SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

SHEILA E. HORN,	:	
	:	
Plaintiff-Respondent	:	
	:	
-against-	:	Index No. 107770/00
	:	
THE NEW YORK TIMES,	:	
	:	
Defendant-Appellant	:	

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

INTEREST OF THE AMICI CURIAE

The Medical Society of the State of New York ("MSSNY") is a New York not-for-profit corporation organized and existing under the laws of the State of New York since 1807. MSSNY has approximately 28,000 member-physicians located in virtually every community of the State of New York. It is the principal professional organization in the State representing physicians in all specialties. MSSNY's membership includes not only physicians who own their own practices or physicians who are employed by medical practices, but also includes physicians who are employed by industry. MSSNY's purposes include:

> "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". (Article 1, MSSNY's Bylaws)

The American Medical Association ("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 the public health. Its 290,000 members practice in all states and in all fields of medical specialization.

The American College of Occupational and Environmental Medicine (ACOEM) represents over 7,000 physicians and is the pre-imminent 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; stimulating 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 to protect the confidentiality of the individually identifiable health information contained in the health and medical records that they create and/or maintain as an integral part of his or her job responsibilities.

PRELIMINARY STATEMENT

MSSNY, the AMA and ACOEM submit this brief in support of Dr. Horn because this appeal presents issues of critical importance to all physicians.[1] The Amici believe that when a licensed physician is hired by an employer to perform services that are medical in nature – whether the employer is another licensed physician or a non-medical entity – there is an implied

[1] The American Medical Association and the Medical Society of the State of New York 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 American Medical Association and private, voluntary nonprofit state medical societies to represent the views of organized medicine in the courts. Forty-nine state medical societies and the Medical Society of the District of Columbia join the AMA as members of the Litigation Center.

covenant of good faith and fair dealing, and an implied understanding that the employer will not require the employee to violate fundamental ethical standards of the medical profession and statutes and regulations governing the practice of medicine. In a decision rendered by New York Supreme Court Justice Edward H. Lehner, the court below held that the exception enunciated in Wieder v. Skala, 80 N.Y. 2d 628 (1992) to New York's rule relating to employment at will should apply to a physician employed by a non-medical entity. The Amici believe that the decision below was correct and should be affirmed. Justice Lehner concluded that no physician should be placed in a position of choosing between either retaining employment or facing professional disciplinary action and the loss of the physician's medical license. Ultimately, judicial recognition of an implied covenant of good faith and fair dealing in the employment of a physician benefits the patients served by the physician and promotes quality medical care.

ARGUMENT

THE COURT BELOW CORRECTLY HELD THAT THE WIEDER EXCEPTION TO THE EMPLOYMENT AT-WILL RULE APPLIED

In Wieder, an attorney sued his former employer, a law firm, claiming he was wrongfully discharged because of his insistence that the firm comply with the governing disciplinary rules by reporting professional misconduct allegedly committed by another member of the law firm. The defendants argued that there was no factual basis to find an express limitation on the right of the defendants to terminate the plaintiff's employment at will, and the defendants could terminate the employment of the plaintiff at any time for any reason or even for no reason, citing Murphy v. American Home Products Corporation 58 N.Y. 2d 293 (1983) and Sabetay v. Sterling Drug, 69 N.Y. 2d 329 (1987). The Court of Appeals held, however, that Murphy and Sabetay

were not controlling. In Murphy and Sabetay, the primary responsibility of the plaintiffs was corporate management. Although they performed accounting services, they did so in furtherance of their primary line responsibilities as part of corporate management. In contrast, in Wieder "plaintiff'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", 80 N.Y. 2d at 635. While every law associate is an employee of the firm, stated the Court of Appeals, they remain independent officers of the court responsible in a broader sense for their public obligations. The Court of Appeals held that there is an implied understanding so "fundamental" to the 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. "Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct … would subvert the central professional purpose of his relationship with the firm - - the lawful and ethical practice of law", 80 N.Y. 2d at 636.

