

ORIGINAL

FILED

03/13/2018

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: OP 18-0053

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0053

BOZEMAN DEACONESS HEALTH SERVICES,  
d/b/a BOZEMAN DEACONESS HOSPITAL,  
a Montana Corporation,

Relator,

v.

MONTANA EIGHTEENTH JUDICIAL  
DISTRICT COURT, GALLATIN COUNTY,  
Honorable John Brown, Presiding,

Respondent.

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CLERK OF THE SUPREME COURT  
STATE OF MONTANA

By petition filed January 25, 2018, Relator Bozeman Deaconess Health Services (Hospital) petitioned this Court to exercise supervisory control reviewing and reversing the order of Respondent Montana Eighteenth Judicial District Court, filed October 21, 2016, adopting the proposed ruling of a special discovery master, filed October 20, 2016, that certain correspondence, dated December 10, 2013, from the St. Vincent Healthcare Medical Executive Committee, by and through Committee Chairman Jeff Johnson, M.D., to Dr. Kipp Webb, M.D., is inadmissible as evidence in the underlying matter of *Webb v. Bozeman Deaconess Health Services*, Cause No. DV-12-123BX, pursuant to §§ 50-16-201(1) and -205, MCA (peer review data privilege). Upon review of the petition and Dr. Webb's response, the Court declines to exercise supervisory control for the following reasons.

As pertinent here, supervisory control is an extraordinary remedy sometimes justified when: (1) the matter at issue involves a purely legal question; (2) the lower court is proceeding under a mistake of law causing a gross injustice; and (3) urgency or emergency factors will render ordinary appeal inadequate. M. R. App. P. 14(3)(a). The

Hospital asserts that the District Court is proceeding under a mistake of law because the Letter is by definition, or waiver, not privileged under §§ 50-16-201(1) and -205, MCA (peer review data privilege). The Hospital asserts that the mistake is causing a gross injustice because, in the context of Dr. Webb's claim that the Hospital tortiously interfered with his prospective economic opportunity with St. Vincent Healthcare (St. Vincent) in Billings, Montana, the Letter is highly relevant, if not essential, to rebut Dr. Webb's central assertion that the Hospital's conduct, rather than Dr. Webb's conduct, was the cause of the problems that led to his premature departure from the employ of St. Vincent. The Hospital asserts that the letter is not only essential to its defense but also necessary to prevent the perpetration of a fraud upon the jury at trial. The Hospital asserts that ordinary appeal will be inadequate due to the significant time, effort, and cost of proceeding to trial, and then appeal, under such a manifest mistake.

In essence, the District Court, through the discovery master, ruled that: (1) it is unclear whether the peer review data privilege is subject to waiver as threshold matter of law; (2) even if so, St. Vincent/St. Vincent MEC has not waived the litigation use preclusion of §§ 50-16-205 and 37-20-201(2), MCA; (3) trial admission of the Letter would unfairly prejudice Dr. Webb because he "will be unable to rebut the content through cross-examination of Dr. Johnson or by calling other witnesses who were involved in the peer review process"; and (4) non-admission of the letter will not prejudice the Hospital because "it possesses and intends to introduce ample evidence independent of the Johnson Letter that may convince a reasonable jury that the Hospital did not tortiously interfere with Dr. Webb . . . [but that] he was the cause of his own problems."

The Hospital indeed presents genuine issues of law as to whether the peer data privilege is subject to waiver and, if so, whether the written statement of St. Vincent MEC is sufficient to effect a waiver of the privilege for admission of the Johnson Letter as previously disclosed by Dr. Webb and consequently obtained by the Hospital. However, supervisory control remains an extraordinary remedy that cannot substitute for ordinary appeal absent a showing of gross injustice and urgent or emergency factors rendering appeal inadequate. Even if the potential prejudice to Dr. Webb may not be as significant

as perceived, we conclude that the Hospital has not shown that the District Court is proceeding under a mistake of law sufficient to cause a gross injustice that, in combination with urgent or emergency factors, will render ordinary appeal inadequate.

THEREFORE,

IT IS HEREBY ORDERED that we decline to exercise supervisory control and the Hospital's petition is hereby DENIED.

The Clerk is directed to provide copies hereof to the District Court and counsel for all parties in the above-referenced District Court cause.

DATED this 13<sup>th</sup> day of March, 2018.

Dick M. Lundberg

James J. Smith

James P. Moore

John P. Moore

Jim Rice

Justices