IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WILLIAM K. SUMMERS, M.D.,

Plaintiff-Respondent,

vs.

Ct. App. No. 28,605
(D. Ct. No. CV-2006-10054)

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

Defendants-Appellants.

Appeal from the Second Judicial District Court
Bernalillo County, New Mexico

The Honorable Nan G. Nash

BRIEF IN CHIEF

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Jocelyn C. Drennan
Edward Ricco
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
FAX: (505) 768-7395

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

STATUTES

Introduction

The Court granted interlocutory review to determine whether the district court properly denied a threshold immunity defense under federal law which would bar this retaliatory action against medical peer reviewers. On the summary judgment record before it, the district court found that one of the requirements for immunity under the federal Health Care Quality Improvement Act ("HCQIA") was not met. The meaning of the requirement – "reasonable effort to obtain the facts," see 42 U.S.C. § 11112(a)(2) – presents an issue of first impression in New Mexico.

The district court misapprehended and therefore misapplied section 11112(a)(2). The court's reading is at odds with the legislative design and the conclusions of other courts. The district court took an incomplete view of the relevant evidence, imposed burdens on medical peer reviewers not required by law, and disregarded the standard for judicial review of peer review decisions under the HCQIA. This erroneous interpretation of the statutory immunity requirement should be rejected.

This case can be disposed of without further delay. The undisputed material facts show that the Appellants – Lovelace Health System, Inc. ("Lovelace") and Ardent Health Services, L.L.C. ("Ardent") – are entitled to summary judgment on immunity grounds as a matter of law.

Summary of Proceedings

Nature of the Case

Following two patient complaints and peer review proceedings, the medical staff privileges of William Summers, M.D. were terminated. Dr. Summers filed the lawsuit at hand. This case calls for a determination of the legal standard a court should apply in analyzing whether the record before it shows that a "reasonable effort to obtain the facts" was made, as required to obtain immunity under federal law, see 42 U.S.C. § 11112(a)(2).

Course of Proceedings and Disposition Below

William Summers, M.D. filed a complaint for damages against Lovelace, Ardent, and William J. Mitchell, M.D. ("Dr. Mitchell") arising out of the termination of his medical staff privileges. (R.P. 1.) The defendants filed an answer which raised HCQIA immunity as a defense. (R.P. 35.) Dr. Summers dismissed Dr. Mitchell without prejudice. (R.P. 46.) Lovelace and Ardent moved for summary judgment on HCQIA and other immunity grounds. (R.P. 75.) The parties fully briefed the motion (R.P. 80, 84, 87), and the district court held a hearing (2/26/08 Tr.).[1] The district court later entered an order denying the motion.

---

[1] The parties filed their summary judgment briefs and accompanying exhibits under seal in the district court. Such materials, along with the summary judgment hearing transcript, appear in the record on appeal in sealed envelopes. (Mot. Seal Documents Appeal, filed 5/20/08; Notice Completion & Transmission Record Proper & Five Sealed Envelopes, filed 6/25/08).

(R.P. 94.) The court amended its order to allow Lovelace and Ardent to apply for interlocutory review of its ruling. (R.P. 108.) This Court granted interlocutory review and assigned the case to its general calendar. (6/23/08 Order.)

Summary of Relevant Facts

William Summers is a physician who held medical staff privileges at four affiliated hospitals (the "Sandia Hospitals"). (R.P. 80, Defs.' Summ. J. Br. at p. 2, MF 1.)[2] Dr. Summers held privileges in internal medicine and psychiatry. (Id.) Many of his patients required care for both medical and psychiatric issues. (Id.) Other physicians asked Dr. Summers to consult in the evaluation and treatment of their patients. (Id.)

The quality of care provided by members of the medical staff was subject to an ongoing system of peer review under the hospitals' medical staff bylaws. (Id., MF 2.) Under the bylaws, a request for corrective action could be made to the Medical Executive Committee ("MEC"), the physician governing body of the medical staff. (Id.) Such a request could lead to further investigation of the concerns by an ad hoc committee, a hearing panel, and an appellate review

---

[2] The district court clerk assigned global record cites to the summary judgment briefing materials filed under seal. (E.g., R.P. 80 encompasses defendants' summary judgment brief and the accompanying exhibits). To facilitate this Court's review while avoiding unduly lengthy citations, this brief cites to the record proper and to specific sections of the briefs. To the extent the brief cites to the parties' statements of material facts ("MF"), such facts identify the portions of the record and accompanying exhibits relied upon for support.

committee. (See generally id. at pp. 4-13.) The Board of Trustees ("Board") had ultimate authority over staff privileges. (Id. at p. 2, MF 2.)

In 2002, the president of the medical staff of the Sandia Hospitals asked the MEC to investigate a complaint concerning Dr. Summers that had been made by a female patient ("Patient A") and her mother. (Id. at p. 3, MF 3.) The patient's primary care physician had asked Dr. Summers to see the patient to assess whether her use of Prozac might account for her headaches and to identify an outpatient therapy referral for treatment of her depression. (Id.)

