IN THE SUPREME COURT OF THE STATE OF NEVADA

LEXEY PARKER, M.D.,
Appellant/Cross-Respondent,
vs.
ST. MARY'S HEALTH NETWORK, A NEVADA CORPORATION; THE CENTER FOR OUTPATIENT SURGERY, A NEVADA LIMITED PARTNERSHIP; JEFFREY BILLS; MICHAEL GLASS, M.D.; MARTIN NAUGHTON, M.D.; AND WILLIAM LLOYD, M.D.,
Respondents/Cross-Appellants.

No. 40426

FILED

SEP 0 7 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ST. MARY'S HEALTH NETWORK, A NEVADA CORPORATION; THE CENTER FOR OUTPATIENT SURGERY, A NEVADA LIMITED PARTNERSHIP; JEFFREY BILLS; MICHAEL GLASS, M.D.; MARTIN NAUGHTON, M.D.; AND WILLIAM LLOYD, M.D.,
Appellants,
vs.
LEXEY PARKER, M.D.,
Respondent.

No. 41028

ORDER OF AFFIRMANCE

Consolidated appeals and cross-appeal from a district court order granting judgment notwithstanding the verdict in favor of respondents/cross-appellants St. Mary's Health Network, et al., and a district court order denying St. Mary's motion for attorney fees and costs. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

05-17696

A district court facing a motion for judgment notwithstanding the verdict (JNOV)[1] "must view the evidence in the light most favorable to the party against whom the motion is being made."[2] Such a motion may be granted "only if the evidence was such that a reasonable person would have necessarily reached a different conclusion."[3]

This court on review applies nearly the same standard as the district court; the evidence must be viewed in the light most favorable to the non-moving party, but "[n]either the credibility of witnesses nor the weight of the evidence will be considered."[4]

HCQIA IMMUNITY

Dr. Lexey Parker appeals the district court's JNOV in favor of all respondents based on immunity under the Health Care Quality Improvement Act (HCQIA).[5] Dr. Parker contends that the jury verdict in her favor implied a finding that HCQIA immunity standards were not satisfied based on the evidence presented at trial. Dr. Parker further

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[1]There was some dispute as to whether the district court granted a directed verdict or a JNOV motion. We decline to make that determination, however, as the issue is moot. See Sheeketski v. Bortoli, 86 Nev. 704, 706, 475 P.2d 675, 676 (1970) (stating identical standards for both directed verdict and JNOV).

[2]Hazelwood v. Harrah's, 109 Nev. 1005, 1011, 862 P.2d 1189, 1193 (1993) (citing Jeffers v. Kaufman Machinery, 101 Nev. 684, 707 P.2d 1153 (1985)).

[3]Id. at 1011-12, 862 P.2d at 1193.

[4]Drummond v. Mid-West Growers, 91 Nev. 698, 704, 542 P.2d 198, 202-03 (1975) (citing Bliss v. DePrang, 81 Nev. 599, 407 P.2d 726 (1965)).

[5]42 U.S.C. §§ 11101-11152 (1995).

argues that respondents/cross-appellants did not satisfy any of the elements required for a grant of immunity under HCQIA.

Respondents/cross-appellants argue that Dr. Parker did not overcome the rebuttable presumption that the review actions here met the standards required for immunity under HCQIA.

Amicus Curiae Nevada Hospital Association urges this court to support the proposition that HCQIA immunity is vital to the important goals of peer review, and that Nevada health care will suffer if immunity is eroded. Amicus also points out that Nevada statutes grant immunity from civil liability for those furnishing good faith information concerning an applicant for a medical license,[6] and for those who report "sentinel event[s]" as required to the State Health Division.[7]

There are four elements that must be satisfied before a peer review action is granted immunity under HCQIA.[8] The peer review action must have been undertaken:

> (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

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[6]NRS 630.364 (Physicians and Related Professionals); and 633.691 (Osteopathic Medicine).

[7]NRS 439.880.

[8]42 U.S.C. § 11112(a).

> after such reasonable effort to obtain facts and after meeting the requirement of paragraph 3.[9]

The statute also includes a rebuttable presumption; a professional review action is presumed to have met the standards for immunity unless that presumption is rebutted by a preponderance of the evidence.[10]

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 is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action.[11]

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[9]Id. at (a)(1-4).

