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

BRIEF OF *AMICUS CURIAE* MISSOURI HOSPITAL ASSOCIATION

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STATEMENT OF INTEREST

Amicus Curiae Missouri Hospital Association ("MHA") is a private, not-for-profit organization whose mission is to create an environment that enables member hospitals and health care systems to improve the health of their patients and community. To that end, MHA regularly appears as *Amicus Curiae* in Missouri courts in support of its member hospitals and health care systems when fundamental issues affecting the delivery of health care are in dispute. MHA appeared as *Amicus Curiae* in Dr. Egan's earlier appeal from his prior lawsuit against St. Anthony's challenging the suspension of his medical staff privileges. Egan v. St. Anthony's Medical Center, 199 S.W.3d 779 (Mo. App. E.D. 2006).

MHA's fundamental interest in this appeal is to encourage this Court to reaffirm the longstanding rule in Missouri that independent physicians may not challenge the medical staff decisions of private hospitals in a court of law. The rule of non-review has been in place in Missouri for over forty years, and serves a critical role in encouraging physicians and hospitals to conduct peer review in order to promote patient safety and the quality of care delivered at Missouri's private hospitals. Thus, MHA urges this Court to reaffirm the holding in Cowan v. Gibson, dismissing a physician's claims against a private hospital for the process and outcome of medical staff privileging determination.

The rule of non-review recognizes that physicians have no judicially cognizable rights arising out of the internal operating rules of private hospitals. In that regard, MHA urges this Court to endorse the decision by the Missouri Court of Appeals for the Western District in Zipper v. Health Midwest, 978 S.W.2d 398, 417 (Mo. Ct. App. W.D. 1998),

and conclude that medical staff bylaws of a private hospital cannot constitute a contract that is enforceable by individual physician members of the medical staff.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED DR. EGAN'S PETITION BECAUSE MISSOURI'S RULE OF NON-REVIEW DIVESTS THE CIRCUIT COURT OF JURISDICTION TO HEAR HIS CLAIMS.

For the last four decades, Missouri courts have adhered to a stringent, bright-line rule of non-review, which completely divests courts of jurisdiction to review both the procedure and substance of medical staff decisions of private hospitals by leaving such decisions to those best able to evaluate issues of quality, i.e., the hospital medical staff and governing board.[1] This Court's decision in Cowan v. Gibson, 392 S.W.2d 307, 308

[1] By contrast, a public hospital is subject to the limitations imposed by the United States Constitution including due process and equal protection requirements. Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56, 60 (8th Cir. 1975). This different treatment of public and private entities is well established. Levin v. Sinai Hosp. of Baltimore City, 46 A.2d 298, 300 (Md. 1946). Despite this well-established precedent, Dr. Egan attempts to confuse the issue at bar by citing cases pertaining to public hospitals, not private hospitals like St. Anthony's. See Appellant's Statement, Brief and Argument ("Egan Brief") at 54 (citing Klinge and Kaplan v. Carney, 404 F. Supp. 161, 163 (Mo. Ct. App. E.D. 1975) noting that physicians were entitled to due process, but failing to point out that such cases involved hospitals treated as public hospitals, not a hospital like St. Anthony's, which is clearly a private hospital, and should be treated as a private hospital).

(Mo. 1965) held that "the exclusion of a physician or surgeon from practicing therein is a matter which rests in the discretion of the managing authorities". Since then, the courts of this state have uniformly applied the rule of non-review. Misischia v. St. John's Mercy Med. Ctr., 30 S.W. 3d 848, 863 (Mo. Ct. App. E.D. 2000); Zipper v. Health Midwest, 978 S.W.2d 398, 417 (Mo. Ct. App. W.D. 1998); Women's Health Ctr. of West County v. Webster, 681 F. Supp. 1385, 1392, n.3 (Mo. Ct. App. E.D. 1988) (stating rule of non-review in *dicta* and citing Richardson v. St. John's Mercy Hosp., 674 S.W.2d 200, 201 (Mo. Ct. App. E.D. 1984)); State ex rel. St. Joseph Hosp. v. Fenner, 726 S.W.2d 393, 395 (Mo. Ct. App. W.D. 1987) ("Willman III") ("the privilege to practice in a hospital is a matter resting in the discretion of the managing authorities"); Richardson, 674 S.W.2d at 201 (citing Cowan for same principle); Dillard v. Rowland, 520 S.W.2d 81, 92 (Mo. Ct. App. E.D. 1974) (dicta stating that "[i]f Barnes is to be considered a private hospital, which it would seem to be, the law is clear that exclusion of a physician or surgeon from practicing in such a hospital is a matter which rests in the discretion of the managing authorities."). See also Madsen v. Audrain Health Care, Inc., 297 F.3d 694, 698-99 (8th Cir. 2002) (applying Missouri law and upholding the dismissal of the physician's breach of contract and tortious interference claims based on the rule of non-review); Klinge v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56, 61 (8th Cir. 1975) (applying Missouri law and holding that judicial review of medical staff decisions is permissible only when the hospital is a state actor and even then the court's role is limited to determining whether due process has been provided). Accord Winston v. American Med. Int'l, Inc.,

930 S.W.2d 945, 956 (Tex. App. 1997) (adopting a stringent rule of non-review which does not allow any judicial review of a private hospital's medical staff decisions).

Dr. Egan asks this Court to change over forty years of jurisprudence to create a new cause of action allowing physicians to sue private hospitals for injunctive relief to challenge whether private hospitals complied with their internal medical staff by-laws when conducting peer review activities. Courts across the country have refused to inject themselves into these private matters because: (1) there is no cognizable right at issue; and (2) reviewing "procedural compliance" inevitably places courts in the untenable position of second guessing the substance of medical staff decisions.

