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COURT REINSTATES TORT SUIT AGAINST THOSE ENGAGED IN PEER REVIEW OF EXPERT MEDICAL TESTIMONY

(Fullerton v. Florida Medical Association)

The Florida District Court of Appeal this week reinstated a defamation lawsuit filed by a doctor against the Florida Medical Association (FMA) and several other doctors, based on the defendants having instigated professional peer review of the plaintiff's expert testimony in a medical malpractice suit. The defendants had begun their investigation because they did not believe that the opinions expressed by the plaintiff doctor in his expert testimony demonstrated professional competence.

The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *Fullerton v. Florida Medical Association*, urging that the trial court's dismissal of the case be upheld. WLF argued that both Florida law and a federal statute, the Health Care Quality Improvement Act of 1986, provide immunity from money damages to doctors who criticize their peers in connection with peer review proceedings.

The physician who brought the case, Dr. John Fullerton, had testified in an earlier, unsuccessful medical malpractice action. After the conclusion of that action, the doctors against whom Dr. Fullerton had testified wrote a letter of complaint to the FMA in 2003, alleging that his testimony was false and financially motivated. They further requested an investigation of Dr. Fullerton's testimony. That letter is the basis of the present lawsuit.

WLF entered the case as an *amicus curiae* in the trial court because the lawsuit presents an important legal test regarding the protection of professional peer review of expert testimony. Improper expert medical testimony is a longstanding concern of the business community, particularly in asbestos litigation, where studies have indicated that the vast majority of claims of asbestos-related diseases are backed by unfounded "expert" interpretations of screening X-rays. Peer review, and the possibility of sanctions by medical associations against wrongdoers, may bring about higher ethics in such testimony, WLF asserted.

In reinstating the defamation lawsuit, the appeals court rejected WLF's immunity arguments. The court agreed with WLF that both Florida and federal law provide immunity to doctors who report a peer to professional medical groups based on allegations that the peer provided substandard medical care to his/her own patient. But, the appeals court ruled, that immunity does not extend to allegations that a doctors' "expert" medical testimony in a lawsuit fell below professional standards of competence – because the immunity statutes only apply where it is a doctor's treatment of an actual patient that is in question.

"The appeals court decision is bad news for efforts to eliminate 'junk science' from the courtroom," said WLF Chief Counsel Richard Samp after reviewing the court's decision. "If doctors can be sued for defamation simply for raising the issue of a peer's professional competence, they will have very little incentive to police their own profession," Samp said. WLF has pledged to assist the defendants with any further appeals in the case.

WLF is a public interest law and policy center with supporters nationwide. WLF engages in litigation and participates in administrative proceedings in a variety of areas of importance to free enterprise, including the screening and policing of expert witness testimony in civil cases. To that end, WLF has appeared as an *amicus* in several of the U.S. Supreme Court's recent cases addressing the use of expert testimony.

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WLF's brief is posted on its web site, www.wlf.org. For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302.