The patient described her encounter with Dr. Summers in a letter to the hospital:

> I feel it is important to write . . . as painful as it to recall . . . so that nothing like this happens to anyone else at this mans hands or mouth. I feel like I was emotionally raped by him.
>
> . . . .
>
> He started off by saying, "My problem is that I need some sport F'ing . . . and that I need to go out in the world and experience random sex with different people. Then he said that there [are] [sic] 4 types of dating and sport "F'ing." They were like group sex, a lesbian experience, . . . an affair with a friend and someone I work with.
>
> . . . .
>
> He said that I need to experience fun things like group sex and . . . cocaine . . . . He told me that he was going to take me off the Prozac because one of the side effects of it was that it decreases your sex drive.
>
> . . . .

> Instead of help from [a] [sic] Doctor, I felt like I had been beaten up mentally and emotionally all over again . . . .
>
> . . . .
>
> It has been recommended that I speak with another [d]octor and I find that very hard to think of at this point, with fear of what one will say . . . .

(Id., MF 4.) Shortly after the encounter, the patient had promised to write a letter detailing her encounter with Dr. Summers. (Id. at p. 4, MF 5.)

The patient's complaint also was documented in a staff email sent a day after the encounter. (Id.) The email describes the encounter in similar terms. (Id.) It also mentions that the patient felt that Dr. Summers' approach bordered on sexual harassment. (Id.)

When initially asked, Dr. Summers admitted that he had made the remarks attributed to him. (Id., MF 6.) He also admitted that he had advised the patient, in part, that she might benefit from experimenting with "f_cking for lust" to resolve jealousy that she might be feeling towards her unfaithful husband. (Id.) Dr. Summers defended the approach, explaining that he felt that the patient might be in denial that she was using physical complaints to mask psychiatric issues related to her personal life and that it was appropriate to "try to shock [her] into hearing the issues" to make sure that she followed up with outpatient therapy. (Id.)

The MEC voted to form a physician ad hoc committee to investigate the complaint and notified Dr. Summers. (Id., MF 7.) The ad hoc committee met

twice with Dr. Summers to discuss the complaint. (Id. at pp. 4-5, MF 8.) Both before and after the meetings Dr. Summers submitted written statements disputing the patient's version of the facts and explaining his use of what he called "here and now" therapy with the patient. (Id. at p. 5, MF 8.)

The committee submitted a report to the MEC with findings and recommendations. (Id., MF 10.) The findings reflect that Dr. Summers had defended the care by reiterating his belief that the patient would benefit from an "emotional shock" and by denying that that he had used "the 'f-word' as often as alleged" or advocated "promiscuous sex or illicit drug use." (Id.) The committee found that Dr. Summers' "aggressive therapeutic approach" and the "language used" were "offensive, insensitive to the patient and demonstrated an error in clinical judgment (in the context of [the] patient's history)" which "border[ed] on abuse." (Id.) It also identified deficiencies in Dr. Summers' charting for the consultation. (Id.)

Dr. Summers agreed to stop use of "here and now" therapy with hospital patients and was told, among other things, to dictate detailed notes of all future psychiatric consultations. (Id., MF 11.) At that point, the MEC did not take any action to restrict his privileges. (Id.)

In October 2003, William J. Mitchell, M.D., the Chief Medical Officer for the Sandia Hospitals, asked the MEC to investigate "[n]ew allegations of improper

behavior from a [female] patient" ("Patient B") concerning sexual comments by Dr. Summers. (Id. at p. 6, MF 12.) An attending physician had asked Dr. Summers to provide a "psych consult" on the patient who had presented with symptoms of a drug overdose. (Id.) The patient's medical chart reflected that she had sought treatment for a Vicodin addiction and had been prescribed methadone in response and that she suffered from severe depression. (Id.)

The patient's allegations were documented in notes taken by a psychiatric case worker. (Id., MF 13.) The case worker had called the patient in response to a report that the patient, then at home, might be suicidal. (Id.) The notes state:

> [Patient] states she was released prematurely – is feeling suicidal – begins crying . . . saying that a Dr. Summers came into her room . . . and was making sexual comments such as:
>
> "You have no kids, no husband, you must be swinging the other way . . . ."
>
> "Meth . . . . How many sexual favors did you have to do . . . ."
>
> "I bet you don't have orgasm . . . ."
>
> . . . .
>
> When pt . . . was told to come to ER – she became frightened & said she was afraid to see Dr. Summers.

(Id.)

The patient's complaint also was documented in notes in the patient's chart made by Dr. Summers at the time of her hospitalization. (Id. at p. 7, MF 15, MF 16.) The first entry reflects that Dr. Summers took a patient history. (Id., MF 16.)

The second entry, dated the next day, added: "the [patient] took sexual [history] . . . out of context from interview yesterday" in reporting it to hospital staff. (Id.)

The MEC discussed Dr. Mitchell's request for an investigation. (Id., MF 17.) Calvin Dudley, M.D., who was the chair of the MEC and who had participated in the 2002 peer review, outlined the issues involved in the peer review, including those relating to the first female patient. (Id.) Dr. Mitchell had reported that the second female patient had refused to come to the emergency room after being asked to do so by the case worker because of her fear of encountering Dr. Summers. (Id., MF 14.) He also had reported that the patient, the case worker, and the director of psychiatry all viewed the statements as inappropriate and sexually harassing. (Id.) The MEC voted to form an ad hoc committee to conduct the investigation. (Id., MF 17.)

