

No. 10-41332

In the United States Court of Appeals for the
Fifth Circuit

David P. Brown, Donald Day, Joe Bland, Andrew Clemmons, M.D.,
Jennifer Hartman, Luis Guerra, and William Todd Campbell, M.D.

Appellants-Defendants

v.

Ajay Gaalla, M.D., Harish Chandna, M.D., and
Dakshesh “Kumar” Parikh, M.D.

Appellees-Plaintiffs.

From the United States District Court
For the Southern District of Texas, Victoria Division
Civil Action No. 6:10-cv-00014

**Brief of Amici Curiae American Medical Association, Texas Medical
Association, and the American Association of Physicians of Indian
Origin in Support of Appellees-Plaintiffs and Affirmance**

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INTEREST OF *AMICI CURIAE*

The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Texas. The Appellees-Plaintiffs in this case are AMA members.

TMA is a private, voluntary, nonprofit association of more than 45,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, TMA's maxim continues in the same direction: "Physicians caring for Texans." TMA's diverse physician members practice in all fields of medical specialization. TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients. The Appellees-Plaintiffs in this case are TMA members.

The AMA and TMA appear herein in their own capacities and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition of the AMA and state medical societies, which represents the views of organized medicine in the courts in accordance with AMA policies and objectives.

AAPI is a forum to facilitate and enable Indian American physicians to excel in patient care, teaching and research and to pursue their aspirations in professional and community affairs. Its vision is to promote professional solidarity in the pursuit of excellence in patient care, teaching and research. The Appellees-Plaintiffs in this case are AAPI members.

Amici and their members subscribe to *AMA Code of Medical Ethics* Opinion E-9.03, which holds that no professional endeavor should be denied to a physician on account of race, color, ethnic affiliation, or national origin. <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion903.page>. *Amici* seek to ensure that medical staff privileges not be deprived on account of ethnic bias or without due process.

Pursuant to Fed. R. App. P. 29(c)(4), the source of authority to file this brief is Fed. R. App. P. 29(a), as all parties to this appeal have consented to its filing. Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel has authored this brief in whole or in part, no party or party's counsel has

contributed money intended to fund preparing or submitting the brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

SUPPLEMENTARY STATEMENT OF THE CASE

Appellant-Defendant David P. Brown is the chief executive officer of Citizens Medical Center (CMC), a county-owned hospital in Victoria, Texas. Appellants-Defendants Donald Day, Joe Bland, Andrew Clemmons, MD, Jennifer Hartman, and Luis Guerra are members of the CMC Board of Directors. Appellees-Plaintiffs Ajay Gaalla, MD, Harish Chandna, MD, and Dakshesh “Kumar” Parikh, MD are cardiologists who hold medical staff privileges at CMC, as is William Todd Campbell, MD, the remaining Appellant-Defendant.

Judge Jack found in her order of December 22, 2010 (R. 2d Supp. 2485-2519) that, prior to 2007, the Plaintiffs regularly admitted patients at CMC and performed their duties as members of the CMC medical staff without a problem. At that point, however, the relationship between Plaintiffs and CMC deteriorated. While the cause of such deterioration is disputed, based on the following facts Judge Jack found substantial evidence of pervasive discrimination against Plaintiffs at CDC on account of their Indian origin:

i. CMC management repeatedly referred to the Plaintiffs as “the Indians” in a derogatory manner and within the context of other discriminatory comments. The most egregious example of such statements was set forth in a March 20, 2007 memorandum authored by the Defendant Brown (the CMC CEO):

I feel a sense of disgust but am more concerned with what this means to the future of the hospital as more of our middle Eastern born physicians demand leadership roles and demand influence over situations that are hospital issues [This] will change the entire complexion of the hospital and create a level of fear among our employees.

At his deposition, Brown acknowledged that these comments were “very clearly” derogatory.

ii. Despite their being board certified, CMC removed the Plaintiffs’ medical staff privileges to implant cardioverter defibrillators. At the same time, CMC granted these privileges to non-Indian cardiologists, who were claimed to be less qualified than the Plaintiffs.

iii. The Plaintiffs were also removed from the CMC Chest Pain Center Committee, while the new cardiologists were allowed to sit on this committee.

iv. CMC removed Dr. Chandna, one of the Plaintiffs, from the CMC peer review committee, allegedly for missing too many meetings of that committee. Dr. Chandna asserts that he attended more meetings than

any other member, except for the chairman. CMC also pressured Dr. Chandna into resigning as director of its cardiac catheterization laboratory.

v. CMC staff refused to call the Plaintiffs when their patients presented at the Chest Pain Center, even when the patients specifically asked to see the Plaintiffs.¹

vi. CMC refused to allow the Plaintiffs to exercise their clinical privileges in the cardiology department or as part of the CMC heart program.

