

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 11-0924**

NOV 28 2011

**R. K.,  
Plaintiff Below, Petitioner**

**v.**

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

**REPLY BRIEF**

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## INTRODUCTION

Simply put, no appellate court in the United States — including courts that have had the opportunity — has interpreted the scope of HIPAA’s preemption in the manner that SMMC urges in this appeal. The only decision cited by SMMC that supports its position is *Fisher v. Yale University*, which, as R.K. explained in his brief, is readily distinguishable because Fisher specifically asserted a violation of HIPAA under the auspices of the Connecticut Unfair Trade Practices Act.

R.K. did not assert any violation of or claim under HIPAA, either impliedly or expressly. Thus, the circuit court should not have addressed whether and to what extent HIPAA preemption applied, and it erred in ruling that HIPAA preempted R.K.’s claims and required dismissal of his complaint. Consequently, this Court should reverse the circuit court’s dismissal of R.K.’s claims on the grounds they are preempted by HIPAA.

Also, as part of its ruling, the Court should affirm the circuit court’s denial of SMMC’s motion to dismiss on the grounds that R.K.’s claims do not come within the Medical Professional Liability Act’s scope, and therefore he was not obligated to follow its procedures before filing suit.

## ARGUMENT

- 1. R.K. did not assert any violation of HIPAA in or through his state-law claims and therefore HIPAA does not preempt his lawsuit.**

SMMC has failed to provide this Court with any authority for its position that HIPAA preempts R.K.'s state-law causes of action. Instead, SMMC relies exclusively on HIPAA's own preemption language to support its position that R.K.'s claims are preempted.

SMMC's extensive discussion of HIPAA's preemptive scope in the context of a conflicting state law is unnecessary, however, as that situation simply does not exist here. As a result, SMMC is left to rely on *Fisher v. Yale University*, 2006 WL 1075035 (Conn. Super. 2006) (unpublished opinion), even though SMMC seemingly does not understand the critical differences that render *Fisher* inapposite to this case.

SMMC asserts that the plaintiff's complaint in *Fisher* asserted a violation of the Connecticut Unfair Trade Practices Act (CUTPA), even though, as that court noted, the plaintiff actually asserted a violation of HIPAA through the CUTPA:

In count twenty-one, the plaintiff Jeannine Fisher asserts a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen.Stat. § 42-110a et seq., ("CUTPA,"), as a result of the Hospital's alleged failure to comply with the HIPAA (Health Insurance Portability and Accountability Act) requirements to safeguard her medical records

and personal information in their files. The court must determine whether the plaintiff's CUTPA claim is preempted by HIPAA.

*Id. at* \*2.

Despite the obvious dissimilarity between Fisher's and R.K.'s claims, SMMC refuses to acknowledge that Fisher specifically alleged a violation of HIPAA while R.K. did not, and treats the two cases identically: "The Petitioner herein also attempts to circumvent the settled rule that HIPAA creates no private cause of action. Similar to *Fisher*, Petitioner cloaks his alleged HIPAA violations in the shroud of otherwise valid state common law causes of action." Respondent's Brief with Cross-Assignment of Error ("Respondent's Brief") at 14.

Whether SMMC chooses to acknowledge them, the fundamental differences between this case and *Fisher* demonstrate that *Fisher* is of no assistance to this Court.

**A. The substance of R.K.'s claims against SMMC do not create or implicate a claim under HIPAA.**

Although SMMC tries repeatedly to create the appearance of some ledgerdemain on R.K.'s part regarding how he has characterized his claims, and misstates R.K.'s position on the matter ("Petitioner contends, therefore, that the courts of this State are bound solely to [*sic*] the labels of the drafter when

reviewing a Complaint[,]" Respondent's Brief at 10), R.K. agrees the nature of a cause of action is determined by its underlying facts, not the type of claim.

In *Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 656 S.E.2d 451 (2007), cited by SMMC, the plaintiffs maintained that because they had not asserted medical-malpractice claims against the defendants, the MPLA did not apply. This Court disagreed and held that, "the determination of whether a cause of action falls within the MPLA is based upon the factual circumstances giving rise to the cause of action, not the type of claim asserted." *Id.* at 702-03, 453-54.

Contrary to SMMC's position, however, R.K. has not argued that any other standard should apply to his claims. The substance of his claims demonstrate that they do not arise under and should not be governed by HIPAA. His claims arise under, and should be adjudicated under, West Virginia law.