The Court of Appeals noted that the particular rule of professional conduct implicated in Wieder - - the duty of each lawyer to report to the Disciplinary Committee of the Appellate Division any potential violations of the Disciplinary Rules that raise a "substantial question as to another lawyer's honesty, trust worthiness or fitness in other respects" - - is critical to the unique function of self-regulation belonging to the legal profession. The Court of Appeals noted that one commentator stated "[t] he reporting requirement is nothing less than essential to the survival of the profession", 80 N.Y. 2d at 636. Moreover, stated the Court of Appeals, the failure to comply with the reporting requirement may result in suspension or disbarment. According to the Court, by insisting that the plaintiff disregard the rule of professional conduct "defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him

in the position of having to choose between continued employment and his own potential suspension and disbarment." 80 N.Y. 2d at 636.

In Horn the plaintiff-appellee served as the Associate Medical Director of the Medical Department of the New York Times. According to Justice Lehner's decision, her primary duty was to provide "medical care, treatment and advice" to employees of the New York Times. Among other responsibilities, Dr. Horn examined employees claiming Workers' Compensation benefits to verify that their claimed injuries were work related. Doctor Horn alleged that on frequent occasions the Labor Relations Department, Legal Department and Human Resources Department of the New York Times directed her to provide them with confidential medical records of employees without those employees' consent or knowledge, and that the Vice President of Human Resources instructed her to "misinform employees regarding whether injuries or illnesses they were suffering were work-related so as to curtail the number of Workers' Compensation claims filed against the Times". Doctor Horn received advice from the New York State Department of Health that such conduct by a physician would violate legal and ethical duties to patients, and Dr. Horn refused to comply with these asserted directives. Soon thereafter, in April, 1999, the New York Times announced that as part of a restructuring of its Medical Department, Dr. Horn's position, as well as that of the medical director and the physician's assistant, would be eliminated. Doctor Horn alleged that she was terminated because she refused to comply with the directives and the termination of her employment was a breach of the implied terms of her employment. Finding that Wieder was controlling, Justice Lehner denied the defendant-appellant's motion to dismiss and held that a covenant of good faith and fair dealing may be implied in a contract for the employment of a physician.

The Amici believe that a comparison of the legal and medical professions supports the application of Wieder. Just as every attorney has obligations to the public, the ethical standards of the medical profession and statutes governing the practice of medicine charge every physician with duties to the patient. The fundamental duties of a physician to deal honestly and not deceive patients, and to safeguard patient confidences within the constraints of the law are as "essential" or "critical" to the medical profession as the professional conduct implicated in Wieder is "essential" or "critical" to the legal profession. Indeed, the trust of patients that the medical profession will honor these fundamental duties "is nothing less than essential to the survival of the profession".

Justice Lehner appropriately held that the fact that the patients that Dr. Horn treated were only employees of the New York Times is of no relevance. There is nothing in the law that makes a physician's duties of confidentiality and honesty any different depending on whether the patients being treated are employees of the physician's employer or are private patients. Whether a physician is employed by another licensed physician to provide medical care to private patients or is employed by industry to provide medical care to the industry's employees, there is a clear understanding that the physician is employed to conduct the practice of medicine in accordance with the ethical standards of the profession and laws governing professional conduct. Just as an attorney should not have to choose between continued employment and his own potential suspension and disbarment, a physician should not have to choose between continued employment and potential revocation of the physician's license.

THE PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION

The Principles of Medical Ethics of the AMA establish the core ethical principles for members of the medical profession. The AMA is the largest association of physicians in the United States. MSSNY is a constituent state association entitled to representation in the AMA House of Delegates, and supports the Principles of Medical Ethics of the AMA.

The Principles of Medical Ethics read as follows:

> The medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. As a member of this profession, a physician must recognize responsibility not only to patients, but also to society, to other health professionals, and to self. The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician.
>
> I. A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity.
> II. A physician shall deal honestly with patients and colleagues, and strive to expose those physicians deficient in character or competence, or who engage in fraud or deception.
> III. A physician shall respect the law and also recognize a responsibility to seek changes those requirements which are contrary to the best interests of the patient.
> IV. A physician shall respect the rights of patients, of colleagues, and of 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, 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, free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.
> VII. A physician shall recognize a responsibility to participate in activities contributing to an improved community.