Judge Jack further found, at pp. 14-15 of her order, that CMC effectively terminated Plaintiffs' medical staff privileges, without a hearing or other due process, even though the Plaintiffs' retained some minimal rights to practice at CMC. She held that the evidence was sufficient to require a full trial on whether the Plaintiffs' civil rights were violated under 42 U.S.C. § 1983 and the Fourteenth Amendment.

In addition, the Plaintiffs' brief sets out the detailed evidence that ties Brown and the individual members of the CMC Board of Directors to the discriminatory actions taken against the Plaintiffs. Since no purpose would

¹ Appellants' Brief, at p. 43, attempts to justify this behavior with the observation that "[c]ontacting cardiologists who are 'on call' is a standard procedure and best practice." While the observation is generally true, it is neither standard procedure nor best practice to refuse to contact a patient's regular physician when specifically requested by the patient, particularly when the physician has staff privileges at the hospital. Absent an emergency, confinement in an institution, or other extraordinary circumstance, the medical profession believes that all persons have the inherent right to choose their physicians freely. See *AMA Code of Medical Ethics*, Opinion E-9.06, at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.page?>.

be served by reiterating these latter details, *amici* incorporate them into this brief by reference.

ARGUMENT

Defendants Brown, Day, Bland, Clemmons, Hartman, and Guerra appeal from Judge Jack's order of December 22, 2010, which denied their motion for summary immunity against the claims for violation of the Plaintiffs' constitutional and civil rights. They argue that the medical staff privileges of the Plaintiffs are too ephemeral to be deemed interests in liberty or property, which would be protected under the United States Constitution or 42 U.S.C. § 1983.

This brief is submitted to dispute that argument. Based on the decisions of the United States Supreme Court and of this Court, medical staff privileges fall squarely within the class of valuable rights that enjoy constitutional and statutory protection. As Judge Jack held, a trial is needed to determine whether the deprivation of those rights arose from administrative decisions based on legitimate criteria, as asserted by Defendants, or from racial animus, as asserted by Plaintiffs.

I. Plaintiffs Have Established a Claim Under 42 U.S.C. § 1983, Because Their Medical Staff Privileges Were Terminated as A Result of Racially Discriminatory Criteria, Thus Depriving Them of the Equal Protection of the Laws.

The Fourteenth Amendment provides, *inter alia*, that no state “shall deny to any person within its jurisdiction the equal protection of the laws.” The core purpose of this requirement is that state governmental distinctions between individuals should be based on legitimate criteria. The use of race as a criterion for making such distinctions is presumptively illegitimate and is subject to strict judicial scrutiny. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Unless the state or its agents are able to prove that the distinction serves a compelling governmental objective and is narrowly tailored to meet that objective, the actions arising from the distinction must be stricken as unconstitutional. *Adarand Constructors, Inc. v. Peña* 515 U.S. 200, 227 (1995).

The Equal Protection Clause applies with as much force to county and other governmental officials who perform state functions as it does to direct agents of the state. *Turner v. Fouche*, 396 U.S. 346 (1970). Further, by virtue of 42 U.S.C. § 1983, a claimed denial of equal protection can be brought against individual perpetrators, as well as the state itself. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009).

Judge Jack found substantial evidence to support Plaintiffs' claim that the reduction of their medical staff privileges resulted from racial prejudice. The Appellants shunt this aside with the observation that the actions taken against the Plaintiffs were based on facially reasonable criteria and, according to the Appellants' affidavits, on considerations other than race. Appellants Brief, at 28-37. Both arguments are shown to be fallacious by the reasoning of *Turner v. Fouche*.

There, an African-American school child and her father, representing a class of plaintiffs, sued their county board of education and county jury commission. They claimed that the method used to select jurors and school board members within the county caused African-Americans to be systematically underrepresented as jurors and as members of boards of education and thus violated the Equal Protection Clause. The district court had enjoined the county officials from systematically excluding African-Americans from the county grand-jury system, but it refused to hold the overall selection process unconstitutional either on its face or as applied.

