FBT-CV07-6001633 S	SUPERIOR COURT
EMILY BYRNE	JUDICIAL DISTRICT OF FAIRFIELD
VS.	AT BRIDGEPORT
AVERY CENTER FOR OBSTETRICS AND GYNECOLOGY, P.C.	AUGUST 3, 2015

MEMORANDUM OF DECISION
MOTION FOR SUMMARY JUDGMENT

This matter has been returned to the trial court following our Supreme Court's decision in *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 314 Conn. 433 (2014).[1] This case involves a claim of an alleged improper release of the plaintiff's medical records by the defendant, where the plaintiff claims, that as a result, she sustained emotional distress. The release of said medical records by the defendant was pursuant to a subpoena on or about July 12, 2005. The plaintiff commenced this current action by way of a summons and complaint dated October 2, 2007. Thereafter, the plaintiff filed a substitute complaint on June 17, 2008. This substitute complaint is the operative complaint, and it is the subject of this motion for summary judgment.

In its decision in *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 436-442, our Supreme Court recited the undisputed facts and procedural history as found by the trial court. See. *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, Superior Court,

An appeal was filed by the plaintiff at the Appellate Court. Thereafter, it was transferred to the Connecticut Supreme Court.

judicial district of Fairfield at Bridgeport, Docket No. FBT-CV07-6001633 S (April 7, 2011, Gilardi, J.)

> "Before July 12, 2005, the defendant provided the plaintiff [with] gynecological and obstetrical care and treatment. The defendant provided its patients, including the plaintiff, with notice of its privacy policy regarding protected health information and agreed, based on this policy and on law, that it would not disclose the plaintiff's health information without her authorization.
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> In May, 2004, the plaintiff began a personal relationship with Andro Mendoza, which lasted until September, 2004 . . . . In October, 2004, she instructed the defendant not to release her medical records to Mendoza. In March, 2005, she moved from Connecticut to Vermont where she presently lives. On May 31, 2005, Mendoza filed paternity actions against the plaintiff in Connecticut and Vermont. Thereafter, the defendant was served with a subpoena requesting its presence together with the plaintiff's medical records at the New Haven Regional Children's [Probate Court] on July 12, 2005. The defendant did not alert the plaintiff of the subpoena, file a motion to quash it or appear in court. Rather, the defendant mailed a copy of the plaintiff's medical file to the court around July 12, 2005. In September, 2005, '[Mendoza] informed [the] plaintiff by telephone that he reviewed [the] plaintiff's medical file in the court file.' On September 15, 2005, the plaintiff filed a motion to seal her medical file, which was granted. The plaintiff alleges that she suffered harassment and extortion threats from Mendoza since he viewed her medical records.
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> The plaintiff subsequently brought this action against the defendant. Specifically, the operative complaint in the present case alleges that the defendant: (1) breached its contract with her when it violated its privacy policy by disclosing her protected health information without authorization; (2) acted negligently by failing to use proper and reasonable care in protecting her medical file, including disclosing it without authorization in violation of General Statutes § 52-146o and the department's regulations implementing HIPAA;(3) made a negligent misrepresentation, upon which the plaintiff relied to her detriment, that her medical file and the privacy of her health information would be protected in accordance with the law; and (4) engaged in conduct constituting negligent infliction of emotional distress. After discovery, the parties filed cross motions for summary judgment.

With respect to the plaintiff's negligence based claims in counts two and four of the complaint, the trial court agreed with the defendant's contention that HIPAA preempts any action dealing with confidentiality/privacy of medical information, which prompted the court to treat the summary judgment motion as one seeking dismissal for lack of subject matter jurisdiction. In its memorandum of decision, the trial court first considered the plaintiff's negligence claims founded on the violations of the regulations implementing HIPAA. The court first observed the well settled proposition that HIPAA does not create a private right of action, requiring claims of violations instead to be raised through the department's administrative channels. . . .

