

IN THE NEW MEXICO COURT OF APPEALS

WILLIS S. MUNCEY,

Plaintiff-Appellee

vs.

EYEGLOSS WORLD, L.L.C.,

Defendant-Appellant.

Ct. App. No. 29,813
Second Judicial District Court
No. CV-2005-07697
Honorable William F. Lang

COURT OF APPEALS OF NEW MEXICO
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PLAINTIFF/APPELLEE'S RESPONSE TO SUPPLEMENTAL BRIEF

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CERTIFICATE OF COMPLIANCE

The Rules of Appellate Procedure do not provide for a word limit on responses to supplemental briefs. However, this Response complies with the type-volume limit for Response Briefs set forth in Rule 12-213(F)(3). According to Microsoft Word 3,445 words.

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SUMMARY OF ARGUMENT

EGW asks this Court for a holding that will be the first of its kind in the nation but offers no viable path to get there. The U.S. Constitution and the Copyright Act require this Court to conduct a two part analysis to determine if a state law claim is preempted by the Copyright Act. Preemption is found only when both 1) the object in question falls within the scope of 17 U.S.C. §§ 102 or 103; and 2) the rights protected by the state law are equivalent to copyright. In this case, neither prong of the preemption test is present. EGW implies that confidential medical records fall within the definition of “literary works” without explaining why much less providing any legal support for their claim. EGW’s claim that conversion protects the same rights in confidential medical records as the Copyright Act, requires this Court to assume that confidential patient files are intangible, intellectual property and to accept EGW’s misstatements regarding the elements of conversion.

No court has held that Congress intended to include confidential patient files within the scope of the Copyright Act. Patient files are not works of original authorship and possess immovable characteristics under HIPAA. Further, no court has held that conversion of tangible property is equivalent to a copyright infringement claim. The verdict below was based on the civil theft of the patient files themselves, not merely the data contained within them. Additionally, the characteristics of confidential patient files mandated by HIPAA and therefore the rights protected through a conversion claim, cannot be protected by the Copyright Act.

ARGUMENT

I. Standard of Review

Whether § 301 of the Copyright Act preempts a conversion claim under New Mexico state law presents a question of law that is reviewed de novo. Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 658 (4th Cir.).

II. The Copyright Act does not preempt a claim for conversion of patient files because patient files are outside of the scope of the subject-matter of copyright and the elements of conversion are not equivalent to the exclusive rights granted by 17 U.S.C. § 106.

Whether federal law preempts state law is a question of congressional intent and the scope of preemption is limited to the terms expressly delineated in the preemption provision of the federal statute in question. Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, ¶ 31, 133 N.M. 669, 680, 68 P.3d 909, 920. Accordingly, state laws are subject to preemption by the federal Copyright Act only if they create “legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 of the Copyright Act. Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1542 (10th Cir. 1996).

The test for whether the Copyright Act preempts a state law claim is well settled, despite EGW’s failure to mention it in their supplemental brief and its correct but inapplicable assertions that the Copyright Act’s preemption of state law is broader

than its protections.¹ A state cause of action is only considered equivalent, and therefore preempted, when both prongs of a two factor test are met: (1) the content of the protected right must fall within the “subject matter of copyright” as described in 17 U.S.C. §§ 102, 103; *and* (2) the right asserted under state law must be equivalent to the exclusive rights contained in 17 U.S.C. § 106. Ehat v. Tanner, 780 F.2d 876, 878 (10th Cir. 1985). The first prong relates to the nature of the work the state law claim protects and the second relates to the nature of the rights granted under the state law. EGW fails to show that the jury’s determination of conversion of confidential patient medical records, meets either of the required prongs of the preemption test.

A. Congress did not intend to include confidential medical records within the subject matter of 17 U.S.C. § 102 because they are not original works of authorship and HIPAA already expressly protects against the unauthorized access and reproduction of medical records.

1. The confidential patient charts in this case lack the originality constitutionally mandated in order to fall within the subject matter of copyright because they are merely a collection of facts without any expressive elements.

The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secure for limited Times to Authors...the exclusive Right to their respective Writings.” This provision “presupposes a degree of originality,” and therefore “[o]riginality is a constitutional requirement.” Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346, 111

¹ Congressional intent to prevent conflicting law in the field of copyright does not reveal an intention that every statement committed to paper falls within the scope of the Copyright Act as a “literary work.”

