

**IN THE MISSOURI SUPREME COURT**

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**Appeal No. SC88493**

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**ROBERT C. EGAN, M.D.,**

Plaintiff-Appellant,

**v.**

**ST. ANTHONY'S MEDICAL CENTER,**

Defendant-Respondent.

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APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
HON. THEA SHERRY, PRESIDING

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**LEWIS, RICE & FINGERSH, L.C.**

Neal F. Perryman, #43057

Jennifer Behm, #52783

500 N. Broadway, Suite 2000

St. Louis, Missouri 63102

(314) 444-7600 (Telephone)

(314) 612-7661 (Facsimile)

Attorneys for Defendant-Respondent

St. Anthony's Medical Center

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## STATEMENT OF FACTS<sup>1</sup>

### **A. Background.**

This case concerns the decision to exclude a private physician, Dr. Robert C. Egan (“Dr. Egan”), from the exercise of medical staff privileges at a private Missouri hospital, St. Anthony’s Medical Center (“St. Anthony’s”). S.L.F. 9-34.<sup>2</sup> Dr. Egan, a surgeon, alleges that he had been a member of St. Anthony’s medical staff for many years. S.L.F. 10 at ¶¶1, 3. He does not allege he was employed by St. Anthony’s. S.L.F. 9-34.

Dr. Egan sued St. Anthony’s seeking a court order reinstating him to St. Anthony’s medical staff. Appellant’s Substitute Brief (“App. Br.”) at 21; S.L.F. 9-34. In all seven operative counts of his lawsuit, Dr. Egan seeks mandatory injunctive relief compelling St. Anthony’s to grant him a new hearing on its summary suspension of his medical staff privileges, to recall St. Anthony’s reports to the “Missouri State Board for the Healing Arts” (*sic*) and the “National Data Bank” (*sic*) pertaining to the revocation of his staff privileges. S.L.F. 22, 24-28, 31.

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<sup>1</sup> Respondent is dissatisfied with the completeness of Appellant’s Statement of Facts, and submits its own Statement of Facts pursuant to MO. S. CT. R. 84.04(f).

<sup>2</sup> “S.L.F.” refers to the Supplemental Legal File filed in the Court of Appeals on November 21, 2006. “L.F.” refers to the Legal File filed in the Court of Appeals on October 24, 2006.

**B. Medical Staff Organization and Physician Peer Review.**

The governance structure for medical staff matters at St. Anthony's is dictated by the Missouri nonprofit corporation law,<sup>3</sup> Missouri hospital licensing law<sup>4</sup> and regulations,<sup>5</sup> national accreditation standards,<sup>6</sup> and Medicare conditions of participation.<sup>7</sup>

Dr. Egan asserts all of his claims against "St. Anthony's" (S.L.F. 9-34, passim), and suggests that this case involves decisions by "hospital administrators." E.g., App. Br. at 46, 81-82. Under Missouri law, a hospital's governing body is responsible for the operation of a hospital.<sup>8</sup> St. Anthony's Board of Directors ("Board") does not act in a vacuum, however, nor do the governing bodies of other Missouri hospitals. Instead, the

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<sup>3</sup> Chapter 355, R.S. Mo.

<sup>4</sup> §§197.010 - 197.121, R.S. Mo.

<sup>5</sup> 19 C.S.R. §30-20.021.

<sup>6</sup> The Joint Commission, COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS (Refreshed Core January 2007).

<sup>7</sup> 42 C.F.R. §482.22.

<sup>8</sup> 19 C.S.R. §30-20.021(2)(A)2-3: ("The governing body shall be the legal authority in the hospital and shall be responsible for the overall planning, directing, control and management of the activities and functions of the hospital. The governing body shall establish and adopt bylaws to provide for the appointment of a qualified chief executive officer and members of the medical staff and of the delegation of authority and responsibility to each.").

Board receives and relies on recommendations about physician competence and professional conduct from other physicians — St. Anthony’s medical staff.<sup>9</sup>

It is the medical staff that develops and adopts bylaws governing the activities of the medical staff, and governing, inter alia, appointment to, suspension from, or revocation of staff privileges.<sup>10</sup> The medical staff — not lay hospital administrators — is

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<sup>9</sup> 19 C.S.R. §30-20.021(2)(A)13-16; §30-20.021(2)(C)5-14: (subsection 15. provides: “The governing body, acting upon recommendations of the medial staff, shall approve or disapprove appointments and on the basis of established requirements shall determine the privileges extended to each member of the staff.”).

<sup>10</sup> 19 C.S.R. §30-20.021(2)(C)1-5: (subsections 1., 2., and 5. provide, in part: “The medical staff shall be organized, shall develop and, with the approval of the governing body, shall adopt bylaws, rules and policies governing their professional activities in the hospital. . . . The bylaws of the medical staff shall include the procedure to be used in processing applications for medical staff membership and the criteria for granting initial or continuing medical staff appointments and for granting initial, renewed or revised clinical privileges. \* \* \* A formal mechanism shall be established for recommending to the governing body delineation of privileges, curtailment, suspension or revocation of privileges and appointments and reappointments to the medical staff. . . . Bylaws of the medical staff shall provide for hearing and appeal procedures for the denial of reappointment and for the denial, revocation, curtailment, suspension, revocation, or other modification of clinical privileges of a member of the medical staff . . .”).

required by law to review and evaluate the quality of clinical practice of the medical staff in the hospital in accordance with the medical staff's peer review function and performance improvement plan and activities.<sup>11</sup> Disciplinary action against a physician practicing in a Missouri hospital is based on peer recommendations — physicians evaluating physicians.

Missouri hospital licensing laws and regulations do not authorize a private action by a physician alleging a violation of a private hospital's bylaws. There is no Missouri statute authorizing a physician to sue a private hospital in Missouri to seek judicial review of the peer review decisions of private hospital medical staffs.

The purpose behind the development of an internal governance structure through an organized medical staff, comprised of physicians, is based upon the belief that the medical profession is best qualified to police itself. 19 C.S.R. §30-20.021(2)(5), 12. The authorizing legislation for 19 C.S.R. §30-20.021 indicates that the legislative purpose is to promote "safe and adequate treatment of individuals in hospitals in the interest of public health, safety and welfare." §197.080, R.S. Mo. In like manner, the purpose statement in the notes accompanying the regulations reflects the goal of the provision of a "high level of care." 19 C.S.R. §30-20.021. In its introduction to recently overhauled

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<sup>11</sup> 19 C.S.R. §30-20.021(2)(C)12: ("The medical staff as a body or through committee shall review and evaluate the quality of clinical practice of the medical staff in the hospital in accordance with the medical staff's peer review function and performance improvement plan and activities.").

medical staff standards, the Joint Commission stated: “The organized medical staff and the governing body work together, reflecting clearly recognized roles, responsibilities, and accountabilities, *to enhance the quality and safety of care, treatment, and services provided to patients.*”<sup>12</sup> Medicare requires each hospital to have “an organized medical staff that operates under bylaws approved by the governing body and is *responsible for the quality of medical care provided to patients by the hospital.*” 42 C.F.R. §482.22 (emphasis added). “The medical staff must be well organized and *accountable to the governing body for the quality of the medical care provided to patients.*” 42 C.F.R. §482.22(b) (emphasis added) The Health Care Quality Improvement Act (“HCQIA”), as its name implies, was enacted by Congress to address, among others, the following congressional findings:

- (1) The 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.
- (2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of a physician’s previous damaging or incompetent performance.

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<sup>12</sup> Medical Staff Standard MS 1.20 at: [http://www.jointcommission.org/AccreditationPrograms/Hospitals/revisions\\_std\\_ms120\\_approved.htm](http://www.jointcommission.org/AccreditationPrograms/Hospitals/revisions_std_ms120_approved.htm) (emphasis added).

\* \* \*

- (5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. §11101.

The public policy expressed by these authorities is apparent: peer review and privileging processes are designed to improve patient care quality and safety, and to vest final authority to make those decisions in the governing body of the hospital, with the direct involvement and advice of the expert medical staff.

### **C. Current Action and Procedural History.**

On June 22, 2005, St. Anthony's summarily suspended Dr. Egan's medical staff privileges at St. Anthony's. S.L.F. 11 at ¶¶11-13. After notice was provided to Dr. Egan, a hearing was held, including sworn testimony and exhibits. S.L.F. 13, 14 at ¶¶21, 22, 28. Per regulation, the hearing committee was comprised of members of St. Anthony's medical staff. 19 C.S.R. §30-20.021(2)(C)1-5, 12. The hearing committee of the medical staff recommended that Dr. Egan's staff privileges at St. Anthony's be revoked. S.L.F. 17 at ¶50. It did so based on its findings with respect to two patients. S.L.F. 17 at ¶¶49-50. The "hearing committee found that '[i]n one case ... Dr. Egan violated the law and/or principles of medical ethics.'" S.L.F. 17 at ¶48. In another case, 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." S.L.F. 16-17 at ¶47.

Dr. Egan appealed the revocation of his staff privileges to an appellate review committee, consisting of three members of St. Anthony's Board, and three physicians selected by Dr. Egan from a list of six tendered to him, as set forth in the medical staff bylaws. S.L.F. 17 at ¶51. Dr. Egan also provided a written statement for consideration by the appellate review committee. S.L.F. 17 at ¶53. The appellate review committee, with one dissent, adopted the findings of the hearing committee and also recommended the revocation of Dr. Egan's staff privileges to the Board. S.L.F. 19 at ¶64. The Board accepted the recommendation of the appellate review committee, and, as by regulation, made the final decision to revoke Dr. Egan's privileges. S.L.F. 20 at ¶65; 19 C.S.R. §30-20.021(2)(A)15-16. St. Anthony's reported the revocation of Dr. Egan's staff privileges to the Missouri Board of Healing Arts ("Board of Healing Arts") and the federal National Practitioners Data Bank ("Data Bank"), as required by law. S.L.F. 21, 22 at ¶¶75, 77. This reporting is mandatory, not discretionary. §383.133, R.S. Mo; 42 U.S.C. §§11133, 11134.

On or around July 26, 2006, Dr. Egan filed his multi-count Amended Petition (the operative petition) requesting that the trial court order St. Anthony's to withdraw its mandatory reports to the Board of Healing Arts and the Data Bank regarding the termination of Dr. Egan's medical staff privileges, and order St. Anthony's to hold another hearing based on various claimed equitable theories.<sup>13</sup> S.L.F. 3, 9-34. Dr. Egan

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<sup>13</sup> On or about August 29, 2006, Dr. Egan dismissed, without prejudice, Count VIII of his Amended Petition. S.L.F. 4-6.

has acknowledged he in fact seeks a court order reinstating him to the medical staff of St. Anthony's, a private hospital, presumably pending the outcome of the second hearing. E.g., S.L.F. 22; App. Br. at 21.

In his Amended Petition, Dr. Egan asserts three challenges to the process which led to the Board's revocation of his clinical privileges. First, he asserts that he was not given adequate notice of the charges against him. S.L.F. 16 at ¶42. Dr. Egan acknowledges that he received notice of concerns about his mental status (S.L.F. 11 at ¶13), as well as notice of ten patients that formed the basis of the adverse action. S.L.F. 11, 12, 13 at ¶¶14, 18, 21-22. He acknowledges that the hearing committee made no findings with regard to eight of the ten patients charged in the notice of hearing (S.L.F. 16 at ¶46) but did make findings on two patients, and, based on those findings, recommended revocation of Dr. Egan's staff privileges. S.L.F. 17 at ¶50. Dr. Egan does not claim he had no notice of the two patients which formed the basis of the revocation recommendation. S.L.F. 9-34, passim. Instead, he complains that the notices he received of the summary suspension of his privileges and of the hearing did not include claims that he violated any law or principle of medical ethics, and thus he was unable to defend against such charges. S.L.F. 16, 17 at ¶¶42, 53. He does not allege that the finding of a violation of law or principles of medical ethics was based on care of patients that were not listed in the notice, however. S.L.F. 9-34, passim. In essence, Dr. Egan contends that he was entitled to notice of the hearing committee's rationale for making its adverse recommendation before the committee convened or heard any evidence.

Dr. Egan acknowledges that, as regards the notice provisions of the medical staff bylaws, he was to receive any one of the three types of information in a notice of hearing: 1) “a concise statement of . . . alleged acts or omissions”; 2) “a list by number of the specific or representative patient records in question”; “and/or” 3) “the other reasons or subject matter forming the basis for the adverse action or recommendation”. S.L.F. 12 at ¶18 (emphasis added); App. Br. at 12. As stated, Dr. Egan acknowledges he received notice of the ten “specific” patients “in question.” S.L.F. 11-12, 13 at ¶¶14-15, 18, 21-22.

Dr. Egan raised his objection concerning the alleged notice issue to the hearing committee (S.L.F. 16 at ¶43), and to appellate review committee (S.L.F. 17 at ¶53). Their recommendations for revocation of privileges based, at least in part, on violations of law and principles of medical ethics, indicates their rejection of Dr. Egan’s argument. S.L.F. 17, 19 at ¶¶54, 64.

Second, Dr. Egan alleges that “[a]fter the hearing, the hearing committee *ex parte* requested and received an ‘analysis of Dr. Egan’s surgical procedure cases,’ which analysis was never furnished to plaintiff or his counsel.” S.L.F. 16 at ¶44. He does not identify the party from whom this analysis was requested, or how such a request constitutes an *ex parte* contact. S.L.F. 9-34, passim. Dr. Egan also does not allege that anyone other than the hearing committee received the analysis. Id. In any case, Dr. Egan has not alleged he was harmed by the hearing committee’s consideration or analysis (if any) of his surgical cases. Id.

