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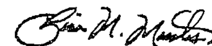

WILLIAM K. SUMMERS, M.D.,

Plaintiff-Appellee,

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

REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 15-page limit set forth in Rule 12-213(F)(2). As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 4,103 words. The brief was prepared and the word count determined using Microsoft Word Program 10.0.2.2000.

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Introduction

In his answer brief, Dr. William Summers proceeds as if the district court had ruled that there are genuine factual issues as to all four of the statutory criteria for immunity under the Health Care Quality Improvement Act ("HCQIA"). (See, e.g., Answer Br. at 1 ("The District Court . . . ruled that there are genuine issues of material fact as to whether defendants met the reasonableness standards imposed . . . by the HCQIA."); id. at 20 ("There are genuine issues of material fact on all four of the standards").) This is not so. The district court ruled in favor of Defendants Lovelace Health System, Inc., and Ardent Health Services L.L.C., ("Defendants") on the first, third, and fourth elements of HCQIA immunity. (See Br. in Chief at 18.) The district court found a genuine issue of fact only with regard to the second element.

The district court certified and this Court agreed to review the ruling on the second element. The brief in chief focuses on the certified issue: did the district court err in concluding that a factual issue exists as to the second requirement for immunity under the Health Care Quality Improvement Act ("HCQIA") – whether Defendants made "a reasonable effort to obtain the facts," during the medical peer review proceedings concerning Dr. Summers. See 42 U.S.C. § 11112(a)(2).

This reply addresses, first, the only issue properly before this Court. MRC Properties, Inc. v. Gries, 98 N.M. 710, 711, 652 P.2d 732, 733 (1982) (only

question certified reviewed). The district court erred in holding that the totality of Defendants' efforts to determine the facts regarding Dr. Summers' interactions with patients did not meet the HCQIA standard of objective reasonableness as a matter of law, particularly when Dr. Summers participated fully in a fact-finding hearing and afterwards twice acknowledged to an appellate review panel that all the evidence he desired to present had been elicited. Point I, infra.

The reply then addresses Dr. Summers' arguments on uncertified issues, should the Court reach them. The district court correctly concluded that Defendants met the remaining HCQIA immunity requirements. Point II, infra. Summary judgment achieves the clear intent of Congress in enacting the HCQIA. Point III, infra.

Argument

I. DEFENDANTS' EFFORTS TO DETERMINE THE FACTS REGARDING DR. SUMMERS' SEXUALLY-CHARGED INTERACTIONS WITH PATIENTS MET THE HCQIA STANDARD OF OBJECTIVE REASONABLENESS AS A MATTER OF LAW.

Reading Dr. Summers' answer brief, one would hardly know that after an initial investigation the concerns regarding Dr. Summers' practice were the subject of an extensive fact-finding hearing before the Professional Review Committee ("PRC") followed by an appellate review process. (Br. in Chief at 10-14.) One would not know at all that, during the appellate review, Dr. Summers' counsel

assured the Appellate Review Committee ("ARC") that all of the evidence relevant to his defense had been presented to the PRC and was in the record. (Id. at 12-13.)

Despite these assurances, Dr. Summers now complains that the facts were insufficiently explored because the peer review action was based on hearsay. (Answer Br. at 15.) He simply ignores that fact that Dr. Clanon and Dr. Thaler testified before the PRC and were subject to cross-examination. (Br. in Chief at 11.) He presents no authority to counter Defendants' showing that documented accounts from patients and hospital personnel, even if technically hearsay, may be considered by peer reviewers without violating the HCQIA "reasonable effort" standard for factual inquiry. (Id. at 24-25.) Cf. Lee v. Lee (In re Adoption of Doe), 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (absence of cited authority justifies assumption that none exists). He fails to meet any of Defendants' arguments regarding the proper construction of the HCQIA. (Cf. Br. in Chief at 22-29.)