The ethical rule implicated in Wieder was a "primary" rule of the legal profession, 80 N.Y. 2d at 638. Similarly, the ethical rules implicated in Horn are the primary ethical rules of the medical profession. . If as alleged Dr. Horn was directed to misinform employees regarding the nature of their injuries and illnesses, then she was directed to violate Principle II and directed to be dishonest and to commit fraud and deception against the patients that placed their trust in her.

If as alleged Dr. Horn was directed by her employer to reveal confidential medical records of employees without those employees' consent or knowledge, then she was directed to violate Principle IV of the Principles of Medical Ethics

The Current Opinions of the Council on Ethical and Judicial Affairs of the AMA reflects the application of the Principles of Medical Ethics to specific ethical issues in medicine. Opinion E-5.09 states that the duty of a physician to protect the patient's confidential information applies to physicians employed by industry:

> "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 a 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, 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."

Report 5-A-99 of the Council on Ethical and Judicial Affairs of the AMA (annexed as Appendix A) more specifically addresses the ethical duties of the "industry employed physician" or "IEP". An IEP is employed by businesses or insurance companies for the purpose of conducting medical examinations. As an example an IEP can perform employment, pre-employment, and work-related examinations to determine whether an individual is suitable for a particular job or if an employee who has been ill or injured can return to work. In the case of Dr. Horn, her responsibilities included examining employees claiming Workers' Compensation

benefits to determine whether their injuries or illnesses were work related. The report states that despite their employment by business or industry, the IEP has the same basic obligations of all physicians to conduct an objective medical examination and maintain patient confidentiality.

One of the "foremost" responsibilities of physicians, according to the report, is to evaluate the health of patients in an objective manner. IEPs have no less a duty as other physicians to evaluate objectively the patient's health or disability. The IEP must not be influenced by the patient-employee, employer or insurance company when making a diagnosis.

In addition to the general requirement of objectivity, the report states that the obligation of an IEP to maintain confidentiality "is the same as it is for other physicians." "As always", states the report, "the information obtained by the physician is confidential and should not be communicated to an outside party without the individual's consent, unless required by law".

PROFESSIONAL MISCONDUCT

Education Law section 6530 provides "Definitions of Professional Misconduct Applicable to Physicians, Physician's Assistants and Specialist's Assistants". Any physician found guilty of such misconduct is subject to the penalties prescribed by Public Health Law section 230-a, which, among other penalties, includes the suspension or revocation of the physician's medical license.

Among the definitions of professional misconduct, subdivision 2 of section 6530 includes "Practicing the profession fraudulently or beyond its authorized scope". Subdivision 23 includes "Revealing of personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized or required by law".

Public Health Law section 230 establishes the New York State Board for Professional Medical Conduct which is charged with the responsibility of investigating suspected professional misconduct and conducting disciplinary proceedings. To provide guidance to members of the Board for Professional Medical Conduct, the New York State Department of Health provides each member with a Manual. Included in the Manual is a summary "Definitions of Professional Misconduct Under the New York Education Law". Attached as Appendix B is a copy of the summary which is included in the Board for Professional Misconduct Board Member Manual, Volume 2, 1997.

According to the Manual, "The intentional misrepresentation or concealment of a known fact, made in connection with the practice of medicine" constitutes the fraudulent practice of medicine. In order to sustain a charge that a licensee engaged in the fraudulent practice of medicine, "the hearing committee must find 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", citing Sherman v. Board of Regents 24 A.D. 2d 315 (3d Dept. 1966), aff'd 19 N.Y. 2d 679 (1967). Citing Matter of Tompkins v. Board of Regents 299 N.Y. 469 (1949), the Manual states "There need not be either actual reliance on or actual injury caused by the misrepresentation in order for the misrepresentation to constitute the fraudulent practice of medicine". "The focus", according to the Manual, "is on the physician's conduct in attempting to induce reliance , and not on whether the physician succeeds in causing reliance or whether any gain to him occurs to the detriment of the patient". "There is no requirement that someone actually be misled", states the summary, "as long as the intent of 'misrepresentation of fact' is present", Matter of Tompkins v. Board of Regents 299 N.Y. 2d at 476.

