IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 06-4221

STEVEN H. UNTRACHT, M.D., Ph.D., F.A.C.S.	:
	:
Plaintiff below,	:
Appellant,	:
	: An appeal from the United
v.	: States District Court for
	: the Western District of
ERDEN FIKRI, M.D., et al.	: Pennsylvania
	: Case No. 3:03 CV 199
Defendants below,	:
Appellees.	:

BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS FILED IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL OF THE JUDGMENT BELOW

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December 14, 2006

CORPORATE DISCLOSURE STATEMENT

Steven H. Untracht, *M.D. v. Erden Fikri, M.D.*, *et al*., No. 06-4221

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, *Amicus Curiae* The Association of American Physicians and Surgeons makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/ Andrew L. Schlafly Dated: December 14, 2006
Andrew L. Schlafly
Attorney for The Association of American Physicians and Surgeons

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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." AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. In 2006, the Third Circuit cited an AAPS amicus brief in the first paragraph of the decision. *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). AAPS has successfully filed *amicus* briefs in other appellate cases also. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court Justice Kennedy frequently citing AAPS submission); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

Of particular concern to AAPS is the growing misuse of peer review commonly known as "sham peer review." This includes anticompetitive manipulation of peer review to eliminate popular physicians from the market, or to

retaliate against physicians who are outspoken in favor of improved patient care. Sham peer review is very real and has a dreadful chilling effect on the entire profession. Competition is important in all walks of life, but it is absolutely essential in improving how patients are treated at our publicly accessible hospitals and facilities. AAPS submits this brief to emphasize that legal accountability for anticompetitive physicians and hospitals must be established to ensure that physicians can provide the best possible care to their patients without fear of retaliation by disgruntled competitors or hospitals.

AAPS has a Sham Peer Review Committee to review cases such as this one, and the AAPS Committee reviewed the entire record of the fair hearing at defendant UPMC Lee Regional Hospital. AAPS found particularly impressive the statements of the independent peer-review expert, Dr. Mitchell Nudelman (Doc. No. 113), who found that defendant hospitals Lee and Conemaugh had acted unreasonably against Dr. Untracht. In addition, AAPS's statistician analyzed the clinical outcome data that were reported by the hospitals of Lee, Conemaugh and Windber to the Pennsylvania Healthcare Cost Containment Council between 1995 and 2002, also part of the record below. AAPS found that Dr. Untracht's performance had this in common with other victims of sham peer review: Dr. Untracht treated sicker patients. But even with a sicker patient population, Dr. Untracht had comparable and sometimes lower complication rates and lengths of

stay relative to his colleagues. Dr. Untracht's overall mortality rate was lower than expected, and lower than that of his competitors.

AAPS respectfully submits this *amicus* brief to ensure that the patients of Dr. Untracht, and patients of other physicians like him, do not lose the superior services of physicians caring for riskier patients. The elimination of Dr. Untracht from the medical market in his community requires meaningful judicial scrutiny of sham peer review.

BACKGROUND

Allegations of an anticompetitive peer review are serious, because removal of a physician directly harms his patients and indirectly harms all patients. Moreover, the destruction of a physician's career through an unjustified peer review has a chilling effect on many other physicians in the region.

Hospital economics is similar to other industries except for one essential distinction: there is a federally mandated database in the hospital industry called the National Practitioner Data Bank ("Data Bank"). This list, which operates as a blacklist, is sanctioned by federal law but has enormous potential for abuse. Some physicians and hospital administrators exploit it to destroy competitors and whistleblowers alike.

Virtually no physician entered into this Data Bank can survive professionally. The best a physician who has been entered into this Data Bank can

hope for is to relocate to a rural area and wait until someone else tries to use the Data Bank entry against him. More often, when a physician applies for privileges with a hospital, it checks the Data Bank and, if there is an adverse entry, the hospital usually denies privileges to the physician. With hospitals fending off malpractice actions, they have little reason to see past a black mark in this Data Bank to allow a physician on staff.

This awesome power is sometimes abused by disgruntled physicians and hospital administrators. *See, e.g.*, Gail Weiss, "Is Peer Review Worth Saving?", Medical Economics (Feb. 18, 2005); Ron Wood, "Jury says hospital defamed doctor, harmed him financially," The Morning News (Jan. 13, 2004); John Zicconi, "Due Process or Professional Assassination?", Unique Opportunities (March/April 2001); William W. Parmley, "Clinical Peer Review or Competitive Hatchet Job," 36 Journal of the American College of Cardiology No. 7 (2000); David W. Townend, "Hospital peer review is a kangaroo court," Medical Economics (Feb. 7, 2000).

