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

THOMAS C. WEINER, Plaintiff – Appellant,

v.

ST. PETER'S HEALTH, a Montana Domestic Nonprofit Corporation d/b/a St. Peter's Hospital, WADE JOHNSON, JAMES TRAVER, M.D., KERRY HALE, M.D., SHELLY HARKINS, M.D., and TODD WAMPLER, M.D., Defendants – Appellees.

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

APPELLEES' AMENDED ANSWER BRIEF

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INTRODUCTION

In 2020, St. Peter's Health (SPH) Medical-Staff leaders learned disturbing details about Thomas Weiner MD's medical practice, raising significant concerns about patient safety. SPH's Medical Staff properly responded by presenting the issues to Weiner, who eventually elected to voluntarily refrain from practicing. Later, after more disturbing details were discovered, SPH appropriately suspended Weiner's Medical-Staff membership and clinical privileges, pending further investigation. The additional investigation confirmed SPH's worries, and it consequently rescinded his membership and privileges after an evidentiary hearing and appeal.

For example, in one case, Weiner treated a patient with chemotherapy for eleven years without a properly confirmed diagnosis. The treatment likely led to the patient's respiratory failure and death, and the autopsy showed no cancer. (Doc. 339, Ex. Z.) In other cases, under a misguided interpretation of "palliative care," Weiner prescribed high doses of narcotics to pain-management patients without adequate documentation, justification, or safeguards. One patient reported "no pain" on several visits, and another was a known alcoholic at high risk of abuse. (Doc. 263, Ex. 11, p. SPH_000683.) Many other alarming cases came to light.

SPH and its physicians had the responsibility to further quality healthcare, and they fulfilled it properly and lawfully. The actions they took meet the standards of

reasonableness that grant them immunity under the Health Care Quality Improvement Act ("HCQIA," often pronounced "hiqua").

STANDARD OF REVIEW

This Court reviews summary judgments de novo. *Chapman v. Maxwell*, 2014 MT 35, ¶ 12, 374 Mont. 12, 322 P.3d 1029.

STATEMENT OF THE FACTS[1]

Weiner's Membership and Privileges

Weiner was a member of the Medical Staff at SPH, a healthcare system in Helena. (Doc. 105, pp. 2, 5.) SPH granted Weiner clinical privileges in "Hematology/Oncology." (Doc. 263, Ex. B, p. SPH_001959.)

The Medical Staff is "responsible for the quality of medical care," and as a member with privileges, Weiner was obligated to provide quality healthcare, work professionally with the Medical Staff and administration, and appropriately document his treatment of SPH patients. (Doc. 263, Ex. 20, pp. 4, 7, 11.)

Employment Dependent on Membership and Privileges

SPH and Weiner had an employment agreement with a one-year Term that ended May 31, 2020. (Doc. 263, Ex. 1, p. 1, attachment A.) If neither party gave

[1] Evidence to show the information SPH had isn't hearsay. M.R.E. 801(c).

notice of non-renewal, the agreement provided for up to four "Renewal Terms." (*Id.* p. 1.) Therefore, the contract would end, at the latest, on May 31, 2024.

One of Weiner's employment obligations was to "apply for and maintain Medical Staff membership." (*Id.* p. 3.) Weiner's employment would "terminate … [i]mmediately … [u]pon the … suspension, withdrawal, [or] curtailment … of [Weiner's] … staff membership or clinical privileges, whether voluntary or involuntary, at SPH." (*Id.* p. 5–6.)

PRC's February 2020 Request for Investigation

SPH's Peer Review Committee (PRC) assesses physician care and oversees peer review. (Doc. 263, Ex. 20, p. 17.) Per that function, on February 5, 2020, the PRC asked Todd Wampler MD, then the Chief of Staff, for an investigation into worrisome aspects of Weiner's practice. (Doc. 251, Ex. 27.) The PRC was concerned about (1) manipulation of patients' do-not-resuscitate status without their consent, (2) substandard non-oncological inpatient care, (3) application of end-of-life care for inpatients, and (4) the potentially inappropriate continuation of cardiotoxic chemotherapy. (*Id.*)

The PRC appropriately spoke with Wampler because he was authorized to request an investigation from the Credentials Committee (CC) into potential corrective action. (Doc. 263, Ex. 20, p. 12, 43.) The CC would then determine whether to investigate. (*Id.*)

Weiner's Knowledge in February 2020 that the CC Was Investigating

Wampler met with Weiner and the CC Chair, James Tarver MD, on February 10, 2020. (Doc. 251, Ex. G., p. 623; Doc. 263, Ex. I, pp. SPH_002066–67; Doc. 302, p. 30.) Tarver told Weiner that "credentials" was "going to send a few cases out" for "external reviews." (Doc. 251, Ex. G, p. 622.)

Weiner had served on positions at each stage of the disciplinary process, so this information would have notified Weiner that the PRC's review had elevated to a CC investigation into corrective action. (Doc. 251, Ex. G, pp. 608–09; Doc. 263, Ex. 20, p. 14.) Weiner wasn't clueless about what was happening. To the contrary, the many peer reviews were frustrating him: "I am getting fed up with this. I am damn close to bailing on this place." (Doc. 263, Ex. I, p. SPH_002067.)

The CC Had the PRC Send Cases for External Review

On February 24, 2020, the CC discussed Weiner's practice and noted concerns about "polypharmacy" and failure to document. (Doc. 263, Ex. 28, p. SPH_001092.) They decided to "send some of these cases for outside review" and decide next steps "[o]nce the outside review comes back." (*Id.*) The PRC, who coordinates external reviews, sent five cases to reviewers at the University of Utah. (Doc. 251, Ex. 44; Doc. 263, Ex. 20, p. 17; Doc. 367, Ex. B.)

In the following months, the PRC and CC waited for the external reviews, and Tarver updated Weiner periodically. (Doc. 263, Ex. G, pp. 623–24.)

[redacted] **Death**

Around May 2020, Weiner started [redacted], his long-time lung-cancer patient, on a new chemotherapy treatment. (Doc. 263, Ex. 67, p. SPH_000242.) [redacted] thereafter complained of a resulting cough, but Weiner continued the treatment, noting in July 2020 that [redacted] "[d]efinitely still has persistent disease" and may have "lymphangitic spread from his cancer." (*Id.* p. SPH_000243–44.)

In August 2020, [redacted] was hospitalized twice for respiratory failure. (Doc. 263, Ex. 67, p. SPH_000153, 196.) Defendant Randy Sasich MD, a pulmonologist, questioned [redacted] 2009 cancer diagnosis because [redacted] "survival time" was extraordinary and the diagnosis lacked adequate tissue confirmation. (*Id.* p. SPH_000157, 196, 199, 218.) An infectious-disease doctor, Anne Anglim MD, expressed similar doubts. (*Id.* p. SPH_000174–77.)

Weiner was aware that Sasich was "skeptical of the diagnosis." (*Id.* p. SPH_000171.) And he had to acknowledge that biopsies placed in doubt any present malignancy: "it is really difficult to say at this point what the state of his disease is in. There is so much going on. The areas that really had been previously malignant and lit up on his PET scan … really were not biopsied, so I don't know that we have excluded the malignancy." (*Id.* p. SPH_000198.)

[redacted] quickly deteriorated and died at the University of Utah on September 16, 2020. (Doc. 367, Ex. C, p. SPH-SW_007340–41.) The lung autopsy

revealed "[n]o malignancy," and the report concluded that his death was "most likely a complication of gemcitabine therapy [the chemotherapy]." (*Id.*)

Weiner's own expert conceded that Weiner began [redacted] cancer treatment with an "inappropriate lack of an initial biopsy," and that the chemotherapy led to [redacted] death. (Doc. 53, pp. 3–4.)

