CAUSE NO. D-1-GN-15-003129

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| ROBERT W. VAN BOVEN, M.D., D.D.S., and THE BRAIN AND BODY HEALTH INSTITUTE, P.A., Plaintiffs | § IN THE DISTRICT COURT OF |
| vs. | § TRAVIS COUNTY, TEXAS |
| LAKEWAY REGIONAL MEDICAL CENTER, L.L.C., Defendant | § 98TH JUDICIAL DISTRICT |

**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PLAINTIFFS**

**TO THE HONORABLE COURT:**

The Association of American Physicians & Surgeons ("AAPS", or "Movant") hereby requests leave to file its accompanying brief as *amicus curiae* in support of Plaintiffs Robert W. Van Boven, M.D., D.D.S. ("Van Boven"), and The Brain and Body Health Institute, P.A., and in opposition to Defendant Lakeway Regional Medical Center, L.L.C. ("Defendant"). In support of this motion, AAPS states the following:

1. **Identification and Purpose of Movant.**

Movant AAPS, founded in 1943, is a non-profit, national association of physicians, including many in Texas. AAPS has members who have suffered from bad faith medical staff credentialing decisions by hospitals, and from unjustified retaliation as occurred in this case. These bad faith decisions by hospitals constitute improper punishment of physicians for standing up for the quality of medical care. These physicians, including Plaintiff Robert

Van Boven, M.D., D.D.S, act in the interests of patients but sometimes hospitals improperly retaliate against them for doing so.

AAPS exists to defend the practice of private and ethical medicine so that physicians may best serve their patients without improper retaliation by hospitals. AAPS has filed *amicus curiae* briefs in many cases before the United States Supreme Court and federal courts of appeals, and AAPS's submissions have been cited favorably in multiple state and federal appellate decisions. *See, e.g.*, *Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (the Illinois Supreme Court discussing an amicus brief which was filed by the Association of American Physicians & Surgeons); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (citing and siding with an AAPS argument); *United States v. Rutgard*, 116 F.3d 1270, 1275 (9th Cir. 1997) (mentioning AAPS as *amicus curiae*).

**2. Interest of Movant.**

Movant AAPS has a strong interest in this case because the central issues concern the ability of physicians to act in the interests of patients, without fear of retaliation by a hospital against them. Judicial reviewability of retaliatory action, as presented in this case, potentially affects virtually every hospital in Texas, virtually every physician at every hospital, and nearly every one of their patients. Movant AAPS therefore has a direct and vital interest in the issues presented in this lawsuit before this Court, based on the harmful effect on the practice of medicine and the quality of patient care as caused by hospital retaliatory actions.

**3. Issues to be Addressed by Movant.**

Movant AAPS makes two points in its accompanying amicus brief that are central to the issues in this case, and thus should be helpful to this Court.

First, AAPS explains that patient safety at public hospitals is clearly a matter of public concern. Indeed, it is difficult to imagine any issue that would be of greater public significance. Raising valid objections about hospital procedures that are harmful to patients, as Plaintiff Van Boven did in an appropriate manner, must be fully protected speech at the core of First Amendment safeguards.

Accordingly, Movant AAPS urges this Court to hold that physicians are protected against retaliation by hospital administrators. Public trust in hospitals can be preserved only by ensuring legal accountability when a hospital abuses that trust. Defendant's misuse of law enforcement to retaliate against Plaintiff Van Boven was a clear abuse of power in violation of the First Amendment, for which Plaintiffs have stated multiple valid causes of action. This case should proceed to discovery and trial.

Second, public policy prevents enforcement of any of the provisions in Plaintiff Van Boven's settlement with Defendant which may purport to silence him against speaking out on behalf of patients. Defendant's attempt to silence Plaintiff Van Boven is contrary to public policy, and any settlement provisions purporting to justify such censorship should be declared void and unenforceable. As Movant AAPS explains in its accompanying amicus brief, a release, like all contractual provisions, is enforceable only if consistent with the public policy of the State. Silencing a physician about patient issues at a hospital does not comport with public policy, and thus should not be allowed by this Court.

**4. Assistance to the Court in the Disposition of this Case.**

AAPS's arguments should assist this Court in resolving this dispute, and are not repetitive with other briefs. AAPS has extensive experience with the policies at stake in this case, and its brief conveys information to the Court based on AAPS's unique expertise in this field. AAPS's *amicus curiae* brief will therefore be of assistance to the Court in adjudicating this matter.

**5. Funding of this brief is by AAPS.**

The funding for this brief and any associated fees are provided for by AAPS.

**Conclusion**

Movant AAPS respectfully requests that leave to file its accompanying *amicus curiae* brief be granted.

