RECORD 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; GLENN CROTTY; JOHN DOES I-X,

Defendants – Appellees,

JANE DOE NUMBERS 1 THROUGH 10; JAMAL KAHN; H. RASHID; K. C. LEE; ANDREW VAUGHN; JOHN L. CHAPMAN,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

REPLY BRIEF OF APPELLANT – UNDER SEAL

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<u>INTRODUCTION</u>

In their brief, Appellees concede that no hearing ever took place. That bedrock fact is pivotal to our submission that the district court judgment should not stand. It is foundational that notice and hearing are required before the profoundly injurious step is taken of – in practical effect – terminating the career of an experienced surgeon. A physician grievously injured by a hospital's imperious action should not be penalized for seeking redress in state court – yet that is the Draconian result Appellees urge here. In addition, Appellees ignore the requisite procedural requirements embodied in the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101 *et. seq.* with respect to the imminent-danger determination. They ignore their own by-laws. Appellees also stand stonily silent in the face of Dr. Wahi's antitrust claim, powerfully buttressed by the action – culminating in a consent decree – by federal antitrust enforcement authorities. More generally, in the face of Appellees' deeply injurious conduct, Dr. Wahi has been denied basic discovery into his state-law based claims closely related to the career-jeopardizing measures taken against him.

Dr. Wahi stands before this Court seeking his day in court. He was turned out of a highly successful surgical practice for reasons rooted in anti-competitive

motivations. The manner in which Dr. Wahi was forced to leave was violative of fundamental procedural requirements. Dr. Wahi is a skilled surgeon, who has been falsely and maliciously maligned. That should not happen in this country without meaningful recourse to the halls of justice. His professional reputation was sullied by an improper release of unfounded charges to the news media. Dr. Wahi should be given his day in court. The judgment below should be reversed.

I. DR. WAHI WAS DEPRIVED OF A HEARING.

Appellees concede that Dr. Wahi never received a hearing. "The presiding officer appointed for Wahi's hearing, F.C. Gall, testified about how the *actual hearing process never began*." Appellees' Br. at 13, *Wahi v. Charleston Area Med. Ctr., Inc.*, No. 06-2162 (4th Cir. April 7, 2008) (emphasis added). Exactly. Appellees' various rationalizations for their admitted failure fall short.

A. Provision of a Hearing is Necessary for Substantial Compliance with the HCQIA's Procedures.

As we emphasized in our Opening Brief, the HCQIA's requirements for substantial compliance are defined through both statutory and case law. Appellant's Br. at 15-18. For a professional review action to enjoy immunity, it

must substantially comply with the HCQIA's due process requirements.[1] *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 211 (4th Cir. 2002).

1. Substantial compliance requires a full hearing.

Appellees maintain that a finding of substantial compliance is appropriate where the physician is given notice of a hearing, *regardless of whether a hearing is provided.* Appellees assert that they repeatedly attempted to provide a hearing. Appellees' Br. at 22. They also maintain that the district court deemed their actions objectively reasonable under the totality of circumstances. *Id.*

Appellees' argument fails. They improperly equate notice or an attempt to provide a hearing with the actual provision of a hearing. In addition, Appellees ignore overwhelming case law in which the courts found substantial compliance only when the physician was provided a full hearing.

The district court committed error by expanding the substantial-compliance standard. *Wahi*, 453 F. Supp. 2d at 954. Case law finding substantial compliance

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[1] For immunity to lie, the 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)(1)-(4).

uniformly arises in circumstances where the physician was afforded a full hearing before a hearing panel. *Imperial v. Suburban Hosp. Assoc.*, 37 F.3d 1026, 1029 (4th Cir. 1994) (internist received a hearing spanning ten hours over three days prior to suspension of hospital privileges); *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 210 (4th Cir. 2002) (internist was afforded a hearing prior to loss of hospital privileges); *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 837 (3d Cir. 1999)(hospital substantially complied with due process requirements by providing multiple hearings prior to suspending a surgeon's hospital privileges); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 465 (6th Cir. 2003) (hospital substantially complied with the HCQIA by providing a trauma surgeon notice and a hearing prior to suspension of hospital privileges); *Gabaldoni v. Wash. County Hosp. Assoc.*, 250 F.3d 255, 258-59 (4th Cir. 2001) (obstetrician was afforded a hearing prior to termination of clinical privileges). In short, in order for the professional review action to substantially comply with the HCQIA's standards, a physician must be provided a hearing. That was not done here.

