

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. \_\_\_\_\_

STEPHANIE MOORING, INDIVIDUALLY, AND AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF ERYON BARNETT,  
DECEASED, TO SPECIFICALLY INCLUDE HIS MINOR SON,  
B.J.W.; AND SARAH WOOLARD, ON BEHALF OF B.J.W., A  
MINOR, INDIVIDUALLY,

Petitioners,

-vs-

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,  
THE HONORABLE RIENNE H. MCELVEA, PRESIDING

Respondent.

**PETITION FOR WRIT OF SUPERVISORY CONTROL  
AND TO STAY PROCEEDINGS**

*Original proceeding arising from Cause No. DV-18-235B,  
Stephanie Mooring, et al v. Bozeman Deaconess Health Services, et al,  
Montana Eighteenth Judicial District Court, Gallatin County, Montana*

## APPEARANCES:

E. Casey Magan  
Russell S. Waddell  
WADDELL & MAGAN, PC  
P.O. Box 11330  
Bozeman, Montana 59719-1330  
(406) 585-4145; (406) 587-6167 fax  
ecm@w-mlaw.com;  
rsw@w-mlaw.com

*Attorneys for Petitioners*

Julie Lichte  
Danielle Coffman  
Ken Lay  
CROWLEY FLECK, PLLP  
P.O. Box 10969  
Bozeman, MT 59719  
(406) 556-1430; (406) 556-1433 fax  
jlichte@crowleyfleck.com  
dcoffman@crowleyfleck.com  
klay@crowleyfleck.com  
*Attorneys for Defendant  
Bozeman Health*

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## INTRODUCTION

Preventable medical errors are estimated to kill between 44,000 and 98,000 patients each year.<sup>1</sup> More recent studies calculate more than 250,000 deaths per year, suggesting that medical errors are the third leading cause of death in the United States.<sup>2</sup>

In Montana, about 15 people per 100,000 residents file medical malpractice lawsuits annually.<sup>3</sup> And when they file suit and request peer-reviewed information to try to find out what happened to them in the hospital, defendant health care providers will assert the peer review privilege to prevent discovery, and district courts will allow the concealment of what is likely the most important information in a

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<sup>1</sup> Institute of Medicine (US) Committee on Quality of Health Care in America, Kohn LT, Corrigan JM, Donaldson MS, eds. *To Err is Human: Building a Safer Health System*. Washington (DC): National Academies Press (US); 2000, Executive Summary at 1 (<https://www.nap.edu/read/9728/chapter/2>).

<sup>2</sup> McMains, Vanessa. "Johns Hopkins Study Suggests Medical Errors Are Third-Leading Cause of Death in U.S." *The Hub*, 3 May 2016 ([hub.jhu.edu/2016/05/03/medical-errors-third-leading-cause-of-death/](http://hub.jhu.edu/2016/05/03/medical-errors-third-leading-cause-of-death/)).

<sup>3</sup> Kolar, Chris. *This Interactive Map Shows Which States Sue Doctors The Most*. 2016 ([research.zippia.com/states-that-sue.html](http://research.zippia.com/states-that-sue.html)).

medical malpractice case. This is what happened when Petitioner Stephanie Mooring<sup>4</sup> sued Bozeman Deaconess Hospital for the death of her son, Eryon (pronounced “Aaron”) Barnett. When Mooring asked the District Court to compel discoverable peer-reviewed health care information concerning Eryon’s care and treatment at the Hospital, the District Court prevented production, refusing Mooring even privilege log information to allow Mooring to substantiate the claim.

This Court should clarify what due process already demands – that patients have a fundamental right to know all facts concerning their care and treatment in order to have a full and fair determination of their lawsuit. The peer review statute,<sup>5</sup> § § 50-16-201 through 205, MCA, and this Court’s opinion in *Huether v. District Court*, 2000 MT 158, 300 Mont. 212, 4 P.3d 1193 (2000), and Order in *Wirtz v. Montana Fifteenth Judicial District Court*, OP 12-0077 (April 18, 2012), already recognize that any right of confidentiality is subject to the patient’s right to know.

