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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KOCH,

Respondent,

-against-

No. 153

SHEEHAN,

Appellant.

20 Eagle Street
Albany, New York 12207
September 09, 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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 153, Matter of Koch.
2 Counselor, would you like any rebuttal
3 time?

4 MR. PALADINO: Yes, Your Honor, three
5 minutes.

6 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

7 MR. PALADINO: Your Honors, the Medicaid
8 program demands more than the minimum from its
9 healthcare providers.

10 JUDGE PIGOTT: You could terminate somebody
11 on thirty-days' notice without cause?

12 MR. PALADINO: Yes.

13 JUDGE PIGOTT: Why don't you?

14 MR. PALADINO: We do all the time.

15 JUDGE PIGOTT: Why didn't you do it here?
16 I mean, it just seems to me like it's kind of being
17 unfair to someone when they're negotiating with your
18 boss, the Department of Health, and you reach an
19 accommodation that does not impact on the ability to
20 practice medicine; in other words, he's treating
21 patients the next day, and then sometime later,
22 someone in your - - - in OMIG's department decides we
23 don't think you're capable of treating patients - - -
24 not all patients, but only the patients that are in
25 need of Medicaid.

1 MR. PALADINO: Well, here - - -

2 JUDGE PIGOTT: It doesn't make sense.

3 MR. PALADINO: - - - they had an option.

4 But here the Medicaid Inspector General, in its
5 discretion, elected to rely upon 515.7(e). There's
6 been a final determination from - - -

7 CHIEF JUDGE LIPPMAN: Do you think that - -
8 - that the determination of someone whether someone
9 should practice medicine should be guided by doctors
10 and people who are, by their training, able to make
11 that kind of evaluation?

12 MR. PALADINO: Well, it is the board that
13 determines whether the doctor gets to keep his
14 license, but it's the Medicaid Inspector General that
15 gets to - - -

16 CHIEF JUDGE LIPPMAN: And based on what did
17 he make his determination in this case?

18 MR. PALADINO: Well, it was a determination
19 made by a registered nurse with extensive experience
20 in quality assurance - - -

21 JUDGE SMITH: What did - - - what did she
22 read?

23 MR. PALADINO: She read the charges and she
24 read the consent order. The char - - -

25 JUDGE SMITH: She didn't even - - - she

1 didn't even read the underlying file, did she?

2 MR. PALADINO: No, Your Honor. But she - -
3 -

4 JUDGE SMITH: Even though they say they
5 will, or something in there says that's what the
6 Inspector General will do.

7 MR. PALADINO: Well, the OPMC has not made
8 the files available to the Medicaid Inspector
9 General. That's what the Medicaid Inspector General
10 would have liked to have looked at.

11 JUDGE PIGOTT: Wasn't that - - - isn't that
12 an internal problem as opposed to - - - to pick on
13 Judge Smith's analogy - - - the way this works, Dr.
14 Koch could put Eli Manning's arm back on his body if
15 he could, but he couldn't work on a poor person,
16 who's in need of Medicaid. So he can practice with
17 the rich, he can't practice with the poor. And I
18 don't understand, you know, what decision that was in
19 the Department of Health that makes sense.

20 MR. PALADINO: Well, the two agencies have
21 different functions. The board is simply determining
22 whether the doctor has the minimum - - -

23 JUDGE ABDUS-SALAAM: Are they really two
24 agencies? This is all under the Department of
25 Health, right, counsel?

1 MR. PALADINO: They're technically under
2 the umbrella of the same agency, but it shouldn't
3 matter whether OMIG is technically under the umbrella
4 of the Health Department or whether it was still back
5 at the Department of Social Services.

6 JUDGE ABDUS-SALAAM: Well, it matters if
7 the right hand doesn't know what the left hand is
8 doing. If one - - - one portion of your agency
9 settles a case with a doctor and the doctor thinks -
10 - - and it says this will settle all, you know,
11 charges, everything else; and then after that, OMIG
12 comes along and says, no, no, that doesn't settle it
13 for us, we're - - - you can't practice on Medicaid
14 patients.

15 MR. PALADINO: Well, there are two things.
16 First, the board plays no role in determining whether
17 a doctor continues to participate in the Medicaid
18 program, so the Medicaid Inspector General isn't
19 duplicating any function - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but does - - -

21 MR. PALADINO: - - - performed - - -

22 CHIEF JUDGE LIPPMAN: - - - it make any
23 sense? Could there be a statutory or regulatory
24 scheme - - - I think that's what Judge Pigott was
25 asking you and what Judge Abdus-Salaam was asking

1 you. How could that make any sense that - - - that
2 he can practice medicine, but he can't practice
3 Medicaid? Isn't it considered within the same
4 overall umbrella, as you describe it? Could that be
5 that - - - that doctors - - - essentially, cutting
6 through the bureaucracy, doctors decide he can
7 practice and nondoctors decide that he can't practice
8 on poor people? Does that make sense as a regulatory
9 scheme here?

10 MR. PALADINO: There's no inconsistency in
11 the two determinations. There's no inconsistency in
12 one entity saying you get to keep your license and
13 the other entity saying, we're not going to expend -
14 - -

15 CHIEF JUDGE LIPPMAN: Do you think he would
16 have agreed to this consent order if he knew he
17 wasn't going to be able to practice on Medicaid
18 patients?

