

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2013-000225

RECEIVED
JUL 17 2013
S.C. Supreme Court

Paresh Shah, M.D. and Paresh Shah, M.D., P.A.....Petitioners,

v.

Palmetto Health Alliance; f/k/a Richland Memorial Hospital.....Respondent.

PETITIONERS' REPLY IN SUPPORT OF WRIT OF CERTIORARI

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INTRODUCTION

The hospital's return to Dr. Shah's Petition for Writ Certiorari discusses, sometimes pedantically, but always thoroughly and scholarly, the various reasons why it maintains this Court can avoid granting the Petition. What this Return does not do is address broadly and candidly the fundamental question at issue in this case, namely, whether or not Dr. Shah has received justice.

Dr. Shah would remind all those who will be involved in the Court's decision whether or not to grant his Petition and hear this case that this is a very important case, not only for Dr. Shah but for all physicians who practice medicine in South Carolina, especially those whose practices are hospital-based.

The way most hospitals operate has changed in recent years. No longer is the physician elected chief of staff the principal policy maker. Hospital administrators have in recent years gained enormous power. Gone are the days when the hospital administrator was responsible for having the halls mopped and the supply of tongue depressors properly maintained. The administrator of old is now the Chief Executive Officer who essentially runs the hospital. Many hospitals now hire groups of physicians to be the exclusive service providers of their particular specialty. This is especially the case with radiologists.

In the middle 1990's, the CEO of Richland Memorial Hospital, Kester Freeman, later to be named the CEO of Palmetto Health and others, undertook a plan to award an exclusive contract to a group of radiologists who would perform all radiological services. This group did not include the radiologist with the largest and most lucrative practice at the hospital, Dr. Paresh Shah. His practice was very successful because he was a board certified radiologist as well as the holder of a Certificate of Additional Qualifications (CAQ) in the highly specialized field of

vascular and interventional radiology. The lifesaving studies and procedures performed by vascular and interventional radiologists are at the cutting edge of what can be done in a hospital to save lives and otherwise render state of the art medical care.

Dr. Shah's continued practice at Richland Memorial frustrated Mr. Freeman's plans. It was a problem for the selected exclusive provider group. A decision was made to exclude Dr. Shah from receiving cases or patients pursuant to the radiology department duty rotation schedule. Since almost no patients needing the care of a radiologist select one from all those in the radiology department, the duty schedule was the way radiologists, at least at that time, received most of their patients. At the same time the hospital had a rule requiring all practitioners with active privileges to work at least 30 hours per week. Without patients to treat, a radiologist could not keep his privileges and remain on the staff by working the minimum number of hours. Dr. Shah brought a lawsuit and obtained an injunction preventing the hospital from removing him from the duty rotation schedule.

In a deposition taken on October 15, 1997, Dr. Tom Trancik testified that he had a conversation with the Richland Memorial CEO, Kester Freeman in which Freeman stated "He was going to get rid of [Dr. Shah]. He said it was going to take eighteen months to do it, but he would be able to starve [him] out in legal expenses in eighteen months, and that he had worked it all through with Howard West [the hospital's general counsel] to be able to accomplish what they wanted." (App. 832). Dr. Trancik further stated that Freeman told him in that conversation "What we are going to do is we are going to get rid of them for QA." In response to this Trancik told Freeman "I don't even see problems with [Dr. Shah] with any QA." (App. 833). This bombshell evidence of deliberate, planned and therefore willful discrimination against Dr. Shah has never been refuted by Mr. Freeman. This was some of the evidence which drove the

settlement of the 1996 lawsuit and resulted in an undisclosed monetary payment to Dr. Shah. The settlement also called for a consent order to protect Dr. Shah.

The 1996 lawsuit was brought following the hospital's totally concocted and totally unwarranted corrective action where the hospital alleged Dr. Shah violated the standard of care and deserved to lose his privileges because of his treatment of eight patients. These eight cases had been selected within the department of radiology through its QA process. At the hearing of this corrective action, the hospital's handpicked expert, Dr. Robert Vogelzang of Northwestern University, a board certified vascular and interventional radiologist, testified he carefully reviewed all eight cases and took no exception whatsoever with Dr. Shah's handling of each of these cases. He testified he would have rendered the same care and made the same decisions as Dr. Shah.

Another reason Dr. Shah brought the 1996 lawsuit was the discovery that some of the evidence offered against him at the corrective action hearing was false and concocted. By verifying when certain people were clocked into the hospital, he was able to discredit their testimony.

