

ORIGINAL



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

No. IN-113,748

AUG 24 2015

STEVEN C. ANAGNOST, M.D.,

MICHAEL S. RICHIE
CLERK

Plaintiff/Appellee/Counter-Appellant,

vs.

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OKLAHOMA SPINE AND BRAIN INSTITUTE, LLP; CLINT BAIRD, M.D.;
CHRIS M. BOXELL, LLC; CHRISTOPHER M. BOXELL, M.D.;
FRANK J. TOMECEK, M.D., P.L.C.; FRANK J. TOMECEK, M.D., individually;

Defendants/Appellants/Counter-Appellees,

TULSA SPINE & SPECIALTY HOSPITAL, L.L.C.; DAVID A. FELL, M.D., individually;
STATE OF OKLAHOMA, ex rel. OKLAHOMA MEDICAL LICENSURE AND
SUPERVISION BOARD; LYLE KELSEY; ERIC FRISCHE, M.D.; GAYLA JANKE;
GARY L. BROOKS; S. RANDALL SULLIVAN; and DANIEL B. GRAVES,

Defendants.

**COMBINED ANSWER AND REPLY BRIEF IN CHIEF OF OKLAHOMA SPINE
AND BRAIN INSTITUTE, LLP;
CLINTON BAIRD, M.D., individually; CHRIS M. BOXELL, LLC; and
CHRISTOPHER M. BOXELL, M.D., individually**

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Christopher M. Boxell, M.D., individually

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Appellants, Oklahoma Spine and Brain Institute, LLP (“OSBI”); Clinton Baird, M.D., individually (“Dr. Baird”); Chris M. Boxell, LLC, and Christopher M. Boxell, M.D., individually, (collectively, “Dr. Boxell”), hereby submit their Combined Answer Brief and Reply Brief¹:

The issues before the Court center on the application of and protections codified by the Oklahoma Citizens Participation Act, Okla. Stat. tit. §§1430-1440 (“Act”). Specifically, Appellants argue the lower court erred when it failed to dismiss Appellee’s claims against Appellants. The Act and long standing public policy required the lower court to dismiss all claims as each allegation relates to the Appellants’ exercise of the rights of freedom of speech and freedom of association.

Appellee argues the lower court erred by finding that the Act applied retroactively to the Appellee’s claims against Appellants.

I. SUMMARY OF RECORD BY APPELLEE IS INACCURATE AND THEREFORE NOT RELIABLE

Appellee’s summary of the record contains unsubstantiated claims, theories, and allegations offered as facts. Two examples: (1) Appellee claims the evidence shows Appellants initiated the Board action/investigation against him by contacting the Board with false claims; (2) Appellee claims Appellants’ actions taken against Appellee were motivated by the goal of removing him from the Tulsa Spine Surgeon community so that Appellants would gain financially.

Appellee lumps all Appellants (including Fell and Tomecek) together as if each action committed by one was also committed by the others. This is improper and disingenuous as

¹Individual Appellants will be referred to by last name when needed for clarity.

the claims against each Appellant should be analyzed separately. While Appellants collectively have the same or similar legal arguments and defenses, the specific facts regarding each physician are important and deserve individual attention.

A. Board Investigation Was Not Initiated By Appellants

What are the facts? Appellee became the subject of an investigation and prosecution by the Oklahoma Board of Medical Licensure and Supervision ("Board") sometime around 2010. Terry Woodbeck, CEO of Tulsa Spine and Speciality Hospital ("TSSH") was deposed and testified the Board's investigator and defendant, Gayle Janke **contacted him** to inquire if any of the physicians affiliated with TSSH would agree to meet with her to discuss her **ongoing** investigation and their knowledge of Dr. Anagnost's surgical results. This request led to what has become known as the January, 2010 "Marriot Meeting" where Ms. Janke interviewed multiple physicians including Boxell, Tomecek and Fell. Appellee continues to claim Baird also met with Ms. Janke at the Marriot without any evidence to support the claim because Baird did not attend the meeting. During these individual meetings, Ms. Janke requested each physician's assistance and cooperation in the Board's investigation of Anagnost. Mr. Woodbeck's testimony clearly shows that the Board, thru Ms. Janke, initiated contact and requested the cooperation of the individual physician defendants. Appellants' cooperation was mandatory as provided by and required by Okla. Admin. Code § 435: 10-7-4 (37-38) (providing that a licensed medical professional may be subject to Board discipline for "[f]ailure to furnish the Board, its investigators or representatives, information lawfully requested by the Board" or for "[f]ailure to cooperate with a lawful investigation conducted by the Board"). Appellee's claim that the Appellants caused the Board to initiate the

