Byrne v. Avery Center for Obstetrics and Gynecology, P.C., 327 Conn. 540 (2018): Yes, You Can Sue Your Health Care Provider If It Discloses Your Medical Records to Your Ex

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Given the all-too-common reports of data breaches, you may have wondered what recourse you have if you are one of the unlucky souls whose confidential information becomes public. The Connecticut Supreme Court explored this issue as it relates to improper disclosures by health care providers in *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.,* 327 Conn. 540 (2018).

The substantive facts of *Byrne* are pretty straightforward. During the time the plaintiff lived in Connecticut, she had a doctor-patient relationship with the defendant. As part of that relationship, the defendant provided the plaintiff with notice of its privacy policy regarding confidential health information and promised that it would not disclose the plaintiff's information without her authorization.

While a patient of the defendant, the plaintiff had a personal relationship with Andro Mendoza. The plaintiff instructed the defendant not to release her medical records to Mendoza. Eventually, the plaintiff moved to Vermont.

A few months after the plaintiff moved, Mendoza filed paternity actions against her in Vermont and Connecticut. Shortly thereafter, the defendant received a subpoena instructing it to appear at the New Haven Regional Children's Probate Court and to produce "all medical records" regarding the plaintiff. Rather than file a motion to quash the subpoena, appear in court, or even notify the plaintiff, the defendant simply mailed a copy of the plaintiff's medical file to the court. A few months later, Mendoza informed the plaintiff that he had reviewed her medical records in the court file. Mendoza also "utilized the information contained within [the plaintiff's medical] records to file numerous civil actions, including paternity and visitation actions, against the plaintiff, her attorney, her father, and her father's employer, and to threaten her with criminal charges."

Byrne's procedural facts are a little more complicated. In 2007, the plaintiff sued the defendant alleging numerous causes of action. The complaint included one count of negligence and one count of negligent infliction of emotional distress. The trial court granted summary judgment in favor of the defendant on these claims because it concluded that the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which sets forth fines and imprisonment as sanctions for the improper disclosure of medical information by health care providers, preempts any cause of action that addresses the privacy of medical information. In a 2014 ruling, the Connecticut Supreme Court reversed the trial court judgement after concluding that the plaintiff's claims were not preempted by HIPPA. The Supreme Court, however, reserved judgment on whether Connecticut common law provides a remedy for a health care provider's disclosure of confidential patient records. It then remanded the matter to the trial court. *Byrne v. Avery Center for Obstetrics and Gynecology, P.C,* 314 Conn. 433 (2014).

On remand, the defendant again moved for summary judgment, this time arguing, among other things, that Connecticut does not recognize a cause of action against a health care provider for breach of its duty of confidentiality. After determining that no Connecticut court previously had recognized a common law duty of confidenti-

ality regarding patient-physician communications, the trial court agreed with the defendant and granted its motion for summary judgment. The plaintiff once again appealed.

The Supreme Court, in an opinion authored by Justice Eveleigh and joined by Chief Justice Rogers and Justices Palmer, McDonald, Robinson, and D'Auria, agreed with the plaintiff that "a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information obtained in the course of that relationship for the purpose of treatment gives rise to a cause of action sounding in tort against the health care provider, unless the disclosure is otherwise allowed by law." In reaching this conclusion, the court began by explaining that one of the primary factors that the court uses when deciding whether to adopt a new common law cause of action is "whether existing [judicial] remedies are sufficient to compensate those who seek the recognition of a new cause of action...." Regarding the disclosure of medical records, no such remedy exists pursuant to statute, although the General Assembly recognized the importance of confidentiality in the doctor-patient relationship by enacting General Statutes § 52-146o, which creates an evidentiary privilege arising from that relationship. Similarly, no remedy exists pursuant to federal law, although by enacting HIPPA, Congress recognized the importance of the confidentiality of medical information. In fact, the *Byrne* Court viewed HIPPA—notwithstanding its failure to set forth a means for victim compensation—as supporting the adoption of a common law cause of action because doing so would support HIPPA's goals "by establishing another disincentive to wrongfully disclose a patient's health care record."

Having concluded that existing judicial remedies did not offer sufficient protection, the court next examined how sister states have resolved the issue. The court concluded that this research also supported the adoption of the plaintiff's proposed common law rule as a majority of jurisdictions to address the issue—including New York and Massachusetts—have recognized a common law cause of action for breach of the duty of confidentiality of medical records by a health care provider. Based on state, federal, and sister state law, the court decided that a patient should have a civil remedy against a health care provider for the unauthorized disclosure of confidential information "unless the disclosure is otherwise allowed by law."

But what about the fact that the defendant in this case had disclosed the plaintiff's records in response to a subpoena? Shouldn't that at least fall within the "otherwise allowed by law" exception? Not under the facts of this case. Although General Statutes § 52-146o(b) provide that a patient's consent is not required for disclosure "pursuant to any statute or regulation...or the rules of court," a subpoena, without a court order, is not a "rule of court." Moreover, the court pointed out that the defendant, by simply mailing the plaintiff's confidential medical records to the court, "did not even comply with the face of the subpoena, which required the custodian of records for the defendant to appear in person before the attorney who issued the subpoena." Nor had the defendant complied with regulations promulgated under HIPPA, which permit the disclosure of records pursuant to a subpoena but "only if the patient has received adequate notice of the request or a qualified protective order has been sought." Because there existed a genuine issue of material fact regarding whether the defendant had violated the duty of confidentiality it owed the plaintiff, the court again remanded the case to the trial court.

Although he joined in the majority opinion, Justice Robinson filed a separate concurrence. In it, he referred to another recent decision in which the court had recognized a new common law cause of action: *Campos v. Coleman,* 319 Conn. 36 (2015) (adopting common law cause of action for minor child's loss of parental consortium). In *Campos,* a four member majority of the court overruled *Mendillo v. Board of Education,* 246 Conn. 456 (1998)—a 17-year-old decision in which the court had concluded that it was up to the legislature, and not the court, to recognize a parental loss of consortium cause of action. Justice Robinson, who had joined Justice Zarella's dissenting opinion in *Campos,* explained that, although he agreed that "a duty of confidentiality arises from the physician-patient relationship and that unauthorized disclosure of confidential information...gives rise to a cause of action sounding in tort," he thought it important to "emphasize [his] continuing reticence to recognize new causes of action under Connecticut's common law insofar as it is not the duty of this court to make law." Justice Robinson explained that the cause of action at issue in *Byrne,* however, was different in several material respects from that at issue in *Campos,* including: (1) there was no contrary precedent on point, which meant that the court's recognition of the cause of action would "not disturb the settled expectations" of those potentially affected by it; (2) permitting the claim "complement[ed]" both federal (HIPPA) and state (General Statutes § 52-146o) law; and (3) there exists "extremely broad support" among Connecticut's sister states for recognition of the cause of action at issue in *Byrne.*

So what do we think? It's hard to argue that a person whose doctor improperly disclosed her medical records to her ex-boyfriend should not have her day in court. Indeed, that an administrative agency might impose a fine provides little solace for the victim of such an egregious breach of trust, and the lack of a "real" remedy could have a chilling effect on patients' willingness to disclose critical health care information to their providers. And though we certainly were skeptical of the majority opinion in *Campos;* see "*Campos v. Coleman,* 319 Conn. 36 (2015): Defining the Court's Role," *Connecticut Lawyer*, Vol. 26, No. 4 (Dec. 2015/Jan. 2016), pp. 30–31, 36; we agree with Justice Robinson that the fact that the *Byrne* Court was writing on a blank slate is a critical difference. **CL**