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COURT OF APPEALS

STATE OF NEW YORK

JOHN DOE,

Appellant,

-against-

No. 224

GUTHRIE CLINIC, LTD., ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
November 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Doe v. Guthrie.

2 Counselor, do you want any rebuttal time?

3 MR. BROWN: Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

5 MR. BROWN: Good afternoon, and may it
6 please the court. My name is Andrew Brown, and I'm
7 here on behalf of Mr. John Doe in this matter.

8 Mr. Doe's life was ruined as a result of
9 improper disclosure of his personal health
10 information, and I am here on a question that has
11 been certified from the United States Second Circuit.
12 And as it applies to this case, the question is
13 whether Mr. Doe has a private right of action against
14 the Guthrie Health organization based on disclosure
15 of a nonphysician acting outside of the scope of his
16 employment. I would ask this court to answer the
17 question yes and to instruct the federal courts - - -
18 the federal courts according - - -

19 CHIEF JUDGE LIPPMAN: Does that go - - - is
20 this consistent with the - - - the path of the law,
21 at least in recent years, in terms of this kind of
22 thing, like Cabrini Medical Center and so many other
23 cases - - -

24 MR. BROWN: Judge - - -

25 CHIEF JUDGE LIPPMAN: - - - a tendency

1 mean it's at a flick of a switch you can - - -

2 MR. BROWN: Well, two - - - well, two - - -

3 CHIEF JUDGE LIPPMAN: - - - transmit this
4 information? What do you mean, how it looks?

5 MR. BROWN: Well, two things. One, with
6 respect to who is there. And secondly, technology
7 that is there. Once upon a time, if you went to a
8 doctor's office, you'd find a doctor there. Now if
9 you go, you see the doctor, the nurse practitioners,
10 you see doctor assistants, you see people of varying
11 stripes. You don't know what they do - - -

12 JUDGE RIVERA: Mr. Brown?

13 MR. BROWN: - - - but they assist you.

14 JUDGE RIVERA: But - - -

15 MR. BROWN: You spend most of your time
16 with them.

17 JUDGE RIVERA: But the real point - - -

18 MR. BROWN: So - - -

19 JUDGE RIVERA: - - - is not that they're
20 there. The point is that they have access to this
21 information. Is that - - -

22 MR. BROWN: They have - - -

23 JUDGE RIVERA: - - - not really the point?

24 MR. BROWN: They have access to
25 information. Well, the - - - well, it's twofold.

1 One, I don't think we should limit - - - the
2 privilege that we talk about with respect to health
3 records doesn't run just to doctors; it runs to
4 nurses and anybody else who's in the office. So why
5 should we limit the potential disclosure - - - or
6 liability of disclosure only to physicians? There's
7 a lot more there - - -

8 JUDGE ABDUS-SALAAM: Does it have anything
9 - - -

10 MR. BROWN: - - - than just physicians.

11 JUDGE ABDUS-SALAAM: - - - to do with that
12 the - - - that this privilege arises from the doctor-
13 patient privilege here?

14 MR. BROWN: It does arise from that, but if
15 we look at CPLR, it expands that. Now that includes
16 nurses. When that - - - back in common - - - when
17 the privilege first evolved, you only had a doctor in
18 the office. You go back far enough, you only had a
19 doctor in the office. Now things have changed.

20 With respect to the technology, technology
21 is different now, and it's important for us to
22 safeguard the integrity of one's medical - - -

23 JUDGE ABDUS-SALAAM: Well, you could still
24 just have a doctor in the office with technology.

25 MR. BROWN: You could, but technology has

1 driven it. Now it's different, even if you only had
2 a doctor in the office; you have the technology. Now
3 in the time that I've been standing here, I could
4 actually take one's medical record and history and
5 share it with the world. I can do that.

6 JUDGE SMITH: So you're saying that because
7 of technology, the risk to which the patient is
8 exposed is greater than it used to be.

9 MR. BROWN: It's far greater.

10 JUDGE SMITH: How do you - - - but does it
11 necessarily follow from that that we have to make
12 doctors or health care organizations insurers against
13 the risk?

