IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. 24-0101

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, WADE JOHNSON, JAMES TARVER, M.D., KERRY HALE, M.D., SHELLY HARKINS, M.D., TODD WAMPLER, M.D., RANDY SASICH, M.D., and JOHN DOES 1-5,

Defendants and Appellees.

On Appeal from Montana First Judicial District Court, Lewis & Clark County
Cause No. ADV 2020-1988, Hon. Mike Menahan, District Court Judge

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APPELLANT'S OPENING BRIEF

(APPEARANCES ON NEXT PAGE)

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STATEMENT OF THE ISSUES

1. Whether the district court erred granting summary judgment to Defendants on their immunity affirmative defense under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq*. ("HCQIA") and denying Weiner's motion for partial summary judgment on the same issue.

2. Whether the district court erred granting summary judgment to Defendants on their HCQIA immunity affirmative defense on Weiner's claims based on Defendants' conduct outside any protection of peer review and in denying Weiner's motion for partial summary judgment on the same issue.

STATEMENT OF THE CASE

I. Nature of the Case.

This case, *Weiner I*,[1] stems from actions against Thomas Weiner, M.D. ("Weiner") by St. Peter's Health ("SPH"), CEO Wade Johnson ("Johnson"), Chief of Medical Staff James Tarver, M.D. ("Tarver"), Credentials Committee Chair Kerry Hale, M.D. ("Hale"), Chief Medical Officer Shelly Harkins, M.D. ("Harkins"), and SPH Medical Group's President Todd Wampler, M.D. ("Wampler") (collectively, "Defendants"). Weiner's *First Amended Verified Complaint for Injunctive Relief and Damages* ("FAC") alleges wrongful conduct by

[1] A second lawsuit, *Weiner II*, is currently on appeal in DA 23-0224.

Defendants arising from their adverse peer review actions targeting Weiner's medical staff privileges **and** their wrongful disclosures of protected information outside the peer review process. Dkt. 99, pp. 38-44.[2]

Weiner contends Defendants wrongfully terminated his employment in late 2020 to protect SPH's business interest in the treatment of oncology patients based on pretextual reasons and went to the press with false accusations to make sure his career was destroyed.

II. Procedural background.

Weiner I, filed December 10, 2020 (Dkt. 1), simultaneously sought a temporary restraining order preventing Defendants from filing an adverse action report with the National Practitioner Data Bank ("NPDB") based on Defendants' summary suspensions of Weiner. Dkt. 24. Defendants stipulated to a preliminary injunction. Dkt. 27.

Weiner filed his FAC on April 22, 2021 to conform allegations to evidence discovered after December 10, add a defendant, and add new claims—including to enjoin SPH from continuing its sham peer review process because of Defendants'

[2] This case does not concern anything that took place after April 22, 2021, including SPH's administrative hearing and appeal process. Weiner attempted to include those issues by moving to amend after their conclusion. SPH opposed and the court denied Weiner's motion. *Weiner II* challenges the administrative process and results.

multiple breaches of SPH's Bylaws and Johnson's improper statements to staff, patients, and the public preannouncing Weiner's guilt. Dkt. 99.

Weiner sought a second temporary restraining order. Dkt. 111. The court denied Weiner's motion without briefing—finding no irreparable harm—permitting SPH to proceed with its administrative hearing and appeal process while *Weiner I* moved forward. Dkt. 116. Weiner participated in SPH's process despite the outcome being predetermined. Dkt. 150, 159, 167; *see also* Dkt. 291, pp. 16–20.

Six months later, January 6, 2022, while discovery in *Weiner I* was ongoing, SPH's Board affirmed Defendants' summary suspension and revocation of Weiner's privileges. It was only then, under SPH's Bylaws, that 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." Plaintiff's Uncontested Statement of Facts in Support of Motion for Partial Summary Judgment RE: HCQIA Immunity, Dkt. 263 ("SUF")[3] Ex. 20, p. 48.

The following week, Defendants moved to lift the stipulated preliminary injunction claiming they were obligated to report their adverse actions against

[3] The SUF is appended as Supp. App. 1. The exhibits are not included because some contain information protected by HIPAA.

Weiner to the NPDB. Dkt. 148. Weiner opposed, arguing a report based upon an alleged sham peer review would destroy his reputation and he was entitled to a trial on the merits before the preliminary injunction was lifted given the significant likelihood of harm. Dkt. 159.

On February 4, 2022, Weiner sought leave to file a second amended complaint challenging the administrative process and seeking to enjoin Defendants from filing an adverse report with the NPDB reporting the outcome. Dkt. 157, Ex. A. The court denied Weiner's motion, finding the amended complaint would cause undue delay and prejudice to Defendants because addressing the hearing and appeal process, which occurred well after the FAC was filed, would require Defendants to "conduct additional discovery in an unreasonably short period of time or vacate the current scheduling order and trial date causing more delay." Dkt. 168. That same day, the court granted Defendants' motion to lift the preliminary injunction. Dkt. 167.[4]

SPH then filed an adverse report with the NPDB—a "scarlet letter"[5]—due to the rulings, after Weiner was foreclosed from challenging Defendants so-called

[4] Notably, the court subsequently revised the schedule and vacated the trial. Dkts. 166, 177.

[5] *See Cole v. St. James Healthcare*, 2008 MT 453, ¶23, 348 Mont. 68, 199 P.3d 810 (analogizing adverse action reports to a "scarlet letter" resulting in permanent harm to the physician).

findings from the administrative process in *Weiner I*. So, Weiner was forced to file *Weiner II* to challenge Defendants' then-final action.

On November 7, 2022, the court issued a wide-ranging order compelling discovery from Defendants regarding inadequate responses to 78 discovery requests, requiring Defendants to supplement and provide a detailed privilege log by January 6, 2023. Dkt. 217. Defendants did not timely or fully comply. Dkt. 297.

On January 11, 2023, Weiner noticed SPH's corporate deposition. Defendants filed a motion to prevent the deposition. Dkt. 226. Discovery closed on January 20 and the motions deadline was February 24. Dkt. 177.

On February 8, 2023, while SPH's untimely and inadequate discovery supplementation was ongoing, and before the district court ruled on Defendants' motion for a protective order, Defendants moved for summary judgment arguing immunity from damages under HCQIA. Dkt. 249.

Weiner cross-moved, arguing Defendants are not entitled to immunity. Dkt. 260. Weiner also filed a motion for discovery sanctions for SPH's failure to comply with the court's order to compel. Dkt. 297.

SPH filed twelve motions in limine, Docs. 267-290. Weiner filed an omnibus motion in limine addressing six topics, including that "Defendants should be precluded from introducing evidence or making argument about the 'hearing'

Defendants conducted in June 2021, a year and one-half after the events relevant to this lawsuit," arguing the hearing and appeal were the subject of *Weiner II* and unrelated to Defendants' earlier decisions to summarily suspend and revoke Weiner's privileges. Dkt. 291.

Weiner requested a hearing on all motions. Dkt. 316. The court conducted a limited hearing on July 6, 2023 to address the summary judgment and discovery motions. *See* Transcript of Hearing (Jul. 6, 2023). The court ran out of time to hear arguments on the discovery motions. *Id.* The court never ruled on the discovery motions or motions in limine.

Despite the pending discovery motions and their potential effect, *see id.*, p. 6, the court entered its *Order – Weiner and St. Peter's Health Motions for Summary Judgment Re: Health Care Quality Improvement Act*, Dkt. 379 (App. 1). Subsequently, the court, *sua sponte*, entered its *Addendum – St. Peter's Health Motion for Summary Judgment Re: Defamation*, Dkt. 380 (App. 2). The orders are collectively referred to as the "HCQIA Order." The HCQIA Order held Defendants are immune from damages under HCQIA and dismissed Weiner's claims.