S.Ct. 1282, 113 L.Ed.2d 358 (1991). Accordingly, Congress provided copyright protection only for “*original* works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a) (emphasis added). Section 102 establishes the general categories of copyrightable works and Section 103 covers compilations and derivative works. EGW has limited its subject matter argument to the category of “literary works” found in Section 102(a)(1). However, none of the statutory categories either expressly include confidential patient charts or suggest that they would fall within any of those categories. The total absence of any consideration of confidential medical records as potential subjects of copyright among the 1337 cases citing Section 301 is revealing. In fact, the only case that considers medical records in the greater context of the Copyright Act finds that they are “non-copyrightable fact works.” Schloss v. Sweeny, 515 F.Supp.2d 1068, 1080 (N.D.Cal. 2007) (Holding that “Defendants’ alleged actions significantly undermined the copyright policy of ‘promoting invention and creative expression,’” because “Plaintiff was allegedly intimidated from using non-copyrightable fact works such as medical records.”). *Accord* 4-13 Nimmer on Copyrights § 13.09.

In order to satisfy the “original works” requirement, a work must be original in the sense that it was not copied from another's work and that it shows creativity (“the creativity requirement”). *Feist*, 499 U.S. at 361-363, 111 S.Ct. 1282. Consequently, there are “works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.” *Id.* at 358-59, 111 S.Ct. 1282. 37 CFR 202.1(f) specifically

states than a “[W]orks consisting entirely of information that is common property containing no original authorship” constitute “material not subject to copyright.”

It is a long-held view of copyright law, affirmed by the U.S. Supreme Court, that “[f]acts whether alone or as part of a compilation, are not original.” Feist, 499 U.S. at 350, 111 S.Ct. at 1290; See also 1-2 Nimmer on Copyright § 1.01[B][2][b]² Nimmer illustrates the distinction between a written record of naked facts versus a presentation of facts that includes the originality required to fall within the scope of copyright: “the interpretation of a historical event is not copyrightable in itself. Nonetheless, adding imagination to fact can result in a protected work. Thus, a historical romance, albeit based on actual personages, is still protected against copying of the fictitious devices added by the narrator.” 1-2 Nimmer on Copyright § 2.11 (*citations omitted*). Because a true author or compiler must exercise some individual judgment, the U.S. Supreme Court has held that local laws mandating the recording or creation of a compilation of facts precludes originality or creativity. Feist, 499 U.S. at 363 (explaining that the publisher of a phone book did not truly “select” to publish the names and telephone numbers of its subscribers; rather, it was required to do so by state regulations as part of its monopoly franchise. Accordingly,

² Copyright does not subsist in facts per se. Therefore, proprietors may claim federal protection only in the particular expression of fact, or in their selection and arrangement.

one could plausibly conclude that this selection was dictated by state law, not by the phonebook publisher.)³

Additionally, Congress did not intend short statements such as exam recordings, notices to patients about procedures and patients' personal history, and the patient charts they are recorded on to be included within the scope of Section 102. Specifically, 37 C.F.R. 202.1(a) states that the following works are not subject to copyright: Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of the ingredients or contents. 37 C.F.R. 202.1(a). "Courts typically rule that 'the Copyright Office's longstanding practice of denying registration to short phrases merits deference... Even marginally longer phrases ('if no pulse, start CPR') are appropriately denied copyright protection." 1-2 Nimmer on Copyright § 2.01. "Copyright protection will be denied to 'fragmentary works and phrases' and to forms of expression dictated solely by functional characteristics because such material does not exhibit the minimal level of creativity necessary to warrant copyright protection." Regents of University of Minnesota v. Applied Innovations, Inc., 685 F. Supp. 698, 707 (D. Minn. 1987) *aff'd*, 876 F.2d 626, 635 (8th Cir. 1989).