The economic incentive for abuse of peer review is obvious and undeniable. If there are a few surgeons in a market, then elimination of one of those surgeons will cause the incomes of the others to increase dramatically. Similarly, if a physician is a whistleblower whose vocal complaints about a hospital could cost it millions of dollars in malpractice liability or government fines, then the

elimination of that physician will save the hospital millions. Physicians and hospitals are attempting to maximize their revenues and profits like anyone else, and the unique National Practitioner Data Bank provides the means to destroy a competitor.

This growing misuse of peer review and the Data Bank has become so widespread that it has acquired a descriptive name: "sham peer review." What appears to be "peer review" under the pretext of protecting patients can in fact be a "sham." The incentive for misusing this power is even greater when someone suffers a drop in income because he has a more successful competitor. Physicians and hospitals are motivated by money just like everyone else, and the current system invites abuse. *See, e.g.*, Jeff Chu, "Doctors Who Hurt Doctors," Time 52 (Aug. 15, 2005) ("Th[e] system is too open to manipulation and needs reform, says the 4,000-member American Association [sic] of Physicians and Surgeons."). If a similar type of peer review were available to retail stores, then it would be in the self-interest of a struggling K-Mart to try "sham peer review" to end the competition from Wal-Mart. Such misuse would not be allowed in the retail context, and it should not be allowed in the medical context either.

Plaintiff Steven Untracht, M.D., succeeded in a manner that caused drops in income to his competitor-physicians. Defendant Fikri lost 50% of his income during the first three years after Dr. Untracht came to Johnstown. (*A324-325*) By

all independent accounts Dr. Untracht was an exemplary surgeon, and even an extraordinary one. (*A300*) But the better he was, the more his competitors wanted him eliminated. Defendant Fikri even began complaining to defendant Mathur that he was referring too many patients to Dr. Untracht and not enough to Fikri. (*A324*) In the face of drops in income it is predictable that the competitors will look for ways to eliminate the cause. "Sham peer review" provides the means to that end. By combining forces among themselves and with the hospital, a few physicians can easily manipulate a peer review into suspending and removing a physician's privileges. Once the hospital is on board in this mission all of its employee-physicians generally cooperate; they are dependent on the hospital for their livelihood. Anyone who stands up for the accused physician, even a physician in independent practice, would be taking a risk himself. The adverse outcome is a *fait accompli*, and the resulting entry in the Data Bank blacklists that physician for life. This process is remarkably easy and increasingly abused.

Unlike other courts that have recognized the importance of evaluating the merit or lack thereof of a peer review action, see *Feyz v. Mercy Mem'l Hosp*., 475 Mich. 663 (2006) (en banc), the court below never addressed the core issue in this case: the unreasonableness of the peer review of Dr. Untracht. Dr. Untracht had numerous physicians offering to testify on his behalf, which underscores how frivolous the charges were against him. In most peer reviews, even in sham peer

reviews, other physicians fear retaliation themselves too much to defend a victim. But the allegations against Dr. Untracht were so baseless that these physicians cried out for rebuttal. Yet defendant UPMC Lee Regional Hospital denied Dr. Untracht the opportunity to present medical testimony in his defense, as explained in Argument Point II, *infra*. The effect was to destroy Dr. Untracht, and report him to the National Practitioner Data Bank.

What legal protections are there against this sort of anticompetitive conduct? The Sherman Act applies to physicians and hospitals like everyone else. Anticompetitive conduct that falls under the Sherman Act is illegal and actionable. There is no exemption from that Act for self-serving behavior supposedly taken for public safety. Competition is what helps patients the most, and competition clearly suffers when a physician or any competitor is removed from the market.

If a physician were truly a danger to patients, then the state medical board can and will restrict or revoke his license to practice medicine. Patients themselves will abandon such a physician, just as shoppers will not continuing buying bad products. But who would listen to a demand by one company that another be prohibited from selling a popular item? Such demand would be so inherently anticompetitive and self-serving that it would not be taken seriously. Yet the peer review in this case, and sham peer review generally, embraces that same type of anticompetitive conduct.