[10]Id. at (a).

[11]42 U.S.C. § 11151(9).

In furtherance of quality health care

This court has held that this standard is satisfied if the peer 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."[12] This is an objective, not a subjective, standard, making the peer reviewer's subjective bias or bad faith irrelevant.[13]

Dr. Parker contends that a preponderance of the evidence shows no objectively reasonable basis for the peer review at issue here. She cites evidence that she had no complications for the two years immediately preceding the final review recommendations, that the two complications that allegedly triggered the review had previously been found to be within the standard of care, and that her surgical privileges were completely unrestricted throughout the review process. She also points out the potential bias of several of the reviewers. Finally, she contends that Dr. Michael Glass, as the anesthesiologist who participated in the two cases that triggered the review, should have recused himself from the review based on both the bylaws and the Quality Management Plan.

Respondents/cross-appellants contend that the facts do not rebut the presumption that the reviewers were concerned with patient care. Respondents/cross-appellants argue that there was evidence of an

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[12]Meyer v. Sunrise Hosp., 117 Nev. 313, 322, 22 P.3d 1142, 1149 (2001) (quoting Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1334-35 (11th Cir. 1994)).

[13]Id. at 323, 22 P.3d at 1149.

apparently high complication rate, along with expert reports expressing concern about the high complication rate, and no evidence that the review was conducted for non-health related reasons. The reports from the experts were not in agreement; however, this court has held that such a dispute does not overcome the presumption of immunity under this standard.[14]

We conclude that the presumption was not rebutted here. There was evidence from which the inference could be made that doctors with conflicts of interest were allowed to participate in the decisions to begin and continue the review. However, there was also ample evidence from which the reviewers could find that Dr. Parker's complication statistics were above an acceptable standard, and therefore of concern as to quality patient care. Dr. Parker did not show by a preponderance of the evidence that the reviewers acted without a reasonable belief that the action was in furtherance of quality health care.

Reasonable effort to obtain facts

Dr. Parker claims that she was not given adequate opportunities to meet with reviewers to defend herself or otherwise meaningfully participate, that respondents'/cross-appellants' retaining of Dr. Parker's expert evidenced their intent to exclude her from the process, that incorrect and incomplete information was sent to experts for review, and that respondents/cross-appellants failed to obtain crucial data as to post-menopausal perforation rates.

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[14]Id. at 324, 22 P.3d at 1150.

Respondents/cross-appellants argue that Dr. Parker's input was solicited after the one-year review, after the first expert report was received, at the meeting with the entire obstetrician-gynecological service, and again at the medical advisory committee (MAC) meeting to consider sanctions. She was even invited to supplement her materials before the final decision on corrective action was made.

The facts show that respondents/cross-appellants hired an abstractor to help with identifying charts for review, conducted three separate statistical studies, consulted two outside reviewers, sought the input of obstetrician-gynecologists at the Center for Outpatient Surgery, and spent over three years gathering information for the review. Additional information was provided by Dr. Parker at the first meeting she attended. Although the communication to Dr. Parker about her opportunities for participation was limited and imperfect, we conclude that the effort to gather facts was reasonable, albeit not perfect. Therefore, we hold that Dr. Parker has not overcome the presumption that a reasonable effort was made to obtain facts here.

Adequate notice and hearing procedures

Subsection 11112(b) of HCQIA outlines requirements as to notice and hearing procedures that, if satisfied, allow professional reviewers to benefit from the "safe harbor" immunity of this standard.[15] A

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[15]It is important to note that the procedures described are not mandatory for immunity; rather, use of the listed procedures means that the standard of adequate notice and hearing procedures is deemed to have been met. 42 U.S.C. § 11112(b). Otherwise, peer review bodies seeking immunity can argue the portion of the standard that calls for "such other

continued on next page . . .

physician facing proposed action must be given adequate notice of the action proposed, reasons for the proposed action, that the physician has the right to request a hearing, and a summary of rights to be afforded at the hearing.[16] Those rights include the right to representation by counsel, right to call and cross-examine witnesses, right to submit a written closing statement, right to a written decision, and the right to have a record made of the proceeding.[17]

Dr. Parker contends that review action was taken against her when the ad hoc committee of the MAC recommended corrective action to the MAC at the December 14, 1998, meeting. Dr. Parker argues that under the statute, such actions may only be taken after notice and hearing; Dr. Parker had no notice of that meeting, nor had she been given her promised chance to meet with that ad hoc committee.

