To be Argued by:
GREGORY ZIMMER
(Time Requested: 15 Minutes)

New York County Clerk's Index No. CTQ-2019-00001

Court of Appeals

of the

State of New York

DR. ROBERT D. HAAR, M.D.,

Plaintiff-Appellant,

– against –

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Defendant-Respondent,

– and –

JOHN and JANE DOE CORPS., 1-10, JOHN and JANE DOE 1-10,

Defendants.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 18-128

BRIEF FOR PLAINTIFF-APPELLANT

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CERTIFIED QUESTION ACCEPTED FOR REVIEW

Does New York Public Health Law Section 230(11)(b) create a private right of action for bad faith and malicious reporting to the Office of Professional Medical Conduct?

The Court should answer this certified question in the affirmative. Appellant Dr. Robert D. Haar, M.D. is one of the class for whose benefit New York Public Health Law § 230 was enacted; recognition of a private right of action would promote the legislative purpose; and the creation of such a right would be consistent with the legislative scheme of Public Health Law § 230.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this proceeding pursuant to 22 N.Y.C.R.R. § 500.27(a).

PRELIMINARY STATEMENT

Since 2003 a cause of action pursuant to New York Public Health Law § 230(11)(b) ("Section 230(11)(b)") for bad faith reporting to New York's Office of Professional Medical Conduct ("OPMC") has been available in the New York State Supreme Court, Appellate Division, First Department (the "First Department") to medical professionals against whom bad faith reports of professional misconduct are made to OPMC. Section 230(11)(b) provides that "[a]ny person, organization, institution, insurance company, osteopathic or medical

society who reports or provides information to [OPMC] *in good faith*, and without malice shall not be subject to an action for civil damages or other relief as the result of such report." (Emphasis added.) The First Department, in *Foong v. Empire Blue Cross & Blue Shield*, 762 N.Y.S.2d 348 (1st Dep't 2003), held that an implied private right of action exists under Section 230(11)(b) and this cause of action is consistent with the overall statutory scheme of New York Public Health Law § 230 ("Section 230"), which provides a mechanism to report, investigate and address professional misconduct by physicians, and strikes a deliberate balance between encouraging reports to OPMC and participation in OPMC proceedings in good faith, and discouraging and penalizing bad faith reports and participation.

Dr. Haar filed his Complaint in the New York State Supreme Court, New York County, and Respondent/Defendant Nationwide Mutual Fire Ins. Co. ("Nationwide") removed the case to the United States District Court for the Southern District of New York (the "District Court") on diversity grounds. There, the District Court dismissed Dr. Haar's cause of action pursuant to Section 230(11)(b), relying solely on a decision in the Southern District of New York, *Lesesne v. Brimecome*, 918 F. Supp. 2d 221 (S.D.N.Y. 2013), which held that no such cause of action exists. The *Lesesne* decision first improperly focused solely on Section 230(11)(b) rather than the entirety of Section 230 and held (incorrectly) that physicians are not among the class Section 230(11)(b) (rather than Section 230 as a whole) was intended to benefit. Next, the *Lesesne* decision purported to discern the purpose of Section 230 by reference solely to Section 230(11)(b)

and then completely ignored the "in good faith and without malice" language of Section 230(11)(b) to find that the sole purpose of Section 230 was to encourage reporting to OPMC (including, apparently, bad faith reporting). The *Lesesne* decision then focused myopically on the confidentiality provision of Section 230(11)(a) (rather than the overall statutory scheme) and found (again incorrectly) that a private right of action for bad faith reporting would be inconsistent with the confidentiality provision. The *Lesesne* court's analysis not only ignored Section 230's overall legislative scheme, it also ignored the "in good faith and without malice" language of Section 230(11)(b) *and* this Court's ruling in *McBarnette v. Sobol*, 83 N.Y.2d 333 (1994), that even the confidentiality provisions of Section 230 must yield when necessary to protect the rights of physicians accused of professional misconduct.