Dr. Egan recognizes the principle that a remedy exists only to address the infringement of a right, but he struggles identifying the "right" that would support his plea for a remedy. At various times, Dr. Egan claims to have a "property right" to his medical staff privileges, or that he is the intended beneficiary of federal and/or state laws addressing medical staff privileges and finally that staff privileges are a contract right that he can enforce. These theories have been extensively reviewed by courts in Missouri, as well as elsewhere, and have been generally rejected. The so-called rule of non-review is based on the fact that physicians cannot identify a right to any particular process, and the rules and regulations governing hospitals licensing are there to protect patients – not to protect doctors or to create rights.

It should also be noted that the rule of non-review is not the broad shield claimed by Dr. Egan, but is rather a carefully crafted doctrine that recognizes that physicians have

no judicially enforceable rights to: (1) challenge the outcome of a medical staff privilege decision; and (2) to judicially compel a hospital to follow any particular procedure in processing medical staff privilege decisions. If, however, in the course of conducting a peer review, a physician's common law or statutory rights are abridged, this Court and a host of other Missouri courts, have recognized that a physician has recourse for the violation of those other common law or statutory rights, but not for violation of by-laws. Thus, if Dr. Egan believes that he has been victimized by an anti-trust conspiracy, or has been discriminated against in violation of federal civil rights laws, he is free to seek relief in the form of damages, but he cannot undo the privileging decision.

A. Rationale Underlying The Rule Of Non-Review.

In order to properly discuss the rationale for this rule, it is important to understand the relationship between a hospital and a physician. Most physicians, like Dr. Egan, are not employees of the hospital, instead, they are independent of the hospital, and therefore must be granted permission to admit patients and use the hospital's facility, supplies and staff. Physicians granted such permission are generally part of the hospital's medical staff. Dr. Egan alleges that he belongs to the medical staff of a number of St. Louis area hospitals.

The purpose of a hospital's organized medical staff is to improve the quality of health care provided at the hospital, and reflects a widespread belief that the medical profession is best qualified to police its own. In Missouri, the Department of Health and Senior Services has promulgated licensing regulations that require hospitals to adopt a host of internal operating rules. Mo. Code. Regs. Ann. tit. 19 § 30-20.001 *et.seq.* (2004).

Among these rules is a requirement that each hospital must have an organized medical staff which develops and adopts (with the approval of the governing body) medical staff bylaws which govern the medical staff's professional activities in the hospital. Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(C)(1) (2004). The medical staff is charged with two functions – credentialing and peer review. The medical staff makes recommendations to the governing body regarding whether to approve or disapprove appointments to the medical staff. Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(C)(5) (2004). In addition, the medical staff, as a body or through a committee such as a peer review committee, provides on-going review and evaluation of the quality of the clinical practice of the staff throughout the hospital. Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(C)(12) (2004). The enforcement of these regulations is by the State of Missouri through a host of possible sanctions that can only be brought by the Attorney General or the Department of Health and Senior Services. See, Mo. Rev. Stat. §§ 197.070, 197.200. It is because peer review committees play a critical role in the effort to maintain high professional standards in the delivery of health care in the hospital setting, that courts have refused to recognize private rights of actions by physicians to enforce these rules. The clearest expression of this law relates the Health Care Quality Improvement Act ("HCQIA"), which Dr. Egan invokes as some sort of justification for his new course of action. However, every court to consider Dr. Egan's argument under HCQIA has rejected it finding that government rules for hospital credentialing decisions exist to protect patients and do not give rise to private rights. See, Goldsmith v. Harding Hospital, Inc., 762 F.Supp. 187 (S.D. Oh. 1991) (in a suit brought by physician against hospital for violating

HCQIA, the court held that "HCQIA creates no cause of action for the benefit of physicians to enforce its provisions"); Hancock v. Blue Cross-Blue Shield of Kansas, 21 F.3d 373 (10th Cir. 1994) (holding that there is no explicit or implied right for a physician to bring an action under HCQIA); Doe v. U.S. Dept. of Health and Human Services, 871 F.Supp. 808 (E.D. Pa. 1994) (in a suit involving an entry in the NPDB, the court held that there was no private right of action for a physician to bring a claim under HCQIA); Azmat v. Shalala, 2000 U.S. Dist. LEXIS 21986 (W.D. Ky. 2000) (in a suit involving an adverse action report entered into the NPDB, the court held there was no private right for a physician to bring a claim under HCQIA).

For obvious reasons, the hospital has a great interest in this credentialing and peer review process. First and foremost, the hospital is concerned about the quality of health care services provided in its facility. Craig W. Dallon, Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions, 73 Temple L. Rev. 597, 615 (2000). This concern is motivated by several factors including: (1) a desire to fulfill the hospital's primary mission; (2) a drive to maintain and enhance the hospital's reputation in the community and among physicians, prospective patients, and the hospital's peers; (3) the fulfillment of the hospital's legally imposed duty; (4) fear of liability to injured plaintiffs;[2] and (5) the hospital's economic viability. Id.

[2] See Scott v. SSM Healthcare St. Louis, 70 S.W.3d 560 (Mo. Ct. App. E.D. 2002) (holding that a hospital under certain circumstances could be found liable for the acts of independent physicians).

This concern for the quality of health care and ultimately patient welfare is the underlying reason courts have given great deference to medical staff decisions and should continue to do so. The rationale for exercising judicial restraint in these circumstances was expressed by the Eighth Circuit in Klinge:

> No court should substitute its evaluation of [medical staff decisions] for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance.

