No. 09-438

In The Supreme Court of the United States

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,
Petitioner,

v.

JOHNELLA RICHMOND MOSES, Personal Representative of the Estate of Marie Moses-Irons, Deceased,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the facts of this case and respondent's theory of recovery under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd, serve to distinguish the Sixth Circuit's ruling in this case from the Ninth Circuit's decision in *Bryant v. Adventist Health Systems*, 289 F.3d 1162 (9th Cir. 2002), and the Fourth Circuit's decision in *Bryan v. Rectors and Visitors of the University of Virginia*, 95 F.3d 349, 352 (4th Cir. 1996)?

Whether the Sixth Circuit correctly applied the well established legal doctrine that a court must reject administrative constructions of a statute which conflict with congressional intent?

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STATEMENT OF THE CASE

On December 13, 2002, Marie Moses-Irons took her husband, Christopher Walter Howard, to the emergency department at Providence Hospital, after Mr. Howard began exhibiting signs of acute mental illness. Ms. Moses-Irons advised members of Providence Hospital's staff that her husband was speaking inappropriately, had slurred speech and was hallucinating. She also reported to the hospital's staff that Mr. Howard demonstrated threatening behavior toward her, and that she was fearful for her own safety and for that of the couples' two children. While at Providence Hospital on December 13, 2002, Mr. Howard called his wife over to his bed and said to her, "Tell your mother I have coffins for the children." Ms. Moses-Irons reported this statement to the Providence Hospital's staff treating Mr. Howard.

On December 13, 2002, after Mr. Howard was admitted to Providence Hospital, he was examined by a neurologist, Dr. Mark Silverman. Dr. Silverman concluded that Mr. Howard required a psychiatric evaluation after finding him "babbling about strange things. He apparently told his mother-in-law he had bought caskets . . ."

Dr. Paul Lessem, a psychiatrist, examined Mr. Howard on December 14, 2002. At the time of his examination, Dr. Lessem was aware that Mr. Howard had made threats of physical harm against his wife and other family members. Dr. Lessem concluded that Mr. Howard had an emergency medical condition and that he needed a complete medical work-up and further observation.

Mr. Howard's psychiatric condition deteriorated while a patient at Providence Hospital. Ms. Moses-Irons became increasingly fearful of her husband's bizarre behavior during his hospitalization. Mr. Howard asked his wife while he was in Providence Hospital: "Have these hands murdered someone? Have I killed someone?"

Dr. Lessem saw Mr. Howard again on December 17, 2002. Dr. Lessem recorded that Mr. Howard exhibited bewilderment and depression. Dr. Lessem also noted that, because of Mr. Howard's behavior over the prior few days, Ms. Moses-Irons was fearful of taking him home.

As of December 17, 2002, Dr. Lessem recognized that Mr. Howard required additional treatment to stabilize his psychiatric condition. It was decided that Mr. Howard would be admitted to Providence Hospital's secured psychiatric unit, 4 East, where Mr. Howard would be subject to twenty-four hour monitoring on a "lock down" unit. According to Dr. Lessem, 4 East was intended for patients "who are expected to be hospitalized and stabilized and who are acutely mentally ill." But, Mr. Howard's transfer to 4 East was contingent on Mr. Howard's insurance covering the cost of the treatment. This contingency was recorded in an order written by Dr. Lessem on December 17, 2002: "Will accept [patient] to 4 [E]ast if [patient's] insurance will accept criteria. Atypical psychosis with somatization and depression. Please observe carefully for any indications of suicidal ideation or behavior."

A member of the hospital's staff contacted Mr. Howard's insurance carrier to determine if his health

insurance would cover the psychiatric treatment which he was about to undergo. Mr. Howard's insurer advised Providence Hospital that there would be no coverage for any such treatment, and that the only treatment which his insurance would cover would be the first two days of his hospitalization, December 13 and 14, 2002. The proposed transfer of Mr. Howard to the hospital's psychiatric unit did not occur.