Dr. Haar appealed the District Court's decision to the United States Court of Appeals for the Second Circuit (the "Second Circuit"). While this action was *sub judice* before the Second Circuit, the New York State Supreme Court, Appellate Division, Second Department (the "Second Department") adopted the holding in *Lesesne* and ruled that there is no private right of action for bad faith reporting pursuant to Section 230(11)(b) in *Elkoulily v New York State Catholic Healthplan, Inc.*, 61 N.Y.S.3d 83 (2d Dep't 2017). The *Elkoulily* decision reasoned that there was no private right of action pursuant to Section 230(11)(b) because that provision does not contain an express cause of action. The *Elkoulily* court did not discuss the factors relevant to a determination whether an *implied* cause of action exists or analyze Section 230 in its entirety as this Court's precedent requires.

After oral argument, the Second Circuit certified the following question to this Court: "Does New York Public Health Law Section 230(11)(b) create a private right of action for bad faith and malicious reporting to the Office of Professional Medical Conduct?"

A proper analysis of whether a private right of action is implied in Section 230(11)(b) requires the Court to consider whether (i) physicians are among the class intended to be protected by Section 230, (ii) whether implication of the right of action will further the purpose of Section 230, and (iii) whether such a right of action would be consistent with the overall legislative scheme of Section 230. Each of these factors is satisfied here.

Section 230 is replete with provisions protecting physicians who are the subject of reports of alleged professional misconduct. And this Court recognized in *McBarnette* that even the confidentiality provision of Section 230 – which the *Lesesne* court focused on to the exclusion of the rest of Section 230 – was intended to protect both reporters to OPMC *and* physicians who are the subjects of those reports. Moreover, a steady stream of amendments to Section 230 providing additional protections for physicians evidences the fact that physicians are among those for whose benefit Section 230 was enacted.

With respect to the second prong of the analysis, there are myriad provisions in Section 230 which strike a balance between protecting good faith reporters to

OPMC and good faith participants in the OPMC investigation process, while expressly recognizing that those who report or participate in bad faith should be subject to civil liability. This exact balance is struck in Section 230(11)(b), which provides protection for persons making reports to OPMC in good faith and without malice, but recognizes that persons who make reports in bad faith should be subject to civil liability. Since there is no express enforcement mechanism to give meaning to this prohibition on bad faith reporting, implying a right of action for bad faith reporting will necessarily further the purpose of Section 230.

Finally, the third prong of the analysis strongly favors the implication of a private right of action. This Court has recognized that the question whether the proposed right of action would be consistent with the overall legislative scheme is the most important factor. The Court has also recognized that the primary focus of this prong of the analysis is whether the legislative scheme imposes its own enforcement mechanisms which are inconsistent with the proposed right of action. Here, Section 230 contains no mechanism whatever to address bad faith reports to OPMC. Given the Legislature's clear recognition that bad faith reports to OPMC should be subject to civil liability, the implication of a private right of action to give effect to Section 230(11)(b) would be entirely consistent with the overall legislative scheme of Section 230.

For these reasons, as set forth more fully below, this Court should affirm the holding in *Foong* and recognize a private right of action for bad faith reporting to OPMC pursuant to Section 230(11)(b).

ARGUMENT

I. LEGAL STANDARD

To determine whether a private right of action is implied in a New York State statute, this Court applies a three-part test: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme. *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629 (1989). This Court reviews questions of statutory construction *de novo*. *See, e.g., Town of Brookhaven v. New York State Bd. of Equalization & Assessment*, 88 N.Y.2d 354 (1996).

II. EACH OF THE FACTORS RELEVANT TO WHETHER AN IMPLIED RIGHT OF ACTION EXISTS UNDER SECTION 230(11)(b) STRONGLY SUPPORTS THE EXISTENCE OF SUCH A CAUSE OF ACTION

Each of the factors this Court considers when determining whether an implied right of action exists militates in favor of a private right of action under Section 230(11)(b). This becomes especially clear when the entirety of Section 230 is considered in addition to Section 230(11)(b).

A. Physicians Are One Of The Classes Of Persons Section 230 Was Intended To Benefit

Section 230 creates a broad legislative scheme for the good faith reporting, investigating and addressing of the professional conduct of physicians. *See* N.Y. Pub. Health Law § 230. When Section 230 is taken as a whole, it is clear that physicians are within the class of persons protected by the legislation.

