IN THE SUPREME COURT OF MISSOURI

ROBERT EGAN

Appellant,

vs.

ST. ANTHONY'S MEDICAL CENTER

Respondent.

Appeal No. SC88493

Appeal from the Circuit Court of St. Louis County

Hon. Thea A. Sherry

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

After his medical staff privileges at defendant hospital were revoked, and said revocation was reported to the National Date Bank and the Missouri Board of Healing Arts, plaintiff filed suit for equitable relief. Defendant's motion to dismiss for failure to state a cause of action was sustained. The jurisdiction of the Missouri Court of Appeals was invoked under Article V, Section 3.1 of the Missouri Constitution. This case was transferred after decision by the Missouri Court of Appeals for the Eastern District. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff is a board-certified general surgeon and vascular surgeon who has been licensed to practice, and has practiced, surgery in the State of Missouri for forty-two years. L.F. 12. Defendant is a corporation which operates St. Anthony's Medical Center, a hospital in St. Louis County, Missouri. *Ibid.* Plaintiff has been a member of the medical staff, and has practiced general and vascular surgery, at defendant's hospital for over twenty years, performing an average of two-hundred surgical procedures a year at said hospital. *Ibid.*

At the time he originally filed this lawsuit, Plaintiff had staff privileges at other hospitals, including St. John's, St. Mary's, Forest Park, St. Alexius, St. Joseph's, Touchette Regional Hospital, and Kindred Hospital. *Ibid.* At the time he originally filed this lawsuit, Plaintiff never had had his staff privileges suspended, revoked, terminated, or restricted by any hospital other than St. Anthony's, nor has he had any application for staff privileges turned down. *Ibid.* Plaintiff never has been the subject of any investigation, has never been disciplined, and has never been subjected to any hearing regarding his staff privileges at any hospital other than St. Anthony's. *Ibid.*

Plaintiff has served as a colonel in the United States Air Force, and served in the Gulf War, commanding the 932nd Medical Squadron, receiving an honorable discharge from the United States Air Force thereafter. *Ibid.* Plaintiff has been Chief of Surgery at Deaconess Hospital, and at Touchette Regional Hospital. L.F. 13

Plaintiff performs an average of seven-hundred-fifty to one-thousand surgical

procedures per year. *Ibid.* Plaintiff performed one-thousand-one-hundred-eighty acute surgical procedures at St. Anthony's during the five fiscal years from 2000 through 2004 with no instances of family dissatisfaction, and no cases resulting in neurological deficit; plaintiff's quality indicator variances (readmissions, unplanned returns to surgery, intra-operative injuries, delayed or missed diagnosis or treatment, infections, wound eviscerations or dehiscences, and deaths) were superior or comparable to other staff surgeons at St. Anthony's Hospital. *Ibid.*

On June 22, 2005, David C. Haueisen, President of the Medical Staff of St. Anthony's, wrote a letter to plaintiff informing him that his clinical privileges had been "summarily suspended." *Ibid.* Dr. Haueisen wrote that such action "was necessary to avoid imminent threats to our patients." *Ib id.* Dr. Haueisen wrote that "[s]pecifically, summary suspension is necessitated by the report of Michael V. Oliveri, Ph.D., ABPP, who found 'mild, relatively nonspecific neurocognitive abnormality classified as suggestive of early abnormal decline.'" *Ibid.* Dr. Haueisen wrote that, "[i]n addition, on June 13, 2005, you performed a right colectomy on an 81-year old female patient" without consulting with her "gastroenterologist" who "had determined that surgery was not indicated." L.F. 12-14. Dr. Haueisen wrote that Robert F. Beckman, Director of the Department of Surgery, and Tom Rockers, President and Chief Executive Officer of St. Anthony's, concurred in the summary suspension. L.F. 14. In this letter, St. Anthony's based the summary suspension of plaintiff's medical staff privileges on Article X, Section 1E, of the Amended and Restated Bylaws of the Medical, Dental and Podiatric Staff of St.

Anthony's Medical Center. *Ibid.*

Article X, Section 1E, of the Amended and Restated Bylaws of the Medical, Dental and Podiatric Staff of St. Anthony's Medical Center, provides: "Summary suspension of privileges is a drastic action that is taken without the opportunity for a prior hearing. The Medical Center must be able to justify summary action on the basis that life or health is imminently threatened." *Ibid.* Dr. Haueisen's letter advised plaintiff of his right to request a "due process" or "fair hearing." *Ibid.* Article X, Section 2B, requires the hospital to provide the "affected practitioner" a notice of hearing which "must contain a concise statement of the Affected Practitioner's alleged acts or omissions, a list by number of the specific or representative patient records in question, and/or the other reasons or subject matter forming the basis for the adverse action or recommendation." *Ibid.*

On July 18, 2005, plaintiff timely requested a hearing, and asked the hospital to advise him of the "'acts of [*sic*] omissions with which'" he was "'charged.'" L.F. 15. On July 19, 2005, Ravindra Shitut, Medical Staff President, responded that Dr. Haueisen's letter of June 22, 2005, specified the "acts or omissions" which formed the basis for the suspension. *Ibid.* On July 26, 2005, President Rockers sent plaintiff a notice of hearing which reiterated that "[s]pecifically, summary suspension was necessitated by the report of Michael V. Oliveri, Ph.D., ABPP, who found 'mild relatively nonspecific neurocognitive abnormality classified as suggestive of early abnormal decline,'" and that "[i]n addition, on June 13, 2005, you performed a right

colectomy on an 81-year old female patient that was not indicated." *Ibid.* President Rocker's notice of hearing added nine patient charts to the specifications contained in the previous two letters. *Ibid.*

The hospital accrediting body, the Joint Committee on Accreditation of Healthcare Organizations imposes an affirmative obligation on a hospital to adopt medical staff bylaws and include in such bylaws fair hearing and appeal process for addressing adverse decisions regarding denial, suspension, or revocation of privileges, JCAHO Standard MS.4.50, 2004 Comprehensive Accreditation Manual for Hospitals. *Ibid.*

Section 11112 of the federal Health Care Quality Improvement Act (42 U.S.C. § 11112) grants hospitals immunity from suits by physicians who have been reported conditioned upon granting the physician notice and an opportunity to be heard before adverse actions are taken. L.F. 15-16.

The Missouri Code of State Regulation, 19 CSR 30-20.021 Organization and Management for Hospitals, and MO. REV. STAT. § 537.035.5, require that hospitals adopt bylaws which provide for appeal and hearing procedures for suspension or revocation of clinical privileges of a member of the medical staff, and that notification of suspension or revocation of privileges shall be in writing and shall indicate the reasons for this action. L.F. 16. Neither the above regulation, nor the above statute, provides criminal penalties for violation thereof. *Ibid.* The above regulation does not provide a civil remedy in damages to a physician who has been denied the notice and

hearing requirements therein. *Ibid.*

A hearing was held in which all witnesses were sworn, and exhibits were provided to members of the hearing committee. *Ibid.* Plaintiff called Dr. Gerard Erker, Ph.D., Director of Clinical Psychology/Neuropsychology at SSM Health Care SSM Rehab, a medical rehabilitation facility based at different SSM Hospitals, particularly St. Mary's, who has a Ph.D. in clinical psychiatry and specialty training in neuropsychology, the same field as Dr. Oliveri. *Ibid.* Dr. Erker performed a neuropsychological assessment of plaintiff, and found no evidence of neurocognitive abnormality, and no abnormal decline. L.F. 16-17. After he had performed his own testing and evaluation on plaintiff, Dr. Erker was shown Dr. Oliveri's report, and disagreed with the findings and conclusions therein. L.F. 17. Dr. Erker found that Dr. Egan demonstrated relative neuropsychological strengths above "normal" on all of the categories. *Ibid.* Dr. Erker found no basis for recommending any restrictions in Dr. Egan's professional activities. *Ibid.* The hospital did not call Dr. Oliveri as a witness. *Ibid.*

Plaintiff also introduced a Psychological Evaluation by Larry Kiel, Ph.D., Clinical Psychologist, Director of The Behavioral Counseling Center, Inc., in which Dr. Kiel found no suggestion of psychological disorder. *Ibid.* Plaintiff also introduced a report of an MRI of the brain, which was normal. *Ibid.*

The parties introduced evidence regarding six of the ten patients listed in the notice of hearing, but the hospital introduced no evidence on the other four. *Ibid.*

Following the hearing, the hospital provided a proposed report and recommendations for the committee. *Ibid.* In its proposed findings, the hospital abandoned its claims that plaintiff suffered from "mild relatively nonspecific neurocognitive abnormality classified as suggestive of early abnormal decline," and did not suggest that the hearing committee make any findings that plaintiff was mentally impaired. *Ibid.* The hospital proposed that the hearing committee make findings adverse to plaintiff with regard to the six patients as to which evidence was introduced. L.F. 18. With regard to two of these cases, the hospital proposed that the hearing committee find that plaintiff had "violated the law and/or principles of medical ethics." *Ibid.*

Nowhere in the letter notifying plaintiff of his summary suspension, or the letter responding to plaintiff's request that he be informed of the "acts or omissions with which he was charged," or in the notice of hearing, was there any claim that plaintiff had violated any law, or that he had violated any principle of medical ethics. *Ibid.*

In his reply memorandum, plaintiff objected to the proposed finding that he had "violated the law and/or principles of medical ethics" on the ground, *inter allia*, that he had received no notice to defend himself against any such charge. *Ibid.*

After the hearing, the hearing committee *ex parte* requested and received an "analysis of Dr. Egan's surgical procedures cases," which analysis never was furnished to plaintiff or his counsel. *Ibid.*

The hearing committee made no findings with regard to plaintiff's mental status.

Ibid. The hearing committee made no findings with regard to eight of the ten patients charged in the notice of hearing. *Ibid.* The hearing committee sustained the charge that plaintiff had performed a colectomy on a patient without consulting with her gastroenterologist who had found that surgery was not indicated. L.F. 18-19. The hearing committee found that "[i]n one case . . . Dr. Egan violated the law and/or principles of medical ethics." L.F. 19. The hearing committee faulted plaintiff's documentation of these two cases. *Ibid.* Based solely on its findings with regard to two patients, the hearing committee recommended that plaintiff's staff privileges be revoked. *Ibid.*

Pursuant to the bylaws, plaintiff appealed to an appellate review committee, consisting of three members of the hospital's board of directors, and three physicians selected by plaintiff from a list of six tendered to him by the hospital. *Ibid.* Under the bylaws, the appellate review committee is limited to consideration of the sworn testimony and exhibits presented to the hearing committee during the hearing. *Ibid.*

In his memorandum in opposition to summary suspension submitted by plaintiff to the appellate review committee, plaintiff objected to the finding that he had "violated the law and/or principles of medical ethics" on the ground, *inter allia*, that he had received no notice to defend himself against any such charge. *Ibid.*

In its written statement to the appellate review committee, the hospital defended the absence of notice of the claim that plaintiff had "violated the law and/or principles of medical ethics" on the ground that the hospital did not become aware of facts

supporting said charge until the hearing itself. *Ibid.*

The bylaws do not permit an affected practitioner to be present, either in person or by counsel, when the appellate review committee meets. L.F. 20. One of the physicians whom plaintiff selected for the appellate review committee was not present when it met. The physician who was absent was not notified of the meeting. *Ibid.*

One of the physicians who did attend, Kirk Nelson, a doctor of osteopathy, introduced his own oral testimony: Dr. Nelson's testimony was extremely critical of plaintiff's professional competence, based upon what he had heard in the past at other hospitals, and his personal interaction with plaintiff. *Ibid.* Dr. Nelson asserted that plaintiff has had privileges suspended at other hospitals. *Ibid.* Dr. Nelson stated that he had witnessed plaintiff give an excessive amount of epinephrine in an attempt to resuscitate a "code" patient in an ICU. *Ibid.* Dr. Nelson asserted that plaintiff once asked him, when Dr. Nelson was working in the Emergency Department, if Dr. Nelson had performed a pelvic examination on a female patient in the Emergency Department with right upper quadrant pain, diagnosed as acute cholecystitis by Dr. Nelson, which Dr. Nelson felt was an inappropriate question. *Ibid.* Dr. Nelson asserted that Dr. Egan had received multiple letters of reprimand over the years from various committees at various hospitals, and that he did not wish for Dr. Egan to practice any longer at St. Anthony's. L.F. 21.