investigation against him is completely unsupported. The facts of the initial contacts were laid out by Mr. Woodbeck's testimony. Appellee ignores the Board as an autonomous statutory agency of government and Appellants have no capacity to cause the Board to act.

B. There is No Evidence Appellants Acted With a Financial Motive

There is no evidence to support Appellee's contention of a financial gain motive as the driving force of any Appellants' required cooperation with the Board's investigation, cooperation with attorneys representing patients, and communications with patients. Appellee's claim Appellants were out to get him because he was a busy surgeon is not supported by any fact. Appellee's argument does not address the reality that the Appellants sincerely believed Appellee had committed repeated acts of negligence that harmed patients. If Appellants possessed a sincere belief that Appellee was harming patients, Appellants were **required** to act in a manner to protect future patients and the community as a whole. Appellee claims Appellants possessed an illicit motive without any evidence that such exists. Appellants lack of ill intent is fatal to Appellee's claims because without it all Appellee can allege is Appellants' took action against him out of concern for the patient community due to Appellants seeing patients obtaining second opinions following bad outcomes while under the care of Appellee. The requirement for a fact to be true to support one's case does not make it true. Appellee has wholly failed to provide scintilla of evidence that Appellant's actions were undertaken for financial gain.

C. The Length of the Investigation Prior to the Litigation at Issue is Irrelevant

Appellee's attention in his Summary of the Record to the length of time the Board's investigation took and how unfairly the Board treated him clouds the issues as they relate to

Appellants. Appellants had nothing to do with the length of time and the continued delays that took place during the investigation and prosecution of Appellee. Nor did they control the process by which the Board elected to investigate and prosecute Appellee. Appellants wanted this matter concluded as expeditiously as was feasible, however the Board and Appellee controlled the pace at which the matter was handled.

D. Appellee Fails to Explain His Unlawful Taking of Confidential Records

Appellee attempts to sanitize his unlawful taking of documents and a CD from the Oklahoma Bar Association (“OBA”) in April, 2014. Shortly after Appellee entered into a Consent Order and Settlement Release with the Board (September 12, 2013), Appellee initiated an OBA investigation by filing a grievance(s) against one or more attorneys associated with the Board action against him. Presumably since the attorney(s) were included in the release, Appellee elected to attack them professionally by filing a grievance with the OBA. Appellee asserts that “[i]t cannot be disputed Appellee and his counsel present at the OBA were provided legitimate and unfettered access to all such documents and permitted to make notes at will regarding their content.” Appellee’s access to the OBA documents is strongly disputed. The documents provided to the Oklahoma Bar Association were produced by the Board pursuant to a subpoena unbeknownst to the Appellants. Appellants did not have an opportunity to object to the production of the Board’s file. “A claim of privilege is not defeated by a disclosure which was: ... 2. Made without opportunity to claim the privilege.” Okla. Stat. tit. 12 §2512. Further, the Board produced the file with the express understanding the OBA would protect the confidential and privileged nature of the file that was to be produced. The Board produced to the OBA a confidential and privileged file whose own

investigative files are privileged under Rule 5.8 of the Rules Governing Disciplinary Proceedings which states “[t]he files and records in disciplinary investigations shall be kept private and confidential... .” The Rule provides four exceptions, none of which apply in this case.

