Certification of Word Count: 2,740

COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue, 3rd Floor
Denver, Colorado 80203

COPY

Appeal from the District Court, 21st Judicial District Mesa County
Honorable Nicholas R. Massaro, Presiding Judge
Case No. 04-CV-668, Division 10

**Plaintiff-Appellant:**
ERIC ANTHONY PEPER, M.D.

**Defendants-Appellees:**
ST. MARY'S HOSPITAL AND MEDICAL CENTER, a Colorado non-profit corporation; FRANCES RALEY, M.D.; JOHN C. BEESON, M.D.; and ROBERT LADENBURGER,

and

**Intervenor:**
DOUGLAS LARSON, Chapter 7 Bankruptcy Trustee

▲ **COURT USE ONLY** ▲

Case Number: 2005 CA 1099

FILE
NOV 09 2005
Clerk, Court of Appeals

Anthony L. Leffert, No. 12375
Robinson Waters & O'Dorisio, P.C.
1099 18th Street, Suite 2600
Denver, CO 80202-1926
Phone Number: 303-297-2600
FAX Number: 303-297-2750
*Counsel for Plaintiff-Appellant*

# REPLY BRIEF

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases



## Statutes



## Rules

## I. STANDARD OF REVIEW

Defendants want this Court to construe the Motion to Dismiss as a Motion for Summary Judgment because if the allegations made by Dr. Peper are accepted as true, such motion must be denied and Dr. Peper must be given his day in Court. At the trial court level, however, Defendants argued that the Motion to Dismiss should not be converted to a summary judgment motion because "the Court may rely upon the documents referred to in the Complaint or providing a context for allegations in the complaint without converting the Rule 12(b)(5) motion into a Rule 56 motion." (ROA 32 (citing *City of Boulder v. Public Serv. Co. of Colo.*, 996 P.2d 198, 203 (Colo.App. 1999)). Had the trial court, as it was required to do, construed the facts and reasonable inferences therefrom in favor of Dr. Peper, the Motion to Dismiss would have been denied.

Consistent with Defendants' argument at the time, the District Court did not construe the Motion to Dismiss as anything other than a Motion pursuant to C.R.C.P. 12. (ROA 728). Therefore, the District Court was required to accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to Dr. Peper, the non-moving party. *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766, 769 (Colo.App. 2000). The Motion to Dismiss must be denied unless it appears beyond a that Dr. Peper can prove no set of facts in support of his claim that

would entitle him to relief. *Id.* Applying this standard, Dr. Peper adequately pled claims against Defendants sufficient to overcome the presumption of immunity and, therefore, the trial court must be reversed and the Motion to Dismiss denied.

Defendants now argue, for the first time, and contrary to their position in the trial court, that the summary judgment standard for cases arising under the Healthcare Quality Improvement Act ("HCQIA") 42 U.S.C. § 11101, *et seq.*, should be utilized in reviewing the trial court's order. This Court should not utilize any standard other than the appropriate standard for a Motion to Dismiss because Defendants raised this issue for the first time in this appellate proceeding. *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 514 (Colo. 1986). Dr. Peper responded to the arguments actually presented to the trial court. Had Defendants argued that the HCQIA summary judgment standard applied, Dr. Peper would have requested a stay of determination pending discovery or submitted additional evidence to meet his burden. Defendants now take the position that Dr. Peper should have requested discovery, but Dr. Peper was not faced with the argument Defendants now make on appeal. Therefore, it is unjust to alter the standard of review on appeal.

To the extent this Court chooses to consider the summary judgment standard, it will be briefly addressed. Courts have determined that the HCQIA rebuttable presumption of immunity creates the following standard of review at the summary

judgment stage: whether a reasonable jury, viewing the facts in the best light for Dr. Peper could conclude that he has shown by a preponderance of the evidence that the defendants' actions are outside the scope of 42 U.S.C. § 11112(a). *Pfenninger v. Exempla, Inc.*, 116 F.Supp.2d 1184, 1201 (D.Colo. 2000). The presumption is merely a procedural device to establish an order of proof and production. Therefore, Dr. Peper can overcome HCQIA immunity at the summary judgment stage if he demonstrates that a reasonable jury could find that the defendants did not conduct the peer review in accordance with any one of the HCQIA standards.

