# In the New York State Courts

By Leonard M. Rosenberg

### Court of Appeals Affirms That Mental Hygiene Legal Services Does Not Have Jurisdiction Over Nursing Home Residents With Mental Disabilities

*Hirschfeld v. Teller*, __N.E.2d __, 2010 WL 1194174 (N.Y. March 30, 2010). In this suit, the director of Mental Hygiene Legal Services ("MHLS") sought a judgment declaring that MHLS has a right of access to mentally disabled nursing home residents.

MHLS sought access to residents admitted to segregated units of nursing homes, known as "neurobiological units" ("NBU units"), after being discharged from facilities licensed by the Office of Mental Health ("OMH"). MHLS sought such access to provide advocacy and legal representation after an investigation suggested that such residents were deprived of the legal protections afforded to similarly situated patients in the psychiatric wards of hospitals.

The nursing homes argued that MHLS had no right to access to the residents because the Mental Hygiene Law provides MHLS with jurisdiction only over facilities required to obtain operating certificates from OMH and, according OMH, nursing homes are not required to have OMH operating certificates.

The Court of Appeals affirmed denial of the relief sought. The Court found that under the Mental Hygiene Law, MHLS's jurisdiction was limited to two categories of facilities. MHLS asserted that the nursing homes fell under one of these categories—namely, places that are required to have an OMH operating certificate. Further, MHLS argued that the key factor is whether facilities are subject to licensing because they provide residential services to patients with mental disabilities.

The Court stated that which facilities are subject to OMH licensure is wholly within OMH's discretion and expertise. Because OMH exercised its authority and decided that the nursing homes did not require licensure and an operating certificate, MHLS had no jurisdiction over such facilities. In so finding, the Court noted that it was making no determination as to OMH's underlying licensure decision, and that any challenges to such decision must be brought through an Article 78 proceeding.

In a dissenting opinion, Chief Judge Lippman found that the Mental Hygiene Law had been amended in 1993 for the purpose of extending MHLS's jurisdiction to cover patients with mental disabilities at residential facilities such as the nursing homes here. The legislative history surrounding the amendment indicates that the legislature intended that MHLS have full access to represent patients with mental disabilities without first having to establish jurisdiction.

The dissent noted that the majority's interpretation of the Mental Hygiene Law establishing MHLS's limited jurisdiction was "textually incorrect and plainly at odds with the purposes informing its enactment." It had become common practice for state psychiatric hospitals to discharge patients to NBU units where they continued to receive psychiatric treatment in "highly restrictive settings"—virtually the same as involuntary psychiatric care—without any protection of the patients' due process rights, which they had been afforded while involuntarily committed to OMH licensed facilities. Chief Judge Lippman wrote that the majority's narrow reading of the Mental Hygiene Law so as to limit MHLS's jurisdiction may have a devastating impact on the rights and liberty interests of a needy population.

Chief Judge Lippman also argued against the majority's rationale that MHLS's jurisdiction is dependent upon OMH's administrative decision as to whether a facility is required to obtain an operating certificate. He noted that, pursuant to the Mental Hygiene Law, an OMH operating certificate is required for a residential facility providing care or treatment of the mentally disabled and that, although nursing homes traditionally did not provide such care, the fact that the nursing homes here were essentially providing involuntary inpatient care to the mentally disabled, there would be no grounds to find that such nursing homes were not subject to OMH licensure, and that such determination should be made by the courts, not by OMH.

### Federal District Court Denies Parents' Motion for Preliminary Injunction to Compel School to Register Unvaccinated Child

*Cavaziel v. Great Neck Public Schools., et al.*, 2010 WL 1269696 (E.D.N.Y. Apr. 5, 2010). Parents of a child just under four years old alleged that their school district violated their state and federal constitutional rights, based on the denial of their application for an exemption from vaccinating their child prior to enrollment in the district's pre-kindergarten program. The Plaintiffs also moved for a preliminary injunction seeking to compel the school district to register their unvaccinated child based on the religious belief exemption. After denying the Plaintiffs' motion for a temporary restraining order, the Court held a hearing on the preliminary injunction motion.