Dr. Nelson's assertion that plaintiff has had privileges suspended at other hospitals was false. *Ibid.* Dr. Nelson's assertion that plaintiff has received multiple

letters of reprimand over the years from various committees at various hospitals was false. *Ibid.*

The other physician who attended the meeting objected to the introduction of Dr. Nelson's testimony as extremely prejudicial to the deliberations of the appellate review committee, and explicitly forbidden by the bylaws, but the chairman of the committee, Joseph G. Lipic, a member of the Board of Directors of defendant hospital, overruled the objection. *Ibid.*

Chairman Lipic himself stated that plaintiff "has mental deficiencies," despite the fact that the hospital abandoned this claim after the hearing. *Ibid.*

None of the appellate review committee members other than the physician who objected to Dr. Nelson's testimony reviewed the hearing record. *Ibid.* The appellate review committee, with the physician who had objected to the testimony of Dr. Nelson dissenting, adopted all of the findings of the hearing committee, including the finding that plaintiff had "violated the law and/or principles of medical ethics," and recommended revocation of plaintiff's staff privileges. *Ibid.*

The Board of Directors accepted the recommendation of the appellate review committee. L.F. 22.

In Robert C. Egan, M.D. v. St. Anthony's Medical Center, Cause No. 06CC-002469, in the Circuit Court for St. Louis County, Missouri, St. Anthony's took the position that it had a "pre-existing legal duty to adopt bylaws," by reason of 19 CSR 30-20.021, and that the provisions in the bylaws obligating St. Anthony's to provide

plaintiff with notice and an opportunity to be heard prior to suspension or revocation of his medical staff privileges thus creates no legal duty in addition to those pre-existing under state law, and thus forms no consideration to support a contract. *Ibid.* In its brief on appeal in the same case, Eastern District of Missouri Appeal No. ED86298, stated that it "has no argument with the principle of a fair hearing."

Defendant offered no evidence that plaintiff's continued practice presents an imminent threat to the health or safety of defendant's patients, and neither the Hearing Committee, the Appellate Review Committee, nor defendant's Board of Directors made such a finding. L.F. 23.

The hospital has reported to the Missouri State Board of Healing Arts that: "Dr. Egan was permanently suspended due to (1) poor medical judgment; (2) inappropriate surgical interventions that did not meet the standard of care and subjected patients to unnecessary additional procedures, (3) inadequate or inaccurate documentation of care, and (4) violations of law and/or principles of medical ethics." *Ibid.*

The hospital has reported to the National Practitioners Data Bank that his Medical Staff appointment and all clinical privileges have been revoked. L.F. 24. The hospital also has reported to the Data Bank, with regard to a patient on whom plaintiff performed a diverting colostomy in January 2004, that plaintiff "diverted the wrong limb of the bowel to the surface during" the colostomy, and "concealed the mistake from the patient and her family." *Ibid.* Neither the hearing committee nor the appellate review committee made a finding that plaintiff "concealed the mistake from the patient

and her family." *Ibid.*

St. Anthony's enacted bylaws which comply with the requirements of the Joint Committee on Accreditation of Healthcare Organizations. By so doing, St. Anthony's has obtained the benefit of accreditation. L.F. 27.

In notifying plaintiff that he had been suspended summarily, St. Anthony's promised him a due process hearing, and a fair hearing, notice, opportunity to be heard, and appeal before a neutral and impartial review panel if he appealed his suspension. L.F. 28. In reliance upon those promises, plaintiff appealed his suspension, employed counsel, expended funds, spent many hours in preparation for such hearing, and underwent three sessions of hearing, submitting himself to voluminous examination. *Ibid.* Plaintiff and his counsel relied upon the specifications in the notice of hearing as containing a concise statement of his alleged acts or omissions forming the basis for the adverse action or recommendation. *Ibid.*

St. Anthony's notified plaintiff that it had utilized the provisions of Article X § E of the bylaws to suspend his privileges summarily. St. Anthony's notified plaintiff that he had a right to a due process hearing and a fair hearing under Article X of the bylaws. L.F, 29. St. Anthony's utilized the provisions of Article X of the bylaws to organize the hearing and as the basis for the rules governing that hearing. *Ibid.*

St. Anthony's offers to permit all members of its medical staff to treat their patients at St. Anthony's, and to provide support facilities for said treatment, and physicians accept said offer by recommending St. Anthony's to their patients. L.F. 31.

Each member of the medical staff at St. Anthony's agrees that his or her contractual relationship with St. Anthony's will be governed by the bylaws of the medical staff, and St. Anthony's agrees with each member of its medical staff that its contractual relationship with that physician will be governed by those bylaws. *Ibid.*

Following the action of respondent's Board of Directors sustaining the termination of his medical staff privileges, appellant sued for mandatory injunctive relief reinstating his privileges pending a new hearing with proper notice and appellate procedures, alleging grounds for such relief in seven counts: one count for injury to property through violation of his right to notice and opportunity to be heard created by state regulation; one count for promissory estoppel; three counts claiming estoppel by conduct; and two counts based on contract. Respondent moved to dismiss, principally on the ground that the trial court lacked jurisdiction, and secondarily on challenges to each count individually. The trial court sustained the motion without comment. The Court of Appeals affirmed without opinion, stating by way of memorandum that Missouri courts have a "strong public policy" that forbids any review of staffing decisions by private hospitals.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION IN THAT IT IS THE PUBLIC POLICY OF THE STATE OF MISSOURI, AS EXPRESSED IN ITS CODE OF STATE REGULATIONS, THAT PHYSICIANS RECEIVE NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO REVOCATION OF THEIR MEDICAL STAFF PRIVILEGES AT A HOSPITAL, WHICH POLICY CAN ONLY BE IMPLEMENTED BY LIMITED JUDICIAL REVIEW OF THE PROCEDURES EMPLOYED IN THE REVOCATION OF A PHYSICIAN'S PRIVILEGES, AND THIS POLICY WAS VIOLATED BY RESPONDENT IN THE INSTANT CASE.

Miller v. St. Alphonsus Reg'l Med. Ctr., Inc., 87 P.3d 934 (Idaho 2004)

Owens v. New Britain Gen. Hosp., 643 A.2d 233, 240 (Conn. 1994)

Reiswig v. St. Joseph's Hosp. & Med. Ctr., 634 P.2d 976 (Ariz. App. 1981)

Islami v. Covenant Med. Ctr., 822 F. Supp. 1361 (N.D. Iowa 1992)

II. THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE THE TRIAL COURT HAD JURISDICTION OF THE SUBJECT MATTER IN THAT THE PETITION CONTAINED SEVEN COUNTS WHICH PROPERLY PLED CAUSES OF ACTION FOR EQUITABLE RELIEF, AND THE FACT THAT THEY INVOLVED MEMBERSHIP ON THE MEDICAL STAFF OF A PRIVATE HOSPITAL DID NOT DEPRIVE THE COURT OF SUBJECT MATTER JURISDICTION.

Feyz v. Mercy Mem'l Hosp., 719 N.W.2d 1 (Mich. 2006)

III. THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT III FOR PROMISSORY ESTOPPEL OF DEFENDANT FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, PROVIDED FOR IN THE ST. ANTHONY'S BYLAWS, BECAUSE ST. ANTHONY'S REPRESENTED TO HIM THAT, IF HE REQUESTED A HEARING REGARDING HIS SUMMARY SUSPENSION, HE WOULD BE AFFORDED THOSE RIGHTS, IN THAT PLAINTIFF RELIED ON THOSE REPRESENTATIONS AND THE NOTICE HE RECEIVED IN RETAINING AN ATTORNEY TO REPRESENT HIM, EXPENDING FUNDS, SPENDING MANY HOURS IN PREPARATION FOR THE HEARINGS, UNDERGOING THREE SESSIONS OF HEARING, AND BEING GRILLED BY MEMBERS OF THE

HEARING COMMITTEE, HIS PRIVILEGES WERE REVOKED ON GROUNDS WHICH WERE OUTSIDE OF THE NOTICE, AND HIS APPEAL WAS DENIED BY A PANEL WHOSE MEMBERS PRESENTED FALSE *EX PARTE* TESTIMONY AGAINST HIM DURING THE HEARING ON HIS APPEAL

Duncan v. Missouri Bd. of Architects, 744 S.W.2d 524 (Mo App. E.D. 1988)

Missouri Dental Bd. v. Cohen, 867 S.W.2d 295 (Mo. App. W.D. 1993)

IV. THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT I FOR EQUITABLE RELIEF FOR DAMAGE TO PROPERTY RIGHTS BY REASON OF VIOLATION OF THE LAW IN THAT COUNT I PROPERLY PLED THAT PLAINTIFF'S PROPERTY INTEREST IN THE PRACTICE OF HIS PROFESSION HAS BEEN AND IS BEING DAMAGED BY ST. ANTHONY'S VIOLATION OF MO. REV. STAT. § 537.035.5 AND REGULATION 19 CSR 30-20.021 IN REVOKING PLAINTIFF'S MEDICAL STAFF PRIVILEGES WITHOUT GRANTING HIM PROPER NOTICE AND OPPORTUNITY TO BE HEARD.

Bishop v. Missouri State Div. of Family Serv., 592 S.W.2d 734 (Mo. 1980)

Hamilton-Brown Shoe Co. v. Saxey, 32 S.W. 1106 (Mo. 1895)

National Pigments & Chem. Co. v. Wright, 118 S.W.2d 20 (St. L. Ct. App. 1938)

Larocca v. State Bd. of Registration for the Healing Arts, 897 S.W.37 (Mo. App. E.D. 1995)

V. THE TRIAL COURT ERRED IN SUSTAINING PLAINTIFF'S MOTION

TO DISMISS IN THAT, IN COUNT VI, PLAINTIFF PROPERLY PLED THAT THE HOSPITAL'S BYLAWS ARE AN INTEGRAL PART OF A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, AND THIS CONTRACT WAS BREACHED BY DEFENDANT'S FAILURE TO PROVIDE PLAINTIFF WITH NOTICE AND THE OPPORTUNITY TO BE HEARD

Gianetti v. Norwalk Hosp., 557 A.2d 1249 (Conn. 1989)

Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 149 A.2d 456 (Pa. 1959)

Lo v. Provena Covenant Med. Ctr., 826 N.E.2d 592 (Ill. App. 2005)

Lyons v. Saint Vincent Health Ctr., 731 A.2d 206 (Pa. Commw. Ct. 1999)

VI. THE TRIAL COURT ERRED IN SUSTAINING PLAINTIFF'S MOTION TO DISMISS BECAUSE THE BYLAWS ARE A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, AND DEFENDANT BREACHED THAT CONTRACT BY TERMINATING PLAINTIFF'S MEDICAL STAFF PRIVILEGES WITHOUT PROPER NOTICE AND OPPORTUNITY TO BE HEARD, IN VIOLATION OF THOSE BYLAWS.

Lawler v. Eugene Westhoff Mem'l Hosp. Ass'n, 497 S.E.2d 1251 (Fla. App. 1986)

Sadler v. Dimensions Healthcare Corp., 836 A.2d 655 (Md. App. 2003)

Owens v. New Britain Gen. Hosp., 643 A.2d 233 (Conn. 1994)

Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219 (Alaska 1992)

VII. THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT II FOR

ESTOPPEL OF DEFENDANT BY ACCEPTANCE OF BENEFITS AND CONDUCT FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, BECAUSE ST. ANTHONY'S HAS AVAILED ITSELF OF THE BENEFITS OF THE STATE REGULATIONS DIRECTING ST. ANTHONY'S TO PROVIDE HIM WITH THESE RIGHTS, IN THAT, BY ENACTING BYLAWS CONFORMING TO THE STATE REGULATION, THE HOSPITAL HAS OBTAINED AND MAINTAINED ITS LICENSE TO OPERATE AS A HOSPITAL IN THE STATE OF MISSOURI.

Magenheim v. Board of Education, 347 S.W.2d 409 (St. L. Ct. App. 1961)

Forest Hills Const. Co. v. City of Florissant, 562 S.W.2d 322 (Mo. 1978)

Pfarr v. Union Elec.Co., 389 S.W.2d 819 (Mo. 1965)

Long v. Huffman, 557 S.W.2d 911 (Mo. App. K.C. Dist. 1977)

VIII. THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT III FOR ESTOPPEL OF DEFENDANT BY ACCEPTANCE OF BENEFITS AND CONDUCT FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, BECAUSE ST. ANTHONY'S HAS AVAILED ITSELF OF THE BENEFITS OF ENACTING THE BYLAWS REQUIRED BY THE JOINT COMMITTEE ON ACCREDITATION OF

HEALTHCARE ORGANIZATIONS BY OBTAINING ACCREDITATION FROM THAT BODY, IN THAT THE BYLAWS WHICH ST. ANTHONY'S ENACTED TO OBTAIN ACCREDITATION PROVIDED THAT PHYSICIANS SUBJECT TO SUSPENSION OR REVOCATION WOULD RECEIVE NOTICE AND THE OPPORTUNITY TO BE HEARD.

