

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2430-07T3

JOSEPH GARCIA, M.D.; JEFFREY  
GINSBURG, M.D.; KEVIN KEARNEY,  
M.D.; MARC KITROSSER, D.P.M.;  
KENNETH REMSEN, M.D.; HOWARD  
TAYLOR, M.D.; ROBERT BAZZINI,  
M.D.; JOHN CECE, M.D.; MICHAEL  
D'ANTON, M.D.; SHARON LI, M.D.;  
WILLIAM MATARESE, M.D.; LAWRENCE  
PIZZO, M.D.; ABAS REZVANI, M.D.;  
JOHN SANZONE, M.D.; JOHN  
SCHEIBELHOFFER, M.D.; BURTON  
SCHLECKER, M.D.; KENNETH GARRETT,  
M.D.; CLIFFORD GORDON, M.D.;  
JEANAE MAZZONE, D.O.; LEONARD  
NICOSIA, M.D.; ROBERT SCHLIEN,  
M.D.; LISA STEVENS, M.D.; and  
ARTHUR SUFFIN, M.D.,

Plaintiffs-Respondents,

v.

HEALTH NET OF NEW JERSEY, INC.,

Defendant/Third-Party  
Plaintiff-Appellant,

v.

WAYNE SURGICAL CENTER, LLC;  
JOSEPH BARATTA, M.D.; BRUCE  
CALIGARO, D.P.M.; ENDOSCOPY  
GROUP, LLC; RAMTIN KASSIR,  
M.D.; WILLIAM MATARESE, M.D.;  
LAWRENCE PIZZO, M.D.; ABAS  
REZVANI, M.D.; JOSEPH TARTA,  
M.D.; ALAN WASSERSTRUM, M.D.;  
WAYNE GYNECOLOGICAL SURGEONS,

LLC; and WSCAG INVESTMENT  
GROUP, LLC,

Third-Party Defendants-  
Respondents.

---

Argued October 5, 2009 – Decided November 17, 2009

Before Judges Rodríguez, Yannotti and  
Chambers.

On appeal from the Superior Court of New  
Jersey, Chancery Division, Bergen County,  
Docket No. C-37-06.

Robert A. White argued the cause for  
appellant Health Net of New Jersey, Inc.  
(Morgan, Lewis & Bockius, L.L.P., attorneys;  
Mr. White and Daniel E. Orr, on the briefs).

Thomas A. Gentile argued the cause for  
respondents Robert Bazzini, M.D., John Cece,  
M.D., Michael D'Anton, M.D., Sharon Li,  
M.D., John Sanzone, M.D., John  
Scheibelhoffer, M.D., Burton Schlecker,  
M.D., Clifford Gordon, M.D., Jeanae Mazzone,  
D.O., Leonard Nicosia, M.D., Kenneth Garrett,  
M.D., Robert Schlien, M.D., Lisa Stevens,  
M.D., and Arthur Suffin, M.D. and  
respondents Wayne Surgical Center, LLC,  
Joseph Baratta, M.D., Bruce Caligaro,  
D.P.M., Endoscopy Group, LLC, Ramtin Kassir,  
M.D., William Matarese, M.D., Abas Rezvani,  
M.D., Joseph Tarta, M.D., Alan Wasserstrum,  
M.D., Wayne Gynecological Surgeons, LLC, and  
WSCAG Investment Group, LLC (Lampf, Lipkind,  
Prupis & Petigrow, attorneys; Mr. Gentile and  
Neil L. Prupis, of counsel; Mr. Gentile, on  
the joint brief).

Bruce H. Nagel argued the cause for  
respondents Joseph Garcia, M.D., Jeffrey  
Ginsburg, M.D., Kevin Kearney, M.D., Marc

Kitrosser, D.P.M., Kenneth Remsen, M.D., and Howard Taylor, M.D. (Nagel Rice, L.L.P. attorneys; Mr. Nagel, on the brief).

Jennifer E. Fradel argued the cause for amicus curiae State of New Jersey (Anne Milgram, Attorney General, attorney; Melissa H. Raksa, Deputy Attorney General, of counsel; Ms. Fradel and John C. Grady, Deputy Attorney General, on the brief).

Boies, Schiller & Flexner, L.L.P., attorneys for amicus curiae The Medical Society of New Jersey and The American Medical Association (David S. Stone, Eric H. Jaso, and Jason C. Spiro, on the brief).

Pringle Quinn Anzano, P.C., attorneys for amicus curiae Insurance Counsel of New Jersey and Property Casualty Insurers Association of America (Paul Anzano and Lisa Levine, on the brief).

Wardell, Craig, Annin & Baxter, L.L.P., attorneys for amicus curiae New Jersey Association of Health Plans (Edward S. Wardell and Christine S. Orlando, on the brief).

#### PER CURIAM

Health Net of New Jersey, Inc. (Health Net) appeals from an order entered by the trial court on December 11, 2007, which granted summary judgment in favor of plaintiffs and third-party defendants on Health Net's claims against them, and denied its motion for summary judgment on those claims. We affirm.