Peer review is inherently "concerted action" within the meaning of Section 1 of the Sherman Act. Here, it consisted of the concerted conduct of several competitors of Dr. Untracht with every financial motive to destroy him. The hospitals likewise had incentives to join the effort. The elimination of Dr. Untracht from the market by this concerted effort was as predictable as it was unlawful. Dr. Untracht plainly has a cause of action under the Sherman Act to recover from this restraint of trade.

Legitimate peer review disallows participation by competitors in the process and adheres to appropriate due process standards such that statutory immunity applies. In contrast, here the defendant hospital Lee's executive committee even allowed defendant Murali, Dr. Untracht's direct competitor, to vote to restrict Dr. Untracht's privileges. (*A330-331*) Sham peer review must be held fully accountable under the antitrust laws or else patients will suffer greatly from the loss of good physicians from the market.

ARGUMENT

As this Circuit held in 2006 in affirming a jury verdict in favor of a physician and against a state hospital, "the state of healthcare" consists of "matters of public concern." *Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (citing *Scheiner v. New York City Health and Hospitals*, 152 F. Supp. 2d 487, 495-96

(S.D.N.Y. 2001); *Kattar v. Three Rivers Area Hosp. Auth.*, 52 F. Supp. 2d 789, 799 (W.D. Mich. 1999)).

The court below erred in at least three ways in denying plaintiff relief. First, it misapplied and implicitly contradicted this Circuit's holding in *Angelico v. Lehigh Valley Hosp., Inc.,* 184 F.3d 268 (3d Cir. 1999). Second, the lower court found a lack of state action, but the federally mandated Data Bank and its operation here implicates the full power of the state. Third, the court below found no violation of due process because the Health Care Quality Improvement Act of 1986 (HCQIA) does not expressly establish a private cause of action, but that ruling cannot stand if there is state action. HCQIA reflects the appropriate due process, and with state action that process is due regardless of whether HCQIA itself creates a private cause of action.

I. The Lower Court Erred in Misapplying the *Angelico* Holding on Antitrust Standing and Injury.

The court below contravened the holding of this Circuit in *Angelico*. There, as here, the physician was allegedly subjected to an anticompetitive peer review. Plaintiff argued for application of the *Angelico* decision to this case, but the trial court said that it "does not agree." *Untracht v. Fikri*, 2006 U.S. Dist. LEXIS 61896, at *46 (W.D. Pa. Aug. 30, 2006) (*A41*). Yet the *Angelico* decision had already rejected the same approach taken by the court below here.

In *Angelico*, the trial court granted the hospitals' motion for summary judgment on the same grounds that the court below granted it here, holding that plaintiff had failed to establish standing and had not suffered antitrust injury. This Circuit then unanimously reversed. "Turning to the second element, whether Angelico's alleged injury is of the type the antitrust laws were meant to redress, we conclude that the injury he suffered, when shut out of competition for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent." *Angelico v. Lehigh Valley Hospital, Inc.*, 184 F.3d 268, 274 (3d Cir. 1999). The *Angelico* court recited this Circuit's holding in *Brader v. Allegheny General Hosp.*, 64 F.3d 869 (3d Cir. 1995), in which this Court reversed a dismissal of similar claims by a physician under Sections 1 and 2 of the Sherman Act. As this *Angelico* Court reiterated, "Brader, as a potential competitor shut out of a market by a purported group boycott, had alleged the type of injury protected by the antitrust laws." *Angelico*, 184 F.3d at 274. The conclusion in *Brader* and *Angelico* is apt here: "the type of injury alleged by Brader (the loss of income due to an inability to practice in the relevant market area) is directly related to the illegal activity in which the defendant allegedly engaged: a conspiracy to exclude Brader from the relevant market." *Brader*, 64 F.3d at 877.

The reason given by the court below in dismissing plaintiff's case was its view that he "offers no evidence of a conspiracy, an essential part of an antitrust

violation, between any of the Defendants." *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *47 (*A41*). But the court below effectively denied plaintiff full discovery, allowing defendants to refuse discovery requests and move for summary judgment, a common litigation tactic by hospitals in these cases. (Appellant's Brief at 3-8, 56). When presented with an analogous lack of discovery on the part of the defendants in *Angelico*, this Circuit held that the plaintiff's relevant allegations should therefore be accepted as true. *Angelico*, 184 F.3d at 274. *Cf.* Federal Rule of Civil Procedure 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial.") Plaintiff's allegation of concerted action below should have been accepted as true for the purpose of defendants' dispositive motions.

