IN THE SUPREME COURT OF MISSOURI

ROBERT EGAN

Appellant,

vs.

ST. ANTHONY'S MEDICAL CENTER

Respondent.

Appeal No. SC88493

Appeal from the Circuit Court of St. Louis County

Hon. Thea A. Sherry

APPELLANT'S SUBSTITUTE REPLY BRIEF

Alan Kimbrell # 18397
2015 Sundowner Ridge Drive
Ballwin, MO 63011
Telephone (636) 273-0442
Fax (636) 273-0466
E-Mail AlanKimbrell67@AOL.COM
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

Respondent's Statement is argumentative: "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." Resp.Br.21. "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." *Id.*at23n14. These arguments should be disregarded.

One statement is misleading: "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 of the physician members selected by Dr. Egan." *Id.*at22-23 . . Egan's choice of physician members was limited to six tendered by respondent. S.L.F. ¶ 51.

Respondent highlights one error in appellant's statement of facts: "Dr. Egan 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.at21." Resp.Br.20-21. Appellant's statement of facts does state that "appellant sued for mandatory injunctive relief reinstating his privileges pending a

new hearing with proper notice and appellate procedures, . . .” App.Br.21. This is wrong. Plaintiff’s prayer for relief in each count asks the court to “grant him mandatory injunctive relief ordering defendant to grant him a new hearing on its summary suspension of his medical staff privileges, . . .” S.L.F.22,24,25,27-34. There is nothing in the petition about court-ordered restoration of privileges, and appellant does not seek such relief.

ARGUMENT

I

A POLICY OF LIMITED JUDICIAL REVIEW WILL FOSTER THE POLICY OF PEER REVIEW PROMULGATED BY THE DEPARTMENT OF HEALTH, CONGRESS, AND THE JOINT COMMISSION ON ACCREDITATION OF HEALTH CARE ORGANIZATIONS

Appellant Had a Legal Right to Notice and an Appeal on the Record.

In their zeal to demonstrate that bylaws are not a contract, respondent and *amicus* have proven that appellant had a legal right to a fair hearing and appeal. "[A] hospital is legally obligated to create medical staff bylaws and provide hearing procedures pursuant to" 19CSR§30-20.021(2)(A)(16). *Amicus*Br.32.

Missouri requires hospitals to adopt bylaws which "'provide for appeal and hearing procedures for the . . . suspension [or] revocation . . . of clinical privileges of a member of the medical staff.'" *Ibid.* Respondent and *amicus* rely on Zipper v. Health Midwest, 978 S.W.2d 378 (Mo.App.W.D.1998), to demonstrate that provisions in respondent's bylaws guaranteeing physicians notice, opportunity to be heard, and an appeal on the record do not furnish consideration for a contract because the hospital was legally obligated to adopt such bylaws. "Because the medical staff and Board had a 'preexisting legal duty to adopt the bylaws independent of [any] relationship with [Egan], consideration is lacking and, therefore, the bylaws cannot constitute a contract between [the medical staff or Board of St. Anthony's] and [Egan].'" Resp.Br.75;

*see**Amicus*Br.31-32.

"To hold that a hospital did not have to comply with its bylaws would, of course, render them essentially meaningless. They would then be a catalogue of rules, which, although binding on the medical staff, were merely hortatory as to the hospital—much 'sound and fury, signifying nothing.'" Keane v. St. Francis Hosp., 522 N.W.2d 517, 522 (Wis.App1994). "'[T]o suggest [that the Hospital has no legal duty to follow its own bylaws] would be to reduce the bylaws to meaningless mouthing of words.'" Lewisburg Community Hosp. v. Alfredson, 805 S.W.2d 756,759 (Tenn.1991). "If the department of health had not intended that the hospital abide by its medical staff bylaws, then the requirement that it enact such laws would be superfluous." Gianetti v. Norwalk Hosp., 557 A.2d 1249,1253 (Conn.1989).

A*micus* concedes respondent had a legal duty to follow its bylaws with regard to hearing and appeal procedures for Egan (*Amicus*Br.32); nothing in respondent's brief contradicts this Thus, respondent had a legal duty to Egan to provide notice and the appeal procedures contained in its bylaws.

Appellant previously pointed out (App Br.60) that: "[W]here there is a legal right, there is a legal remedy, by suit or action at law whenever that right is invaded." WILLIAM BLACKSTONE, COMMENTARIES 536 (Abridged Ed. Wm. Hardcutte Browne, Ed. Bernard C. Gavitt 1892); *seeid.*at952. The law is "solicitous to furnish a remedy for every invasion of legal right." State *ex rel.* Allen v. Dawson, 224 S.W. 824,827 (Mo.1920)(inBanc). Neither respondent nor *amicus* has quarreled with this proposition, attempted to

distinguish these authorities, or cited contrary authority. Thus, since respondent had a preexisting legal duty to provide Egan with notice and the appeal procedures provided in its bylaws, Egan has a legal remedy for its failure to do so.

In order for the preexisting legal duty to provide notice and appeal procedures to preempt the potential consideration found in the notice and appeal promises in the bylaws, that duty must be of benefit to the physician to whom the it is owed. "Consideration" is "some right, interest, profit or benefit accruing to" a party. BLACK'S LAW DICTIONARY 206 (6thed.1990). If the bylaws are a contract, the promises therein to provide notice and appeal rights are a "benefit" to staff members, and, thus, consideration. In order for a preexisting legal duty to preempt these promises, that duty must itself provide an equivalent "benefit" to the physicians, which means that the physicians must have the same right to enforce the fair hearing provisions as they would if the bylaws were a contract. Thus, the rationale of Zipper, adopted by respondent and the *amicus* to prove bylaws are not a contract, requires that the notice and appeal right provisions be as enforceable as they would if the bylaws were a contract.

