IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-07-0410

JESSE A. COLE, M.D.

Plaintiff/Appellee,

v.

ST. JAMES HEALTHCARE,

Defendant/Appellant

On Appeal from the Montana Second Judicial District Court
in and for the County of Silver Bow
District Court Docket No. DV-07-44
Honorable Brad Newman

AMICUS CURIAE BRIEF OF DRS. POPOVICH, SORINI, PULLMAN, CHAMBERLAIN & CORTESE AND THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.

James P. Molloy
MOLLOY LAW FIRM
30 W. 14th St., Suite 204
P.O. Box 1182
Helena, MT 59624-1182
Attorney for Amici Curiae

Robert F. James
UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.
#2 Railroad Square, Suite B
P.O. Box 1746
Great Falls, MT 59403
Attorney for Defendant/Appellant

C. Richard Anderson
Michael J. McKeon
McKEON & ANDERSON, P.C.
P.O. Box 3329
Butte, Montana 59702-3329

Mark A. Vucurovich
HENNINGSON, RICHARDSON & VUCUROVICH, P.C.
116 W. Granite Street
Butte, Montana 59701

Attorneys for Plaintiff/Appellee

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P.O. Box 1182
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Robert F. James
UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.
#2 Railroad Square, Suite B
P.O. Box 1746
Great Falls, MT 59403
Attorney for Defendant/Appellant

C. Richard Anderson
Michael J. McKeon
McKEON & ANDERSON, P.C.
P.O. Box 3329
Butte, Montana 59702-3329

Mark A. Vucurovich
HENNINGSON, RICHARDSON & VUCUROVICH, P.C.
116 W. Granite Street
Butte, Montana 59701

Attorneys for Plaintiff/Appellee

STATEMENT OF INTEREST

Amici Curiae's interests in this case arise out of their concern about safeguarding against improper actions that are often engaged in by hospitals, including Appellant St. James Hospital in this case, with respect to medical staff privileges. Physicians' abilities to treat their patients, to earn a livelihood, and their reputations can be irreparably harmed by improper actions and decisions concerning medical staff privileges. The District Court here properly granted the preliminary injunction to avoid inflicting such harm upon Dr. Jesse Cole and medical patients in Southwest Montana.

Each of the physician amici is a member of the medical staff at Appellant St. James Healthcare in Butte. Dr. Keith J. Popovich currently serves as President of the Medical Staff. Dr. Peter Sorini is a neurosurgeon and a former member of the Medical Staff Executive Committee at St. James. Drs. John Pullman, David Chamberlain, and Florian Cortese are Butte physicians who practice at Mercury Street Medical Clinic. Southwest Montana Independent Healthcare Association, LLC is an organization that has been formed to foster communications and strategies among members of the Butte medical community who have concerns about developments and actions that may adversely affect the quality of patient care at St. James

Healthcare, and that involve the business and professional interests of various independent healthcare providers in the Butte area.

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit national organization consisting of thousands of physicians in all specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service of patients who entrust their care to the medical profession. The motto of AAPS is "*omnia pro aegroto*," or "all for the patient."

Of particular concern to AAPS is the growing misuse of the medical peer review process. The experience of AAPS members demonstrates that improper, or "sham" peer review is very real and has a harmful effect on the entire profession. It is anti-competitive and it is contrary to public policy. Sham peer review harms not only the physicians it targets, but also the patients these physicians treat.

Amici Curiae urge this Court to affirm the District Court's order granting the preliminary injunction against the Hospital. The District Court correctly prevented the Hospital from improperly denying Dr. Cole medical

staff privileges, and in doing so, safeguarded the procedures and protections of the governing Medical Staff Bylaws.

INTRODUCTION

This case concerns whether a hospital may deny staff membership to a highly skilled physician based an "investigation" that circumvents and violates the procedures set forth in the governing Medical Staff Bylaws. The "investigation" was conducted by someone who is *not* his professional peer, and indeed has no medical training at all. The Hospital's actions would harm the physician's reputation by resulting in the filing of a report based on this non-peer review with the National Practitioner Data Bank (NPDB).[1] The court below was entirely correct in enjoining the Hospital from circumventing the legitimate peer review process to harm a competent physician.

The Brief filed by Appellee Dr. Cole explains how and why the Hospital's arguments about the procedures set forth in the Medical Staff Bylaws are wrong. After setting forth the context concerning "sham peer review" like that employed by the Hospital here, this Amicus Brief will focus on erroneous arguments advanced by the Hospital concerning the Healthcare Quality Improvement Act of 1986, 42 U.S.C. 11101, *et. seq.*

[1] The NPDB is accessible on the internet: http://www.npdb-hipdb.hrsa.gov (viewed Oct. 31, 2007).