The court certified the HCQIA Order as a final judgment under Rule 54(b). Weiner appeals the HCQIA Order.

STATEMENT OF FACTS

I. Background.

Weiner practiced oncology at SPH for 24 years. SUF ¶1. Weiner was recredentialed every two years. *Id.* ¶13. Weiner never had his privileges limited and his NPDB record was clear. *Id.* ¶14.

Despite Weiner's flawless record, SPH began targeting his employment in 2016. *Id.* ¶¶15-29. SPH faced embarrassing public backlash. *Id.* ¶19. Even the Montana Nurses Association responded: "Weiner puts patients before profits, benefiting our community, our patients, our staff and our community hospital." *Id.* ¶20.

Fed up with SPH's antics, Weiner threatened to resign in April 2020. *Id.* ¶30. In response, Wampler, Harkins, Johnson, and others met to "discuss" Weiner. *Id.* ¶31. The results of the meeting are unknown; this secret meeting was discovered through an email from an SPH employee after Weiner's termination that was withheld until the court ordered its production:

4/10/20—9-10am Meeting: "Discussion – Dr. Weiner"- In response to Dr. Weiner's Email of resignation.

Invited: Kendra Lenhardt, Brian Lee, Todd Wampler, Shelly Harkins, John Cassani, Andrea Groom, Wade Johnson

*** unsure of the outcome- that would be tracked by Medical Group

Id.

On September 10, 2020, Benefis Health System announced its intent to construct a medical clinic in Helena. *Id.* ¶32. Benefis will compete with SPH in medical oncology. *Id.* Because Weiner was not under a non-compete, he could have moved his practice and patients elsewhere, including Benefis. *Id.* ¶33. Defendants needed to not only terminate Weiner but destroy his ability to practice medicine to end his threat of competition. Shortly after Benefis' announcement, they did just that.

II. First summary suspension of Weiner.

Eighteen days after Benefis' announcement, SPH's Credentials Committee ("CC")—with Hale in charge and Tarver participating—initiated an investigation into Weiner's medical practice. SUF ¶34. The CC retained the Greeley Company to conduct external reviews of random and hand-selected samples of Weiner's patients. *Id.* The CC instructed Hale to meet with Johnson, Harkins, and "the attorney" (referring to SPH's attorney) to coordinate a plan to suspend Weiner. *Id.* ¶37. The meeting minutes state: "[t]he group agreed that a conversation needed to occur between administration and Weiner to discuss a particular oncological patient [(Patient 1)] and hear what Weiner had to say about it." *Id.* The administration never had that discussion with Weiner. *Id.*

Two days later, the CC conducted a "follow up" meeting. *Id.* ¶¶38-41. Weiner was not invited. *Id.* ¶41. The CC voted to summarily suspend Weiner's privileges even though the Bylaws do not give the CC authority to summarily suspend and require a physician be given notice and an opportunity to discuss, explain, or refute evidence before affecting privileges. *Id.* ¶¶44-45.

Nonetheless, the next day, October 15, Tarver and Hale presented Weiner with a "Notice of Summary Suspension and Investigation" summarily suspending his privileges based upon a single external review of an unidentified oncology patient out of the thousands he had treated. *Id.* ¶46.

Even though the CC previously agreed the Bylaws required a discussion with Weiner **before affecting his privileges**, Weiner was never: 1) interviewed; 2) provided notice; or 3) provided opportunity to address the allegations prior to suspension. *Id.* ¶¶41-42, 47. There was no investigation other than the external review. The CC did not speak to any physicians, nurses, or staff members in SPH's Cancer Treatment Center ("CTC") to assess any allegations. *Id.* ¶43. The decision to suspend Weiner relied solely on the external review. *Id.* ¶48. **The medical records provided to the external reviewer were incomplete, omitting critical records confirming that the patient had cancer and was referred to Weiner for treatment**. *Id.* ¶51.

Before issuing the summary suspension, Tarver did not discuss Patient 1 with Weiner, did not do anything to confirm the external reviews accuracy, did not know if the external reviewers were provided complete medical records, and did not speak with the physician who discussed biopsy results with the pathologist and then referred Patient 1 to Weiner for treatment. *Id.* ¶¶49-50. He relied solely on the external review. *Id.*

The **only** basis for a summary suspension without notice under SPH's Bylaws is when "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.* ¶53. The summary suspension letter made no such findings. *Id.* ¶55. Also, despite Defendants' *post hoc* claims of imminent danger, the letter was not delivered until the end of the day on October 15—after Weiner treated patients for an entire day. *Id.* ¶54.

SPH's letter offered an alternative to summary suspension: Weiner could voluntarily refrain from exercising his privileges. *Id.* ¶56. Tarver and Hale instructed Weiner to decide immediately but did not provide him with an opportunity to address his care of the patient and or explain how Weiner posed an imminent danger. *Id.* ¶57. At Tarver's recommendation, and given the risk to his reputation, Weiner agreed to refrain. *Id.* ¶59.

Days later, Tarver and Hale, relying on advice of SPH's counsel (not the medical staff's counsel), advised Weiner he was not summarily suspended, but the CC would investigate his practice. *Id.* ¶60. They told Weiner the CC would provide advanced notice and "**sufficient information, including patient names and the results of Greeley's reviews, to meaningfully discuss these issues with the [CC]**." *Id.* Tarver instructed Weiner must be provided sufficient information "**so he would be able to explain his care** [.]" *Id.*

SPH's attorney (now counsel of record) confirmed Weiner was on "a voluntary leave of absence **unrelated to clinical competency issues**," not summary suspension. *Id.* ¶61. A physician on voluntary leave must request reinstatement of privileges before returning to practice. *Id.* ¶63. The CC, the Medical Executive Committee ("MEC"), and the Board review those requests. *Id.*

III. Second summary suspension.

As of November 12, 2020, Weiner had not practiced for a month and could not exercise his privileges. *Id.* ¶64. Weiner continued to refrain from practicing and did not request reinstatement. *Id.*

According to Johnson and the Bylaws, SPH's physicians "govern and regulate themselves." *Id.* ¶65. It is improper for SPH's administrators to investigate quality of care by a physician; "[t]hose are initiated and conducted by the medical

staff." *Id.* Administrators may not send cases to outside peer review "[b]ecause that's the medical staff. That's their governance function." *Id.* ¶66. The independence between medical staff and administration is "significant" and "there has always been a very clear delineation in that regard." *Id.*; *see also Cole v. St. James Healthcare*, 2007 Mont. Dist. LEXIS 675, ¶¶18-27, aff'd, 2008 MT 453 (holding hospital administrators may not conduct peer review). Despite affirming administrators may not inject themselves into peer review, Hale confirmed "SPH administration also sent five additional cases for external review." SUF, ¶68.

The results from the administration's reviews were sent to Tarver and Hale on November 15. *Id.*, ¶71. On November 16, Hale, Tarver, and Johnson addressed those reviews. *Id.* ¶72. Tarver wanted the reviews "made available to the [CC] to make sure that it was dealt with from the corrective action standpoint in the proper manner." *Id.* Yet, Hale, Tarver, and Johnson usurped the CC by summarily suspending Weiner's privileges based on the review of Patient 1 and the administration's additional reviews. *Id.* ¶73.

Hale did not know why the administration selected cases for external review. *Id.* ¶68. Tarver did nothing to confirm the reviews were accurate, relying solely on the administration's reviewers and whether they felt the care was within the standard. *Id.* ¶¶52, 74. He again did not know what medical records were sent to

the reviewers. *Id.* He did not know SPH was still treating one of the patients with the identical agent that Weiner was criticized for. *Id.* He was not aware of—and did not know whether the reviewers were aware of—pertinent facts related to the treatment of the other five patients that directly contradicted the external reviews' criticisms. *Id.* ¶52.