Dated: July 25, 2018

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on July 25, 2018, a true and correct copy of the accompanying Motion, the Brief of Amicus Curiae Association of American Physicians & Surgeons, and the proposed Order was electronically submitted or sent by United States postal mail to all counsel of record:

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| ROBERT W. VAN BOVEN, M.D., D.D.S.,<br>THE BRAIN AND BODY HEALTH<br>INSTITUTE, P.A.,<br>Plaintiffs | §<br>§<br>§<br>§<br>§ | IN THE DISTRICT COURT OF |
| vs. | §<br>§ | TRAVIS COUNTY, TEXAS |
| LAKEWAY REGIONAL MEDICAL<br>CENTER, L.L.C.,<br>Defendant | §<br>§<br>§ | 98TH JUDICIAL DISTRICT |

**ORDER**

The Court, having considered the Motion for Leave to File Brief of Amicus Curiae Association of American Physicians & Surgeons in Support of Plaintiffs, and its accompanying proposed amicus brief, is of the opinion that the Motion should be granted.

IT IS HEREBY ORDERED THAT:

The Motion for Leave to File Brief of Amicus Curiae Association of American Physicians & Surgeons is GRANTED.

______________________________

Judge Presiding

CAUSE NO. D-1-GN-15-003129

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| ROBERT W. VAN BOVEN, M.D., D.D.S., and THE BRAIN AND BODY HEALTH INSTITUTE, P.A., Plaintiffs | § § § § § | IN THE DISTRICT COURT OF |
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# BRIEF OF AMICUS CURIAE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PLAINTIFFS


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## TABLE OF CONTENTS

Table of Contents ..... ii

Table of Authorities ..... iii

Statement of Interest ..... 1

Introduction ..... 2

Statement of Facts ..... 2

Argument ..... 3

I. This Court Should Protect Medical Practitioners Against Retaliation for Speech on Behalf of Patients. ..... 3

II. None of the Settlement Provisions Purporting to Prevent Plaintiff Van Boven from Speaking Out about Hospital Misconduct Is Enforceable. ..... 6

Conclusion ..... 8

## TABLE OF AUTHORITIES

## CASES

*Ex parte Payne*, 598 S.W.2d 312, 317 (Tex. Civ. App.--Texarkana 1980, no writ), *overruled on other grounds, Huff v. Huff*, 648 S.W.2d 286 (Tex. 1983) .................... 7

*Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187, 597 S.E.2d 202 (2004). .................... 5

*In re Mabray*, 355 S.W.3d 16 (Tex. App.--Houston 2010) .................... 7

*Lawrence v. CDB Servs.*, 44 S.W.3d 544 (Tex. 2001) .................... 7

*Richmond Printing v. Port of Houston Auth.*, 996 S.W.2d 220 (Tex. App.--Houston [14th Dist] 1999, no pet.) .................... 7

*Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177 (Tex. App.--Dallas 1986, no writ) .................... 7

*Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 41 Tex. Sup. Ct. J. 165 (Tex. 1997) .................... 7

*Schmaltz v. Walder*, 566 S.W.2d 81 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.) .................... 7

*Springer v. Henry*, 435 F.3d 268 (3rd Cir. 2006) .................... *passim*

*Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556 (Tex. 1990) .................... 7

*Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 52 N.E.3d 319 .................... 1

## ARTICLES

Martin Makery, *Andrew Ibrahim, MD, Case Western Reserve School of Medicine, and Dominic Papandria, MD, Indiana University School of Medicine*,

"Rising Executive Compensation At Children's Hospitals Threatens The Public Trust," *Health Affairs Blog* (Sept. 14, 2012) ........................................ 5

Bob Stuart, "Court Rules for Whistleblower," *News Virginian* (June 16, 2004) . ....... 5

Steve Twedt, "When Right Can Be Wrong; a 'Disruptive' Doctor Loses His Post After Standing Up for Patients," *Pittsburgh Post-Gazette* A-1 (Oct. 27, 2003) ..................................................... 6

**INTERNET**

http://healthaffairs.org/blog/2012/09/14/rising-executive-compensation-at-childrens-hospitals-threatens-the-public-trust/ .................................................................. 5

The Association of American Physicians and Surgeons ("AAPS") hereby submits its *amicus curiae* brief in support of Plaintiffs Robert Van Boven, M.D., D.D.S. ("Van Boven") and The Brain and Body Health Institute, P.A. ("BBHI").

**STATEMENT OF INTEREST**

Founded in 1943, the *Amicus* Association of American Physicians & Surgeons ("AAPS") has defended the practice of ethical, private medicine for more than seventy years. A non-profit national association based in Tucson, Arizona, AAPS has members in virtually every specialty, including physicians who practice in the State of Texas. AAPS has filed amicus briefs to present the perspective of physicians and patients, and AAPS amicus briefs have been recognized in multiple published decisions by federal and state courts. *See, e.g.*, *Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (the Illinois Supreme Court discussing an amicus brief which was filed by the Association of American Physicians & Surgeons); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (ruling in favor of the position advocated by AAPS in its amicus brief, and expressly recognizing its argument "that the issue transcends the relationship between the parties and instead impacts thousands of patients damaged as a result of hospital errors, incompetence, wrongdoing, and cover-ups").

