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**SUPREME COURT
OF THE UNITED STATES**

In the Matter of:

TIMOTHY A. PATRICK,

Petitioner,

V.

WILLIAM M. BURGET, ET AL.

No. 86-1145

Pages: 1 through 41

Place: Washington, D.C.

Date: February 22, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 TIMOTHY A. PATRICK, :
4 Petitioner, :
5 v. : No. 86-1145
6 WILLIAM M. BURGET, ET AL. :
7 -----x

8 Washington, D.C.

9 Monday, February 22, 1988

10 The above-entitled matter came on for oral argument before
11 the Supreme Court of the United States at 2:00 p.m.

12 APPEARANCES:

13 BARBEE B. LYON, ESQ., Portland, Oregon;
14 on behalf of the Petitioner.

15 THOMAS M. TRIPLETT, ESQ., Portland, Oregon;
16 on behalf of the Respondents.

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1 PROCEEDINGS

2 (2:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 number 86-1145, Timothy A. Patrick versus William M. Burget.

5 Mr. Lyon, you may proceed whenever you're ready.

6 ORAL ARGUMENT OF BARBEE B. LYON, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. LYON: Thank you, Mr. Chief Justice, and may it
9 please the Court.

10 The question before this Court today is whether the
11 State of Oregon has authorized these defendants to monopolize a
12 part of the practice of medicine in the relevant market and
13 whether it has actively supervised their doing so.

14 This was an action for treble damages under the
15 Sherman Act, Sections 1 and 2. Plaintiff is a physician, a
16 surgeon in Astoria. The defendants also are physicians. There
17 was an economic rivalry between plaintiff and defendants that
18 went back for ten years before the events in this case.

19 The defendants are associated with the clinic known
20 as the Astoria Clinic. They have associated with them three-
21 fourths of the physicians in the relevant market. There is one
22 hospital in the relevant market. Dr. Patrick is a surgeon, and
23 if you are a surgeon, you must have access to a hospital in
24 order to practice that branch of medicine.

25 Dr. Patrick lost his privileges at the hospital and

1 he alleged that he was deprived of those privileges by
2 defendants using their power, their dominant power over the
3 hospital, on the staff of the hospital, and over the committees
4 of the hospital. He alleged that they did so for an
5 anticompetitive motive, and that it was anticompetitive
6 conduct. That they did not do so for medical, ethical or
7 professional reasons.

8 The jury agreed with him after a three-week trial and
9 awarded treble damages. The trial judge upheld the verdict and
10 entered judgment accordingly.

11 The Court of Appeals, however, reversed. The Ninth
12 Circuit held that although there was sufficient evidence of the
13 defendants' anticompetitive motive and sufficient evidence of
14 their conduct, nevertheless what they did, unprofessional as it
15 might have been, was immunized from antitrust laws by reason of
16 the State action doctrine.

17 Did the State action doctrine protect and defend what
18 they did? The State action doctrine, as announced by this
19 Court, has as its principles, its purpose, the resolution of
20 principles of Federalism on the one side with State law on the
21 other. It draws a balance between the Federal antitrust laws
22 and State policies which may be anticompetitive.

23 As announced by this Court, there are two branches to
24 the State action doctrine, two tests. The first is whether or
25 not the challenged restraint is one which is clearly

1 articulated by the State and affirmatively expressed as a State
2 policy.

3 The second branch of the test is whether or not it is
4 actively supervised by the State itself.

5 Turning to the second of these first, was this
6 conduct of defendants' actively supervised by the State of
7 Oregon? The defendants, the hospital, its staff and committees
8 are all private parties. They are not agencies of the State
9 of Oregon. They are not subject to the State Administrative
10 Procedure Act. There is no State statute providing any State
11 agency which reviews what they do, authorizes any State agency
12 to reverse what they do.

13 There is no State statute giving a right of appeal to
14 any particular court under any form of procedure.

15 QUESTION: Is there no mechanism in Oregon in your
16 view for a judicial review of the deprivation of the privilege
17 to restore that privilege?

18 MR. LYON: Certainly no clear review. There have
19 been only two cases in which the State of Oregon Supreme Court
20 considered whether or not it had such power. In both cases, it
21 expressly said that it did not decide whether it had the power
22 or not.

23 QUESTION: So perhaps that power exists?

24 MR. LYON: Perhaps that power might exist.

25 QUESTION: It wasn't pursued by your client here?

1 MR. LYON: That is correct, Your Honor.

2 QUESTION: So we don't know.

3 MR. LYON: That is correct, Your Honor.

4 QUESTION: Now, I guess there is a State action for
5 interference with business relations?

6 MR. LYON: That is. That is a private tort action
7 remedy that is available under State law.

8 QUESTION: And that also was not pursued?

9 MR. LYON: That was pursued. That was our State law
10 count that was tried in this particular case, and we want a
11 verdict on that with punitive damages.

12 QUESTION: Is that a form of State supervision in a
13 sense, do you think, to provide that kind of an action?

14 MR. LYON: Your Honor, this Court has never so held.
15 It would strike me as anomalous to say that because private
16 conduct, because a State provides a forum in which litigants
17 can sue each other and redress their private grievances, that
18 doesn't amount to State action.

19 For example, the State provides a forum for people
20 who have a dispute over a breach of contract or a tort. That
21 does not mean the State is actively supervised in what they do.

22 The standard that this Court has announced is whether
23 there is a pointed reexamination of what goes on in the
24 challenged restraint to see that it does not unnecessarily
25 interfere with the policies of the antitrust laws. This Court

1 has never held that judicial review of this type is that kind
2 of pointed reexamination of the anticompetitive conduct.