Nonetheless, on November 17, while Weiner could not practice medicine, the three summarily suspended Weiner again. *Id.* ¶¶72-73.

The second suspension was entered without notice or hearing. *Id.* ¶76. SPH's administration conducted the investigation even though such involvement is prohibited. *Id.* ¶¶65-71. This time, the suspension letter claimed Weiner posed an imminent danger to patients but failed to explain how. *Id.* ¶77.

Defendants subsequently claimed they re-suspended Weiner because he was directing care through nurses while on leave. *Id.* ¶¶80-82. They admittedly had no factual basis for that claim. *Id.* ¶83. Every nurse testified to the contrary. *Id.* ¶84.

Hale admitted the real reason for Weiner's second suspension: **not wanting it to linger over the holidays (Thanksgiving and Christmas)**. *Id.* ¶78.

Wampler terminated Weiner's employment that same day due to the summary suspension. *Id.* ¶86.

IV. Defendants' post-suspension actions.

That evening, Johnson, Harkins, and Wampler met with CTC staff. They disclosed confidential peer review information, including claiming Weiner was prescribing chemotherapy to patients who did not have cancer (based on the incomplete review of Patient 1). *Id.* ¶¶130-135. Defendants admit SPH's staff and nurses **are not part of any SPH peer review committee**. *Id.* ¶132.

On November 23, the CC conducted another meeting with Hale and SPH's lawyer to establish a plan for revoking Weiner's privileges. *Id.* ¶88. Hale claimed two oncology locums covering in Weiner's absence would not return because "[t]hey are scared of the care that has been provided and are worried about their licensing." *Id.* ¶89. Hale subsequently admitted she had no evidence to support that claim. *Id.* ¶90.

Hale also provided an update on Greeley's external reviews, reporting: "She felt their findings were clear. The findings stated that the provider has excessively productive cases and the care provided was okay." *Id.* ¶91. Despite Greely reporting Weiner's care was "okay," Hale later drafted a report stating, "[t]he reviews showed substandard care for approximately 10% of the randomized cases." *Id.* ¶92-93. The inaccuracy of Hale's report is addressed below.

Weiner's first opportunity to defend himself occurred November 24, during a remote MEC meeting addressing the second summary suspension. *Id.* ¶107. The only information provided to Weiner before this informal meeting was partial medical records and outside reviews for six patients. *Id.* ¶105. The MEC did not investigate whether Weiner should be summarily suspended; it relied solely on information provided by the CC. *Id.* ¶106.

Nobody presented evidence or explained how Weiner presented an imminent danger to patients—the sole basis for a summary suspension. *Id.* ¶108. Tarver instructed: The MEC "will determine whether the suspension will continue, be modified, or be terminated. Weiner's presence is intended to allow the MEC to consider relevant facts in determining the next steps of the suspension…." *Id.* ¶109. Despite SPH's attorney's attendance, Weiner was not permitted representation. *Id.* ¶¶112, 114.

Weiner addressed the patients identified as best he could with the limited information provided to him. *Id.* ¶110. Tarver did know if Weiner and the reviewers were provided the same medical records. *Id.* Only one member raised a concern with Weiner about his explanation of a case. *Id.* ¶113. The MEC did not check with the external reviewers to determine whether Weiner's explanations changed their opinions. *Id.*

The next day, Weiner received a letter upholding the second summary suspension. *Id.* ¶115. The letter did not explain how Weiner presented an imminent danger to patients while he was on voluntary leave. *Id.*

The second time Weiner was given an opportunity to defend himself was a November 30 meeting of the CC, when it recommended revocation of Weiner's medical staff membership and privileges. *Id.* ¶116. SPH's attorney attended, but Weiner was not allowed representation. *Id.* ¶119.

According to Tarver, Weiner should have been provided enough information "for him to discuss the cases." *Id.* ¶117. Although the CC had access to the Greeley Report and complete medical records, Weiner was only provided with the "general nature of the concerns." *Id.* ¶120. The CC did not provide Weiner with "sufficient information, including patient names and the results of Greeley's reviews, to meaningfully discuss these issues with the [CC,]" as promised. *Id.* ¶60. This information was necessary for Weiner to "**be able to explain his care**[.]" *Id.* (emphasis added). Nonetheless, the CC revoked Weiner's privileges. *Id.* ¶121.

On December 8, 2020, Johnson published a letter in the newspaper, publicly disclosing the same allegations leveled against Weiner during peer review:

> Numerous concerns about the care Dr. Tom Weiner provided to patients have been brought to the attention of St. Peter's Health Administration. The issues we have identified include the following: **harm that was caused to**

> **patients by receiving treatments, including chemotherapy, that were not clinically indicated or necessary; failure to meet state and federal laws associated with prescribing of narcotics; failure to refer patients to other specialists for appropriate treatments; and failure to meet requirements associated with clinical documentation.**
>
> After extensive review of these concerns and consultation with medical and legal experts, we expect authorities will investigate these concerns and we will cooperate fully. [] **Please know that he was swiftly and decisively removed from patient care as soon as there was proof that patients were harmed**.

Id. ¶137 (emphasis added). Defendants similarly disclosed the substance of the peer review to SPH's staff and patients. *Id.* ¶¶138-140.

Hale and Tarver agree information discovered during peer review **cannot** be released to the public, staff, or patients. *Id.* ¶141. Hale confirmed the information publicly disclosed by Johnson was peer review information. *Id.* ¶142.

Seeking to justify his breach of peer review confidentiality, Johnson claims he learned the information outside peer review from locum oncologists treating Weiner's patients, and Harkins. *Id.* ¶144. Johnson admits he only spoke to one locum; the subject of that conversation was whether the locum was interested in employment. *Id.* Harkins admits she did not provide the information to Johnson because she learned it the same way Johnson did, during peer review. *Id.* ¶145.

Critically, when Johnson publicly condemned Weiner, the MEC had not

determined whether Weiner's privileges would be revoked, or the summary suspensions continued. *Id.* ¶143. That happened seven days later, when the MEC adopted the CC's recommendation to revoke Weiner's privileges. *Id.* ¶122. Johnson disclosed the substance of Weiner's peer review and the eventual determination by the MEC to the public **before** the decision was made.

To revoke Weiner's privileges, the MEC relied solely on representations made by Hale in the "Hale Report." *Id.* ¶94. The MEC simultaneously continued Weiner's suspension. The MEC did not conduct an independent investigation, *id.* ¶106, and did not review the misguided Hale Report for accuracy. *Id.* ¶94.

The Hale Report purported to summarize the CC's investigation. *Id.* ¶93. The Hale Report inaccurately claimed external reviews showed substandard care for approximately ten percent (10%) of Weiner's cases. *Id.* ¶¶92-103.

Contrary to Hale's characterization, the Greeley Report concluded concerns regarding Weiner were minor and **Weiner should be commended for his work given his high case load**. *Id.* ¶95-103; *see also id.* ¶101 ("by far most of [Weiner's] patients evaluated received appropriate, timely and effective treatment for their medical conditions").