("HCQIA"), and the public policy implications of disputes like that in this case.

ARGUMENT

I. The Injunction Below Was Required to Protect Against Irreparable Harm from an Adverse Report to the National Practitioner Data Bank (NPDB).

Peer review falling outside of the standards of federal and state immunity, commonly referred to as "sham peer review," generally involves the sanctioning of an otherwise competent and professional physician for improper reasons, such as retaliation for whistle-blowing, economic competition, or even personal dislike. In sham peer review, the ostensible purpose of protecting patients from incompetent physicians is pretextual. The medical literature and media are replete with accounts of and commentary on increasing episodes of hospitals employing sham peer review procedures against physicians, which then results in adverse entries in the NPDB. *See, e.g.*, G. Weiss, *Is Peer Review Worth Saving?* MEDICAL ECONOMICS (Feb. 18, 2005); S. Twedt, *The Cost of Courage: How the Tables Turn on Doctors*, PITTSBURGH POST-GAZETTE A1 (Oct. 26, 2003); J. Zicconi, *Due Process or Professional Assassination?*, UNIQUE OPPORTUNITIES (March/April 2001); D. Townsend, *Hospital Peer Review Is a Kangaroo Court*, MEDICAL ECONOMICS 133 (Feb. 7, 2000). Medical

journals also describe the often successful attempts by peer reviewers to cloak their sham peer review under federal immunity. *See, e.g.*, W. Summers, "*Sham Peer Review: A Psychiatrist's Experience and Analysis*," JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 125 (Winter 2005); R. Chalifoux, Jr., M.D., *So What Is a Sham Peer Review?*, 7 MEDSCAPE GENERAL MEDICINE (No. 4) 47 (2005); J. Minarcik, M.D., 9 *Sham Peer Review: A Pathology Report*, JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 121 (Winter 2004); L. Huntoon, M.D., Ph.D., *Abuse of the 'Disruptive Physician' Clause*, JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 68 (Fall 2004); W. Parmley, *Clinical Peer Review or Competitive Hatchet Job*, 36 JOURNAL OF THE AMERICAN COLLEGE OF CARDIOLOGY 2347 (2000).

An unjustified, adverse report to the National Practitioner Data Bank (NPDB) is plainly "irreparable harm" that has no adequate remedy at law. As observed by another court in affirming the grant of a preliminary injunction against reporting to the NPDB, "'the granting of the preliminary injunction was necessary to preserve the status quo as it existed prior to Defendants' decision to decertify Plaintiff [Dr. Carlini]. The reporting of this decision to the National Practitioner's Data Bank **will undoubtedly have a devastating impact upon Plaintiff's [Dr. Carlini's] professional**

reputation.'" *Carlini v. Highmark*, 756 A.2d 1182, 1184 (Pa. Commw. Ct. 2000), *appeal denied*, 565 Pa. 676, 775 A.2d 809 (2001) (*quoting trial court decision; emphasis added*).

Additionally, there are problems in the procedures associated with reporting to the NPDB. As the United States District Court for the District of Columbia has noted:

> [W]hen comparing the Privacy Act to the procedures promulgated for challenging a record submitted to the NPDB, it is readily apparent that the NPDB procedures provide less protection than the procedures required by the Privacy Act. For example, the Privacy Act requires that "prior to disseminating any record about an individual to any person other than an agency ...[, the agency must] make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes." 5 U.S.C. § 552a(e)(6). On the other hand, the NPDB regulations only require the DHHS to place a "disputed" notice on any report if information it contains is in dispute, and does not require a "reasonable" check for, among other requirements, accuracy prior to its dissemination. 45 C.F.R. 60.14. Moreover, when reviewing a disputed record pursuant to the NPDB regulation, the Secretary of DHHS only checks the record for accuracy, not its completeness, timeliness and relevance as required by the Privacy Act. *Id.* Thus, the DHHS' regulation which applies to the NPDB fall short of providing an individual with the same level of protection afforded by the Privacy Act in two respects: first, by authorizing the dissemination of the record while information it contains is being disputed, and second, by not requiring that the record be reviewed for completeness, timeliness and relevance.

Doe v. Thompson, 332 F. Supp. 2d 124, 130-31 (D.D.C. 2004). These problems with NPDB reporting further support a determination that

"irreparable harm" can occur when hospitals submit adverse reports about a physician based on actions taken in violation of medical staff bylaws.