Dr. David Clanon, an internal medicine physician who was chair of the case review committee, and Dr. Gail Thaler, a psychiatrist and member of the same committee, agreed to serve on the ad hoc committee. (Id.) They were asked to do a chart review of Dr. Summers' recent patient care and to report on whether his care appeared appropriate. (Id., MF 18.) They reviewed "all . . . charts available for the [prior] several months" for cases in which Dr. Summers had "either attended for psychiatry or medicine or consulted for psychiatry." (Id.) The review encompassed 11 patient charts for the preceding nine months. (Id.) They did not

interview Dr. Summers, the case worker, or the patients as part of their review. (Id. at p. 8, MF 18.)

In a written report to the MEC, Dr. Clanon and Dr. Thaler identified "a relatively high incidence of questionable medical decisions or treatments" which they felt were "troublesome" and suggested that Dr. Summers' patient care might "not be up to standard." (Id., MF 19.) They summarized their concerns in 10 findings. (Id.) The following finding addressed the second female patient complaint:

> 3. Possible usage of inappropriate, sexually explicit language with a patient during a psychiatry consultation. No dicated consult report.

(Id.)

The MEC reviewed and discussed the report, with the understanding that after the 2002 peer review Dr. Summers was expected to avoid sexually explicit language in treating patients and to carefully document his patient interactions. (Id., MF 20.) The MEC, as explained by Dr. Dudley, was surprised by the findings in the report: "[There] seemed to be a very large number of identified [internal medicine] problems" which "were not little problems" and which "[had] not necessarily [been] addressed, and certainly not addressed in a fashion that was clearly understandable by chart review." (Id.) The physicians on the MEC "unanimously felt . . . that there was enough troublesome information . . . that

[they] needed to act, and act at that time" to prevent imminent harm to patients. (Id.) They voted to (1) summarily suspend Dr. Summers' internal medicine privileges and (2) recommend that his psychiatric privileges be restricted to prevent him from treating psychiatric problems with "sexually charged language." (Id. at pp. 8-9, MF 20.) Dr. Dudley informed Dr. Summers about the 2003 ad hoc committee, the ad hoc committee's findings, and the actions taken by the MEC in response. (Id. at p. 9, MF 21.) He also informed Dr. Summers about his right to a trial-type hearing on the actions and his hearing rights. (Id.)

Dr. Summers, through counsel, pursued such review. (Id., MF 22.) Prior to the hearing, the MEC provided Dr. Summers with documents, including copies of its records relating to the 2002 and 2003 peer review inquiries and the 11 patient charts reviewed by the 2003 ad hoc committee. (Id.) The MEC also provided a list of its potential exhibits and witnesses. (Id.)

The hearing, documented in a 244-page transcript and 21 exhibits, took place over the course of two sessions. (Id., MF 23.) Dr. Summers and his counsel attended the hearing. (Id.) The hearing was presided over by the Professional Review Committee ("PRC"), a separate panel of physicians appointed to hear the case. (Id., MF 22.) The physician panelists had access to the 2002 and 2003 peer review records and the 11 patient charts. (Id. at p. 10, MF 24.)

The MEC called Dr. Mitchell, Dr. Dudley, Dr. Clanon, and Dr. Thaler as witnesses. (Id.) Each was subject to cross-examination by Dr. Summers' counsel and to questioning by the physician panelists. (Id.) Dr. Summers testified on his own behalf but did not call any other witnesses. (See id.; see also id. MF 26.) Both then and in a post-hearing brief Dr. Summers was allowed to put as much information as he desired about each of the cases into the record. (Id., MF 24.)

Dr. Thaler was asked about the second female patient complaint. (Id., MF 25.) She testified that if Dr. Summers made the sexually explicit comments that the patient reported, the comments were "not appropriate . . . to use with a patient." (Id.) She further testified that she is not aware of "any evidence" that use of sexually explicit language with patients "is appropriate or helpful." (Id.)

Dr. Summers also was asked about the second female patient complaint. (Id., MF 26.) He testified that he had only taken a medical history and that he had not provided therapy to the patient. (Id.) He denied the statements attributed to him, although he admitted that the history he took addressed sexual subject matter. (Id.) He testified that sexually explicit questions had to be asked to diagnose the patient's condition. (Id.) He challenged the veracity of the patient. (Id.)

