Docket No. 06-2162

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RAKESH WAHI
Plaintiff - Appellant

v.

CHARLESTON AREA MEDICAL CENTER, INCORPORATED, A West Virginia Corporation, *et al.*
Defendant – Appellee

An appeal from the Southern District
of West Virginia at Charleston
District No. 0425-2, 2:04-cv-00019
(James R. Goodwin, Presiding Judge)

BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS FILED IN SUPPORT OF APPELLANT SUPPORTING REVERSAL OF THE JUDGMENT BELOW

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March 11, 2008

CORPORATE DISCLOSURE STATEMENT

RakeshWahi v. Charleston Area Medical Center, Inc., No. 06-2162

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* The Association of American Physicians and Surgeons makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation that is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

Dated: March 11, 2008

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit national organization consisting of thousands of physicians in all specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service of patients who entrust their care to the medical profession. The motto of AAPS is "omnia pro aegroto," or "all for the patient."

AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. AAPS successfully submitted an *amicus* brief to this Court in *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006) (overturning a conviction as argued by AAPS). In another case, the Third Circuit cited an AAPS *amicus* brief in the first paragraph of its decision. *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). AAPS has also successfully filed *amicus* briefs in other appellate cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court Justice Kennedy frequently citing AAPS's submission); *United States v.*

Rutgard, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

Of particular concern to AAPS now is the growing misuse of peer review commonly known as "sham peer review." This includes anticompetitive manipulation of peer review to eliminate innovative or popular physicians from the market, or to retaliate against physicians who provide "too much" care to high risk or critically ill patients. Sham peer review is very real and has a dreadful chilling effect on the entire profession. It is anti-competitive; it is contrary to public policy; it is tortious; and it is defamatory. In its essence, sham peer review is not peer review at all, but a tortious or illegal act disguised as peer review.

AAPS submits this brief to emphasize the need for legal accountability for tortious acts disguised as sham peer review, and to ensure that patients do not lose the services of good physicians based on torts masquerading as peer review.

AAPS requested but did not receive consent from Appellees, and files an accompanying motion for leave to file this brief.

SUMMARY ARGUMENT

Appellant Dr. Rakesh Wahi lost his hospital privileges – and his reputation – without receiving any hearing. This procedure and outcome comport with neither fundamental due process nor the immunity provided for professional peer review decisions by the Health Care Quality Improvement Act of 1986 (HCQIA). The decision below granting immunity to the Charleston Area Medical Center (the "Hospital" or "CAMC") for revoking a physician's privileges without a hearing should be reversed as a matter of law. The burden is not on the physician to request and arrange a hearing, contrary to the decision of the court below. Moreover, even if a physician failed to participate in a hearing, the interests of patients and the general public support a requirement that a proper fact-finding hearing be held in his absence before revoking his privileges, if the hospital seeks to enjoy special immunity under federal law for its actions.

In this case, the medical board of West Virginia investigated Dr. Wahi three times at the urging of the Hospital, and cleared him three times. *Wahi v. Charleston Area Med. Center,* 453 F. Supp. 2d 942, 947 (S.D. W.Va. 2006). There was no basis for revoking his privileges. But the Hospital, anticipating full immunity for any and all wrongdoing or bad faith, revoked Dr. Wahi's privileges anyway. It played a cat-and-mouse game whereby it evaded and avoided the basic

requirement of a hearing. Regardless of whether the Hospital has the right to revoke a physician's privileges and destroy his reputation by reporting that revocation, the Hospital does not have a right to full immunity for its actions in the absence of a hearing.

The integrity of the peer review process requires limitations on game-playing by administrators who are determined – often for wrongful reasons – to destroy a physician. Innovation halts when leading physicians justifiably fear being ambushed and ruined by bad faith peer review, also known as "sham peer review." There is an inherent conflict between the interests of hospitals and physicians: hospitals can improve their profits by limiting care, often in end-of-life situations, while physicians do their job best by increasing care, particularly to the most ill. Amid these conflicts, legal accountability is a necessary deterrent against defamation. *See* James Madison, Federalist No. 51 ("If men were angels, no government would be necessary.").

Sham peer review, such as the revocation of hospital privileges without a hearing, intimidates good physicians and hinders innovation in medicine. Such tortious conduct deters physicians from defending their patients against a hospital more focused on its bottom line or a value system different from the patient's family. The hospital industry is one of the most profitable in America's economy;

it must not be allowed to hide behind sweeping immunity that Congress has not conferred upon it.

Reversal of the decision below is necessary to preserve accountability and to preserve quality and innovative medical care for patients who need it most.

ARGUMENT

HCQIA does not provide blanket immunity for destroying the reputation of a good physician, especially in the absence of a hearing. Nothing in the text of HCQIA or its legislative history supports such radical intrusion into basic due process. Congress did not intend to rewrite due process in order to protect wrongdoing by hospital administration.

