IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 23-0224

THOMAS C. WEINER, M.D.,

Plaintiff and Appellant

v.

ST. PETER'S HEALTH, a Montana Domestic Nonprofit Corporation, d/b/a St. Peter's Hospital

Defendant and Appellee.

On Appeal from Montana First Judicial District Court, Lewis & Clark County
Cause No. CDV 2022-501, Hon. Kathy Seeley, District Court Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES

The sole issue is whether the district court erred by granting Defendant and Appellee St. Peter's Health's motion to dismiss Dr. Thomas Weiner's complaint based on the doctrine of res judicata (claim preclusion).

STATEMENT OF THE CASE

I. Nature of the relevant cases.

There are two pending cases relevant to this appeal. The first was filed by Dr. Thomas Weiner ("Dr. Weiner") on December 10, 2020, in the First Judicial District Court as Cause No. ADV-2020-1988 (Hon. Mike Menahan) (*Weiner I*) against St. Peter's Health ("SPH") and its individual agents.[1] *Weiner I* is ongoing—discovery is closed, numerous motions are pending, and there is no trial date.

Weiner I challenges SPH's initial summary suspensions of Dr. Weiner,[2] the simultaneous termination of Dr. Weiner's employment at SPH, and numerous,

[1] The initial individual defendants in *Weiner I* were Wade Johnson, James Tarver, M.D., Kerry Hale, M.D., Shelly Harkins, M.D., Todd Wampler, M.D. Dr. Weiner refers to the *Weiner I* defendants herein as SPH and the individual defendants. Dr. Weiner subsequently added Randy Sasich, M.D., as a defendant.

[2] Dr. Weiner was summarily suspended on October 15, 2020, and November 17, 2020. For the purposes of this appeal, the combination of the two is referred to herein as the "initial summary suspensions."

public defamatory statements about Dr. Weiner's competency as a doctor. The substance of *Weiner I* is further explained in the Statement of Facts.

The subject of this appeal is the second lawsuit initiated by Dr. Weiner on June 17, 2022, in the First Judicial District Court as Cause No. CDV 2022-501 (Hon. Kathy Seeley) ("*Weiner II*"). Dr. Weiner filed *Weiner II* after the *Weiner I* court refused Dr. Weiner's request for leave to file a second amended complaint.

Weiner II is a breach of contract case based on SPH's failures to comply with its Medical Staff Bylaws (the "Bylaws") during its administrative appellate review of the initial summary suspensions and subsequent revocation of Dr. Weiner's medical staff membership and clinical privileges. Dr. Weiner seeks (1) a declaration that the results of the peer review appeal process are null and void based on SPH's multiple breaches of the Bylaws and the inherent unfairness of the Bylaws; (2) permanent injunctive relief requiring SPH to retract and/or void its April 25, 2022 adverse action report submitted to the National Practitioner Data Bank ("NPDB") and further enjoining SPH from submitting any future adverse reports to the NPDB based on SPH's multiple breaches of the Bylaws and inherent unfairness of the Bylaws; and (3) damages against SPH for breaching the Bylaws. Dkt. 1. pp. 20–22.

II. Procedural backgrounds of the cases.

A. *Weiner I.*

Weiner I was filed on December 10, 2020. Dr. Weiner simultaneously filed a *Motion for Temporary Restraining Order* to prevent SPH from filing an adverse action report against Dr. Weiner with the NPDB or the Montana Board of Medical Examiners based on the initial summary suspensions. SPH and the individual defendants stipulated to entry of a preliminary injunction preventing SPH and its agents from filing with the NPDB.

On April 7, 2021, SPH filed a motion to stay *Weiner I* until the conclusion of its administrative appeal process.

Dr. Weiner filed his first motion for leave to amend on April 22, 2021. The revised complaint conformed the factual allegations to evidence discovered between December 10 and April 22, 2021, added a defendant (Randy Sasich, M.D.), and added new claims—including a claim seeking to enjoin SPH from **continuing** its administrative peer review appeal process because of SPH and the individual defendants' previous breaches of the Bylaws and CEO Johnson's statements to staff, patients, and the public announcing Dr. Weiner's guilt.

Judge Menahan granted Dr. Weiner's motion to amend on May 18, 2021, and denied SPH's motion to stay on May 19, 2021.

On June 4, 2021, Dr. Weiner filed a *Second Motion for Temporary Restraining Order* seeking to enjoin SPH from continuing its administrative appeal process, alleging SPH and the individual defendants' past failures to comply with the Bylaws and federal and state law and the inherent unfairness of the peer review prevented a fair process moving forward. On June 17, 2021, the district court denied that motion without further briefing from the parties based on its finding that Dr. Weiner would not be irreparably harmed, thus permitting SPH to proceed with its administrative appeal process while *Weiner I* moved forward.

Six months later, on January 6, 2022, SPH finally concluded its sham administrative appeal process when SPH's Board of Directors affirmed the summary suspension and revocation of Dr. Weiner's medical staff membership and clinical privileges. It was only then when, according to SPH's Bylaws, Dr. Weiner could "resort[] to formal legal action challenging the decision, the procedures used to arrive at the decision, or assert[] any claim against SPH or participants in the process." Dkt. 1, Exhibit A, p. 48. In other words, Dr. Weiner exhausted his administrative remedies with SPH and was free to resort to formal legal action challenging the administrative appeal process.

The following week, January 14, 2022, SPH and the individual defendants moved to lift the stipulated preliminary injunction claiming they were required to

report their adverse peer review actions against Dr. Weiner to the NPDB because they concluded the administrative appeal against Dr. Weiner. Dr. Weiner opposed the motion arguing the filing of an adverse action based upon SPH's sham peer review process would destroy Dr. Weiner's reputation and, further, he was entitled to a trial on the merits before the preliminary injunction was lifted given the significant likelihood of harm.

On February 4, 2022, Dr. Weiner moved for leave to file a second amended complaint challenging the administrative appeal process and seeking to enjoin SPH and the individual defendants from filing an adverse action report with the NPDB based on the outcome of the same. Dkt. 8, Exhibit A (*Weiner I Proposed Second Amended Verified Complaint*) (adding post First Amended Verified Complaint Factual Allegations and asserting additional claims related to the unfair and predetermined Hearing and Appellate review process).

On April 22, 2022, the district court denied Dr. Weiner's motion for leave to file his second amended complaint, finding the amendment would cause undue delay and prejudice to SPH and the individual defendants. That same day, the district court granted SPH's motion to lift the preliminary injunction.

The result of those combined rulings was SPH filed an adverse report with the NPDB—a "scarlet letter"—against Dr. Weiner based upon its sham peer

review process, but Dr. Weiner was foreclosed from challenging SPH's so-called findings and the report in *Weiner I*.

