IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TERRENCE E. BABB, M.D.,	:	No. 1229 M.D.A. 2018
	:	
v.		
	:	
GEISINGER CLINIC; PENN STATE GEISINGER HEALTH SYSTEM,	:	
ROBIN OLIVER, M.D., AND MICHAEL CHMIELEWSKI, M.D.,	:	
APPEAL OF: GEISINGER CLINIC	:	
TERRENCE E. BABB, M.D.,	:	No 1314 M.D.A. 2018
	:	
v.		
	:	
GEISINGER CLINIC; GEISINGER HEALTH SYSTEM.	:	

BRIEF *AMICUS CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY

Appeal from the Order of the Court of Common Pleas of Centre County, entered at No. 13-23436

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Pa.R.A.P. 531(a), *Amicus Curiae*, the American Medical Association and the Pennsylvania Medical Society file this Brief in Support of Terrence E. Babb, M.D.

Amicus Curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

The mission of the AMA's Litigation Center is to represent the interests of the medical profession in courts through the country. The Litigation Center brings lawsuits, files amicus briefs and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

The Litigation Center's docket encompasses a wide variety of cases over the entire medical-legal landscape, including physician payment issues, medical staff privileges, medical liability issues, peer review and scope-of-practice matters, among many other topics.

Amicus Curiae, the Pennsylvania Medical Society (the "Medical Society") is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as an *amicus curiae* before this Court in cases raising important health care issues, including issues that have the potential to adversely affect the rights of physicians and the quality of medical care.

The AMA and the Medical Society are appearing on their own behalves and as representatives of the Litigation Center.

The above organizations have a unique and substantial interest in the issues presented by the instant case. They are concerned about the misuse of so-called "peer review" procedures in medicine; they believe strongly in the need for transparency and accountability in peer review, particularly when a physician's livelihood and reputation are at stake. They are further concerned about "sham" peer review proceedings and the use by "peer reviewers" or "committee members" of peer review as pretext in order to suspend or terminate physicians for non-patient related or safety reasons. Additionally, they wish to reiterate the importance of fair procedure in protecting physicians against what some courts have characterized as "arbitrary, capricious and oppressive action[s] involving a [physician's] professional qualifications, standing and prestige…."

The AMA and the Medical Society submit that they are appropriate *amici* under Rule 531 of the Pennsylvania Rules of Appellate Procedure. Amici urge this Honorable Court to consider seriously the legal and policy considerations advanced in this Brief *Amicus Curiae*, which compel the conclusion that the trial court's decision be affirmed.

II. FACTS

This is the third time this matter has been before this Court on appeal. The two prior appeals resulted in remands, and ultimately, a jury trial.[1] The underlying dispute arose over two decades ago, and it is not over yet. Now the third time this matter is before this Court, Geisinger appeals a $5.5 million jury verdict in favor of Dr. Babb. The jury and trial court both concluded that Dr. Babb proved he had an employment contract with Geisinger, which contract the hospital breached. By Dr. Babb's account, his professional performance never was an issue prior to his termination. His proofs at trial suggested that issues with his professional competency were first raised after the decision to terminate him (for reasons that did not implicate his qualification to practice medicine) was made.

On May 1, 1997, after a routine annual performance review, Dr. Babb was recommended for reappointment. Four days later, however, when Dr. Babb was away on a medical mission, Geisinger decided to terminate Dr. Babb's employment because of concerted pressure by two of Babb's colleagues, Dr. Oliver and Dr. Chimielewski, one of whose performance Babb previously had questioned. By Dr. Babb's account, his termination was purely a business decision. On May 16, after Dr. Babb had returned from the medical mission, Geisinger's Senior Vice President

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[1] In both prior appeals this Court reversed summary judgments in favor of Geisinger. *Babb v. Centre Community Hospital*, 47 A.3d 1214, 1227(Pa. Super. 2012)(Gantman, Allen and Mundy); and *Babb v. Geisinger Clinic*, 122 A.3d 1122 (Pa. Super. 2015).