The *amicus* attempts tangentially to refute this logic: "Creating a contract right to enforce these regulatory provisions is tantamount to creating a private right of action under that regulatory scheme, which was promulgated for the protection of patients, not doctors." *Amicus*Br.32n.4. To say that regulations requiring fair hearings were not intended to protect doctors smacks of Orwell's *Brave New World*, where war is peace and black is white. If the state and JCAHO regulations do not provide the "benefit" of

enforceability, then the bylaws provide a "benefit" which those provisions do not, and do constitute consideration. Respondent and *amicus* cannot have it both ways.

There Are No Good Reasons NOT to Enforce Fair Hearing Procedures Judicially.

The hospitals maintain that appellant's suit requires the court to "second-guess" doctors.. Respondent states: "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[1], as Missouri law recognizes." Resp.Br.26-27;*seeid*at28 All Egan is asking the court to determine is whether he received adequate notice of what he would be called upon to defend, and whether he received an impartial appellate review. This does not invoke any exercise of "medical judgment."

Respondent posits the "core question" as one of "who should decide whether a private physician is competent to perform surgery in a private Missouri hospital." *Id.*at27. All Egan asks is a new hearing. S.L.F.22,24-28. Determining whether Egan received proper notice and impartial appellate review does not require the court to make

[1] Although this suit does not call for the court to "second guess medical judgment," courts routinely review medical judgments in malpractice cases, and are certainly more qualified to do so than doctors and administrators are qualified to have the last word on what constitutes a fair hearing.

any decision as to whether he "is competent to perform surgery."

Respondent says: "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." Resp.Br.28. This being so, one wonders why three of the five committee members who sat on Egan's appellate review committee were lay persons. S.L.F.17-19,¶¶51,56-58,61. The petition does not ask the court to "disregard" any "recommendations," but to evaluate the fairness of the procedure by which they were reached.

Amicus suggests, without elaboration or authority, that "reviewing 'procedural compliance' inevitably places courts in the untenable position of second guessing the substance of medical staff decisions." *Amicus*Br.13. This is no more true than the notion that reviewing "procedural compliance" in a civil or criminal trial requires the appellate court to "second guess" the substantive decisions of the fact-finder.

The hospitals' second argument as to why limited procedural review is bad is: "opening the door to such litigation will not only tax judicial resources, but will also act as a compelling disincentive to hospitals and physicians throughout this state to engage in, and staff, the kind of searching and timely peer review essential to safeguard patient health and safety." *Amicus*Br.20-21;*see also id.*at37-38;Resp.Br.45-46 n.27. Let us hope there are not so many instances where hospitals use questionable procedures to suspend or revoke medical staff privileges as to "tax" this state's "judicial resources." All hospitals have lawyers on retainer to advise them how to follow diligently the fair

hearing requirements set out by the DOH, the JCAHO, and the HCQIA, and the knowledge that a judge may someday look over such compliance should serve as an **in**centive, not a **disin**centive, to engage in "searching and timely peer review." Complying with federal requirements protects physicians who engage in peer review. Having their hospital's peer review procedures analyzed in a suit for injunctive relief is far better for doctors on hearing committees than to have them arise in a civil damage suit against those doctors because their hospital did not follow fair hearing procedures necessary to provide immunity.

Respondent's "flood of litigation" argument is: "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, 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." Resp.Br.38-39. Respondent has taken the quotation from Zipper so far out of context as to be misleading. The quotation is appended to a sentence in respondent's brief which begins "[t]he specter of litigation in a court of equity." Respondent omitted the beginning of the sentence in the opinion itself: "***A hospital's consideration, when terminating the privileges of a physician, or its potential liability for monetary damages could unduly*** impugn a hospital's actions in terminating the privileges of a physician providing substandard care." Zipper v. Health Midwest, 978 S.W.2d at 417 (Emphasis

added!).

Respondent continues "if physicians conducting peer review are forced into court proceedings and depositions wherein their judgments are challenged, they will be likely be disinclined to participate in such proceedings." Resp.Br.40. For this, respondent cites Mason v. Central Suffolk Hosp., 819 N.E.2d 1029,1032 (N.Y.2004). Respondent fails to mention that Mason was a suit for *damages* : "A decision by those in charge of a hospital to terminate the privileges of . . . a doctor who may be a colleague . . . . should not be made more difficult by the fear of subjecting the hospital to monetary damages." *Ibid.* No such concern is present here. Egan's allegations regarding the peer review proceedings are based on the transcript, exhibits, memoranda, findings, and the dissent on appellate review. The hospital has not challenged the recitations of the dissenting physician of the statements made by Nelson and Lipic in the appellate review hearing. This case can be heard on documentation There are no apparent grounds for either side to call or depose any member of either the hearing or appellate review committee—unless the recitations in the report of the dissenting physician are challenged. Egan does not "challenge" the "judgment" of any peer review participant, but only their conduct dehors the record being reviewed. If the hospital disputes the dissenting physician's report, it can avoid such factual issues in the future by recording the committee discussions or opening the doors thereto to the physician.

