

2 Attachments (Chm. File)

TESTIMONY ON BEHALF OF RICHARD B. WEBER, M.D. OF STAMFORD, CT

March 17, 2008

BEFORE THE JUDICIARY COMMITTEE

I. INTRODUCTION AND BACKGROUND

Good afternoon, Chairman McDonald and Chairman Lawlor and distinguished members of the Judiciary Committee. My name is Ryan Mihalic of Murtha Cullina LLP in Hartford, CT and we have represented Richard B. Weber, M.D., a Stamford retina specialist since he became enveloped in this imbroglio in 2002. I appreciate this opportunity to outline for you the harsh injustices that Dr. Weber has encountered during this journey since his unlawful arrest in 2002, the dismissal of criminal charges with prejudice by Judge Christine Keller in Hartford Superior Court, and the time, energy and expense Dr. Weber has endured to ensure that the actions by the state actors involved have the spotlight of public scrutiny shed upon them so that others, unlike Dr. Weber, are not subjected to the delay, injustice and personal and professional sacrifice he has undergone over the course of the past six (6) years.

In 2000, Dr. Weber, a well known and respected Stamford-based ophthalmologist, was audited by the Department of Social Services ("DSS"). The process was unorganized, without defined procedures, and unfair. As a result, Dr. Weber reached out to his Representative, Christel Truglia, to express his concern about the DSS audit, its procedure, and employees. Representative Truglia forwarded Dr. Weber's claims, with a cover letter requesting assistance from then-DSS Commissioner Patricia Wilson-Coker. On the same day that Commissioner Patricia Wilson-Coker responded to Representative Truglia with a letter containing numerous

factual inaccuracies and misstatements, DSS referred Dr. Weber for criminal investigation over this billing dispute. Such billing disputes are routinely resolved with an audit adjustment and not prosecution. As a result of this referral, Dr. Weber was ultimately subjected to an illegal search and seizure and ultimately arrested after nearly two long years. Subsequently, all charges were dismissed, with prejudice, by Deputy Chief State's Attorney Paul Murray after the lead prosecutor advised the Court that probable cause did not exist.

Because of his years of treating various diseases of the eye, Dr. Weber was aware in the early 1990's, that Medicare and other major health care payors changed the way they reimbursed physicians for various procedures with the use of specialized equipment. Specifically, Medicare and other health care payors recognized that it was less expensive to have certain procedures or treatments performed in a physician's office rather than a hospital. In an attempt to encourage physicians to perform these procedures and treatments in their offices, physicians who did so were reimbursed at a higher amount.

In his practice as an ophthalmologist, Dr. Weber used a Coherent Laser to perform photocoagulation treatments and surgery ("Laser Treatments"). Prior to 1992, Dr. Weber performed Laser Treatments using a laser facility at St. Joseph's Hospital in Stamford, Connecticut. In June 1992, Dr. Weber began using a more advanced Model 920 Coherent Dye Laser for his Stamford office. Thereafter, all laser machines and facilities used by Dr. Weber to perform Laser Treatments were owned by Dr. Weber and located at Dr. Weber's Stamford office.

As the state agency responsible for administrating the federal-state Medicaid program, the Connecticut Department of Social Services ("DSS") is responsible for providing information to physicians regarding the Medicaid Coding process. In 1994, Dr. Weber's office contacted the

DSS Provider Relations Unit for guidance on how to bill. DSS informed Dr. Weber that DSS policy will allow an additional fee when Laser Treatments were performed in a physician's office with equipment owned by the physician, rather than to reduce reimbursements for Medicaid physicians who performed Laser Treatments at a hospital. In response to Dr. Weber's query, DSS advised that, when Dr. Weber submitted a claim for reimbursement for performing the Laser Treatment at his office, he should use a specific additional code – CPT procedure code 99070 ("99070 Code").

In accordance with the advice and guidance provided by DSS, Dr. Weber submitted claims for the 99070 Code when seeking payment for Laser Treatments performed in his office. DSS also advised Dr. Weber to keep records of his use of 99070 Code with the Laser Treatments, which he did.

