COURT OF APPEALS OF THE STATE OF NEW YORK

----------X Index No. 107770/00

SHEILA A. HORN,

Plaintiff/Respondent,

-against-

THE NEW YORK TIMES,

Defendant/Appellant.

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PRELIMINARY STATEMENT

This *amicus curiae* brief is respectfully submitted by the Medical Society of the State of New York ("MSSNY"), the American Medical Association (the "AMA") and the American College of Occupational and Environmental Medicine ("ACOEM") in opposition to the appeal by the defendant/appellant the New York Times ("The Times"). The Times seeks an order reversing the decision/order of the Appellate Division of Supreme Court of the State of New York, First Department, dated March 21, 2002, in this case (the "Decision") and dismissing the complaint of plaintiff/respondent Sheila A. Horn ("Dr. Horn").

MSSNY, a not-for-profit corporation, was founded in 1807 and has approximately 27,000 physician, medical resident, and medical student members located throughout the State of New York. It is the principal medical professional organization in the State, representing physicians in all specialties. MSSNY's primary purpose is:

> To enhance the delivery of medical care of high quality to all people in the most economical manner, and to act to promote and maintain high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public.

MSSNY By-Laws, Art. 1.

The AMA is a private, voluntary non-profit organization of physicians. It was founded in 1846 to promote the science and art of medicine and to improve public health. It has 260,000 members who practice medicine in all states and in all medical specialties. The AMA and MSSNY file this brief as members of the American Medical Association/State Medical Society Litigation Center (The "Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary nonprofit state medical societies to represent the views of organized medicine in the courts. Forty-eight state medical societies and the Medical Society of the District of Columbia participate with the AMA as members of the Litigation Center.

ACOEM represents over 6,000 physicians and is the preeminent and largest organization of physicians specializing in the practice of preventing, assessing, and treating occupational and environmental health problems. ACOEM promotes optimal health and safety of workers, workplaces, and environments by educating health professionals and the public; simulating research; enhancing quality of practice; guiding public policy; and advancing the field of occupational and environmental medicine. The members of ACOEM are committed to upholding the ethical standards of medicine to protect the confidentiality of health information contained in the health and medical records that they create and/or maintain as an integral part of their job responsibilities.

The *amici* have a significant interest in this appeal because this Court's decision will have far-reaching implications for the medical profession and the public at-large. The key issue presented on this appeal is whether a licensed physician can state a claim under this Court's ruling in *Wieder v.*

Skala, where she alleges that her employment was terminated for her refusal to (i) comply with her employer's directives that she reveal her patients' confidential information to third-parties without the patients' consent, and (ii) provide misinformation to her patients regarding the causes of their injuries or illnesses, in derogation of primary ethical rules of the medical profession.

The Times' appeal raises two issues that are of primary concern to the *amici*. First, The Times argues that Dr. Horn was not required to conduct her practice of medicine in conformance with the governing standards of conduct of the medical profession because she was employed by The Times and not other physicians, and because a portion of her practice involved performing employment-related medical examinations. Both the trial court and the Appellate Division rejected The Times' position, and this Court should do the same. Nothing in the law exempts an industry-employed physician from conducting her practice within the strictures of the legal and ethical obligations of the medical profession. Indeed, the AMA's Council on Ethical and Judicial Affairs, which consists of practicing physicians and medical students, has determined that an industry-employed physician's practice of medicine must comply with all governing laws and standards of ethical conduct.

Second, in an attempt to drive Dr. Horn's claim out of the *Wieder* exception, The Times contends that a physician's obligations to maintain patient confidences and impart truthful information to patients are not "primary" or core professional ethical rules of the medical profession. Nothing could be further from the truth. As will be explained in detail below, these long-recognized obligations further important public policy goals, foster the necessary trust in the physician-patient

relationship, and are crucial to the medical profession. Indeed, physicians face potential professional discipline – including the loss of license – in the event they violate these key obligations. Thus, like the plaintiff in *Wieder*, Dr. Horn, and other physicians, should not be left without a remedy if their employer requires them to violate core professional duties and engage in unprofessional conduct as a condition for continued employment.

This brief is submitted to assist the Court in understanding the profound ethical issues implicated in this appeal.

ARGUMENT

POINT I

DR. HORN'S CLAIM OF WRONGFUL TERMINATION FITS SQUARELY WITHIN THE EXCEPTION TO THE "AT-WILL" EMPLOYMENT DOCTRINE RECOGNIZED IN *WIEDER*

In most instances, it is settled law that where employment is for an "indefinite period" and not subject to any agreed upon contractual limitations, it is presumed to be "at-will" and terminable at any time by either party for any reason or no reason at all. *Murphy v. American Home Products*, 58 N.Y.2d 548, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 514 N.Y.S.2d 209, 506 N.E.2d 919 (1987). However, in the seminal case of *Wieder v. Skala*, 80 N.Y.2d 628, 457 N.Y.S. 2d 193, 609 N.E.2d 411 (1992), this Court created an exception to New York's strict "at-will" employment doctrine. The application of the *Wieder* exception is the central issue in this appeal.