The trial court then relied The trial court then relied on Fisher v. Yale University, Superior Court, judicial district of New Haven, Complex Litigation Docket, Docket No. X10-CV-04-4003207-S (April 3, 2006), and Meade v. Orthopedic Associates of Windham County, Superior Court, judicial district of Windham, Docket No. CV-06-4005043-S (December 27, 2007), rejected the plaintiff's claim that she had not utilized HIPAA as the basis of her cause of action, but rather, relied on it as evidence of the appropriate standard of care for claims brought under state law, namely, negligence. Emphasizing that the courts cannot supply a private right of action that the legislature intentionally had omitted, the trial court noted that the plaintiff has labeled her claims as negligence claims, but this does not change their essential nature. They are HIPAA claims. The trial court further determined that the plaintiff's statutory negligence claims founded on a violation of § 52-146o were similarly preempted because the state statute had been superseded by HIPAA, and thus the plaintiff's state statutory claim amount[ed] to a claim for a HIPAA violation, a claim for which there is no private right of action.

The trial court concluded similarly with respect to the plaintiff's common-law negligence claims, observing that, under the regulatory definitions implementing HIPAA's preemption provision; see 42 U.S.C. § 1320d-7 (a); 45 C.F.R. § 160.202 (2004); to the extent that common-law negligence permits a private right of action for claims that amount to HIPAA violations, it is a contrary provision of law and subject to HIPAA's preemption rule. Because it is not more stringent, according to the definition of 45 C.F.R. § 160.202, the preemption exception does not apply. For the same reasons, the trial court dismissed count four of the complaint, claiming negligent infliction of emotional distress.

> With respect to the remainder of the pending motions, the trial court first denied, on the basis of its previous preemption determinations, the plaintiff's motion for summary judgment, which had claimed that the defendant's conduct in responding to the subpoena violated the HIPAA regulations, specifically 45 C.F.R. § 164.512 (e), as a matter of law. The trial court denied, however, the defendant's motion for summary judgment with respect to the remaining counts of the complaint, namely, count one alleging breach of contract and count three alleging negligent misrepresentation, determining that genuine issues of material fact existed with respect to contract formation through the defendant's privacy policy, and whether the plaintiff had received and relied upon that policy. Thus, the trial court denied the defendant's motion for summary judgment as to counts one and three of the complaint, and dismissed counts two and four of the complaint for lack of subject matter jurisdiction. This appeal followed."

(Internal citations and internal quotation marks omitted.) *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 436-442.

The Supreme Court reversed the trial court's decision concluding the court improperly dismissed Counts Two and Four. Count Two alleges that the defendant acted negligently by failing to use proper and reasonable care in protecting her medical file, including disclosing it without authorization in violation of General Statutes § 52-146o and the department's regulations implementing HIPAA. Count Four alleges the defendant engaged in conduct constituting negligent infliction of emotional distress. *Id.*, 459. [2]

"We decline to reach the defendant's statutory argument because we do not read the plaintiff's complaint as asserting a statutory right of action under § 52-146o. Accordingly, we take no position on whether § 52-146o provides a statutory right of action.

The operative complaint asserts four counts, each captioned with a common-law cause of action, namely, (1) breach of contract, (2) negligence, (3) negligent misrepresentation, and (4) negligent infliction of emotional distress. The alleged violation of § 52-146o is mentioned once as a specification of negligence in count two, negligence, which is incorporated by reference into count four, stating that 'the defendant was

The court concluded " that, to the extent that Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality in the course of complying with a subpoena, HIPAA does not preempt the plaintiff's state common-law causes of action for negligence or negligent infliction of emotional distress against the health care providers in this case and, further, that regulations of the Department of Health and Human Services (department) implementing HIPAA may inform the applicable standard of care incertain circumstances." *Id.*, 436.

However, the Supreme Court declined to make any finding that there was a private right of action under HIPAA. "We note at the outset that whether Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality, including in the context of responding to a subpoena, is not an issue presented in this appeal. Thus, assuming, without deciding, that Connecticut's common law recognizes a negligence cause of action arising from health care providers' breaches of patient privacy in the context of complying with subpoenas, we agree with the plaintiff and conclude that such an action is not preempted by HIPAA and, further,

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negligent and [careless] in one or more of the following ways.... It disclosed the medical file, without authority, in violation of ... § 52-146o.' In context, with all of the captioned causes of action arising from the common law, we read this single mention of § 52-146o as providing one of several bases for establishing the standard of care applicable to the plaintiff's common-law negligence claims and not as asserting an independent cause of action. . . Thus, we conclude that the plaintiff's complaint does not plead a statutory cause of action arising under § 52-146o, and decline to decide whether that statute provides such a private right of action." *Id.*, 463; see also, *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 463-64 (Zarella, J., dissenting).

that the HIPAA regulations may well inform the applicable standard of care in certain circumstances." *Id.*, 446-47.

