

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 28,605

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JAN 23 2008

WILLIAM K. SUMMERS, M.D.,

Plaintiff-Appellee,



vs.

Second Judicial No.
CV 2006-10054

**ARDENT HEALTH SERVICES L.L.C., and
LOVELACE HEALTH SYSTEM, INC.,**

Defendants-Appellants.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
THE HONORABLE NAN G. NASH

ANSWER BRIEF

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F) NMRA, I hereby certify that the foregoing Answer Brief complies with the applicable type-volume limitation in that the body of the Answer Brief contains 5,222 words as indicated by the word-count total of the word processing system used to prepare the same, which is Microsoft Office Word 2003.

INTRODUCTION

This case arises out of a decision by defendants, Ardent Health Services, L.L.C., and Lovelace Health System, Inc., to summarily revoke the privileges of a physician, Dr. William K. Summers, to practice psychiatric and internal medicine within the Lovelace Sandia Health System. The actions of defendants were taken without any initial notice to Dr. Summers, without any real investigation of the facts, and without affording Dr. Summers any meaningful opportunity to defend the allegations leveled against him by defendants.

Defendants sought summary judgment on the grounds that they are entitled to qualified immunity under the federal Health Care Quality Immunity Act (HCQIA). The District Court, however, ruled that there are genuine issues of material fact as to whether defendants met the reasonableness standards imposed for immunity by the HCQIA.

The District Court's determination that summary judgment was not proper, and that the issues should await factual determination by a jury, is proper. Dr. Summers has shown, by a preponderance of the evidence, that there are genuine issues of fact. This Court should affirm the District Court's denial of summary judgment and remand this case for resolution of all issues, including the question of immunity under the HCQIA, by a jury.

SUMMARY OF FACTS

The Plaintiff-Appellee, Dr. William Summers is a physician licensed to practice medicine in the State of New Mexico. Prior to Defendants' actions relative to his medical privileges, Dr. Summers' practice primarily consisted of treating psychiatric patients, as well as elderly patients suffering from conditions such as Alzheimer's and dementia. (R.P. 84, Exhibit 1, Affidavit of William K. Summers, M.D., ¶ 1).¹

Dr. Summers received his medical degree in 1971 from Washington University School of Medicine, in St. Louis, Missouri. He completed his residency in internal medicine in 1976 at Washington University Medical Center. He completed a three year residency in psychiatry in 1976 at Washington University. Dr. Summers has held faculty positions in numerous medical schools, including Washington University School of Medicine, the University of Pittsburgh School of Medicine, the University of Southern California School of Medicine, and the University of California at Los Angeles School of Medicine. He has been published in numerous medical journals, including the *New England Journal of Medicine*, *Journal*

¹ As noted in the Brief in Chief, the sealed portions of the record have been assigned a single Record Proper number for each multi-page filing. Plaintiff, therefore, cites to both the Record Proper and to the documents and page or paragraph numbers within each Record Proper cite.

of the American Medical Association, American Journal of Psychiatry, Journal of Clinical Psychiatry, Psychiatric Research, Archives of General Psychiatry, Lancet, Journal of Cardiovascular Surgery, Biological Psychiatry, Journal of Clinical Toxicology, American Federation of Clinical Research, Analytical Biochemistry, European Neurology, and Neuroepidemiology. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 2).

Dr. Summers was first granted psychiatric privileges at St. Joseph Medical Center in 1995. He was granted internal medicine privileges at St. Joseph in November of 2000. On December 4, 2002, Dr. Summers was reappointed to the active medical staff of Sandia Health System (also referred to herein as "Lovelace"). As of January 1, 2003, he held privileges in internal medicine and psychiatry. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 3; R.P. 93, Defendants' responses to Plaintiffs First Set of Requests for Admissions, pp. 1-3).