Wieder involved an associate attorney who was terminated by his employer, a law firm, for insisting that the firm comply with a specific ethical rule governing the conduct of attorneys. Wieder had discovered that another associate of the law firm had committed several acts of professional misconduct while performing legal services, and subsequently attempted to cover-up the misconduct by providing false and misleading information to Wieder. Thereafter, Wieder insisted that the firm report the associate's misconduct in compliance with a disciplinary rule governing attorneys. That rule requires a lawyer to report information that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects to the disciplinary authorities. *Wieder*, 80 N.Y.2d at 636. Wieder's employment was thereafter terminated, and he commenced an action against the firm for breach of contract. Like Dr. Horn, Wieder had no employment agreement with the firm.

In distinguishing Wieder's circumstance from the plaintiffs in *Murphy* and *Sabetay*, this Court noted that Wieder's "performance of professional services for the firm's clients as a duly admitted member of the Bar was at the very core and, indeed, the only purpose of his association with defendants." *Wieder*, 80 N.Y.2d at 635. Thus, the Court determined that there was an "implied understanding so fundamental to the [employment] relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession." *Wieder*, 80 N.Y.2d at 636. The Court reasoned that this implied understanding had its genesis in the major factor distinguishing the legal profession from other professions – that lawyers "remain independent officers of the court

responsible in a broader public sense for their professional obligations." *Wieder*, 80 N.Y.2d at 635.

Accordingly, the Court held that the "essential compact" between the law firm and Wieder required a "different rule regarding the implied obligation of good faith and fair dealing" than had been previously applied in *Murphy* and *Sabetay*. *Weider*, 80 N.Y.2d at 636. In this respect, the Court stated that insistence by the firm that Wieder engage in unethical behavior in violation of a "primary" or core disciplinary rule would "frustrate the only legitimate purpose of the employment relationship", providing Wieder with a valid claim against the firm for breach of the implied obligation to act in good faith. *Wieder*, 80 N.Y.2d at 637. The Court noted that "[e]recting or countenancing disincentives to compliance with the applicable rules of professional conduct. . . would subvert the central professional purpose of [Wieder's] relationship with the firm – the lawful and ethical practice of law." *Wieder*, 80 N.Y.2d at 636.

The Court was also concerned with the precarious position in which the firm's conduct had placed Wieder. In this regard, the Court stated that "the failure to comply with reporting requirements may result in suspension or disbarment. . . .by insisting that plaintiff disregard [the disciplinary rule] defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position to choose between continued employment and his own potential disbarment." *Wieder*, 80 N.Y.2d at 636-37. The Court further noted that the disciplinary rule at issue was "critical to the unique function of self-regulation belonging to the legal profession" and was labeled by one commentator as "nothing less than essential to the survival of the profession." *Wieder*, 80 N.Y.2d at 636.

In the present case, Dr. Horn was employed as the Associate Medical Director of the Medical Department of The Times. (A-10, ¶ 4). She alleges that her "primary responsibilities" were providing "medical care, treatment and advice to employees of the Times. . .[and]. . .[a]mong other things, she was responsible for determining if injuries suffered by Times employees were work-related, thus making the employees eligible for Worker's Compensation." (A-10 ¶ 8). It is further alleged that The Times' labor, legal and human resources departments on several occasions demanded that Dr. Horn provide them with confidential medical records of The Times' employees treated by Dr. Horn without the prior knowledge and consent of the employees. (A-11, ¶ 10). In addition, Dr. Horn alleges that the vice-president of The Times' human resources department directed her to "misinform employees regarding whether injuries or illnesses they were suffering were work-related so as to curtail the number of Worker's Compensation claims filed against The Times." (A-11, ¶ 15).

Dr. Horn solicited advice from the New York Department of Health and verified that she would violate certain legal and ethical obligations governing physician conduct if she complied with The Times' demands. (A-11, ¶¶ 11-12). Dr. Horn refused to comply with the directives. Shortly thereafter, Dr. Horn's position was "phased out" by The Times allegedly as part of a restructuring plan regarding its Medical Department. (A-12 ¶¶ 17-19). Finally, Dr. Horn alleges that her employment was terminated as a result of her refusal to comply with The Times' improper demands and directives, and that such termination was a breach of implied terms of her employment relationship, *i.e.*, that she would practice medicine as an employee of The Times in accordance with

the primary and core ethical and legal obligations of the medical profession. (A-13-14, ¶¶ 25-34). The core ethical and legal obligations of the medical profession at issue in this case are the requirements that a physician maintain and safeguard her patients' confidences and that she refrain from the fraudulent practice of medicine by imparting knowingly false information to her patients regarding their physical condition.