3 And least of all, I should suggest, should the Court
4 announce that as a principle for the first time in a case where
5 the State Supreme Court does not even know whether it has
6 jurisdiction to consider these kinds of issues.

7 When Dr. Patrick was confronted with what was being
8 done to him in Astoria, there was really nothing he could do.
9 The one thing that occurred to him to do was to at least ask
10 the hospital to appoint a neutral panel to consider the charges
11 that were made against him. He offered to submit to whatever
12 decision the panel and the hospital would make if they would
13 only appoint a neutral panel. He said if they only would do
14 that, that would avoid a lot of controversy and a lot of
15 expense. He renewed that request twice. It was denied. There
16 was no place else to turn to and this is how this case arose.

17 The Court of Appeals purported to find active
18 supervision in three ways. First of all, the results of a peer
19 review decision in a State hospital are to be reported to the
20 Board of Medical Examiners which is the State licensing
21 authority for physicians. Yet, there is nothing in the
22 Statute, and counsel concedes, I understand, that the State
23 Board of Medical Examiners has no power to reverse or interfere
24 with any decision made by the State Board of Medical Examiners.
25 It can only make decisions about the medical license to

1 practice medicine in the State of Oregon.

2 Next, the Court of Appeals said there was adequate
3 State supervision because the State Health Division licenses
4 hospitals. And there is a statute that requires the trustees
5 or the governing body of a hospital to see to it that there are
6 procedures in place for peer review.

7 The Court of Appeals said that because the Health
8 Division had the authority to see that the governing body
9 adopted procedures, that amounted to State supervision. There
10 is no evidence in this case that the State Health Division has
11 ever intervened in this case in any way. There's no evidence
12 that it's ever intervened in any peer review proceeding in any
13 way. There are no reported decisions of any case in which it
14 has ever intervened.

15 QUESTION: Mr. Lyon, what supervision does the State
16 of Oregon maintain over this group, the peer group?

17 MR. LYON: I maintain none at all, Your Honor. None
18 at all.

19 QUESTION: Is there anything in the Statute about it?

20 MR. LYON: I say there isn't, Your Honor.

21 QUESTION: Is there anything in any rule about it,
22 State rule?

23 MR. LYON: No rules that I know of, Your Honor.

24 QUESTION: It's your position that they just turn it
25 over to the peer committee and forget about it?

1 MR. LYON: That's true, Your Honor. As far as
2 administering it. What the State does, however, there is
3 another statute that says that the people who participate in
4 peer review are immune from liability for whatever they do in
5 peer review, provided they act in good faith.

6 I contend that by the inclusion of that, the State
7 contemplates the possibility that defendants might abuse this
8 position, might abuse the peer review procedures for their own
9 motive, and therefore it leaves to the person who is the victim
10 of that, the right to sue for damages for the peoples' bad
11 faith. That is the remedy.

12 QUESTION: It is a State created body?

13 MR. LYON: The peer review committee is, Your Honor.

14 QUESTION: It is a State-created body by statute,
15 isn't it?

16 MR. LYON: The peer review committees are not
17 creatures of Statute. The Statute requires hospitals to see to
18 it that the physicians are organized in a way that they review
19 each other's procedures.

20 QUESTION: With or without the approval of the State?

21 MR. LYON: The State does not intervene in the
22 appointment of these committees in any way.

23 QUESTION: Did the State create it? Is the peer
24 group created by the State?

25 MR. LYON: It doesn't seem to me that it is, because

1 the hospital creates them.

2 QUESTION: I'm not interested in your views. I'm
3 interested in facts.

4 MR. LYON: It is the hospital that creates the peer
5 review committees, Your Honor.

6 QUESTION: And the State has no regard to that at
7 all?

8 MR. LYON: It has no authority to mandate --

9 QUESTION: Does the State supervise the hospital?

10 MR. LYON: The State Health Division has supervisory
11 authority over the hospital.

12 QUESTION: Well, why wouldn't that give them
13 authority over the peer committee?

14 MR. LYON: Because all that the State statute gives
15 the Health Division the power to do is to see to it to assure
16 that the trustees have adopted procedures for peer review. It
17 does not give them the power to engage in what this Court has
18 referred to previously as appointed reexamination of what goes
19 on in peer review applying the rules to a particular case.

20 QUESTION: That's what worries me, that the State
21 does have supervision. Convince me that it's not.

22 MR. LYON: There's been no reported case, there's no
23 evidence in this record that any agency of the State ever did
24 anything, there's no reported case in which any State agency
25 has ever intervened in any way in any peer review decision in

1 any matter in the State of Oregon.

2 The first branch of the state action doctrine is that
3 the challenged restraint must be one which is clearly
4 articulated and affirmatively expressed as State policy. The
5 Court of Appeals declared that in this case this particular
6 conduct was indeed clearly authorized by State policy. By
7 that, the Court of Appeals was referring to the Statute which
8 required hospitals to have peer review procedures in place.

9 There is nothing in the Statute that indicates that
10 the State of Oregon ever intended these physicians or any other
11 physicians to monopolize any branch of the practice of medicine
12 within the State of Oregon. The only purpose stated for this
13 Statute was to improve patient care, to reduce mortality, to
14 promote patient welfare.

15 It does not follow that because the State requires
16 peer review for the purpose of patient care, that authorizes
17 people to abuse that procedure for their own anticompetitive
18 purposes. That is the mistake that the Court of Appeals made.

19 You can tell that from the Statute itself, from the
20 articulated purposes, and second of all, you can tell that from
21 the fact that the State itself contemplated, as I said, that
22 this power might be abused and it left the defendants, those
23 who did abuse it, to the liability that they would encounter in
24 an action for damages such as this or one under State
25 procedure.