Supporting Documents for the External Review of [redacted] Case

The PRC reviewed [redacted] case on August 27, 2020, and then sent it for external oncology review, per its authority. (Doc. 367, Ex. B; Doc. 263, Ex. 20, pp. 17, 43.)

On September 17, the PRC sent [redacted] case and supporting records to the University of Utah. (Doc. 263, Ex. 67, p. SPH_000148.) On September 29, when the reviewer asked for more pathology reports, it provided an extensive supplementation. (*Id.* p. SPH_000245.)

Weiner asserts the PRC failed to send "crucial documents, including biopsy results," and suggests the review was thereby compromised. (Weiner Brief, p. 41.) He appears to claim that four documents were missing: (1) a pathology report of [redacted] neck mass in February 2009; (2) Dr. Dixon's recommendation of a "whole body PET scan" based on the pathology report; (3) the resulting radiology report; and (4) Dixon's reiteration of findings "consistent with metastatic carcinoma" and referral to Weiner "for treatment of probable lung Cancer with

metastasis." (*See* Doc. 263, Ex. 61.)

Weiner is incorrect. The PRC did send the reviewer the pathology and radiology reports. (*Compare* Doc. 263, Ex. 61, pp. SPH-SW_000443, SPH-SW_002159 *with* Doc. 263, Ex. 67, pp. SPH_000230–31.) Therefore, the only two documents in question are Dixon's records in which he restates the pathology and radiology findings, and in which he notes his referral to Weiner. But these records are redundant to the information sent to the reviewer. The substance, in addition to being in the pathology and radiology reports, was clearly documented in other records, including Weiner's initial 2009 visit with [redacted]. (*See, e.g.*, Doc. 263, Ex. 67, pp. SPH_000157, 175, 228.)

Cases Forwarded to the CC, and the PRC's Concern for Patient Safety

By September 24, 2020, the University of Utah had returned five out of six external reviews. (Doc. 251, Ex. 44.) The PRC studied them, as well as "four recent cases referred … by other providers." (*Id.*; Doc. 367, Ex. B.)

The PRC then forwarded the cases and reviews to the CC for its consideration. (Doc. 251, Ex. 44.) In doing so, the PRC emphasized that its "physicians are seriously concerned" about Weiner's practice and "genuinely concerned about patient safety." (*Id.*) The PRC worried about Weiner's management of "primary care, oncological care, and chronic pain," and it requested "corrective action." (*Id.*)

CC's Expansion of External Reviews

On September 28, 2020, the CC studied the reviews and cases and determined it should continue to investigate. (Doc. 263, Ex. 28, p. SPH_001093–94.) The CC ultimately decided to send eighty cases to Greeley. (*Id.* p. SPH_001095.)

External Confirmation of Substandard Care in [redacted] Case

On October 9, 2020, the reviewing physician submitted damning conclusions on [redacted] case. (Doc. 263, Ex. 67, p. SPH_000254.) He opined that Weiner didn't meet the standard of care because he gave [redacted] eleven years of toxic chemotherapy and immunotherapy "in the absence of a confirmed diagnosis of cancer." (Doc. 339, Ex. Z.) This "is NOT appropriate," and the "use of these medications may have led to [redacted] death." (*Id.*)

The reviewer explained that the original 2009 studies, rather than being conclusive, "suggest a broad differential diagnosis," and the subsequent pathologic specimens "did not show malignancy." (Doc. 339, Ex. Z.) This comports with Anglim's notes that the "initial biopsy" in 2009 "showed equivocal findings," and that "[h]istopathology of specimens identified was not pathognomonic." (Doc. 263, Ex. 67, pp. SPH_000174–75.) It's further consistent with Sasich's critique that the study of the 2009 tissue from the neck mass didn't involve "cytogenetics," and subsequent tissue sampling showed no malignancy. (*Id.* pp. SPH_000157.)

The reviewer further observed that, even assuming there had been cancer in

2009, it was improper for Weiner to have altered the therapeutic approach to [redacted] treatment "multiple times due to presumed progression" without "repeat biopsies documenting malignancy." (Doc. 339, Ex. Z.) Documentation of malignancy should have been obtained, "not just before therapy was started, but at a time when the clinical course deviated from the expected trajectory." (*Id.*)

The reviewer's findings confirmed the PRC's evaluation: "[I]t was just what we expected." (Doc. 263, Ex. 67, p. SPH_000254.) "We figured it would be pretty straightforward, and our physicians were quite sure of the outcome, but we were really hoping we were wrong." (*Id.* p. SPH_000263.)

Determination to Summarily Suspend Weiner

On October 12, 2020, the CC reviewed the [redacted] external review, which was the straggling sixth review that the PRC had promised to forward when received. (Doc. 251, Ex. 44; Doc. 263, Ex. 28, pp. SPH_001095–96.) "The group agreed they are all concerned with this case." (*Id.*) Then, on October 14, the CC voted in favor of suspension. (*Id.* p. SPH_001097.)

Weiner's Acceptance to Voluntarily Refrain from Exercising Privileges In Lieu of Suspension

On October 15, 2020, Hale (then the new Chief of Staff–Elect and CC Chair) and Tarver met with Weiner and gave him a suspension letter. (Doc. 251, Ex. G, 625; Doc. 263, Ex. 5; Doc. 301, p. 7.) The letter, signed by Hale and Tarver, told Weiner that his membership and privileges were suspended "as a result of serious

concerns regarding your clinical competency." (Doc. 263, Ex. 5.) It cited the recent death of his patient, in which he "prescribed chemotherapy treatment without documented, confirmed evidence of malignancy and that the patient died as a result of said chemotherapy." (*Id.*) The case underwent "an external review" (*id.*), lending credibility.

Nevertheless, per the letter, Weiner could avoid suspension if he chose "to voluntarily refrain from exercising [his] privileges during the suspension period in lieu of a summary suspension." (*Id.*) The bylaws provide for this discretionary benefit: "The Physician … may be given an opportunity to refrain voluntarily from exercising privileges pending an investigation." (Doc. 263, Ex. 20, p. 45.) Weiner reasonably chose to refrain in lieu of suspension. (Doc. 251, Ex. G, p. 625.)

Clarification that Weiner Wasn't Suspended and that Investigation Continued

Weiner sent a letter to the Board and various staff members about his voluntary refrainment, asking how long he was expected to do so because "I will not permit this to drag on indefinitely." (Doc. 113, Ex. C.)

Tarver and Hale responded that, if he chose to withdraw his decision to voluntarily refrain, he would be immediately suspended. (Doc. 263, Ex. 47.) This would, in turn, "trigger your right to meet with the MEC within 14 days." (*Id.*) But so long as he continued to refrain, there was no suspension, and therefore no need for expedited procedures. (*Id.*) "Accordingly, the Credentials Committee is in the

process of conducting an investigation pursuant to the Routine Corrective Action process," i.e., with no set timeline. (*Id.*) Nevertheless, they intended to "complete this process as expeditiously as possible." (*Id.*)

Attorneys' Attempt to Avoid Triggering a Duty to Report

The attorneys negotiated an effort to avoid triggering a duty to report to the National Practitioner Data Bank (NPDB), resulting in a letter dated November 12, 2020. (Doc. 263, Depo. Ex. 48.) SPH agreed that "Weiner's absence . . . will be considered a voluntary leave of absence unrelated to clinical competency issues." (*Id.*) The stated motive was to avoid triggering a duty to report: "Accordingly, there is no obligation for SPH to make a report to the [NPDB]." (*Id.*) Weiner "agree[d] that he will not exercise his clinical privileges" for eighteen days, "through November 30, 2020." (*Id.*)

Upon Mounting Concerns, Weiner's Summary Suspension and Employment Termination

During Weiner's absence, practitioners who saw his patients—for example, Drs. Chase and Wong (Doc. 300, p. 80)—continued to raise worries about Weiner's practice. (Doc. 263, Ex. 46, p. 4.) And around November 15, 2020, SPH received more external reviews. (*Id.*) With mounting concerns, Tarver and Hale discussed Weiner. (Doc. 302, pp. 48–49.) The next day, they suspended him (Doc. 263, Ex. 11), and Wampler, then President of the Medical Group, terminated his employment (Doc. 300, p. 107; Doc. 263, Ex. 12.).