19 MR. PALADINO: Whether he understood the
20 collateral consequences of his consent order - - -

21 CHIEF JUDGE LIPPMAN: Doesn't that matter?

22 MR. PALADINO: Your Honor, there are other
23 doctors who ask the BPMC to send the proposed consent
24 order over to the Medicaid Inspector General, and
25 obtain a preliminary determination of what it would

1 do if he signed that consent order.

2 JUDGE GRAFFEO: But you know, I can
3 understand if there was a suspension or revocation of
4 a license. I could understand the Inspector General
5 relying on that. But where there's a probationary
6 term so that there's still permission to practice,
7 should there be a different review and assessment
8 process by the Inspector General in that situation?

9 MR. PALADINO: Well, yes, Your Honor. It's
10 the point I've been - - -

11 JUDGE GRAFFEO: I mean - - -

12 MR. PALADINO: - - - trying to make - - -

13 JUDGE GRAFFEO: - - - is that - - - is that
14 how we end up with this being arbitrary, because of
15 the differences?

16 MR. PALADINO: No, Your Honor. First of
17 all, the argument that the - - -

18 CHIEF JUDGE LIPPMAN: Let me add on to
19 Judge Graffeo's question - - - with no investigation?

20 MR. PALADINO: That is because the
21 regulation authorizes the imposition of an exclusion
22 based upon a final determination by the BPMC. There
23 is no need for - - -

24 JUDGE PIGOTT: What - - -

25 MR. PALADINO: - - - an independent - - -

1 JUDGE PIGOTT: What - - -

2 MR. PALADINO: - - - investigation.

3 JUDGE GRAFFEO: But it's not a final
4 determination like there usually is, the license is
5 suspended or revoked. It's probationary. So - - -
6 or sometimes they just have what, a monitor works
7 with the doctor, that type of thing? Why should
8 those situations, where they're allowed to practice,
9 be treated the same way as where there's actually the
10 license is taken away?

11 MR. PALADINO: Because the Medicaid
12 Inspector General, and the Medicaid program
13 generally, has an independent obligation to ensure
14 that it is enrolling providers who provide high-
15 quality care. If I can give - - -

16 JUDGE PIGOTT: But one of the things, you
17 know, that your opponent raises, is that the process
18 by the Office of Professional Medical Conduct can be
19 long and very expensive. And - - - and they make a
20 determination that rather than go through all of that
21 - - - because the way the file looked, you know,
22 there were mistakes made at admission and things were
23 overlooked or whatever - - - but rather than go
24 through all of that, you had two deceased patients
25 and - - - and they make a judgment based on time and

1 expense, et cetera, to do what they did; why wouldn't
2 that satisfy OMIG?

3 I mean, you're right; I didn't know this,
4 but you're telling me they could have gone ahead and
5 asked OMIG what's the ramification. Why couldn't
6 OMIG do that before the suspension, revocation, or
7 the consent order, since they're in the same office,
8 and say make sure when you settle this, you tell them
9 that they're still liable to be suspended or we will
10 not suspend them or we will? Wouldn't that make more
11 sense?

12 MR. PALADINO: Of course it could have been
13 done differently. The board and OMIG view it as the
14 doctor and his lawyer's responsibility to take care
15 of considering collateral consequences.

16 Now, if I can answer why there's no
17 inconsistency - - -

18 JUDGE SMITH: Collateral consequences? The
19 - - - it's not obvious - - - it's not an automatic
20 consequence of the first decision. The second - - -
21 the second one didn't follow, by any means,
22 automatically. I mean - - -

23 MR. PALADINO: Right.

24 JUDGE SMITH: - - - in fact, isn't it - - -
25 logically, the two agencies or the two sub-agencies

1 or the two offices disagreed. Right? I mean, they
2 obviously disagreed?

3 MR. PALADINO: Well, no, there's no - - -
4 that's the point about there's no fundamental
5 inconsistency - - -

6 JUDGE SMITH: Well, one - - - one says it's
7 okay for him to keep practicing and the other says he
8 can't practice on Medicaid patients. How are those
9 consistent?

10 MR. PALADINO: If I can use an analogy to
11 answer Your Honor's question. Let's say an attorney
12 disciplinary committee censures an attorney for
13 shoddy legal work, but does not revoke his license.

14 JUDGE SMITH: Um-hum.

15 MR. PALADINO: That shouldn't prevent an
16 assigned counsel program from concluding that it
17 doesn't want that attorney performing services on
18 behalf of the indigent. There's no fundamental
19 inconsistency - - -

20 JUDGE SMITH: Well - - - well, I mean, I
21 can unders - - - I see your poi - - - I see that both
22 determi - - - but aren't there - - - don't those two
23 determinations suggest disagreement? The Bar
24 Association thinks - - - on your hypothetical, the
25 disciplinary committee thought censure was enough.

1 The assigned counsel program thinks for poor people
2 it's not good enough. Maybe they're right, but they
3 obviously disagree, don't they?

4 MR. PALADINO: Well, in a sense they are.
5 But it's not - - - it's not a fundamental
6 disagreement in the sense that the one determination
7 is nullifying the other. If OMIG's determination - -
8 -

9 JUDGE SMITH: Well, but as a practical
10 matter, your case, not the lawyer case, but in your
11 case, as a prac - - - do you contest that as a
12 practical matter, it's very hard to make a living as
13 a doctor in New York State without being able to take
14 Medicaid patients?