Accountability is essential to deter and provide a remedy for the destruction of the reputation of a good physician, as defendants wrongfully did here. Bad faith or "sham" peer review thrives in the darkness of inadequate legal accountability. The court below erred in granting defendants full immunity under HCQIA, and its decision must be reversed.

I. HCQIA Immunity Does Not Extend to Peer Review Action Taken in the Absence of a Hearing.

The Court below erred in conferring HCQIA immunity despite the failure of Defendants to provide a hearing to Dr. Wahi. HCQIA expressly requires the equivalent of adequate notice and hearing procedures: "For purposes of the protection set forth in section 411(a), a professional review action must be taken-- … 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." 42 USCS § 11112(a) & (a)(3). As found by the lower court and conceded by both sides, no hearing was ever set or held. *Wahi v. Charleston Area Med. Center,* 453 F. Supp. 2d 942, 947 (S.D. W.Va. 2006). There was never an equivalent substitute. As a matter of law, this HCQIA requirement has not been satisfied, and immunity should not attach to the professional review action.

The U.S. Supreme Court has noted in various contexts how a hearing is an essential part of basis due process, and Congress cannot be presumed to allow immunity to attach in the absence of a hearing. Justice Brennan observed in the securities context, for example, that even a short suspension "without notice or hearing so obviously violates fundamentals of due process and fair play that no reasonable individual could suppose that Congress intended to authorize such a

thing. *SEC v. Sloan*, 436 U.S. 103, 123-24 (1978) (Brennan, J., concurring). "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)). "The hearing must be 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

The court below implicitly shifted the burden of arranging the hearing from the Hospital to Dr. Wahi, and when he failed to arrange it, the Hospital denied him a hearing altogether. But a physician is in no position to arrange a hearing, and should not bear the burden for arranging it. He does not know what the Hospital really plans to do with him; he does not have access to the schedules of the other witnesses, experts, and availability of the facility; and he does not have the resources to make all the arrangements necessary. If a hospital fails to make the arrangements for a hearing, then the physician can plausibly assume that the hospital is losing interest in taking action against his privileges. Not even drivers' licenses in West Virginia can be revoked under circumstances analogous to those here. *See Abshire v. Cline*, 193 W. Va. 180, 455 S.E.2d 549 (1995) (reversing a revocation of a drivers' license and ordering a new hearing based on a prior failure to reschedule and hold a hearing). It was reversible error for the court below to grant immunity despite a lack of a hearing.

Nothing in HCQIA mandates such a result. In its Preamble, HCQIA limits its purpose to immunize against "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, [which] unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4).

A hearing is a fundamental aspect of due process under both West Virginia and federal law. *See, e.g.*, *Abshire v. Cline*, 193 W. Va. at 183, 455 S.E.2d at 552 (emphasizing that a hearing is a "fundamental right to due process"). Without a clear statutory mandate, Congress should not be presumed to have preempted that basic protection. In such instances where the dispute concerns "the usual constitutional balance between the states and the federal government," then statutory construction requires that Congress "must make **unmistakably clear** its intention to do so in the statute's language." *Premiere Network Servs. v. SBC Comm.*, 440 F.3d 683, 690 n.8 (5th Cir. 2006) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) and *Gonzales v. Oregon*, 546 U.S. 243 (2006), emphasis added). Congress did not make it "unmistakably clear" in HCQIA that it preempts fundamental rights to a hearing. Nothing supports such a massive expansion in federal power over the medical profession. Where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional

role in maintaining it," state law must remain applicable. *Gonzales v. Oregon*, 546 U.S. at 275.

The Supreme Court has emphasized that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts shall] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The expansion in scope of HCQIA immunity would create a constitutional problem: it would lead to massive disruption of state law with respect to hospital administration.

This disruption would adversely affect all patients. Medical care is essential to nearly every American, and is the source of numerous controversial local issues from abortion to end-of-life care to so-called medical marijuana. Wholesale federal preemption of state law under an expanded HCQIA immunity with respect to hospital administration would violate well-established principles of federalism. As Justice Kennedy wrote in the seminal ruling on federalism:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing H. Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977) and G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 524-532, 564 (1969)).

