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COURT OF APPEALS

STATE OF NEW YORK

ORTIZ,
Appellant,

-against-

CIOX HEALTH, NO. 26
Respondent.

20 Eagle Street
Albany, New York
October 6, 2021

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Karen Schwarzlose
Official Court Transcriber



1 JUDGE FAHEY: Our next case is number 26, Ortiz
2 v. Ciox Health.

3 Judge DiFiore is recused at her request, and with
4 the agreement of Judge Rivera, I'll supervise
5 arguments.

6 Ms. Nam, I believe you're first.

7 MS. NAM: Thank you, Your Honor.

8 May it please the Court, my name is Sue Nam, from
9 the law firm of Reese, LLP. We represent the Appellant-
10 Plaintiff Ortiz in this case.

11 I ask to reserve two minutes --

12 JUDGE FAHEY: You have that.

13 MS. NAM: -- for my time for rebuttal. Thank
14 you.

15 This Court in its prior decisions has expressed
16 reluctance to recognize a new private point of action, but
17 this case is unusual and distinguishable from this Court's
18 other decisions in that confirmation that a private right
19 of action as is here, will not create a new cause of
20 action, but will instead preserve a check on compliance
21 that has been in place for decades.

22 The District Court in this matter was the first
23 court, either federal or state --

24 JUDGE RIVERA: Counsel? Counsel? I'm on the
25 screen. Hi.



1 MS. NAM: Yes?

2 JUDGE RIVERA: What -- yes. Thank you.

3 So why doesn't the existing enforcement structure
4 make whole someone like Ortiz?

5 MS. NAM: Well, our position is that the existing
6 structure has always recognized the private right of
7 action. The enumerated --

8 JUDGE RIVERA: Yes. But under the existing
9 structure, it allows for an Article 78, and it begs the
10 question whether or not that's a private right of action.
11 But I understand the point is a plenary right of action,
12 and that you can have an opportunity for a class action.

13 But what isn't the Article 78 and perhaps some
14 other enforcement mechanism enough to ensure that someone
15 like Ortiz, who's now deceased -- now we're talking about
16 the estate -- can be made whole and that we can ensure that
17 there is some other mechanism to deter the conduct in the
18 future?

19 Why isn't the existing structure good enough?

20 MS. NAM: Well, first of all, the CPLR 7806 makes
21 explicit that Ortiz does not have a private right of action
22 for damages. That statute states explicitly that you can
23 only bring an Article 78 action if you have a right to
24 bring an action for damages in the Supreme Court, a plenary
25 action.



1 The position that the defendants have taken in
2 this case is that Ortiz does not have a private right of
3 action in the Supreme Court at all. So there is no remedy
4 for this situation. There is no remedy for refund of
5 overpaid charges. If there is no private right of action
6 here, tens of thousands of people just like --

7 JUDGE RIVERA: Why can't you -- I'm a little
8 confused. Why -- why aren't they correct? I believe they
9 argued that you can get the refund because -- I think it's
10 Section 13 -- there's another section of the public health
11 law that requires compliance with the duties and
12 obligations under the public health law. And that could be
13 part of an Article 78 demand.

14 MS. NAM: Well --

15 JUDGE RIVERA: Why can't you get the refund?

16 MS. NAM: Because Article 78 says you cannot get
17 a refund unless you can bring a claim for damages in
18 Supreme Court. And if there is no private right of action,
19 you cannot bring an Article 78 proceeding for incidental
20 damages. That is just the way that the CPLR is written.

21 JUDGE RIVERA: But if the public health law says
22 that you can proceed to protect your rights and proceed
23 under the other sections 12 and 13, and many other sections
24 are, via an Article 78, is it not possible to harmonize the
25 two by saying what the public health does is allowing you



1 enforce all the duties and obligations that the provider is
2 subject to under the public health law? It's just you're
3 limited to doing that in an Article 78 proceeding, so that
4 it would trump -- what I think you're saying -- are
5 obstacles in -- in the CPLR.

6 MS. NAM: Well, first of all, the Public Health
7 Law 13 does not say you have to proceed under the 78. It
8 says you may. And unfortunately Article 78 doesn't allow
9 you to ever recover damages because the defendants are
10 saying we can't bring a Supreme Court action for damages.
11 So we're out of luck.

12 So the tens of thousands of people who have
13 overpaid are at the whim of providers to see if they could
14 ever get a refund. That cannot be what the legislature
15 intended when they stated that the --

16 JUDGE RIVERA: What about reaching out -- what
17 about reaching out to the attorney general or the
18 commissioner? Is there any way that -- any mode of
19 enforcement under the public health law that they're
20 authorized to take on -- might indeed provide some relief?

