

Appellate Decisions of Interest

Kish v. Graham, M.D.

Appellate Division, Fourth Department (March 16, 2007)

Guiding Principle: A plaintiff in a medical malpractice action cannot be required to provide a HIPAA-compliant authorization allowing the defendants' attorneys to conduct a private interview with the plaintiff's non-party treating physicians.

Summary of the facts: The plaintiff commenced a medical malpractice and wrongful death action alleging that the defendant physicians failed to diagnose and treat the deceased's perineal necrotizing faciitis. As the defendants' attorneys were preparing for the upcoming trial, they requested that the plaintiff (the administrator of the deceased's estate) provide HIPAA-compliant authorizations permitting the defense attorneys to interview the deceased's non-party treating physicians. The plaintiff refused to provide the authorizations. The lower court ordered the plaintiff to provide the authorizations and the plaintiff appealed.

Ruling of the court: A divided Appellate Division (two judges dissented), reversed and held that such private interviews with a plaintiff's non-party treating physicians were not authorized under the law.

Reasoning: Prior pre-HIPAA case law permitted defense counsel to conduct private interviews with a patient's treating physicians once the case was certified as ready for trial. The practice of conducting private interviews of treating physicians was used primarily in medical malpractice litigation. Recently, however, the Appellate Division, Second Department, in a case entitled *Arons v. Jutkowitz*, held that the courts may not compel patients to authorize such private interviews. The Appellate Division, Fourth Department in *Kish v. Graham* agreed and held that such interviews are prohibited. The court held that proper method for obtaining information from a treating physician is to conduct a formal deposition of the treating physician.

The two dissenting judges argued that a party waives the physician-patient privilege by bringing a personal injury action and that fairness dictates that both the patient-plaintiff and the defendant physicians should have equal access to information held by a treating physician. Requiring the defendant physicians to conduct more expensive, inconvenient, and burdensome depositions to gather information from treating physicians provides an unfair advantage to plaintiffs over defendants, argued the dissenters. The dissenters noted that requiring a treating physician to submit to depositions or written questions/interrogatories could significantly impact the treating physician's availability to practice medicine. The dissenting judges warned, "Instead of communicating with an attorney during a 10-minute telephone call, a [treating] physician could be required to attend a four-hour deposition or to provide a time-consuming response to detailed and lengthy interrogatories."

Editor's Note: The practical effect of the court's decision on medical providers, and whether the dissenting judges' dire predictions become reality, remains to be seen.

This decision of interest is not an official citation, and should not be cited as such, nor is it intended to provide any legal advice. For the full text of the uncorrected decision, visit <http://www.courts.state.ny.us/reporter/>.