NO. 12-1314

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD T. GENOVA,

Plaintiff-Appellant,

v.

BANNER HEALTH, an Arizona Non-Profit Corporation, d/b/a NORTH COLORADO MEDICAL CENTER; and
Rick Sutton, Individually and as CEO and an employee of North Colorado Medical Center,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE JUDGE R. BROOKE JACKSON
DISTRICT COURT N0. 11-cv-1139-RBJ-MJW

BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF EMERGENCY MEDICINE SUPPORTING APPELLANT AND REVERSAL

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Dated: November __, 2012

CORPORATE DISCLOSURE STATEMENT

The Amicus Curiae is a non-profit corporation headquartered in Milwaukee, Wisconsin. Pursuant to Fed. R. App. P. 26.1 and 29(c), the amicus curiae does not have a parent corporation or publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The American Academy of Emergency Medicine, Inc (AAEM) is an I.R.S. Section 501(C)(6) not-for-profit professional association. AAEM was incorporated in Wisconsin in 1999. AAEM has approximately 7,000 physician members who practice emergency medicine throughout the United States, including Colorado. Because AAEM members are engaged in the active practice of emergency medicine, the Academy has a significant interest in the precedential issues presented in this case.

AAEM believes that the EMTALA whistleblower provisions are intended to protect physicians who report both actual and imminent violations of EMTALA. The AAEM seeks to assert that the language of

EMTALA should be liberally interpreted to give effect to its purpose, and that a physician should not be put in a position of having to actually endanger patients' lives in order to show a violation of EMTALA. AAEM believes the District Court erred in dismissing Dr. Genova's lawsuit because the hospital retaliated against Dr. Genova when he warned about unsafe conditions that rose to the level of actual or imminent EMTALA violations. AAEM also believes patients served by a hospital are intended third party beneficiaries of any hospital-physician exclusive contract providing for emergency department physician services. Consequently, the parties cannot waive the implied-in-law covenant of good faith if the interest of intended third party beneficiaries would be compromised.

AAEM states that no party's counsel authored the brief in whole or in part and no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. Further no person—other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The underlying principle behind 42 U.S.C. § 1395dd, the Emergency Medical Treatment and Labor Act, or EMTALA, is to ensure that all

patients, without regard to their real or perceived ability or inability to pay for medical care, are given consistent attention. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 797 (10th Cir. 2001). EMTALA, as relevant here, imposes two obligations on a hospital: to conduct an appropriate medical examination to determine whether the patient is suffering from an emergency medical condition, and, if an emergency medical condition does exist, to stabilize the patient before transporting him or her elsewhere. *Id*. at 796. When a hospital engages in practices that put it in a position to violate EMTALA, the whistleblower and civil monetary penalty provisions of EMTALA should protect the physician who demands the hospital comply with EMTALA. A physician should not be required to wait until a patient has died or suffered a physical detriment before he can rely on the whistleblower protections of EMTALA to protect him against retaliation for reporting actual violations or imminent violations.

As more fully set forth below, the District Court's decision should be reversed.

LEGAL ARGUMENT

I. THE JOINDER AGREEMENT VIOLATED PUBLIC POLICY BY WAIVING THE IMPLIED COVENANT OF GOOD FAITH; THE COURT SHOULD ENFORCE THE IMPLIED COVENANT OF GOOD FAITH FOR THE BENEFIT OF THE PATIENTS SERVED

PURSUANT TO THE PARTIES' CONTRACT

The District Court found that Dr. Genova did have a contract with Banner, and from that contract there arose an implied covenant of good faith and fair dealing. This implied covenant, the district court held, would prevent summary judgment from being entered against Dr. Geonova because there were genuine issues of material fact concerning whether Banner violated the covenant in terminating Dr. Genova. 2012 WL 2863009, p. 6. However, the District Court found that this implied covenant of good faith and fair dealing was simply trumped by a "Joinder Agreement" signed by Dr. Genova. The Joinder Agreement purported to waive any right by Dr. Genova to sue for his termination. The District Court should not have used the Joinder Agreement to trump the primary contract and eliminate the covenant of good faith and fair dealing from the contract.

Colorado courts have often denied enforcement of contractual terms that violate public policy, *see, e.g., Cooley v. Big Horn Harvestore Sys. Inc.*, 767 P.2d 740 (Colo.App.1988), and have held that parties to a contract may not waive public policy objections to the contract or waive provisions of law where it would violate public policy, *Equitex, Inc. v. Ungar*, 60 P.3d 746, 750 (Colo. App. 2002); *People v. Walker*, 665 P.2d 154, 156 (Colo.

