

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RAKESH WAHI , M. D.,

Appellant,

v.

No. 06-2162

CHARLESTON AREA MEDICAL CENTER, et al.,

Appellees.

**CHARLESTON AREA MEDICAL CENTER, INC.'S RESPONSE TO
MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BY THE
ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS
IN SUPPORT OF APPELLANT AND FOR REVERSAL OF THE
DECISION BELOW**

The Appellee, Charleston Area Medical Center, Inc. ("CAMC"), hereby responds to the motion by the Association of American Physicians and Surgeons ("AAPS") to file a brief in this matter as *amicus curiae*. As stated in further detail herein, the AAPS would purport to assist the Court yet in reality simply seeks to reiterate the legal arguments adequately made and briefed by Appellant's counsel. Moreover, AAPS lacks knowledge of any meaningful portion of the procedural and substantive basis of CAMC's peer review of Dr. WahI yet "smears" CAMC by claiming it engaged in "sham peer review," all under the guise of a brief which is supposedly "desirable and . . . relevant to the disposition of the case." Because such briefing is unnecessary, duplicative, unhelpful and little more than an attempt by an

amicus petit (“friend of the plaintiff”) to support one specific litigant than actually assist the Court, the motion should be denied and the brief disregarded. Indeed, the entire thrust of the proposed brief is on the cusp of defamatory because it accuses CAMC of engaging in fraudulent conduct—“sham peer review”—when neither AAPS nor its counsel possess any knowledge of the procedural and substantive facts of CAMC’s peer review of Dr. Wahli.

I. STANDARD OF REVIEW FOR A MOTION FOR LEAVE UNDER RULE 29

Whether to permit filing of an *amicus curiae* brief, “is a matter of ‘judicial grace.’” Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542 (7th Cir. 2003) (chambers opinion)(quoting Natl. Org. for Women, Inc. v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000)). The policy of the Seventh Circuit is not to routinely grant rote permission to purported *amicii* and especially not when, as here, the brief at issue essentially duplicates a party’s brief. Judge Posner aptly states the reasons for these policies as follows:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; *amicus* briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation and study of, and response to, *amicus* briefs drive up the cost of litigation; and the filing of an *amicus* brief is often an attempt to inject interest group politics into the federal

appeals process.

Id.

Even in the face of *amicus* briefs offered by the leaders of both houses of the Illinois legislature, Judge Posner wisely applied the same criteria for weighing the propriety of considering the briefs, “whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs.” Id. 339 F.3d at 545. The Court highlighted three factors that would weigh in favor of satisfying this test: (1) where a party is inadequately represented; (2) where the purported *amicus* has a direct interest in another case that may be materially affected by a decision in this case; or (3) where the purported *amicus* has a unique perspective or specific information that can assist the court beyond what the parties can provide. Id.

II. THE AAPS BRIEF IS SIMPLY A RESTATEMENT AND REARGUMENT OF POINTS ADEQUATELY RAISED AND BRIEFED IN APPELLANT’S BRIEF AND SHOULD BE DISALLOWED

Dr. Wahli sought permission from this Court in September of 2007 to unseal confidential, peer-review documents so that the AAPS could review patient records and other documents and file a brief in his favor. See Motion to Unseal Portions of Record (Sep. 27, 2007). This motion was denied, and now the AAPS – without any

knowledge of the facts of the case – essentially seeks leave of this Court to reargue Section II of Dr. Wahi’s brief.

The brief by the AAPS amounts to, in the words of the Seventh Circuit, “an attempt to inject interest group politics into the federal appeals process.” Voices, *supra*. “Where a petitioner’s attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.” Yip v. Pagano, 606 F.Supp. 1566, 1568 (D.N.J 1985) (quoting Casey v. Male, 63 N.J. Super 255 (1960)).

AAPS’s motion and the attached brief are nothing more than an attempt to inject an unsupported, partisan-driven allegation that CAMC engaged in “sham peer review” without knowledge of even a single fact covered by the peer review privilege. Although the AAPS brief cites numerous web sites, journal articles, and other non-judicial authorities, the best characterization of its position on both the Health Care Quality Improvement Act – and essentially any peer review action – are found in the words of a resolution passed at one of its annual meetings. See “RESOLUTION 61-01, 2004: Sham Peer Review,” attached hereto as “Exhibit A.” The AAPS clearly takes the position that the policy of promoting meaningful peer review without the threat of litigation embodied in Congress’s value judgments expressed in the HCQIA is nothing more than a breeding ground for fraudulent and wrongful conduct. This view is not helpful, and this Court is not the forum for its airing.