15 MR. PALADINO: It's hard but it's not
16 impossible. About forty percent of them do. And the
17 fact of the matter is that two - - -

18 JUDGE SMITH: Forty - - - you mean forty
19 percent don't take Medicaid patients, or forty
20 percent are ineligible?

21 MR. PALADINO: Forty percent don't take
22 Medicaid patients.

23 JUDGE SMITH: I mean, it's a - - - you have
24 to - - - if you're ineligible, you're going to have
25 problems getting a job, whether you take them or not,

1 right?

2 MR. PALADINO: Oh, sure. I readily
3 acknowledge that the exclusion from the Medicaid
4 program has significant consequences for Dr. Koch.
5 But it's not fundamentally inconsistent for the
6 Medicaid - - -

7 JUDGE SMITH: It would have signi - - - it
8 would have - - - it would have significant, indeed,
9 near disastrous consequences, for almost any doctor,
10 wouldn't it?

11 MR. PALADINO: Not necessarily. It can
12 have significant consequences. That goes to the - -
13 - whether the penalty is shocking. I don't think
14 it's shocking to exclude someone who provides sub-
15 standard care that results in death.

16 CHIEF JUDGE LIPPMAN: Counsel, can you take
17 the action that you did without the doctor violating
18 some law or regulation?

19 MR. PALADINO: In the sense of provision of
20 substandard care is an un - - - is a basis - - -

21 CHIEF JUDGE LIPPMAN: No, no, no. But do
22 you have the power to do it when the doctor has not
23 violated any law or regulation?

24 MR. PALADINO: I'm not sure if I understand
25 Your Honor's question. There are - - - in this

1 instance, the regulation relied on requires that
2 there had been a finding by another adjudicatory body
3 that the physician committed professional misconduct.
4 And here, I know counsel keep - - - makes the point
5 that it was a no contest plea. But what he consented
6 to was the entry of an order imposing a sanction on
7 him. And under Section 230-a of the Public Health
8 Law, in order for the board to impose a sanction on a
9 doctor, it has to find professional misconduct.

10 JUDGE PIGOTT: But the same thing with CME
11 and supervision, right? I mean, he was still - - -
12 still able to practice medicine anywhere he wanted.

13 MR. PALADINO: Yes, he can practice
14 medicine. The Medicaid program doesn't want to pay
15 for his services.

16 JUDGE PIGOTT: Are part of your rules that
17 if you're - - - if you're Medicaid-ineligible, that
18 you cannot practice in certain other facilities or
19 Medicaid - - - you know?

20 MR. PALADINO: I think that certain other
21 private institutions, as a practical matter, might
22 not allow a doctor to have privileges. That is,
23 again, an acknowledgement there are - - - that there
24 are collateral consequences from the exclusion from
25 Medicaid - - -

1 JUDGE PIGOTT: Do they come from you? Do
2 they come from the Department of Health? In other
3 words, if a hospital has a doctor on that Medicaid
4 has found ineligible, are they in jeopardy with the
5 Department of - - - with Medicaid?

6 MR. PALADINO: Well, I don't think he can
7 participate in the provision of a service that
8 results in the submission of a claim to the Medicaid
9 program.

10 JUDGE ABDUS-SALAAM: Counsel, in those
11 cases where a doctor is faced with having to settle
12 with one part of the Department of Health and, you
13 know, worried about OMIG, how do they know to first
14 float this by OMIG?

15 MR. PALADINO: Well, how the first attorney
16 got the idea, I don't know. What they presumably
17 know, is that the regulations are on the books.
18 515.7(e) is there.

19 JUDGE ABDUS-SALAAM: In other words, if
20 there's no notice coming from either side saying, you
21 know, if you - - - before you settle, you should
22 check with OMIG?

23 MR. PALADINO: Not that I know of. I mean,
24 that question really is - - - I know what Your Honor
25 is getting at. It's what obligation, if any, did

1 BPMC have to alert the doctor of the collateral
2 consequences. That's not presented here.

3 I agree, it would be a great idea if the
4 two entities worked together. And there is when we
5 process - - -

6 JUDGE SMITH: Any idea why that seems to be
7 so difficult?

8 MR. PALADINO: Not reflected in the record,
9 Your Honor. The authority used to be exercised by
10 the Department of Social Services. It went over to
11 the Health Department; it went over to OMIG. OMIG
12 effectively operates as nearly an independent entity
13 within the Health Department. I guess the answer is
14 large government bureaucracy. Of course - - -

15 CHIEF JUDGE LIPPMAN: Why did they give it
16 to the Department of Health, if it wasn't, to some
17 degree, to make it all under - - - in your words - -
18 - one umbrella? Does it make sense that it should be
19 so dysfunctional?

20 MR. PALADINO: Well, the responsibilities
21 for administering the Medicaid program and the - - -

22 CHIEF JUDGE LIPPMAN: I understand, but - -
23 -

24 MR. PALADINO: - - - medical profession,
25 use - - -

1 CHIEF JUDGE LIPPMAN: - - - they must have
2 been given to the Department of Health for a reason,
3 that maybe it should be all together.

4 MR. PALADINO: That's a policy question. I
5 would - - - I would agree that there should be
6 greater - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. PALADINO: - - - coordination - - -

9 CHIEF JUDGE LIPPMAN: Okay. Thanks,
10 counselor. You'll have some rebuttal.

11 Counselor?

12 MS. EBERLE: May it please the court, Susan
13 Eberle on behalf of respondent Dr. Koch.

14 CHIEF JUDGE LIPPMAN: Counselor, why - - -
15 why isn't his point right? That - - - why isn't it
16 like the disciplinary committee and AT&B (ph.)? Why
17 can't - - - why can't they say, hey, we signed a
18 consent order, you can practice medicine, and the
19 OMIG says well, yeah, but - - - but you can't - - -
20 you can't practice on Medicaid patients with - - -
21 since you've - - - you've been - - - even though it's
22 not - - - he doesn't admit anything, because there's
23 been this finding by - - - you know, on your medical
24 qualifications in general, we don't want you
25 practicing on Medicaid patients?