B. *Weiner II*.

Dr. Weiner filed this action (*Weiner II*) on June 17, 2022, challenging SPH's sham administrative appeal process and its results—pursuing the claims the district court would not allow Dr. Weiner to pursue in *Weiner I*. SPH moved to dismiss, arguing impermissible collateral attack, claim splitting, res judicata, and laches. The district court granted SPH's motion based on res judicata—denying SPH's other arguments for dismissal—holding:

1. Dr. Weiner could have brought his *Weiner II* claims in *Weiner I*; and

2. Judge Menahan's denial of Dr. Weiner's second motion to amend *Weiner I* was a final judgment on the merits for the claims brought in *Weiner II*.

Appendix 1. Dr. Weiner appeals this decision.

STATEMENT OF THE FACTS

Given this is an appeal of a dismissal on the basis of res judicata, it is necessary to provide factual background regarding *Weiner I*, the nature of the claims asserted in that case, and the relevant timeline.

I. Factual background.

Dr. Weiner practiced medical oncology at SPH for over 24 years. Dkt. 8, Exhibit F (*Weiner I First Amended Verified Complaint*), ¶ 3. Dr. Weiner was recredentialed without exception every two years. *Id.*, ¶ 20. Dr. Weiner never had his clinical competency limited by any of SPH's quality assurance committees and his NPDB record was clear. *Id.*, ¶ 21.

Despite Dr. Weiner's flawless record, SPH began targeting Dr. Weiner's employment beginning in 2016, including cutting Dr. Weiner's salary on two separate occasions. *Id.*, ¶¶ 23, 36, 42–44. The public backlash SPH faced for attacking Dr. Weiner was enormous. *Id.*, ¶ 29. Even the Montana Nurses Association responded, recognizing "Dr. Weiner puts patients before profits, benefiting our community, our patients, our staff and our community hospital." *Id.*, ¶ 30.

In April 2020, Dr. Weiner became fed up with SPH's antics and threatened to resign. In response, individual defendants Wampler, Harkins, Johnson, and others met to "discuss" Dr. Weiner. The results of the meeting are unknown; the only reason Dr. Weiner learned about this secret meeting was through a chronological summary prepared by an SPH employee after Dr. Weiner's termination.

On September 10, 2020, Benefis Health System announced its intent to construct a freestanding medical clinic in Helena. *Id.*, ¶ 50. Benefis will directly compete with SPH in medical oncology. Because Dr. Weiner was not under a non-compete, if Dr. Weiner's employment simply ended, he could have moved his practice and devoted patients elsewhere, including Benefis. *Id.*, ¶ 51. Consequently, SPH and the individual defendants needed to not only terminate Dr. Weiner's employment but also destroy his ability to practice medicine to end the threat of competition from him. Shortly after Benefis' announcement, they did just that. *Id.*

Just eighteen days after Benefis' announcement, SPH's Credentials Committee ("CC") initiated an adverse action against Dr. Weiner. On October 14, the CC voted to summarily suspended Dr. Weiner's privileges—even though the CC does not have authority under the Bylaws to summarily suspend a physician and even though SPH must give a physician notice and an opportunity to discuss, explain, or refute evidence before affecting privileges.

Nonetheless, at the end of the next day, October 15, individual defendants Tarver and Hale presented Dr. Weiner a letter, "Re: Notice of Summary Suspension and Investigation", informing him his medical staff privileges were summarily suspended based upon on a single undisclosed external review of his care of an unidentified oncology patient. *Id.*, ¶¶ 52, 54.

Even though the CC members previously agreed they needed to (and, in fact, were required to) discuss their concerns with Dr. Weiner before affecting his privileges, Dr. Weiner was never: 1) interviewed; 2) provided pre-deprivation notice; nor 3) provided an opportunity to address the claims against him prior to the suspension. *Id.*, ¶ 52. During the so-called investigation, the CC did not speak to any physicians, nurses, or staff members in SPH's Cancer Treatment Center ("CTC") to assess the merits of the claims against Dr. Weiner. Moreover, the medical records provided to the outside reviewer who prepared the external report upon which the summary suspension was premised were incomplete. Dr. Weiner was not afforded any due process.

The only basis for imposing a summary suspension without notice under the Bylaws is "whenever failure to take such action may result in an imminent danger (i) to the health and/or safety of another; or (ii) the continued effective operation of SPH." *Id.*, ¶ 58. The summary suspension letter did not explain how, let alone state, Dr. Weiner presented an imminent danger. Also, despite the *ex post facto* claim of imminent danger, the letter was not delivered until the end of the next day, October 15—after Dr. Weiner treated patients all day.

SPH's letter offered Dr. Weiner an alternative to summary suspension; it stated he could voluntarily refrain from exercising his privileges while the CC

completed its investigation. *Id.*, ¶¶ 55, 62. Dr. Weiner agreed. *Id.*, ¶ 66. SPH and the individual defendants' attorney (and counsel of record) subsequently confirmed Dr. Weiner was on "a voluntary leave of absence unrelated to clinical competency issues," not a summary suspension. *Id.*, ¶ 71. A physician on voluntary leave of absence must request reinstatement of privileges before returning to practice. Dr. Weiner never did. *Id.*, ¶ 107.

Five days later, on November 17, while Dr. Weiner was on voluntary leave and not practicing medicine, individual defendants Johnson, Tarver, and Hale summarily suspended Dr. Weiner a second time. *Id.*, ¶ 77. Again, the suspension was entered without notice or hearing in violation of SPH's Bylaws. *Id.*, ¶ 78. This time, SPH's administration was actively involved in the investigation and decision even though it was supposed to be a matter decided by the medical staff. This time, the suspension letter claimed Dr. Weiner posed an imminent danger to patients but failed to explain how. *Id.*, ¶ 80. Although unstated in the letter, SPH and the individual defendants subsequently claimed during depositions they needed to suspend Dr. Weiner because he was directing patient care through nurses while on leave. However, they admit they never interviewed any nurses about whether Dr. Weiner was directing patient care, nor did they have knowledge of Dr. Weiner

directing patient care. Indeed, every nurse testified Dr. Weiner never directed patient care in the CTC after October 15, 2020.

Worse yet, when pressed during her deposition, individual defendant Hale identified the real reasons for Dr. Weiner's second summary suspension: not wanting it to linger over the holidays (Thanksgiving and Christmas).

Individual defendant Wampler, as President of SPH's Medical Group terminated Dr. Weiner's employment that same day due to the summary suspension. *Id.*, ¶ 83.

That same evening, individual defendants Johnson, Harkins, and Wampler met with the CTC nurses and staff to discuss Dr. Weiner's termination. *Id.*, ¶ 85. They disclosed confidential peer review protected data to the CTC staff members present at the meeting and stated that Dr. Weiner was prescribing chemotherapy to patients that did not have cancer.

Dr. Weiner's first opportunity to defend himself did not occur until November 24, 2020, during a remote meeting of the MEC to discuss the November 17 summary suspension. *Id.*, ¶¶ 91, 93. None of the MEC members was a medical oncologist qualified to understand Dr. Weiner's explanations of patient care. *Id.*, ¶ 95. No one from SPH presented evidence or explained how Dr. Weiner presented an imminent danger to patients—the sole basis for a summary

suspension. *Id.*, ¶ 93. Dr. Weiner presented information regarding the handful of patients identified in the second summary suspension notice. *Id.*, ¶ 94.

