

**Peper v. St. Mary's Hospital and Medical Center (2005-CA-1099)**  
**Answer Brief—Summary**

In Colorado, where both parties submit material beyond the pleadings in support of or opposing a motion to dismiss, the parties are on notice that a court may treat the motion as a C.R.C.P. 56 motion. The St. Mary's Defendants filed the Motion to Dismiss, attaching exhibits thereto. Dr. Peper responded in kind, and made no request for any discovery pursuant to C.R.C.P. 56 (f). Therefore, the St. Mary's Defendants assert that this Court should treat the dismissal by the trial court as summary judgment.

HCQIA provides an unusual summary judgment standard where the burden is placed upon Dr. Peper to overcome a presumption of immunity. Dr. Peper failed to establish facts to overcome the HCQIA presumption in this case. The crux of the HCQIA immunity inquiry here is a determination of whether Dr. Peper's waiver of the statutory notice and hearing rights provided by HCQIA was valid. Pursuant to federal law, procedural statutory rights are presumptively subject to waiver. Federal law only requires a knowing and voluntary relinquishment of a procedural statutory right. Because Dr. Peper did not (1) establish facts to rebut the presumption that the waived notice and hearing procedures provided for in the Bylaws met the conditions of 42 U.S.C. § 11-112 (b), or (2) claim that his waiver was made unknowingly and/or involuntarily, his waiver of HCQIA notice and hearing rights was valid.

Similarly, under a motion to dismiss standard of review, Dr. Peper fails to plead facts that overcome the HCQIA immunity presumption. In Colorado, when a plaintiff specifically refers to or attaches documents to the complaint, a court may rely upon the documents referred to in the complaint for providing a context for allegations in the complaint without converting a C.R.C.P. 12(b)(5) motion into a C.R.C.P. 56 motion. Under this standard, all exhibits attached by the St. Mary's Defendants and Dr. Peper that were essential to the trial court's dismissal were part of "the Complaint." Therefore, the HCQIA immunity analysis is unchanged by a motion to dismiss standard of review.

Therefore, whether the trial court's dismissal is considered under a motion to dismiss or summary judgment standard of review, Dr. Peper fails to overcome the HCQIA immunity presumption, and his claims should be dismissed.

Finally, the trial court rightly concluded that Dr. Peper failed to exhaust his administrative remedy before the CAC. However, because a failure to exhaust administrative remedies defeats the trial court's subject matter jurisdiction, Dr. Peper's failure to exhaust provides independent grounds for this Court to dismiss his claim.