Case No. 1D05-185

IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA, FIRST DISTRICT

JOHN FULLERTON, M.D.,

Plaintiff/Appellant,

v.

FLORIDA MEDICAL ASSOCIATION, INC.,
JONATHAN B. WARACH, M.D.,
PRAVINCHANDRA ZALA, M.D., and
JOSEPH O. KREBS, M.D.,

Defendants/Appellees.

On Appeal from Final Judgment of Dismissal of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (Case No. 04-CA-129; Judge Jonathan Sjostrom)

UNOPPOSED MOTION OF AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, *INSTANTER*

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UNOPPOSED MOTION OF AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE, INSTANTER*

The American Medical Association ("AMA") moves this Court for leave, under Florida Rule of Appellate Procedure 9.370(a), to file a brief *Amicus Curiae*, *instanter*, in support of Defendants/Appellees, Jonathan B. Warach, M.D., Pravinchandra Zala, M.D., and Joseph O. Krebs, M.D. ("Defendant Physicians"), and for affirmance of the lower court's final judgment. In support of this motion, the AMA states the following:

1. The American Medical Association ("AMA"), is a private, voluntary, not-for-profit corporation, whose members are approximately 245,000 physicians, residents, and medical students. Its members practice in all fields of medical specialization and in every state, and it is the largest medical society in the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health.

2. The AMA submits this brief to present its opinions concerning the importance of medical society peer review programs, such as the Expert Witness Committee ("EWC") adopted by the Florida Medical Association ("FMA").

3. The AMA believes that the rendering of expert medical testimony should be subject to the same exacting standards of professionalism expected of physicians in any other sphere of medical practice. As such, medical testimony should be monitored by peer review programs, such as the EWC, and physicians

failing to maintain the standards set by the medical profession should, if appropriate, be reported to a state licensure board for disciplinary action. An erosion of these standards threatens the viability and stature of the medical profession.

4. Moreover, while the AMA strongly supports the Defendant Physicians' and the lower court's contention that the Defendant Physicians' alleged conduct was privileged under the Health Care Quality Improvement Act, 42 U.S.C. § 11101-11152 (2004), and Florida's counterpart statute, Fla. Stat. § 766.101 (2004), the AMA believes there are other, equally compelling reasons to affirm the lower court's decision—reasons that the AMA, because of its background in health care and its standard setting role in the medical profession, is uniquely qualified to convey to this Court.

5. Specifically, the action of the Defendant Physicians was taken in compliance with their ethical and legal obligations and in support of important public policies, which privilege them from liability. As members of the FMA, their participation in the EWC program also involved constitutionally protected expressive association.

6. All parties have consented to the filing of this brief.

WHEREFORE, the AMA requests that this Court grant its Unopposed Motion for Leave to File Brief *Amicus Curiae, Instanter*.

Respectfully Submitted,

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Dated: June 14, 2005

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Defendants/Appellees.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

STATEMENT OF IDENTITY AND INTEREST. 1

SUMMARY OF ARGUMENT 2

ARGUMENT. 3

INTRODUCTION. 3

I. THE DEFENDANT PHYSICIANS HAD ETHICAL AND LEGAL DUTIES TO REPORT PLAINTIFF'S ALLEGED MISCONDUCT AS A MEDICAL EXPERT WITNESS. 5

A. The Defendant Physicians were ethically required to report what they believed to be Plaintiff's false testimony. 5

B. The Defendant Physicians were legally obliged to report unethical conduct by other physicians. 8

II. SELF-POLICING PEER REVIEW PROGRAMS LIKE THE EWC SERVE THE JUDICIAL PROCESS AND PROTECT THE HEALTH CARE SYSTEM. 10

III. THE EWC ENGAGES IN EXPRESSIVE ACTIVITIES THAT ARE CONSTITUTIONALLY PROTECTED UNDER THE FIRST AMENDMENT'S RIGHT OF FREE ASSOCIATION. 13

CONCLUSION. 15

CERTIFICATE OF SERVICE. 16

CERTIFICATE OF COMPLIANCE. 17

TABLE OF CITATIONS

Cases

Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967, (7th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002). 4, 10, 11

Boy Scouts of Am. v. Dale, 520 U.S. 640 (1997). 14

Deatherage v. State of Washington, Examining Bd. of Psychology, 948 P.2d 828 (Wash. 1997). 11, 12

Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001). 6

Kleinschmidt v. Montes, 551 So. 2d 514 (Fla. Ct. App. 1989). 5, 10

Joseph v. Dist. of Columbia Bd. of Med., 587 A.2d 1085 (D.C. 1991). 9

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). 13

Roberts v. United States Jaycees, 468 U.S. 609 (1984). 14

Statutes and Regulations

42 U.S.C. § 11101-11152 (2004). 4

Fla. Stat. § 456.072 (2004). 8, 10

Fla. Stat. § 458.331 (2004). 8

Fla. Stat. § 766.101 (2004). 4

AMA Opinions and Policies

CEJA Opinion E-9.07. 7

CEJA Opinion E-9.031. 7

HOD Policy H-265.993. . . . . .7, 9

HOD Policy H-265.994. 7

Miscellaneous Authorities

AMA, *Medical Liability Reform – Now! A Compendium of Facts Supporting Medical Liability Reform and Debunking Arguments Against Reform* (December 2004), *at* http://www.ama-assn.org/go/mlrnow. 13

Restatement (Second) Torts § 592A (1977). 5

Restatement (Second) Torts § 598 (1977). 5

STATEMENT OF IDENTITY AND INTEREST

Amicus Curiae, the American Medical Association ("AMA"), is a private, voluntary, not-for-profit corporation, whose members are approximately 245,000 physicians, residents, and medical students. Its members practice in all fields of medical specialization and in every state, and it is the largest medical society in the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health. The AMA submits this brief to present its opinions concerning the importance of medical society peer review programs, such as the Expert Witness Committee ("EWC") adopted by the Florida Medical Association ("FMA").

The AMA believes that the rendering of expert medical testimony should be subject to the same exacting standards of professionalism expected of physicians in any other sphere of medical practice. As such, medical testimony should be monitored by peer review programs, such as the EWC, and physicians failing to maintain the standards set by the medical profession should, if appropriate, be reported to a state licensure board for disciplinary action. An erosion of these standards threatens the viability and stature of the medical profession.

The AMA files this brief by consent of all parties and under Florida Rule of Appellate Procedure 9.370(a).

SUMMARY OF ARGUMENT

Defendants/Appellees, Jonathan B. Warach, M.D., Pravinchandra Zala, M.D., and Joseph O. Krebs, M.D. ("Defendant Physicians"), had both an ethical and a legal duty to report their allegation that Plaintiff had provided false medical expert testimony. Under the *Code of Medical Ethics*, adopted by the AMA and generally recognized by state, county, and specialty medical societies, physicians have an affirmative duty to report unethical conduct, including the proffering of false medical expert testimony. In addition, under Florida law the Defendant Physicians were legally obligated to report false representations made in the practice of medicine. Failure to do so may have resulted in the suspension or revocation of their licenses. This Court should not issue a ruling in this matter that would deter or obstruct these ethical and legal obligations.

Self-policing peer review programs, such as the EWC, also serve important public interests by identifying those who engage in the unethical practice of medicine and by enforcing the professional standards of the medical community. The medical community itself is best equipped to formulate and articulate the standards of its profession and to recognize when those standards have been breached. Thus, self-policing is an essential function of the practice of medicine as well as the administration of justice.

Finally, professional associations and their members, like the FMA and the

Defendant Physicians, have a constitutional right to expressively associate to further their organizational purposes.

ARGUMENT

Introduction

The EWC is a peer review program that provides critical evaluation of medical expert testimony proffered in legal proceedings, particularly in medical malpractice suits. (Complaint, Ex. B.) Under the program's procedural guidelines, members of the FMA are entitled to file complaints with the FMA's Council on Ethical and Judicial Affairs concerning testimony by physicians acting as medical expert witnesses. The EWC functions without regard to whether the testimony is in support of a position urged by a plaintiff or by a defendant. Once a complaint is filed, the physician subject to the complaint is notified of the proceedings and provided a full set of the documents upon which the complaint is based. The EWC then reviews the complaint to determine if a *prima facie* case exists. *Id.*

Cases meeting this threshold are submitted for review by a panel of independent board-certified specialists, each having no economic relationship, competitive or otherwise, with any of the parties. Materials submitted to the panel are redacted to protect the identities of the parties. A majority of the panel then decides whether the charges in the complaint should be dismissed or given a full hearing before the FMA's Council on Ethical and Judicial Affairs. *Id.* Direct

disciplinary action, if warranted, may be taken with respect to FMA members. The EWC may also forward complaints to the Florida State Board of Medicine, the comparable state board in which the physician is licensed, or the state, county, or specialty medical society in which the physician is a member. *Id.*

In the present case, Plaintiff seeks a reversal of the lower court's final judgment dismissing with prejudice the allegations against the Defendant Physicians. Plaintiff contends that the dismissal was unwarranted because the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101-11152 (2004), as well as Florida's counterpart statute, Fla. Stat. § 766.101 (2004), do not grant the Defendant Physicians immunity from monetary liability for their part in the EWC proceedings against Plaintiff.