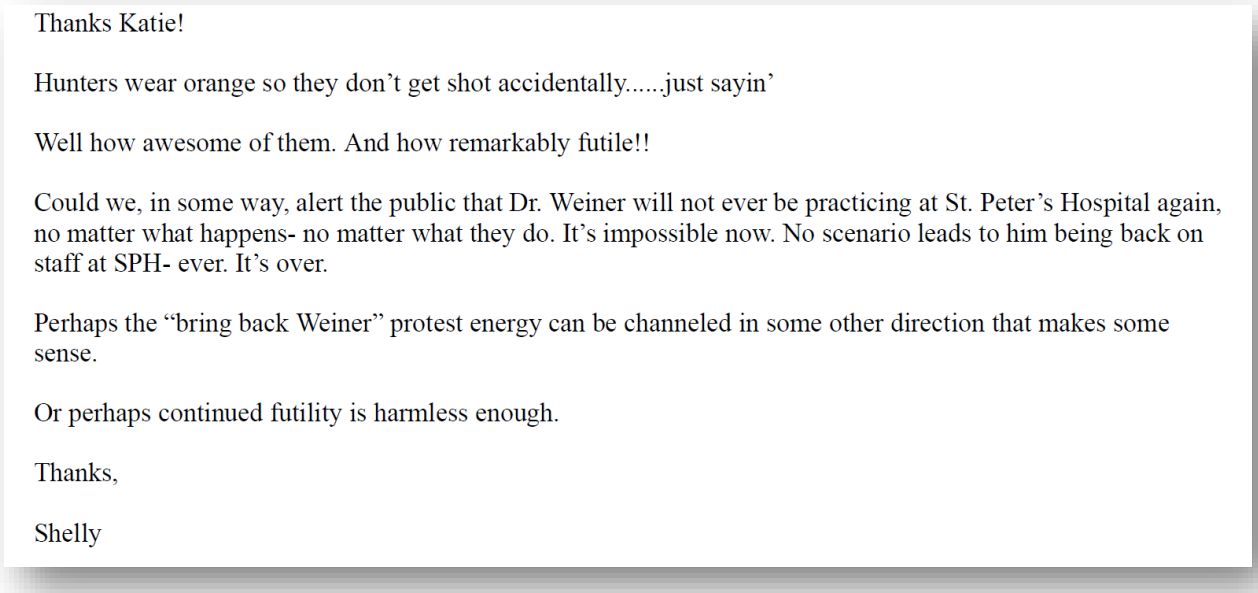
Although the Greeley Report recommended the CC follow up the review by seeking additional information about the cases, the CC refused. *Id.* ¶102. Nor did the CC heed Greeley's disclaimer:

> In the event the practitioners under review are able to provide additional information that would clarify certain clinical issues, this information should certainly be considered prior to taking any final action concerning these findings and conclusions of this report.

Id. ¶96. The CC never discussed the cases with anyone at SPH and never provided Weiner with the Greeley Report, patient names, or the medical records reviewed by Greeley so he could provide additional information. *Id.* ¶¶43, 105.

****

Defendants never intended to conduct a legitimate peer review because allowing Weiner a fair opportunity to keep his job was not part of their plan, as evidenced by Johnson's premature public condemnation and the lack of information provided to Weiner. Harkins summed it up on December 29, **before the peer review process was complete**, in response to an email about the public show of support for Weiner at SPH:



Thanks Katie!

Hunters wear orange so they don't get shot accidentally.....just sayin'

Well how awesome of them. And how remarkably futile!!

Could we, in some way, alert the public that Dr. Weiner will not ever be practicing at St. Peter's Hospital again, no matter what happens- no matter what they do. It's impossible now. No scenario leads to him being back on staff at SPH- ever. It's over.

Perhaps the "bring back Weiner" protest energy can be channeled in some other direction that makes some sense.

Or perhaps continued futility is harmless enough.

Thanks,

Shelly

Id. ¶148.

STANDARD OF REVIEW

A district court's ruling on a motion for summary judgment is reviewed *de novo*. *PLAA v. Bd. of County Comm'rs of Madison County*, 2014 MT 10, ¶15, 373 Mont. 277, 321 P.3d 38.

SUMMARY OF ARGUMENT

Three individually dispositive, undisputed facts entitle Weiner, not Defendants, to summary judgment on HCQIA immunity.

First, Defendants admittedly failed to provide Weiner with notice and a hearing prior to summarily suspending his privileges. 42 U.S.C § 11112(a)(3); *Peper v. St. Mary's Hosp. Med. Ctr.*, 207 P.3d 881, 888 (App. Colo. 2008) ("A 'failure to

provide a physician with adequate notice and fair procedures precludes immunity under the HCQIA.' " (quoting *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 915 (8th Cir. 1999))). Defendants' failure to afford due process was inexcusable as there was never a finding that he posed an imminent danger. § 11112(c)(2); *Brandner v. Providence Health & Servs.*, 394 P.3d 581, 590 (Alaska 2017).

Second, Defendants' "investigation" of Weiner—prior to each adverse action—was objectively unreasonable because they relied solely on outside reviewers. Defendants failed to provide Weiner with necessary information and to interview the doctors, patients, and nurses involved. *Smigaj v. Yakima Valley Mem. Hosp. Ass'n*, 269 P.3d 323, ¶¶63, 64, 70 (Wash. App. 2012), *petition denied*, 278 P.3d 1112 (Wash. 2012).

Third, Defendants' statements about Weiner outside a "professional review body," are not protected under HCQIA. *Delashaw v. Seattle Times Co.*, 2021 U.S. Dist. LEXIS 3146, *11–16 (W.D. Wash 2021).

Additionally, the district court erroneously made factual findings in the face of conflicting evidence and, *sua sponte*, made arguments not raised by Defendants to justify the erroneous HCQIA Order.

ARGUMENT

I. HCQIA.

HCQIA provides qualified immunity from monetary damages for hospitals, doctors, and others who reasonably participate in peer review. *See, e.g.*, *Imperial v. Suburban Hosp. Ass'n, Inc.*, 37 F.3d 1026, 1028 (4th Cir. 1994). There are two types of immunity under HCQIA.

First, there is a qualified immunity for participating in a "professional review action" of a "professional review body" from claims stemming from a professional review action. For HCQIA immunity, a "professional review action" must comport with due process. *See Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 211 (4th Cir. 2002); *Osuagwu v. Gila Reg'l Med. Ctr.*, 938 F.Supp.2d 1142, 1159-1166 (D.N.M. 2012).

Participants are afforded immunity only if the action was taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care;
>
> (2) after a reasonable effort to obtain the facts of the matter;
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

§ 11112(a). A peer review action is presumed to meet the standards for immunity; however, the presumption is rebuttable. If any requirement of § 11112(a) is lacking, **HCQIA immunity fails as a matter of law**:

> [I]f a plaintiff challenging a peer review action proves, by a preponderance of the evidence, any one of the four requirements was not satisfied, the peer review body is no longer afforded immunity from damages under [HCQIA].

Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1333 (10th Cir. 1996). Courts apply an objective standard for reasonableness under HCQIA. *See Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992).

Second, an individual who provides information to a "professional review body" regarding a physician can be immune from damages. § 11111(a)(2). HCQIA does not provide immunity for disclosures made outside a "professional review body." *Delashaw*, *11-16. Disclosures made to the public, patients, or hospital employees outside the hospital's governing body, or a peer review committee are not protected by HCQIA. *Id.*

****

Rule 56(c)'s summary judgment standard applies to HCQIA immunity claims. *See, e.g.*, *Austin*, 979 F.2d at 734 ("Might a reasonable jury, viewing the facts in the best light for [plaintiff], conclude that he has shown, by a preponderance of

the evidence, that the defendants' actions are outside the scope of § 11112(a)[.]"); *Gabaldoni v. Wash. Cty. Hosp. Ass'n*, 250 F.3d 255, 260 (4th Cir. 2001); *Sugarbaker*, 190 F.3d at 912; *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1334 (11th Cir. 1994). Summary judgment is only appropriate when, viewing the evidence in Weiner's favor, a reasonable jury **could not** find Defendants failed to meet one of HCQIA's immunity requirements.

Defendants immune from damages for actions within peer review are not wholly immune. *Reyes v. Wilson Mem'l Hosp.*, 102 F.Supp.2d 798, 820 (S.D. Ohio 1998). Actions outside a peer review body are not protected by HCQIA immunity. § 1111(a) (immunity with respect to peer review action); *Reyes*, 102 F.Supp.2d at 822 (a professional review activity does not include leaking information to the press); *Delashaw*, *11-16.