1 MS. EBERLE: Your Honor, just to - - -

2 CHIEF JUDGE LIPPMAN: Why is that - - - why
3 is his argument wrong?

4 MS. EBERLE: Because of the word you just
5 used, "finding". And underlying all of this, and in
6 the statute itself, the Department has to be - - -
7 this - - - for OMIG to act under that section of the
8 law, 515.7(e), there has to be a finding. And the
9 term of "finding" in - - -

10 CHIEF JUDGE LIPPMAN: What does the finding
11 have to be for them to act?

12 MS. EBERLE: In - - - in our view, Your
13 Honor, the finding has to be premised upon a record
14 of evidence of - - -

15 JUDGE GRAFFEO: Well, why can't they just
16 say we don't want taxpayer dollars spent on any
17 physician who's been disciplined, and therefore,
18 there's a three-year probationary period here; this
19 physician's agreed to a stipulation; he's being
20 disciplined; he's under watch; we don't want to use
21 taxpayer dollars for that. No treatment of Medicaid
22 patients. Why - - - why do they not have that
23 authority?

24 MS. EBERLE: They do not have that
25 authority, because OMIG was - - - their purpose in

1 life is to detect, prevent, and investigate in the
2 Medicaid system, fraud, waste, and abuse.

3 CHIEF JUDGE LIPPMAN: Where does it say - -
4 - I understand that argument, and I think, you know,
5 obviously that's something we have to look at. But
6 where does it say that they can't do this?

7 MS. EBERLE: I - - -

8 CHIEF JUDGE LIPPMAN: In fact, do they have
9 authority to do this without a separate investigation
10 on their part about Medicaid fraud? What's the
11 statutory or the regulatory scheme here?

12 MS. EBERLE: The regulatory scheme
13 originates with Public Health Law 230, which gives
14 the OPMC, BPMC exclusive jurisdiction over physician
15 and medical competence, as opposed to Public Health
16 Law 30, which gives exclusive jurisdiction to OMIG -
17 - -

18 CHIEF JUDGE LIPPMAN: But - - -

19 MS. EBERLE: - - - regarding Medicaid
20 abuse, waste, or fraud.

21 CHIEF JUDGE LIPPMAN: - - - so is it your
22 view that only when they do an investigation and find
23 Medicaid fraud of some kind that they can take this
24 action? Do they have to do that? And what about the
25 whole process where they have the nurse look at it

1 and then make a decision? Are they totally outside
2 their jurisdiction in doing that?

3 MS. EBERLE: I - - - yes. In my view, yes,
4 they are outside - - -

5 JUDGE READ: What about - - - what about
6 the regulation? What about the regulation? What
7 about 515.7(e)? This would seem to allow them to do
8 exactly what they did.

9 MS. EBERLE: It allows them to do what they
10 did if there is a finding. And I go back to the word
11 "finding". There has to be some type of hearing,
12 adjudicatory process - - -

13 JUDGE READ: So it can't be a consent
14 decree or a consent order or - - -

15 MS. EBERLE: Not - - - not as a basis for
16 515.7(e).

17 CHIEF JUDGE LIPPMAN: What if there was a
18 consent order about Medicaid fraud? Would that be
19 enough?

20 MS. EBERLE: I think that then you are
21 functioning - - - you are acting within your
22 fundamental purpose.

23 JUDGE READ: But 515 does say, "after
24 resolution of the proceeding by stipulation or
25 agreement."

1 MS. EBERLE: It says "after resolution of
2 the proceeding." And up above it says, "Upon
3 receiving notice that a person has been found" - - -
4 implicit in "found" is that there is some record - -
5 - "to have violated a State or Federal statute or
6 regulation" - - -

7 JUDGE READ: There has to have been a
8 trial-type proceeding?

9 MS. EBERLE: I believe so, Your Honor.

10 JUDGE PIGOTT: Or an admission?

11 MS. EBERLE: Or a plea.

12 CHIEF JUDGE LIPPMAN: But if they - - -

13 JUDGE PIGOTT: If he's admitted - - -

14 MS. EBERLE: A plea or an admission.

15 CHIEF JUDGE LIPPMAN: But if they - - -

16 MS. EBERLE: Some record.

17 CHIEF JUDGE LIPPMAN: - - - violated a
18 statute or a regulation that has nothing to do with
19 Medicaid fraud, can they - - - can OMIG do what they
20 did here? Let's say, for the sake of argument, that
21 it is a finding, that they did have a proceeding,
22 whatever, but it had nothing to do with Medicaid
23 fraud. Could OMIG do what they did in that
24 hypothetical situation?

25 MS. EBERLE: In my view, they should not,

1 because it's without their fundamental purpose.

2 JUDGE GRAFFEO: So - - -

3 JUDGE SMITH: Should - - - go ahead.

4 JUDGE GRAFFEO: Well, the reg also refers
5 to - - - and I know it doesn't have a bearing on this
6 case - - - but it refers to the Commissioner of
7 Education or the Board of Regents.

8 MS. EBERLE: Yes.

9 JUDGE GRAFFEO: I mean, why are these
10 references in there if they can't depend on the
11 findings by these other agencies?