Instead, the following day, December 18, 2002, Mr. Howard was informed that he would be released. In a discharge summary form filled out on December 18, 2002, Mr. Howard's "final diagnosis" was that he had a "migraine headache" and "atypical psychosis [with] delusional disorder."

On December 19, 2002, Mr. Howard was discharged from Providence Hospital. At the time the decision was made to discharge Mr. Howard, Dr. Lessem was aware that Mrs. Moses-Irons' feared for her own safety and for that of her family. Dr. Lessem recommended that when Mr. Howard was released, Ms. Moses-Irons should arrange to have him stay in a hotel rather than in the couple's home.

Based on Dr. Lessem's recommendation, Ms. Moses-Irons made arrangements for Mr. Howard to stay in a hotel after his December 19, 2002 discharge. She also had the locks on her home changed because of her fear of what Mr. Howard might do in his existing mental condition.

On December 29, 2002, ten days after he was released from Providence Hospital, Mr. Howard murdered Marie Moses-Irons.

Johnella Richmond Moses, the Personal Representative of the Estate of Marie Moses-Irons, filed this action on December 14, 2004. In her Complaint, Mrs. Moses alleged claims under a federal statute, the Emergency Medical Treatment And Active Labor Act, 42 U.S.C. §1395dd (EMTALA), as well as claims under Michigan common law.

On May 14, 2007, Providence Hospital filed a motion for summary judgment seeking dismissal of Mrs. Moses' EMTALA claim. Among the arguments that Providence Hospital raised in its motion was that EMTALA only applied to the transfer of a patient from a hospital's emergency department. Since Mr. Howard was admitted as a patient for a period of days before his December 19, 2002 discharge, Providence Hospital maintained that his discharge could not be the subject of an action under the EMTALA.

The district court granted summary judgment on the EMTALA claim. In reaching this result, the district court did not address Providence Hospital's argument that its admission of Mr. Howard discharged all responsibility that it may have had under EMTALA.

Mrs. Moses appealed the district court's summary judgment ruling to the United States Court of Appeals for the Sixth Circuit. In that Court, Providence Hospital again asserted as an alternative basis for the dismissal of the EMTALA claim its argument that this statute only provides a remedy to a patient who is released in an unstable condition from a hospital's emergency department.

In an opinion issued on April 6, 2009, the Sixth Circuit reversed the district court's grant of summary judgment on Mrs. Moses' EMTALA claim. The Sixth Circuit, relying on its earlier decision in *Thornton v. Southwest Detroit Hospital,* 895 F.2d 1131 (6th Cir. 1990), ruled that Mrs. Moses had a viable claim under EMTALA because issues of fact remained on whether Mr. Howard had an emergency medical condition which had yet to be stabilized at the time of his December 19, 2002 discharge from Providence Hospital. Pet. App. 15a-26a.

REASONS FOR DENYING THE WRIT

Providence Hospital contends that EMTALA's "anti-dumping" prohibition begins at a hospital's emergency department and ends as soon as a patient is admitted to the hospital. If correct, petitioner's argument would mean that a hospital could "circumvent the requirements of the Act merely by admitting an emergency room patient to the hospital, then immediately discharging that patient." *Thornton*, 895 F.2d at 1135.

I. THE CLAIMED CONFLICT WITH DECISIONS OF THE FOURTH AND NINTH CIRCUIT

Central to petitioner's argument is a claimed conflict between the decision of the Sixth Circuit in this case and the rulings of the Fourth and Ninth Circuits in *Bryan v. Rectors and Visitors of the University of Virginia*, 95 F.3d 349 (4th Cir. 1996) and *Bryant v. Adventist Health Systems*, 289 F.3d 1162 (9th Cir. 2002). Neither of these cases reaches a conclusion which is necessarily in conflict with the decision in this case.

In *Bryan*, the Fourth Circuit considered an EMTALA claim brought on behalf of a woman who was admitted to a hospital for respiratory distress. The hospital had provided stabilizing treatment for a period of days when members of its staff entered a "do not resuscitate" order. Plaintiff alleged that this order was contrary to the wishes of the patient's family. When plaintiff's decedent died of a heart attack eight days after the "do not resuscitate" order was put into effect, her estate sued under EMTALA action.