Candidly, in arguing so forcefully for HIPAA preemption, SMMC necessarily relies on the "labels" it has attached to R.K.'s claims, rather than on their substance. Nowhere in its brief does SMMC quote from or otherwise examine what R.K. has alleged. Instead, SMMC refers repeatedly to R.K.'s state-law causes of action, which provides no information about the substance of R.K.'s allegations.

(Consistent with his position here, R.K. argues, in addressing SMMC's cross-assignment of error (Part B, *infra*), that the MPLA should not mechanically

apply to his claims simply because they occurred or had their origin in a health-care setting. Interestingly, however, SMMC claims that the MPLA applies because its employees' alleged acts occurred while R.K. was hospitalized, and thus ignores the factual allegations in R.K.'s claims, contrary to its reliance on *Blankenship* on the HIPAA preemption issue.)

**B. R.K.'s sole assignment of error relates to the circuit court's erroneous dismissal of his complaint against SMMC based on HIPAA preemption.**

Even though R.K. identified only one assignment of error in the circuit court's ruling, SMMC's misunderstanding of *Fisher* has caused SMMC to allege that R.K. asserted a second assignment of error based on *Fisher's* holding: "Petitioner further appears to assert error on the basis that HIPAA would not preempt his state law causes of action because 'the only application of HIPAA [*sic*] to the present facts would be if Petitioner asserted a claim under the West Virginia Unfair Trade Practices Act ("WVUTPA") for a violation of HIPAA.'" Respondent's Brief at 15 (paraphrasing Petitioner's Brief at 13); *see also* Respondent's Brief at 2.

Here is the sentence from R.K.'s brief that SMMC intended to quote: "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." Petitioner's Brief at 13 (bold added). As R.K. went

on to explain, because he did not assert any claim under HIPAA, much less one arising under West Virginia's Unfair Trade Practices Act, the circuit court erred in relying on *Fisher*.

**C. Other courts have held that HIPAA does not preempt state-law claims for breach of confidentiality and similar causes of action.**

SMMC also attempts to create a third assignment of error based on R.K.'s assertion in his brief that, "even though HIPAA does not preempt R.K.'s claims, HIPAA may be used to establish the duty of care that SMMC owed him," Petitioner's Brief at 13. SMMC asserts that:

Petitioner's third assignment of error is telling because it clearly emphasizes Petitioner's reliance on HIPAA in advancing his purported state law claims against St. Mary's. In response, Petitioner's cited precedent is inapposite to the current situation, as those cases undertake no analysis of HIPAA's preemptive effect.

Respondent's Brief at 3.

SMMC is wrong for two reasons. First, R.K. has not assigned any error relating to the standard of care that SMMC owed to him. R.K. was pointing out that appellate courts in North Carolina and Maine considering similar facts have found, in rejecting the defendants' argument that HIPAA preempted the state-law claims, that HIPAA could still serve as the standard of care applicable to the defendants' conduct. R.K. did not argue affirmatively that HIPAA established the

standard of care applicable to SMMC's conduct, and has not raised any assignment of error for the first time in this appeal.

SMMC is also wrong in contending that, "[R.K.'s cited cases] undertake no analysis of HIPAA's preemptive effect and have no bearing on the issues before the Court." *Id.* at 15.

In *Acosta v. Byrum*, 180 N.C.App. 562, 638 S.E.2d 246 (2006), the Court of Appeals of North Carolina found that the plaintiff's claim, which alleged that the defendant's conduct violated, among other things, 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.

Thus, the court did not "undertake [any] analysis of HIPAA's preemptive effect" because the court found that HIPAA was inapplicable.

Similarly, in *Bonney v. Stephens Memorial Hospital*, 17 A.3d 234 (Me. 2011), the Supreme Judicial Court of Maine considered for the first time whether HIPAA authorized a private cause of action. While the court ultimately concluded that HIPAA did not, and so joined every other court that has considered the issue, the court also found 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.

Although SMMC argues that R.K.'s cited authorities are inapposite, SMMC has failed to identify any holding (other than *Fisher*, which is not helpful for the reasons R.K. has already discussed) that supports its position that this Court should affirm the circuit court's ruling.

**2. The circuit court held correctly that the Medical Professional Liability Act does not govern R.K.'s claims and therefore did not obligate him to comply with its pre-suit filing requirements.**

As provided by W. Va. Rev. R. App. 10(f), SMMC has assigned as separate error the circuit court's denial of its motion to dismiss on the grounds that R.K.'s claims are not covered by the MPLA and thus R.K. did not have to follow its pre-suit filing requirements.