During the 1990s, DSS reviewed and audited Dr. Weber's billings on numerous occasions. At no time during or as a result of any of the audits did DSS or the DSS Office of Quality Insurance ("OQA") question Dr. Weber's use of the 99070 Code.

In 2000, DSS/OQA audited Dr. Weber's Medicaid claims for the period of April 1, 1998 through March 31, 2000. During this audit, after Dr. Weber repeatedly requested that DSS provide him with procedures or guidelines concerning the audit process, John McCormick, Accounting Manager of the OQA, advised Dr. Weber that no such procedures or guidelines existed. As before, during the 2000 Audit, DSS/OQA, and in particular McCormick and Supervising Accounts Manager Donna Frank, again were repeatedly made aware of Dr. Weber's use of the 99070 Code in conjunction with the laser treatments. At no time during either the 2000 Audit process, the exit conference, or in the Final Audit Report did DSS/OQA indicate that Dr. Weber's use of the 99070 Code was fraudulent, criminal, or in any way improper. On the

contrary, before Dr. Weber wrote to his State Representative, McCormick thanked Dr. Weber in writing for “the courtesy and cooperation extended to [the DSS/OQA] representative during the course of this audit.”

After the conclusion of the 2000 Audit and receipt of the Final Audit Report, Dr. Weber was disturbed by the conduct and findings of DSS/OQA and its employees. As a result, Dr. Weber contacted his State Representative, Christel H. Truglia, of the 145th District, and reviewed his complaints with her. Specifically, Dr. Weber informed Representative Truglia of his complaints regarding DSS, McCormick, the DSS/OQA audit process, DSS’s failure to have defined procedures for the audit of Medicaid providers, and DSS’s systemic problems with acknowledging and reimbursing Medicaid providers for Site-of-Service Differentials. Along with a cover letter dated January 29, 2001, Representative Truglia forwarded Dr. Weber’s letter to Wilson-Coker, advising her of his concerns regarding the audit process, DSS, the manner in which the State’s Medicaid program was operating, and his justification for the use of the 99070 Code.

In February 2001, Wilson-Coker and then-DSS Deputy Commissioner Michael Starkowski provided Representative Truglia’s and Dr. Weber’s letters to James Wietrak, DSS’s Director of Quality Assurance, and directed Wietrak to draft a response on behalf of Wilson-Coker. McCormick and Wietrak drafted a letter for Wilson-Coker’s signature, which knowingly contained numerous material omissions and false and misleading statements. On the same day that Wilson-Coker forwarded her letter to Representative Truglia, DSS employees, guided by John McCormick, initiated the referral of Dr. Weber to the Medicaid Fraud Control Unit (“MFCU”) branch of the Office of the Chief State’s Attorney (“OCSA”) for criminal

investigation. The referral was based upon Dr. Weber's use of the 99070 Code, even though DSS had specific knowledge of Dr. Weber's use of the 99070 Code.

The OCSA/MFCU, through Director Nancy Salerno, assigned the case to Steven Oborski as Supervisory Inspector, Concezio DiNino as Inspector, Robert Maurer, Jr. as Forensic Fraud Examiner, and Brian J. Leslie as prosecutor. In her position, Salerno knew or should have known that Oborski, DiNino, Maurer, and Leslie each had no training or knowledge concerning the method by which Medicaid providers submit claims to DSS, the use of the 99070 Code, or the systemic difficulties with the DSS reimbursement to Medicaid providers for the use of specialized equipment.

After an incomplete, predetermined investigation guided by misstatements from DSS, OCSA/MFCU obtained a search warrant and executed a search of Dr. Weber's Stamford office. McCormick has since testified that statements attributed to him in the search warrant affidavit, on which MFCU/OCSA inspectors specifically relied, had never been made by him, including that Dr. Weber did not knowingly act in a manner that was fraudulent. Moreover, the MFCU/OCSA inspectors failed to include exculpatory evidence in the search warrant application or the Affidavit.

In October, 2002, the OCSA/MFCU, sought and secured an arrest warrant against Dr. Weber alleging one count of larceny in the first degree. Like the search warrant, the arrest warrant was based on an underlying affidavit that contained false, incorrect, malicious and reckless representations and statements by DSS and DSS employees. In fact, McCormick has since testified that statements attributed to him in both the Search and Arrest Warrants were either false or not made by him.