Dr. Peper's burden under the HCQIA summary judgment standard "is no different than that of the non-movant who must demonstrate the existence of a genuine issue as to any material fact." *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25, 32 (1st Cir. 2002)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)(plaintiff must produce evidence that would support a jury verdict)). Summary judgment is not proper if Dr. Peper demonstrates a material issue of fact with respect to Defendants' claim of qualified immunity. *Pfenninger v. Exempla, Inc.*, 116 F.Supp.2d 1184, 1200 (D. Colo. 2000) Reasonableness of conduct is the overriding consideration for each element of HCQIA immunity and is a factual issue, which should be determined by the jury and not by a judge on a motion to dismiss. To require such a standard is in essence to require the

plaintiff to withstand a directed verdict with no discovery and no evidentiary hearing. What is required to withstand a motion to dismiss or a summary judgment motion is much less than what a directed verdict demands.

Even under the summary judgment standard applied to HCQIA cases, reasonableness issues must be construed in favor of Dr. Peper. *Gabaldoni v. Washington City* Hospital, 250 F.3d 255, 260 (4th Cir. 2001)(all facts must be viewed in light most favorable to plaintiff). The HCQIA statutory scheme supports such a standard as it clearly contemplates a role for a jury in deciding whether a defendant is entitled to immunity. *Singh,* 308 F.3d at 33. At a minimum, the questions of fact presented by Dr. Peper in his Complaint cannot be resolved under a summary judgment standard when no discovery has yet taken place, especially when the consequences are the ruination of a medical career as in this case. If the standard articulated above should be utilized, it should only be utilized in determining a true summary judgment motion after discovery has taken place. Dr. Peper's claim is, in essence, that the professional review activities were not undertaken in good faith and in the interest of good health care, but as a ruse or cover for an unlawful effort to prevent Dr. Peper from competing against St. Mary's. The factual issues raised in the Complaint support these allegations, which encompass conduct that falls outside professional review

action and would not be covered by the statutory standards required for § 11111(a) immunity. As such, the trial court must be reversed and the Motion to Dismiss denied.

## II. ST. MARY'S RESPONSE BRIEF CREATES EVEN MORE MATERIAL FACTS IN DISPUTE THAT PRECLUDE THE GRANTING OF THE MOTION TO DISMISS

The Response Brief of Defendants contains new factual allegations that are not supported by the record in an effort to convince this Court that there was no improper motive in revoking Dr. Peper's privileges and preventing Dr. Peper from practicing medicine. As just one example, Defendants now maintains that the anonymous reviewer began the review in the fall of 2002. *Answer Brief*, p. 8 (citing ROA 00005). Nowhere in the record is there any evidence that this review was started in the fall of 2002. Defendants cite solely to Dr. Peper's Complaint, which alleges that sometime after early January 2003, St. Mary's undertook a review of Dr. Peper's cases. (RPA 00005, ¶ 16). The anonymous reviewer's report is dated February 5, 2003, which also contradicts Defendants contention that the review was undertaken in the fall of 2002. The timing of the reviewer's report is important because October 31, 2002 was Dr. Peper's last day of practice as a cardiothoracic surgeon at St. Mary's. (ROA 2-3, ¶ 10). The Complaint further alleges that the review was undertaken after Dr. Peper was no longer treating patients at St. Mary's hospital, which supports the inference that the review was undertaken for an improper purpose. *Id.* Resolving the inference in favor

of Dr. Peper establishes that the case review was undertaken as part of a deliberate course of action aimed at preventing Dr. Peper from setting up a competing cardiothoracic practice at Community Hospital. This brief example serves to demonstrate the point that this case was not ready for trial; the record was not sufficiently developed; and the District Court ruling on a motion to dismiss without benefit of any hearing was clear error.

## III. THERE WAS NO KNOWING AND VOLUNTARY WAIVER OF DR. PEPER'S RIGHTS TO HEARING AND APPEAL

The HCQIA requires that Dr. Peper be provided a hearing. 42 U.S.C. § 11112(b); C.R.S. § 12-36.5-104(7)(a). Despite this clear requirement, Defendants maintain, as they must, that Dr. Peper's application for medical privileges, wherein he agrees to be bound by the Bylaws, constitutes a knowing and voluntary waiver of his right to hearing and appeal.[1] *Answer Brief*, p. 24. Defendants are entitled to a presumption only when the hearing and proceedings comport with minimum standards of fairness. 42 U.S.C. § 1112(a)(3). Procedures that survived appellate scrutiny include "expert retrospective reviews and fact-finding hearings during which [the physician] was given extensive trial-type rights." *Sugarbaker v. SSM Health Care*, 190

1 It should also be noted that Dr. Peper challenges Defendants argument that the By-Laws do not provide for a hearing. Article IX of the By-Laws states that "such actions as affect the medical staff shall be conducted as outlined in the Corrective Action/Fair Hearing Manual." (ROA 457). "Medical Staff" is defined in the By-Laws as "all physicians and oral surgeons who are given privileges to treat patients in the hospital." (ROA 456). Finally, Section 5.3 of the Corrective Action/Fair Hearing Manual requires a hearing where medical privileges are denied. (ROA 459). Therefore, there is a material question of fact regarding whether St. Mary's own internal procedures require a hearing.

