

STATE OF CONNECTICUT

SUPREME COURT

SC 17029

MOHINDER CHADHA, M.D.

VS.

CHARLOTTE HUNGERFORD HOSPITAL, SAMUEL LANGER, M.D.,
MICHAEL KOVALCHIK, M.D., JUSTIN SCHECHTER, M.D. AND ROBERT STINE, M.D.

BRIEF WITH APPENDIX OF AMICI CURIAE
AMERICAN MEDICAL ASSOCIATION AND
CONNECTICUT STATE MEDICAL SOCIETY

FOR THE AMICI CURIAE,

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STATEMENT OF ISSUES

The Supreme Court granted certification for appeal limited to issues set forth at 265 Conn. 902 (2003). Amici, the American Medical Association and the Connecticut State Medical Society, rely on the defendants' brief relative to the first issue and submit that the Appellate Court properly concluded that a denial of a motion for summary judgment, filed on the basis of absolute immunity, is a final judgment for purposes of appeal. State v. Curcio, 191 Conn. 27, 463 A.2d 566 (1983). Amici requested permission to file a friend of the court brief due to the important ramifications of the Appellate Court decision on health care.

Amici, as professional organizations committed to effective peer review procedures, address the second issue approved for appeal:

Did the trial court err in denying the defendants' motion for summary judgment as:

- (1) the defendants, informants in quasi judicial proceedings are entitled to absolute immunity;
- (2) the defendants' affidavits submitted in medical licensing proceedings are entitled to a presumption of good faith; the plaintiff failed to make the requisite showing of malice; and defendants were entitled to summary judgment as a matter of law.

TABLE OF AUTHORITIES

Cases

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STATEMENT OF INTEREST

Amicus, the American Medical Association (“AMA”), is the largest organization of physicians in the United States with over 250,000 members. Amicus, the Connecticut State Medical Society (“CSMS”), is the federation of eight county medical associations with total membership exceeding 7,000 physicians. The purpose of both the AMA and CSMS is to promote the science and art of medicine and the betterment of public health.

The Department of Public Health (“the Department”) has been given broad powers to regulate and to investigate all medical care providers licensed in the State of Connecticut. See, Conn. Gen. Stat. Secs. 19a-14 and 19a-17et seq. Physicians are ethically and legally required to report fellow physicians who may be considered impaired or incompetent. Conn. Gen. Stat. Sec. 20-13d; AMA Code of Medical Ethics E-9.031. On May 16, 2001, CSMS House of Delegates passed a resolution to encourage member physicians to participate in Department of Public Health case reviews and to promote cooperation between its members and the Department. See HOD Resolution A-01.

Amici are filing this friend of the court brief to delineate the practical effect of the appellate court decision on their members. The decision discourages physicians from reporting colleagues who may appear impaired, incompetent or unethical as well as discourages physicians from cooperating with the Department of Public Health in investigations and proceedings. The threat of exposure to protracted contentious and potentially costly litigation chills any consideration of legal and ethical obligations and undermines the validity of the peer review process.

STATEMENT OF FACTS

On March 3, 1997, Charlotte Hungerford Hospital (“the Hospital”) referred the plaintiff, Dr. Chadha, a psychiatrist with full attending privileges, to the Impaired Physician Program of the Connecticut State Medical Society due to “concern for his emotional health and our responsibility for appropriate medical care for our patients.” (Chadha App. at A-04, 05).

Pursuant to the Impaired Physician Program, M.B. Shimelman, M.D. examined Dr. Chadha on March 7 and 14, 1997. In a written report, Dr. Shimelman opined that “Dr. Chadha cannot practice psychiatry with reasonable skill and safety as a result of his paranoia.” (Chadha App. A-08). On March 17, 1997, the Hospital retained Justin Schechter, M.D., an outside consultant, to perform an independent review of Dr. Chadha’s medical records. Dr. Schechter opined that Dr. Chadha would benefit from a review of psychopharmacology and remedial work regarding the utilization of medications and the handling of psychopharmacological side effects. (Chadha App. at A-26)

On March 19, 1997 Neil Grey, M.D., Director of the Impaired Physician Program, filed a report with the Department of Public Health as required pursuant to Protocol Governing Participation of Established Medical Organizations in the Implementation of Public Act 84-148. Dr. Grey referred the plaintiff to the Department because Dr. Chadha would no longer cooperate with the Physician Health Program.

