SUPREME COURT OF LOUISIANA

No.93-C-2512

PRENTISS E. SMITH, M.D.
PLANTIFF-RESPONDENT

VERSUS

OUR LADY OF THE LAKE HOSPITAL, ET AL
DEFENDANTS-APPLICANTS

AMICUS CURIAE BRIEF ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS-APPLICANTS' JOINT APPLICATION FOR WRIT OF CERTIORARI OR REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT PARISH OF EAST BATON ROUGE

Peer Review Protections

Peter J. Butler (Bar #3731)
Donna D. Fraiche (Bar #5814)
LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
Pan American Life Center
601 Poydras Street - Suite 2400
New Orleans, Louisiana 70130-6036
Telephone: (504) 558-5100

Counsel for amicus curiae, the American Hospital Association

SUPREME COURT FOR THE STATE OF LOUISIANA

No.93-C-2512

PRENTISS E. SMITH, M.D.

Plaintiff/Respondent

VERSUS

OUR LADY OF THE LAKE HOSPITAL, ET AL

Defendants/Applicants

AMICUS CURIAE BRIEF ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE APPLICATION OF OUR LADY OF THE LAKE HOSPITAL, ET AL, DEFENDANTS-APPLICANTS, SEEKING A WRIT OF CERTIORARI OR REVIEW TO THE FIRST CIRCUIT COURT OF APPEAL

MAY IT PLEASE THE COURT:

The American Hospital Association ("AHA") is the primary organization of the hospitals of the United States. Its membership includes nearly 5,500 hospitals and other health care institutions, as well as approximately 50,000 personal members. AHA's principal objective is the promotion of high quality health care and health services for all people through leadership and assistance to hospitals and health care institutions. Through its participation herein, AHA seeks to add its voice to the chorus of concern engendered by the decision handed down by the Louisiana First Circuit Court of Appeal. That decision, if allowed to stand, will have ruinous consequences for quality health care and effective medical peer review in this State. The decision is also anathema to national health care reform and policy, both that envisioned and that already occurring. Finally, the First Circuit's opinion so eviscerates the legislative grant of qualified immunity embodied in La. R.S. 13:3715.3(C) as to render the statute meaningless.

Peer review, the process by which physicians, hospitals and other health care providers observe and review the performance of physicians, and where warranted, discipline physicians for incompetent or unprofessional conduct, has become a critical element of health care in the United States. To be accredited by national accrediting bodies such as the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), hospitals must adopt and implement peer review procedures. See JCAHO, 1991 Accreditation Manual for Hospitals, Standard G.B.1.18, Ms.6.1,QA.2.1.1.

Voluntary service and peer review programs by hospitals and staff physicians have been recognized as indispensable to protecting the quality of care, for only physicians possess the "particular skills and judgment" necessary for assessing and analyzing the quality of care rendered in hospitals. See American Hospital Association/American Medical Association, Report of the Joint Task Force on Hospital-Medical Staff Relationships II (1985). Regrettably, doctors and hospitals know that one common consequence of participation in peer review committees has been the threat of private money damage liability and protracted and disruptive litigation. In response to this strong disincentive, to date some forty-six states have enacted statutes providing immunity to medical peer review participants. Louisiana's law, La. R.S. 13:3715.3(C), became effective on July 21, 1983.

Recognizing the "overriding national need to provide incentive and protection for physicians engaging in effective professional peer review," Congress enacted in 1986 the Health Care Quality Improvement Act ("HCQIA"), 42.U.S.C. § 11101 *et seq*. To qualify for immunity under the Act, a professional review action must be 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). Congress considered, but rejected, a "good faith" standard for immunity, fearing that it would result in disputes over the subjective state of mind of the participants. In an intentional effort to avoid litigation turning on the motives of the peer review participants, or otherwise engaging in a subjective analysis, an objective "reasonable belief" standard was adopted. Congress intended that this "test [would] be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." H.R. Rep. No.903, 99th Cong., 2d Sess. 10, reprinted in 1986 U.S.C.C.A.N. 6393. Congress did not intend to create the right to a trial *de novo* with juries rehearing and reconsidering all of the evidence presented to the peer review participants, then substituting their judgment for that of the hospital.[1] Congress anticipated and encouraged the resolution of the issue of immunity as expeditiously as possible. See

[1] As recognized by the district court in Fobbs v. Holy Cross Health System Corp., 789 F. Supp. 1054 (E.D. Cal. 1992), in which the defendants were granted summary judgment based upon the immunity provided by the HCQIA, it is not the role of courts to express an opinion regarding the "correctness" of the defendants' acts. *Id.* at 1069.