On October 2, 2002, Dr. Weber was illegally and unlawfully arrested and taken into custody. That same day, the State of Connecticut filed a Criminal Information against Dr. Weber for one count of larceny in the first degree by defrauding a public community, which began the matter of State of Connecticut v. Richard B. Weber, M.D., CR-02-564924.

In December 2002 and April 2003, Dr. Weber, through counsel, provided the OCSA/MFCU lead-prosecutor Brian Leslie with detailed submissions of available exculpatory evidence and Dr. Weber's justification for using the 99070 Code – all of which was in the possession and custody of DSS. However, the OCSA/MFCU took no steps to either confirm or deny Dr. Weber's statements.

The State's retaliation against Dr. Weber is further highlighted by the fact that DSS was aware that another ophthalmologist was, and had been, submitting reimbursement claims to Medicaid for the 99070 Code in conjunction with laser treatments, and that these claims amounted to nearly twice the total amount submitted by Dr. Weber. To date, DSS has taken no adverse action against that provider, including referral to the OCSA/MFCU for criminal investigation. In fact, DSS has allowed that provider to keep the reimbursements for use of the 99070 Code through 2004.

In May 2003, Dr. Weber filed a Motion to Dismiss the criminal charges against him and a Motion to Suppress both the Search and Arrest Warrants. Dr. Weber requested and was granted a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978), challenging the validity of the search and arrest warrants, and the underlying affidavits. The State waived the initial requirement for a Franks hearing, which would have required Dr. Weber to make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless

disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause.” 438 U.S. at 155-56.

Ultimately, on December 22, 2003, the Superior Court dismissed the criminal prosecution with prejudice.

II. PREJUDICIAL DELAY BY THE CLAIMS COMMISSION

It is important to note that Dr. Weber was materially prejudiced by the Claims Commission process by the Commissioner’s failure to act or resolve Dr. Weber’s allegations with any degree of efficiency or timeliness. Dr. Weber filed his first notice of claim with the Claims Commissioner in April 2004, just four months after the criminal charges against him were dismissed with prejudice. Dr. Weber amended his claim, per request of the Claims Commission, in August, 2006. As of December 2006, the Claims Commissioner had not acted, thereby forcing Dr. Weber to file his federal complaint against the DSS and OCSA defendants or risk being barred due to the applicable statute of limitations on his negligence claims.

This delay materially prejudiced Dr. Weber as he was forced to file claims of negligence against the State and its employees prior to the Claims Commission granting permission to sue. Moreover, this predicament then allowed the State to argue to the Claims Commission that it was without subject matter jurisdiction as Dr. Weber had another forum within which to resolve his claims – the federal court. This catch-22 resulted in a perversion of justice that denied Dr. Weber appropriate access to the courts in order to address his claims of negligence. As stated by Judge Dorsey:

Taking [Dr. Weber’s] briefs in good faith, it appears that Plaintiff has pursued all administrative remedies available to him but has encountered delays outside his control. To allow such administrative delays to result in the forfeiture of his claims before this Court would appear to unfairly sacrifice Plaintiff’s potentially valid claims to administrative inefficiencies. However, in the absence of legislative waiver of sovereign immunity, a court lacks jurisdiction to hear a claim

for monetary damages against state officials or employees, acting in their official capacity, unless the Claims Commissioner authorizes such a suit. [citations omitted] The fact that the Claims Commission has delayed making a decision on a pending claim through the duration of the statutory limitations period does not authorize this Court to waive the State's sovereign immunity and allow Plaintiff's claims to proceed. [citations omitted] Jurisdiction over Plaintiff's claims against State officials and employees 'in the first instance[] resides by statute solely in the claims commissioner,' . . . and they must therefore be dismissed for lack of subject matter jurisdiction.

Weber v. McCormick, et al., Case No. 3:06 CV 2009 (PCD), Ruling on Motions to Dismiss at 33 (Sept. 30, 2007).

On December 7, 2007, the Claims Commission dismissed Dr. Weber's claims based on a lack of subject matter jurisdiction as pled by Motions to Dismiss, filed by the State, in February 2007.