This case likewise presents issues that transcend the parties and impact many physicians and patients. The possibility of being subjected to retaliation for reporting harm to patients – harm that included avoidable deaths – has a chilling effect on all of medical practice. Plaintiff Van Boven reported more than 20 cases of inadequate care, and for his

efforts was then repeatedly victimized by retaliation. Legal redress by whistleblowers is of paramount concern to all physicians and patients.

AAPS has long been outspoken against the harm caused by retaliation against physicians by hospitals. AAPS respectfully submits that its decades-worth of experience on this issue will be useful to this Court, and AAPS presents arguments here that are not likely to be included by the parties in their briefs.

## INTRODUCTION

Plaintiff Van Boven made numerous internal complaints about the quality of care and safety violations at Defendant Lakeway Regional Medical Center, L.L.C. ("Defendant"), yet Defendant did virtually nothing to improve either. Plaintiff complained about harm and significant risks to patients. Yet Defendant, rather than investigating, instead retaliated against Van Boven so severely that it resulted in a settlement payment by Defendant to him.

Rather than leave Plaintiff Van Boven alone after settling with him, Defendant then retaliated further against Plaintiff Van Boven and misused law enforcement in a wrongful attempt to punish him even more severely than before. The evidence is incontrovertible, including admissions by police officers concerning the scheme. The retaliation was contrary to Van Boven's First Amendment rights and constituted multiple actionable torts against him. Defendant must be legally accountable for its wrongdoing, which undermines the public trust in hospitals in addition to inflicting substantial actionable injury on Van Boven.

## STATEMENT OF FACTS

AAPS hereby incorporates by reference the allegations set forth by Plaintiffs in their

First Amended Petition.

## ARGUMENT

Plaintiffs assert valid causes of action having immense public significance. There must be full legal accountability for Defendant's misuse of law enforcement to take improper action against Plaintiff Van Boven.

As AAPS explains below, no provisions in Plaintiff Van Boven's settlement with Defendant should be enforceable against him in order to prevent him from speaking out and suing over Defendant's continued wrongdoing. Any such provision is contrary to public policy and should be declared null and void.

### I. This Court Should Protect Medical Practitioners Against Retaliation for Speech on Behalf of Patients.

Patient safety at public hospitals is clearly a matter of public concern. Indeed, it is difficult to imagine any issue that would be of greater public significance. Accordingly, raising valid objections about hospital procedures that are harmful to patients, as Plaintiff Van Boven did in an appropriate manner, must be fully protected speech at the core of First Amendment safeguards against retaliation that misuses law enforcement.

This Court should consider and adopt the approach taken by the U.S. Court of Appeals for the Third Circuit, which held that the First Amendment does protect the physician against retaliation by the hospital administrators. *See Springer v. Henry*, 435

F.3d 268 (3d Cir. 2006). The *Springer* Court held:

> Dr. Springer's speech (i.e., a physician's critique of patient safety and unsafe working conditions) constitute matters of public concern. In several cases cited by the District Court the courts held that statements by health care providers regarding patient care involved matters of public concern.

*Id.* at 275.

The *Springer* case involved a public hospital, but in many ways Plaintiff Van Boven's case here is even more compelling because it concerns Defendant's misuse of the law enforcement arm of government. The retaliation by Defendant against Plaintiff Van Boven through misuse of the police power of the State was more severe than the retaliation in the *Springer* case.

Hospitals, by virtue of their receipt of public money, have a duty to serve the public good. But unlike public schools and other government-funded institutions, hospitals typically lack meaningful oversight or external accountability. There are no publicly elected "hospital boards" akin to the school boards that have oversight of public schools. There are no meaningful limits on the runaway self-enrichment by hospital administrators – which frequently consist of multi-million-dollar compensation packages – as there are for most other entities. "Children's Hospital of Los Angeles provided a top executive with the unprecedented compensation of $3.9 million, and the CEO of Children's Hospital of Philadelphia was paid $3.4 million" in 2009; respected academicians explain that hospital administrators are increasingly

enriching themselves at the expense of the public trust.[1] The First Amendment provides an essential "check and balance" where there otherwise would be none.