II. Weiner, not Defendants, is entitled to summary judgment on Defendants' HCQIA immunity defense.

HCQIA immunity is not absolute; Congress recognized a serious threat of abuse. The chairperson of the committee considering the bill was emphatic: "we cannot tolerate abuses of the peer review system, and that [HCQIA] was never intended to protect any such abuses." House Report No. 99-903 (Sept. 26, 1986).

Defendants are not entitled to immunity for a "professional review action" if

they failed to comply with one or more element of § 11112(a).

"A professional review action is one that is 'based on the competence or professional conduct of an individual physician' and 'affects ... adversely' the physician's clinical privileges." *Wieters v. Rober Hosp., Inc.*, 58 Fed. App'x 40, 45 (4th Cir. 2003) (citing § 11151(9)). "A summary suspension is 'a professional review action.'" *Leal v. Secretary*, 620 F.3d 1280, 1287 (11th Cir. 2010). So is a recommendation to revoke clinical privileges. §§ 11151(1), (9). Every "professional review action must satisfy the four standards of section 11112(a) in order to qualify for the immunity protections of section 11111(a)." *Bryan*, 33 F.3d at 1334.

Each of Defendants' adverse actions must separately satisfy § 11112(a)'s due process requirements for immunity to attach. *See* § 11112(a) (each element relates to the time the action was taken); *Stratienko v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 2008 U.S. Dist. LEXIS 68861, at *33-34 (E.D. Tenn 2008) (the court's analysis is limited to defendants' conduct prior to and at the time of summary suspension; further peer review actions are irrelevant); *Brandner*, 394 P.3d at 595.

The HCQIA analysis in this case only concerns the processes used to suspend and revoke Weiner's privileges before Weiner's FAC (May 18, 2021). SPH's subsequent hearing and appeal—both occurring after—rubber-stamping the

CC and MEC's decisions are the subject of *Weiner II* and cannot cure Defendants' previous failures under HCQIA. *See* Dkt. 291.

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On similar—but less egregious—facts, the court in *Smigaj* reversed and entered judgment for the physician, Smigaj, on HCQIA immunity. 165 Wash. App. 837, ¶¶92-93.

Smigaj was notified on May 30, 2008 that the peer review committee reviewed the case of patient JA. *Id.* ¶8. By letter dated June 13, the committee advised Smigaj of its review and Smigaj attended a June 20 meeting with the committee to discuss its concerns. *Id.* ¶11. After Smigaj left, the committee designated itself the investigating committee and discussed various disciplinary measures, of which Smigaj was not informed of. *Id.* ¶¶12-14

The committee met again on July 9, to discuss Smigaj and potential disciplinary measures. *Id.* ¶¶15-16. On July 16, Smigaj was informed of the July 9 meeting, the committee's concerns, and its decision to engage an external reviewer, and Smigaj was asked to provide a written response. *Id.* ¶8. On July 21, Smigaj was again sent a letter, this time informing her of a July 21 committee meeting. *Id.* ¶19.

In late July, the committee hired an independent reviewer to review JA's records and had a conference call with the reviewer on July 30, without Smigaj. *Id.*

¶20. The committee sent an additional case for review on August 8 and had a conference call to discuss the review with the reviewer. *Id.* ¶¶23-26. On August 15, the committee met to discuss JA and two other patients. *Id.* ¶27. The committee agreed on five concerns related to one of the patients that required a written response from Smigaj. *Id.* ¶8. The committee also considered a compilation of minutes taken at its meetings from 1999 through 2008. *Id.* ¶32. Following the meeting, the committee wrote Smigaj informing her of the review of the two additional patients and asking her to provide a written response to the concerns and attend a committee meeting on August 29. *Id.* At the August 29 meeting, Smigaj explained her care and offered independent evaluations. *Id.* ¶33.

On September 3, the committee unanimously approved a motion that Smigaj's continued practice constituted an unacceptable risk to patients and recommended a precautionary suspension while proceeding with an external review of Smigaj's cases. *Id.* ¶38. On September 4, Smigaj was notified her privileges were suspended by the chief of the medical staff, Padilla. *Id.* ¶39. Before making his decision, Padilla reviewed the external reviews and committee meeting minutes. *Id.* Padilla told Smigaj he would initiate further review and the MEC meeting to review the suspension would be held on September 16, and Smigaj was invited to attend. *Id.* Smigaj was reinstated after this meeting. *Id.* ¶43.

Smigaj sued the hospital for harming her reputation. The hospital moved for summary judgment on HCQIA immunity. The court held the letter of suspension was a professional review action. *Id.* ¶¶54-55 ("The letter of suspension stated that the professional review action was due to poor clinical judgment in three cases, a misleading dictation in a patient chart, and disruptive practitioner reports."). The court held HCQIA immunity did not attach because the investigation was unreasonable and Smigaj was not provided with adequate notice and hearing before the professional review action. *Id.* ¶¶71, 87.

A. Defendants failed to provide Weiner with notice and a hearing.

"A 'failure to provide a physician with adequate notice and fair procedures precludes immunity under the HCQIA.'" *Peper*, 207 P.3d at 888. HCQIA only provides immunity for actions that occur "after" providing "adequate notice and hearing" or other "fair" procedures. § 11112(a)(2). These requirements are adjudged considering due process rights of the physician. *Osuagwu*, 938 F.Supp.2d at 1160 (it is an "essential principle of due process ... that a deprivation of ... property be preceded by notice and opportunity for hearing appropriate to the nature of the case" (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985))); *see also Cole*, 2007 Mont. Dist. LEXIS 675.

The Alaska Supreme Court confirmed the importance of providing notice

and a hearing before summarily suspending a doctor's privileges because a summary action amounts to "a stigma of medical incompetence" affecting the doctor's ability to maintain income and reputation, both during the period between the deprivation of privileges and a hearing, as well as after the hearing. *Brandner*, 394 P.3d at 589. "This stigma is compounded because federal law now requires that all terminations be reported to a national data bank." *Id.* (citing 42 U.S.C. §§ 11133, 11136; 45 C.F.R. § 60.1).[6] This Court also recognizes an adverse report to the NPDB is akin to a "scarlet letter" that could permanently harm a physician's professional reputation. *Cole*, 2008 MT 453, ¶23.

Summarily restricting hospital privileges before notice and a hearing is "justified only where there is evidence that a physician's conduct poses a realistic or recognizable threat to patient care which would require **immediate** action by the hospital." *Brandner*, 394 P.3d at 589-90 (emphasis added) (citing § 11112(c)(2)).

This exception is impossible for Defendants to satisfy for the summary suspensions because: (i) Defendants did not take immediate action when the CC

[6] Multiple medical journals document the abuses perpetrated by the hospital industry against good physicians under the guise of peer review. *See, e.g.*, William Summers, "Sham Peer Review: A Psychiatrist's Experience and Analysis," *J. of Am. Physicians and Surgeons* 125 (Winter 2005); Roland Chalifoux, Jr., M.D., "So What Is a Sham Peer Review", 7 *Medscape Gen. Med.* (No. 4) 47 (2005); John Minarick, M.D., "Sham Peer Review: a Pathology Report," *J. of Am. Physicians and Surgeons* 121 (Winter 2004); William Parmley, "Clinical Peer Review or Competitive Hatchet Job," 36 *J. of the Am. College of Cardiology* 2347 (2000).

learned about Patient 1; and (ii) Weiner could not pose a realistic threat to patient care as of November 17, when they summarily suspended him a second time, because he was on a voluntary leave of absence unrelated to clinical competency.

1. October 14 vote/October 15 summary suspension.

Defendants did not provide notice and a hearing before summarily suspending Weiner on October 15, 2020. SUF, ¶¶34-59. Defendants cannot claim the imminent danger exception ("safe harbor") under § 11112(c)(2) because Defendants "did not act in a manner that suggested imminent danger." *Smigaj*, ¶78.

