if it was "made upon unlawful procedure." Section 2-4-704(2)(a)(iii). However, judicial review involving such a challenge can be initiated only by "[a] person who has exhausted all administrative remedies available within the agency." Section 2-4-702(1)(a).

which discusses the importance of the peer review process for all Montana hospitals.

**IV. INJUNCTIVE RELIEF IS NOT WARRANTED BECAUSE OF DR. DOE’S FAILURE TO EXHAUST HIS CMC REMEDIES.**

CMC does not assert that peer review “is immune from [judicial] review.”

Ans. Br. 34. Rather, CMC’s position is that peer review is subject to judicial review only after peer review remedies have been exhausted. Op. Br. 26-30.

A. Injunctive Relief is Available Only After the Peer Review Process Has Been Exhausted.

The fact that injunctive relief is not barred by the immunity provisions of the HCQIA is completely irrelevant to this case. CMC has not asserted HCQIA immunity and that immunity is not now at issue. Dr. Doe’s request for injunctive relief is improper because of his failure to exhaust the CMC remedies.

Dr. Doe cites a number of cases for the proposition that injunctive relief is a “recommended remedy.” Ans. Br. 35. In each one of these cases, the physician fully exhausted his hearing rights under the provider’s procedures. *Poliner v. Texas Health Systems*, 537 F.3d 368, 373-74 (5th Cir. 2008); *Singh v. Blue Cross/Blue Shield of Mass.*, 308 F.3d 25, 30 (1st Cir. 2002); *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 909-10 (8th Cir. 1999); and *Imperial v. Suburban Hosp. Ass’n, Inc.*, 37 F.3d 1026, 1029 (4th Cir. 1994).

In *Poliner*, the court noted that allowing a restriction of a physician's privileges to remain in effect throughout the medical staff hearing and appellate review process

may work hardships on individual physicians, but the provisions [of the HCQIA] reflect Congress' balancing of the significant interests of the physician and "the public health ramifications of allowing incompetent physicians to practice while the slow wheels of justice grind."

537 F.3d at 384.

The cases cited by Dr. Doe underscore the HCQIA's intent to protect the peer review process. *Poliner*, 537 F.3d at 385 (the HCQIA is intended to reinforce the reluctance of courts to substitute their judgment for that of health care professionals); *Sugarbaker*, 190 F.3d at 911 (Congress passed the HCQIA to encourage physicians to discipline physicians who are incompetent or who engage in unprofessional behavior). One of the cases cited by Dr. Doe highlights the need for peer review of a physician's ordering of inappropriate lab tests. *Singh*, 308 F.3d at 39. The Court noted that "[i]f patients are being subjected to unnecessary procedures and tests, the consequences are both economic and medical," and that inappropriate lab tests are "inextricably intertwined with medical concerns." *Singh*, 308 F.3d at 39.

B. The Peer Review Cases Cited by Dr. Doe Are Distinguishable from the Undisputed Facts of This Case.

Dr. Doe cites two peer review cases in which the courts excused exhaustion of medical staff remedies. Ans. Br. 36-38. Both are distinguishable from the facts presented here.

*Stratienko v. Chattanooga-Hamilton County Hosp. Authority*, 2008 U.S. Dist. LEXIS 68861 (E.D. Tenn. 9/8/08), involved a thirty-day suspension of a doctor for allegedly pushing another doctor. *Id.* at \* 4-5. A state court granted a preliminary injunction against the suspension. *Id.* at \* 7, 27. The case was then removed to federal court.

The hospital moved to dissolve the injunction arguing, *inter alia*, that plaintiff had failed to exhaust his administrative remedies. The court declined to set aside the injunction for two reasons: (1) there was no evidence that plaintiff posed a risk of harm to patients; and (2) the suspension was decided without adequate investigation and a meaningful opportunity for plaintiff to refute the charges, in violation of the HCQIA standards for peer review. *Id.* at \* 29. Unlike this case, the *Stratienko* court limited the scope of the injunction to allow the hospital to complete its peer review process. The Court here not only enjoined the

suspension of Dr. Doe, but also prohibited CMC from taking any further action involving Dr. Doe's privileges. CMC App. 10.

In this case, sixteen CMC physicians agreed there are serious concerns of patient safety because of the apparent impairment of Dr. Doe's medical judgment. CMC provided Dr. Doe with notice of those concerns and two opportunities to respond, during which Dr. Doe refused to provide information and the evaluation requested by the MEC. CMC also provided an opportunity for a full due process hearing with representation by counsel and the right to call witnesses and present evidence. Op. Br. 23-24. Dr. Doe refused to avail himself of this opportunity.

In *Sahlolbei v. Providence Healthcare, Inc.*, 5 Cal. Rptr. 3d 598 (Cal. Ct. App. 2003), the hospital denied a physician's application for reappointment and terminated his privileges without first affording him a hearing, in violation of a California statute requiring a pre-termination hearing. *Id.* at 603-07. The Court distinguished a suspension of privileges to avoid danger to patients, which California allows without a pre-termination hearing. *Id.* at 606-07. The hospital raised failure to exhaust, but the Court held that exhaustion was not required, stating:

[E]xhaustion is not required where pursuing the internal remedy would in effect deprive the member of a right guaranteed by law independently of the internal rules. That is the situation here.