Finally, Dr. Egan also claims that he was denied meaningful review by the appellate review committee because of the alleged conduct of the chairman and one

physician member selected by Dr. Egan. S.L.F. 17-19 at ¶¶51, 58, 61, 62. Dr. Egan acknowledges that neither he nor his counsel were present at the meeting of the committee. S.L.F. 18 at ¶55. He alleges certain details about the proceedings behind closed doors, but does not describe the complete deliberations of this committee.<sup>14</sup>

Nowhere in his Amended Petition does Dr. Egan allege the hearing committee's findings with respect to the two cases upon which the hearing committee's recommendation was based was factually erroneous or incorrect. S.L.F. 9-34. He acknowledges that "[t]he hearing committee faulted plaintiff's documentation of these two cases." S.L.F. 17 at ¶49; App. Br., p. 16. Dr. Egan also states that, "[b]ased solely on its findings with regard to two patients, the hearing committee recommended that plaintiff's staff privileges be revoked." S.L.F. 17 at ¶50; App. Br., p. 16. Dr. Egan never alleges the hearing committee's determination that "Dr. Egan violated the law and/or principles of medical ethics" was incorrect. App. Br., pp. 15-17; S.L.F. 16-17 at ¶¶47-50. Further, the applicable regulations do not preclude peer review decision-makers from taking disciplinary action against a medical professional based upon information learned by the decision-maker during a peer review proceeding. See 19 C.S.R. §30.20.021. Dr. Egan does not allege that the ultimately adverse revocation decision was not a permissible decision, at law or in fact, based upon the findings with respect to the two

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<sup>14</sup> The best evidence of what the appellate review committee determined would be contained in the findings and recommendations of the appellate review committee, information that Dr. Egan has not pleaded and that is not otherwise before the Court.

patients, or that a different outcome would have resulted had the process somehow been different. Dr. Egan does not allege disagreement with the basis for the medical staff hearing committee's eventual determination that he should not remain on St. Anthony's medical staff, but, rather, complains about the procedural process afforded to effectuate the private, medical staffing decision now at issue before this Court. S.L.F. 9-34. Finally, Dr. Egan does not allege that the Board's final decision was impermissibly reached, or in violation of any statute, medical staff bylaw, or regulation. S.L.F. 9-34.

Dr. Egan waited until after the Board revoked his privileges, and until after any reports were made to the Board of Healing Arts and the Data Bank, to bring the instant lawsuit. App. Br. at 21.

St. Anthony's timely moved to dismiss the Amended Petition. L.F. at 7-10.<sup>15</sup> St. Anthony's argued that established Missouri law precludes judicial review of the medical staffing decisions of a private hospital, such as St. Anthony's. Alternatively, St. Anthony's argued that, even if the trial court could review St. Anthony's decision to

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<sup>15</sup> This lawsuit was the second one that Dr. Egan asserted against St. Anthony's surrounding its private medical staff decisions. As referenced by Dr. Egan in his Amended Petition (S.L.F. 20 at ¶66), Dr. Egan previously brought claims against St. Anthony's based upon St. Anthony's supposedly "cutting off" his medical staff privileges in 2002, allegedly in violation of the medical staff bylaws. See Egan v. St. Anthony's Medical Center (Cause No. 04CC-01451, St. Louis County, Missouri, Circuit Court), aff'd, 199 S.W.3d 779, 2006 Mo. App. LEXIS 939 (Mo. Ct. App. 2006), transfer denied, Supreme Court No. SC87993 (September 26, 2006) (hereafter "Egan I"; a copy of the court of appeals decision is included in the Appendix ("A") hereto for the Court's convenience, at A-9 - A-21). In Egan I, the trial court granted summary judgment in favor of St. Anthony's on Dr. Egan's breach of contract and tort claims based upon alleged violations of the staff bylaws, the Court of Appeals affirmed, and all transfer requests were denied. Id.

There is now a third action pending against St. Anthony's. Dr. Egan has essentially re-asserted (dismissed) Count VIII of his Amended Petition in a separate proceeding, which is currently pending in St. Louis County, Missouri, Circuit Court (Cause No. 06CC-004883).

exclude Dr. Egan from its private medical staff, Dr. Egan's claims failed because he did not plead any recognized cause of action and, therefore, the trial court had no basis to award the relief sought. Id. Finally, St. Anthony's argued that Dr. Egan failed to state any claim for relief as a matter of law against St. Anthony's for the additional reasons that any report that Dr. Egan's medical staff privileges were revoked was in fact accurate, that any such report cannot be recalled, and that the court had no authority to order such relief. Id.

The trial court below dismissed Dr. Egan's Amended Petition in its entirety, with prejudice. S.L.F. 4. The Court of Appeals affirmed the trial court's Judgment of dismissal (A-1 - A-8), and, on April 12, 2007, denied Dr. Egan's application for rehearing and transfer. This Court sustained Dr. Egan's transfer application on May 29, 2007.

### **SUMMARY OF ARGUMENT**

Missouri courts do not (and should not) review private hospital staffing decisions. They are the internal decisions of a private entity. Longstanding precedent of this Court, followed by numerous courts, requires this result. Strong Missouri public policy supports adherence to Missouri's rule of non-review.

Accordingly, the trial court properly dismissed Dr. Egan's Amended Petition because Dr. Egan's attempts to judicially challenge St. Anthony's private medical staffing decision, and to obtain judicial reinstatement to practice medicine on St. Anthony's medical staff, fail to state any claim for relief as a matter of law, whether pleaded as equitable or legal claims. Missouri law does not envision courts acting as

“super” medical privileges review committees, and second-guessing the medical judgment of medical staffs and hospital governing bodies. Courts are not qualified to make such decisions, as Missouri law recognizes. Moreover, Dr. Egan’s claims for another, judicially-imposed hearing regarding the revocation of his medical staff privileges fails because Dr. Egan failed to allege any recognized legal basis for another hearing. In any case, Dr. Egan’s requests that St. Anthony’s recall its report to the Board of Healing Arts and the Data Bank also fail as a matter of law because St. Anthony’s has no authority or ability to “recall” the reports, nor is there any legal or equitable basis upon which to require such action from St. Anthony’s. The trial court’s Judgment should be affirmed.

### ARGUMENT

**I. THE TRIAL COURT PROPERLY DISMISSED DR. EGAN’S AMENDED PETITION (COUNTS I-VII), BECAUSE MISSOURI COURTS DO NOT (AND SHOULD NOT) REVIEW DECISIONS TO EXCLUDE A PHYSICIAN FROM THE MEDICAL STAFF OF A PRIVATE HOSPITAL, IN THAT *STARE DECISIS*, STRONG PUBLIC POLICY, AND PRACTICAL CONSIDERATIONS SUPPORT CONTINUED ADHERENCE TO MISSOURI’S LONGSTANDING RULE PRECLUDING SUCH REVIEW (Responding to Points Relied On I and II).**

The standard of review is *de novo*.

The core question posed by this case is simple: who should decide whether a private physician is competent to perform surgery in a private Missouri hospital? Is it the

governing body of the hospital, which is accountable for its operations and perhaps financially responsible for surgical mishaps of unqualified physicians, or is it the courts and the attorneys who argue cases before them? Respectfully, Missouri law has long acknowledged that it is the former.

Under Missouri law, a hospital's governing body is responsible for appointing the medical staff of the hospital and granting specific clinical privileges to each physician, based upon the expertise and recommendations of its medical staff physicians. Peer physicians are uniquely and solely qualified to evaluate the competence and professional conduct of a physician, and their recommendations cannot (and should not) be disregarded.

In this case, Dr. Egan attempts to circumvent decades of established law by attempting to allege "equitable claims" to seek review of his dismissal from the medical staff of St. Anthony's, and judicial "reinstat[ement of] his privileges." App. Br. at 21. Although Dr. Egan cites law from jurisdictions that may suggest a different view, under well-established Missouri law, the governing body of a private hospital<sup>16</sup> is (and has been) free to make decisions regarding the composition of its medical staff, without judicial second-guessing or interference.<sup>17</sup> Missouri courts have repeatedly and regularly

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<sup>16</sup> Dr. Egan has never alleged that St. Anthony's is a public hospital, nor can he do so. S.L.F. 9-34.

<sup>17</sup> Significantly, Dr. Egan has previously (and correctly) admitted that courts are not equipped to make such judgments. See Appellant's Reply Brief (in Appeal

held that the exclusion of a physician from practicing in a private hospital is a matter which rests in the discretion of the hospital's managing authorities. The underlying rationale of these holdings is to ensure quality patient care, not the protection of physicians.

**A. Cowan v. Gibson and Its Progeny Compel Affirmance.**

More than forty years ago, in Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965), this Court adopted the general rule that a private hospital's medical judgment regarding the grant or denial of staff privileges is a matter that rests in the discretion of the hospital managing authorities, and generally will not be reviewed by the courts. Id. at 308. Although Cowan carved out an exception to this general rule, Dr. Egan has not pleaded that this case falls within this exception.<sup>18</sup>

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ED88783), at 3. The instant case is not, as Dr. Egan suggests, about "hospital administrators with axes to grind." App. Br. at 82.

<sup>18</sup> In Cowan, plaintiff alleged that there was only one hospital in the county in which he practiced and that there were only three practicing physicians (of which he was one) in the county. 392 S.W.2d at 308. Plaintiff further alleged that the other two practicing physicians in the county conspired with the hospital for their financial advantage to dominate the practice of medicine in that county by excluding plaintiff, the only other practicing physician in that county, from practicing medicine. Id. Plaintiff further alleged that without membership on the staff of defendant hospital, he could not treat his patients and practice medicine. The court noted that under these unique

Missouri courts have expressly relied on the Cowan holding in adjudicating physician-hospital disputes brought before them. In Richardson v. St. John's Mercy Hospital, 674 S.W.2d 200 (Mo. Ct. App. 1984), the Missouri Court of Appeals held that the trial court was without jurisdiction to hear an appeal concerning a plaintiff-physician's judicial challenge to the decision of a private hospital, St. John's, to restrict his surgical privileges. Id. at 201. The Richardson court held that the administrative decision of St. John's, a private hospital, regarding the plaintiff's staff privileges, should not have been reviewed by the trial court upon plaintiff's claim for injunctive relief, and reversed the trial court's grant of equitable relief in favor of the plaintiff doctor. Id. at 201-202.

Dr. Egan's efforts to distinguish Richardson are unavailing. See App. Br. at 48-50. The Richardson court's decision to reverse the trial court's grant of injunctive relief was predicated upon well-established Missouri law: "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." 674 S.W.2d at 201 (*citing* Cowan v. Gibson, 392 S.W.2d 307, 308 (Mo. 1965)). As this Cowan rule leaves such decisions to private hospitals like St. Anthony's, the Richardson court easily determined that it could not — and would not — review the issues surrounding the private hospital staffing decision that led to the

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allegations, which sounded in an action to combat anti-competitive activity, there was more alleged than merely a wrongful denial of staff privileges. Id. at 309. These types of allegations are not made by Dr. Egan in the instant case. S.L.F. 9-34, passim.

appeal. Id. at 201. This was a correct result because St. John's had made a decision left to its sole discretion; there was nothing for a court to review.

Following the 1984 decision in Richardson, the Missouri Court of Appeals in Zipper v. Health Midwest, 978 S.W.2d 398 (Mo. Ct. App. 1998), discussed the public policy implications that would result from conferring contract status on medical staff bylaws. The Zipper court stated:

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.* The grant of hospital privileges to a physician, therefore, does not confer on the physician absolute authority to practice medicine at that hospital.

Id. at 417 (emphasis added) (citation omitted).

Following Zipper, the Missouri Court of Appeals in Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848 (Mo. Ct. App. 2000), held that the exclusion of a physician from the medical staff of a private hospital rests in the discretion of the managing authorities, and that a physician cannot sue the hospital for tortious interference with a business expectancy because of such exclusion from the medical staff.

Id. at 863.

Two years later, the United States Court of Appeals for the Eighth Circuit, applying Missouri law, also rejected a purported equitable cause of action against a

hospital (as Dr. Egan attempts to assert here), based upon Missouri’s generally applicable rule of non-review of hospital medical staffing decisions. Madsen v. Audrain Health Care, Inc., 297 F.3d 694 (8th Cir. 2002). In Madsen, the hospital’s medical staff executive committee recommended to the hospital’s board of directors that Madsen’s medical staff privileges be reduced. Id. at 696. After a hearing before an *ad hoc* committee of the hospital’s medical staff, the board adopted the executive committee’s recommendation and reported the reduction of privileges to the Missouri Board of Healing Arts and the National Practitioners Data Bank. Id. Madsen sued and argued, among other things, that there was no evidence to support the hospital’s decision, and sought to have the “decision adverse to Madsen . . . declared unjustified, arbitrary and capricious, and ordered to be set aside *in toto*, and that such finding be communicated to the Missouri Board of Registration for the Healing Arts, the National Practitioners Data Bank and all other persons or entities to whom such adverse decision was communicated.” Id. at 700.<sup>19</sup>

Relying on this Court’s decision in Cowan, the Eighth Circuit affirmed the district court’s dismissal of the physician’s declaratory judgment claim, holding: “Finally, *Missouri law* in this respect *is clear*. *The expressed policy* in Missouri *is the assurance of*

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<sup>19</sup> Unlike Dr. Egan, plaintiff Madsen apparently realized that the initial reports to the Board of Healing Arts and Data Bank cannot be “recalled,” as Dr. Egan requests in this case, and, thus, plaintiff Madsen attempted to compel the making of additional reports to these entities. See infra, at §IV.

*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.” *Id.* at 699 (emphasis added). The Madsen court referenced specifically the Cowan rule of non-review: “nothing in Madsen’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[.]” *Id.* at 700. The Madsen court’s conclusion did not turn on whether the claims were equitable or legal ones. *Id.*

Against this backdrop of well-settled, clear, Missouri law spanning some four decades, Dr. Egan has cited no Missouri authority that would permit him to advance the claims he has alleged in his Amended Petition. More specifically, Dr. Egan cites no Missouri case that would envision (or permit) a court to substitute its medical judgment for that of a private hospital, and its medical staff, in deciding whether to exclude (or not exclude) a physician from its staff. *It bears repeating that Dr. Egan seeks judicial reinstatement to St. Anthony’s medical staff.* App. Br. at 21. In short, the judicial review sought in this case by Dr. Egan is entirely inconsistent with the long-established law of Missouri. No Missouri statute, regulation, or case authority empowers Missouri judges to place physicians on the medical staffs at private hospitals over the objection of private hospitals.

