4 Civil No. G036080

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

INTEGRATED HEALTHCARE HOLDINGS, INC.

Plaintiff and Respondent,

v.

MICHAEL FITZGIBBONS, M.D.

Defendant and Appellant.

On Appeal from Order Entered on September 12, 2005 in
Orange County Superior Court
Honorable Geoffrey T. Glass, Judge
Case No. 05CC07563

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF DEFENDANT AND APPELLANT

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I. STATEMENT OF INTEREST

The California Medical Association ("CMA") is a non-profit, incorporated professional association of more than 30,000 physicians practicing in the State of California. CMA's membership includes California physicians engaged in the private practice of medicine in all specialties. CMA's primary purposes are ". . . to promote the science and art of medicine, the care and well-being of patients, the protection of public health and the betterment of the medical profession." CMA and its members share the objective of promoting high quality, cost-effective health care for the people of California.

A proper interpretation of the anti-SLAPP law is crucial to CMA's members because in today's complex environment, physicians act not only as healers but as advocates, information providers and citizens who speak out on issues relating to health care. In fact, depending on the area, a physician's speech in the public arena may be mandated by law or ethics. As a result, physicians are particularly in need of the protection of the anti-SLAPP law.

II. THE CALIFORNIA ANTI-SLAPP LAW SHOULD BE CONSTRUED BROADLY TO PROTECT PHYSICIANS' SPEECH ON ISSUES RELATED TO HEALTH CARE.

There is a fundamental public interest in encouraging physicians to voice their opinion on policies and practices that affect the health of their patients. In fact, the law requires physicians to speak up in certain circumstances. *See,* e.g., *Wickline v. State of California* (1986) 192 Cal.App.3d 1630, 239 Cal.Rptr. 810 (physicians have an affirmative obligation to challenge cost containment decisions

which deny or improperly restrict access to medically necessary care.) Health care is not a commodity and thus "has a special moral status and therefore a particular public interest." (Report by Managed Health Care Improvement Task Force convened by Governor Wilson pursuant to Health & Safety Code §13421 entitled "Government Regulation and Oversight of Managed Health Care.") For this reason, the law protects physicians from retaliation where they advocate for medically appropriate health care for their patients. (*See* Business & Professions Code §§2056 and 2056.1.) This is true particularly since physicians and medical staffs have been increasingly involved in significant disputes with hospital administration and hospital boards regarding medical staff operations and the medical staff's rights and responsibilities to oversee the delivery of medical care in the hospital. These disputes ultimately led the California Legislature to pass Business & Professions Code §2282.5, setting forth unequivocally the minimum self-governance rights of the medical staff in the face of obstruction or hindrance of its rights by any person or entity, including the board of directors or owners of the hospital. However, without the anti-SLAPP laws, these protections do not suffice to promote robust advocacy by physicians on public health issues.

Often when a physician speaks out on an issue regarding the delivery of health care, the financial and/or emotional stakes are high. Judged from a SLAPP filer's purely economic point of view, a SLAPP lawsuit may be a more cost effective mechanism for eliminating a physician's criticism than trying to respond appropriately on the merits to the criticism that has been expressed.

The role physicians play as information providers is inseparable from their role as health care providers in today's complex environment. It is a fundamental premise of American jurisprudence that "true consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks. . .". (*Canterbury v. Spence* (D.C. Cir. 1972) 464 F.2d 772, 780.)

Accordingly, as this Court said in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 245, "the patient's right of self-decision is the measure of the physician's duty to reveal." This occurs in the physician/patient relationship, but it also occurs in the broader society, as physicians investigate and speak out about health risks and dangers.

