

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA 11/3/11

Docket No. 11-0924

PLEADING FILED
WITH MOTION

R. K.,
Plaintiff Below, Petitioner

v.

Appeal from a final order of the
Circuit Court of Cabell County
Civil Action No. 10-C-694

ST. MARY'S MEDICAL CENTER, INC.,
d/b/a ST. MARY'S MEDICAL CENTER,
Defendant Below, Respondent

PETITIONER'S BRIEF

COUNSEL FOR PETITIONER, R. K.

Jeffrey V. Mehalic
Counsel of Record
LAW OFFICES OF JEFFREY V. MEHALIC
2011 Quarrier Street
P. O. Box 11133
Charleston, WV 25339-1133
(304) 346-3462
jeff@mehaliclaw.com

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ASSIGNMENTS OF ERROR

The circuit court erred in dismissing Petitioner R. K.'s state-law claims against Respondent St. Mary's Medical Center, Inc. for its employees' improper access to and dissemination of his confidential medical information, on the grounds that his claims were completely preempted by the Health Insurance Portability and Accountability Act of 1996 and required the dismissal of his complaint in its entirety.

STATEMENT OF THE CASE

In March of 2010, Petitioner R. K. ("R. K.") was admitted to Respondent St. Mary's Medical Center, Inc. d/b/a St. Mary's Medical Center ("SMMC") as a psychiatric patient. Appendix ("App.") at 000002. During his hospitalization, he was encouraged to, and necessarily had to, disclose information of a personal and confidential nature. *Id.* At the time he was admitted to SMMC, he and his wife were involved in a divorce. *Id.*

R. K. had not disclosed his psychiatric condition or hospitalization to his wife or to anyone else, nor had he authorized anyone to disclose his condition or hospitalization to his wife or to anyone else. *Id.* While R. K. was hospitalized at SMMC, certain of its employees, individually and/or jointly, accessed his

medical records, which contained confidential medical and psychological information about him. *Id.*

The SMMC employees who, individually and/or jointly, inappropriately and improperly accessed R. K.'s medical records, then disseminated and disclosed that information by informing R. K.'s wife and her divorce lawyer of R. K.'s hospitalization, and provided other confidential medical and psychological information to them. *Id.* at 000002-000003. No one on behalf of SMMC ever informed R. K. that his confidential medical and psychological information had been accessed inappropriately and improperly. *Id.* at 000003.

In May 2010, once R. K. had learned that his confidential medical and psychological information had been accessed inappropriately and improperly, he contacted SMMC and requested an audit of his records. *Id.*

On May 14, 2010, Karen Simmons, Patient Advocate, wrote to R. K. and informed him that SMMC was reviewing his concerns and apologized for the delay in responding to him. *Id.* Three days later, Cheryl Swartzwelder-Willis, Health Information Management Director and Privacy Officer, wrote to R. K., and acknowledged his concern for his privacy during his recent visit and thanked him for speaking with her by phone regarding the process used to investigate his complaint. *Id.*

Ms. Swartzwelder-Willis informed R. K. that SMMC's investigation concluded that there was "an inappropriate access to his medical record" and that SMMC "takes these matters serious [*sic*] and appropriate action has been taken." *Id.* SMMC did not provide any additional information to R. K. regarding its "appropriate action" regarding the "inappropriate access to his medical record." *Id.*

On September 21, 2010, R. K. filed suit against SMMC in the Circuit Court of Cabell County, alleging claims for negligence, outrageous conduct, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent entrustment, breach of confidentiality, invasion of privacy, and punitive damages, as well as his first sets of interrogatories and requests for production of documents. *Id.* at 000001.¹

On October 22, 2010, SMMC moved to dismiss the complaint for failure to state a claim or, in the alternative, for a more definite statement. *Id.* at 000013. SMMC asserted that R. K.'s claims were preempted by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) because HIPAA did not intend to create a private cause of action for the alleged violation of an individual's confidential health information and therefore superseded any state laws that provided for such a recovery. *Id.* at 000018-000021.

¹ Copies of the interrogatories and requests for production are not included in the appendix as they are not at issue in this appeal.

SMMC also alleged that R. K.'s claims came under the West Virginia Medical Professional Liability Act ("MPLA"), West Virginia Code § § 55-7B-1, *et seq.* because they arose from medical care, treatment, or confinement that he received from SMMC. *Id.* at 000022-000023. Thus, SMMC argued that R. K.'s claims should be dismissed because R. K. had not filed a notice of claim or screening certificate of merit, as required by § 55-7B-6.