Pursuant to the above definition, it is clear that Dr. Horn would have been subject to charges of violating Education Law section 6530(2) had she agreed to misinform patients whether injuries or illnesses they were suffering were work related, so as to curtail the number of Workers' Compensation claims filed against the New York Times. Had Dr. Horn agreed to the asserted directive of her employer to so misinform her patients, her patients would have been denied of their lawful right to receive Workers' Compensation benefits. Clearly, misrepresentation of information obtained from the medical evaluation of a patient in order to deprive the patient of his or her lawful right to obtain Workers' Compensation benefits, would constitute the fraudulent practice of medicine within the meaning of Sherman v. Board of Regents and Matter of Tompkins v. Board of Regents.

BREACH OF CONFIDENTIAL PATIENT INFORMATION

Not only would a physician be subject to professional disciplinary action for violating subdivision 23 of section 6530 of the Education Law, but the courts of this state have held that the physician's 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 [see Doe v. Community Health Plan – Kaiser Corporation, 268 A.D. 2d 183 (3rd Dept., 2000), MacDonald v. Clinger 84 A.D. 2d 482 (4th Dept., 1982); see also Doe v. Roe 93 Misc. 2d 201 (Sup Ct., N.Y. Co. 1977)].

The ruling of the Supreme County, New York County in Doe v. Roe, supra, is, apparently, the first instance that a New York court addressed the issue whether a physician may be liable in damages to a patient for wrongfully disclosing patient information. The court

considered several theories upon which the plaintiff could recover damages from her former psychiatrist who had published the extremely personal details of her life revealed during years of psychoanalysis. The court stated that Civil Practice Law and Rule 4504 and other statutes and regulations requiring physicians to protect the confidentiality of information gained during treatment are clear evidence of the public policy of New York. According to the court, the Legislature did not intend to confine the prohibition of CPLR 4504 to trials and formal hearings whose proceedings are governed by the practice act, but intended that CPLR 4504 be given a broad construction to carry out its policy.

The court also held that the duty of the physician to protect confidential patient information arises out of the physician-patient relationship and that the physician 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 the physician in the course of examination and treatment.

Quoting the court in Hammonds v. Aetna Casualty & Surety Company 243 F. Supp. 793 (N.D. Ohio, 1965), the court referred to the Hippocratic Oath as an express warranty of the medical profession:

> "[a]lmost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence. The promise of secrecy is as much an express warranty as the advertisement of a commercial entrepreneur".

(Doe v. Roe 93 Misc. 2d at 209, footnote 6 quoting from Hammonds 243 F.Supp. at 801)

The court in Doe v. Roe also cited Horne v. Patton 291 Ala. 701, 287 So. 2d 824 (1973) and noted that the conclusions in Horne were based on obligations arising from the Hippocratic Oath and the Principles of Medical Ethics of the American Medical Association, 93 Misc. 2d at 210.

In MacDonald v. Clinger, supra, the Fourth Department agreed with the court in Doe v. Roe and held that the breach of the implied covenant of confidentiality is legally actionable. However, the Fourth Department held that the plaintiff's recovery would not be limited to an action for breach of contract, which would generally limit the plaintiff to economic loss flowing directly from the breach of contract. Instead, the Fourth Department held that the breach of confidentiality is actionable as a tort. According to the Fourth Department the duty of confidentiality springs from but is extraneous to the contract. When the duty grows out of relations of trust and confidence, the breach of such duty is actionable as a tort. The Fourth Department held that the "fiduciary duty" of trust and confidence was "essential" to the doctor-patient relationship, stating:

> "The relationship of the parties here 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 in and essential to the doctor-patient relation". (84 A.D. 2d at 487)

In Doe v. Community Health Plan – Kaiser Corporation, supra, the Third Department, citing MacDonald v. Clinger, agreed that the duty not to disclose confidential patient information springs from the implied covenant of trust and confidence that is inherent in the physician patient relationship, and the breach of such duty is actionable as a tort. Although CPLR 4504 does not give rise to a private right of action and the private right of action for breach of duty of confidentiality is not predicated on CPLR 4504, the Third Department stated that CPLR 4504 defines and imposes the "scope of the actionable duty of confidentiality" 268 A.D. 2d at 187. Thus, according to the Third Department, the physician-patient privilege encompassed within CPLR 4504 does not only relate to testimony in trials and formal hearings, but defines the scope of the physician's duty of confidentiality.

