

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 23-0224

THOMAS C. WEINER, M.D.,

Plaintiff and Appellant,

vs.

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

Defendant and Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana First Judicial District,
In and for the County of Lewis & Clark,
Cause No. CDV-2022-501; Honorable Kathy Seeley, Presiding

J. Devlan Geddes
Jeffrey J. Tierney
Henry J.K. Tesar
GOETZ, GEDDES & GARDNER, P.C.
35 North Grand, P.O. Box 6580
Bozeman, MT 59771-6580
(406) 587-0618
devlan@goetzlawfirm.com
jtierney@goetzlawfirm.com
htesar@goetzlawfirm.com

Attorneys for Appellant

David M. McLean
Ryan C. Willmore
McLEAN & ASSOCIATES, PLLC
3301 Great Northern Ave., Ste. 203
Missoula, MT 59808
(406) 541-4440
dave@mcleanlawmt.com
ryan@mcleanlawmt.com

Michael J. Miller
STRONG & HANNI
102 South 200 East, #800
Salt Lake City, UT 84111
(801) 532-7080
mmiller@strongandhanni.com

Attorneys for Appellee

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STATEMENT OF THE ISSUES

Did the District Court err in granting St. Peter's Health's motion to dismiss Plaintiff's complaint?

STATEMENT OF THE CASE

Plaintiff/Appellant Thomas C. Weiner, M.D. ("Weiner") filed his Verified Complaint and Demand for Jury Trial on June 22, 2022. (Doc. 1). In the Complaint, Weiner asserted three causes of action; namely: Count 1: Declaratory Relief; Count 2, Permanent Injunctive Relief Regarding Report; and Count 3: Breach of Contract/Violation of the Medical Staff Bylaws. (Doc. 1). This was the second lawsuit Weiner brought against Defendant/Appellee St. Peter's Health ("SPH") and Weiner asserted he "now brings this second lawsuit to challenge the peer review process." (Doc. 1, p. 2).

On August 4, 2022, SPH filed its Motion to Dismiss. (Doc. 5). Weiner filed his Response on August 24, 2022. (Doc. 8). On September 12, 2022, SPH filed its Reply. (Doc. 9). Thereafter, on March 15, 2023, the District Court entered its Order on Defendant's Motion to Dismiss. (Appendix to Appellant's Opening Brief ("Weiner App.") 1).

The District Court granted SPH's motion to dismiss pursuant to the doctrine of res judicata. (Weiner App. 1, p. 12). The District Court noted the purposes of res judicata included conserving judicial resources, relieving parties of the expense

and vexation of multiple lawsuits, and fostering reliance on adjudication by preventing inconsistent decisions. (Weiner App. 1, p. 12). Further, the District Court held Weiner’s “own actions led to this procedural quagmire.” (Weiner App. 1, p. 12). It is from this Order which Weiner files his appeal.

STATEMENT OF RELEVANT FACTS

Pursuant to Rule 12(1)(d) and Rule 12(2) of the Montana Rules of Appellate Procedure, the briefs of the parties should include a statement of the facts relevant to the issues presented for review. Yet, instead of adhering to this rule, Weiner provides seven pages of irrelevant “factual background.” (Opening Brief, pp. 7-14). Rather than responding to these irrelevant contentions, SPH focuses on facts pertinent to the issue before this Court, which involves the two lawsuits Weiner has filed against SPH. In addition, as established below, Weiner’s facts are not congruent with the factual record.

I. *WEINER I.*

On December 10, 2020, Weiner filed suit in Cause No. ADV-2020-1988 (“*Weiner I*”) against SPH and several of its agents, alleging many causes of action, including wrongful termination, civil conspiracy, and violation of due process. (Weiner App. 1, p. 1). SPH filed its Answer on January 4, 2021. (Doc. 6, p. 2). On April 7, 2021, the defendants in *Weiner I* moved to stay the case until the conclusion of Weiner’s administrative peer review process. (Weiner App. 1, p. 1).

Weiner opposed the motion and Judge Menahan ruled in favor of Weiner and denied SPH's stay request on May 20, 2021. (Weiner App. 1, pp. 1-2). Notably, in his procedural background, Weiner omits the fact he vigorously voiced opposition to the stay. (*See* Opening Brief, p. 3).

Weiner sought leave to amend his complaint in *Weiner I*, which was granted on May 18, 2021. (Weiner App. 1, p. 2). Judge Menahan issued a scheduling order on June 14, 2021, which set an amendment deadline of September 3, 2021. (Weiner App. 1, p. 2). In the scheduling order, Judge Menahan specifically ordered that the schedule "shall not be modified except by leave of the Court upon a showing of good cause." (Weiner App. 1, p. 2). On October 12, 2021, Judge Menahan extended certain deadlines in the scheduling order, including the discovery deadline. (Weiner App. 1, p. 2; Doc. 6, p. 3). However, the pleading amendment deadline was not modified and Weiner did not seek its modification. (Weiner App. 1, p. 2; Doc. 6, p. 3).