1 The irony of this case is that if this sort of
2 behavior is allowed to take place under the guise of the state
3 action doctrine under the state action immunities, it will lead
4 to exactly the opposite result of that which the State
5 contemplated. If the more powerful cannot compete by being
6 good, then they can drive out those who are better and yet do
7 not have the power to resist the influence in this particular
8 case.

9 There was testimony in this case that Dr. Patrick was
10 the better surgeon in Astoria. He is the one who is now
11 deprived of practice. The weaker, the less competent is the
12 one who has succeeded and the practice of medicine has
13 declined. That is not State policy; that is contrary to State
14 policy and is not one that this Court should declare --

15 QUESTION: Mr. Lyon, do you think that in order to
16 fit under the Parker-Brown exception, there has to be a cadre
17 of State officials that actually review each decision of the
18 peer review committee and have the chance to second guess those
19 committees?

20 MR. LYON: Well, certainly not each decision has to
21 be reviewed. Obviously the vast majority of these decisions
22 will never be challenged. But I submit that there needs to be
23 some sort of procedure in place, whether it is judicial,
24 administrative, or otherwise, by which --

25 QUESTION: Did you look at the AMA filed brief in

1 this case?

2 MR. LYON: Yes, I did, Your Honor.

3 QUESTION: And do you think the alternative
4 recommendations given in that brief are satisfactory in your
5 view?

6 MR. LYON: No, Your Honor, I don't think --

7 QUESTION: Why not?

8 MR. LYON: I beg your pardon?

9 QUESTION: Why not?

10 MR. LYON: Because unless there is a procedure in a
11 case whereby the particular result in a particular case can be
12 challenged, can be reviewed by the State to see that the State
13 policy is being carried out, the State policy of bettering
14 patient care, of reducing mortality, then without a system in
15 place for permitting that, then there is no way for the -- as
16 this Court said -- the pointed reexamination of each case, of
17 the events that go on to take place.

18 I don't recall all of the details of the AMA
19 proposals, but I do not believe they provided for that.

20 The Court of Appeals also held that the evidence that
21 was admitted with respect to the activities of one of the
22 defendants, Dr. Russell, who was a member of the Board of
23 Medical Examiners, that his conduct also was state action, and
24 that invalidated the verdict in this particular case.

25 We challenge that particular holding for several

1 reasons. First of all, we did not sue the State Board of
2 Medical Examiners in this case. We sued them previously for
3 violations of the Civil Rights laws, and for violation of the
4 Oregon Administrative Procedures Act, but that case was over.

5 This was an action for treble damages for Dr.
6 Patrick's loss of his hospital privileges and the destruction
7 of his practice in Oregon. The particular defendant in
8 question, the evidence of what happened before the Board of
9 Medical Examiners was part of something that had begun years
10 before, continued through that proceeding, and continued after.
11 It was evidentiary. It displayed the entire course of conduct
12 and was admissible for that purpose, and for no other. We did
13 not seek damages. The damages that we sought were for injury
14 to his business and property, which derived from the loss of
15 his hospital privileges afterwards.

16 Dr. Russell furthermore had disqualified himself at
17 the beginning of the proceedings and under Oregon law, he was
18 therefore entirely without authority to act in any way
19 thereafter.

20 Because of all of those reasons, the evidence of his
21 conduct was admissible, should have been admitted, and the case
22 should not have been reversed on that account.

23 That's all I have, Your Honor, unless you have any
24 further questions.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lyon.

1 We'll hear now from you, Mr. Triplett.

2 ORAL ARGUMENT OF THOMAS M. TRIPLETT, ESQ.

3 ON BEHALF OF RESPONDENTS

4 MR. TRIPLETT: Thank you, Mr. Chief Justice, may it
5 please the Court.

6 Oregon, like many States, in the mid-70s was faced
7 with a malpractice crisis. The cost of insurance premiums for
8 doctors was spiraling, the loss of doctors from practicing
9 because of the lack of coverage was increasing, and indeed, the
10 human tragedy visited by malpractice was evident to all.

11 The State of Oregon recognized that it had to address
12 this malpractice crisis in a multifaceted way. It first armed
13 the governing board of the hospitals of each private hospital
14 with a substantial degree of direction and authority. They
15 were compelled not to simply accept a doctor because they had a
16 license to practice in the State, but rather to make a more
17 discriminating choice of whether they had the skill and
18 training to receive credentialing in the specific areas in
19 which they sought to practice.

20 They were compelled to establish standards for the
21 review of doctors by doctors. And indeed they were compelled
22 to put doctors together in a group of peer review for the
23 purpose of reducing morbidity mortality and to improve patient
24 care.

25 They took another step during the 70s. The Board of

1 Medical Examiners was armed with substantial authority. One of
2 the key portions of that authority was that its proceedings
3 would be absolutely and totally confidential. The wisdom of
4 that choice was demonstrated in this record. The number of
5 complainants before the Board of Medical Examiners rose from
6 300 to 1500 per year once this confidentiality provision was
7 written. They granted immunity to complainants.

8 They went further. They compelled doctors to report
9 on other doctors. They didn't say report in the event a doctor
10 is not good. They stated report in the event that he is or may
11 not be competent to practice.

12 They compelled hospitals to report in the same sort
13 of way.

14 They established procedures for reexamination of
15 doctors who were accused of practicing inappropriately.

16 They compelled medical malpractice insurers to report
17 every single claim against a doctor to the Board of Medical
18 Examiners.

19 QUESTION: Was it the State policy to reduce the
20 number of doctors practicing in the State.

21 MR. TRIPLETT: The net effect of that policy would be
22 to reduce those doctors who ought not continue to practice. So
23 the net effect is that indeed marketplace access was being
24 limited or correspondingly, the door out was being opened.