The relevant facts are essentially undisputed. Wayne Surgical Center (WSC) is an ambulatory surgical center licensed by the New Jersey Department of Health and Senior Services. WSC

is owned by physicians who perform procedures there on patients from the physicians' private practices. Health Net provides health insurance coverage to the physicians' patients. The physicians contracted with Health Net to provide services as part of its network; however, WSC is not part of Health Net's network of health care providers.

Health Net receives at least two insurance claims when one of its subscribers undergoes surgery at WSC. The first is a claim by the treating physician for his or her professional fees. The other is a claim by WSC for its facility fees. Since WSC is not part of the Health Net network, the subscriber is responsible for payment of "co-insurance," which is a percentage of WSC's charge.

Before undergoing surgery at WSC, each patient is required to sign a form stating that he or she is "fully responsible for 100 percent of [the center's] charge." It was, however, WSC's practice to waive the co-insurance obligation for most patients. WSC only pursued payment of co-insurance when a patient was directly reimbursed for WSC's facility charge but failed to turn over the money received to WSC.

Plaintiffs are physicians with ownership interests in WSC. In January 2006, they filed a complaint against Health Net alleging that it had unlawfully refused to renew their contracts

to provide health care services as part of its insurance network. In February 2006, Health Net filed a counterclaim against plaintiffs and a third-party complaint against WSC and other physician-owners of WSC, in which it asserted claims under the Insurance Fraud Prevention Act (IFPA), N.J.S.A. 17:33A-1 to -30, as well as claims for breach of the implied covenant of good faith and fair dealing, unjust enrichment and tortious interference with Health Net's subscriber contracts.

Thereafter, the parties filed cross-motions for summary judgment. The trial court filed a written opinion dated November 20, 2007, and corrected on November 21, 2007, in which it determined that plaintiffs and third-party defendants were entitled to summary judgment on the claims asserted against them, and Health Net was not entitled to summary judgment on its claims. The court filed another opinion dated November 30, 2007, finding that summary judgment should be granted to Health Net on plaintiffs' claims. The court entered an order dated December 11, 2007, memorializing its decisions on the motions.

This appeal followed. We granted motions to appear as amicus curiae by the Medical Society of New Jersey and the American Medical Association; the New Jersey Association of Health Plans; the Insurance Council of New Jersey and Property

Casualty Insurers Association of America; and the State of New Jersey.

On appeal, Health Net raises the following issues for our consideration: 1) the trial court applied an "erroneous knowledge" standard to the IFPA claims; 2) the trial court erred by holding that insurance claims of a provider who waives payment of co-insurance do not misrepresent the provider's charges; 3) and the trial court erroneously granted summary judgment to plaintiffs and third-party defendants on its common law claims.

Having thoroughly reviewed the record and the legal arguments presented by the parties and amici, we conclude that Health Net's appeal is without merit. We accordingly affirm the order granting summary judgment to plaintiffs and third-party defendants substantially for the reasons stated by Judge Robert P. Contillo in his thorough and comprehensive opinion. We add the following comments.

In this matter, Health Net alleged that plaintiffs and third-party defendants violated the IFPA because they knowingly submitted claims that were false and misleading. Health Net maintained that submission of the claims violated the IFPA because the referrals by plaintiffs and third-party defendants of their patients to WSC violated the provisions of the so-

called "Codey Law" that were in effect at the time the referrals were made. Health Net also alleged that plaintiffs and third-party defendants violated the IFPA by submitting claims that did not disclose that WSC waived payment of co-insurance by Health Net's subscribers.

The trial court found that there were no genuine issues of material fact and plaintiffs and third-party defendants were entitled to judgment on the IFPA claims as a matter of law. The trial court held that WSC and its physician-owners did not submit claims to Health Net knowing that they were false and misleading. Health Net argues that, in reaching these conclusions, the trial court applied an erroneous knowledge standard to the IFPA. We disagree.

The IFPA provides in pertinent part that an individual violates that act if he

(1) [p]resents or causes to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy . . . knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim[.]

[N.J.S.A. 17:33A-4(a)(1).]

The IFPA does not define the term "knowing." Therefore, we must interpret the statutory language in light of its ordinary meaning. DiProspero v. Penn, 183 N.J. 477, 492 (2005). The term

"knowing" generally means "showing awareness of; understanding; [or] well informed." Black's Law Dictionary 888 (8<sup>th</sup> ed. 2004).

Here, the trial court found that when the physicians referred their patients to WSC, the Codey Law barred such referrals. At the time the referrals were made, the Codey Law provided that:

[a] practitioner shall not refer a patient or direct an employee of a practitioner to refer a patient to a health care service in which the practitioner, or the practitioner's immediate family, or the practitioner in combination with practitioner's immediate family has a significant beneficial interest; except that in the case of a practitioner, a practitioner's immediate family or a practitioner in combination with the practitioner's immediate family who had the significant beneficial interest prior to the effective date of P.L. 1991, c. 187, the practitioner may continue to refer a patient or direct an employee to do so if that practitioner discloses the significant beneficial interest to the patient.