523 F.2d at 61 (involving a public hospital in which the court was required to review the hospital's decision for compliance with the Fifth and Fourteenth Amendments) (quoting Sosa v. Bd. of Managers of Val Verde Mem'l Hosp., 437 F.2d 173, 177 (5th Cir. 1971). This compelling rationale yields only when constitutional provisions require limited judicial review of the medical staff decisions of public hospitals. With the decisions of private hospitals, on the other hand, the rule of non-review, which leaves such decisions

to the discretion of the hospital's managing authorities, should remain absolute. See Zipper, 978 S.W.2d at 417 ("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.")

Refusing to review these decisions will not result in hospitals trampling the interests of their staff physicians. In fact, hospitals have every economic incentive not to exclude, but to welcome qualified, competent doctors to their medical staffs. It is the physicians who admit the patients that produce revenue for both the physician and the hospital. This reality has been judicially recognized by those courts concluding that hospitals do not compete with physicians, they compete with other hospitals. See Willman v. Heartland Hosp. East, 836 F. Supp. 1522, 1527 (W.D. Mo. 1993) (a "hospital and its medical staff are not competitors") (quoting Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 703 (4th Cir. 1991)). To most effectively compete, hospitals, therefore, need to attract to their medical staffs as many of the best qualified physicians as possible.

Moreover, each additional qualified physician on a hospital's medical staff increases revenue for the hospital, in that only when a physician treats a patient at the hospital, is the hospital able to charge the patient for hospital equipment, supplies and services. A hospital thus has every economic incentive to exercise the discretion afforded by the rule of non-review to extend and maintain, rather than to deny, revoke or restrict, the medical staff privileges of its staff physicians. Indeed, Dr. Egan has the option to shift his admitting practices to any of the many hospitals with whom he has privileges.

Attaching the most mercenary motive to a hospital, as Dr. Egan asserts, the hospital would have every reason to retain any qualified physician so as to enjoy the revenue associated with that physician's practice. Thus, courts need not fear that following the rule of non-review and leaving medical staff decisions to the professionals most qualified to make them, will result in qualified physicians being excluded from practicing at the private hospitals in this state.

In addition, the ordeal confronted by the court in the infamous Willman trilogy only underscores the need for judicial restraint in this area and continued adherence to Missouri's rule of non-review. See State ex rel. Willman v. St. Joseph Hosp., 684 S.W.2d 408 (Mo. Ct. App. 1984) (Willman I); State ex rel. Willman v. St. Joseph Hosp., 707 S.W.2d 828 (Mo. Ct. App. W.D. 1986) (Willman II); Willman III, 726 S.W.2d at 393. Dr. Willman pursued a course of vexatious litigation over the course of a decade designed to entangle a private hospital in burdensome litigation. See Willman I, 684 S.W.2d at 408; Willman v. Heartland Hosp. East, 34 F.3d 604 (8th Cir. 1994). This litigation necessarily required the hospital to divert resources from patient care to the defense of a lawsuit clearly precluded by the rule of non-review announced in Cowan and reaffirmed in Richardson. After suffering through Dr. Willman's relentless attempts to state a viable claim against the private hospital that had terminated his staff privileges, the Court in Willman III denied Dr. Willman's writ of mandamus seeking to enforce as a contract the hospital's medical staff bylaws and held that "the privilege to practice in a hospital is a matter resting in the discretion of the managing authorities." Willman III, 726 S.W.2d at 395 (citing Richardson).

Concurring in the court's rejection of Dr. Willman's claim, Judge Manford stated:

> It is unfortunate that the parties were put to the chore of bringing this matter before the court a third time. That was occasioned by the failure of this court to finalize the matter under State ex rel. Willman v. St. Joseph Hospital, 684 S.W.2d 408 (Mo. Ct. App. 1984) (Willman I). The problem was further compounded by this court when it failed to finalize the matter under State ex rel. Willman v. St. Joseph Hosp., 707 S.W.2d 828 (Mo. Ct. App. W.D. 1986) (Willman II).
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> [H]opefully, everyone will now realize that the claim [of] Dr. Willman is subject to [and barred by] the rule announced in Richardson v. St. John's Mercy Hospital, 674 S.W.2d 200, 201 (Mo. App. 1984) .... (Id.)

If Judge Manford's parting admonition in Willman III is not heeded, and the bright line rule of non-review ignored or circumscribed, the courts of this State will be confronted with lawsuits filed by disgruntled physicians whose medical staff privileges are restricted or terminated by private hospitals. Rejecting or otherwise circumscribing the rule of non-review and opening the door to such litigation will not only tax judicial resources, but will also act as a compelling disincentive to hospitals and physicians throughout this state

to engage in, and staff, the kind of searching and timely peer review essential to safeguard patient health and safety. See infra Section II, B.

B. Rule Of Non-Review In Missouri With Respect To Private Hospitals.

The rule of non-review was announced by this Court over four decades ago in Cowan, where this Court adopted the general rule 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." Cowan, 392 S.W.2d at 308. Following Cowan, the court in Richardson, held that Missouri courts are without jurisdiction to review such determinations, including a private hospital's decision to restrict a staff physician's privileges. 674 S.W.2d at 201-02. As noted above, this general rule has been reaffirmed numerous times by courts in Missouri. See Misischia, 30 S.W.3d at 863; see also Madsen, 297 F.3d at 698-99 (upholding the dismissal of the physician's breach of contract and tortious interference claims based on the rule of non-review).

In Cowan, this Court determined that the plaintiff's allegations avoided the operation of the general rule of non-review, and thus defined the narrow circumstances that would justify an exception to the rule of non-review. 392 S.W.2d at 308 ("In view of this admittedly applicable general rule [we must determine if] there are any allegations which would prima facie remove the cause from the operation of the general rule and therefore entitle [the plaintiff] to a hearing of the cause upon its merits."). In carving out this exception, this Court noted that "[i]n the first place as to parties to the action, this is

not a suit between the doctor and the hospital or its governing board or staff alone in their hospital character and capacities." Id. at 309.