14 MR. BROWN: I don't think - - - I think - -
15 - not in all - - - not against all risks. But here
16 we're looking at - - -

17 JUDGE SMITH: What about - - - what about
18 limiting the risks to risks of acts that were taken
19 in the course of their business?

20 MR. BROWN: I'm - - - with respect to - - -

21 JUDGE SMITH: Why should Guthrie Clinic,
22 Ltd. take the risk of what some nurse did for her own
23 personal reasons?

24 MR. BROWN: For a number of reasons. I
25 think Guthrie is in the best position to do it.

1 JUDGE SMITH: Because they have more money?

2 MR. BROWN: I'm sorry?

3 JUDGE SMITH: Because they have more money.

4 MR. BROWN: They certainly have more money.

5 JUDGE SMITH: But in general, we don't
6 impose liability just because people have money.

7 MR. BROWN: No, but we have to look at the
8 relationship; it's a balance. The - - - the public
9 policy concern is significant. Protecting one's
10 medical health information - - -

11 CHIEF JUDGE LIPPMAN: What if - - -

12 JUDGE RIVERA: But isn't the point that
13 they have control over the - - - they have control
14 over the informa - - - Guthrie has control over the
15 information - - -

16 MR. BROWN: They do have control.

17 JUDGE RIVERA: They have control over the
18 employee, and they're the only ones who can cabin the
19 conduct that's violative of your client's rights.

20 MR. BROWN: They are the only one. They
21 also have the incentive to ensure that this kind of
22 thing doesn't happen.

23 JUDGE ABDUS-SALAAM: Do we hold municipal -
24 - - or municipalities liable for the conduct of their
25 employees that has been performed outside of the

1 scope of their duties?

2 MR. BROWN: I'm sorry, Judge. Can you say
3 that - - -

4 JUDGE ABDUS-SALAAM: Do we hold
5 municipalities liable for conduct of their employees
6 when the employees are acting outside of the scope of
7 their employment, their duties?

8 MR. BROWN: Well, it depends.

9 JUDGE ABDUS-SALAAM: We don't usually, do
10 we?

11 MR. BROWN: No, we don't. And I'm not
12 asking that we adopt a policy - - -

13 JUDGE ABDUS-SALAAM: They have deep
14 pockets.

15 MR. BROWN: Well, deep pockets are, of
16 course, significant. But I'm not asking the court to
17 render a ruling that would say a health facility is
18 responsible and liable for every act of its employee
19 regardless of - - -

20 JUDGE SMITH: But in fact - - -

21 MR. BROWN: - - - the type of act.

22 JUDGE SMITH: - - - in fact, we know that
23 if you go to the doctor and an employee of the - - -
24 or go to a clinic, and an employee of the clinic
25 rapes you, that's - - - the clinic isn't liable for

1 that.

2 MR. BROWN: It is not, and I'm not ask - -
3 -

4 JUDGE SMITH: Why is this case different?

5 MR. BROWN: I think it's different, Judge,
6 because if you look at a rape case today, how unfor -
7 - - however unfortunate that would be, if you look at
8 it today, it would look just like it looked ten years
9 ago, twenty years ago, fifty years ago. With respect
10 to disclosure of health information, things have
11 changed.

12 CHIEF JUDGE LIPPMAN: But what if they - -
13 -

14 MR. BROWN: You can disclose - - -

15 CHIEF JUDGE LIPPMAN: But what if they
16 train them not to divulge private information? If
17 the - - - if the clinic - - - this is a - - - they
18 come in, they learn not to do it, they do it anyway.
19 They're still responsible? The clinic's still
20 responsible?

21 MR. BROWN: I think so. Under a strict
22 liability theory, it would be, Your Honor.

23 CHIEF JUDGE LIPPMAN: Right - - -

24 MR. BROWN: And - - -

25 CHIEF JUDGE LIPPMAN: - - - but my point to

1 you before is aren't we - - - don't we go against
2 that kind of strict liability today?

