

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 04-4124

DAVID T. SPRINGER, M.D.,	:	
	:	
Plaintiff below,	:	
Appellee,	:	
	:	An appeal from the United
V.	:	States District Court for
	:	the District of Delaware
RENATA J. HENRY	:	C.A. No. 00-885-GMS.
	:	
Defendant below,	:	
Appellant.	:	

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

Andrew L. Schlafly
521 Fifth Avenue – 17th Floor
New York, NY 10175
Telephone: (212) 292-4510
Fax: (212) 214-0354
Attorney for *Amicus Curiae* The Association
of American Physicians & Surgeons

April 26, 2005

CORPORATE DISCLOSURE STATEMENT

David T. Springer, M.D. v. Renata J. Henry, No. 04-4124

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

Andrew L. Schlafly

Attorney for The Association of American Physicians and Surgeons

Dated: April 26, 2005

TABLE OF CONTENTS

Table of Contents.....	iii
Table of Authorities	iv
Statement of Identity, Interest and Source of Authority to File	1
Background.....	2
Argument.....	5
I. Dr. Springer’s Outspokenness For Patient Care Should Be Fully Protected Against Retaliation by the State	8
II. The State is Not Entitled to Qualified Immunity for Retaliation	16
Conclusion.....	22
Certificate of Bar Membership.....	23
Certificate of Compliance	24
Certificate of Service	25

TABLE OF AUTHORITIES

CASES

<i>Atkinson v. Taylor</i> , 316 F.3d 257 (3d Cir. 2003)	17
<i>Baldassare v. State of N.J.</i> , 250 F.3d 188 (3d Cir. 2001).....	8, 9
<i>Bennis v. Gable</i> , 823 F.2d 723 (3d Cir. 1987)	18
<i>Bd. of County Comm'Rs v. Umbehr</i> , 518 U.S. 668 (1996)	15, 17
<i>Brown v. Presbyterian Health Care Serv.</i> , 101 F.3d 1324 (10 th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1181 (1997)	19, 20
<i>Chadha v. Charlotte Hungerford Hosp.</i> , 272 Conn. 776 (Feb. 15, 2005)	18
<i>Clark v. Columbia/HCA Info. Servs.</i> , 25 P.3d 215 (Sup. Ct. Nev. 2001)	21
<i>Commonwealth of Pa. ex rel Rafferty v. Philadelphia Psychiatric Ctr.</i> , 356 F. Supp. 500 (E.D. Pa. 1973).....	8
<i>Czurlanis v. Albanese</i> , 721 F.2d 98 (3d Cir. 1983).....	14, 15
<i>Groh v. Ramirez</i> , 540 U.S. 551 (2004).....	17
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	17
<i>Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.</i> , 268 Va. 187 (2004)	12
<i>Islami v. Covenant Medical Ctr.</i> , 822 F. Supp. 1361 (N.D. Iowa 1992)	20
<i>Jones v. Memorial Hosp. System</i> , 677 S.W.2d 221 (Tex. App. 1 Dist. 1984) ..	15, 16
<i>Kattar v. Three Rivers Area Hosp. Auth.</i> , 52 F. Supp. 2d 789 (W.D. Mich. 1999).....	17-18

<i>Mangieri v. DCH Healthcare Authority</i> , 304 F.3d 1072 (11 th Cir. 2002)	15
<i>O’Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996)	17
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968).....	13, 14, 15
<i>Rode v. Dellarciprete</i> , 845 F.2d 1195 (3d Cir. 1988)	18
<i>Rosner v. Eden Township Hospital District</i> , 58 Cal.2d 592 (1962)	21
<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000).....	1
<i>United States v. Rutgard</i> , 116 F.3d 1270 (9 th Cir. 1997).....	1
<i>Zamboni v. Stamler</i> , 847 F.2d 73 (3d Cir.), <i>cert. denied</i> , 488 U.S. 899 (1988).....	18, 20-21

STATUTES

42 U.S.C. § 11112(a)	19
----------------------------	----

OTHER

Paul Davies, “Fatal Medical Errors Said To Be More Widespread,” <i>Wall Street J.</i> , (July 27, 2004).....	11
Bob Herbert, “Victims of Malpractice Face a New Knife: Health ‘Reform,’” <i>San Jose Mercury News</i> (Aug. 11, 1994).....	9, 10
Lawrence R. Huntoon, M.D., Ph.D., “Abuse of the ‘Disruptive Physician’ Clause,” <i>Journal of American Physicians and Surgeons</i> (Fall 2004).....	21
Gregory M. Lamb, “Fatal Errors Push Hospitals to Make Big Changes,” <i>Christian Science Monitor</i> (July 8, 2004)	10-11
Bob Stuart, “Court Rules for Whistleblower,” <i>News Virginian</i> (June 16, 2004) ...	12