On a direct appeal, the Supreme Court found that the method for selecting jurors and school board members was, on its face, neither unfair nor inherently discriminatory against African-Americans. However, the Court also found that the Plaintiffs had submitted evidence showing that the

method for selecting jurors and school board members was discriminatory in practice. Although the state officials who implemented the selection process had testified that they had acted without racial animus, such testimony was merely evidence for the trial court to consider on remand. Since the plaintiffs had presented a *prima facie* case of racial discrimination, a full trial would be needed to determine whether, as actually applied, the selection process was unconstitutional.

In the instant case, too, the policies at CMC may be racially neutral on their face. However, the Plaintiffs here have presented direct evidence of discrimination on account of their race. Notwithstanding the Defendants' assertions that they acted without racial animus, under *Turner v. Fouche* the Plaintiffs are entitled to a full trial on their claims.

II. Plaintiffs Have Established a Claim Under 42 U.S.C. § 1983, Because They Were Deprived of the Right to Make and Enforce Contracts to the Same Extent as White Citizens.

42 U.S.C. § 1983, provides, in part

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...

The purpose of this statute is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.

Richardson v. McKnight, 521 U.S. 399, 403 (1997).

42 U.S.C. § 1981(a) provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. Section 1981(b) clarifies that the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. Since § 1981 is a law of the United States and guarantees federal rights, it falls within the ambit of § 1983.

Persons protected by § 1981 are not just non-Caucasians; the statutory guarantee extends to any person who might be identifiable by ancestry or other ethnic characteristics. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (Person of Arabic ancestry protected under § 1981). Thus, § 1981 guarantees the Plaintiffs the same right to make and enforce contracts as White citizens of non-Indian origin.

The question remaining is whether, viewing the facts most favorably to the Plaintiffs, the Defendants’ actions deprived them of the right to make or enforce a contract. *Adams v. McDougal*, 695 F.2d 104 (5th Cir. 1983), observed that § 1981 is to be read expansively, based on federal law

concepts and in favor of finding the existence of protectable rights.

Farrington v. State of Tennessee, 95 U.S. 679 (1878), held that a contract is formed when a transaction satisfies the following conditions: parties, consent, consideration, and obligation.

By this standard, the Plaintiffs' acceptance of the CMC offer of medical staff privileges constituted a contract, which CMC impaired through ethnically based discriminatory actions. The first three of the four *Farrington* criteria raise little dispute in their application to the present case: There were parties (the Plaintiffs and CMC), consent (the transaction was voluntary), and consideration (as spelled out in the CMC Medical Staff Bylaws,² the Plaintiffs were to have the right to practice medicine within the CMC hospital facilities (§ 3.4) and to admit their patients to the hospital (§ 4.1.2-2). CMC was to receive monetary remuneration from patients the Plaintiffs admitted to the hospital and the benefit of the physician's services.³ By holding medical staff privileges, the Plaintiffs became responsible for providing medical care to patients in the hospital. *See* CMC Bylaws, Article VIII, §§ 1 & 2; R. 2d Supp. 1918).

² The CMC Medical Staff Bylaws are Exhibit D to the Plaintiffs' response to the CMC motion for summary judgment, which is part of the record in this Court. These bylaws were filed under seal.

³ In this case, CMC not only benefited from the cardiology services Plaintiffs provided to patients at CMC but also received the benefit of Plaintiffs' participation on the CMC peer review committee, participation on the Chest Pain Committee, and direction of the cardiac catheterization laboratory, as well as Plaintiffs' general assumption of leadership roles in the provision of medical services at CMC. *See* pp. 7-8, *supra*.

There was also a mutuality of obligation. The Plaintiffs were obliged to follow the hospital protocols and follow the various other requirements set forth in § 3.4 of the CMC Medical Staff Bylaws. Moreover, aside from any specific provisions in the Medical Staff Bylaws, under Texas common law the Plaintiffs were required to perform their professional duties with care, skill, reasonable expedience and faithfulness. *City of Port Isabel v. Shiba*, 976 S.W.2d 856, 858 (Tex. App. 1998). On its part, CMC was required to make its hospital facilities available to the Plaintiffs and their patients.

There were other obligations as well. Under § 3.2.3 of the Medical Staff Bylaws, CMC was prohibited from terminating or reducing the Plaintiffs' privileges "on the basis of ... race, creed, color or national origin." The Texas Constitution (Art. I, § 3a) and V.T.C.A. Health & Safety Code § 241.101(f) impose the same prohibition against ethnic discrimination upon CMC. Further, CMC was required to provide the Plaintiffs with a due process hearing before it could modify or revoke their medical staff privileges on grounds of incompetence or unprofessional conduct. V.T.C.A. Health & Safety Code § 241.101(c). While such grounds have not been raised in this case, CMC's obligation to provide such a hearing is a contract right accruing to the Plaintiffs by virtue of their medical staff membership. *See Walls Regional Hospital v. Altaras*, 903 S.W.2d 36 (Tex. App. 1994).