25 QUESTION: I think all that you've described shows

1 that there's been State action, but as I understood the State
2 action defense in antitrust law, it was that this particular
3 result which the Federal antitrust law declares to be unlawful,
4 if that result is declared to be lawful by the State, then it's
5 all right.

6 So if the Federal antitrust law would forbid price
7 fixing but the State says, we want price fixing, then the
8 Federal Government would leave it alone. Now, the trouble with
9 all you've said is I don't see how this shows any State policy
10 that would allow doctors to monopolize the practice.

11 If the State said, we want doctors to be able to
12 exclude, there are too many doctors in the area, then I'd agree
13 that there was a State action defense.

14 MR. TRIPLETT: The State did direct hospitals to
15 cause doctors to review doctors at the hospital level. The net
16 effect of doctors reviewing doctors for purposes of determining
17 whether they retained their privileges within a hospital would
18 inexorably be the exclusion of doctors from the privilege to
19 practice.

20 That has, as a byproduct --

21 QUESTION: Because of their incompetency. Because of
22 their incompetency, not because of their competitiveness.

23 MR. TRIPLETT: That's right, because of their
24 incompetence. But you have to realize that for years, doctors
25 were accused of the conspiracy of silence. No one reported on

1 another doctor. It was an old boy school, if you will. This
2 system compelling competitors to report on competitors,
3 compelling competitors to judge competitors, was an express
4 statement of the Oregon legislature that we must get on with
5 excluding doctors from practice who are incompetent. That the
6 marketplace dynamics of what do you charge simply don't work.

7 This is not the sale of an apple. It is the sale of
8 a service where the patient doesn't know what they're getting.

9 QUESTION: Does that apply to all doctors or just
10 surgeons? Do all doctors --

11 MR. TRIPLETT: All doctors who are members of the
12 medical --

13 QUESTION: Normally do all doctors have to have
14 hospital contacts in order to practice.

15 MR. TRIPLETT: No.

16 QUESTION: They do?

17 MR. TRIPLETT: They do not.

18 QUESTION: That's what I thought.

19 MR. TRIPLETT: There are a number of --

20 QUESTION: But surgeons do.

21 MR. TRIPLETT: That is correct. They have to be
22 credentialed.

23 QUESTION: Well, shouldn't we make a difference
24 there?

25 MR. TRIPLETT: The doctors who are not part of a

1 medical staff are subject to the ongoing review of the Board of
2 Medical Examiners, and upon complaint by a private citizen,
3 complaint of a fellow practitioner, or any other person, they
4 will then inspect the practice of that doctor to determine
5 whether he or she should continue to practice medicine in the
6 State of Oregon.

7 QUESTION: May I ask if a peer review committee
8 determines that a doctor is not fit to practice in a particular
9 hospital, does the committee have any duty to institute
10 proceedings to exclude the doctor from the practice of
11 medicine?

12 MR. TRIPLETT: The hospital has the responsibility if
13 there is an adverse determination in peer review to report that
14 to the Board of Medical Examiners. The Board of Medical
15 Examiners under the Statute has now received the report of
16 substandard care and under the Oregon laws, they are obligated
17 to look into that matter. They have an investigative staff, a
18 full time staff of 18 people to go and look and see what the
19 problem is and to determine whether further action is required,
20 such as depriving that doctor of the right to practice in the
21 State of Oregon.

22 Or they can also make a determination --

23 QUESTION: Did that happen in this case?

24 MR. TRIPLETT: Excuse me?

25 QUESTION: Did that happen in this case?

1 MR. TRIPLETT: No, because Dr. Patrick resigned
2 before any decision was made by the Hearing Committee of the
3 Hospital.

4 QUESTION: He resigned from what?

5 MR. TRIPLETT: He resigned privileges from the
6 Hospital. He left the hospital prior to the time that the
7 Administrative Committee of the Hospital had made a decision.

8 QUESTION: Mr. Triplett, was there evidence that Dr.
9 Patrick had performed some 2,000 or 3,000 operations?

10 MR. TRIPLETT: Two thousand -- twenty-five hundred.

11 QUESTION: Over what period of time

12 MR. TRIPLETT: Over a period of approximately ten
13 years.

14 QUESTION: But Mr. Triplett, even if he had resigned
15 his privileges at the hospital, if he got adverse peer review
16 recommendations, wouldn't that lead the State Examining Board
17 to inquire into his competency to continue to practice?

18 MR. TRIPLETT: There was no report that I am aware of
19 made subsequent to his resignation from the hospital to the
20 Board of Medical Examiners that would then invoke their
21 authority.

22 QUESTION: In other words, they wouldn't act on the
23 report that was sent to them by the peer review committee to
24 look into his fitness to continue practicing? I thought you
25 certainly would.

1 MR. TRIPLETT: Let me explain. The Oregon Statute
2 provides that once the hospital has made a final determination
3 with respect to the privileges or credentials of a doctor and
4 those determinations are adverse, they are compelled to forward
5 those to the Board of Medical Examiners for their review. If a
6 doctor goes through peer review and indeed he is found to be a
7 satisfactory doctor, no report goes to the Board that he's
8 satisfactory.

9 The process requires a final resolution by the
10 hospital. We in this case urge that indeed the duty of
11 exhaustion of remedies applied and that Dr. Patrick should have
12 been required to complete the hearing process before his peers.
13 If he was unsatisfied with that, to proceed to the Board of
14 Directors of the hospital who under the peer review process set
15 forth in the by-laws would have an independent look, not merely
16 at the question of the facts but of the procedure followed.