Based on the foregoing discussion in Cowan, this Court concluded that "Cowan . . . [only] allows a physician to sue *other physicians* for conspiracy." Richardson, 674 S.W.2d at 201 (emphasis in original). Relying on Richardson, the court in Misischia repeated its interpretation of the exception set forth in Cowan holding that the only exception to the general rule of non-review "allows a physician to sue other physicians for conspiracy, *but not a private hospital*." Misischia, 30 S.W.3d at 863 (emphasis added) (rejecting the plaintiff's tortious interference claim). Interpreting this same language in Cowan, the Eighth Circuit rejected the physician's breach of contract and tortious interference claims stating that "nothing in [the physician's] complaint removes it from the general rule that the exclusion of a physician from practicing in a private hospital is a discretionary matter resting with the managing authorities." Madsen, 297 F.3d at 698. In so holding, the court noted that Dr. Madsen's claims involve a "suit between a doctor and the hospital and its governing staff in their hospital character and capacities." Id. As such, the Eighth Circuit agreed with this Court's holding in Richardson and Misischia that the exception to the rule of non-review applies only to suits by a physician against other physicians for conspiracy.

Here, Dr. Egan is suing St. Anthony's, a private not-for-profit hospital, in its hospital character and capacity, for breach of contract and a host of contract by estoppel type claims to challenge the process and result of St. Anthony's medical staff proceedings. There are neither claims against any other physicians, nor claims for

conspiracy. Under Cowan, Richardson, Misischia, and Madsen, then, Dr. Egan's claims should be precluded by the rule of non-review. Cowan, 392 S.W.2d at 309; Richardson, 674 S.W.2d at 201; Misischia, 30 S.W.3d at 863; Madsen, 297 F.3d 698-99. Since Dr. Egan's claims do not fit within the narrow exception of Cowan, his claims were properly dismissed pursuant to Missouri's rule of non-review.

In view of the exception articulated in Cowan, it cannot be said that the rule of non-review leaves physicians without any remedy whatsoever when their staff privileges have been curtailed or revoked. To the extent that the hospital is an essential facility to the practice of medicine and the physician can establish an actionable conspiracy to restrain trade, he will have a remedy under Cowan against the individual physicians. See Cowan at 310. Anti-trust claims have been recognized. (Wellman and Sugarbaker) Slander has been recognized. (Misischia)

In addition, to the extent a physician contends that his or her privileges were restricted or revoked on the basis of age, sex or religion, the physician will have a remedy against both the hospital and the individual peer reviewers under the federal and state statutes applicable to such claims. See Samuel v. Herrick Memorial Hosp., 201 F.3d 830, 835 (6th Cir. 2000) (applying Michigan law, holding that the rule of non-review does not prohibit courts from reviewing claims against defendants for violating federal antitrust and discrimination claims). However, in each one of those circumstances, the courts were careful to note that the cause of action was for the violation of state or federal law or the violation of a common law right, and that there was no judicially cognizable right by physicians to challenge the process as result of private hospital peer review actions.

Thus, Dr. Egan is free to pursue his remedies for any damages to a statutory or common law right that may have been abridged in the hospital's peer review process, but he cannot under the rule of non-review, seek relief from the peer review process itself, like compelling a hospital to follow certain processes or reach a different result, since the physician has no "right" to any certain process or procedure.

Indeed, one of the anomalies of Dr. Egan's position is that to create the cause of action he seeks in order to challenge the process and result of private hospital peer review action, would create a higher standard for private hospitals than has heretofore existed for public hospitals, which must accord physicians some hearing rights since medical staff privileges are a property right at public hospitals. As quoted above, the court in Klinge held that even under due process standards, the ultimate decision on privileging decisions was left to hospital officials and all that the physician was entitled to was notice and a hearing before privileges could be terminated. Here, Dr. Egan does not dispute he received notice and a hearing. The remedy he seeks is reinstatement of his privileges pending further hearings conducted under trial-like rules, which inescapably leads to a review of the merits of his case. (Egan Brief at p. 21). Further, his privileges were not terminated, but were suspended, pending further hearings. Thus, Dr. Egan's request is to create a right to trial-like proceedings before hospital officials subject to full judicial review, is greater than that envisioned by due process in the public hospital setting.

In sum, the rule of non-review recognizes that a physician has no judicially enforceable rights with respect to the process and result of a peer review proceeding. This is consistent with the notion that private entities cannot, by virtue of their internal

operating rules, create "rights" in a due process sense because those hospitals are not state actors. Although physicians cannot sue private hospitals to challenge the process and result of privileging actions, physicians have remedies if some statutory or common law right has been abridged in the course of such privileging proceeding. Even then, however, the remedy is never, as Dr. Egan requests, to order new privileging hearings or to reinstate medical staff privileges, but it is to recover damages for the injury to those other rights. In short, Dr. Egan is not entitled to his claimed remedies because he lacks any cognizable right to any particular process or result from private hospital's medical staff decision.

C. Rule Of Non-Review In Other Jurisdictions.

In an effort to circumvent the law of this state for the past four decades, which bars claims such as Dr. Egan's, Dr. Egan cites contrary case law from other jurisdictions. Those cases are unavailing. The mere fact that Missouri's rule of non-review represents a differing position is of no moment and in no way dilutes the precedential power of Cowan, Richardson, Misischia, Madsen and Zipper and their dispositive impact in this case. Missouri's steadfast rule of non-review cannot be dismissed as simply a judicial aberration or an archaic rule of law whose time has passed.