The September 3, 2021 deadline for amendment of pleadings expired without either party moving to amend. (Doc. 6, p. 3). On February 4, 2022, five months after the amendment deadline, Weiner moved for leave to file a second amended complaint. (Weiner App. 1, p. 2). Therein, Weiner argued amendment was necessary because the administrative review proceedings had concluded, giving rise to new claims to be added to his complaint. (Doc. 6, p. 3). The

proposed second amended complaint added three new claims. (Doc. 6, p. 4).

Judge Menahan denied leave after finding undue delay on the part of Weiner and prejudice to SPH. (Weiner App. 1, p. 2; Doc. 6, p. 3).

Judge Menahan was troubled by Weiner’s earlier opposition to a stay, in light of Weiner’s intent to always supplement his complaint with claims related to the administrative review process regardless of the result. (Weiner App. 1, p. 2). Further, Weiner waited a month after the administrative review concluded to file his motion to amend, discovery was substantially underway, and the case was already scheduled for trial. (Doc. 6, p. 3). Judge Menahan held Weiner should have either agreed to the stay or raised the issue at the scheduling conference. (Weiner App. 1, p. 2). Specifically, Judge Menahan wrote:

Despite his claim that “all parties were aware that once SPH’s internal remedies were exhausted, Dr. Weiner would have additional claims to assert in this litigation,” Weiner previously objected to Defendants’ motion to stay...Upon review of his argument, it is apparent Weiner intended to file another motion to amend his complaint regardless of the outcome of the internal review process. However, he waited until five months after the amendment deadline set in the scheduling order, and one month after the completion of the internal review process, to seek the Court’s leave to file a second amended complaint. If Weiner was aware he would seek to amend his complaint following the internal review process, he should not have objected to staying the proceedings in this Court pending the outcome of the internal review.

(Doc. 6, p. 4).

On February 8, 2023, SPH filed a Motion for Summary Judgment in *Weiner I* and included an argument that SPH was immune from liability against all of

Weiner's claims under The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, et seq, ("HCQIA"). On August 31, 2023, Judge Menahan issued an Order granting SPH's Motion for Summary Judgment thereby dismissing *Weiner I* in its entirety against the SPH Defendants. (See Appendix to Appellee's Answer Brief ("SPH App.") 1). The Court ruled that all of Weiner's claims against SPH were barred. Specifically, the Court reasoned:

The Court finds Weiner has failed to satisfy his burden of producing sufficient relevant evidence that would allow a reasonable jury to conclude by a preponderance of the evidence that the SPH Defendants are not entitled to statutory immunity under HCQIA. Because SPH Defendants are entitled to HCQIA immunity, they may not be found liable for damages with respect to the professional review actions.

(SPH App. 1, p. 25). On September 8, 2023, the Court issued a supplemental Order in further support of the Order for Summary Judgment. (See SPH App. 2). At the time of the filing of this brief, the only claims remaining in *Weiner I* are the claims SPH has *against* Weiner and Weiner's claims against co-defendant Randy Sasich, MD¹.

II. *WEINER II.*

On June 22, 2022, Weiner filed the underlying action ("*Weiner II*") against SPH, alleging the three identical claims that were disallowed by Judge Menahan

¹ Dr. Sasich filed a Motion for Summary Judgment (Doc. 242 in *Weiner I*) which is pending, but will presumably be granted given the District Court's Orders granting SPH Defendants summary judgment.

when the motion to amend in *Weiner I* was denied. (Weiner App. 1, p. 2). SPH moved to dismiss on grounds of impermissible collateral attack, claim splitting, res judicata, and laches. (Weiner App. 1, p. 2).

The District Court granted SPH's Motion to Dismiss based on the doctrine of res judicata. (Weiner App. 1, pp. 12-13). Having found *Weiner II* to be res judicata, the District Court did not address laches. (Weiner App. 1, p. 12).

Additionally, the District Court did not agree *Weiner II* could be dismissed as an impermissible collateral attack on the denial for leave to amend. (Weiner App. 1, p. 3). While the District Court held SPH was correct that if *Weiner I* and *Weiner II* were consolidated it would have the effect of reversing the denial, it held since consolidation was discretionary it would not dismiss *Weiner II* on grounds of an impermissible collateral attack. (Weiner App. 1, p. 3).