After the hearing, the PRC issued a report in which it made findings and recommendations. (Id., MF 27.) The physician panelists found that testimony from the hearing undercut certain internal medicine findings in the 2003 ad hoc

committee's report and reported that Dr. Clanon nevertheless remained concerned about Dr. Summers' internal medicine practices. (Id.) They also reported Dr. Thaler's testimony about the inappropriateness of the sexual remarks attributed to Dr. Summers. (Id.) They identified such remarks as their "primary" concern. (Id.) In doing so, they cited documents written to the hospital in 2002 by the first patient and her doctor relating to Dr. Summers, pointing out, among other things, that the patient had felt "emotionally raped" by Dr. Summers' use of sexually explicit language. (Id. at p. 11, MF 27.) See supra p. 4. They also cited the second patient's complaint and her reported fear of Dr. Summers' sexually oriented questions and statements. (R.P. 80, at p. 11, MF 27.) The evidence established "a pattern," which concerned them. (Id.) The physicians on the panel recommended that the summary suspension of Dr. Summers' internal medicine privileges remain in place and that his psychiatric privileges also be suspended. (Id.)

The MEC informed Dr. Summers about the findings and recommendations, its adoption of the recommendations, and his appellate hearing rights. (Id., MF 28.) Dr. Summers, with counsel, pursued such review. (See id.)

The Appellate Review Committee ("ARC"), was comprised of the chief executive officers of three of the four Sandia Hospitals. (See id., MF 29.) They had before them the record from the earlier peer review proceedings. (See id.; see

also id. at pp. 12-13, MF 33.) They also had appellate briefs submitted by Dr. Summers and the MEC. (Id. at p. 11, MF 29.)

At the outset of the hearing Dr. Summers' counsel agreed that all of the evidence relevant to Dr. Summers' defense had been presented to the PRC and was in the record. (Id.) At a later point in the hearing Dr. Summers' counsel affirmed that the documents in the record included all the information which Dr. Summers claimed should have been investigated. (Id. at pp. 11-12, MF 30.) Dr. Summers, who was present, did not disagree. (See id. at pp. 11-12, MF 29, MF 30.)

After the hearing, aware of the gravity of the corrective actions under consideration, the ARC remanded the case to the PRC for supplemental findings of fact. (Id. at p. 12, MF 31.) The physicians on the PRC panel clarified their understanding that Dr. Summers saw patients who presented with combinations of internal medicine and psychiatric issues and their belief that Dr. Summers' privileges in both areas therefore needed to be considered together. (Id., MF 32.) They reiterated that the evidence showed that Dr. Summers had "a pattern of using inappropriate sexually explicit language with his patients" and clarified that it also showed that such language could leave patients feeling "fearful of future treatment." (Id.) They found that Dr. Summers' use of sexually explicit language could result in imminent danger to patients' health whether the patients were seen by Dr. Summers for internal medicine or psychiatric issues. (Id.)

After it reviewed the supplemental findings and completed its own review of the peer review record, the ARC issued a report in which it made findings and recommendations. (Id., MF 33.) The hospital administrators found that after the 2002 peer review Dr. Summers had continued to use sexual language inappropriately. (Id.) They observed that the most recent patient complaint had not involved a therapy session but instead the taking of a medical history. (Id.) They found that the explanations offered by Dr. Summers to account for the female patient complaints were "not . . . credible." (See id.) They agreed with the PRC that Dr. Summers' "pattern of inappropriate use of sexually explicit language during interactions with patients" could result in imminent danger to their health whether Dr. Summers saw the patients for internal medicine or psychiatric issues. (See id. at p. 13, MF 33.) They recommended that Dr. Summers' internal medicine and psychiatric privileges be permanently suspended. (Id.)

The ARC's recommendations went to the Board, which adopted them. (See id., MF 34.) Dr. Summers was informed about the Board's actions. (Id.)

In response, Dr. Summers sued Lovelace, Ardent, and Dr. Mitchell. (R.P. 1.) The complaint alleged that the defendants had initiated the peer review "with malice" and that the subsequent proceedings were a "sham." (Id.) The complaint sought money damages. (Id.) Lovelace and Ardent moved for summary judgment

on the ground that the immunity from damages afforded by the HCQIA provided a complete defense to the action. (R.P. 75, 80.)

The HCQIA protects doctors and hospitals from monetary liability arising out of medical peer proceedings if the record shows that four objective criteria have been met. See Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1333 (10th Cir. 1996). Such immunity attaches if the record shows that an adverse privileging action was taken:

> (1) in the reasonable belief that the action was in the 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). The legal standard applicable to the second requirement and, consequently, the adequacy of defendants' showing in support of summary judgment, are at issue in this appeal.

In addressing section 11112(a)(2), Lovelace and Ardent explained that the standard requires a court to look at the totality of the fact-finding efforts leading up to the adverse privileging action and why the record in this case supports a finding that reasonable efforts were made to obtain the facts. (R.P. 80, p. 19.) They

explained that the fact-finding process had begun in 2002 in response to Patient A and that it had been resumed in 2003 in response to Patient B. (Id. at pp. 19-20.) They explained how the record relating to the subsequent MEC, PRC, and ARC proceedings showed that the fact-finding efforts had been comprehensive and that no area supportive of Dr. Summers' position had been left unexplored. (Id. at pp. 20-21.) They also explained that to the extent accounts differed, responsibility for making credibility determinations lay with the peer reviewers in their role as fact-finders. (See id. at pp. 20-21.)