Pursuant to Practice Book §17-44 and §17-49, the defendant ("Avery") has filed a motion for summary judgment on the grounds that no triable issues of fact exist with respect to the plaintiff's claim. The defendant argues there is no common law duty for a health care provider's alleged breach of the duty of confidentiality, and therefore, Avery is not liable for the plaintiff's injuries. The plaintiff has filed an objection claiming that a review of policy in Connecticut clearly establishes a common law duty of confidentiality. Each party has filed a memorandum of law. Oral argument was held before this court on April 6, 2015.

While the plaintiff's motion for summary judgment appears to target all four counts of the plaintiff's complaint, the defendant's memorandum of law addresses only the issue of the existence or non-existence of a claim based on a common law breach of confidentiality. The defendant states in its memorandum of law and its reply memorandum of law that it did not breach any contractual duty, but it fails to address this issue.[3] The plaintiff in its objection to summary judgment addresses only the issue of a common law breach of confidentiality, as well. The court also notes that Judge

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[3] The motion for summary judgment dated February 13, 2015, states that "the defendant, Avery Center will offer uncontroverted evidence that there is no common law remedy for a health care provider's alleged breach of it's duty of confidentiality." The motion states on its face that "the grounds for this motion are further set forth in the accompanying memorandum of law in support of this motion . . . ." Neither the plaintiff or the defendant address issues other than the existence or non-existence of a common law duty of confidentiality in Connecticut.

Gilardi denied the defendant's motion for summary judgment as to Counts One and Three. See. *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, supra, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. FBT-CV07-6001633 S (April 7, 2011, Gilardi, J.). This court sees no reason to disturb or revisit Judge Gilardi's ruling as to Counts One and Three alleging breach of contract and negligent misrepresentation. Accordingly, the court limits its ruling only to Counts Two and Four alleging negligence and a negligent infliction of emotional distress, which are the counts reviewed by our Supreme Court in *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 433.

I

Standard of Law

Summary judgment may be granted under Practice Book § 17-49 of the Practice book if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving part is entitled to judgment as a matter of law. *State v. 2000 Chevy Silverado,* Superior Court, judicial district of Hartford, Geographic Area 14 at Hartford, No. CV-04-2691 (Jul. 25, 2005, Keller, J.). "A material fact is a fact that will make a difference in the result of the case . . . the party seeking summary judgment has the burden of showing the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law." *Arnone v. Connecticut Light & Power Co.*,90 Conn. App. 188 193 (2005). Once the moving party has presented evidence in support of a motion for

summary judgment, the burden shifts to the opposing party to provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. *Fernandez v. Standard Fire Ins. Co.*, 44 Conn. App. 220, 222, 688 A.2d 349 (1997); *State v. Goggin,* 208 Conn. 606, 616, 546 A.2d 250 (1988). To oppose a motion for summary judgment, a party must substantiate its adverse claim by showing that there is a genuine issue of material fact, together with the evidence disclosing the existence of such an issue. The existence of the genuine issue of material fact must be demonstrated by counter-affidavits and concrete evidence and is not rebutted by bald assertions. To oppose a motion for summary judgment successfully, the non-movant must recite specific facts which contradict those stated in the movant's affidavits and documents. *Pion v. Southern New England Telephone,* 44 Conn. App. 657, 663, 691 A.2d 1107 (1997); *2830 Whitney Avenue Corp. v. Heritage Canal Development Associates, Inc.*, 33 Conn. App. 563, 567, 636 A.2d 1377 (1994); *State v. Goggin,* supra, 616. In deciding whether there is a material issue of fact, the court considers the evidence in the light most favorable to the non-moving party. The test is whether a party would be entitled to a directed verdict on the same facts. *Fernandez v. Standard Fire Ins. Co.*, supra, 222; *Connell v. Colwell*, 214 Conn. 242, 247, 571 A.2d 116 (1990).

"[T]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Internal quotation marks omitted.) *Mozeleski v. Thomas,* 76 Conn. App. 287, 290, 818 A.2d 893, cert. denied, 264 Conn. 904, 823 A.2d 1221 (2003). "[T]he use of a motion for summary judgment to challenge the legal sufficiency

of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." *Larobina v. McDonald*, 274 Conn. 394, 401, 876 A.2d 522 (2005).

II

Discussion

A.