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. AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court 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 interest to AAPS is the growing retaliation by hospitals against physicians who speak out in favor of improved patient care. Retaliation against physicians who speak out for patient care is very real and has a dreadful chilling effect on the entire profession. Free speech is important in all walks of life, but it is absolutely essential in connection with how patients are treated at our public hospitals and facilities. Nothing in federal or state law authorizes or confers

immunity on those who retaliate against a physician for speaking out. AAPS submits this brief to emphasize that legal accountability for hospitals and their administrators must be upheld to ensure that physicians may speak out for patient care in the future without fear of retaliation.

BACKGROUND

“All witnesses agreed that the time in issue, late 1999 – early 2000, was a time of severe decline for the Delaware Psychiatric Center” Appellant’s Opening Br. [*hereinafter*, “App. Br.”] at 12. Appellee Henry herself described the DPC as being in a state of “crisis”. (Henry; *A1135*) At the time, DPC was the only in-patient facility devoted to caring for Delaware’s mentally ill and otherwise disturbed or addicted persons (Sylvester; *A627-32, 641, 659, 661, 1388*), yet the DPC was understaffed from at least 1998 to 2000. (Sylvester; *A254*) The facility was tragically plagued with patient suicides (Sylvester; *A632-33*), and care was deteriorating further. The medical care there was so inadequate that the federal government even sought to deny reimbursements worth \$6.5 to \$7 million. (Sylvester, Springer; *A633-34, 659-60, 690, 787-88*). In a remarkable understatement, former Secretary Sylvester declared that DPC “has been a long-standing challenge for the State.” (Sylvester; *A632, 709*).

While harm to patients posed by DPC is clear to all now, Appellee Dr. David Springer was the one who risked his career by speaking out in favor of patients when many others were silent. It was through Dr. Springer's courageous efforts that public attention became focused upon the DPC, which in turn made improvement possible. As training director at the DPC, it was Dr. Springer who stood up for defenseless mental patients. It was he who demanded better care for them that seems so obvious in retrospect. He should have ultimately been commended by the State for highlighting what others would not recognize or admit until years later. His actions were exemplary in putting the patient before his advancement and even his livelihood. Dr. Springer was the personification in the medical profession of the ideal of "omnia pro aegroto": "all for the patient."

As recounted by the judge below, Dr. Springer courageously spoke about "concerns of a grave nature," thereby expediting remedial action to correct them for the benefit of patients. He described the "egregious conditions" at the DPC (Op.2; A28), which included "at least twenty-three separate topics [including] attempted suicides, security failures (including patient escapes), understaffing, violations of Medicare regulations ... and lack of quality medical care." (Op.1; A5). Dr. Springer was entirely professional in sounding the alarms, documenting and supporting his views in detail in memos. One memo that Dr. Springer sent to

public officials, dated November 23, 1999, detailed his warnings about the poor treatment of patients and the overall crisis at DPC itself. (PX2; A1388). He depicted the unsafe working conditions and lack of adequate staff that subjected patient care to unnecessary risk. (PX2; Sylvester; A639-40, 1388). Five months later, on March 21, 2000, Dr. Springer described in a report for the DPC Governing Body various wrongdoing and fraud, alleging deceit of regulators and observing the risk to patients from decisions made by non-medical personnel. (PX5, Springer; B402-03, 1164-75, 788-89).

Dr. Springer's reward was that the State terminated him. Specifically, the DPC failed to renew his annual contract despite having regularly renewed him in the past. Rather than being commended, Dr. Springer was essentially told to get out. His speaking out for patient care was not welcome or even tolerated. He suffered the same indignation and harm to his career that strikes fear into the heart of every physician in the country who witnesses inadequate medical care. Speak out, and lose your job. Some states have passed whistleblower laws to guard against this in certain circumstances, but in this context it is the First Amendment that provides the real protection against retaliation.

Appellant Henry effectively terminated Dr. Springer not long after he spoke out against the inadequate patient care. The State defends its action on appeal by

citing a lack of a formal bid by Dr. Springer, but the court below observed that “Springer was the only independent contractor psychiatrist asked to submit a proposal that year,” (Op.2; *A41*). Since 1991, DPC terminated only Dr. Springer’s contract among all other contracts with independent contractor physicians. (Sylvester; *A671-72*).