The next day, Dr. Weiner received a letter informing him "the MEC voted unanimously to uphold and continue the summary suspension of your clinical privileges and medical staff membership that was imposed on November 17, 2020." *Id.*, ¶ 96. Once again, the letter did not explain how Dr. Weiner presented an imminent danger to patients while he was on voluntary leave. *Id.*

The second time Dr. Weiner was given an opportunity to defend himself was at a November 30 remote meeting of the CC after it "completed" its investigation, where it was considering recommending revocation of his medical staff privileges. *Id.*, ¶ 99. Although the CC had a report from the Greeley Company—hired to review Dr. Weiner's practice—and the patients' medical records, Dr. Weiner was only provided with the general nature of the concerns prior to the CC meeting. *Id.* After that meeting, the CC voted to revoke Dr. Weiner's medical staff privileges.

Next, on or about December 8, 2020, SPH's CEO, Johnson, published a letter in the newspaper, publicly disclosing the same untruthful allegations leveled against Dr. Weiner through peer review that resulted in the initial summary suspensions and ultimate revocation of Dr. Weiner's privileges. *Id.*, ¶ 152. Again, on December 8, 2020, SPH, Johnson, and Harkins disclosed the substance of the

peer review to SPH's staff and the CTC's patients. Hale confirmed at her deposition the information disclosed was identical to that used during Dr. Weiner's peer review.

As of the dates of SPH and Johnson's public disclosures of information about Dr. Weiner's peer review, the MEC had not yet determined whether Dr. Weiner's medical staff privileges would be revoked, or whether the summary suspension continued. That did not happen until December 15, 2020, when the MEC, with Hale, Tarver, Johnson, Harkins, and SPH's counsel present, adopted the CC's recommendation to revoke Dr. Weiner's medical staff privileges and continued the summary suspension beyond its original thirty days.

In making these decisions, the MEC relied solely on representations made by Dr. Hale. Specifically, Dr. Hale prepared what is referred to as the "Hale Report" to summarize the CC's investigation of Dr. Weiner, including outside reviews prepared by the Greeley Company for the CC. The Hale Report claimed the Greeley Company's reviews showed substandard care for approximately ten percent (10%) of Dr. Weiner's randomized cases. The Hale Report mischaracterized the Greely Company's findings. The Greeley Company's report actually stated that concerns regarding Dr. Weiner were minor, and that Dr.

Weiner should be commended for his work given his high case load. Hale did not include these favorable findings in her Hale Report.

The MEC relied on the inaccurate Hale Report to adopt the CC's recommendation to revoke Dr. Weiner's medical staff privileges and uphold the CC's summary suspension of Dr. Weiner's privileges. The MEC did not conduct any independent investigation regarding Dr. Weiner's summary suspension; it solely relied upon materials provided by the CC.

Unbeknownst to Dr. Weiner, until SPH provided notice of the "fair hearing" (discussed *infra*), SPH greatly expanded the universe of patients and medical records at issue. Dkt. 1 (*Weiner II Complaint*), ¶ 61.

II. The initial lawsuit—*Weiner I*.

The initial summary suspensions of Dr. Weiner's medical staff privileges and termination of Dr. Weiner's employment with SPH permitted SPH to submit an adverse action report to the NPDB. This Court has analogized similar adverse action reports to a "scarlet letter" that results in permanent harm to the physician. *See Cole v. St. James Healthcare*, 2008 MT 453, ¶ 23, 348 Mont. 68, 199 P.3d 810.

Faced with the active threat that SPH would file an adverse action report with the NPDB, Dr. Weiner filed *Weiner I* on December 10, 2020, challenging his summary suspensions and termination to protect his ability to practice medicine by

stopping SPH from submitting an adverse action report, defend his reputation, and hold those responsible liable for their actions.

On December 15, while *Weiner I* was already pending, the MEC finalized the summary suspension and revocation of Dr. Weiner's privileges. Dkt. 1, ¶¶ 54–56. As required by the Bylaws, Dr. Weiner appealed those decisions through SPH's administrative appeal process. *Id.*, ¶ 58. SPH responded in January 2021, stating it was in the process of scheduling appeal hearings. *Id.*, ¶ 59.

On April 5, 2021, SPH filed a motion to stay the proceedings, arguing Dr. Weiner failed to exhaust his administrative remedies under the SPH Bylaws. Specifically:

> If an adverse action or recommendation is made with respect to the membership status or clinical privileges of a Physician or Practitioner on the Medical Staff . . . , he or she must exhaust the remedies afforded by these bylaws (including its Appendices) before resorting to formal legal action challenging the decision, the procedures used to arrive at the decision, or asserting any claim against SPH or participants in the decision.

Supplemental Appendix 1 (*SPH Brief ISO Motion to Stay*), p. 2; *see also* Dkt. 1, Ex. A, p. 48.

On April 22, 2021, Dr. Weiner filed his first motion to amend *Weiner I*. The revised complaint conformed the factual allegations to new evidence, added a

defendant, and added new claims—including to enjoin SPH from continuing its peer review process based on previous breaches of contract.

The district court granted Dr. Weiner's motion to amend on May 18, 2021. The next day, the court denied the motion to stay. The court held *Weiner I*'s claims were not subject to the exhaustion requirement because "none of [Dr. Weiner's] present claims are subject to the administrative process to which Defendants expect Weiner to avail himself." Dkt. 8, Exhibit B (*Weiner I Order Denying Stay*). The district court held *Weiner I* **did not** challenge a decision, the procedures used, or assert any claim against SPH or participants in the decision process. *See id.*

SPH finally provided a Notice of the "fair hearing" required under the Bylaws' appeal process by letter dated May 21, 2021, five months after Dr. Weiner appealed SPH's adverse actions against him. Dkt. 1, ¶ 60. The Notice set the hearing for June 21–25 and June 28–30, 2021. *Id.*

The Notice included seventy (70) electronic files containing correspondence reports and over 188,000 pages of medical records, involving fifty (50) patients, at least thirty (30) of whom Dr. Weiner never received notice before. *Id.*, ¶ 61. This was SPH's newest attempt to ambush Dr. Weiner during this process—requiring Dr. Weiner to review a mountain of evidence at the eleventh hour, try to line up additional experts to analyze previously undisclosed medical records, and submit a

responsive witness list in a little over a week. The SPH Bylaws do not allow this; the decision of the hearing panel may not be based on evidence the accused physician was not given the opportunity to refute prior to the hearing—e.g., at a meeting with the CC or MEC. Dkt. 1, Ex. A, p. 52 (*Basis of Decision*).

The hearing concluded on June 29, 2021. The hearing panel finalized its Report and Recommendation on October 14, 2021, over a year after Dr. Weiner was first suspended from SPH and a month **after** *Weiner I*'s deadline to amend pleadings. The hearing panel recommended the SPH Board uphold the MEC's summary suspension and adopt the recommendation to revoke Dr. Weiner's membership and clinical privileges.

As required by the Bylaws, Dr. Weiner timely appealed the Report and Recommendation to the SPH Board. The Board denied Dr. Weiner's appeal on January 6, 2022. *Id.*, ¶ 4.