It also should be noted that Appellee, after taking the confidential and privileged documents and CD from the OBA, has continually and improperly used said documents by referencing information, including emails, in various pleadings including his Combined Answer and Brief in Chief before this Court. Appellee knows this is improper due to the lower court’s May 30, 2014 ruling the Board’s file was confidential and privileged. This hearing took place just over a month after Appellee unlawfully took said documents. Appellee and his counsel failed to disclose this improper taking to the lower court or to opposing counsel prior to or during the hearing on Appellee’s motion to compel for the Board file, which file Appellee had already had in his possession. Appellee further acknowledged the improper use of such materials via his April 17, 2015 filing of his Motion for Leave to Permit Use of Documents He Obtained From the Oklahoma Bar Association. Although this motion is still pending in the lower court, Appellee continually uses and refers to the stolen materials without permission of the court and in violation of the lower court’s May 30, 2014 ruling. Any reference to the emails or documents (including Appellee’s affidavit attached to his Amended Petition, R., pp. 1051-1325, Doc. 32 at Ex. 6) illegally obtained from the OBA should be disregarded by the Court.

E. Retroactivity

Appellee argues his Amended Petition “is virtually identical as to the Appellants with

the exception of a new conspiracy claim-which arose of the same facts pled against Appellants in the original Petition.” Appellee mistakenly argues “the lower court found that the Act applied retroactively to Appellee’s claims. ” The court specifically stated **he was not ruling on retroactivity:**

I believe that the definition of a legal action is broad enough to include the filing of an amended petition. No one -- I don't know that anyone cited that, but I will tell you what I base that on. The definition of a legal action is found in this statute in Section 1431, subsection (6). And so, I believe that the Plaintiff --any party is entitled to filing a Motion any time a judicial pleading is filed that request legal or equitable relief. And the petition being filed after November 1, 2014 satisfies -- makes the motion timely. **I don't think we have to look at retro activity in this case. Once that Amended Petition was filed, the Defendants were able to take advantage of this act.**

[**emphasis added**] R. 1629, Transcript of Proceedings Had Before The Honorable Thomas E. Prince On The 13th Day of February, 2015., Doc. 50, pp. 5-6.

II. CITIZENS PARTICIPATION ACT

The Act provides for a three step analysis when determining if a case should be dismissed pursuant to the Act. Step One: Is the legal action based on or related to the movant’s exercise of the right of free speech, right to petition, or the right of association? If yes, move to Step Two: Has the non-moving party established by clear and specific evidence the prima facie case for each essential element of his claim(s). If yes, move to Step Three: Has the movant established by a preponderance of evidence each essential element of a valid defense to the claim(s).

A. Lower Court Correctly Ruled The Act Applies

1. The Act was available for the Appellants to utilize in moving for dismissal and the lower court’s ruling was not based on retroactivity.

Appellee elected to file an Amended Petition on December 12, 2014 wherein he added a claim of civil conspiracy against Appellants. The Oklahoma Legislature enacted Oklahoma's Anti-SLAPP statute on November 1, 2014 to codify and protect its citizens in exercising their preexisting rights to freedom of speech, right to petition, and right to associate. The purpose of the Act is set out in Okla. Stat. tit. 12 §1430:

The purpose of the Act is to encourage **and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government** to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

[emphasis added]. The lower court correctly ruled the Act was available to the Appellants since it was enacted prior to the Amended Petition being filed. By filing an amended petition, Appellee abandoned his original petition. *Ceasar v City of Tulsa*, 1193 OK CIV APP 150 ¶6, 861 P.2d 349, 351.

2. Retroactivity

a. Lower Court Ruling

Appellee's Counter Appeal is based on a ruling the lower court did not make, i.e. that the Act was allowed to apply retroactively. Appellee apparently misunderstood the lower court's basis for his ruling on why the Act was available to the Appellants. His failure to appeal the court's ruling warrants denying his appeal.

b. The Act is Procedural

Although the retroactivity issue was not addressed by the court, the Act is procedural in nature and therefore it should retroactively apply. The Act clearly lays out the **procedure** under which an individual can file for dismissal when exercising the preexisting rights of

freedom of speech, freedom of association and the right to petition. The Act does not create new rights nor does it broaden the rights the Act was enacted to protect. In an attempt to argue that the Act is substantive in nature, Appellee states “12 O.S. § 1434(B)(1-3) clearly creates a new defense to liability... .” This position is puzzling in that the defense(s) to liability Appellee refers to are the Constitutionally protected rights of free speech, right to petition, and right to associate. The portion of the Act referenced clearly lays out the procedure a court should utilize in examining whether a person’s protected freedoms have been infringed upon by a party filing the lawsuit. It is disingenuous to call these longstanding and fundamental rights “new defenses”.