While the AMA strongly supports the interpretation of HCQIA and the Florida statute espoused by the Defendant Physicians (*see* Brief of Appellees) and the lower court (*see* Order of December 30, 2004), as well as the Seventh Circuit in *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967, 974 (7th Cir. 2001), *cert denied*, 534 U.S. 1078 (2002), the AMA believes there are other, equally compelling reasons to affirm the lower court's decision—reasons that the AMA is uniquely qualified to convey to this Court.

The action of the Defendant Physicians was taken in compliance with their ethical and legal obligations and in support of important public policies, which

privilege them from liability. *See*, *e.g.*, *Kleinschmidt v. Montes*, 551 So. 2d 514, 515 (Fla. Ct. App. 1989); Restatement (Second) of Torts § 592A (1977) ("one who is required by law to publish defamatory matter is absolutely privileged to publish it"); Restatement (Second) of Torts § 598 (1977) (communications of those who act in the "public interest" are privileged). Moreover, as members of the FMA, their participation in the EWC program involved constitutionally protected expressive association. Therefore, the AMA urges this Court to affirm the dismissal of Plaintiff's complaint against the Defendant Physicians.

I. THE DEFENDANT PHYSICIANS HAD ETHICAL AND LEGAL DUTIES TO REPORT PLAINTIFF'S ALLEGED MISCONDUCT AS A MEDICAL EXPERT WITNESS.

The Defendant Physicians were ethically and legally bound to report their claim that Plaintiff engaged in unethical conduct by providing false medical expert witness testimony. The FMA, in turn, had an ethical duty to critically and objectively evaluate the Defendant Physicians' claim and ensure that any finding of unprofessional conduct was either sanctioned or reported to the appropriate authorities.

A. The Defendant Physicians were ethically required to report what they believed to be Plaintiff's false testimony.

As the largest medical society in the United States, the AMA establishes and publishes policies concerning medical issues that represent the consensus viewpoint of American physicians. The AMA Council on Ethical and Judicial

Affairs ("CEJA") publishes the *Code of Medical Ethics*, which includes opinions concerning physicians' ethical obligations to their patients and to the medical community. These opinions serve as guides to physicians for responsible professional behavior.[1] The AMA's *Code of Medical Ethics* is generally considered the most comprehensive, authoritative guide to ethical conduct for physicians in the United States. It is regularly cited by court opinions, including those of the United States Supreme Court. *E.g., Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001).

Additional AMA policies are established by the House of Delegates ("HOD"), the principal policy-making body of the AMA, consisting of elected representatives from state, local, and specialty medical societies throughout the nation. HOD policies are based on the professional principles, scientific standards, and experience of practicing physicians.[2] These policies, too, may address ethical issues.

The AMA recognizes that physicians play a crucial role in the administration of justice, by ensuring that scientifically valid information becomes part of the judicial process. With this role, however, comes the responsibility to testify

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[1] The CEJA Opinions cited in this brief are referenced as "CEJA Opinion E-___," and can be found at http://www.ama-assn.org/ama/noindex/category/11760.html.

[2] The HOD Health and Ethics Policies cited in this brief are referenced as "HOD Policy H-___," and can be found at http://www.amaassn.org/ama/noindex/category/11760.html.

truthfully while providing objective and scientifically valid testimony. In fact, CEJA Opinion E-9.07 states that a physician, both as a citizen and as a professional with "specialized knowledge and experience," has an ethical obligation "to assist with the administration of justice." As such, the AMA encourages its members to serve as impartial expert witnesses. HOD Policy H-265.994.

With respect to the present case, AMA ethical policy is clear: "[p]hysicians have an ethical obligation to report impaired, incompetent, and/or unethical colleagues in accordance with the legal requirements in each state…All other unethical conduct should be reported to the local or state professional medical organization." CEJA Opinion E-9.031. Physicians who receive complaints of inappropriate behavior, in turn, "have an ethical duty to critically, objectively, and confidentially evaluate the reported information and assure that identified deficiencies are either remedied or further reported to a higher or additional authority." CEJA Opinion E-9.031.