Indeed, many jurisdictions follow the rule of non-review. See Brandt v. St. Vincent Infirmary, 701 S.W.2d 103, 106 (Ark. 1987) (administrative decisions of private hospital, unlike those of public hospital, are not subject to judicial review); Green v. Lutheran Med. Ctr. Bd. of Directors, 739 P.2d 872, 873-74 (Colo. Ct. App. 1987) (mandamus inappropriate because denial of staff privileges within discretion of hospital

authorities); Bello v. South Shore Hosp., 429 N.E.2d 1011, 1015 (Mass. 1981) (declining to "adopt the theory ... that a private hospital's [medical staff decisions] are reviewable under a common law theory of judicial review apart from any finding of state action").

In Tigua Gen. Hosp., Inc. v. Feuerberg, 645 S.W.2d 575 (Tex. App. 1982), the court reaffirmed Texas' rule of non-review:

> Texas follows the rule that the exclusion of a physician from staff privileges is a matter which ordinarily rests with the discretion of the management authorities and is not subject to judicial review. [citations omitted]. In summary, in the area of private hospitals ... [a] doctor in this State has no cause of action against a private hospital for the termination of staff privileges even where the action of the hospital was arbitrary and capricious or where common law rights to procedural or substantive due process were violated. In this situation, the final authority to terminate a doctor-staff privilege rests with the Board of Governors.

Id. at 578; see also Grossling v. Ford Mem'l Hosp., 614 F. Supp. 1051, 1058 (E.D. Tex. 1985) (following rule of non-review of medical staff decisions of private hospitals).

Thus, far from the anomaly Dr. Egan claims, Missouri's rule is long-standing and followed by a number of other courts. Further, the other states recognizing some judicial review of privileging decisions are based on interpretations of law that are at variance with bedrock principles long recognized in Missouri. For instance, many of the

authorities cited by Dr. Egan are circumstances where courts found property rights/due process rights existing under the state's constitutional vision. See, e.g., Wong v. Garden Park Community Hospital, Inc., 565 So.2d (Miss. 1990); Miller v. St. Alphonsus Regional Medical Center, Inc., 87 P.3d 934, 943-4 (Idaho 2004); Fontenot v. Southwest Louisiana Hospital Ass'n, 775 So.2d 1111, 1118-22 (La. Ct. App. 2000). As discussed above, Missouri has long held that private persons, absent state action, cannot create due process rights. Likewise, many of the authorities treat medical staff by-laws as a private contract between the hospital and each physician or member of the medical staff. See, e.g., Sadler v. Dimensions Healthcare Corp., 836 A.2d 655, 665-7 (Md. 2003); Babcock v. St. Francis Medical Center, 543 N.W.2d 749, 760-2 (Neb. Ct. App. 1996); Clough v. Adventist Health Systems, Inc., 780 P.2d 627, 632-3 (N.M. 1989); Virmani v. Presbyterian Health Services Corp., 488 S.E.2d 284, 287-9 (N.C. Ct. App. 1997). As shown below, however, that theory was center to Missouri black letter contract law precepts. Thus, the authorities relied upon by Dr. Egan reflect a construct of the law foreign to core concepts of Missouri law, and shall be rejected.

II. THE CIRCUIT COURT PROPERLY DISMISSED DR. EGAN'S BREACH OF CONTRACT CLAIM BECAUSE UNDER MISSOURI LAW MEDICAL STAFF BYLAWS OF A PRIVATE HOSPITAL CANNOT CONSTITUTE A CONTRACT THAT IS ENFORCEABLE BY INDIVIDUAL PHYSICIAN MEMBERS OF THE MEDICAL STAFF.

The established law in Missouri on this issue is clear, medical staff "bylaws cannot be considered a contract under Missouri law…" Zipper, 978 S.W.2d at 416; see also Madsen, 297 F.3d at 699. In an effort to circumvent this established Missouri precedent, Dr. Egan advances the argument that this Court should not adopt the Zipper opinion because it is contrary to the law of the majority of jurisdictions. This argument is meritless. The Court in Zipper specifically addressed this argument, and after carefully considering the law and supporting arguments of the majority and minority jurisdictions, concluded that Missouri contract law and public policy mandated that Missouri should follow the holdings of the substantial minority of jurisdictions - that hospital bylaws do not represent a contract between the physician and hospital. Zipper, 978 S.W.2d at 416.

In particular, the Zipper Court determined that under Missouri law hospital bylaws cannot constitute a contract between the hospital and the physician because the hospital already has "a preexisting legal duty to adopt the bylaws independent of its relationship with [the doctor]" and, therefore, consideration is lacking. Id.; see also Wise v. Crump, 978 S.W.2d 1, 3 (Mo. Ct. App. E.D. 1998) ("A promise to do that which one is already legally obligated to do cannot serve as consideration for a contract.") (citing City of

Bellefontaine Neighbors v. J.J. Kelley R. & B. Co., 460 S.W.2d 298, 301 (Mo. Ct. App. 1970). As set forth below, this preexisting legal duty arises from Missouri's hospital licensing statutes and regulations which require hospitals to adopt medical staff bylaws.

The Zipper Court further concluded that hospital bylaws are not a contract between the hospital and physician because "there is no bargained for exchange as to the procedures adopted in the hospital bylaws as required to have an enforceable contract." Zipper, 978 S.W.2d at 416 (citing Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 1002 (N.D. Ga. 1992)). Lastly, the Court determined that "holding that hospital bylaws do not constitute a contract between the hospital and its medical staff is in accord with the strong public policy principles in Missouri." Zipper, 978 S.W.2d at 417.