As to the "consequent attorney's fees and costs," respondent undoubtedly has spent far more in its efforts to avoid having its procedures challenged in court than it

would have simply trying the matter on the merits. Respondent cites no authority for the proposition that it is entitled to flaunt the procedural requirements of 19CSR§30-20.021(2)(A)(16) and JCAHOStandardMS4.50,2004 with impunity because it would cost the hospital money for attorney's fees to defend its procedures in court. Respondent and the MHA could have surveyed hospitals in thirty-six states and the District of Columbia, where hospital procedures are subject to court challenge, for evidence of the cost of allowing such challenges, but have presented no evidence that such challenges have had any effect on any hospital's budget. Respondent's argument about cost was created out of thin air.

As to multiple rehearings, any rehearings will be based upon *proven* procedural deficiencies, not "perceived" deficiencies. Respondent can avoid multiple hearings by listening to what the court says about its first hearing, and correcting deficiencies.

The hospitals attempt to blur the line between damage suits, which do carry the potential for "chilling effects" on peer review proceedings, and Egan's suit, which seeks no damages. Respondent says "Dr. Egan cites no Missouri law drawing a distinction between legal and equitable claims" (Resp.Br.38), conveniently ignoring the emphasis the court in Zipper v. Health Midwest, 978 S.W.2d at 417, placed on the negative impact of damage claims as a basis for its decision. Respondent disparages appellant's discussion of Madsen v. Audrain Health Care, Inc., 297 F.3d 694 (8thCir.2002)(Resp.Br.38n.20), but ignores explicit language of the court emphasizing the threat of money damages on peer review: "The expressed policy in Missouri in the assurance of quality health care, which

is unduly impugned by allowing a physician to seek damages for an alleged failure of a hospital to follow the procedures established by its bylaws." 297 F.3d at 699. *Amicus* waves the threat of "monetary damages" around, with no acknowledgment that such threat is not present herein: "[C]reating a cause of action for breach of medical staff bylaws would render peer reviewers more vulnerable to damages claims and thereby increase the chilling effect of litigation sought to be avoided by both the HCQIA and Missouri's peer review statute." *Amicus*Br.39; *see id.*at37-40. If Congress and the DOH had thought giving physicians the right to fair hearings would have a "chilling effect," the simplest solution would have been to leave these provisions out of the statute and regulation.

There are no good policy reasons for not enforcing fair hearing procedures judicially.

Enforcing Fair Hearing Procedures Judicially Fosters Good Patient Care

In his brief, appellant cited five cases on the devastating effect denial of staff privileges has on a surgeon. App.Br.43-46. Neither respondent nor *amicus* responded to any of these cases by distinguishing or criticizing them, or citing contrary authority; in fact, none of them are mentioned in either brief.

Appellant cited Cooper v. Delaware Valley Med. Ctr., 654 A.2d at 551, with regard to the fact that National Data Bank reporting has magnified the devastating effects of decisions such as that here exponentially. Respondent's specific riposte is: "But he [Egan] alleges no loss in privileges at other hospitals, or that he is not able to practice

medicine."[2] Resp Br.46-47n.28. Egan's petition was filed June 23, 2006, seeking, *inter allia*, to enjoin the hospital from reporting rescission of his privileges to the NDB and the Board of Healing Arts. His amended petition was filed thirty-three days later, after learning these reports occurred on June 15. Since that filing, appellant has had no opportunity to amend his petition to allege the effect of the NDB report on his privileges at other hospitals and his malpractice insurance. He will do so on remand.

In his brief, appellant cited authority recognizing that patients have an interest in the outcome of peer review involving their doctors. "The public has an interest that staff decisions are not made arbitrarily." Owens v. New Britain Gen. Hosp., 643 A.2d at 240. "'Both doctors and patients can suffer if otherwise qualified doctors are wrongly denied staff privileges.'" *Ibid.* Neither respondent nor *amicus* have discussed this authority.

The response of the hospitals to these concerns is "trust us, because we would never do anything to hurt a good doctor." Resp Br.41-42. "Refusing to review these decisions will not result in hospitals trampling the interests of their staff physicians." *Amicus*Br.18. "[C]ourts need not fear that following the rule of non-review and leaving medical staff decisions to the professionals most qualified to make them, will result in qualified physicians being excluded from practicing at the private hospitals in this state."

---

[2] *Amicus* states that Egan's "privileges were not terminated, but were suspended . . . ." *Amicus* Br.24. *Amicus* has misread the record. Egan's privileges were terminated. S.L.F.17,19-20§§50.64-65.

*Amicus*Br.19. In other words, the fair hearing procedures mandated by DOH, the JCOHA, Congress, and respondent's bylaws are unnecessary because hospitals will only prosecute unqualified physicians. Accepting such an assumption could justify bypassing due process in any type of case.

Respondent does not seek to deny or justify the conduct of Nelson and Lipic in the closed-door Appellate Review hearing, calling on their colleagues to base their decision on false and malicious hearsay outside the record they were supposed to be reviewing. Respondent states that Egan "alleges certain details about the proceedings behind closed doors, but does not describe the complete deliberations of this committee." Resp.Br.23. Appellant's only knowledge of what went on "behind closed doors" comes from the report of the dissenting physician, who *did not* "describe the complete deliberations" of the committee. Faulting Egan for not giving a description of "the complete deliberations" in a hearing he specifically was excluded from would be appropriate for a Lewis Carroll description of Alice's trial.