In addition to Section 230(11)(b), Section 230 contains a number of provisions the purpose and effect of which are to protect physicians from being improperly reported to, investigated or sanctioned by OPMC. For example, Section 230:

- Recognizes that participants in investigations of physicians pursuant to Section 230 are only insulated from civil liability to physicians if their work is performed *without malice* and with a *reasonable belief* that their actions or recommendations were warranted based on the facts presented (N.Y. Pub. Health Law § 230(8) (emphasis added));
- Requires that physicians be given notice of reports made against them (N.Y. Pub. Health Law § 230(10)(a)(3)(A), § 230(10)(c));
- Gives physicians the right to respond to reports made against them and to participate and be represented by counsel in proceedings commenced against them (N.Y. Pub. Health Law § 230(10)(a)(iii)(B), § 230(10)(c));
- Requires that exculpatory information or documentation be disclosed to physicians (N.Y. Pub. Health Law § 230(10)(d-1));
- Permits physicians to have determinations against them reviewed by an administrative review board (N.Y. Pub. Health Law § 230(10)(i)); and

- Permits physicians to seek dismissal of charges against them if they are not timely pursued by OPMC (N.Y. Pub. Health Law § 230(10)(j)).

Section 230 also contains a number of provisions protecting physicians from bad faith conduct by persons participating in investigative proceedings before OPMC. *See*, *e.g.*, N.Y. Pub. Health Law § 230(8) (shielding members of a committee on professional conduct and employees of the board of professional conduct from civil liability only for actions or recommendations made without malice and with a reasonable belief after reasonable investigation that the action or recommendation was warranted); § 230(16) (shielding persons who assist the department as consultants, expert witnesses, administrative officers or monitors in the investigation, prosecution or hearing of alleged professional misconduct, licensure matters, restoration proceedings, probation, or criminal prosecutions for unauthorized practice from civil liability only for actions taken without malice); § 230(11)(g) (shielding members of physician committees of the Medical Society of the State of New York, the New York State Osteopathic Society or a county medical society from civil liability only for actions taken without malice).

Moreover, this Court has recognized that even the confidentiality provision of Section 230 (relied upon by the *Lesesne* Court in finding there is no cause of action under Section 230(11)(b)) is intended, in part, to protect physicians who are accused of professional misconduct. *See McBarnette*, 83 N.Y.2d at 338 (recognizing

that one purpose of Section 230's confidentiality provision is "to preclude the indiscriminate use of these reports . . . to reveal unsubstantiated complaints against a physician")

Given the myriad protections for physicians incorporated into Section 230, as well as the legislative trend to add additional protections through recent amendments, it is clear that physicians are among the class intended to benefit from Section 230's legislative scheme.

B. A Private Right Of Action For Bad Faith Reporting To OPMC Promotes The Purpose Of Section 230

A finding that an implied private right of action for bad faith reporting to OPMC would not promote the purpose of Section 230 would have to ignore Section 230(11)(b)'s "in good faith" language, which implicitly recognizes that civil liability for bad faith reporting to OPMC is appropriate. Moreover, it would be absurd to suggest that the legislative purpose of Section 230 generally, or Section 230(11)(b) specifically, was to encourage *bad faith* reports against physicians.

The purpose of Section 230 is the creation of a board of medical conduct and the establishment of a process by which suspected misconduct can be reported and investigated *in good faith* and, if appropriate, addressed. *See generally* N.Y. Pub. Health Law § 230. One aspect of Section 230's overall scheme is the promotion of good faith reports of misconduct. Another is the protection of physicians from the

damage that can be caused by false or bad faith reports of misconduct. Section 230(11)(b) strikes exactly this balance when it immunizes *good faith* reports to OPMC while, at the same time, subjecting those making reports in bad faith to civil liability. Without an implied right of action, there is no way to enforce the balance that the legislature struck both in Section 230 overall and in Section 230(11)(b) itself.

