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COURT OF APPEALS  
STATE OF NEW YORK

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ROBERT D. HAAR,  
Appellant,

-against-

NO. 81

NATIONWIDE MUTUAL FIRE INSURANCE  
COMPANY, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York  
October 16, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this  
2 afternoon's calendar is appeal number 81, Haar v.  
3 Nationwide Mutual Fire insurance Company.

4 Counsel? Counsel, would you like some rebuttal  
5 time?

6 MR. ZIMMER: Can I take five and five?

7 CHIEF JUDGE DIFIORE: Five minutes?

8 MR. ZIMMER: Yeah.

9 CHIEF JUDGE DIFIORE: Please proceed.

10 MR. ZIMMER: Good afternoon, Your Honors. May it  
11 please the court, Gregory Zimmer for the appellant, Dr.  
12 Robert D. Haar, M.D.

13 We're here today seeking confirmation of the  
14 implied private right of action for bad faith reporting to  
15 the New York Office of Professional Medical Conduct that  
16 was recognized by the First Department back in 2003, in  
17 Foong v. Empire Blue Cross & Blue Shield. The cause of  
18 that - - -

19 JUDGE STEIN: Do you agree, Counselor, that you  
20 have to meet all three prongs of the Sheehy test or all  
21 three factors to - - -

22 MR. ZIMMER: I do. I think the court primarily  
23 focuses on the third factor, because needless to say, you  
24 don't want to be inconsistent with the expressed intent of  
25 the legislature with respect to enforcement, but yes, all



1 three factors are relevant to the analysis.

2 JUDGE STEIN: Well, and if we find that you  
3 failed to meet any one of those three, then - - - then you  
4 - - - you don't prevail here, correct?

5 MR. ZIMMER: Well, I - - - I think that is - - -  
6 that's the - - - the law.

7 JUDGE STEIN: Okay.

8 MR. ZIMMER: I mean, the law according to this  
9 court. I think we - - -

10 JUDGE FEINMAN: So - - -

11 JUDGE RIVERA: So if - - - if the purpose of this  
12 section appears to be to encourage reporting broadly,  
13 doesn't the rule you're advocating, whether it's a private  
14 right of action, discourage that reporting?

15 MR. ZIMMER: Well, respectfully, I - - - I would  
16 disagree with the premise, and - - - and that's the premise  
17 that - - - that Nationwide has - - - has put forward  
18 throughout this. But that - - - to say that it simply  
19 encourages reporting ignores critical language in the  
20 specific section here, and many other critical sections of  
21 the statute. The section here gives immunity grant - - -  
22 admittedly for good faith reporting without malice. But  
23 all of the arguments that I've heard to say that this  
24 encourages reporting writ large completely ignore those  
25 words.

1           And as a matter of fact, if you look at amicus  
2           briefs - - -

3           JUDGE RIVERA: But I - - - I'm - - - I'm a little  
4           confused. What's your point of that? That - - - that it -  
5           - - it only encourages good faith reporting?

6           MR. ZIMMER: Of course, it only - - -

7           JUDGE RIVERA: But isn't that already the case  
8           because you've got common law claims that would serve as  
9           deterrents?

10          MR. ZIMMER: Well, I don't think so. In this - -  
11          -

12          JUDGE RIVERA: The bad faith - - - well, well,  
13          for the moment, just call bad faith reporting.

14          MR. ZIMMER: There - - - there are two - - - two  
15          answers to that. First, the - - - the analysis typically  
16          under Sheehy, and there are lower court decisions that have  
17          carried this to a greater extent than what I've seen from  
18          this court, is to look at the statute itself, not to look  
19          at collateral remedies for similar conduct. And in a  
20          matter of fact, there are cases that say, you know what if  
21          it - - - if it does - - - if it - - -

22          JUDGE FEINMAN: So let - - - let's talk about  
23          that for a second, because - - - before you get to the  
24          Sheehy factors even. What part of the actual statute - - -  
25          what statutory text are you relying on to say that it



1 prohibits - - - the statute prohibits bad faith reporting?

