Case No. 06-11235

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAWRENCE R. POLINER, MD; LAWRENCE R. POLINER, MD, PA
Plaintiffs - Appellees - Cross-Appellants

v.

TEXAS HEALTH SYSTEMS, A Texas Non-Profit Corporation, doing business as Presbyterian Hospital of Dallas; JAMES KNOCHEL, MD
Defendants - Appellants - Cross-Appellees

On Appeal from the United States District Court
for the Northern District of Texas

Honorable Jorge A. Solis, United States District Judge

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN FAVOR OF APPELLEES/CROSS-APPELLANTS AND IN SUPPORT OF THE JUDGMENT BELOW

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, the undersigned counsel for *Amicus Curiae* The Association of American Physicians and Surgeons, Inc. incorporates by reference the certificate of interested persons by Appellees and certifies the following additional information concerning the outcome of this appeal No. 06-11235:

1. The *Amicus Curiae* Association of American Physicians and Surgeons, Inc. is a nonprofit corporate party that lacks any parent corporation.

2. The *Amicus Curiae* Association of American Physicians and Surgeons, Inc. a membership organization, does not have stock. There is no publicly held corporation that owns 10% of more of any stock in the Association of American Physicians and Surgeons.

3. The *Amicus Curiae* Association of American Physicians and Surgeons, Inc., as a legal entity separate from its members, does not have a financial interest in the outcome of this litigation.

Dated: October 11, 2007

____

Andrew L. Schlafly
Attorney for The Association of
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Inc.

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit national organization consisting of thousands of physicians in all specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service of patients who entrust their care to the medical profession. The motto of AAPS is "*omnia pro aegroto*," or "all for the patient."

Of particular concern to AAPS is the growing misuse of the medical peer review process. Peer review falling outside of the standards of federal and state immunity, commonly referred to as "sham peer review," generally involves the sanctioning of an otherwise competent and professional physician for improper reasons, such as retaliation for whistle-blowing, economic competition, or even personal dislike. In other words, the ostensible purpose of the sham peer review – protecting patients from incompetent doctors – is merely a pretext. The experience of our members demonstrates that sham peer review is very real and has a devastating effect on the entire profession. It is anti-competitive; it is contrary to public policy; and, as evidenced in the case below, can destroy the careers of

quality physicians. Sham peer review harms not only the doctors it targets, but also the patients these doctors treat. The jury found in the case at hand that the peer review of Dr. Poliner was just this type of sham peer review.

AAPS submits this brief to emphasize the need for legal accountability in the peer review process. Peer review immunity is and must be limited; if peer review participants can summarily suspend or terminate quality physicians for economic or malicious reasons, unrelated to patient care, the entire system of peer review falls apart. Far from an "outlier," the judgment below represents the system at work: peer reviewers bent on destroying the career of a qualified competitor whom they did not like were properly held accountable. The judgment below (which was based on the jury's findings that this was sham peer review) will not "cast a pall over peer review" (Hospitals *Amici* Br. at 1), but rather vindicate the fact that peer review must be transparent and accountable in order to be effective.

All parties have consented to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

At stake in this case is whether hospitals and peer review participants can act with impunity and without accountability in destroying the career of an outstanding physician. In passing the Health Care Quality Improvement Act of 1986 ("HCQIA"), Congress emphasized that peer review immunity is limited. This statutory immunity shields physicians and hospitals from damages liability for the

legitimate identification and disciplining of incompetent physicians. But it was never intended to provide absolute immunity or enable peer reviewers to abuse the peer review process. The reason for limited immunity is plain: where, as here, the great power of peer review was exerted not for reasons of patient care, but rather for the economic self-interest and out of personal animus of certain participants, accountability is essential. Otherwise, HCQIA becomes a vehicle for abuse.

The Hospital, individual Defendants, and their *amici curiae* all claim that the judgment below will "chill" peer review because no physician will voluntarily agree to serve on any peer review committee for fear of sustaining significant liability. Nothing could be further from the truth. Indeed, if any "chilling" has in fact occurred due to the verdict and judgment in this case, it would be the "chilling" of sham peer review.

ARGUMENT

I. The Limited Nature of HCQIA Immunity for Medical Peer Review is an Essential Safeguard Against Abuse.

The *amici curiae* brief filed in support of the Hospital urges wholesale deference by courts to the decisions of hospitals (through their administrators and influential physicians). But what these hospitals actually seek is not simply deference, but an unprecedented and virtually absolute immunity against traditional state law that deters and remedies wrongful behavior. There is no basis for such a sweeping interpretation of the HCQIA.