SMMC alleged further that R. K.'s claims should be dismissed because his factual assertions were insufficient to support them. *Id.* at 000023-000028. Alternatively, SMMC asked that R. K. be required to provide a more definite statement, as required by W. Va. R. Civ. P. 12(e). *Id.* at 000028-000029.

R. K. opposed SMMC's motion and argued that HIPAA did not preempt his state-law claims because he had not asserted a violation of HIPAA in his complaint. *Id.* at 000048-000050. R. K. also argued that because his claims did not arise under the MPLA, he was not required to follow its pre-filing requirements, such as filing a notice of claim and a screening certificate of merit. *Id.* at 000050-000052. Finally, R. K. asserted that he had alleged sufficient facts to support his claims, particularly under the standard applicable to a motion to dismiss under Rule 12(b)(6). *Id.* at 000052-000054. For the same reason, R. K. opposed SMMC's motion for a more definite statement under Rule 12(e). *Id.* at 000055-000056.

On January 7, 2011, the circuit court held a hearing on SMMC's motion. *Id.* at 000064. The court agreed that HIPAA completely preempted R. K.'s claims against SMMC and dismissed his suit in its entirety. However, the court disagreed that R. K.'s claims arose under the MPLA, and denied SMMC's motion to dismiss on that basis. Similarly, the court determined that R. K. had alleged sufficient facts to support his claims or that it could not say that no set of facts existed to support R. K.'s claims, and denied its motion for a more definite statement.

Following R. K.'s motion for entry of an order reflecting the court's rulings at the January 7, 2011 hearing, *id.* at 000079, and a hearing on May 3, 2011, the court entered an order on May 10 granting in part and denying in part SMMC's motion to dismiss or, in the alternative, for a more definite statement. *Id.* at 000096.

On June 9, 2011, R. K. filed his Notice of Appeal from the circuit court's order, as provided by W. Va. Rev. R. App. 5, and on June 16, 2011, the Court entered a Scheduling Order. As provided by that Order, R. K. submits this brief.

SUMMARY OF ARGUMENT

This is not a case about whether HIPAA authorizes or permits a private cause of action. Clearly it does not, and every court that has considered the issue

has so held. Rather, this case is about whether HIPAA preempts a plaintiff's claims against a hospital for its employees' improper access to and dissemination of his confidential medical information, when those claims are brought under state law, with no reliance on, reference to, or mention of HIPAA. This Court should find that R. K.'s claims against SMMC are not preempted by HIPAA precisely because they are not based on HIPAA; they are based on state law.

Even where a cause of action asserts a violation of HIPAA under state law, however, HIPAA provides exceptions for determining whether that cause of action may proceed, one of which requires a determination of whether the state law is "more stringent" than HIPAA. If so, HIPAA does not preempt the cause of action.

But that analysis is unnecessary here, as R. K. did not assert any violation of HIPAA under any of his state-law claims, and in any event, the circuit court did not address whether the state law underlying his claims is more stringent than HIPAA. Accordingly, the Court should reverse the circuit court's dismissal of R. K.'s complaint and remand the case so that R. K. may prosecute his claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As the issue presented in this appeal is one of first impression in West Virginia, oral argument is appropriate, under the criteria in W. Va. Rev. R. App. 18(a), and would aid the decisional process.

The case is appropriate for argument under W. Va. Rev. R. App. 20 because it involves issues of first impression and of fundamental public importance regarding the confidentiality of an individual's private health information and the appropriate remedy for a breach of that confidentiality.

R. K. believes that the minimum time set for argument under W. Va. Rev. R. App. 20(e) will be sufficient and does not ask for additional time.

ARGUMENT

POINTS OF FACT AND LAW PRESENTED

1. **Because R. K. did not assert any claim under HIPAA, the circuit court's dismissal on his complaint on the grounds that HIPAA preempts private causes of action was erroneous.**
 - A. **SMMC cited no authority for its position that a claim under HIPAA may be inferred or implied where such a claim is not explicitly asserted.**

- B. HIPAA's preemption analysis applies only if a claim under HIPAA is asserted.**
- C. Even though HIPAA does not preempt R. K.'s claims, HIPAA may be used to establish the duty of care that SMMC owed to him.**

STANDARD OF REVIEW

The Court reviews *de novo* a circuit court's decision granting a motion for failure to state a claim upon which relief may be granted. *Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66 (2008). Further, the allegations in the complaint must be taken as true, *Coberly v. Coberly*, 213 W.Va. 236, 580 S.E.2d 515 (2003), and construed most favorably in the plaintiff's behalf. *Doe v. Wal-Mart Stores, Inc.*, 198 W.Va. 100, 479 S.E.2d 610 (1996).