More important to Dr. Shah than the monetary portion of this settlement was the hospital's agreement to enter into a Consent Order regarding future treatment of Dr. Shah by the hospital. It was pursuant to this Consent Order that the Independent Outside Reviewer was selected. He was mutually selected by the hospital and Dr. Shah. Much reference is made to him and his reports in the Appendix and the Briefs before this Court. He is Dr. Bayne Selby of the Medical University of South Carolina. He reviewed many hundreds of Dr. Shah's cases. For the overwhelmingly largest part he gave Dr. Shah validation and approval. He never recommended that a corrective action be brought against Dr. Shah. He never opined Dr. Shah lacked the

qualifications and demonstrated ability to practice medicine in his area of specialty. It must be remembered that Dr. Shah had been at the hospital for nearly twenty-nine years before all this started.

During a period of approximately eighteen months, while Dr. Selby was doing his work, there was no quality assurance review on any of the other fifteen or more radiologists at Richland Memorial Hospital. It is likely no radiologist anywhere in the United States received the scrutiny Dr. Shah received.

The hospital on page 4 of its Return accused Dr. Shah of a “recurring tactic...ask for something, get it, and then complain about it.” This churlish remark is inappropriate. What Dr. Shah asked for was fairness. As noted by Judge William Keesley, the Circuit Judge who signed the Consent Order and who retained jurisdiction in the case should a dispute later arise, Dr. Shah simply wanted to be treated like any other physician at the hospital. That is surely not something he asked for, got, and then complained about.

Dr. Shah did complain because the hospital proceeded to violate the Consent Order. It sent Dr. Selby some old “stockpiled” cases one of its employees had selected. Instead of allowing him to have oversight of the case selection process as required by the Consent Order, Dr. Selby testified he had nothing whatsoever to do with the selection of the cases in the early stages of his QA review. After one of the hearings in the hospital where the hearing panel decided a “fairer measure” would be for Dr. Selby to select and review a substantial percentage of Dr. Shah’s cases, Dr. Selby did involve himself in the case selection process.

Dr. Shah repeatedly complained about how he was being treated. His attorney complained. Letters were sent. Petitions for a Rule to Show Cause were filed. Requests were made to Judge Keesley to hear these Petitions. But there were no hearings before Judge Keesley

on all of these Petitions. So as the weeks and months went by, the hospital and those acting on its behalf became increasingly confident they could do as they pleased when it came to Dr. Shah.

When very favorable reports came from Dr. Selby regarding his QA review of 553 of cases he selected himself and then reviewed, the hospital simply ignored those reports and never put them in the binders, prepared, and presented to the hearing panels and the Medical Executive Committee of the hospital. This was outrageously unfair.

As Attorney Henry McKellar argued at the hearing before Judge Early, all the king's horses and all the king's men could not find a way to comply with the Consent Order and Supplemental Order of Judge Keesley regarding the treatment of Dr. Shah. The petulant claim by the hospital in their Return that any violations of the Orders were inadvertent and not willful flies in the face of all that is reasonable, fair, and true. The ruling of Judge Early was an abuse of discretion given the totality of the evidence. There is no evidence whatsoever that the violations of the Court Orders were inadvertent.

The former CEO never testified that he abandoned his plan to get rid of Dr. Shah and starve him out in legal fees. Indeed, one can look at the tortured history of this case and fairly conclude that, up to this point, the hospital has succeeded in doing exactly that.

If Dr. Shah's case receives no further review, and if the opinion of the Court of Appeals, even though it is unpublished, sets the standard, hospital administrators will be emboldened to believe they can treat a physician they do not like any way they please. They will have no concern that the courts will come to the aid of that physician. Due process rights, as set forth in hospital by-laws, will be given short shrift. By carefully selecting the physicians appointed to serve on corrective actions panels from those who are essentially captive employees of the hospital there will be little concern. With the confident belief that the "nonintervention"

approach will be followed by the courts, hospitals will have the power to target physicians and get rid of them. These doctors will be woefully inferior to defendants in criminal cases.

John Wayne Gacy was entitled to due process of law, but so far, Dr. Paresh Shah has not been entitled to the protection of the Consent Order designed specifically to protect him and the due process rights afforded him by the Palmetto Richland Medical Staff By-Laws. These By-Laws include the provision requiring a physician with alleged psychological problems to be given specific allegations about him and the right to a hearing. There is no evidence to support a finding of compliance with these important requirements.