At that point, Dr. Weiner had finally exhausted SPH's administrative appeal process and could resort to formal legal action challenging the same. Dkt. 1, Ex. A, p. 48.

III. *Weiner I* second motion to amend.

So as not to have two lawsuits at the same time, despite the fact it was allowed, Dr. Weiner filed a second motion to amend *Weiner I* on February 4, 2022.

Before doing so, Dr. Weiner's counsel emailed the proposed Second Amended Complaint to opposing counsel and asked whether SPH and the individual defendants opposed the motion to amend. Dkt. 8, Exhibit C, p. 6. Counsel for SPH and the individual defendants stated they did not agree with the contentions but would not oppose the motion if Dr. Weiner would agree to dismiss the individual defendants in *Weiner I*. *Id.*, pp. 2–3. Specifically,

> We have reviewed your Amended Complaint, and do have a couple of concerns. First, we obviously disagree with the contentions being made. To the extent we can address the issues below, we would like it noted that if we are to agree to the Amended Complaint, we do not agree with the contentions. Thus, assuming we can reach an agreement, then you would represent "Defendants disagree with the allegations stated in the proposed amended complaint, but understand that leave to amend is granted liberally and therefore, do not oppose Plaintiff's Motion for Leave while reserving all claims and defenses."
>
> ****
>
> And, third, and most significantly, we request that you dismiss the individually named defendants. Dr. Weiner's testimony is clear that these individuals were acting in their official capacities. As such, the claims and the injunctive relief you seek are proper against SPH and not against the individuals.
>
> ****
>
> If you agree to dismiss the individuals and pursue your claims against SPH, we would agree to your amended complaint, which should not be taken as any acquiescence to the contentions being made. If you cannot dismiss the individuals, then I think we have to object to the amended complaint in order to preserve our arguments about why the amendment should not be allowed. We are not trying to be difficult, so we are hopeful we can reach an agreement, and if not, that you understand the legal concerns we have about not raising objections or whether we waived certain arguments.

Id. (emphasis added).

SPH and the individual defendants gave no indication they would oppose the motion for leave on any grounds other than futility as asserted against the individual defendants and **agreed** the claims were proper as asserted against SPH. Dr. Weiner refused to acquiesce to the attempts to leverage him to dismiss the

individual defendants and filed an opposed motion because the claims were not futile. *Id.*, p. 1.

SPH and the individual defendants ultimately argued the motion should be denied because: (1) Dr. Weiner did not bring his motion promptly within the deadline to do so; (2) the amendment was futile because Dr. Weiner continued to name individual defendants; and (3) the defendants would incur substantial prejudice. Dkt. 8, Exhibit D (*Weiner I Defendants' Response to Second Motion for Leave*).

The *Weiner I* court denied Dr. Weiner's motion for leave, finding that allowing Dr. Weiner to amend his complaint at that juncture would cause undue delay because of the potential effect on the remaining timeline in the case and agreeing with SPH and the individual defendants that "the amended complaint, **which adds three new causes of action and many additional factual allegations**, would require substantial additional discovery and would necessitate Defendants to re-depose Weiner and others[]"—causing prejudice to SPH and the individual defendants. Dkt. 8, Exhibit E (*Weiner I Order Denying Second Motion for Leave*), p. 4 (emphasis added).[3]

[3] The district court did not find the amendment was futile as to the individual named defendants.

The court, however, acknowledged Dr. Weiner was attempting to amend to add new claims to challenge SPH's administrative appeal process:

> . . . Weiner seeks to file a second amended complaint to update his factual allegation based upon newly discovered evidence and the completion of St. Peter's Health's peer review, hearing, and appeal process, and to assert **new claims** challenging the fairness of the proceedings.

Id., p. 3 (emphasis added).

IV. The second action—*Weiner II*.

Dr. Weiner filed *Weiner II* on June 17, 2022, shortly after the district court in *Weiner I* refused his request for leave to file his second amended complaint. SPH moved to dismiss *Weiner II* on res judicata grounds, along with others that are not relevant for the purposes of this appeal.

In *Weiner I*, SPH claimed it would incur substantial prejudice if Dr. Weiner were granted a second leave to amend because SPH would have to address entirely new claims and arguments, and the facts related to such arguments would not be the same as those already at issue. Dkt. 8, Exhibit D. Indeed, SPH relied heavily on this Court's holding in *Stevens v. Novartis Pharmaceuticals Corp.*, 2010 MT 282, 358 Mont. 474, 247 P.3d 244. As represented by SPH, *Stevens* rebuffed an argument that a new punitive damages claim and allegations would not require additional time to defend because they arose out of the same operative facts which served as a

basis for liability, holding that it was immediately apparent that was not the case. Dkt. 8, Exhibit D, p. 9 (citing *Stevens*).

SPH argued:

> Just as in *Stevens*, Defendants will have to **address three entirely new causes of action**, which would require substantial discovery, including re-deposing Plaintiff. . . . **Defendants cannot conduct discovery on these new allegations and causes of action in less than two months** and need to consider additional experts for **Plaintiff's new claims and allegations. Essentially, this case will have to be restarted**.

Id., p. 10 (emphasis added).

When its view of Dr. Weiner's additional claims no longer suited it, SPH's arguments seeking dismissal to the *Weiner II* court flipped the script:

> [T]he claims in Weiner I and Weiner II arise out of **the same nucleus of facts**- to wit the termination of Weiner's employment from SPH. In fact, **two of the three claims asserted in Weiner II are identical legal claims brought in Weiner I** . . . , **but the factual scope has been slightly expanded to include the administrative peer review process**[.] . . . If allowed to proceed, **Weiner II will force the Defendant to conduct discovery a second time**, both fact and expert discovery, including countless depositions.

Dkt. 6 (*SPH's Brief in Support of Motion to Dismiss*), p. 8 (emphasis added).

In *Weiner I*, SPH argued Dr. Weiner's proposed amended complaint would be unfairly prejudicial because it added entirely **new claims** and **new allegations** that would require the case to start anew. In *Weiner II*, however, SPH argued Dr.

Weiner was inappropriately splitting claims because those same claims were duplicative and SPH would need to redo all the work it did in *Weiner I*. Such sophistry should not be allowed. *Cf. Simpson v. Simpson*, 2013 MT 22, ¶¶ 27–29, 368 Mont. 315, 294 P.3d 1212 (judicial estoppel seeks to prevent a litigant from asserting a position that is inconsistent with one that was previously asserted in the same or in a previous proceeding and applies where "chameleonic" litigants advance opposite theories in an attempt to manipulate the court).[4]

SPH should not be permitted to argue as it did in *Weiner I* to achieve its desired result there, and then argue the opposite to the *Weiner II* court. Gamesmanship should not be rewarded.