The Act's provisions lay out the procedures that an individual can choose to utilize in an attempt to end a lawsuit based on his or her exercise of First Amendment Rights. For example, the Act specifies the procedures for the timing of when the motion must be filed, when a hearing on the motion must be held, and when the motion should be ruled on. *See* 12 O.S. §§ 1432(B), 1433(A), (B), 1434(A). All of these requirements are purely procedural and, therefore, apply to pending litigation. “The general rule that statutes will be construed as to be prospective only does not apply to statutes affecting procedure. Such statutes apply to all actions falling within their terms, whether the right of action existed before or after the enactment. This rule is based upon the tenet that no one has a vested right in any particular mode of procedure for enforcement or defense of his rights.” *Fleming v Baptist General Convention of Oklahoma*, 742 P.2d 1087 at 1092, 1987 OK 54 (Okla. 1987).

The Act is procedural in its application and it allows the Appellants to file motions to dismiss at an early stage in litigation to avoid costly and time consuming discovery. The Act

was codified to lay out the procedure for early intervention in cases centered on an individual's exercise of protected First Amendment Rights. Although the lower court specifically did not address retroactivity, the Act is clearly procedural and should be available to the Appellants to seek the requested dismissals.

c. Other states have ruled similar laws to be procedural

Other states have applied their anti-SLAPP statutes retroactively, including California, Illinois, and Washington. *Robertson v. Rodriguez*, 36 Cal. App. 4th 347 (Cal. Ct. App. 1995); *Shoreline Towers Condominium Ass'n v. Gassman*, 936 N.E.2d 1198 (Ill. App. Ct. 2010); *Nguyen v. Cnty. of Clark*, 732 F. Supp. 2d 1190 (W.D. Wash. 2010). The U.S. Supreme Court has held that "Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.... We noted the diminished reliance interests in matters of procedure." *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994).

3. 60 day filing requirement

Appellee also mentions "an additional hurdle" Appellants failed to clear related to the timing of the filing of their motions to dismiss. Specifically, Appellee maintains that Appellants did not show why the 60-day time limit should run from the date of the Amended Petition (December 12, 2014) as opposed to the date of the original Petition (November 7, 2013). The obvious answer is that the Act did not exist at the time the original Petition was filed, thereby making it impossible to file a motion to dismiss pursuant to the Act within 60 days of the filing of the original Petition. Appellants' motion to dismiss was filed on January 20, 2015 clearly within 60 days of the filing of the Amended Petition. This argument is odd

being that Appellee spent pages of his brief arguing Appellants should not be allowed to utilize the Act due to the enactment of the law going into effect close to a year after the filing of the original Petition.

B. The Lower Court Erred by Finding Appellee Established by Clear and Specific Evidence a Prima Facie Case of Each Essential Element of the Claims in Question.

Appellee's claims against Appellants are for tortious interference with business relations, intentional infliction of emotional distress and common law civil conspiracy. Appellee also has a claim for defamation pending against Baird which will be discussed later in this brief. Throughout Appellee's brief, he continually makes general statements regarding all Appellants even when referencing specific actions of a single Appellant. It is helpful to review the exact factual allegations he has made against each individual Appellant as they relate to the claims of tortious interference with business relations, intentional infliction of emotional distress and common law civil conspiracy.:

Boxell

54. [T]he Defendant Neurosurgeons conspired to submit numerous unsubstantiated verbal and written complaints to the Board regarding Dr. Anagnost's care and treatment of multiple patients.
57. Later in early January or February, Defendants Baird, Boxell and Tomecek attended a meeting at the Southern Hills Marriott in Tulsa, Oklahoma, with Defendant Janke. The purpose of the meeting was an effort to focus on bad outcomes, complications, unhappy patients, and anything negative relating to Dr. Anagnost's care and treatment of patients.
105. In August of 2013, Dr. Anagnost discovered for the first time that Defendant Boxell emailed a complaint to the Board regarding Dr. Anagnost's patient POM on or about January 12, 2011, wherein he states in part, "I have encountered another case where it appears a sham surgery was performed by Dr. Anagnost...I performed a large spinal reconstructive surgery on this patient

and found no evidence that Dr. Anagnost had done anything other than a skin incision. ... This was a false and unformed complaint similar to those complaints by Defendants Tomecek and Fell that failed at the Emergency Hearing.

