APL-2018-00167
Albany County Clerk's Index No. 776-16

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of

THE PLASTIC SURGERY GROUP, P.C.

Petitioner-Appellant,

against

THE COMPTROLLER OF
THE STATE OF NEW YORK,

Respondent-Respondent,

BRIEF OF AMICI CURIAE MEDICAL SOCIETY OF THE STATE OF NEW YORK AND THE NEW YORK STATE SOCIETY OF PLASTIC SURGEONS, INC. IN SUPPORT OF THE APPEAL OF THE PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

The amici curiae brief is submitted by The Medical Society of the State of New York ("MSSNY") and the New York State Society of Plastic Surgeons, Inc. ("NYSSPS") in support of the appeal by the Petitioner-Appellant, The Plastic Surgery Group, P.C.

MSSNY, a Not-For-Profit Corporation, was founded in 1807 and has approximately 20,000 physician, medical resident and medical student members throughout the State of New York. It is the principal professional organization in the State representing physicians of all specialties.

The MSSNY Mission Statement reads as follows:

> "To advance the health of the residents of our State by promoting a favorable environment for the practice of medicine through advocacy, education and professional community for New York State physicians." (Article 1, MSSNY By-Laws)

The following are subsidiaries or affiliates of MSSNY: Empire State Medical, Scientific and Education Foundation, Inc., and Medical Educational and Scientific Foundation of New York, Inc.

The NYSSPS is a Not-for-Profit Corporation founded in 2008. The mission of NYSSPS is to advance the quality of care for plastic surgery and to promote public policy that protects patient safety. NYSSPS was founded on the guiding principle that a professional organization is needed to advocate on behalf of the interests of plastic surgeons and their patients. NYSSPS has no subsidiary or affiliate organization.

PROCEDURAL HISTORY

In February 2016, the Comptroller of the State of New York commenced an audit of health insurance claims paid by United Healthcare in connection with the New York State Empire Plan to determine if United had overpaid Petitioner-Appellant for claims submitted between 2011 and 2015. The New York State Empire Plan is the primary health insurance plan for the New York State Health Insurance Program (NYSHIP), which provides health insurance coverage to government employees, retirees and their dependents. The Comptroller served a subpoena duces tecum that requested the production of patients' confidential medical records in connection with the audit. None of Petitioner-Appellant's patients whose records were sought in the subpoena provided authorization to the release of their medical records.

The Supreme Court, Albany County (Honorable Christina L. Ryba) in a Decision/Order entered on July 11, 2016 quashed the subpoena because it did not satisfy the requirements of CPLR 3122(a)(2), which provides as follows:

> "A medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a Court, requesting the production of a patient's medical records pursuant to this rule need not respond our object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served on a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the Court has issued the Subpoena or otherwise directed the production of the documents."

State Finance Law §9 which establishes the Comptroller's power to issue subpoenas, expressly states that any subpoena issued by the Comptroller is regulated by the CPLR. The statute, in relevant part states:

> "The comptroller, deputy comptroller and assistant deputy comptroller, or either of them, may issue a subpoena or subpoenas requiring a person or persons to appear before the comptroller, deputy comptroller or assistant deputy comptroller and be examined in reference to any matter within the scope of inquiry or investigation being conducted by the comptroller, and in a proper case, to bring with him, a book or paper. A subpoena issued under this section shall be regulated by the civil practice law and rules..."

By a decision issued on November 22, 2017, the Appellate Division, Third Department, in *Plastic Surgery Group, P.C. v. Comptroller of the State of New York,* 155 A.D. 3d 1417 (2017), by a 5-0 ruling, reversed the lower court's decision and held that the subpoena duces tecum was validly issued. The Third Department held that CPLR 3122(a)(1) and (2) "read together," are only applicable to subpoenas issued during the discovery stage of litigation, and not applicable to the subpoena issued by the Comptroller pursuant to his authority under Finance Law §9. This Court granted Petitioner-Appellant's motion for leave to appeal.

