

STATE OF CONNECTICUT
APPELLATE COURT

A.C. NO. 24827

WILLIAM W. BACKUS HOSPITAL,
Plaintiff-Appellee,

v.

SAFAA HAKIM, M.D.,
Defendant-Appellant.

June 30, 2004

**APPELLEE'S OBJECTION TO THE AMICUS CURIAE APPLICATION
OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.**

Pursuant to Practice Book § 67-7, the Plaintiff-Appellee, William W. Backus Hospital (the "Hospital"), hereby objects to the Application of the Association of American Physicians and Surgeons, Inc. ("AAPS") for Leave to File an *Amicus Curiae* Brief on the grounds that the Application fails to demonstrate that AAPS has a substantial interest in the matters on appeal as AAPS mischaracterizes the issues before this Honorable Court. AAPS seeks leave to file an *amicus* brief in support of overturning the Sealing Order. However, in its Application, AAPS mis-states the basis on which the Sealing Order was entered and, in the process, draws unwarranted and inflammatory inferences about the Hospital's motives for obtaining the Sealing Order. Specifically, AAPS suggests that the Sealing Order was entered

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as part of a process it characterizes as "sham peer review," when, in fact, the Order was entered specifically to protect psychiatric patient privacy rights. It is clear from AAPS' Application that, if it is permitted to file an *amicus* brief, its brief will only confuse the issues on appeal, and detract from a consideration of the merits of the Sealing Order. Therefore, the Hospital respectfully requests that the Court deny AAPS' Application.

In support of its objection, the Hospital avers the following.

A. BRIEF HISTORY

The captioned matter was commenced by the Hospital against Dr. Hakim in January 2003 by way of a five-count complaint seeking injunctive and other relief for the unlawful use and disclosure by Dr. Hakim of confidential patient records of a number of persons receiving psychiatric care and treatment at the Hospital. The instant appeal was commenced by Dr. Hakim after the trial court (*Hurley, J.*) entered an Order and Judgment for Damages and Injunctive Relief against Dr. Hakim on October 27, 2003.

B. SPECIFIC FACTS

The Hospital learned of Dr. Hakim's unauthorized use and disclosure of patient charts during the course of discovery in the case of Safaa Hakim, M.D. v.

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William W. Backus Hospital, No. 3:99CV1142(DJS), filed by Dr. Hakim against the Hospital in the United States District Court for the District of Connecticut ("Federal Action"). Dr. Hakim had repeatedly disclosed patient charts, or patient information contained in the patient charts, to non-parties without either patient consent or the Hospital's authorization. Because the unauthorized disclosure and use of the patient charts was for purposes other than the provision of care or related hospital functions, the Hospital initiated this lawsuit seeking comprehensive injunctive relief in order to protect the privacy interests of the Hospital's former psychiatric patients.

Immediately after the action was filed, the Hospital moved to seal the record and close the proceedings for the purpose of protecting patient privacy. The psychiatric patients whose records Dr. Hakim used and disclosed are not parties to this action, and have a statutorily protected right to maintain their privacy, and to be protected against inadvertent or intentional disclosure of their identities in this litigation. The Hospital's motive in seeking the Sealing Order was to uphold that protection.

In its Application, AAPS asserts that its interest in the matter is to protect against "sham peer review," which it states is a "term coined for the growing problem of unfair retaliation against good physicians due to their whistleblowing or competitive

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activities.” (Application, page 4). AAPS is apparently referring to the peer review privilege, which protects the confidentiality of internal hospital review of the competence and quality of care rendered by physicians. However, this case is not a peer review action – it is an injunctive action to stop a physician from violating patient privacy rights. Moreover, AAPS repeatedly, without factual foundation, attributes nefarious motives to the Hospital for requesting the Sealing Order, i.e., to:

- “Conceal wrongdoing” at the Hospital (Application, pp. 5, 8, 9, 10);
- “Cover up corruption” (Application, p 9);
- “Protec[t] [Hospital officials’] own powerful jobs (Application, p. 8).

In fact, AAPS, wholly ignoring the important public policy of protecting the privacy interests of psychiatric patients (a public policy issue that a physician lobby organization purportedly concerned about patient rights should have some appreciation for), again without any factual support or foundation, has the audacity to argue that “concealing wrongdoing by officers [is] the *likely rationale*” for seeking the Sealing Order in this case. (Application, p. 10, emphasis supplied). The only wrongdoing at issue in this case is Dr. Hakim’s own wrongful dissemination of psychiatric patient records. Through its unwarranted assertions, AAPS reveals how

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little grasp it has of the issues in this case, and that its own bias has eliminated its ability to contribute meaningfully to a fair consideration of the issues.