Appellees cite Dr. Wahi's resort to state-court litigation as the justification for their denial of a hearing. Appellees' Br. at 30. This is without merit. First, it

punishes Dr. Wahi for exercising his constitutional right to access the courts. Second, Appellees improperly try to shift the HCQIA requirement to provide an adequate hearing from themselves to the physician. *See* 42 U.S.C. § 11112(a)(3). That turns the statutory scheme upside down. As part of the professional review board, Appellees must provide adequate hearing procedures to Dr. Wahi, the physician. *Id.*

Third, Dr. Wahi resorted to litigation to preserve his right to a fair hearing guaranteed under the HCQIA. Importantly, *Appellees indisputably failed to provide Dr. Wahi the information he requested pursuant to the HCQIA and CAMC's bylaws.* Appellees' notice of hearing failed to set forth the place, time and date of the hearing. It was silent as to a list of witnesses.[2] In response, Dr. Wahi sought to protect his rights by filing a protective suit in state court. Based

[2] The HCQIA requires that once a physician requests a hearing, notice of the hearing must state "the place, time, and date, of the hearing" and "a list of witnesses…expected to testify at the hearing on behalf of the professional review body." 42 U.S.C. § 11112(b)(2). Similarly, CAMC bylaw 3.6 provides that a hearing "shall" be scheduled with notice of its time, place and date and CAMC bylaw 3.7 requires that either party "shall" furnish a witness list within 10 days after making the request. (JA. 489.) CAMC's counsel admitted that 15 months after Dr. Wahi requested a hearing and a list of witnesses, CAMC had not provided him a list of witnesses. Appellant's Br. at 20.

upon CAMC's unqualified assurances that it would provide him a fair hearing and replace hearing panel members, the state court dismissed Dr. Wahi's complaint until Appellees provided him a hearing with a fair hearing panel. (JA 133-136, 183-187.) [3] Yet CAMC failed to schedule such a hearing.

2. Dr. Wahi did not waive his right to a hearing.

CAMC contends that Dr. Wahi refused or failed to participate in a hearing and thus waived his right to a hearing. Appellees' Br. at 13, 30. Not so. CAMC relies upon statements Dr. Wahi made in settlement negotiations that they purport to indicate Dr. Wahi was willing to give up his right to a hearing, in exchange for entries in the NPDB that would allow him to resume practicing at other hospitals. Appellees' Br. at 14-15. But no settlement was reached, and CAMC did not clear his name.

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[3] In addition, in Defendant's Memorandum of Law In Support of Its Motion to Dismiss Plaintiff's Amended Complaint or for Summary Judgment [Doc. 8], filed in this case on February 11, 2004, CAMC argued to the district court that it should not exercise jurisdiction in the instant case "until [Dr. Wahi's] peer review proceedings at CAMC have reached a final resolution." *Id.*, p. 8. In the same document, CAMC represents that "the peer review appeal hearing has yet to take place," that it can "be completed within a reasonable time," and that "Dr. Wahi will obviously receive a fair hearing." *Id.*, p. 18. In short, even below, CAMC was making representations to the district court that Dr. Wahi was still entitled to a hearing.

CAMC further implies that Dr. Wahi refused to participate in a hearing by filing the aforementioned lawsuit in state court.[4] The letter from CAMC President Phillip Goodwin, however, notifying Dr. Wahi of his hearing rights, states that the "Credentials Committee's recommendations will not be forwarded to the Board of Trustees until you have exercised or been deemed to have waived your right to a hearing as provided in Article III." (JA 647.) Article III states, in pertinent part:

> 3.9.1 Failure to Appear Failure, without good cause, of the individual requesting the hearing to appear and proceed at such a hearing shall be deemed to constitute voluntary acceptance of the recommendation or actions pending.

(JA 490). Under CAMC's bylaws, this is the only way in which a person forfeits a hearing: by failing to appear at a hearing that has been scheduled. Consistent with this, the HCQIA mandates scheduling a hearing and states that "the right to the hearing may be forfeited if the physician fails, without good cause, to appear." 42 U.S.C. § 11112(b)(3)(B). Once again, that is the only way a hearing is forfeited under the HCQIA. The case of *Fobbs v. Holy Cross Health Systems Corp.*, 789 F. Supp. 1054 (1992) illustrates the point. In *Fobbs*, a hearing was scheduled for the

[4]CAMC represents that "Wahi filed a civil action ...seeking to enjoin CAMC from the proceeding with its proposed administrative hearing." Appellees' Br. at 28. That representation mischaracterizes the nature of the action. Dr. Wahi filed an action seeking a declaratory judgment that CAMC was required to provide him an itemization of the specific charges against him, access to his medical records and documents and a fair hearing panel. (JA 99-113.) In other words, he was by no means waiving the right to a hearing. To the contrary, he was seeking a meaningful hearing.

physician and the physician refused to appear. *Id.* at 1058. Here, CAMC never scheduled a hearing. And as we noted above, CAMC never provided a list of witnesses (as required under the HCQIA and its bylaws). Finally, CAMC was fully aware that it had the burden of scheduling the time and place of the hearing once Dr. Wahi had timely submitted his request. (JA 990.)