12 MS. EBERLE: In this case, Your Honor, if
13 the - - - a finding had been made by the Board of
14 Education, arguably, even though it's without - - -

15 JUDGE GRAFFEO: So - - - so your posture is
16 it's not professional misconduct when you're put on
17 probation for three years? Is that - - - is that how
18 you get yourself out of this language - - -

19 MS. EBERLE: No, I - - -

20 JUDGE GRAFFEO: - - - in subdivision (e)?

21 MS. EBERLE: - - - I say that for
22 unprofessional conduct to be found, there has to be a
23 record. There is no record in this case. He did not
24 admit to any unprofessional conduct.

25 JUDGE PIGOTT: So the nurse in - - - you

1 know, in her affidavit at record 132, says, "Among
2 the other findings were those involving," and then
3 she goes through Patient B in this particular one.
4 And you're saying those were never found by the OPMC?

5 MS. EBERLE: The use by OMIG and the nurse
6 of the term "findings" is incorrect.

7 JUDGE PIGOTT: There were no findings.

8 MS. EBERLE: No. She simply reviewed the
9 specification of charges.

10 JUDGE SMITH: Well, suppose - - -

11 JUDGE RIVERA: So the fact that - - - I'm
12 sorry. So the fact that your client cut off that
13 process by entering this agreement, you say, then,
14 does not allow them to look at the agreement and make
15 a determination about whether or not to continue them
16 as part of the Medicaid program?

17 MS. EBERLE: I think that since both
18 agencies are under the Department of Health, and the
19 Department of Health has entered into a written
20 agreement with my doctor saying that this - - - this
21 monitoring and those conditions are full resolution
22 of this investigation, that is binding on OMIG. I
23 don't think OMIG - - -

24 JUDGE SMITH: Well - - -

25 JUDGE RIVERA: Of those charges, though.

1 MS. EBERLE: Pardon?

2 JUDGE RIVERA: I'm sorry.

3 MS. EBERLE: I'm sorry.

4 JUDGE RIVERA: Of those charges, right?

5 Based on what - - - what the board is doing? On that
6 particular investigation, independent of whatever the
7 IG determines?

8 MS. EBERLE: I don't think it can be viewed
9 as independent.

10 JUDGE RIVERA: Are you saying your client
11 wasn't aware?

12 MS. EBERLE: Pardon?

13 JUDGE RIVERA: Are you saying your client
14 wasn't aware that potentially the IG might - - -

15 MS. EBERLE: Well, certainly - - -

16 JUDGE RIVERA: - - - I mean, they've done
17 it in the past.

18 MS. EBERLE: For - - - for counsel - - -
19 OMIG came into existence in 2006. All of these
20 exclusions as a result of consent agreements started
21 in 2009, when I - - - on behalf of Dr. Koch, I was
22 negotiating. And, yes, now attorneys are floating
23 their - - - the possibility of what is OMIG going to
24 do to me if I go ahead and agree to a contest
25 agreement.

1 JUDGE SMITH: Am I - - - am I correctly
2 understanding that you have two alternative
3 arguments. One, you're saying that once the OPM - -
4 - the medical board - - - has determined the penalty,
5 then OMIG can't come in and disqualify him; that
6 they're bound by the judgment that - - - that the
7 board made. But you're also saying, as I take it,
8 that OMIG is completely beyond its jurisdiction
9 anyway; that it has no business worrying about this
10 sort of thing?

11 MS. EBERLE: To the extent that it involves
12 physician medical competence, yes.

13 JUDGE SMITH: So you're saying - - -
14 suppose - - - suppose there had never been a medical
15 board investigation. Suppose this initiates with
16 your - - - with the Office of the Medicaid Inspector
17 General, and they do an investigation and they find
18 that four Medicaid patients have died or - - - make
19 it a little more difficult - - - that the doctor has
20 billed Medicaid for sub-qual - - - for bad quality
21 medicine, for substandard work. Can they - - - can
22 they cut him off?

23 MS. EBERLE: If - - - if they investigated
24 and found that his work was substandard, I - - - I
25 guess that would be within OMIG's province.

1 JUDGE SMITH: Okay. Then why - - - why
2 can't they cut him off if he's doing substandard work
3 on non-Medicaid patients, and they say, you know
4 what, we don't want - - - we think it's - - - we
5 don't want to pay for substandard work?

6 MS. EBERLE: The point is, there is no
7 finding that it was substandard work.

8 CHIEF JUDGE LIPPMAN: So if they had done
9 their own investigation and found that, that would be
10 okay, even though it doesn't amount to fraud or
11 misconduct relating to Medicaid?

12 MS. EBERLE: There - - -

13 CHIEF JUDGE LIPPMAN: Medicaid patients or
14 care?

15 MS. EBERLE: Yes, Your Honor. There has to
16 be some reasonable basis for them to intrude - - -

17 CHIEF JUDGE LIPPMAN: Right. But as to
18 your backup argument about it's got to be relating to
19 Medicaid, you're saying if they did their own
20 investigation on whatever he did that was wrong with
21 regard to non-Medicaid patients, and then came to the
22 conclusion and made findings that he's guilty of
23 misconduct or he did something, whatever,
24 inappropriate, even though it didn't have to do with
25 Medicaid, they could still say, you're not going to

1 treat Medicaid patients?

2 MS. EBERLE: Your Honor, I will concede
3 that had they followed their own investigative
4 process, there might have been a rational basis for
5 them to come to that conclusion. But they did not
6 follow any investigative process, even their own.