To protect physicians when they speak out about health care issues, the law has provided protection in some areas, as state above. The California Legislature has specifically provided that physicians should not suffer retaliation for speaking out on matters of quality health care. (Business & Professions Code §2056.) The Legislature has also enacted specific protections for reporting of child abuse, sexual assault and other forms of misconduct or criminal activity. (*See*, e.g., Penal Code §11172 [immunity for reporting child abuse]; Welfare & Institutions Code §15634 [immunity for reporting elder and dependent adult abuse]; Penal Code §11161.9 [immunity for reporting injuries by firearm or by criminal act].) These protections, however, would be severely undermined without the specific procedural remedy made available by the anti-SLAPP statute. A carefully crafted

complaint will plead libel, slander or interference with economic advantage in a way which makes it impossible to dispose of the lawsuit expeditiously without the anti-SLAPP law. It is to prevent this inappropriate burden on the right to free speech or to petition that the anti-SLAPP statute was enacted.

Particularly in this era of dwindling reimbursements for hospitals and physicians, the rising costs of health care, and concern for financial solvency of medical groups, hospitals and hospital systems, physicians must be able to speak out freely about matters which may impact the community's or their patients' care, including, e.g., the potential for insolvency of the hospital system owned and operated by IHHI in this case. But to be able to speak freely, physicians must also know that their rights to do so, as well as their right to advocate and participate in issues impacting access to quality care, are not illusory. Physicians must know these rights will be safeguarded by the courts. Without judicial recourse against the tactics of others who intimidate physicians to silence their criticisms, physicians will never be able to truly and completely fulfill the panoply of their professional obligations to their patients.

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III. THERE IS NO DOUBT THAT DR. FITZGIBBONS' EMAIL WAS COMMENTING ON A MATTER OF ONGOING PUBLIC INTEREST. IT INVOLVED A MATTER THAT WAS ALREADY SUBJECT TO PUBLIC SCRUTINY ONLY SEVERAL MONTHS BEFORE, AND INVOLVED AN INHERENT QUESTION WHETHER IHHI'S DEFAULT ON TWO MULTI-MILLION DOLLAR LOANS COULD LEAD TO INSOLVENCY, BANKRUPTCY, AND COULD DISRUPT DELIVERY OF HEALTH CARE FOR THOUSANDS OF PEOPLE IN THE REGION.

Dr. Fitzgibbons's communications at the heart of this case expressed his analysis of, and concerns for, the financial viability of the four-hospital system owned and operated by IHHI. (*See* AA186 for a copy of the communication at issue.) Given the history of involvement of the medical staff of Western Medical Center—Santa Ana (WMCSA) (including Dr. Fitzgibbons) in fighting against the purchase of the four hospitals by IHHI, in fighting against Dr. Chaudhuri's involvement in the ownership and/or operations of the hospitals, and in successfully fighting for the assurances the medical staff obtained in a legally-binding contract with IHHI that permitted the sale to be completed, there is little wonder that Dr. Fitzgibbons' email was derisive of IHHI. In spite of all that history, in spite of all the public protest, public hearings, and public involvement to assure the purchase of the hospitals would not, intentionally or inadvertently, convert the hospitals to a real estate developer's nirvana, Dr. Fitzgibbons and the physicians at the four hospitals saw what they thought was a harbinger of their worst nightmare – insolvency and bankruptcy of the system.

It is unfathomable to amicus CMA that IHHI would consider Dr. Fitzgibbons' communication about its financial situation, including reference to

IHHI's defaults on loans, one a $50 million loan and one a $30 million line of credit,[1] to be anything other than a communication on a public issue or a matter of public interest. The solvency and successful operations of the hospital system involved in this case was at the very core of the public hearings and debate in the months preceding Dr. Fitzgibbons' email. Financial failure of that hospital system could lead to a total loss of the provision of health care services to an entire region served by the hospitals. A similar nightmare had been witnessed already by the region five years earlier when one of the contending purchasers of the four hospitals in this case, Dr. Chaudhuri, had been involved in the bankruptcy of the KPC Medical Group, which first bought out ailing MedPartners, in Southern California. **(***See* AA198-200, "O.C. Hospital's Sale in Peril," *Orange County Register*.**)** In that debacle, hundreds of thousands of patients found themselves without health care, could not access their medical records, and KPC left thousands of doctors unpaid for their services. (*Id*., *see also* AA095, discussing Chaudhuri's role in the KPC debacle.)