17 QUESTION: Mr. Triplett, you're explaining why you
18 think he should have exhausted before he filed a lawsuit
19 against your clients. But the question I was trying to seek an
20 answer to is, if the real purpose of peer review is to get rid
21 of incompetent doctors, and if you found a doctor that you
22 think is so incompetent that he should be denied hospital
23 privileges, why wouldn't you report that to some public
24 authority instead of just closing the file because he says,
25 well, I'll resign from your hospital?

1 Can he avoid disciplinary proceedings by simply
2 resigning from the hospital, if the Statute has the purpose you
3 describe?

4 MR. TRIPLETT: He ought not to.

5 QUESTION: Well, then why did he?

6 MR. TRIPLETT: Your Honor, in this case, the decision
7 to bring him to a hearing was made in March of 1981 by the
8 Executive Committee of the Hospital. Fourteen days later, this
9 lawsuit was filed. The process of the ad hoc hearing before
10 the hospital didn't commence until six months later. The
11 allegations of the complaint asserted that at least one of the
12 defendants had previously engaged in misconduct by reporting to
13 the Board of Medical Examiners.

14 Now, I put it to you in the context of having been
15 sued and accused of impropriety in reporting to the Board, do
16 you exacerbate the circumstance. I think what happened here
17 --

18 QUESTION: I suppose you don't if you're interested
19 in defending a lawsuit, but if you're interested in getting rid
20 of incompetent doctors, I think you do. I think it's rather
21 clear. If this is a public body seeking to get, as you
22 describe it, actively supervised by the State, it seems to me
23 they should perform that mission.

24 MR. TRIPLETT: I can report to you that with respect
25 to the Snodgrass incident which is the one that triggered the

1 hospital peer review, that that was reported. I can also
2 advise you that when the Board of Medical Examiners reviewed
3 Dr. Patrick's practice in 1980, and announced a decision in
4 regard to it just one year prior to the commencement of the
5 hospital-based review of both prior and subsequent events to
6 the Board of Medical Examiners, that they reviewed his entire
7 practice, issued a formal reprimand with respect to abandonment
8 of a patient, which Dr. Patrick acknowledged was fair.

9 He disagreed with their opinion as to how he had
10 handled other cases which involved essentially misdiagnoses, or
11 cases in which wisdom would have suggested that the patient be
12 sent to a tertiary care hospital, a hospital that had the
13 capability of handling that patient's problems. This hospital
14 unfortunately had no pathologist on staff, had no radiologist
15 that was there on a permanent basis, had only an anesthetist,
16 and yet some of the most exotic vascular and thoracic surgery
17 was being performed by this doctor in that hospital.

18 Many people described him as a marvelous physician
19 from the elbows down. And that his problem indeed was
20 judgmental and ego. That he ought not to have been performing
21 these procedures in this rural community.

22 QUESTION: We had a jury trial about that. I gather
23 the jury apparently who heard all of this pretty much thought
24 this was a pretty good doctor and that the reason he had been
25 excluded was because of the anticompetitive behavior of his

1 peers and not because of his inabilities. To the extent that
2 that's a question that's still at issue in this lawsuit, I
3 presume that's how that jury saw it.

4 MR. TRIPLETT: There's no question that that's how
5 the jury saw it.

6 QUESTION: I think that the state action claim you're
7 making goes beyond what our cases have held. Can you give us
8 another state action case where we have not said that the State
9 approves the result with the Federal law determines to be
10 unlawful, that is, in Parker v. Brown, the Federal law says no
11 price fixing; the State says we want price fixing. Now, this
12 is not that case. The Federal law says no anticompetitive
13 exclusion of doctors. The State here hasn't said we want
14 anticompetitive exclusion of doctors.

15 Your argument is a little different. It's sort of a
16 Federal preemption argument in reverse. That is, if we apply
17 the antitrust laws, we will be impinging upon the State policy
18 of assuring competent doctors. Now, maybe that's a good
19 argument, but I don't know of any other case where we have used
20 that preemption in reverse so to speak.

21 MR. TRIPLETT: I know the Court has debated whether
22 the issue here is exemption or preemption. I won't engage in
23 that colloquy. I think that if you look at two of the Court's
24 most recent decisions, that they come closer to the mark.

25 In Town of Hallie, there was no direct statement in

1 the enabling legislation by the State that the town of Hallie
2 should engage in a tie-in arrangement in which it would
3 predicate the availability of its solid waste disposal system
4 upon those in an unannexed area using their garbage haulers.
5 There was no indication that the State directly intended the
6 restraint that was imposed.

7 I think that what the Court said there is, if it is
8 reasonably foreseeable that an anticompetitive restraint will
9 arise, that is sufficient.

10 And I think as well, when you look at what happened
11 in Southern Motor Freight, there a group of --

12 QUESTION: Before you go on, would you use the same
13 language here? It's reasonably foreseeable because of this law
14 that doctors would exclude a competitor?

15 MR. TRIPLETT: Yes.

16 QUESTION: For the reasons done here?

17 MR. TRIPLETT: For good, bad or indifferent reasons.

18 QUESTION: That's reasonably foreseeable.

19 MR. TRIPLETT: Yes.

20 QUESTION: Mr. Triplett, it seems to me that under
21 Oregon's law, the only thing that's reasonably foreseeable is
22 that peer review action might take place in good faith. There
23 is a law in Oregon that does not extend immunity to people in
24 peer review processes that's taken in bad faith.

25 So it would seem to me that at best, you could

1 characterize the State policy of Oregon as allowing or making
2 it reasonably foreseeable that some doctors would be
3 disciplined and removed from practice by action taken in good
4 faith.

5 And I might ask you also to comment on whether that
6 doesn't in fact parallel the law the Federal Government has now
7 enacted authorizing only good faith action?