The hospital in its Return to the Petition champions the notion that Dr. Shah's refusal to undergo an imposed psychological evaluation by Dr. Bill Burke, the psychologist specifically selected by the hospital, is a stand alone ground to terminate him. The hospital also asserts this is sufficient legal justification for the Circuit Court to deny him relief and for the Court of Appeals to affirm.

Likewise, the hospital's Return champions the notion that the alleged misdiagnosis of a large abdominal tumor in an x-ray warrants the lower courts' rulings. The ruling of the hospital MEC was that this one case was a stand alone basis for his termination. This ruling was validated of the Circuit Court and the decision of the Court of Appeals. If this result is allowed to stand, we will have a new rule about the practice of radiology in South Carolina. One misdiagnosis, even whether there is no resulting harm to the patient, can, standing alone, warrant the termination of privileges of that radiologist. Dr. Selby, referring to paperwork compliance, suggested a fair standard would be a failure rate of less than 5%. Dr. Selby also noted, in one of his very favorable reports about Dr. Shah's cases, that one radiologist will invariably take exception to the reading of some x-rays by another radiologist in a certain number of cases.

The Supreme Court of South Carolina needs to accept this case and give this legal conclusion more careful consideration.

ARGUMENT

The hospital terminated Dr. Shah for three reasons, namely because of the way he handled thirty-five emergency room cases, because he misread the x-ray of patient X, and because he refused to submit to the psychological evaluation ordered by the MEC. Nothing could be clearer than the fact the medical cases, which formed the basis of this termination, were not selected or reviewed by the Independent Outside Reviewer as specifically required by the Supplemental Court Order. Dr. Shah was told the 35 emergency room cases were submitted at the hearing only for comparison purposes. The administrative matter, namely the imposed psychological examination, was to be handled by the Chief of the Radiology Department. This requirement was also clearly violated.

In the hospital's Return to Dr. Shah's Petition, the hospital claims that the issue regarding the required psychological review and the claim the hospital failed to follow its own by-law provisions regarding such a matter was not properly before the Court. The hospital claims on Page 28 of its Return that Dr. Shah did not raise this issue in his contempt petitions. It argues the Circuit Judge therefore correctly ruled that the issue was not properly before him. The hospital is absolutely wrong. The Circuit Court was wrong. The Court of Appeals was wrong.

In fact, Dr. Shah did raise his concerns about the imposed psychological evaluation and the hospital's failure to follow its By-Laws. In this Supplemental Memorandum in Support of his Petition for Rule to Show Cause dated December 19, 2005 (App. 92). Dr. Shah stated that "notwithstanding the clear requirements of this Court's Order, Palmetto Richland Memorial Hospital never referred to the Chief of the Radiology Department any issues regarding Dr.

Shah's alleged behavioral issues . . . after referencing the letter he had received advising him the Medical Executive Committee had decided to summarily suspend his privileges. Dr. Shah noted, his Rule to Show Cause Petition, "by the clear terms of this letter, it is apparent the decision of the MEC was based in part on Dr. Shah's failure to be evaluated by Dr. Bill Burke and to fulfill any recommendations made by Dr. Burke." (App. 93).

The hospital in its Return, referring to the thirty-five emergency room cases, that Judge Early correctly rejected Dr. Shah's contempt claim regarding these cases for the same reason. It wrote, "First, he [Judge Early] ruled correctly that '[t]his violation is not asserted in any of the pending motions.' Thus, it was not a proper ground for contempt." (Return P.30). Wrong again.

This assertion by the hospital and this ruling by Judge Early was absolutely untrue. In Dr. Shah's Memorandum of Support of his Consolidated Petitions for Rule to Show Cause dated November 24, 2008, he specifically addressed these violations. (App. 253). This Memorandum addressed to Judge Keesley, years before the hearing before Judge Early, stated "Members of the MEC also reviewed, considered, and made clinical determinations about medical cases of Patient X and thirty-five emergency department cases without sending them to Dr. Selby." This section of the Memorandum goes on to say, "The Court Order requirement that "any complaint against Dr. Shah that involves an allegation that Dr. Shah deviated from the standard of care in treating a patient...shall be referred to an outside reviewer." The hospital repeatedly bases its case on the notion that the three grounds for termination were not properly raised by Dr. Shah in his contempt Petitions. Building on this false premise, the hospital presents a lengthy argument that these matters could not have been properly tried before Judge Early under the concept of Implied Consent. Dr. Shah raised all these issues in this Petitions. They were properly before the Court. Judge Early got it wrong.