21 MS. NAM: Your Honor, PHL 13 does not provide for
22 the funds to go back to the people who are overcharged.
23 There is no mechanism.

24 So in effect, if we read Public Health Section
25 18(2)(E) as having no private right of action, even though



1 it says, "The reasonable charge for paper copies shall not
2 exceed \$0.75 per page." Those people who were charged in
3 excess of \$0.75 per page have no recourse.

4 Tens of thousands of the very citizens that the
5 legislature sought to protect.

6 JUDGE SINGAS: So why -- sorry, Judge.

7 JUDGE CANNATARO: No, that was me, but you can go
8 ahead.

9 JUDGE SINGAS: All right. Thank you. Sorry. So
10 why should we read a private right of action when the
11 legislature has expressly prescribed such a remedy
12 elsewhere in the public health law?

13 MS. NAM: But Your Honor, the legislature did not
14 limit the remedies. It says, may, and also says
15 specifically that, "Shall not abridge or alter rights of
16 actions or remedies now or hereafter existing." So this --

17 JUDGE SINGAS: But the legislature at the --
18 around this same time contemplated refunds in Medicaid. So
19 in Section 19 where they explicitly provided for a refund
20 there, leading us to believe that here, they considered it
21 and rejected it.

22 MS. NAM: Well, Your Honor, there's nothing in
23 the record, in the legislative history, or in the statute
24 that -- itself that says that they considered and rejected
25 such a remedy. That just isn't there. And this statute



1 was expressly provided to protect citizens of the state.

2 JUDGE CANNATARO: One really good indicator of
3 that would be the statute itself. I mean, the legislature
4 certainly knows how to create private rights of action.
5 I -- they've done it before. I was just looking at General
6 Business Law 349 the other day. There's a private right of
7 action in there for deceptive trade practices.

8 You know, the best indication of their intent
9 would've been to say there's a private right of action.
10 And it seems as if, or at least one could argue that they
11 came to the conclusion that that just wasn't appropriate in
12 this context.

13 MS. NAM: Your Honor, the whole notion of an
14 implied private right of action is a legal construct. It's
15 a legal construct to provide for those instances where the
16 statute doesn't expressly provide for a private right of
17 action.

18 But the circumstances, the policies, the caselaw
19 that's already been decided in this state all suggest that
20 there is something that was overlooked, that the intent --

21 JUDGE CANNATARO: Well, that would lead you to
22 Sheehy, right, the -- the --

23 MS. NAM: Yes.

24 JUDGE CANNATARO: -- the test for that exists in
25 our courts.



1 MS. NAM: Absolutely.

2 JUDGE CANNATARO: And do you believe that -- that
3 this private right of action fits appropriately within the
4 overall legislative scheme?

5 MS. NAM: Absolutely, Your Honor, because each of
6 the -- each of the statutes or the elements that must be
7 considered are met here. Clearly our plaintiff/appellant
8 meets the -- the requirement that -- that she was the one
9 that legislatures wanted to protect here.

10 Secondly, the indication is that this provision,
11 having a private right of action would fit seamlessly into
12 the current enforcement scheme, which for decades have
13 included implicitly and explicitly, a private right of
14 action.

15 JUDGE CANNATARO: I'm a little concerned that the
16 legislature might have done some sort of, you know,
17 evaluation that, including this private right of action,
18 would lead to a huge explosion in costs for the healthcare
19 providers, which ultimately would get passed on to the
20 medical consumer. And this -- and you know, this was kind
21 of a -- an expense saving device on their part.

22 MS. NAM: There's nothing in the legislative
23 history about this particular provision with the \$0.75 cap
24 that indicates that this was, in any way, for the benefit
25 of medical providers. It clearly was meant to protect



1 consumers from overcharging in a very clear and simple way,
2 \$0.75 cap.

3 Now, Respondent Ciox, has violated that in tens
4 of thousands of instances, and it could not have been the
5 intent of the legislature to leave those people who are
6 overcharged without restitution -- without remedy.

7 JUDGE SINGAS: I'd like to go back to the third
8 factor of Sheehy -- can you talk about that, please,
9 because we have established that that is the most important
10 one, and how do you reconcile that with your position?

11 MS. NAM: Well, Your Honor, I think that
12 absolutely it reconciles with our position because it works
13 seamlessly and has for the several decades after this
14 provision was enacted to have a private right of action.