In approximately June of 2002, the Medical Executive Committee ("MEC") raised an issue with respect to Dr. Summers' care of a psychiatric patient. Dr. Summers explained to the MEC that he had utilized a recognized psychotherapy technique known as "here and now" therapy. The MEC asked another psychiatrist to review the chart and Dr. Summers' use of

this therapy modality. The psychiatrist agreed that the technique did not constitute malpractice. The MEC also did not find that use of “here and now” therapy constituted an “imminent danger” to patient safety. Nonetheless, in deference to the MEC, Dr. Summers agreed not to utilize “here and now” therapy with future patients. Approximately two months later, Dr. Summers’ privileges were renewed and upgraded. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 4; R.P. 93, Defendants Responses to Plaintiff’s First Set of Requests for Admissions, p. 9, Response to Request No. 15).

During the spring and early summer of 2003, there were a number of disagreements between Dr. Summers and others on the medical staff regarding the referral of patients to non-Lovelace nursing facilities. A case worker employed by Lovelace generally refused to discharge Dr. Summers’ patients to a non-Lovelace nursing facility where Dr. Summers was attending. Instead, at the apparent direction of Lovelace administration, this case worker transferred Dr. Summers’ patients to other Lovelace-preferred facilities where he did not hold privileges, effectively destroying the physician-patient relationship. Dr. Summers complained to the administration on numerous occasions that this practice was improper, unethical, and dangerous. Dr. Summers’ fears were realized when a patient

died after being transferred over his objection to a facility where he did not have privileges. Dr. Summers' was outraged by this incident and made his position known to the administration. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 5).

On or about May 24, 2003, a 48-year-old vicodin and methadone addicted patient ("Patient B") was admitted to Albuquerque Regional Medical Center ("ARMC") by Dr. Harvey Featherstone, due to a probable self-induced methadone overdose. Although Patient B's normal psychiatrist was Richard Smith, M.D., Dr. Featherstone requested that Dr. Summers perform a psychiatric consult while in the hospital. Dr. Summers examined Patient B on two occasions and determined that, despite her chronic drug abuse and other disorders, she was no longer a suicide risk and could be discharged on May 27, 2003. Patient B was apparently not happy that she was going to be discharged. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 6).

On or about July 3, 2003, a case worker with whom Dr. Summers had previously encountered problems regarding patient referrals apparently made contact with Patient B. Patient B apparently expressed her dissatisfaction that she was discharged sooner than she would have liked. She apparently also alleged that Dr. Summers used inappropriate language during his

questioning of her. Given the nature of Patient B's multiple illnesses, it was necessary that Dr. Summer inquire into matters involving sexual history and sexual abuse. However, Dr. Summers did not make a single inappropriate comment to Patient B. His interactions with Patient B were at all times appropriate and within the requisite standard of care. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 7).

On September 4, 2003, Dr. Summers sent the first of a series of letters to Lovelace administration raising concerns regarding the discharge of his patients to facilities other than those which he had specifically requested. On October 3, 2003, Dr. Summers sent a letter advising the administration that a patient of his had died after having been discharged to a facility where he did not have privileges. It was at this point, after having alerted Lovelace that a patient may have died due to improper transfer policies, that Dr. Summers' privileges to practice within the Lovelace system were in jeopardy. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 8; R.P. 93, Letter of October 3, 2003).

On October 6, 2003, a mere three days after Dr. Summers' complaint regarding the patient's death, the Lovelace Chief Medical Officer, William Mitchell, M.D., made a formal request during the MEC meeting that an ad hoc committee be formed to "see if formal action should be taken to restrict

or suspend [Dr. Summers'] privileges." The MEC capitulated, and directed that David Clanon, M.D. and Gail Thaler, M.D. conduct a clandestine investigation of Dr. Summers' practice. Dr. Clanon and Dr. Thaler were both direct economic competitors. Dr. Summers was not informed that an ad hoc committee had been formed, nor was he advised by MEC that his privileges were under review. (R.P. 84, Affidavit of William K. Summers, M.D., ¶9).

