No.

In The

Supreme Court Of The United States

Kathleen Leonard,

Petitioner,

v.

Retailer's Credit Association Of
Grass Valley, Inc.,

Respondent.

On Petition For Writ Of Certiorari

To The

California Court Of Appeal, Third Appellate District

Patrick H. Dwyer
Counsel of Record
P.O. Box 1705
17318 Piper Lane
Penn Valley, CA 95946
530-432-5407

Attorney for Petitioner
May 7, 2014

Questions Presented

Background:

Respondent, a debt collection agency, filed a complaint for breach of contract by Petitioner in the Nevada County Superior Court, Nevada County, California, alleging failure to pay medical charges. Respondent, without either consent from Petitioner or a court protective order, attached to the complaint un-redacted copies of medical records protected by HIPAA[1], thereby placing these medical records into the public domain of the superior court files.

The appellate court found that, although the complaint exhibits were protected by HIPAA, they could be publicly disclosed under an implied "safe harbor" rule without prior authorization or a protective order.

1. May health information protected by HIPAA be disclosed in a legal proceeding without patient authorization or a protective order?

2. Does the constitutional right to privacy require that a suitable protective order be obtained before patient health information is used or disclosed in a legal proceeding?

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1 HIPAA is The Health Insurance Portability and Accountability Act, Pub. L. 104–191, 110 Stat. 1936; 42 US § 1320d, as implemented by the regulations of the Department of Health and Human Resources at 45 C.F.R. §§160 *et seq.*

Parties To Proceeding

Kathleen Leonard, an individual

Retailer's Credit Association of Grass Valley, Inc.

[To Petitioner's knowledge, there is no parent or publicly held company owning 10% or more of this corporation's stock]

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Petition For A Writ Of Certiorari

Kathleen Leonard respectfully petitions for a writ of certiorari to the United States Supreme Court to review the denial by the California Court of Appeal of a Petition For Transfer of the Decision of the Appellant Division of the California Superior Court For The County Of Nevada in the matter of the appeal of *Retailer's Credit Association of Grass Valley, Inc. v. Kathleen Leonard* (3rd DCA No. C075603; NCSC No. L78288A)

Opinions Below

The unreported opinion of the Appellant Division of the California Superior Court For The County Of Nevada in Case No. L78288A was filed December 4, 2013. Petitioners' Appendix ("Pet. App.") at A28-A33. An Application for Transfer To The California Court of Appeal was denied on January 10, 2014. Pet. App. at A26-A27. A Petition For Transfer To The California Court Of Appeal, Case No. C075603, Pet. App. at A2-A25, was denied on February 10, 2014, by the California Court of Appeal without comment. Pet. App. at A1.[2]

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2 Under California Rules of Court ("CRC") 8.1000 et seq., for a case that is a limited action (i.e, the amount in controversy is under $25,000) an appeal lies to the appellate division of the Superior Court. A decision by the Appellate Division may be transferred to the Court of Appeal upon the granting of request for certification of transfer by the Appellate Division, CRC 8.1005, or upon the granting of a Petition to the Court of Appeal for transfer. CRC 8.1006. There is no further right to appeal or petition to the California Supreme Court.

Jurisdiction

The jurisdiction for this petition for a writ of certiorari is based upon 28 U.S.C. §1257(a).

The Federal Issues Were Raised In The Appellate Court

The federal questions regarding the application of HIPAA to California courts were raised by Petitioner in the Petition For Transfer To The California Court of Appeal. Pet. App. at A2-A25.

Constitutional and Statutory Provisions

1. **Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. 104–191, 110 Stat. 1936; 42 USC § 1320d,** and the implementing regulations issued by the **United States Department of Health and Human Services, including 45 C.F.R. § 164.502(a)**, the "**Privacy Rule**" for protected health information:

> ... A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

2. **United States Department of Health and Human Services, 45 C.F.R. § 164.512(e)**:

> .... Standards: Disclosures for judicial and administrative proceedings ....
>
> (iv) ... a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
>
> (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

3. **U.S. Constitution, Amendment XIV, § 1:**

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement Of Facts

In January 2012, Respondent filed a complaint against Petitioner for alleged breach of contract to pay medical charges incurred by Petitioner at Sierra Nevada Memorial Hospital, part of the Dignity Health System ("Dignity"). Without prior notice to Petitioner and without a protective order from the court, Respondent attached to the complaint five exhibits that contained Petitioner's health information protected under HIPAA. By filing the complaint and exhibits without a protective order, Petitioner's protected health information ("PHI")[3] was placed into the public domain.[4]

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3 PHI is defined under HIPAA at 45 C.F.R. § 160.103 in a two part analysis. First, there has to be identifying information about the individual or that could be used to identify the individual. Second, the identifying information must be connected with:

> *any* information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider ...; and (2) relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual. (Emphasis added.)