More generally, the *sine qua non* of all peer reviews, including legitimate ones, is concerted action. It is impossible to conduct a peer review proceeding without concerted action, as physicians work with the hospital with a common goal and agreement to take an adverse action against a physician on staff. Saying that a peer review action is not concerted action is like saying that a marching band does not walk in a concerted manner. Everything it does is concerted and by agreement. The issue is not whether a peer review action is concerted – it plainly is – but

whether it reasonably restrains trade in a particular case. Yet the court below refused to reach that central question of this case.

Instead, the trial court went beyond the undisputed facts and substituted its own speculation about the nature of peer review, insisting that its speculation "disproves" a conspiracy among multiple hospitals. "In fact, Plaintiff offers evidence to the Court that disproves a conspiracy. First, Plaintiff offers evidence that while the adverse actions were being taken against him at Lee he notified Conemaugh and Windber and that, upon review, each hospital renewed his clinical privileges multiple times." *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *47 (*A42*). But it is typical in a sham peer review for the concerted action or conspiracy to be between physicians and one hospital, and then later between the same physicians and another hospital, rather than directly between multiple hospitals. The disgruntled physician-competitors form the hub in such hub-and-spoke conspiracies, which are well-recognized in the law. A hub-and-spoke conspiracy is fully actionable under antitrust laws, and "disproof" of a direct conspiracy between different hospitals does not in any way disprove the existence of an overall conspiracy.

The trial court relied entirely on its own theory that "Lee and Conemaugh were not acting in concert, *i.e.,* conspiring, but were actually acting quite independently," without recognizing how sham peer review typically works.

Untracht, 2006 U.S. Dist. LEXIS 61896, at *48 (*A42*). As has been well-documented in medical journals, sham peer review can be driven by physicians at hospitals, often under pretextual criticism such as charges that a physician is "disruptive". Building a record of "disruptive" behavior at a hospital takes time, but under the stressful conditions of an operating room most surgeons need to advocate for patients, sometimes even in a loud and insistent manner. This is not "disruptive", yet it hospitals are increasingly labeling it so. Lawrence R. Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," 9 Journal of American Physicians and Surgeons 68 (Fall 2004) ("The term 'disruptive physician' is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish.").

The charges asserted by defendants against Dr. Untracht accused him of histrionics and problems with reasonableness, collegiality and professionalism. (Doc. No. 147, Ex. 10; Doc. No. 155, at 21, 23). Few patients facing surgery would list personality at the top of their priorities for picking a good surgeon. The volume and nature of the petty complaints against Dr. Untracht reveal a desire to eliminate him for any reason. Other courts have already seen through the pretext of the "disruptive physician." "At the outset, we reject [defendant's] suggestion at oral argument that a finding of *potential* disruption could be sufficient to outweigh [plaintiff's] interests. To the contrary, in cases such as this involving speech on

matters of significant public concern, a showing of *actual* disruption is required. … Moreover, a finding of actual disruption, while necessary, is not sufficient to a determination that the employee's speech is not protected." *Zamboni v. Stamler*, 847 F.2d 73, 78-79 (3d. Cir.), *cert. denied*, 488 U.S. 899 (1988). *See also Clark v. Columbia/HCA Info. Servs.*, 25 P.3d 215 (Sup. Ct. Nev. 2001) (denying immunity to HCA for revoking privileges based upon the pretext of disruptive behavior by the physician); *Rosner v. Eden Township Hospital District*, 58 Cal.2d 592, 598 (1962) (in a case concerning retaliation against a physician for testimony against a hospital in a malpractice action, the court emphasized that "[i]n these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present").

The evidence cited by the trial court to disprove a conspiracy is actually completely consistent with a sham peer review, and the concerted action that underlies it. The lower court declared that:

> Plaintiff's evidence establishes that Conemaugh only began adverse action against Plaintiff following the death of EE, one of Plaintiff's patients at Conemaugh, more than three years after Plaintiff's problems at Lee arose. *Id.* at P 25. Finally, Plaintiff admits he never suffered adverse action at Windber and, in fact, voluntarily resigned from Windber. … The evidence provided by Plaintiff demonstrates that Lee and Conemaugh were not acting in concert, *i.e.,* conspiring, but were actually acting quite independently.