The State denied that it had retaliated against Dr. Springer, but a jury found that it had after hearing testimony and reviewing many exhibits in an exhaustive trial. There was no outlandish verdict or award here that might shock someone’s conscience. The jury awarded less than one million dollars, a modest amount for a physician who risked his professional career for the sake of patients and, as found by the jury, was injured as a result. In the absence of this relief, the chilling effect would deter physicians from ever speaking out in favor of patient care. In mental facilities, where the patients themselves cannot speak out, there would be nothing to check deterioration in care.

ARGUMENT

Retaliation, and the fear of retaliation, create an enormous disincentive for physicians to speak out for improving patient care. Whistleblowers and advocates of quality health care should not fear losing their job or opportunities when they disclose inadequate medical care for patients. The public relies almost entirely on

the medical profession to serve the interests of patients in uncovering, addressing and improving the quality of medical care. Physicians are duty-bound by medical ethics to stand up for patients and be as vocal as possible in reducing and eliminating any deficiencies in care. Medical ethics require a physician to speak out on issues of patient care and safety and on understaffing. (Sylvester; A253-54, 159-60) Appellant David Springer, M.D., acted courageously and commendably in blowing the whistle on the inadequate care of patients at a state facility.

The State's retaliation against Dr. Springer for his outspokenness in favor of patients is an affront to the entire medical profession. The relatively modest award below of less than one million dollars is a small step towards removing the chilling effect of retaliation that silences so many in the medical profession. Even now, few, if any, are willing to sacrifice their careers as Dr. Springer did. If this Court were to overturn the award here, then we can expect no physician to speak out for patient care in a government facility. Where, as here, the jury properly finds that retaliation occurred, affirmance is essential to make it clear that retaliation will not be tolerated against those who stand up for patient care. As explained below, the particularly wanton effect of retaliation in this case and the medical field in general reinforces the need to affirm here.

It is particularly inappropriate for Appellant-Defendant to assert immunity for the retaliation found by the jury. Patients can suffer and even die if physicians and others do not speak out about substandard care. In a state psychiatric facility, it is virtually impossible for patients themselves to complain in a meaningful manner. Yet the State implicitly asserts here a power to retaliate, with immunity, against physicians who decry poor medical care. Nothing in the law supports such an argument, and it should be emphatically rejected.

After hearing from the witnesses and examining the documentary evidence, the jury below found that Appellee Dr. Springer's First Amendment speech was a "substantial or motivating" factor in the State's decision not to renew his contract. There is no basis for overturning this jury verdict. Appellant Henry's appeal raises sixteen issues, none of which have any merit. One question is at the heart of this case, and the answer must be resolved against the State: does the State have immunity to retaliate against an outspoken physician? Surely not. The First Amendment and the interest of patients at public hospitals militate against any condoning of retaliatory conduct.

I. DR. SPRINGER'S OUTSPOKENNESS FOR PATIENT CARE SHOULD BE FULLY PROTECTED AGAINST RETALIATION BY THE STATE.

Speaking out against inadequate patient care at a state facility is of obvious public concern, and the court below properly found this to be protected First Amendment speech. Physicians should be encouraged to disclose problems in medical care so that remedial action may be taken. *See, e.g., Commonwealth of Pa. ex rel Rafferty v. Philadelphia Psychiatric Ctr.*, 356 F. Supp. 500 (E.D. Pa. 1973). “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.” *Id.* at 507-08. There, as here, the caregiver spoke about inadequate care at a state psychiatric hospital, and damages should be awarded for retaliation.

The First Amendment plainly protects Dr. Springer against retaliation for his speech. 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 number one cause of deaths in America is not tragic fires, handguns, car accidents, or other familiar calamities. Instead, the top killer is reportedly hospital errors, incompetence, wrongdoing and cover-ups. "If you add up all the deaths each year from crime, from motor vehicle accidents and from fires, they will not equal the estimated 80,000 people who die in hospitals annually from some form of negligence or malpractice." Bob Herbert, "Victims of Malpractice Face a New Knife: Health 'Reform,'" *San Jose Mercury News* 9B (Aug. 11, 1994). That was ten years ago, and only the tip of the iceberg then. "Scores of thousands of patients

each year are left paralyzed, brain-damaged, blind or otherwise horribly disabled from malpractice.” *Id.*

The ten years since 1994 has seen worsening of care in this respect, due to the enormous chilling effect of retaliation against physicians like Dr. Springer. The incessant intimidation of physicians who speak out about poor care, as Dr. Springer did, has kept the numbers of deaths caused by hospitals astronomically high, and yet undisclosed to the public eye. Several years ago a widely publicized study by the Institute of Medicine reported that hospitals negligently kill as many as 98,000 patients each year, as discussed below. How could that be with so many physicians watching? The answer is illustrated by this case of Dr. Springer, who complained about hospital negligence and found himself subjected to a career-ending action by the hospital. Predictably, the number of deaths caused by hospital negligence has not declined since the Institute of Medicine’s report.