New York State Public Health Law § 2164(7) requires children entering public school to be vaccinated against certain diseases. However, Plaintiffs argued that they are entitled to the exemption to this rule, as provided by Subdivision 9: the rule shall not apply to "children whose… parents…hold genuine and sincere religious beliefs which are contrary to the practices herein required.…"

After disposing of peripheral issues relating to notice of claim and exhaustion, the Court focused on whether Plaintiffs met the heightened standard for a preliminary injunction that affects government action taken in the public interest pursuant to a statutory or regulatory scheme. This more rigorous standard requires that the injunction be granted only if the moving party shows both (1) irreparable harm and (2) a likelihood of success on the merits. The Court concluded that the Plaintiffs satisfied the first prong by showing there would be irreparable harm to their child if she was unable to enter school in September 2010.

As to the second prong, the Court considered the Plaintiffs' argument that they are entitled to the religious belief exemption to the vaccination rule by the New York Public Health Law, as well as the First and Sixth Amendments, because of their "genuine and sincere religious beliefs." The Court concluded that the Plaintiffs' objections, although sincere, were not religious in nature and are thus not entitled to the exemption. Although the law does not require the Plaintiffs to be a member of an organized religion, Mrs. Cavaziel is a member of the Sanctuary of the Beloved Church, which does not express opposition to vaccination, according to her testimony at the hearing. Furthermore, Mrs. Cavaziel revealed that her beliefs are personal, and not religious, through numerous examples in her testimony. Specifically, she described her concern that vaccinations cause autism, which concern has no ties to any religious beliefs. She also admitted that she takes Motrin and essential oils despite her religion's belief that the body is divine and needs no medications.

Furthermore, in a letter drafted by Plaintiffs' attorney regarding the family's religious beliefs, the Court found the following language revealing: "For thousands of years our ancestors never injected diseases into their bodies, nor do we want to now inject diseases or make unnecessary marks on our bodies." Believing that there is nothing religious about this statement, the Court concluded that it simply shows personal feelings relating to a fear of injecting disease into the body and a reluctance to make unnecessary bodily marks. Mrs. Cavaziel had no such feelings when she vaccinated her three older children, and when she pierced her own ears, and those of her daughter. Because such feelings are more in the nature of a secular philosophy than a religious belief, the Court concluded that Plaintiffs are unlikely to succeed on their claim that they qualify for the religious belief exemption to the vaccination requirement and denied Plaintiffs' preliminary injunction motion accordingly.

### False Claims Act Suit Based on Allegations of Care Provided by Unsupervised Medical Residents Dismissed for Failure to Plead That Claims for Payment Were Submitted to the Government

*Johnson v. University of Rochester Medical Center*, 2010 WL 598655 (W.D.N.Y. Feb. 18, 2010). Plaintiffs, a physician and a registered nurse, brought a *qui tam* action against their former employers alleging, *inter alia*, violations of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA").

The *qui tam* provisions of the FCA encourage private citizens to come forward with information regarding acts of fraud against the U. S. government by permitting such Plaintiffs to share in the resulting recovery. Plaintiffs in this action alleged that the defendants had defrauded the U.S. government by filing false claims for payment under New York Medicare/Medicaid and other Federal programs. Specifically, Plaintiffs alleged that defendants had fraudulently billed the government for procedures performed by residents without the required presence or supervision of a teaching or attending physician, in violation of relevant Medicare/Medicaid regulations. Further, Plaintiffs alleged that they had been retaliated against for refusing to alter medical records to falsely reflect the attendance of physicians during such procedures, and for reporting to supervisors that medical records had been altered in this manner to obtain reimbursement.

The court noted that Plaintiffs' complaint included lengthy allegations of defendants' repeated failure to provide the supervision of residents by teaching/attending physicians as required, as well as multiple allegations concerning falsified information on patient records. Nevertheless, the court dismissed Plaintiffs' fraud claims for failing to allege that bills for any of the described procedures were ever presented to the government for payment. In so ruling, the court instructed that the FCA attaches liability not to the underlying fraudulent activity, but to the claim for payment from the government. Thus, the "central question under the False Claims Act is whether the defendant actually presented a 'false or fraudulent claim' to the government."

