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 REPLY BRIEF

(APPEARANCES ON NEXT PAGE)

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INTRODUCTION

Defendants confirm this case is limited to Defendants' conduct between October and December 2020. *See* Response, pp. 16-17. Indeed, the HCQIA Order addressed four professional review actions: (1) the CC's October 14 vote to summarily suspend Weiner; (2) Weiner's October 15 summary suspension; (3) the November 17 second summary suspension; and (4) the CC's recommendation to revoke Weiner's privileges, which the MEC adopted on December 15. App. 1, pp. 10-11.

Defendants' subsequent conduct—including their June 2021 administrative hearing, the October 14 Hearing Panel decision revoking Weiner's privileges, and the Board's January 6, 2022 denial of Weiner's appeal—**was not at issue**. SPH's Bylaws prohibited Weiner from challenging that administrative process until his appeal was denied. Dkt. 263 ("SUF"), Ex. 20, p. 48 (Exhaustion of Remedies).

SPH's Bylaws required Weiner's administrative hearing to occur "as soon as arrangements therefore may reasonably be made[,]", SUF, Ex. 20, p. 48; the Hearing Panel deliberate within 20 days after the hearing, *id.*, p. 52; and the appellate review not take more than 30 days. *Id.*, p. 53. With Defendants controlling the process, Weiner had to wait to challenge the predetermined, but not final, results while *Weiner I* progressed. Defendants took over a year.

To assert his triggered right, Weiner sought leave to challenge Defendants' administrative process within a month of SPH's appellate review. Dkt. 157, Ex. A. The court denied Weiner's motion based on Defendants' arguments that additional claims would require "additional discovery in an unreasonably short period of time or vacate the current scheduling order and trial date causing more delay." Dkt. 168 (Apr. 22, 2022). (Despite Defendants' purported concerns, they obtained multiple extensions, and the trial was vacated.)

The court decided the faulty administrative process would not be at issue in *Weiner I*.[1] So, Weiner filed *Weiner II* (*see Weiner v. St. Peter's Health*, 2024 MT 155 (DA 23-0224)) to assert his challenge. This Court recently issued its *Weiner II* Opinion, affirming dismissal based on the prohibition against claim splitting. *Id.*, 2024 MT 155, ¶14. Accordingly, the administrative process will only become an issue in this case if Weiner successfully appeals the denial of his motion to amend. *See id.*, ¶16.[2] (That denial is not the subject of this interlocutory appeal. *See* Order (Feb. 27, 2024)).

[1] In denying Weiner's motion for leave to amend the FAC and, ultimately, the HCQIA Order, the court challenged Weiner for opposing Defendants' Motion to Stay. *See* Dkt. 168, pp. 3-4; App. 1, p. 6. But as the court itself recognized by denying a stay, *Weiner I*—as it stands—does not assert claims challenging the administrative process. Dkt. 101.

[2] Absent successful appeal, Weiner will forever be denied due process to challenge the sham administrative proceeding that ended his career.

Despite everyone agreeing Defendants' administrative processes in 2021-2022 are not at issue in *Weiner I*,[3] most of the evidence Defendants presented to support their successful summary judgment motion was taken from that process. Specifically, Defendants offered sixteen exhibits from the administrative process: Exhibit G and Exhibits K-Y. Dkt. 251. Defendants cited the administrative hearing transcript (Exhibit G) 49 times, *id*, ¶¶16-118, and extensively quoted the Hearing Panel's findings (Exhibit V), *id.*, ¶¶123-125, to establish the "facts" for their motion.

The court adopted Defendants' version of facts nearly *carte blanche* and expressly relied on the administrative process to conclude "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. In doing so, the court ignored Weiner's pending motion in limine to exclude such hearsay (Dkt. 291) and—ignoring its own holding on relevance (App. 1, p. 24)—adopted administrative findings it prevented Weiner from challenging.[4]

Nothing from the administrative review should have been considered. *Id.* These documents are inadmissible hearsay, *see* M.R.Evid. 801(c); *Cheyenne Tribe v.*

[3] Defendants did not respond to Weiner's Statement of the Case so it is deemed well-taken. Mont.R.App.P. 12(2)

[4] The court also disregarded Weiner's pending discovery sanctions motion (Dkt. 297).