(R., pp. 1051-1325, Doc. 32 Amended Petition at pp. 10, 11 and 24).

Baird

54. [T]he Defendant Neurosurgeons conspired to submit numerous unsubstantiated verbal and written complaints to the Board regarding Dr. Anagnost's care and treatment of multiple patients.

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(R., pp. 1051-1325, Doc. 32 Amended Petition at pp. 10 and 11).

1. Tortious Interference With Business Claim

The Act provides "[t]he court shall not dismiss a legal action under this section if the party filing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." Okla. Stat. tit. 12 §1434(C). Appellee failed to meet this burden as it relates to the non-defamation claims against each Appellant. The elements of a tortious interference claim are laid out in *Fulton v. People Lease Corp.*, 2010 OK CIV APP 84, ¶20 (Okla. App. 2010). are:

1. That he or she had a business or a contractual right that was interfered with.
2. **That the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable.**
3. That damage was proximately sustained as a result of the complained of interference.

(Emphasis added). Appellee spends some 57 pages of his Amended Petition along with 200+ pages of exhibits in an attempt to lay out his case against Appellants. Nowhere in those

documents is found a single piece of paper, email, letter, communication, etc. that comes close to showing a malicious and wrongful intent on the part of Boxell or Baird. Appellee certainly would not have hesitated to include such evidence if it existed. Appellee points to § 1435 of the Act which allows the court to review pleadings in its analysis of the motion to dismiss. While it is true the court can look to the pleadings, the Act clearly requires more than an allegation to meet the **clear and specific evidence** requirement for a claim to survive a motion to dismiss. Determining otherwise would ignore the intent of §1434(C) and would treat a motion to dismiss filed under the Act as a routine motion to dismiss. The Legislature clearly intended to heighten the burden on the party making the claim in an attempt to safeguard an individual's Constitutional rights.

Appellee repeatedly states in his pleadings that Appellants', including Boxell's actions were done in order to ruin him financially and for some competitive advantage. To "support" this contention, Appellee references Appellants' communications with the Board and their communications with attorneys representing patients. He also points to his affidavit attached to his Amended Petition which details emails and documents he unlawfully obtained from the OBA in April, 2014. While it is totally improper for Appellee to refer to information the lower court ruled as privileged and confidential, it is noteworthy that his affidavit includes no evidence whatsoever or any references to Boxell or Baird that would allow one to infer either of them had some malicious or wrongful intent that was driving their involvement with the Board's investigation or any role in Appellee's litigation history.

2. Intentional Infliction of Emotional Distress

For the reasons above, Appellee's intentional infliction of emotional distress claim

should also have been dismissed by the lower court. "An action for intentional infliction of emotional distress will lie only where there is **extreme and outrageous** conduct coupled with severe emotional distress... [emphasis added]" *Gaylord Entm't Co. v. Thompson*, 1998 OK 30, ¶45, 958 P.2d 128, 148. Appellee again failed to present clear and specific evidence that Appellants' involvement with the Board's investigation or their communications with attorneys representing patients was extreme and outrageous. The mere fact that Appellee believes Appellants were wrong to question and communicate concerns about his treatment does not rise to the level of extreme and outrageous conduct. This is especially true when Appellants were obligated to cooperate with the Board's investigation. See Okla. Admin. Code § 435:10-7-4 (37-38, 43) (including "[f]ailure to furnish the Board ... information lawfully requested by the Board", "[f]ailure to cooperate with a lawful investigation conducted by the Board", and [failure to report to the Board unprofessional conduct committed by another physician as "unprofessional conduct" and grounds for discipline). Appellee claims he overwhelmingly met his burden citing specific facts related to Appellants' communications with the Board and with patient attorneys. While it is true that Appellee has alleged many things to be facts, including the impact the Appellants' alleged actions had on his practice, he has continually left one important thing out: Appellee has never laid out any **clear and specific evidence** that proves Appellant's actions were extreme and outrageous. Simply alleging and attributing an ill motive to Appellants' actions is not enough. These contentions are nothing more than allegations and his intentional infliction of emotional distress claim should be dismissed.