In his response, Dr. Summers disputed these points. (R.P. 84.) He asserted that the adverse actions had been taken solely on the basis of allegations relating to Patient B and the case worker's notes. (Id. at p. 3, ¶ 9; id. p. 4, ¶ 11; id. pp. 15-16.) He pointed out that neither Patient B nor the case worker had been interviewed or had testified at the PRC hearing. (Id. at pp. 15-16.) He denied that he had said anything inappropriate to Patient B and attacked the trustworthiness of Patient B and the case worker whom he claimed had reasons to fabricate accounts against him. (Id. at p. 16.)

At the summary judgment hearing, the district court focused on the issues raised by Dr. Summers. The district court indicated that notwithstanding the peer review involving Patient A, it was of the view that the adverse privileging actions had been taken solely on the basis of the allegations surrounding Patient B.

(2/26/08 Tr. at 39.) Defense counsel reminded the court that the standard called for the court to take into account the totality of the fact-finding efforts and reviewed why the complaints made by Patients A and B warranted the actions taken. (Id. at 40-41.) The court responded:

> And all of that is absolutely true if in fact what Patient B says was true . . . . Not only if what Patient B said was true, but if Patient B accurately reported it to the caseworker who then accurately reported it. And the fact that neither the case worker, [or] Patient B . . . was spoken to, gets me back to this question of, was that reasonable?

(Id. at 41.) Defense counsel replied that the court appeared to be disregarding Dr. Summers' stipulations before the ARC that the record as it stood included all of the information bearing on his defense and reminded the court that the objective standard of review foreclosed the court from reweighing the evidence or substituting its judgment for that of the peer reviewers. (Id. at 41-43.)

Asked by the court to respond, Plaintiff's counsel dismissed the ARC stipulations and expanded upon the court's concerns. (Id. at 43-45.) Plaintiff's counsel repeated the attacks made by Dr. Summers on the trustworthiness of Patient B and the case worker and characterized their accounts as inadmissible hearsay. (Id. at 43-45; see also id. at 15-16.) Plaintiff's counsel argued that the peer reviewers had wrongly credited their accounts over Dr. Summers' denials of wrongdoing. (Id. at 43-44.) In reply, defense counsel pointed out that Dr. Summers had aired the same arguments during the peer review hearings and that

those charged with making the credibility determinations had rejected the arguments. (Id. at 45.)

At the end of the hearing, the court reserved ruling. (Id. at 46.) It later entered an order denying summary judgment on the ground that "[a] genuine issue of material fact exists regarding the reasonableness of the efforts taken by Defendant[s] to obtain the facts of the matter during the professional review action." (R.P. 94, 108.) The district court certified its order for an interlocutory appeal, which this Court accepted. (R.P. 108; 6/23/08 Order.)

Question Presented

Whether the district court correctly apprehended and applied the legal standard for immunity set forth under 42 U.S.C. § 11112(a)(2), which calls for a determination whether a hospital, prior to taking a medical peer review action affecting a physician's privileges, made "a reasonable effort to obtain the facts."

Standard of Review

"The denial of [d]efendants' motion for summary judgment presents a question of law that this Court reviews de novo." Wilson v. Fritchsy, 2002-NMCA-105, ¶ 10, 132 N.M. 785, 55 P.3d 997. The interpretation or construction of a statute presents a question of law subject to de novo review. State v. Alvarado, 1997-NMCA-027, ¶ 6, 123 N.M. 187, 936 P.2d 869. More particularly, whether the facts of a case give rise to a statutory immunity "is a legal question . . .

[this Court] review[s] de novo." Campos de Suenos, Ltd. v. County of Bernalillo, 2001-NMCA-043, ¶ 10, 130 N.M. 563, 28 P.3d 1104.

"Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. A material fact is one that could affect the outcome of the case under "the substantive law governing the dispute." See Farmington Police Officers Ass'n v. City of Farmington, 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204. "[Where] the material facts are not in dispute, only their legal effect . . . summary judgment may be properly granted." Van de Volde v. Volvo of Am. Corp., 106 N.M. 457, 458, 744 P.2d 930, 931 (Ct. App. 1987).

Preservation of the Issue

The issue was preserved by the parties' summary judgment briefs and oral arguments. (R.P. 80, 84, 87; 2/26/08 Tr.).

Argument

THE DISTRICT COURT ERRED IN DENYING IMMUNITY TO APPELLANTS UNDER THE FEDERAL HEALTH CARE QUALITY IMPROVEMENT ACT

A. The HCQIA Provides Immunity from Damages to Medical Peer Reviewers and Institutions That Satisfy the Statute's Objective Criteria.

The HCQIA has been construed and applied numerous times in the federal courts and on a number of occasions in state courts as well. A broad, common understanding has emerged regarding the standards that a court should apply when analyzing whether the immunity criteria are met. These standards are informed by the statute's background and purpose.

"Congress passed the [HCQIA] to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior." Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 632 (3rd Cir. 1996) (internal quotation marks & citations omitted). Aware that the threat of litigation "unreasonably discourages physicians from participating in effective professional peer review, Congress deemed it essential . . . to provide . . . immunity from damages actions for hospitals, doctors and others who participate in professional peer review proceedings." Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1333 (10th Cir. 1996) (internal quotation marks & citations omitted); see also Mathews v. Lancaster Gen. Hosp., 883 F. Supp.