As the circuit found in its order, "just because a cause of action involves a health care provider or facility does not make the MPLA the exclusive remedy." App. at 000102. That rationale appears to be the basis for SMMC's appeal, however.

SMMC argues that R.K.'s claims "stem directly from health care services rendered," Respondent's Brief at 18, as discussed by this Court in *Blankenship*,

*supra*, and thus come within the definition of "health care" found at West Virginia Code § 55-7B-2(e).

That provision defines "health care" as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement."

SMMC argues that the act at issue in this case was the "safeguarding of confidential health care information," Respondent's Brief at 19, and that its alleged failure to perform that act during R.K.'s hospitalization was health care under the MPLA, which required R.K. to comply with the MPLA's pre-suit requirements.

These facts present a situation where the MPLA should not apply. Obviously, medical negligence or the use of defective medical products can occur only in a health-care setting, so that any claim based on such negligence or defect is necessarily covered by the MPLA. Here, however, the alleged disclosure and dissemination of R.K.'s confidential information could occur just as easily outside a health-care setting as within it.

In other words, the fact that R.K. was hospitalized when his confidential information was allegedly accessed and disseminated is irrelevant to R.K.'s claims. While his location may add to the outrageousness of SMMC's employees'

actions, his location does not transform their actions into ones covered by the MPLA.

In *Blankenship*, this Court noted that its opinions in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004), and *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005), had identified examples of types of conduct unrelated to providing medical care, so that the MPLA would not apply. *Blankenship* at 707, 458 (quoting *Boggs* at 663, 924 and *Gray* at 568, 330). Here, the inappropriate and improper disclosure of R.K.'s confidential information was "conduct that is unrelated to providing medical care." *Blankenship* at *id.* Thus, the inappropriate disclosure of R.K.'s confidential information should be given the same treatment as fraud, spoliation of evidence, negligent hiring, assault, theft, and defamation, which are actions that "would not require application of the MPLA any more than if the doctor or nurse committed such acts outside of the health care context." *Blankenship* at *id.*

Accordingly, this Court should affirm the circuit court's ruling that the MPLA did not govern R.K.'s claims and therefore that he was not required to follow its pre-suit filing requirements.

## CONCLUSION

HIPAA's preemption analysis comes into play only if a plaintiff asserts a violation of HIPAA under state law, such as the plaintiff in *Fisher v. Yale University*. Otherwise, HIPAA does not preempt a plaintiff's claims.

Undeniably, R.K. did not assert any claims under HIPAA, nor did he rely on HIPAA on pleading his claims. Regardless of how SMMC chooses to characterize R.K.'s complaint, the fact remains that SMMC attempts to apply HIPAA's preemption to claims that arise solely under West Virginia law.

This issue is one of first impression for this Court. While there is little authority from other jurisdictions, R.K. suggests that the Court should rely on the Court of Appeals of North Carolina's opinion in *Acosta v. Byrum*, which addresses facts similar to these, and establishes that where a plaintiff does not assert a claim under HIPAA, then HIPAA does not apply.

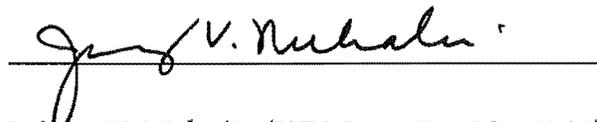
Finally, the Court should affirm that part of the circuit court's ruling that denied SMMC's motion to dismiss because the MPLA does not govern R.K.'s claims. This Court has held, through a series of decisions dealing with the MPLA, that it looks to the factual allegations, and not the type of claim asserted, to determine the nature of a cause of action.

Under that analysis, the MPLA does not govern R.K.'s claims, and he had no obligation to comply with its requirements, as the acts that he has alleged

against SMMC are not unique to a health-care setting and could have been committed outside of that setting, similar to fraud, spoliation of evidence, theft, and defamation.

**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.

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Plaintiff Below, Petitioner

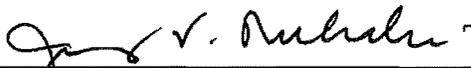
v.

ST. MARY'S MEDICAL CENTER, INC.,  
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Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, Jeffrey V. Mehalic, hereby certify that on this 28th day of November, 2011, that I served the foregoing **REPLY 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:

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