In addition, even though the holding in Zipper has only been adopted by the substantial minority of jurisdictions to address this issue, its holding represents the growing trend of jurisdictions. See, e.g., Mason v. Central Suffolk Hosp., 819 N.E.2d 1029, 1030 (N.Y. 2004); Kessel v. Monongalia Gen. Hosp. Co., 600 S.E.2d 321, 326 (W.Va 2004). For example, the highest court in the state of New York recently held in 2004 that "no action for [contract] damages may be based on a violation of medical staff by-laws…". Mason, 819 N.E.2d at 1030. While that same year, the Supreme Court of Appeals of West Virginia held that the fundamentals of contracts do not support the assertion that the medical staff bylaws constituted a contract between the physicians and the hospital. Kessel, 600 S.E.2d at 326.

Moreover, despite Dr. Egan's assertion to the contrary, Georgia still adheres to the expanding minority viewpoint that medical staff bylaws by themselves do not create a

binding contract between the physician and hospitals. Even though Georgia Courts have determined that the recently enacted Georgia statute, O.C.G.A. § 51-1-6, grants a physician a cause of action in tort against a hospital for failing to follow existing medical staff bylaws, the courts still adhere to the principle that medical staff bylaws do not create an enforceable right sufficient to support a claim for breach of contract. See St. Mary's Hosp. of Athens, Inc. v. Radiology Prof'l. Corp., 421 S.E.2d 731, 736-37 (Ga. Ct. App. 1992) (granting summary judgment in favor of hospital for breach of contract claim based on hospital's failure to follow existing medical staff bylaws with regards to the termination of a physician's staff privileges, but allowing a tort cause of action to proceed based under O.C.G.A. § 51-1-6).

In addition to the established case law in Missouri and other jurisdictions, Missouri contract principles, as well as Missouri and federal public policy, dictate that the Court's holding in Zipper is proper and medical staff bylaws do not constitute a contract that is enforceable by individual physician members of the medical staff.

A. Well-Established Missouri Contract Principles Dictate That The Zipper Court's Holding Was Proper And Medical Staff Bylaws Do Not Constitute A Contract That Is Enforceable By Individual Physician Members Of The Medical Staff.[3]

When analyzed under fundamental principles of Missouri contract law, it is respectfully submitted that medical staff bylaws cannot be an enforceable contract. See Zipper, 978 S.W.2d at 416-17. The essential elements of a contract are competent parties, proper subject matter, legal consideration, mutuality of agreement and mutuality of obligation. Cash v. Benward, 873 S.W.2d 913, 916 (Mo. Ct. App. W.D. 1994); Douros Realty & Constr. Co. v. Kelley Properties, Inc., 799 S.W.2d 179, 182 (Mo. Ct. App. E.D. 1990). Stated differently, "[a] valid contract must include an offer, an acceptance and consideration." Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. banc 1988).

Here, the essential element of consideration is lacking. In Missouri, a promise to do something that one is already under a legal duty to do fails to satisfy the essential element of consideration. See Cash, 873 S.W.2d at 916 (consideration must consist of doing something that one is not legally bound to do); 17 Am.Jur. 2d , Contracts § 119.

St. Anthony's already had a legal duty to adopt medical staff bylaws pursuant to Mo. Rev. Stat. § 197.080 and Mo. Code Regs. Ann. tit. 19, § 30-20.021. As a condition

[3] There is a question as to whether Appellants have preserved their contract-based arguments for review. See Appellee Brief filed by St. Anthony's Medical Center.

for state licensure, the Missouri Department of Health and Senior Services requires that a hospital's medical staff adopt bylaws "governing their professional activities in the hospital." Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(C)(1). The duty of both the medical staff and hospital governing body to adopt bylaws is repeated in the provisions outlining the duties of the governing body at Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(A)(3) and those provisions outlining the duties of the medical staff at Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(C)(1). Governing body and medical staff bylaws must also "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." Mo. Code Regs. Ann. tit. 19, § 30-20.021 (2)(A)(16). As a hospital is legally obligated to create medical staff bylaws and provide hearing procedures pursuant to the above stated Missouri regulations, its "promise" to do so does not and cannot constitute consideration to support a binding contract with private physician members of the hospital medical staff under Missouri law.[4]

[4] Creating a contract right to enforce these regulatory provisions is tantamount to creating a private right of action under that regulatory scheme, which was promulgated for the protection of patients, not doctors. The trend, however, is away from recognizing private rights of action to enforce a statute or regulation, particularly when, as in this case, the statute or regulation was enacted for the benefit of persons other than the person attempting to privately enforce it.

In addition to legal obligations imposed by Missouri statutes and regulations regarding medical staff bylaws and fair hearings and appeals, 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 reappointment, denial, reduction, suspension, or revocation of privileges…" JCAHO Standard MS.4.50, 2004 Comprehensive Accreditation Manual for Hospitals.[5] Thus, hospitals that are accredited have a prior obligation to adopt medical staff bylaws and fair hearing and appellate review mechanisms such that their provision thereof does not and cannot constitute consideration.

Moreover, St. Anthony's medical staff bylaws cannot constitute an enforceable contract for the additional reason that there is no bargained for exchange between St. Anthony's and Dr. Egan in the creation of those bylaws. A contract cannot be formed absent the element of bargained or agreed exchange. Cash, 873 S.W.2d at 916. Here, Dr. Egan, as with any staff physician, and St. Anthony's, as with any hospital, did not bargain over the creation of the Medical Staff Bylaws or the particular contents thereof. Those

[5] JCAHO accreditation is virtually a necessity for hospitals. Earning such accreditation through compliance with JCAHO standards, and passing regular examinations and investigations, automatically earns a facility "deemed compliant" status for purposes of the federal Medicare Program. Accreditation therefore signifies compliance with federal conditions of participation for hospitals. 42 C.F.R. § 482.

bylaws were not born of negotiations between the hospital and physician. As such, the element of bargained for exchange is lacking and medical staff bylaws cannot constitute an enforceable contract between a hospital and a physician.

