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Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000092-MR

BENJAMIN REID, JR., M.D. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 14-CI-000590

KENTUCKYONE HEALTH, INC. APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, NICKELL AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Benjamin Reid, Jr., M.D., appeals from an order of the Jefferson Circuit Court, granting a judgment on the pleadings and dismissing his tort and contractual claims against Appellee, KentuckyOne Health, Inc. For the reasons set forth herein, we reverse and remand to the trial court for further proceedings.

Dr. Reid is a general surgeon licensed to practice medicine in the Commonwealth of Kentucky. He was a member of the medical staff at Jewish Hospital & St. Mary's Healthcare, Inc. ("the Hospital") for over forty years. On February 4, 2013, Dr. Reid received a letter from the Hospital's Surgery QA & I Committee that all of his cases from January 31, 2013, through June 30, 2013, would be subject to a focus review. Dr. Reid claims that during an impromptu meeting on February 27, 2013, he was informed by Dr. William James Monarch, Chair of the Medical Executive Committee (MEC), that the MEC had voted to cancel his surgical and endoscopy privileges and that he could no longer perform any further surgical procedures unless he was accompanied by an actively practicing and board certified general surgeon or endoscopist. The same day, Dr. Reid's assistant received a phone call from the surgical nurse supervisor letting her know that Dr. Reid would not be permitted to perform a previously scheduled surgery the following day without the assistance of another surgeon. Dr. Reid was able to find another surgeon to accompany him during the February 28, 2013 surgery. Subsequently, on March 5, 2013, Dr. Reid received a formal letter from the MEC stating that in the interest of patient safety it was the recommendation of the MEC "that a Board Certified Surgeon/Board Certified Gastroenterologist accompany you into [the] operating room for all future procedures." Dr. Reid did not perform any additional surgeries at the Hospital after February 2013.

On August 5, 2013, Dr. Reid received a second letter from the MEC informing him that the focus review had ended without any finding of quality

concerns. Dr. Reid was granted a conditional reappointment to the medical staff for six months, which permitted him to practice at the hospital as long as he met certain conditions. Dr. Reid did not exercise his privileges during the six-month period and his medical staff membership expired on August 26, 2014. Dr. Reid took no further action to renew his membership and as a result, his privileges to practice at the Hospital have lapsed.

On January 31, 2014, Dr. Reid filed a complaint in the Jefferson Circuit Court against KentuckyOne and its subsidiaries including the Hospital, seeking compensatory and punitive damages for breach of contract, intentional infliction of emotional distress, tortious interference with business and contractual relations, and slander. On September 12, 2014, KentuckyOne filed a Kentucky Rules of Civil Procedure (CR) 12.03 motion for judgment on the pleadings. Therein, KentuckyOne argued that it was entitled to immunity under the Health Care Quality Improvement Act, 42 United States Code (U.S.C.) §§ 11101et seq. ("HCQIA"), because the Hospital's conduct with respect to Dr. Reid was related to its professional review activities. KentuckyOne further argued that, notwithstanding immunity, all of the claims asserted by Dr. Reid failed as a matter of law.

On November 26, 2014, the trial court entered an opinion and order granting KentuckyOne's motion and dismissing all of Dr. Reid's claims. Therein, the trial court noted,

> Here, it is clear from the facts that Reid has proffered that a mandate or recommendation that another surgeon observe his professional activities in the operating room constituted a professional review activity. He knew KentuckyOne had concerns about his competence. Reid did not permit KentuckyOne to conduct this review of his professional actions. KentuckyOne took no corrective, adverse action against him. Reid did not allege any facts in his Complaint or his response to KentuckyOne's motion that would evidence KentuckyOne acted outside the scope of its immunity. Accordingly, he has not rebutted the presumption that KentuckyOne is immune, and KentuckyOne is entitled to judgment on the pleadings.

Dr. Reid thereafter appealed to this Court.

CR 12.03 provides that any party to a lawsuit may move for a judgment on the pleadings. In *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757 (Ky. 2003), our Supreme Court explained the function and application of CR 12.03:

> The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. The procedure is not intended to delay the trial in any respect, but is to be determined before the trial begins. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. When a party moves for a judgment on the pleadings, he admits for the purposes of his motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. *Archer v. Citizens Fidelity Bank & Trust Co*., Ky., 365 S.W.2d 727 (1963). The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle

> him/her to relief. *Cf. Spencer v. Woods*, Ky., 282 S.W.2d 851 (1955).

City of Pioneer Village, 104 S.W.3d at 759.

On appeal, Dr. Reid argues that the trial court erred in concluding that he could not overcome the rebuttable presumption that KentuckyOne was entitled to immunity. Dr. Reid points out that professional review actions are afforded a rebuttable presumption of immunity under the HCQIA only if certain conditions are met by the healthcare entity, including notice and a hearing, which Dr. Reid claims did not occur herein.