Roman Catholic Church, 2013 MT 24, ¶21, 368 Mont. 330, 296 P.3d 450, and it is/was a patent denial of due process for Defendants and the district court to weaponize the hearing/appeal against Weiner while preventing him from conducting discovery on and challenging that process. *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 843 (3d Cir. 1999); *Stratienko v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 2008 U.S. Dist. LEXIS 68861, *33-4 (E.D. Tenn 2008); *Brandner v. Providence Health & Servs.*, 394 P.3d 581, 595 (Alaska 2017).

RESPONSIVE STATEMENT OF FACTS

In an about-face, Defendants' Statement of Facts *attempts* to cite admissible evidence. *But see* Response, pp. 4, 10, 13-14, 17 (citing Dkt. 251, Exhibit G).[5] This is impermissible. Parties on appeal may not rely on evidence or present arguments not presented to the district court. *State v. Peterson*, 2013 MT 329, ¶26, 372 Mont. 382, 314 P.2d 227.

Further, Defendants' factual recitation is replete with argumentative, conclusory statements without credible supporting evidence. *See Gonzales v. Walchuck*, 2002 MT 262, ¶9, 312 Mont. 240, 59 P.3d 377. The instances are too numerous to address, but some significant examples are discussed below.

[5] In a footnote, Defendants strangely claim their Statement of Facts represents "[e]vidence to show the information SPH had isn't hearsay." Response, p. 2 n.1. Then Defendants continue to cite the inadmissible administrative hearing transcript.

First, Defendants state: "Weiner is incorrect" when he "asserts the PRC failed to send 'crucial documents, including biopsy results,' and suggests the review [of Patient 1] was thereby compromised." Response, pp. 6-7 (comparing SUF, Ex. 61 with SUF, Ex. 67, pp. 000230-31). Defendants' comparison illustrates that critical medical records were not provided to the outside reviewer. These records show Patient 1's treating physician concluded, "findings consistent with **metastatic carcinoma**" and "**DIAGNOSIS**: … Neoplasm Lymph Nodes neck-malignant, metastatic." SUF, Ex. 61, p. 001613, 001615, (emphasis added). Accordingly, Patient 1 was referred by his treating physician to Weiner for "**probable lung Cancer with metastasis**." *Id.* (emphasis added). These withheld documents are especially important because they confirm the mass biopsied was from a lymph node and not soft tissue and, therefore, confirm the treating physician's diagnosis—in staunch opposition to Defendants' assertion that "Weiner treated a patient for eleven years without a properly confirmed diagnosis." Response, p. 1.[6]

Second, Defendants misrepresent the PRC's role for the purposes of HCQIA. The PRC chair confirmed the PRC does not conduct investigations. Dkt.

[6] Why did Defendants withhold documents establishing Patient 1 had cancer? More importantly, how does withholding documents comport with Defendants' obligation to make a "reasonable effort" to obtain facts before taking corrective action? § 11112(a)(2).

367, p. 7. The PRC's internal documents also prove it did not do anything the CC should have. Dkt. 367, pp. 8-9.

Third, the CC did not tell the PRC to send "five cases to the reviewers at the university of Utah." Response, p. 4. The five cases in addition to Patients 1 and 2 (Dkt. 367, p. 9) were chosen and sent for review by the administration without any committee oversight. Hale and Tarver confirmed this. Dkt. 172, ¶¶17-24; SUF, ¶68.

Fourth, Defendants omit Johnson's involvement in the November 17 summary suspension. He met with Tarver and Hale, and also suspended Weiner. *Compare* Response, p. 11-13, *with* Opening Brief, pp. 18-20. While the CC investigation was ongoing, the three usurped the CC—which had the same reviews but needed to meet with Weiner before taking action—and summarily suspended Weiner without notice or a hearing.