III. DR. WEBER'S STATE CLAIMS

Dr. Weber respectfully requests that the Legislature grant him permission to sue the State for its egregious behavior as outlined below:

A. Tortious Interference with Contractual Relations.

DSS tortiously interfered with Dr. Weber's contractual relationship with Medicaid by alleging that Claimant's use of 99070 Code was fraudulent. This interference was tortious as DSS, McCormick, Frank, Wietrak and Comerford initiated criminal proceedings against Weber based upon unsupported allegations and charges of fraud, which eventually resulted in the termination of the Medicaid contract. However, DSS had been aware of – and tacitly approved of – Weber's use of 99070 Code since 1995, but took no adverse action until after Weber complained about his treatment at a DSS audit. Moreover, evidence shows that at least one other physician used 99070 Code in the same manner as Weber previously had used such code – and

DSS has taken no adverse action against this physician's contractual relationship with Medicaid or filed fraud charges.

Additionally, Wilson-Coker and Starkowski are liable for tortious conduct against Weber concerning his contractual relationship with Medicaid because, as the then-Commissioner and Deputy Commissioner of DSS, they were negligent in their roles to adequately supervise the conduct of DSS employees. They allowed the hiring and/or transferring of incompetent, inexperienced and retaliatory employees who were not educated, trained or instructed on the complicated and changing rules and regulations which govern Medicaid billing and reimbursement to make substantive decisions concerning Dr. Weber's reimbursement requests without understanding the process.

The evidence shows that the allegations of fraud and larceny for which Weber's Medicaid contract ultimately was terminated were based entirely upon retaliation from McCormick after Weber had criticized his conduct to a public official during a DSS audit. This interference resulted in damages to Claimant as he is now no longer subject to the beneficial relationship between him and Medicaid. Such conduct also adversely and materially affected Weber's contractual relations with other providers and hospitals, including but not limited to, re-credentialing periodically required by payors of professional health care services.

B. Breach of Contract.

DSS, as the administrator of the Medicaid program, and Wilson-Coker as the then-Commissioner of DSS and responsible for establishing DSS policy, breached the Medicaid contract with Claimant by failing to reimburse Claimant for certain procedures involving the use of 99070 Code. Pursuant to the terms of the Medicaid agreement, Weber provides services to

Medicaid patients for reimbursement. DSS failed to pay Weber for services involving 99070 Code, but continues to pay for such services today (99070 Code) for other ophthalmologists.

C. Tortious Interference with Business Relations.

DSS engaged in tortious conduct that interfered with Claimant's business relationships with his Medicaid and non-Medicaid patients, in addition to his relationship with Stamford Hospital. As the state agency responsible for administering the Medicaid program, DSS, including its employees McCormick, Frank, Wietrak, and Comerford, were aware of the business relationships Weber had with his patients as a provider of medical services. Nevertheless, DSS, McCormick, Frank, Wietrak, and then-Comerford took tortious steps to interfere with such relationships by initiating a baseless criminal action against Weber premised on the use of 99070 Code. Wilson-Coker and Starkowski are also liable for tortious conduct against Weber concerning his business relationships because, as the then-Commissioner and Deputy Commissioner of DSS, they were negligent in their roles to adequately supervise the conduct of DSS employees, McCormick, Frank, Wietrak, and Comerford. In addition, their conduct was negligent as they allowed the hiring and/or transferring of incompetent, inexperienced and retaliatory employees who were not educated, trained or instructed on the complicated and changing rules and regulations which govern Medicaid billing and reimbursement. This tortious interference was furthered by the involvement of OCSA, which, acting with gross negligence and absent its own independent research and investigation, merely rubber-stamped the allegations made by DSS. Specifically, OCSA relied almost exclusively on DSS and its rogue employees when it brought criminal charges against Weber for use of 99070 Code. This conduct

resulted in damage to Weber as the relationships he had with his Medicaid and non-Medicaid patients were affected by the conduct of the State Defendants.

On numerous occasions, DSS breached the confidentiality of Claimant's patients, which also interfered with his business relations with his patients. Specifically, at the exit conference, McCormick took three original charts that Claimant had brought to the conference and handed them to Cass to copy without Claimant's permission, or the permission of Claimant's patients. Wilson-Coker also is liable for this conduct by DSS employees as the chief policy-maker for DSS. Additionally, the search and seizure of Claimant's office resulted in significant breaches of patient confidences as various documents and computer records unrelated to OCSA's investigation were searched and seized.