Respondents/cross-appellants argue that notice and hearing procedures are not required "where there is no adverse professional review action taken." Since no such action was ever taken against Dr. Parker, and since she received notice and an opportunity for a hearing when the recommendations for such action were finally adopted by the executive committee, respondents/cross-appellants contend that this standard has been met for immunity purposes.

. . . *continued*
procedures as are fair to the physician under the circumstances." 42 U.S.C. § 11112(a)(3).

[16]42 U.S.C. § 11112(b)(1).

[17]Id. at (b)(3).

The statute does include "recommendation[s]" in the definition of "review action[s]."[18] It also states that for purposes of immunity, such actions must be taken after adequate notice and hearing procedures.[19] However, the statute goes on to state that nothing in the "adequate notice and hearing" section require such procedures "where there is no adverse professional review action taken."[20]

The facts show that a recommendation for potential corrective action was first discussed at the December 14, 1998, meeting where Dr. Parker was not invited or present. However, the subcommittee making those recommendations did not have the power to impose them; they merely reported to the next level of review for further discussion, and Dr. Parker was invited to attend that next meeting where the recommendations would be formally submitted to the MAC.

The facts also show that the next meeting was incorrectly noticed to Dr. Parker, in that she understood that she was not to be given an opportunity to address the merits of her cases. However, she was told that the corrective actions were only recommendations, and she was invited during the meeting to discuss those recommendations; she declined the invitation.

Finally, when the recommendations were adopted by the executive committee, with the power to enforce them, the proposed actions were stayed pending Dr. Parker's appeal. Dr. Parker had adequate notice, and fair procedures were in place for that appeal hearing, although it

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[18]42 U.S.C. § 11151(9).

[19]42 U.S.C. § 11112(a)(3).

[20]Id. at (c)(1)(A).

never took place since the recommendations were subsequently withdrawn. We conclude, therefore, that Dr. Parker did not rebut the presumption that she was given notice and adequate procedures as to potential professional review actions.

Reasonable belief that action was warranted by the facts known

This standard requires that professional review actions be taken "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the [notice and hearing] requirements of paragraph (3)."[21]

Dr. Parker argues that since recommendations for corrective actions were made without her being given notice and allowed a hearing, this standard was not met. She further claims that the "facts known" included the facts that she had not had any complications for two years prior to the review action proposal, and that all her previous complications had been found to be within the standard of care. Dr. Parker contends that this shows the reviewers had no reasonable basis for recommending corrective actions. Respondents/cross-appellents reply that despite facts later discovered about differing rates of perforations in post-menopausal patients and Dr. Parker's proctoring with Dr. Richard Soderstrom, at the time the review actions were proposed there was a clear factual basis for such actions. Respondents/cross-appellents contend that Dr. Parker has presented no evidence rebutting the presumption that the recommendations were made in the reasonable belief that they were warranted by the known facts.

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[21]Id. at (a)(4).

As mentioned above, reasonable efforts were made to obtain facts, and adequate notice and procedures were provided. The fact that the proposed corrective actions were withdrawn, after the reviewers received Dr. Soderstrom's report as to post-menopausal complication rates and proctoring of Dr. Parker, actually bolsters respondents'/cross-appellants' argument that the proposed actions, as well as the review, were reasonably warranted by the facts known. We conclude, therefore, that Dr. Parker has not overcome the presumption that respondents/cross-appellants met this standard.

Dr. Parker has not overcome the presumption that respondents/cross-appellants acted within the boundaries required for a grant of HCQIA immunity. This case presents an admittedly close call, but absent evidence of actual bias or improper motives, our decision favors providing immunity for professional review action in the interest of encouraging physicians to participate and make efforts to improve health care and protect patients.