3 MR. BROWN: Well - - -

4 CHIEF JUDGE LIPPMAN: Isn't that the - - -
5 the cases along those lines are very much in the
6 opposite direction?

7 MR. BROWN: It's a balance, Judge.

8 CHIEF JUDGE LIPPMAN: So what's - - - so
9 why here do we hold it responsible that - - -

10 MR. BROWN: I think because of the ease of
11 disclosure of health information. It's easier than
12 ever. I wouldn't - - -

13 JUDGE PIGOTT: Would the case be different
14 if - - -

15 MR. BROWN: I wouldn't be here twenty years
16 ago. I wouldn't be here fifteen years ago arguing
17 this. What's driven it, what's made it different is
18 technology, the ease of it. On one hand, we value -
19 - -

20 JUDGE ABDUS-SALAAM: But counsel, why - - -

21 MR. BROWN: - - - the protection - - -

22 JUDGE ABDUS-SALAAM: - - - why is this case
23 different because of technology? That nurse could
24 have gone to another room, picked up the phone, and
25 called her sister-in-law, rather than texting her.

1 MR. BROWN: Because, Your Honor, in that
2 situation the damage is limited. You can only call
3 one person at a time. You can now, on your cell
4 phone, share that information with the entire world
5 before I could run to a courthouse and get an
6 injunction.

7 JUDGE PIGOTT: If she was - - - if she was
8 sitting at her home and, you know, her workday's over
9 and she's just e-mailing her relatives and disclosing
10 this, would Guthrie still be responsible, in your
11 view?

12 MR. BROWN: It would, because Guthrie would
13 have given her the information, and that's important.
14 She wouldn't have the information but for - - -
15 Guthrie is nothing but a collection of people.

16 CHIEF JUDGE LIPPMAN: Yeah, but what's the
17 - - - what's the policy issue? The policy issue as
18 to why Guthrie is responsible is totally because they
19 gave them the information? If they had done nothing
20 else wrong, if they had trained them not to do it,
21 it's a strong policy of theirs, health information is
22 very important, is the rationale - - - the policy
23 rationale that - - - that it's because they have
24 their inf - - - the information and modern
25 technology; therefore, you're always responsible?

1 decision, in Kroll, we said that the laboratory is
2 also in the best position to prevent false positive
3 results. "Under the circumstances, we find that
4 Kroll had a duty to the test subject to perform his
5 drug test in keeping with relevant professional
6 standards and that the existence of its contract with
7 the County does not immunize" defendant from the
8 (sic) laboratory - - - "the defendant laboratory."
9 Are you arguing similarly here to our decision in
10 Kroll, or have you not had an opportunity to read it?
11 It's kind of - - -

12 MR. BROWN: I've not had an opportunity.

13 JUDGE PIGOTT: It's kind of new. Yeah,
14 okay.

15 JUDGE RIVERA: So but - - -

16 JUDGE GRAFFEO: Counselor, can I ask you,
17 would your argument be the same if this was an
18 inadvertent disclosure? Like, say someone in the
19 medical records department of the clinic intends to
20 send that record to the patient's insurance carrier
21 but hits the wrong - - - hits the wrong key on the
22 keyboard and it ends up going to - - -

23 MR. BROWN: It - - -

24 JUDGE GRAFFEO: - - - some private
25 individual instead?

1 MR. BROWN: It would, because I don't know
2 how we would otherwise carve out a different
3 situation.

4 CHIEF JUDGE LIPPMAN: Would that be
5 stronger or weaker?

6 MR. BROWN: I think it would probably be
7 weaker. Certainly - - -

8 JUDGE GRAFFEO: Strict liability would
9 apply to both - - -

10 MR. BROWN: Strict liability would apply -
11 - -

12 JUDGE GRAFFEO: - - - intentional and - - -

13 MR. BROWN: - - - would apply to both. It
14 would appear, on its face - - -

15 JUDGE GRAFFEO: - - - inadvertent - - -

16 MR. BROWN: - - - to be a stronger case -
17 - -

18 JUDGE GRAFFEO: - - - disclosure.

19 MR. BROWN: - - - if somebody were doing it
20 intentionally.

21 JUDGE RIVERA: Well, coun - - - I thought
22 you were actually arguing before - - - maybe I
23 misunderstand you - - - against strict liability,
24 because you were in the middle of answering a
25 question when you said it's not your position that