H.R. Rep. No.903, 99th Cong., 2d Sess. 12, reprinted in 1986 U.S.C.C.A.N. 6394; see also 132 Cong.Rec. H99559 (daily ed. Oct.14, 1986)(statement of Rep. Waxman)(standards for determining entitlement to immunity "should permit a court to make an early finding in that regard"). See also Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992) (affirming summary judgment based on HCQIA qualified immunity).

Congress also provided, in § 11111(c) of the Act, a mechanism for states to adopt the provisions of the HCQIA and apply them to state laws. The Louisiana legislature opted in to the HCQIA by Act No. 690 of 1988, thereby determining that all peer review actions commenced after July 15, 1988 would be governed by the provisions of the HCQIA. We submit that this action by the Louisiana legislature is strong evidence of its desire to have the provisions of La. R.S. 13:3715.3(C) interpreted in accordance with the standards set forth in the HCQIA. In other words, rather than run the substantial risk of differing and irreconcilable judicial interpretations of "reasonable belief", the Louisiana legislature opted for the interpretive guide offered by § 11112 of the Act. Therefore, if a professional peer review action is taken in the reasonable belief that the action is in furtherance of quality health care, after a reasonable effort to obtain the facts, after adequate notice and hearing, and in the reasonable belief that the action is warranted by the facts known, then the peer review action must necessarily be "without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to [the peer review committee member]."

Our conviction that the Louisiana legislature intended that result is bolstered by the chaos threatened by the First Circuit's untenable decision. According to the First Circuit, summary judgment is simply unavailable as a vehicle to implement the defense of qualified immunity provided under La. R.S. 13.3715.3(C). While the appellate court was careful to eschew any such "bright line" rule, the facts of this case and the ruling of the First Circuit clearly provide peer review committee members with no hope of averting by summary dismissal of the claims asserted the exorbitant costs of a trial on the merits.[2] Since others have adequately addressed the issue, we will not belabor the point other than to briefly note that Dr. Smith's conduct and competency were reviewed on no less than nine separate occasions by various hospital committees, services and boards and were also subject to an

[2]AHA wishes to make clear that it does not argue that La. R.S. 13:3715.3(C) provides an immunity *from suit*. Two federal courts which have interpreted the HCQIA, in the context of the appealability of a denial of a motion to dismiss, have noted the distinction between immunity from suit and immunity from liability and indicated that the HCQIA provides the latter, but not the former. See Manion v. Evans, 986 F.2d 1036 (6th Cir. 1993); Decker v. IHC Hospital, Inc., 982 F.2d 433 (10th Cir. 1992). What we do argue is that *summary judgment* should be available to afford defendants the immunity from liability granted by the Louisiana Act, as is the case under the federal Act.

independent review by the National Society of Thoracic Surgeons. This peer review process took place over a four year period and concluded in a finding that the surgery performed by Dr. Smith did not measure up to acceptable standards of practice for the time interval involved. It is important to note that Dr. Smith has made no allegation that he was deprived of due process or of hearings and appeals due to him.

As previously noted, it is not the role of the courts to express an opinion regarding the "correctness" of peer review participants' acts. Fobbs, 789 F. Supp at 1069. As the United States Fifth Circuit has recently reiterated:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the Court, which is charged with the responsibility of providing a competent staff of doctors. . . .The court is charged with a narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered.

Leach v. Jefferson Parish Hospital District No. 2, 870 F.2d 300, 302 (5th Cir. 1989) [quoting Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971)]. Put another way, "[t]he evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance." Sosa, 437 F.2d at 177.