for Medical Operations and the hospital's medical director met with Dr. Babb and requested that he resign or Geisinger would "come up with reasons" for his termination. Dr. Babb refused to resign and was fired on the same day. Dr. Babb's termination was confirmed by letter dated May 19, which indicated that quality of care concerns had been partly an issue. On June 17, 1997, counsel for Geisinger then advised Dr. Babb of the reason for his termination, and informed him that he was entitled to a *post-termination* hearing under Geisinger's Peer Review Fair Hearing procedure (applicable where termination results from patient care concerns), rather than the hospital's Involuntary Review Process (applicable where termination is a business decision). Dr. Babb has maintained throughout this long litigation that Geisinger followed the wrong review procedure because patient care concerns raised by Geisinger were pretextual.

Geisinger's post-termination procedures spanned ten months. In March, 1998, the hearing committee claimed to have found evidence that Dr. Babb had issues with professional conduct and clinical competency; its findings emphasized an alleged failure to properly and promptly complete medical records and patient charts. The committee concluded that this conduct had adverse implications for patient care and affirmed the decision to terminate Dr. Babb. On May 1, 1998, Dr. Babb commenced this action in the Court of Common Pleas, Centre County.

Based on the results of the Peer Review hearing, Geisinger submitted a report to the National Practitioner Data Bank (NPDB), on June 2, 1998, which was mandatory given the conclusions of Geisinger's committee. Once terminated from Geisinger, Dr. Babb lost his privileges at Centre Community Hospital ("CCH"), which refused to accept Dr. Babb's reapplication based on Geisinger's NPDB report. CCH then also made a report to NPDB stating that Dr. Babb had been denied clinical privileges because of unprofessional conduct and incompetence. Not surprisingly, Dr. Babb thereafter sustained the stigma associated with his termination by Geisinger, loss of hospital and clinical privileges and the reports to NPDB. For a prolonged period, Dr. Babb had difficulty finding a new position, and replacing his lost income.

The lawsuit between Dr. Babb, Geisinger Dr. Oliver, Dr. Chimielewski and CCH continued for 21 years, winding through federal, appellate and trial courts.[2] In the first appeal to this Court, the Panel reviewed the trial court's entry of summary judgment against Dr. Babb in favor of Geisinger Dr. Oliver, Dr. Chimielewski and

[2] Dr. Babb filed a writ of summons in Centre County on May 1, 1998, against Geisinger, Dr. Oliver and Dr. Chimielewski, alleging breach of contract and several other claims. (Geisinger countered Dr. Babb's allegations arguing that Dr. Babb was an at-will employee who could be terminated with or without cause). Dr. Babb reapplied for clinical privileges with CCH in July, 1999. After CCH's denial of those privileges, he appealed to the U.S. Department of Human Services. Dr. Babb also attempted to pursue federal remedies by commencing an action in November, 1999 in the U.S. District Court. That Court ultimately entered summary judgment against Dr. Babb on September 14, 2001. Dr. Babb's Complaint in the Centre County action was filed on October 31, 2001; he filed an amended complaint on January 25, 2002, adding CCH as a defendant.

CCH based on immunity under the Health Care Quality Improvement Act (42 U.S.C. §§ 11101-11152, the "HCQIA") (which encourages hospitals and physicians to report conduct of other physicians that raise patient safety concerns, by providing immunity to those who make the reports). This Court concluded that issues of fact precluded summary judgment in favor of Geisinger, but affirmed summary judgment in favor of Dr. Oliver, Dr. Chimielewski and CCH.[3] A second grant of summary judgment in favor of Geisinger was appealed to this Court and resulted in a *per curiam* decision affirming, reversing and remanding.[4] Ultimately, in March 2018, a Centre County jury found in favor of Dr. Babb. As more fully set forth in the Statement of the Case in the Geisinger's Brief to this Court, the jury concluded that Dr. Babb was not an at-will employee, Geisinger breached his employment agreement, and Dr. Babb suffered damages as a result. The jury awarded Dr. Babb $5.5 million.

The trial court denied Geisinger's post-trial motions. In its opinion, the trial court specifically identified facts supporting the conclusion that there was a contract between Geisinger and Dr. Babb as well as sufficient evidence to support Babb's claims that Geisinger breached that agreement and that Dr. Babb sustained economic injury as a result.

