THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-46-00167
Appellate Case No. 2014-000913

Robert Randall, M.D.,

Appellant,

v.

Amisub of South Carolina, Inc.
d/b/a/ Piedmont Medical Center,
Nathaniel Edwards, M.D., and
Richard Patterson, M.D.,

Respondents.

APPELLANT'S INITIAL BRIEF

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Statement of the Case

Appellant brought this action in January 2013, for conspiracy and defamation against the Respondents. After discovery was conducted, Respondents moved for summary judgment. The lower court held a hearing on March 3, 2014 on the motion, which was granted by the lower court by order dated March 28, 2014. Appellant then filed the instant appeal.

Statement of the Facts

Appellant Dr. Robert Randall ("hereinafter Appellant") is a board certified general surgeon. Until his privileges were revoked in summer of 2009, Appellant had been performing abdominal surgeries at the Defendant Piedmont Medical Center for more than 25 years. (Randall CV, R.p. __) . As part of a periodic peer review process, the peer review committee of Piedmont Medical Center reviewed of all of Appellant's surgeries in 2007 and concluded that the procedures were all appropriately done and there was no need to monitor Appellant's surgical procedures going forward. Peer Review Minutes 5/7/08, R.p. __ .

In 2008 Appellant's surgical practice, Rock Hill Surgical Associates, was purchased by Novant Health. Randall Depo. p. 33, ll. 13-22, R.p. __. Novant Health also owns Carolinas Medical Center in Charlotte, North Carolina. During this period of time, Novant was also seeking a certificate of need to construct a new hospital in Fort Mill, South Carolina. Novant was competing with Piedmont and a third hospital for the right to build this new hospital. Charles Miller Depo. p. 13, ll. 12-24, pp.14-15, ll. 1-4, R.p. __.

In addition, Piedmont was also actively recruiting surgeons to become employed by Piedmont. Piedmont eventually created its own hospital surgeon practice through

recruiting and hiring other local surgeons in the Rock Hill area. Charles Miller Depo. p. 12-ll. 7-24, p. 13 ll.1-3, R.p. __. Thus, during 2008 through 2010, Piedmont was actively competing with Appellant's employer for the construction of a new hospital in Fort Mill and was preparing to compete with Appellant and other surgeons in the Rock Hill area.

In 2010, Dr. Nathaniel Edwards ("Dr. Edwards"), a cardiologist, became chairman of the medical executive committee (MEC) at Piedmont. Dr. Edwards Depo., p. 13, ll. 11-22, R.p. __. As chairman of the MEC, Dr. Edwards also served on the peer review committee. Id at p. 16, ll. 4-13, R.p. __. Prior to his becoming chairman of the MEC, Dr. Edwards had never served on the peer review committee. Id. at p. 19, ll.24-25, p. 20, ll. 1-20, R.p. __.

Dr. Edwards held a personal animosity toward Appellant. Dr. Randall Depo. p. 98, ll. 5-25, p. 99-103 ll. 1-13, R.p. __. Appellant had previously treated a patient who is a close family friend of Dr. Edwards and his wife. Dr. Edwards' wife is also a medical doctor. She complained about Appellant's care of this close family friend to Dr. Edwards. Dr. Edwards Depo. at p. 88, ll. 16-25, pp. 89-90 ll. 1-4, R.p. __. During Dr. Edwards' tenure as chairman of the MEC, the hospital chief medical officer (CMO) Dr. Patterson, began pulling medical files of patients of Appellant to submit to the peer review committee for review and action. See, Exhibit 3 Email correspondence (Diane West Depo. Exhibits 1-11, 14, 16, 18, 21, 23, 27 and 28) , R.p. __. Dr. Patterson is not licensed to practice medicine in South Carolina and he is not on the medical staff. Rather, he is simply a hospital employee. However, Dr. Patterson, as the CMO, attends peer review committee, credentials committee and the MEC on behalf of the hospital.

The hospital by-laws provide for the peer review committee to review files submitted to it and if the peer review committee believes corrective action needs to be taken, then the peer review committee is tasked with recommending the action to the medical executive committee. Piedmont Medical Center By-Laws, Exhibit 4, R.p. __. The MEC is then required to vote on a recommendation and then submit proposed action to the hospital board for their consideration. Piedmont Medical Center By-Laws, Exhibit 4, R.p. __. Here, the peer review committee never made any recommendation to the MEC for corrective action to be taken against Appellant.