In ruling *Weiner II* was barred under the doctrine of res judicata, the District Court held *Weiner* had the opportunity to litigate these causes of action in *Weiner I* because he attempted to do so, and, **but for his tactics**, he could have. (Weiner App. 1, p. 11)(Emphasis added). The District Court further held that in reaching the determination *Weiner II* is barred, it was mindful of the purposes of res judicata: conserving judicial resources, relieving parties of the expense and vexation of multiple lawsuits, and fostering reliance on adjudication by preventing inconsistent decisions. (Weiner App. 1, p. 12). Most importantly, the District

Court held Weiner's own actions led to this procedural quagmire. (Weiner App. 1, p. 12). Ironically, Weiner argues "[g]amesmanship should not be rewarded," yet it was his gamesmanship that led to dismissal below and denial of his motion for leave to file a second amended complaint in *Weiner I*. (See Opening Brief, p. 22).

STANDARD OF REVIEW

A district court's application of res judicata is an issue of law which this Court reviews for correctness. *Touris v. Flathead County*, 2011 MT 165, ¶ 10, 361 Mont. 172, 258 P.3d 1.

SUMMARY OF ARGUMENT

Weiner's complaint was appropriately dismissed by the District Court. The Order granting SPH's Motion to Dismiss set forth applicable authority and the analysis is well-reasoned. (See Weiner App. 1). There is no reason to disturb the District Court's conclusion.

Weiner's three causes of action are barred pursuant to the doctrine of res judicata. The denial for leave to amend in *Weiner I* constitutes a final judgment regarding the three causes of action. There is identity between the subject matter and issues, as the causes of action are the same. Lastly, the decision was not unfair, as Weiner could have pursued his other claims in *Weiner I*.

Additionally, if this Court finds the District Court erred in applying the doctrine of res judicata, this Court should affirm based on either the doctrine of laches or the doctrine of claim splitting.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED *WEINER II* BASED UPON THE DOCTRINE OF RES JUDICATA.

The doctrine of res judicata, or claim preclusion, bars re-litigation of a claim that a party has already had the opportunity to litigate. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267. Central to res judicata is the concept of finality; litigation must, at some point, come to an end. *State v. Southwick*, 2007 MT 257, ¶ 15, 339 Mont. 281, 169 P.3d 698; *Orlando v. Prewett*, 236 Mont. 478, 481, 771 P.2d 111, 113 (1989). In addition, res judicata promotes judicial efficiency, deterring plaintiffs from splitting a single cause of action into more than one lawsuit. *Touris*, ¶ 12(citing *Baltrusch*, ¶ 15). A plaintiff cannot continually seek re-litigation of issues under the guise of claim-splitting because doing so would frustrate a purpose of res judicata, protecting defendants from repetitive lawsuits, and instead encourage a veritable whack-a-mole of contemporaneously-filed duplicative lawsuits based upon similar claims. *Touris*, ¶ 22. Like the claim splitting doctrine, res judicata is designed to defeat collateral attacks against previous orders.

In the underlying case, Weiner dedicated less than two pages of argument to the issue of claim preclusion. (Doc. 8, pp. 17-19). Now, Weiner dedicates twenty pages to res judicata in his Opening Brief, presenting numerous new arguments that should have been raised below. This Court's rule regarding arguments presented for the first time on appeal is well established. *Grizzly Sec. Armored Express, Inc. v. Bancard Servs.*, 2016 MT 287, ¶ 59, 385 Mont. 307, 384 P.3d 68. This Court has consistently held that it will not consider issues raised for the first time on appeal. *See In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. Accordingly, the Court generally will not address either an issue raised for the first time on appeal or a party's change in legal theory. *Grizzly*, ¶ 59 (citations omitted). The basis for the general rule is that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *Id.* Accordingly, this Court should cast aside Weiner's newly raised arguments.

Moving to the core of the doctrine of res judicata, it applies when five elements are met: (1) the parties or their privies are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; (4) the capacities of the persons are the same in reference to the subject matter and to the issues; and (5) a final judgment has been entered on the merits in the first action. *Adams v. Two Rivers Apartments, LLLP*, 2019 MT

157, ¶ 8, 396 Mont. 315, 444 P.3d 415; *Poplar Elementary Sch. Dist. No. 9 v. Froid Elementary Sch. Dist. No. 65*, 2020 MT 216, ¶ 39, 401 Mont. 152, 471 P.3d 57. The doctrine of res judicata deters plaintiffs from splitting a single cause of action into more than one lawsuit, as Weiner attempted to do in *Weiner I* and *Weiner II*, thereby conserving judicial resources and encouraging reliance on adjudication by preventing inconsistent judgments. *Baltrusch*, ¶ 15.

In his appeal, Weiner does not challenge the first four elements of res judicata. Instead, Weiner only argues a final judgment on the merits was not entered in the first action. Further, Weiner argues he could not have brought his *Weiner II* claims in *Weiner I* when he filed his first amended complaint. Both of these arguments fail.

1. The District Court correctly held there was a final judgment on the merits in *Weiner I*.

Since Weiner admits the first four elements of res judicata are met, the only element for this Court to analyze is whether the denial of Weiner's motion for leave to amend in *Weiner I* constitutes a final judgment on the merits. The District Court correctly held that it did.