The deterrence of bad faith reports to OPMC clearly promotes the purpose of Section 230 by reducing the number of meritless reports submitted to OPMC. This is important because Section 230 requires that OPMC conduct at least a preliminary investigation of *every* report. N.Y. Pub. Health Law § 230(10)(a)(i)(B). Reducing the number of meritless reports by deterring bad faith reports would necessarily reduce OPMC's case load and permit it to focus limited resources on meritorious complaints that actually impact the public health.

On the other hand, absolute immunity for bad faith reports to OPMC would thwart the legislative purpose of Section 230, and the text of Section 230(11)(b) itself. Permitting reporters to make bad faith reports with impunity would also result in the limited resources of OPMC being diverted to the investigation of bad faith reports that have no relation to legitimate public safety concerns, and therefore would make OPMC's job of identifying and addressing actual threats far more difficult. This is especially significant given that Section 230 requires that

OPMC conduct a preliminary review of *every* report. *See* N.Y. Pub. Health law § 230(10)(a)(i)(B). In fact, the New York State Department of Health Board for Professional Medical Conduct reported that in 2017 only 43 percent of the 9,699 complaints received proceeded past the initial review phase.[1] While not all meritless reports will be made in bad faith, deterring bad faith reporting clearly will promote the purpose of Section 230 by deterring the submission of bad faith meritless reports to OPMC and preventing the need to employ limited resources to investigate knowingly frivolous allegations of bad faith.

Deterring bad faith reports to OPMC through civil actions clearly promotes the legislative purpose of Section 230 and gives effect to the plain language of Section 230(11)(b), by protecting good faith reporters from civil liability while deterring bad faith reporting and reducing the likelihood that OPMC will have to spend time and limited resources on unjustified investigations.

C. A Private Right Of Action For Bad Faith Reporting To OPMC Is Consistent With The Legislative Scheme

As set forth in Part II(B), *infra*, encouraging good faith reporting and deterring bad faith reporting to OPMC clearly promotes the legislative purpose of Section 230, which is establishing a fair and efficient regime for the good faith

[1] *See* https://www.health.ny.gov/professionals/doctors/conduct/annual_reports/2017/docs/report.pdf, at 4.

reporting and investigation of legitimate public safety issues with respect to physicians' practice of medicine. The third factor, whether the creation of a private right of action would be consistent with the legislative scheme leads to the same conclusion – a private right of action deterring and punishing bad faith reporting is entirely consistent with the legislative scheme.

This third factor, which this Court has recognized to be the most important, focuses on whether the Legislature has created enforcement mechanisms in the statute and, if so, whether the proposed private right of action would be inconsistent with the existing statutory enforcement mechanisms. Cases where this Court has held that an implied right of action would be inconsistent with specific statutory schemes involved cases where the Legislature had created enforcement mechanisms for the specific provision at issue but specifically excluded the remedy sought by the plaintiff. *See, e.g., Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629 (1989) (statute permitted civil suits for damages by anyone harmed by the provision of alcohol to a minor *except* the minor); *Mark G. v. Sabol*, 93 N.Y.2d 710 (1999) (one statute imposed funding cuts if local child welfare agencies did not meet reporting requirements or provide necessary services; other statute provided civil remedy only for "willful" failure to provide services); *Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958 (1993) (statute expressly authorized the New York State Attorney General or a District Attorney to commence a civil

action to enforce the statute); *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61 (2013) (statute expressly authorized civil actions only against judgment creditors so implied right of action against restraining banks would be inconsistent).

There are no statutory enforcement provisions in Section 230 that even remotely resemble those present in *Sheehy*, *Mark G*, *Varela* or *Cruz*. In fact, here, there is no enforcement mechanism in Section 230 concerning bad faith reporting to OPMC and, as set forth above, an implied right of action is necessary to give effect to Section 230(11)(b). An implied right of action for bad faith reporting to OPMC will promote the purpose of Section 230 and it also is entirely consistent with the statutory scheme of Section 230.