Moreover, in the summer of 2010, Appellant's credentials on the surgical medical staff were up for renewal. Dr. Edwards, in his capacity as chairman of MEC and a designated member of the peer review committee appeared before the credentials committee opposing Appellant's renewal. Dr. Edwards presented a series of cases that had previously been reviewed by the peer review committee. Minutes of Credentials Committee 6/10/2010, Exhibit 5, R.p. __.

The credentials committee consists of more experienced members of the medical staff. Dr. Patterson Depo. p. 29 ll. 13-19, R.p. __. Dr. Edwards has never served on the credentials committee. After hearing from Dr. Edwards, the members of the credential committee invited Appellant to address the series of cases presented by Dr. Edwards. The physician members of the credentials committee concluded that "Dr. Randall was safe to continue performing surgery." Minutes of the Credentials Committee, 7/13/2010, Exhibit 6, R.p. __. Thereafter, the full MEC considered the credentials committee's recommendation that Appellant be reappointed and did in fact reappoint Appellant for

another year. MEC Minutes 8/9/10, Exhibit 7, Medical Staff Appointment 8/19/10 Exhibit 8, R.p. __.

Dr. Edwards, having his views rejected by both the peer review and the credentials committee as well as the full MEC, acting in conjunction with Dr. Patterson, created a brand new committee formed solely for purposes of sanctioning Appellant. Dr. Edwards Depo. p. 17, ll. 22-25, p. 18 ll.1-25, R.p. __. This new committee was called the "ADHOC" committee and was hand-picked by Dr. Edwards. Dr. Edwards Depo. p. 16, ll. 18-24, p. 17-18, R.p. __. Dr. Edwards did not select any general surgeons with experience performing abdominal laparoscopic surgery to serve on his committee. Dr. Edwards Depo. p. 18 ll. 10-15, R.p. __. The members of this ADHOC committee requested that a general surgeon serve and further requested that Dr. Patterson on behalf of the hospital provide one. Dr. Edwards Depo. p. 39:22-40:11, R.p. __. These requests went unanswered and there was never a board certified general surgeon to sit in judgment of Appellant. MEC Committee Minutes 9/13/10, Exhibit 9; Dr. Edwards Depo. p. 39, ll. 16-25, p. 40, ll. 1-22, R.p. __.

Dr. Edwards' ADHOC committee met and considered the files previously reviewed and considered by the credentials committee and the peer review committee. The Edwards' ADHOC committee ultimately voted to recommend to the MEC that Appellant's abdominal surgical privileges be revoked. Dr. Baker Depo. p. 50:23-25; p. 51:1-17, R.p. __. During this process, Appellant was invited to appear and made a presentation about his care of a number of patients whom he had been notified were being considered by the ADHOC committee. Dr. Randall Depo p. 91, R.p. __. During this meeting, Dr. Edwards

questioned Appellant on two additional cases that Appellant had never been notified were under consideration. Dr. Randall Depo. p. 91, ll. 9-25; p. 92, ll.1-13, R.p. __.

Although the ADHOC recommended to the MEC that Randall's abdominal surgical privileges be revoked, their recommendation was conditioned upon allowing Appellant to continue performing surgical procedures while he exhausted the peer review hearing process provided in the hospital by-laws. Dr. Baker Depo. p. 50, ll. 23-25, p. 51, ll. 1-17, R.p. __. Subsequently, the MEC to voted accept the recommendation of this ADHOC committee, provided that Appellant's privileges would not be restricted until he was given an opportunity for a formal hearing. MEC Minutes 10/10/2010, Exhibit 10, R.p. __.

Days later, Dr. Edwards, contrary to decisions of his hand-picked ADHOC committee and of the MEC, unilaterally suspended Appellant's privileges without notice or hearing. Letter of Dr. Edwards to Dr. Randall, 10/15/2010, Exhibit 11, R.p. __. Dr. Edwards made this decision after Dr. Patterson presented him with information regarding patient JR, who had been treated and released in July, almost three months earlier. There was a question regarding Dr. Randall's treatment of JR and the amount of blood that she was transfused over numerous days. Interestingly, the hospital external reviewer subsequently determined that he could not argue with Appellant's successful outcome in the treatment of patient JR and did not conclude that Appellant's care of this patient was substandard. Furthermore, Dr. Edwards testified that he did not consult with anyone other than Dr. Patterson regarding Appellant's treatment of patient JR. Dr. Edwards Depo. p. 53 ll. 13-25, pp. 54-70 ll. 1-19, R.p. __.

