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 REPLY BRIEF

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ARGUMENT

Respondents spend a significant portion of their brief analyzing HCQIA standards that Appellant has challenged as inadequate. The only HCQIA standards that this Court need consider is whether the Respondents met the third and fourth standards. As Respondents did not, they are not entitled to immunity.

The third and fourth standards of HCQIA are whether the professional review was taken:

> (1) 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
> (2) 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).

Contrary to Respondents' Brief, Appellant has demonstrated that there is a question of fact as to whether the Respondents can meet these provisions. Thus, the lower court erred in granting Respondents' Motion for Summary Judgment.

A. There was no adequate notice and hearing

Respondents first claim that Appellant was not entitled to notice or a hearing before his suspensions. Respondents attempt to avoid Estate of Blume v. Marian Health Ctr., 503 F. Supp. 2d 1103 (N.D. Iowa 2007) vacated, 516 F.3d 705 (8th Cir. 2008), because that case clearly held that the 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 claim that hospital was immune under HCQIA. Respondents argue that the case was vacated on appeal, but the appellate court based its decision on a provision in the bylaws which provided that the practitioner extended immunity to the hospital for all actions relating to suspensions). Estate of Blume v. Marian Health Ctr., 516 F.3d 705, 708 (8th Cir. 2008). The appellate court did not vacate the applicable law that a physician must be given notice of all charges against him and/or be provided a hearing before a suspension.

A summary suspension without notice is only proper "where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2). There was clearly no such imminent danger here as the Credentials Committee voted to renew Dr. Randall's surgical privileges, finding that he was "safe to continue performing surgery." R.p. __. Just one month later the MEC approved Dr. Randall's reappointment to the surgical staff. Even after the ADHOC committee convened by Dr. Edwards recommended revocation of Dr. Randall's privileges, there was no finding of imminent danger; in fact the MEC recommended revocation only on the condition that Dr. Randall's "privileges will not be restricted...during the 30 days he can request a hearing." Since there was no imminent danger, HCQIA does not allow the Respondents to summarily suspend Dr. Randall without notice and a hearing.

Respondents dismiss the argument that the hearing date was untimely, arguing that a hearing can be continued beyond 90 days for good cause shown. However, there was no "good cause" for the second continuance. The only reason the Hospital sought the second continuance was because its expert suddenly became "unavailable," despite the fact that the hearing date had been set for over a month. After claiming it was a

scheduling conflict and receiving the postponement, the Hospital then 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. __. These tactics by Respondents cannot constitute "good cause."

Finally, Respondent claims that their failure to include a general surgeon or one with laparoscopic experience does not render the hearing panel inadequate under HCQIA. Respondents argue that Congress acknowledged that other physicians in other specialties could be panel members. 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 or using physicians of a different specialty". However, there is no evidence that Respondents made <u>any</u> attempt ore "reasonable effort" to use a surgeon from out of town despite Appellant's requests to do so.

B. Respondents cannot meet the requirement that they had a reasonable belief their action was warranted.

Under the fourth prong of HCQIA, immunity is only conferred if the hospital had a reasonable belief that its actions were warranted by the facts known after such reasonable effort to obtain facts and after meeting the adequate hearing requirements of the third prong. Of course, as noted, Respondents did not meet adequate hearing requirements, and thus, it is not possible for Respondents to have met the fourth requirement.

C. Respondents have the capacity to conspire.

Respondents wrongly claim that the intra-corporate doctrine does not apply because Dr. Randall and Dr. Edwards are both agents of the Hospital and cannot conspire. However, South Carolina courts have clearly recognized that agents of a corporation can conspire with each other. 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...." That case involved the conspiracy between a hospital administrator and the hospital, and other members of the medical staff to limit the privileges of a physician assistant. Id. This Court held that "the agents of a corporation are legally capable, as individuals, of conspiracy among themselves or with third parties...." Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 14, 344 S.E.2d 379, 383 (Ct. App. 1986).