The plaintiff in *Bryan* alleged the existence of a claim under 42 U.S.C. §1395dd(b), the subsection of EMTALA which provides:

> (b) Necessary stabilizing treatment for emergency medical conditions and labor
>
> (1) In general
>
> If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either --
>
> **(A)** within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
>
> **(B)** for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

Based on EMTALA's definition of the phrase "to stabilize" contained in 42 U.S.C. §1395dd(e)(3)(A), the Fourth Circuit held in *Bryan* that the stabilization requirement of 42 U.S.C. §1395dd(b) "is defined entirely in connection with a possible transfer and without any reference to the patient's long-term care within the system." *Bryan*, 95 F.3d at 352.

In *Bryan*, the Fourth Circuit considered a case in which there was no transfer as that term is defined in EMTALA. *See* 42 U.S.C. §1395dd(e)(4). On this basis, the decision in *Bryan* must be distinguished from this case. Here, Mr. Howard's December 19, 2002 discharge from Providence Hospital meets EMTALA's definition of a discharge. *Id.*

In the *Bryant* case, the plaintiff's decedent went to a hospital emergency department on January 24, 1997. During that visit a chest x-ray was misinterpreted and the patient was released. Later that day, a doctor detected the error in the reading of the x-ray and an employee of the hospital called the patient's parents, instructing them to return to the hospital. Once the patient returned, he was admitted to the hospital. On January 28, 1997, the patient was transferred to another hospital where he underwent emergency surgery.

The patient died suddenly slightly over one month after the surgery was performed and plaintiffs instituted an action under EMTALA against the hospital that treated their decedent between January 24 and January 28. In that EMTALA claim, plaintiffs alleged that this federal act was violated both during the January 24, 1997 emergency department visit and the three day hospitalization that began the following

day. The plaintiff in *Bryant* did not contend that the emergency transfer which occurred on January 28, 1997 violated EMTALA. *Bryant*, 289 F.3d at 1164.

Thus, like the Fourth Circuit's ruling in *Bryan*, the Ninth Circuit's decision in *Bryant* did not involve the transfer provisions of EMTALA. Moreover, the *Bryant* Court did not adopt the bright line rule that petitioner urges this Court to adopt. *Bryant* did not hold that all liability under EMTALA is automatically eliminated upon admission to a hospital. Instead, the Ninth Circuit held that EMTALA's "stabilization requirement *normally* ends when a patient is admitted for inpatient care." 289 F.3d at 1167 (emphasis added). The *Bryant* Court posited a potential exception to the rule that all responsibility under EMTALA is discharged by admission to a hospital in those situations in which a hospital admits a patient with no intention of providing treatment. *Id.* at 1169.

While the exception discussed in *Bryant* has no application to this case, the mere fact that that the Ninth Circuit was compelled to recognize that the policy objectives of EMTALA might call for liability even when a patent is admitted to the hospital is of significance here. Petitioner stresses that EMTALA is an "anti-dumping" statute, precluding hospitals from refusing treatment to those who are unable to pay for it. Despite the fact that Mr. Howard was admitted to Providence Hospital on December 13, 2002, his transfer six days later directly implicated EMTALA's anti-dumping provisions.

On December 18, 2002, Mr. Howard's psychiatric problems were considered so severe that his treating psychiatrist, Dr. Lessem, wanted him admitted to the

hospital's secured psychiatric unit, designed to house the "acutely mentally ill." Pet. App. 4a. Dr. Lessem wrote a note indicating that Mr. Howard would be transferred to this secured psychiatric unit "if [patient's] insurance will accept criteria." *Id.*

When it was discovered that Mr. Howard's insurer would pay only for the first two days of inpatient psychiatric care, the plan to place Mr. Howard in the secured psychiatric unit was abandoned. In addition, the following day the decision was made to release Mr. Howard. Thus, in the space of a single day, Mr. Howard went from a patient who was recommended for transfer to a unit of the hospital for the "acutely mentally ill," to being advised that he was to be released from the hospital altogether.