Dr. Edwards also testified that he made the decision to suspend Appellant because the general consensus in the ADHOC committee meeting was that Appellant's privileges should have been suspended but that he was one of only a few holdouts who thought Appellant should have been given his "due process" rights of review. Dr. Edwards Depo. p. 67 ll. 4-21, R.p. __. Dr. Edwards' testimony of the sentiments of the ADHOC committee is contrary to the testimony of other MEC members. Dr. Baker for example testified that Dr. Edwards' actions came as a surprise and contrary to the decision of the MEC. Dr. Baker Depo. p. 55 ll. 12-17, p. 59 ll. 2-12, R.p. __. No member of the ADHOC committee testified that the majority of the members wished to deny Appellant his full hearing rights before imposition of such a career ending sanction. Dr. Edwards' actions were totally at odds with the decision with the ADHOC Committee's decision that Appellant's privileges should not be summarily suspended without having formal review hearing prior to the sanction going into effect. Id.

Appellant received written notice of the summary suspension and immediately requested a hearing before the MEC. At this hearing Appellant appeared with an attorney. However, Appellant's attorney was not permitted to participant in the hearing. Dr. Patterson Depo. p. 58, ll. 14-25, p. 59 ll. 1-10; Jay McKay Depo. p. 5 ll. 19-25, pp. 6-8 ll. 1-3, R.p. __. Once again Appellant gave a presentation on the cases he believed were under consideration by the MEC and no one asked any questions of Appellant. Furthermore, there was no investigation undertaken by the MEC prior to Appellant's appearance before the committee. Dr. Patterson Depo. p. 54 ll. 21-25, p. 55 ll. 1-8; Dr. Edwards Depo. p. 59 ll. 21-25, p. 60 ll. 1-25, R.p. __. At this hearing, Dr. Patterson, who is not a voting member of the MEC, falsely represented that a reviewer determined that patient JR's injury

occurred as a result of Appellant's procedure. Notes of MEC Meeting 10/25/10, Exhibit 12, R.p. __. This was not correct as the external reviewer's report was not even available at the time of the MEC meeting. Once the external review's report was made available, the reviewer could not determine that Appellant's treatment of patient was substandard. Dr. Edwards Depo. p. 62, ll. 10-25, pp. 63-64, R.p. __.

In addition, Dr. Patterson also misinformed the MEC of their options. He advised MEC that they could either uphold the summary suspension in its entirety or modify it. Dr. Patterson did not inform the MEC that they could have vacated the summary suspension. Notes of MEC Meeting 10/25/10, Exhibit 12, R.p. __.

The summary suspension, once it was in effect, was required to be reported to the South Carolina Medical Board and to the National Practitioner Data Bank. Appellant through his attorney, attempted to negotiate a resignation without the report being submitted to the medical board but could not because of the reporting obligations. Jay McKay Depo. p. 18 ll. 12-17, R.p. __. The Respondent Piedmont had previously negotiated such a resolution with another physician in the past. This no doubt was no longer an option because of Dr. Edwards' unilateral decision to suspend Appellant prior to the appellant process taking place.

Appellant requested that a general surgeon serve on the hearing panel that was to be convened to consider the appeal of the summary suspension sanction and the recommendation by the MEC to revoke Appellant's abdominal surgical privileges. Jay McKay Depo. p.31:5 – 33:21, R.p __. Once again, the hospital refused to appoint a member from the medical staff who had experience with performing laparoscopic abdominal surgery to the hearing panel. Jay McKay Depo. p. 34, ll. 16-22, R.p __.This is because the

hospital by-laws prohibit anyone serving on a committee considering sanctions of another physician if the proposed member of the hearing panel has an economic interest with or against the doctor who is being reviewed. (Bylaws, R.p. __). All witnesses who were asked testified that it is essentially impossible for someone's conduct to be judge by a physician who practices within the same specialty under the hospital's policy. At Piedmont Medical Center, all physicians in the same specialty either compete against with each other or are in the same practice. Thus, Appellant was deprived of the opportunity to have a board certified general surgeon to serve on the hearing panel. However, there were other surgeons available on the medical staff that in fact perform abdominal surgery, yet none of the other surgical specialties who have experience performing the same type surgeries that were under review were appointed to the hearing panel. Jay McKay Depo. p. 31, ll. 5-25, pp. 32-34 ll. 1-22, R.p. __.

Also, under the hospital by-laws, Appellant had a right to a hearing to consider his summary suspension and revocation within 90 days from the date the sanctions went into effect. (Bylaws, R. p. _). However, just two days before the scheduled hearing within the time frame provided under the by-laws, the hospital's surgical expert who had reviewed Appellant's files refused to come testify before the hearing panel. Jay McKay Depo. p. 22, ll. 6-23, p. 23, ll. 1-25, p. 27, ll. 4-22, R.p. __. The hospital, through its attorney, first claimed that there was a scheduling conflict and then later notified the hearing panel representative that the surgical expert would not be available at all. *Id.* At the hospital's request the hearing was postponed in violation of the hospital by-laws and was rescheduled only once when the hospital found another expert to testify against Appellant. This expert was not a general surgeon but a vascular surgeon.