Respondent faults Egan for not pleading "the findings and recommendations of the appellate review committee" because they would be "[t]he best evidence of what the appellate review committee determined." *Id.*at23n.14. However, the findings and recommendations would be of no help to the Court in determining the process by which those results were reached.

In support of its pious proclamation that it would never "exclude a good physician" (*id.*at42), respondent says it reports quality data to Medicare. *Id.*at41. Yet,

while performing 1,180 "acute surgical procedures" over a five-year period at St. Anthony's,. Egan had "no instances of family dissatisfaction, and no cases resulting in neurological deficit." His "quality indicator variances (readmissions, unplanned returns to surgery, intra-operative injuries, delayed or missed diagnosis, infections, wound eviscerations or dehiscences, and deaths) were superior or comparable to other staff surgeons at St. Anthony's Hospital." He has been Chief of Surgery at Deaconess and Touchette Regional Hospitals, and had privileges at six additional hospitals. Egan "never had his staff privileges suspended, revoked, terminated, or restricted by any hospital other than St. Anthony's, nor has he had any application for staff privileges turned down." He had never "been the subject of any investigation, never has been disciplined, and never has been subjected to any hearing regarding his staff privileges at any hospital other than St. Anthony's." S.L.F.10-11at¶¶ 4-6,10.

In asking its auditors to accept that hospital administrators and competing physicians are pure as Caesar's wife, the hospitals make an assumption of naivety that hospitals, unlike the military, judiciary, and corporations, are the only large institutions free of the taint of internal politics.[3]

It Is the "Public Policy" of Missouri That Private Hospitals Provide

[3] Without any citation, *amicus* accuses appellant of "[a]ttaching the most mercenary motive to a hospital, . . ." *Amicus*Br.19. Plaintiff made no such allegation, either in his pleading (S.L.F.9-34), or his brief.

Physicians Subject to Revocation Of Medical Staff Privileges a Written Statement of the Reasons For the Action and Appeal Procedures.

The DOH has promulgated a regulation requiring hospitals seeking to revoke medical staff privileges to provide physicians with written notice, a hearing, a written statement of the reasons for the action, and appeal procedures. This was promulgated pursuant to MO.REV.STAT.§197.080. Resp.Br.17. The parties agree that Missouri's peer review statutes, and the regulations promulgated thereunder, represent the public policy of Missouri. Resp.Br.19. "[S]tatutes are the very highest evidence of public policy and binding on the courts." Brawner v. Brawner, 327 S.W.2d 808,812 (Mo.1959). Thus, it is the "public policy" of Missouri that a physician whose membership on the staff of a private hospital is threatened have notice, opportunity to be heard, and impartial appellate review.

Amicus states that peer review regulations can be enforced by the state "through a host of possible sanctions that can only be brought by the Attorney General or the Department of Health and Senior Services," citing MO REV.STAT.§§197.070 and 197.200. *Amicus*Br.15. Section 197.200 is a "Definitions" section which says nothing about enforcement, sanctions, or the Attorney General. Section 197.070 provides that DOH "may deny, suspend or revoke a license in any case where it finds that there has been a substantial failure to comply with the requirements established under this law." It says nothing about "a host of possible sanctions" or the Attorney General. Suspending or revoking respondent's license would close the hospital and throw out hundreds of patients

and employees. DOH is not going to take such action at the behest of one doctor who did not receive the procedural protections guaranteed him by regulations.

Respondent argues: "Missouri hospital licensing laws and regulations do not authorize a private action by a physician alleging a violation of a private hospital's bylaws." Resp.Br.17. The converse is true—there is nothing in the statutes or regulations prohibiting such action. To say the statutes do not provide a suit for damages for violation of CSR§30-20.021(2)(A)(16) is not the same as saying a court may not enjoin violation of that regulation.

In Zipper v. Health Midwest, 978 S.W.2d at 416, the court distinguished Zipper's case from suits in other jurisdictions: "Two of the courts holding that hospital bylaws cannot constitute a contract between the hospital and its medical staff, however, find that the medical staff may seek judicial review and **request injunctive relief to force the hospital to comply with the procedures adopted in its bylaws."** (Emphasis added.). The court set forth policy considerations for rejecting Zipper's damage suit:

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

Ibid. (Emphasis added.). In the concluding sentence of its rationale for upholding the summary judgment rejecting Zipper's damage claim for breach of contract based on the

bylaws, the court held: "***[B]ecause Dr. Zipper sought only contractual damages for MCI's alleged breach of its bylaws***, Dr. Zipper has failed to state a cause of action on Count I." *Ibid.* (Emphasis added.).

A*micus* attempts to use the absence of a cause of action under HCQIA for violation of its fair hearing provisions as proof that a Missouri court cannot enjoin violation of similar provisions in Missouri's regulations. *Amicus*Br.15-16; *see* *Amicus*Br.39;Resp.Br.4 n.28. However, Congress used a "carrot" approach to obtain fair hearing procedures, promising immunity to hospitals and doctors if they provided physicians with appropriate notice, opportunity to be heard, and appellate review. 42U.S.C.§11112. Counsel for respondent admitted in oral argument below that, if this decision is affirmed, the only incentive for hospitals to hold any hearings will be to guarantee immunity from conspiracy and antitrust suits for doctors who initiate, testify, or participate in peer review proceedings. There is no such "carrot" in the Missouri statute, and only the "stick" of injunctive relief and the prospect of having to hold a new hearing can motivate hospitals to follow the Missouri regulation.