Appellants and their *amici curiae* have no basis for seeking virtually unlimited federal immunity here. The plain meaning of the statute limits immunity, as does its legislative history. *See* H.R. REP. 99-903, *reprinted in* 1986 U.S.C.C.A.N. 6384, 6385, 6391. Recognizing that this immunity "might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls," Congress narrowed the scope to provide immunity "only for proper peer review." *Id.* at 6391. In the context of suspensions less than 14 days or in the case of emergency, for example, Congress emphasized that these procedural exceptions "are not meant to provide a back door for harassment of physicians through repeated short-term suspensions or interminable investigations never leading to a professional review action." *Id.* at 6394.

In this vein, the Supreme Court of Nevada has concluded that there are meaningful limits on the scope of immunity under HCQIA. *See Clark v. Columbia/HCA Info. Servs.,* 25 P.3d 215 (Sup. Ct. Nev. 2001). In *Clark*, the court denied HCQIA immunity to the hospital for revoking a physician's privileges based upon the pretext of disruptive behavior by the physician. In reversing a grant of summary judgment to the hospital, the court held that "the board is not entitled to immunity as a matter of law." *Id.* at 222. The court found that the real reason for the sham peer review against the physician was his filing of reports critical of the hospital. *See id.* Other courts have likewise recognized the limited

nature of HCQIA immunity. *See, e.g.*, *Brown v. Presbyterian Healthcare Services*, 101 F.3d 1324, 1333-34 & n.9 (10th Cir. 1996) (no HCQIA immunity when defendants undertook objectively inadequate investigation); *Harris v. Bradley Mem. Hosp. & Health Ctr.*, 2005 Conn. Super. LEXIS 1401, at *15-*16 (Conn. App. Ct. May 19, 2005) (reversing summary judgment for the hospital on ground that fact issues existed regarding HCQIA immunity).

The concerns recognized by Congress and the courts regarding sham peer review are well-founded. If those in charge of hospitals in this country were angels, then no accountability would be necessary. *See* JAMES MADISON, FEDERALIST NO. 51 ("If men were angels, no government would be necessary."). In reality, however, accountability is essential for the medical peer review system to function ethically, honestly, and in the interest of patient care. Hospitals (acting through their administrators) and influential physicians at these hospitals (who may be competitors) frequently have a strong self-interest in eliminating colleagues with whom they compete. For example, hospitals can improve their profits by limiting care, often in end-of-life situations, while a physician does his or her job best by increasing care, particularly to the most ill. Further, a physician influential at a hospital can increase his or her income by terminating the hospital privileges of competitors.

Unchecked, retaliation against innovators and outspoken physicians is a growing problem. Nearly 25% of physicians who told their hospitals about their concerns with patient care, which could include denial of care to handicapped infants or those in persistent vegetative states, suffered threats to their jobs in one study. Scott Plantz, M.D., *et al.*, *A National Survey of Board-Certified Emergency Physicians: Quality of Care and Practice Structure Issues*, 16 AM. J. OF EMERG. MED. 1, 2-3 (Jan. 1998). Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series beginning Oct. 26, 2003, entitled "Cost of Courage." His articles shows how retaliation occurs nationwide, describing in detail the experiences of 25 physicians and a nurse who suffered from actions adverse to their careers after they tried to improve care at their respective institutions.

The importance of accountability in peer review is further illustrated by the case of Dr. Harry Horner, a physician who had to fight all the way to the Supreme Court of Virginia to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187 (2004). Though difficult to glean from the reported decision, Dr. Horner was exposing the poor care of patients when an administrator at Western State Hospital charged him with violating another employee's right to confidentiality. The administration of Dr.

Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. *See* Bob Stuart, "Court Rules for Whistleblower," NEWS VIRGINIAN (June 16, 2004). Such pre-textual allegations have become common.

Recent medical literature is replete with examples of this devastating phenomenon. *See, e.g.*, Gail Weiss, *Is Peer Review Worth Saving?* MEDICAL ECONOMICS (Feb. 18, 2005); Steve Twedt, *The Cost of Courage: How the Tables Turn on Doctors*, PITTSBURGH POST-GAZETTE A1 (Oct. 26, 2003); John Zicconi, *Due Process or Professional Assassination?*, UNIQUE OPPORTUNITIES (March/April 2001); David Townsend, *Hospital Peer Review Is a Kangaroo Court*, MEDICAL ECONOMICS 133 (Feb. 7, 2000). Medical journals also describe the often successful attempts by peer reviewers to cloak their sham peer review under federal immunity. *See, e.g.*, William Summers, "Sham Peer Review: A Psychiatrist's Experience and Analysis," *Journal of American Physicians and Surgeons* 125 (Winter 2005); Roland Chalifoux, Jr., M.D., *So What Is a Sham Peer Review?*, 7 MEDSCAPE GENERAL MEDICINE (No. 4) 47 (2005); John Minarcik, M.D., *Sham Peer Review: A Pathology Report*, JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 121 (Winter 2004); Lawrence Huntoon, M.D., Ph.D., *Abuse of the 'Disruptive Physician' Clause*, JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS 68 (Fall 2004); William Parmley, *Clinical Peer Review or*

Competitive Hatchet Job, 36 JOURNAL OF THE AMERICAN COLLEGE OF CARDIOLOGY 2347 (2000).