Numerous Texas courts, in addition to *Walls Regional Hospital*, have recognized that the relationship between a physician and a hospital is contractual in nature. *E.g.*, *Stephan v. Baylor Medical Center at Garland*, 20 S.W.3d 880 (Tex. App. 2000); *East Texas Medical Center v. Anderson*, 991 S.W.2d 55 (Tex. App. 1998); *Gonzalez v. San Jacinto Methodist Hosp.*, 880 S.W.2d 436 (Tex. App. 1994). Judge Jack's order, at pp. 15-16, found that this contractual relationship was defined, at least in part, by the confluence of the CMC Corporate Bylaws, the CMC Medical Staff Bylaws, and the CMC Hearing & Appellate Review Procedure manual.

Johnson v. Christus Spohn, 2009 WL 1766557 (5th Cir. 2009), is not to the contrary. That case held that a hospital's medical staff bylaws, standing alone, did not create a binding contract between a hospital and a physician on its medical staff. The medical staff bylaws there stated that that the medical staff was empowered only to make recommendations regarding staff appointments, which would not be binding on the hospital board of directors. *Johnson* noted, though, that while medical staff bylaws do not generally create contract rights under Texas law, hospital bylaws can create such rights.

Here, the Plaintiffs' contractual rights derive from the CMC bylaws and the CMC Hearing & Appellate Review Procedure manual, in addition to

the medical staff bylaws. Thus, *e.g.*, Article VIII, § 1 of the CMC Bylaws states:

Each appointee shall have appropriate authority and responsibility for the medical care of patients subject only to such limitations as are set forth in these Bylaws and in the Bylaws, Rule and Regulations, Policies and Procedures of the organized Medical Staff, and such limitations as may be attached to his individual appointment.

This is promise-making, rights-creating language, not just a general statement of nonbinding or aspirational guidelines.

While it may be that certain of the rights appurtenant to the Plaintiffs' medical staff privileges are enforceable only through the actions of public authorities, *Stephan v. Baylor Medical Center*, 20 S.W.3d at 886, such factor should not enter into the § 1981 analysis. The protections of § 1981 are determined by federal principles and are not dependent on the legal nuances of a particular state. *Adams v. McDougal*, 695 F.2d 104 (5th Cir. 1983). By entering into a contract, parties can arrange their affairs based on anticipated future performance by the other contracting parties. Thus, the parties can benefit from the future performance of others. 1 Williston, *Treatise on the Law of Contracts 2d* (ALI 1979), § 1.1. As the Supreme Court noted in *Farrington v. State of Tennessee*, 95 U.S. 679, 682 (1878), contracts “give stability to the present and certainty to the future. ... They are the springs of business, trade, and commerce.”

The purpose of § 1981 is to allow all persons in the United States to enjoy these important legal and economic advantages, to the same degree as do White persons. The CMC board resolution of February 17, 2010, which closed the cardiology department to the Plaintiffs, deprived them of the right to make a contract on the same basis as the non-Indian cardiologists on the CMC medical staff. Likewise, the other reductions in their privileges deprived the Plaintiffs of the right to perform and enjoy the benefits of their contracts on the same terms as those accorded to the non-Indian cardiologists. Thus, the Plaintiffs were deprived of the benefits articulated by *Williston* and *Farrington*. If the Defendants' actions were motivated by the Plaintiffs' ethnic origin, then those actions violated § 1981. And, if the Defendants violated § 1981, they are liable to the Plaintiffs under § 1983.

III. Plaintiffs Have Established a Claim Under 42 U.S.C. § 1983, Because They Were Deprived of the Property Rights in Their Medical Staff Privileges Without Due Process of Law.

Plaintiffs have proffered substantial evidence that their medical staff privileges were diminished because of ethnic animus. They were therefore deprived of a property right without procedural or substantive due process. This deprivation was a violation of the Fourteenth Amendment, made actionable under 42 U.S.C. § 1983.

The hallmark of property under the Due Process Clause is a personal entitlement grounded in state law, which cannot be removed except for cause. Protected property interests can be as varied as “the whole domain of social and economic fact.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). In general, enforceable contract rights are deemed to be property rights. 1 Williston, *Treatise on the Law of Contracts 2d* (ALI 1979), § 1.1.