Therefore, we affirm the judgment of the district court as to HCQIA immunity for respondents/cross-appellants.

AWARD OF COSTS

A district court's decision as to an award of costs is reviewed under an abuse of discretion standard.[22]

NRS 18.020(3) mandates an award of costs to the prevailing party in an action to recover more than $2,500.00.

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[22]Parodi v. Budetti, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999).

HCQIA calls for a mandatory award of costs and reasonable attorney fees to a substantially prevailing defendant if the court finds that the claims brought were "frivolous, unreasonable, without foundation, or in bad faith."[23] The HCQIA statutes also state:

> Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter.[24]

Respondents/cross-appellents argue that this "preemption disclaimer" gives the district court the power to award mandatory costs as in NRS 18.020, since the state law provides defendants with more protection than HCQIA. Respondents/cross-appellants therefore contend that the district court erred in denying their motion for costs.

Dr. Parker counters that since criteria for an award of costs is "specifically provided in this subchapter," the language of subsection 11115 does not permit preemption of federal law by state law. Dr. Parker argues that since the federal statute is specific to HCQIA situations, it preempts a more general state statute. Finally, Dr. Parker claims that since the federal statute is discretionary and the state statute is mandatory, there is direct conflict between the two statutes, and the federal statute prevails. This court has expressed a reluctance to find

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[23]42 U.S.C. § 11113.

[24]42 U.S.C. § 11115(a).

federal preemption of otherwise legitimate state action.[25] This court has held that preemption analysis is fundamentally a task of statutory construction,[26] involving an inquiry into whether the state law is contrary to, or interferes with, the federal law.[27] "There is an actual conflict when compliance with both state and federal law is physically impossible, or when a state law obstructs the accomplishment and execution of the full purpose and objectives of Congress."[28]

Here, the federal law would mandate no award of costs, since the district court made a finding that Dr. Parker's claims were not "frivolous, unreasonable, without foundation, or in bad faith." State law would mandate an award of costs here. Additionally, the disclaimer in HCQIA that permits some preemption expressly omits issues specifically provided for in HCQIA; award of costs is most certainly "specifically provided for," and thus may preempt state law.

We conclude, therefore, that the district court did not abuse its discretion in finding an actual conflict, in requiring preemption and in denying respondents'/cross-appellants' motion for costs.

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[25]State, Dep't of Mtr. Vehicles v. Lovett, 110 Nev. 473, 479, 874 P.2d 1247, 1251 (1994).

[26]Id.

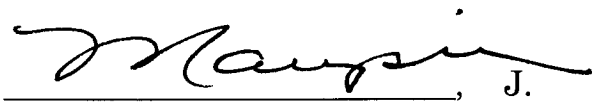
[27]Davidson v. Velsicol Chemical, 108 Nev. 591, 593, 834 P.2d 931, 932 (1992).

[28]Id. at 600, 834 P.2d at 937 (citing Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991)).

All of the other assignments of error, on both appeal and cross-appeal, deal with the pretrial dismissal of claims by summary judgment, and several claims dismissed during the trial. Since we affirm the finding of HCQIA immunity for the respondents/cross-appellants, those issues are moot. Accordingly we

ORDER the judgment of the district court as to both HCQIA immunity and the award of costs AFFIRMED.


_____, C.J.
Becker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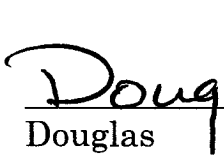
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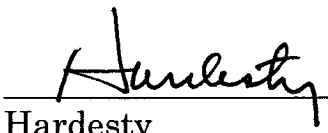
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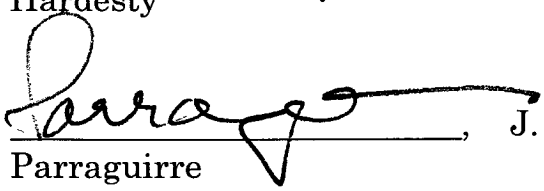
_____, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Robison Belaustegui Sharp & Low
Earley Savage
Georgeson Thompson & Angaran, Chtd.
Jones Vargas/Las Vegas
Washoe District Court Clerk

GIBBONS, J., with whom ROSE, J., agrees, dissenting:

The district court abused its discretion in granting respondents/cross-appellants' motion for JNOV or a directed verdict after the jury found in favor of Dr. Parker. Respondents/cross-appellants are not entitled to conditional immunity from damages under the Health Care Quality Improvement Act (HCQIA) based upon the evidence presented at trial and the jury verdict.