Untracht, 2006 U.S. Dist. LEXIS 61896, at *48 (*A42*). But this sequence is precisely what one would expect when there is concerted action by disgruntled competitors to eliminate and destroy another physician through misuse of peer review. The competitors would not attempt to revoke his privileges at multiple hospitals simultaneously. Rather, the revocations would occur seriatim, and merely three years between one peer review and another hardly disproves a connection.

Just as even the best trial lawyers lose many cases, the best surgeons have patients who die. The only way to avoid patient deaths is the same as the only way for attorneys to avoid losing trials: decline risky cases. But such a self-serving approach disserves the public and proves nothing about the competence of the professional. Dr. Untracht was, and is, an exemplary surgeon. The reliance by the court below on how "Conemaugh only began adverse action against Plaintiff following the death of EE, one of Plaintiff's patients at Conemaugh, more than three years after Plaintiff's problems at Lee arose" is entirely misplaced. *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *48 (*A42*). This fact says nothing to dispel anticompetitive, concerted conduct against Dr. Untracht. The adversaries of Dr. Untracht, or of any surgeon specializing in high-risk cases, can be expected to wait until there is the inevitable patient death before trying improperly to remove him from the staff.

The court below was mistaken in declaring that "[p]rior to Plaintiff's voluntary withdraw[al] from the market, consumers had the same goods and services (an option for surgery performed by Plaintiff) available to them in the market as they had before the peer review actions taken by Lee and Conemaugh." *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *66 (*A52*). In fact, patients were deprived the option of having surgery performed by the physician of their choice, Dr. Untracht, and at the hospitals of their choice, Lee and Conemaugh. This is no small or trivial deprivation. Plaintiffs were also deprived of the option of having surgery performed by their preferred physician at the hospital where certain other physicians, such as their family physicians, may have privileges. The supply of surgical services was plainly restricted by the revocation of Dr. Untracht's privileges, and that constitutes antitrust injury under Section 1 of the Sherman Act.

Under the "Rule of Reason" analysis of antitrust, defendants should prevail only if their restraint of trade was reasonable. But there are factual issues concerning fairness of the procedures for the jury to decide here, as in other sham peer review cases. "The critical issue in Dr. Islami's motion for summary judgment becomes whether the procedures the defendants afforded to Dr. Islami were fair under the circumstances. ... The court believes that 'fairness based on the circumstances' is the paradigm jury question. The parties have diametrically opposed views on the issue and believe that the factual record viewed as a whole

supports their position. **This is an issue for the jury to decide**." *Islami v. Covenant Medical Ctr.*, 822 F. Supp. 1361, 1374 (N.D. Iowa 1992) (emphasis added).[1]

In sum, revocation of hospital privileges does confer antitrust standing and does constitute antitrust injury, and the court below erred in holding otherwise. The revocation of privileges also interrupts and terminates the physician's practice at the hospital used by many of his current and potential patients. The very nature of peer review is concerted action and restraint of trade. The only issue below is whether the restraint of trade in the form of revocation of Dr. Untracht's privileges was reasonable, an issue the lower court failed to reach. Its opinion failed to adequately address the lack of merit in the allegations against Dr. Untracht, and the insufficient basis for revoking his privileges. A remand is necessary for the lower court to address these central issues.

[1] As explained more fully in AAPS's Statement of Interest, *see supra* pp. 2-3, Dr. Untracht treated more sickly patients than his colleagues did, yet Dr. Untracht had complication rates as low or lower than his competitors. And while the court below pointed out a patient death among Dr. Untracht's thousands of cases, his patient mortalities were actually statistically less than expected. Simply put, Dr. Untracht was providing superior care not otherwise available in his community, and the elimination of him from the market hurts the sickest patients.

II. The Use of the National Practitioner Data Bank by Defendants Constituted State Action.

For most physicians, including Dr. Untracht, the revocation of hospital privileges triggers the federally mandated, career-ending adverse report in the National Practitioner Data Bank. This constitutes sufficient "state action" to satisfy the claim under Section 1983. 42 U.S.C. § 1983.[2] The court erred in dismissing all of plaintiff's claims under free speech, due process and equal protection based on a lack of state action.