4 Under California law, all that is required to plead a breach of contract is a statement of "ultimate" facts constituting a cause of action. California Code of Civil Procedure §425.10. The facts to be pleaded are those upon which liability will depend. *Doe v. City of Los Angeles* (2007) 42 Cal. 4th 531, 549-550 ("Doe"). The ultimate fact of the existence of a contract

Petitioner was shocked to find that her PHI had been attached to the complaint without her consent and without any protection from public use and disclosure. Not being able to afford private counsel, Petitioner proceeded *pro se.*

Petitioner timely filed an answer to the complaint denying the allegations about non-payment of the alleged medical debt. Petitioner also filed a cross complaint for injunctive relief and damages for violation of HIPAA, CIMIA[5] and her constitutional right of privacy arising from Respondent's attachment of her PHI to the complaint without her written authorization or a court approved protective order as required under HIPAA. Respondent filed a general denial to the cross complaint.

Trial was held on June 11, 2012, in California

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may be pleaded either in *hac verba* (word for word, typically done by attachment) or generally according to the contracts intended legal effect. See *Construction Protective Services, Inc. v. TIG Speciality Ins. Co.* (2002) 29 Cal. 4th 189, 198-199. A complaint will be upheld if it provides the defendant with notice of the issues sufficient to enable the preparation of a defense. Doe at 549-550. Thus, it was not necessary for Respondent to attach the contracts that contained PHI, it only had to plead the essential ultimate facts: i.e., that there was a contract for medical services, the services were provided, and all or part of the charges remain unpaid. There is no need to plead any PHI to state a viable cause of action.

5 The California Confidentiality Of Medical Information Act, California Civil Code §§56 et seq. ("CIMIA") was found by the lower court to be less stringent than HIPAA, and therefore, preempted by HIPAA. See *e.g., Crenshaw v. Mony Life Insurance* 318 F. Supp. 2d 1015 (S.D. Cal. 2004) at 1029; *Law v. Zuckerman* 307 F. Supp. 2d 705 (E.D. Cal. 2007) at 709-711. Thus, CIMIA is not pertinent in a federal appeal.

Superior Court For Nevada County. There was no trial transcript, but there is a minute order dated June 11, 2012, that contains some record of the proceeding. According to the minute order, the trial court found that there was nothing "confidential" about the exhibits or the action and denied Petitioner's motion to close the courtroom to protect her PHI from public disclosure.

Petitioner, not wanting to disclose even more of her PHI, refused to offer into evidence additional PHI that she could have used to refute the allegations about failure to pay the medical charges.

The trial court then admitted into evidence all of Respondent's complaint exhibits, plus four additional pages of Petitioner's medical records,[6] and found for Respondent on both the complaint and cross Complaint.

On July 27, 2012, Respondent filed a Notice of Entry of Judgment. Petitioner found legal counsel and on August 13, 2012, filed a Notice of Appeal to the Appellate Division of the California Superior Court. Petitioner also filed a motion to place the exhibits under seal pending appeal, but that motion was denied.

The decision of the Appellate Division was filed on December 4, 2013. That decision found that HIPAA had an implied "safe harbor" rule that, notwithstanding HIPAA's Privacy Rule and express provisions governing the disclosure of PHI in a legal

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6 These pages contained test and the names of Petitioner's doctors. These pages were found by the lower appellate court to be both protected by HIPAA and not subject to an implied safe harbor rule. They were ordered sealed.

proceeding, allowed medical debt collectors to put certain PHI into the public domain, including the following specific information about Petitioner:

> 1. Petitioner and her minor child's name, age and date of birth;
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> 2. Petitioner and her minor child's individual medical ID numbers used to access their medical files at Dignity Health;
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> 3. the treating departments at the hospital (e.g., oncology);
>
> 4. The date the services were provided;
>
> 5. the admit status (i.e., the level of patient acuity);
>
> 6. a bar code that encodes the above items and is an access code for the patient's complete medical record; and
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> 7. The name of the minor child's father.

Petitioner filed an Application For Certification For Transfer to the California Court of Appeal on December 18, 2013. This was denied on January 10, 2014. Petitioner then filed a Petitioner For Transfer to the California Court of Appeal. This was denied on February 10, 2014. This petition for a writ of certiorari followed.

Why A Writ For Certiorari Should Issue

A. Introduction

This case presents two simple, but urgent issues. First, may health information protected by HIPAA be disclosed in a legal proceeding without patient authorization or a protective order? Second, does the constitutional right to privacy require that a suitable protective order be obtained before patient health information is used or disclosed in a legal proceeding?

