

**No. 11 – 0924 R.K., Plaintiff Below, Petitioner v. St. Mary’s Medical Center, Inc.,
d/b/a St. Mary’s Medical Center, Defendant Below, Respondent**

FILED
November 15, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, Chief Justice, dissenting.

I believe the plaintiff’s causes of action are preempted by HIPAA.

There is no doubt that HIPAA preempts state laws that are inconsistent with its provisions, other than laws that provide more stringent protections than HIPAA. Laws that create obstacles to HIPAA’s purposes are also preempted. *See* 42 U.S.C.A. § 1320d-7. West Virginia has not adopted any standards or factors to be used in determining whether a cause of action, based on State statute or common law, creates an obstacle to, or is less stringent than, HIPAA.

Reviewing how other jurisdictions have approached this issue, I would adopt the standards set forth in *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical*, 372 N.J.Super. 105, 855 A.2d 608 (2003). After exploring the HIPAA statutes and regulations, the superior court set forth five factors that courts should examine:

When evaluating whether a state law is more stringent, courts should examine certain considerations—whether the state law: 1) prohibits or restricts a use or disclosure more so than the Privacy Rule; 2) permits greater rights of access to or amendment of information; 3) provides the individual with a greater amount of information; 4) narrows the scope or

duration of an authorization or consent, expands the criteria necessary for an authorization or consent, or reduces the coercive effect of the circumstances surrounding an authorization or consent; or 5) requires longer or more detailed retention or reporting of disclosures. 45 *C.F.R.* § 160.202.

Smith, 372 N.J.Super. at 128, 855 A.2d at 622.

Applying these factors to the causes of action alleged in the plaintiff's complaint, I find that they are inconsistent with HIPAA. HIPAA specifically provides for penalties, punishment and an administrative mechanism for compensation for privacy violations. *See e.g.*, 42 U.S.C.A. § 1320d-5 and 45 *C.F.R.* § 160.404. A lawsuit for damages under our statutes or common law creates an obstacle to the purposes and objectives of HIPAA. Such lawsuits are, therefore, preempted by HIPAA.

I respectfully dissent.