The Christian Science Monitor reported last year 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 (July 8, 2004). The only way to reduce these errors is to stop retaliation against physicians like Dr. Springer who speak out against mistreatment of patients.

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.*, at D5 (July 27, 2004). This Health Grades study was based on data from “37 million Medicare patients in every state over three years.” *Id.* But when physicians like Dr. Springer complain about poor care, they face discipline by the hospital and revocation of their privileges or even license. This retaliation must stop to allow improvement in safety at hospitals.

This type of retaliation by a hospital sets a dreadful precedent for other physicians knowledgeable about poor hospital care. Dr. Scott Plantz published a study of about 400 physicians in a 1998 edition of the *Journal of Emergency Medicine*. He found that almost 1 in 4 of roughly 400 physicians who responded to his survey had been terminated or threatened with termination for reporting problems with patient care. Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series “The Cost of Courage.” His articles

demonstrated the pervasiveness of this problem nationwide, describing in detail the experiences of 25 physicians and a nurse, all of whom experienced retaliation after trying 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 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).

The impact of allowing retaliation against physicians like Dr. Springer is severe. While the hospital benefits economically from hushing up problems and covering up negligence, 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. Killing

the messenger does not resolve the problem. Instead, the State should be held legally accountable.

On appeal, the State insists that Dr. Springer's speech contained falsehoods and was disruptive, but that misses the point. Dr. Springer was right to highlight problems now widely recognized to have existed. He performed a valuable service to his patients and the public by speaking out. Retaliation against a medical professional is not justified by insisting that the speech was disruptive or that a few of the statements are debatable. Six doctors and other members of the DPC Medical Staff attested to the truthfulness of Dr. Springer's statements. Sylvester's testimony reinforced Dr. Springer's concerns (A251-52). Five other doctors reinforced the validity of Dr. Springer's criticisms, and Henry herself admitted to some of their validity. The jury was absolutely correct to affirm Dr. Springer's free speech and reject Henry's arguments.

The facts here fully support Dr. Springer's jury verdict. In *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) a high school teacher was fired from his job by the defendant after he sent a letter critical of the defendant's past handling of proposals to raise more money for the schools to a newspaper. *Id.* at 564. The U.S. Supreme Court held that the plaintiff's free speech rights were violated by the defendant's actions. *Id.* at 565. The Court held that "absent proof of false statements

knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574. Similarly, Appellant violated the free speech rights of Dr. Springer in effectively terminating their relationship. The Court discussed the importance of balancing the employee's interests "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Similarly, this Court in *Czurlanis v. Albanese* decided that the 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*, 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. The district court incorrectly relied on the U.S. Supreme Court's decision in *Bd. 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*, 304 F.3d 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.

Dr. Springer spoke out for patient care, which subjected the administrators of the DPC to scrutiny and criticism. The jury found that he was improperly injured in retaliation, and that finding should be affirmed here on appeal.

II. THE STATE IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR RETALIATION.

The State has no basis for asserting immunity here. A physician has a clear right – and even a professional duty – to engage in First Amendment speech about inadequate care at state facilities. Retaliating against such a physician is a clear violation of his federal constitutional right. “If the law was clearly established, the

immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.” *Groh v Ramirez* 540 U.S. 551, 563-64 (2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). Qualified immunity does not protect such retaliation. *See generally Atkinson v. Taylor*, 316 F.3d 257, 261 (3d Cir. 2003). Moreover, it is so clearly wrong to terminate or fail to renew a contract due to outspokenness for patient care that it would contravene public policy to extend immunity to such circumstances.

The U.S. Supreme Court has clearly established that independent government contractors like Dr. Springer are not to be terminated for exercising their rights under the First Amendment. *See Bd. of County Comm'Rs v. Umbehr*, 518 U.S. 668, 686 (1996) (declaring “the right of independent government contractors not to be terminated for exercising their First Amendment rights”); *see also O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 723 (1996) (“Independent contractors, as well as public employees, are entitled to protest wrongful government interference with their rights of speech and association.”); *Kattar v. Three Rivers Area Hosp. Auth.*, 52 F. Supp. 2d 789, 798 n.8 (W.D. Mich. 1999) (“[E]ven though he was not an employee, his status was similar to that of an employee in that many of the same workplace considerations that apply to

governmental employees' free speech rights also apply to Kattar's role as a provider of services").