But even if lack of a specific provision authorizing suit for violation of CSR§30-20.021(2)(A)(16) constituted a bar to suits for injunctive relief for violation of that regulation itself, that would not answer the larger issue on which the Eastern District based its decision in the instant case: whether Missouri "public policy" bars any review of the peer review procedures employed by private hospitals.

Amicus states time and again that the Missouri regulation, the JCAHO standards,

the HCQIA peer review provisions, and respondent's bylaws are for the protection of patients and not physicians. "[G]overnment rules for hospital credentialing decisions exist to protect patients and do not give rise to private rights." *Amicus* Br.15. Missouri's regulatory scheme "was promulgated for the protection of patients, not doctors. . . . [T]he statute or regulation was enacted for the benefit of persons other than the person attempting to privately enforce it." *Id.*at32n.4; *see id.*at34,37-41;Resp.Br.19

This is a false dichotomy. There is no conflict between protecting patients against incompetent physicians through peer review and protecting the practice and reputation of competent physicians by utilizing fair hearing procedures to conduct that review. If the sole concern of DOH, JCAHO. and Congress had been protecting patients, they could have done so without requiring bylaws mandating notice and appellate review. One of the cases cited by *amicus* belies the hospitals' argument: "The statute [HCQIA] attempts to balance the chilling effect of litigation on peer review with *concerns for protecting physicians improperly subjected to disciplinary action*." Bryan v. James E. Holmes Mem'l Hosp., 33 F.3d 1318, 1322 (11thCir.1994)(cited at *Amicus*Br.37). The inclusion of fair hearing procedures in these regulations evidences a policy to ensure that hospitals abide by them. It is sophistry to claim otherwise.

The Language in Cowan "'It Is Generally Held That the Exclusion of a Physician or Surgeon From Practicing Therein Is a Matter Which Rests In the Discretion of the Managing Authorities'" Was a *Dictum* and Does Not Merit *Stare Decisis* Treatment

Respondent argues this language was necessary to decision in Cowan because it "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." Resp.Br.34.

This argument can easily be tested. Cowan sued physicians, directors, and a hospital for conspiracy to prevent him from acquiring staff privileges, and interference with contractual rights with patients. This Court held that his petition stated a cause of action. This result did not depend on the existence or non-existence of any so-called "rule of non-review." This Court could have accepted or rejected the language in the A.L.R. annotation, and the outcome would have been the same. The accuracy or inaccuracy of the statement was irrelevant. This is a textbook example of a *dictum*.

Neither respondent nor *amicus* acknowledges that the Cowan Court was quoting a 1951 A.L.R.2d annotation, nor that such annotation has been replaced by annotations in A.L.R.3d and A.L.R.5th which support Egan's right to bring the instant suit. *See*App.Br.34.

In his brief, appellant listed cases from thirty-four jurisdictions which have rejected the "general rule" stated in the 1951 A.L.R.2d annotation since it came out.

App.Br.34-36. Respondent notes that five of those jurisdictions[4] are based upon statutes; nonetheless, those jurisdictions review staffing decisions for procedural fairness. Resp.Br.54. Respondent argues that, in one case,[5] the issue was not disputed. *Ibid.* Nevertheless, that jurisdiction permits the type of limited review sought herein. *Amicus* argues that seven of those cases[6] would have been decided differently in Missouri, but acknowledges that those cases are contrary to the "rule of non-review" in the Cowan *dictum. Amicus*Br.26-27. The total of undisputed jurisdictions allowing some form of

---

[4] Florida- Lake Hosp. & Clinic v. Silversmith, 551 So.2d 558 (Fla.App.1989); Georgia-Batilla Health Serv., Inc. v. Bell, 633 S.E.2d 575 (Ga.App.2006); Idaho-Miller v. St. Alphonsus Reg'l Med. Ctr., Inc., 87 P.3d 934 (Idaho2004); Louisiana-Fontenot v. Southwest La. Hosp. Ass'n, 775 So.2d 1111 (La.App.2000); Mississippi-Wong v. Garden Park Community Hosp., Inc., 565 So.2d 550 (Miss.1990).

[5] Indiana-Terre Haute Reg'l Hosp., Inc. v. El-Issa, 470 N.E.2d 1371 (Ind.App.1984).

[6] Idaho-Miller v. St. Alphonsus Reg'l Med. Ctr., Inc., 87 P.3d 934 (Idaho 2004); Louisiana-Fontenot v. Southwest La. Hosp. Ass'n, 775 So.2d 1111 (La.App.2000); Maryland-Sadler v. Dimensions Healthcare Corp., 836 A.2d 655 (Md.App.2003); Mississippi- Wong v. Garden Park Community Hosp., Inc., 565 So.2d 550 (Miss.1990); Nebraska- Babcock v. Saint Francis Med. Ctr., 543 N.W.2d 749 (Neb.App.1996); New Mexico-Clough v. Adventist Health Sys., Inc., 780 P.2d 627 (N.M.1989); North Carolina-Virmani v. Presbyterian Health Serv., 488 S.E.2d 284 (N.C.App.1997).

review of medical staff terminations is twenty-seven.