Dr. Summers devotes inordinate attention to the original investigation and summary suspension, which may occur under the HCQIA prior to notice and a hearing. 42 U.S.C. § 11112(c)(2). But the termination of Dr. Summers' medical staff privileges, which is the final review action at issue, occurred only after he had a full opportunity to respond at a hearing to the concerns that were raised and after he acknowledged that the opportunity to present responsive evidence was

satisfactory to him. (Br. in Chief at 12-13.) Indeed, despite his contention that the PRC hearing was "vacuous" and "futile" (Answer Br. at 8), Dr. Summers was able to convince the PRC that some of the concerns raised by the initial chart review were unfounded. (Brief in Chief at 11-12.) He also presented to the hearing panel his views as to why the version of events offered by Patient B should not be believed. (Id. at 11.) Ultimately, however, based in part on the occurrence involving Patient A, Patient B's complaint, and evidence corroborating that Dr. Summers made sexual comments upsetting to the patient while taking Patient B's history (id. at 7-8, 12), the PRC believed that Dr. Summers was unable to prevent himself from engaging in inappropriate and harmful sexually charged dialog with female patients in both his psychiatric and his internal medicine practice, necessitating termination of his privileges in both areas (id. at 12-13).

While the answer brief is short on legal authority supporting Dr. Summers' view of HCQIA immunity, it is replete with argumentative and conclusory assertions presented as fact – assertions that are insufficient to demonstrate a material factual dispute. V.P. Clarence Co. v. Colgate, 115 N.M. 471, 472, 853 P.2d 722, 723 (1993) (arguments of counsel are not evidence that can be considered on summary judgment). Moreover, Dr. Summers' argument relies heavily on his own affidavit, which is largely irrelevant and conclusory and thus doubly ineffective. Farmington Police Officers Ass'n v. City of Farmington, 2006-

NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204 (material fact is one that may affect outcome under governing standard); Hernandez v. Wells Fargo Bank N.M., N.A., 2006-NMCA-018, ¶ 10, 139 N.M. 68, 128 P.3d 496 (conclusory allegations in affidavit do not create genuine factual issue).

Most of what Dr. Summers says is immaterial. For instance, Dr. Summers implies that the peer review proceedings were a pretextual effort resulting from his conflicts with hospital administrators over patient management. (Answer Br. at 19-20.) But HCQIA immunity is based on objective factors, and allegations of pretext or improper motive are irrelevant. (See Br. in Chief at 22.) And Dr. Summers seems to think that his denials can create a material dispute regarding the correctness of the PRC's findings regarding his behavior with patients. (Answer Br. at 6, 19-20.) But the intent of the HCQIA is to accord deference to factual determinations and medical judgments made by medical professionals charged with the responsibility for peer review. (Br. in Chief at 22.) Whether the reviewers reached a correct result on a scale of absolute truth simply is not a factor bearing on their entitlement to immunity under the HCQIA. See Poliner v. Texas Health Sys., 537 F.3d 368, 378-79 (5th Cir. 2008), cert. denied, ___ U.S. __, No. 08-543, 2009 WL 129303 (U.S. Jan. 21, 2009). When the insufficiencies in Dr. Summers' response are pared away, nothing remains that could defeat summary judgment under the governing legal standard of objective reasonableness.