8 MR. TRIPLETT: My analysis of the Oregon Statute
9 which is a Statute that addresses the question of immunity, not
10 the question of the evidentiary privilege, and there is no
11 exception in Oregon with respect to whether you are entitled to
12 the type of information that was obtained here. That view with
13 respect to the immunity in good faith. Good faith I presume
14 means not arbitrary or capricious, means that you have
15 substantial evidence for what you have done, which is the
16 equivalent of -- is the opposite side of arbitrary and
17 capricious.

18 QUESTION: Excuse me. I think you can be arbitrary
19 and capricious and be acting in entirely good faith. We
20 reverse Federal agencies all the time for action that's
21 arbitrary and capricious. I don't think we're saying that the
22 action was in bad faith. If it's bad faith, it's arbitrary
23 and capricious but vice versa is not true.

24 MR. TRIPLETT: Well, I'm not so sure.

25 QUESTION: It needs something more than that, doesn't

1 it?

2 MR. TRIPLETT: My view of the language of the Oregon
3 Statute is this. It is sending a clear signal that the State
4 through its State process will remedy, will supervise and
5 remedy the peer review process in the event any participant
6 steps out of line.

7 QUESTION: Well, what is the remedy as a matter of
8 State law. Just a lawsuit, you mean?

9 MR. TRIPLETT: Well, there are a host of remedies. I
10 categorically disagree with counsel that there is not an
11 absolute right to review of a hospital-based decision.

12 QUESTION: You mean the Board could direct the
13 Hospital to reinstate a doctor?

14 MR. TRIPLETT: The State Court can direct.

15 QUESTION: If the doctor brings a lawsuit.

16 MR. TRIPLETT: If he asks for judicial review of the
17 decision.

18 QUESTION: Under a particular statute or just your
19 right to sue anybody?

20 MR. TRIPLETT: Yes. No, distinctly not. Section
21 41.675(5) which is cited in our brief along with the
22 legislative history that relates to it. And that Section was
23 enacted in order to clarify the type of evidence that a doctor
24 would have available in the event he sought judicial review of
25 loss of privileges.

1 And so we cite the Court to that Statute.

2 Secondly, there are other remedies --

3 QUESTION: Is that the one, is that Statute in so
4 many words authorize judicial review?

5 MR. TRIPLETT: That is my view of it.

6 QUESTION: But I'm just asking you.

7 MR. TRIPLETT: Yes.

8 QUESTION: If it authorizes it in so many words.
9 There shouldn't be two different views of the answer to that
10 question.

11 MR. TRIPLETT: The reason that there has been
12 fuzziness about is there judicial review is that in the Straube
13 case, the Court of Appeals of the Supreme Court of Oregon said,
14 we need not decide whether there is a right of review. And
15 then in their footnote, they then proceeded on to review on the
16 basis of was there due process and was there substantial
17 evidence to support the conclusion.

18 In a footnote right where they said we need not
19 decide this issue, they quote the new Statute which is the
20 Statute which imposed upon hospitals the obligation to have
21 fair proceedings for review of doctors. And so I believe it is
22 very clear that there is a right of judicial review of peer
23 review decisions.

24 Secondly, --

25 QUESTION: But Mr. Triplett, the requirement for

1 State action? That just sort of wipes it off the books. If
2 the supervision requirement is satisfied just by the ability to
3 bring a lawsuit and have an adjudication, it certainly doesn't
4 amount to much, does it?

5 MR. TRIPLETT: Well, I guess it depends on what the
6 definition of active versus passive is. Let me put it this
7 way. How do you establish a structure for review? That's a
8 very difficult problem. To what extent do we say to the Oregon
9 Legislature, establish a massive mechanism. Why not leave it
10 to the Courts to determine if fair process has been followed?

11 Now that indeed is the issue here. Our people are
12 accused of engaging in misconduct during the peer review
13 process. The Court of Oregon is perfectly capable of
14 supervising that, giving the sort of check that Hallie seems to
15 say is appropriate.

16 I view the second component as evidentiary. I think
17 that's what Hallie says. It is a double check on whether you
18 are conforming with State law. And if in the supervision, they
19 find that someone is not complying --

20 QUESTION: May I ask, is there a State law that
21 prescribes the procedures to be followed at a peer review
22 proceeding? Sort of a miniature administrative procedure act
23 or something like that?

24 MR. TRIPLETT: No. The hospital has, and it's in
25 evidence, --

1 QUESTION: But there's no State law that says how
2 these proceedings shall be conducted?

3 MR. TRIPLETT: It says you shall have one that is
4 written and that --

5 QUESTION: Does it say what the burden of proof is,
6 or what the grounds are for disqualification?

7 MR. TRIPLETT: No. But then what happens --

8 QUESTION: What kind of evidence is received? Or who
9 can testify? Does it have any of that kind of thing?

10 MR. TRIPLETT: In the by-laws, the answer is, yes.

11 QUESTION: By-laws of the hospital?

12 MR. TRIPLETT: By-laws of the hospital. And the by-
13 laws of the hospital are subject to review by the Health
14 Division of the State of Oregon.

15 QUESTION: Can the Health Division of the State of
16 Oregon tell them to rewrite the by-laws?

17 MR. TRIPLETT: Yes.

18 QUESTION: The by-laws on peer review can?

19 MR. TRIPLETT: Yes. The Statute is very clear that
20 the Health Division of the State of Oregon has total authority
21 over hospitals within the State. They are charged with the
22 responsibility of auditing compliance with their rules. They
23 are a receiver of --

24 QUESTION: Have they adopted any rules relating to
25 peer review commissions?

1 MR. TRIPLETT: They have granted authority to the -
2 QUESTION: They have authority to adopt these rules.
3 Have they adopted any rules?