In addition, there can be no meeting of the minds between a hospital and a staff physician as required to render the medical staff bylaws an enforceable contract. "[A] meeting of the minds is necessary to consummate a unilateral contract." Klamen v. Genuine Parts Co., 848 S.W.2d 38, 40 (Mo. Ct. App. 1993). Hospitals such as St. Anthony's create and adopt medical staff bylaws not to protect physicians, but rather to protect patients. Thus, when hospitals create medical staff bylaws they do so not to enter into an agreement with their staff physicians to define the rights of and create remedies for doctors, but rather to develop a mechanism to ensure that they deliver quality health care to patients. As such, there is no meeting of the minds between the hospital and its staff physicians as required to consummate a unilateral contract.

Accordingly, fundamental Missouri contract principles preclude a holding that a private hospital's medical staff bylaws are an enforceable contract between a hospital and the physician members of the medical staff.

B. The Public Policy Of This State And The Nation Dictate That The Zipper Court's Holding Was Proper And Medical Staff Bylaws Do Not Constitute A Contract That Is Enforceable By Individual Physician Members Of The Medical Staff.

Missouri has a strong and clearly articulated public policy to assure that patients receive quality health care. Madsen, 297 F.3d at 699 (citing Zipper, 978 S.W.2d at 417). To this end, Missouri and federal law protects the confidentiality of the peer review process to encourage physicians to participate in conscientious evaluations of clinical practices which improves the quality of health care provided to patients. See Mo. Rev. Stat. § 537.035; State ex rel. Chandra v. Sprinkle, 678 S.W. 2d 804, 809 (Mo. banc 1984). Likewise, the objective in enacting the HCQIA was to lessen the compelling disincentive of litigation to hospitals and physicians to encourage meaningful peer review thus safeguarding patient health and safety. 42 U.S.C. § 11101(4) ; see also Goldsmith v. Harding Hosp., Inc. 762 F. Supp. 187, 189 (S.D. Ohio 1991). Therefore, recognizing Dr. Egan's purported breach of contract claim would conflict with Missouri and federal public policy by diminishing the protections for peer reviewers and hospitals. In fact, recognizing a breach of contract claim in this situation would potentially discourage physicians and hospitals from taking principled and difficult stands on behalf of quality patient care and against substandard or incompetent practitioners in the future and ultimately sacrifice patient health and safety.

Missouri's public policy favoring peer review is clearly reflected in Mo. Rev. Stat. 537.035. Prior to the enactment of the privilege and confidentiality provision of the Missouri peer review statute, see § 537.035.4, the Missouri Supreme Court, in State ex rel. Chandra, 678 S.W. 2d at 804, rejected a claim that any public policy favoring peer review trumped a litigant's right to discover relevant evidence such that peer review information and records were privileged from disclosure. Id. at 807. Writing in dissent, Judge Welliver criticized the Court's refusal to acknowledge the strong public policy in favor of peer review:

> [T]he community naturally encourages this relationship – that is, the peer review committee – because it fosters critical self-evaluation with the medical profession. This self-evaluation leads to the improvement in the delivery of health care services, and '[a]n effective medical staff review process is essential if the medical profession and the hospital are to meet their increased responsibilities to the community' [citation omitted]. The…crucial question is whether disclosure would injure society more than it would benefit society.

Id. at 811.

Just one year later, the General Assembly implicitly adopted the arguments of Judge Welliver by amending the peer review statute to add a provision preserving the confidentiality of peer review proceedings. Mo. Rev. Stat. § 537.035.4. By preserving

the confidentiality of these proceedings, the General Assembly sought to encourage physicians to participate in the kind of "candid and conscientious evaluation of clinical practices [that] is the *sine qua non* of adequate hospital care." State ex rel. Chandra, 678 S.W.2d at 809 (quoting Berdice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D. D.C. 1970).

This public policy of encouraging peer review has a national dimension as well. In 1986, Congress enacted the HCQIA, 42 U.S.C. § 11101, *et seq*. The HCQIA proceeds from the congressional finding that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State," 42 U.S.C. § 11101 (1), and that these problems "can be remedied through effective professional peer review." Id. at § 11101 (3). "Peer review [is] the process by which physicians and hospitals evaluate and discipline staff doctors…". Bryan v. James E Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1321 (11th Cir. 1994), cert. denied, 514 U.S. 1019 (1995). The fundamental objective of the HCQIA is to encourage peer review. Id. Congress found, however, that "t[h]e threat of private money damage liability under [state and] Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." § 11101 (4). See also Goldsmith v. Harding Hosp., Inc., 762 F. Supp. 187, 189 (S.D. Ohio 1991) (quoting House Report 99-903 for the Energy and Commerce Committee, reprinted in 1986 U.S. Code Cong. & Ad. News pp. 6287, 6384). Thus, Congress enacted the immunity provision, not to encourage hospitals to enact by-laws to protect the rights of physicians whose staff privileges were removed as Dr. Egan

suggests, but rather to lessen the possibility of litigation, and thereby remove a compelling disincentive to hospitals and physicians and allow them to engage in and staff the kind of timely, searching and meaningful peer review essential to safeguard patient health and safety.