In short, there is no evidence that Dr. Wahi waived his right to a hearing or refused to participate. Rather, on January 10, 2004, after the State Medical Board dismissed – for the third time and with prejudice – CAMC's charges against Dr. Wahi, Dr. Crotty made the following statement to the news media: "'We [CAMC] stand by our decision not to renew [Dr. Wahi's] privileges.'" (JA 198.) After Dr. Crotty's announcement of this *fait accompli* a hospital hearing would have been pointless. *See e.g., Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994). The bottom line is this: Dr. Wahi never waived his right to a hearing.

3. Due process through "other procedures as are fair to the physician under the circumstances" is not meant to serve as a substitute for scheduling a hearing.

A peer review action satisfies the HCQIA if the physician is afforded both notice and a hearing, *or* if the review action is taken "after such other procedures as are fair to the physician under the circumstances." 42 U.S.C. § 1112(a)(3). Appellees contend that the HCQIA standard addressing "such other procedures as are fair to the physician under circumstances" permits departure from its notice –

and – hearing requirements or hospital bylaws.[5] Appellees' Br. at 23. Their argument is rebuked by the clarity of Congress's intent.

The HCQIA's legislative history reveals that the clause – "such other procedures as are fair to the physician under circumstances provided" – was by no means intended to serve as a substitute for scheduling a hearing as required by the hospital's bylaws. Rather, this clause was designed to permit *existing* due process procedures (which already provided due process when the HCQIA was enacted) to remain as a mechanism to satisfy the new statutory requirement.[6] H.R. Rep. No. 99-903 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6393. We thus are guided to the bylaws themselves. But they, too, were not followed here.[7]

In addition, Appellees *summarily* suspended Dr. Wahi's hospital privileges. Such unilateral after-the-fact conduct is a far cry from even the "fair [procedures]

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[5] Appellees' argument is weakened by reliance on an unpublished opinion. *Wieters v. Roper Hosp., Inc.*, 58 Fed. Appx. 40 (4th Cir. 2003).

[6] "The Committee is aware, for example, that some courts have already carefully spelled out different requirements for certain professional review activities or actions, such as procedures for decisions regarding applicants for clinical privileges at a hospital. In those situations, compliance with applicable law should satisfy the "adequacy" requirement even where such activities or actions require different or fewer due process rights than the ones specified under subsection 102(b). In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices." H.R. Rep. No. 99-903 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6393.

[7] CAMC's bylaws require a hearing to be scheduled before any adverse action is taken against the employee. (JA 489.) CAMC failed to comply with these bylaws. *Wahi*, 453 F. Supp. 2d at 951-55.

under the circumstances" that Congress envisioned when drafting the HCQIA. *See* 42 U.S.C. § 11112(a)(3); *see also* H.R. Rep. No. 99-903 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6384, 6393. We develop that more fully below.

B. Summary Suspension Without Notice and Hearing Violates the HCQIA's Due Process Requirements.

Appellees argue that they substantially complied with the HCQIA's due process requirements by affording Dr. Wahi adequate procedures, including notice of actions against him. Appellees' Br. at 22-28. Appellees are mistaken. They violated Dr. Wahi's due process rights and the HCQIA by suspending his medical privileges without prior notice. Appellant's Br. at 18. Dr. Wahi would be able to prove, by a preponderance of the evidence, that Appellees' professional-review process violated the HCQIA's adequate notice – and – hearing procedures because it was not fair under the circumstances. The factual record demonstrates the following:

- On July 28, 1999, CAMC's Chief of Staff reported to CAMC's Board that his internal investigation cleared Dr. Wahi of the allegations against him-- that he had operated outside of his delineated clinical privileges-- based upon an external review and opinion of the Chief of the Department. (JA 964); Appellant's Br. at 21.
- On July 30, 1999, CAMC notified Dr. Wahi that he had been summarily suspended. (JA 586); Appellant's Br. at 19. Appellees

violated 42 U.S.C. § 11112(a)(3) because this action was taken *before* Dr. Wahi was afforded adequate hearing – and – notice procedures.