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<sup>4</sup> Personal Representative and on behalf of all plaintiffs/petitioners.

<sup>5</sup> Appendix A.



Mooring, therefore, asks this Court to issue a writ of supervisory control and reverse two Orders<sup>6</sup> of Montana's Eighteenth Judicial District Court that prevent Mooring from discovering peer-reviewed facts about her son's death at Bozeman Deaconess Hospital. The District Court's Orders infringe on Mooring's fundamental right to know all information concerning her son's care and treatment, contain mistakes of law that allow the Hospital to withhold essential facts under incorrect privilege claims, and deprive Mooring the required privilege logs to enable her to determine if privilege exists.

## STATEMENT OF FACTS

### *Factual Background*

Twenty-four-year-old Eryon Barnett, a former Montana State University cornerback, was training for the NFL when admitted to Bozeman Deaconess Hospital on July 2, 2015. Eryon died there two days later on July 4, 2015, after his attending physician noted,

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<sup>6</sup> Exs. 7 and 12, Orders.

“He is receiving exorbitant amounts of  
[IV] Dilaudid.”<sup>7</sup>

IV Dilaudid is a potent Schedule II controlled substance. Even in normal amounts, it has the highest potential risk for fatal respiratory depression and death.<sup>8</sup> Yet in addition to administering what was by its own admission, “exorbitant amounts” of Dilaudid, the Hospital also infused Eryon with other sedative-hypnotics, further increasing his risk of profound sedation, respiratory depression, and death.<sup>9</sup> And although these risks make IV Dilaudid contraindicated in unmonitored settings,<sup>10</sup> the Hospital placed Eryon in an unmonitored room so that his death was unknown until he was found in his hospital bed already cold and rigid.<sup>11</sup>

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<sup>7</sup> Appendix D, “Exorbitant.”

<sup>8</sup> See Appendix E, FDA Warnings.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> Ex. 13, Am. Compl., ¶ 99.

### *Procedural Background*

Mooring filed this lawsuit, and after discovering that Eryon's death was peer-reviewed, served three related requests for production (RFPs) on the Hospital, instructing:

If you claim that any of the documents requested below are privileged, please assert the claimed privilege, provide a privilege log to allow Plaintiffs and the Court to properly assess any claim of privilege (*see* Definitions and Instructions No. 8, *supra*),<sup>12</sup> and segregate the documents for potential *in camera* and appellate review. *E.g. Huether v. District Court*, 2000 MT 158, ¶ 22, 300 Mont. 212, 4 P.3d 1193.<sup>13</sup>

The Hospital objected to each request<sup>14</sup> without providing a privilege log in response to RFP 25, which asked for:

25. All information reviewed by all peer review, utilization review, medical ethics review, quality assurance, or quality improvement committees<sup>15</sup> concerning Eryon Barnett, his care, treatment and death.

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<sup>12</sup> Ex. 1, Reqs. for Prod., p. 4.

<sup>13</sup> *Id.*, p. 17.

<sup>14</sup> *See* Ex. 2, Responses to RFPs 25, 26 and 27.

<sup>15</sup> This wording mirrors § § 50-16-201, 202, 204, MCA (“...utilization review, peer review, medical ethics review, quality assurance, or quality improvement committee ...”).

NOTE: This request does not seek any written reports, notes or records or oral reports or proceedings created by or at the request of such Committee, or any opinions, evaluations or conclusions of a reviewer when such material was used exclusively in connection with quality assessment or improvement activities.<sup>16</sup>

Mooring's NOTE includes language from § 50-16-201, MCA ("data") showing that Mooring was not seeking confidential information. The Hospital nevertheless objected:

RESPONSE: Bozeman Health objects that this request violates § 50-16-203, MCA, to the extent that it seeks the particular records that would have been reviewed by any such committee. Responding to the portion of this request to which there is no objection, Bozeman Health does not have any non-privileged documents responsive to this request.<sup>17</sup>

The Hospital also objected to RFPs 26 and 27, which asked for Committee composition and peer review attendee information, as "not reasonably calculated to lead to the discovery of admissible evidence,"<sup>18</sup> producing nothing.