3. Civil Conspiracy

A civil conspiracy "consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means." *Gaylord Entm't Co. v. Thompson*, 1998 OK 30, 40, 958 P.2d 128, 148. As opposed to a criminal conspiracy, "civil conspiracy does not itself create liability. In order to be liable the conspirators must pursue an independently unlawful purpose or use an independently unlawful means." *Id.* "A conspiracy between two or more persons to injure another is not enough; an underlying unlawful act is necessary to prevail on a civil conspiracy claim." *Roberson v. Pain Webber, Inc.*, 2000 OK CIV APP 17, ¶21, 998 P.2d 193,201 (citing *Brock v. Thompson*, 1997 OK 127, ¶39, 948 P.2d 279, 294). Appellee has failed to establish by clear and specific evidence the Appellants' alleged actions were unlawful or done for an unlawful means. Appellants had a legal right and a duty to communicate with attorneys representing patients related to their opinions of Appellee's treatment decisions. The Appellants also had a duty to report their concerns and to cooperate with the Board's investigation. Any action they took as it related to communications with the Board was lawful and cannot be used to support a civil conspiracy claim.

4. Defamation (Slander) Claim Against Baird

The specific factual allegations against Baird that Appellee argues support his defamation claim are:

104. ...Defendant Baird told a patient's family to look up the numerous lawsuits on file on the internet against Dr. Anagnost (lawsuits that had been generated by the Neurosurgeon Defendants and the plaintiff's lawyers they were working with) and made it clear to them that he did not like Dr. Anagnost and would not send his worst enemy to him as a patient...
153. ... [Dr.] Baird had made, among others, the following false, unprivileged

communications imputing criminal activity about Dr. Anagnost when he told a patient's family:

- (a) To look up the numerous lawsuits on file on the internet against Dr. Anagnost; (STATEMENT A)
- (b) Indicated to them that he was a "bad doctor who hurt people"; (STATEMENT B)
- (c) He "indicated that he would not send any of his patients to see Dr. Anagnost and that he was not a very good doctor"; (STATEMENT C) and
- (d) Made it clear to them that he did not like Dr. Anagnost and "wouldn't send his worst enemy to go and see Dr. Anagnost. (STATEMENT D)

155. The verbal communications or statements by Defendant Baird contained materially false allegations against Dr. Anagnost.

(R., pp. 1051-1325, Doc. 32 Amended Petition at pp. 24, 40, and 41). Appellee's defamation claim is based on alleged verbal statements made by Dr. Baird therefore slander law applies. "Slander is defined in part as a **false** and unprivileged publication, ...". 12 O.S. §1442. (Emphasis added). Assuming arguendo that Baird actually made the alleged statements, Appellee did not present clear and specific evidence that each purported statement was false.

Taking each purported statement individually and assuming Dr. Baird said each, it is clear that each statement does not qualify as slander because Appellee cannot prove any of the four statements to be false. The sub-parts of ¶ 153 of the Amended Petition are inclusive of ¶104 and ¶155 and therefore the analysis of the four sub-parts will also cover the more general allegations of ¶104 and ¶155..

STATEMENT A: Advising a patient to look up a publically available website regarding the number of lawsuits filed against Appellee is informative, not defamatory. A Tulsa County review of OSCN shows that it is a fact that numerous lawsuits have been filed

against Dr. Anagnost. It is also important to note that although Appellee repeatedly blames his extensive lawsuit history on Appellants, an OSCN review shows that approximately twenty medical malpractice cases had been filed against Appellee in 2009 or earlier. His lawsuit history would understandably be information a patient or a patient's family may have an interest in knowing. Communicating where to find this public and factual information can never be proven to be false.