2 MR. ZIMMER: Well, the - - - without a - - - an  
3 implied right of action to give effect and meaning to the  
4 recognition in there, in our view, that bad faith reporting  
5 with malice should be subject to civil liability, you need  
6 a - - - an implied private right of action, that this court  
7 has - - -

8 JUDGE WILSON: But that goes back to Judge  
9 Rivera's point, doesn't it, that there are other ways, for  
10 example, defamation that you could provide that.

11 MR. ZIMMER: Well, I've not seen a case out of  
12 this court that said we're not going to imply a right of -  
13 - - a private right of action because there are other means  
14 to address similar conduct. Needless to say, a defamation  
15 action requires falsity, which is potentially an element of  
16 bad faith reporting, but certainly not coterminous with it,  
17 because - - -

18 JUDGE RIVERA: But isn't the qualified immunity  
19 language a recognition of these potential opportunities for  
20 a common law claim to discourage reporting, and so the  
21 legislature is making clear the intent - - -

22 MR. ZIMMER: Well, it certainly would apply to  
23 good faith reporters to the extent that they were brought  
24 into court on other causes of action, but I do not believe  
25 that it - - - it goes far enough to enforce the statute,



1 and as we've demonstrated - - -

2 JUDGE STEIN: Are - - - aren't you essen - - -  
3 essentially relying on negative implication? And didn't we  
4 reject that approach, that - - - that analysis in Cruz?

5 MR. ZIMMER: No, I - - - I don't think that I - -  
6 - first of all, I don't think that is correct. This court  
7 has always looked to whether the cause of action will  
8 promote the statute, and then whether it's consistent. The  
9 - - - the source of - - - of the - - - of the impetus for  
10 the - - - for the cause of action, I don't think has - - -  
11 has - - - has ever been the reason why a cause of action  
12 has been rejected. This court has many - - -

13 JUDGE STEIN: Let's talk about - - - a minute  
14 about consistency. How is the - - - how is the - - - the  
15 rule that you are proposing consistent with the general  
16 confidentiality provisions of the statutory scheme? How -  
17 - - how would this kind of claim be brought other than in -  
18 - - in the perhaps unusual case in which - - - in which the  
19 person knows the accuser?

20 MR. ZIMMER: Well, it's - - - it's kind of ironic  
21 that you're bringing that up, because this case presents  
22 specific facts that made it relatively certain who had made  
23 - - -

24 JUDGE STEIN: Well, I realize that, but - - - but  
25 we're talking about a - - -



1 MR. ZIMMER: But - - - but - - -

2 JUDGE STEIN: - - - a broader rule there.

3 MR. ZIMMER: - - - but, well, at the same time, I  
4 do think that that in itself is a limiting factor that - -  
5 - that renders this - - - this remedy appropriate because,  
6 contrary to the empirical facts, which we've cited in our  
7 brief, but also based on the inability of some, you know,  
8 wrongly accused doctors, to identify the reporter or the  
9 contents of the report, it will minimize the number of  
10 claims. It will not have this parade of horrors that's  
11 been set forth, but - - -

12 JUDGE FAHEY: But it doesn't - - - doesn't - - -

13 MR. ZIMMER: - - - it will give people who - - -

14 JUDGE FAHEY: Excuse me. Does - - - doesn't your  
15 approach - - - approach turn the purpose of the statute upside  
16 down on its head? It's - - - the - - - the purpose of the  
17 statute is to protect the general public, not - - - not the  
18 doctor themselves that's be - - - that's being reported on.

19 MR. ZIMMER: Well, I don't think those are  
20 mutually exclusive, and I don't either think that it's a -  
21 - - that it's just a matter of procedural due process.  
22 Procedural due process would say you had to have the right  
23 to be heard in potentially some level of appeal.

24 JUDGE FAHEY: Yeah, the problem is - - -

25 MR. ZIMMER: I think some of this court precedent



1 is - - -

2 JUDGE FAHEY: If - - - if you start out with that  
3 premise in the way the statute is written, then it seems to  
4 me that you have a - - - a two-prong problem. The first  
5 problem is - - - is the problem that Judge Feinman talked  
6 about, which is that you have to rely on silence in a  
7 statutory scheme to create an implied - - - implied right  
8 of action, and then you have to meet all three prongs of  
9 the test as your second problem. And the hurdles seem to  
10 multiply as we move into the analysis.