Respondent disputes the inclusion of seven states among those permitting some form of review. For Alabama, respondent cites Murdoch v. Knollwood Park Hosp., 585 So.2d 8 73,876 (Ala.1991), and Moore v. Andalusia Hosp., Inc., 224 So.2d 617,619 (Ala.1969). Resp.Br.49. In Murdoch, the court reviewed bylaws and found Murdoch had received a fair hearing. Although the court was "not convinced" the bylaws were a contract, it declined to reach that issue. Nothing was said about a "rule of non-review." Moore involved a bill in equity to have a receiver appointed for a hospital corporation which had refused to appoint plaintiff to its staff. The court stated that "the refusal of the Board of Directors to appoint a particular physician or surgeon to the medical staff of the hospital is not subject to judicial review." Since Moore had never been on the staff to begin with, he had no protection from the bylaws, and would not have been protected by any regulation such as CSR§30-20.021(2)(A)(16), or the JCAHO standards. In Clemons v. Fairview Med. Ctr., 449 So.2d 788 (Ala1984), the court held that a petition alleging plaintiff had been terminated from the medical staff without a hearing as provided by the bylaws stated a cause of action. Neither respondent's brief, nor Murdoch v. Knollwood Park Hosp., 585 So.2d at 876, mentions Clemons. Alabama is fairly included among those states which reject a "rule of non-review."

Respondent cites Green v. Board of Dir., 739 P.2d 872,873 (Colo.App.1987), as placing Colorado in the column of "non-review." Resp.Br.49. This is another case where an application for privileges was denied, which differs from suspension or termination of

a member of a staff who is subject to bylaws. The court in Green did not mention Hawkins v. Kinsie, 540 P.2d 345 (Colo.App.1975), wherein the court held that a complaint that a decision not to renew existing staff privileges was arbitrary, capricious, and unreasonable stated a cause of action. Colorado remains in the column of states which reject a "rule of non-review."

Respondent cites Goldberg v. Rush Univ. Med. Ctr., 863 N.E.2d 829,836 (Ill.App.2007), in an attempt to remove Illinois from the list of states which permit judicial review of staff revocations. Resp.Br.49.[7] That case says: "An exception to this rule has developed where a physician's existing staff privileges are revoked, suspended, or reduced. . . . In such circumstances, the court will engage in limited review to determine whether the hospital complied with its bylaws in rendering the decision." Precisely! Illinois is more firmly in the column of the limited review sought here than ever. Respondent concedes this in a footnote. *Id.*at49n.31.

The court in Natale v. Sisters of Mercy, 52 N.W.2d 701, 710 (Iowa1952), declined to review termination of plaintiff's use of hospital facilities. Resp.Br.50. Respondent ignores the later case of Islami v. Covenant Med. Ctr., Inc., 822 F.Supp. 1361 (N.D.Iowa1992), which held the bylaws were a contract, and denied summary judgment

[7] Respondent also cites Barrows v. Northwestern Mem'l Hosp., 525 N.E.2d 50 (Ill.1988), for the same purpose. Resp.Br.49-50. That case involved an application for membership, not curtailment of existing membership.

on the physician's breach of contract claim with regard to the fairness of the proceedings by which defendant suspended his medical staff privileges. Iowa remains in the column rejecting the "rule of non-review."

Respondent and *amicus* rely on Tigua Gen. Hosp. v. Feuerberg, 645 S.W.2d 575 (Tex.App.1982), as proof Texas follows the "rule of non-review." Resp.Br.51; *Amicus*Br.26. Respondent also relies on Sosa v. Board of Managers, 437 F.2d 173 (5thCir.1971), for the same proposition. Resp.Br.51. Sosa involved an application, rather than revocation of existing privileges, and different rules apply. *Amicus* ignores the later case of East Texas Med. Ctr. Cancer Inst. v. Anderson, 991 S.W.2d 55 (Tex.App.1998); respondent attempts to slough it off: "(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)." Resp.Br.80. Respondent overlooks the specific holding that follows: "we hold that there was *legally* and factually sufficient evidence to support the jury's finding that the Institute and Staff *by-laws afforded Anderson contractual rights to due process.*" East Texas Med. Ctr. Cancer Inst. v. Anderson, 991 S.W.2d at63(Emphasis added.).. This puts Texas squarely in the column of jurisdictions permitting review of procedural fairness.

The language quoted by respondent from Johnson v. City of Ripon, 47 N.W.2d 328 (Wis.1951), was *dicta* because the case involved a municipal hospital. Resp.Br.51. Respondent quotes defendant's allegations in Fletcher v. Eagle River Mem'l Hosp., 456 N.W.2d 788 (Wis.1990), not the language of the court. Resp.Br.51. Respondent ignores

the recent case of Seitzinger v. Community Health Network, 676 N.W.2d 426 (Wis.2004), holding that the bylaws are a contract. Wisconsin is squarely in the column of judicial review.

Respondent claims four jurisdictions not cited by appellant join Missouri in the minority position of no review whatsoever. Respondent scores one for its side with Brandt v. St. Vincent Infirmary, 701 S.W.2d 103 (Ark.1985). However, Bello v South Shore Hosp., 429 N.E.2d 1011,1015-1017 (Mass.1981), recognizes that hospital bylaws are enforceable contracts between staff physicians and the hospital. Bello lost because he was an applicant rather than a member of the staff.

Khoury v. Community Mem'l Hosp., Inc., 123 S.E.2d 533,537 (Va.1962), is no help to either side because the court "assume[d] without deciding" that the bylaws were a contract between the staff and the hospital. Khoury lost because he was an applicant, not a staff member. *However*, respondent's footnote shows that, by statute, Virginia now allows limited judicial review. Resp.Br.47n.26.