The District Court weighed all the circumstances and found in this particular, unusual circumstance, the denial of leave to amend the complaint in *Weiner I* constitutes a final judgment for res judicata purposes. (Weiner App. 1, p. 9). First, the District Court relied on *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184,

366 Mont. 78, 285 P.3d 494. Under claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action. *Brilz*, ¶ 18. Claim preclusion bars the relitigation of a claim that the party has already had an opportunity to litigate, including “claims that were or *could have been* litigated in the first action.” *Brilz*, ¶ 21 (Emphasis in original). While claim preclusion traditionally aimed to prevent plaintiffs from “splitting” causes of action, it now also operates as a kind of common-law compulsory joinder requirement, promoting judicial economy through the consolidation of related claims. *Brilz*, ¶ 23. “The law of res judicata now reflects the expectation that parties who are given the capacity to present their ‘entire controversies’ shall in fact do so.” *Brilz*, ¶ 24 (quoting Restatement (Second) of Judgments § 24 cmt. a).

In *Brilz*, Plaintiff argued that the federal district court’s judgment was not “on the merits” with respect to her common law claim because the court ultimately ruled that she had failed to plead or allege such a claim in her complaint. *Brilz*, ¶ 26. Despite her arguments, this Court held “that a dismissal for inadequate pleading is a ‘final judgment on the merits’ for purposes of claim preclusion under Montana law, so long as leave to amend was available and either was not requested or was requested but properly rejected under the circumstances.” *Brilz*, ¶ 29. When determining whether leave to amend was properly rejected under the

circumstances, a trial court is justified in denying a motion to amend for an apparent reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowance of the amendment, or futility of the amendment. *Lindey's, Inc. v. Prof. Consultants, Inc.*, 244 Mont. 238, 242, 797 P.2d 920, 923 (1990). This is exactly what happened in *Weiner I* – leave to amend was properly rejected for undue delay and prejudice to SPH. Accordingly, pursuant to *Brilz*, the denial of leave to amend in *Weiner I* constitutes a final judgment on the merits. *Brilz*, ¶ 29.

In addition to the ruling in *Brilz*, this Court has held the doctrine of res judicata, or claim preclusion, also bars re-litigation of a claim that a party has already had the opportunity to litigate even where it was not actually litigated. See *Fisher v. State Farm Gen. Ins. Co.*, 1999 MT 308, ¶ 10, 297 Mont. 201, 991 P.2d 452. Courts from other jurisdictions have reached similar conclusions. For example, the 8th Circuit has held it is well established that “the denial of a motion to amend a complaint in one action is a final judgment on the merits barring the same complaint in a later action.” *Prof'l Mgmt. Assocs., Inc. v. KPMG LLP*, 345 F.3d 1030, 1032 (8th Cir.2003)(citing *Landscape Props., Inc. v. Whisenhunt*, 127 F.3d 768, 683 (8th Cir. 1997)); see also *King v. Hoover Group, Inc.*, 958 F.2d 219, 222-23 (8th Cir. 1992)(“Denial of leave to amend constitutes res judicata on the

merits of the claims which were the subject of the proposed amended pleading.”). The District Court of Minnesota, found in the 8th Circuit, followed this reasoning and held such a denial “constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading ... even when denial of leave to amend is based on reasons other than the merits, such as timeliness.” *Crystal Imp. Corp. v. AVID Identification Sys., Inc.*, 582 F. Supp. 2d 1166, 1170 (D. Minn. 2008)(quoting *Prof'l Mgmt.*, holding “denial of a motion for leave to amend a complaint to add claims constituted a final judgment on the merits of the claim for res judicata purposes.”).

The 1st Circuit has followed suit. “Denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading.” *Hatch v. Trail King Industries, Inc.*, 699 F.3d 38, 45 (1st Cir. 2012). “When a party chooses to move for leave to amend its complaint and then not to appeal denial of that motion, the party is not entitled to a second opportunity [in a later action] to litigate [the] claim that the party sought to add. Instead, the party’s recourse [is] to appeal, not to start a new action.” *Hatch*, 699 F.3d at 45.