In this case, the Hospital hired an attorney to investigate and review Dr. Cole's suitability for medical staff privileges. In doing so, the Hospital circumvented the peer review procedures mandated under the Medical Staff Bylaws. As the lower court observed, "Attorney Carey Matovich is not a member of the Medical Staff. She is not a peer of Dr. Cole. She was hired by the Hospital's Board of Directors, not by the Medical Staff Executive Committee or any other peer investigating committee." (MEMORANDUM AND ORDER, pp.14-15, Appellant Brief, Appendix 2). This was not "peer review" in any meaningful sense. The preliminary injunction was appropriate and necessary to prevent the results of this sham peer review from being disseminated nationwide through the NPDB as though it were the result of legitimate peer review.

II. The Injunction Below Was Fully Consistent with HCQIA.

The Hospital argues, for the first time on appeal, that the injunction below is "also inconsistent with the immunities provided by the federal Healthcare Quality Improvement Act of 1986, ('HCQIA'), 42 U.S.C. 11101, *et seq.*" (Appellant Brief at 36). But as the Hospital tacitly concedes in its next sentence, as it must, HCQIA provides immunity only from *monetary*

damages (in situations in which HCQIA properly applies). HCQIA does not provide immunity from injunctive relief, including that at issue here. Its applicability to Dr. Cole's damage claims is not at issue at this point in this litigation.

Even if the Hospital's new argument concerning HCQIA were properly presented, nothing in the federal law restricts a physician's right to obtain declaratory or injunctive relief to enforce the physician's rights against procedural violations occurring in a peer review. The statute is clear and, to the extent one resorts to the legislative history, it is likewise clear that equitable relief remains available to physicians with respect to peer review. *See* H.R. Rep. No. 99-903, 1986 U.S.C.C.A.N. at 6391. Thus, notwithstanding HCQIA, a physician may seek injunctive relief to obtain protection against peer review violations. *See Sugarbaker v. SSM Health Care,* 190 F.3d 905, 918 (8th Cir. 1999), *cert. denied* 528 U.S. 1137 (2000)("HCQIA immunity is limited to suits for damages; there is no immunity from suits seeking injunctive or declaratory relief."); *McLeay v. Bergan Mercy Health Sys. Corp.*, 714 N.W.2d 7, 18 (Neb. 2006) (remanding for consideration of equitable claims even after finding that immunity applied to claims for damages); *see also* N. Hwang, *Defaming a Physician's*

Career, 25 J. Legal Med. 95, 107 (2004) (advocating use of equitable remedies in unfair peer reviews).

Construing immunity under HCQIA to prevent injunctive relief like that entered below could expose physicians to rampant violations of their rights, and even discrimination. What check or balance would be left if a hospital can destroy a physician through use of a sham peer review? HCQIA cannot be interpreted to place such unfettered authority in the hands of a hospital, with all the possibilities for abuse and unlawful conduct. *See, e.g.*, *Bender v. Suburban Hosp.*, Inc., 758 A.2d 1090, 1100 (Md. Ct. Spec. App. 2000), *cert. denied*, 362 Md. 34, 762 A.2d 968 (2000) (addressing issue of sex discrimination in peer review context).

III. Public Policy Fully Supports the Injunction Below.

In litigation arising from peer review, hospitals often argue for deferential or preferential treatment by pleading poverty and/or inciting fear. So, too, has the Hospital in this case by arguing that being held accountable for violating a physician's rights can "reduce . . . ever-diminishing margins," and put it at "risk of admitting unqualified or problem physicians who might in turn harm patients through substandard care." (Appellant Brief at 40). These arguments are specious in this case.

With respect to the latter suggestion, there is absolutely nothing in the record to suggest that Dr. Jesse Cole is anything but a highly skilled and competent radiologist. Moreover, it should be the primary responsibility of state boards of medical examiners, not hospitals, to determine who is or is not competent to practice medicine. *See* MCA §§ 37-3-101, *et seq.* That is, it is the primary responsibility of the state medical board, not unqualified hospital administrators who have a conflict of interest when a physician may be a competitor like Dr. Cole in this case, that should make competency decisions. Neither should medical staff qualification decisions be determined by an "investigation" by an attorney hired by a hospital to circumvent peer review procedures set forth in medical staff bylaws.

The real issue in these sham peer review cases is often how hospitals treat qualified and skilled physicians who may attract patients away from the hospital. The medical board naturally will not base determinations involving such physicians on economic considerations, yet hospitals have an economic incentive to eliminate them. In such circumstances, it is fully consistent with public policy for courts to protect physicians, like the District Court did in this case.