Plaintiffs argued that they were unable to make such allegations because evidence of defendants' Medicare/Medicaid reimbursement requests was in the sole possession of the defendants. The court was not persuaded, holding that although fraud can be pleaded on information and belief where the defendant has exclusive control over relevant evidence, a Plaintiff must still set forth the factual basis for such belief, and that basis must arise from the Plaintiff's direct, independent, firsthand knowledge. Because Plaintiffs had

failed to identify or describe any particular false claims that were presented to the government for payment, their fraud claims were dismissed for failure to satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b).

Plaintiffs' claims under the FCA for retaliatory discharge were similarly dismissed for failure to allege termination in retaliation for an investigation, inquiry or testimony directed at exposing a fraud on the government. The court held that Plaintiffs' actions, as described in their pleadings, were motivated by frustration at physicians who were ignoring their responsibility to supervise residents, at the peril of the residents and their patients, and by moral objections to falsifying records, rather than by a desire to expose a fraud on the government. While noting that such motives are commendable, the court held them insufficient to bring Plaintiffs' allegations within the FCA.

### Excluded Medicaid Provider Properly Terminated Under Employment Agreement with Hospital Where Services May Have Violated Medicaid Regulations

*William J. DeTorres III, M.D., P.C. v. Claxton-Hepburn Medical Center*, 65 A.D.3d 733, 883 N.Y.S.2d 659 (3d Dep't 2009). Claxton-Hepburn Medical Center (the "Medical Center") entered into a Hospitalist Physician Services Agreement (the "Agreement") with Plaintiff William J. DeTorres III, M.D., P.C. The Agreement required Dr. DeTorres to provide emergency medical services to patients who did not have an assigned physician or whose attending physicians were unavailable. The Agreement did not require Plaintiff to be a Medicaid provider, and the Medical Center was aware that Dr. DeTorres was excluded from participation in the Medicaid program.

After hiring Plaintiff, the Medical Center received a Medicaid publication which strongly advised against hiring excluded Medicaid providers. The Medical Center thereafter invoked a provision in the Agreement that permits termination of the Agreement "without liability, if on the advice of its counsel it determines in its reasonable judgment that the terms of the Agreement more likely than not may be interpreted to violate any present or proposed future law or regulation."

Plaintiff sued the Medical Center for breach of the Agreement, among other claims. The Appellate Division affirmed dismissal of the complaint. The court found that the Medicaid publication and a Medicaid regulation imposing sanctions against a provider for any involvement by an excluded person in the care of a Medicaid patient (*see* 18 NYCRR 515.5) constituted good cause for the Medical Center's counsel to determine, based upon its reasonable judgment, that the Agreement could be interpreted to violate a law or regulation.

In its finding for the Medical Center, the Court noted that, although the Agreement did not expressly require Plaintiff to provide medical treatment to Medicaid patients, and that the Medical Center could possibly have avoided a penalty by having Plaintiff serve only non-Medicaid patients, the Agreement clearly obligated Plaintiff to serve any unattended patients, regardless of whether such patients were Medicaid or non-Medicaid. Therefore, the prospect of such a violation constituted good cause and an objectively reasonable basis for the Medical Center to terminate the Agreement.

### Appellate Division Holds That a Voluntary Attending Physician Not Employed by a Hospital Cannot Recover for Alleged Retaliation Under New York Labor Law § 741

*Deshpande v. Medisys Health Network, Inc.*, 70 A.D.3d 760, 896 N.Y.S.2d 103 (2d Dep't 2010). Plaintiff, a physician member of the medical staff of the defendant hospital (the "Hospital"), alleged that the Hospital improperly curtailed his privileges in retaliation for his complaints about improper patient care provided by medical residents at the Hospital. Plaintiff sought damages from the Hospital and several Hospital-affiliated defendants (collectively, the "Hospital Defendants") for violation of New York Labor Law § 741, violation of New York common law public policy, and for alleged breach of an implied obligation-in-law of good faith and fair dealing. Plaintiff also sought relief against the Accreditation Council on Graduate Medical Education ("ACGME"), the entity that accredited the Hospital's internal residency program, for negligence and breach of its duty of proper accreditation and enforcement.

The Appellate Division affirmed the dismissal of Plaintiff's claims. Plaintiff could not recover under Labor Law § 741 (also known as New York's Health Care Whistleblower Law) because although he was previously employed by the Hospital, he was not an employee of the Hospital at the time the alleged retaliation occurred. Furthermore, the court held that dismissal was proper because Plaintiff had failed to cite a law, rule or regulation that he in good faith believed the Hospital had violated, as required under § 741.