C. LEGAL GROUNDS

Practice Book § 67-7 provides that a brief of an *amicus curiae* may be filed only with the permission of the court. It is a privilege, not a right, and the third-party is required to set forth its interest and the reasons why a brief should be allowed. *Id.*

AAPS' Application does not demonstrate that AAPS has a substantial interest in the matters on appeal, but instead demonstrates that, if it is permitted to file an *amicus* brief, AAPS will insert extraneous issues into the appeal and confuse the issues before this Court. AAPS mischaracterizes the basis on which the Sealing Order was sought and entered in this matter. The Hospital sought the entry of the Sealing Order because of its over-riding interest in protecting patient privacy. The Hospital's former psychiatric patients, whose medical records Dr. Hakim disseminated and disclosed for her own purposes, are not parties to this action and have never done anything to warrant such intrusions into their privacy. As far as the Hospital is aware, and Dr. Hakim has produced no evidence to the contrary, neither the patients nor any family members or representatives ever consented to the use or disclosure of their patient records for any purpose. Such unwarranted disclosure is a

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violation of the Connecticut Patient Confidentiality Statute, which is why this litigation was initiated. See Conn. Gen. Stat. 52-146e and 52-146f.

Indeed, the trial court acknowledged the importance of upholding the confidentiality of those patients' charts, noting that as the basis for its ruling. Specifically, the Court (*Hurley, J.*) stated, "I wanted to put on the record the reason, and that is, that these are confidential patient files, quoting names of patients, and for their protection, I think it's appropriate to seal all of these documents." Transcript of September 29, 2003 Hearing, p. 42-43.

AAPS refers to the patient privacy issue in only one sentence of its 10-page Application. In that sentence, AAPS merely asserts that the Sealing Order was overly broad and that a less restrictive measure would have been using patient initials and removing other personal identifiers. However, in making that blythe assertion, AAPS ignores the mandates of state law. State law requires *more* than mere removal of patient names under the circumstances of this case – where actual patient records and detailed reports of records were being submitted and discussed. Connecticut law prohibits the disclosure or transmission of any communication or records containing *descriptive data* from which a person acquainted with the patient

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might reasonably recognize the patient. Conn. Gen. Stat. § 52-146d. The patient records and expert reports contained this level of detail.

Moreover, AAPS has ignored that the court initially did enter a narrower Sealing Order, and only broadened it to the point of closing the entire record after the failure of the *pro se* plaintiff to adhere to the initial order gave rise to a concern that the original order was ineffective in fully protecting patient rights. Therefore, it was in light of the paramount privacy interests at stake, and only after the matter had come before the court several times, that the court finally issued an order mandating that the entire record be sealed and the proceedings closed.

Because the heart of the Hospital's action was the preservation of the privacy interests of these non-party patients, the only way to ensure fully adequate protection was for the Court to seal the record and close the proceedings. No lesser measure would have accomplished the degree of protection to which these vulnerable patients are entitled. The compelling psychiatric patient privacy interest at stake ultimately overrode the countervailing interest in providing public access to the judicial proceedings. P.B. § 11-20A(c).

AAPS wholly fails to address the patient privacy issue, merely asserting repeatedly, without foundation, that the Sealing Order was entered to "cover up" and

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“conceal” Hospital wrongdoing. In fact, AAPS’ Application suggests that its true interest in the matter is to protect against what it calls “sham peer review,” – something that is not even arguably an issue here, since the court did not enter the order on the basis of peer review, but rather, because of the psychiatric patient privilege. AAPS’ unjustified, hysterical attack on the Hospital adds nothing to a fair and reasoned consideration of the issues. If AAPS’ Application is any indication of the content of its brief, then permitting AAPS to submit an Amicus Brief will merely insert extraneous arguments and confuse the issues before this Court. Thus, its Application should be denied.

AAPS’ contention that the public had no notice of the Sealing Order and had no opportunity to be heard is also misleading. The docket in this case remained open to public inspection from the time the first Motion to Seal the Record was filed on February 27, 2003, until September 29, 2003, when the court finally directed the clerk’s office to ensure that the record would no longer be available for public inspection. The issue of sealing was discussed in open court on at least two occasions during that seven month time frame – April 21, 2003 and July 7, 2003 -- and was the subject of several motions filed and available for public inspection. In fact, a member of the press reviewed the entire case file in the clerk’s office on or

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about September 25, 2003, and subsequently published news articles discussing the psychiatric care rendered to specific patients.

In short, AAPS' Application demonstrates no appreciation for the sensitive public policy issues raised by the entry of a Sealing Order in this case, and its bombastic and misguided attack on the Hospital will not contribute to a thorough and deliberate consideration of the merits of the Sealing Order.

WHEREFORE, the Hospital respectfully requests that the Court deny AAPS' Application for Leave to File an *Amicus Curiae* Brief.

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Respectfully submitted,

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ORDER

The foregoing Objection, having been duly presented to the Court, it is hereby ORDERED:

SUSTAINED / OVERRULED.

BY THE COURT

Judge

Date

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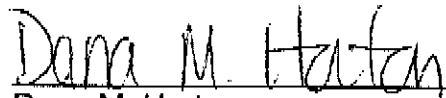
CERTIFICATION

Pursuant to Practice Book § 62-7, I hereby certify that the foregoing Objection to the Amicus Curiae Application of the Association of American Physicians and Surgeons, Inc. complies with the Practice Book rules, including but not limited to §§ 62-7 and 66-2 and 66-3, and that a copy of the foregoing was mailed via both Certified and First-Class mail, postage pre-paid on June 30, 2004, as follows:

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