As a holding, State *ex rel.* Sams v. Ohio Valley Gen. Hosp. Ass'n, 140 S.W.2d 457 (W.Va.1965), suffers from the same deficiency as Khoury, because Sams was an applicant for, not a member of, the medical staff. However, the language of the court is sufficiently broad that West Virginia must be counted as a state which permits no review.

The result of respondent's efforts to find jurisdictions not included in appellant's list is a wash, with two states on appellant's side and two on respondent's, making the

total appellant 36 respondent 3 (counting Missouri)[8]. It is worthy of note that respondent's most recent cases were decided in 1965, and that 34 of appellant's cases are later than that..

Respondent's Repeated References to Absence of a Specific Allegation That the Findings of the Hearing Committee Were "Wrong" Are "Red Herrings."

Point I of respondent's brief poses the central issue before this Court: Whether Missouri should follow a rule of non-review. Resp.Br.27. This point is argued on pages 27-56 of respondent's brief. Throughout these pages, respondent argues that Egan "sued even though he does not claim the hearing committee's decision with respect to the two patients was erroneous," "does not allege a different result would (or must) have been reached absent the error," "makes no allegations that the hearing committee's findings on either of the two patients was wrong," "does not allege error in the Board of Directors' final decision." *Id.*at39,43-45.[9]

---

[8] Samuel v. Herrick Mem'l Hosp., 201 F.3d 830 (6thCir 2000), is cited by respondent in a footnote for the proposition that the "rule of non-review" does not bar anti-trust claims. Resp.Br.42-43n.24. Examination of the opinion reveals that the Sixth Circuit counts Michigan as a state which follows the "rule of non-review." 201 F.3d at 835. This would raise the number of other states on respondent's side to 3.

[9] Respondent also throws this argument into its Statement of Facts. Resp.Br.24. It reappears in respondent's point IV under a heading which claims dismissal was correct

These arguments are not pertinent to the point in which they appear, and were not raised in the hospital's motion to dismiss, or its brief below (*see* S.L.F.7-10). Respondent cites no authority stating that such allegations were necessary to plead a cause of action. Missouri is a fact-pleading state. These arguments are conclusions, not statements of fact.

If plaintiff pled that, but for lack of notice or the calumnies in the appellate review committee, his privileges would not have been rescinded, and such allegations were necessary to state a cause of action, plaintiff would have been required to prove those allegations. This would have required the court to "second-guess" the hearing and appellate review committees—a procedure which all agree is not good policy. In effect, respondent is criticizing Egan for not inviting the very criticism on which it principally relies. Nothing which respondent has cited or argued required appellant to do this.

Respondent's Arguments That the Notice Given Egan Was Adequate Go To the Merits, and Are Not Grounds For Sustaining Dismissal For Failure To State a Cause of Action

Under Point I, which contends that dismissal was proper "because Missouri Courts do not review decisions to exclude a physician from a medical staff," respondent argues its notice was adequate. RespBr44-45,45n.27. This argument has nothing to do with

---

"BECAUSE THERE IS NO BASIS FOR ANOTHER INTERNAL HEARING, . . .": *Id.*at82-84. This portion of point IV does not appear in respondent's motion to dismiss or its brief below.

whether Missouri should follow a "rule of non-review." It does not appear in the motion to dismiss. S.L.F.7-10. It goes to the merits, not the sufficiency of the pleading. Respondent did not claim that Egan had "violated the law and/or principles of medical ethics" until the hearing was over, and Egan had no opportunity to cross-examine or offer evidence with regard thereto. The hospital does not claim that this belated accusation gives Egan any idea of what law or principle of medical ethics he was supposed to have violated. Even if respondent was not bound by what it charged prior to the hearing, it would not be entitled to dismissal of Egan's suit, for it does not question the accuracy of the report of the dissenting physician on the appellate review committee, or defend the conduct of Nelson and Lipic.

III.

PLAINTIFF PLED A SUBMISSIBLE CLAIM FOR PROMISSORY ESTOPPEL IN COUNT IV.

Respondent mis-characterize appellant's argument: "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 at57." Resp.Br.66. What Dr. Egan actually said at 57 was: "Dr. Egan . . . has alleged that he was 'harmed' by St. Anthony's convicting him of 'violat[ing] the law and/or principles of medical ethics' when he had not been charged with any such violations in the notice of

hearing." Further:

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

App.Br.57. There is a total disconnect between respondent's description of the contents of page 57 and what it actually says.

Secondly, respondent argues that, since the promises in its notice were the same as the fair hearing provisions of the bylaws, and the bylaws are not enforceable because they are not a contract, enforcing the promises in the notice would constitute enforcement of the bylaws, which is not permitted. To see through this argument, look at the situation as if there were no bylaws. In such case, respondent's argument falls flat. The fact that there are bylaws providing for notice and impartial appellate review cannot vitiate the independent promise the hospital made to Egan as to what would happen if he requested a hearing, hired a lawyer, obtained witnesses and spent hours participating in that hearing. The theory underlying the proposition that the bylaws are not a contract is that there was no consideration flowing from the hospital to Egan. In this case, there was "forebearance, detriment, loss, or responsibility, given, suffered, or undertaken" by Egan. This is consideration for enforcement of promises contained in the notice of hearing.

BLACK'S LAW DICTIONARY 206 (6th ed.1990).