Appellant's attorney-- who attempted to appear with him before the MEC to consider the summary suspension and who participated before the hearing panel-- testified that Appellant was denied a fair hearing based upon a number of facts. First, Appellant was prohibited from having attorney representation at the hearing before the MEC to consider his summary suspension. Second, Appellant was not given adequate notice of all of the cases that were to be reviewed by the MEC prior to his suspension and hearing. Third, Appellant was not given a timely hearing under the by-laws before the review panel. Had the hearing gone forward as required under the by-laws, Appellant no doubt would have prevailed before the hearing panel because his expert was ready, willing, and able to testify at the originally scheduled hearing. Fourth, Appellant did have a board certified general surgeon appear before the panel to testify on his behalf that Appellant's conduct was within the standard of care and that he was competent to prepare abdominal surgical procedures. See, Testimony of Dr. Ben Tribble, Transcript of Hearing, Exhibit 13, R.p. __. If the hearing had gone forward as scheduled, the hospital would not have had any competent expert to contradict Appellant's well qualified expert. Jay McKay Depo. at p. 57 ll. 22-25, p. 28 ll. 1-22, R.p. __.

ARGUMENT

I. The lower court erred in finding that the Respondents are immune from liability for damages under the Health Care Quality Improvement Act.

Respondents are not entitled to immunity under the Health Care Quality Improvement Act. (HCQIA) for multiple reasons: 1) Appellant was not afforded adequate notice of the charges levied against him and a fair hearing prior to the imposition of the summary revocation of his surgical privileges; 2) Appellant was not provided a fair hearing

to address the summary revocation because he was denied the right to counsel before the MEC, was not provided notice that the summary suspension was the result of Dr. Edward's review of Appellant's care of patient JR and because Dr. Patterson made misrepresentations of both fact and procedure; 3)Appellant was not provided a hearing within the 90 day period as required under the hospital by-laws to review the decision of the MEC; and 4) Lastly, there were not any physicians who had experience with laparoscopic abdominal surgery on the hearing panel that ultimately reviewed the decision of the MEC.

Congress enacted 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." Matthews v. Lancaster General Hosp., 87 F.3d 624, 632 (3'd Cir. 1996)(quoting H.R. Rep. No. 903, 99th Cong., 2d Sess. 2 (1986)). An entity qualifying for HCQIA immunity "shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action." 42 U.S.C. §11111(a)(1). Specifically, HCQIA provides a "professional review body"[1] with immunity from damages whenever a "professional review action"[2] is taken in

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[1] The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity. 42 U.S.C. § 11151(11)

[2] The statute defines "professional review action" as an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. 42 U.S.C. §

accordance with the requirements of the statute.

In order for HCQIA immunity to apply, a professional review action must have been taken:

> (1) in the reasonable belief that the action was in furtherance of quality health care,
> (2) after a reasonable effort to obtain the facts of the matter,
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. §11112(a).

Because the evidence establishes a question of fact as to whether the Respondents can meet the third and fourth provisions of the statute, the lower court erred in granting Respondents' Motion for Summary Judgment.

A. Respondents Did Not Provide Adequate Notice and Hearing Procedures or Other Procedures Fair Under the Circumstances.

Contrary to the lower court's holding, Appellant clearly was not provided "adequate notices and hearing procedures" prior to the imposition of the summary suspension that would provide Respondents with the "safe harbor" they seek. The lower court improperly ignored or rejected the various deficiencies of Respondents.

1. Suspension

A suspension of a physician's clinical and admitting privileges is a significant action. There are consequences that flow from a suspension. All suspensions of doctors,

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11151(9).

regardless of the term, must be reported to the South Carolina Board of Medical Examiners pursuant to the South Carolina Hospital Reporting Act. Guanciale v. McLeod Regional Health, C/A No. 4:02-3001 (USDC-SC March 8, 2004)(attached). Congress recognized the importance of procedural safeguards by including a "due process" component requiring "adequate notice and hearing procedures" in the statutory framework. Congress intended to ensure that physicians facing disciplinary action have an opportunity to present a response to such action.