1 the company would be liable for all actions by
2 employees. What are the actions that would - - -

3 MR. BROWN: For instance - - -

4 JUDGE RIVERA: - - - fall outside of - - -

5 MR. BROWN: - - - traditional torts. I'm
6 only looking at the disclosure of health information,
7 medical records. And there, I think there's a
8 difference because of - - -

9 JUDGE GRAFFEO: You mean not assaults?

10 MR. BROWN: Not assaults.

11 JUDGE GRAFFEO: When you say different
12 types of torts, you mean - - -

13 MR. BROWN: Yeah, traditional assault - - -
14 like there have been many cases involving sexual
15 harassment, rapes, physical assaults by doctors or
16 other folks in a medical facility - - -

17 JUDGE RIVERA: Okay. So I misunderstood
18 you. So you mean with respect to the medical data,
19 you are saying the company - - -

20 MR. BROWN: Correct.

21 JUDGE RIVERA: - - - is liable for any and
22 all disclosure.

23 MR. BROWN: For disclosures.

24 JUDGE RIVERA: Period.

25 MR. BROWN: Of - - -

1 JUDGE RIVERA: By an employee, right?

2 MR. BROWN: - - - of health records.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 JUDGE RIVERA: Yeah, health records.

5 CHIEF JUDGE LIPPMAN: You'll have your
6 rebuttal.

7 MS. STOLLEY: Good afternoon, Your Honors.
8 My name is Martha Stolley, and I am here to represent
9 the Guthrie defendants.

10 CHIEF JUDGE LIPPMAN: Counsel, what's the
11 remedy, if we don't hold you responsible - - - let's
12 assume, for the sake of argument, that counselor is
13 right and John Doe's life is ruined; what's the
14 remedy for John Doe?

15 MS. STOLLEY: Well - - -

16 CHIEF JUDGE LIPPMAN: Or is there none and
17 it's tough luck?

18 MS. STOLLEY: A little of both. I would
19 beg to differ with counsel about the fact that strict
20 liability is the only way to - - - to encourage
21 medical corporations to train their employees or to
22 put in place prohibitions against the use of cell
23 phones, for instance, or to put in place measures to
24 prevent this sort of thing from happening. I think
25 the traditional - - - the traditional negligence

1 facets are - - - are strong enough to prevent this
2 from happening.

3 CHIEF JUDGE LIPPMAN: Well, yeah, but he's
4 - - - but your adversary's saying that beyond that
5 you should be responsible, in this modern age, with
6 technology the way it is. Doesn't somebody have to
7 be responsible, or is the answer no, that there's
8 just no remedy, it's an unfortunate incident, and
9 that's the end of the story? Is that your position?

10 MS. STOLLEY: It is, to some extent, Your
11 Honor. The fact is - - -

12 CHIEF JUDGE LIPPMAN: I mean, I assume you
13 didn't know that this nurse was going to go and - - -

14 MS. STOLLEY: Of course not.

15 CHIEF JUDGE LIPPMAN: - - - and send this
16 to her - - -

17 MS. STOLLEY: There was no way that this
18 was - - -

19 CHIEF JUDGE LIPPMAN: - - - sister-in-law,
20 or whoever it was.

21 MS. STOLLEY: The - - -

22 CHIEF JUDGE LIPPMAN: So let's assume
23 that's the case. Why shouldn't you be held
24 responsible?

25 MS. STOLLEY: Because of the fact that this

1 was not foreseeable and this was not done within the
2 scope of this - - -

3 CHIEF JUDGE LIPPMAN: So - - -

4 MS. STOLLEY: - - - nurse's employment.

5 CHIEF JUDGE LIPPMAN: - - - come back to my
6 other question; no remedy, essentially - - -

7 MS. STOLLEY: No remedy - - -

8 CHIEF JUDGE LIPPMAN: - - - for John Doe?

9 MS. STOLLEY: There is not a proper remedy
10 to make the medical corporation strictly liable for
11 the actions of a nurse that were taken outside the
12 scope - - -