Suspension. On November 17, 2020, Tarver and Hale sent Weiner a letter informing him of "several additional and very concerning issues that have come to light regarding your clinical practice." (Doc. 263, Ex. 11.) Adding to previously disclosed cases, Tarver and Hale provided information on six new external reviews, which concluded Weiner provided substandard care to patients [redacted] and [redacted] (*Id.*; Doc. 339, Ex. BB, p. 3.) The letter explained, "Several of your patients are receiving treatment for conditions for which you have failed to provide documented evidence to support the diagnosis." (Doc. 263, Ex. 11.) For other patients, their conditions worsened because he failed to refer them to specialists for appropriate testing and diagnosis. (*Id.*)

The letter also raised "serious concerns" about poor "clinical documentation," often lacking support for diagnoses, therapies, and medications. (*Id.*)

The letter documented concerns about "prescribing high doses of narcotics to patients for conditions that are outside the scope of [Weiner's] clinical privileges or in quantities that are dangerous and inappropriate." (Doc. 263, Ex. 11.) He prescribed high-dose opioids without documented pain contracts, chronic-pain treatment plans, or precautions like urine tests. (*Id.*) In many cases, prescriptions weren't in the medical record, so SPH had to determine what patients had been given through queries to the Prescription Drug Registry. (*Id.*) The letter identified three specific pain-management patients and problematic details about their care. (*Id.*)

The letter concluded, "SPH believes that your care poses an imminent danger to patients and is impeding the operations of SPH." (*Id.*) Weiner's membership and privileges were suspended, and he was invited to meet with the MEC on November 24 to discuss whether the suspension should continue. (*Id.*)

Employment Termination. Wampler's employment-termination letter informed Weiner that, because of the suspension, his employment was terminated per Section 12(a)(i) of the agreement. (Doc. 263, Ex. 12.)

Wampler also raised concerns about Weiner's conduct. (Doc. 263, Ex. 12.) He said, "We are … deeply troubled by your refusal to refrain from interfering with the operations of the [Cancer Treatment Center] during your absence," citing Weiner's discussions with staff about patients, thereby undermining fill-in physicians. (*Id.*) He also denounced Weiner's "direct threat," referring to a text in which Weiner said to "put a muzzle on Sasich or else." (*Id.*; Doc. 251, Ex. 10.)

SPH's Reasonable Update to Staff

On November 17, 2020, Johnson (SPH CEO) "conducted a meeting of staff members and nurses of the Cancer Treatment Center [CTC]" about Weiner. (Doc. 251, Ex. G, p. 48.) This was needed because Weiner "did not practice in a vacuum," and the CTC had about twenty nurses. (*Id.* p. 37, 604–05.)

CC's Continued Investigation

While the question of Weiner's suspension was on track with the MEC

process, the CC was still finishing its investigation into corrective action. (*See* Doc. 113, Ex. I.) On November 23, 2020, the CC met and discussed additional concerns about Weiner that physicians had expressed, as well as Greeley's external review. (Doc. 263, Ex. 28, p. SPH_001099.)

In preparation for the CC's meeting with Weiner on November 30, Hale invited the committee to email questions, so Hale could ask them. After meeting with Weiner, the CC planned to finalize a report with a recommendation to the MEC on potential corrective action. (Doc. 263, Ex. 28, p. SPH_001099.)

MEC's Meeting with Weiner and Extension of His Suspension

On November 24, 2020, within a week of Weiner's suspension, he met with the MEC to give input on the ten cases mentioned in the November 17 letter. (Doc. 251, Ex. G, p. 630–31.) Weiner explained each patient's care. (*Id.* p. 631; Doc. 263, Ex. 22, SPH_001115–23.) The MEC noted that Weiner's "lack of proper chart documentation" made it "impossible to follow progress of his patients, confirm their treatments or medications, or even what type of cancer they have." (*Id.*)

The next day, the MEC informed Weiner that it "voted unanimously to uphold and continue the summary suspension." (Doc. 263, Ex. 84.) The MEC told Weiner that they would meet again by December 17—within thirty days of the suspension—to reevaluate. (*Id.*)

CC's Meeting with Weiner and Recommendation to Revoke

On November 30, 2020, the CC met with Weiner to consider its recommendation for corrective action. (Doc. 263, Ex. 28, p. SPH_001078–87.) It had an extensive back-and-forth with Weiner about six categories of concern: patient volume, conduct, coordination with other providers, medical errors, documentation, and narcotics prescribing. (*Id.*) The CC was unpersuaded by his responses, and it voted to recommend revocation. (*Id.*)

The CC issued a detailed report to the MEC supporting its recommendation. (*Id.*, Ex. 24.)

SPH's Answers to Frequently Asked Questions

On December 7, 2020, SPH communicated an update to CTC staff about Weiner with answers to FAQs [Frequently Asked Questions]. (Doc. 263, Ex. 38.) It did so because they were "on the front lines who are answering phones and interacting frequently with patients." (*Id.*) On December 8, SPH instructed, "If you are asked questions about the [Weiner] situation please stay to the below script *and don't comment any further*." (*Id.*) (emphasis added).

The substance of these FAQs was published in the local news on December 7, and in a letter to patients on December 8. (Doc. 263, Exs. 37, 39.)

MEC's Evaluation, Extension of Suspension, and Recommendation to Revoke

On December 15, 2020, the MEC met to decide whether to extend Weiner's

suspension beyond thirty days, and whether to recommend to the Board that Weiner's membership and privileges be revoked. (Doc. 263, Ex. 24, p. SPH_001127.) The MEC engaged in a wholistic review of Weiner's peer review process, discussing case reviews at each level, experiences interviewing Weiner, and other insights. (*Id.* pp. SPH_001127–34.)

One physician shared his view that the "outside reviews are devastating" and he didn't believe the committee could "let this kind of stuff go on that hurts our patients." (*Id.* p. SPH_001130.) Another shared discoveries about Weiner's narcotics-prescription irregularities. (*Id.* p. SPH_001131–32.) When Weiner first left the CTC, "his Nurses[']first concern was who will sign all the pain medication scripts for the next day." (*Id.*) There "was not proper documentation for many of the pain medication scripts," which was a "major deal" because "[t]his type of thing could cause anyone else to lose your license immediately." (*Id.*)

After a thorough discussion, they voted to extend the suspension and recommend revocation. (*Id.* p. SPH_001127.)

Subsequent Events

Weiner's brief quotes an email indicating a physician's confidence that Weiner wasn't returning. But to be clear, Weiner's appeal doesn't challenge subsequent events in the corrective-action process (Weiner Brief, p. 9 n.2), in which the Board adopted the MEC's recommendation, Weiner asked for a formal hearing,

he received a multi-day hearing, the hearing panel recommended revocation, Weiner appealed, and the Board denied the appeal. The Board then revoked Weiner's membership and privileges. (Doc. 113, Exs. K–L; Doc. 251, Exs. G–Y.)