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[1] *See* Dr. Fitzgibbons' Opening Brief, p. 29, and reference to the record therein: "The instigating factor behind Dr. Fitzgibbons' email was IHHI's May 9, 2005 public filing with the SEC reporting IHHI's receipt of a Notice of Default on a $50 million acquisition loan and on a working capital non-revolving line of credit up to $30 million." (Emphasis in original.) "The effects of the defaults were to suspend all credit, to increase the interest rate on the outstanding loans, and to accelerate and make due and payable $63,937,333 in debt. (AA293, 294.)" (Fitzgibbons' Opening Brief, p. 3, citation to record in original.)

To illustrate how severe were the results of these bankruptcies, the Legislature was moved to adopted SB 260 to help protect against future debacles of the kind. The bill required certain financial reports to the Department of Managed Health Care in order to address the mounting crisis surrounding the delivery of health care services in California caused by the insolvency of medical groups. As discussed by the Assembly Committee on Appropriations, legislation on the subject was required because:

> The author indicates this bill will enhance consumer protection for patients served by risk-bearing health care provider organizations. She cites the recent bankruptcies of two large medical groups, MedPartners and FPA Medical Management, Inc., as an indication of the potential problems these organizations may pose for patients who rely on them for the delivery of health care services.

(Report on SB 260 by the California Assembly Committee on Appropriations, August 19, 1999, p. 2.)

Thus, in the physician community in Southern California, where these events took place, nerves remained raw in the wake of the KPC bankruptcy at the time of Dr. Fitzgibbons's email, regarding the potential for any other disruptions in the delivery of health care because of financial insolvency.[2]

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[2] *See* AA118-121, *OC Weekly*, "Dire Prognosis: Buyer of Four Tenet Hospitals Leaves Doctors Fearful for County's Health-Care Future," Dec. 3-9, 2004, quoting Dr. Jeff Kaufman: "If a hospital folds, it's not just another investment to write off and move on. It's a real-life catastrophe for real, live people."

When the sale of the four hospitals was finally completed by IHHI after intense negotiations, after public hearings and involvement by the Orange County Board of Supervisors and the California State Senator for the region, and after agreement by the medical staff to permit the sale to go through, the months of public exposure and debate regarding these issues necessarily faded away due to apparent resolution of the controversy. After the initial controversy had disappeared from the papers and newscasts, and the IHHI defaults occurred, any reasonable person could assess that the developments discussed by Dr. Fitzgibbons in his email clearly raised the specter of possible hospital-system insolvency.[3] This development served to raise some of the very same concerns previously exposed in the initial public controversy on the sale.

CMA maintains that this renewed concern for insolvency should not be isolated from its origins for purpose of analyzing the anti-SLAPP statute. The IHHI defaults on the multi-million dollar loans should not be viewed as any less a public issue or matter of public interest than were the concerns expressed months earlier about the potential for financial failure underlying the purchases and operation of the hospitals. The news of the defaults should be viewed instead as

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[3] The fact the IHHI argues in its brief that it still "stands on its feet operating the hospital," and "has not filed bankruptcy" (see Respondent's "Reply" [i.e., Opposition] Brief, p.27) does not change the analysis of how its financial condition could be viewed at the time of the loan defaults and Dr. Fitzgibbons's email.

confirmation that the initial public debate on the matter was properly raised and well-founded.

Along the same lines, the default on loans totaling over $60 million by a four-hospital owner, IHHI, is inherently itself a matter of public interest. Dr. Fitzgibbons' reference to *Tuchscher Development Enterprises Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219 in his Reply Brief in this regard is on point. In *Tuchscher*, a developer brought an action against the City of Chula Vista's port district and commissioner for inducing breach of contract, intentional and negligent interference with prospective economic advantage, and violation of the unfair competition law, based on their alleged interference with an agreement between the developer and the city granting the developer exclusive rights to negotiate to develop bay front property. As in the instant case, the matter in *Tuchscher* was not the subject of any formal public process at the time of the city's alleged communications at issue. The developer itself conceded that "[W]hile the development of Crystal Bay was an 'issue of public interest,' no issue was before the Port District concerning the project." (*Tuchscher Development Enterprises Inc. v. San Diego Unified Port Dist., supra,* 106 Cal.App.4th 1219, 1232.) Thus the *Tuchscher* court expressly declined to consider whether the city's communications were made in connection with an issue under consideration or review by a legislative, executive or judicial body under Code of Civil Procedure §425.16(e)(1) and (2). (*Tuchscher Development Enterprises Inc. v. San Diego Unified Port Dist., supra*, 106 Cal.App.4th 1219, 1233.)