- 1. Because R. K. did not assert any claim under HIPAA, the circuit court's dismissal of his complaint on the grounds that HIPAA preempts private causes of action was erroneous.**
 - A. SMMC cited no authority for its position that a claim under HIPAA may be inferred or implied where such a claim is not explicitly asserted.**

The circuit court erred in dismissing R. K.'s claims against SMMC on the grounds that HIPAA preempts private causes of action, because R. K. did not assert any claim under HIPAA or even mention HIPAA in his complaint.

SMMC did not cite, nor has R. K.'s research located, any authority, to support SMMC's argument that a claim under HIPAA may be inferred or implied in a complaint, when the complaint otherwise does not assert such a claim or, indeed, even mention the statute.

SMMC argues that even though R. K. had not asserted any claim under HIPAA, the court must look beyond such labels when determining whether contested claims are preempted, and cites the United States Supreme Court's decision in *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488 (2004), which dealt with the scope of ERISA preemption. App. at 000061. Further, SMMC claims that R. K.'s "artful drafting" should not be able to circumvent HIPAA's preemption provision. *Id.*

SMMC's argument ignores the legal significance of R. K.'s claims, and its reliance on *Davila* is misplaced, as are its multiple attempts to compare favorably various aspects of HIPAA and ERISA.

To be clear, ERISA does not offer the Court any assistance in its consideration of the scope of HIPAA's preemption. The Court of Appeals for the Fourth Circuit has made clear that ERISA preemption is very broad, eliminating virtually all state claims: "In enacting ERISA, Congress drafted its 'most sweeping federal preemption statute' in order to achieve uniformity and consistency in the law governing employee benefits." *Madonia v. Blue Cross and*

Blue Shield of Va., 11 F.3d 444, 450 (4th Cir. 1993) (citing *Holland v. Burlington Ind., Inc.*, 772 F.2d 1140, 1146 (4th Cir. 1985), *aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986) (citation omitted)). Consequently, SMMC's assertions that the scope of HIPAA's preemption is the same as or even remotely close to ERISA's are simply wrong.

B. HIPAA'S preemption analysis applies only if a claim under HIPAA is asserted.

Here, the fact that R. K. did not base any of his claims on HIPAA, but relied instead on state-law causes of action, means that HIPAA does not preempt those claims. That conclusion is reinforced by *Fisher v. Yale University*, 2006 WL 1075035 (Conn. Super. 2006), which SMMC cited and the circuit court found to be persuasive. App. at 000101.

In *Fisher*, decided by the Superior Court of Connecticut, Yale University and its affiliated hospital moved to dismiss the plaintiff's claims that their employee had improperly accessed her private health information, then used that information to harass and threaten her.

The court found that the plaintiff's claims, which were brought under the Connecticut Unfair Trade Practices Act (CUTPA) and explicitly alleged a violation of HIPAA, were preempted. The court also identified circumstances when a claim for a HIPAA violation brought under state law is not preempted.

The court explained that HIPAA contains two exceptions to its general preemption rule, which are found at 42 U.S.C. § 1320d-7(a)(2)(A) and (B). The first applies to provisions of state law determined by the Secretary of Health and Human Services to be necessary, among other things, for the prevention of fraud and abuse, an exception that did not apply to *Fisher*.

However, the second exception provides that it “shall not supersede a contrary provision of State law, if the provision of State law ... subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.” *Fisher* at *2 (citing 42 U.S.C. § 1320d-7(a)(2)(B)).

The court went on to explain that regulations promulgated by the Department of Health and Human Services and found at 42 C.F.R. § 160.203(b), expanded on the exception and provided that:

a contrary provision of state law is preempted unless:

The provision of state law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart B of part 164 of this chapter.

Id. at *2-*3.

Thus, if a state law is more stringent than HIPAA, it is not preempted.

The plaintiff argued that regulations interpreting HIPAA, which define “more stringent” as “provid[ing] great privacy protection for the individual who

is the subject of the individually identifiable health information,” implicated CUTPA: “The argument is that since a violation of HIPAA is a violation of a clearly delineated public policy, it is actionable under CUTPA, and that the ability of a plaintiff to bring the action will result in greater privacy protection to her as a subject of individually identifiable health information.” *Id.* at *2.