There can be no quarrel that in this case the defendants' actions in terminating Dr. Smith's hospital privileges were reasonable and the process was fairly administered. Acutely aware of this fatal flaw in his case, Dr. Smith chose to launch the trial court into the murky waters of intent and malice. We do not believe, given the interpretative guidance of the HCQIA and the applicable jurisprudence, that this is an area in which the courts should immerse themselves in medical peer review cases. The important inquiry is whether the process itself was fair, not whether some portion of the process or one of the participants was motivated by ill-will. Yet, the First Circuit, in our view, improperly chose to focus its inquiry on a defendant's state of mind, not during the peer review process itself, but prior thereto. Specifically, the appellate court held that while "the evidence [was] not clear as to whether or not there was any malice and/or a lack of reasonable belief that the actions taken were warranted, there [was] substantial indication in the record that something other than Dr. Smith's alleged lack of surgical skills and/or his alleged substandard practices motivated the inquiry into his mortality statistics." (Opinion on Rehearing, p.16). Assuming that malice is properly at issue in this case, we think that a more direct causal link should be required to be proved by the plaintiff than that enunciated by the appellate court. The fact that "something" motivated an *inquiry* into Dr. Smith's *mortality statistics* hardly provides a basis for concluding that the defendants are not entitled to summary judgment on their

qualified immunity defense. See Carter v. BRMAP, 591 So.2d 1184 (La.App. 1st Cir. 1991) (summary judgment granted since there was no issue of material fact as to *pertinent* intent).

The hospital-wide inquiry into mortality statistics, which subsequently revealed a potential problem regarding Dr. Smith's practices, was initiated in the fall of 1983 by the then-Chief of Surgical Services and Medical Chief of Staff, not by any peer review committee. This study was for the purpose of quarterly educational staff meetings. It is important to note that it is not the action or recommendation of any peer review committee member which the First Circuit faults, but rather the alleged motivation of an unnamed person in conducting an inquiry *prior to* peer review action or recommendation. AHA submits that the First Circuit embarked upon an improper inquiry, focused upon an irrelevant event, and reached an erroneous conclusion. As a matter of public policy, it should make no difference whether one of the defendants was motivated by less than pure intentions in initiating the mortality statistics study, for Dr. Smith's rights are protected and the public's health concerns are advanced so long as the plaintiff was afforded due process, and the peer review action ultimately taken was reasonably based.

Not only does the First Circuit's opinion effectively deprive medical peer review participants of the benefit of qualified immunity, but the decision also emasculates the proper role of summary judgment. As the United States Supreme Court has noted, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[3] Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986)(citations omitted). By virtue of the ruling under review, the First Circuit has virtually assured that no "speedy and inexpensive determination" on the defense of qualified immunity under R.S.13:3715(C) can ever be reached.

The end result is that in a case where every conceivable aspect of due process was afforded, where there is not even a complaint that due process was denied, where there can be no argument that the result of the peer review was based upon anything other than a reasonable belief that the actions taken were warranted, and where there is no evidence of any malice and/or lack of reasonable belief, the defendants must nevertheless bear the full expense of costly and drawn-out litigation before submitting their statutory qualified

[3] Article 966 of the Louisiana Code of Civil Procedure is based upon Federal Rule of Civil Procedure 56 (a)-(c), and therefore the jurisprudence of federal appellate courts interpreting the federal rule is persuasive under Louisiana law. Dietrich v. Allstate Ins. Co., 540 S.2d 358, 363 n.4 (La. App. 1st Cir.), writs denied, 541 So.2d 898 and 902 (La. 1989).

immunity defense to the trier of fact. The effect, therefore, is to render the defense meaningless since its primary purpose is to provide a disincentive to the threat of money damages, including protracted litigation, and an incentive to voluntary participation in effective professional peer review. The result reached by the First Circuit was not contemplated by the Louisiana legislature, never countenanced by Congress, and must be reversed.

Respectfully submitted,

Peter J. Butler (Bar #3731)
Donna D. Fraiche (Bar #5814)
LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
Pan American Life Center
601 Poydras Street - Suite 2400
New Orleans, Louisiana 70130-6036
Telephone: (504) 558-5100

BY: Donna D. Fraiche
DONNA D. FRAICHE
Counsel for amicus curiae, the American Hospital Association

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been forwarded to all counsel of record by depositing a copy thereof, postage prepaid, in the United States mail, addressed to them on this 16th day of November, 1993.

LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)

BY: Donna D. Fraiche
Donna D. Fraiche (Bar #5814)
LOCKE PURNELL RAIN HARRELL
(A Professional Corporation)
Pan American Life Center
601 Poydras Street - Suite 2400
New Orleans, Louisiana 70130-6036
Telephone: (504) 558-5100

Counsel for amicus curiae, the American Hospital Association