7 JUDGE READ: But why - - - why can't they
8 rely on - - - why can't they rely on what the other
9 board did? I mean, the other board - - - I think you
10 spent some time in your brief talking about how
11 thorough and what a good job they do. Why couldn't
12 they just rely on that? Just plain old collateral
13 estoppel?

14 MS. EBERLE: No, Your Honor. I - - - I
15 don't think that that is collateral estoppel in this
16 case. Because - - -

17 JUDGE READ: Because the issues were
18 different?

19 MS. EBERLE: - - - collateral estoppel - -
20 -

21 JUDGE READ: The issues were different?

22 MS. EBERLE: The collateral estoppel
23 requires that there was a full and fair hearing of
24 the issues. There was no full and fair hearing of
25 the issues. We negotiated a consent agreement based

1 upon - - -

2 JUDGE SMITH: You're saying you can't be
3 collaterally estopped by a settlement?

4 JUDGE READ: It seems to be what you're
5 saying.

6 CHIEF JUDGE LIPPMAN: Or are you saying
7 that if there was a consent order, but it admitted
8 misconduct, then - - - then they could do it? Then
9 OMIG could take action? In other words, is it the
10 nature of no consent order, or is it that he didn't
11 admit to anything? If he admitted to misconduct, not
12 having to do with a Medicaid patient, but he admitted
13 to misconduct or violating some law or regulation,
14 then they could act, right? Even though there wasn't
15 a full hearing?

16 MS. EBERLE: Pleading guilty constitutes a
17 record. An investigation with a finding by an
18 adjudicatory body constitutes a record. I agree,
19 under those circumstances - - -

20 CHIEF JUDGE LIPPMAN: But a consent order
21 where you don't plead guilty, no record, OMIG is
22 powerless in your - - - from your perspective?

23 MS. EBERLE: In my view, yes. Particularly
24 where it concerns physician miscon - - - not
25 misconduct - - - physician medical competence, which

1 is what the board OPMC was properly - - -

2 CHIEF JUDGE LIPPMAN: But there's a - - -

3 MS. EBERLE: - - - determining.

4 CHIEF JUDGE LIPPMAN: - - - there's a
5 broader issue here, and I think there's a little bit
6 of a disconnect that's hard, maybe, for all of us to
7 get our arms around, in that you have something
8 that's all under the Department of Health. You have
9 physicians who are determining whether physicians
10 should be able to practice. And we understand - - -
11 I understand that concept that this is a process
12 guided, in general, by physicians.

13 And then you have OMIG. What's their role?
14 What's the - - - the bigger picture of - - - clearly
15 it's a process not guided by physicians, and that
16 appears to possibly - - - depending on how you view
17 it - - - that they're able to take action. And I
18 think what you're saying - - - and I'm just trying to
19 put it together - - - is that only if there's
20 something - - - a process that's guided by
21 physicians, in which it's determined that he did
22 something wrong - - - misconduct, breaking some law
23 or regulation - - - is the only time that
24 nonphysicians, in this case OMIG, could take action?
25 You know what I'm saying? It doesn't really - - -

1 MS. EBERLE: But - - -

2 CHIEF JUDGE LIPPMAN: - - - seem to fit
3 together?

4 MS. EBERLE: I do, Your Honor. But I would
5 return to the basic premise that OMIG was created for
6 one reason, and they should and do act within that
7 realm of Medicaid fraud. The only - - -

8 CHIEF JUDGE LIPPMAN: And you're saying, in
9 a broader scale, they shouldn't - - - that's what I'm
10 sort of driving at. Putting aside exactly what they
11 have the power to do and not do, you're saying they
12 shouldn't be messing with this issue of physician
13 competence?

14 MS. EBERLE: That's correct. Because it
15 creates inconsistent results and it's not related to
16 their fundamental purpose. And it's also double - -
17 - double-dipping. He made a - - - he made a deal,
18 okay, with one arm of the Department of Health, and
19 this would be the consequences of that deal. And
20 then, they came in and said, oh, no, because you made
21 - - - you know, you entered into this with them, we
22 are going to exercise 515.7(e), which I don't think
23 comes into play because there was no hearing and no
24 record.

25 JUDGE ABDUS-SALAAM: Counsel, are you

1 saying that if OMIG were not a part of the Department
2 of Health, then it would be perfectly okay for them
3 to now come in and look at this settlement
4 collaterally?

5 MS. EBERLE: In my view, no, because of the
6 fundamental purpose argument. I think they were
7 arbitrary and capricious.

8 CHIEF JUDGE LIPPMAN: Okay. Thanks,
9 counselor.

10 MS. EBERLE: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

12 MR. PALADINO: First of all, there was a
13 finding. Under BPMC regulations, 51.10, a consent
14 order has the same force and effect as an order
15 issued after a hearing. He agreed at page 122 of the
16 record, in the consent order, that the sanction that
17 was being imposed on him was authorized under Section
18 230-a of the Public Health Law.

19 JUDGE PIGOTT: Did he say it was not an
20 admission of guilt?

21 MR. PALADINO: He didn't say one way or the
22 other. But under 230-a of the Public Health Law, the
23 board can't sanction a doctor, except upon a finding
24 of professional misconduct.

25 JUDGE PIGOTT: The - - - the amicus brief

1 from the Medical Society goes into elaborate detail
2 about Public Health Law Section 230, and how on that
3 side of this whole thing, you know, there are
4 experts, there's, you know, deep analysis of exactly
5 what the practice was, et cetera. And they, then,
6 make a determination to go forward or not. And in
7 this case they determined not to. And they
8 determined to allow him to continue to practice. And
9 that was the - - - that's what the consent decree
10 says.