- On September 8, 1999, Dr. Wahi's counsel sent CAMC a letter, received by CAMC on the following day, requesting (i) a hearing, (ii) a particularized itemization of charges, (iii) a list of witnesses to be called by CAMC, (iv) access to records necessary to prepare a defense to the charges, and (v) immediate lifting of the summary suspension because it had lasted for more than the maximum fourteen (14) days. (JA 648-653.) (This letter was sent in response to the August 26, 1999, letter from CAMC to Dr. Wahi explaining that his request for reappointment had been denied and that he was entitled to a hearing). (JA 647.); Appellant's Br. at 19.
- On December 2, 1999, CAMC responded to Dr. Wahi's September 8, 1999 letter, informing him that a hearing would take place; however, CAMC never provided Dr. Wahi with the requested information, including (i) time, date or location of the hearing, or (ii) a witness list. (JA 672-674); Appellant's Br. at 19. (Appellees thereby violated 42 U.S.C. § 11112(b)(2), which establishes that if a hearing is requested in a timely basis, the physician must be given notice of both pieces of information).

- No hearing has ever taken place. (JA 991); Appellees' Br. at 13. Since 42 U.S.C. § 11112(a)(3) requires adequate notice and hearing or other fair procedures, a lack of a hearing in its entirety demonstrates Appellees' unlawful conduct.

Thus, the factual record firmly establishes Appellees' failure to substantially comply with the HCQIA's requirements. The district court erroneously concluded that Dr. Wahi would be unable to prove, by a preponderance of the evidence, CAMC's failure to provide him adequate process. *Wahi v. Charleston Area Med. Ctr., Inc.*, 453 F. Supp. 2d 942, 954 (S.D. W. Va. 2006).

Appellees contend "there is no evidence that CAMC would have forced Wahi into a hearing without first providing him a list of witnesses." Appellees' Br. at 30. Appellees' contention is completely speculative. The pivotal fact is that no such notice was provided even though CAMC's bylaws provide they shall be given within ten (10) days. Moreover, CAMC's counsel admitted that some fifteen (15) months after Dr. Wahi requested the list, she had not provided it. Indeed, she had only made a list up "in [her] mind." (JA 689); Appellant's Br. at 20.

C. Summary Suspension Without Notice and a Hearing is Permissible Only if Justified by (1) Imminent Danger or (2) a Limited Investigation not to Exceed Fourteen Days.

Appellees argue that Dr. Wahi's summary suspension was conducted pursuant to their Procedures Manual, which permitted such action "for the best interest of patient care." Appellees' Br. at 32 (citing Art. II, § 2.4.1). In addition, Appellees contend that no time limitation applies to summary suspensions of clinical privileges. Appellees' Br. at 33 (citing Med. Staff Procedures Manuel Art. II, § 2.4.1). They are mistaken. Appellees fail to recognize that the HCQIA, as the governing federal statute, overrides a hospital manual to the contrary. The HCQIA identifies its own application "to State laws in a State only for professional review actions commenced on or after October 14, 1989." 42 U.S.C. § 11111(c).[8]

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[8] CAMC represents that "[t]his argument [that there is a 14 day time limit] contradicts the plain language of the Procedures Manual," and that "the time limitation set forth in § 2.4.2, not § 2.3.3 applies" to "Wahi's summary suspension [which] was carried out pursuant to §2.4.1" of its bylaws. Appellees' Br. at 32-33. CAMC's contention clearly misrepresents and contradicts the plain language of CAMC's own bylaws, which state:

> 2.4.3. <u>Chief of Staff Procedure</u>. Any person who exercises his authority under Section 2.41 to summarily suspend Clinical Privileges shall immediately report this action to the Chief of Staff to take further action in the matter. At that point the Chief of Staff shall take such further action as is required in the manner specified under Section 2.3.

(JA 486.) Thus, under the specific language of the bylaw, the fourteen (14) day time limitation set forth in § 2.3.3 clearly applies to suspensions implemented pursuant to § 2.4.1.