CONCLUSION

For all the foregoing reasons amici curiae urge the Court to affirm the decision and order of the Supreme Court, New York County, denying the New York Times' motion to dismiss.

Dated April 23, 2001

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
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BRIEF IN SUPPORT OF MOTION TO APPEAR AMICUS CURIAE, OF THE MEDICAL SOCIETY OF THE STATE OF NEW YORK, THE AMERICAN MEDICAL ASSOCIATION, AND THE AMERICAN COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE AND IN REPLY TO BRIEF OF DEFENDANT-APPELLANT THE NEW YORK TIMES

PRELIMINARY STATEMENT

This brief is submitted in support of the joint motion of the Medical Society of the State of New York ("MSSNY"), the American Medical Association ("AMA") and the American College of Occupational and Environmental Medicine ("ACOEM") (together, the "Movants") to appear as amicus curiae in support of Plaintiff-Respondent Dr. Sheila Horn, and in reply to the brief of Defendant-Appellant The New York Times in opposition to the motion to appear amicus curiae.

ARGUMENT

A. The Amicus Curiae Brief Will Be Of Special Assistance To The Court

The Movants urge this Court to affirm the ruling of the IAS Court which held that the exception enunciated in Wieder v. Skala 80 N.Y. 2d 628 (1992) to New York's rule relating to employment at will should apply to a contract for the employment of a physician to render medical services. The IAS Court held that extension of the Wieder exception to the employment of a physician ultimately is for the benefit of the patient as well as the physician. The Movants urge this Court to grant the motion to appear amicus curiae, because the resolution of this appeal has implications not only for the Horn case but for many other employed physicians and their patients as well.

The AMA is the largest professional organization in the nation representing physicians of all specialties. MSSNY is the largest professional organization in the State of New York representing physicians in all specialties. ACOEM is the largest organization of physicians specializing in the practice of preventing, assessing and treating occupational and environmental health problems. Because the Movants will offer a unique perspective that will be of special assistance to the Court, the Movants respectfully request this Court to grant the motion for leave to appear, amicus curiae.

The Defendant-Appellant contends that the Court should deny the Movants' application to appear as amici curiae because the contentions underlying Horn's position have been fully and ably presented by Horn's counsel. Notwithstanding that Horn's counsel has fully and ably presented Horn's position, this Court has discretion to grant the motion if

the Court believes that the amicus curiae brief will be of special assistance to the Court. The Movants respectfully submit that Movants present the perspective of the medical profession and this perspective will be of special assistance to the Court.

The Defendant-Appellant cite Rourke v. New York State Department of Correctional Services, 603 N.Y. S. 2d 647, 649, 159 Misc. 2d 324 (Sup. Ct. Albany Cty. 1993), aff'd 615 N.Y.S. 2d 470, 201 A.D. 2d 179 (3rd Dept. 1994); Franklin v. Krause, 371 N.Y.S. 2d 757, 761, 83 Misc. 2d 42 (Sup. Ct. Nassau Cty., 1975; and Estate of Mayer, 441 N.Y.S. 2d 908, 911, 110 Misc. 2d 346 (Surr. Ct., N.Y. Cty. 1981) as authority to deny the Movants' application to appear as amici curiae. It is submitted that the decisions cited by Defendant-Appellant are inapposite and irrelevant to Horn.

Defendant-Appellant's citation of Rourke demonstrates the speciousness of Defendant-Appellant's position. The Defendant-Appellant mentions the fact that Justice Keegan denied the motion by the New York Civil Liberties Union for leave to appear as amicus curiae 603 N.Y.S. 2d at 649, but fails to mention that in the appeal, the New York State Supreme Court, Appellate Division, Third Department granted the motion by the New York State Civil Liberties Union to appear as amicus curiae; see Rourke v. State Dept. of Corr. Services 615 N.Y.S. 2d 470, at 471. Surely, Defendant Appellant does not suggest that the Third Department granted the motion by the New York Civil Liberties Union to appear as amicus curiae in the appeal because it felt that petitioner-respondent Rourke's contentions were inadequately presented.

