

Editorial:

Former Texas Medical Board Member's Lawsuit Dismissed

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A fundamental right, which distinguishes our form of government from totalitarian regimes, is the right of citizens to criticize the performance and/or conduct of public officials without fear of punishment or retaliation. On Jan 11, 2012, an Appeals Court in Texas upheld this right in its decision in the case involving an AAPS member, Dr. Steven F. Hotze (*Steven F. Hotze, M.D. v. Keith E. Miller, M.D.*, Court of Appeals Twelfth Court of Appeals District of Texas, No. 12-10-00413-CV, Judgment Jan 11, 2012).¹

Background

In reviewing the facts of the case, the Court noted:

Miller is a physician and, from 2003 until 2007, he served on the Texas Medical Board (TMB). He was the chairman of the TMB's Disciplinary Process Review Committee.... Hotze became aware of Miller's alleged conduct on the TMB and that Miller had testified as an expert against physicians in over forty medical malpractice cases while on the TMB. Hotze wrote an editorial in a community newspaper complaining about the TMB, without mentioning Miller. He wrote additional editorials describing the alleged denial of constitutional rights of physicians who appeared before Miller and the TMB. Hotze invited Pigott [Dr. Shirley P. Pigott] to be a guest on his radio program to share her experiences with TMB and to describe her investigation into Miller's dual roles as a TMB member and an expert witness against physicians in medical malpractice cases. Pigott also complained that Miller's position on an advisory board for Blue Cross Blue Shield created a conflict of interest. After Miller resigned from the TMB, Hotze wrote an article saying that Miller was forced off the board. He published the article on his website, FANS. The same letter was also published on the website for the Association of American Physicians and Surgeons.

In an article published in the *Journal of American Physicians and Surgeons*, AAPS Counsel Andrew Schlafly wrote: "The top disciplinarian on the TMB, Dr. Keith Miller, abruptly resigned as news of this hearing [legislative hearing on TMB oversight] first spread in August, claiming that his reason for resigning was a new rule against a member serving as an expert witness in a malpractice case."² Through the efforts of AAPS and our members, on Oct 23, 2007, anonymous complaints and other abuses by the TMB were brought to light in an 11-hour hearing before a Texas legislative committee that has oversight of the TMB. This extraordinary hearing testimony is posted on the AAPS website.³

Miller Files Lawsuit Against Hotze

As reviewed by the Court, "Miller sued Pigott and Hotze for libel, slander, libel per se, slander per se, and civil conspiracy. He asked

for \$1 million in actual damages, \$3 million in general damages, and an award for exemplary damages." In a footnote, the Court provided: "Miller's claims against Pigott have previously been disposed of, and Pigott is not a party to this appeal."

Dr. Hotze filed a no-evidence summary judgment motion, "asserting that there is no evidence that Hotze published any statements that were legally defamatory or false, or that he acted with actual malice." He also asserted there was no evidence of civil conspiracy. Hotze also filed a traditional motion for summary judgment asserting that "falsity, actual malice, and civil conspiracy are each conclusively negated by his summary judgment evidence. The trial court denied both motions, and this appeal followed."

Jurisdiction

Texas law (Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(6)) confers a right to appeal a denial of a motion for summary judgment if a defendant qualifies as a media defendant (members of electronic and print media whose statements have been published in the media). Miller argued that Hotze was not a media defendant.

The Court found: "The record shows that Hotze has been a political writer and journalist for thirty years.... Therefore, we conclude that we have jurisdiction over this appeal."

Defamation Claim

The requirements to maintain a claim of defamation are different for public officials and private individuals: "To maintain a defamation cause of action, the plaintiff must prove that the media defendant (1) published a false statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement." The alleged defamatory statements must also "relate to the plaintiff's official conduct."

Miller Argued He Was Not a Public Official

The Court noted: "Miller asserts that he is not a public official." The Court found:

The TMB is an executive body of state government; its members are executive officers of the state.... Members of the TMB are appointed officers of a major state agency who serve six year terms.... The legislature has determined requirements for membership and grounds for removal.... Thus, the legislature has determined that members of the TMB are "state officers".... Further, the legislature has also recognized that members of state boards are "public officials".... Thus, TMB members are executive officers of the state who have substantial control over governmental

regulation of medical practitioners, an issue of public concern.... TMB members act for the benefit of the public. We conclude that Miller, as a TMB board member, was a public official.