³ The same is true for patient medical records. "Established physician-patient relationship means a relationship between a physician and a patient that is for the purpose of maintaining the patient's's well being...A medical record must be generated by the encounter. (Emphasis added) N.M.A.C. § 16.10.8.7

Based on the undisputed description of the patient charts at issue in this case, it is obvious that they lack the necessary originality to fall within the subject matter of copyright. The “work” that is the subject matter of Dr. Muncey’s conversion claim are confidential patient medical charts which are a physical record of facts and history related to a particular person. EGW incorrectly characterizes the patient charts as “original reports” in a lame attempt to force them to fit within a recognized category of copyrightable materials. EGW cites to nothing in the record before this Court that even insinuates that there is anything “original” in those charts much less content that would constitute the writing of an “author” within the meaning of the copyright clause of the Constitution. The only description in the trial record of what is included in the patient charts was provided by the testimony of Dr. Muncey⁴ and Dr. Nathaniel Roland. See TR, 182 and 184. Dr. Roland described the patient charts to contain: “the exam recordings and things of that nature, notices to patients about procedures.” See TR, p. 182, lines 8-10. Dr. Roland also stated that the charts in question included: “information about their (patients’) exam, their personal history, data collected that relates to, in some cases, diseases, family histories of certain conditions, ...” These descriptions make it abundantly clear that the charts are the

⁴ “The Patient file has got all kinds of medical information, and it’s got Social Security numbers it it. It’s got patient history. We have them fill out a form, asking them tons of questions that relate to them personally, to their family, if there’s been any health issues, taking any kinds of medication, antidepressants, birth control pills. This is privileged information and there’s a lot of it in every file, along with all their current prescriptions, past prescriptions, and whatever services have been provided.” TR 106 lines 6-14.

result of a systematic recording of factual data provided by the patient for the sole purpose of aiding with the patient's care.

Exam recordings, notices to patients about procedures, information about patient's exams and personal history can only be expressed in limited, non-original ways. The patient charts in this case are a systematic gathering of factual information about the patient provided by the patient herself. The record does not indicate any imagination, original expression, or creativity was involved in taking that information and recording it in the patient chart. The confidential patient charts do not include copyrightable material and there is no evidence in the record before this Court that the patient charts in question are arranged in some special manner that reveals an expressive element. The Constitutionally and statutorily required "stamp of the author's originality" to make facts into copyrightable subject matter is lacking in a legally confidential collection of facts which includes "personal history, data collected that relates to, in some cases, diseases, family histories of certain conditions." See Trial Record, p. 182 and 184. Accordingly, EGW's attempt to preempt Dr. Muncey's conversion claim on the basis that the confidential patient charts fall within the scope of Section 102 of the Copyright Act is unsupported by law or the record.

2. Congress' express protection of the unauthorized access, reproduction, and use of confidential medical records within HIPAA further indicates that they did not intend for medical records to fall within the scope of Section 102.

HIPAA⁵ expressly covers the right to access and reproduce medical records that EGW is asking this Court to read into the scope of the Copyright Act by implication. In fact, because HIPAA protects patients' rights to keep their medical information private, it mandates confidentiality and highly restricts the access, reproduction, and distribution of patient files. 45 CFR §§160, 164(A), and (E). This mandate is in direct conflict with the purpose of the Copyright Act which protects, in order to promote, authors' rights to reproduce, publish, distribute and sell works publicly. Congress does not enact redundant statutes much less conflicting ones. See EC Term of Years Trust v. United States, 550 U.S. 429, 433-434, 127 S.Ct. 1763, 1767 (2007)(“Resisting the force of the better fitted statute requires a good countervailing reason, and none appears here.”).

B. Dr. Muncey's conversion claim is not equivalent to federal copyright law because the conversion claim below was based on rights in physical property rather than intangible property and the nature of medical records under HIPAA prevents the rights protected by conversion from being equivalent to the rights protected by a Copyright claim.

The second prong of the preemption test also cannot be satisfied if there is an extra element to the state cause of action that makes it qualitatively different from the rights protected in a copyright infringement claim as set out in 17 U.S.C. § 106. U.S. ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453, 1463 (4th Cir. 1997). In analyzing this equivalency requirement to preemption, a court should compare “the elements of the causes of action..., not the facts pled to prove

⁵ Health Insurance Portability and Accountability Act of 1976.

them.” Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655 (4th Cir. 1993). Under New Mexico law, conversion is the unlawful exercise of dominion and control over property belonging to another in defiance of the owner’s rights, or acts constituting an unauthorized and injurious use of another’s property, or lawful possession combined with a wrongful detention after demand has been made. Security Pacific Financial Services, a Div. of Bank of America, FSB v. Signfilled Corp., 1998-NMCA-046, ¶15, 125 N.M. 38, 956 P.2d 837. (Citations omitted). 17 U.S.C. § 106 gives the owner of copyright exclusive rights: (1) to reproduce copyrighted work; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies to the public by sale or other transfer of ownership.⁶

1. Medical records are tangible property and the rights in them protected by a state law claim for conversion is not equivalent to the rights protected by the Copyright Act.