The lower court found that Appellant was not entitled to a hearing before his suspension. However, the United States District Court in Guanciale explained:

> The statute requires that "adequate notice and hearing procedures" are afforded to the physician" facing disciplinary action. Use of the terms "notice" and "hearing procedures" are significant. Congress chose these terms for good reason and the use of these terms indicate the hospital must meet at least a minimal "due process" requirement if the hospital gets the benefit of the shield of immunity. Inherent in basic due process is the right to be heard. "The right to be heard, which is so essential to due process in an adversary system of adjudication, [can] be vindicated only by affording a defendant an opportunity to testify before the fact-finder." Sexton v. French, 163 F.3d 874, 881 (4th Cir. 1998).

In this case, Randall did not receive any advanced notice of his suspension or the grounds for it. In addition, Randall was not provided any opportunity for a hearing prior to his summary suspension took effect. This cannot be disputed.

Moreover, Respondents failed to provide adequate notice as to all of the cases that were to be reviewed by the MEC prior to the suspension and hearing. The failure of a hospital to provide a physician with the basis of the claims precludes a claim of immunity. Estate of Blume v. Marian Health Center, 503 F. Supp. 2d 1103 (N.D. Iowa 2007) (Failure of hospital to provide suspended physician with any hearing, or access to incident reports forming basis of claims against him, prior to imposition of suspension,

precluded immunity under HCQIA). At the meeting by the ADHOC committee, Appellant was asked to address two cases that he had never been told were under consideration. Moreover, while both the ADHOC and the MEC recommended revocation of privileges, both committees recommended that Appellant be permitted to continue performing surgery until the peer review process was complete. Instead, on October 15, 2010, Dr. Edwards issued a letter summarily suspending Appellant, even though there was nothing subsequent to the MEC's determination that required suspension.[3]

2. Right to an attorney

Congress was very specific when it drafted into the statute what rights it believed a physician should be afforded under the "adequate notice and hearing procedures" section. Regarding a hearing procedure, the statute specifically states:

> (C) in the hearing the physician involved has the right-
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> > (i) to representation by an attorney or other person of the physician's choice,
> > (ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,
> > (iii) to call, examine, and cross-examine witnesses,
> > (iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and
> > (v) to submit a written statement at the close of the hearing; am.
>
> (D) upon completion of the hearing, the physician involved has the right-

[3] In fact, the lower court judge effectively acknowledged this, stating "And I think that Doctor Edwards was a little precipitous on taking that action....Because Patient JR did not just happen. That's the thing. That happened months ago." Tr. p. 45:20-25. The lower court also indicated that granting summary judgment, instead of allowing the matter to go to trial, was basically to further judicial economy because "I think if I grant summary judgment we'll get a quicker resolution than the other way and save lots of money." Tr. 45:9-20.

> (i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and
> (ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

42 U.S.C. § 11112 (b)(3)(C)&(D).

While the statute also states that a professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3), it does clearly indicate what type of hearing procedure should be afforded to a physician facing disciplinary action. Guanciale.

As noted, Appellant was not given notice of the charges that led to his summary suspension, nor was he provided an opportunity to be heard ahead of time. Furthermore, Dr. Patterson prevented Appellant's attorney for appearing before the MEC to address the summary suspension. Thus, even the post-sanction meeting before the MEC does not qualify as a hearing under HCQIA.

3. Hearing Date

The lower court found that Appellant was not entitled to a hearing date within 90 days of the suspension. However, the bylaws of Respondent hospital state that the hearing date "shall not be not less than thirty (30) days **nor more than ninety (90) days**" from the request for hearing. (R.p.__) (emphasis added).

Here, just two days before the hearing set within the 90-day time frame, the Respondent hospital's expert refused to come testify. The hospital first claimed that there was a scheduling conflict and then later notified the hearing panel representative that the surgical expert would not be available at all. *Id.* Jay McKay Depo. p. 22, ll. 6-23, p. 23, ll. 1-26, p. 27, ll. 4-22, R.p. __. At the hospital's request the hearing was postponed in

violation of the hospital by-laws and was rescheduled only once the hospital found another expert to testify against Appellant. Respondents cannot ignore their own peer review procedures while at the same time claiming those same procedures are fair and adequate, and provide Respondents with immunity under HCQIA.