Magenheim v. Board of Education, 347 S.W.2d 409 (St. L. Ct. App. 1961)

Forest Hills Const. Co. v. City of Florissant, 562 S.W.2d 322 (Mo. 1978)

Pfarr v. Union Elec.Co., 389 S.W.2d 819 (Mo. 1965)

Long v. Huffman, 557 S.W.2d 911 (Mo. App. K.C. Dist. 1977)

IX.. THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT V FOR ESTOPPEL OF DEFENDANT BY ACCEPTANCE OF BENEFITS AND CONDUCT FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, PROVIDED FOR IN THE ST. ANTHONY'S BYLAWS BECAUSE ST. ANTHONY'S USED THESE BYLAWS TO ITS ADVANTAGE IN THAT DEFENDANT ST. ANTHONY'S MEDICAL CENTER UTILIZED THESE BYLAWS TO SUSPEND PLAINTIFF SUMMARILY AND AS THE BASIS FOR CONVENING A HEARING COMMITTEE, AND IS ESTOPPED THEREBY FROM DENYING THE ENFORCEABILITY OF THOSE BYLAWS

Miskimen v. Kansas City Star, 684 S.W.2d 304 (Mo. App. W.D. 1984)

Warren v. Warren, 784 S.W.2d 247 (Mo. App. W.D. 1989)

ARGUMENT

I

THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION IN THAT IT IS THE PUBLIC POLICY OF THE STATE OF MISSOURI, AS EXPRESSED IN ITS CODE OF STATE REGULATIONS, THAT PHYSICIANS RECEIVE NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO REVOCATION OF THEIR MEDICAL STAFF PRIVILEGES AT A HOSPITAL, WHICH POLICY CAN ONLY BE IMPLEMENTED BY LIMITED JUDICIAL REVIEW OF THE PROCEDURES EMPLOYED IN THE REVOCATION OF A PHYSICIAN'S PRIVILEGES, AND THIS POLICY WAS VIOLATED BY RESPONDENT IN THE INSTANT CASE.

The standard of review is de novo.

Appellant's Medical Staff Privileges Were Revoked On the Basis of Post-hearing Charges Against Which He Had No Opportunity To Defend, and An Appellate Review By a Biased Hearing Committee Which Invented New Allegations

On June 22, 2005, appellant was informed, in writing, that his clinical privileges at St. Anthony's Medical Center had been "summarily suspended" based on the report of a neuropscychologist who had tested appellant and found "mild, relatively nonspecific neurocognitive abnormality classified as suggestive of early abnormal

decline." L.F. 13. "In addition," the letter continued, "you performed" surgery on a patient "without consulting with her gastroenterologist" who "had determined that surgery was not indicated." L.F. 13-14. The letter stated that the suspension had been imposed pursuant to the bylaws of the medical staff of the hospital. L.F. 14.

The letter advised appellant of his right to request a "due process" or "fair hearing." *Ibid.* The bylaws require the hospital to provide the "affected practitioner" a notice of hearing which "must contain a **concise statement** of the Affected Practitioner's alleged acts or omissions, a list by number of the specific or representative patient records in question, and/or the other reasons or subject matter forming the basis for the adverse action or recommendation." *Ibid.* (Emphasis added.).

Appellant timely requested a hearing, and asked the hospital to advise him of the "'acts of [*sic*] omissions with which'" he was "'charged.'" L.F. 15. The Medical Staff President responded that the previous letter specified the "acts or omissions" which formed the basis for the suspension. *Ibid.* Later, respondent's president sent plaintiff a notice of hearing which reiterated the previous charges and added nine patient charts to these specifications. *Ibid.*

At his hearing, appellant called his own neuropsychologist, who specifically refuted the findings of the hospital's neuropsychologist. L.F. 16. The hospital did not call the neuropsychologist whose report was the primary basis for the original suspension L.F. 17.. In its post-hearing submission, respondent abandoned the report of its neuropsychologist as a basis for upholding the suspension, and the Hearing

Committee made no findings with regard thereto. *Ibid.*

Of the nine patient charts added in the revised notice of hearing, the hospital offered no evidence as to four patients. *Ibid.* The hospital proposed that the hearing committee make findings adverse to plaintiff concerning the six patients as to which evidence was introduced. L.F. 18. With regard to two of these cases, the hospital proposed that the hearing committee find that plaintiff had "violated the law and/or principles of medical ethics." *Ibid.*

The Hearing Committee made no findings with regard to eight of the ten patients charged, and revoked appellant's privileges solely on the basis of two patient charts. *Ibid.* As to one of these, the Hearing Committee found that appellant had "violated the law and/or principles of medical ethics." L.F. 19.

Nowhere in any of the three notices appellant received was he ever warned that he would be called on to defend himself against charges that he had "violated the law," or that he was going to be accused of violating "principles of medical ethics." L.F. 18.

Under the bylaws, Dr. Egan had the right to appeal an adverse decision by the Hearing Committee to an "Appellate Review Committee," composed of three staff physicians and three members of the hospital's Board of Directors, which review is based solely on the testimony and exhibits presented to the Hearing Committee. L.F. 19. Appellant availed himself of this right. *Ibid.*

The bylaws do not permit an affected practitioner to be present, either in person or by counsel, when the appellate review committee meets. L.F. 20. One of the

physicians whom plaintiff selected for the appellate review committee was not present when it met. The physician who was absent was not notified of the meeting. *Ibid.*

One of the physicians who did attend introduced his own oral testimony, which was extremely critical of plaintiff's professional competence, based upon what he had heard in the past at other hospitals, and his personal interaction with plaintiff. L.F. 20-21. This physician asserted, *inter allia,* that Dr. Egan's privileges had been suspended at other hospitals, and that Dr. Egan had received multiple letters of reprimand over the years from various committees at various hospitals. L.F. 21. These assertions were false. *Ibid.*

The chairman of the appellate review committee, who was a member of the hospital's board of directors, stated that plaintiff "has mental deficiencies," despite the fact that the hospital had abandoned this claim. *Ibid.*

None of the appellate review committee members other than the physician who objected to Dr. Nelson's testimony reviewed the hearing record. *Ibid.* The appellate review committee, with one physician dissenting, adopted all of the findings of the hearing committee, including the finding that plaintiff had "violated the law and/or principles of medical ethics," and recommended revocation of plaintiff's staff privileges. *Ibid.*

There Is No Basis For Holding That Missouri Courts Have a "Public Policy" Against Limited Judicial Review of Whether Physicians Have Received Notice and Fair Hearing Procedures Prior to Termination of Their Hospital Staff Privileges.

The genesis of the view that there is a "public policy" against review of private hospital actions revoking medical staff privileges is language in this Court's opinion in Cowan v. Gibson, 392 S.W.2d 307, 308 (Mo. 1965): "'it is generally held that the exclusion of a physician or surgeon from practicing therein is a matter which rests in the discretion of the managing authorities.'" This language did not create any "public policy."

The Language In *Cowan* Relied On By the Eastern District Is a Dictum.

Cowan sued hospital board members and medical staff for conspiracy to "injure him in the practice of medicine." En route to a holding that Cowan had stated a cause of action, this Court quoted language from a 1951 annotation in A.L.R.2d stating that, with regard to private hospitals, "'it is generally held that the exclusion of a physician or surgeon from practicing therein is a matter which rests in the discretion of the managing authorities.'" *Id.* at 308, quoting from Annotation, 24 A.L.R.2d 850, 852. The opinion expressed neither approval nor disapproval of this language, but quoted it in order to distinguish it. It cannot be used to create a "public policy" against limited judicial review of medical staff terminations: "'There is no doctrine better settled than that the language of judicial decisions must be construed with reference to the facts and issues of the particular case, and that **the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision.**'" Parker v. Bruner, 683 S.W.2d 265 (Mo. 1985)(En

Banc)(Emphasis added.).

The Language of the 1951 A.L.R.2d Annotation Quoted in the *Cowan* Opinion Has Been Modified and No Longer Supports the Proposition for Which the Eastern District Cited *Cowan.*

Since Cowan, the annotation which it quoted has twice been supplanted, by 31 A.L.R.3d 645, and, most recently, by 28 A.L.R. 5th 107, 152. The following qualifier has been appended to the language quoted by this Court in Cowan: "frequently asserting that there is an exception to the general rule where the hospital fails to conform to its own bylaws or regulations, or fails to provide basic procedural protections."

This modification of the 1951 annotation was necessitated by the fact that, since 1951, at least thirty-three states and the District of Columbia have permitted physicians to challenge suspensions or revocations of their medical staff privileges by private hospitals on the grounds that they did not receive a "fair hearing": Alabama-Clemons v. Fairview Med. Ctr., 449 So. 2d 788 (Ala. 1984); Alaska-McMillan v. Anchorage Community Hosp., 646 P.2d 857 (Alaska 1982); Arizona-Bock v. John C. Lincoln Hosp., 702 P.2d 253 (Ariz. 1985); California-Miller v. Eisenhower Med. Ctr., 614 P.2d 258 (Cal. 1980)(In Bank); Colorado-Hawkins v. Kinsie, 540 P.2d 345 (Colo. Ct. App. 1975); Florida-Lake Hosp. & Clinic v. Silversmith, 551 So. 2d 558 (Fla. App. 1989)); Georgia -Batilla Health Serv., Inc. v. Bell, 633 S.E.2d 575 (Ga. App. 2006)(by statute); Hawaii-Silver v. Castle Mem'l Hosp., 497 P.2d 564 (Haw. 1972); Idaho-Miller v. St. Alphonsus Reg'l Med. Ctr., Inc., 87 P.3d 934 (Idaho 2004); Illinois-Adkins v. Sarah

Bush Lincoln Health Ctr., 544 N.E.2d 733 (Ill. 1989); Indiana-Terre Haute Regional Hosp., Inc., 479 N.E.2d 1371 (Ind. App. 1984); Iowa-Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361 (N.D. Iowa 1992); Kentucky-McElhinney v. William Booth Mem'l Hosp., 544 S.W.2d 216 (Ky. 1976); Louisiana-Fontenot v. Southwest Louisian Hosp. Ass'n, 775 S.W.2d 1111 (La. App. 2000); Maine- Bartley v. Eastern Maine Med. Ctr., 617 A.2d 1020 (Maine 1992); Maryland-Sadler v. Dimensions Healthcare Corp., 836 A.2d 655 (Md. App. 2003); Michigan-Feyz v. Mercy Mem'l Hosp., 719 N.W.2d 1 (Mich. 2006); Minnesota-Campbell v. St. Mary's Hosp., 252 N.W.2d 581 (Minn. 1977); Mississippi-Wong v. Garden Park Community Hosp., Inc., 565 So.2d 550 (Miss. 1990); Nebraska-Babcock v. Saint Francis Med. Ctr., 543 N.W.2d 749 (Neb. App. 1996); Nevada-Clark v. Columbia/HCA Info. Serv., Inc., 35 P.3d 215 (Nev. 2001); New Hampshire-Bricker v. Sceva Speare Mem'l Hosp., 281 A.2d 589 (N.H. 1971); New Jersey-Greisman v. Newcomb Hosp., 192 A.2d 817 (N.J. 1963); New Mexico-*see* Clough v. Adventist Health Sys., Inc., 780 P.2d 627 (N.M. 1989); New York-Falk v. Anesthesia Assoc., 644 N.Y.S.2d 237 (N.Y. App. Div. 1996); North Carolina-Virmani v. Presbyterian Health Serv. Corp., 488 S.E.2d 284 (N.C. App. 1997); Ohio-Bouquett v. St. Elizabeth Corp., 538 N.E.2d 113 (Ohio 1989); South Dakota-Mahan v. Avera St. Luke's, 621 N.W.2d 150 (S.D. 2001); Tennessee-Eyring v. East Tennessee Baptist Hosp., 950 S.W.2d 354 (Tenn. App. 1997); Texas-East Texas Med. Ctr. Cancer Inst. v. Anderson, 891 S.W.2d 55 (Tex. App.1998); Utah-Brinton v. IHC Hosp., Inc., 973 P.2d 956 (Utah 1998); Vermont-Woodard v. Porter Hosp., Inc., 217 A.2d 37 (Vt. 1966);

Wisconsin- Seitzinger v. Community Health Network, 676 N.W.2d 426 (Wis. 2004); District of Columbia-Shulman v. Washington Hosp. Ctr., 222 F. Supp. 59 (D.D.C. 1963). Appellant respectfully suggests that it is time for this Court similarly to qualify the language it quoted from the 1951 annotation, and to indicate that the language from that annotation should no longer be strictly followed without qualification regarding the fairness of the hospital's peer review procedures.