**B. The Cowan Rule is a Holding, and the Doctrine of *Stare Decisis* Compels Affirmance.**

Contrary to Dr. Egan’s assertions (App. Br. at 33), the general rule of judicial non-review stated in Cowan was a holding by this Court and not mere *dictum*. The Cowan

Court's statement regarding the general rule of judicial non-review being "*admittedly applicable*," 392 S.W.2d at 308 (emphasis added), was based on the facts of that case, and was not a mere tangential remark. The applicability of the general rule was essential to the Cowan holding because it served to define the scope of review with respect to the circumstances of that particular case. Without the "admittedly applicable" general rule, this Court in Cowan would have been unconstrained, and could have instituted a different policy of judicial review (or non-review) of private staffing decisions, without a need for any exception.

As Dr. Egan points out (App. Br. at 34), the authority of precedent is limited to points of law that are "raised by the record, considered by the court, and necessary to a decision." Parker v. Bruner, 683 S.W.2d 265, 265 (Mo. *banc* 1985) (quoting State ex rel. Baker v. Goodman, 274 S.W.2d 293, 297 (Mo. *banc* 1954)). The rule of non-review stated by this Court in Cowan meets these three requirements. The issue of judicial non-review of a hospital's medical staffing decision was raised by the record as that was the subject of the case. That point of law was also considered, as this Court deliberated whether there was to be any exception to the "admittedly applicable" general rule. The general rule was necessarily essential to the holding because, *en route* to carving out an exception to the point of law, this Court proclaimed its acceptance of the general rule of judicial non-review. Without an affirmation of the general rule of judicial non-review, it would not have been necessary for this Court to consider allegations that would "remove the cause from the operation of the general rule and therefore entitle [Cowan] to a hearing of the cause upon its merits." Cowan, 392 S.W.2d at 308.

Since this Court's holding in Cowan, other courts have steadfastly relied upon it in declining to exercise review of Missouri hospital medical staffing cases. Nine years after Cowan, the Missouri Court of Appeals, Eastern District, relied upon Cowan in reversing a trial court's judgment in favor of a physician who was not retained on staff by Barnes Hospital. See Dillard v. Rowland, 520 S.W.2d 81 (Mo. Ct. App. 1974). In discussing the plaintiff's theory that Barnes Hospital and Washington University were in a joint venture, and that the hospital should be liable for the acts of its chief of surgery, the Dillard court relied on Cowan and stated:

If Barnes is to be considered a private hospital, which it would seem to be, the law is *clear* that the exclusion of a physician or surgeon from practicing in such a hospital is a matter which rests in the discretion of the managing authorities.

Id. at 92 (emphasis added).

Ten years later, in Richardson, 674 S.W.2d 200, the same Missouri Court of Appeals again relied upon Cowan in holding that the circuit court was "without jurisdiction" to review the hospital's decision to limit the plaintiff's surgical privileges.

Id. at 201.

Three years after Richardson, the Missouri Court of Appeals, Western District, also held that the general rule in Missouri is that "far from being an unconditional right, the *privilege* to practice in a hospital is a matter resting in the discretion of the managing authorities." State ex rel. St. Joseph Hosp. v. Fenner, 726 S.W.2d 393, 395 (Mo. Ct. App. 1987) (citing Richardson, 674 S.W.2d at 201; emphasis added). In applying the rule, the

Fenner court held that the plaintiff had no clear right to clinical privileges at a hospital, and that the allegations did not support the use of mandamus. Eleven years after Fenner, the same Court of Appeals again held that “[t]he exclusion of a physician or surgeon from practicing in a private hospital is a matter that rests in the discretion of the managing authorities.” Zipper, 978 S.W.2d at 417 (citation omitted).

More recently, in 2000, the Missouri Court of Appeals, Eastern District, held that a physician cannot sue a hospital for tortious interference with a business expectancy based upon the termination of the physician’s staff privileges. See Misischia, 30 S.W.3d at 863. And two years thereafter, the United States Court of Appeals also rejected a purported equitable cause of action against a hospital because of Missouri’s general rule of judicial non-review of hospital staffing decisions. See Madsen, 297 F.3d at 699.

It is clear, therefore, that Missouri courts have long relied on the Cowan rule of judicial non-review as a well-settled body of law surrounding the subject of private hospital medical staffing decisions.

This Court has recently held that a decision of the Court should not be lightly overruled when the opinion has remained unchanged for many years and the decision is not clearly erroneous or manifestly wrong. Southwestern Bell Yellow Pages, Inc., v. Dir. of Revenue, 94 S.W.3d 388, 390-91 (Mo. *banc* 2002).

The doctrine of *stare decisis* compels adherence to the policy of judicial non-review established by Cowan and reaffirmed by Missouri Courts of Appeal for more than forty years. The decision in Cowan is not clearly erroneous or manifestly wrong as it is well-supported by policy concerns still prevalent today, principally, that the peer review

process instituted by medical staffs in hospitals across the state of Missouri, without judicial interference, is the best method of protecting patients and ensuring quality health care. The legislature has not determined it should be changed; the rule should be left undisturbed by the courts. Finally, for forty-plus years, Missouri hospitals have relied on the decision in Cowan in shaping their peer review procedures and policies.

Dr. Egan has not established any compelling reason for a change in Missouri law, particularly under the circumstances of this case. “[T]he rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires ‘special justification.’” Randall v. Sorrell, 126 S. Ct. 2479, 2489, 165 L. Ed. 2d 482, 496 (2006); Hodges v. City of St. Louis, 217 S.W.3d 278, 282 (Mo. 2007) (“In respect for the principle of *stare decisis*, the Court declines to revisit the issue”). No “special justification” is presented by the circumstances of this case.

Even assuming, *arguendo*, that this Court’s statement of the general rule in Cowan was not an essential part of the judgment in that case, the decision is still entitled to *stare decisis* effect because the policy concerns behind the doctrine of *stare decisis* remain applicable, as more fully explained below. See *infra* at §I.C. Overturning the Cowan decision after more than forty years of reliance by the lower courts of this state would cause a major shift in Missouri healthcare jurisprudence and hospital operations, regardless of whether this Court’s statement of the general rule in Cowan is considered essential to the holding (which it was). Thus, this Court’s decision in Cowan is entitled to the full effect of *stare decisis*, and application of this doctrine alone compels affirmance.

**C. Strong Missouri Public Policy Continues to Support the Rule of Non-Review.**

This Court has repeatedly expressed its preference for deferring public policy choices to the legislature, as Dr. Egan has acknowledged. Application for Transfer to this Court at 7-8 (*citing, e.g., State v. Dunbar*, 230 S.W.2d 845, 849 (Mo. 1950) (“[I]t is not for courts to declare public policy. That is a function of the legislative department[.]”). At the same time, however, Dr. Egan requests that this Court make a judicial policy choice and change established Missouri law based upon the alleged circumstances of his case alone. Here, Dr. Egan appears to urge that the strong public policy against judicial review of private hospital staffing decisions only applies to suits for damages, and not to suits for injunctive relief. App. Br. at 46.<sup>20</sup> In doing so, of course, he necessarily acknowledges that public policy concerns are indeed present when litigation occurs following peer review decisions. Dr. Egan cites no Missouri law drawing a distinction between legal and equitable claims, however, and St. Anthony’s is aware of none. See Richardson, 674 S.W.2d at 200-01. The specter of litigation in a court of equity over the decision to exclude a physician from a hospital medical staff, the consequent attorney’s fees and costs, and the potential requirement of a judicially-imposed second (or third or fourth or fifth) administrative hearing based upon perceived procedural deficiencies,

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<sup>20</sup> Dr. Egan attempts to suggest the holding of the Madsen case only applies to claims for damages. App. Br. at 41, 53. Madsen, however, did not so hold, and that case involved equitable claims. 297 F.3d at 700.

could certainly “impugn a hospital’s actions in terminating the privileges of a physician providing substandard patient care.” Zipper, 978 S.W.2d at 417.

With respect to the burdens posed by peer review, Dr. Egan has candidly acknowledged that “[p]eer review hearings are expensive and time consuming.” App. Br. at 81. This concern is particularly evident here, where litigation has ensued not because Dr. Egan did not receive a hearing or appeals, but, instead, solely because of complaints about the process Dr. Egan was afforded. Moreover, he sued even though he does not claim the hearing committee’s decision with respect to the two patients was erroneous, or that the Board lacked the authority to reach the ultimate decision it reached. S.L.F. 9-34. Judicial application of the rule announced in Cowan should not depend upon whether equitable or legal claims are alleged. E.g., Richardson, 674 S.W.2d at 200-01; Madsen, 297 F.3d at 699-700.

Other considerations likewise support the rule of non-review. A hospital may, under certain circumstances, be found liable for acts of an independent (non-employed) physician. See Gridley v. Johnson, 476 S.W.2d 475, 484 (Mo. 1972) (“The fact that defendant doctors here were not employees of the defendant hospital does not necessarily mean the hospital cannot be held for adverse effects of treatment or surgery approved by the doctors.”); Scott v. SSM Health Care St. Louis, 70 S.W.3d 560 (Mo. Ct. App. 2002). Dr. Egan, formerly a non-employed independent physician on St. Anthony’s medical staff, wants a court to reinstate him to the medical staff at St. Anthony’s pending a second hearing. App. Br. at 21. Who (or what entity) would be responsible in tort for any future negligent acts? Would St. Anthony’s receive some new form of new judicially-created

immunity for any subsequent wrongful acts, based upon the fact that a court reinstated Dr. Egan's privileges after St. Anthony's medical staff and Board determined he should no longer be permitted to exercise them?

Further, if physicians conducting peer review are forced into court proceedings and depositions wherein their judgments are challenged, they will likely be disinclined to participate in such proceedings. E.g., Mason v. Central Suffolk Hospital, 819 N.E.2d 1029, 1032 (N.Y. 2004) (a decision to terminate the privileges of "a doctor who may be their colleague will often be difficult"). If there is physician reluctance to participate in "expensive and time consuming" administrative hearings (App. Br. at 81), and later (potentially) as witnesses in subsequent judicial hearings, what will be the impact upon peer review and the goal of quality care and patient safety? How will such judicial review advance such goals? Would physicians be less inclined to engage in peer review activities and make the difficult decision to recommend revocation of a colleague's privileges if they must now fear litigation?

Dr. Egan has indicated that physicians "keep searching for remedies." Application for Transfer to this Court at 10. Dr. Egan himself has instituted three lawsuits against St. Anthony's. See, e.g., Fenner, 726 S.W.2d at 394-95 (Mo. Ct. App. 1982) (noting decade-long litigation saga involving Dr. Willman and his efforts to challenge loss of staff privileges). If the rule of non-review that currently precludes such litigation were lifted, would litigation proliferate? What impact would such lawsuits have on health care and other costs? Does the rule of non-review, as a policy matter, concern physicians

other than Dr. Egan? What strong policy concerns mandate that a forty-year old, well-settled rule be changed now, as a result of Dr. Egan's allegations?

These are all significant questions, and they cannot be answered by this Court in the limited context of the record before the Court. If change is really called for, however, it should come not from a judicial stroke of the pen, but, instead, by legislative action where the reasons for and impact of such change is carefully considered, after appropriate investigation and fact-finding.

Hospitals have no incentive to exclude qualified, competent physicians. In the end, their interests are not divergent. Physicians and hospitals are not competitors. It is in the best interest of the hospital and each of its staff physicians to assemble the most qualified and competent medical staff possible. Because health care spending continues to significantly outpace inflation in other sectors, it is undeniable that Missouri hospitals and physicians are under tremendous pressure to improve quality and patient outcomes, enhance patient safety and reduce avoidable costs. Payors are adopting payment strategies to reward high-quality, efficient hospitals and physicians, while reducing payments to marginal providers. For example, for several years, hospitals have reported quality data to Medicare to preserve current payment levels, and such quality data is published on the Medicare website so that patients can compare performance of local hospitals.<sup>21</sup> For hospital services provided on or after October 1, 2008, Medicare will

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<sup>21</sup> [www.hospitalcompare.hhs.gov](http://www.hospitalcompare.hhs.gov). Annual payment updates of Medicare reimbursements are reduced by two percent (2%) per year for hospitals which fail to

implement a “pay for performance” reimbursement system, based on the achievement of increased quality and patient outcomes goals, pursuant to the Deficit Reduction Act of 2005.<sup>22</sup> More than half of private payors have likewise adopted various forms of pay for performance strategies, effecting 80% of persons enrolled.<sup>23</sup>

To survive and be successful, hospitals must attract and maintain qualified, talented and committed physicians to practice in their facilities. No governing body has an incentive to exclude good physicians and forfeit the patients they bring to the facility. Physicians, of course, are a significant revenue producing engine in a hospital. Yet powerful disincentives, such as reduced payments, patient injuries and liability in damages, tarnished reputations, and the exodus of good physicians, compel medical staffs and hospital governing bodies to exclude perceived incompetent or unfit physicians.<sup>24</sup> Ultimately, that is the policy that should be fostered.

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report quality data. Deficit Reduction Act of 2005, Pub. L. 109-171, Section 5001(a), codified at 42 U.S.C. §1395ww(b)(3)(B).

<sup>22</sup> Deficit Reduction Act of 2005, Pub. L. 109-171, Section 5001(b), codified at 42 U.S.C. §1395ww(b)(3)(B).

<sup>23</sup> “Pay for Performance in Commercial HMOs,” Rosenthal, M., *et al.*, New England Journal of Medicine, Volume 355, pp. 1895-1902; <http://content.nejm.org/cgi/content/full/355/18/1895>.