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[3] *Babb v. Centre Community Hospital*, *supra,* n.1 at, 1227-1230(Opinion by Judge Mundy).
[4] *Babb v. Geisinger Clinic*, *supra*, n. 1 at 1122.

Geisinger, Defendant below, asks this Court to vacate the jury's verdict and to enter judgment in favor of Geisinger on Dr. Babb's claims. Geisinger argues that the jury's conclusion that there was a contract between Geisinger and Dr. Babb is not supported by the evidence. Geisinger also argues that even if there were a contract, the evidence was insufficient to establish that it was breached relying on Dr. Babb receiving pre-termination notice, which it asserts gave him an opportunity to review the underlying grievances prior to termination. In support of its position, Geisinger points generally to letters and individual meetings with hospital leadership as evidence of pre-termination notice. Geisinger also notes that Dr. Babb's contract did not specify or require a specific type of notice, specific number of notices, or a specific means of response.

Amici adopt the Statement of Facts advanced by Dr. Babb in his opening brief. Amici write to specifically address the issue the level of due process and pre-termination hearing Babb was entitled if, in fact, a valid contract between the Hospital and Babb existed.

III. SUMMARY OF ARGUMENT

Amici believe that a hospital should be free to contract with a physician on terms on which the two parties agree and, accordingly, take no position on whether a valid contract was in place here. However, Amici submit that where a hospital itself ties its decision to terminate a physician to matters of professional competency that necessitate peer review, it is incumbent upon that hospital to comply with the procedures mandated by statute, both for the benefit of the physician as well as for the benefit of the public at large. In this case, Dr. Babb claims that Geisinger (the Hospital) did not supply him with the requisite pre-termination due process to which he was entitled.

Amici submit that if, as the hospital's subsequent actions suggest, Dr. Babb's termination by the hospital was inextricably intertwined with considerations of professional competency, Dr. Babb should have been given reasonable notice of the facts and allegations against him *prior to termination* and should have been provided a reasonable opportunity to respond to those allegations before the decision to terminate was made where that decision necessarily unleashed a series of events that affected his future. Amici further submit that providing *post*-termination proceedings – after the die was cast – without an opportunity for the physician to exonerate himself prior to termination, is insufficient to protect the physician's interests.

Amici also submit that a hospital should not be allowed to avoid responsibility for its actions by adopting the peer review process in circumstances where that process is used for an ulterior motive. Where the hospital uses that process as a means to justify discharging a physician/employee, it cannot subsequently claim that the termination was made for a business reason. In such circumstances, the hospital may neither claim immunity (from wrongful termination or retaliation claims by a physician), nor subsequently be heard to claim that the termination was a routine discharge of an at-will employee. Such "sham" peer reviews undermine the credibility of peer review procedures necessary to ensure patient safety and unfairly allow hospitals and other institutions a level of immunity from employment decisions other employers do not enjoy.

Amici therefore submit that this Court should guard against abuse of "peer review" as well as subversion and distortion of internal hospital procedures, HCQIA procedures and National Practitioners Data Bank ("NPDB") reporting by hospitals to the detriment of physicians. Amici also join in Dr. Babb's request that this Court affirm the trial court's decision.

IV. ARGUMENT

A. Introduction.

Over the last few decades, federal and state legislatures and courts have developed a body of law intended to balance the health and safety of patients with the employment and credentialing rights of physicians. The principles are basic. Physicians who are faced with termination of employment or staff privileges for alleged conduct that implicates patient care are entitled to meaningful due process that affords them the opportunity to challenge accusations before employment or credentialing decisions (that have the serious potential for ruining their careers) are made. Terminations that involve patient safety issues must be reported to the NPDB. Adverse employment or credentialing decisions that do not involve patient safety should not be reported.

Peer review should be reserved for occasions where quality of patient care actually is at issue; it should not be used to shield from scrutiny an employment decision motivated by routine business or personnel considerations but mischaracterized as related to professional competency.