Cases Cited in the 1951 A.L.R.2d Annotation Do Not Support the Blanket Rule of Nonreview Which the Eastern District Attributed to This Court's Citation Thereof in *Cowan*.

The 1951 recitation of the rule which the Eastern District morphed into an absolute ban on any review of private hospital decisions terminating medical staff priviliges was not itself couched in absolute terms, but qualified by the phrase "generally held." In fact, some of the cases cited in that A.L.R.2d annotation do not support an inflexible approach. Included among the cases cited in the Annotation for this generality was Levin v. Sinai Hosp., 46 A.2d 298 (Md. App. 1946). Like St. Anthony's, Sinai was a private hospital. The court stated: "In Maryland, a court of equity may properly grant injunctive relief to protect a physician in his right to treat his own patients in a hospital where its constitution and by laws accord him that right, and may pass upon the validity of asserted amendments to the constitution for determining

his right to such relief." *Id.* at 301.[1] The Annotation also cited Hughes v. Good Samaritan Hosp., 158 S.W.2d 159 (Ky. 1942), with the caveat "Where the hospital authorities act, not arbitrarily or capriciously, but in the exercise of a sound discretion." Another authority cited by the Annotation was Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920), which included the parenthetical "where hospital authorities act in good faith, with the view of promoting the efficiency of the institution."

The Decision of the Western District Court of Appeals, Cited for the Proposition That There Is a "Strong Public Policy" In Missouri Against Reviewing Staffing Decisions of Private Hospitals, Cannot Stand As a Judicial Declaration of the Public Policy of the State of Missouri, For Only the Highest Court of a State Has the Power Judicially To Declare Public Policy.

The Memorandum of the Court of Appeals for the Eastern District relies on the following language in Zipper v. Health Midwest, 978 S.W.2d 398, 417 (Mo. App. W.D. 1998):

> "The holding that hospital bylaws do not constitute a contract between the hospital and its medical staff is in accord with strong public policy principles in Missouri. The exclusion of a physician or surgeon from practicing in a private hospital is a matter that rests in the discretion of the managing authorities."

For this proposition, the Western District cited Richardson v. St. John's Mercy Hosp.,

[1] The doctor's petition was dismissed for pleading deficiencies.

674 S.W.2d 200, 201 (Mo. App. E.D. 1984). The phrase "public policy" is not found in Richardson. The statement in Richardson that "[i]t has been generally held in Missouri that the exclusion of a physician or surgeon from practicing in a private hospital is a matter which rests in the discretion of the managing authorities" has this Court's dictum in Cowan as its source. Richardson v. St. John's Mercy Hosp., 674 S.W.2d at 201.

"'Questions of public policy . . . are governed by the law of the state, as expressed in its own constitution and statutes, or **declared by its highest court.**'" *In re* Hahn's Estate, 291 S.W. 120, 123 (Mo. 1926) (Emphasis added.).. "The public policy of a State is evidenced by the Constitution, statutory laws, course of administration and **decisions of the courts of last resort of the State**." State *ex rel.* Gaines v. Canada, 113 S.W.2d 783, 785 (Mo. 1937)(in Banc), *rev'd on other grounds*, 305 U.S. 337 (1938)(Emphasis added.).. An intermediate appellate court cannot adjudicate public policy. Breece v. Jett, 556 S.W.2d 696, 708 (Mo. App. St. L. Dist. 1977). Changes in public policy "by judicial rather than legislative action . . . would be appropriate only for the Supreme Court, not an intermediate appellate court." Wood v. Evans Prod. Co., 574 S.W.2d 488, 493 n.1 (Mo. App. K.C. Dist. 1978).

In the absence of a clear holding by this Court that a "public policy" existed, the attempts by the Eastern and Western Districts to declare such "public policy" on the basis of the dictum in Cowan exceeded their authority. Moreover, This Court has defined "public policy" as "that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good; it

is synonymous with the 'policy of the law' and 'the public good.'" Brawner v. Brawner, 327 S.W.3d 808, 812 (Mo. 1959)(En Banc). "'Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in.'" *In re* Hahn's Estate, 291 S.W. at 123.. "A court may make an alleged public policy the basis of a judicial decision only in the clearest cases." 20 AM. JUR. 2D *Courts* § 47 at 437; *accord,* Minnesota Fire & Cas. Co. v. Greenfield, 855 A.2d 854, 868 (Pa. 2004).

In the absence of applicable statutes or constitutional provisions, "'a judicial determination of the question becomes an expression of public policy provided it is so plainly right as to be supported by the general will.'" Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 217 (Mo. App. St. L. Dist. 1975). "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection." Patton v. United States, 281 U.S. 276, 306 (1930).

The Requirement of the Missouri Code of State Regulations That All Hospitals Enact Bylaws Providing Physicians With Notice and Opportunity To Be Heard Whenever Their Medical Staff Memberships Are Placed In Jeopardy By Hospital Administrators Establishes Such Protections As the "Public Policy" of the State of Missouri

The Missouri Department of Health and Senior Services, Organization and

Management for Hospitals, 19 CSR 30-20.021 (*see* MO. REV. STAT. § 537.035.5) requires that hospitals adopt bylaws which provide for appeal and hearing procedures for suspension or revocation of clinical privileges of a member of the medical staff, and that notification of suspension or revocation of privileges shall be in writing and shall indicate the reasons for this action:

> "14. Bylaws of the governing body shall require that the medical staff develop and adopt medical staff bylaws and rules which shall become effective when approved by the governing body.
>
> . . . .
>
> "16. Bylaws of both the governing body and medical staff shall provide for appeal and hearing procedures for the denial of reappointment and for the denial, curtailment, suspension, revocation or other modification of clinical privileges of a member of the medical staff. These bylaws also shall provide that notification of denial of appointment, reappointment, curtailment, suspension, revocation or modification of privileges shall be in writing and shall indicate the reasons(s) for this action.
>
> "17. The governing body shall establish mechanisms which assure the hospital's compliance with mandatory federal, state and local laws, rules and standards."

St. Anthony's bylaws conform to this state regulation.

In Zipper v. Health Midwest, 978 S.W.2d at 416, the Western District held that these regulations placed a "legal duty" on hospitals to adopt bylaws containing such procedural protections for their staff physicians. In Miller v. St. Alphonsus Reg'l Hosp. Ctr., Inc., 87 P.3d at 943, the court took the very sensible position that:

> "Implicit in those mandates is the requirement that the hospital substantially follow whatever procedures it adopts for determining qualifications for medical staff appointment. It would be meaningless to require a hospital to adopt written procedures that afford due process to applicants for medical staff privileges unless the hospitals were also required to substantially comply with the procedures they adopt."

"To hold that a hospital did not have to comply with its bylaws would, of course, render them essentially meaningless. They would then be a catalogue of rules, which, although binding on the medical staff, were merely hortatory as to the hospital—much 'sound and fury, signifying nothing.'" Keane v. St. Francis Hosp., 522 N.W.2d 517, 522 (Wis. App. 1994)(quoting from Bass v. Ambrosius, 520 N.W.2d 625, 627 (Wis. App. 1994)). : "A hospital's obligation to follow bylaws can. . . . be based on a preexisting legal duty imposed by our state department of health regulations to adopt ' "bylaws, rules and regulations, including medical staff bylaws." ' " Owens v. New Britain Gen. Hosp., 643 A.2d 233, 240 (Conn. 1994). "'[T]o suggest [that the Hospital] has no legal duty to follow its own bylaws] would be to reduce the bylaws to meaningless mouthing of words.'" Lewisburg Community Hosp. v. Alfredson, 805

S.W.2d at 759. "If the department of health had not intended that the hospital abide by its medical staff bylaws, then the requirement that it enact such laws would be superfluous." Gianetti v. Norwalk Hosp., 557 A.2d at 1253.

In its Memorandum in the instant case, the Court of Appeals for the Eastern District did not even mention the existence of 19 CSR 30-20.021, much less attempt to square its "public policy" of non-review with that state regulation.

Allowing managing authorities of private hospitals unfettered and unreviewable discretion to exclude physicians from their medical staffs without notice and opportunity to be heard does not foster reliable peer review

In addition to the Missouri statutes and regulations which require hospitals to provide notice and fair hearings to their physicians where their privileges are at stake, the hospital accreditation body invokes the same requirement. The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") imposes an affirmative obligation on a hospital to adopt medical staff bylaws and include in such bylaws fair hearing and appeal process for addressing adverse decisions regarding suspension of privileges. JCAHO StandardMS4.50,2004.

The federal government has implemented identical policy provisions. Section 11112 of the federal Health Care Quality Improvement Act (42 U.S.C. § 11112) grants hospitals immunity from suits by physicians who have been reported conditioned upon granting the physician notice and an opportunity to be heard before adverse actions are taken.

"The public has an interest that staff decisions are not made arbitrarily." Owens v. New Britain Gen. Hosp., 643 A.2d at 240. "[J]udicial review is available, but limited to a determination whether the regulation is reasonable, *i. e.,* 'one that comports with the legitimate goals of the hospital and the rights of the individual and the public' . . . ." Reiswig v. St. Joseph's Hosp. & Med. Ctr., 634 P.2d 976, 979-80 (Ariz. App. 1981). "Medical staff bylaws reflect what the medical community considers to be crucial to the effective administration of the hospital and the provision of quality medical care by physicians whose performance has earned them privileges." Owens v. New Britain Gen. Hosp., 643 A.2d at 240. St. Anthony's "public policy" analysis ignores totally the interests of the physicians. "[E]xclusion or expulsion" of a doctor, particularly a surgeon, from a hospital staff "seriously impairs an individual's ability to pursue his or her occupation." Reiswig v. St. Joseph's Hosp. & Med. Ctr., 634 P.2d at 980; *accord,* Mahmoodian v. United Hosp. Ctr., Inc., 404 S.E.2d 404 S.E.2d 750, 756 (W. Va. 1991). The Health Care Quality Improvement Act recognizes "that suspension of a doctor's staff privileges can have a devastating effect upon a medical professional." Islami v. Covenant Med. Ctr., 822 F. Supp. at 1379.

> "Doctors, particularly surgeons, have a substantial interest in favorable responses to their applications for staff membership, for their ability to pursue their profession may depend on the availability of necessary hospital facilities. . . . Furthermore, it is obviously important that they protect their professional reputations. All of these identifiable values are proper components to be

considered when measuring the adequacy of the process dealing with an application for admission to a hospital staff."

Garrow v. Elizabeth Gen. Hosp. & Dispensary, 401 A.2d 533, 537 (N.J. 1979).

A hospital's obligation to follow its bylaws also arises from the public's substantial interest in the operation of hospitals, public or private.

"'Hospitals exist to provide health care to the public. In addition to serving the needs of their patients, hospitals also provide a place of employment for doctors and other professionals. The privilege to admit and treat patients at a hospital can be critical to a doctor's ability to practice his [or her] profession and to treat patients. Both doctors and patients can suffer if otherwise qualified doctors are wrongly denied staff privileges.'"

Owens v. New Britain Gen. Hosp., 643 A.2d at 240.

"'"[T]he essential nature of a qualified physician's right to use the facilities of a hospital is a property interest which directly relates to the pursuit of his livelihood." . . . [A]dmission of a physician to medical staff membership establishes a relationship between physician and hospital which . . . gives rise to rights and obligations. . . .' Summary deprivation of this right amounts to a stigma of medical incompetence."

McMillan v. Anchorage Community Hosp., 646 P.2d at 864.

The disastrous affects of staffing decisions on doctors, particularly surgeons, has

been magnified exponentially by the reporting requirements of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101, *et seq.*, the regulations implementing that act, 42 CFR, Part 60, and the National Practitioners Data Bank Guidebook.

> "The goal of protecting patients and the general public from less than competent physicians is balanced against the rights of the private physician. The worst possible punishment for a physician is a 'denial of privileges based upon a physician's poor performance, inferior qualifications, or disruptive behavior.' . . . Finding gainful employment in the hospital setting after a poor review is unlikely as a result of the provisions of the Health Care Quality Improvement Act of 1986 . . . which requires that doctors who have been denied privileges be reported to a national service. . . . Hospitals must check with this service that keeps track of inadequate and poorly qualified physicians before hiring a new doctor to assure that he has not been rejected by other health care facilities."