In state court in Virginia, Dr. Harry Horner took his case all the way to the Virginia Supreme Court to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187, 597 S.E.2d 202 (2004). Dr. Horner criticized the substandard care of patients, whereupon an administrator at Western State Hospital responded with pretextual allegations against him, such as unjustifiably accusing him of abuse and neglect because he did not wear gloves while dressing a wound on a particular patient's foot. See Bob Stuart, "Court Rules for Whistleblower," *News Virginian* (June 16, 2004). State courts and the U.S. Court of Appeals for the Third Circuit have recognized the problem of retaliation by hospital administrators against physicians who stand up for patient care, this court should likewise side with patients and with their physicians who are subjected to wrongdoing in response to valid complaints.

Retaliation by hospital administrators against physicians and other medical

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[1] Martin Makery, *Andrew Ibrahim, MD, Case Western Reserve School of Medicine, and Dominic Papandria, MD, Indiana University School of Medicine*, "Rising Executive Compensation At Children's Hospitals Threatens The Public Trust," *Health Affairs Blog* (Sept. 14, 2012). http://healthaffairs.org/blog/2012/09/14/rising-executive-compensation-at-childrens-hospitals-threatens-the-public-trust/ (viewed 6/26/18).

practitioners who properly criticize hospital administration is at epidemic levels. Steve Twedt of the *Pittsburgh Post-Gazette* reported on this problem in his series "The Cost of Courage." *See, e.g.*, Steve Twedt, "When Right Can Be Wrong; a 'Disruptive' Doctor Loses His Post After Standing Up for Patients," *Pittsburgh Post-Gazette* A-1 (Oct. 27, 2003) (describing retaliation inflicted by a hospital in South Carolina). His series of articles demonstrated the pervasiveness of this problem nationwide, describing in detail the experiences of 25 physicians and a nurse, all of whom experienced retaliation after trying to improve care at their respective institutions.

Independent medical practitioners provide the only check and balance against runaway self-enrichment by hospital administrators. Removing that restraint by allowing hospitals to retaliate against independent physicians based on their speech would leave such hospitals with no meaningful accountability to the public which the hospital is obliged to serve.

Public trust in hospitals can be preserved only by ensuring legal accountability when a hospital abuses that trust. Defendant's misuse of law enforcement to retaliate against Plaintiff Van Boven was a clear abuse of power, for which Plaintiffs have stated multiple valid causes of action. This case should proceed to discovery and trial.

## II. None of the Settlement Provisions Purporting to Prevent Plaintiff Van Boven from Speaking Out about Hospital Misconduct Is Enforceable.

Settlement provisions that purport to prevent Plaintiff Van Boven from speaking out

for patients and against hospital misconduct should be void and unenforceable as a matter of public policy. "The courts will not enforce a contract whose provisions are against public policy." *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 180 (Tex. App.--Dallas 1986, no writ) (quoted by *In re Mabray*, 355 S.W.3d 16, 29 (Tex. App.--Houston 2010). It is difficult to imagine an issue more important to public disclosure than misconduct by hospital officials in misusing law enforcement to retaliate against a physician.

The law favors voluntary settlement of disputes and, accordingly, enforces properly executed releases as parts of settlement. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178, 41 Tex. Sup. Ct. J. 165 (Tex. 1997); *Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.). But a release, like all contractual provisions, is enforceable only if consistent with the public policy of the State. *See Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d at 180.

As a Texas appellate court held:

> [I]f a contract violates public policy it is void, not merely voidable. *Lawrence*, 44 S.W.3d at 555 (citing, *e.g., Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990)). When a contract is void, neither party is bound thereby. *Ex parte Payne*, 598 S.W.2d 312, 317 (Tex. Civ. App.--Texarkana 1980, no writ), *overruled on other grounds, Huff v. Huff*, 648 S.W.2d 286 (Tex. 1983). Neither estoppel nor ratification will make a contract that violates public policy enforceable. *Lawrence*, 44 S.W.3d at 555-56 (Baker, J., dissenting) (citing *Richmond Printing v. Port of Houston Auth.*, 996 S.W.2d 220, 224 (Tex. App.--Houston [14th Dist] 1999, no pet.) and *Ex parte Payne*, 598 S.W.2d at 317)." *In re Mabray*, 355 S.W.3d 16, 38-39 (Tex. App. 2010).

*Ranger Ins. Co. v. Ward*, 107 S.W.3d 820, 827 (Tex. App. 2003).

Contractual provisions that silence whistleblowing – which is what Plaintiff Van Boven was doing in speaking out – are void and unenforceable, and should be so held in this case.

## CONCLUSION

For the foregoing reasons and the allegations as set forth in Plaintiffs' First Amended Complaint, Plaintiffs have stated valid causes of action and their requested relief should be granted.

Dated: July 25, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on July 25, 2018, a true and correct copy of the accompanying Motion, the Brief of Amicus Curiae Association of American Physicians & Surgeons, and the proposed Order was electronically submitted or sent by United States postal mail to all counsel of record:

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