11 MR. ZIMMER: Well, I disagree with that. First  
12 of all, I - - - I - - - I think that silence - - - the  
13 absence of a remedy clearly militates in favor of an  
14 implied right of action. Most of the cases - - -

15 JUDGE FAHEY: There's a quote - - -

16 MR. ZIMMER: - - - that you see before this  
17 court, where the court has denied a private right of  
18 action, there have been ample remedies available, but the  
19 specific - - - whether it's that the attorney gen - - -

20 JUDGE FAHEY: But the premise - - - the premise  
21 that you're arguing to us is that the legislature would  
22 hide this - - - this - - - this implied remedy, rather than  
23 make it expressed, and - - - and there's a - - - there's a  
24 quote that - - - that Judge Scalia used to use. Well, it's  
25 always colorful when Judge Scalia uses a quote, as



1 everybody knows. But he said that "Legislative bodies do  
2 not generally hide elephants in mouseholes."

3 And that's particularly apt here, because it - -  
4 - it would seem that they would be actually hiding the  
5 remedy that - - - that you're seeking, and they wouldn't do  
6 that. They would make it expressed.

7 MR. ZIMMER: Well, I - - - I respectfully  
8 disagree, because the whole premise of an implied right of  
9 action is that there's none in the statute, and here, in  
10 fact, the very language that we rely on, and - - - and that  
11 appears in similar form in multiple other areas of the  
12 statute - - - recognizes there should be civil liability  
13 for improper reporting, bad faith reporting to OPMC, and  
14 the reason is clear. Bad faith reporting is going to  
15 overburden the agencies. It's going to harm doctors, and  
16 as - - - if I can just finish one point I was going to  
17 make?

18 JUDGE STEIN: Well, I - - -

19 MR. ZIMMER: This is not a procedural due process  
20 alone, that doctors receive here. There are substantive  
21 provisions that - - - that at least deter on the face of  
22 the statute, any kind of bad faith, willful conduct,  
23 whether it be in the investigation, in the punishment, in  
24 the reporting. And so doctors have been given a lot more  
25 than just due process here.



1 I do believe that they are given some level of  
2 protection under the statute, although certainly it's also  
3 intended to protect the public. But doing that by  
4 permitting or even encouraging bad faith reporting in a  
5 volume of reports that have no bearing on public health,  
6 does nothing to advance the purpose of the statute and  
7 actually deters it with the limited resources that the OPMC  
8 has available to it.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 Counsel?

11 MR. CARTER: Good afternoon. May it please the  
12 court, Ralph Carter, for respondent, Nationwide.

13 We're here on a certified question based on the  
14 split between the Elkoulily decision in 2017 from the  
15 Second Department, and the Foong decision, upon which Dr.  
16 Haar relies.

17 We would rec - - - respectfully submit that the  
18 Second Department got it right, and applied - - -  
19 appropriately applied the Sheehy factors and adopted the  
20 reasoning of the Lesesne court, the Southern District Judge  
21 Nathan, in finding that 230(11)(b) does not create an  
22 implied private right of action, but rather is a qualified  
23 immunity defense for an already existing claim, be it a  
24 defamation claim, like that that Dr. Haar had to abandon  
25 here, or another common law claim.



1 JUDGE RIVERA: But doesn't that - - - didn't that  
2 - - - doesn't that defense already exist? Didn't that  
3 exist at the time that the provision's enacted?

4 MR. CARTER: It - - - it did. The - - - the - -  
5 - under the common law, the - - - the defense would not  
6 have been as heightened as it is under 11(b) in our view.  
7 11(b), as opposed to a common law defamation claim, what  
8 you have here is something saying that the proponent of the  
9 claim has to not only show that it would be untrue and that  
10 there were damages, but you also have to surmount the  
11 hurdle that the - - - the statement was made with - - - in  
12 - - - in - - - with - - - in the absence of bad faith and  
13 without malice.

14 So I think really if you look at what 11(b) is  
15 doing, is that it's encouraging - - - it's encouraging all  
16 reporters to come forward as whistleblowers. In essence,  
17 11(b) is a whistleblower protection provision, as part of  
18 an overall comprehensive regulatory scheme, which create -  
19 - -

20 JUDGE WILSON: So if - - - if there are already  
21 like defamation and other common law claims that might be  
22 brought for bad faith reporting, and if the defense that's  
23 provided in the statute is, as you're saying, a little bit  
24 higher than what the common law defense would have been,  
25 what's the harm in recognizing a private right of action?