Instead, the *Tuchscher* court viewed the developer's plans for the bay front project at issue in the case as *inherently a matter of public interest.* The court stated:

> The declaration of TDE's president and chief executive officer contains statements demonstrating the Crystal Bay development was a matter of public concern, having broad effects on the community. He averred Chula Vista's mayor and Chula Vista staff encouraged TDE to pursue the development of a large-scale multi-use, resort-oriented, master-planned project on the mid-bay front in Chula Vista; that the Chula Vista City Council approved the exclusive negotiating agreement with TDE after being publicly noticed and agendized on four separate occasions; and that, in planning the project, TDE conducted numerous public forums with government agencies, local community groups, and individuals, as well as organized meetings with various environmental and habitat organizations, including the U.S. Fish and Wildlife Service and the California Department of Fish and Game. [Footnote omitted.] The prospect of commercial and residential development of a substantial parcel of bay front property, with its potential environmental impacts, *is plainly a matter of public interest.* (E.g., *Ludwig* [*v. Sup. Ct.* (1995) 37 Cal.App.4th 8] at p. 15, 43 Cal.Rptr.2d 350 [development of a discount mall "with potential environmental effects such as increased traffic and impact[s] on natural drainage, was clearly a matter of public interest"].)

(*Tuchscher Development Enterprises* Inc. *v. San Diego Unified Port Dist.*, *supra*, 106 Cal.App.4th 1219, 1233-34, emphasis added.)

For purposes of the anti-SLAPP statute, the concerns for hospital system solvency at the heart of Dr. Fitzgibbons' email should be viewed as carrying the same cachet as the related financial concerns did when they first caught the attention of the public in this case, regardless whether they were subject to scrutiny by the press or were only documented in a mandated report to the SEC. Likewise, and consistent with the *Tuchscher* court's view of "public interest," there can be little doubt of the public interest impact of IHHI's default on the more

than $60 million dollars worth of loans and fears of insolvency that were at the heart of Dr. Fitzgibbons's email in this case. Dr. Fitzgibbons was communicating about a matter of great public interest to the region and the state: the current and very appropriate concern that IHHI's default on monstrous loans could potentially lead to a disruption in access to health care for hundreds of thousands of persons in the region.

IV. THE PUBLIC'S SPECIAL INTEREST IN HEALTH CARE AND THE UNIQUENESS OF THE PHYSICIAN/PATIENT RELATIONSHIP HAS RESULTED IN ENHANCED PROTECTIONS FOR A PHYSICIAN'S ABILITY ADVOCATE ON BEHALF OF IMPROVED HEALTH CARE FOR PATIENTS.

There is no debate about the fundamental public interest that is at stake with respect to issues surrounding the availability and provision of medical services. As the Managed Health Care Improvement Task Force created by the Legislature observed in its 1997 report to the California Legislature: "Health care has a special moral status and therefore a particular public interest." (Cal. Managed Health Care Improvement Task Force, Rep. to Leg., Dec. 13, 1997, "Government Regulation And Oversight Of Managed Health Care, Findings And Recommendations," p. 1; *see also Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1070, 95 Cal.Rptr.2d 496, citing same.) Because of this special public interest, physicians and their provision of medical care cannot be considered in the commercial context—it is not "business as usual" when health care is concerned. The judiciary has recognized this fact:

> The medical profession . . . stands in a peculiar relation to the public and the relationship existing between the members of the profession and those who seek its services cannot be likened to the relationship of a merchant to his customer.