13 CHIEF JUDGE LIPPMAN: Well, John Doe - - -

14 MS. STOLLEY: - - - of her employment.

15 CHIEF JUDGE LIPPMAN: - - - could sue the
16 nurse, right?

17 MS. STOLLEY: Absolutely. John Doe brought
18 a direct action against Guthrie for lack of training,
19 for inadequate supervision, for hiring and/or
20 retaining Magan Stalbird, despite knowing or having -
21 - - having - - -

22 JUDGE RIVERA: Are those live claims?

23 MS. STOLLEY: I'm sorry; what?

24 JUDGE RIVERA: Are those live claims?

25 MS. STOLLEY: Yes, all of those were

1 is against only the individual, which means it
2 doesn't get any - - - it doesn't go towards the
3 problem that he's identifying, which is what
4 incentivizes you to change your protocol so that it
5 won't happen again?

6 MS. STOLLEY: I think the medical
7 corporations are already incentivized to have
8 measures in place to prevent this sort of thing from
9 happening.

10 JUDGE READ: What about HIPAA? Does HIPAA
11 have anything to say about this kind of thing?

12 MS. STOLLEY: Well, HIPAA presents the
13 standard, but that's another incentive for
14 corporations to have measures in place so that there
15 are not violations of HIPAA.

16 JUDGE GRAFFEO: Well, HIPAA almost - - -

17 MS. STOLLEY: So I think - - -

18 JUDGE GRAFFEO: HIPAA almost underscores
19 the importance of confidentiality - - -

20 MS. STOLLEY: Absolutely.

21 JUDGE GRAFFEO: - - - of medical records.

22 MS. STOLLEY: Absolutely.

23 JUDGE GRAFFEO: So if all inappropriate
24 disclosures of medical history and medical records
25 are outside the scope of employment, then no patients

1 are really going to have any recourse - - -

2 MS. STOLLEY: Well - - -

3 JUDGE GRAFFEO: - - - against the medical
4 provider - - -

5 MS. STOLLEY: With all due respect - - -

6 JUDGE GRAFFEO: - - - correct?

7 MS. STOLLEY: - - - that's what the court
8 in Kaiser said, the Third Department said, and that's
9 actually not accurate, because there are instances,
10 as the Second Circuit pointed out, where you can have
11 a wrongful disclosure of personal health information
12 while acting in the course of one's employment. For
13 instance, one of the judges brought up sending - - -
14 faxing personal health information or sending it via
15 computer and pressing the wrong key and sending it to
16 the wrong person.

17 JUDGE RIVERA: But that's inadvertent.

18 MS. STOLLEY: Inadvertent, but wrongful,
19 nonetheless. And in that - - -

20 CHIEF JUDGE LIPPMAN: Now, that you're
21 responsible for, right?

22 MS. STOLLEY: In that instance, not
23 strictly responsible - - -

24 CHIEF JUDGE LIPPMAN: No, but - - -

25 MS. STOLLEY: - - - not strictly liable,

1 yes.

2 CHIEF JUDGE LIPPMAN: No, but you believe
3 there it's fair to hold you responsible.

4 MS. STOLLEY: Well, in that case the person
5 could sue the clinic for, perhaps, lack of training
6 or a lack of - - -

7 JUDGE RIVERA: Because it's within the
8 scope of employment.

9 MS. STOLLEY: Because it's within the scope
10 of employment, right.

11 JUDGE SMITH: You would have respondeat
12 superior liability in that case.

13 MS. STOLLEY: Yes.

14 JUDGE PIGOTT: Are you familiar with our
15 decision in Landon v. Kroll?

16 MS. STOLLEY: I am not; I'm sorry, Your
17 Honor.

18 JUDGE PIGOTT: They don't read our stuff.

19 MS. STOLLEY: I'm going to go home and read
20 it, though.

21 Another - - -

22 JUDGE RIVERA: Copies are available at the
23 door.

24 MS. STOLLEY: Okay, thank you. Another
25 example is, for instance, as we know from HIPAA, you

1 are allowed to disclose personal health information
2 in the attem - - - in the efforts of getting paid for
3 one's services. So those are just two examples where
4 there is the possibility of wrongful disclosure of
5 information while acting in the course of one's
6 employment. And in that case there is possible
7 respondeat superior - - -