App. 1983) *aff'd and remanded sub nom. Yording v. Walker*, 683 P.2d 788 (Colo. 1984). While no Colorado authority has specifically addressed whether the implied duty of good faith and fair dealing can be waived, other courts have held that the obligation to perform in good faith may not be waived. *Cont'l Bank N.A. v. Everett*, 760 F. Supp. 713, 717 (N.D. Ill. 1991) *aff'd sub nom. Cont'l Bank, N.A. v. Everett*, 964 F.2d 701 (7th Cir. 1992); *B.A. Mortgage & Int'l Realty Corp. v. American Nat'l Bank & Trust Co. of Chicago*, 706 F.Supp. 1364 (N.D. Ill.1989).

The implied covenant of good faith and fair dealing is implied by law into every contract. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo.1995). Courts should not permit parties to waive the requirement that they act in good faith. This is especially so where, as here, the contract is between a physician and a hospital, and grants the hospital the discretion to remove the physician from local practice for any reason or no reason, including the sounding of the alarm that EMTALA is being violated and patient care is being compromised. In these situations, the implied covenant of good faith and fair dealing protects not only the physicians, but the third parties for whose benefit the hospital and physician have entered into the contract – that is, the patients being served by them.

Colorado courts permit a party to a contract to object to a contract or its provisions on the ground of violation of public policy. This is done not just for the party, but “for the protection of the public, by thus preventing this character of contracts being made, and avoiding evils which naturally result therefrom." *Russell v. Courier Printing & Pub. Co.*, 43 Colo. 321, 325-26, 95 P. 936, 938 (1908). Colorado courts also prohibit contracts from putting employees in a position of “either obeying an employer's order to violate the law or losing his or her job.” *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992).

Here, the contract between the parties was intended to provide emergency room services to the public. In that respect, the public is an intended beneficiary of the contract, especially for purposes of enforcing the covenant of good faith and fair dealing. *See, e.g.*, *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 624 (Colo. App. 2004) (amateur athlete is third-party beneficiary of the contractual relationship between the NCAA and its members for purposes of claim that covenant of good faith and fair dealing has been violated). The covenant of good faith and fair dealing cannot be waived by the parties when it affects a third party, especially, as here, where the intended beneficiary is the public being served by the contract.

Based on the foregoing, the District Court should not have allowed the Joinder Agreement to prevent it from enforcing the implied covenant of good faith and fair dealing, and as a result find that it should grant summary judgment. While no Colorado court has dealt with these specific facts, clearly Colorado does not permit the enforcement of contracts which violate public policy. Colorado seeks to protect the public from the "evils" such as those here – permitting a hospital to fire a physician for attempting to enforce the law and protect patients. Colorado courts would certainly hold that under such a circumstance, a contract waiving the right to sue for such a termination is not enforceable as a matter of public policy. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992)("In light of Colorado's long-standing rule that a contract violative of public policy is unenforceable, it is axiomatic that a contractual condition…should also be deemed unenforceable when violative of public policy").

This Court should so hold, and should reverse the grant of summary judgment against Dr. Genova on his contract claim.

II. THE COURT SHOULD FIND THAT THE PROVISIONS OF EMTALA WERE VIOLATED, AND THE WHISTLEBLOWER AND CIVIL MONEY PENALTIES APPLY TO PROTECT DR. GENOVA FROM RETALIATION

A. THE PROVISIONS OF EMTALA

This case involves the provisions of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), found at 42 U.S.C. § 1395dd.

As relevant here, EMTALA provides:

> (a) Medical screening requirement
>
> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.
>
> (b) Necessary stabilizing treatment for emergency medical conditions and labor
>
> (1) In general
>
> If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--
>
> **(A)** within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
>
> **(B)** for transfer of the individual to another medical facility in accordance with subsection (c) of this section.
>
> EMTALA provides for civil enforcement for violation of its

provisions. It states that "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury…and such equitable relief as is appropriate." 42 U.S.C § 1395dd(d)(2)(A). EMTALA also protects whistleblowers, providing that:

> A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) of this section or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