When courts extend immunity to abuse sham peer review, the "system is too open to manipulation and needs reform." Jeff Chu, *Doctors Who Hurt Doctors*, TIME 52 (Aug. 15, 2005) (citing the Association of American Physicians and Surgeons). Medicine is a type of business, and, as in any industry, a sweeping grant of immunity to one side of an industry is as disastrous as it is unjustified. Such sham peer review interferes with quality medical care and impedes the benefits of competition and free enterprise. In short, sham peer review is not "peer review" at all, but rather tortious conduct masquerading as "peer review" in an attempt to escape liability for damages under federal immunity.

The overbroad immunity advocated by the Defendants and their *amici curiae* is thus as unwise as it is unjustified by statute. If such were the case, hospitals, already a highly profitable industry lacking in adequate competition, would become islands of unaccountability with a shield of federal and state immunities. The effect of near-absolute immunity for hospitals is clear: destroy the career of one physician, and hundreds or thousands of physicians will refrain from speaking out or competing against the perpetrators.

II. The Judgment Below is Not An "Outlier" That Will "Chill" Medical Peer Review.

The Defendants and their affiliated *amici curiae* are also incorrect in their bold claim that this judgment will "chill" peer review by discouraging other physicians from participating. They contend that if the judgment below is allowed to stand, physicians will no longer want to participate on medical peer review committees for fear of the kind of liability incurred by Defendants. (Hospitals *Amici* Br. at 1, 23) This speculative assertion is simply incorrect. In the approximately three years since this judgment, it has been the experience of our members that peer review is alive and well. Physicians have continued to participate. Just as important, our members report that hospitals and peer review participants have been more careful to conduct peer review with greater transparency and integrity. Instead of "casting a pall" over peer review, the judgment below has helped to renew the emphasis on accountable and proper peer review. Any "chill" has been on sham peer review only, not proper peer review.

The conduct found here to be tortious after a full trial and voluminous post-trial litigation below was plainly not legitimate "peer review." Rather, it typified the kind of abuse of power that intimidates good physicians, deters innovation in medicine, and tends to deprive end-of-life patients of much-needed care. Such tortious conduct scares physicians away from standing up for their patients against a hospital more focused on unchecked power.

The verdict and judgment below have sent a much-needed message to those inclined to engage in tortious conduct against good physicians -- namely, that tortfeasors cannot obtain immunity merely by labeling their actions "peer review." Accountability is essential to deter and provide a remedy for the destruction of the reputation of a good cardiologist, as Defendants wrongfully did here. The size of the award below pales in comparison to the harm such malicious conduct imposes as a whole on the practice of medicine and patients. Defendants in this case inflicted upon Dr. Poliner the professional equivalent of a fatal blow, wrongfully destroying his unblemished reputation and depriving patients of their rightful access to his care. Sham peer review thrives in the darkness of inadequate legal accountability. The judgment below is long overdue to deter abusive behavior by hospitals, their administrators, and peer review participants, and it should be affirmed.

CONCLUSION

Wrongful and anticompetitive behavior by hospitals is rampant under the guise of "peer review." Such behavior, as found by the jury in this case, is not legitimate peer review and is not entitled to immunity from accountability. The award below was modest compared to the enormous direct and indirect harm that Defendants' conduct caused in the medical community, including interference with medical care to patients. The judgment below was a long-overdue step towards

restoring accountability and free enterprise in the practice of medicine at hospitals. Appellants' challenge to the judgment rendered in this case should be rejected.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), the undersigned certifies this brief complies with the type volume limitations of 5TH CIR. R. 32.2.7(b), for the following reasons:

1. This brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B) because this brief contains only 3,314 words.

2. This brief has been prepared in a proportionally spaced typeface using Word in Times New Roman 14 pt.

3. I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the court's striking the brief and imposing sanctions against me.

____
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Dated: October 11, 2007

CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, attorney for the *amicus curiae*, hereby certify that two true and complete hard copies, and an electronic copy in PDF, of the Brief of the text of *amicus curiae* Association of American Physicians and Surgeons, Inc., was served via commercial overnight delivery, on counsel of record as listed below, on this 11th day of October, 2007, to:

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