4 MR. TRIPLETT: They have adopted rules where a
5 complaint has been filed by any person who believes there's
6 been a violation of the Health Rules, which includes the entire
7 peer review section that apply to hospitals, which grants to
8 them total access to all hospital records to determine whether
9 there's been a violation of the Act.

10 QUESTION: That's not a rule describing how a peer
11 review shall be conducted.

12 MR. TRIPLETT: There is also a provision that they
13 shall use the rules of the Joint Commission on Hospital
14 Accreditation or they adopt their own and they are subject to
15 review by the State of Oregon Health Division for conformance
16 with the State law.

17 QUESTION: And does that Division have the right to
18 reverse a decision of a peer review committee to deny hospital
19 privileges?

20 MR. TRIPLETT: The Statute says that in event of a
21 violation of any health statute, that the Division will report
22 that to the District Attorney and obtain an injunction against
23 continued or perpetuation of that practice. So I think the
24 answer is, yes, Your Honor.

25 QUESTION: Mr. Triplett, are there any instances

1 cited to us where either the State Health Division or the Board
2 of Medical Examiners have actually intervened in cases to
3 assure a correction of substantive abuses like those alleged
4 here in the process, or directed procedural changes to avoid
5 problems?

6 MR. TRIPLETT: The only evidence in the record at all
7 of an interface between the Board and the problems of Dr.
8 Patrick are that it did --

9 QUESTION: Any one else?

10 MR. TRIPLETT: We weren't dealing with any one else
11 in this case, so I can't answer that. But with respect to Dr.
12 Patrick it did in one instance involving the Partridge case
13 refer that to a county medical society for review retaining
14 supervisory authority over it to determine whether indeed
15 further action was required to be taken.

16 They did, when we reported a limitation as applies to
17 Dr. Patrick when he was put on probation because of thoracic
18 problem and put on probation for six months. We reported that.
19 They wrote back and said we're watching, we want to know what
20 the outcome of that is. And so there is an interface that is
21 taking place because of the reporting requirements. And their
22 duties as the Board of Medical Examiners to monitor all medical
23 practitioners within the State.

24 QUESTION: Well, counsel, after the final action is
25 taken by the review committee, what are the steps that would

1 mean administrative review, specific, if you please?

2 MR. TRIPLETT: All right. After the committee
3 completes its review, it makes a recommendation. That
4 recommendation is to the Executive Committee of the Hospital.
5 And it can recommend any one of a number of things. Loss of
6 specific credentials, loss of the right to practice in the
7 hospital, a corrective program of education. It makes its
8 recommendation to the Executive Committee.

9 QUESTION: What next?

10 MR. TRIPLETT: Then the Executive Committee, if it
11 concurs in the recommendation, then passes it on to the
12 Governing Board of the Hospital, 18 people, 16 of the 18 --

13 QUESTION: What next?

14 MR. TRIPLETT: -- not being doctors.

15 QUESTION: What next?

16 MR. TRIPLETT: They then will hear the case both to
17 determine whether there has been procedural due process --

18 QUESTION: What next?

19 MR. TRIPLETT: What next is if discipline is issued,
20 it is then reported to the Board of Medical Examiners.

21 QUESTION: And what appeals from that?

22 MR. TRIPLETT: You have either the right to have a
23 Court review under OS.41.

24 QUESTION: I've never understood a Court review to be
25 an administrative review.

1 MR. TRIPLETT: I'm just saying. You either have the
2 right of a review by a Court which is contemplated under --

3 QUESTION: What is the administrative review?

4 MR. TRIPLETT: Administrative review that is
5 available is that when the Board of Medical Examiners receives
6 the report, they are obligated to investigate the
7 circumstances.

8 QUESTION: And then what?

9 MR. TRIPLETT: They can take further action. But I
10 think it is contemplated that the action that they would take
11 is to determine whether the license should be retained.

12 At the same time, Dr. Patrick, if he believed that
13 the process was inappropriate, had the right to file his own
14 complaint with the Board of Medical Examiners, assert that my
15 clients had engaged in unprincipled activities, and they would
16 then review his complaint. And if they concurred, I'm sure
17 that the hospital's decision would be reversed.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Triplett.

20 Mr. Lyon, you have 12 minutes remaining.

21 ORAL ARGUMENT OF BARBEE B. LYON, ESQ.

22 ON BEHALF OF PETITIONER - REBUTTAL

23 MR. LYON: Thank you, Your Honor.

24 It is no remedy for Dr. Patrick that he could have
25 complained to the Board of Medical Examiners of the conduct of

1 defendants and maybe lead to ultimately perhaps for the
2 defendants losing their license to practice medicine in the
3 State of Oregon. That is not a review of what happened in this
4 particular case and it gives him no remedy at all for what
5 happened to him at the Hospital.

6 What counsel is avoiding saying is that the Board of
7 Medical Examiners has no power to do anything about peer review
8 in this case or in any other case. What counsel has done is to
9 argue the policy, but the policy has already been established
10 by the State law.

11 QUESTION: Mr. Lyon, what is the point then of the
12 requirement in the Statute that the hospital report
13 disciplinary actions to the State Medical Examiner?

14 MR. LYON: That is because the function of the State
15 Board of Medical Examiners is to pass on the qualification of
16 physicians to have a state license to practice medicine within
17 the State. Obviously, if a hospital disciplines a physician,
18 terminates their privileges, the same grounds that justified
19 that may be grounds for taking away the license of that
20 physician.

21 QUESTION: Under your view of that, the fact that
22 your client had resigned from the Hospital facilities wouldn't
23 have prevented the State Medical Board from going ahead to look
24 into his fitness to practice?