STATEMENT B: While it is unclear what Appellee means by "indicated", even if Baird made the statement that he believed Appellee to "be a bad doctor who hurt people" this statement is nothing more than an opinion that was communicated to his patient. Further this statement cannot be provable as false. The United States Supreme Court addressed defamation based on opinions and held "...[W]e think *Hepps* stands for the proposition that a statement on matters of public concern **must be provable as false** before there can be liability under state defamation law...". *Milkovich v. Lorain Journal Co. Et Al.*, 497 U.S. 1, 19 (1990). [Emphasis added]. The Court further held "*Hepps* ensures that a statement of **opinion** relating to matters of public concern which does not contain a provably false factual connotation **will receive full constitutional protection.**" [emphasis added]. *Id.* at 20. The purported statement is insufficient to support a claim for defamation as it is clearly a statement of opinion that cannot be proven to be false. As this statement cannot be proven to be false, Appellee most certainly did not provide clear and specific evidence that this statement was false.

STATEMENT C: Again, it is unclear what Baird is alleged to have specifically said based on Appellee's use of "indicated", however again for argument's sake, we will assume

the statement was made as alleged. Assuming Baird communicated he would not send any of his patients to Appellee, this statement is insufficient to support a defamation claim. Baird certainly has the right to decide to not refer patients to Appellee and he also has the right to communicate this position to his patients and their family members. The statement that Appellee is “not a very good doctor” is an opinion that cannot be proven as false. The same argument applied to STATEMENT B applies here. This statement too cannot be proven to be false and Appellee did not provide clear and specific evidence that this statement was false.

STATEMENT D: Baird’s personal feelings cannot be the basis for a defamation action. Further, Baird’s purported statement that he would not send his worst enemy to Appellee is a position that Baird is entitled to take and is not sufficient to be the basis for a defamation action. Communicating his personal position that he would not refer anyone to Appellee could never be proven to be a false statement.

The purported statements attributed to Baird even if assumed to be true are not sufficient to support a case for defamation. They are either statements of facts, personal positions, and/or personal opinions that cannot be proven to be false, all of which are protected by law. Appellee failed to present clear and specific evidence to support his defamation claim against Baird and the lower court erred in not dismissing this claim.

C. Lower Court Erred by Not Dismissing Appellee’s Claims Because the Appellants Established by a Preponderance of the Evidence Each Essential Element of a Valid Defense to Appellee’s Claims.

1. Defenses: Right of Free Speech, Right to Associate, Right to Petition

Okla. Stat. tit. 12 § 1434(D) provides “ Notwithstanding the provisions of subsection C of this section, the court shall dismiss a legal action against the moving party if the moving

party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.” Appellants have established each element of valid defenses to every claim asserted by Appellee and dismissal of the claims is warranted. Each communication/action allegedly made by Appellants was protected by their Constitutional rights of free speech, freedom to associate and/or right to petition. The procedure to expedite the defense of lawsuits based on the exercise of these rights is found in the Act subject to the current appeal.

The Act includes definitions applicable to the case before the Court. “Exercise of the right of association” is defined as “a communication between individuals who join together to collectively express, promote, pursue or defend common interests”. Id. at §1431(2). “Exercise of free speech” is defined as “a communication made in connection with a matter of public concern”. Id. at §1431(3). “Matter of public concern” is defined as “an issue related to: a. health or safety, ...” Id. at §1431(7).

“Exercise of the right to petition” means any of the following:

- a. a communication in or pertaining to:
 - (1) a judicial proceeding, ...
 - (3) an executive or other proceeding before a department or agency of the state or federal government or a political subdivision of the state or federal government, ...
- b. a communication in connection with an issue under consideration or review by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding,
- c. a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding,
- d. a communication reasonably likely to enlist public participation in an effort to

effect consideration of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding, and

- e. any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the Oklahoma Constitution.

Id. at §1431(4).