Cooper v. Delaware Valley Med. Ctr., 654 A.2d 547, 551 (Pa. 1995).

The Memorandum decision of the Court of Appeals for the Eastern District in the instant case was rooted in law which is over half-a-century old, long before today's system of peer review was even thought of. By stacking the deck in favor of hospital administrators and ignoring the interests of accused physicians, it is throwing good doctors out along with the bad. This is bad "public policy." The instant lawsuit, which does not seek damages, is the ideal fusion between the policy of affording accused

physicians notice and opportunity to be heard, enunciated by the Missouri legislature, the Missouri Department of Health and Senior Services, Congress, and the Joint Committee on Accreditation of Healthcare Organizations, on the one hand, and the policy of granting hospital administrators leeway in conducting peer review, found in cases cited by St. Anthony's, on the other.

II

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE THE TRIAL COURT HAD JURISDICTION OF THE SUBJECT MATTER IN THAT THE PETITION CONTAINED SEVEN COUNTS WHICH PROPERLY PLED CAUSES OF ACTION FOR EQUITABLE RELIEF, AND THE FACT THAT THEY INVOLVED MEMBERSHIP ON THE MEDICAL STAFF OF A PRIVATE HOSPITAL DID NOT DEPRIVE THE COURT OF SUBJECT MATTER JURISDICTION.

The standard for review of a judgment sustaining a motion to dismiss on the grounds that the petition fails to state a cause of action is de novo.

Paragraph 3 of defendant's St. Anthony's Medical Center's Motion to Dismiss Plaintiff's First Amended Petition for Injunction and Other Equitable Relief [hereinafter St. Anthony's Motion to Dismiss] states: "This Court lacks jurisdiction over all of Plaintiff's claims because established Missouri law precludes judicial review of the staffing decisions of a private hospital, such as St. Anthony's." L.F. 8. The next paragraph begins: "Established law holds that the decision to exclude a physician from a

private hospital is a matter which rests in the discretion of managing authorities. Further, hospital bylaws do not create enforceable contract rights." *Ibid.*

The Trial Court Had Subject Matter Jurisdiction of Plaintiff's Claims

The first case cited by respondent below was Cowan v. Gibson, 392 S.W.2d 307, discussed at length in Point I above. Again, Cowan sued hospital board members and medical staff for conspiracy to "injure him in the practice of medicine." This Court held he had stated a cause of action. This Court said nothing about Missouri courts lacking "jurisdiction" to review "the staffing decisions of a private hospital."

Defendant's second principal case for the proposition that the trial court lacked jurisdiction to entertain plaintiff's suit in equity was the Eastern District's decision in Richardson v. St. John's Mercy Hosp., 674 S.W.2d 200. In Richardson, the staff privileges of the complaining physician had not been suspended or revoked. Rather, the hospital had made the administrative decision to require Dr. Richardson "to have preoperative consultative and intraoperative assistance on all major abdominal cases." *Id.* at 201. Plaintiff sought to enjoin St. John's from requiring him to accept this assistance. The holding was that the court had no "jurisdiction to review the administrative decision" of St. John's. *Ibid.* The Court of Appeals stated the sole issue to be whether "the circuit court had jurisdiction to review the administrative decision of St. John's to restrict the surgical privileges of Dr. Richardson.". "[A]dministrative review" is judicial review of decisions rendered by "agencies" or "state agencies" in "contested cases." MO. REV .STAT. §§ 536.010, 536.018, 536.063, 536.100. Another

statute permits suit by injunction or original writ when an officer or body existing by constitution, statute, municipal charter or ordinance renders a decision not subject to administrative review affecting any person's legal rights or privileges. MO.REV.STAT .§ 536.150. Clearly, St. John's did not fit any of these categories, so the suit for injunction or review failed. In touting this case as standing for the proposition that this Court lacks jurisdiction of a suit in equity challenging the procedures employed by the hospital to terminate Dr. Egan's privileges, defendant has overlooked the Court of Appeal's concluding caveat: "**[T]his opinion . . . does not take up or rule whether respondent, Dr. Richardson, has and may pursue an alternative means of recovery.**" 674 S.W.2d at 202 (Emphasis added.). There was no question of suspension or termination of privileges.

The Richardson Court reviewed four cases. It specifically recognized that the issue was not reached in Cowan. Richardson v. St. John's Mercy Hosp., 674 S.W.2d at 201. Its discussion of the other three cases was in terms of "standing to invoke the due process requirements of the Fourteenth Amendment." *Ibid.* As to Dillard v. Rowland, 520 S.W.2d 81 (Mo. Ct. App. St. L. Dist. 1974), the Richardson opinion noted "that issue did not have to be decided since plaintiff in that case had declined the hearing on his claim, and whatever rights to due process he *might* have had were deemed to be waived." 674 S.W.2d at 201. Both of the federal cases cited in Richardson, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976), dealt with the question of whether receipt of federal funds by a private

hospital converted its staffing decisions into "state action" such as to entitle the subject of such a decision to invoke the Fourteenth Amendment; both cases answered this question in the negative. Thus, although the Eastern District in Richardson did not specify the grounds on which Dr. Richardson sought to have the restrictions placed by St. John's on his surgical practice overturned, it is evident, from the cases on which that court relied to abjure such review, that plaintiff had sought review on the grounds that the hospital had violated Fourteenth Amendment due process. The Supreme Court ruling in Jackson that acceptance of federal funds did not transform the hospital's administrative procedures into "state action" made rejection of that claim an easy call.

By way of contrast, Dr. Egan's claims herein do not involve any federal law, constitutional or otherwise. Appellant's claims are based on violations of state administrative regulations, and principles of equity under state law. None of these were implicated in the Richardson case.

The use of the term "jurisdiction" in Richardson (674 S.W.2d at 201) can only be meaningful in one of two contexts. The statutes on review of administrative decisions are limited to the actions of governmental agencies, and it is correct to say that a court has no "jurisdiction," under those statutes, to review a decision of a private body. Alternatively, since action by a private hospital is not "state action," it can be said that a court has no "jurisdiction" to apply the Fourteenth Amendment thereto. These claims are not implicated in the present case.

The hospital's third authority below for the proposition that the trial court lacked

subject matter jurisdiction was Zipper v. Health Midwest. Dr. Zipper sued a hospital for damages for breach of contract for terminating his staff privileges without following procedures specified in the hospital's bylaws. In contrasting decisions in other states holding that hospital bylaws are contractual with those holding they are not, the Western District noted:

> "Two of the courts holding that hospital bylaws cannot constitute a contract between the hospital and its medical staff, however, find that the medical staff may seek judicial review and **request injunctive relief to force the hospital to comply with the procedures adopted in its bylaws.** *Robles* [v. Humana Hosp., 785 F. Supp. 989] at 1002 (N.D.Ga.1993); *Gianetti v. Norwalk Hosp.*, 211 Conn. 51, 557 A.2d 1249, 1256 (1989)."

Zipper v. Health Midwest, 978 S.W.2d at 416. The Western District decided that consideration for a contract was lacking because "[b]y state regulation, Missouri hospitals are required to 'adopt bylaws, rules and policies governing their professional activities in the hospital." *Ibid.* The court proceeded to discuss the "public policy" considerations in the portion of the opinion relied on by St. Anthony's: "The holding that hospital bylaws do not constitute a contract between the hospital and its medical staff is in accord with strong public policy principles in Missouri. The exclusion of a physician or surgeon practicing in a private hospital is a matter that rests in the discretion of the managing authorities." *Id.* at 417. The Western District then set forth its rationale

for using these "public policy" considerations to bar Dr. Zipper's contract claim for damages:

> Allowing a physician ***to seek damages*** for an alleged failure of a hospital to follow the procedures established by its bylaws is contrary to this policy. A hospital's consideration, when terminating the privileges of a physician, of ***its potential liability for monetary damages*** could unduly impugn a hospital's actions in terminating the privileges of a physician providing substandard patient care.

Ibid. (Emphasis added.). In the concluding sentence of its rationale for upholding the trial court's grant of summary judgment on Dr. Zipper's claim for damages for breach of contract based on the bylaws, the court held: "***[B]ecause Dr. Zipper sought only contractual damages for MCI's alleged breach of its bylaws***, Dr. Zipper has failed to state a cause of action on Count I." *Ibid.* (Emphasis added.).

Two things are clear from the above. First, there is not the slightest hint that the court thought it did not have "jurisdiction" of a suit challenging a hospital's failure to follow procedures in its bylaws. More significantly, the rationale that the threat of damages could deter hospitals from terminating inept doctors, taken together with the citation, without quarrel, of cases holding that equitable relief is available when hospital's fail to follow procedures established in their bylaws, was an open invitation to Dr. Zipper, and others similarly harmed by violations of bylaw protections, to seek equitable relief.

The fourth case cited by respondent below for the proposition that the trial court lacked subject matter jurisdiction is Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848 (Mo. App. E.D. 2000). In that case, plaintiff-doctor abused patients. Misischia does not support the claim of lack of subject matter jurisdiction because the court of appeals therein found that the notice and hearing procedures employed sufficiently comported with HCQIA requirements to entitle the hospital to immunity. The *dicta* referred to in St. Anthony's memorandum related to a claim for damages for tortious interference with the doctor's relationships with his patients. The court did not rely solely on the "general rule" of deference to the discretion of managing authorities in affirming rejection of the tortious interference count, but "coupled" it with "the fact that St. John's had a legal right to summarily suspend and ultimately terminate plaintiff's privileges." There is no hint that the court considered the issue jurisdictional. Since the claim was for damages, even the *dicta* is inapposite to the instant claims for equitable relief.

The fifth and last case cited by St. Anthony's for the proposition that the trial Court lacked subject matter jurisdiction is Madsen v. Audrain Health Care, Inc., 297 F.3d 694, 697 (8th Cir. 2002). The Eighth Circuit upheld dismissal of a breach of contract claim based on the hospital's bylaws on the same rationale as that in Zipper v. Health Midwest, 978 S.W.2d at 416, discussed above: "The expressed policy in Missouri is the assurance of quality health care, which is unduly impinged by allowing a physician ***to seek damages*** for an alleged failure of a hospital to follow the procedures established by its bylaws." 297 F.3d at 699(Emphasis added.) Madsen had a full hearing and appeal

pursuant to the hospital's bylaws. The opinion does not mention any allegations that Dr. Madsen did not receive full notice and opportunity to be heard, as required under the bylaws mandated by the Missouri Department of Health and Senior Services regulations.[2]

Michigan is a recent convert to the proposition that the modern system of peer review requires judicial oversight of the procedures employed by hospitals to weed out incompetent doctors. Feyz v. Mercy Mem'l Hosp., 719 N.W.2d at 7-11. The court therein describes its former approach as "the judicial nonintervention doctrine." *Id.* at 8. It holds quite specifically that: "The judicial nonintervention doctrine does not deprive a court of subject matter jurisdiction . . . ." *Id.* at 8 n.29.

III

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT III FOR PROMISSORY ESTOPPEL OF DEFENDANT FROM DENYING PLAINTIFF THE

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[2]In Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975), the court held that a surgeon with privileges at privately owned, federally aided, hospital was entitled to notice and opportunity to be heard before removal from staff. In Kaplan v. Carney, 404 F. Supp. 161 (E.D. Mo. 1975) and State *ex rel.* Willman v. St. Joseph Hosp., 707 S.W.2d 828 (Mo. App. W.D. 1986), the physicians were in fact provided with due process hearings before reduction in status. There was no suggestion in any of these cases that the court thought there was any doubt as to its jurisdiction.

RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, PROVIDED FOR IN THE ST. ANTHONY'S BYLAWS BECAUSE ST. ANTHONY'S REPRESENTED TO HIM THAT, IF HE REQUESTED A HEARING REGARDING HIS SUMMARY SUSPENSION, HE WOULD BE AFFORDED THOSE RIGHTS, IN THAT PLAINTIFF RELIED ON THOSE REPRESENTATIONS AND THE NOTICE HE RECEIVED IN RETAINING AN ATTORNEY TO REPRESENT HIM, EXPENDING FUNDS, SPENDING MANY HOURS IN PREPARATION FOR THE HEARINGS, UNDERGOING THREE SESSIONS OF HEARING, AND BEING GRILLED BY MEMBERS OF THE HEARING COMMITTEE, HIS PRIVILEGES WERE REVOKED ON GROUNDS WHICH WERE OUTSIDE OF THE NOTICE, AND HIS APPEAL WAS DENIED BY A PANEL WHOSE MEMBERS PRESENTED FALSE *EX PARTE* TESTIMONY AGAINST HIM DURING THE HEARING ON HIS APPEAL

The standard of review is de novo.