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<sup>16</sup> Ex. 2 at Response to RFP 25.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at Responses to RFPs 26, 27.

Mooring moved to compel, asking the District Court to overrule the Hospital's objection<sup>19</sup> to producing peer-reviewed information in response to RFP 25: "[the request] seeks the particular records that would have been reviewed by any such committee."<sup>20</sup> Mooring argued that the objection was incorrect under *Huether*, which held that evidence is not shielded because the peer review committee reviewed it.<sup>21</sup> At the hearing, and in conformity with its response to RFP 25 ("Bozeman Health does not have any non-privileged documents responsive to this request,") defense counsel represented that the Committee had not reviewed any documents the Hospital had produced in discovery (non-privileged documents, such as medical records).<sup>22</sup>

The Court denied Mooring's motion to compel without ruling on the Hospital's objection, finding Mooring's requests "overbroad" (which

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<sup>19</sup> Ex. 3, Br. Supporting Mot. to Compel at 8; *and see* Exs. 4 and 5, Response and Reply Briefs.

<sup>20</sup> Ex. 2 at Response to RFP 25.

<sup>21</sup> Ex. 3, Mooring's Br. at 3, fn. 2 (citing *Huether* at ¶ 15).

<sup>22</sup> *See* Ex. 6, Tr. at 29:20-25.

the Hospital had not asserted), and that RFP 27 (requesting peer review attendee information) sought confidential information.<sup>23</sup> The District Court also ordered the Hospital to submit the peer-reviewed records for *in camera* review and provide lists of all documents reviewed by the Committee: one list to identify peer-reviewed privileged documents; the other to identify non-privileged peer-reviewed documents.<sup>24</sup> The Court also ordered that Petitioner could not discover these lists.<sup>25</sup>

Upon its *in camera* review, the District Court found that “all material reviewed at the Peer Review are ‘data’ as defined by § 50-16-201, MCA and are confidential and not discoverable pursuant to § 50-16-205, MCA.”<sup>26</sup> And despite the Hospital’s earlier assertions that there were no non-privileged peer-reviewed documents,<sup>27</sup> it produced Eryon’s non-privileged medical records *in camera*, representing that they were

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<sup>23</sup> *Id.* at 26:1-3; 30:4-10; Ex. 7, Order at 1.

<sup>24</sup> Ex. 6 at 27:20-28:17, Ex. 7, Order at 2.

<sup>25</sup> *Id.*

<sup>26</sup> Ex. 12, Order at 1.

<sup>27</sup> Ex. 2 at Response to RFP 25; *e.g.* Ex. 6, Tr. at 29:20-25.

reviewed by a member of the Committee.<sup>28</sup> After its *in camera* review, the District Court ordered that “Bozeman Health is not required to disclose which medical records were reviewed by a member of the Peer Review Committee.”<sup>29</sup>

## ISSUE

Did the District Court abuse its discretion by denying Mooring’s motion to compel peer-reviewed information where ① Mooring has a right to know all facts about Eryon’s care and treatment, and her request neither seeks privileged information nor is “overbroad”; ② the Hospital waived privilege by its incorrect privilege claim, and by not providing a privilege log; and ③ the District Court prohibited Mooring from discovering “privilege log” information concerning the withheld materials the Hospital

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<sup>28</sup> Ex. 12, Order at 1 “Bozeman Health represents that a member of the Peer Review Committee reviewed Eryon Barnett’s medical records.”

<sup>29</sup> *See id.* at 2 ¶¶ 2, 3.

submitted *in camera*, depriving Mooring of the ability to potentially challenge the privilege claim?

## ARGUMENT

### I. Supervisory Control is Necessary and Proper.

District courts must regulate discovery to ensure a fair trial for all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage. *Hegwood v. Mont. Fourth Jud. Dist. Court*, 2003 MT 200, ¶ 16, 75 P.3d 308, 317 Mont. 30. Yet here, the District Court’s mistakes of law concerning privilege, peer review, and discovery place Mooring “at a significant disadvantage in litigating the merits of the case.” *Preston v. Montana Eighteenth Judicial Dist. Ct.*, 282 Mont. 200, 206, 936 P.2d 814, 817 (1997).