1016, 1025-26 (E.D. Pa. 1995), aff'd, 87 F.3d 624 (3rd Cir. 1996) (corporate defendants encompassed).

In furtherance of these objectives, Congress drafted the act to enable defendants "to file motions to resolve . . . immunity . . . as early as possible in the litigation process." Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1332 (11th Cir. 1994); accord Zisk v. Quincy Hosp., 834 N.E.2d 287, 294 n.7 (Mass. App. Ct. 2005) ("[T]he vast majority of suits . . . should be resolved at or before the summary judgment stage."); see also 42 U.S.C. § 11111(a)(1) (immunity extends to state law claims for damages). "HCQIA immunity" therefore presents "a question of law for [a] court to decide" and one that "may be resolved whenever the record in a particular case [is] sufficiently developed." Bryan, 33 F.3d at 1332.

Congress set forth the criteria that a defendant must satisfy in 42 U.S.C. § 11112(a). Supra p. 15; see also Bryan, 33 F.3d at 1321-22 ("[I]f a professional review action . . . meets certain due process and fairness requirements, then those participating in [the] review process [are] not liable under any state or federal law for damages for the results."). It also included a presumption that all of the criteria are met, see 42 U.S.C. § 11112(a). "Therefore, [a plaintiff] can overcome HCQIA immunity at the summary judgment stage only if he demonstrates that a reasonable jury could find that the defendants did not conduct the relevant peer review

action[] in accordance with one of the HCQIA standards." Singh v. Blue Cross/Blue Shield of Mass., 308 F.3d 25, 32 (1st Cir. 2002).

In keeping with the legislative goals and understanding that a court evaluating a claim of HCQIA immunity effectively occupies the position of an appellate court reviewing an administrative record, courts apply "an objective standard" to assess whether the requisite showing has been made. Brown, 101 F.3d at 1333. "[A]ssertions of hostility" or "bad faith" are therefore "immaterial." Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992). Moreover, in examining the peer review record, it is not the role of a court "to reweigh the evidence regarding the renewal or termination of medical staff privileges," that has already been assessed by medical and administrative professionals. Bryan, 33 F.3d at 1337 (quotation marks & citation omitted).

The district court appears to have understood generally the background and purpose of the HCQIA. It is in applying the HCQIA – and specifically the requirement of a "reasonable effort" to obtain the facts – that the court committed error.

B. The District Court Misapprehended the Standard for HCQIA Immunity in Concluding That an Issue Existed as to Whether the Hospital Made a Reasonable Effort to Obtain the Facts Concerning Dr. Summers' Sexually Charged Interactions with Patients.

From the arguments made by Plaintiff and the district court's remarks and written order, it appears that the court believed that there was reason to question

whether the hospital's fact-finding effort was "reasonable" within the meaning of the HCQIA where neither Patient B nor the caseworker had been interviewed or had testified during the peer review proceedings. The court's determination that the HCQIA's "reasonable effort" standard was not satisfied is incorrect for three reasons.

First, the district court adopted an unduly narrow focus in analyzing the question of reasonable effort. "The relevant inquiry . . . is whether the totality of the process leading up to the Board's professional review action . . . evidenced a reasonable effort to obtain the facts." Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 637 (3rd Cir. 1996) (internal quotation marks omitted); accord Manzetti v. Mercy Hosp., 776 A.2d 938, 948 (Pa. 2001) ("[W]e must examine the totality of the circumstances presented by each case."). The inquiry, placed in context, requires a court to look at the efforts made to explore the facts surrounding the concerns raised and to assess whether the record shows that the efforts as a whole resulted in a reasonably thorough explanation of the concerns. In doing so, a court should view the fact-finding efforts relating to the concerns as a continuum and take into account all the phases of review that underlie the privileging action at issue. See, e.g., Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1323-1330, 1335 (in arriving at its conclusion that 42 U.S.C. § 11112(a)(2) was met, court examined the full history of the investigations undertaken to address the

concerns raised about a physician which eventuated in review by the medical executive committee, a physician hearing panel, an appellate review committee, and termination of the physician's privileges by the governing board); see also Brader v. Allegheny Gen. Hosp., 167 F.3d 832, 834-38, 841 (3rd Cir. 1999) (internal quotations marks & citation omitted) (in also finding requirement met, court reviewed all the fact-finding efforts that had taken place and sources of information considered by each of the fact-finding bodies in arriving at their determinations); Zisk v. Quincy Hosp., 834 N.E.2d 287, 291-293, 295-96 (Mass. App. Ct. 2005) (court took similarly comprehensive view in finding that a reasonable effort to obtain the facts had been made, noting, among other things, the opportunities the fact-finding process afforded the plaintiff and his counsel to challenge the evidence in the record).