The Department initiated an investigation and obtained affidavits from Dr. Samuel Langer, Chairman of the Hospital’s Department of Psychiatry, Dr. Michael Kovalchik, President of the Hospital’s Medical Staff, Dr. Robert Stine, Director of the Hospital’s

Inpatient Services for the Department of Psychiatry and Dr. Justin Schechter, the Hospital's expert consultant. The Department submitted a Motion for Summary Suspension supported by a Statement of Charges, the affidavits of Doctors Langer, Kovalchik, Schechter and Stine, and the psychiatric evaluation by Dr. Shimelman to the Connecticut Medical Examining Board. (Chadha App. at A- 20)

Following the full hearing on the charges, Dr. Chadha filed civil lawsuits alleging, inter alia, defamation and malicious prosecution against the Connecticut Medical Examining Board, Neil Grey, M.D., M.B. Schimelman, M.D., the Hospital and Doctors Langer, Kovalchik, Schechter and Stine. The plaintiff's remaining claims against the Hospital and physicians arise out of the affidavits executed at the Department's request. (See attached at A1- A7). The defendants moved for summary judgment on the ground that the defendants were immune from suit as informants in quasi-judicial proceedings. Amici adopt and rely on the procedural history set forth in the lower court decision and the defendants' brief.

ARGUMENT OF LAW

- I. ABSOLUTE IMMUNITY PROTECTS INFORMANTS IN QUASI JUDICIAL PROCEEDINGS INVOLVING HEALTH CARE PROFESSIONALS FROM LAWSUITS ARISING OUT OF THOSE PROCEEDINGS.

At common law an individual who makes statements in connection with quasi-judicial proceedings is entitled to absolute immunity. See, Petyan v. Ellis, 200 Conn. 243, 510 A.2d 1337 (1986). The purpose of providing absolute immunity is to prevent witnesses from being threatened, discouraged or otherwise refusing to cooperate with governmental or regulatory bodies out of fear of subsequent lawsuits. See, Field v. Kearns, 43 Conn. App.

265, 682 A.2d 148 (1996). Dr. Chadha's retaliatory filing of multiple lawsuits upon the resolution of the Department licensing action exemplifies the chilling, time-consuming, costly actions that will inhibit individuals from coming forward to express opinions regarding a physician's medical practice.

The Appellate Court held that Conn. Gen. Stat. Secs. 19a-17b and 19a-20 abrogate the common law right to absolute immunity and provide only qualified immunity to informants in peer review proceedings. However, a close analysis of the overall statutory scheme requires that the appellate decision be overturned and the reasoning of the dissent be adopted.

Amici urge the court to look not only to the words of General Statute Sections 19a-17b(b) and 19a-20, but also to the legislative policy that the body of peer review, mandatory reporting and licensing review statutes were designed to implement. See, Babcock v. Bridgeport Hospital, 251 Conn. 790, 819 (1999).

Conn. Gen. Stat. 19a-17b(b) provides in relevant part:

"No cause of action shall arise against, any person who provides testimony, information...to any professional licensing board... when such communication is intended to aid in the evaluation of the qualifications, fitness or character of a health care provider and does not represent as true any matter not reasonably believed to be true."

Conn. Gen. Stat. Sec. 19a-20 provides in relevant part:

"...no person making a complaint or providing information to any of such boards or the Department of Public Health as part of an investigation...or a disciplinary action... shall, without a showing of malice, be personally liable for damage or injury to a practitioner arising out of any proceeding of such board or department."

Similar statutory provisions were reviewed in Attaya, M.D. v. Shoukfeh, M.D., 962 S.W.2d 237 (Tex. App. 1998). As in the case at bar, in Attaya, a doctor brought suit claiming that

the defendant-doctor provided information to the Texas State Board of Medical Examiners in bad faith. In concluding that the Medical Practice Act did not afford a private cause of action, the court evaluated the impact of providing only conditional immunity and its impact on mandatory reporting statutes similar to Connecticut General Statute Sec. 20-13c. The reasoning of the Texas court applies with equal force to this case:

[T]he qualified immunity provisions of the Medical Practice Act do not repeal, destroy, diminish or supercede common law absolute immunity. Qualified immunity alone, whether by statute or common law, does not adequately protect the party informant's interest or promote the board's government function. In this connection, absolute immunity is necessary to encourage parties to fully utilize the governmental grievance process without fear of reprisal. Likewise, the mere threat of retaliatory lawsuits, however meritless, is sufficient to discourage physicians from complying with mandatory provisions of section 5.06(d) which requires licensed physicians, medical students and other designated persons to report relevant information to the Board on acts of physicians whose actions constitute a threat to the public welfare through the practice of medicine.