11 And therefore, for OMIG to almost invade -
12 - - my word, not theirs - - - their findings, is
13 wrong. They can do waste, fraud, and abuse, but they
14 can't do - - - they can't determine medical
15 misconduct in the fashion of Public Health Law
16 Section 230.

17 MR. PALADINO: I disagree, Your Honor. The
18 process is in 230, but under 230-a, to penalize a
19 doctor, it has to be upon a finding of professional
20 misconduct. Pleading no contest has the same force
21 and effect within the BPMC proceeding as a guilty
22 plea.

23 CHIEF JUDGE LIPPMAN: But it says, "Any
24 investigation referred to an investigative committee
25 must provide the doctor with - - - being investigated

1 with an opportunity to be interviewed to provide an
2 explanation of issues being investigated. The
3 interview opportunity is a condition precedent to the
4 convening of an investigative committee." And then
5 there's a whole thing on the committee.

6 MR. PALADINO: And it went beyond that
7 point, Your Honor. There were - - - there were
8 charges proffered against him, and he decided to
9 plead no contest. That had the same effect as a
10 guilty plea.

11 JUDGE SMITH: Once they were - - - once
12 they were resolved and then Nurse Blanchette picks up
13 the file and looks at and she says she decides - - -
14 she believed that Dr. Koch's conduct was so negligent
15 that OMIG should exercise its discretion and exclude
16 him, what is the reason - - - she doesn't tell how -
17 - - what reasoning process she went through.

18 How can that be rational, for a nurse
19 reading nothing, as far as I can tell, except the
20 consent agreement and order, to say all these doctors
21 are wrong; he - - - this is a guy who shouldn't be
22 treating patients?

23 MR. PALADINO: She didn't just read the
24 consent order. She read the charges and
25 specifications, the emphasis being on the

1 specifications, the detailed factual - - -

2 JUDGE SMITH: Where does she say that?

3 MR. PALADINO: - - - allegations about - -

4 -

5 JUDGE SMITH: Where does she say that? She
6 says, "On or about December 29, in 2009 I reviewed
7 the consent agreement and order concerning Dr. Koch."
8 Where does she say she read anything else?

9 MR. PALADINO: If you go on to read where
10 she describes what the board found - - - and I know
11 she disagrees that that was a finding - - - she goes
12 on - - - what she is referring to are the
13 specifications.

14 JUDGE PIGOTT: Well, the only thing we have
15 here - - -

16 JUDGE SMITH: Yeah, but she does - - - does
17 she say she read them before she made a decision? I
18 don't see it in there.

19 MR. PALADINO: Well, yes, because she go -
20 - - she is describing in detail: he doesn't notice
21 the necrotic tips, he doesn't perform - - -

22 JUDGE SMITH: She - - - she describes it in
23 her - - - yeah, she describes it relying - - -
24 relying on a letter from your adversary objecting to
25 the finding. She describes it in her litigation

1 affidavit. I'm asking what she had before her when
2 she made a decision?

3 MR. PALADINO: She had the consent order,
4 to which was attached - - -

5 JUDGE SMITH: All she says she had was the
6 consent agreement and order.

7 MR. PALADINO: She had - - - she had the -
8 - -

9 JUDGE SMITH: She has the date on which she
10 reviewed it. If she reviewed something else, why
11 doesn't she tell us?

12 MR. PALADINO: Attached to the consent
13 agreement and order were the charges and
14 specifications. The detail that she's giving in her
15 affidavit came from those specifications. What the -
16 - - what the OMIG is exercising is its exclusion
17 authority. And that is an authority to remove
18 someone from the Medicaid program for substandard
19 care, regardless of whether it is directed at
20 Medicaid or non-Medicaid patients - - -

21 JUDGE SMITH: Is there any explanation
22 anywhere of why she, Nurse Blanchette, reacted so
23 much more negatively to what the doctor did than the
24 board did?

25 MR. PALADINO: She had a diff - - - she had

1 a judgment with respect to the iss - - - separate
2 issue of whether or not - - -

3 JUDGE SMITH: Does she explain why that was
4 her judgment?

5 MR. PALADINO: You have her affidavit. She
6 - - - she's - - -

7 JUDGE PIGOTT: But the affidavit is after -
8 - - I'm looking at what was in the record as her
9 review sheet, and all she says is that "participating
10 doctor" - - - "allegations, 2/06, while working in
11 ER, provided poor care to two patients."

12 MR. PALADINO: That's the - - - that's the
13 form that you're referring to. You have her
14 affidavit. This is a separate issue - - -

15 JUDGE PIGOTT: This is only - - - this is
16 what she - - - what she said and signed. And she
17 said that she looked at the allegations.

18 MR. PALADINO: Well, whether this
19 particular determination is properly supported or
20 not, is one issue. The larger issue is does OMIG
21 have the authority to do this at all. And - - -

22 JUDGE PIGOTT: Would you disagree with
23 Judge Graffeo's question a while back that if they
24 suspend - - - if OPMC suspends, you can suspend; if
25 they don't suspend, you cannot? Does that make

1 sense? I don't think that's exactly her question.