Nationwide, hospitals seek to extend HCQIA immunity beyond sensible limits in a manner that would lead to federal control of all of medicine. This is contrary to precedent and congressional action. The Supreme Court has emphasized that "[o]bviously, direct control of medical practice in the States is beyond the power of the Federal Government." *Linder v. United States*, 268 U.S. 5, 18 (1925). At no time has Congress attempted to alter state jurisdiction over medicine, despite the urgings of hospitals. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Congress never authorized such a complete disregard of state law for medical practice, an area in which "[s]tates lay claim by right of history and expertise." *Gonzales v. Raich*, 545 U.S. 1, 48 (2005) (O'Connor, J., dissenting) (quoting *Lopez,* 514 U.S. at 583 (Kennedy, J., concurring)). ""It also seems appropriate … to emphasize the kinship between our well-established presumption against federal pre-emption of state law." *Jones v. United States*, 529 U.S. 848, 859 (2000) (Justices John Paul

Stevens and Clarence Thomas, concurring) (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)).

The Supreme Court of Nevada has already concluded that there are meaningful limits on the scope of immunity under HCQIA. This has benefited Nevadan patients and physicians alike. *See Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 25 P.3d 215 (Sup. Ct. Nev. 2001). There the court denied HCQIA immunity to the hospital (HCA) for revoking a physician's privileges based upon the pretext of disruptive behavior by the physician. In reversing a grant of summary judgment to the hospital by the court below, the court held that "the board is not entitled to immunity as a matter of law." 117 Nev. at 480, 25 P.3d at 223. The court found that the real reason for the sham peer review against the physician was his filing of reports critical of the hospital.

Similarly, a state court in Connecticut has rejected the insatiable demand of hospitals for complete federal immunity. In *Harris v. Bradley Mem. Hosp. & Health Ctr.*, 2005 Conn. Super. LEXIS 1401 (Conn. Super. Ct. May 19, 2005), the court held that HCQIA does not immunize a hospital against all claims for damages because not all summary suspensions qualify as peer review under HCQIA. "After a review of the case law and the evidence, presented by the plaintiff, the court concludes that the plaintiff engaged in more than one

professional review action and that the plaintiff has demonstrated the existence of a genuine issue of material fact concerning whether one of those actions satisfied the statutory requirements for immunity." *Id.* at *15 - *16.

Neither the plain meaning of HCQIA nor well-established principles of federalism support immunity in the absence of a hearing.

II. Applying HCQIA Immunity Despite a Lack of a Hearing Would Frustrate Competition, Innovation, and Quality Medical Care.

Immunity for hospitals in peer review in the absence of a hearing is as unwise as it is unjustified by statute. Hospitals, already a highly profitable industry lacking in adequate competition, become islands of unaccountability with shields of federal immunity. It is imprudent to place hospitals above the law, and give them the ability to dispose of principled physicians who stand up for their patients.

Congressional Gold Medal winner Michael DeBakey performed the first successful coronary bypass surgery in 1964, "a breakthrough credited with prolonging millions of lives." Todd J. Gillman, "Pioneering Heart Surgeon to Get Congressional Gold Medal," Dallas Morning News (Sept. 8, 2007).[1] That innovation was worth billions, perhaps trillions, of dollars. But would an

[1]http://www.dallasnews.com/sharedcontent/dws/news/nation/stories/DN-debakey_08tex.ART.State.Edition1.4228788.html (viewed 3/11/08)

analogous innovation be likely today, if hospital or jealous competitor can destroy an innovator without even a hearing? There have not been many DeBakeys since courts began extending near absolute immunity to hospitals to destroy, or allow the destruction, of good physicians. The reason is obvious: the physician who approaches medicine in a new way is an outlier, an object of envy, and a competitive threat. Hospitals must be held accountable to ensure reward for innovation and deterrence against interference with medical advances.

The leading law firm for hospitals, Horty & Springer, has actually conducted special seminars at luxurious resorts for hospital administrators teaching them how to use sham peer review as a way of "[d]ealing with economic competition from medical staff members."[2] Had Dr. DeBakey been viewed as an economic threat to other physicians in control of a hospital, as occurred in the case of *Patrick v. Burget* 486 U.S. 94 (1988), then Dr. DeBakey's privileges could have been snuffed out through sham peer review, and his innovative techniques blocked from use. His innovative techniques may never have seen the light of day.

[2] http://www.allianceforpatientsafety.org/hs2.pdf (viewed 3/11/08)

Unchecked, retaliation against innovators and outspoken physicians is a growing problem. Nearly 25% of physicians who reported concerns with patient care, which could include denial of care to handicapped infants or those in persistent vegetative states, suffered threats to their jobs. Scott Plantz, M.D., *et al*., "A National Survey of Board-Certified Emergency Physicians: Quality of Care and Practice Structure Issues," 16 *Am. J. of Emerg. Med.* 1, 2-3 (Jan. 1998). Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series beginning Oct. 26, 2003, entitled "Cost of Courage."[3] His articles showed how retaliation occurs nationwide, describing in detail the experiences of 25 physicians and a nurse, who suffered from actions adverse to their careers after they tried to improve care at their respective institutions.

Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court of Virginia to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187 (2004). Though difficult to glean from the reported decision, Dr. Horner was exposing the poor care of patients when an administrator at Western State Hospital charged him with violating another employee's right to confidentiality. The administration of Dr.

[3] http://www.post-gazette.com/pg/03299/234499.stm (viewed 3/11/08)

Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. *See* Bob Stuart, "Court Rules for Whistleblower," *News Virginian* (June 16, 2004). Such pretextual allegations have become common.

The chilling effect of a grant of immunity to hospitals in the absence of a hearing is clear: destroy the career of one physician, and hundreds or thousands of physicians will refrain from speaking out or competing against the perpetrators.

III. A Hearing is Essential to Deter and Inhibit Sham Peer Review, and Granting Immunity in the Absence of a Hearing Would Have Dire Consequences.

Where courts have erroneously granted near-absolute immunity to hospitals, an epidemic of sham peer review has predictably resulted. Such wrongful conduct interferes with quality medical care and impedes the benefits of competition and free enterprise. "Sham peer review" is not "peer review" at all, but is tortious conduct labeled "peer review" by hospitals in order to exploit a judicially created immunity. A hearing would deter and inhibit sham peer review, and must be granted to maintain justice and promote innovation among physicians.

Medical literature has frequently described the resultant travesty of justice. *See, e.g.*, Gail Weiss, "Is Peer Review Worth Saving?" Medical Economics (Feb.

18, 2005);[4] Steve Twedt, "The Cost of Courage: How the Tables Turn on Doctors," *Pittsburgh Post-Gazette* A1 (Oct. 26, 2003);[5] John Zicconi, "Due Process or Professional Assassination?" Unique Opportunities (March/April 2001);[6] David Townsend, "Hospital Peer Review Is a Kangaroo Court," Medical Economics 133 (Feb. 7, 2000).

Medical journals also recount egregious injustices under judicially created immunity for "sham peer review." *See, e.g.*, William Summers, "Sham Peer Review: A Psychiatrist's Experience and Analysis," *Journal of American Physicians and Surgeons* 125 (Winter 2005);[7] Roland Chalifoux, Jr., M.D., "So What Is a Sham Peer Review?", 7 *Medscape General Medicine* (No. 4) 47 (2005); John Minarcik, M.D., "Sham Peer Review: a Pathology Report," *Journal of American Physicians and Surgeons* 121 (Winter 2004);[8] Lawrence Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," *Journal of American Physicians and Surgeons* 68 (Fall 2004);[9] William Parmley, "Clinical Peer Review or Competitive Hatchet Job," 36 *Journal of the American College of Cardiology* 2347 (2000).

[4] http://www.memag.com/memag/article/articleDetail.jsp?id=147405 (viewed 3/7/08)
[5] http://www.post-gazette.com/pg/03299/234499.stm (viewed 3/7/08)
[6] http://www.uoworks.com/pdfs/feats/PEERREVIEW.pdf (viewed 3/7/08)
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[8] http://www.jpands.org/vol9no4/minarcik.pdf (viewed 3/7/08)
[9] http://www.jpands.org/vol9no3/huntoon.pdf (viewed 3/7/08)

In a purely economic sense, hospital administrators hired to maximize profits arguably should exploit this immunity for the benefit of shareholders or stakeholders, and often at the expense of patient care. And if this immunity were actually created by Congress, then the courts might leave the problem for Congress to resolve. But Congress did not create such sweeping immunity in HCQIA or any other federal law. Moreover, principles of federalism militate against such a massive interference with state law in this field.

When courts expand immunity to sham peer review the "system is too open to manipulation and needs reform." Jeff Chu, "Doctors Who Hurt Doctors," Time 52 (Aug. 15, 2005) (citing the Association of American Physicians and Surgeons). In medicine as in any industry, a sweeping grant of immunity to one side is as disastrous as it is unjustified. For physicians who truly are a danger to patients, state medical boards can and will restrict or revoke their licenses to practice medicine. Likewise, they can weed out complains filed under questionable motivations, such as when the West Virginia state medical board repeatedly exonerated Dr. Wahi. Patients themselves will abandon such a physician, just as shoppers will not continue buying bad products. If a hospital wishes to rid itself of a negligent physician, it is always free to do so regardless of whether it has special

immunity under federal law. But immunity for sham peer review by a hospital is inappropriate.

CONCLUSION

Wrongful and anticompetitive behavior by hospital administrators is rampant under the guise of "peer review." Immunity should not attach in the absence of a hearing, and the decision below should be reversed.

Respectfully submitted,

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Dated: March 11, 2008

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CERTIFICATE OF SERVICE

Andrew L. Schlafly hereby certifies that he caused two true copies of this *Amicus* Brief Filed In Support of Appellant Rakesh Wahi to be delivered by overnight commercial carrier on this 11th day of March 2008, to:

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