4. General Surgeon

Appellant requested that a general surgeon serve on the hearing panel that was to be convened to consider the appeal of the summary suspension sanction and the recommendation by the MEC to revoke Appellant's abdominal surgical privileges. Once again, the hospital refused to appoint a member from the medical staff who had experience with performing laparoscopic abdominal surgery to the hearing panel. While Respondents should not have appointed any surgeon that was an economic competitor of Appellants, Respondent was required to make every effort to include a physician of the same specialty. See, H.R. REP. 99-903, 11, 1986 U.S.C.C.A.N. 6384, 6393, in which Congress noted that in some instances, "it may not be feasible to find physicians who are of the same specialty as the respondent but who are not in direct in economic competition. Nevertheless, the Committee expects the professional review body to make every reasonable effort to find appropriate officers or members of the panel, even if this requires bringing in reviewers from out of town...."). As a result of Respondents' failure to include a general surgery or someone experienced with abdominal laparoscopic surgery, Appellant was not afforded a fair hearing procedure and HCQIA offers no immunity to Respondents.

II. The lower court erred in failing to recognize that Respondents do not meet the exception to the Due Process Requirement.

The lower court found that under 42 U.S.C.A. § 11112(c)(2), Respondents were exempted from the due process requirements of notice and hearing to Appellant

because the suspension was necessary to protect patients from imminent harm. However, Respondents do not meet the exceptions to the notice and hearing requirements outlined in 42 U.S.C. §11112(c)(l) and (2). Section §11112(c) states:

> For purposes of section 11111(a) of this title, nothing in this section shall be construed as--
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> (1) requiring the procedures referred to in subsection (a)(3) of this section--
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> (A) where there is no adverse professional review action taken, or
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> (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
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> (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

42 U.S.C. §ll112(c)

Clearly, the exception cited in §11112(c)(l)(A) is not appropriate because the summary suspension was an adverse professional review action. The exception cited in §11112(c)(l)(B) applies only if the suspension or restriction of clinical privileges does not exceed 14 days "during which" an investigation is "being conducted" to determine the "need for" a professional review action. There are two primary components to the (c)(l)(B) subsection: (1) a suspension must not exceed 14 days; and (2) the suspension is imposed while an investigation is being conducted to determine the need for a professional review action.

The facts in the record do not support application of this special exception to the notice and fair hearing procedures required by §11112(a)(3). First, Appellant's summary suspension was not limited to 14 days. Second, there was no investigation undertaken to

determine the need for professional review action during the period of summary suspension, as admitted by both Dr. Patterson and Dr. Edwards. Dr. Patterson Depo. p. 54 ll. 21-25, p. 55 ll. 1-8; Dr. Edwards Depo. p. 59 ll. 21-25, p. 60 ll. 1-25. Furthermore, the letter to Appellant from Dr. Edwards does not indicate that an investigation will be undertaken. Rather, the letter states that Dr. Edwards has "determined that summary restriction of your privileges is warranted to ensure there will be no imminent danger to the persons for whom you might provide services under those privileges."

Dr. Edwards' conclusion that Appellant posed an imminent danger is contradicted by the actions of the MEC just days before which concluded that Appellant would be permitted to retain his surgical privileges while the proposed corrective action was under review. The patient JR who Dr. Edwards cited as the basis for his decision to impose a summary suspension was discharged in July from the hospital, had not been readmitted and, as far as the record indicates, did not suffer any adverse outcome. In addition, upon recommendation of the Credentials Committee, the MEC renewed Appellant's privileges for another year as of August, 2010, a month after patient JR had been discharged. Lastly, when patient JR's chart was reviewed by an external reviewer, the reviewer did not assess fault with Appellant's care and treatment.

Therefore, while a finding of imminent danger is an exception to the notice and hearing due process requirements under HCQIA, here there is sufficient evidence from which a jury could conclude that Appellant was not an imminent danger. As a result, summary judgment must be denied upon the Respondents' claim of HCQIA immunity.

III. The Intracorporate Conspiracy Doctrine Does Not Shield the Respondents From Liability Under South Carolina Law.

The lower court also found that there was no liability for civil conspiracy because a hospital's medical staff, doctors, and administrators in a peer review action, they cannot conspire. The lower court also found that Dr. Patterson and Dr. Edwards, two of the Respondents, were both agents of the hospitals and counsel not conspire. Under South Carolina law, the intracorporate conspiracy doctrine does not shield the defendants from liability for agent to agent conspiracies, particularly where one of the co-conspirators is acting through self-interest and malice.

South Carolina courts have clearly held that agents can conspire with each other in order sustain a cause of action for civil conspiracy. In Lee v. Chesterfield General Hosp., 289 S.C. 6, 14, 344 S.E.2d 379, 383 (Ct. App. 1986), the court held that "the agents of a corporation are legally capable, as individuals, of conspiracy among themselves or with third parties...." Specifically, in that case, the court found that an employee of a hospital could conspire with "other members of the medical staff"—in this case Dr. Patterson and Dr. Edwards. Id.