EMTALA was enacted to "ensure all patients, regardless of their perceived ability or inability to pay for medical care, are given consistent attention." *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 797 (10th Cir.2001), *cert. denied,* 535 U.S. 905, 122 S.Ct. 1203, 152 L.Ed.2d 142 (2002). "The avowed purpose of EMTALA was … to provide an 'adequate first response to a medical crisis' for all patients." *Bryan v. Rectors and Visitors of the Univ. of Virginia*, 95 F.3d 349, 351 (4th Cir. 1996); *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1189 (1st Cir. 1995); see also H.R. Rep. No. 241, 99th Cong., 1st Sess. 27 (1986), reprinted in 1986

U.S.C.C.A.N. 42, 605, 726-27. The civil sanctions and penalties were intended largely as a deterrent to violations of EMTALA's provisions. H.R.REP. No. 241, 99th Cong., 1st Sess., pt. 3, at 7, *reprinted in,* 1986 U.S.CODE CONG. & ADMIN. NEWS 726, 729; *Burditt v. U.S. Dept. Of Health and Human Services,* 934 F.2d 1362, 1375 (5th Cir. 1991). As in many other legislative enactments, these sanctions are the "teeth" of the law, without which the law means nothing.

The District Court read the whistleblower provisions of EMTALA too narrowly. It held that there was no evidence of any violation of EMTALA because Banner "never refused to conduct an initial medical examination" and because Banner never failed to stabilize a person before transfer to another hospital. 2012 WL 2863009, p. 8. However, it is clear that in the period from January 21 to January 22, 2010, Dr. Genova called the hospital administrator and warned of imminent EMTALA violations.

B. BANNER VIOLATED EMTALA'S SCREENING REQUIREMENTS

EMTALA violations do not just occur when a hospital refuses to screen a patient. Other actions or inactions also violate EMTALA. The statute itself provides that the hospital must provide "an appropriate medical screening examination …to determine whether or not an emergency medical

condition exists." 42 U.S.C. § 1395dd(a). "The statute by its terms directs a participating hospital to provide an appropriate screening to all who come to its emergency department….[T]he failure appropriately to screen, by itself, is sufficient" to demonstrate a violation of EMTALA. *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1190 (1st Cir. 1995). This is true "whether or not they are in the throes of a medical emergency when they arrive." *Id*.

Further, "if the screening that [a patient] received is so delayed or paltry as to amount to no screening at all," this creates an EMTALA violation. *Byrne v. Cleveland Clinic*, 684 F. Supp. 2d 641, 651-53 (E.D. Pa. 2010). "[A]n egregious and unjustified delay in attending a patient can amount to an effective denial of a screening examination ... Depending on the particular circumstances of a case ... the Court can find that no screening at all was provided to the patient." *Byrne v. Cleveland Clinic*, 684 F. Supp. 2d 641, 651-53 (E.D. Pa. 2010), quoting *Marrero v. Hospital Hermanos Melendez,* 253 F.Supp.2d 179, 194 (D.P.R. 2003).

Further, there is no need to show that the delay or failure to screen arose out of a desire to shirk the burden of uncompensated care *Collins v. DePaul Hosp.*, 963 F.2d 303, 308 (10th Cir.1992); *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 857 (4th Cir.1994); *Correa v. Hosp. San*

Francisco, 69 F.3d 1184, 1193-94 (1st Cir. 1995).

Here, the district court granted summary judgment to Defendant on the mistaken notion that there was no violation of EMTALA, because there was no evidence that Banner "has ever refused to conduct an initial medical examination…to determine if an emergency medical condition exists." The facts showed, however, that the ER at Banner on the particular day in question was at a critically dangerous point, overcrowded to the point that it impacted the physicians' ability to conduct appropriate screening.

Dr. Genova specifically asked to implement Code Purple to divert patients to other hospitals because he believed that the ER could no longer provide appropriate and timely screening to the patients in the ER because of overcrowding. The evidence indicated clearly that on the date in question, January 21-22, 2010, there were "excessively long wait times" in the ER -- lasting hours. One patient with a GI bleed had already collapsed in the waiting room bathroom due to delay in receiving attention. Two heart attack victims had presented in the ER, and if any additional critical patients presented, in Dr. Genova's opinion they were certain not to receive appropriate and timely screening because the ER staff simply could not do any more.

With these circumstances present, Dr. Genova called on Banner to divert patients. He reported the situation to Rick Sutton, the CEO of NCMC who was the Administrator on Call (AOC). Dr. Genova advised Sutton that they should put into effect the Code Purple policy to divert patients, a policy which was specifically meant to free up care for patients already in the ER. Sutton refused to permit the diverting of patients to other hospitals, thus insisting that the ER continue to take patients it could not timely screen for emergency medical conditions and thus putting the hospital in the position of violating EMTALA.