15 This notion that the defendants would be open to
16 a flood of litigation, it's just not true. Since it's been
17 enacted, there have been private right of actions and
18 there's been a handful of cases. And they have defended
19 them vigorously, and well.

20 But to say that there is a sea change now at this
21 Court to -- if either there isn't a private right of action
22 could open some serious consequences and implications for
23 the consumer.

24 Right now, the --

25 JUDGE FAHEY: You know, I -- I --



1 MS. NAM: Sorry.

2 JUDGE FAHEY: -- can you just stay -- I agree
3 with you that there will be consumer consequences, but I
4 think the judge is focused in on what may be the lynchpin
5 of any analysis that ultimately comes out of the court by
6 identifying the third Sheehy factors is -- is the one we
7 should be looking at.

8 There seems to be a number of cases that the
9 private right of action was rejected. I count, starting
10 with Schlessinger v. Valspar in 2013, Metts (ph.), 2012,
11 Smokesbrites (ph.), 2009, McLean, 2009, The Kennel Club.
12 There's a number of them around animal cruelty and the
13 private right of action.

14 And usually what the court is looking for is
15 whether or not there are more substantial enforcement
16 mechanisms affirmatively provided for in the statute than
17 what could be provided for by a private right of action.

18 Would you agree with that analytically?

19 MS. NAM: I believe, Your Honor, that this case
20 stands quite apart from the other cases.

21 JUDGE FAHEY: How so?

22 MS. NAM: Because in the other cases, there
23 hadn't been sort of a set regulatory scheme that included a
24 private right of action for decades that were incorporated
25 into the way compliance was viewed by healthcare providers.



1 That has been the state of affairs for thirty
2 years. And for this Court to now say -- after cases have
3 been decided the other way, to say that there is no private
4 right of action has serious consequences and implications
5 for the regulatory landscape, which is the very regulatory
6 landscape that this Court is quite concerned about,
7 justifiably.

8 We believe that --

9 JUDGE WILSON: Your argument -- your argument --

10 MS. NAM: Sorry.

11 JUDGE WILSON: -- your argument strikes me as a
12 little -- over here. Sorry.

13 MS. NAM: Yes.

14 JUDGE WILSON: As a little unusual because you're
15 saying in a way, we can -- we don't really have to answer
16 the question whether we think the legislature would've
17 wanted to have a private right of action because whatever
18 the legislature might've -- legislature might've thought,
19 people were bringing suits for a long period of time, and
20 that's a sufficient basis to keep doing what we're doing.
21 That seems a different kind of test.

22 MS. NAM: No, Your Honor. I don't -- I don't
23 believe that that is a different type of test because
24 ultimately, this Court looks at whether a private right of
25 action coalesces smoothly with exact -- existing statutory



1 scheme, and we have shown over decades that it, in fact,
2 does.

3 So I don't think we are applying any different
4 tests than this Court has done previously. I think this
5 situation absolutely checks every of the boxes that this
6 Court requires.

7 JUDGE FAHEY: Thank you.

8 JUDGE RIVERA: Counsel, I thought in part --
9 Counsel, I thought in part you were arguing -- just to
10 clarify this.

11 I thought in part you were arguing certainly what
12 Judge Wilson was asking you about, but also that there were
13 private lawsuits already in existence and so the Public
14 Health Law's provision that says its -- its -- it -- all
15 existing avenues for actions continue and are not being
16 displaced, I thought that was part of your argument, that
17 that's another signal that the -- this would work -- what
18 you call, seamlessly with the existing framework.

19 MS. NAM: There are some complications as to how
20 PHL Section 12(c)-- (6), rather, was enacted and when, and
21 when it became effective. The -- there are some
22 complications, but it reads as it reads today. When we
23 look at the statute that is in effect today, it absolutely
24 says it is not meant to confine the remedies. And so I
25 think as the statute has to be read today, it does support



1 our side.

2 Thank you, Your Honor.

3 JUDGE FAHEY: All right. Thank you.

4 Next up is Ciox Health. Mr. Lefkowitz?

5 MR. LEFKOWITZ: Thank you. Good afternoon, Your
6 Honors. Jay Lefkowitz from Kirkland & Ellis for Ciox
7 Health. And I'd like to just start to answer just Judge
8 Cannataro and Judge Singas' questions about Sheehy and then
9 in turn to the questions Judge Rivera asked of Counsel.

