No. 119220

IN THE SUPREME COURT OF ILLINOIS

Steven I. Valfer, M.D., Plaintiff-Appellant, v. Evanston Northwestern Healthcare n/k/a Northshore University Health System, Defendant-Appellee.	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 14-2284 There Heard from the Circuit Court of Cook County Illinois, County Department, Law Division, No. 13 L 3933 The Honorable Brigid Mary McGrath Judge Presiding.

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BY THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF STEVEN I. VALFER, M.D., AND IN SUPPORT OF REVERSAL OF THE DECISION BELOW

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The Association of American Physicians & Surgeons (AAPS") respectfully moves, pursuant to Supreme Court Rules 345 and 361, for leave to submit an amicus brief in support of the position of Appellant-Plaintiff Steven I. Valfer, M.D., and in support of reversal of the decision below. A copy of its proposed amicus brief and a proposed order are attached. AAPS supports its motion as follows:

I. Statement of Identity and Interest of the Proposed *Amicus Curiae*

Founded in 1943, the proposed *Amicus* Association of American Physicians & Surgeons ("AAPS") has defended the practice of ethical, private medicine for more than seventy years. A non-profit national association based in Tucson, Arizona, AAPS has thousands of members in virtually every specialty, including physicians who practice in the State of Illinois. AAPS has frequently filed amicus briefs at the federal appellate level in order to present the perspective of physicians and patients, and has been recognized in published decisions. *See, e.g., Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (ruling in favor of the position advocated by AAPS, and recognizing its argument "that the issue transcends the relationship between the parties and instead impacts thousands of patients damaged as a result of hospital errors, incompetence, wrongdoing, and cover-ups").

AAPS has many members who have been victimized by "sham peer review," which is peer review perpetrated in bad faith at a hospital for the wrongful purpose of eliminating a competitor, a whistleblower, or a patient

advocate, or on some other improper basis, such as racial discrimination. AAPS respectfully submits that its decades-worth of experience on this issue will be useful to the Court as it decides the breadth of hospital immunity in the case at bar. AAPS, relying on the extensive background of its members in practicing medicine at hospitals, presents arguments here that are not likely to be included by the parties in their briefs, or by other amici.

The disposition of this appeal will almost certainly affect the rights of members of AAPS. The impact of the ruling below would be to open the floodgates to misconduct by removing deterrence and legal remedies for wanton or willful misbehavior. Unless the decision below is reversed, there will be no meaningful accountability to restrain intentional wrongdoing in peer review and similar decision-making, and this will have a profoundly negative impact on the members of AAPS and the public. Accordingly, *Amicus* AAPS has a strong interest in filing this brief.

II. Reasons to Allow the Proposed *Amicus* Brief

Pursuant to Illinois Supreme Court Rule 345, Movant AAPS explains "how an *amicus* brief will assist the court."

The appellate court first observed below that:

> Under the Act, healthcare providers engaging in peer review, including individuals who are members, agents, or employees of hospitals, hospital medical staff, hospital administrative staff, or the hospital governing board, are immune from civil damages for their acts, omissions, decisions, or any other conduct, except those involving willful or wanton misconduct. 210 ILCS 85/10.2 (West 2012).

Valfer v. Evanston Nw. Healthcare, 2015 IL App (1st) 142284, ¶18. But the appellate court then interpreted the exception to immunity for "willful or wanton misconduct" to apply only where there is physical harm to an individual:

> Here, Dr. Valfer admittedly did not allege any harm to his safety and the safety of others, *i.e.*, physical harm, and, as such, ENH is immune from any civil damages arising out of his claims pursuant to section 10.2 of the Act.

Id. ¶32 (citing See 210 ILCS 85/10.2).

The proposed *Amicus* AAPS, which is thoroughly familiar with instances of wrongdoing in peer review and similar decision-making in the hospital setting, explains three reasons why this holding by the appellate court should be reversed.

First, a type of "willful or wanton misconduct" is discrimination, and the Act should not be interpreted in a way that would leave victims of discrimination without a legal remedy merely because no one has been physically injured. The Illinois legislation must not be presumed to have enacted legislation that would, in effect, provide some protections for intentional discrimination, and the appellate court erred in adopting an interpretation that would tend to safeguard such wrongdoing. *See, e.g.*, *Bhanusali v. Orange Reg'l Med. Ctr.*, 572 F. App'x 62, 63 (2d Cir. 2014) (reversing dismissal of a claim by a physician based on racial discrimination when the physician alleged that he "received peer reviews or was disciplined for surgeries that resulted in neither patient complaints nor negative patient outcomes" while "younger, white physicians at the same medical facility who engaged in conduct that caused significantly worse outcomes for patients, including death, avoided any peer review or discipline").

Second, the appellate court erred in adopting a narrow interpretation of "willful or wanton misconduct" which would open the floodgates to "sham" or bad-faith peer review without any meaningful deterrence and without any legal remedies for its victims. The problem of sham peer review has been recognized by courts for more than two decades, and has been widely reported in the news and in medical journals. In an analogous case, the Michigan Supreme Court held that hospitals and peer review participants should remain liable for malice that occurs during peer review, and that this limitation on immunity is "consistent with the objects of the peer review immunity statute." *Feyz v. Mercy Mem'l Hosp.*, 475 Mich. 663, 667, 719 N.W.2d 1, 4 (2006).

Third, the construction of the Act below would violate public policy, by adopting a sweeping immunity that is broader than the one set forth in federal law, which limits this type of immunity only if there is a "reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts." 42 USCS § 11112(a)(4).

The proposed *Amicus* AAPS has a strong interest in ensuring deterrence against wrongdoing in the hospital setting, and in advocating for the proper interpretation of Illinois law such that it does not confer immunity on discrimination or other "willful or wanton" misconduct. AAPS brings its unique background and extensive experience in this field to its proposed amicus brief, which can provide a helpful perspective to the Court as it reviews the decision below and the important policy considerations implicated by it.

Conclusion

For the foregoing reasons, the undersigned proposed *Amicus* respectfully requests leave to file the attached amicus brief.

Date: November 3, 2015

Respectfully submitted,

Association of American Physicians & Surgeons, *amicus curiae*

By: _____
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