[N.J.S.A. 45:9-22.5.]

A "significant beneficial interest" means "any financial interest" except ownership of a building that is leased to another and publicly traded securities. N.J.S.A. 45:9-22.4. The term "health care service" includes facilities that provide ambulatory surgery. N.J.S.A. 45:9-22.4.

The trial court determined, however, that a reasonable fact finder could not conclude that WSC's physician-owners acted with



knowledge of illegality when they submitted their claims to Health Net. The court noted that the Executive Committee of the New Jersey State Board of Medical Examiners had issued an advisory opinion dated November 12, 1997, in which it concluded that a physician's referral of patients to an ambulatory surgical center in which the physician had a financial interest was permissible because the center was jointly owned by a hospital and the facility fees derived from the center were nominal in relation to the professional services fee.

The trial court found that the advisory opinion was inconsistent with the plain language of the Codey Law but determined that the opinion provided WSC's physician-owners with a reasonable basis to believe that the referrals of their patients to WSC were lawful. In further support of that finding, the trial court pointed out that WSC's ownership structure had not been hidden, there was a lack of clear guidance from the regulatory agencies as to the application of the Codey Law to ambulatory surgery centers, and WSC's ownership structure was typical of the ownership structures of such facilities.

The trial court additionally determined that WSC and its physician-owners did not violate the IFPA because they failed to disclose that they waived collection of co-insurance due on WSC's facility charge. The court noted that WSC had all of its

patients sign agreements in which they agreed to pay co-insurance and elected in most instances not to collect this money. The court observed that, at the time WSC submitted its claims to Health Net, it did not know whether it would enforce the subscriber's agreement to pay co-insurance. The court found that the practice was not unlawful and WSC and its physician-owners did not knowingly submit false and misleading claims by failing to disclose the practice.

In our judgment, the trial court's decision does not represent the application of an erroneous knowledge standard to IFP claims. Here, the trial court did not require Health Net to show an intent to deceive. See State v. Nasir, 355 N.J. Super. 96, 106 (App. Div. 2002) (holding that IFPA does not require proof of an intent to deceive), certif. denied, 175 N.J. 549 (2003). Rather, the court determined that Health Net failed to establish that plaintiffs and third-party defendants submitted claims knowing that they were false and misleading, as required by N.J.S.A. 17:33A-4(a)(1). Thus, the trial court applied the knowledge standard drawn from the plain language of the IFPA.

Health Net and the State argue, however, that the trial court's decision is inconsistent with Open MRI of Morris & Essex, L.P. v. Frieri, 405 N.J. Super. 576 (App. Div. 2009). We disagree. In that case, two insurers asserted a claim under the

IFPA against Open MRI of Morris & Essex, alleging that the facility had submitted insurance claims for MRI services which it was not licensed to perform. Id. at 582. We held that summary judgment was warranted on the IFPA claim because the facility had twice been informed that it required a license to operate but it had operated without a license "solely for economic reasons." Id. at 584.

We also stated that that the facility was charged with notice of the license requirement, observing that

"[a] belief, even a good faith belief, that one is performing these services in a reasonable or otherwise sound manner is not a defense. As a matter of law, entities wishing to engage in a highly regulated business which directly impacts upon the safety and welfare of the public, such as the delivery of health care, are constructively on notice of the existence of legal requirements governing its practice and operations. Those who, nonetheless, venture forth without first obtaining the required governmental approvals, whether out of ignorance or arrogance, do so at their own risk and must face the legal consequences for their actions. Sound public policy can accept no lesser standard."

[Ibid. (quoting Material Damage Adj. Corp. v. Open MRI of Fairview, 352 N.J. Super. 216, 227 (Law Div. 2002)).]


This case is significantly different from Fieri. There, the licensed facility provided health care services notwithstanding a clear and unequivocal directive from the regulatory agency

mandating compliance with the statutory licensing requirement. By contrast, in this case, the physicians had a reasonable basis to believe that the referrals of their patients to WSC was lawful.<sup>1</sup> Furthermore, there was no statute, regulation or regulatory directive from any licensing agency barring the waiver of a contractual right to collect co-insurance. Thus, as indicated in Fieri, there may be cases in which knowledge of illegality may be imputed to an entity operating in a highly-regulated industry. This is not such a case.

We have considered the other contentions raised by Health Net and find them to be of insufficient merit to warrant comment in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

---

<sup>1</sup> We note that the Codey Law was amended by L. 2009, c. 24, to permit under certain circumstances the referral of patients to ambulatory surgical centers in which the referring practitioner has a financial interest. The amendment applies retroactively to certain referrals made prior to its effective date. N.J.S.A. 45:9-22.5a(a). Plaintiffs and third-party defendants argue that the enactment of this amendatory legislation retroactively authorized the referrals at issue here. We have determined that even if the Codey Law barred the referrals at the time they were made, WCS and its physician-owners did not submit insurance claims knowing that they were false and misleading. Therefore, we need not address this issue.