In determining that Dr. Horn's claim fit squarely within the *Wieder* exception, the Appellate Division correctly held that there are "core characteristics shared by the legal and medical professions. . . *i.e.,* the indivdual practitioner's employment for the purpose of practicing the profession and the importance of professional ethical obligations both to the practitioners profession and to the public . . ." *Horn v. New York Times*, 293 A.D.2d 1, 3, 739 N.Y.S.2d 679 (1st Dep't 2002). Indeed, the Appellate Division noted that "[p]hysicians too are independent professionals responsible in a broader public sense for their professional obligations." *Horn*, 293 A.D.2d at 11. The court concluded that "Dr. Horn's obligations, as a physician, to comply with Principles of Medical Ethics established by the American Medical Association . . .are analogous to the obligation upon lawyers to comply with the Code of Professional Responsibility." *Horn*, 293 A.D.2d at 7. The Appellate Division further found that Dr. Horn's allegations that the "determination of whether an injury is work-related. . .[is]. . .a diagnostic function and an integral part of the practice of medicine" was sufficient to "demonstrate that the practice of medicine was 'at the very core' of her employment." *Horn*, 293 A.D.2d at 7. The court also recognized that a physician's obligation to maintain patient confidences is a "primary tenet of medical profession and one of profound importance to patients and the public." *Horn*, 293 A.D.2d at 7.

It is the *amici's* view that the Appellate Division's express finding that the legal and medical professions share "core characteristics" with respect to their "broader public" obligations is correct and provides an appropriate basis for applying the *Wieder* exception in this case. Moreover, the court's determination that the fundamental duty of a physician to safeguard patient confidences is a "primary tenet" of the medical profession further supports the application of *Wieder* to the circumstances alleged by Dr. Horn. Indeed, this obligation is the bedrock of the trust necessary for the proper functioning of the physician-patient relationship and is "nothing less than essential to the survival of the profession." *See Wieder*, 80 N.Y.2d at 638.

POINT II

FAILING TO SAFEGUARD PATIENT CONFIDENCES AND IMPARTING FALSE INFORMATION TO PATIENTS VIOLATES THE PRINCIPLES OF MEDICAL ETHICS OF THE AMA

Like the disciplinary rule in *Wieder*, the medical ethical rules implicated in the present case are "primary" or core rules "essential to the survival of the profession." *See* Wieder, 80 N.Y.2d at 636. The Appellate Division below recognized this to be the case when it correctly determined that "Dr. Horn's obligation, as a physician, to comply with the Principles of Medical Ethics established by the American Medical Association and with applicable provisions of the Education Law, *see, e.g.,* § 6530 [definitions of professional misconduct], and rules promulgated by the Board of Regents, *see, e.g.*, 8 N.Y.C.R.R. § 29.[b] [unprofessional conduct] is analogous to the obligation upon lawyers to comply with the Code of Professional Responsibility." *Horn*, 293 A.D.2d at 7.

The Principles of Medical Ethics of the AMA (the "Principles") establish core ethical principles for members of the medical profession. (A copy of the principles is annexed as Exhibit 1). The preamble to the Principles notes that the "medical profession has long subscribed to a body of ethical statements" and that as "a member of this profession, a physician must recognize responsibility to patients first and foremost, as well as to society, to other health professionals, and to self." (Ex. 1). Thus, the Principles embody "standards of conduct which define the essentials of honorable behavior for the physician." (Ex. 1). The Principles are as follows:

> I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.
>
> II. A physician shall uphold the standards of professionalism, *be honest in all professional interactions*, and strive to report physicians deficient in character or competence, *or engaging in fraud and deception* to appropriate entities.

> III. A physician shall respect the law and also recognize a responsibility to seek changes to those requirements which are contrary to the best interests of the patient.
>
> IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and *shall safeguard patient confidences within the constraints of the law.*
>
> V. A physician shall continue to study, apply and advance scientific knowledge, maintain commitment to medical education make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
>
> VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.
>
> VII. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.
>
> VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount.
>
> IX. A physician shall support access to medical care for all people.

(Ex. 1)(emphasis provided).

If Dr. Horn had provided misinformation to her patients regarding their medical conditions as she was allegedly directed to do, she would have violated Principle II, which clearly requires all physicians to deal honestly with her patients and would have committed fraud and deception upon her patients. In addition, had Dr. Horn complied with The Times demands that she provide confidential patient records to its various departments, she clearly would have violated Principle IV, requiring her safeguard her patients' confidences within the confines of the law.