1 Why would that change anything?

2 MR. CARTER: Well, thank you, Your Honor. We  
3 would argue that there are elements that are already there  
4 for a - - - a common law claim that are not articulated.  
5 And had the legislature intended to do so, it would have  
6 done so, and as - - - as Judge Fahey noted, the legislature  
7 creates - - - has created - - - seen fit to create a number  
8 of qualified immunity defenses, and they're not in the  
9 business of creating elephants out of mouseholes.

10 Here, the - - - the contours of what a defamation  
11 claim are are clear. The - - - when you look in - - - in -  
12 - - in the statute as a whole, you have the adjacent  
13 provisions in 11(a), which provide for confidentiality and  
14 inadmissibility of the contents of an OPMC report in the  
15 contents of - - - in the - - - in the context of such a - -  
16 - a claim, it's not clear how that would be consistent with  
17 the overall statutory scheme. And - - -

18 JUDGE STEIN: Is - - - is there a concern about  
19 the resources of the agency to - - - to address cla - - -  
20 claims which may include bad faith claims?

21 MR. CARTER: Well, there - - - there are always  
22 those concerns, but I think here the legislature, in its  
23 wisdom, made that cost ben - - - benefit analysis. And it  
24 - - - it weighed that, and it said we're going to - - -  
25 we're going to err on the side of encouraging all these



1 complaints to come in, for the benefit of the general  
2 public against medical misconduct.

3 JUDGE FEINMAN: So - - - so what about the  
4 spurned spouse who makes malicious bad faith allegations in  
5 the course of, let's say, a hotly contested matrimonial,  
6 and says, you know, my wife, the doctor, is running a pill  
7 mill, and - - - and you know. Is there any remedy under  
8 230 for that?

9 MR. CARTER: Well, no, because there - - -  
10 there's no remedy under 230, because the remedy was already  
11 there. It was the - - - the common law claim.

12 JUDGE FEINMAN: Defamation or libel or - - -

13 MR. CARTER: It might be defamation - - -

14 JUDGE FEINMAN: - - - whatever it is, depending  
15 on whether its - - -

16 MR. CARTER: Abuse of process perhaps.

17 JUDGE FAHEY: Can a comparison be made between  
18 this process and say, the attorney grievance process?

19 MR. CARTER: Exactly, Your Honor. As the amici  
20 notes - - -

21 JUDGE FAHEY: How would you do that?

22 MR. CARTER: As amici notes, it would be akin to,  
23 you know, in our - - - in our grievance process here in New  
24 York. You can't, as a lawyer, bring a claim against your  
25 client, if they raise some concern with the disciplinary



1 committee. This is really on all fours, very similar to  
2 that situation.

3 The legislature, in creating 230, which created  
4 OPMC and the overarching regulatory scheme, saw fit to  
5 create a limited private right of action, in fact, under  
6 230(j), which is even further indicia of the fact that it  
7 knew how to create an implied pri - - - an expressed  
8 private right of action, rather, and it did so in a limited  
9 fashion, and chose not to create an overarching claim,  
10 where the OPMC would be, effect, going after whistleblowers  
11 for performing their civic duty.

12 JUDGE STEIN: But if we found an implied private  
13 right of action under this section, would it then affect  
14 other subdivisions of 230 that have some protection for  
15 employees of the agency, and - - - and investigators, and -  
16 - - and experts, and other people who was - - -

17 MR. CARTER: Thank you.

18 JUDGE STEIN: - - - in the process?

19 MR. CARTER: Thank you, Your Honor. Yes, that -  
20 - - that would have - - - could have an - - - an unintended  
21 consequence in - - - in terms of 230(8), which provides  
22 that those people who are part of the - - - the  
23 investigative process, the - - - that are - - - that are  
24 brought together, the two doctors and a lay person, in most  
25 instances, that they are protected as long as their



1 investigations are reasonable and without malice.