Fifth, Defendants repeat their bald claim that locums raised concerns. Response, pp. 11, 14. The CC's members who conducted the "investigation" readily admit: (1) they never interviewed any locums in connection with their investigation, SUF, ¶43 (citing Hale Depo, 42:2-6 (Dkt. 301)); Tarver Depo., 72:17-73:15 (Dkt. 302)); and (2) the adverse actions were based solely on a handful of external reviews. SUF, ¶¶48, 49, 105 (citing Ex. 5; Hale Depo., 49:15-50:12; Tarver

Depo., 71:22-72:27, 116:19-117:8). Defendants cannot legitimately cite self-serving hearsay documents prepared by them to contradict their sworn testimony.

Next, Defendants again cite an internally prepared document to conclude the MEC "engaged in a wholistic review of Weiner's peer review process" when suspending and revoking Weiner's privileges. Response, p. 16. The MEC's members admit that is untrue: it (1) "didn't conduct any investigation" even though the Bylaws specify it is responsible for investigations after summary suspension (SUF, Ex. 20, p. 44) and relied solely on the tainted Hale Report to uphold the CC's actions, SUF, ¶106 (Tarver Depo., 116:19-117:8); (2) did not share Weiner's explanations with the outside reviewers as suggested, SUF, ¶111 (Tarver Depo., 127:2-11);[7] and (3) withheld the medical records Weiner required to defend himself, SUF, ¶120 (Hale Depo., 121:18-122:9). The MEC's review was not wholistic; it was slanted and unfair.

Finally, Defendants fail to address a multitude of facts, which remain undisputed, including:

> Weiner wasn't subject to a covenant not to compete if he quit. SUF, ¶32.
>
> After Weiner threatened to quit, Defendants conducted a secret meeting just prior to initiating adverse actions. SUF, ¶31.

[7] This is especially damning because SPH "didn't have another oncologist" who could assess Dr. Weiner's explanations. Response, p. 29.

Weiner was never interviewed, provided notice of, or given an opportunity to address allegations prior to Defendants' adverse actions. SUF, ¶¶41-42, 47.

Defendants promised to provide Weiner sufficient information (including the outside reviews) so he could defend himself but never did. SUF, ¶¶60, 105, 110, 117, 120-121.

SPH's administrators can't participate in peer review but, nonetheless, injected themselves into the investigation by hand-selecting cases for external review. SUF, ¶¶66, 68.

Weiner's second suspension occurred when he couldn't practice medicine based on unsupported accusations he was directing patient care through nurses. SUF, ¶¶80-84.

Hale admitted the purpose of the second suspension: not wanting the investigation to linger into the holidays. SUF, ¶78.

Tarver didn't know whether external reviewers were aware of—and presumably weren't—other pertinent facts directly contradicting criticisms of Weiner. *Id.* (citing Tarver Depo. 102:6-103:9, 104:11-105:19, 106:8-108:2, 108:10-110:21, 111:7-113:17).[8]

Hale admitted no evidence existed to support allegations that locums were "scared" to practice medicine at SPH. SUF, ¶¶89-90.

One patient used to suspend/revoke Weiner's privileges continued receiving the identical "problematic" agent from Defendants' locums because it was working. SUF, ¶52.

Johnson publicly disclosed peer review information and claimed Weiner harmed patients. SUF, ¶¶137-140.

[8] Five of the patients discussed in these portions of Tarver's deposition are identified on page 12 of Defendants' Response. Another is discussed in SUF, ¶52.

> Johnson obtained the information from protected peer review and could not publicly disclose that information. SUF, ¶¶141-43.
>
> The Hale Report, which the MEC solely relied on to affirm Weiner's suspension and revocation, didn't disclose that outside reviewers' concerns about Weiner were minor and Weiner should be commended for the quality of his work. SUF, ¶¶95-103.