<sup>24</sup> Note, for example, that the Cowan rule was not designed to preclude actions for anti-competitive activity against other physicians. See Cowan, 392 S.W.2d at 308; see

Dr. Egan’s novel contentions in this case also raise a number of practical issues. By what standard would a court review the administrative determination of a private hospital? Would a court be permitted to find that a physician was wrongfully removed from a medical staff, and reinstate him over the medical staff’s objection? Also, what record would the court review? Would physicians be permitted to bring multiple, successive lawsuits alleging procedural deficiencies in administrative hearings? What review would apply in a case like the instant one, where the plaintiff questions the notice given and the conduct of the first-level, internal appellate review committee, but does not allege a different result would (or must) have been reached absent the error? S.L.F. 9-34. Dr. Egan has never explained how any “limited judicial review” (App. Br. at 29) would be implemented or operate. App. Br., passim. For forty-plus years, there has been a simple, sound, and pragmatic answer to these questions: there is no judicial review of the staffing decisions of private hospitals. There is no reason to disturb it, particularly given the record of this case.

Again, while Dr. Egan claims he did not receive notice of one of the “charges,” he acknowledges that he received notice of the two cases on which the hearing committee based its recommendation. S.L.F. 13, 16-17 at ¶¶ 21-22, 46-49. Presumably, Dr. Egan was more familiar with the care of these two patients than anyone else. With respect to “unnoticed” finding of the hearing committee, Dr. Egan alleges it resulted from

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also, e.g., Samuel v. Herrick Memorial Hosp., 201 F.3d 830 (6th Cir. 2000) (despite rule of non-review, courts not prohibited from reviewing antitrust claims).

information learned by the hearing committee during the hearing itself. S.L.F. 16-17 at ¶¶42, 54. Dr. Egan does not allege anywhere in his Amended Petition, however, that the medical staff hearing committee was precluded from making its decision upon evidence that *it learned during the hearing*. L.F. 9-34, passim. The regulations, 19 C.S.R. §30-20.021, do not suggest otherwise either. See also Adkins v. Sarah Bush Lincoln, 544 N.E.2d 733, 742 (Ill. 1989) (fact that plaintiff did not receive prior notice of one patient chart in issue did not cause notice to be inadequate). The point of a hearing, of course, is to receive and evaluate evidence adduced by the parties. If such evidence cannot be considered, there is no reason to hold a hearing.<sup>25</sup> It would be an exercise in futility.<sup>26</sup> Dr. Egan acknowledges he was permitted to raise his notice objection to the hearing committee and to the appellate review committee. S.L.F. 16-17 at ¶¶43, 53.

Also, Dr. Egan makes *no* allegations that the hearing committee's findings on either of the two patients was wrong. He also does not allege any error whatsoever with respect to one patient, nor does he contend that the hearing committee or Board was

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<sup>25</sup> Dr. Egan also concedes he asserts no constitutional claims, state or federal. App. Br. at 50.

<sup>26</sup> Dr. Egan's medical staff hearing was not a criminal trial. However, he uses terms like "conviction" to describe the result. By doing so, Dr. Egan appears to suggest that medical staff hearings are to be conducted like criminal trials in circuit court. He never explains why this should be the case, however, or the basis for such formal procedures.

constrained to reach some different result if only the “charge” relating to that one patient was sustained. See Adkins, 544 N.E.2d at 742 (“[a] hospital’s public responsibility warrants restrictions on a physician for even a single professional deficiency”). Further, Dr. Egan does not plead that the hearing committee erred in its determination as to the two patients. S.L.F. 16-17 at ¶¶46-50. Finally, Dr. Egan does not allege error in the Board of Directors’ final decision, nor does he allege it failed in its review responsibilities.<sup>27</sup>

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<sup>27</sup> In respect to Dr. Egan’s claimed notice argument, the following hypothetical explains why it truly elevates procedural form over substance, and must be rejected. Suppose physician Smith is summarily suspended for very poor medical care in respect to patient X. Dr. Smith receives notice of a hearing in respect to patient X, and a hearing is held before a medical staff hearing committee, which lasts for many hours over a period of many weeks. During the hearing, Dr. Smith testifies he did not provide poor care to patient X, but instead admits he provided poor medical care to patients Y and Z, and then concealed his poor care from those patients. Under Dr. Egan’s view, the hearing committee and hospital governing body could not revoke Dr. Smith’s staff privileges based upon Dr. Smith’s admissions, without providing additional notice and holding a second, new hearing, even though Dr. Smith admitted conduct justifying revocation in the judgment of the hospital medical staff and governing body. Such a construction of “notice” under the regulations is absurd, and would unduly limit medical staffs and governing bodies from addressing patient care issues. It would also very likely entangle

Thus, even if review of the private medical staff decisions were permitted, Dr. Egan has failed to plead or establish why he should be entitled to any relief under the circumstances of this case. L.F. 16-17 at ¶¶46-50. Without such allegations, his complaints at bar ring hollow. They amount to “sound and fury, signifying nothing.” App. Br. at 81 (internal quotations and citation omitted).

In sum, Missouri does not allow judicial review of medical staff privileges decisions by hospital governing bodies unless the claim falls within the narrow exception outlined by this Court in Cowan. The Missouri Court of Appeals previously recognized and properly applied these principles in regard to Dr. Egan. (A-1 - A-8). The trial court’s decision was supported by clear precedent, and strong, long standing public policy, and should be affirmed.<sup>28</sup>

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courts, and tax limited judicial resources, in purely procedural litigation over private medical staff matters.

<sup>28</sup> The public policy expressed by Missouri is also supported by federal law and policy, contrary to Dr. Egan’s suggestion. The HCQIA, 42 U.S.C. §§11111, et seq., was enacted by Congress to improve quality of care by encouraging identification and discipline of incompetent physicians. Sugarbaker v. SSM Healthcare, 190 F.3d 905, 911 (8th Cir. 1999). The HCQIA does not permit private rights of action for physicians. Wayne v. Genesis Medical Center, 140 F.3d 1145, 1147-48 (8th Cir. 1998) (citing 42 U.S.C. §§11101-52). Thus, federal policy supports Missouri’s “hands off” approach to privileges decisions made by Missouri hospitals. See id. at 1148-49. Notably, Dr. Egan

**D. Other States Follow the Rule of Judicial Non-Review.**

Missouri is not the only state to follow the doctrine of judicial non-review of medical staffing decisions of private hospitals, contrary to Dr. Egan's suggestions. E.g., App. Br. at 82.

In Khoury v. Community Memorial Hospital, Inc., 123 S.E.2d 533 (Va. 1962), the Virginia Supreme Court held that "when the trustees of a private hospital, in their sound discretion, exclude a doctor from the use of the facilities of the hospital, the courts are without authority to *nullify that discretion by injunctive process*. There are no constitutional or statutory rights of the doctor, or his patients who wish to be treated in the hospital by him, which warrant such interference." Id. at 539.<sup>29</sup>

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complains that HCQIA reporting requirements can harm physicians. App. Br. at 45. But he alleges no loss in privileges at other hospitals, or that he is no longer able to practice medicine. S.L.F. 9-34. In any case, the United States Congress required such reporting, and chose not to permit actions based on such reports.

<sup>29</sup> After that decision, the Virginia legislature made a slight modification to this result by enacting a statute requiring a hospital to state its reasons in writing for refusing, revoking, or limiting staff privileges, and by further providing that if the given reasons are unrelated to the considerations listed in the statute, the aggrieved physician may seek certain injunctive relief. Medical Centers Hospitals v. Terzis, 367 S.E.2d 728, 730 (Va. 1988). Missouri has no such statute.

In a subsequent Virginia Supreme Court case, the court referenced the Khoury decision, as well as its subsequent legislative modification and held, under the new legislation, that the court's review of a private hospital's staffing decisions was limited to considering only whether the reasons stated by the hospital were within the statutory criteria. The Virginia Supreme Court specifically held that, except for that limited inquiry, the staffing decisions of private hospitals were not reviewable. Terzis, 367 S.E.2d at 730. The Terzis Court<sup>30</sup> also noted it was aware of different holdings in other jurisdictions, but nonetheless affirmed its basic policy of non-intervention in such hospital staffing decisions:

We are aware of the conflicting policy considerations and authorities dealing with judicial review of any such decisions by private hospitals. \* \*

\* In our opinion, Khoury articulates a rule of non-intervention in a hospital's internal affairs and spells out its underlying policy considerations. The legislature has acquiesced in that ruling by its limited modification of Khoury, unambiguously expressed in Code §32.1-134.1.

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<sup>30</sup> For purposes of deciding this case, the Court assumed without deciding that the medical staff bylaws constituted a contract between the doctor and the hospital. Id. at 729. In view of the result reached, however, this assumption did not affect the outcome that Dr. Terzis was not entitled to judicial review of his claim regarding the alleged breach of contract.

Id. at 730. In Missouri, the legislature has also acquiesced in the rule of non-review, in that it has not legislated any change in the rule which has been existence for many years.

In addition to Virginia, courts in a number of other jurisdictions follow at least some form of the rule of non-review, recognizing that private hospitals' medical staffing decisions are entitled to certain discretion. Examples follow:

- Alabama (Murdoch v. Knollwood Park Hospital, 585 So.2d 873, 876 (Ala. 1991) (“refusal to appoint a particular physician to a medical staff is not a proper subject for judicial review”); Moore v. Andalusia Hospital, Inc., 224 So.2d 617, 619 (Ala. 1969));
- Arkansas (Brandt v. St. Vincent Infirmary, 701 S.W.2d 103, 106-108 (Ark. 1985) (managing authority of private hospital can dictate how medicine is practiced));
- Colorado (Green v. Bd. of Directors, 739 P. 2d 872, 873 (Col. App. 1987) (“if LMC is a private hospital, the denial of staff privileges is a matter solely within the discretion of its managing authorities”));
- Illinois (Barrows v. Northwestern Memorial Hospital, 525 N.E. 2d 50, 52-53 (Ill. 1988)<sup>31</sup> (denial of membership on private hospital medical staff

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<sup>31</sup> Illinois has an exception to its generally applicable rule of non-review for revocation or curtailment of existing staff privileges. Adkins, 544 N.E.2d at 738. Illinois continues to note, however, that the “judicial reluctance to review internal staff decisions” is a reflection of the “unwillingness of courts to substitute their judgment for

subject to “rule of non-review”; “large majority of states continue to adhere to the rule”); Goldberg v. Rush University Medical Center, 863 N.E.2d 829, 836 (Ill. App. 2d Dist. 2007) (“The power to manage the affairs of a private hospital necessarily must include the discretion to make routine clinical staffing assignments and allocation of resources and personnel. The doctrine of ‘non-review’ serves both judicial economy and the medical and commercial interests of private corporations operating a hospital or medical center. Consequently, hospital staffing decisions are entitled to deference from the courts”));

- Iowa (Natale v. Sisters of Mercy, 52 N.W. 2d 701, 709-710 (Iowa 1952) (exclusion of private hospital licensed physicians “rests within the sound discretion of managing authorities”) (citation omitted));
- Massachusetts (Bello v. South Shore Hospital, 429 N.E.2d 1011, 1015 (Mass. 1981) (court “declin[e] to adopt the theory . . . that a private hospital’s actions are reviewable under a common law theory of judicial review”));

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the professional judgment of hospital officials with superior qualifications.” Id. By asking this Court to reinstate his privileges, Dr. Egan is effectively asking a Court to substitute its judgment for St. Anthony’s medical staff and governing body and overrule the decision to exclude him.

- Texas (Tigua General Hospital, Inc. v. Feuerberg, 645 S.W.2d 575, 578 (Tex. App. 1982) (physician in private hospital “has no cause of action against a private hospital for the termination of staff privileges even where the action was arbitrary and capricious or where common law rights to procedural or substantive due process were violated”); see also Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971) (“No court should substitute its evaluation of such matters 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.”) (applying Texas law));
- Wisconsin (Johnson v. City of Ripon, 47 N.W.2d 328, 329 (Wis. 1951) (“directors of private hospital corporation have the power to exclude physicians from the privilege of practicing their profession in said hospital”); Fletcher v. Eagle River Mem. Hospital, 456 N.W.2d 788, 791 (Wis. 1990) (“private hospital ... staffing decisions were not subject to judicial review or subject to due-process requirements”));
- West Virginia (State ex rel. Sams v. Ohio Valley General Hosp. Assoc., 140 S.E. 2d 457, 462-63 (W. Va. 1965) (holding that a private hospital has authority to exclude, in its discretion, members of the medical profession from membership on its staff; denying writ of mandamus by physician to

compel hospital to appoint him to its medical staff or to afford him a hearing regarding the refusal of his application)).<sup>32</sup>

While Dr. Egan suggests the rule of non-review is a minority view, this Court has previously followed the minority view in other areas of the law. See, e.g., State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo. 1985); Richardson v. State, 495 S.W.2d 435, 440 (Mo. 1973) (declining to “adopt the majority rule”), *superseded by statute as stated in State v. Beishir*, 646 S.W.2d 74, 81 (Mo. 1983). Here, as explained more fully below, Dr. Egan has provided nothing more than a survey of what courts in other states have decided with respect to medical staffing decisions in their states. These states do not represent Missouri law.

**E. Review of the Revocation of Dr. Egan’s Staff Privileges Is Contrary to Other Missouri Law.**

St. Anthony’s, a private, non-profit corporation, is governed by Chapter 355 of the Missouri revised statutes. Section 355.141.1.3, R.S. Mo., sets forth how actions of a non-profit corporation may be challenged. Specifically, this section provides that “the validity of a corporate action may not be challenged on the ground that the corporation . . . lacked power to act,” except as follows:

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<sup>32</sup> Like Illinois, West Virginia has a “narrow exception” to the general rule of non-review for allegations of incompetence or misconduct. Kessel v. Monongalin County General Hospital Co., 600 S.E.2d 321, 330 (W.Va. 2004).

A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the attorney general, a director, or by a member or members in a derivative proceeding.

§355.141.2, R.S. Mo. Dr. Egan does not plead (and is not) one of the enumerated parties authorized to challenge the actions of a non-profit entity such as St. Anthony's. His purported claim frustrates established principles of Missouri corporate law.

Furthermore, under Missouri's regulations pertaining to hospital governance and administration, it is the governing body of St. Anthony's that is responsible for the management, activities, control and function of the hospital, and the composition of the medical staff. 19 C.S.R. §§30-20.021(2)(A)2; 30-20.021(2)(C)15-16.