The HCQIA addresses two circumstances where summary suspension is justified. Neither applies here. First, procedures identified in § 11112(a)(3) are unnecessary "in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action." 42 U.S.C. § 11112(c)(1)(B). Second, immediate suspension or clinical privilege restriction is permitted "where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2). That action, however, is "subject to subsequent notice and hearing or other adequate procedures." *Id.*

Dr. Wahi's summary suspension was entirely unjustified. Appellees completely lacked evidence that Dr. Wahi constituted an imminent danger to patient health. Appellant's Br. at 21-23. Even indulging the unfounded assumption that Dr. Wahi was found to pose an "imminent danger," Appellees still would not be in compliance because they conducted an investigation prior to Dr. Wahi's suspension, rather than after it.[9] Appellees further failed to comply with the HCQIA's procedures by virtue of the timing of the professional review action. The timeline shows CAMC's disregard for statutory requirements because: (i) the

[9] 42 U.S.C. § 11112(c)(2) requires immediate suspension of clinical privileges where failure may result in imminent danger to another's health, "subject to subsequent notice and hearing or other adequate procedures."

action occurred before Dr. Wahi was afforded notice – and – hearing procedures;[10] and (ii) CAMC's internal investigation conducted prior to his suspension cleared him.[11] In sum, the summary suspension was unlawful.

II. DR. WAHI PRESENTS A TRIABLE ANTITRUST CLAIM.

In his opening brief, Dr. Wahi demonstrated that a triable antitrust claim exists based on Appellees' anti-competitive conduct. Appellant's Br. at 30. Dr. Wahi alleged that Appellees' anti-competitive goals constituted an underlying motive in his suspension. *Id.* Appellees disregard Dr. Wahi's antitrust claim by: (i) relying on their asserted immunity under the HCQIA and (ii) breezily dismissing the existence of a "triable issue of fact." Appellees' Br. at 33-34. Appellees pointedly fail to acknowledge the antitrust consent decree expressly enjoining CAMC from anti-competitive practices. Appellant's Br. at 32. When presented with the consent decree as powerful evidence of anti-competitive activity, Appellees have no response.

Appellees argue that Dr. Wahi's antitrust claim is barred because he offers no material issue of fact to refute CAMC's HCQIA immunity. Appellees' Br. at

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[10] 42 U.S.C. § 11112(a)(3) requires 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 (emphasis added)."

[11] 42 U.S.C. § 11112(c)(1)(B) permits suspension for a period not longer than fourteen days to investigate.

33. Once again, Appellees ignore the consent decree and final judgment. The HCQIA requires that peer review actions be taken "in the reasonable belief that the action was in furtherance of quality health care." 42 U.S.C. § 11112(a)(1). Dr. Wahi argued below that the action against him was not intended to further quality health care, but to carry out CAMC's attempt to unlawfully restrain competition. Dr. Wahi provided concrete evidence that CAMC's investigation was initiated in response to his own pro-competitive inquiries with other hospitals. The district court nonetheless concluded that Dr. Wahi failed to present evidence sufficient for a reasonable jury to find the hospital acted unreasonably. *Wahi v. Charleston Area Med. Ctr., Inc*, 453 F. Supp. 2d 942, 951 (S.D. W. Va. 2006). With all respect, that conclusion should not stand in the light of the United States' antitrust claim against CAMC. That claim by federal authorities provides compelling evidence supporting Dr. Wahi's antitrust allegations.

In the face of this evidence, Appellees gamely deny that Dr. Wahi presented a triable issue of fact. Appellees' Br. at 34. This ignores our argument. Appellant's Br. at 32-33. CAMC's consent decree and final judgment provides compelling evidence that the district court should have permitted Dr. Wahi to conduct discovery, thereby establishing at minimum a triable antitrust claim.

Appellant's Br. at 32. This supposition is further supported by evidence that after the close of limited discovery, CAMC filed suit against its own doctors alleging the very same anticompetitive practices. (JA 199-214); Appellant's Br. at 33. Accordingly, this Court should vacate and remand the two orders which: (i) granted Appellees summary judgment based on their asserted immunity, and (ii) allowed no discovery of antitrust claims. *Id.* at 32.

III. DR. WAHI IS ENTITLED INJUNCTIVE RELIEF.

Appellees argue that Dr. Wahi's claim for injunctive relief was factually unsupported. Appellees' Br. at 38. Appellees are wrong.[12] Dr. Wahi presented sufficient evidence to support his injunctive relief claim which would require CAMC to: (i) provide him a hearing and (ii) remove his name from the NPDB. Appellant's Br. at 25. First, Dr. Wahi suffered irreparable injury when CAMC summarily suspended his clinical privileges and reported him to the NPDB. *Id.* Dr. Wahi was deprived of employment with CAMC. The NPDB report, which all potential employers must check, precludes his practicing medicine anywhere else. *Id.* Second, remedies at law are inadequate. CAMC has essentially deprived Dr.