These facts, and others from Weiner's Opening Brief, establish Defendants' adverse professional review actions against Weiner were not taken: (1) after a reasonable effort to obtain the facts of the matter; or (2) after providing Weiner with adequate notice. 42 U.S.C. §§ 11112(a)(2)-(3).

ARGUMENT

Summary judgment is "an extreme remedy that should be granted only when no material factual controversy exists." *Mont. Metal Bldgs., Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997). Instead, the district court gratuitously accepted Defendants' version of events—mostly extracted from Defendants' inadmissible administrative hearing—to establish "undisputed" facts upon which the HCQIA Order was premised. In doing so, the court failed to view the evidence in a light most favorable to Weiner and erred in deciding a reasonable jury could not find Defendants failed to meet one of HCQIA's immunity requirements. "It is only where reasonable minds cannot differ, that questions of fact can be determined as a matter of law." *Brown v. Demaree*, 272 Mont. 479, 483, 901 P.2d 567, 570 (1995).

Additionally, the court mistakenly held Defendants' conduct outside the protections of peer review was immune under HCQIA.

I. The HCQIA Order erroneously entered summary judgment against Weiner on Defendants' HCQIA immunity defense.

The district court's charge was to decide whether, viewing the admissible evidence in a light most favorable to Weiner, a reasonable jury could only conclude that Defendants conducted a fair proceeding, made a reasonable effort to obtain the facts, and possessed a reasonable belief their action was in furtherance of patient care. *See* § 11112(a). If any requirement of § 11112(a) is lacking, **HCQIA immunity fails as a matter of law**. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1333 (10th Cir. 1996); *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992); *Babb v. Ctr. Cmty. Hosp.*, 47 A.3d 1214, 1226 (Penn. Sup. Ct. 2012); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1334 (11th Cir. 1994). This includes a reasonable investigation, § 11112(a)(2), and adequate notice, § 11112(a)(3).[9]

A. Defendants' adverse actions were not premised on reasonable efforts to obtain the facts.

[9] Defendants cite *Singh v. BCBS of Mass., Inc.*, 308 F.3d, 25, 36, to assert "[i]mmunity is intended to be resolved expeditiously on summary judgment." Response, p. 21 (emphasis added). Defendants misstate *Singh*, which actually held a "qualified immunity determination should be made as soon as possible during the course of litigation[,]" because "insubstantial claims should not proceed to trial." *Singh*, 308 F.3d at 36 (citations omitted).

Displacing the role of the jury, the district court weighed the competing evidence and concluded that "the totality of the circumstances surrounding the investigation demonstrate [] Defendants took reasonable effort to obtain the facts of the matter before taking action," warranting summary judgment on § 11112(a)(2). App. 1, p. 17. However, just like the MEC did when it upheld the CC's decision to suspend/revoke Weiner's privileges, SUF, ¶94, the court mistakenly adopted the "CC Report of Investigation," otherwise referred to as the Hale Report, as its own factual basis. *Id.*, p. 16. The district court never addressed the significant facts presented by Weiner, establishing the CC's **investigation** was unreasonable.

Defendants also ignore the inaccuracies found within and the information withheld from the Hale Report, including, for example: (1) the inaccurate claim that external reviews showed substandard care for approximately ten percent of Weiner's cases, SUF, ¶¶92-103; (2) Hale's intentional withholding that outside reviewers concluded any concerns about Weiner were "minor" and **Weiner should be commended for his work given his high case load**, *id.*, ¶95-103; and (3) the CC did not secure additional information about the minor errors before taking action against Weiner, disregarding the reviewers' recommendation. *Id.*, ¶96.

One factor courts consider when assessing the reasonableness is whether information was falsely presented or maliciously obtained. *See* § 11111(a)(2) (no

immunity if information is knowingly false); *Jenkins v Methodist Hosps. of Dallas, Inc.*, 2004 US Dist LEXIS 28094, *47 (N.D. Tex 2004), *aff'd* 478 F.3d 255 (5th Cir 2007); *Manion v. Evans*, 1991 U.S. Dist. LEXIS 14986, *18 (N.D. Ohio 1991) (denying immunity under § 11111(a)(2) because a jury "could reasonably conclude that defendant deliberately misrepresented the facts"). Of course, there is no immunity under HCQIA—even if the recipient is a member of a professional review body—for providing false information. § 11111(a)(2).