Though undisclosed at the time, the first summary suspension was based on Weiner's treatment of Patient 1. *See* SUF, ¶51. The CC received the incomplete review for Patient 1 on October 9, 2020. Doc. 367, Ex. B.

Just like in *Smigaj*, the timeline proves Defendants did not reasonably believe Weiner was an imminent danger. *Smigaj*, ¶¶78-79. If the CC truly believed Weiner was dangerous based solely on an incomplete outside review, they would have summarily suspended him sooner and certainly would not have allowed him to practice the entire day on October 15, after the decision was made. *Id.*; *see also Brandner*, 394 P.3d at 590 ("speculative . . . post hoc rationalization . . . does not rise to the level of a 'realistic or recognizable threat' requiring an emergency termination of hospital privileges"). Defendants' lack of a reasonable belief for the

summary suspension was later confirmed when SPH's attorney stated Weiner was on "a voluntary leave of absence **unrelated to clinical competency issues**[.]" SUF, ¶61.

Notice and hearing were required. Defendants are not immune under HCQIA for this professional review action and, instead, summary judgment in Weiner's favor is appropriate.

2. November 17 summary suspension.

Defendants did not provide notice and a hearing before summarily suspending Weiner on November 17, 2020. SUF, ¶¶34-76. Weiner only received notice the CC was investigating his practice. *Id.* Defendants did not inform Weiner that anyone was considering or recommending a second summary suspension. Weiner was not invited to any meetings or ever asked to explain his care (worse than in *Smigaj*). *See Smigaj*, ¶84.

Defendants cannot claim the imminent danger "safe harbor" under § 11112(c)(2) because Weiner was on a voluntary leave of absence unrelated to clinical competency. SUF, ¶61. Put simply, "there was no factual basis to support an emergency suspension designed to protect patients at the Hospital." *Moore v. Gunnison Valley Hosp.*, 170 F.Supp.2d 1080, 1091 (D. Colo. 2001) ("the plaintiff had no patients under the care of the Hospital at the time of his suspension").

The district court found Weiner interpreted the imminent danger standard too narrowly. App. 1, p. 19 (citing *Sugarbaker*, 190 F.3d at 917). In *Sugarbaker*, the Eighth Circuit saw "no reason to limit the HCQIA emergency provision to situations where there **is currently an identifiable patient whose health may be jeopardized**." *Id.* (emphasis added). *Sugarbaker* held HCQIA "only requires that the danger **may** result if the restraint is not imposed." *Id.*

Weiner's case is easily distinguishable. Unlike Dr. Sugarbaker, who "refused to request a voluntary leave of absence", *id.* at 908-09, Weiner was on voluntary leave so there was no possibility Weiner could treat a patient until he requested reinstatement—i.e., Weiner did not have any identifiable patient admitted, **and** he could not admit a patient in the future.

Tarver and Hale's after-the-fact claims (in their depositions, not the written notice) that they suspended Weiner while on leave because he was interfering with patient care had no basis in fact. Both admitted those allegations came from unknown sources and they did not interview any members of the CTC staff. SUF, ¶¶78-83; *Smigaj*, ¶70. Had they done so, every CTC employee would have confirmed Weiner never directed patient care after October 15. SUF, ¶84.

Finally, Defendants did not summarily suspend Weiner because he posed an imminent danger. Defendants admitted the reason for the summary suspension was

"**mostly related to not wanting things to linger over the holidays**." SUF, ¶78. That is not a lawful reason to deprive Weiner of due process.

Weiner was entitled to notice and a hearing before this professional review action was taken. *Smigaj*, ¶¶71, 87; *Brandner*, 394 P.3d at 595. Defendants usurped the CC's investigation and issued the suspension on November 17 as part of their scheme to pre-decide the peer review process. "The informal procedure process used here failed to provide [Weiner] with adequate notice and hearing." *See Smigaj*, ¶84.

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Defendants' failures to give Weiner proper notice, allow him to attend pre-suspension meetings, and provide him with procedural safeguards, negates their ability to claim immunity for the summary suspensions under HCQIA. Summary judgment in Weiner's favor is appropriate.

B. Defendants' investigation was objectively unreasonable.

The second immunity prong requires Defendants to make a reasonable effort to obtain the facts before taking adverse actions. § 11112(a)(2). This prong is met when "the totality of the process" leading up to the professional review action establishes "a reasonable effort to obtain the facts of the matter." *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 841 (3d Cir. 1999); *Smigaj*, ¶62. To rebut the

presumption, Weiner must present sufficient evidence that a jury could find the investigation was unreasonable. *Austin*, 979 F.2d at 734; *Smigaj*, ¶63.

1. The summary suspensions followed unreasonable investigations.

In issuing the October 15 suspension, Defendants relied solely on an outside reviewer who was provided incomplete medical records. SUF, ¶49. That alone defeats Defendants' HCQIA immunity defense. *Smigaj*, ¶¶71, 87.

Neither Tarver nor Hale identified Patient 1 or discussed Patient 1 with Weiner on or before October 15. Weiner SUF, ¶¶48, 50. They did nothing to confirm the review's accuracy. *Id.* ¶49. They did not know which documents were sent to the reviewer. *Id.* ¶50. The records sent to the external reviewer were incomplete and did not contain crucial documents, including biopsy results. *Id.* ¶51.

In issuing the November 17 suspension, Defendants relied on external reviews. Five were hand-picked by SPH's administration—which Defendants admit was improper. SUF, ¶¶66-74. Defendants did nothing to confirm the external reviews were accurate, did not know what medical records were sent to the reviewers, did not know whether the reviewers were aware of pertinent facts that contradicted the reviews, and did not even know that SPH was still treating a patient with the same agent Weiner was criticized for. *Id.* ¶52.

It was manifestly unreasonable for Defendants to solely rely on these external reviews as the basis for a summary suspension and not interview Weiner, any other doctors, patients, or nurses. *See Smigaj*, ¶¶63-70. The Defendants failed to meet § 11112(a)(2).

2. The remainder of the peer review actions followed unreasonable investigations.

The remainder of the peer review actions were exclusively based on the CC's investigation of Weiner's practice. SUF ¶¶94, 122. The CC's investigation did not evidence a reasonable effort to obtain the facts of the matter. *Brader*, 167 F.3d at 841; *Smigaj*, ¶62.

A professional review body's "[m]ere reliance on a report [of an outside reviewer] or an asserted fact is not sufficient; **a thorough investigation is required**." *Smigaj*, ¶63 (emphasis added) (citing *Brown*, 101 F.3d at 1333-34). It is objectively unreasonable for a professional review body to fail to interview doctors, patients, and hospital employees during their investigation. *Id.* ¶70. Further, it is unreasonable for a professional review body to rely on incomplete, incorrect, or mischaracterized information. *Id.* ¶¶64-68.

Defendants admit the CC oversaw Weiner's investigation and the MEC did not conduct any independent investigation. *Id.* ¶106. Further, Defendants:

- admit the CC relied solely on outside reviews. Their only "other evidence" came from unidentifiable sources, *id.* ¶83, 90;
- admit the CC never interviewed doctors, nurses, or staff in the CTC, *id.* ¶¶42-43;
- relied on incomplete or incorrect information because they failed to provide—or don't know whether they provided—outside reviewers with complete medical records. *id.* ¶¶51, 113; and
- relied on incomplete or incorrect information because they never provided Weiner with the Greeley Report to discuss; so, they never allowed Weiner to clarify issues before final action—as required by Greeley—and could never follow up with the reviewers to see if any explanations changed their opinions. *Id.*, ¶¶96, 120; and
- relied on incomplete or inaccurate information because the Hale Report materially mischaracterized the Greeley Report and failed to disclose information favorable to Weiner. *Id.* ¶¶91-103.