[12] Under well-settled law, to obtain permanent injunctive relief a plaintiff must show: (i) he suffered irreparable injury; (ii) remedies available at law will not compensate for such injury; (iii) balancing hardships between plaintiff and defendant warrant a remedy in equity; and (iv) the public interest would not be disserved. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

Wahi of his liberty interest in gainful employment. *Id.* Monetary damages will not restore his credibility within the medical community, nor his status as an employable cardiac surgeon. *Id.*

For its part, CAMC will suffer no hardship by affording Dr. Wahi a hearing and removing the NPDB report. CAMC's compliance would simply require (i) the convening of a body of different members to review Dr. Wahi's case and (ii) retraction of the NPDB report. Appellant's Br. at 26. Dr. Wahi, on the other hand, is grievously injured by allowing the current situation to fester. *Id.* Due to CAMC's NPDB report, he is unable to find comparable employment as a trained surgeon. Finally, the public interest would not be disserved by providing Dr. Wahi a hearing and removing his name from the NPDB. To the contrary, the public interest would benefit by ensuring that hospitals abide by governing law.

Appellees assert that "[t]o grant the extraordinary injunctive relief Wahi requests in this case would overturn the judgment of the medical professionals that reviewed him and allow Wahi to avoid the peer review envisioned by HCQIA." Appellees' Br. at 39. While Dr. Wahi's first amended complaint requested reinstatement of medical privileges, and while Dr. Wahi still seeks reinstatement

pending a hearing, there is an alternative injunctive remedy.[13] In his opening Brief, Dr. Wahi requested this alternative--a permanent injunction which would require CAMC to provide Dr. Wahi a hearing and removal of his name from the NPDB. Appellant's Br. at 25.

While injunctive relief is "extraordinary," it is entirely necessary under these circumstances as the only possible way to provide Dr. Wahi complete relief. CAMC's provision of a hearing to Dr. Wahi would not overturn the judgment of medical professionals who reviewed him; rather it would simply effect compliance

[13]The only thing that prevents Dr. Wahi from returning to his practice at CAMC today is the summary suspension improperly imposed without a finding of imminent danger, contrary to the HCQIA and CAMC's own bylaws. This is clearly explained in a May 25, 2000, letter from CAMC's attorney and general counsel, F.C. Gall, Jr., to Elizabeth Spangler, Vice President of Medical Affairs at CAMC. The letter stated that although Dr. Wahi's "clinical privileges have been suspended," his credentials to the medical staff are still in place because "an application for reappointment automatically extends the current appointment period until the board acts on the application" and "that the board cannot act in this case until the hearing is concluded." (JA 990.)

If the court were to reinstate Dr. Wahi pending a hearing and direct CAMC to provide him access to documents and a list of witnesses as required by the HCQIA and CMAC's bylaws, the reinstatement could remain for a relatively short period of time pending the hearing that CAMC has never provided Dr. Wahi. There would be no harm, since the State Medical Board investigated CAMC's allegations against Dr. Wahi three (3) different times, and found no probable cause to support them the first two (2) times and dismissed them with prejudice the third time. (JA 147-171, 248-255.) Thus, the State Medical Board, which is responsible for licensing and disciplining physicians and maintaining the quality of patient care, found there simply was no substance to CAMC's long list of charges and insinuations, and that he was fully competent to practice medicine without restrictions.

with the HCQIA and CAMC's bylaws. Nor would a hearing somehow circumvent the HCQIA's goal of peer review. Dr. Wahi's peers would conduct that hearing. Contrary to Appellees' assertions, injunctive relief is entirely consistent with the purposes of the HCQIA.

IV. DR. WAHI'S ADDITIONAL CLAIMS.

A. The District Court Erred in Disallowing Discovery on All Claims and Issues.

The district court's order limited the scope of discovery, but stated that "[a]fter evaluating the summary judgment proceedings, the court will determine if the case shall continue, and if so, will reopen the discovery period." (JA 66.) Thus, the issue is not necessarily whether Dr. Wahi produced sufficient evidence to resist CAMC's motion for summary judgment, but whether he provided sufficient evidence to permit him continued discovery as to all claims.

Appellees have totally ignored the Rule 56(f) affidavit and request for additional discovery. Appellant's Br. at 33. At a minimum, Dr. Wahi satisfied his burden of producing sufficient evidence to reopen the discovery period as provided in the district court's order. Dr. Wahi should be allowed to proceed with discovery on all claims, including but not limited to those additional claims addressed below.