Because Dr. Summers places such heavy reliance on his affidavit, a more detailed examination of the affidavit and its substantive deficiencies is warranted. Paragraphs 6 through 9 of the affidavit – insofar as they allege that the 2003 Medical Executive Committee ("MEC") investigation was part of a sham cover-up of a retaliatory campaign against Dr. Summers – are immaterial under the objective standard of review that applies. (See Br. in Chief at 22.) Dr. Summers' claim that the physicians on the 2003 ad hoc committee were economic competitors also is immaterial under the HCQIA. Mathews v. Lancaster Gen. Hosp., 883 F. Supp. 1016, 1031 (E.D. Pa. 1995) (although HCQIA discourages competitors as hearing officers or panel members, "it imposes no such requirement on participants in other phases of the peer review process"), aff'd, 87 F.3d 624 (3rd Cir. 1996). The same can be said for Dr. Summers' claim that in 2003 the MEC failed to notify him that his privileges were under review. Mathews, 883 F. Supp. at 1028 (A preliminary effort to obtain the facts constitutes a "'professional review activity,' which is not separately subject to the strictures of section 11112(a)."). Paragraphs 10 and 11 of the affidavit – to the extent that they do not sound the same theme – prove immaterial in other respects. The HCQIA does not mandate interviews during a preliminary investigation, see id., and it allows a summary suspension if the physician is found to represent an "imminent danger" to patients, see 42 U.S.C. § 11112(c)(2), as was the case here (see Br. in Chief at 9-10).

Paragraph 12 of the affidavit, too, is littered with sham peer review allegations that must be disregarded. (See Br. in Chief at 22.) The allegations also are conclusory and unsupported. Supra p. 5. Dr. Summers' remaining shot – that the nature of the concerns changed as the peer proceedings progressed – is inaccurate. (Cf. Br. in Chief at 7-14.) It is also, in any event, immaterial. Lee v. Trinity Lutheran Hosp., 408 F.3d 1064, 1071-72 (8th Cir. 2005).

Once culled, the arguments and evidence upon which Dr. Summers relies do not call into question the objective reasonableness of the peer reviewers' fact-finding efforts or negate Dr. Summers' admissions that the review process allowed him to present all the arguments and evidence that he and his counsel deemed relevant during the peer review proceedings. (Cf. Br. in Chief at 13.) Dr. Summers' attack on the fact-finding efforts is actually a disagreement with the reviewers' ultimate findings. (See id. at 31.) That dispute does not give rise to a genuine issue of material fact under § 11112(a)(2). E.g., Deming v. Jackson-Madison County Gen. Hosp. Dist., 553 F. Supp. 2d 914, 927-28 (W.D. Tenn. 2008).

There is no question that Defendants' fact-finding efforts were objectively reasonable within the standard established by the HCQIA. Summary judgment is therefore proper.

II. DEFENDANTS SATISFIED THE OTHER THREE HCQIA IMMUNITY REQUIREMENTS AS A MATTER OF LAW.

Although the issues are not properly before the Court, Dr. Summers also argues that the district court incorrectly determined that Defendants satisfied the other three immunity requirements under the HCQIA. See supra p. 1. If the Court reaches the arguments, it should reject them.

To qualify for immunity under the HCQIA, the challenged review action must have been conducted:

> (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).

Dr. Summers' arguments with respect to the first and fourth "reasonable belief" elements essentially piggyback onto his argument regarding the second. (See Answer Br. at 14 ("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."); id. at 20

("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.")). These arguments fail because their premise is unsound. Point I, supra. As to the third, Dr. Summers' claim that the review proceedings were a "mere formality" (Answer Br. at 16) does him no service, because the HCQIA itself describes procedures that, if provided, are adequate as a matter of law, and those procedures were either accorded to or waived by Dr. Summers.

Dr. Summers does not explain the legal standards that apply under the first, third, and fourth HCQIA requirements, nor does he correctly analyze those requirements on the facts of this case. The following discussion remedies those shortcomings. Rather than simply relying on the unrebutted HCQIA presumption that all immunity requirements have been met, see 42 U.S.C. § 11112(a), Defendants explain below how each of these requirements was satisfied.

(1) The reviewers' belief that they were furthering quality health care was objectively reasonable.

Section 11112(a)(1) examines whether "the inquiry into [the plaintiff's] performance was focused on . . . health care concerns." Imperial v. Suburban Hosp. Ass'n, 37 F.3d 1026, 1030 (4th Cir. 1994). The requirement is met "if the [peer] reviewers, with the information available to them at the time of the professional review . . . would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." Bryan v. James E.

Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1334-35 (11th Cir. 1994) (quotation marks & citations omitted).

The record in this case shows that the MEC, PRC, and ARC focused on and took actions to address concerns surrounding Dr. Summers' patient care. The MEC, knowing of the prior peer review concerning Patient A, formed an ad hoc committee after Dr. Mitchell brought the complaints relating to Patient B to its attention. (See Br. in Chief at 6-8.) Summary suspension was based on the committee's report which raised concerns about Dr. Summers' internal medicine practice and did not eliminate the concern that Dr. Summers had used sexually-charged language inappropriately with Patient B. (See id. at 8-10.) The PRC, after reviewing the underlying materials and conducting a hearing, found that the evidence in the record regarding Patients A and B revealed a "pattern" of use of sexual language that could harm patients. (See id. at 10-12.) The ARC reviewed the records from the earlier peer review proceedings, held its own hearing, and considered the supplemental PRC findings. (See id. at 12-14.) It found that the record revealed an expanding pattern of inappropriate use of sexual language by Dr. Summers that could harm patients and recommended that all of his privileges be suspended permanently. (Id. at 14.)

For his part, Dr. Summers relies on arguments of counsel and allegations in his affidavit (Answer Brief at 14). They do not give rise to a genuine issue of material fact. Supra pp. 4-5.

The record thus demonstrates that the MEC, PRC, and ARC focused on addressing the concerns that had been raised surrounding Dr. Summers' patient care. Section 11112(a)(1) is met.

(3) Dr. Summers received all the process he was due.

The procedural standard of section 11112(a)(3) "do[es] not preclude 'an immediate suspension . . . of clinical privileges, subject to subsequent notice and hearing.'" Brader v. Allegheny Gen. Hosp., 167 F.3d 832, 842 (3rd Cir. 1999) (citation omitted). For a review action, notice and hearing procedures which meet the standard as a matter of law appear in § 11112(b)(1)-(3).

The record in this case shows that Dr. Summers received fully adequate process. After the summary suspension, the MEC notified Dr. Summers about its decisions and the underlying reasons. (See Br. in Chief at 9-10.) The MEC also notified Dr. Summers about his right to a trial-type hearing and his associated hearing rights. (Id. at 10.) He received a notice of hearing setting forth the place, time, and date of the hearing and the witnesses the MEC might call. (Id. at 10, MF 22.) He did not object that he received less than 30 days notice. (Id., MF 23.) Bryan, 33 F.3d at 1336 (lack of objection waives procedural irregularity). He

agreed to the composition of the PRC and received the trial-type rights listed in the HCQIA. (Id. at 10-12.) He received the PRC's findings and recommendations and notice of his right to an appellate hearing. (Id. at 12.) He appeared without objection before the ARC. (Id. at 12, MF 29.) Finally, he received notice of the Board's actions and the reasons for them. (Id. at 14.)

Dr. Summers does not demonstrate that he was denied the notice and hearing rights he was due. (Answer Br. at 16-17.) His arguments relate only to the 2003 MEC investigation phase of the proceedings, to which notice and formal proceedings do not apply. Supra p. 6. The case that Dr. Summers cites (Answer Br. at 17) – Stratienko v. Chattanooga-Hamilton County Hosp. Auth., No. 1:07-CV-258, 2008 WL 4191275 (E.D. Tenn. Sept. 8, 2008) – is not to the contrary. It did not involve a summary suspension that fit within the "imminent danger" exception. See Stratienko, 2008 WL 4191275 at *4 n.5; see also id. at *9 ("there is no evidence . . . [of] any risk of harm to any patients"). Dr. Summers also overlooks Peyton v. Johnson City Med. Ctr., 101 S.W.3d 76 (Tenn. Ct. App. 2002), a case in which the court rejected the notion that notice and a hearing must be afforded before a summary suspension may occur. Id. at 88. There, as here, the physician's suspension fell within the "imminent danger" exception. The case that Dr. Summers tacks on at the end of his argument – Estate of Blume v. Marian Health Ctr., 503 F. Supp. 2d 1103 (N.D. Iowa 2007), vacated, 516 F.3d 705 (8th

Cir. 2008) – does not help him either. There, following a suspension, the hospital did not afford the physician any hearing whatsoever despite his request, id. at 1108-11. That is not the situation in this case. (Cf. Br. in Chief at 9-14.)