While society has an interest in the provision of quality health care, and in policing physicians who move from one location to another, reporting to the NPDB should be done judiciously where circumstances warrant in order to avoid the devastating effect on the physician's career and prospect for future employment. It

is of utmost importance, then, to prevent peer review and NPDB reporting from being subverted for improper purposes.

In this case, Geisinger asks this Court to turn these principles on their head. Geisinger terminated Dr. Babb, and Centre Community Hospital took away his credentials without allowing Dr. Babb any pre-termination hearing or allowing him opportunity to exonerate himself. While Geisinger held post-termination hearings, it did so after the decision was made and the die was cast. Dr. Babb had no opportunity to adequately defend himself from the charges that were asserted before the decision to terminate him was made.

For the reasons set forth below, it is clear that the federal Health Care Quality Improvement Act and other considerations required that Dr. Babb be given a level of pre-termination due process which he did not receive. As Amici also will show, that level of due process was particularly important here, where the adverse termination decision was reported to the NPDB.

B. HCQIA Requires Pre-Termination Hearings.

Traditionally, physicians in private practice enjoyed a high level of independence even in circumstances where they were on medical staff at a hospital and subject to the hospital's by-laws and administrative oversight. This construct changed when hospitals began to employ physicians directly as hospital employees. Currently hospitals often provide employment agreements that require physicians to

join the hospitals' medical staff and maintain appropriate privileges for their practice. These agreements also generally require that physician/employees abide by the medical staff's bylaws, rules and regulation and often tie termination of employment with automatic termination of the physicians' medical staff membership or privileges, which in turn can have implications for their credentials as physicians. As a result, of contemporary employment practices hospitals now have a greater degree of control over physicians than previously. For many physicians, hospital employment, staff privileges and professional credentials are now inextricably intertwined.

In 1986, Congress passed the Health Care Quality Improvement Act (the "HCQIA"), intended to "improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior." *Mathews v. Lancaster Gen. Hosp*., 87 F.3d 624, 632 (3d Cir. 1996) (quoting H.R.Rep. No. 903, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6384). HCQIA advanced its goals by providing immunity to hospitals and physicians who participated in peer review proceedings properly conducted by a professional review body. A "professional review body" is defined as a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee

of the medical staff of such an entity when assisting the governing body in a professional review activity.

If deemed a professional review action, immunity under HCQIA is available if the action was taken:

(1) in a reasonable belief that the actions was in furtherance of a 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 requirements of paragraph (3).

One of the main purposes of HCQIA was to "balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action." HCQIA details the requirements for adequate notice and hearing procedures. The statute requires that a physician be notified of a proposed adverse action and the reasons for the action. The notice must specify that the physician has a right to a hearing, which may be requested within not less than 30 days. The physician must be advised of the hearing procedure, including what

witnesses will be called. The statute also specifies who can be the decision maker at the hearing, that the physician may be represented by counsel at the hearing, that the hearing will be recorded, and that the physician may call and cross-examine witnesses and present evidence. The statute also requires a written report of the result of the hearing.

HCQIA's recognition that individual physicians' privileges should not be adversely affected by the actions of their peers or their hospitals without some form of due process is consistent with Pennsylvania law. *See, e.g., Berberian v. Lancaster Osteo. Hosp. Assn.*, 395 Pa. 257 (Pa. 1959) (remedies extended by the internal regulations of a voluntary association in respect of the expulsion of members must be given strict compliance); *Joseph v. Passaic Hospital Association*, 26 N.J. 557, 141 A.2d 18, 23, 24 (N.J. 1958) ("A hearing on notice is of the essence of the cited provisions of the Constitution and By-laws. . . . The requirement of a hearing before `a man fails of reappointment' is quite clearly intended to protect the staff member against arbitrary, capricious and oppressive action involving his professional qualifications, standing and prestige and the opportunity and facilities for continued service, and for the good of the Hospital as well. . . ."). Thus, HCQIA provides protection for peer reviewers in actions brought by physicians where the peer reviewers took the proper steps and abided by the minimum safeguards set forth in the bylaws or other places to protect against arbitrary disciplinary action.