Defendant represented to the trial court that Count IV should be dismissed because, *inter allia*, "[p]laintiff has failed to allege reliance." L.F. 8. This assault on Count IV is incomprehensible:

"93. In notifying plaintiff that he had been suspended summarily, St. Anthony's promised him a due process hearing, and a fair hearing, notice, opportunity to be heard, and appeal before a neutral and impartial review panel if he appealed his suspension.

"94. In reliance upon those promises, plaintiff appealed his suspension, employed counsel, expended funds, spent many hours in preparation for such hearing, and underwent three sessions of hearing, submitting himself to voluminous examination.

"95. Plaintiff and his counsel relied upon the specifications in the notice of hearing as containing a concise statement of his alleged acts or omissions forming the basis for the adverse action or recommendation."

L.F. 28.

When it suspended Dr. Egan, St. Anthony's had three basic alternatives: (1) it could have taken the position that it had no obligation to give him a hearing; (2) it could have taken the position that it would give him a hearing, but was not required to provide him with "a concise statement of the Affected Practitioner's alleged acts or omissions, [and] a list by number of the specific or representative patient records in question"; (3) it could have offered him a hearing with the full range of protections provided in the bylaws, including a notice containing the above specifications. St. Anthony's chose alternative (3). Dr. Egan relied, not on the bylaws themselves, but on the various communications he received from the hospital promising the full protection of the provisions of the bylaws regarding hearing and appellate review procedures if he requested a hearing. It was <u>these</u> promises Dr. Egan relied on.

In its motion, defendant also claimed that this count fails "because Plaintiff . . . seeks relief beyond any purported statement or promise by St. Anthony's, because he alleges no harm resulting from the repudiation of a statement or promise by St.

Anthony's, and because he seeks to enforce rights greater than provided under the bylaws." L.F. 8.

Dr. Egan certainly has alleged that he was "harmed" by St. Anthony's convicting him of "violat[ing] the law and/or principles of medical ethics" when he had not been charged with any such violations in the notice of hearing. Defendant's motion does not allege that this conviction was not a clear violation of Dr. Egan's right to notice, nor could it reasonably do so. For example, in Missouri Dental Bd. v. Cohen, 867 S.W.2d 295 (Mo. App. W.D. 1993), the court held that Dr. Cohen could not be convicted on unpleaded charges. Similarly, in Duncan v. Missouri Bd. for Architects, 744 S.W,2d 524, 538-39, 538 n.10, 542 (Mo. App. E.D. 1988), the court held that an architect could not be found guilty on a charge which had not been pled.

It ill behooves St. Anthony's to protest that Dr. Egan was not "harmed" by its failure to provide him notice that he would be convicted of violating some nebulous law "and/or" unspecified "principles of medical ethics" when it was this very conclusion which St. Anthony's reported to the National Data Bank and the Missouri Board of Healing Arts.

For purposes of determining whether a cause of action is stated, the prayer is not considered part of the pleading. Thus, whether plaintiff "seeks relief beyond any purported statement or promise by St. Anthony's," or whether he "seeks to enforce rights greater than provided under the bylaws," is irrelevant to the question of whether he has pled facts supporting a cause of action for equitable estoppel. Even if the relief

sought were part of the cause of action pled, a hearing limited to charges as to which he has received notice, and appellate review by an unbiased panel, limited to the record of the hearing, is exactly what he was promised, and what is provided under the bylaws.

IV

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT I FOR EQUITABLE RELIEF FOR DAMAGE TO PROPERTY RIGHTS BY REASON OF VIOLATION OF THE LAW IN THAT COUNT I PROPERLY PLED THAT PLAINTIFF'S PROPERTY INTEREST IN THE PRACTICE OF HIS PROFESSION HAS BEEN AND IS BEING DAMAGED BY ST. ANTHONY'S VIOLATION OF REGULATION 19 CSR 30-20.021 IN REVOKING PLAINTIFF'S MEDICAL STAFF PRIVILEGES WITHOUT GRANTING HIM PROPER NOTICE AND OPPORTUNITY TO BE HEARD.

The standard of review is de novo.

As described above, the Missouri Code of State Regulation, 19 CSR 30-20.021 Organization and Management for Hospitals, requires that hospitals adopt bylaws which provide for appeal and hearing procedures for suspension or revocation of clinical privileges of a member of the medical staff, and that notification of suspension or revocation of privileges shall be in writing and shall indicate the reasons for this action. The above regulation does not provide criminal penalties for violation thereof.

In Zipper v. Health Midwest, 978 S.W.2d at 416, the Court held that hospitals

have a legal obligation to follow the bylaws they enact:

> "The hospital bylaws cannot be considered a contract under Missouri law because consideration is lacking. By state regulation, Missouri hospitals are required to "adopt bylaws, rules and policies governing their professional activities in the hospital." . . . MCI therefore had a preexisting legal duty to adopt the bylaws independent of its relationship with Dr. Zipper. . . . [A] promise to do that which a party is already legally obligated to do does not constitute valid consideration. Because MCI had a preexisting legal duty to adopt the bylaws independent of the relationship with Dr. Zipper, consideration is lacking and, therefore, the bylaws cannot constitute a contract between MCI and Dr. Zipper."

Mere adoption of bylaws confers no benefit on staff physicians unless the hospital is legally obligated to follow the bylaws it adopts. It was Dr. Zipper's position that MCI had a contractual obligation, by reason of the bylaws, to provide him with notice and opportunity to be heard. *Id.* at 415. If this alleged promise did not furnish consideration because MCI was already legally obligated to provide such notice and opportunity to be heard, then such obligation stemmed from the statute and regulation. Conversely, if the statute and regulation did not obligate MCI to provide Dr. Zipper with notice and opportunity to be heard, then the bylaws promised something MCI was not already legally obligated to do, and there was thus consideration. Since the Zipper court held that there was no consideration, it follows of necessity that the statute and

regulation legally obligated MCI—and, thus, St. Anthony's Medical Center—to provide physicians whose staff membership is at risk with notice and the opportunity to be heard.

"[W]here there is a legal right, there is a legal remedy, by suit or action at law whenever that right is invaded. WILLIAM BLACKSTONE, COMMENTARIES 536 (Abridged Ed. Wm. Hardcutte Browne, Ed. Bernard C. Gavitt 1892). "Where there is a legal right, there is also a legal remedy." *Id.* at 952. In England and the states in this country, the law is "solicitous to furnish a remedy for every invasion of legal right." State *ex rel.* Allen v. Dawson, 224 S.W. 824, 827 (Mo. 1920)(in Banc). "Equity will not suffer a wrong to be without a remedy, and seeks to do justice and avoid injustice." Willman v. Beheler, 499 S.W.2d 770, 778 (Mo. 1973); *accord*, Cannon v. Bingman, 383 S.W.2d 169, 174 (Springf. Ct. App. 1964). It "'is not bound by strict common law rules.'" Hydesburg Common School Dist. v. Rensselaer Common School Dist., 218 S.W.2d 833, 836 (St. L. Ct. App. 1949). Equity "looks to the substance rather than the form and will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality." Weaver v. Jordan, 362 S.W.2d 66, 75 (Springf. Ct. App. 1962); *accord*, Merrick v. Stephens, 337 S.W.2d 713, 719 (Springf. Ct. App. 1960).

"'[W]here a statute or the organic law creates a right, but is silent as to the remedy, the party entitled to the right may resort to any common law action which would afford him adequate and appropriate means of redress . . . .'" Bishop v. Missouri State Div. of Fam. Serv., 592 S.W.2d 734, 736 n.1 (Mo. 1980)(En Banc).

Just as a statute regulating operation of plants for cold storage becomes a part of every contract made between a locker plant operator and an individual locker renter, so the Missouri Code of State Regulations mandating bylaws which protect the rights of individual physicians to notice and opportunity to be heard regarding assaults on their medical staff memberships becomes a part of the relationship between every hospital with the members of its medical staff. *See* Barnard v. Murphy, 365 S.W.2d 614, 619 (Mo. 1963).

"[W]hen the act complained of threatens an irreparable injury to the property of an individual a court of equity will interfere to prevent that injury, . . . In such a case the court . . . exerts its force to protect the individual's property from destruction, . . . There can be no doubt of the jurisdiction of a court of equity in such a case." Hamilton-Brown Shoe Co. v. Saxey, 32 S.W. 1106, 1108 (Mo. 1895)(Emphasis added.). "[A] court of equity . . . will issue an injunction to enjoin persons from attempting, by . . . unlawful means, to threaten irreparable injury to property rights, . . ." National Pigments & Chem. Co. v. Wright, 118 S.W.2d 20, 24 (St. L. Ct. App. 1938)(Emphasis added.). For example, in Dennig v. Graham, 59 S.W.2d 699, 702 (Springf. Ct. App. 1933), a persistent fisherman was enjoined from trespassing on plaintiff's property to pursue that activity, the court stating: "[E]quity . . . will enjoin an act which threatens irreparable injury."

St. Anthony's response to this was that "Count I fails because Plaintiff has no 'property' right in his membership of the medical staff of St. Anthony's (a private

hospital) and, therefore, he cannot state a claim for injunctive relief based upon alleged injury to his property rights." L.F. 8. To the contrary, "'"the essential nature of a qualified physician's right to use the facilities is a property interest which directly relates to the pursuit of his livelihood."'" McMillan v. Anchorage Hosp., 646 P.2d at 864. Even if the allegation that staff membership itself is not a property right be accepted as true, for sake of argument, there are far more valuable property rights at stake here than just membership on St. Anthony's staff. It cannot be gainsaid that Dr. Egan has a property interest in his license to practice medicine. *See, e.g.*, Larocca v. State Board of Registration for the Healing Arts, 897 S.W.2d 37, 43 (Mo. App. E.D. 1995); Moore v. Board of Education, 836 S.W.2d 943 (Mo. 1992)(En Banc). Moreover, his practice and contracts with his patients are valuable property rights. As shown above, the National Data Bank reporting requirements have enlarged the scope of the damage done to a physician far beyond the loss of staff privileges at an individual hospital. The injury to Dr. Egan's surgical practice in the instant case is palpable.

The issue herein is identical to that in Fontenot v. Southwest Louisiana Hosp. Ass'n, 775 So. 2d at 1119, wherein the State of Louisiana statutorily required hospitals to have rules and regulations providing physicians with hearing rights: "The legislature, by requiring hospitals to establish rules, regulations, and procedures, surely intended that applicants for staff privileges would be entitled to at least minimum due process."

California so values the right to practice one's profession that it has developed a common law right of "'fair procedure.'" Ezekial v. Winkley, 572 P.2d 34 (Cal. 1977).

"'California courts have long recognized a common law right to fair procedures protecting individuals from arbitrary exclusion or expulsion from private organizations which control important economic interests.'" Rosenblit v. Superior Court, 282 Cal. Rptr. 819, 825 (Cal. App. 1991). "The underlying rationale" thereof "is that certain private entities possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced." Ezekial v. Winkley, 572 P.2d at 35. "Such a private organization's actions must be both substantively rational and procedurally fair." Rosenblit v. Superior Court, 282 Cal. Rptr. at 835.

"A hospital's staff membership decisions contain a . . . potential for arbitrary impairment of the physician's right to engage in activities authorized by his license. 'It is common knowledge that a physician or surgeon who is not permitted to practice his profession in a hospital is as a practical matter denied the right to practice his profession.'" Ezekial v. Winkley, 572 P.2d at 36. With regard to medical staff privileges, "the right to retain staff privileges is a 'vested' right that merits protection over and above that afforded to other property interests . . . ." Sahlolbei v. Providence Healthcare, Inc., 5 Cal. Rptr. 3d 598, 610 (Cal. App. 2003).

Thus, (1) the Code of State Regulations gives appellant a legal right to have St. Anthony's enact bylaws requiring fair hearing procedures with regard to the termination of staff privileges; (2) the right to have the bylaws enacted includes a legal right to have them followed; (3) respondent violated the bylaws with regard to notice and the

opportunity to be heard and impartial appellate procedures; (4) appellant has a property interest in the exercise of his profession; (5) that property interest was damaged by respondent's violation of the code of state regulations; and (6) appellant has a cause of action for violation of state regulations which damages his property rights.