In its Return, the hospital accused the attorneys for Dr. Shah of deliberately misquoting the provisions of the Consent Order which dismissed the 2006 action and set a hearing before Judge Early. Specifically the hospital states in its Return Dr. Shah's attorneys deliberately omitted the last line of a sentence which ends with the words "...as may be relevant and admissible therein." (App. 24). If the Court will look at Dr. Shah's Petition for a Writ of Certiorari, Page 8, the Court will see that these words are not omitted. The hospital's attempt to portray Dr. Shah's lawyers as deceitful misquoters is not well founded.

The animus and blatant targeting of Dr. Shah by the CEO of the hospital was shared by others in the hospital leadership. Dr. Stewart, the Chief of Staff in 2003, who was heavily involved in the Dr. Shah matter, and who sent the thirty-five emergency room cases directly to the MEC, acknowledged his awareness that pursuant to the Consent Orders those cases should have been selected and reviewed by Dr. Selby, the Independent Outside Reviewer. (App 2035,6). Dr. Stewart's feelings toward Dr. Shah and, therefore, the proof that he acted willfully is reflected in his sarcastic and critical remarks made when he testified at one of the hearings. (App 2051). Dr. Stewart also hatefully volunteered to Dr. Shah "You wanted to be arrogant and try your best to snub your nose at the medical staff. This is wrong. And so, what you are doing is paying the price for it." (App. 2033).

The hospital contends in its Return Dr. Shah is advancing arguments he did not make below. It was, in fact, the hospital who injected new issues never raised below by placing in the Order signed by Judge Early the notion there were several stages of QA and that the Orders of Judge Keesley only applied to the earliest stage of QA. There are no segregated states of QA.

A substantial part of the hospital's Return is the construction of an argument that the Huellmantel case does not apply because in that case the physician practiced at a public hospital,

which had the duty to provide constitutionally protected due process rights. The hospital in this case goes on to argue that Dr. Shah should have brought a lawsuit for breach of contract if he maintained that the imposition of the psychological evaluation violated the by-laws which create contractual due process rights for him. It then argues the psychological evaluation was not properly before Judge Early because “Shah did not raise this issue in his contempt motions...” (Return p. 28). Wrong again.

As previously pointed out, Dr. Shah’s Supplemental Memorandum in Support of his Rule to Show Cause dated April 13, 2006, clearly does complain about the hospital’s imposition of this psychological evaluation requirement. Such a requirement is an administrative issue which, under the Supplemental Order of Judge Keesley, should have been handled by the Chief of the Radiology Department (App. 93). That, of course, was clearly not done.

What the hospital chooses to ignore is that Dr. Shah’s rights were set forth in detail in two Court Orders. Dr. Shah does not have to seek an interpretation of generalized constitutional due process violation or contractual due process claim. He can point to the specific provisions of two Court Orders, specifically entered to protect him and which were clear. He has shown they were deliberately violated repeatedly. The hospital had numerous attorneys to advise them. Of course we cannot know what advice these lawyers gave, but they were at every MEC meeting, both hearings and both Board of Directors meetings when Dr. Shah’s matter was brought up.

Complying with Court Orders is a bedrock concept of our system of justice. In the Family Court, for example, litigants are frequently hauled into Court on a Rule to Show Cause, and if they are found to have failed to pay child support or to comply with some Order of the Court about visitation. They are found to be in contempt. Often they are sent to jail. In this case, a carefully drawn *Consent* Order obligated a sophisticated institution with many lawyers to

do certain things specifically to protect Dr. Shah from unfair treatment. This institution failed and refused to do it. Can it be fair for that the ex-husband/father goes to jail and the hospital is totally exonerated?

So what did the Consent Order and the Supplemental Order accomplish? Absolutely nothing. The hospital relentlessly focused all of its radiology department quality assurance attention on Dr. Shah and totally ignored all other radiologists. These other radiologists had no QA reviews whatsoever even though QA is required by several federal programs in which the hospital participated. The hospital further employed unfair mechanisms for conducting quality assurance review on Dr. Shah and blatantly ignored the guiding provisions of the Orders entered by the Court. The evidence of this is overwhelming. It easily meets the standard of clear and convincing evidence. This evidence overwhelmingly proved that the hospital acted willfully as they ignored the Orders. This Court has authority to take its own view of the evidence in general equity cases. Durlach v. Durlach, 359 S.C. 64, 596 S.E.2d 908 (2004).

Even if this Court applies the higher appellate standard requiring a showing of “abuse of discretion,” this case clearly meets that standard. Lewis v. Lewis, 709 S.E.2d 650 (S.C. 2011). There is no evidence from the record in the Circuit Court that the hospital complied with the Court Orders and no evidence that this lack of compliance was inadvertent or mistaken. In the Circuit Court the hospital never took the position that they were excused from complying with the provisions of the by-laws.