Dr. Egan's requests for a new hearing and judicial reinstatement to the private hospital medical staff would operate to transfer these governance functions from St. Anthony's Board to the courts. Paskon v. Salem Memorial Hosp. Dist., 806 S.W.2d 417, 423 (Mo. Ct. App. 1991) (bylaws cannot "deprive the board of" the power to suspend physician, because board has ultimate authority). This divestiture of private corporate authority is not contemplated by applicable law. If the legislature wanted to enact procedures for the review Dr. Egan now seeks, it could have done so. It did not.

**F. Case Law From Other States Does Not Compel a Different Result.**

Understandably, Dr. Egan's Brief is heavily laden with citations to case law from other states. Any suggestion, however, that there is uniform national law on the subject at hand, and a uniform national approach to review of medical staffing decisions, is

misplaced. Review of the cases Dr. Egan cites from various different states and the District of Columbia (App. Br. at 34-36) reveals a number of approaches and outcomes. These cases, however, reveal no national, uniform policy to allow injunctive claims for relief in situations like that now before the Court. Further, that other states may have adopted other approaches does not mean Missouri should do so too.

Some of the states permit certain types of judicial review of medical staffing decisions based upon specific statutory provisions. E.g., Satilla Health Serv., Inc. v. Bell, 633 S.E.2d 575 (Ga. App. 2006); Fontenot v. Sw. La. Hosp. Ass'n, 775 So.2d 1111 (La. Ct. App. 2000); Miller v. St. Alphonsus Reg'l Med. Ctr., Inc., 87 P.3d 934 (Idaho 2004); Lake Hosp. & Clinic v. Silversmith, 551 So.2d 538 (Fla. App. 1989); Wong v. Garden Park Cmty. Hosp., Inc., 565 So.2d 550 (Miss. 1990). Missouri, however, has no statute that authorizes judicial review of medical staffing decisions at private hospitals. (A-8). Indeed, that Missouri's legislature has not changed the law signals legislative approval of the rule of non-review.

Other cases cited by Dr. Egan discuss judicial review of medical staff decisions in the context of a theory that medical staff bylaws afford the physician certain contract rights to enforce the provisions of the bylaws. The majority of these cited "contract" cases, however, did not hold that hospital bylaws create contract rights, or are readily distinguishable, or do not correctly reflect the law of the particular jurisdiction. See, e.g., Mason, 819 N.E.2d at 1031-32 (New York: bylaws are not a contract); Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n, 497 So.2d. 1261 (Fla. App. 1986) (court *assumed* that bylaws formed a contract); Terre Haute Reg'l Hosp., Inc. v. El-Issa, 470 N.E.2d 1371

(Ind. App. 1984) (issue of whether bylaws were a contract tried by implied consent; hospital waived argument that bylaws did not create contract). A significant number of the other contract cases cited by Dr. Egan are distinguishable, and are addressed in §III, infra.

In the end, therefore, Dr. Egan cited few cases that have held, as a broad proposition, that medical staff bylaws constitute a contract between the hospital and the physician. In any case, as set forth in §III, infra, Dr. Egan has waived any argument that medical staff bylaws create enforceable contract rights in Missouri. Lastly, medical staff bylaws do not create such contract rights under established Missouri law.

The cases cited by Dr. Egan that involve common law review of medical staffing decisions are also distinguishable. The New Jersey and Hawaii cases cited by Dr. Egan both limited their common law-based review to situations where a hospital has either received more than nominal government funding or where the hospital was deemed “quasi-public.” See Silver v. Castle Mem’l Hosp., 497 P.2d 564, 566 (Haw. 1972) (“The majority of jurisdictions have held that a private hospital, as opposed to a public hospital, has the right to exclude any physician from practicing therein. \* \* \* [W]e need not reach the issue of whether the decision of the board of a truly private hospital not to grant privileges is subject to judicial review.”); Greisman v. Newcomb Hosp., 192 A.2d 817, 821 (N.J. 1963). Illinois still follows a form of the rule of non-review. Barrows, 325 N.E.2d at 52-53. Likewise, Alabama has no general rule permitting review of medical staffing decisions. Murdoch, 585 So.2d at 876. The Colorado case cited by Dr. Egan,

Hawkins v. Kinsie, 540 P. 2d 345 (Col. App. 1975) is unpublished, and appears contrary to more recent, published, Colorado law. Green, 739 P. 2d at 873.

In the end, different states follow different approaches for their own legal and policy reasons. Missouri's longstanding rule of non-review reflects its strong public policy determination. Other states' determinations do not require Missouri to reach a different result. Even Dr. Egan appears to acknowledge these policy concerns, stating that only "limited judicial review of the procedures employed in the revocation of a physician's privileges" is appropriate. E.g., App. Br. at 29.

**II. THE TRIAL COURT PROPERLY DISMISSED ALL CLAIMS IN DR. EGAN'S AMENDED PETITION, BECAUSE HE FAILED TO STATE ANY CLAIMS FOR RELIEF BASED UPON AN ESTOPPEL OR "DUE PROCESS" THEORY RECOGNIZED BY MISSOURI LAW (Responding to Points Relied On II-IV, VII-IX).**

The standard of review is *de novo*.

As previewed above, in Counts I-VII of his Amended Petition, Dr. Egan sought to have this Court order St. Anthony's "to recall its report to the Missouri State Board for the Healing Arts . . . and its report to the National Data Bank that his [Dr. Egan's] medical staff privileges have been revoked, on the grounds that the hearing and appeal procedures employed to revoke his privileges violated state statutes and regulations guaranteeing him notice and the opportunity to be heard, and an appeal before a neutral and impartial panel." See S.L.F. 9-34. He seeks another, judicially mandated internal

hearing, as well as judicial reinstatement to St. Anthony's medical staff. Id.; App. Br. at 21.

In addition to the fact that Missouri law does not allow judicial review of medical staff privileges decisions, Dr. Egan's purported claims for equitable relief in his Amended Petition also fail because he has not alleged any causes of action recognized by Missouri law, and upon which he may base any request for equitable relief. City of Kansas City v. New York-Kansas Bldg. Associates, L.P., 96 S.W.3d 846, 853 (Mo. Ct. App. 2002) ("powers of a court of equity to adjudicate are . . . limited to the claim for relief and issues made by the pleadings"); Steele v. Allison, 73 S.W.2d 842, 844 (Mo. Ct. App. 1934) ("Equity will not act unless the right to the relief is clearly established[.]"). A claim in equity cannot stand absent an underlying basis in law; only the nature of relief is equitable. See J.E. Dunn Jr. and Associates, Inc. v. Total Frame Contractors, Inc., 787 S.W.2d 892, 897 (Mo. Ct. App. 1990) ("This kind of nebulous claim for equitable relief on general principles invokes no substantive principle of law and states no claim upon which relief can be granted. What remedy it seeks by this count, and upon what theory, is a mystery."); Felling v. Wire Rope Corp. of America, Inc., 854 S.W.2d 458, 464 (Mo. Ct. App. 1993) (upholding trial court's dismissal of a petition which did not support equitable rescission of an employment contract based upon reliance on a safety manual and, as such, appellants "failed to state a claim cognizable under the substantive law").

What claim Dr. Egan has attempted to plead is a "mystery." Total Frame Contractors, 787 S.W.2d at 897. In Counts I-VII, Dr. Egan asserts claims for purported "equitable relief," but he has failed to plead the essential elements of any substantive,

recognized claim. Thus, in addition to the rule of non-review discussed above, all of Dr. Egan's claims were properly dismissed by the trial court.

**A. The Trial Court Properly Dismissed Counts II-V of the Amended Petition Because Dr. Egan Failed To State a Claim for Estoppel (Responding to Points Relied On II-III, VII-IX).**

“[E]stoppel, even when pleaded . . . , does not in itself give a cause of action, and . . . its purpose is to preserve rights already acquired and not to create new ones’[.]” Brown v. Brown, 146 S.W.2d 553, 555 (Mo. 1941) (quoting McLain v. Mercantile Trust Co., 237 S.W. 506, 508 (Mo. 1922)); Whitney v. Aetna Cas. & Sur. Co., 16 S.W.3d 729, 733-34 (Mo. Ct. App. 2000) (same). Estoppel is “a shield and is not available as a sword.” Guzzardo v. City Group, Inc., 910 S.W.2d 314, 316 (Mo. Ct. App. 1995). Dr. Egan's purported estoppel claims in Counts II-V of his Amended Petition fail for this reason alone. Estoppel cannot be used to mask the absence of a substantive claim for relief.

In Counts II-V, Dr. Egan requests an order requiring St. Anthony's to recall reports and hold another hearing (nullifying the Board's revocation of his medical staff privileges) based upon his claim that he is entitled to injunctive relief on the grounds of “equitable estoppel.” Among other allegations, Dr. Egan claims that St. Anthony's has obtained certain benefits by enacting bylaws, and should thus be estopped from denying Dr. Egan the benefits of those staff bylaws. E.g., S.L.F. 25 at ¶¶88-90. Dr. Egan has cited no Missouri case that would permit such a claim to avoid the rule of non-review, and St. Anthony's is aware of no such case.

Estoppel is not a favorite of the law in any event, and each element must clearly appear and be proven by the party seeking its enforcement. E.g., Farmland Industries, Inc. v. Bittner, 920 S.W.2d 581, 583 (Mo. Ct. App. 1996); Thompson v. Chase Manhattan Mortg. Corp., 90 S.W.3d 194, 208 (Mo. Ct. App. 2002) (*citing Investors Title Co. v. Chicago Title Ins. Co.*, 983 S.W.2d 533, 537 (Mo. Ct. App. 1998)). Under Missouri law, a person asserting the doctrine of equitable estoppel must show: (1) an admission, statement or act inconsistent with a claim afterward asserted and sued upon; (2) reliance—action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. Doe v. O’Connell, 146 S.W.3d 1, 4 (Mo. Ct. App. 2004); Zipper, 978 S.W.2d at 411. The “burden of proof to establish the estoppel pleaded and every essential element thereof rest[s] upon the party pleading it.” Emery v. Brown Shoe Co., 287 S.W.2d 761, 767 (Mo. 1956).

**1. In addition, Dr. Egan’s Estoppel Claims in Counts II, III, and V of his Amended Petition Fail Because He Has Not Alleged Reliance (Responding to Points Relied on VII, VIII and IX).**

Although reliance is an essential element of an equitable estoppel claim, Dr. Egan did not allege reliance in Counts II, III or V of his Amended Petition. Dr. Egan has thus failed to state a claim for relief in those Counts. Littlefield v. Edmonds, 172 S.W.3d 903, 908 (Mo. Ct. App. 2005) (“To support a claim of estoppel, a representation must be made by the party estopped and *relied upon by another party*, who changes his position to his detriment.”) (emphasis added); Schoeller v. Schoeller, 465 S.W.2d 648, 653 (Mo. Ct.

App. 1971). Dr. Egan seems to try to base his estoppel claims in Counts II, III, and V on the grounds that *St. Anthony's* position was somehow improved as a result of enacting bylaws. S.L.F. 23-25, 27-28 at ¶¶82-91, 98-104. A benefit to St. Anthony's from the enactment of staff bylaws, however, does not create in *Dr. Egan* a claim for equitable estoppel. Dr. Egan must still plead and establish reliance on a representation made to Dr. Egan with the intention that he would rely on it, and he did not do so. As the Missouri Court of Appeals stated:

[W]e note that equitable estoppel requires more than proof of acceptance of benefits. \* \* \* [I]n order to invoke the doctrine, a party must show by clear evidence that there was: a representation made by the party estopped *and relied upon by another party who changes his position to his detriment*. \* \* \* The representation may be manifested by affirmative conduct, either acts or words, or by silence amounting to concealment of material facts. \* \* \* These facts must be known to the party estopped, and unknown to the other party. \* \* \* The “representation” must be made with the intention that it will be acted upon by the other party, or made under circumstances which imply a reasonable expectation that it will be acted upon.

Ryan v. Ford, 16 S.W.3d 644, 651 (Mo. Ct. App. 2000) (emphasis added) (citations omitted); see also Klaar v. Lemperis, 303 S.W.2d 55 (Mo. 1957) (estoppel claim failed where there was “no indication that [plaintiffs] even relied upon the alleged agreement” regarding the land boundary); Schoeller v. Schoeller, 465 S.W.2d 648, 653 (Mo. Ct. App. 1971) (estoppel claim failed where defendants “in no way changed their position” in

reliance on plaintiff's representation). Dr. Egan does not allege that the medical staff bylaws were enacted with the intention that Dr. Egan would rely upon them.

Accordingly, because Dr. Egan failed to allege the required element of reliance in Counts II, III and V, these claims fail as a matter of law for this additional reason. The trial court's judgment dismissing them should be affirmed.

**2. Counts II, III and V of the Amended Petition Also Fail Because So-Called Estoppel "by Acceptance of Benefits and Conduct" Is Not an Independent, Affirmative Claim For Relief (Responding to Points Relied On VII, VIII, and IX).**

In an attempt to try to overcome his pleading deficiencies regarding the requirement of reliance, Dr. Egan argues that the estoppel claims he actually pleaded are some form of benefits or conduct estoppel claims. (E.g., App. Br. at 77-80). Dr. Egan attempts to affirmatively use so-called "estoppel by benefit or conduct" to enforce St. Anthony's medical staff bylaws. Regardless of the estoppel label used, however, reliance is required by the party claiming an estoppel.<sup>33</sup>

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<sup>33</sup> Estoppel requires reliance, typically in the form of a party's change of position. If a party's position does not change in reliance upon an action, estoppel will not stand. See Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 9 (Mo. *banc* 1948) ("[t]he [estoppel] rule for which defendant contends has no application where no injury resulted to any one except the party against whom the estoppel is claimed."); see also 31 C.J.S. Estoppel and Waiver §123; cf. Shumate v.