8 JUDGE PIGOTT: If she's - - -

9 MS. STOLLEY: - - - liability.

10 JUDGE PIGOTT: If she's sitting there,
11 whatever she was working, your employee, and is
12 talking on the cell phone and just says, you know, by
13 the way, a guy in here just the other - - - you know,
14 just now, he's going in, and he's got, you know,
15 whatever the ailments happen to be, and somebody
16 overhears it and it spreads all over this not very
17 large town, are you responsible, or can you
18 conceivably be?

19 MS. STOLLEY: No, because I don't see that
20 as any different from what we have here.

21 JUDGE PIGOTT: So even though she's just
22 talking in a loud voice on her phone, inadvertently,
23 if somebody hears it, that's not your responsibility?

24 MS. STOLLEY: I think that he would then
25 have a stronger case to say, okay, your employees are

1 not being trained well enough.

2 CHIEF JUDGE LIPPMAN: What if - - -

3 JUDGE PIGOTT: Doesn't it seem odd - - - if
4 he did not know who this person was, he'd have a
5 stronger case than knowing.

6 MS. STOLLEY: That's correct.

7 JUDGE PIGOTT: I - - -

8 MS. STOLLEY: And one thing I have to point
9 out, because throughout his brief and even today, Mr.
10 Doe's counsel has claimed that this information was
11 broadcast, seemingly, across the universe. And the
12 fact is these were texts sent from one person, Magan
13 Stalbird, to one person, Jessica - - - I don't know
14 her last name, who was Mr. Doe's girlfriend at the
15 time. They were not disseminated anywhere else.

16 CHIEF JUDGE LIPPMAN: Say in Judge Pigott's
17 hypothetical, say that the person on the phone was
18 talking to an insurance carrier, or whatever, on a
19 legitimate reason to mention the condition, but
20 again, she or he was talking too loud, and it was
21 heard and it spread all over the place. You're
22 responsible?

23 MS. STOLLEY: It de - - - we could be; that
24 could be a case of - - -

25 CHIEF JUDGE LIPPMAN: Because of poor

1 training - - -

2 MS. STOLLEY: - - - respondeat superior - -

3 -

4 CHIEF JUDGE LIPPMAN: - - - or - - -

5 MS. STOLLEY: - - - because she or he is
6 acting in the course - - -

7 CHIEF JUDGE LIPPMAN: - - - a not secure
8 phone or whatever?

9 MS. STOLLEY: - - - and she or he is acting
10 in the course of his or her employment. I mean, the
11 fact is, this is one person, who for personal animus,
12 sent this text to another person. She was not acting
13 as the - - - in the capacity of a caregiver for Mr.
14 Doe on that day in question.

15 JUDGE RIVERA: But why does - - -

16 MS. STOLLEY: She was not one of the nurses
17 that was treating him.

18 JUDGE RIVERA: Yeah, but why doesn't he
19 have an action to say the only reason she's able to
20 do that is because your protocols are deficient? Why
21 - - - why does he have to wait - - -

22 MS. STOLLEY: He did say that.

23 JUDGE RIVERA: - - - until someone - - -

24 MS. STOLLEY: He did say that - - -

25 JUDGE RIVERA: I understand that, but - - -

1 MS. STOLLEY: - - - and he lost.

2 JUDGE RIVERA: I know, but my question is
3 why can't he use that argument in this - - - in this
4 claim? Why does he have to wait for the person who
5 does it as part of their job?

6 MS. STOLLEY: Because in the - - -

7 JUDGE RIVERA: Isn't the failure on your
8 side the same? It's the failure to set up proper
9 protocols?

10 JUDGE SMITH: Well, as I understand it, you
11 were conceding that if your protocols are deficient
12 he could recover?

13 MS. STOLLEY: If she were acting within the
14 scope - - -

15 JUDGE RIVERA: But only if she's - - -

16 MS. STOLLEY: - - - of her employment.

17 JUDGE RIVERA: Right, and my question is
18 why doesn't he have that argument if she's acting
19 outside the scope of her employment, if it's the
20 flawed protocols that allowed her to do that?