Common Law Cause of Action

The defendant argues that given the fact that our Supreme Court declined to address the issue of whether a common law cause of action for a "health care provider's breach of duty of confidentiality" exists in Connecticut, the Supreme Court has left it to the trial court to determine if there is a common law remedy for the alleged breach of a physician's duty of confidentiality.[4] The defendant argues that there is no common law duty of confidentiality between the physician and a patient in Connecticut. The defendant argues that there is no precedent in Connecticut, either at the trial court level or the appellate level for recognizing a common law duty between a physician and patient with respect to the improper disclosure of medical records. In support, the

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[4] See *Id.* 464, (Zarella, J. dissenting) ("[B]ecause this court has determined that the issue of whether Connecticut's common law provides a remedy for a health care provider's breach of its duty of confidentiality in the course of complying with a subpoena has not been raised, the issue remains unresolved, which leaves the parties and the trial court to determine the most appropriate course of action as the litigation proceeds.

defendant cites *Salatto v. Hospital of St. Raphael,* Superior Court, Judicial District of New Haven at New Haven, No. CV 095032170 (Oct. 6, 2010, Robinson, A., J.) 50 Conn. L. Rptr, which states:

> "The defendant argues that the plaintiff's common-law negligence claim, asserted in his Second Count, is more properly characterized as a claim for breach of confidentiality in the physician-patient or hospital-patient context which Connecticut doesn't recognize as a viable cause of action. Despite arguing against this contention, the plaintiff has failed to provide this court with any case law to support his assertion that the defendant owed the plaintiff a common-law duty to maintain the confidentiality of the plaintiff's medical records and information.
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> Other states have recognized such a cause of action. But, this court is unaware of any controlling Connecticut case law that recognizes a similar common-law duty. As a result, the plaintiff's common-law claim fails to allege a valid cause of action and cannot be remedied by re-pleading. The defendant is, therefore, entitled to summary judgment on Count Two of the plaintiff's complaint."

Id.

The defendant additionally argues that even those states that recognize a common law duty between a physician and a patient do not extend this duty to a disclosure made in response to a judicial order, subpoena or other judicial authority.[5] Therefore, decisions from other states that

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[5] Sec. 52-143 Subpoenas for witnesses reads in relevant part as follows:

(a) Subpoenas for witnesses shall be signed by the clerk of the court or a commissioner of the Superior Court and shall be served by an officer, indifferent person . . . The subpoena shall be served not less than eighteen hours prior to the time designated for the person summoned to appear, unless the court orders otherwise.

(e) If any person summoned . . . or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than twenty-five dollars and pay all damages to the party aggrieved; and the court or judge, on proof of the service of a subpoena containing the statement as provided in subsection (d) of this section, or on proof of

address the common law duty to maintain a patient's confidentiality, concern out of court disclosures made without the authority of the court, and are , thus, distinguishable from this case, where the disclosure by the defendant was in response to a subpoena.

It is not disputed that the defendant received a subpoena directed to the defendant's Custodian of Records from a Commissioner of the Superior Court, directing the defendant to produce all medical records of the plaintiff to the New Haven Regional Children's Probate Court for a hearing scheduled for July 8.[6] The subpoena was signed by Attorney Paul Garlinghouse. In response to the subpoena, the plaintiff's medical records were mailed by the defendant in a sealed envelope to the New Haven Regional Children's Probate Court.[7]

The defendant has submitted a copy its "Notice of Patient Privacy Practices"("Notice"), which was signed by the plaintiff on July 15, 2003, wherein the plaintiff acknowledges that she reviewed its contents. The copy in accordance with its terms, was provided by the defendant in

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the service of a subpoena and the tender of such fees, may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify.

(f) Any subpoena summoning a physician as a witness may be served upon the office manager or person in charge at the office or principal place of business of such physician who shall act as the agent of the physician named in the subpoena. Service upon the agent shall be deemed to be service upon the physician.

[6] The defendant has submitted a photocopy of the subpoena for the court's review.

[7] The defendant has submitted a sworn affidavit signed by Dawn Begian, the defendant's Office Manager at the time of the incident in July, 2005.

accordance with the Health Insurance Portability and Accountability Act of 1996. The document has an effective date of April 13, 2003. The Notice contains a section titled "Other Permitted and Required Uses and Disclosures That May Be Made Without Your Authorization or Opportunity to Object." This section provides that the defendant may use or disclose the plaintiff's health information in certain situations without the patient's authorization or without providing the patient an opportunity to object. The Notice specifically states that the defendant may disclose health information for law enforcement or legal proceedings as required by law or "in response to a valid subpoena."