Even the confidentiality provisions of Section 230 which were exclusively focused on by the *Lesesne* court (which rationale was adopted by the *Elkoulily* court) are not inconsistent with a private right of action for bad faith reporting to OPMC. The contents of allegations made against physicians in OPMC reports are disclosed to them in non-confidential notices issued by OPMC. Dr. Haar was informed in detail of the alleged misconduct set forth in Nationwide's report to OPMC in a notice sent to him by OPMC. (*See* Appendix at 80-81, ¶ 2). Moreover, Nationwide acknowledges that it also submitted its report to the National Insurance Crime Board, a private entity that is not a part of the OPMC process and is neither bound nor protected by Section 230's confidentiality

provisions. (*See* Appendix at 55). Thus, physicians have access to the contents of the reports made against them even without access to the actual reports submitted by the reporter.

This Court also recognized in *McBarnette* that reports made to OPMC may be shared with physicians notwithstanding Section 230's confidentiality provisions in certain circumstances, including where the reporting party takes steps that would render application of the confidentiality provisions unfair to the physician. Here, Nationwide submitted as evidence in the District Court a partially redacted version of its report to OPMC in support of its motion to dismiss. (*See* Appendix at 54-55). Nationwide self-servingly redacted only the substantive allegations against Dr. Haar, but showed the reporting entity, the date of the report and other substantive information that Nationwide perceived as helpful to its arguments for dismissal. (*Id.*) Nationwide also offered to provide an unredacted copy of the report to the District Court for *in camera* review. (*See* Appendix at A-79.8, n. 3). In light of Nationwide's self-serving selective disclosure of the OPMC report, the Court's holding in *McBarnette* may well require that the unredacted report be produced to Dr. Haar and admitted into evidence in this case.

Thus, the facts in this case further illustrate that the potential existence of "proof problems" in individual cases does not render a private right of action for

bad faith reporting pursuant to Section 230(11)(b) inconsistent with Section 230's confidentiality provisions.

With respect to the identity of the reporter of allegations of professional misconduct, Dr. Haar was aware that Nationwide was the only entity that could reasonably have been the reporting entity based on a number of facts, each of which was set forth in his complaint. (*See* Appendix at 81, ¶ 3). Although he alleged that Nationwide was the reporting entity "upon information and belief" because he was not absolutely certain of that fact, Dr. Haar was aware of facts that made it reasonable for him to believe Nationwide was the reporting entity. (*Id.*) Pleadings "upon information and belief" are proper in both state and federal court so long as the pleading party has a reasonable basis for the allegations, which was the case here. Nationwide has admitted that it was the reporting entity that made the report to OPMC regarding Dr. Haar. Again, the fact that some physicians may not be able to determine the identity of the reporter of bad faith allegations in certain cases does not render a cause of action for bad faith reporting inconsistent with Section 230's confidentiality provisions.

The contents of OPMC proceedings are not relevant to a claim for bad faith reporting, which turns on whether a reporter had a reasonable basis to allege bad faith conduct at the time a report was made to OPMC. While the non-confidential outcome of an OPMC proceeding exonerating a physician from allegations of

misconduct may constitute evidence that reported allegations were not true, even this is not required to demonstrate that a reporter did not have a good faith basis to allege the misconduct at the time the report was submitted.

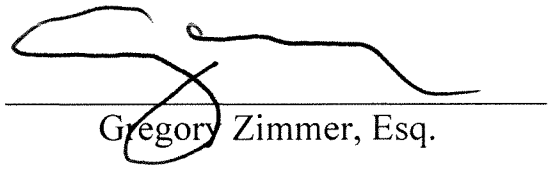
* * *

Each of the factors relevant to an analysis whether a private right of action is available to a plaintiff under a New York State statute lead to the conclusion that a private right of action should be implied pursuant to Section 230(11)(b) for bad faith reporting to OPMC.

CONCLUSION

For the foregoing reasons, Dr. Haar respectfully requests that the Court answer the certified question in the affirmative, find that a private right of action for bad faith reporting to OPMC exists pursuant to Section 230(11)(b), and grant Dr. Haar such other and further relief as the Court deems just and proper.

Dated: Westchester, New York
May 17, 2019



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NEW YORK STATE COURT OF APPEALS
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