2 It might also have a - - - another unintended  
3 consequence as pertains to numerous other qualified  
4 immunity defenses that the state legislature has seen fit  
5 to enact. Those are all intended to encourage people - - -  
6 essentially deputizing the New York public as - - - as  
7 whistleblowers to come forward and assist the State in - -  
8 - in - - - in a number of - - - of various areas, here to  
9 root out medical misconduct.

10 That is the justification - - - it's in the  
11 justification for the statute. It was to encourage  
12 reporters to come forward, and to - - - to reduce the fear  
13 of litigation attendant to them doing so. Whistleblowers,  
14 members of the public, have no - - - there's no bounty  
15 provision in 230. They come forward, because they believe  
16 that there may be some misconduct here.

17 In Nationwide's instance, I neglected to note  
18 that they are also pre - - - a mandatory reporter under  
19 Insurance Law 5108, and it's implemented in Regulation 83.

20 JUDGE FAHEY: You mean they had to report under  
21 no-fault?

22 MR. CARTER: Exactly, Your Honor. So here they'd  
23 be whipsawed between two competing obligations. And I - -  
24 - I can't see that when you have these two interrelated  
25 structures that are intended to protect the New York public



1 and to reduce rampant no-fault insurance fraud, that is an  
2 acknowledged issue in this state - - -

3 JUDGE RIVERA: Well, I'm a little unclear about  
4 your point about the insurance law. I mean, isn't this  
5 back to your adversary's point that all of this is to get  
6 only good faith reporting. You're not suggesting that you  
7 report without any basis?

8 MR. CARTER: I'm - - -

9 JUDGE RIVERA: What are you - - -

10 MR. CARTER: - - - I'm suggesting that under - -  
11 - thank you. I'm suggesting that under Section 230(11)(b),  
12 the legislature made the reasoned judgment that it is  
13 better to bring in more complaints and set up a regulatory  
14 structure within the OPMC, whereby as we noted in the 2017  
15 annual report, only forty-three percent of the 9,700  
16 complaints made it past the - - - the circular file people.  
17 They didn't reach the - - - the point of even warranting  
18 the initial investigative review by the body.

19 Here, Dr. - - - Dr. Haar is lowering the bar for  
20 implied private right of action, even further than that.  
21 He admits that in this instance - - - and I understand the  
22 court is - - - is enacting a rule of law for the State, but  
23 in this particular case, he admits that not only did the  
24 OPMC proceed to an initial investigation, but that he  
25 participated in a hearing, which suggests that there was





1 some veracity and validity, at least in the - - - on the -  
2 - - the OPMC viewed some validity in the - - - the claim  
3 that was bro - - - in the - - - in the complaint of  
4 apparent issues under the no-fault statute in this  
5 instance.

6 So for all those reasons, it - - - it would do  
7 potential harm to those two regulatory structures, the  
8 insurers who are required to report, both to the OPMC, and  
9 the - - - and the New York State Department of - - -

10 JUDGE FEINMAN: So - - -

11 MR. CARTER: - - - Financial Services.

12 JUDGE FEINMAN: So I - - - I want to ask you a  
13 question of - - - about how you would structure the  
14 analysis, because do you think we actually have to reach in  
15 to the Sheehy factors or could we just resolve this on the  
16 - - - the plain language of the statute?

17 MR. CARTER: Well, I think you have - - - and of  
18 course, that is your alternative, Judge Feinman. I think  
19 you can go either way here. I think applying the Sheehy  
20 factors, it's clear that Dr. Haar can't meet - - -

21 JUDGE FEINMAN: Right, but that might provide  
22 support, but my - - - my - - - I - - - I guess the point I  
23 was trying to make with your adversary was, if we were to  
24 agree with you that there was no statutory text that  
25 prohibits bad faith reporting, do you need to go any



1 further?

2 MR. CARTER: I - - - I - - - I would agree that  
3 that would provide the court with another rationale that it  
4 - - - it's on its face and in looking at the statutory  
5 intent, there's no indication that anything else was  
6 intended by the - - - the legislature.

7 JUDGE RIVERA: But what - - - what's - - - what  
8 is the benefit gained by encouraging bad faith reporting?  
9 Isn't the whole point to reduce costs, to find out if  
10 indeed you have doctors who are behaving badly?