INTEREST OF MSSNY and NYSSPS

MSSNY and NYSSPS respectfully submit that the Third Department incorrectly decided that CPLR 3122(a)(2) does not apply to the subpoena duces tecum issued by the Comptroller. The Third Department's decision does not only impact the Petitioner-Appellant but will likely have a far-reaching impact on MSSNY's and NYSSPS's member physicians and their patients, and the medical community as a whole. The interests of the medical profession need to be considered and for this reason MSSNY and NYSSPS submit this amici curiae brief in support of the appeal of Petitioner-Appellant.

The question whether CPLR 3122(a)(2) applies to a subpoena duces tecum issued by the Comptroller to a medical provider seeking medical records is of critical importance to MSSNY and NYSSPS and their member physicians.

MSSNY and NYSSPS respectfully urge this Court to reverse the decision of the Third Department and hold that the subpoena duces tecum issued by the Comptroller should be quashed because the subpoena was not accompanied by the patients' written authorization as required by CPLR 3122(a)(2).

QUESTION PRESENTED

Does the plain language of CPLR 3122 (a)(2) and Finance Law §9 read together require that a subpoena duces tecum issued by the Comptroller to a medical provider requesting a patient's medical records must be accompanied by the patient's written authorization?

The Third Department answered the question in the negative.

ARGUMENT

The New York State legislature has declared that it is the public policy of this State to protect the privacy and confidentiality of sensitive medical information. CPLR 3122 (a)(2) was enacted to advance and promote the State's public policy to protect the confidentiality of patient medical information, and MSSNY and NYSSPS respectfully submit that it is contrary to the State's established public policy to construe CPLR 3122 (a)(2) in such an unduly narrow manner that it only applies to subpoenas issued during the discovery phase in litigation. MSSNY and NYSSPS believe that CPLR 3122 (a)(2) should be given a "broad and liberal construction" to carry out the State public policy to protect the privacy and confidentiality of medical records. The physician-patient privilege is codified at CPLR 4504. The statute provides that "(u)nless the patient waives the privilege, a person authorized to practice medicine... shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

This Court stated in *Matter of Grand Jury Investigation of Onondaga County*, 59 N.Y.2d 130 (1983) that the physician-patient privilege is to be construed in accordance with its purpose – "to encourage full disclosure by the patient so that he can secure appropriate treatment from the physician" and is to be given "a broad and liberal construction to carry out its policy" (citations omitted) 59 N.Y.2d at 134.

This Court has recognized that although the privilege belongs to the patient, it may be asserted by the physician for the protection of patients. 59 N.Y.2d at 135. Physicians have a legal and ethical responsibility to protect patient privacy and the physician-patient relationship because the protection of patient privacy is necessary for effective medical treatment.

This Court further elaborated in *Chanko v. American Broadcasting Companies, Inc. 27* N.Y.3d 46 (2016) that the physician-patient privilege serves the following policy objectives of the State:

> "(1) maximize unfettered communication between patients and medical professionals, so that people will not be deterred by possible public disclosure 'from seeking medical help and securing adequate diagnosis and treatment'; (2) encourage physicians to candidly record confidential information in medical records, so that they are not torn between the legal duty to testify and the professional obligation to honor patient confidences; and (3) protect the reasonable privacy expectations of patients that their sensitive personal information will not be disclosed" (citation omitted) 27 N.Y.3rd at 52.

This Court stated "Even apart from CPLR 4504, the legislature has declared that it is the public policy of this State to protect the 'privacy and confidentiality of sensitive medical information'." (citation omitted) 27 N.Y.3d at 53.

CPLR 3122(a)(2) was enacted to serve the same public policy that CPLR 4504 is intended to serve, and like CPLR 4504 "should be given a broad and liberal construction to carry out its policy." Similar to CPLR 4504, CPLR 3122(a)(2) is intended to "maximize unfettered communication between patients and medical professionals," "encourage physicians to candidly record confidential information and medical records" and other policy objectives articulated by this Court in *Chanko*.

However, the Third Department followed an unduly narrow and restricted construction of CPLR 3122(a)(2) in stating that when read together with CPLR 3122(a)(1), CPLR 3122(a)(2) only applies to subpoenas issued during the discovery stage of litigation. Such a narrow construction by the Third Department will unavoidably chill communications between physicians and their patients who receive care through the State Empire Plan. If this occurs, it will seriously and adversely affect quality care of patients. Patients who receive coverage for health care services through the State Empire Plan, like all patients, need their medical privacy to be protected, and are entitled to the protection of CPLR 3122(a)(2).