The court also upheld the dismissal of Plaintiff's remaining claims against the Hospital Defendants because there is no common law cause of action for damages arising from a hospital's wrongful denial of staff privileges. Quoting *Lobel v. Maimonides Med. Ctr.*, 39 A.D.3d 275, 277, 835 N.Y.S.2d 28 (1st Dep't 2007), the court stated that "[W]here a cause of action is based upon an allegedly wrongful denial of hospital privileges, the aggrieved physician is limited to injunctive relief under Public Health Law § 2801-c and is barred by section 2801-b from maintaining an action for damages."

The court also upheld dismissal of Plaintiff's claim against ACGME. Plaintiff had failed to establish the existence of a contract between ACGME and the Hospital under which ACGME would be liable to Plaintiff as a third party.

### Appellate Division Affirms Dismissal of Nurse's Whistleblower Retaliation Claim Against Hospital Under New York Labor Law § 741, for Failure to cite a Law, Rule or Regulation That She in Good Faith Believed Had Been Violated

*Luiso v. Northern Westchester Hospital Center*, 65 A.D.3d 1296, 886 N.Y.S.2d 216 (2d Dep't 2009). Plaintiff, a nurse, brought this suit against her employer, a hospital, pursuant to New York Labor Law § 741, alleging that the hospital removed her from her management position in retaliation for her complaints about the quality of patient care at the hospital.

The Appellate Division upheld summary judgment dismissal of Plaintiff's claims. The court examined Labor Law § 741, which protects employees from retaliation when they disclose or threaten to disclose a "policy or practice…that the employee, in good faith, reasonably believes constitutes improper quality of patient care." N.Y. Lab. § 741(2)(a). "Improper quality of patient care" is defined as "any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law" and poses a danger to the health and safety of the public or a specific patient. Plaintiff could not recover under the statute because she was unable to cite any law, rule, regulation or declaratory ruling adopted pursuant to law that she in good faith believed to have been violated.

The court also held that the hospital had demonstrated that its decision to transfer Plaintiff from her management position in the operating room, without any reduction in pay or benefits, was based on her performance as a manager, rather than her complaints about quality of patient care. Notably, Plaintiff acknowledged that she had refused to support certain management policies and requests unrelated to the subject of the quality of patient care.

***[Ed. note—Garfunkel Wild, P.C. represented the defendants in the Luiso case.]***

### Removal of Physician from Participation in Workers' Compensation System Based on Physician's Failure to Maintain Accurate Records Annulled as Arbitrary and Capricious

*Matter of Liguori v. Beloten*, 26 Misc.3d 593, 888 N.Y.S.2d 737 (Sup. Ct. Albany Cty. 2009). Petitioner, a physician, brought an Article 78 proceeding to annul the New York State Workers' Compensation Board's (the "Board") removal of Petitioner as an eligible medical care provider within the workers' compensation system, due to a reprimand from the New York State Department of Health's Office of Professional Misconduct ("OPMC") for failure to maintain accurate records.

In an OPMC proceeding, Petitioner pled guilty by consent order to failure to maintain accurate records. Specifically, Petitioner was charged for his failure to maintain complete printouts of EEG tests. Petitioner was then subject to a censure and reprimand, among other things. However, Petitioner voluntarily took the further remedial step of purchasing expensive, more up-to-date equipment that would prevent the issue from recurring.

Despite this mitigating factor, and the facts that there were no allegations of patient mistreatment, and that Petitioner had an otherwise spotless record, the Board notified Petitioner that he was no longer eligible to "render medical care to individuals who have suffered work-related injuries or illnesses."

The court annulled the Board's determination as arbitrary and capricious. The court noted that the Board did not give any weight to the fact that Petitioner purchased special equipment in order to keep full records, that no patient care issue was involved, and that Petitioner had an otherwise spotless record.

Noting that Petitioner's removal would result in a 20% decrease in his practice, the court pointed out that "an agency cannot tack on to the prior findings and penalty given by another agency and then argue…that the court must examine their particular punishment in a vacuum, without giving any consideration to the cumulative and highly detrimental effects that both determinations had on an individual."