11 MR. CARTER: I - - - I mean, I will grant that  
12 the OPMC doesn't want completely scurrilous complaints.  
13 That will have something of a bandwidth issue. But again,  
14 the legislature said, or made the decision, that it is  
15 better to encourage more complaints, and it's taking other  
16 steps, even as we speak, and there other measures in - - -  
17 in - - - at play, and in - - - in - - - before the  
18 Assembly, to encourage more people to come forward for the  
19 benefit of the general - - - general New York public, in  
20 protecting against medical misconduct and no-fault  
21 insurance fraud.

22 CHIEF JUDGE DIFIORE: Thank you.

23 JUDGE FEINMAN: There's not any evidence in this  
24 record that there is an overwhelming number of scurrilous  
25 or baseless complaints.



1 MR. CARTER: No, the - - - the OPMC does not  
2 state that in their reports. There's - - - there's no  
3 indication that they're overwhelmed with - - - with  
4 reports. But that they view it as part of their mandate to  
5 - - - to do that initial cut that, you know, here in 2017  
6 the most recent report was fifty-seven percent didn't make  
7 it to the - - -

8 JUDGE FEINMAN: There are all sorts of agencies  
9 that do that. You know, civil complaint - - - Civilian  
10 Civil Complaint Review Board, all - - - all sort - - - you  
11 know - - -

12 MR. CARTER: Exactly.

13 JUDGE FEINMAN: - - - the Lawyer Grievance  
14 Committee, the Judicial Conduct Commission - - -

15 MR. CARTER: Yes.

16 JUDGE FEINMAN: - - - acknowledges - - - dismiss  
17 a complaint without further investigation.

18 MR. CARTER: Exactly, and that's the - - - that  
19 the - - - you know, the - - - not all those claim - - -  
20 complaints necessarily have to be bad faith. They just  
21 might not speak to what 230 covers, right? Someone might  
22 say, you know, my doctor's not returning my - - - my phone  
23 calls, and they - - - they might say, okay, well, that's -  
24 - - that's a problem, but it may not warrant further  
25 investigation by the OPMC.



1 JUDGE RIVERA: So what are the consequences for  
2 of a - - - let's just take a doctor, for a moment - - - for  
3 a doctor who indeed is cheating, just put it that way.  
4 What - - - what potential consequences befall him under the  
5 existing system?

6 MR. CARTER: Under the existing system, the OPMC  
7 would undertake an analysis of that. If again, at the  
8 initial phase, it looks at the complaint, the confidential  
9 complaint, and they make a - - - the investigative body  
10 makes a determination as to whether or not it warrants  
11 further investigation.

12 It moves up the line from there, and if it passes  
13 muster, there is a notice of hearing and a statement of  
14 charges rendered. Then the attorney - - - I'm sorry, the  
15 attorney - - - not the attorney - - - the doctor, rather -  
16 - - has certain due process protections, such as the  
17 ability to have a lawyer present, and to participate in  
18 that.

19 But in the event that those - - - those charges  
20 are sustained, then there may be certain penalties that  
21 flow from that, including revocation, suspensions of  
22 licensure. In certain circumstances, there are summary  
23 instances in which the OPMC will just say that there's  
24 something that rises to the level where there has to be  
25 some sort of a summary suspension, or a - - - or an action



1 taken with respect to a - - - a physician or another  
2 medical licensee.

3 So the - - - the - - - the overarching regulatory  
4 structure is there. This would thwart that structure or  
5 would - - - might result in additional litigation that  
6 would be contrary to the overall purpose of the statute,  
7 and the - - - the particular purpose of the qualified  
8 immunity defense under 11(b).

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. CARTER: Thank you, Your Honors.

11 CHIEF JUDGE DIFIORE: Counsel? Counsel, what do  
12 you make of your colleague's argument regarding their  
13 status as mandated reporters?

14 MR. ZIMMER: I think that that in - - - again,  
15 you're looking at this statewide for all reporters. But I  
16 think that completely undercuts their own argument.  
17 There's nothing in the mandatory reporting law that says  
18 just fling out allegations, willy-nilly, every forty  
19 minutes or so.