This Court has addressed peer review confidentiality in the context of patient requests for information in three cases:

- In *Sistok v. Kalispell Regional Hosp.*, 251 Mont. 38, 823 P.2d 251 (1991), this Court found that Section 50-16-203, MCA “unambiguously confers an absolute privilege on medical staff committees,” *id.* at 253, and that “The records, data and



information generated by Medical Executive Committees are privileged against discovery.” *Id.*;

- In *Huether*, this Court held that confidentiality is subject to the patient’s right of access, overruling *Sistok* to the extent that its statements that § 50-16-203, MCA “confers an absolute privilege” do not apply to patients seeking disclosure of information concerning their care or treatment. *Id.* at ¶¶ 13 and 19; and
- In *Wirtz*, this Court allowed discovery of a peer review report allegedly used by the hospital in settlement negotiations, finding the report an “incident report” because it was created in response to the decedent’s death, thus falling outside the definition of “data.” *Id.* at 3.

This Court accepted supervisory control jurisdiction in both *Huether* (at ¶¶ 1 and 6), and *Wirtz* (at 2).<sup>30</sup> This Court should also accept supervisory control jurisdiction in this case where the matters complained about involve purely legal questions, and the District Court

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<sup>30</sup> *Sistok* appealed after the district court granted the hospital’s motion for summary judgment. *Sistok* at 251.

is operating under a mistake of law which is causing a gross injustice and making the normal appeal process inadequate. Rule 14(3)(a), M.R.App.P.

The District Court's misapplication of the law has also deprived Mooring – as the patient's representative – due process by preventing her fundamental right to know the facts of Eryon's care and treatment.

*Accord* Justice Trieweiler's dissent or concurrence in *Huether* at ¶ 35 (denying patients access to records of their care and treatment when that care and treatment is at issue would be an unconstitutional denial of the patient-plaintiff's right to due process). If this District Court is allowed to proceed based upon mistakes of law, "the course of discovery, the cost of preparation, and the trial itself [will] be adversely affected." *Plumb v. Fourth Jud. Dist. Court*, 279 Mont. 363, 370, 927 P.2d 1001, 1015-16 (1996)(superseded on other grounds).

These issues are also of state-wide importance, Rule 14(3)(b), M.R.App.P., affecting Montana practitioners regularly. Mooring therefore asks this Court to accept jurisdiction to correct the District Court's mistakes of law and clarify Montana law on these issues.

Mooring also asks this Court to stay the lower court proceedings pending its ruling to avoid the District Court's repetition of these errors.

## II. This Court Should Reverse the District Court's Orders.

[Restated.] The District Court abused its discretion by denying Mooring's motion to compel peer-reviewed information where ① Mooring has a right to know all facts about Eryon's care and treatment, and her request neither seeks privileged information nor is "overbroad"; ② the Hospital waived privilege by its incorrect privilege claim, and by not providing a privilege log; and ③ the District Court prohibited Mooring from discovering "privilege log" information concerning the withheld materials the Hospital submitted *in camera*, depriving Mooring of the ability to potentially challenge the privilege claim.

- ① Mooring has a right to know all facts about Eryon's care and treatment, and her request neither seeks privileged information nor is "overbroad."

### *Facts Concerning a Patient's Care and Treatment are Discoverable.*

Twenty years ago this Court decided *Huether v. Sixteenth Judicial District*, 2000 MT 158, 300 Mont. 212, 4 P.3d 1193 (2000), holding that confidentiality is "*plainly subject to* the patient's right of access to records

concerning his or her own hospital care and treatment,” *id.* at ¶ 13

(emphasis added), and that:

[A]ll ‘health care information’<sup>31</sup> either reviewed or generated by medical staff committees should be made available to the subject patient.

*Id.*, ¶ 18.