The trial court correctly restated the test for state action, but failed to apply it to the use of a federal database. Simply put, "liability attaches to those wrongdoers who 'carry a badge of authority of a [s]tate and represent it in some capacity.'" *Untracht*, 2006 U.S. Dist. LEXIS 61896, at *72 (*A55-56*) (quoting *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 191 (1988)). The federally mandated National Practitioner Data Bank confers that "badge of authority" on the defendant hospitals to destroy a physician by branding him as substandard through the Data Bank. Put another way, the "symbiotic relationship" test for state action has been met when entities are given the special authority to ruin physicians through use of a federal database. In such a context the state has "insinuated itself

[2] In *Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court extended Section 1983 type of liability to agents of the federal government.

into a position of interdependence" with the defendants, so as to be considered a joint participant with them and thereby trigger state action. *Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 725 (1961). *See also Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (finding state action because "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'");

Federal law mandates reporting of the summary suspension to the Data Bank for nationwide distribution. *See* 42 U.S.C. § 11133(a), 11134(b), 45 C.F.R. §§ 60.1, .2, .7-.9. This federally required reporting, along with the state regulatory scheme governing the hospital proceeding, is sufficient nexus for state action. *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 507 (2002) (finding state action "when the state provides significant encouragement for the activity") (citing *Brentwood Acad.*, 531 U.S. at 296).

Although the court below addressed an argument about the Data Bank in the context of state action, it did not fully consider the power of the state that the Data Bank confers on hospitals with respect to the reputation of individual physicians. The Data Bank has an effect on reputation similar to that of a criminal indictment, which surely is state action. The Data Bank possesses this awesome power not due to freedom of speech or the press, but solely because the federal government

established it and mandates its use. The Data Bank is equivalent to the grand jury, which is composed of private citizens, when it announces an indictment. The hospitals play the role of a prosecutor, who does not need be an actual employee of the state to be a state actor. There, as here with HCQIA, state action exists because the defendant possessed power by law (HCQIA reporting) and this is made possible because the defendant is cloaked with the authority of state law (others, such as physicians and individuals, cannot report to the Data Bank). *See Groman v. Twp. of Manalapan,* 47 F.3d 628, 639 n. 17 (3d Cir. 1995).

Defendants cannot have it both ways, such that they exploit the state-mandated power of the Data Bank but then simultaneously ignore the procedural protections established in HCQIA, which established the Data Bank. By choosing to file an adverse and career-ending report about Dr. Untracht with the Data Bank, the defendant hospitals became state actors with respect to Dr. Untracht's reputation. HCQIA confers immunity on hospitals that performed the underlying peer review in good faith and with reasonable procedures. A remand is necessary here for the lower court to determine if the hospitals complied with all of HCQIA, or simply exploited the ability to use the Data Bank without utilizing the fair procedures.

All indications are that the hospital affirmatively violated the procedural guidelines of HCQIA, yet insisted on filing an adverse report to the Data Bank

anyway. The transcript of the Joint Committee of the Board of the Medical Staff of defendant UPMC Lee Regional Hospital, dated May 27, 2003, illustrates how its committee did not want to hear any criticism of its view concerning Dr. Untracht. The Chairman of the Board of Trustees of defendant UPMC Lee Regional Hospital, Mr. Gardill, insisted that Dr. Untracht should not even be allowed to respond to the allegations leveled against him! Here was the exchange:

MR. GARDILL: …We are not looking for you to criticize our report….

DR. UNTRACHT: The new evidence I wanted to provide you won't let me provide. You are not allowing me to call witnesses, so I can't put on any new evidence."

DR. UNTRACHT: …Now you are saying that, you know, I can't produce my own experts who are going to state facts about what they think about the situation and to express factual reasons why they think it is not appropriate for the hospital to be taking the action that they recommend. That is what they are going to testify about….And it is – to not be allowed to call witnesses, I think, that is, you know, that is just a little extreme.

MR. GARDILL: Okay. We can certainly take that under advisement….

DR. UNTRACHT: If I can just say, since this is a proceeding, I should be allowed to respond to the things that Mr. Federowicz [the hospital's attorney] mentioned.

MR. GARDILL: **I don't see a need for that.**

DR. UNTRACHT: I mean, I do, but I think it is just in fundamental fairness the person that starts gets to have the last word in proceedings like this, but you are moderating the proceedings and if you refuse it, well, then fine. I think – I just want it to be on the record.