Under HCQIA, where a hospital takes an adverse employment action against a physician that affects the physician's clinical privileges for more than 30 days, and that physician is given any form of due process, regardless of how or when it occurs, that adverse action, and the reasons for such action, must be reported to the National Practitioner Data Bank.

C. Joint Commission on Accreditation of Health Care Organization (JCAHO).

The JCAHO Joint Commission on Accreditation of Health Care Organization (JCAHO) also provides hospitals with standards for notice and hearings. These requirements are more stringent HCQIA requirements. Joint Commission standards are often adopted by hospitals in their bylaws; thus, these standards also guarantee that physicians receive due process before any termination decisions are made.

Appropriately, JCAHO's medical staff standards note that mechanisms for fair hearing and appeal processes should be designed to allow the affected individual a fair opportunity to defend themselves against the adverse decision to an *unbiased* hearing body of the medical staff, and an opportunity to appeal the decision of the hearing body to the governing body; this is to assure full consideration and reconsideration of quality and safety issues and, under the current structure of reporting to the NPDB, allow practitioners and opportunity to defend themselves. To this end, JCAHO requires specific characteristics of hospital medical staffs

hearing and appeals processes, including the adherence to specific hearing procedures and a hearing committee that includes impartial peers.

D. American Medical Association Code of Medical Ethics.

The American Medical Association Code of Medical Ethics regarding peer review and due process is also instructive here. The AMA Code holds that fairness is essential in all disciplinary or other hearings where the reputation, professional status, or livelihood of the physician may be adversely affected. Accordingly, the AMA Code instructs that physicians involved in reviewing the conduct of fellow professionals should always:

(a) Always adhere to principles of a fair and objective hearing, including:

1. A listing of specific charges

2. Adequate notice of the right of a hearing

3. The opportunity to be present and to rebut the evidence

4. The opportunity to present a defense

(b) Ensure that the reviewing body includes a significant number of persons at a similar level of training.

(c) Disclose relevant conflicts of interest and, when appropriate, recuse themselves from a hearing.

E. The National Practitioners Data Bank.

The National Practitioners Data Bank is a creation of HCQIA intended to bolster the integrity of the peer review process by "accumulating and disseminating data pertaining to adverse peer review actions which have an impact on the clinical privileges of physicians and other staff members." Karen S. Rieger, *et al*, *Healthcare Entity Bylaws and Related Documents: Navigating the Medical Staff/Healthcare Entity Relationship;* § 1.1, at 2 (3d ed. 2011); Gayland Hethcoat, *Terminating the Hospital-Physician Employment Relationship: Navigating Conflicts Arising from the Physician's Dual Roles as Employee and Medical Staff Member*, 23 U. Miami Bus. L. Rev. 425 (2014). The availability of a process by which to challenge an employment decision by a hospital becomes immeasurably more important when the risk of a report to the National Practitioners' Data Bank is in play.

As our Supreme Court has acknowledged, an adverse Data Bank report may have a devastating effect on a physician's future practice of medicine. *Hayes v. Mercy Health Corp*., 559 Pa. 21, 739 A.2d 114 (1999); *Cooper v. Delaware Valley Med. Ctr*., 539 Pa 620, 654 A.2d 547, 551 (1995) ("finding gainful employment in the hospital setting after a poor review is unlikely as a result of the provisions of the [HCQIA]"). 42 U.S.C.A. § 11133. Unlike attorney discipline, which is reported and *may* be reviewed by a client or potential employer, every hospital has an affirmative

duty to request the information contained in the NPDB file for every physician who applies for a position on its medical staff. 42 U.S.C.A. § 11135.

Therefore, a doctor whose employment or staff privilege termination is reported to the NPDB will be severely, and negatively, impacted by such a report and will likely have an exceedingly difficult time finding subsequent employment,[5] even where that physician has not been afforded a pre-termination hearing. Some have even compared a listing on the NPDB to McCarthy era blacklisting or even to the public listing of a sexual predator, albeit with a *much* lower burden of proof placed on the hospital. Katherine Van Tassel, *Hospital Peer Review Standards and Due Process: Moving from Tort Doctrine Toward Contract Principles Based on Clinical Practice Guidelines*, 36 Seton Hall L. Rev. 1179, 2037 (2006). *See also Carlini v. Highmark,* 756 A.2d 1182, 1184 (Pa. Cmwlth. Ct. 2000)("The reporting of this decision to the National Practitioners Data Bank will undoubtedly have a devastating impact upon [the physician's] professional reputation.").