B. CAMC Violated Dr. Wahi's Constitutional Rights in Violation of 42 U.S.C. § 1983.

CAMC argues that the dismissal of Dr. Wahi's claims brought pursuant to 42 U.S.C. "§ 1983 [was] correct [based upon the court's] observation that CAMC is private, not-for-profit hospital and the clear precedent of Modaber and its progeny." Appellees' Br. at 37.[14] In support of their argument in this regard, Appellees frequently refer to Judge King's decision in their brief as determinative of CAMC's public or quasi-public status. Appellees' Br. at 29, fn. 9. What Appellees do not disclose, however, is that the *Kessel* decision was not even argued or decided until well after Judge King's decision. Judge King entered his decision in state court on December 6, 2001, while *Kessel* was decided long thereafter – on May 19, 2004, several months after the filing of this suit. *Kessel* modified *Mahmoodian v. United Hosp. Center*, 185 W.Va. 59, 404 S.E.2d 750 (1991) by recognizing the category of a *quasi-public* hospital under West Virginia law and by requiring a hospital to abide by its bylaws and procedures when it charges a physician with professional incompetence.

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[14] CAMC downplays the book that Dr. Wahi found during discovery, published by an intertwined entity of CAMC, which clearly states that CAMC is a public hospital, arguing the book "was not authored by CAMC, but by a separate corporation involved with fundraising." Appellees' Br. at 36-37. The "Introduction" to the book, however, is written by Phillip H. Goodwin, President of CAMC. (JA 258). Mr. Goodwin is the same person, who as President of CAMC, gave Dr. Wahi notice of the recommendation that his reappointment to the hospital be denied. (JA 653.)

CAMC further represents that these "issues [were] raised in support of this argument for the first time on appeal." Appellees' Br. at 36. Not so. The issue was clearly raised and extensively addressed in the record below in Dr. Wahi's opposition to CAMC's motion for summary judgment. (Pls. Mot. Sum J. at 70-73, Doc. 95.)

Finally, CAMC represents that it matters not whether CAMC is a public hospital since CAMC's compliance with the HCQIA "bars a due process claim." Appellees' Br. at 35, fn. 15. CAMC's argument lacks merit. The HCQIA "exempts any claim alleging a civil rights violation or claims for declaratory or injunctive relief." *Frelich*, 313 F.3d 205, 212 (4th Cir. 2002)(citing 42 U.S.C. § 1112).[15] Given the evidence that Dr. Wahi uncovered during discovery that CAMC was a public hospital, he should, at a minimum, have been allowed to conduct full discovery on the issue.

C. CAMC Defamed Dr. Wahi.

Aside from a cursory reference to the district court's erroneous holding that CAMC was entitled to immunity, Appellees ignore (and do not otherwise dispute) the merits of Dr. Wahi's defamation claim. Appellees' Br. at 33. The HCQIA was not intended to protect defamatory statements to the *news media* in reference to a

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[15]"[Immunity]shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq." 42 U.S.C. § 11111(a)(1).

licensed physician who posed no danger to patients. Yet, that is the result Appellees urge this Court to embrace. This Court should decline that invitation. Dr. Crotty's disclosure that CAMC (i) refused to reinstate Dr. Wahi's privileges and (ii) reported Dr. Wahi to the NPDB had the inevitable result of injuring Dr. Wahi's professional reputation. A reasonable observer would naturally conclude that Dr. Wahi posed a threat to patients – a deeply injurious, false conclusion thrice rejected by the State Medical Board. (JA 197-98, 248-55.) Accordingly, there exists a triable issue of fact regarding the defamation claim. The district court's grant of summary judgment in this respect should be reversed.

D. CAMC Breached the Duty of Confidentiality it Owed Dr. Wahi.

If CAMC's argument on breach of confidentiality is carried to its logical extension, there would be no cause of action or remedy available for publicly releasing the contents of NBDB reports to the news media – even though in violation of 45 C.F.R. § 60.13 and W. Va. Code § 30-3C-3. Further, Appellees represent that Dr. Wahi's Amended Complaint "does not allege 'Breach of Confidentiality.'" Appellees' Br. at 39. The heading of the claim in the Amended Complaint, however, refers to the claim in part as a violation of "Disclosure of Private Information." The claim itself refers to "violat[ing] the confidentiality of reports to the NPDB." (JA 38.) Rule 12(b)(6) does not permit such technical scrutiny that a meritorious claim can somehow be defeated at a pleading stage. *See*

e.g., *Suarez Corp. Industries v. McGraw*, 125 F.3d 222, 225 (4th Cir. 1997). It confounds logic to argue that information contained in a confidential report to the NPDB, such as a physician's name, can be released to the news media simply because there is a legal obligation to make such a report. This is especially so when releasing the information contained in the confidential report, such as a physician's name, is more damaging to the physician than the entire contents of the report itself, which CAMC refuses to allow to be made public.