When addressing the issue of willfulness, Dr. Shah would urge this Court to read with care his many letters beginning in September of 2002 and running up to December 6, 2004. These letters are contained in the Appendix. (App. 801-818). These letters to the hospital’s attorneys, to the CEO, to the Chairman of the Board of Trustees, to the Chief of Staff, to the

President of Palmetto Health, to members of the Hearing Committees, and to others, together with his several Petitions for Rule to Show Cause destroy any notion that the hospital's numerous instances of violating the Orders were merely inadvertent and did not rise to the level of willful violations. All three Chiefs of Staff have acknowledged in their testimony they were knowledgeable of the Court Orders relating to Dr. Shah (App. 1024, 1909, 1911, 1918, 1933, 2036, 2047, 2053, 2147, 2148). Attorney Frederick A. Crawford sent a letter to Dr. Selby, the Independent Outside Reviewer, and reminded him that Judge Keesley required that "every effort should be made to make the review [of Dr. Shah] as similar as possible to customary and prevailing procedures followed for every other person on the medical staff." (App. 2438). The CEO of the hospital knew about the Orders. (App. 1884). This Court will never see a case where the conduct of the litigant before it was more willful than the conduct of the hospital in this case.

The hospital weaves an argument that the Circuit Court and the Court of Appeals got it right when they concluded Judge Keesley's orders only dealt with the initial stage of QA and not to later related proceedings such as a corrective action. A careful reading of the Supplemental Order totally refutes this argument. The Supplement Order contemplated the selection and review of the medical cases by the Independent Outside Reviewer and, if the reviewer found a deviation from the standard of care, he was to send the matter to the MEC pursuant to the Section 10.2.2 (b) of the by-laws. (App. 19). The Supplemental Order goes on to address how a corrective action was to be handled if the Independent Outside Reviewer found a violation of the standard of care in medical cases. It specifically refers to a corrective action. It does separate the QA process from a corrective action. It does just the opposite. (App. 19-20).

The notion that there are various discrete stages of QA is a concoction of the hospital's attorneys as they prepared the Order which Judge Early signed. There is no evidence to support

his notion about QA. Quality Assurance Review and, when necessary, corrective action to deal with substandard performance are a continuous process. Nowhere in the Orders of Judge Keesley or in the by-laws of the hospital are there delineations of various stages of QA. There is no reference to an "initial stage." There is no evidence of inadvertence or mistake. The issue regarding the requirement of a psychological review for Dr. Shah should have gone to the Chief of the department. It did not. There is no evidence that this was handled inadvertently or mistakenly. There is no evidence that there was any failed attempt to comply with the by-law provisions or the Court Order.

Another very important and unfair thing is the suppression and failure to disclose to the decision makers the fact the Independent Outside Reviewer, Dr. Selby, selected and favorably reviewed five hundred and fifty-three (553) of Dr. Shah's cases including over 90 of his invasive procedures. Dr. Selby rendered reports which validate the excellent if not outstanding job Dr. Shah did of reading these films and performing these complex invasive procedures. The hospital in its return claims these reports were considered, but in in the earlier submissions by Dr. Shah he pointed out the fact that these favorable reports were not put in the binder of materials the hospital prepared and gave to the members of the hearing panel. Dr. Shah emphasized the suppression of these favorable reports at the hearing before Judge Early. He emphasized this in his Motion for Reconsideration and in his appeal to the Court of Appeals. The fact that it was ignored by the Circuit Court and the Court of Appeals reeks of unfairness and injustice.

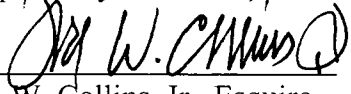
CONCLUSION

Recently this Court rendered its powerful and didactic opinion in the case of Brandt v. Gooding and Gooding, PA 368 S.C. 618, 630 S.E.2d 259 (2006). That case clarified the power of a circuit court judge to hold litigants in civil or criminal contempt of court. By accepting and

deciding this case, this Court can add to and clarify that important jurisprudence. For the reasons stated herein and in his Petition, Dr. Paresh Shah respectfully submits this Honorable Court should grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Petitioners' Reply in Support of Writ of Certiorari by mailing a copy of same, via United States Mail, postage prepaid, on March 15, 2013 to the following counsel of record:

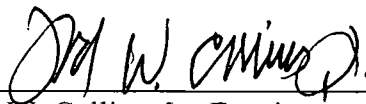
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