Respondent relies upon a statement in Brown v. Brown, 146 S.W.2d 553, 555 (Mo.1941), that "estoppel claims cannot create rights which do not already exist." Resp.Br.67. In Brown, there were no promises, but merely silence on a matter of public record. If Egan does not have a right to enforce promises he relied on to his detriment, there is no such thing as promissory estoppel.

VI

THE BYLAWS ARE A CONTRACT BETWEEN PLAINTIFF AND DEFENDANT.

Respondent contends that appellant waived his right to defend his contract counts because he did not brief that issue below. Resp.Br.72-74. Respondent then argues that there was no contract. *Id.*at74-82. Respondent is asking the Court to consider its arguments that Counts VI and VII do not state a claim, and ignore any contrary arguments. It could as well be argued that respondent has waived its waiver argument.

The issue as to whether a physician has a contractual right to a fair hearing was decided against Egan last year in the Eastern District. Resp.Br.A-9 to A-17. There have been no intervening legal developments to justify revisiting that issue. Asking the court to do so would have been a waste of the court's time and an exercise in futility—especially since the Eastern District found the issue did not even merit an opinion. *Id.*atA-10. A party is not required to engage in a futile act to preserve error.

Neither court below ruled on the issue of whether Counts VI and VII state claims on which relief can be granted. Resp.Br.A-2 to A-9. If this Court adopts a "rule of non-review," this issue is moot. If the Court permits review limited to the fair hearing issue, the issue of the appropriate key to the doors of the courthouse will remain. The 36 jurisdictions which permit limited judicial review do so through a variety of avenues. Although it is not strictly necessary to choose the jurisdictional "hook" for review at this point, judicial economy would seem to favor doing so. If the Court chooses to rule on this issue, it should utilize all of the input available, including appellant's arguments on the contract issue.

One basis on which MHA sought to appear as *amicus* was "to endorse" Zipper, and "conclude that medical staff bylaws of a private hospital cannot constitute a contract that is enforceable by individual physician members of the medical staff." MHA Motion 2-3. MHA alleged that the parties had not "addressed all of the possible ramifications and issues associated with . . . recognizing medical staff bylaws as a private contract." *Id.*at3. *Amicus's* brief spends 14 pages on this issue. Respondent would have the Court hear only one side of this issue.

Turning to the merits, respondent argues that "hospital licensing regulations, such as C.S.R. §30.021, do not permit private causes of action." Resp.Br.68; *see id*.at74. *Amicus* contends that only the state can enforce this regulation. *Amicus*Br15,32n.4. If this is true, then the regulation cannot take the place of the consideration promised by the

fair hearing provisions of the bylaws.

Respondent argues that there is no "mutuality of agreement and obligation" between appellant and respondent because Dr. Egan did not "have any input into the enactment of the staff bylaws." Resp.Br.75. Yet, earlier in its brief, respondent admits "[i]t is the medical staff that develops and adopts bylaws . . . governing . . . revocation of staff privileges." Resp.Br.16.

The only secondary authority relied on by *amicus* is Craig W. Dalton, *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decision,* 73 TEMPLE L. REV. 597 (2000). *Amicus*Br.16. *Amicus* fails to note that Dalton is firmly in favor of the position that the bylaws are enforceable contracts: "Courts should find that the hospital and medical staff bylaws are contractually binding in favor of both applicants and medical staff members." Dalton, *supra*at679; *seeid.*at646.

Neither respondent nor *amicus* has addressed the point that the bylaws are consideration because they provide more rights than the regulation requires. Dalton, *supra*at67.

Neither St. Anthony's nor *amicus* has responded to the argument that one making a promise cannot avoid enforcement thereof by asserting that the promise did not furnish any consideration to the recipient, even though the party making the promise did receive consideration from the party seeking to enforce the promise.

"Consider the irony: a physician attempting to enforce the provisions of the

> bylaws in a contract action . . . is barred because the provisions the physician is trying to enforce did not confer any added benefit to the physician. The physician cannot enforce the provisions because they were already required by law. The result turns contract law on its head because the person who allegedly received no benefit cannot enforce the agreement against the party who received benefit but purportedly gave nothing.

Dalton, *supra* at 646.

Zipper should not be applied to respondent's bylaws.

CONCLUSION

Missouri should join 36 jurisdictions rejecting the "rule of non-review." This case should be reversed and remanded for trial.

Respectfully submitted,

_____

Alan Kimbrell # 18397
2015 Sundowner Ridge Drive
Ballwin, MO 63011
Telephone (636) 273-0442
Fax (636) 273-0466
E-Mail AlanKimbrell67@AOL.COM
Attorney for Appellant

CERTIFICATION

This brief contains the information required by Rule 55.03. It complies with the limitations contained in Rule 84.06(b). It contains 7,749 words and is 38 pages long. It has been formatted on Word Perfect 9. The accompanying disc has been scanned, using AVG Antivirus, and found to be virus-.

_____

CERTIFICATE OF SERVICE

One copy of Appellant's Statement, Brief and Argument, and a disc containing same, were served on respondent on this 1st day of October, 2007, by mailing sam*e* to Neal F. Perrymen, Lewis Rice & Fingersh, 500 N. Broadway, St. Louis, MO 63101, and on *Amicus Curiae* by mailing same to David M. Harris, Greensfelder, Hemker & Gale, P.C., 10 S. Broadway, St. Louis, MO 63102.

_____