The California Court of Appeal has let stand a lower appellate court decision that medical debt collectors operate under an implied "safe harbor" exception to HIPAA's Privacy Rule that permits them to use and disclose certain protected health information in a litigation without authorization of the patient and without a court protective order, thereby placing the patient's health information into the public domain. The decision neither defines or limits what protected health information is subject to this "safe harbor", nor sets forth any criteria to be used for making such a determination.

The practical effect of this undefined "safe harbor" exception to HIPAA is that any medical debt collector in California may now ignore HIPAA and disclose protected health information without repercussion. Quite literally, a medical debt collector may threaten a patient with public use and disclosure of their protected health information unless they pay the alleged medical bill. This will subject alleged debtors to coercion.

In prosecuting this appeal in the courts below,

it has become apparent that there is a much bigger area for concern. Does HIPAA apply whenever a patient with PHI is a litigant and their PHI is relevant to the matter at issue?

For example, in the context of tort litigation it is well established that when a plaintiff files an action alleging physical injury, their health becomes an issue and their PHI is subject to discovery. Does this mean that a patient/plaintiff must place their PHI into the public domain of the legal forum to obtain relief for their claims? Or does HIPAA impose a procedural due process requirement that a litigant has a right to a protective order, just like the right to notice and hearing?

In addition, is there a substantive due process right to privacy under the 14th Amendment that requires the protection of private health information in a legal proceeding irrespective of HIPAA? The burden of obtaining a protective order for private health information as a matter of due process is very small with the potential for harm through the disclosure of private health information into the public domain of a legal proceeding.

B. HIPAA Has No Express Exception For Medical Debt Collectors

The Department of Health and Human Resources ("DHHS") regulations implementing HIPAA begin with the general principal that a covered entity may not use or disclose "protected health information" except: (1) as the privacy rule permits or requires; or (2) as authorized in writing by the patient. 45 C.F.R. § 164.502(a)(1). This is the

"Privacy Rule". Covered entities include all health care providers, health plans and health care clearinghouses. 45 C.F.R. §160.103. The HIPAA regulations were extended to include "business associates"[7] of covered entities by the Health Information Technology for Economic and Clinical Health Act ("HITECH"), Pub. L., 111-5, 42 U.S.C. §17931.

A covered entity (or business associate) is authorized to use or disclose PHI in the course of performing its internal day-to-day "Health Care Operations" defined at 45 C.F.R. §164.501. However, the use or disclosure of PHI to third parties is not allowed except as expressly permitted. 45 C.F.R. §164.502.

HIPAA authorizes covered entities to use or disclose PHI for their own internal activities, 45 C.F.R. §164.506(a), but not in external legal proceedings. 45 C.F.R. §164.506(b) & (c). There is no specific authorization for the use or disclosure of PHI in a litigation by a collection agency or an attorney for a covered entity.

The use or disclosure of PHI outside of the internal operations of a covered entity is governed by 45 C.F.R. §164.508 which prohibits the use and disclosure of PHI unless there is patient authorization or the use or disclosure falls within one of the few exceptions set forth at 45 C.F.R. §164.512 (b) through (l). There are no express exceptions for debt collection in §164.512.

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7 In this action, Respondent is a medical debt collector and it agreed that it was a "business associate" for purposes of enforcing HIPAA.

When use or disclosure is expressly authorized, the covered entity may only use or disclose the "minimum necessary" amount PHI for the authorized purpose. 45 C.F.R. §164.502(b)(2). This is the "Minimum Necessary" rule.

The only express exception under which Respondent could have used or disclosed Petitioner's PHI was the litigation exception at 45 C.F.R. §164.512(e). This allows for the use and disclosure of PHI in a legal proceeding if there is either written patient authorization or there is a court approved protective order that meets regulation's requirements. These requirements specify that any such protective order must require that all PHI be returned or destroyed at the conclusion of the litigation. 45 C.F.R. §164.512(e)(v). In other words, HIPAA forbids the disclosure of PHI into the public domain of a legal forum.

In this case, Respondent neither obtained written authorization to use or disclose Petitioner's PHI nor sought a protective order from the trial court before attaching and filing Petitioner's PHI in the court's public record.

Respondent admitted that there is no express authorization under HIPAA to use or disclose PHI in a legal proceeding, including this case.

Instead, Respondent made two arguments. First, it contended that its disclosure of Petitioner's PHI was impliedly allowed under the definition of day to day "Health Care Operations" at 45 C.F.R. §164.501. This definition includes the "conducting or arrangement for ... legal services". Respondent argued that its use and disclosure of Petitioner's PHI in this case, i.e., by attaching it to the complaint and

then introducing it at trial, fell within the definition of day to day operations of a covered entity and it was not required to follow 45 C.F.R. §164.512(e) and either obtain prior written authorization or a court approved protective order.