Montana’s Legislature amended the statute in response to *Huether*, paraphrased in the Compiler’s Comments and Case Notes:

The right of confidentiality created under this section [Section 50-16-205] is subject to the patient’s right of access to records concerning that patient’s own hospital care and treatment.<sup>32</sup>

Both the statute’s plain meaning and this Court’s *Huether* opinion clearly provide patients the right to know the facts about their care and treatment because the peer review statute protects only “data.” §§ 50-16-201 (“data” does not include health care information about the subjects of

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<sup>31</sup> Appendix B, § 50-16-504 MCA (“health care information” is “any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and relates to the patient’s health care...”). *Id.* at (6).

<sup>32</sup> Appendix C, Compiler’s Notes. at 4.

the information) and 50-16-205, MCA (“data” is confidential; non-data is not).

*Mooring’s Request for Factual Peer-Reviewed Information  
is Not “Overbroad.”*

Rather than address the Hospital’s objection, the District Court determined that Mooring’s request was “overbroad”<sup>33</sup> because Mooring had asked for information from the Hospital’s “...utilization review, peer review, medical ethics review, quality assurance, or quality improvement committee[s] ...” that reviewed her son’s care.<sup>34</sup> Although this language quotes §§ 50-16-201, 202, 204, MCA, the District Court said, “There’s too much in there to respond to.”<sup>35</sup>

Mooring’s requests were not “overbroad.” “Overbroad” requests “function like a giant broom, sweeping everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to

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<sup>33</sup> Ex. 6, Tr. at 26:1-3; 30:1, 8; Ex. 7, Order at 1.

<sup>34</sup> See Ex. 1, Mooring’s RFPs 25.

<sup>35</sup> Ex. 6, Tr. at 25:14-26:3.

determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request.” *Dauska v. Green Bay Packaging Inc.*, 291 F.R.D. 251, 261 (E.D. Wisc. 2013) (citation omitted). In contrast, Mooring requested limited material relevant to her case: peer-reviewed information concerning Eryon’s care, treatment and death. There is no confusion about what category of documents she sought, and the information was likely easily found and produced – as it was for the District Court’s *in camera* review.

Even if “overbroad,” the Hospital was still to have responded to the extent the request was non-objectionable. M. R. Civ. P. 34(b)(C) (“An objection to part of a request must specify the part and permit inspection of the rest.”). For instance, the Hospital should have responded by producing Eryon’s non-privileged medical records. Although it claimed in response to RFP 25 that the Committee had not reviewed non-privileged documents,<sup>36</sup> the Court noted in its Order that, “Bozeman Health represents that a member of the Peer Review

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<sup>36</sup> Ex. 2, Response to RFP 25.

Committee reviewed Eryon Barnett’s medical records.”<sup>37</sup> The Hospital’s objection was legally and factually wrong, and the Court was mistaken to prevent Mooring’s discovery of the withheld documents.

Prohibiting Mooring from receiving Committee member and attendance information (RFPs 26 and 27) was also mistaken because such information is non-privileged “organic” information. *See Zander v. Craig Hosp.*, Civil Action No. 09-cv-02121-REB-BNB (D. Colo. Mar. 2, 2010) at 16 (privilege applies only to work product of the medical review committee and not “organic” documents such as those that describe the quality management functions, programs, and committee requirements). The requested material could have revealed that the Hospital shared peer-reviewed information with persons outside the Committee, allowing Mooring to argue that the privilege did not apply. *See e.g.* Rule 503, M.R.Ev. (waiver of privilege by voluntary disclosure). This Court allowed production of a peer review report on similar grounds in *Wirtz*,

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<sup>37</sup> Ex. 12, Order at 1.

where the hospital's use of the report in settlement negotiations fell outside the definition of "data." *Wirtz* at 3.

- ② The Hospital waived privilege by its incorrect privilege claim, and by not providing a privilege log.