With respect to the Hospital's "ever diminishing margin" argument, again, it is entirely unsupported by the record. Hospitals are not the destitute

litigants that they often portray themselves as. If the Hospital believes this public policy argument is factually and legally convincing, it should attempt to make a record to support it on remand. Amici respectfully suggest that the Hospital may have a difficult time credibly making such a case. *See St. James Healthcare's "Form 990" (non-profit organizations' annual report of revenue, expenses and assets- publicly available at* http://www.guidestar.org/FinDocuments/2005/810/231/2005-810231785-023dce68-9.pd).

Implicit in the Hospital's arguments before this Court is that the judiciary is somehow not up to the task of assessing the medical issues entailed in peer review and matters of hospital privileges. This is a familiar refrain in many hospital court filings; such arguments are entirely fallacious and increasingly courts are seeing through them.

The Michigan Supreme Court recently rejected such an argument in *Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663, 719 N.W.2d 1 (2006). The Court in *Feyz* rejected the concept of deference or "nonintervention doctrine" with respect to peer review because it "is inconsistent with the legislative mandate that covers protection of the peer review communicative process only." 475 Mich. at 679, 719 N.W.2d at 11. There, as here, a

hospital sought to avoid judicial review of its actions, and the Michigan Supreme Court found no merit in that argument.

The *Feyz* court flatly rejected the hospital's "belief that courts are ill-equipped to review hospital staffing decisions because courts lack the specialized knowledge and skills required to adjudicate hospital staffing disputes." 475 Mich. at 674, 719 N.W.2d at 8. The court explained:

> [W]e are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute. This is not to say that hospital staffing decisions, which involve specialized medical and business knowledge and considerations, are not entitled to some measure of deference. However, **when those staffing decisions violate the legal rights of others, the judiciary must exercise its obligation to adjudicate legal disputes**, except to the extent that the citizens of this state, through their elected representatives, have made a policy choice to shield such decisions from liability.

475 Mich. at 680, 719 N.W.2d at 11 (*emphasis added*). Consistent with the well-reasoned analysis of the court in *Feyz*, the District Court properly exercised its obligation to adjudicate legal disputes, and resolved those disputes correctly.

Medicine is a business, and, as in any industry, a sweeping grant of deference, non-intervention or immunity to one side of an industry is both

ill-advised and unjustified. Sham peer review interferes with quality medical care and impedes the benefits of competition and free enterprise. In short, sham peer review is not "peer review" at all, but rather tortious conduct disguised as "peer review" in an attempt to escape liability.

The Hospital argues that affirming the preliminary injunction below "will cause hospitals to think twice before conducting such investigations." (Appellant Brief at 40). More accurately, the real effect will be to cause hospitals to "think twice" before circumventing procedures set forth in governing Medical Staff Bylaws and engaging in sham peer review --- which is as it should be.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief submitted by Appellee Dr. Cole, this Court should affirm the District Court's order granting preliminary injunctive relief.

RESPECTFULLY SUBMITTED this 9th day of November, 2007.

By _____

JAMES P. MOLLOY
Molloy Law Firm
30 W. 14th St., Suite 204
P.O. Box 1182
Helena, MT 59624-1182

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of November, 2007, a true and correct copy of the foregoing ***Amicus Curiae Brief Of Drs. Popovich, Sorini, Pullman, Chamberlain & Cortese And The Association Of American Physicians & Surgeons, Inc.,*** was served on the following counsel by depositing in the U.S. Mail, postpaid and addressed as follows:

C. Richard Anderson
Michael J. McKeon
McKEON & ANDERSON, P.C.
P.O. Box 3329
Butte, Montana 59702-3329
(406) 494-8890
randerson701@qwest.net

Mark A. Vucurovich
HENNINGSON, RICHARDSON & VUCUROVICH, P.C.
116 W. Granite Street
Butte, Montana 59701
(406) 723-3219
carrieholland@qwest.net

Robert F. James
UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.
#2 Railroad Square, Suite B
P.O. Box 1746
Great Falls, MT 59403
(407) 771-0007
rfj@uazh.com

Copies were also forwarded electronically via e-mail.

By _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P, I certify that this ***Amicus Curiae Brief Of Drs. Popovich, Sorini, Pullman, Chamberlain & Cortese And The Association Of American Physicians & Surgeons, Inc.,*** is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double-spaced with the exception of footnotes and quoted and indented material; and the word count calculated by Microsoft Word 2003 for Windows totals 2770, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 9th day of November, 2007.

MOLLOY LAW FIRM

By _____
JAMES P. MOLLOY