The investigation of Dr. Summers' practice continued for approximately six (6) weeks. He was never afforded the opportunity to answer questions or provide input. Dr. Summers was not aware that his ability to practice medicine was in jeopardy. At no time was he informed that his actions could have or did represent a danger of any type to his patients. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 10; R.P. 93, Defendants Responses to Plaintiff's First Set of Requests for Admissions, p. 11-12, Response to Request No. 21, 22).

On or about December 1, 2003, the MEC voted to summarily suspend Dr. Summers' privileges. The MEC did not interview Dr. Clanon, Dr. Thaler, Patient B, the caseworkers, or Dr. Summers. He was not given an opportunity to say or do anything in his defense. Instead, even though Dr. Clanon did not state that Dr. Summers' care constituted malpractice of medical negligence, Dr. Summers received a letter on December 3, 2003,

advising him that his internal medicine privileges were summarily suspended and that he could no longer practice internal medicine at Lovelace. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 11; R.P. 93, Defendants Responses to Plaintiff's First Set of Requests for Admissions, p. 12-13, Response to Requests No. 22-25).

Dr. Summers appealed the MEC's decision through various channels within the Lovelace administrative maze. Approximately a year later, following a series of vacuous and otherwise futile "hearings" with the MEC and the Professional Review Committee ("PRC"), Dr. Summers' case wound its way to the so-called Lovelace Appellate Review Committee ("ARC"). Notwithstanding the fact that the MEC failed to interview Dr. Clanon, Dr. Thaler, Patient B, the caseworkers, or Dr. Summers, and despite the fact that Dr. Summers repeatedly informed the various committees that he never said anything inappropriate to Patient B, the ARC found that he somehow posed a danger, indeed an imminent danger, to his patients and that he had somehow demonstrated a *pattern* of utilizing inappropriate sexual comments. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 12).

Although the MEC had initially claimed that Dr. Summers' internal medicine practice was somehow deficient, the conjecture and assumption with respect to the allegedly inappropriate comments formed the entire basis

for the ARC's decision. The ARC recommended to the Board of Trustees that all of Dr. Summers' privileges be revoked. On May 16, 2005, the Board of Trustees voted to revoke Dr. Summers' privileges, in their entirety. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 12).

ARGUMENT

I. STANDARD OF REVIEW

This is an interlocutory appeal from denial of summary judgment based on the existence of genuine issues of material fact. In reviewing a summary judgment ruling, this Court applies a *de novo* standard of review. *Headley v. Morgan Management Corp.*, 2005-NMCA- 45, 137 N.M. 339, 110 P.3d 1076, 1078.

Summary judgment is appropriate only where, based on the record, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 1-056(C) NMRA. The burden is initially on the moving party to establish a *prima facie* case that there are no material issues of fact and the moving party is entitled to judgment. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972); *Bartlett v. Mirabal*, 2000-NMCA-36, 128 N.M. 830, 833, 999 P.2d 1062, 1065. Only when a *prima facie* showing has been made of the absence of any

material issue of fact, and entitlement to judgment as a matter of law is established, does the burden shift to the non-moving party to show the existence of a genuine issue of fact. *Gardner-Zemke v. State of N.M.*, 109 N.M. 729, 790 P.2d 1010 (1990).

The Court is to consider the matters presented for and against the motion in a light most favorable to trial on the merits. *Gardner-Zemke Co. v. State*, 109 N.M. at 732, 790 P.2d at 1013; *see also Sarracino v. Martinez*, 117 N.M. 193, 194, 870 P.2d 155 (Ct. App. 1994). The Court views the facts and draws all reasonable inferences in the light most favorable to the nonmoving party. *Garcia-Montoya v. State of New Mexico Treasurer's Office*, 2001-NMSC-003, ¶ 23, 130 N.M. 25, 16 P.3d 1084; *Nashan v. Nashan*, 119 N.M. 625, 627, 894 P.2d 402, 404 (Ct.App.1995). The Court takes note of any evidence in the record which puts a material fact in issue. *Pharmaseal Lab., Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977). Summary judgment is foreclosed where the record discloses the existence of a substantial dispute concerning a material factual issue. *Id.* at 756, 568 P.2d at 592.