F.3d 905, 915 (8th Cir. 1999). In this case, Dr. Peper was not given trial-type procedures or even one in which he had a meaningful opportunity to participate in the process, or answer the allegations against him. It is a basic tenant of all law regarding waiver, federal and state, that a waiver can only occur knowingly and voluntarily. Under the facts of this case, it is unreasonable to conclude that Dr. Peper knowingly and voluntarily waived his right to hearing and appeal.

Defendants fail to cite any HCQIA case wherein a physician was held to have prospectively waived his right to a hearing. Instead, Defendants cite *United States v. Mezzanatto*, 513 U.S. 196, 200-01, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995), for the proposition that statutory rights are presumptively subject to waiver. *Mezzanatto*, however, does not address whether a statutory right can be waived prior to such right existing. In fact, all the rights mentioned in *Mezzanatto* are rights that are waived upon being able to exercise them. M*ezzanatto*, 513 U.S. at 201 (citing cases wherein a double jeopardy defense was waived, right to jury trial was waived, right to counsel was waived and statutory eligibility for attorneys fees was waived). Therefore, Defendants' authority is inapposite and does not support the conclusion that Dr. Peper could waive a right to a hearing prospectively.

Colorado law does not address prospective waiver of a right that has not yet manifested itself. Therefore, it is reasonable to cite persuasive law from other

jurisdictions regarding this issue. The courts Washington and Texas have both concluded that a party cannot waive a statutory right before the right exists. *Broughton Assoc. Joint Venture v. Boudreaux*, 70 S.W.3d 324, 328 (Tex.App. 2002); *Tjart v. Smith Barney, Inc.*, 28 P.3d 823, 830 (Wash.App. 2001). Such a limited restriction on waiver (the only application is to statutory rights) is consistent with protecting rights such as Dr. Peper's right to a hearing prior to having his medical privileges revoked. Such a procedural right is extremely important when the consequences are the end of a career and the decision makers are provided the presumption of immunity. Therefore, this Court should conclude as other states have, that Dr. Peper did not knowingly and voluntarily waive his right to a hearing because such right did not exist and could not be exercised at the time of the purported waiver.

Finally, to the extent Dr. Peper could not prospectively waive his right to a hearing, this Court should conclude that no "final action" occurred for purposes of the CPRA. As such, this Court should remand this case to the CAC for an administrative hearing regarding whether the revocation of Dr. Peper's privileges was the result of anticompetitive conduct.

## IV. WITHOUT A HEARING, ST. MARY'S COULD NOT HAVE MADE REASONABLE EFFORTS TO OBTAIN THE FACTS

Even if Dr. Peper's waiver is found to be voluntary, there can be no argument that Defendants should have conducted a hearing in order to comply with the second prong of HCQIA in making reasonable efforts to obtain the facts. No one can seriously argue that the peer review process would not have been benefited by a hearing with Dr. Peper and by hearing from his two experts regarding the 19 cases in question. If St. Mary's was genuinely acting in furtherance of quality healthcare, they would have conducted a hearing, especially when the reviewer's report made no finding of conduct falling below the standard of care. On this single issue alone, it is clear that Defendants conduct was not reasonable, and that they did not use reasonable efforts to obtain the facts. If even one of the four immunity requirements is not satisfied, the defendants are not entitled to the presumption. 42 U.S.C. § 11112(a); *Brown v. Presbyterian Healthcare* Services, 101 F.3d 1324, 1333 (10th Cir. 1996). Without this prong, there is no immunity and Dr. Peper has clearly rebutted the presumption of immunity. *North Colo. Med. Ctr., Inc. v. Nicholas*, 27 P.3d 828, 839 (Colo. 2001)(citing *Pfenninger v. Exempla, Inc.*, 116 F.Supp.2d 1184, 1199 (D.Colo. 2000)).