In analyzing Fisher’s claim under CUTPA, the court determined that to the extent CUTPA permitted a private cause of action for a HIPAA violation, it was a “contrary” provision of state law and fell generally within HIPAA’s preemption. The next step was to determine whether Fisher’s claim came within the second exception to HIPAA’s preemption. *Id.* at *3.

In considering Fisher’s argument that CUTPA was more stringent than HIPAA under the second exception, the court found that:

CUTPA is not in its express language or by inference through FTC regulations [required by the statute as guidance in construing the state legislature’s intent in identifying prohibited conduct] or case law, a law that “has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way.”

Id. at *5.

Because Fischer’s claim of a HIPAA violation under CUTPA did not fall within the second exception to HIPAA’s general preemption provision, Fisher’s lawsuit was preempted.

The most obvious, and perhaps only, application of *Fisher* to these facts would be if R. K. had asserted a claim under the West Virginia Unfair Trade Practices Act for SMMC's violation of HIPAA. Because R. K. did not assert any claim under HIPAA, much less one arising under the UTPA, the circuit court erred in relying on *Fisher*.

C. Even though HIPAA does not preempt R. K.'s claims, HIPAA may be used to establish the duty of care that SMMC owed to him.

A decision based on facts much closer to these, and which addresses the relationship between HIPAA and state-law claims that are not preempted, is *Acosta v. Byrum*, 180 N.C.App. 562, 638 S.E.2d 246 (2006).

In that case, Acosta asserted a claim for negligent infliction of emotional distress against Faber, her psychiatrist, and claims for invasion of privacy and intentional infliction of emotional distress against Byrum, Faber's office manager, after Byrum allegedly gained access to Acosta's medical files and shared the information with third parties.

Specifically, Acosta alleged that on numerous occasions, Faber allowed Byrum to use his medical record access number to retrieve Acosta's confidential medical records, which Byrum then provided to third parties without Acosta's consent. She alleged also that Faber's conduct violated the rules and regulations

of a local hospital, a local health-care system, and HIPAA. Faber moved to dismiss for failure to state a claim.

The Court of Appeals of North Carolina found that Acosta had not cited the exact HIPAA rule or regulation that allegedly established Faber's duty to her, but that she was not required to do so, as her only obligation was to provide him with notice of the claim against him and how she intended to prove it. 638 S.E.2d at 250-51.

The court also ruled that Acosta's allegation that Faber violated the rules and regulations established by HIPAA:

... does not state a cause of action under HIPAA. Rather, plaintiff cites to HIPAA as evidence of the appropriate standard of care, a necessary element of negligence. **Since plaintiff made no HIPAA claim, HIPAA is inapplicable beyond providing evidence of the duty of care owed by Dr. Faber with regards to the privacy of plaintiff's medical records.**

Id. at 572 (emphasis added).

The only difference between *Acosta* and this case is that here, R. K. did not mention or make any allegation under HIPAA. But even where Acosta affirmatively alleged that the defendant violated rules and regulations applicable to HIPAA, the Court of Appeals found that her allegation was not a claim under HIPAA and held that the trial court erred in dismissing her complaint on that basis.

Clearly, the circuit court erred here in dismissing R. K.'s complaint for the same reason. This Court should reverse the circuit court because its ruling was erroneous, and leaves R. K. with no remedy against SMMC.

Earlier this year, in *Bonney v. Stephens Memorial Hospital*, 17 A.3d 123 (Me. 2011), Maine's highest court issued a decision discussing HIPAA preemption. In *Bonney*, a hospital security guard notified the police that a husband and wife, who had sought treatment in the emergency room, had been the victims of an assault, after he overheard a conversation between the couple and emergency room nurses.

The couple sued the hospital and its security guard, alleging claims for the unauthorized disclosure of confidential medical information, violation of their privacy, and negligent infliction of emotional distress under Maine law and HIPAA. The trial court determined that HIPAA does not provide a private cause of action and dismissed the plaintiffs' claim against the hospital.

The appeal provided the Supreme Judicial Court of Maine with its first opportunity to determine whether HIPAA authorizes a private cause of action. The court found that both HIPAA's language and decisions from other courts compelled the conclusion that HIPAA did not provide for a private cause of action and could be enforced administratively only by the Secretary of Health and Human Services and State Attorneys General. *Id.* at 127.