Dr. Egan’s case law discussion demonstrates further that his arguments miss the mark. In some of the cases cited by Dr. Egan, *defendants* utilized estoppel by benefit as a *defense* to claims brought by plaintiffs. In others, the defendants’ attempts to use estoppel as a defense were precluded. In none of these cases, however, was estoppel pleaded to supply the affirmative, stand-alone claim for relief. Estoppel cannot be employed to create rights that do not otherwise exist. See e.g., Whitney, 16 S.W.3d at 733-34.

In Magenheim v. Board of Education, 347 S.W.2d 409 (Mo. Ct. App. 1961) (App. Br. at 76-77), the plaintiff, a former public school teacher, sued the board for breach of contract and declaratory judgment. Plaintiff claimed he was forced to join and involuntarily pay dues to four organizations as part of his employment contract. Id. at 411. Plaintiff asked the court to declare the contract invalid, and to order the return of dues paid by him. Id. at 411-12. The court determined that plaintiff was not entitled to the return of his dues because he had been paid a salary pursuant to the salary schedules in his employment contract, which required membership in the organizations. Id. at 419. Plaintiff was not permitted to “adopt an inconsistent position to the prejudice of the defendant School District” because he had benefited under the contract by being paid his

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Dugan, 934 S.W.2d 589, 594-595 (Mo. Ct. App. 1996) (reliance is an element of equitable and promissory estoppel; for estoppel, “*the person claiming the benefit of the estoppel* must have been misled into such action that he will suffer injury if the estoppel is not declared.”) (emphasis added).

salary. Id. Thus, “estoppel” was not used by the plaintiff as an affirmative claim, but, instead, operated as a defense to the plaintiff’s claim for relief. Further, there *was* reliance in that case — changed positions; defendant paid the plaintiff-teacher a salary based upon the plaintiff’s payment of membership dues in various organizations. Id.

Similarly, in Owen v. City of Branson, 305 S.W.2d 492, 493 (Mo. Ct. App. 1957) (App. Br. at 77), plaintiff sought to enjoin enforcement of a taxing ordinance. Previously, plaintiff had joined in a stipulation which induced a court to enter a judgment that, pursuant to the taxing ordinance, the city had power to levy and collect tax. Id. The court held that “plaintiff, having received the benefit of his stipulation and the judgment rendered in accordance therewith, may not now dispute the validity of such judgment.” Id. at 497 (citations omitted). The court observed the well-known principle that “the estoppels against the plaintiff do not *create* a right ..., but preserve the rights which were settled and determined under the stipulation and judgment in the previous suit.” Id. at 498 (emphasis in original). That is, the court noted that a party cannot use estoppel affirmatively to *create* a right which was not previously recognized or in existence.<sup>34</sup>

Here, Dr. Egan does not allege reliance, as shown. Further, Dr. Egan is improperly attempting to create rights by the affirmative use of estoppel that do not otherwise exist.

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<sup>34</sup> Reliance was also present in Owen, as the City of Branson relied on the former position taken by the plaintiff, and the rights fixed, in the prior litigation. Owen, 305 S.W.2d at 496-97.

The remaining so-called estoppel “by acceptance of benefits” cases cited by Dr. Egan do not aid him, as there was no contractual relationship between Dr. Egan and St. Anthony’s, because there has been no prior judicial recognition of supposed rights Dr. Egan now seeks to enforce, because Dr. Egan has no substantive claim for relief, and because Dr. Egan did not plead reliance. See, e.g., Forest Hills Const. Co. v. City of Florissant, 562 S.W.2d 322, 325-26 (Mo. 1978) (plaintiff could not attack validity of an ordinance when plaintiff accepted benefits thereunder; plaintiff deemed estopped); Pfarr v. Union Electric Co., 389 S.W.2d 819 (Mo. 1965) (plaintiffs-landowners estopped from denying that defendant electric power company was the fee simple owner of the property, where electric company was awarded such title in a prior condemnation action involving landowners); Kirkwood v. Trust Co. v. Joseph F. Dickmann Real Estate Co., 156 S.W. 2d 54, 59-61 (Mo. Ct. App. 1941) (plaintiff estopped from challenging authorization of payment of fees to defendant where court order authorizing and directing the sale of property contained a direction to pay the fees); Long v. Huffman, 557 S.W.2d 911, 415-16 (Mo. Ct. App. 1977) (in suit to enforce the noncompetition employment contract, defendant employee estopped from denying the existence of a valid contract where he had accepted the benefits of his employment contract for the full employment term); In re Marriage of Carter, 862 S.W. 2d 461 (Mo. Ct. App. 1993) (husband estopped from denying settlement agreement terms because he had accepted its benefits by taking possession of personal property awarded him therein); Wilson v. Midstate Industries, Inc., 777 S.W. 2d 310, 314 (Mo. Ct. App. 1989) (defendant employer estopped from denying the existence of valid contract and payment obligations thereunder where it had

received the benefits of the noncompetition covenant in the contract as well as the labor of the plaintiffs).

Dr. Egan's so-called "estoppel by conduct" cases do not aid him either. Significantly, each of the "conduct" estoppel cases reflect "reliance," contrary to Dr. Egan's argument (App. Br. at 78). See State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W. 2d 806, 808 (Mo. 1931) ("[A] person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances in the case, had, in good faith, *relied thereon.*") (citations omitted; emphasis added); Response Oncology v. Blue Cross & Blue Shield of Missouri, 941 S.W. 2d 771, 778 (Mo. Ct. App. 1997) (where cancer treatment center provided expensive treatment, which initially was believed to be covered by his insurance plan but was later found not to be, to dying cancer patient, and where cancer treatment center relied on the insurance company's mistaken representation regarding existence of coverage, insurance company was estopped from denying payment for the claim); Warren v. Warren, 784 S.W. 2d 247, 253-54 (Mo. Ct. App. 1989) (in suit for wages due, plaintiff was estopped from denying compensation plan from business partnership with defendant where plaintiff had been aware of and relied on such plan for years); Miskimen v. Kansas City Star, 684 S.W. 2d 394, 401 (Mo. Ct. App. 1984) ("One claiming an estoppel *must have acted in reliance* and to his detriment upon the admission or conduct of one estopped. \* \* \* The party claiming estoppel must have been misled to his prejudice." (emphasis added)); Chicago Insurance Company v. First Missouri Bank of Jefferson County, 622 S.W. 2d 706, 708

(Mo. Ct. App. 1981) (“The party asserting equitable estoppel must have changed its position for the worse in reliance on the representation or conduct of the person sought to be estopped.”).

Counts II, III, and V each fail as a matter of law for a number of reasons and each was properly dismissed.

**3. The Trial Court Properly Dismissed Count IV Because Dr. Egan Failed to Plead Any Recognized Estoppel Claim. (Responding to Point Relied on III).**

In Count IV of his Amended Petition, Dr. Egan claims he relied upon certain “promises” by St. Anthony’s regarding the provision of notice and a fair hearing outside of the medical staff bylaws. More specifically, Dr. Egan claims he relied upon a notice received from St. Anthony’s about his suspension, and a hearing and opportunity for appeal. From the outset, again, Dr. Egan does not complain in his lawsuit that he did not receive a hearing. As the record reflects, he does not complain that he did not receive an appeal; he received both an intermediate appeal and deliberation and a final decision by the Board. Instead, with respect to Count IV, Dr. Egan’s complaint is that, since he was not notified that the hearing committee could consider his statements during the hearing in connection with its determination as to Dr. Egan’s staff privileges, the hearing committee was precluded from considering his statements. App. Br. at 57. Dr. Egan does not allege, however, that the hearing committee was in fact precluded from considering Dr. Egan’s statements during the hearing, or that the Board promised him it would not consider them. S.L.F. 26-27. The applicable licensing regulations also do not

proscribe the hearing committee from considering such information. So, for this reason alone, this claim fails like all the others.

In addition, as Dr. Egan concedes in his Brief, the hearing rights to which Dr. Egan claims he is entitled and which form his estoppel claim in Count IV are based upon the medical staff bylaws. App. Br. at 56, 58. The bylaws do not create an estoppel claim because Dr. Egan does not allege he relied upon them, and because he cannot otherwise enforce them. The medical staff bylaws create no contract rights, as explained in §III, *infra*. Any notification sent to Dr. Egan relating to the bylaws also cannot support an estoppel claim. If this were true, then any time a person provided notice called for under a contract, that person would be subject to a separate estoppel claim based upon the notice itself. But estoppel claims cannot create rights which do not already exist. *Brown*, 146 S.W.2d at 555.

Because Dr. Egan has no cause of action to enforce the bylaws, his claim in Count IV fails. He cannot change these realities by clothing his claim in the wardrobe of an “estoppel” theory. Count IV was properly dismissed.

**B. The Trial Court Properly Dismissed Count I of Dr. Egan’s Amended Petition Because Dr. Egan Has No “Property” Right to Privileges on St. Anthony’s Medical Staff (Responding to Point Relied On IV).**

In Count I of his Amended Petition, Dr. Egan asserted that his “membership on the medical staff of [St. Anthony’s] was a property right.” S.L.F. 20 at ¶67. In addition, Dr. Egan alleged that St. Anthony’s purported violation of state law (19 C.S.R. §30-20.021) that injured his supposed property right permits him injunctive relief. S.L.F. 20

at ¶68. Dr. Egan has never explained, however, the bases for these conclusory allegations. None exist.

St. Anthony's is a private hospital and its Board is free to make decisions regarding the composition of its medical staff, un-bound by the strictures that apply to public institutions. See Lile v. Hancock Place School Dist., 701 S.W.2d 500, 507 (Mo. Ct. App. 1985) (substantive due process required that termination of public school teacher's employment by school board could not be arbitrary and capricious but must have a "rational basis"); see also Klinge v. Lutheran Charities, 523 F.2d 56, 61 (8th Cir. 1975) (judicial review of medical staffing decision permissible only where hospital is a state actor; and, in such a case, court's role remains limited to determining whether due process was provided). Moreover, "property interests and protected rights are created, and their dimensions defined, by existing rules or understandings that stem from an independent source such as state law." McIntosh v. LaBundy, 161 S.W.3d 413, 416 (Mo. Ct. App. 2005). Dr. Egan cites to no "independent source" for his alleged property right, or any other basis for it. The only law cited, Missouri hospital licensing regulation 19 C.S.R. §30-20.021, does not purport to provide Dr. Egan with any "property right" to have privileges on the medical staff at *St. Anthony's* or at any other hospital. App. Br. at 58. Dr. Egan makes no allegation in his Amended Petition that St. Anthony's deprived him of his right to practice medicine wherever else he might qualify to do so.

Notably, hospital licensing regulations, such as 19 C.S.R. §30-20.021, do not permit private causes of action. E.g., Fitzgerald v. Midwest Building Inspection, Inc., 911 S.W.2d 676, 677-78 (Mo. Ct. App. 1995) (and cases cited therein). This regulation,

in any case, does not purport to grant individual physicians “property” rights in their independent staff positions. In point of fact, it merely sets forth requirement for hospitals to qualify for licensure by the Missouri Department of Health and Senior Services.

Even for public institutions, a property interest must clearly be established. For example, in McIntosh v. LaBundy, a sex therapist sued the state because he was not placed on the list of “approved” therapists to be used by the Department of Corrections (“DOC”). McIntosh claimed the DOC unlawfully denied him his purported property right. The Missouri Court of Appeals rejected McIntosh’s claim that he had a property right in being on the approved list of therapists:

The DOC’s refusal to place McIntosh on the Approved Providers List does not deny him his right to work as a sex therapist in any general or particular sense, and he does not allege that he has been denied a license to practice in the field. McIntosh points to no rule, statute, or other authority creating a legal right or entitlement that he be placed on the list of approved providers. McIntosh points to no provision in state law or anywhere else that creates a property interest or privilege in placement on the approved list. In accordance with the above authorities, and in the face of little to no authority indicating otherwise, we find that McIntosh’s petition failed to state a legal claim for relief because he had no legal right or privilege to be included on the list of approved sex therapists.

161 S.W.3d at 417. Similarly, Dr. Egan has alleged no basis in law for his “property right” in privileges on the staff of St. Anthony’s, a private hospital. As recently noted by one appellate court:

[W]e are not aware of any state or federal law that grants to hospital staff physicians a property right in their staff privileges. Instead, the plaintiffs appear to reason that because they have practiced at the hospital for a number of years, they have a right to continue to do so. This, however, amounts to nothing more than a unilateral expectation of continued employment which we have rejected as a sufficient basis for a property interest. \* \* \* Accordingly, we conclude that the plaintiffs’ assertion of a property right protected by due process must fail.

Kessel, 600 S.W.2d at 328; see also Fletcher, 456 N.W.2d at 797 (“expectation” of right insufficient; “there must be evidence of ‘entitlement’ to the right asserted”).

Moreover, even “detailed procedural protections in a state statute or regulation are not sufficient to create a protected property interest.” Moore v. Middlebrook, 96 Fed. Appx. 634, 2004 WL 928262 at \*4 (10th Cir. 2004). This is because property “cannot be defined by the procedures provided for its deprivation, any more than can life or liberty.” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Dr. Egan’s attempt to use claimed procedural “rights” in the medical staff bylaws to fashion a new “property right” fails.

The cases cited by Dr. Egan in his Brief (at page 62), Larocca v. State Board of Registration for the Healing Arts, 897 S.W.2d 37 (Mo. Ct. App. 1995), and Moore v.

Board of Education, 836 S.W.2d 943 (Mo. 1992), are inapplicable to this case because both of those cases involved a recognized property interest and state action. For example, in Larocca, the court held that the doctor had substantive and due process rights under Missouri law with respect to his state-issued medical license. Larocca, 897 S.W.2d at 42 (“In order to invoke the mandates of procedural due process, one must have been deprived of a property interest *recognized and protected by the Due Process Clauses*”) (emphasis added).<sup>35</sup> In Moore, the court held that plaintiff, a tenured, permanent teacher in a public school, was entitled to the protection of the Missouri Teacher Tenure Act, and, therefore, had a property interest in continued employment which was protected by both procedural and substantive due process. Moore, 836 S.W.2d at 947.

Here, no recognized property interest or state action is pleaded by Dr. Egan and none exists.<sup>36</sup> See App. Br. at 50 (“action by a private hospital is not ‘state action’”). Dr. Egan cites no case holding that exclusion from the medical staff of a private hospital amounts to state action such that constitutional due process rights are implicated.