Here, Defendants cannot refute they withheld medical records. It is undisputed that the record set provided to Patient 1's outside reviewer was missing critical records establishing the treating physician diagnosed Patient 1 with cancer. Defendants likewise cannot dispute that the Hale Report, which the MEC and the district court relied on *exclusively*, knowingly failed to disclose exculpatory findings from outside reviewers. These failures are sufficient "to raise a material issue of fact as to whether [Weiner] met his burden to show that the peer review process … was unreasonable, thus precluding summary judgment based on HCQIA immunity." *Babb*, 47 A.3d at 1223 (citations omitted).

Neither Defendants nor the district court addressed that the external reviews, which the court found Defendants reasonably relied upon, *see* App. 1, p. 16, were themselves incomplete based on the withholding of records. *See* SUF, Ex. 61;

SUF, ¶¶50-52. They also fail to address/refute: (1) SPH's administration improperly inserted itself into the peer review process; (2) Defendants never interviewed any doctors, nurses, or staff in connection with their investigation; (3) Defendants did not provide Weiner with promised information so he could refute the allegations and defend himself; and (4) Defendants did not follow up with the external reviewers to see if the explanations Weiner was able to provide, based on the limited information provided to him, changed their opinions.

In sum, the Defendants relied on a deliberately incomplete "investigation" to reach a predetermined and self-serving conclusion: "Weiner will not ever be practicing at St. Peter's Hospital again." SUF, ¶148. The district court made the same mistake, failing to consider substantial evidence presented by Weiner that rebuts the presumption of a reasonable investigation—creating triable jury questions about disputed fact issues. *Austin*, 979 F.2d at 734; *Smigaj v. Yakima Valley Mem. Hosp. Ass'n*, 269 P.3d 323, ¶63 (Wash. App. 2012), *petition denied*, 278 P.3d 1112 (Wash. 2012).

B. Defendants failed to provide Weiner with adequate notice.

HCQIA sets forth "safe harbor" provisions health care entities **must** follow for notice and hearing procedures to be adequate as a matter of law. *See Benson v. St. Joseph Reg. Health Ctr.*, 2007 U.S. Dist. LEXIS 99255 (S.D. Tex. 2007) (citing §

11112(b)). These safe harbor provisions require the entity to provide notice of the proposed action and permit the physician to request a hearing **prior to** taking adverse action. *Id.*; *Peper v. St. Mary's Hosp. Med. Ctr.*, 207 P.3d 881, 888 (App. Colo. 2008) (quoting *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 915 (8th Cir. 1999)).

It is undisputed Defendants failed to comply. They admit they did not provide Weiner with notice or an opportunity to be heard prior to summarily suspending his privileges on October 14/15 and November 17, SUF, ¶¶41-42, 47, 76, and withheld outside reviews and the Hale Report until the June 2021 administrative hearing. Dkt. 251, Ex. G., p. 907.

Since Defendants failed to provide notice and adequate hearing procedures, the question turns to whether the procedures were fair under the circumstances. *See Benson*, at *15. This is a "classic jury question" not suitable to resolution by the court on summary judgment. *Id.*; *Schindler v. Marshfield Clinic*, 2006 U.S. Dist. LEXIS 75055, at *16-17 (W.D. Wis. 2006) ("Were [the procedures afforded to the plaintiff before termination] fair? Were they adequate? These are questions not amenable to resolution on summary judgment."); *Islami v. Covenant Med. Ctr., Inc.*, 822 F.Supp. 1361, 1377-78 (N.D. Iowa 1992) (such pre-trial determinations "would

require the court to draw numerous inferences and weigh the evidence of the parties; a process which is anathema to summary judgment decisions.").