Second, the district court imposed fact-finding duties that other courts have held are not required for HCQIA immunity to attach. A peer review proceeding affords procedural protections for the affected practitioner, but it is not a trial. Peer reviewers thus may rely on documentary accounts of the sort used here. See Imperial v. Suburban Hosp. Ass'n, 862 F. Supp. 1390, 1397 (D. Md. 1993), aff'd 37 F.3d 1026 (4th Cir. 1994) ("Under 42 U.S.C. § 11112 . . . there is no prohibition against the use of hearsay in the peer review process."); see, e.g., Gureasko v. Bethesda Hosp., 689 N.E.2d 76, 81-83 (Ohio Ct. App. 1996) (summary suspension

based on patient care representatives' reports to chief medical officer regarding two instances of improper care and concerns raised during subsequent undisclosed review of 13 patient cases); accord Rooney v. Med. Ctr. Hosp., No. C2-91-1100, 1994 WL 854372 at *4 (S.D. Ohio March 30, 1994) (hospital properly relied on incident reports which were "unsigned and unsworn"; plaintiffs did not present any authority establishing that "a 'reasonable effort' to obtain facts requires sworn testimony"). Thought about in context, allowing the use of such materials makes sense. As this and other cases illustrate, patient issues not infrequently are documented in medical records by medical professionals who learn of them in performing their duties.

Moreover, to the extent accounts may differ, the immunity standard ensures that the physician has adequate opportunity to present his (or her) version of events during the fact-finding process so that peer reviewers have both sides of the story when the time comes for them to make credibility determinations. See 42 U.S.C. § 11112(a)(3), see, e.g., Zisk v. Quincy Hosp., 834 N.E.2d 287, 293, 295-96 (Mass. App. Ct. 2005) (in finding reasonable efforts had been made to obtain the facts, court observed that the process allowed the physician the opportunity to "challenge any errors" in case summaries and to raise the alleged falsity of information reported); see also Chalal v. Northwest Med. Ctr., Inc. 147 F. Supp. 2d 1160, 1166-68, 1173 (N.D. Ala. 2000) (adverse privileging action followed by

professional review hearing during which no witnesses testified but which afforded plaintiff the opportunity, during exchanges with physician panel members who had reviewed patient charts, "to put forth any and all evidence he desired" followed by review by a separate appellate committee, sufficed), aff'd, 250 F.3d 749 (11th Cir. 2001). Fact-finding efforts similar to the ones in this case are therefore considered adequate as a matter of law. See, e.g., Gureasko, Zisk, Chalal.

Third, the district court disregarded the standard for judicial review of peer review actions which applies under the HCQIA. In questioning whether the hospital could reasonably rely on patient statements recorded in documents, the district court implicitly weighed the evidence presented for review by the medical peer reviewers. The court's comments reflect that it gave credence to the claims made by Dr. Summers about the untrustworthiness of Patient B and the case worker and his position that both should have been interviewed or required to testify during the peer review proceedings to resolve where the truth lay. Supra p. 17. The court's ruling reflects that it agreed with Dr. Summers that such issues gave rise to a question of material fact as to the reasonableness of the efforts that had been made to obtain the facts. Supra p. 18. The district court thereby disregarded the principle that "assertions of hostility" or "bad faith" are "immaterial." Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992). It also disregarded the principle that the role of a reviewing court under the HCQIA is not

"to reweigh the evidence," considered by peer reviewers. Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1337 (11th Cir. 1994) (internal quotation marks & citation omitted). "[T]he intent of [the HCQIA] was . . . to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise." Id. (internal quotation marks & citation omitted).

That reluctance to second-guess professional medical and administrative judgments is well-founded, particularly in the context of this case and the HCQIA. In a medical peer review setting, courts have long recognized that they should not interfere with a fact-finding approach that was administered fairly by those responsible for ensuring that a member of the medical staff does not present a risk of harm to patients. See Shahawy v. Harrison, 875 F.2d 1529, 1533 (11th Cir. 1989). In this case, accepting Dr. Summers' view of "reasonable" fact-finding efforts would have required that Patient B testify under oath and open herself to cross-examination at the PRC hearing, an approach that hardly seems reasonable or necessary, taking into account all the circumstances surrounding her allegations and the opportunities the peer reviewers afforded Dr. Summers to present all evidence and arguments to the contrary that he wished. Supra pp. 10-11. The limited role that a reviewing court should play also effectuates the intended operation of the HCQIA. It prevents a court from stepping into the shoes of a fact-

finder who must evaluate all the evidence in deciding which evidence to credit. That allows a court to promptly dismiss a lawsuit when the other immunity criteria are met, which in turn, encourages full and candid participation in hospital peer review by individuals who might otherwise elect to remain silent or temper their remarks out of fear of reprisals in civil lawsuits. Supra pp. 20-21.

All of the preceding considerations support the view that the district court misapprehended and misapplied section 11112(a)(2). That view is in line with the legislative history, supra pp. 20-21, and the conclusions other courts have reached in construing the requirement and addressing the issues that concerned the district court, supra pp. 23-27. The totality of the circumstances standard employed by those courts and the defense is an appropriate one given the setting. It takes into account how peer review works in reality, both in terms of sources of information and ongoing review of physician performance. It assures that sufficient investigatory steps are taken to uncover information that when tested through the hearing process can be determined to be reliable enough to enable the governing body to make an informed decision. In keeping with the governing standard of review, it accords appropriate deference to the medical and administrative expertise of those involved in the process and upon whom responsibility falls on a day-to-day basis to protect patients from harm. It also supplies a uniform approach

that can be applied to the individual circumstances of each case. It is the construction this Court should adopt.