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<sup>35</sup> Significantly, “A physician . . . has no constitutional right to staff privileges at a public hospital . . . merely because he is licensed to practice medicine.” Capili v. Shott, 487 F. Supp. 710, 713 (S.D. W. Va. 1978).

<sup>36</sup> There are significant differences between public hospitals and private hospitals. Richardson, 674 S.W.2d at 201-02. Due process rights, such as those urged by Dr. Egan here, are simply not implicated in private hospitals. Id.

Moreover, Dr. Egan fails to otherwise explain (or plead) how St. Anthony's has violated any state law.

In sum, as this case involves no recognized property right or state action, no due process rights are implicated, and the trial court properly dismissed Count I of Dr. Egan's Amended Petition because it fails to state a claim.

**III. THE TRIAL COURT'S JUDGMENT DISMISSING COUNTS VI AND VII OF THE AMENDED PETITION SHOULD BE AFFIRMED BECAUSE DR. EGAN HAS WAIVED THE ARGUMENTS CONTAINED IN POINTS RELIED ON V AND VI, AND, IN ANY CASE, BECAUSE THE MEDICAL STAFF BYLAWS DO NOT CONSTITUTE A CONTRACT UPON WHICH DR. EGAN CAN OBTAIN INJUNCTIVE RELIEF (Responding to Points Relied On V and VI).**

The standard of review is *de novo*.

In his original brief to the Missouri Court of Appeals below, Dr. Egan did not raise any point relied on that contains the contract-based arguments he now attempts to raise in Points V and VI of his Brief filed in this Court. More specifically, now, Dr. Egan claims that the medical staff bylaws "are an integral part of a contract" between St. Anthony's and Dr. Egan (Point V), and also that the medical staff bylaws "are a contract between Dr. Egan and St. Anthony's" (Point VI). (These points refer to Counts VI and VII, respectively, of Dr. Egan's Amended Petition.) Because Dr. Egan did not raise in his Court of Appeals brief such contract-based arguments, such contentions were abandoned. Hastings v. Coppage, 411 S.W.2d 232, 235 (Mo. 1967). Dr. Egan's attempt to alter the

basis for his appellate arguments in this Court is proscribed by law. MO. S. CT. R. 83.08(b); Blackstock v. Kohn, 994 S.W.2d 947, 953 (Mo. 1999) (appellant “did not raise this claim before the court of appeals,” and, thus, the Supreme “Court may not review the claim”).<sup>37</sup>

Pursuant to Rule 83.08(b), a party may not in a substitute brief “alter the basis of any claim that was raised in the Court of Appeals brief.” Linzenni v. Hoffman, 937 S.W.2d 723, 726-27 (Mo. 1997) (denying claims in Supreme Court because “[t]hose issues were not raised in the brief before the Court of Appeals”). Even if Dr. Egan had included a reference to a contract claim in the argument section of his prior brief, any such claim was waived by his failure to raise it as a specific point relied on. See V.M.B. v. Missouri Dental Board, 74 S.W. 3d 836, 839 -840 (Mo. Ct. App. 2002) (“Issues raised only in the argument portion of the brief are not preserved for review.”) (citations omitted); City of Riverside v. Progressive Inv. Club of Kansas City, Inc., 45 S.W.3d 905, 913 n.1 (Mo. Ct. App. 2001) (citing MO. S. CT. R. 84.04(d); same); see also Bland v. IMCO Recycling, Inc., 67 S.W.3d 673, 681-82 (Mo. Ct. App. 2002) (scope of review limited to the issues raised in a point relied on). Because Dr. Egan did not specify in the Court of Appeals below a point relied on concerning the supposed contract status of the medical staff bylaws, he has waived those issues. Current Points Relied On V and VI

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<sup>37</sup> Dr. Egan did not even include in his original Legal File the pages of the Amended Petition that contain Counts VI and VII.

should not be considered by this Court, and the trial court's Judgment on Counts VI and VII should be affirmed.

Even if Dr. Egan had preserved his contract claims for review, his arguments fail. In Counts VI and VII of his Amended Petition, Dr. Egan alleged that medical staff bylaws constitute a contract with St. Anthony's, or an integral part of a contract.<sup>38</sup> Dr. Egan cites the above-discussed hospital licensing regulation, 19 C.S.R. §30-20.021, that requires hospitals to have medical staff bylaws which include a peer review process. L.F. 16 at ¶25. Neither the regulation, however, nor any Missouri statutes authorize a cause of action for a medical staff's or hospital governing body's alleged failure to comply with its bylaws. See A-8 ("We have found no Missouri statute or any Missouri State Regulation that provides a cause of action against a private hospital for failing to comply with its bylaws."). Further, medical staff bylaws do not constitute enforceable contracts in Missouri, based upon established principles of Missouri law. Zipper, 978 S.W.2d at 412.

The essential elements of a contract in Missouri are: "(1) competency of the parties to contract; (2) subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. Zipper, 978 S.W.2d at 416 (citations omitted). 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). Consideration must consist of

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<sup>38</sup> Note that medical staff bylaws are separate from corporate bylaws. 19 C.S.R. §30-20.021(2)(A)1.-3.; §30-20.021(2)(C)1.-5.

doing something that a party is not already legally required to do. Cash v. Beaward, 873 S.W.2d 913, 916 (Mo. Ct. App. 1994).

St. Anthony's medical staff is required to "adopt bylaws, rules and policies governing . . . professional activities in the hospital," to be approved by the Board, as a condition of state licensure. See Zipper, 978 S.W.2d at 416; see also 19 C.S.R. §30-20.021(2)(C). Because the medical staff and Board had a "preexisting legal duty to adopt the bylaws independent of [any] relationship with [Dr. Egan], consideration is lacking and, therefore, the bylaws cannot constitute a contract between [the medical staff or Board of St. Anthony's] and [Dr. Egan]." Zipper, 978 S.W.2d at 416.

In Missouri there also must be mutuality of agreement and obligation between parties to a contract. Zipper, 978 S.W.2d at 416 (citations omitted). There is no allegation by Dr. Egan in his Amended Petition that the medical staff bylaws at issue resulted from any bargained-for exchange between Dr. Egan and the medical staff or Board, which is a required element of a contract claim. Cash, 873 S.W.2d at 916. S.L.F. 9-34. Dr. Egan does not allege he had any input into the enactment of the staff bylaws, or the terms thereof. He does not allege he would have the ability to negotiate with the medical staff or Board any change or amendment to the medical staff bylaws. In addition, importantly, medical staff bylaws are at issue, not hospital bylaws. There is no allegation that the medical staff bylaws were adopted to benefit individual physicians, like Dr. Egan, as against hospitals, like St. Anthony's. S.L.F. 9-34. Finally, Dr. Egan pleads no term of duration, or that he has any obligation to even exercise staff privileges at St. Anthony's. Id.; see Mason, 819 N.E.2d at 1032 ("A clearly written contract,

granting privileges to a doctor for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause, will be enforced.”). In short, the medical staff bylaws are not a contract between Dr. Egan and St. Anthony’s.

That medical staff bylaws do not create a contract is also supported by strong Missouri precedent. *E.g. Cowan*, 392 S.W.2d at 308; *Richardson*, 674 S.W.2d at 201. Allowing a physician to bring suit for an alleged failure of a medical staff or hospital Board to follow the procedures established by its medical staff bylaws is directly contrary to settled law. The foregoing disposes of any contract claim purportedly pleaded by Dr. Egan. Both Counts VI and VII depend upon the medical staff bylaws, which do not create enforceable contract rights.

Other states’ jurisprudence supports Missouri’s approach. In *Munoz v. Flower Hospital*, 507 N.E.2d 360 (Ohio Ct. App. 1985), the plaintiff-doctor appealed a trial court grant of the hospital’s motion for summary judgment dismissing his breach of contract claim which was predicated upon a claimed violation of the hospital’s staff bylaws. After noting that there was a split in authority as to whether a hospital’s staff bylaws constituted a contract with the hospital, the Court of Appeals said: “. . . the trial court could have reasonably found as a matter of law that the staff bylaws did not constitute a contract between the doctors and the hospital, and, therefore, appellee could not be guilty of a breach of a non-existent contract.” *Id.* at 365.

Plaintiff has argued that the “continuing vitality” of *Munoz* is “seriously called into question” by a subsequent case, *Christenson v. Mount Carmel Health*, 678 N.E.2d 255 (Ohio Ct. App. 1996). App. Br. at 70. A review of the *Christenson* case, however,

does not show that it called into question the vitality of the Munoz holding. The Christenson court simply held that the hospital in question abused its discretion when it denied Dr. Christenson privileges and then reported her to the Data Bank under the provision entitled “incompetency/malpractice/negligence” where there was no notice to her, nor any evidence of any specific negligence or lack of standard of care, and where all twenty doctors giving references for her recommended her for staff privileges. Id. at 256. The appeals court quoted the Ohio Supreme Court regarding the standard of reviewing such medical decisions as follows:

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, has abused its discretion.

Id. at 260 (citation omitted). In short, Christenson did not suggest that the Munoz holding was no longer “vital” and it did not suggest that the medical staff bylaws constituted a contract between the medical staff and the hospital.

Dr. Egan has also argued that the three cases in Georgia cited by the Zipper court as holding that the bylaws do not create contractual rights in the medical staff are “now moot because the [Georgia] state legislature has created a cause of action which allows a physician to sue a hospital for failure to follow its bylaws.” App. Br. at 69. The Georgia statute, however, has not been enacted in the State of Missouri and, therefore, may not be relied upon to reflect the policy in this state. It is reasonable to presume that the failure

of the Missouri legislature to enact similar legislation signals an approval of the policy articulated in Zipper. Such implicit legislative approval should not be judicially overturned.

Contrary to Dr. Egan's assertions in his Brief at 67-68, many of the cases cited by Dr. Egan do not represent a judicial resolution of a litigated dispute regarding whether the bylaws constitute a contract or not:<sup>39</sup> Clemons v. Fairview Med. Ctr., 449 So.2d 788 (Ala. 1984) (no discussion as to whether the bylaws were or were not contractual); McMillan v. Anchorage Community Hospital, 646 P.2d 857, 860 n.4 (Alaska 1982) (in connection with discovery disputes relating to the issue of whether defendant hospital was a public or private hospital, the hospital *stipulated it was waiving* its claim that it was a private hospital whose staffing decisions were not subject to judicial review, and stipulated that its actions must comport with the requirements of due process, a duty generally not applicable to private hospitals); Bock v. John C. Lincoln Hospital, 702 P.2d 253, 258 (Ariz. 1985) (issue of whether the bylaws constituted a contract was not litigated; the parties all agreed to treat the bylaws as a contract); Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361, 1370-71 (N.D. Iowa 1992) (federal court, predicting Iowa law, recognized a contract claim; this decision, however, was limited by the Iowa Supreme Court in Tredea v. Anesthesia & Analgesia, P.C., 584 N.W.2d 276, 286-87 (Iowa 1998), which held that "continued staff privileges are not implied by the bylaws,

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<sup>39</sup> A number of these distinguishable cases are also cited by Dr. Egan at pages 34-36 of his Brief. They are addressed here to avoid duplication.

and we will not give the bylaws the effect of a contract,” and bylaws constitute a contract only when plaintiff can establish “‘with sufficient definiteness’ that an offer of continued *employment* was part of the agreement” (emphasis added)); Bartley v. Eastern Maine Medical Center, 617 A.2d 1020, 1021 (Me. 1992) (in the context of whether the hospital’s economic decision to terminate the contract of a company which provided emergency room physicians to the hospital, and to contract directly with the ER physicians involved in providing these services, which policy had the effect of preventing the hospital’s ER staff physicians from exercising ER privileges unless they negotiated employment contracts with the hospital, violated the hospital bylaws, the court noted that “the bylaws of a private medical center *may* constitute an enforceable contract between the medical center and its staff physicians”) (emphasis added); Sadler v. Dimensions Healthcare Corp., 836 A.2d 655, 675 (Md. App. 2003) (court stated, in *dicta*, that bylaws “*may*, under some circumstances, be regarded as contractual in nature” but the action of the hospital is entitled to the same level of discretion as any internal corporate decision); Campbell v. St. Mary’s Hospital, 252 N.W.2d 581 (Minn. 1977) (court simply affirmed the trial court’s summary judgment in favor of the hospital and found that all bylaws were followed, without discussing whether the bylaws were contracts, as issue was not raised on appeal); Babcock v. Saint Francis Medical Center, 543 N.W.2d 749 (Neb. Ct. App. 1996) (summary judgment in favor of the hospital on the basis that there was no material dispute that the hospital followed its bylaws affording a fair hearing; no contention that the hospital bylaws constituted a contract); Clark v. Columbia/HCA Information Services, Inc., 25 P.3d 215 (Nev. 2001) (court did approve limited judicial

review where psychiatrist was allegedly terminated for whistle-blowing conduct; court did not state that bylaws constituted a contract between the physician and the hospital); Clough v. Adventist Health Systems, Inc., 780 P.2d 627 (N.M. 1989) (affirming the trial court’s dismissal of a suspended physician’s breach of contract, tortious interference, and other claims, on grounds that, as a matter of law, the defendants followed all provisions of the bylaws; issue of whether the bylaws constituted a contract was not litigated); Falk v. Anesthesia Assoc. of Jamaica, 644 N.Y.S.2d 237 (N.Y. App. Div. 1996) (New York’s highest court, in Mason v. Central Suffolk Hospital, 819 N.E.2d 1029, 1032 (N.Y. 2004),<sup>40</sup> later clarified that hospital bylaws do not create a contract in New York); East Texas Medical Center Cancer Institute v. Anderson, 991 S.W.2d 55, 62 (Tex. Ct. App. 1998) (court merely acknowledged that “[p]rocedural rights created in a medical organization’s by-laws *may* constitute contractual rights in favor of a doctor with staff privileges”) (emphasis added); Brinton v. IHC Hospital, Inc., 973 P.2d 956 (Utah 1998) (affirmed the trial court’s dismissal of a terminated physician’s claim that the hospital violated its bylaws in revoking his staff privileges; the parties stipulated that the bylaws constituted a contract and the issue was not litigated); Seitzinger v. Community Health

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<sup>40</sup> “This does not mean, of course, that the hospital may not expose itself to such [contract] liability if it chooses to do so. A clearly written contract, granting privileges to a doctor for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause, will be enforced. But the bylaws in this case are not such a contract.” Mason, 819 N.E.2d at 1032.