The District Court also relied on *Save the Bull Trout v. Skipwith*, 2020 U.S. Dist. LEXIS 81898 (D. Mont. May 6, 2020).² As in *Brilz*, the *Skipwith* court

² Adopted in full by Montana U.S. District Judge Dana L. Christensen in *Save the Bull Trout v. Skipwith*, 2020 U.S. Dist. LEXIS 134127 (D. Mont. July 29, 2020).

acknowledged res judicata bars “claims that were raised *or could have been raised* in a prior action.” *Skipwith*, *6 (citing *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002)(Emphasis in original)). Claims presented in a failed motion to amend may be barred from being reasserted in a subsequent action for res judicata purposes. *Skipwith*, *8 (citing to *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985 (9th Cir. 2005)). The *Skipwith* court held “denial of leave to amend in a prior action may bar those proposed claims in a subsequent action.” *Skipwith*, *10-11. Further, “in ‘unusual circumstances’ the denial of leave to amend may constitute a final judgment on the merits.” *Skipwith*, *11. Courts have interpreted and applied these principles based on the facts and circumstances of each case. *Id.* Thus, there is not a bright-line rule regarding whether a denial for a motion for leave to amend is unequivocally a final judgment on the merits. *Id.*

In applying the holdings in *Skipwith* to the case at hand, the District Court held the risk of inconsistent decisions was high because the two suits, *Weiner I* and *Weiner II*, were proceeding concurrently within the same district. (Weiner App. 1, p. 7). The District Court also held Weiner would be able to address the lion’s share of his concerns in *Weiner I*. (Weiner App. 1, p. 7). Further, the preliminary injunction was dissolved in *Weiner I*, and while appealable, Weiner failed to appeal the dissolution. (Weiner App. 1, pp. 7-8). Further, the District Court held it saw no basis to revisit Judge Menahan’s decision in a subsequent lawsuit and there

was nothing unfair about a determination that the order constituted a final judgment. (Weiner App. 1, p. 8).

The District Court reached these conclusions after carefully considering the facts and circumstances of the case. *See Skipwith*, *11. For example, it noted Judge Menahan was “troubled by the tactics [Weiner] demonstrated by opposing the stay that would have allowed him to timely bring these causes of action in *Weiner I*.” (Weiner App. 1, p. 8). Further, the Court looked to the fact Weiner raised the new theories five months after the deadline to amend, without moving to amend the scheduling order, despite always intending to raise them regardless of the outcome of the peer review process. (Weiner App. 1, p. 8). Therefore, the District Court held Weiner had the opportunity to litigate these causes of action in the first suit, and but for his tactics, he could have. (Weiner App. 1, p. 11). Moreover, the District Court held Weiner’s own actions led to this procedural quagmire. (Weiner App. 1, p. 12). Thus, the District Court appropriately held “...weighing all the circumstances presented, the Court finds that this is an unusual circumstance where denial of leave to amend the complaint in *Weiner I* constitutes a final judgment for res judicata purposes.” (Weiner App. 1, p. 9).

Weiner’s main argument regarding the final judgment finding is that the denial of his motion to amend in *Weiner I* was not “with prejudice.” Notably, Weiner did not raise this argument below. (*See generally* Doc. 8). Thus, his

argument should not be considered by this Court. *See Grizzly*, ¶ 59; *In re T.E.*, ¶ 20.

Judge Menahan's Order did not specifically state whether it was with or without prejudice. (Doc. 6, Exhibit D). However, a plain reading of his Order indicates finality of the issue and suggests it was with prejudice. Further, the Order does not state it was without prejudice. "Without prejudice" ordinarily imports the contemplation of further proceedings, and...shows that the judicial act is not intended to be res judicata of the merits of the controversy. *Black's Law Dictionary* 1603, 6th ed. 1991. Had Judge Menahan wanted to leave the door open for "further proceedings," he could have indicated the denial was without prejudice. He did not do so and while the District Court noted he did not expressly state that his order was with prejudice, it held all the circumstances presented constituted a final judgment for res judicata purposes. (Weiner App. 1, pp. 8-9). Therefore, it is clear the District Court considered whether the denial was with prejudice and determined it was. Further, *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 988 (9th Cir. 2005), held there was a final judgment when "the remainder of the claims, which arise out of the same transaction, were decided on the merits when they were dismissed on summary judgment." Here, summary judgment was entered against Weiner on the remainder of the claims, which arise

out of the same transaction, on August 31, 2023. (See SPH App. 1). Thus, as in *Mpoyo*, the res judicata test is satisfied.

Despite Montana law holding denial of a motion for leave to amend being construed as a final judgment, such as *Skipwith* and *Brilz*, Weiner relies on numerous cases from other jurisdictions. Essentially, Weiner argues the District Court should have relied on case law from the Second Circuit, Fifth Circuit, and Eleventh Circuit. However, those cases actually support giving the District Court discretion in its application of the doctrine of res judicata. For example, the Eleventh Circuit held the application of claim preclusion is not purely mechanical. *Seminole Tribe of Fla. v. Biegalski*, 757 F. App'x 851, 862 (11th Cir. 2018). Similarly, the Fifth Circuit stated it was unwilling to hold res judicata constituted an absolute from which it must never stray and believed that the occasional adoption of an exception to the finality rule would not undermine its general effectiveness. *Moch v. E Baton Rouge Par. Sch. Bd.*, 548 F.2d. 594, 598 (5th Cir. 1977). Lastly, Weiner cites to the principle that claim preclusion rules must strike a proper balance. *Brilz*, ¶ 21. While Weiner erroneously argues this balance should have tilted in his favor, the District Court appropriately balanced the issues, considered the circumstances, including Weiner's actions, and correctly concluded *Weiner II* was barred under the doctrine of res judicata.