SUMMARY OF THE ARGUMENT

SPH committees peer-reviewed Weiner's cases and found mounting evidence of alarming practices. During the peer-review process, Weiner's privileges were suspended and ultimately revoked. Weiner erroneously asserts the SPH Defendants engaged in alleged wrongs related to the peer-review process, but his claims fail because HCQIA grants the defendants immunity. Alternatively, the Court should dismiss Weiner's claims for additional reasons.

HCQIA IMMUNITY. HCQIA is important legislation enacted to encourage physicians to engage in effective peer review, thereby helping to ensure quality healthcare. 99 Cong. Rec. 33,118 (Oct. 17, 1986); 42 U.S.C. § 11111(a)(1). It immunizes a peer reviewer from damages claims so long as the review action meets statutory standards of reasonableness. 42 U.S.C. § 11112(a).

HCQIA is drafted to be resolved expeditiously on summary judgment by creating objective, rather than subjective, standards, and by imposing a rebuttable presumption that the review action meets those standards. *Id.*; *Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 36 (1st Cir. 2002).

Weiner failed to rebut the presumption that the review actions were taken after fair procedures, after reasonable effort to obtain the facts, and with reasonable belief that the actions were justified and furthered quality healthcare. As such, all Weiner's claims were properly dismissed.

Weiner argues that portions of his claims survive HCQIA immunity, insofar as they allege disclosure of information about his professional-review actions to others. Specifically, he criticizes announcements of details about the professional-review action to staff, patients, and the public. However, these types of announcements are an inherent part of the professional-review process and are swept within the scope of HCQIA immunity. *Gabaldoni v. Wash. Cnty. Hosp. Ass'n*, 250 F.3d 255, 260 n.4 (4th Cir. 2001).

ADDITIONAL REASONS TO DISMISS. If any portion of Weiner's claims survive HCQIA immunity, the Court should affirm the district court's dismissal of the claims for the reasons stated in its decision. Alternatively, the Court should affirm on any other grounds supporting the district court's correct result. *Mountain Water Co. v. Mont. Dep't of Revenue*, 2020 MT 194, ¶ 42, 400 Mont. 484, 469 P.3d 136.

ARGUMENT

The Court should affirm summary judgment in the SPH Defendants' favor, and it may do so on any appropriate basis. *Mountain Water Co. v. Mont. Dep't of Revenue*, 2020 MT 194, ¶ 42, 400 Mont. 484, 469 P.3d 136.

This appeal doesn't involve Counts I–II, which the district court dismissed in a previous order not certified or challenged. And Weiner concedes punitive damages depends on survival of other claims. Therefore, the appeal concerns only claims for damages under Counts III–X.

Counts III–X are requests for damages that Weiner places into two categories. First: damages from curtailment of his clinical privileges. And second: damages from the disclosure of information about his professional-review actions to others. Weiner concedes that, if HCQIA immunity applies, he cannot recover damages in the first category. But he argues Counts III–IX should survive because they partially seek damages in the second category about disclosures. (Weiner Brief, p. 44.)

The Court should affirm because all the SPH Defendants' conduct—even the disclosures—fall within HCQIA immunity. Alternatively, the district court properly dismissed any remaining portions of Weiner's claims for other reasons.

I. HCQIA Bars All of Weiner's Claims

The SPH Defendants are immune from Weiner's damages claims under HCQIA, which is important legislation enacted to address lawsuits like this one.

Our medical system requires physicians to be willing to engage in effective peer review. 99 Cong. Rec. 33,118 (Oct. 17, 1986). But if these reviewers face "years of litigation with the prospect of having to pay enormous litigation fees [and other damages], they simply will not do peer review." *Id*. Those who drafted HCQIA recognized that the national reporting system they were enacting (NPDB) would undoubtedly increase the incentive for a disciplined physician to aggressively litigate any reportable corrective action. H.R. Rep. No. 99-903, at 3; 99 Cong. Rec. 33,118. Consequently, Congress afforded peer reviewers federal immunity "with respect to" a "professional review action," so long as it meets certain statutory standards 42 U.S.C. § 11111(a)(1).

Weiner concedes that the suspension and revocation of his membership and privileges qualify as professional review actions, and he doesn't deny that each defendant falls within the list of persons who may receive immunity. (Weiner Brief, p. 32); 42 U.S.C. § 11111(a)(1). Therefore, there are only two overall questions regarding HCQIA. First, whether the professional-review actions met the statutory standards. And second, whether Weiner's damages are "with respect to" those actions. We address each in turn.

1. **Weiner failed to meet his burden on summary judgment to present evidence sufficient to rebut the presumption that the professional review actions met HCQIA's objective standards of reasonableness**

The district court correctly ruled that Weiner failed to rebut HCQIA's

presumption of immunity.

Summary judgment encourages judicial economy by avoiding unnecessary trials. *Silvestrone v. Park Cnty.*, 2007 MT 261, ¶ 9, 339 Mont. 299, 170 P.3d 950. If "there is no genuine issue as to any material fact," and the movant "is entitled to judgment as a matter of law," then "judgment should be rendered." M.R.C.P. 56(c)(3).

As movants for summary judgment on an affirmative defense, the SPH Defendants' initial burden would typically be to submit evidence sufficient to establish each element of the defense. *See J&C Moodie Props., LLC v. Deck*, 2016 MT 301, ¶ 16, 385 Mont. 382, 384 P.3d 466. The burden would then shift to Weiner to present "substantial evidence" of specific, material facts that establish a genuine issue for trial. *Thornton v. Songstad*, 263 Mont. 390, 868 P.2d 633, 637–38 (1994).

However, in this case, the SPH Defendants asserted an immunity defense under HCQIA, which imposes a presumption that a professional review action qualifies for immunity. 42 U.S.C. § 11112(a). Consequently, the defendant "is relieved of the initial burden of providing evidentiary support" for "its compliance with the HCQIA standards." *Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 33 (1st Cir. 2002). This "creates a somewhat unusual standard" for summary judgment: "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 the defendants'

actions are outside the scope of [the statutory standards]?" *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992).

In other words, Weiner had the burden to rebut the presumption that the review actions were 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)

42 U.S.C. § 11112(a).

These HCQIA standards use objective terms like "reasonable and "adequate," and federal circuits "have uniformly applied all the sections of § 11112(a) as objective standards." *Singh*, 308 F.3d at 32. Immunity is intended to be resolved expeditiously on summary judgment. *Id.* at 36; *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 635 (3d Cir. 1996); *see also* 99 Cong. Rec. 30,767 (Oct. 14, 1986).

Weiner fails to rebut the presumption. We first address Standard 3, then Standard 2, and finally Standards 1 and 4 together.

a. Standard 3: Fair procedures

Weiner's challenge under § 11112(a)(3) is limited to two events: the decision to suspend in October 2020, and the suspension on November 17, 2020. (Weiner Brief, pp. 36–37.) But his argument is misguided because, as explained below, the first event implicating § 11112(a)(3) was the MEC's decision on November 24, 2020, to extend Weiner's suspension beyond fourteen days. That action occurred *after* providing Weiner notice and an opportunity to be heard. And the MEC's further extension of the suspension on December 15 happened after Weiner had been thoroughly questioned by the CC and MEC. (Doc. 263, Ex. 22, p. SPH_001115; *id.*, Ex. 28, p. SPH_001078.) Therefore, Weiner's lack-of-notice arguments fail. Additionally, even if the Court were to evaluate the prior events for compliance with § 11112(a)(3), the district court correctly concluded they qualify under § 11112(c).