In this case, the material facts are not in dispute, only their legal effect. The parties do not disagree about the fact-finding steps taken by the various peer review bodies and the information they considered. The district court's ruling reflects that the court found that all of the other immunity requirements are met. The case, then, may be disposed of through summary judgment. Supra p. 19 (Van de Volde).

This case demonstrates a reasonable effort to obtain the facts within the meaning of the HCQIA immunity standard. Considered in their totality, supra pp. 23-24 (Mathews, Manzetti, Bryan, Brader, Zisk), the circumstances in this case show that the statutory standard was met.

The record reflects that the peer review inquiry relating to Dr. Summers began in 2002 in response to Patient A's complaint. Supra pp. 4-6. At the end of that process, the MEC thought that the necessary remedial measures were in place. Dr. Summers agreed to refrain from using sexually-charged language when seeing patients and to thoroughly document his patient interactions. Supra p. 6. Less than a year later, however, Patient B made a similar complaint, that renewed the MEC's concerns. Supra pp. 6-7. With the 2002 peer review inquiry as background, the MEC appointed a new ad hoc committee to conduct a patient chart review and to

report on the quality of Dr. Summers' more recent care. Supra p. 8. Two physicians trained in the same fields as Dr. Summers conducted the review. Supra p. 8. They raised additional questions about his practice. Supra pp. 8-9.

During the PRC proceedings that followed, the issues were carefully explored by a different panel of physicians who undertook their own review of the peer review record relating to Dr. Summers. Supra pp. 10-12. During the hearing proceedings Dr. Summers was accorded the opportunity to present all the evidence and arguments deemed pertinent to his defense. Supra pp. 10-11. Some of the internal medicine concerns were laid to rest. Supra pp. 11-12. With respect to Patients A and B, the task fell to the physicians on the panel to reconcile the documentary evidence in the record before them and the testimony they had heard. Supra pp. 11-12. In their unanimous judgment, the evidence relating to Patient A and Patient B revealed a pattern of conduct by Dr. Summers involving the inappropriate use of sexually charged language with patients that was harmful to patients and that could recur if his privileges remained in place. Supra pp. 11-12.

The ARC hearing shows that no information supportive of Dr. Summers' position was left unexplored. The hospital administrators on the panel were vigilant in this regard. During the appellate hearing they twice asked Dr. Summers whether the record included all of the information relevant to his defense and twice were assured that the record was complete. Supra pp. 12-13. In an abundance of

caution, before taking any action, they remanded the case to the PRC to ensure that they fully understood the factual basis for the PRC's recommendations. Supra p. 13. After receiving such findings, they undertook their own assessment of the full peer review record and made their own findings. Supra p. 14. They, too, found a pattern of harmful conduct on the part of Dr. Summers that could be repeated if he continued to hold medical staff privileges. Supra p. 14.

In the end, what emerges is the understanding that Dr. Summers' "actual focus is on his disagreement with the conclusions reached" by the peer reviewers which he "has attempted to bootstrap into an argument that the [d]efendants failed to make a reasonable effort to obtain the facts." Deming v. Jackson-Madison County Gen. Hosp. Dist., 553 F. Supp. 2d 914, 928 (W.D. Tenn. 2008). The record undoes his attempt, and the HCQIA forecloses his argument. The record shows that Dr. Summers had ample opportunity to present all the information bearing on his defense and "a careful and thorough review of all the evidence" by the PRC and ARC. Zisk v. Quincy Hosp., 834 N.E.2d 287, 296 (Mass. App. Ct. 2005). The HCQIA requires nothing more. Supra pp. 23-27. Because the "reasonable effort" standard was met and, as the district court found, the other elements of HCQIA immunity also were satisfied, Lovelace and Ardent were entitled to summary judgment.

Conclusion

Congress intended immunity to be decided on a pretrial motion like this one. Supra p. 21 (Bryan). The record shows beyond genuine dispute that the peer reviewers reasonably investigated the issues regarding Dr. Summers and that all the information Dr. Summers claims should have been taken into account emerged during the fact-finding process. The other requirements for HCQIA immunity also were met. Accordingly, this Court should reverse the district court's denial of immunity and instruct the district court to enter an order dismissing the case with prejudice upon remand.

Respectfully submitted,

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

By _____
Jocelyn C. Drennan
Edward Ricco
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
FAX: (505) 768-7395

Attorneys for Appellants

CERTIFICATE OF SERVICE

We certify that a copy of the foregoing pleading was served upon

Alfred L. Green, Jr., Esq.
Neil R. Blake, Esq.
Emily A. Franke, Esq.
Butt Thornton & Baehr P.C.
P.O. Box 3170
Albuquerque, NM 87190-3170

by first-class mail this 6th day of November, 2008.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By _____
Jocelyn Drennan