(*Jones v. Fakehany* (1968) 261 Cal.App.2d 298, 305.)

V. THE OBLIGATIONS IMPOSED UPON PHYSICIANS TO PROTECT THE PUBLIC WELFARE TRANSCEND THOSE INVOLVED IN ANY COMMERCIAL CONTEXT.

It is no surprise that the singular importance of health care imposes extraordinary obligations upon physicians. Recognizing the unique and fiduciary nature of the physician/patient relationship, the Legislature and the courts have imposed numerous duties on physicians to protect their patients and the public—duties which have no parallel in purely commercial relationships.

First and foremost, California courts have established that there is a fundamental societal interest in encouraging its health care professionals to voice their disapproval of and opposition to substandard health care. Obviously, the consequences of substandard health care are serious. The repercussions are increased morbidity and mortality. Due to the specialization of health care, no one is more qualified to determine whether health care policies, procedures and facilities are sufficient than the physicians themselves.

This policy of societal concern is founded in part upon the physician-patient relationship, whose essential component is trust. The patient must not only trust that the physician's primary goal is to enhance the patient's well-being, but also that the physician is competent to make clinical decisions and to evaluate

correctly the adequacy of the facility in which treatment is to be administered. As the California Supreme Court recognized in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 104 Cal.Rptr. 505, "the patient, being unlearned in the medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician which transcends arms-length transactions." (*Id*. at p. 242.[4]) Consequently, patients depend on their physicians to help them understand and make critical decisions such as what care and treatment they receive, where they receive treatment, what diagnostic tests are essential, and what therapy is appropriate. (*See also Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 [duty to warn persons foreseeably endangered by a patient's conduct]; Health & Safety Code §3125 [mandatory reporting of communicable diseases]; and Penal Code §§11165 *et seq*. [mandatory reporting of child abuse].)

In order to promote quality care and recognizing the unique nature of the physician-patient relationship, the courts and the Legislature have imposed numerous additional duties on physicians to protect their patients and even the public at large from harm. For example, absent termination of a physician-patient relationship, a physician's relationship with his or her patient is a continuing one

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[4]In light of this abject dependence, physicians must obtain their patients' "informed consent" prior to performing most medical procedures, *Cobbs v. Grant*, *supra*, and their informed refusal when the patient refuses to heed the physician's advice. (*Truman v. Thomas* (1980) 27 Cal.3d 285.)

that imposes ongoing obligations, such as warning patients of subsequently discovered dangers from prior treatments. (*See Tresemer v. Barke* (1988) 86 Cal.App.3d 656, 150 Cal.Rptr. 384 [holding that patient stated a cause of action against a physician who had inserted an intrauterine device on the grounds that the physician, who had seen the patient only once, failed to warn her of its dangerous side effects of which he learned only after its insertion].) And if physicians know, or should know, that a patient needs more specialized care, they have a duty to make appropriate referrals. (CACI 508.) In making the referral, the physician has a duty to inform the patient of the risks of not seeing a specialist. (*Moore v. Preventative Medicine Medical Group, Inc.* (1986) 17 Cal.App.3d 728.)

Moreover, the California Supreme Court has recognized that at the heart of the physician-patient relationship lies the physician's right and responsibility to advocate standards pertaining to quality medical care. (*See Rosner v. Eden Township Hospital District* (1962) 58 Cal.2d 592, 598, 25 Cal.Rptr. 551 [stating, among other things, "the goal of providing high standards of medical care requires that physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed"].)

More recently, the *Rosner* court's recognition that physicians must be free to advocate on their patient's behalf has been extended by the courts to encompass an affirmative legal duty, on the part of physicians, to speak up and challenge decisions which jeopardize a patient's health. In the landmark case of *Wickline v. State of California* (1986) 192 Cal.App.3d 1630, 239 Cal.Rptr. 810, the court

strongly suggested that an injured patient is entitled to recover compensation from all persons responsible for the deprivation of care, including physicians and third party payers, when medically inappropriate decisions result from defects in the design or implementation of cost containment programs.