20 Matter of fact, they - - - the amicae make a  
21 point in their brief, that the insurance laws, which I  
22 don't believe have any relevance to whether there should be  
23 an implied right of action, but they mandate that they have  
24 an inspector's office to look into complaints. So there's  
25 no way that New York State mandated that a specific office



1 be created to investigate reports, because they wanted  
2 insurers to report in bad faith. And mandatory reporters -  
3 - -

4 JUDGE STEIN: I don't - - -

5 MR. ZIMMER: - - - can't say we're going to be  
6 deterred from reporting, because they have to report.

7 JUDGE STEIN: Counsel, I'm not - - -

8 MR. ZIMMER: What they have to do is report in  
9 good faith.

10 JUDGE STEIN: I'm having a hard time  
11 understanding. It sounds like you're arguing that not  
12 implying a private right of action indicates some intent to  
13 encourage bad faith complaints. And - - - and - - - and  
14 I'm not sure I understand the basis of that.

15 And I also - - - it seems to me that, if you look  
16 at the legislative history, there - - - there was no  
17 concern on the part of the agency that they were going to  
18 be inundated with frivolous or bad faith complaints. As a  
19 matter of fact, they - - - they - - - they referred to the  
20 experience of another state, where there was an increase in  
21 reporting, and - - - and they indicated that's what they  
22 were looking for. They didn't seem to be concerned that  
23 that was going to generate an unwieldy number of - - - of -  
24 - - of bad complaints.

25 MR. ZIMMER: Well, what I would say is, if that



1 were the case, then they should have simply said that no  
2 one shall be subject to civil liability for reporting to  
3 OPMC. They did not. And I - - - as I point out in the  
4 brief, there - - - throughout - - -

5 JUDGE WILSON: Hold on a second - - -

6 MR. ZIMMER: - - - throughout the statute,  
7 there's a balance struck - - -

8 JUDGE WILSON: Just a minute. Saying what you  
9 just said, might remove the common law defenses, for  
10 example, to defamation. Maybe they didn't want to do that.

11 MR. ZIMMER: Well, that would certainly encourage  
12 reporting, Your Honor.

13 JUDGE WILSON: That would provide an absolute - -  
14 -

15 MR. ZIMMER: Though, I mean, if they were - - -  
16 if - - - if they were truly concerned about, you know,  
17 volume of reports, regardless of veracity and intent, and  
18 if they really wanted to, you know, encourage reporting  
19 under any circumstances, and if it were truly a  
20 whistleblower statute - - -

21 JUDGE WILSON: Maybe they simply - - - maybe they  
22 simply - - -

23 MR. ZIMMER: - - - they certainly would have  
24 said, hey, you don't have to worry; we would prefer to have  
25 the information and we'll sort it out.



1 JUDGE WILSON: Maybe they simply wanted to keep  
2 the status quo.

3 MR. ZIMMER: Well, there was no status quo,  
4 because they're creating a new entity to investigate  
5 physician misconduct. So there are a couple of points that  
6 I would like to address. First of all, it's - - - this  
7 idea that, because half of the - - - more than half of the  
8 complaints are found not to have merit, that somehow re - -  
9 - means we need more reporting.

10 Now, it's not - - - it's certainly not the case  
11 that every nonmeritorious complaint was made in bad faith.  
12 But bad faith reports don't have merit. Now the fact that  
13 my client was forced to go through and spend hundreds of  
14 thousands of dollars in this inquiry is absurd, and that's  
15 why we brought this action. If you look at the record - -  
16 -

17 JUDGE STEIN: But your client has a remedy - - -

18 MR. ZIMMER: Well - - -

19 JUDGE STEIN: - - - and in fact, you brought an  
20 action for defamation - - -

21 MR. ZIMMER: He did - - - he did not have an  
22 effective remedy, though, if I might. Because if you look  
23 at the - - - the - - - what happened in this case, it took  
24 OPMC so long to even inform him that they had received the  
25 complaint, that the statute of limitations had expired for





1 years on a defamation claim.

2 Nationwide came into the district court, and  
3 notwithstanding their concern about confidentiality,  
4 submitted into evidence, to dismiss the defamation claim.  
5 Their complaint - - - and you'll see that it's  
6 approximately four to six inches of redacted text, which  
7 may or not even have been filled.