Additionally, during the pendency of this appeal, the District Court in *Weiner I* granted summary judgment in favor of SPH Defendants on all claims asserted by Weiner. (See SPH App. 1 and 2). Accordingly, there has now been a final judgment against Weiner. Since this Court will affirm a district court's decision when it reaches the correct result for the wrong reasons, even if it finds the res judicata decision was premature, there is now no doubt regarding final judgment. See *State v. Howard*, 2008 MT 173, ¶ 20, 343 Mont. 378, 184 P.3d 344. Accordingly, Weiner's appeal and *Weiner II* are moot. Whether Weiner had been allowed to amend in *Weiner I* or bring those same claims in *Weiner II*, his claims are now barred by the immunity provided under HCQIA. Thus, if Weiner was granted the relief requested in his appeal, for remand to the District Court, such a decision would be academic and his claims would be dismissed under either the doctrine of res judicata or under HCQIA.

Weiner could have raised the claims he asserted in *Weiner II* in *Weiner I*, but made a tactical decision not to do so. Weiner always intended to add new claims at the conclusion of the peer review process but chose to oppose the stay that was specifically offered to allow Weiner to bring additional claims, while also preventing waste of resources and prejudice to the defendants. Weiner's tactics led him to the result he now faces, and his tactics should not be rewarded or go without consequence. Here, the consequence is to bind him to the results his tactical

decisions created and affirm the District Court's Order on Defendant's Motion to Dismiss.

2. The District Court correctly held Weiner could have brought his claims in *Weiner I*.

Weiner argues he could not have brought his claims in *Weiner I*, thus, res judicata does not apply. However, the key finding by the District Court is that “[c]ontrary to Plaintiff’s argument, *Weiner I* challenges the decisions and procedures regarding his medical staff membership and clinical privileges.” (Weiner App. 1, p. 11). Further, the District Court held that while Weiner was asserting different theories of recovery, they all arise from the same claim and those actions were initiated as one process – which Weiner characterized as a civil conspiracy in *Weiner I*. (Weiner App. 1, p. 11). “Furthermore, unlike in *Olsen*, Plaintiff was aware of these additional actions and intended to bring them regardless of the outcome of the review.” (Weiner App. 1, p. 11). The District Court specifically held Weiner could have brought these causes of action in *Weiner I*, “but for his tactics.” (Weiner App. 1, p. 11). “Plaintiff opposed the stay despite intending to bring these additional causes of action regardless of the outcome of the peer review process.” *Id.* “And then Plaintiff failed to timely amend the complaint. The Court agrees with Defendant that Plaintiff had an opportunity to litigate these causes of action.” (Weiner App. 1, pp. 11-12).

Weiner's argument that his claims did not accrue before he filed his First Amended Complaint in *Weiner I* ignores the procedural history of that case and Judge Menahan's findings and Order. (Doc. 6, Exhibit D). As the District Court agreed, Weiner was aware prior to conclusion of the peer review process that additional claims were likely to emerge by the conclusion of that process. Further, Judge Menahan made findings that Weiner was aware all along that he would add claims at the conclusion of the peer review process:

Despite his claim that "all parties were aware that one SPH's internal remedies were exhausted, Dr. Weiner would have additional claims to assert in this litigation," Weiner previously objected to Defendants' motion to stay the case pending the outcome of the internal administrative process. Now Weiner argues the Court should allow him to amend his complaint again to incorporate allegations of matters which occurred during those proceedings. Upon review of this argument, it is apparent Weiner intended to file another motion to amend his complaint regardless of the outcome of the internal review process. However, he waited until five months after the amendment deadline set in the scheduling order, and one month after the completion of the internal review process, to seek the Court's leave to file a second amended complaint. If Weiner was aware he would seek to amend his complaint following the internal review process, he should not have objected to staying the proceedings in this Court pending the outcome of the internal review.

(Doc. 6, Exhibit D, pp. 3-4).

Weiner knew early in litigation in *Weiner I* that he intended to add the claims he asserted in *Weiner II*. In response, SPH offered to stay the proceedings to avoid waste of resources and prejudice to the defendants. For reasons unknown, however, Weiner opposed the motion to stay. As the District Court held, Weiner

had the opportunity to timely bring the *Weiner II* claims in *Weiner I*, he just chose not to use the opportunity.