21 JUDGE GRAFFEO: Does the record tell us how
22 she got access to this information? Was she the
23 nurse that was actually - - -

24 MS. STOLLEY: She was not the nurse - - -

25 JUDGE GRAFFEO: - - - in the room with him?

1 MS. STOLLEY: - - - that was caring for
2 this patient, no.

3 CHIEF JUDGE LIPPMAN: But what - - - but
4 what if the - - -

5 MS. STOLLEY: I'm not sure whether it's in
6 the record, quite frankly.

7 CHIEF JUDGE LIPPMAN: But following up on
8 Judge Rivera's question, what if you say to them - -
9 - or you should be saying to them, look, I don't care
10 what you do, you know, you cannot take someone's
11 health records and gossip about it to somebody else,
12 clearly saying outside the scope of your employment.

13 MS. STOLLEY: Yes.

14 CHIEF JUDGE LIPPMAN: You can't do that;
15 don't do that. If you're deficient in saying that or
16 in your training, even though it's outside the scope
17 of the employment, you could be responsible, right?

18 MS. STOLLEY: I believe so. I believe so,
19 and that could be an action - - -

20 JUDGE SMITH: That - - -

21 MS. STOLLEY: - - - brought that - - -

22 JUDGE SMITH: That's a negligent
23 supervision case?

24 MS. STOLLEY: That would be a lack of
25 supervision, lack of training.

1 CHIEF JUDGE LIPPMAN: Even though they're
2 outside the scope?

3 MS. STOLLEY: Correct. And for instance,
4 if we knew that Nurse Stalbird had a propensity for
5 sending texts about - - - with personal health
6 information - - -

7 CHIEF JUDGE LIPPMAN: And you didn't watch
8 her, yeah.

9 MS. STOLLEY: - - - even though she were
10 acting outside the scope of her employment, that
11 could be an action for lack of - - - for negligent
12 retention or - - -

13 CHIEF JUDGE LIPPMAN: So your answer is - -
14 -

15 MS. STOLLEY: - - - hiring of this person.

16 CHIEF JUDGE LIPPMAN: - - - it depends?

17 MS. STOLLEY: Excuse me?

18 CHIEF JUDGE LIPPMAN: Your answer is it
19 depends - - -

20 MS. STOLLEY: Correct.

21 CHIEF JUDGE LIPPMAN: - - - on the
22 circumstances.

23 JUDGE RIVERA: Well, if I understand, your
24 answer is it's not this claim; it's a different
25 claim, and he lost on those claims. Or am I

1 misunderstanding your answer?

2 MS. STOLLEY: I think - - - I think you've
3 said it correctly.

4 JUDGE RIVERA: Right.

5 MS. STOLLEY: I think you did.

6 JUDGE RIVERA: It's not this common law
7 claim; it is another claim.

8 MS. STOLLEY: It is another common law
9 claim.

10 JUDGE RIVERA: And he made those claims - -
11 -

12 MS. STOLLEY: And he lost.

13 JUDGE RIVERA: - - - and he lost those
14 claims. And my question to you is he lost those
15 claims because I thought the court said there is no
16 such claim, or did I misunderstand?

17 MS. STOLLEY: Both the district court and
18 the Second Circuit stated that Mr. Doe failed to show
19 any foreseeability - - -

20 JUDGE RIVERA: Okay.

21 MS. STOLLEY: - - - on the part of Nurse
22 Stalbird, and failed to show any sort of
23 in-furtherance-of-business or acting within the scope
24 of her employment.

25 JUDGE RIVERA: But it still sounds a little

1 bit circular because that finding strikes me as
2 saying no one in their right mind would think their
3 employee would do this, and I think his argument is
4 you didn't train them properly to avoid this, you
5 have bad protocols, which could be you can't have a
6 cell phone when you're handling or have access to
7 private documentation.

8 MS. STOLLEY: Well, that is not what he
9 argues.

10 JUDGE RIVERA: Okay.

11 MS. STOLLEY: I mean, he's arguing for
12 strict liability. And I see I have one - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. STOLLEY: Do I have one minute?