Summary judgment is disfavored. *Holcomb v. Power*, 83 N.M. 496, 493 P.2d 981 (Ct. App. 1971), *cert. denied*, 83 N.M. 473, 493 P.2d 958 (1971); *Pharmaseal Labs, Inc. v. Goff*, 90 N.M. 753, 568 P.2d 589 (1977).

Summary judgment is a drastic measure, which should only be granted in limited circumstances. *North v. Public Service Co.*, 97 N.M. 406, 640 P.2d 512 (Ct. App. 1982); and *S. Cebolleta Land Grant, ex rel. Board of Trustees v. Romero*, 98 N.M. 1, 644 P.2d 515 (1982).

II. THE FEDERAL HEALTH CARE QUALITY IMPROVEMENT ACT

The Defendants sought summary judgment as to Plaintiff's claims based upon immunity under the Health Care Quality Improvement Act ("HCQIA"). Individuals associated with a medical "professional review action" including a professional review body, members or staff of the body, persons under contract with the body, and persons who participate or assist with the review action may be entitled to immunity from damages under federal law under the HCQIA. 42 U.S.C. § 11101(a). However, to establish entitlement to immunity, certain strict requirements of the HCQIA must be met.

A "professional review action" is defined under the HCQIA as:

"An action or recommendation of a professional review body which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients) and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation and also includes professional review

activities relating to a professional review action. “

42 U.S.C. § 11151(9).

If the action at issue meets this definition, the HCQIA sets forth precise standards for such actions that must be fulfilled for the immunity provision to apply. For immunity to apply, the review action *must* have been pursued:

(1) in the reasonable belief that the action was in furtherance of quality health care;

(2) after a reasonable effort to obtain the facts of the matter;

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a).

For purposes of HCQIA immunity, a professional review action is initially presumed to have met these standards. However, that presumption is rebuttable by a preponderance of the evidence. *Id.*

The standard for resolving this issue at summary judgment is

therefore: “Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?” *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1333 (11th Cir.1994) (quoting *Austin v. McNamara*, 979 F.2d 728, 735 (9th Cir.1992)). Courts are to utilize an objective standard of reasonableness when considering whether a defendant has met the statutory requirements. *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 635 (3rd Cir.1996).

The immunity granted by the HCQIA is not an absolute immunity but, instead, is only a qualified immunity. If there is a question of fact on which the existence of the immunity is dependent, then an award of summary judgment on the basis of HCQIA immunity must be postponed until trial. *Crosby v. Hospital Authority of Valdosta*, 873 F.Supp. 1568, 1581-1582 (M.D. Ga. 1995).

III. THE DISTRICT COURT PROPERLY DETERMINED THERE ARE
GENUINE ISSUES OF MATERIAL FACT
PRECLUDING SUMMARY JUDGMENT UNDER THE HCQIA

The District Judge ruled that there were genuine issues of material fact, which precluded summary judgment in favor of defendants on the HCQIA immunity question. The District Court applied the correct standards for determining the issue of HCQIA and properly concluded that resolution

of the issue should await fact finding by the jury.

There are genuine issues of material fact as to whether the standards for HCQIA immunity applies in this case. As to the first standard for HCQIA immunity, there are genuine issues of material fact regarding whether Defendants had a reasonable belief that the action was in furtherance of quality health care. The ARC found that Dr. Summers somehow posed a danger, indeed an imminent danger, to his patients and that he had somehow demonstrated a *pattern* of utilizing inappropriate sexual comments. Dr. Summers' ability to practice at Defendants' hospital was summarily revoked, based on these findings. Yet the facts establish that no witnesses, either patients, caseworkers or other doctors, were ever interviewed that demonstrated Dr. Summers presented any danger to patients, at all, much less "imminent danger." Nor were any facts developed that showed a *pattern* of utilizing inappropriate sexual comments. (R.P. 84, Affidavit of William K. Summers, M.D., ¶¶ 4-11).