In cases of conversion, the distinction between a preempted and non-preempted case is whether the claim is based on tangible property or intangible property because conversion of tangible property adds an element of physical retention.⁷ Conversion of intangible property may be preempted by the Copyright Act. See Ehat v. Tanner, 780 F.2d 876, 877 (1985)(conversion claim where defendant copied, published, and sold

⁶ Subsections (4), (5), & (6) apply only to musical works and sound recordings. 17 U.S.C. § 106(4) – (6).

⁷ EGW misstates the law when they assert in page 7 of their Supplemental Brief that the difference is “whether the plaintiff is complaining of the defendant’s exercise of unauthorized dominion and control over property to the complete exclusion of the plaintiff.”

plaintiff's literary work preempted); Daboub v. Gibbons, 42 F.3d 285, 289-90 (5th Cir. 1995) (conversion claim when defendant improperly copied a song was preempted). A conversion claim concerned with dominion or interference with ownership rights in tangible property rather than intangible property is qualitatively different than the elements of copyright infringement and so falls outside the scope of the federal Copyright Act. Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines* 777 (3rd ed. 1993); See also 1-1 Nimmer on Copyright § 1.01[B][1][i] ("The torts of conversion and trespass relate to interference with tangible rather than intangible property..."); Lynn v. Sure-Fire Music Co., 237 Fed.Appx. 49, 54 (6th Cir. 2007).

Nimmer quotes the legislative history of the Copyright Act that even a state law action for conversion of a work that clearly falls within the scope of Section 102 of the Copyright act will not be preempted if the plaintiff can prove the extra element that the defendant unlawfully retained dominion and control over the physical object embodying the plaintiff's work. 1-1 Nimmer on Copyright § 1.01[B][1][i] ("Nothing contained in Section 301 precludes the owner of a material embodiment of a copy or a phonorecord from enforcing a claim of conversion against one who takes possession of the copy or phonorecord without consent."); See Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984); Asunto v. Shoup, , 132 F.Supp.2d 445 (E.D.La.2000). (Claim alleging conversion of royalties for recordings was qualitatively different from a copyright claim because the object that was allegedly converted was tangible,

money.); SecureInfo Corp. v. Telos Corp., 387 F.Supp.2d 593 (E.D.Va 2005)

(Detinue claim was different from copyright claim where developer alleged that defendants made and wrongfully possessed physical copies of its copyrighted software.). This type of state protection of rights in physical property does not obstruct the accomplishment of the purposes and objectives of the Copyright act.

Carson v. Dynegy Holdings, Inc., 344 F.3d 446, 457 (5th Cir. 2003). In Carson, the

Fifth Circuit explained:

“To make an appropriate comparison, even if the counter-culture author Abbie Hoffman owns the copyright to his hippie treatise entitled *Steal this Book*, such intellectual property ownership would not clothe the writer with the authority to march into the local Barnes & Noble and take a copy without paying for it.”

Carson, 344 F.3d at 457, n. 12 (5th Cir. 2003)

The conversion in this case was based on patient claims regarding confidential patient files as tangible property, rather than a claim that EGW interfered with Dr. Muncey’s rights to the data contained within the records. The jury found that EGW exercised unlawful dominion and control and/or an unauthorized and injurious use of his patient medical files. [RP 609].⁸ Dr. Muncey proved the elements of his conversion claim when he presented facts regarding EGW exercising dominion and control over Dr. Muncey’s patient files by unlawfully, giving third parties access, reproducing and then retaining the copies, as well as repeated concessions from EGW

⁸ These were the only theories of conversion presented to the jury. The alternative theory of demand and refusal was not relied upon because EGW did not come into possession of the patient files lawfully.

executives that the reason they copied the files was for use by a replacement optometrist. EGW erroneously focuses on the facts relied upon to prove conversion rather than the elements of conversion. Regardless, its allegation that Dr. Muncey's conversion claim is based solely on the copying or reproduction of the patient files and so is no different from a copyright claim ignores the full breadth of conduct found in the record below that made up EGW's wrongful and unauthorized acts of dominion and control and injurious use.