"'[A] motion for [JNOV] may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.'"[1] While within the discretion of the district court, a grant of JNOV "'is proper only in those instances where the evidence is so overwhelming for one party that any other verdict would be contrary to the law.'"[2]

This court has stated it will not affirm a judgment invoking conditional immunity for peer review action if "a reasonable jury, viewing the facts in a light most favorable to [the plaintiff], could conclude by a preponderance of the evidence that the hospital's actions fell outside the protection afforded by section 11112(a)."[3] This issue was implicitly

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[1]Trustees, Carpenters v. Better Building Co., 101 Nev. 742, 745, 710 P.2d 1379, 1381 (1985) (emphasis in original) (quoting Bates v. Chronister, 100 Nev. 675, 679, 691 P. 2d 865, 868 (1984)).

[2]Chowdry v. NVLH, Inc., 109 Nev. 478, 482, 851 P.2d 459, 461 (1993) (quoting Bliss v. DePrang, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965)); see also Dudley v. Prima, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968) (stating that "the power to grant such motions should be cautiously exercised").

[3]Meyer v. Sunrise Hosp., 117 Nev. 313, 322, 22 P.3d 1142, 1149 (2001); see also Singh v. Blue Cross/Blue Shield of Mass., 308 F.3d 25, 33

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decided in favor of Dr. Parker by the jury as the trier of fact. This court has stated that the issue of immunity under HCQIA is a question of law for the court to decide "'whenever the record is sufficiently developed.'"[4] Apparently, the district court did not believe the record was sufficiently developed to rule upon the HCQIA immunity issue prior to the commencement of the trial and the jury rendering its verdict. The district court should have deferred to the jury.

Dr. Parker alleges that a professional review action occurred at the December 14, 1998, meeting of the Medical Advisory Committee (MAC) ad hoc subcommittee. Respondents/cross-appellants argue that this meeting was not a professional review action and fell outside the scope of HCQIA. I disagree. The record suggests that all essential fact-finding and interpretive duties were delegated to the ad hoc subcommittee. The minutes of the December 14 meeting indicate that the subcommittee engaged in a comprehensive review of written correspondence, reports, and statistical data generated during the prior year's review of Dr. Parker. The findings and recommendations resulting from this subcommittee meeting were intended to be conclusively adopted by the MAC in its action against Dr. Parker at its January 11, 1999, meeting, without further meaningful consideration of the underlying substantive information. The fact that MAC chairperson and

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(1st Cir. 2002) (stating that "the statutory scheme contemplates a role for the jury . . . in deciding whether a defendant is entitled to HCQIA immunity").

[4]Meyer, 117 Nev. at 322, 22 P.3d 1149 (quoting Egan v. Athol Mem'l Hosp., 971 F. Supp. 37, 42 (D. Mass. 1997)).

respondent/cross-appellant Dr. Glass attended and actively participated in the December 14 meeting, in my view, lends further weight to the conclusion that this meeting, and not the January 11 MAC meeting, was to be the final decisional forum.

The December 14 subcommittee meeting constituted a professional review action. In order to enjoy conditional immunity under the statute, respondents/cross-appellants were obligated under 42 U.S.C. subsection 11112(a)(3) to provide Dr. Parker with adequate notice and hearing before instituting the professional review action. Respondents/cross-appellants failed to do so. To constitute adequate notice under HCQIA, the health care entity must provide the physician with notice of the proposed professional review action, the reasons supporting the proposed action, and the physician's right to request a hearing before the professional review action.[5] Further, if the physician requests a hearing in a timely manner, the health care entity must provide the physician with notice of the time, place, and date of the hearing, as well as a list of witnesses (if any) expected to testify on behalf of the reviewing body.[6] HCQIA affords the physician an impartial fact-finder and a trial-type hearing.[7] To rebut the presumption of conditional immunity, Dr. Parker introduced substantial evidence at trial of how these meetings did not comply with proper procedure.