Whether Defendants intentionally engaged in this conduct may be disputed, but that dispute is immaterial because the standard on summary judgment under HCQIA is reasonableness. Nothing about Defendants' investigation was reasonable under the circumstances.

Defendants are not immune under HCQIA. At the very least, viewing the evidence in Weiner's favor, a reasonable jury could find Defendants failed to conduct a reasonable investigation and are not entitled to HCQIA immunity.[7]

III. Weiner is entitled to summary judgment on HCQIA immunity for claims based on Defendants' actions outside peer review.

Whether Defendants are immune from damages for peer review actions is not dispositive of whether they are liable for actions taken outside peer review. Other than Count X—Violation of Due Process—each of Weiner's causes of action is based, in part, on allegations that Defendants improperly weaponized confidential peer review information by making disclosures **outside of peer review**. Dkt. 99.

HCQIA immunity under § 11111(a)(1) applies to "a professional review action ... of a professional review board." Immunity under § 11111(a)(2) applies when "providing information to a professional review body." Even if the Court

[7] Also problematic, the CC and MEC were not comprised of neutral decision makers. *See Smigaj*, ¶86. Under HCQIA, hearings must be conducted by a panel of individuals not in direct competition with the physician. §§ 11112(b)(3)(A)(i)-(iii). Johnson, Harkins, and SPH's attorney participated in most every CC and MEC meeting during which they took adverse actions against Weiner. SUF, ¶¶38-40, 86, 88, 112, 118, 122. Further, despite SPH's knowledge that its administrators cannot be involved in peer review investigation, they were not bystanders in the process. SPH administration sent cases for external review with incomplete records, which were then considered by the CC and MEC, and SPH's counsel guided the peer review process throughout. SUF, ¶¶65-68. The same counsel is representing Defendants NOW in this case (Dkt. 22) and is prosecuting SPH's counterclaims against Weiner. "Because the process made available to [Weiner] did not include neutral decisionmakers, it was not fair under the circumstances." *Smigaj*, ¶86.

determines Defendants are entitled to HCQIA immunity for their peer review actions, it is indisputable much of Defendants' harmful conduct occurred **outside** the protections of a professional review body and, therefore, cannot be subject to HCQIA's immunity protections as a matter of law.

This was addressed in *Delashaw*, *supra*. At issue was a letter sent by defendant Cobbs "outlining several concerns allegedly raised by physicians, nurses and staff about [the plaintiff,] Delashaw." *Id.*, *5. Cobbs shared his letter with numerous individuals, including: 1) the hospital's corporate officers; 2) the hospital's [MEC]; and 3) members of the hospital's "executive council." *Id.*, *3-5. Delashaw alleged Cobbs' statements in the letter resulted in "extreme reputational harm and loss of employment opportunities." Delashaw also alleged civil conspiracy and tortious interference with business expectancy. *Id.* Cobbs moved for summary judgment that he enjoyed immunity under HCQIA. *Id.*, *10–11.

The court partially granted and denied Cobbs' motion. The court held HCQIA immunity "turns on whether the recipients of Dr. Cobbs's Letter were members of a professional review body, as defined under the Act." *Id.*, *11. The court granted Cobbs' motion with respect to his disclosure to the hospital's corporate officers because they represented the interests of a "health care entity." *Id.*, *13-14. The court granted Cobbs' motion with respect to his disclosure the

MEC, because they were members of a "professional review board." *Id.*, *14-16. The court rejected Cobbs' motion for disclosures to members of the hospital's "executive council" because they did not operate a "health care entity," nor were they members of a "professional review board." *Id.*

State law and SPH's Bylaws obligate Defendants to maintain peer review confidentiality. SUF, ¶123; MCA § 50-16-203 ("All proceedings in hospital records and reports of committees shall be confidential and privileged."); *see also Cole*, 2007 Mont. Dist. LEXIS 675, ¶20.[8] Defendants knew it was improper to share information outside of peer review because "it's all confidential." SUF, ¶124.

On November 17, Johnson, Harkins, and Wampler made statements to CTC staff members about Weiner, including that he was treating patients for cancer who did not have cancer. *Id.* ¶130-135. Indeed, Johnson read directly from Weiner's summary suspension letter. *Id.* ¶135. On December 7, Johnson published a letter condemning Weiner for treating patients for cancer who did not have cancer, among other things. *Id.* ¶137. The same defamatory accusations were sent to SPH

[8] The district court, without citation, erroneously held Weiner is not entitled to confidentiality under peer review, finding only patients are entitled to confidentiality over health care information (presumably under HIPPA). App. 1, p. 28.

staff and patients on December 8. *Id.* ¶¶138-140. Those accusations were clearly made outside HCQIA's protections.[9]

These defamatory statements were not made to a "professional review body" and are not entitled to HCQIA immunity as a matter of law. *Reyes*, 102 F.Supp.2d at 822. Weiner, not Defendants, is entitled to summary judgment.

IV. The court made erroneous factual findings in the face of conflicting evidence.

If a court "is required to weigh evidence, choose between disputed facts, or assess the credibility of witnesses, an entry of summary judgment is inappropriate." *Larson Lumber Co. v. Bilt Rite Constr. & Landscaping LLC*, 2014 MT 61, ¶32, 374 Mont. 167, 320 P.3d 471. The standard for summary judgment under HCQIA is: "Might a reasonable jury, **viewing the facts in the best light for [Weiner]**, conclude that he has shown, by a preponderance of the evidence, that [Defendants'] actions are outside the scope of § 11112(a)[.]" *Austin*, 979 F.2d at 734 (emphasis added). Despite this guidance, the court made numerous factual findings against Weiner to justify the HCQIA Order.

[9] Both Hale and Tarver agree information discovered during the peer review process cannot be disclosed, SUF, ¶141, and Hale confirmed Johnson did just that in his December 7 and 8 disclosures. *Id.* ¶142.

First, the court improperly relied on Defendants' sham hearing and appeal to hold: "the reasonableness of the corrective actions has been confirmed at every step of the review after each subsequent reviewing body considered the evidence." App. 1, p. 24. This conclusion of fact is both unfair and violative of HCQIA. As the court recognized, subsequent steps in the peer review process are not considered under HCQIA. *Id.* The court effectively rubber stamped the subsequent reviewing bodies' own rubber stamp.

Defendants and the court cannot prevent Weiner from investigating and challenging the legitimacy of Defendants' hearing and appeal process by rejecting his amended complaint and forcing him to file *Weiner II*, while *ex post facto* relying on the hearing and appeal to justify adverse actions taken against Weiner one and a half years earlier. The hearing and appeal are not part of this case because the court found adding those issues would cause undue delay and prejudice to Defendants. Dkt. 168. It is equally prejudicial to Weiner to now permit Defendants to rely on the very hearing and appeal they excluded from this case.

Moreover, HCQIA is clear: SPH's subsequent hearing and appeal, which occurred after Weiner's operative complaint was filed, affirming prior decisions are irrelevant and cannot cure previous failures under HCQIA. § 11112(a); *Brader*, 167 F.3d at 843 (holding a hospital must "act at all times" in the reasonable belief that

its actions would further quality healthcare); *Stratienko*, 2008 U.S. Dist. LEXIS 68861, at *33-34; *Brandner*, 394 P.3d at 595.

This was also impermissible because the court relied on SPH's use of the "fair hearing" transcript, which is hearsay. *Larson Lumber*, 2014 MT 61, ¶32; *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶21, 368 Mont. 330, 296 P.3d 450 (a court need only consider admissible evidence in deciding whether summary judgment is an appropriate remedy); *Hiebert v. Cascade County*, 2002 MT 233, ¶35, 311 Mont. 471, 56 P.3d 848.[10]

Second, the district court held, as a matter of fact, Defendants were justified in relying on Patient 1's external review finding the "case documentation did not support a malignancy and Weiner erroneously diagnosed Patient 1 as having lung cancer." App. 1, pp. 4, 18. This finding ignores Defendants' failure to provide the outside reviewer Patient 1's complete medical records. SUF, ¶51. The court utterly failed to address the incompleteness of medical records provided to external reviewers.