Summarily restricting privileges before notice under the imminent threat of harm exception, § 11112(c)(2), 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*, at 589-90. This exception is impossible for Defendants to satisfy. First, Defendants received the review for Patient 1 (based on incomplete records) on October 9 but waited until October 15 to suspend Weiner. Response, p. 25.[10] Second, they admitted Weiner's October 15 summary suspension was "**unrelated to clinical competency issues**[.]" SUF, ¶61. Third, the November 17 suspension was imposed when Weiner was on voluntary leave[11] unrelated to clinical competency. *Moore v. Gunnison Valley Hosp.*, 170 F.Supp.2d 1080, 1091 (D. Colo. 2001) (summary

[10] Defendants' reading of *Smigaj* is incorrect, but Defendants still did not act in a manner that suggest imminent danger under their reading because the "investigation"—from Defendants' telling—was ongoing between February to October 2020 and they received a physician complaint about Patient 1 in August.

[11] Defendants' assertion that there were reasonable indications Dr. Weiner would attempt to exercise privileges flies in the face of the Bylaws' contractual requirements.

suspension was improper when "the plaintiff had no patients under the care of the Hospital at the time of his suspension").[12]

There was no threat to patient safety. Defendants' self-serving claim that "Weiner was having 'discussions regarding patients … that undermine the treatment recommendations of [stand-in] physicians," Response, p. 28, was not stated as a reason for suspension and is patently false. SUF, ¶¶80-84. At minimum, these facts create genuine issues of material fact regarding whether a jury would find notice was required.

Defendants further argue that they were not required to provide notice of the CC's October 14 vote to suspend Weiner's privileges and October 15 summary suspension or the November 17 second summary suspension because these were not professional review actions and, therefore, did not require compliance with § 11112(a)(3). *Id.*, pp. 22-23. They are wrong. The Eleventh Circuit, in *Leal v. Secretary*, considered and rejected Defendants' identical argument, definitively holding: "A summary suspension is 'a professional review action.'" 620 F.3d 1280, 1287 (11th Cir. 2010); *see also* Dkt. 367, pp. 3-5. So is a forced abeyance/voluntary leave of absence. *Id.*; *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 634 (3d Cir.

[12] Defendants' continued reliance on *Sugarbaker*, 190 F.3d at 917, is misplaced. Response, pp. 26-7. Unlike Weiner, the doctor "refused to request a voluntary leave of absence." *Sugarbaker*, at 908-09.

1996) (distinguishing action from activity). Defendants know this: SPH reported Weiner to the NPDB for both the October 15 voluntary abeyance/leave of absence and November 17 summary suspension **adverse actions**. Weiner Supp. App. Ex. 1.

Substantial evidence of failure to provide legally required notice means the district court could not conclude Defendants satisfied § 11112(a)(3) on summary judgment. The ultimate determination of fairness and reasonableness are jury questions.

II. Defendants' conduct outside of peer review is not protected by HCQIA.

HCQIA immunity does not apply to conduct—including disclosure of peer review information—outside a professional review body. §§ 11111(a)(1)-(2). The leading cases on this issue, *Reyes v. Wilson Mem'l Hosp.*, 102 F.Supp.2d 798 (S.D. Ohio 1998) and *Delashaw v. Seattle Times Co.*, 2021 U.S. Dist. LEXIS 3146 (W.D. Wash 2021), are clear.

Defendants' only authority in response is a footnote in a Fourth Circuit case where the court stated the "announcement of a change in a physician's status is inherently part of the 'professional review action' protected by HCQIA.'" *Id.*, p. 33 (quoting *Gabaldoni v. Wash. Cnty. Hosp. Ass'n*, 250 F.3d 255, 260 n.4 (4th Cir. 2001)). Defendants' reliance on *Gabaldoni* is misplaced.

First, Defendants did not raise this argument below. This Court will not consider new arguments and theories raised for the first time on appeal. *Schlemmer v. N. Central Life Ins. Co.*, 2001 MT 256, ¶22, 307 Mont. 203, 37 P.3d 63.