Network, 676 N.W.2d 426, 429 (Wis. 2004) (in *dicta*, court referenced the “general rule” that bylaws may constitute a contract, but this was not a litigated issue).

Eliminating the foregoing jurisdictions from those having made a judicial resolution that hospital bylaws do constitute a contract between the physician and the hospital, the number of jurisdictions claimed by Dr. Egan to support his viewpoint is much smaller. The Zipper court itself acknowledged that Missouri was following the minority position on this issue, but was doing so based on strong Missouri public policy reasons. 978 S.W.2d at 415, 417. There are other states that agree with Missouri’s analysis of this contract issue. See e.g., Mason, 819 N.E.2d at 1031-32 (New York); Kessel, 600 S.E.2d at 326 (West Virginia: “medical staff bylaws do not constitute a contract”); Tredea, 584 N.W.2d at 287 (Iowa); cf. Murdoch, 585 So.2d at 876 (“we are not convinced that the hospital by-laws created a binding contract” between the physician and hospital); Vesom v. Atchison Hospital Assoc., 2006 WL 2714265, No. 04-2218-JAR (D. Kansas Sept. 22, 2006) (applying Kansas law: “hospital bylaws do not create a contract”). Significantly, the Kessel court noted that, of the jurisdictions holding that bylaws do create a contract, “most of those courts apply little, if any, contract law analysis.” 600 S.E.2d at 614 n.7. “[T]he better-reasoned line of cases hold that hospital bylaws do not create a contract.” Vesom, 2006 WL 2714265 at \*16.

Because creating a breach of contract action would be inimical to Missouri’s expressed policy of assuring quality health care, public policy principles support the finding that the bylaws did not constitute a contract between St. Anthony’s and Egan. Zipper, 978 S.W.2d at 417; see also Misischia v. St. John’s Mercy Medical Center, 30

S.W.3d 848, 863 (Mo. Ct. App. 2000) (affirming the dismissal of the tortious interference claim against St. John’s because St. John’s had the legal right to “summarily suspend and ultimately terminate plaintiff’s privileges”). Thus, even if he had properly preserved the contract-based arguments, claims for injunctive relief in Counts VI and VII based upon a “contract” supposedly created under medical staff bylaws fail as a matter of law.<sup>41</sup>

**IV. THE TRIAL COURT PROPERLY DISMISSED ALL OF DR. EGAN’S CLAIMS BECAUSE THERE IS NO BASIS FOR ANOTHER INTERNAL HEARING, AND BECAUSE ANY REPORT THAT DR. EGAN’S MEDICAL STAFF PRIVILEGES HAVE BEEN REVOKED IS TRUE, CANNOT BE RECALLED, AND COURTS CANNOT ORDER ANY SUCH RELIEF (Responding to Points Relied On I-IX).**

The standard of review is *de novo*.

Dr. Egan’s claims in his Amended Petition cannot provide Dr. Egan the relief that he seeks in this case. More specifically, the relief Dr. Egan seeks in the case finds no support in the medical staff bylaws or in any law. See Whitney, 16 S.W.3d at 733 (“estoppel may not be employed to create [contract] coverage where it otherwise does not exist”); Hoag v. McBride & Son Inv. Co., Inc., 967 S.W.2d 157, 171 (Mo. Ct. App. 1998)

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<sup>41</sup> St. Anthony’s notes that, at pages 73 and 74 of his Brief, Dr. Egan cites “L.F. 65” and “L.F. 68.” Neither the original Legal File nor the Supplemental Legal File contains a page 65 or 68. This Court should not consider references to matters not contained in the record.

(“a plaintiff may not use estoppel as a basis for a cause of action”). Dr. Egan seeks rights and relief that do not exist. See Ford v. Director of Revenue, 11 S.W.3d 106, 110 (Mo. Ct. App. 2000) (*overruled on other grounds by Baldwin v. Director of Revenue*, 38 S.W.3d 401 (Mo. banc 2001)).

**A. The Staff Bylaws Do Not Provide Any Basis for the Additional Relief Dr. Egan Requests.**

Dr. Egan asserts that, pursuant to the medical staff bylaws, he was to receive notice, a hearing, and an appellate review of the decision to remove him. As admitted by Dr. Egan, he received the notice and two-step review to which he claims to be entitled. See, e.g., S.L.F. 17, 19-20 at ¶¶48, 64, 65, 69. The harm he complains of in this case relates to the procedural process he was afforded resulting in the revocation of his privileges, and the report of the revocation of those privileges. S.L.F. 23-26, 28 at ¶¶84, 90, 96, 103. In his estoppel claims, Dr. Egan requests as relief a new hearing, a “do-over” of the review process. S.L.F. 9-34. This proposed “super review” process, however, is not required (or even authorized) under the bylaws, nor has Dr. Egan alleged that it is. The regulations do not require or contemplate such a secondary review. Estoppel is thus inappropriate.

Further, the harm Dr. Egan alleges here does not stem from the repudiation of a promise to hold a hearing or an appeal. Dr. Egan admits that a “hearing was held in which all witnesses were sworn, and exhibits were provided to members of the hearing committee.” S.L.F. 14 at ¶28. Instead, Dr. Egan’s alleged harm stems from the ultimate decision of the Board following a hearing and appellate review. Dr. Egan does not even

allege in his lawsuit that an incorrect result was reached. S.L.F. 9-34. Moreover, as set forth above, Dr. Egan never alleges that the Board was precluded from reaching the conclusion it reached. He does not even allege that he believes a different result would be reached following a new hearing. See S.L.F. 9-34. Thus, he alleges no harm specifically caused by the alleged lack of process. L.F. 16-22 at ¶¶46-81.<sup>42</sup>

**B. The Reports Cannot Be Recalled.**

Moreover, each of Dr. Egan's equitable claims seeking a judicial order that St. Anthony's recall reports to the Board of Healing Arts and the Data Bank fail because a court cannot award such relief. S.L.F. 9-34. Under both Missouri and federal law, hospitals are required to report disciplinary actions against physicians to the Board of

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<sup>42</sup> Rather than an "estoppel" claim, Dr. Egan seems to be arguing for a cause of action more akin to "specific performance." The equitable remedy of specific performance presupposes the existence of a valid contract between the parties based on a clear, mutual understanding with terms that are sufficiently definite and certain to enable the court to decree performance. McKenna v. McKenna, 607 S.W.2d 464, 467 (Mo. Ct. App. 1980). The trial court cannot be required to write the contract for the parties. Id. at 738 (citing Biggs v. Moll, 463 S.W.2d 881, 887 (Mo. 1971)). In this case, however, the bylaws are not a contract, Zipper, 978 S.W.2d at 412, and a "specific performance" claim cannot lie. Moreover, Dr. Egan has not preserved for review any contract claim. (See supra at §III).

Healing Arts. §383.133, R.S. Mo. (1994),<sup>43</sup> HCQIA, 42 U.S.C. §§11133, 11134.<sup>44</sup> In turn, the Board of Healing Arts is required to transmit the report to the Data Bank. 45 C.F.R. §60.9(b); Sugarbaker v. SSM Health Care, 946 S.W.2d 280, 281 (Mo. Ct. App. 1997).<sup>45</sup>

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<sup>43</sup> State law mandates that “any hospital . . . shall report to the appropriate health care professional licensing authority any disciplinary action against any health care professional or the voluntary resignation of any health care professional against whom any complaints or reports have been made which might have led to disciplinary action.” §383.133.1, R.S. Mo.

<sup>44</sup> Under federal law, St. Anthony’s was required to report the termination of Dr. Egan’s staff privileges at St. Anthony’s. 42 U.S.C. §11133(a) requires that “[e]ach health care entity which (A) takes a professional review action that adversely affects the clinical privileges of a physician for longer than 30 days; . . . shall report to the Board of Medical Examiners” the name of the physician or practitioner involved, a description of the acts or omissions or other reasons for the action, and such other information respecting the circumstances of the action. 42 U.S.C. §§11133(a)(1), (3).

<sup>45</sup> Notably, all reports to the Data Bank are filed electronically and there is no way to “revoke” such reports, as requested by Dr. Egan. See National Practitioner Data Bank Guidebook, U.S. Department of Health and Human Services, at [http://www.npdb-hipdb.hrsa.gov/pubs/gb/NPDB\\_Guidebook.pdf](http://www.npdb-hipdb.hrsa.gov/pubs/gb/NPDB_Guidebook.pdf).

Dr. Egan seeks to have a court force St. Anthony's to "recall" the reports regarding the revocation of Dr. Egan's medical staff privileges that it was required by state and federal law to file. S.L.F. 9-34. St. Anthony's is required, however, to report any revocations of clinical privileges.<sup>46</sup> Dr. Egan has alleged no basis in law for this Court to require St. Anthony's to "recall" a report to the Board of Healing Arts or the Data Bank.

The federal regulations do permit revisions of reported information that is erroneous. See 45 C.F.R. §60.6.<sup>47</sup> However, Dr. Egan has not alleged that the information reported regarding the suspension and revocation of his medical staff privileges was erroneous; Dr. Egan's privileges were indeed revoked as reported. S.L.F. 22 at ¶77.

Moreover, the regulations establishing the Data Bank detail a procedure for disputing a report if the physician believes the report is erroneous. See 45 C.F.R. §60.14. The Secretary of Health and Human Services mails a copy of the report from a reporting

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<sup>46</sup> In fact, failure to report such information constitutes an infraction. See §383.133.6, R.S. Mo.

<sup>47</sup> In addition, the federal regulations allow for revisions of reports to the Data Bank in certain instances. "Revisions include reversal of a professional review action or reinstatement of a license." 45 C.F.R. §60.6. As neither of these events is alleged to have (or has) occurred, St. Anthony's is not obligated to revise its report to the Data Bank.

agency to the affected physician. Then, the physician has 60 days from the date on which the Secretary mails the report in which to dispute said report. 45 C.F.R. §60.14(b). If a physician disputes the information, the reporting agency is given an opportunity to revise the reported information, and then the Secretary, upon request, will review the information for accuracy. 45 C.F.R. §60.14(c)(1), (2). If the Secretary concludes the information is accurate, the Secretary will include “a brief statement by the physician . . . or other health practitioner describing the disagreement concerning the information, and an explanation of the basis for the decision that it is accurate, or (ii) [i]f the Secretary concludes that the information was incorrect, send corrected information to previous inquirers.” 45 C.F.R. §60.14(c)(2)(i), (ii). Thus, the statute provides for a mechanism for review and correction of a disputed report. Courts, however, cannot compel relief that is not permitted under the statutory scheme established by the legislation when a method of review is already established by the legislation. Ford, 11 S.W.3d at 110 (“A court of equity may not act merely upon its own conceptions of what may be right or wrong in a particular case, and may not purport to establish a right that does not exist.”); Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. *banc* 1998) (“Unless a statutory scheme is plainly inadequate under circumstances where a court has a duty to act, there is no need for the court to exercise its equity powers to fashion a ‘better’ remedy than exists in the statutes.”). Here, there is no basis for a “recall.”

In an analogous case, Ford v. Director of Revenue, a driver petitioned for the expungement of records related to his arrest and suspension of his license for drunk driving. The Department of Revenue filed a motion to dismiss the driver’s petition on the

grounds that there was no statutory authority authorizing that action under the facts. Ford, 11 S.W.3d at 107. The trial court nevertheless ordered the expungement of the records. The appellate court reversed, on the basis that there was no statutory authority for the relief sought. While “the legislature has enacted statutes concerning expungement of records concerning arrests and alcohol related enforcement contacts, . . . none of those legislative enactments would entitle Respondent to the relief granted by the trial court.” Id. at 110.

Here, the state and federal legislatures have established a statutory scheme mandating the reporting of information by St. Anthony’s to the Board of Healing Arts and Data Bank. There is a means for disputing such reports. No statutory or other remedy exists (and Dr. Egan cites none) that would permit St. Anthony’s to “recall” a report to the Board of Healing Arts or the Data Bank. Consequently, the equitable relief sought by Dr. Egan in Counts I-VII relating to the recall of reports is unavailable. The dismissal of such claims for relief was appropriate.<sup>48</sup>

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<sup>48</sup> Dr. Egan has not brought a claim against the Board of Healing Arts or the Data Bank; they are not defendants in this case. S.L.F. 9-34. Query how any “recall” order could be enforced against such non-parties.

**CONCLUSION**

For all the foregoing reasons, this Court should affirm the trial court's dismissal, with prejudice, of each and every one of Dr. Egan's claims.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

Dated: August 31, 2007

By: \_\_\_\_\_

Neal F. Perryman, #43057  
nperryman@lewisrice.com  
Jennifer E. Behm, #52783  
jbehm@lewisrice.com  
500 North Broadway, Suite 2000  
St. Louis, Missouri 63102  
(314) 444-7600 (telephone)  
(314) 612-7661 (facsimile)

Attorneys for Respondent  
St. Anthony's Medical Center

**CERTIFICATION**

The undersigned certifies that Respondent's Brief complies with the requirements of Rule 84.06. Respondent's Brief contains 22,224 words. The undersigned also certifies that the floppy disk provided to the Court has been scanned for viruses and is virus-free pursuant to Rule 84.06(g).

Dated: August 31, 2007

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Jennifer E. Behm, #52783

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 31, 2007, two true and correct copies of the foregoing Substitute Brief of Respondent, along with a floppy disk scanned for viruses pursuant to Rule 84.06(g), were addressed and delivered to Alan Kimbrell, 2015 Sundowner Ridge Drive, Ballwin, Missouri 63011.

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## **APPENDIX**