Furthermore, while Respondents assert that members of the peer review board must be considered a single entity that cannot conspire with itself, the Fourth Circuit Court of Appeals has recognized that individuals on a peer review board have the capacity to conspire:

> The question remains whether the medical staff has the capacity to conspire among itself either during peer review or at other times. **We recognize that a medical staff can be comprised of physicians with independent and at times competing economic interests. As a result, when these actors join together to take action among themselves, they are unlike a single entity and therefore they have the capacity to conspire as a matter of law.**

Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 706 (4th Cir. 1991)(emphasis added).

The record in this case creates an issue of fact as to whether Dr. Edwards was motivated to conspire by personal bias. In addition, there is evidence of bias by Dr.

Patterson in that Dr. Randall's practice merged with a company, Novant, that is in competition with Dr. Patterson's employer. Thus, Respondents had the capacity to conspire as a matter of law and there is sufficient evidence by which a jury could conclude that they were motivated by bias to conspire.

D. Respondents' malice supports the defamation claim.

Respondents claim that Dr. Randall admitted that the report submitted to the National Practitioner Data Bank was factually accurate and thus, his defamation claim is baseless. However, Respondent completely ignored the fact that 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.) Furthermore, HCQIA only confers immunity on any person who makes a report to the National Practitioner Data Bank "without knowledge of the falsity of the information contained in the report." 42 U.S.C. § 11137(c) (1994). Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1334 (10th Cir. 1996). Here, Respondents knew that Dr. Randall was not an imminent danger to the patients as the MEC had made that determination there should be no suspension without a hearing. Instead of accepting such decision, Respondents maliciously and summarily suspended and then submitted the report to NPDB, thus providing the basis for the defamation claim. See, Wuchenich v. Shenandoah Memorial Hospital, 215 F.3d 1324 (4th Cir. 2000)(court concluded of Appeals concluded that the hospital's accurate reporting to the NPDB of a summary suspension based upon incompetence constituted defamation per se).

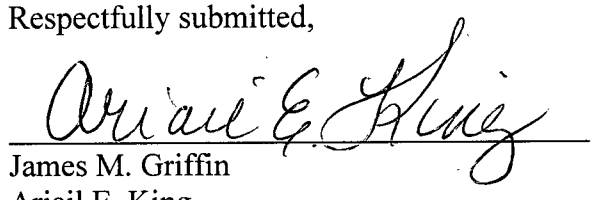
Respondents also claim that even if the report to NPDB was false and defamatory,

it is protected by privilege, citing Swinton Creek Nursery v. Edisto Farm Credit 334 SC 469, 514 S.E.2d 126 (1999). However, in order to claim the privilege afforded by Swinton Creek, Respondents must have made the report "in good faith and without malice" as required by S.C. Code Ann. § 44-7-70. There is evidence in the record that Respondents act with ill will and malice, to wit: Dr. Edwards refused to accept the MEC's decision to allow Dr. Randall to continue performing surgery until a hearing could be held; the fact that Dr. Edwards used pretense as the basis for summary suspension – the patient JR who had been released from the hospital months before with no adverse outcome and thus was no danger; and 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. Thus, they are not entitled to claim privilege as a shield to the defamation claim.

CONCLUSION

There was no imminent danger from Dr. Randall's continuing surgery, as the MEC clearly found, and the summary suspension without notice or a hearing was improper. Furthermore, Respondents failed to meet the third and fourth requirement for HCQIA immunity. For those reasons, as set forth more fully herein and in Appellant's opening Brief, the lower court's grant of summary judgment should be reversed.

Respectfully submitted,



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September 19, 2014

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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 Reply Brief on September 19, 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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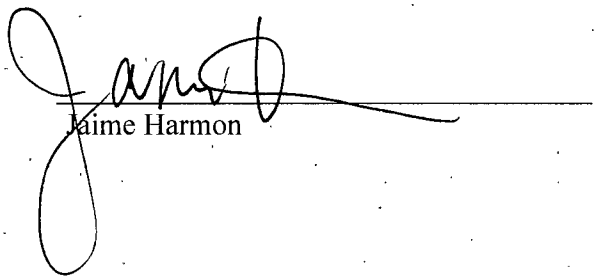

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This 19th day of September, 2014.

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September 19, 2014

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
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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 Appellant's Initial Reply Brief. Please file these documents and return the clocked in copy to the courier.

By copy of this letter and as evidenced on the Proof of Service, I am serving counsel of record.

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)
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