Second, Respondent acknowledged that, although HIPAA may expressly require written authorization or a court approved protective order before use or disclosure of PHI in a legal proceeding under 45 C.F.R. §164.512(e), there was also an implied "safe harbor" that allowed the use and disclosure of the type of PHI that was contained in the exhibits attached to the complaint.[8] While not providing any definition of what constituted the type PHI that could be disclosed under such a safe harbor, it argued that the PHI disclosed in the complaint exhibits fell within this implied safe harbor rule.

C. Use Or Disclosure By Legal Counsel For Day To Day Health Care Operations Does Not Allow Further Unprotected Disclosure To Third Parties

Petitioner argued that day to day Health Care Operations may have authorized the disclosure by Dignity (the health care provider) to Respondent (the business associate debt collector), but that the further disclosure by Respondent by means of unauthorized attachment to the complaint was not

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8 The kinds of PHI that were found disclosable under the *implied* "safe harbor" rule are set out in the Statement of Facts, *supra*.

included in the definition of day to day operations.

Petitioner agrees that day to day operations by a covered entity do allow for the internal use by or disclosure to legal counsel (whether inside or outside counsel). However, there is nothing in the definition of day to day operations that permits the further external disclosure by such legal counsel into the public domain of a legal proceeding, except as expressly permitted by 45 C.F.R. §164.512(e) which requires written authorization or a protective order.

D. HIPAA Does Not Have A "Safe Harbor" For Medical Debt Collectors

With regard to the second argument that there was an implied "safe harbor" under 45 C.F.R. §164.512(e) for disclosure or certain types of PHI, Petitioner pointed out that there was no definition or criteria with which to determine what PHI could or could not be disclosed under such an implied safe harbor. Further, the definition of PHI specifically includes "any information" that "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." 45 C.F.R. §160.103. This definition is all encompassing and there is no division between PHI that may or may not be protected under HIPAA – it is all protected under the Privacy Rule.

Under settled principles of construction, a law's plain meaning controls. There is nothing in this language that creates a "safe harbor". There is nothing that indicates that collection agencies and

their lawyers should be excepted. The construction proposed by Respondent and adopted by the lower appellate court defeats the entire purpose of HIPAA. The language of 45 C.F.R. §164.512(e) is not limited to a particular forum or nature of the litigation; it extends to any judicial or administrative tribunal and any type of proceeding, including a debt collection suit.

Respondent did not propose a single reason or policy consideration why the simple requirements of 45 C.F.R. §164.512(e) could not be followed in this case. Respondent merely needed to either obtain written authorization from Petitioner or get a court approved protective order to use Petitioner's PHI in the manner that it did.

The burden on Respondent to comply with HIPAA's express mandate was nominal, whereas the harm to Petitioner was serious. There was no justification for the failure to follow the law and there is no compelling interest to create an implied "safe harbor" for the PHI it wrongfully disclosed.

The Lower Court Decision

The Appellate Division ruled orally from the bench, without citation to authority, that there is an implied "safe harbor" that permits public disclosure of PHI by a collection agency, such as Respondent RCA, in a debt collection litigation. There was no discussion of what the boundaries of this safe harbor are or what PHI is subject to the safe harbor. These items were left undefined.

Conclusion

The decision of the lower court creates a gaping hole in HIPAA that benefits medical debt collectors. There are no policy reasons stated for this exception and there are no criteria with which to determine the boundaries of this implied "safe harbor." This decision creates serious policy questions with very wide implications. All of us have health information that we want to keep private. That is why HIPAA was enacted. There is no reason to create an exception to the Privacy Rule just for medical debt collectors. Doing so not only encourages the complete disregard for the protection of PHI, but it creates the circumstances where medical debt collectors will have unfair leverage to collect alleged debts, regardless of the validity of such claims. Simply put, the burden of compliance with HIPAA is small compared to the harm from non-compliance.

There is a real need to clarify the law concerning the protection of PHI in all types of litigation. The failure to require adequate protections for PHI in a legal proceeding is a failure to apply the principles of due process, both procedural and substantive, under the 14th amendment.

There is no plausible justification for requiring a litigant to forego privacy in their personal health information in exchange for the right to pursue redress of their grievances. All that is required is a simple protective order that keeps the PHI from entering the public domain and that ensures that any copies are returned destroyed at the completion

of the matter. With such a simple and nominal burden, the right to privacy in health information, both statutory and constitutional, can be fully sustained.

Respectfully Submitted,

___/s/_____
Patrick H. Dwyer
Counsel of Record for Petitioner

P.O. Box 1705
17318 Piper Lane
Penn Valley, California 95946
530-432-5407
pdwyer@pdwyerlaw.com