As discussed *supra*, the Plaintiffs’ medical staff privileges are a contract right. It is well-settled in this circuit that those privileges may constitute a property interest, protected under the Due Process Clause of the Fourteenth Amendment. Such interest is recognized when there is a prohibition against termination of those privileges, except upon a hearing and finding of cause. *Darlak v. Bobear*, 814 F.2d 1055, 1061 (5th Cir. 1987). Here, that prohibition arises from (at least) provisions in the CMC medical staff bylaws, the CMC corporate bylaws, and Texas statutory law.

Even if CMC has a right to terminate those privileges for legitimate administrative purposes, it cannot deprive the Plaintiffs of their rights for improper, racially discriminatory reasons. In *Perry v. Sindermann*, 408 U.S. 593 (1972), a professor who taught at a junior college had publicly disagreed with the school administration over school policy issues. After ten years’ of

the professor's service, the school refused to renew his contract. The professor claimed that the reason for the non-renewal was the exercise of his right of free speech. The administration, in turn, asserted that the non-renewal had been unrelated to the professor's public statements.

The professor sued for deprivation of his property rights without constitutionally mandated due process. The trial court granted summary judgment to the school because, it held, the professor had no right to have his contract renewed. However, the Supreme Court found that there had been a constitutional deprivation, stating the following:

The first question is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendment. We hold that it does not.

[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.

In this case ... the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the right to free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment.

408 U.S. at 596-598. Thus, the professor was entitled to a trial to determine whether his right of substantive due process was infringed because he had exercised his right of free speech.

Similarly, *Sosa v. Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971), held that a physician was entitled to a due process hearing to determine whether a hospital's refusal to admit him to its medical staff was based on criteria reasonably related to the operation of the hospital. Because the hospital was county-owned, it was required to operate in a fair and rationale manner. It erred by failing to provide an administrative hearing at which the physician would be entitled to present (and rebut) evidence pertaining to his fitness to serve on the medical staff.

By the same rationale, CMC may have had the right to terminate the Plaintiffs' privileges for legitimate reasons, based on its judgment as to the best interests of the hospital. However, CMC had no right to terminate those privileges arbitrarily or because of impermissible criteria – the Plaintiffs' ethnic backgrounds. The Defendants' self-serving affidavits are insufficient to determine whether, in fact, they acted for proper reasons, and Judge Jack correctly ruled that a trial is needed to determine the true motivations behind those actions.

CONCLUSION

CMC terminated, or at very minimum severely reduced, Plaintiffs' medical staff privileges. These privileges convey substantial economic value. In an even broader sense, Plaintiffs require these privileges to serve the patients who rely on them for medical care. CMC hospital privileges, therefore, are essential components of the Plaintiffs' professional practices. These privileges are contractual in nature. They carry concrete significance in day-to-day medical practice and are enforceable under Texas law. They are neither ephemeral nor subject to the hospital's whim.

Plaintiffs have adduced substantial evidence to support their charge that CMC, the individual members of its Board of Directors, and its Chief Executive Officer were motivated, at least in part, by racial animosity against the Plaintiffs. If that is, indeed the case, then at least CMC and possibly other Defendants have violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as 42 U.S.C. § 1981. If so, they are liable under 42 U.S.C. § 1983. The Plaintiffs are therefore entitled to a trial on whether their privileges were terminated or substantially diminished for improper reasons and whether the reasons stated for the Defendants' actions are pretextual.

Judge Jack's Order of December 22, 2010 should be affirmed as to the Appellants-Defendants Brown, Day, Bland, Clemmons, Hartman, and Guerra. *Amici* take no position regarding the appeal of Dr. Campbell.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief was produced in Times New Roman 14 point typeface using Microsoft Word 2003 and contains 4,501 words. I further certify that all required Privacy redactions have been made as required by 5th Cir. R. 25.2.13; that the electronic submission is an exact copy of the paper document as required by 5th Cir. R. 25.2.1; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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PROOF OF SERVICE

I, Donald P. Wilcox, certify that on this 7th day of June, 2011, a copy of the foregoing Brief of *Amici Curiae* the American Medical Association, the Texas Medical Association, and the American Association of Physicians of Indian Origin in Support of Appellees-Plaintiffs and Affirmance was served on all counsel of record by electronically filing it with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Appellate ECM/ECF system, which automatically provides electronic notification to the following persons:

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