Dr. Genova, as the ER physician, was charged with the decision making regarding patient care, screening and transfer to another hospital. App. 568 (p. 15 lines 8-25); App. 555 (p. 94 lines 24-25, p. 95 lines 1-12); App. 437 (p. 58 lines 5-19). As the ER physician working the evening in question, Dr. Genova was in the best position to determine whether the ER was at a critical point. Dr. Genova sized up the situation and determined that if the hospital did not undertake to divert patients to another hospital, it was virtually certain that the emergency room personnel would not be able to perform the appropriate screenings (they already were not doing so) and would not be able to do such further medical examination and treatment

necessary to stabilize the emergency medical conditions (they were already finding it difficult to do so). Violations of EMTALA were imminent given the situation.

Despite this, instead of Banner putting Code Purple in place, Sutton indicated that Dr. Genova should transfer a single patient to the sister hospital, McKee, which meant one ambulance would be out of service for two hours, to reduce the ER load by a mere one patient. It was not an appropriate response to the situation, would not have solved or resolved the problems the ER was encountering and would not avoid EMTALA violations of delay or failure to screen at all.

The issue here is not which response to the Emergency Department crisis of January 22, 2010 was most appropriate -- Dr. Genova's requested Code Purple or Mr. Sutton's proposed response of transferring a single patient. Regardless of the propriety or relative merit of the two responses, the whistleblower protections of EMTALA should protect Dr. Genova's good faith warning to the hospital administrator of imminent EMTALA violations. A finding that the whistleblower protections only apply to a report of an actual violation weakens the remedial intent of the statute and creates perverse incentives. The EMTALA whistleblower provisions should

also protect physicians who seek to avert the conduct that violates EMTALA, and is punished for doing so.

C. DR. GENOVA ATTEMPTED TO PREVENT VIOLATIONS OF EMTALA'S PROVISIONS PROHIBITING TRANSFER OF UNSTABLE PATIENTS

42 U.S.C. § 1395dd(b) provides that if an emergency medical condition exists, the hospital must stabilize the patient before transporting him or her elsewhere. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001). The stabilizing treatment that hospitals must render is "such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." 42 U.S.C. § 1395dd(e)(3)(A); *St. Anthony Hosp. v. U.S. Dept. of Health & Human Services*, 309 F.3d 680, 694 (10th Cir. 2002). Under this section of EMTALA, there is no requirement that the hospital act with "an improper motive." *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 252-53, 119 S. Ct. 685, 686-87, 142 L. Ed. 2d 648 (1999). Thus, a patient is entitled to stabilizing treatment under EMTALA regardless of whether he or she has insurance. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d at 798.

This portion of EMTALA requires that, before a transfer of a patient may occur, there must be a signature from an appropriate medical provider that the transfer is appropriate. Of this provision, the Fifth Circuit has held that the statute requires more than a signature on a certification form to avoid EMTALA violations. *Burditt v. U.S. Dept. of Health & Human Services*, 934 F.2d 1362, 1371 (5th Cir. 1991). Instead, the statute requires a signed certification. "Thus, the hospital also violated the statute if the signer has not actually deliberated and weighed the medical risks and the medical benefits of transfer before executing the certification." *Id*. As the Court noted, Congress expressly provided that the medical personnel must make an actual determination of medical appropriateness for transfer, not just sign a form saying it's appropriate. *Id*. at n. 9. The statute is also violated if the signer of such a certification uses improper considerations as a significant factor in making the certification decision. *Id*. at 1371.

Here, it was clear that Banner was on the verge of just such EMTALA violations. It was not timely screening and treating the patients already in the ER. If it did not divert patients, it would soon be in a position where patients would need to be transferred and the ER did not have the staff and capabilities of first stabilizing any emergency medical conditions prior to

transfer.

As discussed above, Dr. Genova sought to put into effect the Code Purple policy to divert patients to free up care for patients already in the ER and to avoid EMTALA violations. Dr. Genova was charged with the decision making regarding transfer to another hospital, and the overcrowding put him in the position of violating EMTALA because the ER simply could not stabilize those with emergency conditions if it continued to accept additional patients. App. 568 (p. 15 lines 8-25); App. 555 (p. 94 lines 24-25, p. 95 lines 1-12); App. 437 (p. 58 lines 5-19).