POINT III

PHYSICIANS EMPLOYED BY INDUSTRY MUST COMPLY WITH ETHICAL RULES GOVERNING PHYSICIAN CONDUCT

The Times argues that Dr. Horn was not bound by ethical rules governing the medical profession because she was employed in industry and not by other physicians and because part of her duties required her to perform employment-related examinations.[1] Neither of these contentions can survive scrutiny.

The question of whether the Principles and, by implication, other rules governing the ethical conduct of physicians, apply to physicians who are employed by industry was settled by the Council on Ethical and Judicial Affairs of the AMA ("CEJA"). CEJA is charged with interpreting and applying the Principles. In furtherance of its duties, it issues opinions, which reflect CEJA's views on the application of the Principles in certain specific circumstances.

[1]It should be noted that Dr. Horn alleges that her "primary responsibilities" as an employee of The Times were providing "medical care, treatment and advice to employees of the Times. . ." and that conducting employment-related examinations were only a part of her responsibilities. (A-10 ¶ 8).

CEJA's Opinion E-5.09 (the "Opinion") addressed the specific issue of whether the obligation to protect patient confidences applies in to physicians employed by industry. (A copy of the Opinion is annexed as Exhibit 2). In this respect, CEJA stated:

> Where a physician's services are limited to performing an isolated assessment of an individual's health or disability for an employer, business, or insurer, *the information obtained by the physician as result of such examinations is confidential and should not be communicated to a third party without the individual's prior written consent*, unless required by law. If the individual authorized the release of medical information to an employer or a potential employer, the physician should release only that information which is reasonably relevant to the employer's decision regarding that individual's ability to perform the work required by the job.
>
> When a physician renders treatment to an employee with a work-related illness or injury, the release of medical information to the employer as to the treatment provided may be subject to the provisions of worker's compensation laws. The physician must comply with the requirements of such laws, if applicable. However, the physician may not otherwise discuss the employee's health condition with the employer without the employee's consent or, in event of the employee's incapacity, the appropriate proxy's consent.

(Ex. 2)(emphasis provided).

CEJA further issued a report – Report 5-A-99 (the "Report") – which more specifically addressed the ethical obligations of a physician employed by industry. (A copy of Report 5-A-99 is annexed as Exhibit 3). The term "industry employed physician" ("IEP") "refers to physicians who are employed by businesses or insurance companies for the purpose of conducting medical examinations." (Ex. 3). IEPs can perform "employment, pre-employment, and work-related examinations, which include those aimed at determining whether an individual is suitable for a

particular occupation or if an employee who has been ill or injured can return to work." (Ex. 3). CEJA specifically stated "[d]espite their ties to a third party, the responsibilities of IEPs. . . are in some basic respects very similar to those of other physicians." (Ex. 3). Indeed, IEPs "*have the same obligations to conduct an objective medical examination, maintain patient confidentiality, and disclose potential or perceived conflicts of interest.*" (Ex. 3)(emphasis provided).

Moreover, "[o]ne of the foremost responsibilities of physicians, regardless of the circumstances, is to evaluate the health of patients in an objective manner" and "physicians should not be influenced by the preferences of the patient-employee, employer, or insurance company when making a diagnosis", which is precisely what The Times is alleged to have done with respect to Dr. Horn. (Ex. 3). With respect to an IEP's confidentiality obligations, the Report unambiguously provides that "[a]s always, *the information obtained by the physician is confidential and should not be communicated to an outside party without the individual's consent.*" (Ex. 3) (emphasis provided).

The Report and Opinion confirm conclusively that a physician, who is employed by industry is governed by the same "primary" and "core" ethical rules as all other physicians. As noted, there is nothing in the law that holds otherwise.

Without any support in the record or from outside sources, The Times argues that there is "uncertainty and debate" within the medical profession as to whether an industry-employed physician is bound by the Principles and other ethical and legal rules governing the profession. (The Times Brief at 20). There is no such "uncertainty or debate." The fact that the Opinion was issued

in 1999 is not evidence of any "uncertainty or debate", as The Times contends. Indeed, there is nothing in the Opinion that indicates it was issued in response to, or for the purpose of resolving, any "uncertainty or debate." The Times position in this regard is pure speculation and conjecture.

Moreover, The Times contention that the Opinion should be accorded little deference because it is not a judicial or legislative pronouncement must also be rejected. CEJA is the "judicial authority" of the AMA. (C-106). It has the power to adjudicate "[a]ll controversies arising. . . under the Principles of Medical Ethics to which the [AMA] is a party" and to "suspend or expel" physicians from membership in the AMA for "unethical conduct." (C-106-07). Indeed, the physician and medical student members of CEJA are intimately familiar with the Principles and the unique ethical issues that arise in the practice of medicine. The members' specialized knowledge and experience in these respects enable them to determine the proper practical application of the Principles. Thus, CEJA's interpretation and application of the Principles – as evidenced in documents such as the Opinion – should be accorded great weight by this Court. *See, e.g., Austin v. American Association of Neurological Surgeons*, 253 F.3d 967 (5th Cir. 2001)(recognizing the importance of the ethical regulatory function performed by medical professional associations and the expertise of such associations regarding ethical issues concerning the profession).