Thus, both legal and ethical standards demand that physicians not sit back and watch conditions that could potentially be harmful to their patients. *See also* Business & Professions Code §2056, declaring it is against public policy to retaliate against physicians who advocate for medically appropriate health care for their patients, discussed more fully in the Reply Brief of Dr. Fitzgibbons.

It is critical to the public health and welfare that physicians continue to advocate for health care, and advocate against those forces that may deprive the community of access to that care. This includes speaking out regarding matters that may appear to be of a pure "business" nature, but which inevitably have a great impact on the delivery of health care. Evaluation of the financial status of the corporate owner of four hospitals readily falls in this category, both when that owner purchases the hospitals, and later when indicators appear that the corporate owner may be in trouble. The courts have recognized the fact that the delivery of medical care can be significantly impacted by decisions that, on their face, appear to be in the nature of "business decision." For example, in *Marik v. Superior Court* (1987) 191 Cal.App.3d 1136, 236 Cal.Rptr. 751, the court explained the importance of the state's prohibition ("bar") against the corporate practice of medicine. The court noted that, in this context involving business judgment and

the operation of a physician's professional corporation, the business judgment of the corporate directors, shareholders, and officers requires the ethical and professional judgment of physician licentiates in order to assure effective and available delivery of health care. The court explained this point:

> For example, the prospective purchase of a piece of radiological equipment could be impacted by business considerations (cost, gross billings to be generated, space and employee needs), medical considerations (type of equipment needed, scope of practice, skill levels required by operators of the equipment, medical ethics), or by an amalgam of factors emanating from both business and medical areas. The interfacing of these variables may also require medical training, experience, and judgment.
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> (*Marik v. Superior Court* (1987) 191 Cal.App.3d 1136, 236 Cal.Rptr. 751.)

While a professional corporation is required by law to have shareholders, directors and officers who are all licentiates, a purely lay corporation, such as IHHI, may own hospitals without physicians at the helm. Nonetheless, given that business decisions involving and leading up to financial solvency or insolvency have a clear effect on access to and delivery of health care to a community, it is not difficult to see the importance of assuring physicians in the community are free to involve themselves in the debate, express their concerns and work towards effectuating better outcomes for the "business" side of a hospital system. Such freedom will undoubtedly, indeed must, include criticism of the decisions made by the corporate owners of the system that raise the specter of feared insolvency, as in this case. But criticism in a free society is what keeps the society free. In cases such as these, physician involvement and even criticism help assure that lay

corporate entities do the right thing and keep the community's health care interests as the top priority.

The courts should be especially sensitive to the special role physicians play in society in this regard, and assure that they are protected from intimidation delivered through lawsuits intended to shut them up. Under these principles of law illustrating the role of the physician in advocating for appropriate health care, this court should view with grave concern IHHI's lawsuit filed against Dr. Fitzgibbons for his speech regarding the financial solvency of IHHI.

VI. AMICUS CMA IS GRAVELY CONCERNED THAT A CONTRACT PROVISION REQUIRING A PHYSICIAN TO ACT OR COMMUNICATE IN WAYS SUPPORTIVE OF THE CORPORATE OPERATIONS OF FOUR HOSPITALS WOULD EVER BE CONSTRUED AS PROHIBITING THE PHYSICIAN FROM EXPRESSING CONCERNS FOR FINANCIAL SOLVENCY OF THE CORPORATION

In order for physicians to effectively oversee the medical care of their patients, the medical care delivered by the medical staff within hospitals, and to monitor the medical care within their community, they must be free to exercise a professional ethic to criticize and speak out on issues that impact delivery of health care. There are a myriad of ways they can carry out this ethic: through their legislators (e.g., as physicians did in seeking support from their State Senator, Joe Dunn, in this very case); through their organized medical staffs (as the medical staff at WMCSA was very involved in the events leading up to its contract with IHHI); through their medical societies (as numerous Orange County physicians sought amicus CMA's and the Orange County Medical Association's involvement

in the events surrounding the sale of the now-IHHI hospitals); and through participation in the debate as individual physicians, with physicians and others in the community, to name just a few. But at the most fundamental level, the physician's choice to carry out this ethic of advocacy requires the guaranteed freedom to stand up and be personally identified as watchdog, participant, critic and advocate *without fear of retaliation*. No physician should be deemed to have knowingly waived such an ethic.[5] Amicus strenuously avers that this court should be equally loathe to interpret any contract provision as a knowing waiver of a physician's freedom to perform these roles of watchdog, participant, critic and advocate in matters affecting, *or that could affect,* the delivery of health care in the community.