MR. GARDILL: **I am going to refuse it at this point.**

(Lee Transcript, May 27, 2003, pp. 16-20) (emphasis added). The hospital's executive committee then decided Dr. Untracht's fate based on only one surgeon's recommendation, without Dr. Untracht being told why the reviewing physician made the adverse recommendation. (*A353*)

Plaintiff Dr. Untracht is entitled to proceed under Section 1983 for this flagrant violation of basic due process, once state action is recognized here. A remand on the grounds of Section 1983 is appropriate.

III. Adherence to Due Process with Respect to Hospital Privileges Hearings is Essential to Patient Safety.

In recently affirming a jury verdict in favor of a physician against hospital administrators in the *Springer* case, this Circuit framed the issues based in part on our amicus brief:

> [T]he Association of American Physicians and Surgeons, argues that the issue transcends the relationship between the parties and instead impacts thousands of patients damaged as a result of hospital errors, incompetence, wrongdoing, and cover-ups.

Springer v. Henry, 435 F.3d 268, 271 (3d Cir. 2006). The chilling effect of a sham peer review is undeniable: destroy the career of one physician, and hundreds or thousands of physicians will refrain from speaking out or competing against the perpetrators.

Without meaningful judicial review of sham peer review, the hospital industry will remain in the dark ages replete with archaic techniques, rampant

errors, incompetence, wrongdoing and cover-ups. Hospitals reportedly kill more people in America than tragic fires, handguns, car accidents, and other familiar calamities. The *Christian Science Monitor* reported that "about 1 of every 200 patients admitted to a hospital died because of a treatment mistake ... [which] was more ... than died in 1998 from highway accidents (43,458), breast cancer (42,297), or AIDS (16,516)." It then added that some experts think this number of deaths due to hospital misconduct "was almost certainly far too low." Gregory M. Lamb, "Fatal Errors Push Hospitals to Make Big Changes," *Christian Science Monitor* 14 (July 8, 2004). The best way to reduce these errors is to end anticompetitive conduct at hospitals, so that the very best quality can rise to the top. But as long as sham peer review is allowed, the benefits of full competition will never be realized. For example, the most effective way to minimize the number of packages lost by Federal Express is to facilitate robust competition by UPS and DHL. Errors at Federal Express would skyrocket if it could destroy UPS and DHL in a manner similar to the one that defendants apparently used here to destroy Dr. Untracht.

A study by Health Grades, Inc., estimates that medical errors in American hospitals "contributed to almost 600,000 patient deaths over the past three years, double the number of deaths from a study published in 2000 by the Institute of Medicine." Paul Davies, "Fatal Medical Errors Said To Be More Widespread,"

Wall Street J. D5 (July 27, 2004). Harvard Professor Lucian Leape has written that "[i]n most industries, defects cost money and generate warranty claims. In health care, perversely … physicians and hospitals can bill for the additional services that are needed when patients are injured by their mistakes." *Leape*, *supra*, at 2388. But when physicians fear sham peer review like what happened here whenever they compete or complain, misconduct will reign supreme.

Retaliation against physicians, as alleged by Dr. Untracht here, is a growing problem. In one study, nearly 25% of physicians who reported concerns with patient care suffered threats to their jobs. 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."[3] His articles showed 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.

Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court of his State of Virginia to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental*

[3] http://www.post-gazette.com/pg/03299/234499.stm

Health, Mental Retardation, & Substance Abuse Servs., 268 Va. 187 (2004). 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 pretextual allegations have become common, and it is essential for there to be meaningful judicial review of the abuses.

Like Drs. Springer and Horner, Dr. Untracht was a whistleblower. The court below acknowledged that Conemaugh revoked his privileges entirely for his communications with his patient's family. *Untracht*, 2006 U.S. Dist. LEXIS 61896, *25 (*A29*). Physicians like these must be able to speak freely without fear of retaliation in the form of a sham peer review. "It can hardly be doubted that conditions at a state mental hospital are matters of considerable public concern on which citizens … ordinarily have the right to comment freely. And it is equally clear that defendants' interest in allaying the anxieties of some of their employees is, under the Pickering balancing test, totally insufficient to outweigh [a nurse's] interest in speaking freely about Haverford State Hospital." *Commonwealth of Pa. ex rel Rafferty v. Philadelphia Psychiatric Ctr.*, 356 F. Supp. 500, 507-08 (E.D. Pa. 1973).