The Times further argues that the task of examining its employees does not constitute the practice of medicine. This contention was correctly addressed by the Appellate Division, which held that such examinations are "diagnostic procedures" and fall squarely within the clear definition of the practice of medicine under New York law. *Horn*, 293 A.D.2d at 7; *see*, N.Y. Educ. Law § 6521 (the practice of medicine consists of "diagnosing, treating, operating or prescribing for any human

disease, pain, injury, deformity or physical condition"). Indeed, the authority propounded by The Times does not support its proposition. The cases cited hold only that, where a physician conducts a one-time examination on an employer's behalf, *solely* for the purpose of determining whether an employee has the ability to perform a specific job, or is suffering from a work-related injury, no physician-patient relationship exists for the purposes of a medical malpractice claim. *See White v. Southside Hospital*, 281 A.D.2d 474, 474, 721 N.Y.S.2d 678 (2d Dep't 2001)(no physician-patient relationship existed for the purposes of plaintiff's medical malpractice claim where defendant treated plaintiff only once "solely for the purpose of a pre-employment physical. . . and did not thereafter provide any treatment"); *Violandi v. City of New York*, 185 A.D.2d 364, 584 N.Y.S.2d 842 (1st Dep't 1992); *Murphy v. Blum*, 160 A.D.2d 914, 554 N.Y.S.2d 640 (2d Dep't 1990); *Lee v. City of New York*, 162 A.D.2d 34, 560 N.Y.S.2d 700 (2d Dep't 1990). Nothing in these cases can be construed as holding that a physician is not bound by the core ethical obligations owed to the examinee, the medical profession and the public at-large when conducting such an examination.

POINT IV

ACOEM'S CODE OF ETHICAL CONDUCT PREVENTS AN INDUSTRY-EMPLOYED PHYSICIAN FROM DISCLOSING CONFIDENTIAL PATIENT INFORMATION AND MAKING MISREPRESENTATIONS TO PATIENTS

ACOEM promulgates a Code of Ethics (the "Code") which is "intended to guide occupational and environmental medicine physicians in their relationships with the individuals they serve, employers and worker's representatives, colleagues in the health professions, the public, and all levels of government including the judiciary." (A copy of the Code is annexed as Exhibit 4). The Code provides as follows:

> Physicians should:
>
> 1. accord the highest priority to the health and safety of individuals in both the workplace and the environment;
>
> 2. practice on a scientific basis with integrity and strive to acquire and maintain adequate knowledge and expertise upon which to render professional service;
>
> 3. *relate honestly and ethically in all professional relationships*;
>
> 4. strive to expand and disseminate medical knowledge and participate in ethical research efforts as appropriate;
>
> 5. *keep confidential all individual medical information, releasing such information only when required by law or overriding public health considerations,* or to other physicians according to accept[ed] medical practice, or to others at the request of the individual;
>
> 6. *recognize that employers may be entitled to counsel about an individual's medical work fitness, but not to diagnoses or specific details,* except in compliance with laws or regulations;

> 7. *communicate to individuals and/or groups any significant observations and recommendations concerning their health or safety;* and
>
> 8. recognize those medical impairments in oneself and others, including chemical dependency and abusive personal practices, which interfere with one's ability to follow the above principles, and take appropriate measures.

(Ex. 4)(emphasis provided).

Had Dr. Horn complied with The Times' alleged demands that she provide confidential patient information to its various departments, she would have violated Sections 5 and 6 of the Code, which clearly require industry-employed physicians to maintain patient confidences even when providing advice to employers regarding an employees's medical work fitness and physical condition. In addition, Dr. Horn would have violated Sections 3 and 7 of the Code in event she provided false information to her patients regarding their physical condition and the causes of their illnesses or injuries, as The Times allegedly instructed her to do.

POINT V

PHYSICIANS ARE SUBJECT TO PROFESSIONAL DISCIPLINE FOR FAILING TO SAFEGUARD PATIENT CONFIDENCES AND FOR FRAUDULENTLY PRACTICING MEDICINE

New York Education Law § 6530 defines professional medical misconduct. The statute states that "any licensee found guilty of such misconduct under procedures prescribed in section two hundred thirty of the public health law shall be subject to the penalties prescribed in section two hundred thirty-a of the public health law." N.Y. Educ. Law § 6530. Among the forty-seven acts or courses of conduct constituting professional misconduct specifically set forth in the statute are: "[p]racticing the profession fraudulently or beyond its authorized scope" (N.Y. Educ. Law § 6530(2)); and "[r]evealing of personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized by law" (N.Y. Educ. Law § 6530(23)).