The plaintiff directs the court to the defendant's own Privacy Manual which provides:

> "Avery Center may disclose PHI (Patient Health Information) in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court . . . if the Avery Center receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the PHI that has been requested has been given notice of the request or Avery Center receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order.

The plaintiff states that the Privacy Manual further provided that any disclosures, including subpoenaed PHI would be handled in a specific way; namely that the patient would be provided with notice thereof. The plaintiff argues that there was no court order that commanded Avery to produce her medical records. Additionally, at no time after the service of the subpoena did Avery (1) appear in court as commanded; (2) notify the plaintiff of the subpoena; (3) obtain the plaintiff's consent; (4) obtain "satisfactory assurances" of notice to the plaintiff from the attorney issuing the

subpoena; (5) seek a qualified protective order; or (6) seek to limit the production of the PHI to that relevant to the controversy. Instead, Avery copied the plaintiff's entire medical record, and mailed it in an envelope the court. Thereafter, the court clerk placed the envelope in the court file. Eventually, a party in reviewing the court file, opened the envelope and examined the plaintiff's medical records which, according to the plaintiff, contained private, embarrassing and detailed medical information, that had no relevance to the pending paternity case. The plaintiff claims that the defendant, by its actions violated several provisions of the Code of Federal Regulations ("CFR") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §1320d.

The plaintiff has cited out of state decisions regarding the recognition of the existence of a duty of confidentiality. See. *Wilson v. IHC Hosps., Inc.* 289 P.3d 369-392-93 (Utah 2012); *Burton v. Matteliano*, 81 A.D. 3d 1272, 1274 (N.Y. App. Div. 2011); *Hammonds v. Aetna Cas.&Sur. Co.*, 243 F. Supp.793,797 (D.Ohio 1965); *Vassiliades v. Garfinckel's*, 492 A.2d 580,590 (D.C. 1985). Plaintiff also argues that a review of policy in Connecticut establishes a common law duty of confidentiality and that duty was recognized by te legislature's passage of General Statutes §52-146o.[8] While the plaintiff concedes that our Supreme Court did not decide whether there was a duty

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[8] Sec. 52-146o regarding the prohibition of disclosure of patient communication or information by physician, surgeon or health care provider, reads in relevant parts, as follows:

" (a) Except as provided in sections 52-146c to 52-146j, inclusive, sections 52-146p, 52-146q and 52-146s, and subsection (b) of this section, in any civil action or any proceeding preliminary thereto or

of confidentiality it did conclude that HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims. *Byrne v. Avery Ctr. For Obstetrics & Gynecology, P.C.*, supra 314 Conn. 459. In essence, this court would first have to determine that the duty of confidentiality exists, then turn to HIPAA to determine the appropriate standard of care. This court respectfully declines the invitation to establish a new cause of action which would have wide-ranging implications for the medical community, as well as, the patients it serves.

As noted by our Supreme Court in *Edelstein v. Department of Public Health & Add. Serv.*, 240 Conn. 658,662 692 A.2d 803 (1997)," [a] common law privilege for communications made by a patient to a physician has never been recognized in this state. . . Although the plaintiff urges us to recognize a common law privilege for communications between a patient and a physician, we decline to do so in light of precedent and the legislature's subsequent action on this issue" *Id.* " General Statutes § 52-146o (a) provides that a physician 'shall not disclose . . . any communication made to him by . . . a patient . . .unless the patient or his authorized representative explicitly

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in any probate, legislative or administrative proceeding, a physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal
examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure.

(b) Consent of the patient or the patient's authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court . . . ."

consents to such disclosure." The purpose of the act is to protect the confidentiality of communications between a physician and a patient." *Id.* [9]

This court must follow the precedent established by our Supreme and Appellate courts, and, to date, these courts have not recognized or adopted a common law privilege for communications between a patient and physicians, despite opportunities to do so. It is also noted that when the plaintiff requested our Supreme Court to determine, as a matter of law whether the defendant's act of mailing the medical records into court in response to the subpoena complied with General Statutes § 52-143 and the federal regulatory provisions under HIPAA, namely, 45 C.F.R. § 164.512 (e) (1) (ii) and (iii), with respect to notifying the plaintiff or seeking a qualified protective order, the court declined to address that claim. *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 461 [10]

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[9] The court in *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 314 Conn. 461-62, did not read the plaintiff's complaint as asserting a statutory right of action under § 52-146o. Accordingly, the court declined to determine whether §52-146o provides a statutory right of action.