The HCQIA was passed in 1986 to provide for effective peer review and interstate monitoring of incompetent physicians, and to grant qualified immunity from damages for those who participate in peer review activities. *Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir. 1992); 42 U.S.C. § 11101. Congress enacted HCQIA "to encourage such peer review activities, 'to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.'" *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1321 (11th Cir. 1994) (citation omitted). If a "professional review action" satisfies certain reasonableness requirements, then those persons participating in the review "shall not be liable in damages under any law of the United States or of any State ... with respect to the action." 42 U.S.C. § 11111(a)(1).

To be afforded immunity under the HCQIA, 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). The HCQIA creates a rebuttable presumption of immunity, forcing the plaintiff to prove that the defendant's actions did not comply with the relevant standards. *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 468 (6th Cir. 2003); 42 U.S.C. § 11112(a) ("A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence."). The plaintiff has the burden of overcoming the presumption of immunity by showing that the review process was not reasonable. *Bryan,* 33 F.3d at 1333.

Under the HCQIA, there is a distinction between professional review actions and professional review activities. A "professional review action" is defined as:

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity ... which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of a physician. Such term ... also includes professional review activities relating to a professional review action.

42 U.S.C. § 11151(9). "The term 'adversely affecting' includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity." 42 USC § 11151(1).

The term "professional review activity" is defined separately as:

> [A]n activity of a health care entity with respect to an individual physician—
>
> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of such privileges or membership, or
>
> (C) to change or modify such privileges or membership.

42 U.S.C. § 11151(10).

The question we are presented with herein is whether the Hospital's conduct constituted a professional review action or a professional review activity. Dr. Reid contends that although the MEC's letter was characterized as a recommendation, it was, in fact, a mandate that essentially cancelled, or, at a minimum, severely restricted his privileges at the Hospital. As such, Dr. Reid argues that he was subject to a professional review action that "affect[ed] adversely [his] clinical privileges" as set forth in 42 U.S.C. § 11151(1) and (10).

KentuckyOne, on the other hand, argues that the Hospital did nothing more than engage in professional review activities for the purpose of ascertaining Dr. Reid's competence, and that the MEC's recommendation that Dr. Reid be accompanied by another surgeon in no manner adversely affected his privileges. Whether the Hospital's conduct was a professional review action or only a professional review activity is determinative of whether the Hospital was required to meet the standards set forth in 42 U.S.C. § 11112(a).

Kentucky state courts have not previously had the occasion to examine the provisions of the HCQIA at issue herein. However, a leading case that discusses the distinction between professional review activities and professional review actions is *Mathews v. Lancaster General Hospital*, 87 F.3d 624 (3rd Cir. 1996). Therein, a physician argued that a letter recommending a focused review of his cases and a possible restriction of his privileges, as well as subsequent revocation of his privileges, were two separate professional review actions. In examining the language of the pertinent provisions of the HCQIA, the Third Circuit Court of Appeals concluded,

> The definition of "professional review action" encompasses decisions or recommendations by peer review bodies that directly curtail a physician's clinical privileges or impose some lesser sanction that may eventually affect a physician's privileges. "Professional review actions" do not include a decision or recommendation to monitor the standard of care provided by a physician or factfinding to ascertain whether a physician has provided adequate care. These are "professional review activities." . . . We believe Dr. Rothacker's March 12, 1992 letter was a part of ongoing

> professional review activities. It did not constitute a decision to restrict Dr. Mathews' privileges, nor did it recommend that Dr. Mathews' privileges be restricted immediately. In fact, the letter did not impose any penalty. Instead, it recommended further investigation and review by an outside agency before any limitations were placed on Dr. Mathews' privileges. No professional review action occurred here until the Board's September 16, 1993 vote to suspend Dr. Mathews' privileges. *See Austin v. McNamara*, 979 F.2d at 736 ("no 'action' was taken in this case until ... the first occasion when [plaintiff's] clinical privileges were adversely affected. Prior to that time, he had been monitored and reviewed, but no professional review body had limited his clinical privileges or adopted a recommendation that they be limited."). Because Dr. Rothacker's March 19, 1992 letter was not a professional review action, the district court correctly held it did not have to meet the standards set forth in 42 U.S.C. § 11112(a).

Id. at 634. *See also Fobbs v. Holy Cross Health Sys. Corp.*, 789 F.Supp. 1054, 1065 (E. D. Cal.1992) (*aff'd*, 29 F.3d 1439 (9th Cir.1994), *cert. denied*, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995)).