F. <u>Application of the Above to this Case.</u>

Below, the jury concluded that the hospital had not provided necessary pre-termination due process. That verdict is supported by the sequence of events that

[5] In many cases, the termination of medical privileges "could have a career ending effect on a doctor." Paul K. Ho, *HCQIA Does Not Provide Adequate Due Process Protection, Improve Healthcare Quality and is Outdated under "Obama Care"*, 11:1 Ind. Health Law Rev. 304, 319 (2014). Moreover, an adverse peer review may also cause the institution of an investigation by a state licensing board. *Id.*

occurred in this case. Originally, the hospital invoked HCQIA immunity as protection from a challenge to its decision to terminate Dr. Babb and then proceeded directly to Peer Review (rather than Involuntary Review, applicable to "business" terminations), on the apparent theory that Dr. Babb's termination was based "in part" on quality of care issues. While the hospital long after the fact, when the case finally went to trial, opted to abandon HCQIA immunity and attempted to recast this case as a routine termination of an at-will employee, it cannot so easily avoid the consequences of its earlier actions. From the beginning, the hospital chose not to characterize Dr. Babb's termination as a business decision, but instead used the peer review process as a sword rather than a shield. The hospital itself tied Dr. Babb's termination to his professionalism, his fitness to practice medicine, and his staff privileges as well as his employment. The evidence at trial suggested that the hospital invoked the statute and the immunity it afforded only after it utilized the peer review process as a means for ridding itself of Dr. Babb.[6] The hospital then reported the adverse employment decision to the NPDB. In these circumstances, there is no meritorious basis on which to challenge the jury verdict.

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[6] The post-termination proceedings in this case also were flawed. The panel appointed was improper in that two of the persons appointed had no experience in the relevant field of obstetrics and gynecology. More significantly, two of the participants in the post-termination proceedings had been involved in the proceedings (in which Dr. Babb was excluded from participation) which preceded the termination. Notes of the post-termination proceedings were not produced until after the hearing; this, too, prevented Dr. Babb from having a fair hearing.

The hospital's reliance on the fact that it allowed Dr. Babb to review certain letters or to have certain informal meetings, is misplaced. Informal procedures are insufficient to satisfy the requirements of due process. See *Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018) (while "individuals reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto . . . are defined as a type of "review organization" such individuals are not "review committees entitled to claim PRPA's evidentiary privilege in its section 425.4.").

This case illustrates why pre-termination procedures are necessary in a case where employment termination leads to lost credentials and a report to NPDB. In such circumstances, the potential for termination without prior review is likely to have a chilling effect on the ability of a doctor to perform his or her duties. It is easy to imagine a scenario where a doctor who is disliked by his superiors for non-medicine-related reasons is summarily tossed to the street based on an unsubstantiated and unfounded allegation, only to be given a pretense of a fair hearing after-the-fact at which the hospital digs deeply into minutia to justify the action already taken. There is a significant risk that fear of termination without notice and the opportunity to be heard – leading to loss of privileges, and an NPDB report – would subvert the medical judgements of physicians forced to practice with more powerful but unqualified colleagues, or in accordance with hospital procedures with which they disagree, in fear that they may be fired at any time, for any reason, and

with no explanation whatsoever. As a result, patient safety and quality of care, which should be paramount, would be ceded to fear of termination.

In circumstances where a physician's livelihood is in jeopardy, stringent safeguards must be in place to prevent the improper deprivation of physicians' rights. In most scenarios, a post-decision hearing will fall far short of the type of due process that should be accorded to physicians when medical privileges already are affected, particularly in circumstances where the physician already has experienced the stigma of having the action against him reported to the NPDB.