There was no adverse action in October 2020. When Weiner voluntarily refrained from exercising his privileges, Tarver and Hale refrained from suspending him. (Doc. 263, Ex. 5.) This scenario falls under § 11112(c)(1)(A), which says § 11112(a)(3) isn't implicated "where there is no adverse professional review action taken." 42 U.S.C. § 11112(c)(1)(A); *cf. id.* § 11133(a)(1) (treating "a professional review action that adversely affects" the physician as distinct from an acceptance of "the surrender of clinical privileges").

Also, the suspension on November 17, 2020, doesn't implicate § 11112(a)(3)

because it was "not longer than 14 days" and during "an investigation." *Id.* § 11112(c)(1)(B). Weiner had the right to meet with the MEC "within 14 days," after which the MEC would decide whether to extend the suspension. (Doc. 263, Ex. 11.) Meanwhile, the CC and MEC continued to investigate. A short suspension of this type cannot be construed as "requiring the procedures referred to in subsection (a)(3)." 42 U.S.C. § 11112(c)(1)(B).

Therefore, the first event the Court could evaluate under § 11112(a)(3) is the MEC's decision on November 24, 2020, to continue the suspension. This is critical because Weiner challenges only the October 2020 and November 17 events. He concedes that, on November 24 he was given an "opportunity to defend himself." (Weiner Brief, p. 22.) At that meeting, the MEC asked if Weiner had adequate notice and was prepared, and he answered, "yes." (*Id.*, pp. SPH_001115–16.) And the December 15 extension occurred after he was thoroughly questioned by the CC and MEC. Consequently, Weiner's argument under § 11112(a)(3) is baseless.

This should end the Court's inquiry. But if the Court considers the events prior to November 24 as implicating § 11112(a)(3), it should hold that the actions complied with § 11112(c)(2), and therefore complied with § 11112(a)(3). Weiner's arguments to the contrary shouldn't persuade the court for the following reasons.

October 2020—May result in imminent danger. Weiner argues that the [redacted] case didn't demonstrate a sufficiently imminent danger to justify

suspension in October 2020. He reasons that, after the CC voted for suspension on October 14, Tarver and Hale waited until the evening of October 15 to impose it, showing lack of immediate danger. In so arguing, he relies on *Smigaj v. Yakima Valley Mem'l Hosp. Ass'n*, 269 P.3d 323, 860–61 (Wash. Ct. App. 2012), but he misapplies *Smigaj*, which doesn't stand for the proposition that a suspension cannot wait one day. Instead, the *Smigaj* court took issue with the perceived slow pace of the peer-review investigation, noting that it took months from start to suspension. *Id.* at 861. It reasoned that the committee "did not act in a manner that suggested an imminent danger." *Id.*

Dissimilarly, in this case, the PRC sent the [redacted] file to an external reviewer the day after he died. (Doc. 367, Ex. C, p. SPH-SW_007340; Doc. 263, Ex. 67, p. SPH_000148.) The reviewer issued his report on October 9, the CC reviewed it on October 12, it voted to suspend on October 14, and Weiner agreed to a voluntary refrainment the next day. (Doc. 263, Ex. 67, p. SPH_000254; *id.*, Ex. 28, p. SPH_001095–97; Doc. 251, Ex. 5.) This quick pace demonstrated urgency.

Nevertheless, *Smigaj*'s approach was incorrect. The analysis is objective, asking whether the circumstances justified a summary suspension. *See Austin*, 979 F.2d at 734. Properly understood, § 11112(c)(2) allows a review body to impose a suspension if there is a reasonable basis to conclude that, without it, a danger to someone's health may arise before the review body can complete its review. *See* 42

U.S.C. § 11112(c)(2).

This reading is guided by the text. First, the statute doesn't require a danger to *life* but instead to "health," suggesting that the danger need not be life-threatening. Second, the statute doesn't require that there *be* a danger but instead that one "may result," meaning may "arise as a consequence"[2] of not imposing the suspension. This indicates that the danger need not have arisen at the time of the suspension. And third, the statute doesn't require an *immediate* danger but instead an "imminent" one, meaning the danger is "ready to take place" or "happening soon."[3] When read in context with the rest of the provision, an "imminent" danger means one that may arise before the review body can complete its "notice and hearing or other adequate procedures." 42 U.S.C. § 11112(c)(2).

The above interpretation is consistent with the prevailing view. *See Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1443 (9th Cir. 1994), *overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001); *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 917 (8th Cir. 1999); *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 382–83 (5th Cir. 2008). For example, in *Sugarbaker*, the suspension of a physician complied with § 11112(c)(2) even though

[2] *Result*, Merriam-Webster.com, at https://www.merriam-webster.com/dictionary/result.
[3] *Imminent*, Merriam-Webster.com, at https://www.merriam-webster.com/dictionary/imminent.

he had no current patients admitted to the hospital. 190 F.3d at 909–10. It was enough that his continued privileges *may* result in danger to health. *Id.*

Rather than being reserved for "extraordinary cases," subsections (c)(1)(B) and (c)(2) work in tandem with (a)(3) to create a fair approach that balances the physician's rights with patient safety: "legitimate concerns lead to temporary restrictions and an investigation; an investigation reveals that a doctor may in fact be a danger; and in response, the hospital continues to limit the physician's privileges." *Poliner*, 537 F.3d at 382–384.

In this case, there was clear evidence in October 2020 that failure to suspend Weiner may result in imminent danger. The PRC forwarded five external reviews and four other cases to the CC, emphasizing they "are seriously concerned" with Weiner's practice and "genuinely concerned about patient safety." (Doc. 251, Ex. 44.) And the CC received a sixth external review in which the reviewer concluded Weiner may have caused the patient's death because of substandard care. (Doc. 339, Ex. Z.) Suspension pending further investigation was justified.

November 17, 2020—Voluntary refrainment. Weiner argues the November 17 suspension is invalid because he was on "leave" and therefore "could not admit a patient in the future." (Weiner Brief, p. 39.) He refers to the November 12 letter between attorneys considering him to be on "leave of absence." He claims this triggered a bylaw provision placing his privileges in "abeyance." (Doc. 105, p. 18;

Doc. 263, Depo. Ex. 20, pp. 6–7.) Once in abeyance, SPH's Board must reinstate the privileges after "procedures for reinstatement." (*Id.*)

This argument fails because there were indeed reasonable indications that Weiner could soon attempt to exercise privileges. The November 12 letter is plainly inconsistent with the notion that Weiner's privileges needed to be reinstated by the Board. Instead, Weiner merely "agree[d] that he will not exercise his clinical privileges" for eighteen days. (Doc. 263, Depo. Ex. 48.) This meant Weiner still had his privileges, and that on November 17 his promise would end in less than two weeks. Furthermore, the November 17 employment-termination letter documented SPH's belief that, per reports from CTC staff, Weiner was having "discussions regarding patients … that undermine the treatment recommendations of [stand-in] physicians." (Doc. 263, Ex. 12.) There was a reasonable basis to conclude failure to suspend may result in imminent danger to health.

b. Standard 2: Reasonable effort to obtain the facts

Weiner cannot rebut the presumption that the SPH Defendants made a "reasonable effort" to obtain the facts before taking corrective action. 42 U.S.C. § 11112(a)(2). Importantly, the standard calls for "effort," not success. And it requires only that the effort be "reasonable," not "perfect." *Poliner*, 537 F.3d at 380.