[10] A large swath of Defendants' "factual assertions" came from the transcript of the "fair hearing" which is inadmissible hearsay. *See* Dkt. 309 (Weiner Response to SPH MSJ), pp. 1-4; *Id.*, Ex. A. Many of those "factual assertions" were attributed to individuals who have submitted declarations in this case and/or were deposed but, instead of relying on that testimony, Defendants used hearsay.

Third, the court held the CC "sent five more cases to an independent medical oncologist for review." App. 1, pp. 5, 20. That is wrong. Defendants admit SPH's administrators sent those cases for review without authority or justification. SUF, ¶68.

Fourth, the court held "Weiner had an opportunity to respond to the [CC's] concerns and to provide additional information and context." App. 1, pp. 20-21. To make that finding, the court ignored Defendants' admission that they withheld pertinent information and medical records from Weiner, including patients' names. SUF, ¶60, 120.

Fifth, just like the MEC, the Court mistakenly relied on the accuracy of the Hale Report (calling it the "CC Report of Investigation") to establish the reasonableness of Defendants' investigation. App. 1, pp. 15-16. As noted, the Hale Report blatantly misrepresented the results of the external reviews, incorporated the administrators' improper external reviews, and relied on statements regarding "patient care concerns" raised by phantom "SPH providers, staff, and *locum tenens* providers" whom Hale could not identify. SUF, ¶¶89-94. Indeed, the only conversation any Defendant recalled with a locum provider was Johnson's communication about future employment. *Id.* ¶144.

Finally, the court held, without any evidence whatsoever, "Weiner independently decided SPH Defendants had breached SPH Bylaws and therefore chose not to engage in the full review process." App. 1, p. 23. That is untrue. Weiner opposed Defendants' motion to stay while Defendants unleashed their unfair hearing and appeal process, but he participated at every stage. *See* Dkt. 150, 159, 167.

V. The district court erroneously raised arguments not presented.

After holding Defendants are entitled to HCQIA immunity, the district court "briefly examine[d] Weiner's remaining claims against SPH Defendants in relation to the professional review actions." App. 1, p. 25. The court held Weiner's claims for breach of contract/violation of the medical staff Bylaws, breach of the implied covenant of good faith and fair dealing, wrongful termination, and violation of the Montana Unfair Trade Practices Act were all subject to HCQIA immunity. *Id.*, pp. 25-26, 29. The court was wrong because Weiner's claims were supported by evidence of Defendants' actions outside of peer review and, thus, outside of HCQIA protections. *See* Section III.

Then, the district court went further and, *sua sponte*, granted summary judgment on Weiner's claims for interference with prospective business advantage, civil conspiracy, and defamation based on arguments not raised by Defendants.

Doing so was improper. *Tags Realty, LLC v. Runkle*, 2015 MT 166, ¶10, 379 Mont. 416, 352 P.3d 616 (court "should not have granted summary judgment" on grounds not raised by moving party); *see also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present" and parties are responsible for advancing facts and arguments entitling them to relief).

A. Interference with prospective business advantage.

The court dismissed Weiner's claim for interference with prospective business advantage because Weiner did not provide evidence that he was damaged by Defendants "communicating false, unfounded, or otherwise negative information … to employees of SPH, Weiner's patients, and the public[.]" App. 1, pp. 26-27. Regardless of the *per se* damage, Defendants never argued for summary judgment on that basis. *See* Dkt. 250, pp. 14-15 ("Weiner's...interference with prospective business advantage claim...[is] nothing more than an attack on the professional review action taken by the SPH Defendants. Thus, the court should apply the same HCQIA analysis and dismiss...."); Dkt. 339, p. 18.

Weiner was not required to submit evidence of damage. The court erred in resolving issues that were not presented.

B. Civil conspiracy.

Weiner asserts a claim for civil conspiracy, alleging "Defendants took one or more unlawful act in furtherance of such conspiracy including breaching SPH's Bylaws, making defamatory statements, and all other wrongful actions described above." App. 1, pp. 39–40. The court held "[b]ecause the Court finds SPH Defendants took no unlawful actions in relation to Weiner's suspension and termination, this claim must fail." *Id.*, p. 30.

Defendants did not argue their actions were lawful, but for HCQIA immunity. Dkt. 250, p. 15. Regardless, Weiner's claim for civil conspiracy based on Defendants' defamatory statements outside of peer review must survive summary judgment. *See* Section III.

C. Defamation.

The district court failed to address Weiner's claim for defamation in its initial order but still granted summary judgment. App. 1, pp. 27-29. Eight days later, the district court, *sua sponte*, issued an "Addendum." App. 2. The reason for the addendum was "[i]nadvertently, the Order did not include a thorough analysis and discussion of [Weiner's] ... claim for defamation, which is set forth herein." *Id.*, pp. 1-2.

In moving for summary judgment, Defendants argued Johnson did not "disclose any peer-review protected information"—irrelevant for the defamation claim—and"[s]ince Mr. Johnson's statements were made to protect public safety, no malice can be shown by Weiner who is a public figure or, at a minimum, a limited purpose public figure." Dkt. 250, pp. 16-17. **That is it**. *See id.*; Dkt. 339, pp. 20-21.

The Addendum does not mention "public figure" or "malice." App. 2. Instead, the district court factually concluded—even though "Weiner might conceivably produce an expert at trial to question the truth of each statement"—summary judgment was appropriate because "the Court finds each of Johnson's allegedly libelous statements **to be true** and therefore not defamatory as a matter of law." *Id.*, pp. 6-7 (emphasis added).

Johnson's statements were not true, but that was not before the court and, therefore, not argued by the parties. The court improperly weighed evidence related to other issues before the court, chose between disputed facts, and assessed the credibility of hearsay declarants (*see, e.g.*, references to "hearing panel")—all improper at the summary judgment stage.

Defendants are not entitled to summary judgment on Weiner's defamation claim.

D. Punitive damages.

Because the court improperly granted summary judgment on at least one of Weiner's tort claims, the court also erred in granting summary judgment on Weiner's claim for punitive damages.

CONCLUSION

The district court erroneously granted summary judgment to Defendants on their HCQIA immunity affirmative defense when the facts establish Defendants failed to provide Weiner with adequate notice and opportunity to be heard and they based their adverse actions against Weiner on an objectively unreasonable investigation. Moreover, the district court erred by holding Defendants were immune from damages for their conduct outside peer review.

The Court should reverse the HCQIA Order and enter summary judgment in Weiner's favor. Alternatively, the Court should reverse the HCQIA Order because, at minimum, disputed issues of fact remain and a reasonable jury could find that Defendants are not immune.

DATED this 19th day of April, 2024.

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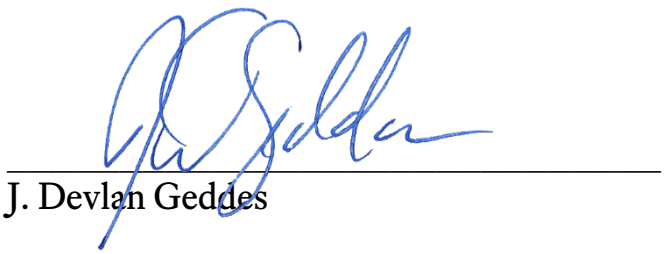
CERTIFICATE OF COMPLIANCE

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 (9,984 words), excluding the Caption, Table of Contents, Table of Authorities, the Certificate of Service and this Certificate of Compliance.



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