CMA has long been a critic of similar contract provisions, for example in the managed care context, that sought to "gag" physicians from discussing critical health care treatments and options for their patients, treatments and options that may not be covered by the managed care plan in which the patient was enrolled. (*See also* Business & Professions Code §2056.1, prohibiting managed care

[5] Additionally, no physician should be deemed to have waived the right to be human in performing those advocacy roles, or the right to express himself or herself in the most human of ways, with emotion. Emotions such as disdain, fear, bewilderment, concern, contempt, resentment, an air of "we could have done it better," all of those things can be part and parcel of the disappointment that arises when the most-feared consequence, hospital bankruptcy, may be presaged by the events spurring the "offending" communication. Emotion reflects a depth of feeling and conviction, and is part and parcel of the elements of persuasive free speech.

contracts with physicians that prevent the physician from discussing with their patients information relevant to their patients' health care.)

Amicus CMA asks that this court first note that Dr. Fitzgibbons is not a "party" to the contract to which the provision would personally adhere. (*See* Dr. Fitzgibbons' Reply Brief, pp. 44-46, explaining that Dr. Fitzgibbons was not a party to the agreement in his individual capacity.) In such a case, no interpretation of the "support IHHI" provision of the contract would be necessary. If the contract provision is somehow deemed to apply to him personally, we ask that this court construe the provision as narrowly as possible. (*See* Dr. Fitzgibbons' Reply Brief, pp. arguing why the provision at issue is vague, and why Dr. Fitzgibbons did not intend any waiver of free speech in this instance). Such a vague provision could never have been intended to reach the right of a physician to provide his opinion to others on a matter of great importance to the delivery of health care, namely the financial solvency of the corporate owner of four hospitals in the region. As clearly explained in Dr. Fitzgibbons's Reply Brief, the contract provision relied upon by IHHI in its attempt to silence Dr. Fitzgibbons simply should not be construed to prohibit the speech at issue.

VII. CONCLUSION

Physicians serve a profoundly important role in society, to advocate and deliver the best quality of medical care possible. Advocacy towards that end can take a myriad of avenues, and be expressed in a myriad of ways. The communication at issue in this case is the embodiment of the frustration and

disappointment many physicians undoubtedly feel when the corporate body operating a hospital system shows signs of foundering financially, potentially threatening the delivery of health care to many thousands. Such expression could become a target for a corporate entity to squelch discourse or criticism regarding the manner in which it does business, or regarding the potential for the corporation's financial failure in light of events at the time of the communication. Physicians should be protected from being targeted in this way.

For the foregoing reasons, and the reasons set forth in the briefing by Dr. Fitzgibbons, this court should reverse the trial court and grant Dr. Fitzgibbons' motion to strike under Code of Civil Procedure §425.16.

DATED: April 24, 2006

Respectfully Submitted,
California Medical Association
CATHERINE I. HANSON
GREGORY M. ABRAMS

By:_____
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Certification under Section 14 of the California Rules of Court

I, Gregory M. Abrams, am an attorney at law licensed to practice before all courts of the State of California. I am Counsel of Record for amicus curiae herein, the California Medical Association. I hereby certify that the word counting feature on the computer word processing program with which this brief was written indicates that the actual text of this brief, excluding the cover page and addresses of counsel, the Table of Authorities, the Table of Contents, this certification, and the Proof of Service, is 4,771 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this Declaration was executed on April 24, 2006, in San Francisco, California.

_____

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