There could be no objectively reasonable belief that the actions taken by Defendants were in furtherance of quality health care when the review body did not even attempt to ascertain the actual facts. Genuine issues of material fact on the first standard preclude summary judgment in this case.

There are also genuine issues of material fact on the second standard--

whether reasonable effort were made to obtain the facts of the matter. The MEC's actions against Dr. Summers were taken based on hearsay complaints allegedly made by Dr. Clanon, Dr. Thaler, and Patient B. However, the facts demonstrate that, although the Defendants' MEC voted summarily to summarily suspend Dr. Summers' privileges, the MEC did not even interview Dr. Clanon, Dr. Thaler, Patient B, the caseworkers, or Dr. Summers. Dr. Summers was not given an opportunity to say or do anything in his defense before he was summarily deprived of his privilege to practice medicine. (R.P. 84, Affidavit of William K. Summers, M.D., ¶¶ 6-11).

Notwithstanding the fact that the MEC failed to interview Dr. Clanon, Dr. Thaler, Patient B, the caseworkers, or Dr. Summers, and despite the fact that Dr. Summers repeatedly informed the various committees that he never said anything inappropriate to Patient B, the ARC found that he somehow posed a danger, indeed an imminent danger, to his patients and that he had somehow demonstrated a *pattern* of utilizing inappropriate sexual comments. Although the MEC had initially claimed that Dr. Summers' internal medicine practice was somehow deficient, the conjecture and assumption with respect to the alleged inappropriate comments formed the entire basis for the ARC's decision. The ARC recommended to the Board of Trustees that all of Dr. Summers' privileges be revoked. On May 16, 2005,

the Board of Trustees voted to revoke Dr. Summers' privileges, in their entirety. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 12; R.P. 93, Defendants Responses to Plaintiff's First Set of Requests for Admissions, p. 11-12, Response to Request No. 21, 22).

The failure of Defendant's MEC and ARC to even so much as interview the individuals with actual factual information creates genuine issues of material fact as to the reasonableness of the investigation on which the actions against Dr. Summers were based. The genuine issue of material fact as to the second standard--whether reasonable effort were made to obtain the facts of the matter—precludes summary judgment in this case.

There are also genuine issues of material fact on the third standard for HCQIA immunity. The third standard requires that adequate notice and hearing procedures be afforded to the physician involved. In this case, although the MEC and ARC did afford some notice and hearing procedures, the notice and hearing provided amounted to a mere formality, without any substantive due process attached to it. First, Dr. Summers was not informed that an ad hoc committee had been formed, nor was he advised by MEC that his privileges were under review. (R.P. 84, Affidavit of William K. Summers, M.D., ¶9; R.P. 93, Defendants Responses to Plaintiff's First Set of Requests for Admissions, p. 11-12, Response to Request No. 21, 22).

Later, Dr. Summers was not permitted to speak in his own defense during the preliminary procedures. He was not allowed to examine the alleged complaining witnesses on whose hearsay allegations the actions of Defendants were based. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 11).

A reasonable jury could determine defendants did not take action “in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after [adequate notice and hearing].” 42 U.S.C. § 11112(a)(4). A reasonable jury could find that a person could not reasonably believe that a physician should be suspended from clinical privileges without informing or questioning that physician until after deciding suspension is, or is likely to be, necessary. See, e.g., *Stratienko, M.D., v. Chattanooga-Hamilton County Hospital Authority*, 2008 WL 4191275 (E.D.Tenn.).

There are genuine issues of material fact as to the reasonableness and the fairness of the notice and hearing procedures afforded Dr. Summers. Summary judgment should not be granted in this case based on the failure to meet the third standard of the HCQIA. *Estate of Blume v. Marian Health Center*, 503 F.Supp. 1103 (N.D.Iowa 2007).