Departing from the rule of non-review and recognizing Dr. Egan's purported breach of contract claim, on the other hand, would conflict with the public policy reflected in both the Missouri peer review statute and the HCQIA by diminishing the protections for peer reviewers and hospitals by adding another layer of potential litigation to dissuade hospitals and physicians from engaging in meaningful peer review. Such a ruling would also be inconsistent with an important, although generally unexpressed, policy consideration:

> It is preferable for hospital administrators [and physicians] who decide whether to grant or deny staff privileges to make those decisions free from the threat of a damages action against the hospital. It is not in the hospital's interest, but in the public interest, that no doctor whose skill and judgment are substandard be allowed to treat or operate on patients. A decision by those in charge of a hospital to terminate the privileges of, or deny privileges to, a doctor who may be their colleague will often be difficult. It should not be made more difficult by the fear of subjecting the hospital to monetary liability.

Mason, 819 N.E.2d at 1031-32. Thus, the public policy of encouraging meaningful peer review militates against recognizing Dr. Egan's contract claim by which he seeks to circumvent the rule of non-review.

Further, permitting physicians such as Dr. Egan to invoke a contract claim, would allow disgruntled physicians to circumvent the well-recognized holding that no private right of action exists under peer review statutes. Federal courts have almost universally refused to recognize a private right of action under the HCQIA. See, e.g., Wayne v. Genesis Med. Ctr., 140 F.3d 1145, 1148 (8th Cir. 1998); Hancock, 21 F.3d at 374-75; Doe v. U.S. Dept. of Health and Human Services, 871 F.Supp. 808 (E.D. Pa. 1994); Goldsmith, 762 F. Supp. at 188-90; Caine v. Hardy, 715 F. Supp. 166 (S.D. Miss. 1989). These courts have rejected such actions, first, because the HCQIA was not enacted for the benefit of physicians, but rather for consumers of health care services; *i.e.*, patients, and, second, because creating yet another cause of action in this context would discourage physicians from engaging in peer review. See Wayne, 140 F.3d at 1148 (determining that the act was not enacted to benefit physicians undergoing peer review). Therefore, recognizing contract claims, such as Dr. Egan's, would allow physicians, by mere artful pleading, to obtain a back door via contract claims that could not be obtained through the front door under the statutory peer review provisions.

Accordingly, creating a cause of action for breach of medical staff bylaws would render peer reviewers more vulnerable to damages claims and thereby increase the chilling effect of litigation sought to be avoided by both the HCQIA and Missouri's peer review statute. In addition, allowing "physician[s] to seek [contract] damages for an

alleged failure of a hospital to follow the procedures established by its bylaws" would violate Missouri's well-established public policy to assure quality health care. Madsen 297 F.3d at 699 (citing Zipper, 978 S.W.2d at 417). With the fear of litigation discouraging physicians and hospitals to take principled and difficult stands on behalf of quality patient care, more substandard or incompetent practitioners will remain vested with the staff privileges enabling them to treat, and thus possibly harm, patients. The resulting risk of even one fatality or other serious bodily injury, when balanced against any financial harm to physicians such as Dr. Egan, tips the equitable and public policy scales firmly in favor of rejecting the notion that medical staff bylaws are an enforceable contract and reaffirming Missouri's rule of non-review. Or to paraphrase Judge Welliver in Chandra, recognizing medical staff bylaws as an enforceable contract would injure society more than it would benefit society, in that it would result in the breakdown of a viable mechanism to provide society with quality medical care and treatment.

Dr. Egan attempts to argue that this public policy against recognizing medical staff bylaws as a contract between the physician and hospital is not persuasive because it is counter to the legislative intent of the HCQIA and Mo. Rev. Stat. § 537.035. (Egan Brief at p. 40-6). In support of his position, Dr. Egan mistakenly argues that the purpose behind enacting these laws was to protect physicians medical staff privileges. Id. As stated above, the real purpose and intent in enacting these immunity provisions was not to encourage hospitals to offer protection for physicians, as Dr. Egan suggests, but to encourage physician and hospital participation in the peer review process to increase health care quality for the general public. See Mason, 819 N.E.2d at 1031-32; Wayne,

140 F.3d at 1148. In fact, the viewpoint that the procedural and immunity provisions of these statutes was meant to protect the rights of physicians by ensuring that hospitals give physicians certain notices is directly counter to the universal mandate that there is no private right of action under HCQIA or Mo. Rev. Stat. § 537.035. See discussion, supra n.9. If the intent was to truly protect the rights of the physicians, these laws would have surely granted physicians a private right of enforcement.

Accordingly, the Circuit Court properly endorsed Zipper by recognizing that medical staff bylaws do not constitute a contract that is enforceable by individual physician members of the medical staff.

CONCLUSION

For the foregoing reasons and authorities, *Amicus Curiae* MHA respectfully submits this Honorable Court should adhere to the rule of non-review announced in Cowan and elucidated in Richardson, Misischia, and Madsen and not review Dr. Egan's claims against St. Anthony's for breach of contract and contract by estoppel relating to a medical staff decision. *Amicus Curiae* MHA further submits this Court should adopt the rule announced in Zipper and refuse to recognize medical staff bylaws as an enforceable contract. MHA thus respectfully prays that this Honorable Court affirm the circuit Court's decision dismissing Dr. Egan's claims.

Dated: August 31, 2007

Respectfully submitted,

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CERTIFICATION

The undersigned certifies that a copy of the computer diskette containing the full text of Brief *Amicus Curiae* of the Missouri Hospital Association is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Mo.R.Civ.P. 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 8,107 words, as calculated by the Microsoft Word 2000 software used to prepare this Brief.

Dated: _____ _____

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 31st day of August, 2007, a true and accurate copy of the foregoing instrument and disc was sent via regular U.S. Mail, postage prepaid, to the following:

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