Second, Defendants' disclosures far exceeded an announcement about a change in Weiner's status. Defendants' disclosed the substance of the accusations against Weiner in an attempt to turn public opinion against him before completion of the peer review process. Defendants' argument that Johnson's disclosures were part of their investigation does not hold up: SPH's administration (1) is not allowed to conduct peer review; (2) does not investigate physicians' quality of care; and (3), per Johnson, did not have any involvement in the investigation. SUF, ¶¶66-67. Perhaps most fundamental, these communications cannot be part of an investigation because § 50-16-201, *et seq.*, MCA, and the Bylaws don't allow it. *See* SUF, ¶123 (confidentiality).

Defendants' vicious, public attacks on Weiner's competence and ethics are not protected by HCQIA. The district court erred in taking Weiner's claims away from the jury.

III. Weiner's remaining claims.

Defendants inappropriately ask the Court to nonetheless affirm based on a "whack-a-mole" of new and undeveloped factual theories and legal arguments.

Defendants were required to carry their burden to offer **evidence** to the district court proving there is no genuine issue of material fact. They may not make new arguments on appeal to backstop an erroneous and premature summary judgment. *See Schlemmer*, ¶22.

A. Breach of contract/implied covenant.

Defendants never previously argued they did not breach the employment contract or the Bylaws. They argued immunity. Dkt. 250, p. 14; Dkt. 339, p. 18. Consequently, Weiner was not required to show otherwise—factually or legally—and the Court must decline to consider Defendants new arguments. *Schlemmer*, ¶22; *Monroe v. Cogswell Agency*, 2010 MT 134, ¶30, 356 Mont. 417, 234 P.3d 79 (burden of persuasion does not shift until movant carries the burden of production).

The employment contract is a contract between Weiner and SPH. SPH could not drum up an improper suspension to terminate Weiner's employment and avoid a breach. The contract and covenant do not permit it.

The SPH Bylaws obligate Defendants to maintain peer review confidentiality. SUF, ¶123. They did not. The Bylaws are an enforceable contract between Weiner and SPH. *Doe v. Community Medical Center, Inc.*, 2009 MT 395, 353 Mont. 378, 221 P.3d 651. If the issue was properly before it, this Court could also find Weiner is a third-party beneficiary of the Bylaw-contracts between the individual defendants

and SPH. *See Williams v. Univ. Med. Ctr. of S. Nev.*, 688 F.Supp.2d 1134, 1144 (D. Nev. 2010) (reasonable jury could find plaintiff was an intended third-party beneficiary of the contract between another physician and the hospital).

Whether—and which—Defendants are liable for breach based on conduct outside peer review is not before the Court. Inviting the Court to affirm summary judgment based on newly asserted arguments, not argued or decided below, is improper.

Defendants' discussion of who may waive privilege/confidentiality under § 50-16-203, MCA, however, sheds light on Defendants' improper withholding of peer review documents and communications. In the district court, Weiner argued Defendants waived peer review privilege/confidentiality by disclosing information outside peer review and selectively choosing which peer review "data" to produce and rely on in this case. Dkt. 185; *see also* § 50-16-201, MCA (defining "Data"). Defendants resisted discovery, objecting thirty-six times that discovery was improper because "the requested information is protected under Montana's peer review process" and Defendants did not waive the privilege. Dkt. 192, pp. 9-13.

Now, Defendants admit they waived peer review privilege/confidentiality. Response, pp. 36-37. It necessarily follows that they improperly withheld information relevant to their supposed investigation. There are untold troves of

documents and communications (including with committee members, administrators, and external reviewers) that are relevant to the determination of Weiner's claims that should have been produced **years ago** and were excluded from the court's consideration. This admission, alone, should be sufficient to reverse and remand.

B. Interference with business advantage.

Defendants never argued Weiner was not damaged in his business, nor challenged the sufficiency of his pleading of damages. Again, they argued immunity. Dkt. 250, p. 14. Consequently, Weiner was not required to prove the merits of his claim.