In previous meetings of the MAC and in written correspondence with Dr. Parker shortly before the December 14

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[5]42 U.S.C. § 11112(b)(1) (1995).

[6]Id. at (b)(2).

[7]Id. at (b)(3).

subcommittee meeting, Dr. Glass specifically noted that Dr. Parker should meet with the subcommittee to address the review process. However, Dr. Parker did not receive notice of the December 14 meeting. This meeting would have been the proper forum during which Dr. Parker could have meaningfully addressed the factual foundation upon which the subcommittee and the MAC based its recommendations.

Moreover, the January 11 MAC meeting, as respondents/cross-appellants concede in their answering brief, was a professional review action. The record indicates that this meeting was not conducted in accordance with the trial-type requirements of 42 U.S.C. subsection 11112(b)(3), nor did it meet the less stringent fairness standard of the latter half of the sentence comprising the subsection.[8] Dr. Parker was not permitted to address the substantive basis for the peer review action. Although Dr. Parker was later granted a hearing, this hearing occurred months after the professional review action.

The notice and hearing provisions of U.S.C. subsection 11112(a)(3) are mandatory where "adverse professional review action [is] taken."[9] Dr. Parker presented evidence sufficient to demonstrate the adverse effect this peer review action had on her practice. Simply because the MAC, after nearly three years of intense scrutiny into Dr. Parker's practice, declined to sanction her does not relieve respondents/cross-appellants of their duty to strictly comply with the statute in order to invoke conditional immunity.

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[8]See id. at (a)(3) (adding that "such other procedures as are fair to the physician under the circumstances" are also sufficient to meet the procedural requisites of the statute).

[9]Id. at (c)(1).

Dr. Parker argues that the review of her performance was not undertaken "in the reasonable belief that the action was warranted by the facts known."[10] A court or jury may not substitute its own judgment for that of health professionals charged with ensuring the competence of their colleagues.[11] In addition, Congress declined to adopt a "good faith" standard in enacting 42 U.S.C. § 11112(a) and elected an objective standard of review.[12] However, peer review must be made under the "reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts."[13] Meyer v. Sunrise Hospital[14] is distinguishable on its facts. In that case, three independent panels of the reviewing hospital, with no commonality in membership, were sufficient to ensure the reasonableness and confidentiality of the peer review action. Respondents/cross-appellants did not take such precautions in their attempt to comply with HCQIA. Not only was panel membership shared between the MAC and the ad hoc subcommittee, the reviewing body did not carefully delimit what information it would consider during the review process.

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[10]Id. at (a)(4).

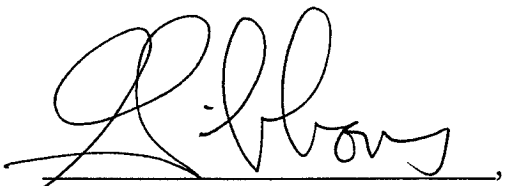
[11]See Clark v. Columbia/HCA Info. Servs., 117 Nev. 468, 475, 25 P.3d 215, 220 (2001) (describing courts' reluctance to interfere with "decisions grounded in the review boards' area of expertise"); Egan, 971 F. Supp. at 42 (stating that "the Court must not . . . substitute its own judgment for that of the peer review committee").

[12]Meyer, 117 Nev. at 325, 22 P.3d at 1151.

[13]42 U.S.C. § 11112(a)(4).

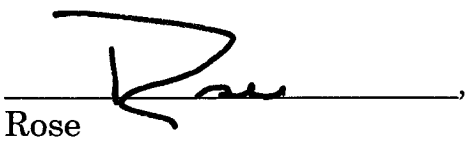
[14]Meyer, 117 Nev. at 313, 22 P.3d at 1142.

A reasonable jury did find in favor of Dr. Parker. Implicit in the jury's verdict was the conclusion that Dr. Parker had rebutted the presumption in favor of conditional immunity by a preponderance of the evidence. Accordingly, I would reverse the district court's order.



_____, J.
Gibbons

I concur:



_____, J.
Rose