Similarly, Anthony v. Ward, 336 Fed. Appx. 311 (4th Cir. 2009) recognized that the intracorporate conspiracy doctrine was only applicable to principal-agent conspiracies, and not to conspiracies among fellow agents. In that case, the Fourth Circuit Court of Appeals affirmed a jury verdict against employees of the South Carolina Department of Corrections for civil conspiracy. The employees were accused of conspiring "for personal and malicious reasons" to force the plaintiff's termination from the Department. *Id.* at 312. On appeal, the defendants argued that the trial court erred by refusing the charge the jury on the issue of whether the defendants were acting in the course and scope of their employment and were therefore incapable of conspiring with each other. *Id.* at 315. The

trial court ruled that the intracorporate conspiracy doctrine was only applicable to principal-agent conspiracies and since the plaintiff alleged an agent-agent conspiracy the requested charge was rejected. *Id.* at 315-16. The Fourth Circuit Court of Appeals affirmed the judgment of the District Court concluding that since the jury specifically found on the jury verdict form that the defendants had conspired "for the purpose of injuring" the plaintiff, the defendants were not prejudiced "even if the district court erred in failing to give the requested instruction...." *Id.* at 316.

Furthermore, whether a conspirator had the intent to harm a plaintiff is for a jury to decide. Allegro, Inc. v. Scully, ___ S.E.2d__ (Ct. App. 2014)(2014 WL 2930343). Here, the evidence clearly creates a jury question regarding Dr. Edwards' motives for summarily suspending Appellant.[4] As Appellant explained, Dr. Edwards harbored personal animosity towards Appellant. Dr. Edwards admitted that his wife complained about Appellant's care for a friend's child. Subsequently, Dr. Edwards confronted Appellant more than once in the hospital over mundane issues, such as complaining that Appellant parked his car too close to Dr. Edwards. Dr. Edwards' conclusion that Appellant posed an imminent danger (and therefore that summary suspension was needed) was contradicted by the actions of the MEC just days before which concluded that Appellant would be permitted to retain his surgical privileges while the proposed corrective action was under review. The patient JR

[4] There is also bias by Dr. Patterson in that Appellant's merged his office with a company, Novant, that is in competition with Respondent Piedmont, which is Dr. Patterson's employer, which is a violation of Appellant's due process. *See, e.g.*, Braswell v. Haywood Reg'l Med. Ctr., 352 F. Supp. 2d 639, 646 (W.D.N.C. 2005)(finding personal bias in violation of due process where members of the MEC and other committees were competitors of plaintiff). Novant, Piedmont and a third hospital were all seeking to construct a new hospital in Fort Mill, South Carolina. Charles Miller Dep., p. 13-15 (R.p. __).

who Dr. Edwards cited as the basis for his decision to impose a summary suspension was discharged in July from the hospital, had not been readmitted and, as far as the record indicates, did not suffer any adverse outcome. In addition, upon recommendation of the Credentials Committee, the MEC renewed Appellant's privileges for another year as of August, 2010, a month after patient JR had been discharged. Lastly, when patient JR's chart was reviewed by an external reviewer, the reviewer did not assess fault with Appellant's care and treatment.

Dr. Edwards' stubborn refusal to accept the decision of the Credentials Committee, the Peer Review Committee and the MEC to allow Appellant to continue with surgical privileges is also circumstantial evidence of the ill will and personal bias Dr. Edwards harbored toward Appellant.

Furthermore, the evidence is overwhelming that Dr. Patterson conspired with Dr. Edwards to summarily suspend and ultimately convince the MEC to revoke Appellant's surgical privileges. At Dr. Edwards request, Dr. Patterson pulled patient records to present to the Peer Review Committee and then to the Credentials Committee. Dr. Patterson also met with Dr. Edwards after the MEC refused to summarily suspend Appellant and drafted the letter for Dr. Edwards that suspended Appellant, in direct conflict with the decision of the MEC. Dr. Patterson falsely represented the facts of patient JR's care before the MEC and misrepresented the MEC's options with regard to the summary suspension. Moreover, Dr. Patterson was the only physician who had training in general surgery that attended the ADHOC committee and MEC committee meetings where Appellant's surgical skills were being considered.

Under South Carolina law, a claim for civil conspiracy includes the following elements: (1) a combination of two or more persons; (2) joining for the purpose of injuring the plaintiff; and (3) which causes special damage to the plaintiff. Pye v. Estate of Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). Clearly there is more than a scintilla of evidence in the record to create a question of fact for the jury as to whether the Respondents Edwards and Patterson conspired for the purpose of injuring Appellant, causing him special damages, and the lower court erred in granting the motion for summary judgment.