Section 809.1, *et seq.*, affords plaintiff the right to a pretermination hearing. Pursuing the internal remedy offered, a post-termination hearing, would effectively deprive plaintiff of that statutory right.

*Id.* at 609. As in *Stratienko*, the injunctive relief granted in *Sahlolbei* was limited. The Court did not halt the peer review process but reinstated the plaintiff's staff privileges pending the statutorily required pretermination hearing. It also provided that the injunctive relief would be subject to the hospital's right to seek a suspension of privileges if it were to be determined that the plaintiff presented a danger to patients. *Id.* at 614.

In this case, patient safety was the basis for Dr. Doe's suspension and there is no allegation that Dr. Doe was deprived of any hearing right. On the contrary, it was Dr. Doe who chose to bypass hearing rights.

C. Dr. Doe's Reliance on *Cole* is Misplaced.

According to Dr. Doe, CMC contends a court cannot "under any circumstances" enjoin a report to the NPDB, and that CMC's argument is "foreclosed by *Cole*, which involved nearly identical facts." Ans. Br. 38. He is wrong on both points.

CMC does not take the position that a report to the NPDB can never be enjoined. In *Cole v. St. James Healthcare*, 2008 MT 453, 348 Mont. 68, 199 P.3d 810, this Court affirmed an injunction against a possible NPDB report because the

hospital denied Dr. Cole reappointment to the medical staff without an opportunity for peer review, and the hospital did not challenge the district court's determination that the hospital violated its medical staff bylaws. *Cole*, ¶¶ 18, 22, 25. St. James based its decision on an investigation conducted by an attorney, rather than affording Dr. Cole the investigation he was entitled to, "conducted by his peers on the Medical Staff." *Cole*, ¶ 6.

*Cole*'s limited holding recognizes that an NPDB report can be enjoined where a hospital takes adverse action against a doctor without peer review, in undisputed violation of its bylaws. The facts of *Cole* are the reverse mirror image of what happened here, where Dr. Doe's peers unanimously imposed a suspension because of impaired medical judgment. It was Dr. Doe, not CMC, who violated the Medical Staff Bylaws by failing to exhaust his peer review remedies.

#### **V. THE DISTRICT COURT'S INJUNCTION IS A MANIFEST ABUSE OF DISCRETION.**

The District Court entered injunctive relief in a case over which it had no jurisdiction because of Dr. Doe's failure to exhaust his CMC remedies.

The District Court's decision, taken to its logical conclusion, renders completely ineffectual the reporting requirements mandated by federal and state law. Under the District Court analysis, injunctive relief is warranted because such

reports may cause harm to Dr. Doe's reputation. CMC App. 6-9; Ans. Br. 42.

As a practical matter, this means that as long as a doctor contests a reportable matter, the doctor can delay that report for as long as the litigation process requires to reach its final conclusion, without concern for patient safety.

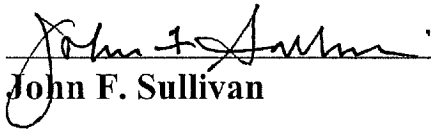
This case demonstrates the extent to which that logic has allowed legislative prerogative to be thwarted. CMC was required to make reports to the NPDB and the BME on March 25, 2008. Ans. Br. 2, 45. We are now fourteen months past that date and counting. In the meantime, Dr. Doe is able to practice medicine in Montana and elsewhere, without a final determination of the potential limitations on his medical judgment and without notice to the BME and other institutions of such limitations.

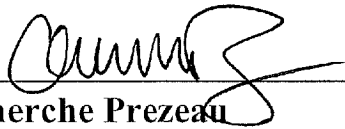
### **CONCLUSION**

This case represents an obstruction of the peer review process and the reporting requirements of federal and state law that cannot be allowed to stand. The District Court decisions should be reversed and the case remanded with instructions to dismiss Dr. Doe's complaint because of his failure to exhaust the CMC remedies.

Dated this 13th day of May, 2009.

**HUGHES, KELLNER, SULLIVAN & ALKE, PLLP**

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**CERTIFICATE OF SERVICE**

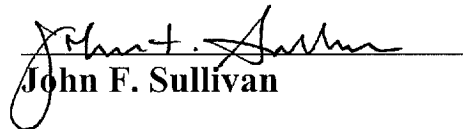
I **HEREBY CERTIFY** that on the 13th day of May, 2009, I mailed a copy of the foregoing **APPELLANT'S REPLY BRIEF**, postage prepaid, to the following named attorneys of record:

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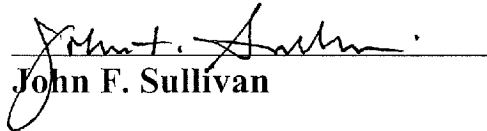
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**CERTIFICATE OF COMPLIANCE**

This is to certify that the foregoing **APPELLANT'S REPLY BRIEF** is proportionally spaced using 14 point Times New Roman font and contains 4,993 words.

Dated this 13th day of May, 2009.

  
John F. Sullivan