2. HIPAA prevents the rights in medical records that are protected by a conversion claim under state law from being equivalent to the rights protected by a Copyright claim.

Pursuant HIPAA the U.S. Department of Health and Human Services (HHS) enacted the Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule") establishing a set of national standards for the protection of certain health information found at 45 CFR 160 and 164(A) and (E). The Privacy Rule protects all "individually identifiable health information" held or transmitted by a health provider in any form or media, whether electronic, paper or oral. Id. "Individually identifiable health information "is information including demographic data that relates to: (i) the patient's past, present or future physical condition; (ii) the provision of health care to the patient; or (iii) the past present or future payment for the provision of health care to the patient and that identifies the patient or which can be used to identify the patient." Id. The major purpose of the Privacy Rule is to define and limit the circumstances in which a patient's protected health information

may be used or disclosed by a health provider. A health provider may not use or disclose protected health information except either (i) as the Privacy Rule permits or requires; or (ii) as the patient who is the subject of the information authorizes in writing. 45 CFR 164.502(a)⁹

HHS may impose civil monetary penalties violations of the Privacy Rule. 42 U.S.C. §1320d-6. A person who knowingly obtains or discloses individually identifiable health information in violation of HIPAA faces a fine of \$50,000 and up to one-year imprisonment (42 U.S.C. §1320d-6) and up to \$250,000 and up to 10 years imprisonment if the wrongful conduct involves the intent to sell, transfer or use individually identifiable health information for commercial advantage, personal gain or malicious harm. Id.¹⁰

The rights laid out in Section 106 cannot be granted to owners of medical records because patient files are property subject to immovable restrictions that

⁹ The Privacy Rule requires disclosure in two situations: (i) to the patient upon request; and (ii) to HHS as part of a compliance investigation or enforcement action. 45 CFR 164.502(a)(2) The permitted uses and disclosures of protected patient records are limited to: (i) to the patient; (ii) for purposes of treatment, payment and health care operations [45 CFR 164.506(c)]; (iii) in circumstances that clearly give the patient the opportunity to agree, acquiesce or object to the disclosure such as in an emergency situation [45 CFR 164.510(a)(b)]; (iv) incidental to an otherwise permitted use or disclosure as long as reasonable safeguards have been adopted and the information shared is limited to the "mimimum necessary" [45 CFR 164.502(a)(1)(iii)]; and (v) 12 national priority purposes such as law enforcement, judicial and administrative proceedings and public health threats. [45CFR 164.512].

¹⁰ Although Dr.Muncey does not have the exclusive rights to copy, prepare derivative works or distribute the confidential medical records that are conferred by Section 106, he is authorized, in fact required by HIPAA, to protect medical records. HIPAA specifically allows State Court actions that are not in conflict with HIPAA, including actions designed to "prevent fraud and abuse." 42 U.S.C. § 1320 d-7.

circumscribe their access and use in order to safeguard patient privacy. A medical provider cannot (1) reproduce medical records in copies; (2) prepare derivative works based on the medical records; or (3) distribute copies of the medical records to the public by sale or other transfer of ownership. The purposes of the HIPAA restrictions are in inherent conflict with the purposes of the Copyright act thereby making it impossible for the Copyright Act to protect property rights in medical records. As a result, state protection of medical records via a cause of action in conversion cannot be equivalent to much less undermine the protections and purposes of the Copyright Act and so, section 301(a) preemption does not apply.

Respectfully submitted,

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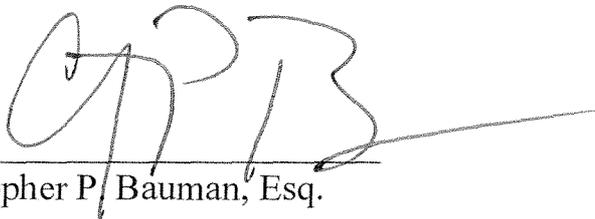
I HEREBY CERTIFY that a true and correct copy of the foregoing Response to the Supplemental Brief was served on the following counsel of record via e-mail and US First Class Mail on this 21st day of April, 2011.

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