This Circuit has a long history of protecting whistleblowers against retaliation. In *Baldassare v. New Jersey*, the plaintiff, a law enforcement investigator, was demoted and eventually fired after he helped conduct an investigation into criminal allegations against two members of the Prosecutor's Office. 250 F.3d 188, 192-93 (3rd Cir. 2001). The district court granted summary judgment for the defendants on the plaintiff's claim for violation of his rights by not allowing "'him to exercise his freedom of speech in speaking out about various public issues.'" *Id*. at 194. On appeal, this Court reversed the lower court by holding "that Baldassare's expression in his investigation is constitutionally protected." *Id*. at 200. This Court's decision was grounded in the fact that the plaintiff's "investigation involved a matter of public concern" and "the state has failed to establish its interest outweighed its employee's." *Id*. This Court also rejected the defendants' claim of qualified immunity noting that "as of 1982 the law was 'clearly established' that a public employee could not be demoted in retaliation for exercising his rights under the first amendment." *Id.* at 201.

The impact of allowing sham peer review is severe. While the hospital benefits economically from eliminating outspoken physicians by claiming they are "disruptive", the public pays an enormous price indeed. Lives are lost. Establishing quality control of the delivery of medical care may be economically harmful to the hospital, but essential to the public's safety and economics.

This Circuit again sided with a whistleblower in *Czurlanis v. Albanese*, where it held that plaintiff's free speech rights "were violated as a matter of law." 721 F.2d 98, 99 (3rd Cir. 1983). The plaintiff worked as a mechanic for Union County and was suspended twice without pay and frequently transferred after he spoke at public Board meetings concerning "inefficiency, false reports, duplication, and unnecessary work on and parts for vehicles under the jurisdiction of the Division of Motor Vehicles." *Id*. at 100. In concluding that the plaintiff's "speech was protected under the First Amendment," the Court took into account the fact that "there is no evidence that the relationship between Czurlanis and his immediate superiors was seriously undermined or that the operations of the Division of Motor Vehicles were disrupted." *Id*. at 106-07. The Court also noted that "the defendants [did not] contend that Czurlanis' statements 'have in any way impeded [the] performance of his daily duties.'" *Id*. at 106-07 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

Other courts have held likewise. In *Mangieri v. DCH Healthcare Authority*, the 11th Circuit held that the plaintiff "is not barred . . . from asserting claims for the alleged violation of his First Amendment rights in a suit under § 1983." 304 F.3d 1072, 1076 (11th Cir. 2002). In that case, the plaintiff medical doctor "began receiving complaints from the Authority regarding the quality of anesthesia services provided" by his company after he "opposed a proposal by the Authority."

Id. at 1073-74. Subsequently, the defendant Authority told the plaintiff that they would not renew his contract when it expired at the end of that year. *Id*. at 1074. There the district court had incorrectly relied on the U.S. Supreme Court's decision in *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996), in ruling for the defendant. In vacating the district court's decision, the 11th Circuit refused to "conclude, as the district court did, that the absence of an automatic renewal provision in the 1998 contract prevented the non-renewal of that contract from constituting a 'termination' of a pre-existing commercial relationship." *Mangieri, supra*, at 1075.

In *Jones v. Memorial Hosp. System*, the plaintiff, a nurse employed by the defendant, wrote an article, which was printed in a local paper, "critically describing the conflict between the wishes of terminally ill patients and their families and the orders of the attending physicians." 677 S.W.2d 221, 223 (Tex. App. 1 Dist. 1984). After the hospital fired her, the plaintiff brought an action against them for infringing her free speech rights under the Texas Constitution. *Id*. The Court looked to "federal first amendment cases for guidance." *Id*. at 224. The Texas Court stated that "the plaintiff may still assert her claim for reinstatement if the hospital's decision was grounded upon the plaintiff's exercise of her constitutionally protected first amendment freedom of speech." *Id*. at 225. Since the hospital was technically privately owned, the Court remanded the case to

determine whether the state action doctrine applied to the hospital. *Id*. at 225-26. A remand is appropriate here also.

CONCLUSION

The decision below should be reversed and remanded.

Respectfully submitted,

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Dated: December 14, 2006

CERTIFICATION OF BAR MEMBERSHIP

The undersigned herewith certifies that he is a member of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted on motion of Richard F. Collier, Jr., on March 12, 2003.

By: /s/ Andrew L. Schlafly
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Dated: December 14, 2006

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