## V. THE FINDING BY THE DISTRICT COURT THAT DR. PEPER FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES DOES NOT APPLY TO ALL CLAIMS

St. Mary's now, for the first time, takes the position that, to the extent Dr. Peper failed to exhaust the administrative remedy regarding anti-competitive conduct, he is precluded from bringing any other claims. Again, this Court should not entertain this argument as it was not raised below. *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 514 (Colo. 1986).

The CPRA is the relevant statute requiring that a physician must have a claim of unreasonable anticompetitive conduct reviewed by the CAC. C.R.S. § 12-36.5-106(7). The statute clearly defines the scope of the review as limited to "whether such final board action resulted from unreasonable anticompetitive conduct." *Id.* More importantly, the CPRA provides that "[n]othing in this article shall preclude a physician or health care provider otherwise aggrieved by the final action of a governing board from seeking other remedies available to them by law . . . ." C.R.S. § 12-36.5-106(8). The trial court properly recognized that there is no requirement to exhaust administrative remedies prior to filing an action for damages. (ROA 731). Dr. Peper's claims for intentional interference with contract, intentional infliction of emotional distress, conspiracy and negligence are, therefore, viable claims even if Dr. Peper failed to exhaust his administrative remedy under the CPRA.

## VI. THE DISTRICT COURT ERRED IN CONCLUDING THAT DR. PEPER SOUGHT ONLY MONETARY DAMAGES

The relief sought by Dr. Peper was for both reinstatement of his medical privileges in the form of declaratory and/or injunctive relief as well as monetary damages. It is undisputed that immunity provided by the HCQIA is limited to damages liability. 42 U.S.C. § 1111(a). Congress attempts to balance the need for protection for participation in peer review with concerns for protecting physicians improperly subjected to disciplinary action by providing immunity from damages but permitting physicians to maintain actions for injunctive or declaratory relief. *Imperial v. Suburban Hospital Ass'n*, 37 F.3d 1026, 1030-31 (4th Cir. 1994); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1322 (11th Cir. 1994).

The District Court acknowledged that immunity is inappropriate where a party is seeking equitable relief, but improperly determined that Dr. Peper was not seeking equitable relief. (ROA 732); *City of Colo. Springs v. Conners*, 993 P.2d 1167, 1168-69 (Colo. 2000). Dr. Peper is not obligated to formally file a motion for preliminary injunction to demonstrate that he is seeking equitable relief. The allegations in Dr. Peper's Complaint and the motions practice make clear that he is seeking reinstatement of his medical privileges in addition to monetary damages. In response to the Bankruptcy Trustee's Motion to Intervene, Dr. Peper argued that he was seeking

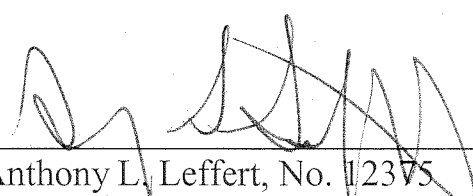
reinstatement of his medical privileges and because a medical license is not property for purposes of bankruptcy law, the trustee did not have standing with respect to such claim. (ROA 626, ¶ 4). In Response to Defendants' Motion to Dismiss, Dr. Peper again took the position that he should be permitted to move forward on his request for reinstatement of his medical privileges regardless of Defendants' claim of immunity. (ROA 472). Dr. Peper consistently asserted a claim for equitable relief and to conclude otherwise is in error. Dr. Peper cannot regain his ability to practice medicine unless the revocation of his privileges by St. Mary's is remedied. Therefore, this Court should remand this case to the District Court for a determination at least with respect to Dr. Peper's equitable claims.

## VII. CONCLUSION

For the reasons stated, and the authorities cited above, the District Court's April 12, 2005 Order dismissing Dr. Peper's claims in their entirety should be reversed and remanded for new trial.

Respectfully submitted this 9th day of November, 2005.

ROBINSON WATERS & O'DORISIO, P.C.



Anthony L. Leffert, No. 12375
Chad M. McShane, No. 30462
*Attorneys for Plaintiffs/Appellants*

## CERTIFICATE OF MAILING

I hereby certify that on this 9th day of November, 2005, I placed a true and correct copy of the foregoing **REPLY BRIEF** in the U.S. Mail, postage pre-paid, addressed to the following:

Linda L. Siderius, Esq.
Robert W. Steinmetz, Esq.
McConnell Siderius Fleischner Houghtaling & Craigmile LLC
4700 South Syracuse, Suite 200
Denver, CO 80237