*The Hospital's Privilege Claim Was Incorrect.*

Contrary to the Hospital's assertion,<sup>38</sup> records are not privileged merely because they are reviewed by the Committee. *Huether*, ¶ 15 ("Such evidence is not shielded from discovery when given to a peer review committee").<sup>39</sup> The Hospital knew this when it made its objection because its attorneys had written on the topic, saying, "Just because a document is reviewed by the committee, does not make it confidential."<sup>40</sup> Yet the Hospital's only objection to Mooring's request for all peer-reviewed information was that "it seeks the particular records that would

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<sup>38</sup> Ex. 2 at Response to RFP 25.

<sup>39</sup> *And see* Ex. 3, Supporting Brief at 3 (even if "data," it must be "used exclusively in connection with quality assessment or improvement activities" to be protected).

<sup>40</sup> Appendix F, excerpt from "Peer Review & Confidentiality" PowerPoint, also at Ex. 5, Reply Br. at 5.



have been reviewed by any such committee.”<sup>41</sup> The District Court should have overruled the Hospital’s incorrect claim.

*Privilege Logs Are Required.*

Without privilege logs, parties cannot substantiate their opponent’s privilege claims and defenses. Recognizing this dilemma, this Court amended Rule 26(b)(A) M.R.Civ.P. Effective 2017, parties withholding otherwise discoverable information on claims of privilege are required to “expressly make the claim,” and produce a privilege log that “describe[s] the nature of the documents, communications, or things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” *Id.* at 26(b)(6)(A)(i) and (ii).

The Committee Notes to Montana’s amended Rule 26(b)(6) explain:

Rule 26(b)(6) is a verbatim adoption of Federal Rule 26(b)(5) and imposes a procedure for handling of information withheld under claimed privilege, *requiring the creation of a privilege log ...*

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<sup>41</sup> Ex. 2 at Response to RFP 25.

AF 07-0157, *In the Matter of the Montana Rules* at 75.  
(Emphasis added).

Although this Court has not yet addressed waiver for failing to provide a privilege log, federal courts routinely find waiver for non-compliance with the privilege log requirement. Because Montana Rule 26(b)(6) is a verbatim adoption of Federal Rule 26(b)(5), this Court may look to those courts' interpretation of the federal rule for guidance.<sup>42</sup>

In *Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142 (9th Cir. 2005), the Ninth Circuit affirmed the district court's finding that Burlington had waived privilege by making boilerplate objections to Rule 34 requests for production and not producing a privilege log. The Court held that "boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege," *id.* at 1149, and that the district court

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<sup>42</sup> See *Bates v. Anderson*, 2014 MT 7, ¶ 19, 373 Mont. 252, 316 P.3d 857 (2014) (Federal authority is instructive where Montana's Rule 36 is modeled on Federal Rule 36)(citing *Muri v. Frank*, 2001 MT 29, ¶ 12, 304 Mont. 171, 18 P.3d 1022 (Federal interpretation provides guidance since Montana Rule 60(a) is modeled on Federal Rule 60(a.))).

had not erred in ordering production of documents after Burlington's untimely production of a non-specific privilege log. *Id.* at 1149-1150. Although acknowledging waiver, the *Burlington* Court refused a *per se* rule that would waive privilege if the log was produced after Rule 34's 30-day time limit. *Id.* at 1149. Instead, the Court recommended case-by-case determinations to examine whether (1) the objection is presumptively insufficient; (2) the timeliness of producing privilege log information; and (3) the magnitude of the document production. *Id.*

Using *Burlington's* factors here, (1) the Hospital's objection that documents reviewed by a peer review committee are privileged is presumptively insufficient because it is incorrect. *Huether*, ¶ 15;<sup>43</sup> (2) the Hospital never produced a privilege log; and (3) although Mooring cannot know the magnitude of her request because even the number of documents submitted for *in camera* review was concealed from her, Mooring's request asked for a readily-identifiable and discrete category of materials—peer-reviewed documents concerning Eryon's

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<sup>43</sup> *And see* Appendix E, PowerPoint excerpt.

care, treatment, and death.