Additionally, “[i]t is well-settled that a plaintiff may not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed.” *Zisumbo v. Ogden Reg'l Med. Ctr.*, No. 1:12-CV-91 TS, 2012 WL 4795655, at 3 (D. Utah Oct. 9, 2012), aff'd, 536 F. App'x 832 (10th Cir. 2013)(citing *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 990 (10th Cir. 2002)). “In particular, ‘the court must [e]nsure that the plaintiff does not use the incorrect procedure of filing duplicative complaints for the purpose of circumventing the rules pertaining to the amendment of complaints.’” *Id.* “The proper procedure is to seek leave to amend, rather than filing a new action.” *Id.*, quoting *Catlin v. Salt Lake City Sch. Dist.*, 2011 WL 939349, at 2 (D. Utah Mar. 16, 2011).

Weiner relies on *Olsen v. Milner*, 2012 MT 88, 364 Mont. 523, 276 P.3d 934, to support his argument he could not have brought his claims in *Weiner I*. However, *Olsen* is distinguishable. Notably, in *Olsen*, the plaintiff “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.” *Olsen*, ¶ 25. Weiner’s position is much different in this case. The problem with Weiner’s reliance on *Olsen* is Weiner’s own stance that he intended to bring his claims regardless of the outcome of the administrative

process. (Weiner App. 1, p. 11). Thus, unlike *Olsen*, Weiner was aware of the claims at the time of the first suit because he always intended to bring them. In fact, in *Weiner I*, Weiner declared the peer review process as a sham even prior to the process being concluded. (See SPH App. 3 at p. 26).

The District Court dismissed Weiner's attempt to circumvent the rules pertaining to the amendment of complaint, by filing duplicative complaints. This Court should likewise prevent Weiner from this type of legal gamesmanship and affirm the District Court.

II. HAD THE DISTRICT COURT CONSIDERED THE DOCTRINE OF LACHES, *WEINER II* WOULD LIKEWISE BE DISMISSED.

The District Court did not address laches because it held res judicata barred Weiner's second complaint. However, had the District Court considered laches, it would have also reached the result that *Weiner II* should be dismissed. Thus, even if this Court determines the District Court incorrectly applied res judicata, it should still affirm. This Court will affirm a district court's decision when it reaches the correct result for the wrong reasons. *Howard*, ¶ 20.

The doctrine of "laches" is an equitable remedy asserted as an affirmative defense by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when the delay or negligence has prejudiced the party against whom relief is sought. *Algee v. Hren*, 2016 MT 166, ¶ 8, 384

Mont. 93, 375 P.3d 386. Laches applies when: (1) the party against whom the defense is asserted lacked diligence in asserting a claim; and (2) that lack of diligence resulted in prejudice to the party asserting the defense. *Id.*

Both elements are met here. The denial of Weiner's motion to amend in *Weiner I* established the lack of diligence and prejudice to SPH. (Doc. 6, p. 12). Weiner lacked diligence in bringing the three causes of action, as he was previously aware he would assert new claims at the close of the fair review process. (Doc. 6, p. 12). Despite this, Weiner chose to oppose the proposed stay of *Weiner I* until the review process was complete, failed to object to the *Weiner I* scheduling order, and delayed bringing his motion to amend for a month after the review process concluded. (Doc. 6, p. 12). It was held "...that allowing Weiner to amend his complaint again would cause undue delay." (Doc. 9, p. 12). Weiner's lack of diligence has prejudiced SPH with undue expense of SPH's resources, not only with the briefing of the issue in *Weiner I*, but also with the continued pursuit here in *Weiner II*. Further, if *Weiner II* was allowed to proceed, SPH would be prejudiced by restarting discovery, incurring additional hardship and expense based upon Weiner's scorched earth discovery approach, and may distract from the important services SPH provides to the community. Additional prejudice exists in the form of inconsistent court rulings, inconsistent jury verdicts and awards of

damages, and the impact on SPH's appellate rights, not to mention the potential of retrials in both cases.

Accordingly, the three claims asserted in *Weiner II* should also be dismissed pursuant to the doctrine of laches.

III. WEINER II IS ALSO BARRED UNDER THE DOCTRINE OF IMPERMISSIBLE CLAIM SPLITTING.

Similar to the doctrine of laches, if this Court does not believe the doctrine of res judicata is applicable, this Court can also affirm under the doctrine of impermissible claim splitting. As provided above, this Court will affirm a district court's decision when it reaches the correct result for the wrong reasons. *Howard*, ¶ 20.

A plaintiff under the doctrine of claim splitting generally has no right to maintain two separate actions involving substantially the same subject matter, at the same time, in the same court, and against the same defendant. *Mendoza v. Amalgamated Transit Union Int'l*, 30 F.4th 879, 886 (9th Cir. 2022). "A plaintiff cannot continually seek re-litigation of issues under the guise of 'claim-splitting.'" *Touris*, ¶ 22. The bar against claim splitting protects defendants from repetitive lawsuits, and it deters "a veritable whack-a-mole of contemporaneously-filed duplicative lawsuits based upon identical claims." *Id.*

Under the claim splitting doctrine, a party may not use a second action to reverse a decision in a prior action. *Glitsch, Inc. v. Koch Eng'g Co.*, 216 F.3d 1382,

1384 (Fed. Cir. 2000). A party cannot bring numerous civil suits that arise out of the same general subject matter or the same transactional nucleus of facts.

