

## **Peper v. St. Mary's Hospital and Medical Center (2005-CA-1099)**

### **Opening Brief—Summary**

The key to the District Court's finding that St. Mary's conduct was reasonable and subject to qualified immunity was based upon factual findings that were simply wrong. The District Court also completely failed to consider the circumstantial evidence with respect to the timing of the review of 19 hand-selected cases. A central factual issue supporting the District Court's conclusion that St. Mary's actions were reasonable is his determination that, "an external reviewer found several cases falling below generally accepted standards of practice." There is no such finding in the anonymous reviewer's report. There is no finding of any negligence or patient treatment concerns in the reviewer's report, only questions as to certain cases.

Most importantly, the District Court failed to consider the fact that a thorough review of Dr. Peper's practice and cases had just been completed in December 2003, when his privileges were reappointed. Immediately thereafter, when St. Mary's learned that Dr. Peper was setting up a competing practice, someone at St. Mary's called for a "routine quality assurance peer review." While there is nothing in the record to indicate whether or not there is such a "routine" review process at St. Mary's, there is absolutely no explanation as to why it would be reasonable for St. Mary's, or its Board, to call for another review just after it had completed a thorough review and reappointment. The obvious connection between the two is the direct and circumstantial evidence regarding St. Mary's learning that Dr. Peper intended to set up a competing practice, and their motivation to prevent him from doing so. The Plaintiff has not been allowed to conduct discovery or to complete his investigation regarding St. Mary's motivation and conduct.

Dr. Peper was entitled to a hearing in accordance with state and federal law. CPRA and the HCQIA provide that a professional review committee shall provide for a hearing if it finds that a physician has provided substandard or inappropriate patient care. Despite this express requirement of both state and federal law, St. Mary's argued, and the District Court concluded, that Dr. Peper voluntarily waived his right to any hearing. While it may be true that under certain circumstances statutory rights may be waived, they are certainly distinguishable where HCQIA and CPRA require a hearing or similar procedures and where the Medical Staff Bylaws do not create a binding contract with Dr. Peper<sup>2</sup>. Certainly, a hearing where Dr. Peper could have presented both his testimony and his expert reports, would have led to a full and fair understanding of the 19 cases reviewed. This, of course, was not what St. Mary's was after; they were trying to prevent Dr. Peper from competing against them.