Each specific factual allegation related to Boxell arises from or relates to his cooperation with the Board's investigation and prosecution of Dr. Anagnost. An investigation into alleged unprofessional conduct regarding medical care and potential harm to patients clearly is a matter of public concern and thus protected by his right of free speech. Boxell's written and/or verbal communications with the Board were actions protected by his right of free speech and right of association. His alleged actions are also protected by his right to petition secondary to the Board being a state agency. The verbal and written communications were: (1) made in connection with an issue under consideration or review by the Board; (2) reasonably likely to encourage consideration by the Board; and (3) reasonably likely to encourage public participation to encourage the Board's consideration of Appellee's conduct. Each and every claim Appellee has made against Boxell (tortious interference with business relations and/or economic advantage, intentional infliction of emotional distress, negligence, and civil conspiracy) is based upon the same protected actions and communications with the Board. Boxell clearly established by a preponderance of the evidence each essential element of his Constitutional right defenses and the lower court committed error in overruling his motion to dismiss.

The specific factual claims against Baird relate in part to his involvement and

cooperation with the Board secondary to its investigation of Appellee. As such, Baird is protected from liability because any communications with the Board are protected as exercises of free speech and the right to petition. The remaining claims are based upon alleged statements made to a patient and/or family member. As such, they are also protected under the Act as they are exercises of the rights of association and free speech. Such statements would qualify as communications made in connection with a matter of public concern and are also protected free speech under the Act.

Although Boxell and Baird are not specifically mentioned as ones who: (1) met and reviewed patient files in an effort to identify negative issues related to Appellee's care and treatment, (2) communicated with other doctors about his alleged issues with Appellee and the Board's resolution of their complaints, (3) served as an expert witness against Appellee and funneled information back and forth between the Board and various plaintiff's attorneys, or (4) disparaged Appellee to patients and their families of patients referenced in prior pleadings, each of these alleged activities would be protected under the Act as an exercise of the right to associate and/or free speech as they certainly relate to a matter of public concern.

2. Absolute Immunity Related To Communications Made Secondary To The Board Proceeding Against Appellee.

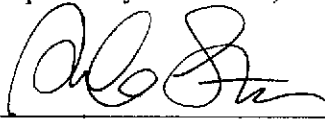
Appellants rely on the prior pleadings related to this issue which has been thoroughly briefed during the course of this litigation. (R., pp. 239-269, Motion To Dismiss For Failure To State A Claim And Improper Venue, Doc. 2). (Also see the Brief In Chief of Tomecek and Fell.) Appellants clearly established each element necessary for the absolute immunity defense to apply to the communications made secondary to the Board's investigation and

prosecution of Appellee. Any claims that relate to allegations centered on the communications and interactions with the Board should have been dismissed by the lower court.

CONCLUSION

The lower court correctly ruled the Oklahoma Citizens Participation Act was available for the Appellants to utilize based on Appellee's election to file an amended petition. The court erred by overruling Appellants' Motions to Dismiss as the ruling was contrary to the purpose of the Oklahoma Citizens Participation Act, and established principles in this Court concerning privileged communications. Appellants request dismissal of each of Appellee's claims against them.

Respectfully submitted,



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CERTIFICATE OF SERVICE

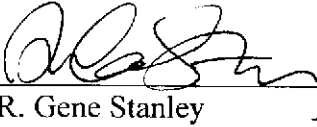
I hereby certify that on this 24th day of August, 2015, a true and correct copy of the foregoing **COMBINED ANSWER AND REPLY BRIEF IN CHIEF OF OKLAHOMA SPINE AND BRAIN INSTITUTE, LLP; CLINTON BAIRD, M.D., individually; CHRIS M. BOXELL, LLC; and CHRISTOPHER M. BOXELL, M.D., individually**, individually was mailed, postage prepaid thereon, to:

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I further certify that a copy of the **COMBINED ANSWER AND REPLY BRIEF IN CHIEF OF OKLAHOMA SPINE AND BRAIN INSTITUTE, LLP; CLINTON BAIRD, M.D., individually; CHRIS M. BOXELL, LLC; and CHRISTOPHER M. BOXELL, M.D., individually**, individually was filed in, the Office of the District Court of Oklahoma County on the 24th day of August, 2015.



R. Gene Stanley