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[4] In deciding whether undue prejudice exists, district courts balance the prejudice against the sufficiency of the moving party's justification for the delay. *Rolan v. New W. Health Servs.*, 2017 MT 270, ¶ 16, 389 Mont. 228, 405 P.3d 65. Prejudice exists when "[g]ranting the amendments would [require] additional discovery and time to determine the sufficiency of the claims alleged in the amended complaints, . . . [that would cost] additional time, energy and money to resolve the case." *Lindey's, Inc. v. Prof. Consultants, Inc.*, 244 Mont. 238, 242–243, 797 P.2d 920, 923 (1990). The *Weiner I* court relied on SPH and the individual defendants' representations they would have to conduct additional discovery concerning the new claims and related allegations. Ex. E, p. 4. Based on SPH's subsequent representations to the *Weiner II* court, the *Weiner I* court's denial of the motion to amend was directly contrary to this Court's recent holding in *Cremer Rodeo Land & Livestock v. McMullen*, 2023 MT 117, ¶¶ 23–26 (permitting untimely leave to amend when the new subject matter was no surprise to the parties and the parties had already conducted discovery on the additional claim).

The *Weiner II* court granted SPH's motion to dismiss based on res judicata. The court held Dr. Weiner could have brought his *Weiner II* claims in *Weiner I* and that the *Weiner I* order denying Dr. Weiner's second motion to amend was a final judgment on the merits for the additional claims. Appendix 1. Dr. Weiner appeals this decision.

STANDARD OF REVIEW

This Court reviews a district court's application of res judicata de novo for correctness. *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 13, 366 Mont. 78, 285 P.3d 494.

SUMMARY OF THE ARGUMENT

The district court's ruling that the second action, *Weiner II*, is precluded by the first action, *Wiener I*, under res judicata is incorrect as a matter of law. First, Dr. Weiner could not have asserted his *Weiner II* claims until he exhausted SPH's administrative remedies. Second, there was no final judgment on the merits from which res judicata could operate.

I. The district court's decision to dismiss the second action based on res judicata was in error.

"Res judicata, or claim preclusion, bars a party from relitigating a matter that the party already had the opportunity to litigate." *Adams v. Two Rivers Apartments, LLLP*, 2019 MT 157, ¶ 8, 396 Mont. 315, 444 P.3d 415. Res judicata has evolved to

include claims that were or *could have been* litigated in the first action. *Brilz*, ¶ 21; *Wiser v. Mont. Bd. of Dentistry*, 2011 MT 56, ¶ 17, 360 Mont. 1, 251 P.3d 675; *Somont Oil Co. v. A & G Drilling, Inc.*, 2008 MT 447, ¶ 11, 348 Mont. 12, 199 P.3d 241.

"[G]iven the countervailing policy favoring the resolution of disputes on their merits, claim-preclusion rules must strike the proper balance between efficiency and finality on one hand and the vindication of just claims on the other." *Brilz*, ¶ 21 (citing *Restatement (Second) of Judgments* § 24 cmt. b (1982); Charles Alan Wright et al., *Federal Practice and Procedure* vol. 18, § 4406, 138, § 4407, 157, § 4415, 351 (2d ed., West 2002)).

For res judicata to apply, each of the following elements must exist:

> (1) the parties or their privies are the same in the first and second actions; (2) the subject matter of the actions is the same; (3) the issues are the same in both actions, or are ones that could have been raised in the first action, and they relate to the same subject matter; (4) the capacities of the parties are the same in reference to the subject matter and the issues between them; and (5) a valid final judgment has been entered on the merits in the first action by a court of competent jurisdiction.

Id., ¶ 22 (citations omitted).

Here, the parties are the same and the parties' capacities are the same. And for the purposes of this appeal, it is unnecessary to analyze whether the subject

matter and issues are the same in both matters.[5] What is at issue is (A) whether Dr. Weiner could have brought his *Weiner II* claims in *Weiner I* and (B) whether there is a final judgment on the merits that would operate to preclude *Weiner II*.

A. Dr. Weiner could not have brought his *Weiner II* claims in *Weiner I* until he exhausted his administrative appeal remedies.

Weiner II is not precluded by *Weiner I* because Dr. Weiner could not have asserted his *Weiner II* claims in *Weiner I* when he filed his first amended complaint. At that time, he had not exhausted SPH's sham administrative remedies; there was no outcome to the administrative hearing and appeal to challenge. The *Weiner I* court held the initial claims in *Weiner I* did not challenge the administrative appeal process or its results. As the *Weiner I* court recognized, that is precisely what Dr. Weiner seeks to do in *Weiner II*.

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Dr. Weiner's never brought his *Weiner II* claims in *Weiner I*—the second motion to amend was denied. Therefore, for res judicata to operate, this Court must find that Dr. Weiner *could have* brought the *Weiner II* claims in *Weiner I*. *Brilz*, ¶ 21; *see also Clark v. Bear Stearns & Co.,* 966 F.2d 1318, 1321 (9th Cir.1992) ("If a

[5] While the *Weiner II* court mentioned these elements, it did not hold that the remaining claims in *Weiner I* precluded *Weiner II* as independent grounds for dismissal. Nor could it have so held. There is no final judgment on the merits in *Weiner I*.

claim could not have been asserted in prior litigation, no interests are served by precluding that claim in later litigation."); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000) (claim preclusion "does not preclude litigation of events arising after the filing of the complaint[.]").

The *Weiner II* court held Dr. Weiner "had the opportunity to litigate these causes of action in the first suit because he attempted to do so, and, but for his tactics, he could have." Appendix 1, p. 11. That Dr. Weiner's unwillingness to agree to a stay, which the *Weiner I* court denied,[6] could prejudice Dr. Weiner's right to bring later accruing claims in a second action strains credulity and has no legal support.

The issue is straightforward and does not involve any devolution into how things could have played out had Dr. Weiner or the *Weiner I* court agreed that a stay was in order: **could Dr. Weiner have brought his *Weiner II* claims in *Weiner I* *as a technical matter*?**

The point in time to consider is when the complaint was filed or, at the latest, when the amended complaint was filed. *See Olsen v. Milner*, 2012 MT 88, ¶ 25, 364 Mont. 523, 276 P.3d 934 ("Olsen could not have technically presented the

[6] The denial occurred the day after the district court granted Dr. Weiner's first motion to amend.

issues in the former case as he does now. . . . In other words, Olsen's trespass claim did not exist as a matter of law . . . . Moreover, Olsen was not aware of the trespass claim at the time of the first suit because he had yet to commission the survey of his property."); *Traders State Bank v. Mann,* 258 Mont. 226, 240, 852 P.2d 604, 613 (1993), *overruled on other grounds*, *Turner v. Mountain Eng'g & Constr.*, 276 Mont. 55, 915 P.2d 799 (1996) (defendants could not have raised contract-related defense until conclusion of prior bankruptcy proceeding); *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022 (9th Cir. 2019) ("Thus, the question before us is whether MRT's current claims accrued—i.e., 'c[a]me into existence' or 'ar[o]se,' Accrue, Black's Law Dictionary (10th ed. 2014)—and could have been sued upon before MRT filed *MRT I.*"); *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) ("Thus, Howard's retaliation claims in this suit arose from events that occurred after she filed her complaint in *Howard I*, and they are not barred by claim preclusion."); *Curtis*, 226 F.3d at 139 (crucial date is the date the complaint was filed); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 210–11 (4th Cir. 2009) (claims only barred if available at the time of the first suit); *Gaines v. Anderson*, 2018 U.S. Dist. LEXIS 35079, 2018 WL 1156768, at *6 (D. Md. Mar. 5, 2018) (declining to bar a retaliation claim via res judicata where the plaintiff "could not have brought the instant retaliation claim during [the first action] given that she

had not yet exhausted her administrative remedies"); *McClary v. Lightsey*, 2018 U.S. Dist. LEXIS 230091, 2018 WL 9849553, at *4 (E.D.N.C. June 20, 2018), *aff'd*, No. 19-6901, 783 Fed. Appx. 298, 2019 WL 5787984 (4th Cir. Nov. 6, 2019) ("If the claims were not exhausted, they could not have been raised in [the first litigation], and would not be barred by the doctrine of *res judicata*.").