CPLR 3122 subsection (a) is composed of two separate and distinct subdivisions. There is nothing in the language of CPLR 3122 (a) that provides that subdivision 1 and 2 are to be read together or that subdivision 2 is limited by subdivision 1. Subdivision 1 refers to CPLR 3120 and 3121. Both CPLR 3120 and 3121 are prefaced by the words "after commencement of an action." In contrast to CPLR 3122 (a)(1), CPLR 3122 (a)(2) does not refer to CPLR 3120 or 3121, and, accordingly, its provisions are not limited by the term "after commencement of an action." Rather, CPLR 3122 (a)(2) should be construed as standing by itself and apart from CPLR 3122 (a)(1).

The legislative history of CPLR 3122 (a) provides evidence that CPLR 3122 (a)(1) and CPLR 3122 (a)(2) are intended to be separate and apart from each other. Prior to the enactment of chapter 307 of the laws of 2011, subdivision (a) of CPLR 3122 consisted of one paragraph, which read:

> "(a) within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified. A medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena of the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous boldfaced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient. The party seeking disclosure under Rule 3120 or Section 3121 may move for an order under Rule 3124 or Section 2308 with respect to any objection to, or other failure to respond or permit inspection as requested by, the notice or subpoena deuces tecum, respectively, hereof."

As a result of chapter 307 of the laws of 2011, subdivision (a) was separated into two distinct paragraphs. Paragraph (1) refers to CPLR 3120 and 3121. Paragraph 2, the construction of which is the focus of the appeal, is written in general terms and makes no reference to, and is not limited by, CPLR 3120 or 3121.

It is respectfully submitted that because the legislature chose to separate subdivision (a) of CPLR 3122 into two separate and distinct paragraphs, then each paragraph must be read and construed separately. If CPLR 3122 (a)(2) is read

separately, as it should, then CPLR 3122 (a)(2) would not be construed in such an unduly narrow manner that it would solely apply to subpoenas issued during the discovery stage of litigation.

It is respectfully submitted that the Third Department committed error in finding that CPLR 3122 (a)(2) had to be read together with CPLR 3122 (a)(1). Rather, the Third Department should have read CPLR 3122 (a)(2) as standing on its own, and the fact that the legislature chose to create two separate and distinct paragraphs where there was previously one demonstrates the legislative intent that each paragraph must be read and construed separately. The fact that the Third Department chose to read 3122(a)(1) and 3122(a)(2) together where the legislature chose to separate 3122(a) into separate and distinct paragraphs 3122(a)(1) and 3122(a)(2) underscores the error of the Third Department.

State Finance Law §9 provides that a subpoena issued by the Comptroller shall be regulated by the CPLR. A proper construction of CPLR 3122 (a)(2) should lead to the conclusion that the subpoena duces tecum issued by the Comptroller is regulated by CPLR 3122 (a)(2).

CONCLUSION

It is respectfully urged that this Court reverse the decision of the Third Department and hold that the subpoena duces tecum issued by the Comptroller should be quashed because the subpoena was not accompanied by the patients' written authorization as required by CPLR 3122(a)(2).

Dated: Great Neck, New York
November 29, 2018

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STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of	
THE PLASTIC SURGERY GROUP, P.C.,	AFFIDAVIT OF SERVICE
Petitioner-Appellant, -against-	Albany County Clerk's Index No.: 776/2016
THE COMPTROLLER OF THE STATE OF NEW YORK,	APL-2018-00167
Respondent-Respondent.	

Lauren Drucker, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides in the State of New York. That on the 29th day of November, 2018, deponent served the within Brief of Amici Curiae Medical Society of the State of New York and The New York State Society of Plastic Surgeons, Inc. in Support of the Appeal of the Petitioner-Appellant dated November 29, 2018, upon:

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Lauren Drucker

Sworn to before me this
29th day of November, 2018.

Notary Public

BARBARA R. BALESTRIERI
Notary Public, State of New York
No. 01BA5057826
Qualifies in Nassau County
Commission Expires 3/25/2022

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