New York Public Health Law § 230 establishes "a state board of professional medical conduct" (the "Board") which is charged with investigating allegations of physician misconduct as defined in the Education Law. N. Y. Pub. Health Law § 230. This statute creates an administrative process to address issues of professional misconduct and to discipline those physicians guilty of engaging in conduct proscribed by the Education Law. *See id.* The penalties the Board may impose on those physicians guilty of misconduct include "[c]ensure and reprimand", "[s]uspension of license" and "[r]evocation of license." N.Y. Pub. Health Law § 230-a(1)(2) & (4).

1. Maintaining Patient Confidentiality is a Primary Obligation of the Medical Profession.

The language of Education Law § 6530(23) makes clear that a physician commits professional misconduct by disclosing a patient's confidences without prior consent. This is so because confidentiality is an essential element of the physician-patient relationship and is crucial in providing proper medical care and advice. "[C]onfidentiality encourages the patient to seek medical treatment and to be frank in describing his or her symptoms to the physician so that the most effective treatment can be obtained." *Camperlengo v. Blum*, 56 N.Y.2d 251, 254, 451 N.Y.S.2d 697, 698, 436 N.E.2d 1299 (1982). Confidentiality in the physician-patient relationship works to eliminate "fear of embarrassment or disgrace flowing from disclosure of communications made to a physician [that] would deter people from seeking medical help and securing adequate diagnosis and treatment." *Williams v. Roosevelt Hospital*, 66 N.Y.2d 391, 395, 497 N.Y.S.2d 348, 488 N.E.2d 94 (1985). Indeed, this Court held long ago that "[t]he disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it." *Davis v. Supreme Lodge, Knights of Honor*, 165 N.Y. 159, 163, 58 N.E. 89 (1900).

The public policy goals furthered by the concept of confidentiality in the physician-patient relationship are self-evident: Confidentiality encourages individuals to seek medical treatment of diseases and conditions, which in turn promotes a healthier society. *See* Furci, *Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend That Far?*, 5 Quinnipiac Health L.J. 229, 236. As the Appellate Division below noted, it was for the very reason of

encouraging individuals to seek medical treatment that the Legislature adopted the physician-patient privilege almost one-hundred seventy five years ago. *See* N.Y. Civ. Prac. L & R § 4504; *Dillenbeck v. Hess*, 73 N.Y.2d 278, 284-85, 539 N.Y.S.2d 707, 536 N.E.2d 1126 (1989). As the Appellate Division explained, the physician-patient privilege was initially enacted to encourage people with venereal diseases to be frank with their physicians. *Horn*, 293 A.D.2d at 684; *see* Clark, *Confidential Communications in a Professional Context: Attorney, Physician, and Social Worker*, 24 J. Legal Prof. 79, 84 (1999-00). These policy goals are further evident in New York's AIDS Confidentiality law (N.Y. Pub. Health Law § 2780-2787), which was designed to encourage people to obtain HIV tests, alter their sexual behavior and seek treatment for HIV infection. *See* Salmon, *The Name Game: Issues Surrounding New York State's HIV Partner Notification Law*, 16 N.Y.L.Sch. J.Hum.Rights 959, 973-74.

A determination by this Court that a physician's obligation to maintain patient confidences is not a "primary" or core ethical rule governing physician conduct – as The Times urges in its appeal – would have potentially catastrophic effects on the policy goals which the concept of confidentiality seeks to effectuate. Such a holding would create great uncertainty in the minds of patients as to whether their most personal health information would be safeguarded by their physicians, which could result in patients either not seeking medical treatment or failing to provide full and accurate information regarding their symptoms so that effective treatment can be applied. It would also have a deleterious effect on the physician-patient relationship, which is built entirely upon mutual trust.

The ripple effect of such a ruling could have serious implications with respect to the public health. With individuals not seeking medical treatment or not properly revealing their symptoms or

medical histories to physicians, diseases and conditions may go untreated, placing the public at risk. Thus, The Times contention that the public at-large would not be affected by a ruling permitting employers to invade the confidential zone between an industry-employed physician and her patients is wholly without merit. (*See* The Times' Brief at 31).

The Times also erroneously argues that "confidentiality. . . .does not relate directly to the quality of medical treatment in the manner that the provision at issue in *Wieder* related directly to the quality of legal service." (The Times' Brief at 29). As established above, confidentiality fosters trust between the physician and patient that is necessary to facilitate an open and truthful dialogue regarding the patient's symptoms and physical condition. Obviously, such a dialogue is crucial to the rendering of a proper diagnosis and treatment. Thus, confidentiality is not just directly related to the provision of quality medical care, but is essential to the proper functioning of the physician-patient relationship.