Again, the HCQIA was intended to protect patients from dangerous doctors, not to provide a mechanism for hospital administrators to injure physicians' reputations by disclosing information Congress intended to be kept confidential. The district court's dismissal of the breach of the duty of confidentiality claim should be reversed.

E. CAMC Breached Dr. Wahi's Employment Contract.

Appellees contend that CAMC's bylaws do not constitute a binding contract between CAMC and Dr. Wahi. Appellees' Br. at 41-42. When CAMC initially appointed Dr. Wahi to his position in 1992, however, his appointment letter provided him with a copy of the bylaws and Procedures Manual. The letter stated: "It will be to your advantage to become familiar with these, as compliance with the Bylaws and Rules and Regulations is a requirement of continuing appointment." (JA 98.) Similarly, a 1994 letter of reappointment from CAMC to Dr. Wahi states:

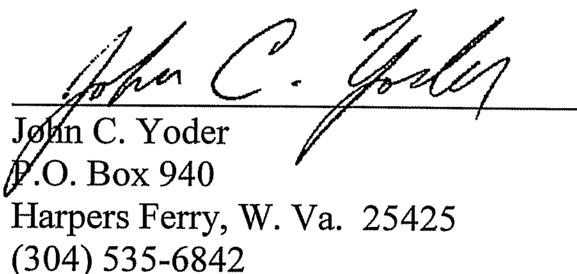
"This reappointment is subject to all of the terms and conditions of your initial appointment and previous reappointments, and to the Medical Staff Bylaws, Procedures Manual, Rules and Regulations and policies of the hospital and medical staff that are in force from time to time during the term of your reappointment." (JA 295.)

Finally, in its Answer to Plaintiff's First Amended Complaint, Appellees state twice that Dr. Wahi "agreed to be bound" by the governing documents. (JA 95.) At a minimum, a triable issue of fact exists as to whether the bylaws and Procedures Manual constituted a binding agreement or contract where Dr. Wahi was charged with professional misconduct. Particularly in light of *Kessel*, which speaks to this precise situation, this Court should reverse the district court's dismissal of the breach of contract claim.

CONCLUSION

For the reasons set forth above, and those discussed in Appellant's Opening Brief, the judgment below should be reversed.

Respectfully submitted,



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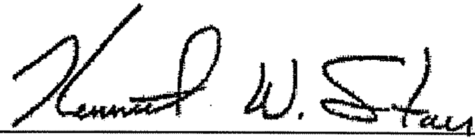

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CERTIFICATE OF COMPLIANCE

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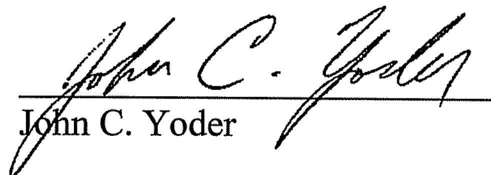

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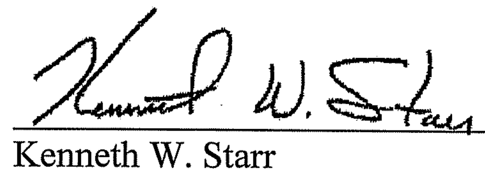

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I hereby certify that on this 29th day of April, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required number of copies of this Sealed Reply Brief of Appellant, and further certify that I served, via UPS Ground, postage prepaid, the required number of copies of said brief to the following:

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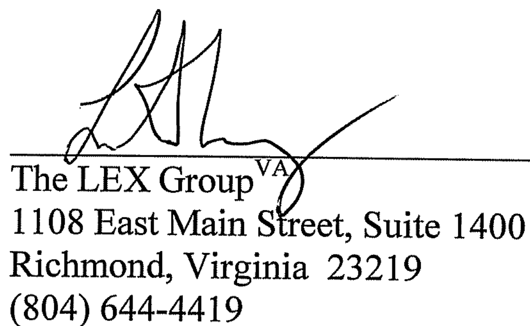

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