This Court has repeatedly rejected arguments for immunity in analogous contexts. Rejecting immunity, this Court has emphasized 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” *Zamboni v. Stamler*, 847 F.2d 73, 80 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988) (quoting *Bennis v. Gable*, 823 F.2d 723, 733 (3d Cir. 1987)). *See also Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3d Cir. 1988) (reversing grant of summary judgment to a governmental entity, holding instead that “[p]ublic employees retain their first amendment right to comment on matters of public concern. Thus, the protected or unprotected character of [plaintiff’s] speech is a preliminary problem of importance.”) (citations omitted).

Limiting immunity in the context of medical care is particularly important in light of public policy in favor of quality medical care. Immunity has been repeatedly rejected for hospitals and other facilities in analogous circumstances of malice or bad faith. Recently, for example, the State of Connecticut abrogated common law immunity for hospital peer reviews when malice exists. *See Chadha v. Charlotte Hungerford Hosp.*, 272 Conn. 776 (Feb. 15, 2005). There, as here, the

court denied a motion for summary judgment based on immunity. Though that case concerned a Connecticut statute, it discussed the public policy interests underlying immunity. There is no public policy justification for protecting malice or retaliation. Quite the contrary, the entire weight of public policy is in favor of encouraging outspokenness about the quality of medical care.

Even where federal law has expressly provided for immunity by hospitals, courts have emphasized the need to limit to its scope where, as here, a jury has found that an administrator has acted improperly. *See, e.g., Brown v. Presbyterian Health Care Serv.*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997). “We are not persuaded by the defendant’s view. Under its theory, a peer review participant would be absolutely immune from liability for [his] actions so long as it produced a single expert to testify the requirements of 42 U.S.C. § 11112(a) were satisfied. This would be in direct contravention to Congress’ intention to provide ‘qualified immunity.’ Moreover, to remove a plaintiff’s claims from the jury simply because ‘a difference of opinion among experts’ exists **would abrogate the jury’s responsibility to weigh the evidence and determine the credibility of witnesses.**” 101 F.3d at 1334 (emphasis added).

This express congressional intent to respect the jury verdict applies with even greater force here. In the *Brown* case, there was no termination of the

physician's privileges, and the ultimate recommendation was modified to "allow[] Dr. Brown to reapply for privileges after fulfilling certain training requirements." *Brown*, 101 F.3d at 1328. Dr. Springer, in contrast, was cut off entirely. The jury verdict is not to be disturbed. *See Islami v. Covenant Medical Ctr.*, 822 F. Supp. 1361, 1374 (N.D. Iowa 1992) ("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.**") (emphasis added).

It is now widely recognized that hospital administrators often cloak their retaliation with pretextual, *post hoc* claims of disruptive speech by the targeted physician. Courts have consistently rejected such rationalization, and the court below was correct in rejecting this argument. "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*, 847 F.2d at 78-79. 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 emphasize 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"); 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."). Appellant Henry's pretextual claims that Springer's speech obstructed DPC policy implementation cannot withstand scrutiny.

There is no immunity for the retaliation proven in this case, and the jury verdict should be sustained.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

/s/ Andrew L. Schlafly

Andrew L. Schlafly

Counsel for Amicus Curiae

521 Fifth Avenue – 17th Floor

New York, NY 10175

Telephone: (212) 292-4510

Fax: (212) 214-0354

Dated: April 26, 2005

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
Andrew L. Schlafly
Counsel for Amicus Curiae

Dated: April 26, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
David T. Springer v. Renata J. Henry, No. 04-4124

FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 4,693 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionately spaced typeface using Microsoft® Word 2002 in Times New Roman 14 pts font.

Dated: April 26, 2005

/s/ Andrew L. Schlafly
Andrew L. Schlafly
Attorney for the *Amicus Curiae*

CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, counsel for *amici curiae* Association of American Physicians and Surgeons, Inc. (AAPS) do hereby certify that the text of this brief in electronically filed form is identical to the text of the paper form and that the electronically filed brief has been checked for virus content using Norton AntiVirus.

The undersigned hereby certifies that on April 27, 2005, he caused the original and nine copies of the attached brief to be delivered by overnight commercial carrier to:

Clerk of the Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

and two true copies to also be delivered by overnight commercial carrier to:

Counsel for Appellants:

March P. Niedzielski
Phebe S. Young
Deputy Attorneys General
Department of Justice
6th Floor
820 N. French Street
Wilmington, DE 19801

Counsel for Appellees:

Stephen J. Neuberger, Esq.
The Neuberger Firm
Attorneys and Counselors at Law
Two East Seventh Street, Suite 302
Wilmington, DE 19801-3707

April 27, 2005

/s/ Andrew L. Schlafly
Andrew L. Schlafly