V

THE TRIAL COURT ERRED IN SUSTAINING PLAINTIFF'S MOTION TO DISMISS IN THAT, IN COUNT VI, PLAINTIFF PROPERLY PLED THAT THE HOSPITAL'S BYLAWS ARE AN INTEGRAL PART OF A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, AND THIS CONTRACT WAS BREACHED BY DEFENDANT'S FAILURE TO PROVIDE PLAINTIFF WITH NOTICE AND THE OPPORTUNITY TO BE HEARD.

The standard of review is de novo.

A number of courts have held that bylaws are an integral part of an overall contract between the hospital and its staff member. They have reached this conclusion by the following route:

> Once this hospital . . . has agreed to extend privileges to a physician, the hospital has changed its position with reference to that physician. By agreeing to extend privileges to the plaintiff physician, the hospital has then done something it was not already bound to do. . . . In granting privileges, this hospital extended to the plaintiff those benefits to his medical practice that are to be gained by use of the hospital, including the facilities and admissions to the

> hospital. "Whatever else the granting of staff privileges may connote, it is clear . . . that it [at least] involves a delegation by the hospital [to the physician] of authority to make decisions on utilizations of its facilities." . . . In return for that, the plaintiff agreed to abide by its medical staff bylaws. Therefore, the requisite contractual mutuality was then present. . . . This agreement was supported by valid consideration. . . . The hospital changed its position by granting medical staff privileges and the plaintiff physician has likewise changed his position in doing something he was not previously bound to do, i.e., to "abide" by the hospital medical staff bylaws. Therefore, there is a contractual relationship between the hospital and the plaintiff.
>
> . . . [I]t is inherent in this contractual relationship that the hospital must obey its own bylaws. . . . [B]ecause the hospital has a duty to obey its bylaws, the bylaws have now become "an enforceable part of the contract" between the hospital and the physician to whom it has given privileges at the hospital.

Gianetti v. Norwalk Hosp., 557 A.2d at 1254-55. *Accord,* Pariser v. Christian Health Care Sys., Inc., 816 F.2d 1248, 1251 (8th Cir. 1987)(interpreting Illinois law); Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 149 A.2d 456, 459 (Pa. 1959); Lyons v. Saint Vincent Health Ctr., 731 A.2d 206, 210 (Pa. Commw. Ct.)("Many jurisdictions . . . have concluded that medical staff bylaws constitute an integral part of the contractual relationship between a hospital and its staff doctors"); *see* Joseph v. Passaic

Hosp. Ass'n, 141 A.2d 18, 24 (N.J. 1958).

"No law required defendant . . . to grant plaintiff the privilege to practice medicine in its hospital. Nor did any law require plaintiff to practice there. Each party conferred a benefit to the other, and their mutual benefit is consideration. . . . Defendant and the association of which plaintiff is a member agreed that certain disciplinary procedures . . . would govern plaintiff's employment." Lo v. Provena Covenant Med. Ctr., 826 N.E.2d 592, 598-99 (Ill. App. 2005)(dicta). *See* Craig W. Dallon, *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decision*, 73 TEMPLE L. REV. 597, 640-41 (2000) (" Some courts . . . find that the medical staff bylaws . . . in the context of the entire relationship between the physicians and the hospital . . . are enforceable as part of a larger contractual relationship").

Appellant pled that St. Anthony's bylaws were an integral part of an overall contract between himself and the hospital, and that respondent violated that contract by not following those bylaws. Thus, Dr. Egan pled a cause of action in Count VI for breach of contract.

VI

THE TRIAL COURT ERRED IN SUSTAINING PLAINTIFF'S MOTION TO DISMISS BECAUSE THE BYLAWS ARE A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT, AND DEFENDANT BREACHED THAT CONTRACT BY TERMINATING PLAINTIFF'S MEDICAL STAFF PRIVILEGES WITHOUT

PROPER NOTICE AND OPPORTUNITY TO BE HEARD, IN VIOLATION OF THOSE BYLAWS.

The standard of review is de novo.

In Zipper v. Health Midwest, 978 S.W.2d at 415-17, the Western District held that hospital bylaws do not constitute a contract between the hospital and its medical staff. That opinion is contrary to the law in the vast majority of jurisdictions. Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 So. 2d 1261, 1264 (Fla. App. 1986); Lewisburg Community Hosp., 805 S.W.2d at 759;. Dallon, *supra* at 640-41; *see* Zipper v. Health Midwest, 978 S.W.2d at 415. These jurisdictions include: Alabama (Clemons v. Fairview Med. Ctr., 449 So. 2d 788); Alaska (McMillan v. Anchorage Community Hosp., 646 P.2d 857); Arizona (Bock v. John C. Lincoln Hosp., 702 P.2d 253); Florida (Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 S. 2d at 1263-64); Illinois (Adkins v. Sarah Bush Lincoln Health Ctr., 544 N.E.2d 733); Indiana (Terre Haute Regional Hosp., Inc., 479 N.E.2d 1371); Iowa (Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361); Maine (Bartley v. Eastern Maine Med. Ctr., 617 A.2d 1020); Maryland (Sadler v. Dimensions Healthcare Corp., 836 A.2d 655); Minnesota (Campbell v. St. Mary's Hosp., 252 N.W.2d 581);Nebraska (Babcock v. Saint Francis Med. Ctr., 543 N.W.2d 749); Nevada (Clark v. Columbia/HCA Info. Serv., Inc., 35 P.3d 215); New Mexico (*see* Clough v. Adventist Health Sys., Inc., 780 P.2d 627)(accepting trial court finding and parties' agreement the bylaws created implied contract)); New York (Falk v. Anesthesia Assoc., 644 N.Y.S.2d 237); North Carolina (Virmani v. Presbyterian Health

Serv. Corp., 488 S.E.2d 284); South Dakota (Mahan v. Avera St. Luke's, 621 N.W.2d 150); Tennessee (Eyring v. East Tennessee Baptist Hosp., 950 S.W.2d 354); Texas (East Texas Med. Ctr. Cancer Inst. v. Anderson, 891 S.W.2d 55); Utah (Brinton v. IHC Hosp., Inc., 973 P.2d 956); Wisconsin (Seitzinger v. Community Health Network, 676 N.W.2d 426).

The Western District listed the District of Columbia as being among the jurisdictions following the minority view it was adopting: "A substantial minority of jurisdictions, however, find that bylaws that are subject to the ultimate authority of the hospital do not constitute a binding agreement between the medical staff and the hospital. *See, e.g.,* . . . *Balkissoon v. Capitol Hill Hosp.*, 558 A.2d 304, 308 (D.C.1989) . . . ." Zipper v. Health Midwest, 978 S.W.2d at 416. This is a total misreading of the District of Columbia case. The court held that the hospital had failed to afford Dr. Balkissoon "the process and protections encompassed in its bylaws." Balkissoon v. Capitol Hill Hosp., 558 A.2d at 307, 309. On the very page referred to by the Western District, the District of Columbia court stated: "The Hospital's obligation to follow its bylaws does not arise only from a contractual relationship with appellant." *Id.* at 308. On that same page, it further stated: "Thus, although the bylaws may create contractual rights, the Hospital's obligation to act in accordance with its bylaws is independent of any contractual right of appellant." *Ibid.* These statements are the antithesis of a finding that "bylaws . . . do not create a binding agreement between the medical staff and the hospital." *See* Dallon, *supra* at 640-41 n.288 (citing Balkissoon

for the proposition that "bylaws may create contractual rights").

The Western District cited a total of five cases as constituting the "substantial minority of jurisdictions" it chose to follow. Zipper v. Health Midwest, 978 S.W.2d at 416. Three of these were from the state of Georgia, and were decided in 1983, 1989, and 1992. They are now moot, because the state legislature has created a cause of action which allows a physician to sue a hospital for failure to follow its bylaws: "A hospital has a legal duty to follow its existing bylaws, and the violation of that duty is actionable under OCGA § 51-1-6." Katz v. Hosp. Auth., 561 S.E.2d 858, 860 (Ga. App. 2002).

Subtracting the three Georgia cases, and the misinterpreted District of Columbia, leaves only one intermediate Ohio appellate opinion standing among the Zipper court's "substantial minority of jurisdictions" (Munos v. Flower Hosp., 507 N.E.2d 360 (Ohio App. 1985)). The continuing vitality of that 1985 opinion is seriously called into question by the later Ohio appellate opinion in Christenson v. Mount Carmel Health, 678 N.E.2d 255 (Ohio App. 1996). In that case, the court held:

> The general rule that a hospital's exercise of discretion in excluding members of the profession is ordinarily not subject to judicial review does not apply "'where there is a contention that the hospital failed to conform to procedural requirements set forth in a hospital's constitution, bylaws, or rules and regulations.'"

Id. at 260. The court then quoted with approval with the very District of Columbia case relied on by the Western District in Zipper:

> "The board of trustees of a private hospital has broad discretion in determining who shall be permitted to have staff privileges. Courts should not interfere with the exercise of this discretion unless the hospital has acted in an arbitrary, capricious or unreasonable manner or, in other words, abused its discretion."

Ibid. The Ohio court remanded Christenson's case to the trial court with directions to order to grant the doctor "the benefit of a hearing process that is fundamentally fair and in compliance with its own bylaws." *Id.* at 264. Thus, in the three jurisdictions comprising the Zipper courts "substantial minority," the prevailing law supports Dr. Egan's position.

In 2003, a court of appeals in Maryland noted that it is "the increasingly predominant view that the bylaws of a hospital constitute a contract between the hospital and the physician holding privileges." Sadler v. Dimensions Healthcare Corp., 836 A.2d at 666.

As shown earlier, 19 CSR 30-20.021 requires hospitals to enact bylaws which guarantee physicians notice and the opportunity to be heard before their medical staff privileges can be rescinded. It is suggested that the author of these rules would be appalled to learn that his or her efforts to protect physicians from arbitrary and capricious actions by hospital administrators would be used by the Missouri Court of Appeals for the Western District as justification for denying the very safeguards he or she sought to create:

> "The hospital bylaws cannot be considered a contract under Missouri law because consideration is lacking. By state regulation, Missouri hospitals are required to "adopt bylaws, rules and policies governing their professional activities in the hospital." . . . . MCI, therefore, had a preexisting legal duty to adopt the bylaws independent of its relationship with Dr. Zipper. . . . [A] promise to do that which a party is already legally obligated to do does not constitute valid consideration. Because MCI had a preexisting legal duty to the [*sic*] adopt the bylaws independent of its relationship with Dr. Zipper, consideration is lacking and, therefore, the bylaws cannot constitute a contract between MCI and Dr. Zipper."

Zipper v. Health Midwest, 978 S.W.2d at 416.

This rationale has been rejected by the courts which form the "vast majority," have adopted the "increasingly predominant view," and reach the "better reasoned" result. The Missouri Code of State Regulations does not create any direct avenue of private enforcement. In Connecticut, the Supreme Court found no inconsistency in enforcing a contract remedy when the state mandated bylaws: "A hospital's obligation to follow bylaws can stem from a contractual relationship between the hospital and the physician. . . . . It can also be based on a preexisting legal duty imposed by our state department of health regulations to adopt ' "bylaws, rules and regulations, including medical staff bylaws." ' " Owens v. New Britain Gen. Hosp., 643 A.2d at 240. *See* Keane v. St. Francis Hosp., 522 N.W.2d at 522; Lewisburg Community Hosp. v.

Alfredson, 805 S.W.2d at 759; Gianetti v. Norwalk Hosp., 557 A.2d at 1253.

One easy response to the Western District's rationale is that St. Anthony's bylaws provide appellant more procedural rights than the state regulations require it to provide. "[B]ylaws which *exceed* the minimum standards required under state law satisfy the consideration requirement." Dallon, *supra* at 647 (Emphasis in original.), citing Janda v. Madera Community Hosp., 16 F. Supp. 2d 1181, 1188 (E.D. Cal. 1998)(interpreting California law). For example, 19 CSR 30-20.021.16 requires the "[b]ylaws of both the governing body and medical staff" to provide that "notification" of "suspension . . . shall . . . indicate the reason(s) for this action." Respondent's bylaws state that "[t]he notice of hearing must contain a concise statement of the Affected Practitioner's alleged acts or omissions, a list by number of the specific or representative patient records in question, and/or other reasons or subject matter forming the basis for the adverse action or recommendation." L.F. 65. Another example of procedural rights found in respondent's bylaws which are not found in the CSR is that the "Affected Practitioner" is entitled to a list of witnesses. *Compare* 19 CSR 30-20.021.16, -.17 *with* L.F. 65.