2 MR. PALADINO: I don't agree. The notion
3 that OMIG can't sus - - - cannot remove from the
4 Medicaid program unless BPMC suspends, would render
5 entirely meaningless 515.7(e). There are other
6 regulations that would have made his exclusion from
7 the Medicaid program - - -

8 JUDGE PIGOTT: But aren't many of those - -
9 -

10 MR. PALADINO: - - - automatic.

11 JUDGE PIGOTT: - - - directed at - - - you
12 know, OMIG has a big job. And individual doctors is,
13 I think, a small part of it. They're dealing with
14 nursing homes and with overbillings and billing
15 agencies and pharmacies that bill, you know, by the
16 ton, as opposed to one doctor who does these discrete
17 acts. This is a minor part of OMIG's job, I assume,
18 right?

19 MR. PALADINO: Well, they get roughly
20 twenty to thirty consent orders a month. It is an
21 important part of their job.

22 CHIEF JUDGE LIPPMAN: Yeah, but do you do
23 it from scratch? Do you - - - do you go and
24 investigate doctors on issues relating to their
25 medical qualifications or to their medical work?

1 MR. PALADINO: In other instances, there
2 are separate regulations that would allow OMIG to
3 charge the doc - - -

4 CHIEF JUDGE LIPPMAN: But that relates to
5 Medicaid fraud, right? The other re - - -

6 MR. PALADINO: Not - - -

7 CHIEF JUDGE LIPPMAN: What I'm saying is,
8 do you ever just investigate individual doctors that
9 their care was not, you know, adequate or up to
10 medical standards. Do you do that in the first
11 instance?

12 MR. PALADINO: OMIG - - -

13 CHIEF JUDGE LIPPMAN: I don't know the
14 answer to that. I'm asking.

15 MR. PALADINO: It has the authority to
16 charge a doctor with unacceptable practices.
17 Unacceptable practices - - -

18 CHIEF JUDGE LIPPMAN: Relating to Medicaid
19 or relating to their competence as a doctor?

20 MR. PALADINO: It usually relates to
21 Medicaid. However, the authority to exclude is not
22 limited - - -

23 JUDGE GRAFFEO: I guess the question is,
24 like, could someone's spouse send a complaint to OMIG
25 and say, my spouse, I believe, is receiving

1 substandard care by this physician; would they
2 investigate that?

3 MR. PALADINO: They could potentially. But
4 what they'd normally do is they - - - they rely upon
5 BPMC consent orders or findings - - -

6 JUDGE GRAFFEO: I guess that's my question;
7 do they - - - do they refer it to the other agency
8 instead of investigating it themselves, since it's an
9 individual physician?

10 MR. PALADINO: If the - - - if the
11 objective is either - - - is to - - - with a view
12 toward potential exclusion from the program or
13 recovery of an overpayment, they would do it. In
14 this instance, what they have been generally doing is
15 relying upon final BPMC determinations and consent
16 orders - - -

17 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

18 JUDGE READ: It's - - -

19 MR. PALADINO: - - - fall into that
20 category.

21 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
22 Read?

23 JUDGE READ: And you said - - - I wanted to
24 pick this up; I'm glad you mentioned this. You said
25 you get twenty - - - they get twenty to thirty

1 consent - - - consent orders a month. So there are
2 twenty to thirty times a months when they have to
3 make a determination as to whether or not to cut the
4 doctor off from Medicaid?

5 MR. PALADINO: Yes. That's correct. And -
6 - -

7 JUDGE READ: Okay.

8 MR. PALADINO: - - - this past year in 73
9 out of 193 instances, 38 percent of the time, they've
10 excluded. This is not an automatic reflexive action,
11 like she is suggesting. There is judgment and
12 discretion authorized. You might think this record
13 is thin - - -

14 CHIEF JUDGE LIPPMAN: But never - - - but
15 never do a separate investigation?

16 MR. PALADINO: They have the authority to,
17 but they also have - - -

18 CHIEF JUDGE LIPPMAN: But they never do, in
19 practice?

20 MR. PALADINO: No, that's not - - -

21 CHIEF JUDGE LIPPMAN: You go, the nurse
22 gives the recommendation, and they do what they do?

23 MR. PALADINO: No, Your Honor. If I can
24 finish?

25 CHIEF JUDGE LIPPMAN: Yes, please.

1 MR. PALADINO: They - - - when they have a
2 BPMS proceeding that's been resolved, there is no
3 point in doing an independent investigation. That's
4 the whole point of the regulation.

5 JUDGE SMITH: Why is there a point in
6 reading - - - in reaching a separate medical
7 judgment?

8 MR. PALADINO: Because the entity has its
9 own mission and statutory authority to determine
10 whether it's going to allow public funds to be spent
11 on this provider.

12 JUDGE SMITH: And is the decision usually
13 made - - - within OMIG, is it typical for it to be
14 made by a nurse rather than a doctor?

15 MR. PALADINO: It's typically, there's a
16 recommendation from the registered nurse, and then
17 there's a panel of individuals - - - I know as a
18 policy matter, you might think it might be better if
19 it was done by a physician - - -

20 CHIEF JUDGE LIPPMAN: I think - - -

21 MR. PALADINO: - - - but the - - - but the
22 - - -

23 CHIEF JUDGE LIPPMAN: - - - that that would
24 seem to be obvious.

25 MR. PALADINO: - - - but the legislature

1 had delegated to OMIG the exclusion authority that
2 was historically - - -

3 CHIEF JUDGE LIPPMAN: Okay, counselor. We
4 have both of your arguments. Appreciate it. Thank
5 you so much.

6 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Koch v. Sheehan, No. 153 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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