Mendoza, 30 F.4th at 887. “When a court enters an order that a party does not like, the party’s recourse is to seek relief on appeal; it is not appropriate for the party to contest the court’s order by filing a new action ... challenging the court’s ruling in the first case.” *Finjan, Inc. v. Blue Coat Sys., LLC*, 230 F. Supp. 3d 1097, 1101 (N.D. Cal. 2017), quoting *Glitsch*.

The prohibition on claim splitting will apply to a subsequent lawsuit where 1) the first and second actions involved the same parties or their privies; and 2) the subsequent action arose out of the same transactional nucleus of facts. *Mendoza*, 30 F.4th at 887. There need not be a final judgment in the first lawsuit for the bar against claim splitting to apply. *Id.* “The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.” Mont. Code Ann. § 26-3-103.

“It is well-settled that a plaintiff may ‘not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed.’” *Zisumbo*, at 3(citing *Hartsel Springs Ranch*, 296 F.3d at 990). “In particular, ‘the court must [e]nsure that the plaintiff does not use the

incorrect procedure of filing duplicative complaints for the purpose of circumventing the rules pertaining to the amendment of complaints.” *Id.* “The proper procedure is to seek leave to amend, rather than filing a new action.” *Id.*, quoting *Catlin*, at 2.

Although the claim splitting doctrine protects defendants from harassment by repetitive actions based on similar claims (*Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321 (9th Cir. 1995)), the doctrine furthers the need for “[d]istrict courts [to] have discretion to control their dockets by dismissing duplicative cases.” *Zisumbo* (citing *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011)). “The rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste ‘scarce judicial resources’ and undermine ‘the efficient and comprehensive disposition of cases.’” *Id.*, quoting *Hartsel Springs Ranch*, 296 F.3d at 985. “Related claims must be brought in a single cause of action.” *Id.*, at 1214.

Weiner I and *Weiner II* are essentially a single lawsuit, which Weiner seeks to split conceptually into separate parts to allow him to add the claims he was not permitted to add in *Weiner I*. Indeed, only one trier of fact should be used for trial of what is essentially the same lawsuit with the same parties arising from the same nucleus of facts. *Fitzgerald v. U. S. Lines Co.*, 374 U.S. 16, 83 S. Ct. 1646, 10 L.

Ed. 2d 720 (1963). Accordingly, the three claims asserted in *Weiner II* should also be dismissed pursuant to the doctrine of impermissible claim splitting.

CONCLUSION

The District Court correctly applied the doctrine of res judicata in the underlying case. As the District Court held, Weiner's three causes of action were barred pursuant to the doctrine of res judicata. First, the denial for leave to amend in *Weiner I* constituted a final judgment regarding the three causes of action. Secondly, the decision was not unfair, as Weiner could have pursued his other claims in *Weiner I*.

Even if the District Court erred in applying the doctrine of res judicata, this Court can affirm based on the doctrine of laches. Weiner lacked diligence in asserting his three claims and that lack of diligence resulted in prejudice to SPH.

Similarly, this Court can also affirm under the doctrine of claim splitting. Weiner has no right to maintain two separate actions involving substantially the same subject matter, at the same time, in the same court, and against the same defendant, SPH.

Accordingly, the District Court appropriately dismissed Weiner's Complaint and should be affirmed.

For the reasons set forth herein, Defendant/Appellee St. Peter's Health respectfully requests this Court affirm the District Court's Order on Defendant's Motion to Dismiss. (Weiner App. 1).

DATED this 3rd day of October, 2023.

McLEAN & ASSOCIATES, PLLC

By /s/ David M. McLean

David M. McLean
Attorneys for Appellee

STRONG & HANNI

Michael J. Miller
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellee's Answer Brief, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 6,766 words.

/s/ David M. McLean

McLEAN & ASSOCIATES, PLLC

CERTIFICATE OF SERVICE

I, David Matthew McLean, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-03-2023:

Jeffrey J. Tierney (Attorney)
35 N. Grand
P.O. Box 6580
Bozeman MT 59715
Representing: Thomas C Weiner, MD
Service Method: eService

J. Devlan Geddes (Attorney)
PO Box 6580
Bozeman MT 59771
Representing: Thomas C Weiner, MD
Service Method: eService

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Thomas C Weiner, MD
Service Method: eService

Michael J. Miller (Attorney)
102 S 200 E Ste 800
Salt Lake City UT 84111
Representing: St. Peter's Health
Service Method: E-mail Delivery

Electronically signed by Cecelia Hamilton on behalf of David Matthew McLean
Dated: 10-03-2023