

# NEWSLETTERS

# THOMAS PASCHOS & ASSOCIATES P.C. ATTORNEYS AT LAW

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## THE PASCHOS LAW UPDATE NEWSLETTER

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## November, 2014

### I. GENERAL LITIGATION

#### The Connecticut Supreme Court Ruling on HIPAA Could Have Potential National Impact

In *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, SC 18904 (Conn., November 11, 2014), plaintiff, Emily Byrne, received gynecological and obstetrical services from the defendant, Avery Center for Obstetrics and Gynecology, P.C. Plaintiff advised her doctor at the Avery Center not to provide her personal health information to her significant other. However, after the provider received a subpoena from her significant other's attorneys in a paternity suit, the health center promptly turned over the information without alerting the patient or fighting the subpoena in court. Plaintiff alleged that she suffered harassment and extortion threats from Mendoza after he viewed her medical records, and that Mendoza was able to use the information to file several civil actions, including paternity and visitation actions.

On motions for summary judgment by both parties, the trial court dismissed the plaintiff's claims alleging the defendant (1) acted negligently by failing to use proper and reasonable care in protecting her medical file; and (2) engaged in conduct constituting negligent infliction of emotional distress. The trial court noted that it is well-settled that HIPAA does not provide a private right of action and agreed with the defendant that "HIPAA preempts 'any action dealing with confidentiality/privacy of medical information.'" The plaintiff appealed.

On appeal, the Connecticut Supreme Court held that HIPAA does not preempt state common law negligence and emotional distress claims against medical providers who improperly breach the confidentiality of a patient's medical records and that "HIPAA may inform the applicable standard of care in certain circumstances."

The court held that preemption applies only when a "state law" provision is contrary to HIPAA. Additionally, state laws that are "more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter" are exempt from preemption. In reviewing the regulatory history of HIPAA and its implementing regulations, the court also concluded that HIPAA did not intend to preempt state tort actions resulting from unauthorized disclosure of protected health information. As such, the court concluded that "private rights of action in state courts, to the extent that they exist as a matter of state law, do not preclude, conflict with, or complicate health care providers' compliance with HIPAA", which "may inform the relevant standard of care in such actions".

#### Pennsylvania Superior Court Denies Attorney's Claim for Unjust Enrichment Against Successor Attorney

In *Kurzweg v. Miller*, 630 W DA 2014 (Pa. Super. Nov. 7, 2014), Janice Miller hired attorney Henry Miller to represent her in a potential medical malpractice suit in 1997. Henry Miller filed a writ of summons and a complaint in 1999. However, in January 2002, Janice Miller discharged Henry Miller, and Matthew Kurzweg, who is also a Pittsburgh-based attorney, took over as her attorney. He entered his appearance in the case in

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Janice Miller's case settled in September 2003, and Kurzweg collected a contingency fee.

Henry Miller demanded a portion of the fee, but Kurzweg did not pay the requested fee.

According to Bender, Miller alleged that he was discharged as a result of "machinations orchestrated by" Janice Miller, Kurzweg and Kurzweg's secretary. He sued in 2004, and in an amended complaint filed in 2012 he pleaded six counts against Janice Miller, Kurzweg and Kurzweg's secretary. He sought recovery of the entire contingency fee. The court dismissed five of the six claims in July 2013, leaving only a claim for unjust enrichment. Kurzweg filed preliminary objections which were denied.

Kurzweg petitioned the court to certify that its order denying Appellant's preliminary objections involved a controlling question of law as to which there is a substantial ground for difference of opinion, but the trial court denied his petition. Nevertheless, this Court granted Appellant's petition for review and issued a stay pending the appeal.

On appeal, Kurzweg raised the following question:

Whether the trial court erred in overruling Kurzweg's Preliminary Objections to a discharged attorney's claim of unjust enrichment against a successor attorney who replaced the discharged attorney and who collected a contingent legal fee as a result of settlement of the client's case.

The court held that Pennsylvania does not recognize a claim in unjust enrichment, or *quantum meruit*, brought by a former attorney against a subsequent attorney, citing in support *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, PC*, 95 A.3d 893 (Pa. Super. 2014)

In *Meyer Darragh*, an attorney representing an estate in a wrongful death action left his firm to join another, taking with him the wrongful death litigation file. *Meyer Darragh*, 95 A.3d at 895. Thereafter, the attorney's new firm began to represent the estate. *Id.* The case settled, and a contingency fee was paid to the new firm. *Id.* The attorney's original firm initiated litigation, claiming *quantum meruit* against both the estate and the new firm, and the trial court entered a verdict in its favor against both defendants. *Id.* at 896.