Our Appellate Court dismissed the Attaya decision claiming: "we are not convinced that the general policy announced by the courts of granting absolute immunity to those who make statements in connection with quasi-judicial proceedings should overcome the legislature's validly expressed will, which is to provide a qualified, but not absolute, immunity to those who fall within the purview of Sections 19a-20 or 19a-17." Ironically, in trying to give weight to certain provisions, the Appellate Court thwarts the entire body of statutory law regarding peer review. The effect of the Appellate Court's ruling is to wipe out a statutory scheme intended to provide absolute immunity to physicians reporting health care providers who may pose a risk to their patients. It is very unlikely that the legislature intended this result. The long-standing principal of absolute immunity for communications published in the course of judicial or quasi-judicial proceedings is essential to achieve the legislative goal of identifying incompetent doctors.

Pursuant to the Appellate Court's reasoning, whenever the Department fails to sustain its burden of proof, the Medical Examining Board and any physicians who provided information to the Board may be subjected to meritless, retaliatory lawsuits. Such a result is untenable and undermines the integrity of licensure procedures for health care providers. The possibility that a health care professional with an improper motive might successfully use the reporting system to harm a competitor is exceeding remote. The complaint and investigation are confidential for eighteen months. If independent review does not verify the concerns raised, the matter is concluded and remains confidential. Conn. Gen. Stat. Sec. 20-13e. If probable cause is found that a physician poses a threat in the practice of medicine to the health and safety of any person, there is notice and opportunity for a full hearing, Conn. Gen. Stat. Sec. 20-13e(e) and after the hearing, the right to appeal. Conn. Gen. Stat. Sec. 19a-12.

The chilling effect of the Appellate Court decision on AMA and CSMS members is undeniable. Health care professionals will be reluctant to initiate an investigation of a medical professional whose behavior raises questions regarding his or her ability to practice medicine safely. Individual members will not cooperate in investigations as consultants for fear that expressing their opinions will subject themselves to litigation and potential personal liability. Without consultants, the entire process is undermined. In light of its practical impact, qualified immunity is clearly insufficient to protect the public from unsafe health care practices and virtually ensures professional silence.

In its most basic terms, the entire statutory scheme is structured to insure that physicians police themselves for the benefit of the patient and the public. The unlikely possibility that a health care professional might use the system to professionally harm a

competing medical professional is far outweighed by the stifling impact of retaliatory lawsuits on the peer review process and mandatory reporting. While it is unlikely that a physician will attempt to abuse the system to affect competition, it is very likely that a physician who is the subject of an investigation will be angry with the individual, doctor(s) or committee that initiated the proceedings and, therefore, may file a retaliatory lawsuit. A risk benefit analysis of absolute immunity weighs heavily in favor of its preservation.

The Appellate Court's reliance on that portion of General Statute Section 19a-20 which provides "that a person making a complaint or providing information ... to the Department of Public Health...shall be entitled to indemnification and defense in the manner set forth in Section 5-141d with respect to a state officer or employee" is misplaced and demonstrates the court's failure to appreciate the practical ramifications of its decision. The statute, at best, provides for a defense and does not entitle a person to counsel of choice. In addition, the Attorney General has the power to withhold a defense. In that event, the physician must incur legal fees and costs and will be reimbursed by the state only after the conclusion of the case and only in those cases where the physician prevailed. In addition, legal fees and costs are paid only in such amounts as the Attorney General determines to be reasonable. It is clear that the statutory indemnification conditionally provided to a reporting or consulting physician is hardly sufficient to eliminate or significantly reduce the personal and professional impact of defending a potentially meritless and protracted lawsuit. It is also clear that qualified immunity is no comfort to a health care professional who may be faced with protracted contentious litigation handled by an attorney, not of his own choosing.