Last, genuine issues of material fact exist as to Defendants' reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of adequate notice and a hearing. First, The MEC directed that David Clanon, M.D. and Gail Thaler, M.D., who were both direct economic competitors of Dr. Summers, conduct a clandestine investigation of my practice. Dr. Summers was not informed that an ad hoc committee had been formed, nor was he advised by MEC that his privileges were under review. (R.P. 84, Affidavit of William K. Summers, M.D., ¶9; R.P. 93, Defendants Responses to Plaintiff's First Set of Requests for Admissions, p. 9, Response to Request No. 15; R.P. 93, Defendants Responses to Plaintiff's First Set of Requests for Admissions, p. 11-12, Response to Request No. 21, 22).

Following a series of vacuous and otherwise futile "hearings" with the MEC and the Professional Review Committee ("PRC"), where no real attempt was made to actually determine the true facts, Dr. Summers' case wound its way to the Lovelace Appellate Review Committee ("ARC"). Even though the MEC had utterly failed to interview Dr. Clanon, Dr. Thaler, Patient B, the caseworkers, or Dr. Summers, and even though Dr. Summers repeatedly informed the various committees that he never said anything inappropriate to Patient B, the ARC recommended to the Board of

Trustees that all of Dr. Summers' privileges be revoked. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 12).

Devoid of any factual support, whatsoever, the ARC actually went so far as to find that Dr. Summers posed an "imminent danger" to patients. The ARC, without any basis, also found that he had somehow demonstrated a *pattern* of utilizing inappropriate sexual comments. Although the MEC had initially claimed that Dr. Summers' *internal medicine* practice was somehow deficient, the conjecture and assumption with respect to the alleged inappropriate comments, allegations relating to his psychiatric practice, formed the entire basis for the ARC's decision. Yet the ARC recommended to the Board of Trustees that *all* of Dr. Summers' privileges be revoked. On May 16, 2005, the Board of Trustees voted to revoke Dr. Summers' privileges, in their entirety. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 12).

The actual facts, had they been obtained by Defendants, would have established that Dr. Summers was neither a danger to patients, nor did he have a pattern of using inappropriate comments with patients. Defendants could not have had a reasonable belief that these sham findings warranted the actions taken against Dr. Summers. Instead, the real facts suggest that Dr. Summers privileges to practice medicine within the Lovelace system

were jeopardized because he alerted Lovelace that a patient may have died due to Lovelace's improper transfer policies. (R.P. 84, Affidavit of William K. Summers, M.D., ¶ 8).

Defendants could not have had any objectively reasonable belief that its actions were warranted by the facts, when, in fact, no effort was made to obtain the facts. Genuine issues of material fact on the fourth standard preclude summary judgment in this case under the provisions of the HCQIA.

There are genuine issues of material fact on all four of the standards that must be met for qualified immunity under the HCQIA. The factual questions must be resolved by a jury before any legal determination as to whether immunity under the HCQIA should be granted. If there is a factual question on which the existence of the immunity is dependent, then an award of summary judgment on the basis of HCQIA immunity must be postponed until, or after, trial. The subsidiary factual questions controlling the existence of immunity should be submitted to the jury by means of special interrogatories. *Crosby v. Hospital Authority of Valdosta*, 873 F.Supp. 1568, 1581-82 (M.D. Ga. 1995). Therefore, the District Court properly denied Defendants' Motion for summary judgment based on HCQIA immunity.

IV. HCQIA IMMUNITY SHOULD PROPERLY BE SUBMITTED TO THE JURY

The HCQIA statutory scheme contemplates a role for the jury, in an appropriate case, in deciding whether a defendant is entitled to HCQIA immunity. The weight of authority from the courts reflects this proposition. *See Gabaldoni v. Washington Cty. Hosp.*, 250 F.3d 255, 260 (4th Cir.2001) (The standard for determining whether summary judgment should be granted to defendants is whether a reasonable jury, viewing all facts in a light most favorable to the plaintiff, could conclude that plaintiff has shown, by a preponderance of the evidence, that defendants actions fell outside the scope of Section 11112(a.); *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 912 (8th Cir.1999); *Brader v. Allegheny Gen. Hosp.* 167 F.3d 832, 839 (3d Cir.1999); *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 n. 9 (10th Cir.1996). This jury involvement is not limited to disputes over subsidiary issues of fact. Rather, a jury could be asked to decide the ultimate issues of reasonableness set forth in the immunity statute.