8 My client on the basis of that was put through a  
9 hearing, at which he proved he had done nothing wrong. So  
10 this is not a situation where there was some facts and  
11 circumstances, an investigation led to something. They put  
12 in a handful of words; we believe in bad faith. It cost my  
13 client a long time - - - he needed to report this to places  
14 where he had professional privileges - - -

15 JUDGE STEIN: You're not suggesting that every  
16 time that a complaint is not deemed to be - - - to - - - to  
17 warrant sanctions, that - - - that that indicates it's bad  
18 faith?

19 MR. ZIMMER: Certainly not, but what I'm saying  
20 is, if you look at the statistics that we cite and the  
21 source material that we cite, there are literally thousands  
22 and thousands and thousands of nonmeritorious complaints.  
23 Anything that adds to that simply delays another year. And  
24 had my client been engaged in some mis - - - misconduct,  
25 where he clearly was found not to have been, more patients



1 would have been seen by him in the next ensuing year, where  
2 these bad faith reports were being investigated, took they  
3 said 2012, I believe - - - 2016, he was given a chance to  
4 defend himself.

5 In the meantime, everyone who had any access to  
6 that, had seen his name and he's got this against him. He  
7 had to report to places where he had report - - - where he  
8 had privileges at hospitals. He had to report it to  
9 insurance carriers and all these things. And in the  
10 handful of instances, where it is - - - where the doctor is  
11 able to find out who this person is and has a basis to  
12 allege - - - and again, you have to allege facts. It could  
13 be on information and belief, but it can't just be, I  
14 believe they're bad people.

15 We - - - if you looked at the appendix and looked  
16 at our complaint, there are specific facts alleged, and  
17 again, this was a state court complaint initially. We had  
18 - - - didn't even amend it in federal court, because we  
19 never got to that point yet. But he alleged specific facts  
20 as to how he was aware, or had every reason to believe, and  
21 was correct, that Nationwide was the reporter, and he tells  
22 you exactly how he knew what the contents of the report  
23 was, and demonstrates that OPMC found that he had not  
24 engaged in any misconduct.

25 So people are being harmed by this every day.



1 OPMC is being bogged down for four or five years on an  
2 individual complaint, and had this been a doctor who was -  
3 - - who was really harmed - - -

4 JUDGE RIVERA: That might be a very good argument  
5 to make to the legislature for them to amend the statute,  
6 and provide for a private right of action, or more  
7 deterrents.

8 MR. ZIMMER: Well, but - - - but that does not  
9 preclude a - - - of course, the legislature could always  
10 take this up, but that - - - the fact - - - the fact that a  
11 statute doesn't impose a right of action is the reason why  
12 one asks for an implied right, and this court has clear - -  
13 - and other courts have clearly found them.

14 One thing I'd like to say about the Elkoulily  
15 case, which is re - - - touted here. It does not even  
16 mention Sheehy, okay. So the - - - these ca - - - it's not  
17 as if one came in with some discursives on, you know, the  
18 implied rights of action, and the other one didn't. And  
19 the experience under Foong has been that. There have been  
20 an extremely limited number of cases where doctors were  
21 able to determine the reporter, and you know, there were  
22 actually was done, you know, basis to allege it was done in  
23 bad faith. If there's no basis for allegations, you can't  
24 bring the lawsuit anymore than you could bring a defamation  
25 claim or any other claim. So that, I believe, Elkoulily

1 doesn't really support any kind of analysis.

2 And the Lesesne decision focuses, regardless of  
3 the rep - - - the case speaks for itself. The court says,  
4 oh, they're a Section 230, and then there's this  
5 confidentiality provision, and it focuses exclusively on  
6 that, and as we point out, the McBarnette decision, it's  
7 one of the handful of provisions in this statute that this  
8 court has actually found was there to protect equally  
9 doctors and reporters. It's certainly not a basis to say  
10 that the doctor should not have a cause of action where  
11 he's been harmed by improper reporting.

12 So I - - - I do think that this calls out for an  
13 implied right of action, and perhaps the legislature may  
14 take it up later, but that's not - - - no reason for this  
15 court to, you know, kind of side step its very important  
16 function, which is to give life to statutes, where the  
17 Sheehy factors and a need for enforcement, you know,  
18 justifies a private right of action.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. ZIMMER: Thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

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I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Dr. Robert D. Haar v. Nationwide Mutual Fire Insurance Company, et al., No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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