The Times points to the fact that ACOEM has chosen not to discipline physicians for violating their confidentiality obligations as proof that Dr. Horn "overstated " her concerns of being disciplined for complying with The Times' directives. (The Times Brief at 30). This position overlooks the fact that the New York State Department of Health has, on several occasions, disciplined physicians for doing so. *See In the Matter of James L. Duffy, M.D.* Order No. BMPC 02-129; *In the Matter of James Y. Severinsky, M.D.*, Order No. BMPC 00-226; *In the Matter of Dieter H. Eppel*, Order No. BMPC 02-82;(the orders in these disciplinary cases can be found at *http://www.health.state.ny.us/nysdoh/ompc*).

In addition to being sanctioned for professional misconduct, the courts of this State have held that a physician can be personally liable in tort for breaching the "implied covenant of trust and confidence" that is inherent in the physician-patient relationship. *See Doe v. Community Health Plan*, 268 A.D.2d 183, 709 N.Y.S.2d 215 (3d Dep't 2000); *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (4th Dep't 1982); *Doe v. Roe*, 93 Misc.2d 201, 400 N.Y.S.2d 668 (Sup. Ct. N.Y. Co. 1977).

In *Doe v. Roe, supra.*, a psychiatrist had published the intimate details of the plaintiff's life that were gleaned through years of psychoanalysis, without the plaintiff's consent. The plaintiff commenced an action for damages alleging that the psychiatrist violated her right to privacy by disclosing confidential information that the psychiatrist was obligated to maintain in confidence. The court held that "a physician, who enters into an agreement with a patient to provide medical attention, impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient's physical or mental condition as well as all matters discovered by physician in the course of examination or treatment." *Doe*, 93 Misc.2d at 210. Moreover, the court determined that the plaintiff stated a valid cause of action for breach of this implied covenant against the psychiatrist on account of his unauthorized betrayal of the plaintiff's confidences. The *Doe* court held that this cause of action was based in contract and that the plaintiff would be limited to purely economic damages as a result of the psychiatrist's breach.

In *MacDonald v. Clinger, supra.*, the Appellate Division also held that the breach of the implied duty of confidentiality by a physician provides the wronged patient with the basis for a

cause of action. Its analysis differed from *Doe* in that the court determined that the cause of action was grounded in tort and thus the plaintiff was not limited to the recovery of solely economic damages. In reaching its conclusion, the Appellate Division stated:

> The relationship of the parties was one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach was not merely a broken contractual promise, but a violation of a fiduciary responsibility to plaintiff implicit and essential to the doctor-patient relationship.

MacDonald, 84 A.D.2d at 487. More recently, the Appellate Division reaffirmed *MacDonald*, holding that "the duty not to disclose confidential personal information springs from the implied covenant of trust and confidence that is inherent in the physician patient relationship, the breach of which is actionable as a tort." *Doe v. Community Health Plan*, 268 A.D.2d 183, 709 N.Y.S.2d 215 (3d Dep't 2000).

2. Imparting Truthful Information to Patients is a Core Professional Obligation of a Physician

It is beyond question that a physician licensed in the State of New York is subject to professional discipline when she practices the profession fraudulently. *See* N.Y. Educ. Law §6530(2); *see, e.g., Larkins v. DeBuono*, 257 A.D.2d 714, 682 N.Y.S.2d 732 (3d Dep't 1999)(revocation of medical license was appropriate where physician fraudulently practiced medicine by engaging in a pattern of ordering tests and treatments for patients that were not medically necessary); *Rosenberg v. Board of Regents of University of the State of New York*, 96 A.D.2d 651, 466 N.Y.S.2d 743 (3d Dep't 1983), *appeal denied*, 61 N.Y.2d 608, 475 N.Y.S.2d 1025, 463 N.E.2d 1235 (1983)(evidence establishing osteopath acted knowingly and intentionally in providing worthless and unnecessary treatments warranted a finding that he fraudulently practiced medicine).