Under the SPH Bylaws,

> If an adverse action or recommendation is made with respect to the membership status or clinical privileges of a Physician or Practitioner on the Medical Staff . . . , he or she must exhaust the remedies afforded by these bylaws (including its Appendices) **before resorting to formal legal action challenging the decision**, the procedures used to arrive at the decision, or asserting any claim against SPH or participants in the decision.

Dkt. 1, Ex. A, p. 48 (emphasis added).

Dr. Weiner's *Weiner II* claims could not have been raised in a formal legal action when he filed his first amended complaint in *Weiner I* because Dr. Weiner had not exhausted his administrative remedies and there was no decision from the administrative appeal process to challenge. In other words, the *Weiner II* claims "did not exist" when Dr. Weiner filed his first amended complaint. *See Olsen*, ¶ 25.

Nor could Dr. Weiner have litigated them if they had "existed." The *Weiner I* court did not have jurisdiction over the claims until Dr. Weiner exhausted his administrative remedies, which occurred after Dr. Weiner filed his first amended

complaint. *Browning v. Navarro*, 887 F.2d 553, 558 (5th Cir. 1989) ("It is black-letter law that a claim is not barred by res judicata if it could not have been brought. If the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded."); *see also N. Star Dev., LLC v. Montana Pub. Serv. Comm'n*, 2022 MT 103, ¶ 23, 408 Mont. 498, 510 P.3d 1232 (the correct jurisdictional basis for dismissal due to failure to exhaust administrative remedies is lack of procedural justiciability); *Getter v. Beckman*, 236 Mont. 377, 380, 769 P.2d 714, 716 (1989) (no jurisdiction over proceedings until administrative remedies are exhausted).

While the *Weiner I* court was potentially within its discretion to deny Dr. Weiner's second motion to amend because—in its opinion—Dr. Weiner could have agreed to the stay and a further amendment would delay *Weiner I*, the doctrine of res judicata does not allow for the same judicial discretion.[7]

The *Weiner II* claims either could have been brought at the time Dr. Weiner filed his first amended complaint in *Weiner I* or they could not have been.

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[7] An appeal of a denial of a motion to amend is reviewed for an abuse of discretion. *See Ally Fin., Inc. v. Stevenson*, 2018 MT 278, ¶ 10, 393 Mont. 332, 430 P.3d 522. An appeal from an order dismissing a case based on res judicata is reviewed for correctness. *Brilz*, ¶ 13.

Because Dr. Weiner could not have asserted his *Weiner II* claims when he first amended his complaint (before the completion of the administrative appeal process), the *Weiner II* court erred in granting SPH's motion to dismiss based on res judicata. *See, e.g.*, *Olsen v. Milner*, ¶¶ 25–26.

This Court should reverse and remand.

B. There is no final judgment on the merits to preclude *Weiner II*.

Assuming, *arguendo*, Dr. Weiner could have brought the *Weiner II* claims in *Weiner I*, then the analysis turns to the elements of res judicata. Res judicata requires a final judgment on the merits. *Touris v. Flathead Cnty.*, 2011 MT 165, ¶ 13, 361 Mont. 172, 258 P.3d 1. Because there is no final judgment on the merits to consider, *Weiner II* is not precluded.

1. The denial of Dr. Weiner's second motion to amend *Weiner I* does not preclude *Weiner II*.

In granting SPH's motion to dismiss based on res judicata, the *Weiner II* court analyzed the additional claims in the proposed amended complaint in *Weiner I* compared to the claims brought in *Weiner II*. Under this analysis, the issue for the Court to decide is whether the district court's denial of Dr. Weiner's second

motion to amend *Weiner I* was a final judgment on the merits for the proposed additional claims.[8] If not, the district court must be overturned.

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Whether the denial of a motion for leave to amend is a final judgment for the purposes of res judicata is an issue of first impression in Montana. This Court should decide the issue in the negative.

Only a final judgment on the merits precludes a later claim under res judicata. *Brilz*, ¶ 21. Therefore, denial of leave to amend must be on the merits to preclude subsequent litigation of the additional claims in the proposed amended complaint. *See id.*, ¶ 22; *Curtis*, 226 F.3d at 139 (2d Cir. 2000) ("Here, the denial of leave to file the second amended complaint was clearly not based on the merits, but rather on the procedural ground of untimeliness. Thus, the claim preclusion effect of *Curtis I* — assuming a final judgment will be rendered in that case — will not prevent litigation of claims arising after the filing of plaintiffs' first amended complaint in *Curtis I*."); *N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000) (noting that where denial of leave to amend does not reach underlying merits of claim, "the actual decision denying leave to amend is

[8] Under the *Weiner II* court's analysis, the subject matter and issues must be the same because the proposed amended claims in *Weiner I* are the same as the claims in *Weiner II*.

irrelevant to the claim preclusion analysis."); *Millennium Labs., Inc. v. Ward*, 289 Neb. 718, 729, 857 N.W.2d 304, 313 (2014) ("In the case at bar, Millennium's motion to amend its second amended counterclaims was not decided on the substance of the proposed counterclaims or their merits. The Florida court denied leave to amend, because Millennium's proposed third amended counterclaims were not timely filed and good cause had not been shown for the untimeliness. We thus conclude that the denial of leave to amend was not a judgment on the merits for purposes of res judicata and did not bar Millennium's claims against Ward in the district court.")

Here, the denial of Dr. Weiner's second leave to amend was not on the merits. SPH and the individual defendants opposed Dr. Weiner's second motion to amend, arguing delay, prejudice, and **futility**.[9] Dkt. 8, Exhibit D. In arguing the amendment was futile, SPH stated "[a]lthough the merits of a proposed amended claim are generally not to be considered by the court, the merits of a claim *are* to be considered if the claim is frivolous, meritless, or futile." *Id.*, p. 6 (emphasis in original) (citations omitted).

[9] SPH and the individual defendants only argued the claims were futile as asserted against the individual defendants. Dkt. 8, Exhibit D, pp. 6–9. There was no claim or argument that Dr. Weiner's legal challenge to the administrative appeal process (as was his right under the Bylaws) by naming SPH as a defendant was futile. SPH agreed the claims were proper against SPH. Dkt. 8, Exhibit C, pp. 2–3.