Dr. Genova had determined that if the hospital did not divert he would not be able to do such further medical examination and treatment necessary to stabilize the emergency medical conditions, as he was already having trouble doing so. Instead of Banner putting Code Purple in place, Sutton indicated that Dr. Genova should transfer a single patient to the sister hospital, a completely inappropriate response to the situation.

Dr. Genova advised Mr. Sutton that he could not do the independent evaluation and certification necessary to permit an appropriate transfer. Appellee suggests that Dr. Genova did not want to make a transfer because "it would take more time than he wanted to give." Appellee's Opening

Brief, p. 9, n. 3. Instead, the crisis situation in the Emergency Room was such that Dr. Genova could not take the appropriate steps to evaluate and weigh the risks and determine whether transfer was appropriate. The Emergency Room was simply too busy and he was not physically capable of performing all that was required of him in the Emergency Room and perform independent evaluations for patient transfers.

Further, the evidence showed that Mr. Sutton was asking Dr. Genova to use improper considerations as a significant factor in making decisions about transfer of patients. Sutton did not want to divert patients away from the hospital and he insisted that transfers be made to NCMC's sister hospital, McKee, even if another non-Banner hospital was closer. App. 534 (p. 15 lines 3-25, p. 16 lines 1-9). Thus, Banner, through Sutton, was asking that the medically inappropriate consideration of maximizing profits be the factor in determining transfers of patients. Under *Burditt*, this was a clear violation of EMTALA.

Here, the court should find that the acts of Banner in demanding transfer without the required weighing and independent deliberation of the appropriateness of transfer violated EMTALA. Further, the Court should find that the improper consideration of profit to Banner as a significant

factor in deciding on transfers also violated EMTALA. The Court should reverse the District Court's grant of summary judgment.

D. DR. GENOVA'S REMOVAL WAS RETALIATION FOR HIS REPORTING OF EMTALA VIOLATIONS

The whistleblower provisions of EMTALA provide that a hospital may not take adverse action against a physician because he refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee "reports a violation of a requirement of this section." 42 U.S.C.A. § 1395dd(i).

Dr. Genova was removed from ER duties two weeks after this report of EMTALA violations on January 22, 2010. Dr. Genova was clearly the target of retaliation for reporting that the hospital was violating EMTALA by continuing to allow the ER to fill up with more patients who could not be appropriately screened and given stabilizing medical treatment for emergency medical conditions. His demand that the hospital assure appropriate patient care could be delivered was met with his removal from ER duties so that he no longer could serve as an ER physician.

As a matter of public policy, this Court simply should not allow hospitals to fire, without suffering any penalty, those who are on the front

lines treating patients with emergency medical conditions and who seek to resolve situations where EMTALA is likely to be violated, or is in the process of being violated, and will most certainly be violated if the situation continues. An emergency physician reporting actual or imminent violations should be protected by the whistleblower provisions of EMTALA. To hold otherwise means that physicians or employees who report violations in an attempt to save patients, but who do so before a patient dies or suffers compromised health due to inattention, may be fired at will with no penalties under EMTALA. Such a ruling is too narrow. EMTALA is a remedial statute and its language should be liberally interpreted to give effect to its purpose. A physician should not be put in a position of having to actually endanger patients' lives in order to show a violation of EMTALA. This is what the District Court has essentially held, and this Court should overturn that decision. 2012 WL 2863009 (D. Colo) pp. 8, 9.

Appellee suggests that Dr. Genova did not "report" violations because he did not report the violation to the Department of Health and Human Services. This is not required by the terms of the statute. Other cases have approved a report to a direct supervisor and an anonymous tip to the compliance hotline of the hospital in violation, *Lopes v. Kapiolani Med.*

Ctr. for Women & Children, 410 F. Supp. 2d 939, 942 (D. Haw. 2005), and a report to another hospital accepting transfer of a patient first refused by another hospital, *Fotia v. Palmetto Behavioral Health*, 317 F. Supp. 2d 638, 641 (D.S.C. 2004). Here, Dr. Genova's report to other physicians in the ER and his report to Sutton was a report of violations and sufficient under EMTALA's whistleblower provisions.