The record shows that the requirements of section 11112(b)(1)-(3) were met or waived. There is, then, no genuine issue of material fact regarding section 11112(a)(3).

(4) The Board held an objectively reasonable belief that the termination of Dr. Summers' privileges was warranted.

"The final inquiry under § 11112(a) is whether the professional review action was taken in the reasonable belief that the action was warranted by the facts known after a reasonable effort to obtain those facts." Brader v. Allegehny Gen. Hosp., 167 F.3d 832, 843 (3rd Cir. 1999). The role of a reviewing court "is not to substitute [its] judgment for that the . . . governing board or to reweigh the evidence," Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1337 (11th Cir. 1994) (internal quotation marks & citation omitted), but rather to assess the "factual basis for [the board's] action," id.

The factual record before the Board revealed the following determinations. During the 2002 peer review Dr. Summers admitted that as part of "here and now therapy" he had used shocking, sexually explicit language with a female patient that was severely distressing to her and made her fearful of future treatment. (See Br. in Chief at 4-6, 11-14.) He had used sexual language with another female

patient in 2003 who reported similar complaints. (See id. at 6-8, 11-14.) The later incident involved not a therapy session but the taking of a medical history. (See id. at 7-8, 14.) Dr. Summers' inappropriate and harmful conduct had been repeated and could extend across both areas of his practice. (See id. at 13-14.)

Presented with these determinations, it was objectively reasonable for the Board to conclude that removal of Dr. Summers' internal medicine and psychiatric privileges was warranted. Dr. Summers dealt with patients who presented with internal medicine and psychiatric issues. He saw patients for different reasons, at various stages of care. He had ignored or skirted the admonitions from the 2002 peer review. His behavior presented an unacceptable risk of harm to other internal medicine or psychiatric patients who, if exposed to similar sexually-charged interactions, might suffer injury or be deterred from seeking future care.

Dr. Summers does not overcome this showing. (Answer Br. at 18-20.) Insofar as the arguments and portions of the record Dr. Summers raises involve the analyses under sections 11112(a)(2) and 11112(a)(3), they have been dealt with elsewhere. Supra pp. 2-7, 11-13. What remains is an invitation to the Court to reweigh the evidence and to substitute its judgment for that of the Board. That is an invitation properly declined. Supra p. 13.

No reasonable jury could conclude that the Board did not act in an objectively reasonable manner in deciding that termination of Dr. Summers'

privileges was warranted on the basis of the facts that had been determined following an extensive factual investigation which included a full hearing and appeal process. Section 11112(a)(4) also is met.

III. THIS CASE PRESENTS NO JURY ISSUES; DEFENDANTS ARE ENTITLED TO HCQIA IMMUNITY AS A MATTER OF LAW.

In the last point of his answer brief, Dr. Summers argues from the general proposition that a jury may have a role in determining the availability of immunity under the HCQIA (Answer Br. at 21) to the specific conclusion that a jury question exists in this case (id. at 23). The argument is flawed because too much has been omitted from it.