Weiner advances a more stringent standard stated in *Smigaj*: that the reviewing body must thoroughly investigate and verify reports and allegations,

rather than trust in their sources. (Weiner Brief, p. 42.) But he errs in relying on *Smigaj*, which in turn cited as support the now-outdated Tenth Circuit opinion *Brown*. Since then, the Tenth Circuit has clarified that *Brown* was somewhat unique to its facts, involving "overwhelming proof of conjuring up evidence against the doctor." *Cohlmia v. St. John Med. Ctr.*, 693 F.3d 1269, 1277 n.3 (2012) (quoting approvingly the district court). The thoroughness of investigations will depend on the need. *Id.* at 1278 n.4. For example, when the issue "concerns a single incident, summary suspension will inherently require less intensive fact finding." *Id.*

Under the proper test, Weiner's arguments fail. We address them in turn.

Outside Reviews. Weiner criticizes that the actions against him were based on unverified outside reviews. But this criticism is invalid for two reasons.

First, it's beneficial to seek disinterested, outside review, especially in this case because SPH didn't have another oncologist. SPH could rely on the outside reports because "HCQIA does not require the ultimate decisionmaker to investigate a matter independently." *Gabaldoni*, 250 F.3d at 261. It may instead "rely on the reports and investigations of the various committees . . . in rendering its decision." *Id.* All that matters is that "the totality of the process leading up to [the action] evidenced a reasonable effort." *Id.* (quoting *Mathews*, 87 F.3d at 637).

Second, SPH didn't merely rely on outside reviews. The PRC reviewed the cases and expressed it was "genuinely concerned about patient safety." (Doc. 251,

Ex. 44.) The CC, Tarver, Hale, and the MEC also reviewed the cases before acting. For example, before the October 15 letter, the CC discussed the [redacted] case and agreed "they are all concerned."

No Missing Information. Weiner challenges the [redacted] review by arguing that the PRC failed to provide critical documents to the outside reviewer. Not so. As explained in the statement of facts, the reviewer had the information that Weiner incorrectly states was missing.

Interpretation of Data. Weiner argues that the CC's Report to the MEC was inaccurate because it interpreted the Greeley Report as finding substandard care for "approximately 10% of the randomized cases." (Doc. 263, Ex. 24, p. SPH_002100.) But this is a reasonable interpretation of Greeley's determination that only 90% of the oncology cases were "Appropriate," categorizing the rest as "Questionable" or "Not Appropriate." (*Id.* Ex. 49, p. SPH_000847.) But even if the CC were to have misinterpreted Greeley, that would speak only to its "interpretation of the facts—not its 'effort to obtain the facts.'" *Singh*, 308 F.3d at 39.

Information from Weiner and Others. Weiner complains that the SPH Defendants didn't obtain input from him and others. But that's not accurate. The [redacted] case sent for outside review was accompanied by records that already contained the views of two SPH physicians who doubted Weiner's 2009 diagnosis. (Doc. 263, pp. SPH_000157, 174–77, 196, 199, 218.) And it even contained

Weiner's own records discussing the [redacted] matter, including his response to the skepticism about his diagnosis. (Doc. 263, Ex. 67, pp. SPH_000171, 198.) There was plenty to support the decision on October 2020 to suspend. As the investigation progressed, the CC and MEC thoroughly interviewed Weiner, though "[n]othing in the [HCQIA] requires that a physician be permitted to participate in the review of his care." *Singh*, 308 F.3d at 40. The SPH Defendants made reasonable efforts, and Weiner fails to identify any missing information that would have made a difference.

c. Standards 1 and 4: Reasonable belief

Standards 1 and 4 are "closely related" and can be evaluated together. *Singh*, 308 F.3d at 38 n.13; *see Sugarbaker*, at 916. These objective standards are met if "the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action [was warranted and] would restrict incompetent behavior or would protect patients." *Bryan*, 33 F.3d at 1334–35, 1337.

Here, a reasonable reviewer could clearly conclude that the actions against Weiner were warranted and furthered quality care. An external review confirmed the PRC's conclusion that Weiner had treated [redacted] for eleven years without adequately confirming malignancy, and that the chemotherapy likely led to his death. (Doc. 263, Ex. 67, p. SPH_000254, 263.) And several other cases caused the PRC to ask the CC for corrective action because the physicians were "genuinely

concerned about patient safety." (Doc. 251, Ex. 44.) The November 2020 suspension letter detailed highly worrisome chronic-pain cases and other matters. (Doc. 263, Ex. 11.)

In response, Weiner argues the peer review was merely a "sham" designed to address Benefis Health System's announcement of a competing clinic. (Weiner Brief, p. 15, 36 n.6.) However, the investigation began many months before Benefis's announcement (Doc. 263, Ex. 28, p. SPH_001092), and the evidence shows only proper motives (Doc. 263, Exs. 22–28). Weiner doesn't present anything other than suspicion and conjecture. *See Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 37, 410 Mont. 239, 518 P.3d 840. Furthermore, allegations of "bad faith" are immaterial to the objective standard. *Austin*, 979 F.2d at 734.

2. <u>All claims are "with respect to" the professional review actions</u>

The Court should hold that all claims fall within the scope of HCQIA immunity and were correctly dismissed.

Weiner believes portions of Counts III–IX survive HCQIA immunity, insofar as they allege disclosure of information about his professional-review actions to others. He specifically criticizes two events: (a) an update to the CTC staff in a meeting on November 17, 2020, and (b) a disclosure about Weiner to the staff, patients, and public on December 7–8, 2020. (Weiner Brief, pp. 21, 23–24.)

However, even these portions of the claims fall within the scope of HCQIA

immunity, which applies to all damages "with respect to" the professional-review actions. 42 U.S.C. § 11111(a)(1). "Professional review action" includes all related "professional review activities," 42 U.S.C. §§ 11111(a)(1), 11151(9), such as conduct related to the investigation, *Austin*, 979 F.2d at 737. And the phrase "with respect to" means "with reference to," "concerning," or "relating to."[4] Therefore, Weiner's damages are barred if they are with reference to or relate to the professional review actions or related activity. Weiner's alleged damages are barred.

November 17, 2020. Clearly, when Weiner was suspended on November 17, SPH had to announce it to his staff. He was the only oncologist, and he "did not practice in a vacuum," having about twenty nurses. (*Id.* p. 37, 604–05.) The staff would have questions, and they would have to field questions from patients and the public. Why is Weiner gone? What did he do? Should we postpone appointments? Is he coming back? Do we need to make changes to patients' treatment? SPH had to decide what information concerning the professional-review action was appropriate to disclose. This difficult-but-unavoidable task was a necessary part of the suspension.

The Fourth Circuit agrees that "*announcement* of a change in a physician's status is inherently part of the 'professional review action' protected by the HCQIA."

[4] *Respect*, Merriam-Webster.com, at https://www.merriam-webster.com/dictionary/with%20respect%20to; *Concerning*, Merriam-Webster.com, at https://www.merriam-webster.com/dictionary/concerning.

Gabaldoni, 250 F.3d at 260 n.4. In *Gabaldoni*, the physician alleged breach of the bylaws for his termination and for "disseminating information to hospital personnel and third parties regarding the same." *Id.* at 259. He argued that this dissemination wasn't immune, but the court disagreed. *Id.* at 260 n.4. Announcements are part of the process, and they are categorically "covered by the broad grant of immunity." *Id.* This holding makes sense because, if it were otherwise, there would be frequent damages claims regarding alleged breach of confidentiality, thereby undermining HCQIA's purpose of shielding reviewers from damages.