Franklin is clearly distinguishable from the instant appeal. Franklin involved a dispute in regard to the establishment of a plan of apportionment for the Nassau County Legislature. The Supreme Court, Nassau County held that it would not impose either the plan supported by the plaintiffs or the defendants, but, instead, would appoint a judicial commission to devise a plan

for a County Legislature. A group of five citizens asked for leave to intervene as amicus curiae, but the request was denied. The Court in Franklin noted that the citizens had another forum to present their views – they could present their recommendations to the judicial commission appointed by the Court, see Franklin 371 N.Y.S. 2d 757 at 761. Moreover, in Franklin it was the judicial commission and not the Court that would ultimately decide which plan of apportionment would be adopted. The citizens had the opportunity to present their views to the body that would ultimately decide the dispute. In the instant appeal, there is no alternative forum. This Court will decide the issue of vital interest to physicians and their patients.

In Estate of Mayer the Attorney General and Manhattan School of Music ("Manhattan") sought authorization to sell certain land that was received by Manhattan through a charitable bequest. The Court accepted arguments made by Manhattan that a premium could be obtained if the sale of the land was consummated in the summertime. Serious concern was expressed by Manhattan that if the sale had to be delayed until the next summer, the property could be damaged if severe winter storms struck the area. The Court denied the request of a contiguous landowner to intervene in the proceeding, or alternatively to appear as amicus curiae, because the Court agreed that a delay in the sale of the property could substantially prejudice the rights of Manhattan. Clearly, Estate of Mayer has no application to the instant appeal as Defendant-Appellant has made no similar showing of substantial prejudice.

B. The Movants' Specific Arguments Are Properly Presented On Appeal And Are Relevant To The Issues Presently Before This Court

1. The Defendant-Appellant's Brief contends that Horn did not rely on the argument in the IAS court below that the Times improperly sought to force her to make false representations to patient employees concerning the work-related nature of illness or injuries. This is a specious contention. Paragraph 15 of Horn's Complaint states:

"Dennis Stern, HR Vice President, instructed Dr. Horn to misinform employees regarding whether injuries or illnesses they were suffering were work-related so as to curtail the number of Workers' Compensation claims filed against the Times. Again concerned about committing ethical violations, Dr. Horn failed to comply with Mr. Stern's instructions."

Clearly, the IAS Court found that Horn properly raised the issue, holding:

> "Considering these statutes and rules and the principles that govern the practice of medicine, I find that the claim that plaintiff was discharged because she refused to comply with demands that she provide Times officials with confidential medical information and that she give employees misinformation with respect to their possible claims under the Workers' Compensation Law is sufficient to state a cause of action for breach of an implied contract of employment. I have reached this conclusion because the strictures imposed upon the profession and the resulting responsibility to the public warrants an extension of the principles set forth in Wieder to physicians."

2. The Defendant-Appellant's Brief argues that the Movants' position, that industry employed physicians (IEPs) are subject to the same provisions as other physicians concerning patient confidentiality and honesty to patients, is irrelevant. First, Defendant-Appellant states that the Current Opinions of the Council on Ethical and Judicial Affairs of the AMA ("Current Opinions") is not binding authority on this Court. This is a specious statement. The Movants have not asserted that the Current Opinions is binding authority, but, Movants believe the Current Opinions provides the perspective of the medical profession that will be of special assistance to the Court.

Next, the Defendant-Appellant contends that even assuming industry employed physicians owe a duty of confidentiality to patient-employees, such duty does not create an implied contract between The Times and Horn. It is submitted that Defendant-Appellant is simply wrong and the IAS Court below correctly decided the issue. Precisely because every

physician owes ethical and legal duties to patients – just as every attorney has obligations to the public – the IAS Court below held that the Wieder exception to the employment at will rule should apply to the employment of a physician, and an allegation of good faith and fair dealing may be implied in a contract for the employment of a physician.

Conclusion

For the forgoing reasons, the Movants' application for leave to appear as amicus curiae should be granted.

Dated: Lake Success, New York
May 14, 2001

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