Without absolute immunity, the reporting or consulting physician must endure the unquantifiable personal and professional impact of litigation where his professional judgment and integrity are being challenged. The checks and balances afforded the reported physician and discussed above do not apply. There is no period of confidentiality, independent investigation or finding of probable cause. Discovery is likely to include numerous depositions in an effort to prove malice or, at least, to create a question of fact sufficient to ensure a trial. Even if the reporting or consulting physician prevails, he or she loses. As noted by Judge Landau in his dissent, “[i]f in time qualified immunity saves the day for the defendants and they are indemnified for their legal defense, it will come after years of litigation, involving time and stress on the parties and many judicial resources. Here, qualified immunity is as good as no immunity.” Chadha v. Charlotte Hungerford Hospital, 77 Conn. App. 104,123, 822 A.2d 303 (2002).

Amici urge the court to hold that common law absolute immunity applies to these defendants who submitted information under oath to a governmental body in a proceeding in which the plaintiff was afforded due process.

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

In this case, the trial court also determined that although the plaintiff failed to make the requisite statutory showing of malice needed to overcome even qualified immunity, the defendants were not entitled to judgment as a matter of law because the defendants did not submit documentation in accordance with the Practice Book. (R. at 101). Amici disagree. A motion for summary judgment may be predicated on pleadings and affidavits. Conn.

Prac. Bk. Sec. 17-49. The defendants referred to the underlying affidavits in their Memorandum in Support of the Motion for Summary Judgment and noted that the affidavits were available for the court's review as exhibits to the plaintiff's revised complaint. (See Memorandum in Support of Motion for Summary Judgment at 3). The affidavits are available to this Court on appeal. (See, Defendant's Appendix at A25 – A30 and Plaintiff's Appendix A23 – A28). If this Court determines that absolute immunity is not available to the defendants, then Amici request that this Court exercise its discretion to address whether the trial court was correct in denying the defendants' motion for summary judgment based on conditional immunity as a matter of law. See, Commissioner of Social Services v. Smith, 265 Conn. 723, 733, 830 A.2d 228 (2003) The lower court's finding that the defendants failed to submit the proof necessary for summary judgment, despite referral to the affidavits, raises issues which are important to resolve. The interests of public policy, clarity, simplicity, directness and economy of judicial action support the exercise of the court's discretionary powers of review.

Amici submit that the affidavits filed by Doctors Langer, Kovalchik, Schechter and Stine referred to in defendants' Memorandum in Support of the Motion for Summary Judgment constitute sufficient documentation to place the burden on the plaintiff to make a showing of malice. Affidavits are legal declarations made under oath and are presumed to be true and reasonably made. An affidavit submitted in a judicial or quasi-judicial proceeding clearly stands as the affiant's declaration that the affidavit is made in good faith and therefore, without malice. Conn. Gen. Stat. Sec. 19a-20 provides: "no person...shall, without a showing of malice, be personally liable for damage." The lower court found that the plaintiff failed to make the requisite showing of malice. (R. at 101). To suggest that the

defendants must submit additional documentation beyond the sworn affidavits already before the court further dilutes whatever limited protection qualified immunity affords.

CONCLUSION

The Appellate Court decision in this case has a significant chilling impact on AMA and CSMS members' willingness to engage in review of fellow physicians' conduct and competence as well as to act on information suggesting incompetence by reporting the same to the Department of Public Health as required by law. The Appellate Court decision further discourages voluntary cooperation with investigations by the Department and undermines the important role peer review plays in the delivery and establishment of quality medical care.

Amici urge the court to reverse the decision of the appellate court and find as a matter of law that CHH and Doctors Langer, Kovalchik and Schechter are entitled to absolute immunity. In the alternative, amici request that the court find that when the information given for the purposes of peer review is in the form of affidavits or under oath that there is a presumption of truthfulness or good faith which the court may consider on a motion for summary judgment. The statutory burden is on the plaintiff to show malice in order to sustain a cause of action. As the plaintiff failed to make the requisite showing of malice, the defendants are entitled to judgment as a matter of law.

Respectfully Submitted Amici Curiae
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AMA Code of Medical Ethics E-9.031A8

CSMS HOD Resolution A-01.A9

Conn. Gen. Stat. § 5-141dA10

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