Furthermore, in November 2020, SPH committees were investigating potential revocation. And Weiner alleges that SPH Defendants asked the staff to bring forward information about substandard care. (Doc. 263, p. 33.) This alleged conduct constitutes investigation, and to effectively vet and gather related information, they would necessarily have to explain what the allegations are.

December 7–8, 2020. Under the same reasoning, SPH's announcements on December 7–8 to the staff, patients, and public fall within HCQIA immunity. SPH recognized that the staff was "on the front lines . . . answering phones and interacting frequently with patients." (Doc. 263, Ex. 38.) It therefore sent them answers to Frequently Asked Questions and told them to "stay to the below script and *don't comment any further*." (*Id.*) (emphasis added). The substance of the FAQs was also published in the local newspaper and in a letter to patients. (*Id.*, Exs. 37, 39.) This

conduct is a clear attempt to control what information gets disclosed about Weiner's suspension and to minimize ad hoc answers by staff to the patients' and public's frequently asked questions. These efforts resulted directly from, and were an inherent part of, the professional-review action.

Remember, in *Gabaldoni*, the plaintiff alleged disclosures to "third parties," but the court recognized that such announcements were an inherent part of the professional-review action and protected. *Gabaldoni*, 250 F.3d at 259, 260 n.4. Indeed, it would be extraordinary to conclude that SPH couldn't inform the CTC patients about potential concerns with their treatment. Nor would the immunity be a persuasive incentive for participation if inevitable announcements and answers to questions were a minefield that could expose reviewers to damages.

The Court should hold that all of Weiner's claims are barred.

II. THE SPH DEFENDANTS ARE ENTITLED TO JUDGMENT ON ANY REMAINING CLAIMS

If the Court concludes that a portion of Weiner's claims survives HCQIA immunity, the Court should affirm dismissal of the claims on any proper basis, *Mountain Water Co.*, 2020 MT 194, ¶ 42, including the following.

1. Breach of Contract

Weiner's breach-of-contract claim concerns both his employment contract and the bylaws. We address each.

Employment. The employment contract clearly says Weiner's employment

shall immediately terminate if his Medical-Staff membership or clinical privileges are suspended. (Doc. 263, Ex. 1, pp. 5–6.) If a contract is clear, a court interprets it as a matter of law and "appl[ies] the language as written." *Richards v. JTL Grp., Inc.*, 2009 MT 173, ¶ 13, 350 Mont. 516, 212 P.3d 264 (citation omitted). There's no dispute that Weiner was suspended on November 17, 2020, so the immediate termination couldn't be a breach.

Bylaws—Individuals. Per *Hughes v. Pullman*, bylaws are not enforceable contracts between individual physicians because "there is clearly no consideration." 2001 MT 216, ¶¶ 33–35, 306 Mont. 420, 36 P.3d 339. Under the reasoning in *Hughes*, the Court should affirm dismissal against each defendant other than SPH.

Bylaws—SPH. Weiner argues that HCQIA doesn't bar damages for disclosed peer-review information. (Weiner Brief, p. 46.) Even if true, the claim fails.

Weiner relies on M.C.A. § 50-16-203, which says that "[a]ll proceedings, records, and reports of committees are confidential and privileged." However, the statutory confidentiality and privilege don't belong to the reviewed physician but instead to "all members of the Committee as well as to the patients whose cases are reviewed." *Sistok v. Kalispell Reg'l Hosp.*, 251 Mont. 38, 823 P.2d 251, 253–54 (1991), *partially overruled on other grounds by Huether v. Dist. Ct. of Sixteenth Jud. Dist. of State of Mont., In re Cnty. of Custer*, 2000 MT 158, ¶¶ 19, 21, 300 Mont. 212, 4 P.3d 1193). This is why, when the Court considered who must consent to

waiver of the privilege, it listed only the committee members and the patient, not the physician. *See id.* Furthermore, before the alleged disclosures, [redacted] estate was already making allegations of malpractice regarding [redacted] death. (Doc. 377.)

2. Breach of the Implied Covenant

The Court should affirm any remaining portions of the implied-covenant claim for the following reasons.

Employment. The employment contract contains an express provision permitting Weiner's immediate termination if his privileges are suspended. This is dispositive because the covenant of good faith cannot prohibit a party from doing what the agreement expressly permits. *Farris v. Hutchinson*, 254 Mont. 334, 838 P.2d 374, 376–77 (1992).

Bylaws—Individuals. There can be an implied-covenant claim only if there's an "underlying, independently enforceable contract." *House v. U.S. Bank Nat'l Assoc.*, 2021 MT 45, ¶ 23, 403 Mont. 287, 481 P.3d 820. The individual defendants don't have an enforceable contract with Weiner, *see supra*, so they cannot have breached an implied covenant.

Bylaws—SPH. The implied-covenant claim fails for the same reasons the breach-of-contract claim fails: The confidentiality right belongs to others.

3. Wrongful Termination

Weiner's claim under the wrongful-discharge statute fails because the statute

doesn't apply to a contract "for a specific term," M.C.A. § 39-2-912(2) (2020), and Weiner's contract was for a specific term ending May 31, 2020, with up to four renewal terms. (Doc. 263, Ex. 1, p. 1, attachment A.)

Weiner argued that the agreement wasn't for a specific term because it contained renewal terms. (Doc. 309, p. 17.) But in *Farris*, this Court considered a professional-employment contract that had an initial term of "one year" and "provided for non-renewal with adequate notice," and the Court held that the contract was "for a specific term as contemplated under the Act." 838 P.2d at 375, 378. Weiner's claim fails.

4. Interference with Prospective Business Advantage

Weiner contends that HCQIA doesn't bar the portions of his claims that seek to recover for disclosure of information. If true, one portion of the interference claim would survive: the allegation that the defendants disclosed information with the intent to harm his ability to practice at a competing clinic. (Doc. 105, p. 41.) Nevertheless, the district court correctly dismissed this allegedly remaining portion as unsupported.

A claim "must give notice to the other party of the facts which the pleader expects to prove." *Mysse v. Martens*, 279 Mont. 253, 926 P.2d 765, 773 (1996). Weiner's complaint, however, doesn't allege that he attempted to join a competing clinic or suffered interference. (Doc. 105, p. 41.) At most, Weiner implies that he

could have joined Benefis, who announced a clinic in Helena. (*Id.* p. 11.) Therefore, the question was whether Weiner could support such an implication. Weiner included evidence of Benefis's announcement (Doc. 263, Ex. O), but the SPH Defendants countered with undisputed evidence that Weiner never applied to work there. (Doc. 340, Ex. FF.) The district court correctly dismissed Weiner's interference claim as unsupported by evidence of harm. (Doc. 379, p. 27.)

5. Defamation

We agree with the district court that no reasonable jury could find the SPH Defendants' statements were false, and we incorporate its analysis here. (Doc. 380.) Both parties inundated the court with materials from the professional-review action, and these insurmountably confirmed the truth of the defendants' statements. "[I]f the evidence is so overwhelming that any other conclusion would be unreasonable," then "the court is afforded the discretion to make a proper finding" that the statements were "essentially truthful." *Hale v. City of Billings, Police Dept.*, 1999 MT 213, ¶¶ 17–18, 295 Mont. 495, 986 P.2d 413.

We also advance these alternative bases to affirm:

No malice. Weiner was a public figure regarding his status at SPH. As early as 2016, the public cared deeply about Weiner's continuance at SPH. (Doc. 263, Exs. D–F.) Inevitably, the corrective actions sparked public outcry and debate. (Doc. 263, Ex. K.) Weiner invited public attention in his publication on December 6, 2020.