On appeal, a panel of the Superior Court stated:

It is well-settled that a client may terminate his relation with an attorney at any time, notwithstanding a contract for fees, but if he does so, thus making the performance of the contract impossible, the attorney is not deprived of his right to recover on a *quantum meruit* a proper amount for the services he has rendered.

However, the court provided that "[t]here is no Pennsylvania appellate court case holding that an attorney who initially represents a client and is dismissed can maintain a *quantum meruit* action against the attorney who ultimately settles the case. Rather, the initial attorney has to proceed against the client." The panel concluded, "Until our [S]upreme [C]ourt holds otherwise, we will not recognize a claim for quantum meruit by a former attorney against a subsequent attorney."

Based upon the holding in *Meyer Darragh*, the Superior Court held that there was no legal basis for Appellee's claim for unjust enrichment against his successor.

## **II. PROFESSIONAL LIABILITY**

### **Hospital Immune from Monetary Damages in Lawsuit Brought by Disciplined Physician**

In *Hurwitz v. AHS Hospital*, 2014 N.J. Super. LEXIS 161 (Nov. 24, 2014), plaintiff, Dr.

James Hurwitz filed a lawsuit against Overlook Hospital (legally known as AHS Hospital) after the hospital's board of trustees stripped him of his surgical privileges. Hurwitz, who earned operating privileges at Overlook in 1998, came under review by the hospital in 2010 after shortcomings were revealed in the care that plaintiff had provided to certain patients. Over the next two years the investigation grew. In August 2010, his privileges

were temporarily suspended pending the outcome of the investigation. After extensive administrative hearings conducted within the hospital, in which plaintiff and his attorney participated, the hospital's Board of Trustees revoked Hurwitz's clinical privileges. Hurwitz contended that the actions taken against him by the hospital were arbitrary, unreasonable, and unduly punitive. He sought relief in the trial court, based on several legal theories. Specifically, Hurwitz alleged breach of contract, breach of the implied covenant of good faith and fair dealing and violation of his due process rights.

The trial court dismissed the plaintiff's lawsuit. In doing so, the court relied upon immunities from monetary damages conferred by federal and New Jersey statutes upon hospitals and the participants in peer review processes when evaluating a physician's performance and in making decisions about that physician's clinical privileges. See 42 U.S.C.A. §§ 11111 to 11112 and N.J.S.A. 2A:84A-22.10. The court found that plaintiff had failed to present sufficient evidence or indicia to overcome those statutory immunities. The court further ruled that plaintiff had not justified the taking of depositions, or the pursuit of other additional discovery, before the immunity issues were adjudicated.

On appeal, the Superior Court affirmed the trial court's decision. Specifically, the Superior Court concurred that the hospital and the participants in the hospital's internal review processes were statutorily immune in this case from monetary liability. The court provided that "[t]his immunity from monetary liability has been enforced repeatedly by federal and state courts, aside from exceptional circumstances where the immunity has been overcome." The court cited a 1994 ruling from the U.S. Court of Appeals for the 11th Circuit, noting that it was not the proper role of the judiciary to substitute its judgment for that of a hospital's governing board.

The Superior Court also agreed with the trial court that plaintiff had not identified sufficient grounds to establish that the hospital conducted its investigation without a reasonable basis for doing so, or that the hospital's revocation of plaintiff's privileges was imposed without a reasonable belief that such action was in furtherance of quality health care objectives. The court held that "[t]he record provides no evidence, nor even a plausible indication, that defendants failed to comport with...norms of fairness and reasonableness."

Finally, the court sustained the trial court's ruling that plaintiff's allegations of wrongdoing by the hospital and the participants in the internal review process were insufficient to warrant depositions or the taking of other additional discovery. The court held that the right to obtain discovery, particularly depositions, in cases involving these immunity statutes is not absolute. Instead, the court may curtail discovery in its discretion "if there are no reasonable indicia that a factual basis to surmount the immunities will be uncovered."

***Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.***

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