Dr. Summers' argument is drawn from the discussion of HCQIA immunity in Singh v. Blue Cross/Blue Shield of Massachusetts, Inc., 308 F.3d 25 (1st Cir. 2002). In Singh, the court acknowledged that the HCQIA "contemplates a role for the jury, in an appropriate case," which may encompass "the ultimate issues of reasonableness set forth in the immunity statute." Id. at 33, 34. There is nothing special about this result; it simply means, as Singh states, that "HCQIA immunity determinations may be resolved by a jury if they cannot be resolved at the summary judgment stage." 308 F.3d at 34-35. The point is emphasized by the holding of Singh, which rejected the plaintiff's contention that the district court improperly "resolv[ed] . . . reasonableness issues . . . that should have been

resolved by a jury," id. at 33, and affirmed the district court's grant of summary judgment. Three other cases cited in Singh and carried over into Dr. Summers' brief also upheld grants of summary judgment under the HCQIA immunity standards. Gabaldoni v. Washington County Hosp. Ass'n, 250 F.3d 255 (4th Cir. 2001); Sugarbaker v. SSM Health Care, 190 F.3d 905 (8th Cir. 1999); Brader v. Allegheny Gen. Hosp., 167 F.3d 832 (3d Cir. 1999); accord Crosby v. Hospital Auth. of Valdosta, 873 F. Supp. 1568 (M.D. Ga. 1995), aff'd, 93 F.3d 1515 (11th Cir. 1996). In only one cited case, Brown v. Presbyterian Healthcare Services, 101 F.3d 1324 (10th Cir. 1996), did a jury decide an HCQIA immunity claim, and there the court was presented with conflicting expert testimony as to whether the number of cases on which the hospital's review action was based constituted a reasonable survey of the physician's practice.

Brown provides no help to Dr. Summers because he points to no evidence from which a reasonable jury could find that Defendants failed to meet any immunity standard of the HCQIA. "Given the objective standards set forth in the statute, reasonableness determinations under the HCQIA may often become legal determinations appropriate for resolution by the judge at summary judgment." Singh, 308 F.3d at 36. So it is here, as in the great majority of cases. With respect to the "reasonable effort" standard for factual investigation, there is no bar under the HCQIA to considering hearsay reports in the course of peer review; moreover,

Dr. Summers' admission that the peer reviewers had all the evidence they needed to consider simply forecloses any argument that Defendants' investigatory efforts were not objectively reasonable. Point I, supra. Nor could a reasonable jury find that Defendants failed to meet any of the other immunity criteria. Point II, supra.

As Singh emphasizes and Dr. Summers fails to acknowledge, "Congress unmistakably recognized the usefulness of summary judgment proceedings in resolving immunity issues under the HCQIA." 308 F.3d at 35. "Congress indicated in the legislative history of the HCQIA that its immunity determinations should . . . be made expeditiously" by motion at an early stage of the litigation where possible. Id. at 36. On the record presented to the district court in the present case, Defendants' motion for summary judgment should have been granted.

Conclusion

In the end this lawsuit presents a classic attempt by a physician who disagrees with the outcome of medical peer review proceedings to hold the peer reviewers that conducted the proceedings liable for money damages. It is precisely the type of case that Congress intended courts to dispose of early by applying objective immunity standards at the summary judgment stage. Congress sought to promote effective medical peer review and protect patients by ensuring that individuals and institutions that comply with the HCQIA standards are not deterred

from conducting review activities by the threat of financial liability. Damages are the only remedy Dr. Summers seeks. In this case, a summary judgment of dismissal is the right result.

Respectfully submitted,

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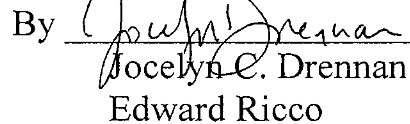

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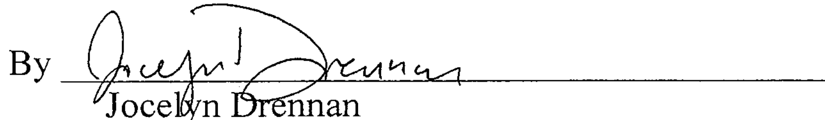

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