Interestingly, the Court also noted that Miller had himself previously argued that he was a public official: "Furthermore, Miller, in his affidavit, explained that when Pigott made ex parte contact with staff and TMB members in an attempt to get her case dismissed, she was attempting to 'coerce public officials.'"

Alleged Defamatory Statements

Miller claimed that certain statements were not related to his official conduct or role on the TMB. In reviewing the statements, the Court found:

The statements imply that, for money, Miller will provide information he knows by virtue of his position on the board and that he might use his position on the board to punish physicians who have testified for the defense. Miller also complains of being referred to as the "2006 Red Devil." While that phrase is not defined, we note that it is used in the context of the complaints about Miller's providing expert testimony and possibly taking retribution on defense experts...[and] allegations that the professional activities Miller engaged in outside of the TMB created conflicts of interest with his role on the TMB.

Another statement that Miller specifically identifies as one unrelated to his official conduct accused him of destroying the lives and careers of physicians. This statement clearly refers to his role in determining the fate of a physician about whom a complaint has been filed with the TMB. Additionally, Miller complains generally of an article that appeared in several publications. In that article, Hotze comments on Miller's resignation from the TMB and insinuates Miller misused his position on the TMB. Hotze also mentions Miller's nurse, Bridget Hughes, and her plight involving stolen prescriptions to feed her alleged drug addiction. The article questions Miller's association with Hughes and insinuates that Hughes may know damaging information about Miller. Hotze also states that Miller's resignation from the TMB was in part due to his relationship with Hughes.

We conclude that the complained of statements clearly refer to Miller in his capacity as a TMB board member and relate to his official conduct as such. TMB board members must be physicians licensed in Texas.... To be a licensed physician in Texas, one must be "of good professional character"... A physician may be subjected to disciplinary action for unprofessional or dishonorable conduct that is likely to deceive or defraud the public.... Thus, any conduct by Miller indicating that he is unethical or not "of good professional character," or that is unprofessional or dishonorable and likely to deceive the public reflects on his qualifications to serve on the board. Further, a physician who fails to supervise adequately the activities of those acting under him commits unprofessional or dishonorable conduct likely to deceive or defraud the public.... The

comments about Hughes could be construed to fall under this section. We have reviewed all of the allegedly defamatory statements and find none that did not relate to Miller's official conduct.

No Evidence of Actual Malice

As Miller was a public official, Miller had the burden to prove that Hotze acted with actual malice. In reviewing the legal standard, the Court provided: "To establish actual malice, a plaintiff must prove that the defendant made the statement with knowledge that it was false or with reckless disregard, a public official or public figure must prove that the publisher entertained serious doubts as to the truth of his publication."

In reviewing the evidence, the Court found:

In the [Hotze's] affidavit, he says he has been advocating for reform of the TMB since 2007. He explained that he first learned about Miller after speaking with Dr. William Rea, who had to appear before the TMB to respond to a complaint filed against him. Miller allegedly told Rea that he wanted Rea's license revoked. Hotze was "shocked" by this threat and began his investigation into the TMB and Miller's authority to lodge such a threat. He called and interviewed "many dozens" of Texas physicians regarding their experience with the TMB and Miller. Each physician he spoke with who had Miller as an informal settlement conference officer described a similar experience of threats and intimidation. Hotze wrote several editorials describing the experiences of some physicians who appeared before Miller. He described these meetings as "cloaked in secrecy and lacking in due process" and other constitutional rights....

He talked to doctors to find out what was going on at the TMB, which is where he got support for saying Miller was arrogant, abusive and disdainful....

Hotze also explained that he had a conversation with Pigott who told him that Miller had testified as a medical malpractice expert in over forty cases and that Miller had hired a nurse who had previously forged narcotic prescriptions for her own use. Hotze learned that charges were to be filed against the nurse in federal court and questioned why Miller would allow the nurse to continue to work for him....

Hotze stated that he believes all of the allegedly defamatory statements he made about Miller are either true factual statements or opinions that cannot be factually verified. He asserted that all statements he made about Miller consisted of a constitutionally protected exercise of free speech necessary to bring reform to the TMB and concerned significant public issues. He stated that "[t]he TMB's allowance of arbitrary conduct and abuses of authority was personified by Miller as a member of the TMB." Hotze claimed that his editorials about the TMB and Miller led to a legislative hearing regarding the TMB's actions. Hotze stated that he believed his outcry about the TMB, and Miller's conduct during his tenure on the TMB, played an essential role in raising public and legislative awareness of ethical problems associated with Miller's dual

role and conflict of interest and of the arbitrary and capricious implementation of TMB rules by TMB board members. After his complaints, he asserted, the legislature prohibited conflicts of interest by board members, ended anonymous complaints, and instituted due process protections for physicians in proceedings before the TMB.