[10] The defendant, contended that its act of mailing the records to the Probate Court complied with Connecticut and federal law, as its staff complied with the directions of the attorney who had issued the subpoena and its privacy policy had unequivocally informed the plaintiff that it would use or disclose health information in response to a subpoena without patient authorization or the opportunity to object. *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 461.

B.

HIPAA Regulations and Subpoenas

If one was to assume that a common law privilege for communications between a patient and physicians does exist as a hypothetical, this court was additionally tasked by our Supreme Court with determining if plaintiff's rights under the Healthcare Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d, et seq. were violated when the defendant sent the plaintiff's confidential medical records to the Probate Court pursuant to a subpoena issued by a Commissioner of the Superior Court. "[A]ssuming, without deciding, that Connecticut's common law recognizes a negligence cause of action arising from health care providers' breaches of patient privacy in the context of complying with subpoenas, we agree with the plaintiff and conclude that such an action is not preempted by HIPAA and, further, that the HIPAA regulations may well inform the applicable standard of care in certain circumstances." *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 446-47.

This court has already determined that, to date, Connecticut's common law does not recognize a negligence cause of action arising from health care providers' breaches of patient privacy in the context of complying with subpoenas. Nonetheless, an analysis of HIPAA regulations regarding a possible standard of care has been requested by our Supreme Court.

In general, HIPAA governs confidentiality of medical records and regulates how "covered entities" can use or disclose "individually identifiable health and medical information concerning

an individual." 45 C.F.R. §§ 160 and 164. "Covered entities" are defined as health plans, health care clearinghouses and any health care provider engaged in electronic transactions. 45 C.F.R. § 160.102(a). HIPAA regulations govern the disclosure of confidential health information in judicial proceedings but the regulation only applies if a "covered entity" is requested to disclose such information pursuant to: 1) an order issued by a court, 2) an administrative tribunal, or 3) a subpoena or discovery request. 45 C.F.R. 164.512(e)(1).

Section 45 C.F.R. § 164.512 sets forth the uses and disclosures for which an authorization or opportunity to agree or object is not required. "A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally." *Id.*

Section 45 C.F.R. 164.512(e)(1) permits a disclosure of the plaintiff's health information by the defendant in the course of any judicial or administrative proceeding. Section 45 C.F.R 164.512 (e)(1)(ii) allows such disclosure "in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal . . . ." However, Section 45 C.F.R. 164.512(e)(1) attaches certain conditions to allow the health care

provider to comply with a subpoena not accompanied by a court order. Among these conditions are :

> (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
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> (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

Notwithstanding certain conditions as set out in paragraph (e)(1)(ii)(A) or (B) of 45 C.F.R. 164.512, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of C.F.R. 164.512, or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of C.F.R. 164.512.

This is not the first time our Supreme Court has been faced with the issue of whether compliance with a subpoena violated a patient's rights. In *State v. Williams,* 146 Conn. App. 114 (2013), finding the record was inadequate to review the defendant's claim that his rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) were violated by the state

attorney's office when it issued a subpoena to the Corrections Department, for medical records, "as there was no finding by the trial court that the state failed to abide by the HIPAA regulations, *Id.*, 114-115. The court did acknowledge, however, that HIPAA regulations do permit an entity covered by HIPAA regulations to disclose medical records pursuant to a subpoena if certain conditions are met. *Id.,* 115; see also 45 C.F.R. 164.512(e)(1). "[A]n entity covered by HIPAA regulations may disclose medical records pursuant to a subpoena if certain conditions are met. *Id.*, 145. "A subpoena is an appropriate process for the production of documents that are relevant to the matter before the court." (Internal quotation marks omitted.) *Id.*, 144, citing, *State v. Montgomery,* 254 Conn. 694, 728, 759 A.2d 995 (2000). "If the subpoena on its face is too broad and sweeping, it is subject to a motion to quash." (Internal quotation marks omitted.) *Id.* [fn36] Section 164.512 (e) of title 42 of the United States Code "authorizes a covered entity . . . to disclose private health information in judicial or administrative proceedings in response to an order of a court. § 164.512 (e) (1) (I). The regulation also allows the disclosure of such information in those proceedings in response to a subpoena, discovery request, or other lawful process, § 164.512 (e) (1) (ii), if the party seeking the information either notifies the patient (or at least makes a good faith effort to do so). . . ." (Internal quotation marks omitted.) *Id.*, 145 n.36; *Northwestern Memorial Hospital v. Ashcroft,* 362 F.3d 923, 925 (7th Cir. 2004).

