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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID M. ODOM, M.D.,

Plaintiff,

vs.

FAIRBANKS MEMORIAL HOSPITAL, LUTHERAN HEALTH SYSTEMS, INC., WESTERN HEALTH NETWORK, INC., JAMES H. GINGERICH, SUSAN MCLANE, LINDA SMITH, RONALD L. BLISS, HOI P. LEE, M.D., STEVE E. MANCILL, M.D., JERRY A. PERISHO, M.D., RANDALL K. MCGREGOR, M.D., LAWRENCE W. STINSON, JR., M.D., ANESTHESIA ASSOCIATES, INC., WILLIAM F. STODDARD, M.D., DANNY R. ROBINETTE, M.D.,

Defendants.

Filed in the Trial Courts
STATE OF ALASKA, FOURTH DISTRICT

APR 5 2001

Clerk of the Trial Courts
By _____ Deputy

Case No. 4FA-93-2901 Civil

MEMORANDUM OPINION AND ORDER

Defendants seek summary judgment in this case on the basis of federal legislation which immunizes members of a professional review body from damages arising out of a professional review action, if that action is 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). The same provision also includes a burden-shifting presumption that these standards have been met. Id. This legislation has been the subject of numerous idiosyncratic interpretations in the federal courts and the courts of other states.

First, and foremost, despite the plain language[1] of the provision in issue, it is represented that the federal courts of appeals "have uniformly applied an objective standard in assessing compliance," to which "bad faith" is irrelevant. Mathews v. Lancaster General Hospital, 87 F.3d 624, 635 (3d Cir. 1996). It is not at all clear what this means, or how it can be accomplished.[2] Is a peer review board that makes no "effort to

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[1] Generally speaking, a "reasonable belief" is a belief that is both actually and reasonably held. This language, under normal circumstances, would require satisfaction of both a subjective and an objective standard.

[2] According to the Mathews court:

> [T]his standard "will 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 actions would restrict incompetent behavior or would protect patients."

Mathews v. Lancaster General Hospital, 87 F.3d 624, 635 (3d Cir. 1996), quoting H.R. Rep. No. 903 99th Cong. 2d Sess. 10 (1986). This explanation suggests that, to be immune, a panel has to actually make a "reasonable effort to obtain the facts of the matter." If so, the standard is both "subjective"--in that the panel must actually make the effort to obtain information--and "objective"--in that the effort must be reasonable. The same is

obtain the facts of the matter" immune if the facts, if known, would have produced the same result? Is action taken by a body that affirmatively believes the action not to be "warranted by the facts known" immune if other unknown facts would support it? Under scrutiny, this "objective standard" degenerates into nothing. And the fact is, as plaintiff points out, that strict adherence to it is rarely even attempted, let alone achieved.

It is simply impossible to accept that in principle, a sham review, based upon no facts, and motivated by animosity and self interest, would immunize the participants if a properly motivated and informed body "would have" or "could have" reached the same result. What if a peer review body decided to forego not only fact finding and rational consideration of the issues, but notice to the subject professional himself or herself? Could the members claim immunity by attempting to show that the subject professional would have fared no better if permitted to participate in the process? This so called "objective standard" that is "uniformly applied" by the federal appellate courts makes no sense, and is not even susceptible to meaningful application. See, e.g., Fobbs v. Holy Cross Health System Corp., 789 F. Supp. 1054, 1064 (E.D. Cal. 1992).

It has been established, as a matter of law, that the

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true, presumably, of the requirement of "adequate notice and hearing procedures." Certainly, then, "bad faith" is relevant to at least these two prongs of the immunity test. Why a "reasonable effort" must be assessed both subjectively and objectively while a "reasonable belief" must not is a great mystery.

professional review action in the present case may have been the result of "a conspiracy to restrain trade," undertaken in an attempt "to monopolize the anesthesiology practice at FMH." Odom v. Lee, 999 P.2d 755, 764 (Alaska 2000). Given those possibilities, it is equally possible that the defendants did not have a "reasonable belief that the action was in furtherance of quality health care"; that they did not make a "reasonable effort to obtain the facts of the matter"; and that they did not have a "reasonable belief that the action was warranted" by the facts they did not know after failing to make a "reasonable effort to obtain" them. Stated in more practical and coherent terms, it is entirely possible, given the Alaska Supreme Court's observations on the subject, that Dr. Odom was deprived of the "fairness" that this process is intended to insure. Austin v. McNamara, 979 F.2d 728, 733 (9th Cir. 1992). Reasonable minds could differ on the question of whether the utterly incoherent "objective standard" that the federal appellate courts claim to apply, or the more comprehensible "fairness" standard that they actually do apply, was met in this case. This fact is dispositive of defendants' Motion for Summary Judgment.

There is, however, one additional--and equally strange--inconsistency among the cases that must be addressed. According to the Third Circuit:

> When a defendant moves for summary judgment on the basis of HCQIA immunity, the proper inquiry is whether the plaintiff has produced "evidence that would allow a reasonable jury

> to conclude that the [defendant's] peer review disciplinary process failed to meet the standards of the [HCQIA]."

Perez v. Pottstown Memorial Medical Center, 1998 WL 464916 (E.D. Pa. 1998), quoting Mathews v. Lancaster General Hospital, 87 F.2d 624, 633 3d Cir. (1996). Clearly, a jury verdict on the question of immunity is contemplated. See also Brown v. Presbyterian Healthcare Services, 101 F.3d 1324, 1333 (10th Cir. 1996); Islami v. Covenant Medical Center, Inc., 822 F. Supp. 1361, 1378 (N.D. Iowa 1992). But the Eleventh Circuit says:

> A district court should consider the issue of HCQIA immunity from damages at the summary judgment stage. If it determines that the defendant is not entitled to such protection, then the merits of the case should be submitted to the jury without reference to the immunity issue. If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special interrogatories. Under no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury.

Bryan v. James E. Holmes Regional Medical Center, 33 F.3d 1318, 1333 (11th Cir. 1994). Whatever else the Bryan court might intend to communicate in this holding, it at least makes clear elsewhere that "although immunity may be determined at the summary judgment stage, resolution of that issue may be deferred until or after trial if the standards of Rule 56 cannot be satisfied." Id. at 1332. On either view, then, this court, having found that "the