Similar to this case, the physician in *Azmat v. Shalala*, 186 F.Supp.2d 744 (U.S.Dist.Ct, W.D. Ky. 2001), received a letter from the hospital's Medical Executive Committee informing him that, as part of his "ongoing quality review," his cases were being sent to a Louisville clinic for analysis. The letter recommended that the physician obtain second opinions on all of his elective procedures and assistance from a second physician on all major cases. In determining whether the MEC's "recommendation" constituted a professional review action or only a professional review activity, the Federal District Court noted,

> The restrictions themselves were substantial in that they, in most circumstances, constrained Dr. Azmat's clinical privileges. In a letter to the Medical Executive Committee, Dr. Azmat wrote, “this ongoing review and restriction of my ability to practice keeps me from [performing surgery and providing excellent patient care].” (Complaint, Exh. 2). He also complained that the decision had “caused my practice to dwindle to almost nothing.” *Id*. Thus, Dr. Azmat's description of the restrictions makes clear the impact they had upon his ability to furnish medical care at the Hospital. We believe that these restrictions fit squarely within the HCQIA's definitions of “adversely affecting” and “clinical privileges.” See 42 U.S.C. § 11151(1) and (3); *Mathews*, 87 F.3d at 634 (“The definition of ‘professional review action’ encompasses decisions or recommendations by peer review bodies that directly curtail a physician's clinical privileges or impose some lesser sanction that may eventually affect a physician's privileges.”).
>
> A minor impact is all that the HCQIA requires. Therefore, we find that, as a matter of law, Dr. Azmat's clinical privileges were adversely affected.

Id. at 750-51.

Recently, in *Williams v. Columbus Clinic, P.C.*, 773 S.E.2d 457 (Ga. Ct. App. 2015), the Georgia appellate court was asked to determine what constituted a restriction of privileges as was referred to in a hospital’s bylaws. The court observed that neither the HCQIA nor the regulations thereunder provide a definition of “restrict.” *Id.* at 461. The court then looked to the decisions of various jurisdictions, including those cited herein, for guidance:

> [I]nstructive are cases addressing when a hospital's action rises to the level of a professional review action that does or may adversely affect a physician's privileges for purposes of the HCQIA. In *Mathews v. Lancaster Gen.*

> *Hosp*., the Third Circuit concluded that a letter recommending focused outside review of certain cases that had been identified by a hospital committee as involving substandard care was not a "professional review action." 87 F.3d 624, 634 (3d Cir.1996). The Third Circuit stated generally that a "decision or recommendation to monitor the standard of care provided by a physician or factfinding to ascertain whether a physician has provided adequate care" were professional review activities, i.e., preliminary investigative measures taken in a reasonable effort to obtain facts relevant to a possible change in privileges, not professional review actions. *Id.* Courts, citing *Mathews*, have concluded that auditing a physician is not a professional review action, *Singh v. Blue Cross and Blue Shield of Massachusetts*, 182 F.Supp.2d 164, 171 (D. Mass. 2001), nor is a recommendation that a physician submit to an outside professional evaluation. *Morgan v. PeaceHealth*, 101 Wash. App. 750, 14 P.3d 773, 782 (2000); *see also Wood v. Archbold Med. Center*, 738 F.Supp.2d 1298, 1363 (M.D. Ga. 2010) (recommendation that physician undergo outside psychiatric evaluation not professional review action). . . . By contrast, in *Azmat v. Shalala*, the court held that a letter recommending that a surgeon obtain a second opinion on all procedures that were not immediately life-threatening and acquire assistance from a second physician on all major cases were recommended restrictions on his privileges reportable under the HCQIA. 186 F.Supp.2d 744, 750 (W. D. Ky.2001); *see also Fobbs v. Holy Cross Health System Corp.*, 789 F.Supp. 1054, 1064 (E.D.Cal.1992), aff'd 29 F.3d 1439 (9th Cir. 1994).

Id. at 461-62.

The trial court herein found that Dr. Reid's staff privileges were "effectively cancelled," yet nevertheless concluded that "a mandate or recommendation that another surgeon observe his activities in the operating room constituted a professional review activity" and that "KentuckyOne took no

corrective, adverse action against him." We must disagree. The MEC's recommendation effectively prevented Dr. Reid from performing surgery at the Hospital unless he could find another qualified surgeon willing and able to be present. We believe that restriction fit squarely within the HCQIA's definitions of "adversely affecting" and "clinical privileges." *See* 42 U.S.C. § 11151(1) and (3).[1] As such, the Hospital's conduct constituted a professional review action rather than simply professional review activities as the trial court found.

As previously noted, for a professional review body to be afforded immunity under the HCQIA, the professional review action must meet the standards set forth in 42 U.S.C. § 11112(a), namely, it must have been taken:

> (1) in the reasonable belief that the action was in the 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).

Id.

[1] "(3) The term "clinical privileges" includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity."

The trial court herein, because it concluded that the Hospital's conduct was a professional review activity, never considered the standards set forth in 42 U.S.C. § 11112(a). Dr. Reid alleged in his pleadings, and the Hospital did not dispute, that he was never afforded any notice or opportunity for a hearing prior to his privileges being restricted. Certainly, 42 U.S.C. § 11112(b) does provide that the failure to meet the notice and hearing requirements does not, in and of itself, constitute a failure to meet the required standards in 42 U.S.C. § 11112(a). Nevertheless, we are of the opinion that the trial court must consider whether the Hospital met all of the standards in 42 U.S.C. § 11112(a) before the Hospital's immunity can be determined. Accordingly, a judgment on the pleadings was inappropriate and further consideration of the pertinent provisions of the HCQIA is required.

As such, we necessarily do not reach the substance of Dr. Reid's underlying claims.

For the reasons set forth herein, the decision of the Jefferson Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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