This is a case which directly implicates the anti-dumping policy behind EMTALA. In this case, there is evidence establishing that Mr. Howard's inpatient treatment was terminated after it was discovered that his insurance would not pay any part of that treatment. Where, as here, plaintiff can demonstrate that the decision to transfer Mr. Howard was motivated by payment concerns which were addressed in EMTALA, that statute should provide a remedy.

II. THE CENTERS FOR MEDICARE AND MEDICAID SERVICES' REGULATIONS

Petitioner argues that the Court should review the Sixth Circuit's April 6, 2009 decision because of its treatment of the 2003 regulations promulgated by the Centers for Medicare and Medicaid Services (CMS). The Sixth Circuit recognized that an agency's construction of the statutory scheme it administers is

entitled to a degree of deference. Pet. App. 18a. But, it held that it must "reject administrative constructions which are contrary to clear congressional intent." *Id.* There is nothing groundbreaking or controversial in the Sixth Circuit's formulation of the principles governing the relationship between courts and regulations promulgated by administrative agencies. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984).

Nor did the Sixth Circuit err in its conclusion that the CMS regulation specifying that a hospital discharges all potential liability under EMTALA by admitting a patient is at odds with congressional intent as expressed in the text of that statute. It is noteworthy that when CMS first spoke on this subject in 2002, it proposed rules extending EMTALA's stabilization requirements to patients who were admitted to the hospital. In 2003, CMS reversed course and issued the regulation on which petitioner now relies, 42 C.F.R. §489.24(d)(2)(i).

CMS's vacillation on this issue serves to highlight the fact that the language of EMTALA does not readily lend itself to the conclusion that this act has no application whatsoever once a patient is admitted to the hospital. EMTALA mentions the term "emergency department" in its first subsection, 42 U.S.C. §1395dd(a). However, thereafter, the statute describes "emergency medical conditions" and the stabilization of such conditions *without* reference to whether those conditions and the medical responses to them occurred within an emergency department. *See e.g.* 42 U.S.C. §1395dd(b), (c).

Moreover, the definitional section of the statute, 42 U.S.C. §1395dd(e), defines the key words and phrases without confining them to the emergency department setting. Thus, for example, the term "transfer" is defined in EMTALA as "the movement (including the discharge) of an individual outside a hospital's *facilities*." 42 U.S.C. §1395dd(e)(4) (emphasis added). Clearly, Congress could have limited the reach of EMTALA's anti-transfer provision to the actions taken within an emergency department by specifying that the word "transfer" encompasses only a transfer from a hospital's emergency department. But, Congress did not so limit the reach of the anti-transfer provision of EMTALA.

The Sixth Circuit did not err in its treatment of the CMS' regulations.

III. THE RETROACTIVE APPLICATION OF CMS'S REGULATION

The Sixth Circuit also offered an additional reason why it would not apply CMS's 2003 regulation to this case. It held that this regulation should not be retroactively applied to this cause of action, which arose in 2002. Pet. App. 19a. Petitioner asserts that this ruling conflicts with this Court's decisions.

For reasons discussed in the preceding issue in this brief, quite apart from this retroactivity argument, the Sixth Circuit's basis for rejecting the 2003 CMS regulation was entirely appropriate. Under these circumstances, there is no reason for the Court to review the Sixth Circuit's alternate grounds for rejecting the regulation.

In addition, even the case law from this Court cited in Providence Hospital's petition does not support its position. Providence Hospital relies on the Court's decision in *Smiley v. Citibank*, 517 U.S. 735 (1996), in support of its assertion that a clarifying regulation is to be given full retroactive effect. Yet, in *Smiley* this Court indicated that an argument for the prospective only application of a regulation would have substance, "if the regulation replaced a prior agency interpretation." *Id.* at 744, n. 4.

As discussed previously, the 2003 CMS regulation on which petitioner relies replaced a 2002 proposal which would have extended EMTALA's reach to inpatients. Thus, under the very precedent that petitioner cites, the Sixth Circuit did not err in its ruling with respect to the retroactive application of the 2003 regulations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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