Last, because of the DSS audit, criminal investigation and prosecution, Claimant's privileges at Stamford Hospital were placed in jeopardy. Such conduct also adversely and materially affected Weber's business relations with other providers, including but not limited to, re-credentialing periodically required by payors of professional health care services.

D. Intentional Infliction of Emotional Distress.

The conduct of the State Defendants in this case was grossly outrageous. DSS, guided by McCormick's retaliatory vendetta, which was blindly followed by OCSA acting with gross negligence, initiated unsupported criminal claims against the Claimant. These claims were unjustified, unwarranted, and ultimately dismissed for a lack of probable cause. Claimant and his family have suffered emotional and psychological harm as a direct result of the State Defendant's malicious and retaliatory conduct, which resulted in, among other things, the search of Weber's Stamford office and public hearings in Superior Court.

E. Libel and Slander.

On February 21, 2001, Wilson-Coker sent a letter, as Commissioner of DSS, to Representative Christel H. Truglia, that contained slanderous and libelous statements about Claimant. While this letter was sent and approved by Wilson-Coker, it was written at Wilson-Coker's direction by McCormick and Wietrak. Discovery in this matter determined that Wilson-Coker's letter contained numerous false statements and conclusions that she as DSS Commissioner and her staff had a legal duty to verify the accuracy of before sending such letter. These false statements and conclusions injured Claimant insofar as such statements and conclusions formed the basis for his eventual prosecution.

Additionally, through their statements at the time of the claimant's false imprisonment and arrest, certain employees, agents and or servants of OCSA caused or caused to be made certain libelous and slanderous statements against Weber and his family. Specifically, on or about October 8, 2002, said statements were published by OCSA, which was acting with gross negligence, to media outlets and the public at large. Moreover, such statements were made in violation of the OCSA employee's legal duties, which, in light of the seriousness of the statements, maintained a legal duty to verify and support such statements. In addition to causing such statements to be published in the *Stamford Advocate* and elsewhere, OSCA employees also caused significant harm to the Claimant's immediate family by publishing such statements.

F. Trade Libel/Defamation and Commercial Disparagement.

The libelous and slanderous statements set forth in Section II.E. above also injured the Claimant's livelihood and profession. As such, Claimant seeks permission to pursue claims of

trade libel and defamation and commercial disparagement against DSS, Wilson-Coker, McCormick, Wietrak, OCSA and its employees, and others insofar as such statements damaged Claimant's business as an ophthalmologist.

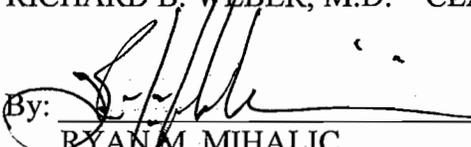
IV. CONCLUSION

It should be noted that Dr. Weber, having been forced to preserve his rights in federal court, has pending in the United States District Court for the State of Connecticut a civil rights action for malicious prosecution (Tab.1.). As you can see, after the various State defendants filed Motions to Dismiss, several state actors remain as defendants in their individual capacities, including former Commissioner Wilson-Coker (Tab.2.). These civil rights claims for malicious prosecution are completely different from the claims identified above which Dr. Weber had presented to the Claims Commission. The very claims which languished before the Claims Commission in yet another example of Dr. Weber's rights and liberties being trampled upon without relief or redress.

Dr. Weber is not requesting monetary relief from this Committee. All that is being requested is that justice, fairness and equity be served by this Committee exercising its discretion and authority by granting him permission to sue in state court on the claims presented herein.

Respectfully submitted,

RICHARD B. WEBER, M.D. – CLAIMANT

By: 

RYAN M. MIHALIC

His Attorney

Cc: The Honorable Jodi C. Rell
The Honorable Michael Fedele
Richard B. Weber, M.D.
Christel Truglia, Representative
Carlo Leone, Representative
Jim Shapiro, Representative
William Tong, Representative
Livvy R. Floren, Representative
Senator William H. Nickerson