This Court should find that the Hospital waived any privilege, which would comport with numerous federal decisions finding waiver for failing to produce the required privilege log. *See Pensacola Firefighters' Relief Pension Fund v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 265 F.R.D 589, 592-94 & n.1 (N.D. Fla. 2010); *Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 683 (D. Colo. 2008); *Lugosch v. Congel*, 219 F.R.D. 220, 239 (N.D.N.Y. 2003); *Nagele v. Elec. Data Sys. Corp.*, 193 F.R.D. 94, 108 (W.D.N.Y. 2000).

*The Hospital's Circular Argument is Unavailing.*

The Hospital argued that Rule 26(b)(6)'s requirement for a privilege log when withholding "otherwise discoverable" material was obviated because the peer-reviewed material was privileged and not "otherwise discoverable."<sup>44</sup> This circular argument allows the Hospital to claim any document is privileged, and it is wrong. "Even absolute protection against disclosure of documentary materials does not

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<sup>44</sup> Ex. 4, the Hospital's Response Brief at 7.

ordinarily foreclose discovery of the existence of the documents and a sufficient description of them to enable opposing counsel and the Court to assess the merits of the claimed protection.” *Beard v. Middle Tennessee Home Health Service*, 144 F.R.D. 340, 342, (E.D. Tenn. 1992)(citation omitted). The District Court never addressed the Hospital’s refusal to produce a privilege log and abused its discretion by withholding the information from Mooring.

- ③ The District Court prohibited Mooring from discovering “privilege log” information concerning the peer-reviewed materials the Hospital submitted to the court for its *in camera* review.

The District Court’s orders unfairly prejudice Mooring. She can find no authority – and the District Court cited none - allowing it to withhold the court-ordered lists of “privilege log” information from her.<sup>45, 46</sup> Nor can Mooring find authority – and the District Court cited

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<sup>45</sup> Ex. 7, Order at 2.

<sup>46</sup> *And see* Exs. 8-10, Plaintiffs’ Notice of Filing Material Considered by the Court at 7, attaching Plaintiffs’ communications with the Court concerning clarification regarding the denial of privilege log information. The District Court did not provide clarification.

none - for its order prohibiting Mooring from discovering which of Eryon's non-privileged health records the Committee reviewed.<sup>47</sup>

## CONCLUSION

Montana's Legislature and this Supreme Court have made it clear that patients have a right to their health care information. The District Court has misapplied that law to prevent Mooring from discovering Eryon's peer-reviewed records about his care and treatment, thus depriving her of due process and the possibility of a full and fair trial based on all of the facts. Supervisory control will correct this gross injustice for which the ordinary remedy of appeal is inadequate.

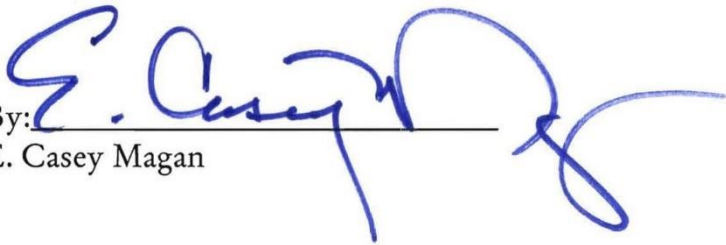
WHEREFORE, Mooring asks this Court to accept jurisdiction, reverse the District Court's orders and require the immediate production of all withheld information. Mooring also asks this Court to stay the lower court proceedings pending its ruling.

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<sup>47</sup> Ex. 12, Order at 2.

Respectfully submitted on September 10, 2020 by,

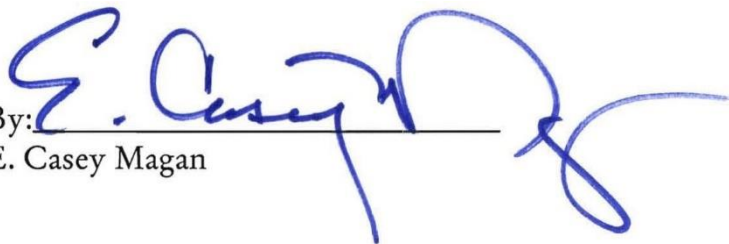
WADDELL & MAGAN, PC

By:   
E. Casey Magan

#### CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing is proportionally spaced using  
14 point StempelGaramond LT Roman font and contains 3,971 words.