15 CHIEF JUDGE LIPPMAN: You have one thought.
16 Go ahead.

17 MS. STOLLEY: I just want to bring up the
18 Kaiser case, because obviously - - -

19 CHIEF JUDGE LIPPMAN: Go ahead.

20 MS. STOLLEY: - - - that's the main
21 argument here, and say that in thirteen years since
22 that decision was made by the Third Department, no
23 court has adopted the logic of strict liability for a
24 medical corporation for the breach of fiduciary duty.
25 And in fact, Juric, which is a Third Department 2007

1 case, Juric v. Vergstraesser, that was an instance
2 where personal health information was turned over by
3 a doctor. The plaintiff sued both the doctor and the
4 hospital, and the Third Department actually dismissed
5 the claim - - -

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MS. STOLLEY: - - - against the hospital.

8 CHIEF JUDGE LIPPMAN: That was one thought.
9 Thank you.

10 Counselor, rebuttal?

11 MR. BROWN: A couple of things, Your Honor.
12 With respect to Kaiser, it's still good law. If you
13 look at the case that was just referenced, the case
14 was not, in any way, rejected with respect to - - -
15 with respect - - -

16 CHIEF JUDGE LIPPMAN: Has anyone followed
17 it, counsel? Do you see it cited?

18 MR. BROWN: You don't, Your Honor, but this
19 is - - - this is the New York Court of Appeals. I
20 mean, this court has been out front before, and we're
21 asking it to get out front now. Again, technology
22 has changed the world we live in. We believe that
23 that is significant. With respect to - - -

24 JUDGE RIVERA: Counselor, what's your
25 response to her statements that you do actually have

1 recourse, you just lost those claims?

2 MR. BROWN: You don't, Your Honor. First
3 of all, with respect to - - - in all my thirty years
4 of practice, with respect to hiring and training,
5 that comes out at discovery. This case was dismissed
6 on a Rule (b)(6) motion. There was no discovery
7 allowed.

8 JUDGE SMITH: But we can't review - - -

9 MR. BROWN: So - - -

10 JUDGE SMITH: - - - maybe that was wrong,
11 but we can't review - - - we aren't reviewing what
12 the district court did with those claims.

13 MR. BROWN: I just answer - - - no,
14 admittedly, Judge; I was just speaking to the
15 question.

16 With respect to remedies, for all those
17 people who would not be able to point to the facility
18 having done something wrong with respect to hiring or
19 training, if those folks have their records
20 disclosed, then there is no remedy at all. Now,
21 that's a lot of people. In the grand scheme of
22 things, that's most people.

23 JUDGE RIVERA: But Guthrie could not - - -
24 if I'm understanding what your hypothetical is,
25 Guthrie could not continue in business if it allowed

1 that kind of conduct. I mean, I think that's - - -

2 MR. BROWN: Well, Your Honor, what we're
3 looking to do - - -

4 JUDGE RIVERA: - - - your opponent's
5 position.

6 MR. BROWN: - - - with strict liability - -
7 -

8 JUDGE RIVERA: There are other ways to
9 incentivize this company to protect the - - -

10 MR. BROWN: With respect to - - -

11 JUDGE RIVERA: - - - personal information.

12 MR. BROWN: - - - HIPAA, HIPAA provides
13 nothing. The other statutes that are there, they
14 provide no right of action to the person who's been
15 most harmed, the individual here.

16 JUDGE RIVERA: But in a business model, if
17 people know their information's not going to be
18 private, they won't keep going to this business.

19 MR. BROWN: Well, Your Honor, that's - - -
20 that would hopefully be the case. But I think,
21 again, here, the best way to incentivize the hospital
22 to prevent this from happening is strict liability.
23 I think it's fair, on balance, with respect to the
24 rights and the public policies underlying strict
25 liability and with respect to the health care

1 facilities in this case and in future cases.

2 CHIEF JUDGE LIPPMAN: Okay, thanks,
3 counsel. Thank you both. Appreciate it.

4 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of John Doe v. Guthrie Clinic, Ltd., et al., No. 224 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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