IV. The Premise Underlying Appellant's Suspension was False and Therefore the Report of that Suspension to the S.C. Medical Board and the National Practitioner's Databank Gives Rise to a Claim for Defamation.

The lower court held that Appellant's claim for defamation must fail because the statements submitted to the NPDB were factually accurate. However, the lower court ignores South Carolina law that recognizes that defamation maybe actionable if the insinuation of the statement is false. Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 898, 901 (1987)(A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain.). The clear insinuation of the Appellants' report of suspension to both the South Carolina Medical Board and the NPDB is that Appellant was so incompetent that allowing him to practice medicine poses an imminent danger to patients.

In Wuchenich v. Shenandoah Memorial Hospital, 215 F.3d 1324 (4th Cir. 2000), the Court of Appeals concluded that the hospital's accurate reporting to the State Medical Board and the NPDB of a summary suspension based upon incompetence "constitutes defamation per se because each statement falsely imputed unfitness on the part of Dr. Wuchenich to perform his duties as an anesthesiologist and prejudiced him in his

profession." Similarly, in Guanciale, the District Court also permitted the plaintiff to pursue a claim for defamation for reporting a summary suspension to the South Carolina Medical Board.[5]

At the hearing, Respondent claimed that any report to the NPDB is privileged and cannot form the basis for a defamation claim, citing Swinton Creek Nursery v. Edisto Farm Credit 334 SC 469, 514 S.E.2d 126 (1999). Swinton Creek merely stands for the proposition that certain communications are conditionally privileged and when the conditional privilege applies, the plaintiff must prove actual malice. To prove actual malice, "plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious disregard for plaintiff's rights." 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999).

The evidence in the record discussed above clearly is sufficient to create a jury question regarding whether the Respondents acted with ill will and/or recklessness by causing the report of Appellant's summary suspension to be submitted to the NPDB. In addition, Appellant also alleges that the report of his suspension to the South Carolina Medical Board likewise was defamatory. In order to be immune from liability for making reports to the Medical Board, the Respondents must make the report "in good faith and without malice." S.C. Code Ann. § 44-7-70. Once again, whether the Respondents' actions were in good faith and without malice are questions of fact to be decided by the jury.

[5] The undersigned counsel was also counsel for Dr. Guanciale. In Guanciale, the case was ultimately remanded back to the Court of Common Pleas, Dillon County where a jury trial was held and Plaintiff obtained a verdict on the defamation claim.

CONCLUSION

As set forth herein, Respondents failed to meet the standards entitling them to immunity under the Health Care Quality Immunity Act. Thus, the lower court order granting Respondents' motion for summary judgment must be reversed.

Respectfully submitted,

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Columbia, South Carolina
August 1, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-46-00167

Robert Randall, M.D.,

Appellant,

v.

Amisub of South Carolina, Inc.
d/b/a/ Piedmont Medical Center,
Nathaniel Edwards, M.D., and
Richard Patterson, M.D.,

Respondents.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis Babcock & Griffin L.L.P, attorney for Robert Randall, M.D., do hereby certify that I have served a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on August 1, 2014, by causing a copy of same to be deposited in the U.S. Mail, proper postage prepaid addressed as follows:

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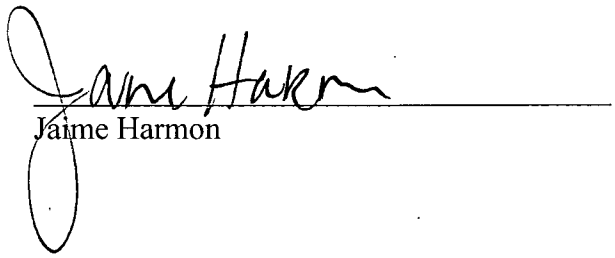

Jaime Harmon

This 1st day of August, 2014.

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August 1, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: ***Robert Randall, M.D. v. Amisub of South Carolina, Inc. d/b/a/ Piedmont Medical Center, Nathaniel Edwards, M.D. and Richard Patterson, M.D.***
Case No.: 2014-000913
Our File No.: 11-588

Dear Ms. Abbott Kitchings:

Enclosed please find the original and one copy of the following documents:

(1) Appellant's Initial Brief

(2) Designation of Matter to be Included in the Record on Appeal

Please file these documents and return the clocked in copy to the courier.

If you have any questions, please do not hesitate to contact this office.

With best regards, I am

Very truly yours,

Jaime Harmon
Assistant to James M. Griffin

/jh
Enclosures

cc: Travis Dayhuff (Via U.S. Mail)
Monteith P. Todd (Via U.S. Mail)