Dated: September 10, 2020.

By:   
E. Casey Magan

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition for a writ of supervisory control and to stay proceedings, together with the Appendix and Exhibits was served upon the following persons by mailing and emailing, as indicated, true and correct copies to the following persons at the following addresses on September 10, 2020:

District Judge:

*Via Mail and Email*

The Hon. Rienne H. McElyea  
District Judge  
Law & Justice Center  
Room 207  
615 S. 16th avenue  
Bozeman, MT 59715  
(c/o LCertain@mt.gov)

Party in Interest:

*Via Mail and Email*

Julie Lichte  
Danielle Coffman  
Ken Lay  
Crowley Fleck, PLLP  
P.O. Box 10969  
Bozeman, MT 59719  
jlichte@crowleyfleck.com  
dcoffman@crowleyfleck.com  
klay@crowleyfleck.com

Other Parties:

*Via Email Only*

Gary Kalkstein  
Joe Newman  
Kalkstein Law Firm, PC  
P.O. Box 8568  
Missoula, MT 59807-8568  
Gary@kalksteinlaw.com  
joe@kalksteinlaw.com

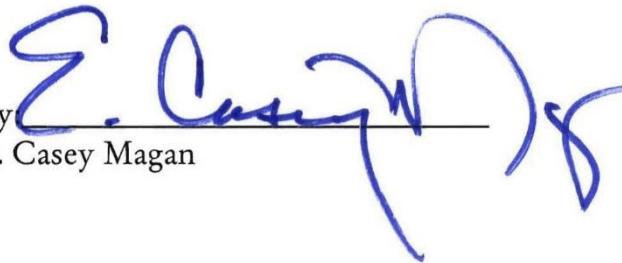
Other Parties:

*Via Email Only*

Elizabeth L. Hausbeck  
Leah T. Handelman  
Garlington, Lohn & Robinson, PLLP  
P.O. Box 7909  
Missoula, MT 59807-7909  
elhausbeck@garlington.com  
lthandelman@garlington.com

By

E. Casey Magan





## **CERTIFICATE OF SERVICE**

I, Casey Magan, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 09-10-2020:

Kenneth K. Lay (Attorney)  
900 North Last Chance Gulch, Suite 200  
P.O. Box 797  
Helena MT 59624  
Representing: Bozeman Health  
Service Method: eService

Danielle A.R. Coffman (Attorney)  
1667 Whitefish Stage Rd  
Kalispell MT 59901  
Representing: Bozeman Health  
Service Method: eService

Joe J. Newman (Attorney)  
225 N Adams St  
Missoula MT 59801  
Representing: Jessica Hoge, MD  
Service Method: eService

Gary Darling Kalkstein (Attorney)  
P.O. Box 8568  
225 N Adams  
Missoula MT 59807-856  
Representing: Jessica Hoge, MD  
Service Method: eService

Leah Tracy Handelman (Attorney)  
Garlington, Lohn & Robinson, PLLP  
P.O. Box 7909  
Missoula MT 59807  
Representing: Sarah Donahue, MD  
Service Method: eService

Elizabeth L. Hausbeck (Attorney)  
Garlington, Lohn & Robinson, PLLP  
P.O. Box 7909

Missoula MT 59807  
Representing: Sarah Donahue, MD  
Service Method: eService

Rienne McElyea (Respondent)  
18th Judicial District Court  
Law & Justice Center, Room 207  
615 S. 16th Ave.  
Bozeman MT 59715  
Representing: Self-Represented  
Service Method: E-mail Delivery

Russell Scott Waddell (Attorney)  
P.O. Box 11330  
Bozeman MT 59719  
Representing: Stephanie Mooring  
Service Method: E-mail Delivery

Julie A. Lichte (Attorney)  
1915 South 19th Ave.  
P.O. Box 10969  
Bozeman MT 59719-0969  
Representing: Bozeman Health  
Service Method: E-mail Delivery

Electronically Signed By: Casey Magan  
Dated: 09-10-2020