The proffering of false medical expert testimony in a legal proceeding constitutes unethical conduct. *See* CEJA Opinion E-9.07. Moreover, AMA policy further states: "all medico-legal expert witness testimony given by a physician should be subject to peer review." HOD Policy H-265.993(2). Accordingly, the Defendant Physicians' decision to report Plaintiff to the FMA was well within the

norm of ethical and professional conduct for physicians. To have done otherwise would have been unethical.

B. The Defendant Physicians were legally obliged to report unethical conduct by other physicians.

Even beyond their ethical obligations, physicians in Florida have a *legal* duty to report those who make false representations in the practice of medicine. Fla. Stat. § 458.331(1)(k). Failure to do so may result in disciplinary action, including civil fines and suspension or permanent revocation of licensure. *Id.*

Chapter 456 of the Florida Statutes prohibits the making of "deceptive, untrue, or fraudulent representations *in or related to* the practice of a profession." (Emphasis added.) Fla. Stat. § 456.072(1)(m); *see also* Fla. Stat. § 458.331(1)(h) and (k). Subsection (1)(i) states that "failing to report to the department any person who the licensee knows is in violation of this chapter" may be grounds for disciplinary action. Fla. Stat. § 456.072(1)(i); *see also* Fla. Stat. § 458.331(1)(e).

The FMA established the EWC to serve as a mechanism by which physicians can undertake their ethical obligation to report professional misconduct in the practice of medicine. As stated earlier, the function of the EWC is to identify physicians who provide false testimony, and then, through the FMA Council on Ethical and Judicial Affairs, report them to the Board of Medicine of the state in which they are licensed. *Supra*, at 3-4. The EWC's layered process of review ensures that only legitimate complaints are forwarded to the appropriate

Board of Medicine and that the system of review is not abused for purposes of retaliation.

In the present case, the Defendant Physicians' complaint to the FMA was based on their belief that Plaintiff had made false representations as a medical expert witness in a malpractice trial. Plaintiff's proffering of testimony in this trial constituted—or at least was "related to"—the "practice of a profession," as he was providing his professional opinion as a physician.

It is broadly accepted that the giving of medical expert testimony is part of the practice of medicine. *Joseph v. Dist. of Columbia Bd. of Med.*, 587 A.2d 1085, 1089 (D.C. 1991) (affirming the District of Columbia Board of Medicine's categorization of the offering of expert witness testimony as the "practice of medicine"). In *Joseph,* a physician serving as a medical expert in a malpractice suit falsely testified about his credentials, including the fact that he was a board certified thoracic surgeon. He was sanctioned by the Board of Medicine for providing a false report in the practice of medicine. The court rejected the physician's argument that the practice of medicine was limited to the "treatment" of patients.

The *Joseph* holding comports with the general standards of the medical profession. HOD Policy H-265.993(1) states, "the giving of medico-legal testimony by a physician expert [is] considered the practice of medicine." As

stated earlier, HOD policies, such as this, are based on the professional principles and experiences of practicing physicians and are promulgated by the principal policy-making body of the AMA. *Supra*, at 6.

Therefore, under Fla. Stat. § 456.072(1)(i), the Defendant Physicians had an affirmative legal duty to report what they believed was unprofessional and illegal conduct by Plaintiff. Their failure to do so may have resulted in disciplinary action by the Florida Board of Medicine, including the suspension or loss of their own medical licenses. This Court should not render a decision that would deter or obstruct physicians from carrying out their legal responsibilities.

II. SELF-POLICING PEER REVIEW PROGRAMS LIKE THE EWC SERVE THE JUDICIAL PROCESS AND PROTECT THE HEALTH CARE SYSTEM.

In deciding whether the Defendant Physicians' complaint to the EWC should be privileged from liability, this Court should consider the important public interests served by such programs. *Kleinschmidt*, 551 So. 2d at 515; *see also supra*, at 5.