A physician practices medicine fraudulently within the meaning of Education Law § 6530(2) when she intentionally misrepresents or conceals facts from a patient regarding the patient's condition. *See Muncan v. State Board for Professional Misconduct*, 296 A.D.2d 721, 722, 745 N.Y.S.2d 304 (3d Dep't 2002)(physician was guilty of fraudulently practicing medicine where he knew he removed the wrong kidney during surgery and intentionally concealed his mistake instead of taking steps to rectify it); *Steckmeyer v. State Board for Professional Conduct*, 295 A.D.2d 815, 744 N.Y.S.2d 82 (3d Dep't 2002)(physician was guilty of fraudulently practicing medicine by exposing his patients to excessive and unnecessary medical treatments); *Sherman v. Board of Regents of the University of the State of New York*, 24 A.D.2d 315, 321, 266 N.Y.S.2d 39 (3d Dep't 1966), *aff'd*, 19 N.Y.2d 679 (1967)(the fraudulent practice of medicine is "characterized as intentional misrepresentation or concealment of fact. . . [and]. . . shall not be construed to require

that anyone actually be misled so long as intent is present"); *Hutschnecker v. Board of Regents of the University of the State of New York*, 269 A.D. 891, 56 N.Y.S.2d 322 (3d Dep't 1945)(physician was guilty of practicing medicine fraudulently when he knowingly misrepresented patient's fitness for specific employment).

As a supplement to the Education Law, the New York State Department of Health issues to each member of the Board a copy of the Board for Professional Medical Misconduct Board Member Manual (the "Manual"). (The relevant excerpts of the Manual are annexed as Exhibit 5). The purpose of the Manual is to provide guidance to Board members by further defining professional medical misconduct. The Manual provides that "[t]he intentional misrepresentation or concealment of a known fact, made in some connection with the practice of medicine constitutes the fraudulent practice of medicine." (Ex. 5). Indeed, all that is needed to sustain a charge of fraudulently practicing medicine is a showing that "(1) a false representation was made by the licensee whether by words, conduct or concealment of that which should have been disclosed, (2) the licensee knew the representation was false, and (3) the licensee intended to mislead through the false representation." (Ex. 5); *see*, also, *Sherman v. Board of Regents*, 24 A.D.2d 315 (3d Dep't 1996). The Manual further provides that "[t]here need not be either actual reliance on or actual injury caused by the misrepresentation in order to constitute the fraudulent practice of medicine." (Ex. 5). Instead, the "focus is on the physician's conduct in attempting to induce reliance, and not whether the physician succeeds in causing reliance or whether any gain to him occurs to the detriment of the patient." (Ex. 5). Indeed, the Manual clearly provides that "[t]here is no requirement that someone actually be misled, as long as the intent of 'misrepresentation of fact' is present." (Ex. 5); *see*

Tompkins v. Board of Regents of the University of the State of New York, 299 N.Y. 469, 87 N.E.2d 517 (1949)(physician was guilty of the fraudulent practice of medicine where he prescribed medication to a patient for an improper purpose).

Like the duty to safeguard patient confidences, the obligation of a physician to impart truthful and accurate information to her patients is a primary element of the physician-patient relationship and essential to the medical profession. Its importance to the physician-patient relationship is evidenced in the following:

> The relationship of a patient to his physician is by its very nature one of the most intimate. Its foundation is the theory that the physician is learned, skilled and experienced in the afflictions of the body about which the patient ordinarily knows little or nothing but which are the most vital importance to him. Therefore, the patient must necessarily place great reliance, faith and confidence in the professional word, advice and acts of his doctor. It is the physician's duty to act with the utmost good faith and to speak fairly and truthfully at the peril of being held liable for damages for fraud and deceit.

41 Am. Jur., *Physicians and Surgeons*, § 74; *see, also*, 61 Am. Jur.2d, *Physicians and Surgeons*, § 99 ("[a] physician is under obligation, in making disclosure to the patient as to the [patient's] condition, the results of the treatment administered, the possibility of cure, and the like, to speak fairly and truthfully. . .")

It is clear that Dr. Horn could have been subjected to professional discipline had she complied with The Times' alleged directives to conceal or misrepresent the true physical condition

of The Times' employees she examined. Providing false information to patients for the purposes of depriving them of a benefit under the Worker's Compensation Law to which they would be lawfully entitled would certainly constitute the fraudulent practice of medicine. The Times' alleged directives that Dr. Horn provide false information to her patients placed Dr. Horn in the position of having to choose between her continued employment with the company or violating a primary ethical obligation which is one of the basic foundations of the physician-patient relationship. Should the Court determine that a physician's duty to impart truthful and accurate information to her patients is not a "core" or "primary" ethical duty of the medical profession, it will erode the foundation of trust between a patient and her doctor that is essential to facilitating proper medical care.

CONCLUSION

It is respectfully requested that this Court affirm the Appellate Division's decision and order in its entirety.

Dated: Great Neck, New York
November 26, 2002

Respectfully submitted,

_____

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COURT OF APPEALS OF THE STATE OF NEW YORK

----------X Index No. 107770/00

SHEILA A. HORN,

Plaintiff/Respondent,

-against-

THE NEW YORK TIMES,

Defendant/Appellant.

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BRIEF OF *AMICI CURIAE* MEDICAL SOCIETY OF THE STATE OF NEW YORK, THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE

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