The *Weiner I* court did not even address the futility argument—i.e., the only merits-based argument. Dkt. 8, Exhibit E. Instead, the court held the amendment would cause undue delay because of the potential effect on the remaining timeline in the case and—agreeing with SPH—because "the amended complaint, **which adds three new causes of action and many additional factual allegations**, would require substantial additional discovery and would necessitate Defendants to re-depose Weiner and others[]"—causing prejudice to SPH. *Id.*, p. 4 (emphasis added).

Even so, some courts have found denials of motions for leave to amend to be on the merits when entered with prejudice.

In *Marin v. HEW, Health Care Financing Agency*, 769 F.2d 590, 593–594 (9th Cir. 1985), the Ninth Circuit reasoned that because a motion to amend was denied with prejudice, was based on a statutory time bar, and coincided with dismissal of the action for lack of subject matter jurisdiction, the denial of the motion to amend constituted a final judgment on the merits.

In *Dzhanikyan v. Liberty Mut. Ins. Co.*, the district court found the Ninth Circuit's holding in *Marin* to be applicable only to orders denying motions for leave to amend *with* prejudice. 2014 WL 12781773 (C.D. Cal. May 9, 2014). The district court reasoned that since the court in the original action denied the motion for

leave to amend without indicating whether the denial was with prejudice, *Marin* did not apply. The district court also analyzed the denial to determine whether it was intended to be with prejudice. The motion was denied for failing to comply with procedural requirements, however, and it was unclear based on the order whether the denial was with prejudice. *Id.* at *8. Unable to determine whether the order was intended to be with prejudice, the district court declined to bar the plaintiff's claims.

In *Save the Bull Trout v. Skipwith*, the plaintiffs asserted claims in federal court in the District of Montana that mirrored claims raised by the plaintiffs in a proposed amended complaint filed in the District of Oregon. 2020 U.S. Dist. LEXIS 81898, at *5, 2020 WL 2213557 (D. Mont. May 6, 2020), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 134127, 2020 WL 4345324 (D. Mont. July 29, 2020). One of the issues before the court was "whether the order denying Plaintiffs' motion for leave to amend their complaint in the District of Oregon should be construed as a final judgment on the merits for purposes of res judicata." *Id.* at *6.

The court held it was unclear whether the Oregon court intended to deny the plaintiffs' motion to amend with prejudice. *Id.* at *16. Based on the record, and in line with *Dzhanikyan*, the court "decline[d] to find the district court denied

Plaintiffs' request for leave to amend with prejudice[]" and, "[t]herefore, under *Marin*, Plaintiffs' claims [were] not barred by res judicata." *Id.* at *16–17.

This Court has never gone further. In *Touris v. Flathead County*, "*Touris I* was a final judgment on the merits for the purposes of res judicata because *Touris* dismissed the action **with prejudice**" and "[v]oluntary dismissal **with prejudice** constitutes a final judgment on the merits." *Touris*, ¶ 15 (emphasis added). The Court was undeterred by the fact that *Touris I* was never actually decided on the merits because the dismissal was **with prejudice**. *Id.*

In support, the Court cited *Xin Xu v. McLaughlin Research Inst. for Biomedical Science*, 2005 MT 209, ¶¶ 32–36, 328 Mont. 232, 119 P.3d 100. In *Xin Xu*, the Court held that "under Rule 41(b), a dismissal with prejudice under Rule 37(d), M.R.Civ.P., constitutes an adjudication on the merits." *Id.*, ¶ 36. There is no equivalent rule in Montana for the denial of a motion to amend based on untimeliness or prejudice to the defendant.

The *Weiner II* court cited *Touris* favorably in its order and admitted that it was "unable to state whether Judge Menahan's denial was intended to be with prejudice. . . . Menahan did not expressly state that his order was with prejudice." Appendix 1, p. 8. Without a finding that Judge Menahan's order (not technically on

the merits) was with prejudice, the order cannot operate alone to preclude *Weiner II*.[10]

The *Weiner II* court failed to follow *Touris* and incorrectly held that res judicata applied because of the "unusual circumstance." Order, p. 9. That is not a proper interpretation of the "unusual circumstances" language in *Marin* and finds no support in Montana jurisprudence. For the denial of a motion to amend that is not issued on the merits to be a final judgment for res judicata purposes based on "unusual circumstances," the denial must be **with prejudice**:

> The more difficult question in this case is whether denial of the motion to amend constitutes a final judgment on the merits of Marin's appeal from the decision of the P.R.R.B. We hold that under the unusual circumstances of this case it does.
>
> ****
>
> Even without a determination which is literally on the merits, a denial **with prejudice** may be a final judgment with a res judicata effect as long as the result is not unfair. *See Young Engineers v. U.S. Intern'l Trade Comm'n.*, 721 F.2d 1305, 1314, 219 U.S.P.Q. (BNA) 1142 (Fed. Cir. 1983).

[10] Even if the order had been with prejudice, there is no rule in Montana that a denial of a motion to amend with prejudice based on untimeliness is a final judgment on the merits for res judicata purposes.

Marin, 769 F.2d at 593 (emphasis added) (citation omitted) (where the unusual circumstances also included a dismissal of the action in its entirety, denial of the motion to amend with prejudice was immediately appealable, and the denial of the motion to amend was not appealed).

The denial of Dr. Weiner's second motion to amend *Weiner I* was not a decision on the merits and was not with prejudice. This court should reverse and remand.

The exception to the "final judgment on the merits rule" that some courts have also applied is that even when a denial of a motion to amend is not "on the merits"[11] of the new claims, res judicata may operate when there is also a final judgment on merits of the remaining claims. *See Save the Bull Trout*, 2020 U.S. Dist. LEXIS, at *17 ("[I]n the cases finding the denial of a motion to amend to be a final judgment . . . each case's procedural posture includes an adjudication on the merits.").

This was the precise scenario addressed by the Ninth Circuit in *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985 (9th Cir. 2005). There, "Mpoyo filed claims of racial discrimination and retaliation in violation of Title VII against his former employer" and later "sought leave to amend his complaint to include

[11] Technically or through a denial with prejudice.

FMLA and FLSA claims." 430 F.3d at 986. The district court denied the amendment request on untimeliness grounds and eventually entered judgment in the defendant's favor on the remaining claims. *Id.* Following entry of judgment, and while the first case "was on appeal, Mpoyo filed a new action in district court . . . alleging the FMLA and FLSA claims of his proposed amended complaint." *Id.*

The district court dismissed the second lawsuit on res judicata grounds and the Ninth Circuit affirmed, holding the second element of the res judicate test (final judgment on the merits) was satisfied because "the remainder of the claims, which arise out of the same transaction, were decided on the merits when they were dismissed on summary judgment." *Id.* at 988.

Mpoyo makes clear that, if Dr. Weiner filed *Weiner II* after *Weiner I* had been litigated to completion and judgment entered, *Weiner II* may be precluded by res judicata if there was an identity of subject matter and issues with the remaining claims in *Weiner I*. Due to the absence of a final judgment in *Weiner I*, the res judicata test in *Mpoyo* is not satisfied here.