(Doc. 336, Ex. 2.) Weiner was therefore a public figure and must prove the SPH Defendants knew their statements were false or "entertained serious doubts as to the truth." *Planet Aid, Inc. v. Reveal*, 44 F.4th 918, 928 (9th Cir. 2022). Weiner failed this test because he didn't present evidence that the defendants knew or suspected any falsity, and HCQIA imposes an unrebutted presumption of "reasonable belief" that the actions were justified and furthered quality care. 42 U.S.C. § 11112(a).

Opinions. Opinions aren't defamatory. *McConkey v. Flathead Elec. Co-op*, 2005 MT 334, ¶ 49, 330 Mont. 48, 125 P.3d 1121. In *McConkey*, a board member wrote letters to newspapers accusing a manager of mismanagement, but this wasn't actionable because it constituted opinion. *Id.* ¶¶ 16, 49. Likewise, statements that Weiner's suspension was because of his own poor performance are non-actionable.

Privilege. A communication is privileged if made without malice to a "person interested." M.C.A. § 27-1-804(3). Thus, a publisher acting without malice can give information to someone in common interest with it, or someone whose important interests are affected by the information. Restatement (Second) of Torts §§ 595–596 (1977). For example, "statements of church members made in the course of disciplinary … proceedings" or of "disfellowship made … to other Church members interested in the matter" are privileged, even with "incidental communication to non-Church members." *Rasmussen v. Bennett*, 228 Mont. 106, 741 P.2d 755, 758 (1987).

In this case, there's no evidence of malice, and SPH had a common interest

with its staff in ensuring everyone had the information they needed about a fellow employee to effectively do their jobs. And SPH's patients had an important health interest in knowing about potential issues with care.

6. Unfair Trade Practices Act

The district court correctly dismissed Weiner's unfair-trade-practices claim because he failed to support it with anything other than "mere speculation." (Doc. 379, p. 29.) The evidence the parties submitted shows only legitimate motives for the corrective actions, and on appeal Weiner makes no attempt to identify any contrary evidence. Mere suspicion of anti-competitive behavior isn't enough to create a genuine issue for trial. *See Kostelecky*, 2022 MT 195, ¶ 37.

7. Civil Conspiracy

If the Court affirms dismissal of Weiner's other claims, it should affirm dismissal of the civil-conspiracy claim, which by its nature relies on the viability of an underlying tort. *Duffy v. Butte Teachers' Union, No. 332, AFL-CIO*, 168 Mont. 246, 541 P.2d 1199, 251–52 (1975). Its function is to make otherwise non-tortfeasors liable in damages with the tortfeasors. *Id.* If the underlying tort fails, civil conspiracy fails. *Hughes*, 2001 MT 216, ¶ 26.

8. Due Process

If the Court concludes that HCQIA immunity applies, then it should affirm dismissal of the due-process claim because Weiner hasn't argued it as independent

from the statutory analysis. Alternatively, the Court should hold that Weiner received due process.

Confined to HCQIA. Weiner listed "due process" as a separate claim, but he clarified in the district court that he was referring to "due process rights *under HCQIA*," and he didn't brief Count X independently. (Doc. 309, pp. 14, 15 n.6) (emphasis added). He agreed that, if the professional-review actions complied with HCQIA's standards, then they complied with due process. (*Id.* p. 3.) And the same holds true on appeal: Weiner makes no due-process argument independent of his interpretation of HCQIA. (Weiner Brief, p. 29.) His argument is that the SPH Defendants must "satisfy § 11112(a)'s due process requirements for immunity to attach." (*Id.*, p. 32.)

Therefore, if HCQIA applies, the Court should dismiss the due-process claim, which Weiner confined to compliance with HCQIA. In other words, Weiner hasn't made an "as-applied" constitutional challenge to HCQIA immunity. *See Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Reg.*, 2022 MT 227, ¶ 11, 410 Mont. 450, 520 P.3d 301.

If Weiner argues otherwise in his reply, he failed to preserve the independent constitutional challenge. *See Hanley v. Dep't of Revenue*, 207 Mont. 302, 673 P.2d 1257, 1259 (1983); *Young v. Era Advantage Realty*, 2022 MT 138, ¶ 15, 409 Mont. 234, 513 P.3d 505.

Merits. Alternatively, the SPH Defendants—if deemed State actors subject to the Due Process Clause—gave Weiner constitutionally appropriate pre- and post-deprivation process. (Doc. 379, p. 30.) Due process is flexible, and post-deprivation process is appropriate when the State actor "must act quickly" or "it would be impractical to provide predeprivation process." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Serious concerns about protecting public health or safety certainly qualify as a justification to "act quickly." *See Patel v. Midland Mem'l Hosp. and Med. Ctr.*, 298 F.3d 333, 339–40 (5th Cir. 2002).

For example, in *Patel*, it was constitutionally permissible for a hospital to immediately suspend a physician when its medical staff became concerned about his competency and the accuracy of his documentation. *Id.* at 336, 339–40. The committee notified the physician of his suspension by letter, he asked for a post-deprivation hearing, and he received it. *Id.* at 337. Under a reasonable belief that the physician "posed a danger to patient safety," it "was not practical under the circumstances" to provide pre-deprivation procedures. *Id.* at 339–40.

Similarly, in this case, Tarver and Hale had plenty of reason to be concerned about patient safety before they decided to suspend Weiner in October 2020. The PRC forwarded the CC five external reviews and four other cases, emphasizing they "are seriously concerned" with Weiner's practice and "genuinely concerned about patient safety." (Doc. 251, Ex. 44.) Additionally, the CC received a sixth external

review, the [redacted] case, in which the reviewer concluded Weiner may have caused the patient's death after giving him chemotherapy for eleven years without a confirmed cancer diagnosis. (Doc. 339, Ex. Z.) It didn't violate the constitution to seek a suspension, subject to an opportunity to be heard within fourteen days and, if requested, a formal hearing and appeal.

At each subsequent stage, the evidence against Weiner mounted, further justifying temporary deprivation. For example, SPH discovered Weiner was prescribing high-dose opioids without documented pain contracts, chronic-pain treatment plans, or precautions like urine tests. (Doc. 263, Ex. 11.) Many prescriptions weren't documented in medical records, and the MEC identified cases of particular concern, where the prescriptions didn't appear justified given the patient's condition or propensity for abuse. (*Id.*)

This Court held that a physician doesn't have a constitutionally protected interest in exercising clinical privileges in violation of bylaws, and that "hospitals have the discretionary right to exclude, suspend or take away staff privileges upon grounds set by the medical staff." *N. Valley Hosp., Inc. v. Kauffman*, 169 Mont. 70, 544 P.2d 1219, 1223–24 (1976). In this case, SPH's bylaws required Weiner to practice quality medicine and to properly document his treatment. The undisputed evidence shows he didn't meet these requirements, and that his suspension and ultimate revocation were justified.

CONCLUSION

The Court should affirm in full the district court's summary judgment order, and it should grant the SPH Defendants' reasonable attorney fees under 42 U.S.C. § 11113 because Weiner's appeal was unreasonable and without foundation.

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CERTIFICATE OF COMPLIANCE

I certify that, excepting the cover and the components of the brief excluded from the word count computation, this brief is in 14-point font and is in Times New Roman, a proportionately spaced typeface. The brief is double spaced except for the cover, footnotes, and quoted and indented material. Excluding the cover, table of contents, table of citations, certificate of service, certificate of compliance, and appendix, this document's word count is **9,999 words**.

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