Another basis for the determination of the Western District in Zipper that Dr. Zipper did not have contractual rights to the hearing procedures provided in the bylaws of Medical Center Park, Inc., was that:

> [T]here is no bargained for exchange as to the procedures adopted in hospital bylaws as required to have an enforceable contract. . . . Dr. Zipper did not

> have input in the bylaws nor did he have the power to change the bylaws. MCI had the right to unilaterally change the procedures set forth in the bylaws without consultation with anyone on the medical staff and to impose those bylaws on its medical staff.

Zipper v. Health Midwest, 978 S.W.2d at 416-17. This is in stark contrast to the bylaws of St. Anthony's medical staff, which not only can be amended by a two-thirds vote of the staff, but can only be amended by such vote. L.F. 68.

Enforcing respondent's bylaws would not put the Court in the position of second-guessing doctors in their area of expertise:

> "[C]ourts are equipped to determine whether a hospital's governing body has followed its bylaws and whether a decision regarding an application for privileges was made in accordance with basic principles of fairness and due process of law. Courts may "require that the procedures employed by the hospital are fair, that the standards set by the hospital are reasonable, and that they have been applied without arbitrariness and capriciousness. . . . This type of limited review does not intrude upon a hospital's recognized expertise regarding evaluation of medical qualifications, yet it affords protection to an applicant against arbitrary denial of privileges in violation of an applicant's rights to substantive and procedural due process of law."

Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d at 1223.

After exhaustive analysis of case law in all jurisdictions, the author of the Temple

Law Review article concludes: "Courts should find that the hospital and medical staff bylaws are contractually binding in favor of both applicants and medical staff members." Dallon, *supra* at 679. A decision leaving hospital staffing decisions to the unbridled discretion of hospital administrators, on the naive assumption that all such decisions will be based strictly on medical competence, assumes that the world of hospital administration and medical staffing is free of the politics endemic in government, corporate, and military bureaucracy—an assumption which does not comport with the real world, or serve the interests of patients or physicians.

VII

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT II FOR ESTOPPEL OF DEFENDANT BY ACCEPTANCE OF BENEFITS AND CONDUCT FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, BECAUSE ST. ANTHONY'S HAS AVAILED ITSELF OF THE BENEFITS OF THE STATE REGULATIONS DIRECTING ST. ANTHONY'S TO PROVIDE HIM WITH THESE RIGHTS, IN THAT, BY ENACTING BYLAWS CONFORMING TO THE STATE REGULATION, THE HOSPITAL HAS OBTAINED AND MAINTAINED ITS LICENSE TO OPERATE AS A HOSPITAL IN THE STATE OF MISSOURI.

The standard of review is de novo.

By enacting the bylaws required by state regulations providing physicians whose medical staff privileges have been suspended or revoked with fair hearing and due process rights of notice and the opportunity to be heard, and the right to appeal before a neutral and impartial panel, St. Anthony's Medical Center has availed itself of the benefits of compliance with these regulations, that is, it has obtained and maintained state licensure thereby.

Defendant's assault on this count in its motion to dismiss is that it fails "because Plaintiff has failed to allege reliance . . . because he seeks relief beyond any purported statement or promise by St. Anthony's, because he alleges no harm from the repudiation of a statement or promise by St. Anthony's, and because he seeks to enforce rights greater than provided under the bylaws." L.F. 8.

In Magenheim v. Board of Education, 347 S.W.2d 409 (St. L. Ct. App. 1961), a teacher was required to join a teachers' association to be eligible for certain salary benefits. He sought to recover the dues he paid to that association:

> "He was paid his teacher's salary under the Salary Schedule which required such membership. He may not now adopt an inconsistent position to the prejudice of the defendant School District. The estoppel here is more accurately termed a quasi-estoppel . . . . This rule or doctrine is sometimes classified as one of ratification or election or estoppel by acceptance of benefits. . . .
>
> 'Where one having a right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and

> cannot avoid its obligation or effect by taking a position inconsistent therewith. A party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations. Courts of equity proceed on the theory that there is an implied condition that he who accepts a benefit under an instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it.'
>
> '. . . .
>
> 'The rule is well settled that one voluntarily proceeding under a statute or ordinance, and claiming benefits thereby conferred, will not be heard to question its validity in order to avoid its burdens. The same or similar rules have been applied to litigation involving many different types of instruments, licenses, or other transactions."

Id. at 419. Examples of application of estoppel by acceptance of benefits include taking advantage of the benefits of an ordinance (Forest Hills Const. Co. v. City of Florissant, 562 S.W.2d 322, 325-26 (Mo. 1978)(En Banc)), accepting the benefits of a condemnation award (Pfarr v. Union Elec. Co., 389 S.W.2d 819 (Mo. 1965)), claiming the benefits of a court order (Kirkwood Trust Co. v. Joseph F. Dickmann Real Estate Co., 156 S.W.2d 54, 59 (St. L. Ct. App. 1941)), and collecting a judgment (Owen v. City of Branson, 305 S.W.2d 492, 497-98 (Springf. Ct. App. 1957)). It frequently has been applied to disputed contracts: "[A] person who accepts benefits may be estopped to question the existence, validity, and effect of the contract from which they derive. That person will not be allowed to assume the inconsistent positions which affirm a contract in part by acceptance of its benefits and disaffirm it in part by avoidance of its

obligations." Long v. Huffman, 557 S.W.2d 911, 915-16 (Mo. App. K.C. Dist. 1977). *Accord*, *e.g.*, *In re* the Marriage of Carter, 862 S.W.2d 461, 468 (Mo. App. S.D. 1993); Wilson v. Midstate Indust., Inc., 777 S.W.2d 310, 314 (Mo. App. W.D. 1989).

Estoppel by conduct (*e.g.*, Miskimen v. Kansas City Star, 684 S.W.2d 304 (Mo. App. W.D. 1984); Warren v. Warren, 784 S.W.2d 247 (Mo. App. W.D. 1989)) or "promissory" estoppel (*e.g.*, State *ex rel.* Consolidated Schoo Dist. v. Haid, 41 S.W.2d 806 (Mo. 1931); Chicago Title Ins. Co. v. First Missouri Bk., 622 S.W.2d 706 (Mo. App. E.D. 1981); Response Oncology, Inc. v. Blue Cross & Blue Shield, 931 S.W.2d 771 (Mo. App. W.D. 1997)) has been granted in numerous cases. Where equity in general, and estoppel in particular, are concerned, each case turns on its own unique facts, and whether certain facts create a claim for estoppel must be decided on a case-by-case basis..

Notable by its absence from any discussion of estoppel by acceptance of benefits or by conduct is the term "reliance." "Reliance" is not an element of estoppel by acceptance of benefits, and the authorities cited by St. Anthony's are not relevant to this count.

VIII

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT III FOR ESTOPPEL OF DEFENDANT BY ACCEPTANCE OF BENEFITS AND CONDUCT FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING,

NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, BECAUSE ST. ANTHONY'S HAS AVAILED ITSELF OF THE BENEFITS OF ENACTING THE BYLAWS REQUIRED BY THE JOINT COMMITTEE ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS BY OBTAINING ACCREDITATION FROM THAT BODY, IN THAT THE BYLAWS WHICH ST. ANTHONY'S ENACTED TO OBTAIN ACCREDITATION PROVIDED THAT PHYSICIANS SUBJECT TO SUSPENSION OR REVOCATION WOULD RECEIVE NOTICE AND THE OPPORTUNITY TO BE HEARD. The standard of review is de novo.

For purposes of this appeal, the following facts are presumed to be true: St. Anthony's enacted bylaws which comply with the requirements of the Joint Committee on Accreditation of Healthcare Organizations. By so doing, St. Anthony's has obtained the benefit of accreditation.

With regard to this count (III), defendant made the same argument that it fails for lack of an allegation of "reliance." L.F. 8. Again, reliance is not an element of estoppel by acceptance of benefits. *See, e.g.,* Forest Hills Const. Co. v. City of Florissant, 562 S.W.2d at 325-26; Pfarr v. Union Elec. Co., 389 S.W.2d 819; Kirkwood Trust Co. v. Joseph F. Dickmann Real Estate Co., 156 S.W.2d at 59.

IX

THE TRIAL COURT ERRED IN SUSTAINING THE MOTION TO DISMISS BECAUSE PLAINTIFF PLED A CAUSE OF ACTION IN COUNT V FOR

ESTOPPEL OF DEFENDANT BY ACCEPTANCE OF BENEFITS FROM DENYING PLAINTIFF THE RIGHTS TO DUE PROCESS, FAIR HEARING, NOTICE AND THE OPPORTUNITY TO BE HEARD, AND REVIEW BY A NEUTRAL AND IMPARTIAL PANEL, PROVIDED FOR IN THE ST. ANTHONY'S BYLAWS BECAUSE ST. ANTHONY'S USED THESE BYLAWS TO ITS ADVANTAGE IN THAT DEFENDANT ST. ANTHONY'S MEDICAL CENTER UTILIZED THESE BYLAWS TO SUSPEND PLAINTIFF SUMMARILY AND AS THE BASIS FOR CONVENING A HEARING COMMITTEE, AND IS ESTOPPED THEREBY FROM DENYING THE ENFORCEABILITY OF THOSE BYLAWS

The standard of review is de novo..

St. Anthony's notified plaintiff that it had utilized the provisions of Article X § E of the bylaws to suspend his privileges summarily. St. Anthony's notified plaintiff that he had a right to a due process hearing and a fair hearing under Article X of the bylaws. St. Anthony's utilized the provisions of Article X of the bylaws to organize the hearing and as the basis for the rules governing that hearing.

With regard to this count (V), defendant makes the same argument that it fails for lack of an allegation of "reliance." L.F. 8.. Again, reliance is not an element of estoppel by acceptance of benefits. *See, e.g.,* Forest Hills Const. Co. v. City of Florissant, 562 S.W.2d at 325-26; Pfarr v. Union Elec. Co., 389 S.W.2d 819; Kirkwood Trust Co. v. Joseph F. Dickmann Real Estate Co., 156 S.W.2d at 59.

CONCLUSION

The counts for relief briefed above constitute alternative grounds for the relief sought. The court below sustained a motion to dismiss, not a motion to strike individual counts. If any one of the counts is valid, the dismissal must be reversed. This is not a suit for damages, such as to raise the specter of chilling vigorous peer review. It does not ask any court to second-guess any medical judgments. Defendant's motion to dismiss did not challenge plaintiff's allegations that he was denied proper notice and opportunity to be heard, nor does it question plaintiff's charges that his appellate review was handled by partisan panel members who biased other members of the panel with false allegations which were totally outside of the hearing record. If dismissal of this suit for equitable relief is sustained, the Missouri statutes, Code of State Regulations, and Joint Committee on Accreditation of Healthcare Organizations Standard truly will be "much 'sound and fury, signifying nothing.'" Peer review hearings are expensive and time consuming. If Dr. Egan's instant challenges to his hearing procedures cannot even enter the door of the courthouse, no surgeon in Missouri ever will be able to obtain any judicial oversight of the procedures by which he or she lost the opportunity to practice surgery in a hospital. The power of hospital administrators over members of their medical staff will be absolute. Peer review hearings are expensive and time-consuming. While ensuring immunity from suit for conspiracy, antitrust violations, or slander for its physicians by complying with Section 11112 of the federal Health Care Quality Improvement Act (42 U.S.C. § 11112) may supply some motivation to some hospitals to follow fair hearing practices, others may not decide it is worth the cost. Barring

physicians who have been ousted from medical staffs of private hospitals because of palpable violations of the right to notice and opportunity to be heard promulgated by these standards is contrary to the pubic policy which they embody, and would leave Missouri as the only state which turns a totally blind eye to such abuses by hospital administrators with axes to grind.

Respectfully submitted,

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CERTIFICATION

This brief contains the information required by Rule 55.03. It complies with the limitations contained in Rule 84.06(b). It contains 18,648 words and is 82 pages long. It has been formatted on Word Perfect 9. The accompanying disc has been scanned, using AVG Antivirus, and found to be virus-.

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CERTIFICATE OF SERVICE

One copy of Appellant's Statement, Brief and Argument, and a disc containing same, were served on respondent on this __ day of June, 2007, by mailing same to Neal F. Perrymen, Lewis Rice & Fingersh, 500 N. Broadway, St. Louis, MO 63101.

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APPENDIX

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