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This Court has never held that a denial of a motion to amend (with or without prejudice) is a final judgment on the merits for the purposes of res judicata

and has repeatedly described the second element of the res judicata test as whether the "earlier suit reached a final judgment on the merits." *See, e.g.*, *Brilz*, ¶ 22.

Because there is no final judgment on the merits from which res judicata could operate, the district court erred in dismissing *Weiner II*. This Court should reverse and remand.

2. Any exception to the application of res judicata could only favor Dr. Weiner.

The *Weiner II* court found there was nothing "unfair about a determination that Judge Menahan's order [on Dr. Weiner's second motion to amend] constitutes a final judgment." Appendix 1, p. 8. The court recognized that Montana Code Annotated § 28-2-1501 allows for successive actions on the same contract when a new action arises but took solace in its conclusion that it appeared Dr. Weiner would be able to address the lion's share of his concerns regarding the Bylaws in *Weiner I*. *Id.*, pp. 7, 12.

Eschewing the gamesmanship by SPH in fabricating an argument either in opposing the second motion to amend *Weiner I* or in moving to dismiss *Weiner II*, the *Weiner II* court blamed Dr. Weiner for not agreeing to stay *Weiner I* and used that as a deciding factor in granting the motion to dismiss on res judicata grounds. *Id.*, p. 11.

In reaching its conclusion that *Weiner II* is barred, the *Weiner II* court also found that Judge Menahan was wrong in denying SPH's motion to stay. Judge Menahan denied the stay because Dr. Weiner's claims in *Weiner I* were not subject to the administrative exhaustion requirement. Dkt. 8, Ex. B, p. 2. In stark contrast, the *Weiner II* court held that "*Weiner I* challenges the decisions and procedure regarding [Dr. Weiner's] medical staff membership and clinical privileges." Appendix 1, p. 11.

The problem with the *Weiner II* court's analysis is that it is not based on an application of res judicata but, instead, on weighing the blame for why Dr. Weiner's second motion to amend *Weiner I* was denied and the potential harm to Dr. Weiner if his *Weiner II* claims could not go forward. The *Weiner II* court's conclusion—that it was Dr. Weiner's fault and he would not be too damaged by a dismissal—disregards the proper res judicata analysis as well as Dr. Weiner's constitutional rights:

> [Montana] Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable . . . . Right and justice shall be administered without sale, denial, or delay.

Montana Constitution, Art. II, Section 16. "No person shall be deprived of life, liberty, or property without due process of law." *Id.*, Art. II, Section 17.

Dr. Weiner was constitutionally entitled to bring and litigate *Weiner I*. He is further entitled to litigate *Weiner II*.

Any exception to the application of res judicata only cuts in Dr. Weiner's favor; it cannot bar him from pursuing his claims. The rule of finality protects defendants unless there is good reason to depart from a mechanical res judicata analysis. There is no countervailing inquiry that allows a court to declare res judicata when the elements are not strictly met:

> The Supreme Court "has cautioned against departing from accepted principles of res judicata." *Griswold v. Cty. of Hillsborough*, 598 F.3d 1289, 1294 (11th Cir. 2010). But the application of claim preclusion is not purely mechanical, *Maldonado v. U.S. Att'y Gen.*, 664 F.3d 1369, 1375 (11th Cir. 2011), and the Court has recognized that **the requirements of due process may limit** the application of claim preclusion, *Richards v. Jefferson Cty. Ala.*, 517 U.S. 793, 797, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996).

Seminole Tribe of Fla. v. Biegalski, 757 F. App'x 851, 862 (11th Cir. 2018) (emphasis added).

> This court is well aware of the value that the bar and estoppel doctrines serve in achieving a finality to litigation and in preventing harassment of a party and a waste of the court's resources through multiplicitous law suits [sic]. We are unwilling to hold, however, that they constitute an absolute from which we must never stray, even when a mechanical application would result in manifest injustice. Rather, we believe that the occasional adoption of an

> **exception to the finality rule** when public policy so demands does not undermine its general effectiveness.

Moch v. E. Baton Rouge Par. Sch. Bd., 548 F.2d 594, 598 (5th Cir. 1977) (emphasis added).

> [G]iven the countervailing policy favoring the resolution of disputes on their merits, **claim-preclusion rules must strike the proper balance between efficiency and finality on one hand and the vindication of just claims on the other**.

Brilz, ¶ 21 (emphasis added) (citing *Restatement (Second) of Judgments* § 24 cmt. b (1982); Charles Alan Wright et al., *Federal Practice and Procedure* vol. 18, § 4406, 138, § 4407, 157, § 4415, 351 (2d ed., West 2002)).

It is undisputed Dr. Weiner could have brought his *Weiner II* claims in a separate lawsuit instead of moving to amend *Weiner I*. *See Fisher v. State Farm Gen. Ins. Co.*, 199 MT 308, ¶ 18, 297 Mont. 201, 991 P.2d 452 ("As mentioned above, Fisher could have pleaded and tried his UCPA claim separately."). Dismissal based on res judicata in this instance is inequitable and serves no proper purpose. Instead, upholding dismissal in this case would cause litigants to avoid moving to amend and, instead, file separate lawsuits when additional claims accrue after the deadline to amend.

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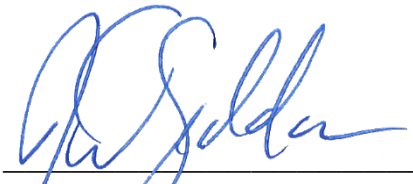
Because all elements of res judicata are not present, the *Weiner II* court erred in granting SPH's motion to dismiss. This Court should reverse and remand.

CONCLUSION

Dr. Weiner could not have brought his *Weiner II* claims in *Weiner I* and there is no judgment on the merits from which res judicata could operate. The district court was incorrect as a matter of law, and Dr. Weiner respectfully requests this Court to reverse and remand.

Respectfully submitted this 14th day of July, 2023.

GOETZ, GEDDES & GARDNER, P.C.



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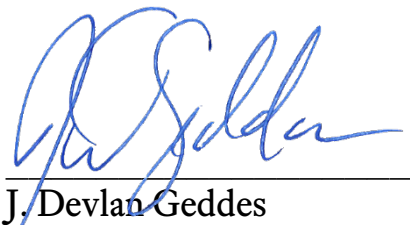
INDEX TO APPENDIX

App.	Date	Description	Record
1	3/15/2023	Order on Defendant's Motion to Dismiss	Dkt. 11

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, that this brief is proportionately spaced, printed in 14-point Equity Text A (a Roman-style, non-script) type-face, is double-spaced (except that footnotes, quoted and indented material are single spaced); and is not more than 10,000 words (9,903 words), excluding the Caption, Table of Contents, Table of Authorities, the Index to Appendix, the Certificate of Service and this Certificate of Compliance.



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CERTIFICATE OF SERVICE

I, J. Devlan Geddes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-14-2023:

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