Our Appellate Court faced the question of the unauthorized release of medical records in *Alexandru v. West Hartford Obstetrics & Gyn.*, 78 Conn. App. 521, 827 A.2d 776, cert. denied, 266

Conn. 912, 832 A.2d 68 (2003). In that case, the HIPAA regulations were not addressed. In count two of a revised complaint, the plaintiff had alleged that the defendant improperly had released her medical records and attendant private information in violation of General Statutes §§ 52-146o (a) and 52-146i. In count three, the plaintiff alleged that by improperly releasing her medical records that contained information regarding her emotional and psychological condition, the defendant violated § 52-146i. While the Supreme Court in *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 436-442 found that the plaintiff did not assert an independent cause of action under §52-146o, it acknowledged that a violation of this section provided on e of several bases for establishing the standard f care applicable to a possible common law negligence action. See. n.2, herein.

General Statutes § 52-146o (a) generally proscribes the unauthorized release of patient medical records or patient communications unless the patient explicitly consents to such disclosure. That statute, however, contains an exception relevant to this case. That exception is set forth in § 52-146o (b), which provides in relevant part that the "[c]onsent of the patient or his authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court. . . ."

The court in *Alexandru v. West Hartford Obstetrics & Gyn.,* supra, 78 Conn. App. 524-25, found that the disclosure of the plaintiff's medical records took place during the deposition of the plaintiff's expert, and that the disclosure was pursuant to applicable rules of court. The expert's

deposition had been noticed pursuant to rule 30 of the Federal Rules of Civil Procedure and had included a request "to produce and permit the [defendant] . . . to inspect and duplicate at the time of this deposition or prior thereto Dr. Gerber's report prepared for this lawsuit and the medical file for [the plaintiff] including not limited to notes, letters, diagnoses and prescriptions." The deposition notice was within the allowable parameters of rule 30 (b) (5), which permits such a request for the production of documents. Thus, because the disclosure was made pursuant to applicable court rules, it clearly fell within the exception set forth in § 52-146o (b) (1).

Additionally, the court found the plaintiff executed a valid authorization for her medical records to be released to her attorney in the federal action. "Having authorized release of that information to her attorney, she impliedly gave consent to her attorney to utilize the information on her behalf in advancing her claims in the federal action." *Id;* see also *Calcano v. Calcano,* 257 Conn. 230, 246, 777 A.2d 633 (2001).

While the decision in *Alexandru v. West Hartford Obstetrics & Gyn* supra, 78 Conn. App. 521 is not an analysis of HIPAA, it is instructive because the court recognized the validity of a disclosure of medical records pursuant to the applicable rules of court for court proceedings, and secondly, the factor of consent by a patient. In the matter before this court, the defendant, *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, argues that the plaintiff, Byrne, had knowledge and gave consent when she signed the defendant's "Notice of Patient Privacy Practices"("Notice"), which contained a section titled "Other Permitted and Required Uses and Disclosures That May

Be Made Without Your Authorization or Opportunity to Object." This section provided that the defendant may use or disclose the plaintiff's health information in certain situations without the patient's authorization or without providing the patient an opportunity to object. The Notice specifically states that the defendant may disclose health information for law enforcement or legal proceedings as required by law or "in response to a valid subpoena."

Lastly, this court finds the decision in *Smith v. Rossi*, Superior Court, judicial district of Fairfield at Bridgeport, No. CV 03 0399819 (Jul. 21, 2004, Doherty, J) 37 Conn. L. Rptr. 505, is also instructive.. In *Smith v. Rossi,* the plaintiff alleges that the defendants' attempt to compel the defendants' health care providers to disclose his medical records violated 42 U.S.C. § 290dd-2(a). In *Smith,* the court first noted that Practice Book § 13-28(b) permits the issuance of subpoenas for the purpose of summoning a person to testify at a deposition. Subsection (c) of that provision states that "[a] subpoena issued for the taking of a deposition may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters within the scope of the examination permitted by Sections 13-2 through 13-5."