However, the court denied Petitioner's constitutional claims that his procedural due process rights were violated because his removal occurred without a hearing. The court held that the Board's actions had no impact on Petitioner's medical license and did not deprive Petitioner of any vested liberty interest requiring a notice and hearing.

### Limited Liability Companies May Be Convicted of Crimes Committed by Their Employees

*People of the State of New York v. Highgate LTC Management, LLC*, 69 A.D.3d 185, 887 N.Y.S.2d 298 (3d Dep't 2009). Highgate LTC Management ("Highgate"), a limited liability company ("LLC") that operated a rehabilitation and extended care facility, was convicted of willful violation of health laws and falsifying business records. Highgate appealed the conviction on the grounds that an LLC cannot be held criminally liable for the intentional acts of its employees committed within the scope of their employment, and that the doctrine of

*respondeat superior*—although specifically applicable to corporations under the Penal Law § 20.20—was not applicable to it because it is technically an LLC.

The Court unanimously upheld the conviction and found that an LLC may be convicted of intentional crimes committed by its employees under certain circumstances. Although Penal Law § 20.20 was not applicable to Highgate per se, the underlying principles of Penal Law § 20.20, upon which the indictment, jury instructions, and conviction were based, nonetheless applied to LLCs, which are legally similar entities to corporations in that they both operate only through their designated agents and employees.

In support of expanding the principles underlying Penal Law § 20.20 to LLCs, the Court cited to *United States v. A & P Trucking Co.*, 358 U.S. 121, 125-26 (1958), which held that "with regard to corporations *and other associations*,…such impersonal entities can be guilty of 'knowing' or 'willful' violations of regulatory schemes through the doctrine of *respondeat superior*." As the Supreme Court explained therein, "the treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." Thus, absent any distinction recognized by the United States Supreme Court between corporations and LLCs, the Court likewise found that Highgate, as an LLC, may be convicted of intentional crimes under the doctrine of *respondeat superior*.

Moreover, given the public interest at issue and the regulatory nature of the crimes committed, the Court found that there was no rational basis to exempt Highgate from criminal liability, particularly where a similar nursing home corporation would have been held accountable.

### Appellate Division Holds That Hospital Had Rational Basis for Suspension of Physician's Clinical Privileges Pursuant to Public Health Law § 2801-c

*Tabrizi v. Faxton-St. Luke's Health Care*, 66 A.D.3d 1421, 886 N.Y.S.2d 312 (4th Dep't 2009). Petitioner, a physician, sought an injunction under Public Health Law § 2801-c barring the Defendant hospital (the "Hospital") from suspending his clinical privileges.

The Appellate Division affirmed denial of the petition. The Appellate Division found that the Hospital had a rational basis for its suspension of Petitioner's clinical privileges, and that Petitioner had been afforded his full procedural rights pursuant to the Hospital's bylaws.

The Court noted that upon reviewing an application for an injunction pursuant to Public Health Law § 2801-c, the court's inquiry is limited to determining whether the purported grounds for suspending or restricting a physician's practice privileges were reasonably related to the institutional concerns set forth in the statute, whether they were based on the apparent facts as reasonably perceived by the administrators, and whether they were assigned in good faith. Here, the court found that the Hospital's reasons for suspending Petitioner's clinical privileges were properly related to the Hospital's concern for the safety of its patients. In addition, the Hospital's actions were undertaken in good faith, *i.e.*, in response to a telephone call from a physician affiliated with an insurance company who expressed concern over Petitioner's care of a patient insured by that company.

**Compiled by Leonard Rosenberg, Esq. Mr. Rosenberg is a partner in the firm of Garfunkel Wild, P.C., a full service health care firm representing hospitals, health care systems, physician group practices, individual practitioners, nursing homes and other health-related businesses and organizations. Mr. Rosenberg is Chair of the firm's litigation group, and his practice includes advising clients concerning general health care law issues and litigation, including medical staff and peer review issues, employment law, disability discrimination, defamation, contract, administrative and regulatory issues, professional discipline, and directors' and officers' liability claims.**

Reprinted with permission from the *Health Law Journal*, Spring 2010, published by the New York State Bar Association, One Elk Street, Albany, New York 12207. www.nysba.org