III. NO GROUNDS EXIST THAT WOULD JUSTIFY GRANTING AAPS'S MOTION TO FILE AN *AMICUS* BRIEF.

Dr. Wahí is adequately represented before this Court, as he was before the District Court. He has enjoyed the counsel of some of West Virginia's most experienced attorneys and is currently represented by John Yoder, a West Virginia State Senator¹ and former U.S. Supreme Court law clerk and Kansas trial court judge. In addition to Mr. Yoder, Dr. Wahí is also now represented by Kenneth W. Starr who, as this Court may be aware, is the current Dean of Pepperdine Law School. Dean Starr has served as law clerk to U.S. Supreme Court Chief Justice Warren E. Burger, a partner at Kirkland & Ellis and Gibson, Dunn & Crutcher, Judge for the U.S. Court of Appeals D.C. Circuit, independent counsel in the Whitewater scandal and other matters, and U.S. Solicitor General arguing twenty-five (25) cases before the U.S. Supreme Court.

AAPS's brief is not necessary to assist Dr. Wahí or his counsel nor do they purport to have legal resources beyond those available to Dr. Wahí currently. Analogous to the briefs submitted to the court in U.S. v. Gotti, AAPS does not cite any pertinent case not cited by Dr. Wahí and fails to cite those which actually *are* cited by

¹ Senator Yoder is currently licensed to practice law in three states and the District of Columbia.

Dr. Wahí and would therefore not “assist the court in the least.” 755 F.Supp. 1157, 1158 (E.D.N.Y. 1991). AAPS also does not have and does not purport to have a direct interest in another case which would be materially affected by the outcome of this appeal.

AAPS has no “specific information” of any kind with regard to this appeal or the issues presented herein. Moreover, as noted previously, AAPS is without any facts actually related to Dr. Wahí’s patient care, the peer review actions taken against him, or any other matter covered by the peer review privilege and/or the District Court’s Order placing certain items under seal. Further, the AAPS perspective is identical to Dr. Wahí’s perspective and – for that matter – that of every other physician who feels an adverse finding in a peer review proceeding must be the result of a “sham.” The parties, who have full access to the record, can provide much more factual information as well as perspectives which benefit from well over a decade of experience with Dr. Wahí’s medical practice and the ensuing litigation.

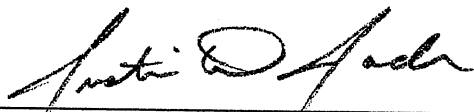
As the Seventh Circuit deftly stated:

The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help we need for deciding the appeal.

Ryan v. Commodity Futures Trading Commn., 125 F.3d 1062, 1064 (7th Cir. 1997)
(chambers opinion).

WHEREFORE, for the reasons stated above and for any other grounds apparent to this Court, Appellee Charleston Area Medical Center, Inc. respectfully requests that the Court DENY the Association of American Physicians and Surgeons' Motion for leave to file an *amicus curiae* brief.

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Association of American Physicians and Surgeons, Inc.
A Voice for Private Physicians Since 1943
Omnia pro aegrato

RESOLUTION 61-01, 2004: Sham Peer Review

WHEREAS: the Association of American Physicians and Surgeons supports fair and unbiased peer review in the interest of improving the safety and quality of patient care, and;

WHEREAS: the Health Care Quality Improvement Act (HCQIA) of 1986 has created an environment in which those who conduct or participate in sham peer review (bad faith peer review) enjoy substantial immunity, and;

WHEREAS: substantive due process in peer review corrective actions is often lacking in the hospital setting, and;

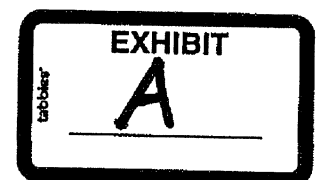
WHEREAS: physicians who raise quality of care concerns in the hospital setting are often targeted for retaliation via sham peer review, and careers are often ruined as a result, and;

WHEREAS: in recognition of the fact that sham peer review is a growing problem nationwide;

THEREFORE BE IT RESOLVED that the Association of American Physicians and Surgeons condemns the practice of sham peer review, and;

BE IT FURTHER RESOLVED that the Association of American Physicians and Surgeons declares that those who conduct or participate in sham peer review are engaging in unethical and/or unprofessional conduct

BE IT FURTHER RESOLVED: that existing physicians' "Whistleblower" and "Patient Advocate" laws in effect for physicians who are employees of hospitals, managed care organizations, States, and federal institutions be extended to all physicians in the country.




CERTIFICATE OF SERVICE

I, the undersigned counsel for Charleston Area Medical Center, Inc., do hereby certify that the foregoing "CHARLESTON AREA MEDICAL CENTER, INC'S RESPONSE TO MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF BY THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF APPELLANT AND FOR REVERSAL OF THE DECISION BELOW" was served this 20th day of March, 2008, by placing a true and exact copy in the United States mail, postage prepaid, addressed to the following:

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