The *Smith* court then addressed Practice Book §13-28(e). "Practice Book § 13-28(e) provides that a party served with a subpoena accompanied by a command that the deponent produce and permit inspection of designated items may file a motion to quash or modify the subpoena if it is unreasonable and oppressive or if it seeks the production of materials not subject

to production . . ." (Internal quotation marks omitted.) *Id.*; see also, *Brackett v. St. Mary's Hospital,* Superior Court, Complex Litigation Docket at Waterbury, Docket No. X01 CV 97 0140111 (January 31, 2002, Hodgson, J.) (31 Conn. L. Rptr. 429).

The plaintiff in *Smith*, argued that based on General Statutes § 52-146o, the defendants did not have the statutory right to compel his health care providers to produce his medical records without his authorization. The defendants argued that their subpoenas are authorized by the provisions of the Practice Book and they do not contravene § 52-146o, because subsection (b) of that statute provides that "[c]onsent of the patient or his authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of court . . ."[11] The plaintiff's reply asserted that the subpoenas are not authorized by any rules of the court, and therefore, the exception does not apply. *Smith v. Rossi*, supra. The court, citing *Alexandru v. West Hartford Obstetrics & Gynecology, P.C.,* supra, 78 Conn. App. 521, agreed with the defendants' position and found that, even in the absence of the plaintiff's explicit permission for disclosure, the record keepers who received the subpoenas are required to produce the medical records in accordance with the subpoena.

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[11] This court, once again, acknowledges that our Supreme Court *in Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, supra, 314 Conn. 436-442 interpreted the plaintiff's claim as a negligence action and not an independent cause a action for a statutory violation of General Statutes § 52-146o. It found that the allegation of a violation of §52-146o was to be interpreted as just one of several allegations contained in the count alleging negligence. See. n.2 , herein. Nonetheless, the decision in *Smith v. Rossi* is instructive is assessing a standard of care when a medical provider complies with a subpoena for a patient's medical records.

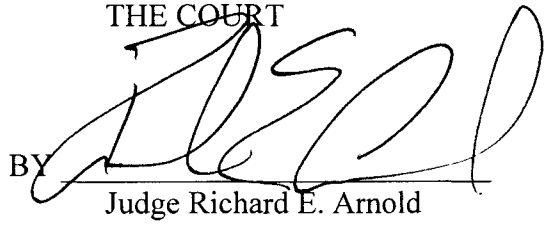
The decisions in *State v. Williams,* 146 Conn. App. 114 (2013), *Alexandru v. West Hartford Obstetrics & Gynecology, P.C.,* supra, 78 Conn. App. 521, **and** *Smith v. Rossi*, Superior Court, judicial district of Fairfield at Bridgeport, No. CV 03 0399819 (Jul. 21, 2004, Doherty, J) 37 Conn. L. Rptr. 505, all recognize that our Rules of Practice permit the disclosure of medical records in compliance with a validly issues subpoena for the discovery process and court proceedings. It is also acknowledged that consent of the patient either prior to any proceedings or during the proceedings, negates a patient's claim that his or her rights were violated when the subpoena is complied with and the relevant medical records are delivered.

These decisions do not conflict with the HIPAA regulations. Pursuant **to** paragraph (e)(1)(ii)(A) or (B) of 45 C.F.R. 164.512, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of C.F.R. 164.512, or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of C.F.R. 164.512. If our Appellate or Supreme courts determine at a later time that a negligence cause of action arising from health care providers' breaches of patient privacy in the context of complying with subpoenas does, in fact, exist in Connecticut , the issues to be resolved in the present matter are:(1) the validity of the subpoena complied with; and (2) did the plaintiff's written acknowledgment by signing a copy of

the defendant's "Notice of Patient Privacy Practices"("Notice"), negate any requirement that the defendant give notice to the plaintiff prior to complying with the subpoena.

The court for the reasons stated herein, finds that no courts in Connecticut, to date, recognized or adopted a common law privilege for communications between a patient and physicians. Any recognition of this cause of action is best addressed to our Supreme and Appellate courts or the legislature. Accordingly the motion for summary judgment is granted as to Counts Two and Four of the plaintiff's operative complaint. The court (Gilardi, J) has already denied summary judgment as to the First and Third Counts alleging breach of contact and negligent misrepresentation.

THE COURT

BY 

Judge Richard E. Arnold