However, the court also noted that “... **HIPAA standards, like state laws and professional codes of conduct, may be admissible to establish the standard of care associated with a state tort claim....**” *Id.* at 128 (quoting Ilene N. Moore, *et al.*, *Confidentiality and Privacy in Health Care from the Patient’s Perspective: Does HIPAA Help?*, 17 Health Matrix 215 (2007) (emphasis added)).

Although *Bonney* differs from *Acosta* – and consequently from this case – in that its plaintiffs did assert a private cause of action under HIPAA, which was preempted, *Bonney* and *Acosta* both establish that HIPAA’s standards may be used to establish the standard of care applicable to a plaintiff’s state-law claims.

CONCLUSION

The circuit court erred in relying on SMMC’s argument that even though R. K. had not asserted a claim under HIPAA, or even mentioned HIPAA in his complaint, HIPAA nevertheless preempted R. K.’s state-law claims.

SMMC was unable to cite any decision that supported its position, and R. K. has explained why the decision in *Fisher v. Yale University*, while informative, was wholly distinguishable from this case on the basis that Fisher had explicitly asserted a HIPAA violation under Connecticut state law not intended to protect the privacy of health information.

For that reason, the Court of Appeals of North Carolina's decision in *Acosta v. Byrum* is of more assistance here, as its facts are much closer to these. The court's determination that where the plaintiff made no HIPAA claim, HIPAA is inapplicable except as evidence of the duty of care owed to the plaintiff by the defendant applies directly to this appeal. This Court should find that where R. K. did not assert a HIPAA claim, HIPAA is inapplicable beyond serving as the standard of care that SMMC owed to R. K.

Likewise, even though the Supreme Judicial Court of Maine held in *Bonney v. Stephens Memorial Hospital* that the plaintiffs' private cause of action under HIPAA was preempted – which is likely what this Court would hold under the same facts – the court found HIPAA could serve as the standard of care owed by the defendant to the plaintiff.

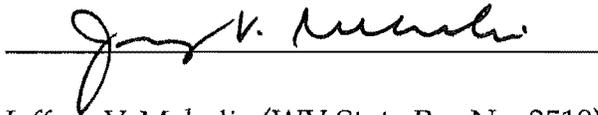
The circuit court acknowledged that there was very little on which it could rely for precedential guidance and seemed to place great weight on language found in HIPAA regarding the need to protect and safeguard the confidentiality of private health information.

But as these decisions make clear, it is not HIPAA's language that causes a claim to be preempted; it is the nature of the claim asserted. Here, because R. K. asserted purely state-law claims against SMMC, there was no basis for preemption under HIPAA and the circuit court erred in dismissing R. K.'s

complaint in its entirety. This Court should reverse the circuit court and remand this action so that R. K. can prosecute his claims against SMMC.

WHEREFORE, Petitioner R. K. prays that this Honorable Court reverse the May 10, 2011 order of the Circuit Court of Cabell County and remand this action to that court for further proceedings, and grant any other relief the Court deems just and proper.

R. K.
By Counsel

A handwritten signature in black ink, appearing to read "Jeffrey V. Mehalic", is written over a horizontal line.

Jeffrey V. Mehalic (WV State Bar No. 2519)
Law Offices of Jeffrey V. Mehalic
2011 Quarrier Street
P. O. Box 11133
Charleston, WV 25339-1133
(304) 346-3462
jeff@mehaliclaw.com
Counsel for Petitioner, R. K.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0924

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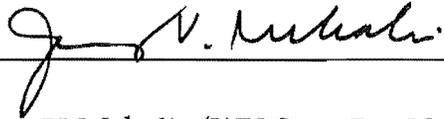
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ST. MARY'S MEDICAL CENTER, INC.,
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CERTIFICATE OF SERVICE

I, Jeffrey V. Mehalic, hereby certify that on this 13th day of September, 2011, that I served the foregoing **PETITIONER'S BRIEF** upon the following counsel of record by electronic mail and/or facsimile and/or depositing a true copy thereof in the United States mail, postage prepaid, addressed to them at their last known office address as listed below:

Robert M. Sellards, Esquire
Ryan Q. Ashworth, Esquire
Nelson Mullins Riley & Scarborough LLP
P. O. Box 1815
Huntington, WV 25719-1815



Jeffrey V. Mehalic (WV State Bar No. 2519)