25 MR. LYON: Oh, not at all. Not at all.

1 In fact, of course, and the evidence showed that the
2 defendants had brought him before the State Board of Medical
3 Examiners once before that led to a letter of reprimand. When
4 the circumstances of the letter of reprimand came out, the
5 State Board of Medical Examiners revoked the letter.

6 QUESTION: Does the State Board have any power to
7 compel a hospital to allow a doctor to have staff privileges?

8 MR. LYON: No, Your Honor, none at all. And it's
9 never been done. And I don't understand counsel to say that it
10 does, either. The policy which counsel argues, on the one hand
11 urging that this is necessary to protect peer review, is a
12 policy that has already been addressed by the State of Oregon,
13 by the legislatures of most States and by the Congress. There
14 is a balance to be drawn and that balance has already been
15 struck by every legislative body that has looked into it, and
16 this Court should not need to second guess that.

17 Counsel focuses on the fact that Dr. Patrick resigned
18 from his hospital privileges. Bear in mind that he did not
19 have any kind of an administrative remedy through any State
20 body. The hospital was a coconspirator. The hospital was a
21 defendant in this case which settled just before the eve of
22 trial. There is no precedent of this Court which requires a
23 plaintiff in an antitrust suit to go through a procedure
24 established by one of the defendants who is a coconspirator and
25 indeed a defendant in the case.

1 QUESTION: You say the hospital settled?

2 MR. LYON: Yes, Your Honor.

3 QUESTION: This case?

4 MR. LYON: Yes, Your Honor.

5 He resigned because he knew that under medical
6 practice that the result would be a foregone conclusion and
7 that if his privileges were revoked by this committee, he would
8 not be able to practice in any other hospital and he would not
9 be able to get malpractice coverage. That was in mitigation of
10 damages.

11 He did, after this, continue to work at a small
12 hospital. If he had not done what he did, the damages would
13 have been even greater because his practice would have been
14 damaged even more than it was.

15 I do object to counsel's continuing to argue the
16 merits of this case when counsel says, for example, that -- to
17 argue the merits of whether Dr. Patrick's practice was
18 sufficient or not when counsel says that he was practicing some
19 exotic surgery -- that is counsel's interpretation. I do not
20 even believe that was the interpretation by the witness on
21 which he is relying. And the testimony that he's talking
22 about when he says that was a criticism that was made by
23 consultant to the Board of Medical Examiners against the
24 defendant, the surgeon in the Astoria Clinic equally with the
25 defendant.

1 QUESTION: Wasn't all that decided by the jury?

2 MR. LYON: That's correct, Your Honor.

3 QUESTION: Well, what business is it of ours?

4 MR. LYON: It is none, Your Honor. And I'm glad you
5 said that, Your Honor.

6 As for Oregon Or.Rev. Stat. 41.675, which counsel
7 tells the Court creates right of judicial review. What the
8 Statute is is a statute that --

9 QUESTION: What page are you reading from?

10 MR. LYON: I'm reading from page 46 of their brief,
11 Your Honor.

12 All this Statute is is a statute that has to do with
13 the evidentiary privileges. And what it says is that the
14 State, the evidentiary statute that says this evidence is not
15 admissible does not apply, "in a judicial proceeding in which a
16 health care practitioner contests the denial, restriction or
17 termination of clinical privileges by a health care facility."

18 From that evidentiary statute, he would elaborate and
19 invent a judicial remedy. It doesn't exist. We say that that
20 statute is consistent with exactly what happened in this case.
21 You have a State statute that says that defendants are liable
22 for damages if they act in bad faith. You have another
23 evidentiary statute that says that the evidence is admissible
24 in such a proceeding where a practitioner contests what
25 happened with him.

1 That statute is consistent with our bringing this
2 action. It does not create an administrative procedure which
3 takes away our right under the antitrust laws.

4 QUESTION: Except you're exaggerating the State law
5 in the same manner that your opponent is, that is to say, there
6 isn't a State statute that says you're liable for damages if
7 you act in bad faith, is there?

8 MR. LYON: That is correct, Your Honor.

9 QUESTION: There is one that says you're not liable
10 for damages if you act in good faith.

11 MR. LYON: That's correct, Your Honor.

12 I will rest with the inference that's drawn from that
13 Statute.

14 QUESTION: That's the same kind of inference he's
15 trying to draw. It's rather curious that you should fight fire
16 with fire.

17 MR. LYON: Yes, Your Honor.

18 One last point. The two cases of the Oregon Supreme
19 Court, both cases in which the Court refused to decide whether
20 it had any authority to do anything about these at all. One of
21 those cases was a mandamus case where the plaintiff brought an
22 action under the State provisions of mandamus. Mandamus has
23 always been said by the Oregon Supreme Court to be an
24 extraordinary remedy only available for a clear breach of duty
25 and is one that is disfavored in the law.

1 Even with that, the Court said that it did not know
2 whether that remedy existed. If this Court is going to find
3 for the first time that that kind of review is a sufficient
4 State action, if the Court is going to find that judicial
5 review is sufficient supervision of this kind of conduct, it
6 should at least not make that principle for the first time in a
7 case where the State Supreme Court does not even know that it
8 has that power.

9 I have nothing further unless the Court has
10 questions.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lyon.

12 The case is submitted.

13 (Whereupon, at 2:55 p.m., the case in the above-
14 entitled matter was submitted.)
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REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-1145
CASE TITLE: PATRICK J. BURGET
HEARING DATE: 2/22/88
LOCATION: WASHINGTON, DC

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
SUPREME COURT OF THE UNITED STATES
and that this is a true and accurate transcript of the case.

Date: 2/22/88

Margaret Daly

Official Reporter

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