Further, despite the District Court's narrow view, Dr. Genova qualified as a whistleblower under the provision protecting "any hospital employee because the employee reports a violation of a requirement of this section." 42 U.S.C.A. § 1395dd(i). As the court in *Zawislak v. Mem'l Hermann Hosp. Sys.*, 2011 WL 5082422 (S.D. Tex. 2011) held, it would contradict the very purpose of EMTALA if "the act affirmatively prohibits hospitals from taking adverse action against 'any hospital employee,' [but] impliedly permits hospitals to take adverse action against physicians with hospital privileges who have observed and reported EMTALA violations." The purpose of the statute, it held, is best served by construing it to prohibit participating hospitals from penalizing physicians with medical privileges. *Id*. Where the "application of the literal terms of the statute will produce a result that is 'demonstrably at odds with the intentions of its drafters,' those

intentions must be controlling." *Id*., citing *See Miller v. Med. Ctr. of Sw. Louisiana,* 22 F.3d 626, 629 n. 6 (5th Cir.1994) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)). Thus the court held that the whistleblower provision included physicians with medical privileges within the definition of "hospital employee."

The statute also permits "any individual who suffers personal harm" to bring a civil action for "those damages available for personal injury under the law of the State in which the hospital is located." 42 U.S.C. § 1395dd (d)(2)(A). Where a physician who has been terminated as a result of reporting a violation seeks to recover not only financial losses, but also damages for humiliation, pain and suffering, and embarrassment, he has stated a cause of action for personal injury under this provision of EMTALA. *Fotia v. Palmetto Behavioral Health*, 317 F. Supp. 2d 638, 642 (D.S.C. 2004). Dr. Genova here did just that. Complaint. Further, EMTALA does not bar whistleblowers from recovering financial losses when they assert a retaliation claim, because that result would contradict the very purpose of having a whistleblower provision. *Fotia v. Palmetto Behavioral Health, supra*.

Based on the foregoing, this Court should find that in this case Dr. Genova did report imminent or actual violations of EMTALA to his colleagues and to the hospital through Sutton. As a result of making this report, Banner revoked his privileges to serve in the ER at NCMC. This was retaliation under the whistleblower's provision of EMTALA, and Dr. Genova should have been permitted to pursue his claims to trial. This Court should reverse the summary judgment in favor of Banner.

CONCLUSION

In this case, Banner violated EMTALA. As a matter of law and of public policy, this Court should reverse the District Court.

The ER was at a critical point and not appropriately screening patients and stabilizing patients with emergency medical conditions. Even knowing this, Banner did not follow the plan that was put in place – Code Purple – to deal with the overcrowding of the ER. It was a violation of EMTALA to permit this situation to continue and to fail to follow the procedures to divert patients to other hospitals so that the patients currently already in NCMC could be treated in accordance with EMTALA's requirements.

The overcrowding in the ER impacted the ability to stabilize patients

with medical emergencies for transport if necessary. The ER had three critical patients. One of them had already waited an extended period of time for attention before collapsing in the waiting room bathroom from a GI bleed (bleeding from the rectum). The two ER physicians on duty, one of whom was Dr. Genova, were already handling patients presenting with Myocardial Infarctions. App. 526-27 (p. 56 lines 5-25, pp. 57-59). On January 22, 2010, Dr. Genova advised Mr. Sutton that the staff was overwhelmed. It was merely a matter of time before a patient suffered injury or death as a result of the delays in screening and stabilization of emergency medical conditions.

Dr. Genova reported the violations to his colleagues and to Sutton and reported that further violations of EMTALA were imminent. He asked for implementation of Code Purple. As a result, he was terminated by removal of his ER privileges.

The District Court's narrow interpretation of EMTALA whistleblower protections caused it to make a legal error when it granted summary judgment in favor of Banner. Further, the court erred in finding the Joinder Agreement between the hospital and Dr. Genova precluded enforcement of the implied covenant of good faith. The Joinder Agreement

violated public policy – a policy intended to protect the patients who were to be served pursuant to the contract between the parties. The District Court should have declined to enforce the agreement as it compromised the interest of the intended third party beneficiaries (patients) to the hospital-physician contract.

This Court should reverse the District Court's grant of summary judgment and order that Dr. Genova may proceed with his case against Banner.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on

the ____ day of _____, 2012 via ECF on the following counsel:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,148 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and,

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2012 in Times New Roman 14 point type.

/s/ Joseph P. Wood

Joseph P. Wood

ECF CERTIFICATION

I hereby certify that: (1) all required privacy redactions have been made in the foregoing documents; (2) if required to file additional hard copies, the ECF submission is an exact copy of those documents; and (3) the ECF submission was scanned for viruses using McAfee Anti-Virus Plus with an update on November 28, 2012 and, according to the program, the document is free of viruses.

/s/ Joseph P. Wood
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