In this allocation of responsibility between judge and jury, there is an important difference between qualified immunity under the HCQIA and other forms of qualified immunity. Qualified immunity determinations involve pure questions of law, subject to resolution by the judge not the jury, while HCQIA immunity determinations are to be resolved by a jury if

they cannot be resolved at the summary judgment stage. There is no pure legal question involved in the immunity analysis under the HCQIA. Moreover, immunity under the HCQIA is immunity from damages only, whereas other qualified immunity, such as under § 1983 is “an *immunity from suit* rather than a mere defense to liability that is effectively lost if a case is erroneously permitted to go to trial. Hence, there is less reason under the HCQIA to exclude the jury entirely from involvement with the dispositive determinations.

The United States Supreme Court has suggested a helpful functional approach in deciding the proper allocation of functions between judge and jury:

“At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”

Miller v. Fenton, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

Such a functional inquiry involves several factors, including whether the issue falls within the common experience of jurors, whether its resolution involves the kinds of decisions traditionally entrusted to jurors, and whether a judgment of peers is desirable.” William W. Schwarzer, Alan

Hirsch, and David J. Barrans, *The Analysis and Decision of Summary Judgment Motions* 18-19 (1991) (reprinted at 139 F.R.D. 441). Although peer review actions are not within the common experience of jurors, they are not so esoteric that they cannot be fairly evaluated by jurors, perhaps with the assistance of expert witnesses. Also, jurors are routinely asked to evaluate the quality of medical care in medical malpractice cases. As this case illustrates, the quality of medical care is often at the core of a peer review dispute under the HCQIA. Therefore, the jury stands in the best position to resolve factual questions and should not be excluded from immunity determinations under the HCQIA. *Singh, M.D., v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25, 33-36 (1st Cir. 2002).

In this case, the District Court properly concluded that there are genuine issues of material fact relating to whether the requirements for HCQIA immunity were met by the defendants when they decided to summarily revoke Dr. Summers' privileges to practice medicine. HCQIA immunity is a unique form of qualified immunity, where the jury has a proper role to play in deciding the questions of reasonableness under the statute. This Court should affirm the District Court's ruling that genuine issues of material fact exist and allow the jury to perform its role in deciding the facts necessary to resolution of the immunity issue.

CONCLUSION

Dr. Summers' privileges to practice medicine within defendants' health care system were summarily revoked without affording him any real notice or opportunity to defend the allegations made against him. Defendants claim that they should be entitled to immunity for their actions as a matter of law. The District Court, however, ruled that there are genuine issues of material fact, and summary judgment on the immunity question should be denied.


The District Court's ruling should be affirmed. Dr. Summers has presented a preponderance of evidence from which a reasonable jury could determine (1) that defendants did not act in the reasonable belief that their actions were in furtherance of quality health care; (2) that defendants made no reasonable effort to obtain the facts of the matter; (3) that defendants gave no adequate notice or hearing procedures to the Dr. Summers; and (4) that defendants did not act in the reasonable belief that their actions were warranted by the facts known after any reasonable effort to obtain facts and after meeting the requirements of notice and a fair hearing. The jury should be permitted to decide the genuine factual issues presented by Dr. Summers' evidence.

Therefore, the Plaintiff-Appellee, Dr. William Summers, would

respectfully request this Court affirm the District Court's denial of Defendants-Appellants' Motion for Summary Judgment based on HCQIA immunity.

RESPECTFULLY SUBMITTED,

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I hereby certify that I have mailed a true copy of the foregoing Answer Brief to the following counsel of record this 23rd day of January, 2009:

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