In any case, Defendants' new arguments are baseless. Weiner produced evidence that he was unable to attain alternative employment, causing significant loss of income, and put it before the district court in response to Defendants' eighth motion in limine. Dkt. 352.

C. Defamation.

Defendants admit they never argued the defamatory statements about Weiner were true. They now argue the district court had materials from the professional review (hearsay) to *sua sponte* confirm the truth of Defendants' statements. But whether those statements were true requires expert testimony.

Weiner had no occasion to put forth his experts' opinions because Defendants did not present a truth defense, all of which was irrelevant to the HCQIA inquiry. *Sugarbaker*, 190 at 916-17. The issue was simply not before the district court.

Defendants' various other arguments also fail.

First, Defendants failed to prove Weiner was a limited purpose public figure. In the district court, Defendants took for a given that Weiner was a public figure, without developing any facts. Dkt. 250, pp. 16-17. The court did not address the issue. It did, however, address the same issue in resolving another defendant's motion for summary judgment and held that the determination is a question of fact for the jury. Dkt. 396, p. 12.

Second, even if Weiner were a limited purpose public figure, Defendants failed to prove—or even attempt to prove—their statements were not made with actual malice. It was Defendants' burden to present evidence proving Johnson did not know the information he published was false or that he did not publish it with a reckless disregard to truth or falsity. *Kurth v. Great Falls Tribune Co.*, 246 Mont. 407, 410, 804 P.2d 393, 394 (1991). Defendants argued Johnson's statements were not made with actual malice because they were allegedly made to protect public safety. Dkt. 250, pp. 16-17; Dkt. Dkt. 339, p. 21. That is not the standard, *see* 50 Am

Jur 2d, Libel and Slander § 35 ("[a]ctual malice … should not be confused with the concept of malice as an evil intent") and this is another fact question for the jury.

Third, Defendants never argued the statements were opinions or that they were privileged. Dkt. 250; Dkt. 339. Again, Weiner was therefore never required to offer proof to the contrary and the Court must decline to consider Defendants' new arguments.

D. Unfair trade practices.

Defendants never argued they did not have an improper motive. They argued for immunity. Dkt. 250, p. 14. Consequently, Weiner was not required to show otherwise, and the Court must decline to consider Defendants' new arguments.

E. Due process.

Weiner agrees a grant of immunity bars his due process claim. Defendants' merits argument was made for the first time on appeal. Response, p. 43. Again, the Court must decline to consider it. If the Court holds the district court improperly granted summary judgment on immunity, then the due process claim must be addressed in the district court in the first instance.

F. Civil Conspiracy & Punitive damages

Because Weiner's tort claims based on Defendants' actions outside peer review were improperly dismissed, so were his civil conspiracy and punitive

damages claims.

CONCLUSION

The district court erroneously granted summary judgment to Defendants. The Court should either reverse the HCQIA Order because disputed issues of material fact remain or enter summary judgment in Weiner's favor based on Defendants' admitted failures to comply with HCQIA.

DATED this 9th day of August, 2024.

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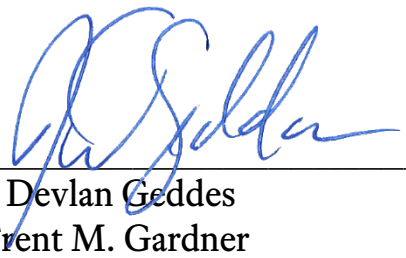

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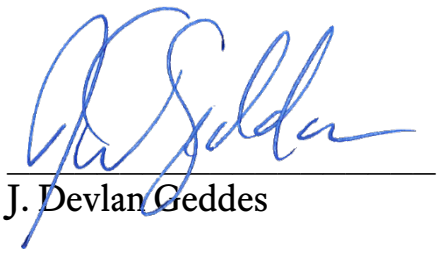
CERTIFICATE OF COMPLIANCE

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 5,000 (4,998 words), excluding the Caption, Table of Contents, Table of Authorities, the Certificate of Service and this Certificate of Compliance.



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