The purpose of the EWC is to assure that expert testimony in medical malpractice suits is a true reflection of the actual standard of care. Those who offer false testimony, and thus engage in the unethical practice of medicine, undermine the medical profession and at least indirectly threaten public health. *Austin*, 253 F.3d at 974. Thus, programs like the EWC serve a "strong national

interest…in identifying and sanctioning poor-quality physicians and thereby improving the quality of health care." *Id.*

In *Austin*, a neurosurgeon was sanctioned by a medical society for providing false medical expert testimony in a malpractice suit. *Id.* The neurosurgeon sued the medical society for its disciplinary actions, alleging that the society was merely seeking "revenge" for the fact that he had previously testified against another member of the society. The trial court dismissed the suit, and the Seventh Circuit affirmed, holding that the medical society's expert testimony review program furthered the interests of justice. Moreover, such review serves "an important public policy" in protecting patients from "poor physicians." *Id.* The court stated, "[a]lthough Dr. Austin did not treat the malpractice plaintiff for whom he testified, his testimony at her trial was a type of medical service and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician." *Id.*

Moreover, while courts themselves may serve as a gatekeeper for expert testimony, "judges are not experts in any field except law. Much escapes [them], especially in a highly technical field." *Austin*, 253 F.3d at 973. Thus, in cases that are "technical and esoteric and hence difficult to refute in terms intelligible to judges and jurors…[m]ore policing of expert witnessing is required."

Similarly, in *Deatherage v. Washington Examining Bd. of Psychology*, 948 P.2d 828, 831 (Wash. 1997), a state licensing board brought a disciplinary action against a psychologist, claiming that he had failed to meet ethical standards while offering expert testimony in several child custody suits. The board alleged that the psychologist failed to verify information and mischaracterized statements in the underlying litigation. The court rejected the psychologist's argument that his testimony fell within the state absolute witness immunity doctrine, holding that in addition to protecting the public from unethical professionals, the licensure board action "serve[d] to advance the court's goal of accurate testimony from expert witnesses." *Id.*

In the present case, the EWC serves an important public interest in identifying unscrupulous physicians. Those who provide false medical expert testimony demonstrate poor medical judgment, and the identification of such individuals is the first step in protecting the public from further acts of unprofessional or unethical conduct.

The discouragement of false medical expert testimony also protects patients by relieving physicians of the pressure to engage in inordinate defensive measures in their medical practices. If medical experts are not in some way held to account, some courts could endorse erroneous standards of care. As a result, physicians may expose their patients to unnecessary tests or procedures in order to shield

themselves against later malpractice litigation. Physicians may also be deterred from taking highly difficult cases for fear that they may be held liable for an unfavorable outcome, in spite of the patient's receiving appropriate care. AMA, *Medical Liability Reform – NOW! A Compendium of Facts Supporting Medical Liability Reform and Debunking Arguments Against Reform* (December 2004), *available at* http://www.ama-assn.org/go/mlrnow.

Though most physicians who provide expert witness testimony do so truthfully, others—seemingly motivated by financial gain—do not adhere to ethical or professional standards and often foster the introduction of "junk science" into the judicial system. This practice harms the legal process, reflects poorly on the medical profession itself, and undermines the relationship between physician and patient.

III. THE EWC ENGAGES IN EXPRESSIVE ACTIVITIES THAT ARE CONSTITUTIONALLY PROTECTED UNDER THE FIRST AMENDMENT'S RIGHT OF FREE ASSOCIATION.

Finally, this Court should consider the constitutional protections afforded to programs like the EWC. The discussion of medical standards and the professional review of the practice of medicine are legitimate, well-established expressive activities of medical societies, which are constitutionally protected under their right of free association. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (holding that "freedom to engage in association for the advancement of

beliefs and ideas" is protected under the Due Process Clause and the First Amendment). Expressive association occurs when members of an organization "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). If a group engages in "some form of expression, whether it be public or private," it comes within the ambit of constitutionally protected expressive association. *Boy Scouts of Am. v. Dale*, 520 U.S. 640 (1997).

In the present case, the EWC program involves private activities that directly pertain to the FMA's purpose of serving as an "advocate for physicians and their patients to promote the public health, to ensure high standards in medical education and ethics, and to enhance the quality and availability of health care."[3] Those who participate in the EWC program are members of the FMA who associate in furtherance of this purpose. Although Plaintiff himself was not a member of the FMA, he was nonetheless engaged in the practice of medicine in Florida. Thus, the FMA had every right to draw its own opinion as to whether his conduct should have been brought to the attention of the state licensing authorities. As such, statements by the parties in furtherance of the EWC goals should be constitutionally protected.

[3] *See* About the FMA: Mission, *at* http://www.fmaonline.org/about.asp.

CONCLUSION

WHEREFORE, the AMA requests this Court to affirm the lower court's final judgment dismissing with prejudice Plaintiff's allegations against the Defendant Physicians.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I, John D. Buchanan, Jr., an attorney, certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a).

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