Certainly there are situations, particularly those relating to the imminent safety of patients that may require immediate action by a hospital-employer. These, however, should be the exception instead of the rule.

As far back as 1982, and reaffirmed in 2017, the Alaska Supreme Court evaluated this critical issue and held that the failure to hold a hearing before the suspension or termination of a doctor's medical privileges creates a "'stigma of medical incompetence' affecting the doctor's ability to maintain income and reputation, both during the period between the deprivation of privileges and a hearing as well as after the hearing." *Brandner v. Providence Health and Services – Washington*, 394 P.3d 581, 589 (Alaska 2017) (citing *McMillan v. Anchorage Cmt. Hosp.*, 646 P.2d 857, 864 (Alaska 1982)). That stigma that was discussed in 1982 is much more devastating now that the HCQIA requires reporting of certain

disciplinary actions to the NPDB. Only in situations that show a "realistic or recognizable threat" to a patient's well-being should an emergency suspension or termination be allowed. *Brandner*, 394 P.3d at 590.

The United States District Court for the District of New Mexico reached a similar conclusion and held that a doctor's due process rights were violated when a hospital suspended, then terminated, a doctor without providing the requisite pre-termination notice and an opportunity to defend himself. *Osuagwu v. Gila Reg'l Med. Ctr.*, 938 F. Supp.2d 1142, 1160 (D.N.M. 2012). Specifically, the Court determined that the hospital could have easily protected its patients by providing certain safeguards, such as requiring oversight by more experienced doctors during operations, until a full investigation was completed and the doctor was given an opportunity to dispute the hospital's claims because "the risk of erroneous deprivation was high." *Id.*

This case is strikingly similar to that in *Osuagwu*. Dr. Babb was not notified, much less given an opportunity to dispute, any of the claims against him that impugned his ability to practice medicine prior to Geisinger terminating his employment and precipitating the cascade of events that stigmatized Dr. Babb. While Geisinger argues that Dr. Babb was given opportunity to review the underlying grievances prior to termination (Geisinger points to a September 24, 1996 letter from Dr. Wolfe; a October 21, 1996 meeting with Dr. Wolfe and Mr. Myers;

his May 1, 1997 yearly review; his ambulatory chart review; and multiple meetings with Drs. Oliver and Wheeler) Geisinger overlooks the fact that, under Pennsylvania Supreme Court precedent, the scope of the peer review privilege is limited to *review committees* that evaluate the "quality and efficiency of services ordered or performed" by a professional health care provider." *See Reginelli v. Boggs*, 181 A.3d 293 (Pa. 2018) (while "individuals reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto . . . are defined as a type of "review organization" such individuals are not "review committees entitled to claim PRPA's evidentiary privilege in its section 425.4.").

Moreover, there were no allegations of a "realistic or recognizable threat" to patients' well-being that warranted emergency action by the hospital without a pre-deprivation hearing. Instead, there was testimony at trial, apparently believed by the jury, that Dr. Babb's termination was based on business interests and his relationship with other doctors, for which *no* impact on patient safety was raised. While Dr. Babb was given a *post*-termination hearing in which Geisinger presented purported medical reasons for the termination, this process had the appearance of an after-the-fact justification, it was wholly inadequate, and it was patently unfair to Dr. Babb. In cases where a hospital has commenced action against a physician on contractual grounds, then imbues that termination with purported issues of professional competency, allowing the hospital to abandon its HCQIA defense and recast the

action as a simple employment decision obviously would encourage manipulation of the peer review process for that hospital's expedient business needs. In turn, this would set a dangerous precedent that would have a detrimental effect on the practice of medicine within Pennsylvania.

Accordingly, it is imperative that *all* hospitals within this Commonwealth be required to engage in meaningful due process protections *before* decisions are made that implicate professional competency and medical privileges, which then are reported to the NPDB, effectively ending or seriously impairing a physician's career.

V. <u>CONCLUSION</u>

WHEREFORE, for the foregoing reasons, *Amicus Curiae*, respectfully request that the Superior Court of Pennsylvania AFFIRM the Order of the Court of Common Pleas of Centre County.

Respectfully submitted,

LAMB McERLANE PC

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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