Hotze specifically stated that, at all relevant times, he believed that every oral and written statement he made about Miller was true. At no time did he ever entertain any serious doubts about the truth or veracity of any oral or written statement he made about Miller.

The Court ultimately found:

Accordingly, Miller's summary judgment evidence did not raise a fact issue on the element of actual malice. The trial court erred in denying Hotze's motion for no-evidence summary judgment because there is no evidence that Hotze acted with actual malice....

Neither does the record support the trial court's denial of Hotze's traditional motion for summary judgment.... Hotze's affidavit conclusively negates the element of actual malice as a matter of law because it is clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies and capable of being readily controverted.... Miller's evidence did not controvert Hotze's affidavit and failed to raise a fact issue. Hotze's traditional motion for summary judgment, supported by his affidavit, should have been granted because the evidence established as a matter of law that there is no issue of fact regarding the element of actual malice."

No Civil Conspiracy

Because the claim of civil conspiracy derives from the claims of defamation, and the Court found no evidence of actual malice to support claims of defamation, the Court ruled that the claim of civil conspiracy "fails as a matter of law." The Court found: "Because none of the actions allegedly conspired upon supports a cause of action, summary judgment was also appropriate against the claim that Hotze conspired to commit those actions."

Decision

In its final decision, the Court stated:

The record supports a determination that Miller is a public official and the complained of statements related to his official conduct. However, because there is no evidence that Hotze acted with actual malice, and Miller has not raised a fact issue regarding actual malice, we reverse the trial court's judgment and render judgment that Miller take nothing.

Conclusions:

The Court's decision that "Miller take nothing" should serve as a bold reminder to all public officials, especially those who serve on medical boards, that their official conduct and performance are subject to public scrutiny and criticism. Our ability to hold public officials accountable for their actions and to preserve our First Amendment right to raise concerns and express grievances

about any public official or government agency is preserved only through the actions of courageous individuals, such as Dr. Steven F. Hotze, who stand up and fight back.

AAPS has led the way in Texas, insisting on due process for our AAPS members and all physicians in Texas, in their dealings with the Texas Medical Board. Moreover, AAPS has established the template to achieve appropriate medical board reform in other states. This template has been discussed in a series of articles authored by AAPS counsel Andrew Schlafly in our Journal. The first step is to organize aggrieved physicians to lobby for and obtain hearings by state legislative committees that have oversight over medical board operations.² The second step is to propose model legislation designed to uphold due process rights of physicians and to eliminate medical board abuses. AAPS has proposed model legislation which could be implemented in any state.⁴ The third step is to organize physicians in the state to support and lobby for medical board reform by getting proposed model legislation passed.

Unfortunately, close alliances sometimes exist between state medical associations and medical boards in some states, like Texas, making medical board reform more difficult. As noted by Andrew Schlafly, "The Texas Medical Association (TMA) initially opposed most of AAPS's reforms in Texas.... Were it not for the opposition of the TMA and a few of their close allies in the Texas legislature, even stronger reforms would have passed. The Texas House of Representatives passed AAPS's full set of reforms by an astounding vote of 147-0. But the TMA blocked many of those reforms and would not allow them to pass the Texas Senate."⁵ Ultimately, AAPS achieved many important medical board reforms in the H.B. 680 law that was passed in Texas in 2011.⁶

In its continued effort to hold the TMB accountable for its actions, AAPS's lawsuit against the TMB, filed in 2007,⁷ is going forward and has recently, through discovery, provided important information which the TMB fought hard to keep secret. It was revealed that some complaints, for example, were filed by an employee of an insurance company. In other complaints, the complainant was listed only as "TMB," implying that a member of the TMB initiated the complaint. As Mr. Schlafly noted, "Four out of five key people identified as problems on the TMB in 2007 have since resigned. Indeed, a majority of the TMB itself has left."⁵

AAPS remains the only medical organization that has undertaken a lawsuit against a medical board to ensure fair treatment of physicians by a medical board and to ensure access to care for patients.

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