10 I think Sheehy is the definitive statement of how
11 this Court approaches these issues, and what the Court said
12 there is that, "Where the legislature has not been
13 completely silent, but have instead made express provision
14 for civil remedy, albeit a narrower remedy than the
15 plaintiff might wish, the Court should ordinarily not
16 attempt to fashion a different remedy."

17 That's the situation here. We have first and
18 foremost in Section 12, a robust public enforcement
19 mechanism, both the Commissioner and the Attorney General
20 can bring action. And under the State Finance Law, and I
21 believe this answers part of Judge Rivera's question, at
22 Section 4(11)(B)(2), it expressly permits the Attorney
23 General or the Department of Health to pay out quote,
24 "Money" to distribute it -- "to be distributed solely or
25 exclusively as a payment of damages or restitution to



1 individuals or entities specifically harmed by a party's
2 conduct."

3 JUDGE SINGAS: So is that what you were referring
4 to as a refund in your brief?

5 MR. LEFKOWITZ: There are two different avenues
6 actually to get the refund here, Your Honor. There is the
7 public enforcement option. And as this Court has said both
8 in the Metts case involving boat disasters, and in the CPC,
9 McKesson case involving the Martin Act, even in the absence
10 of any other type of private remedy, public enforcement is
11 sufficient to hit prong three of Sheehy.

12 But there's also the Article 78 that Section 12
13 specifically talks about. And in Article 78 cases, money
14 damages that are incidental to the injunctive relief, to
15 ensuring that the law is obeyed, are also available.

16 JUDGE CANNATARO: What do you mean injunctive
17 relief?

18 JUDGE SINGAS: But those don't --

19 JUDGE CANNATARO: I'm sorry, Judge.

20 JUDGE SINGAS: I'm sorry. Those don't -- those
21 don't translate to money in the person's pocket. So the
22 person who has put out money to get their medical records,
23 they can't avail themselves of getting a refund because the
24 Article 78 will just compel the hospital to make sure that
25 they abide by the prescribed rate. And there could be a



1 fine by the Commissioner. But there's no avenue to
2 actually put money back into those people's pocket.

3 MR. LEFKOWITZ: So -- so two -- two answers, Your
4 Honor. There is both a public answer and a private answer.
5 The public answer is that the Attorney General under the
6 State Finance Law can order the restitution to the
7 individual. And under the Article 78 that this Court found
8 in the Health Plan v. Bahou case, and again in Signature
9 Health v. State of New York, there can be an order
10 requiring the Commissioner to reimburse subscribers who
11 were overcharged.

12 And that's because the money damages refund of
13 whatever was overcharged is considered to be incidental to
14 the violation of the statute.

15 So in this situation, Your Honor, looking at the
16 two -- the third Sheehy test, which as this Court has said,
17 if the --

18 JUDGE RIVERA: Counsel, just -- Counsel, if I
19 may. I'm over here on the screen.

20 MR. LEFKOWITZ: Sure.

21 JUDGE RIVERA: So I -- I just want to clarify.
22 I -- I think you're making some very good points about this
23 enforcement and -- and these avenues, but it does strike me
24 that both of them likely it -- it helps you very much in
25 this case, given -- given that this is an attempt at a



1 class action, but it doesn't help the one or two or three
2 people because it -- it's likely the AG may not do that,
3 and the Commissioner may not pursue that, especially if the
4 amount is quite small.

5 And I think that's where your adversary has also
6 made this other argument that it cannot be that if the
7 legislature's trying to ensure access, that it would not
8 have wanted an individual to not be able to get back money
9 that they put out first because they need -- they need
10 these documents, even though they're being overcharged and
11 they're not being able to recoup that later.

12 MR. LEFKOWITZ: So I think --

13 JUDGE RIVERA: They have to be beholden to -- I
14 understand your point. It's not -- it's not -- I actually
15 think it's a compelling -- they're beholden to a state
16 actor to choose to work on their behalf, but the likelihood
17 of them doing it for one or two people is quite small,
18 right?

19 MR. LEFKOWITZ: Well, the -- Your Honor, I'll
20 give you a couple of answers to that. First of all, if --
21 in this situation, for example, Ms. Ortiz, once she alerted
22 Ciox that there had been an overcharge because Ciox had
23 thought she was not a protected party, turns out she was,
24 they simply refunded the money. And oftentimes, that's
25 what happens. She would've had the ability to simply move



1 on her own for that Article 78. She could've told the
2 Attorney General or the Department of Health. And in the
3 Weg v. De Buono case, recently the third -- or not
4 recently. In 2000, the Third Department upheld a thirty-
5 day medical license suspension, five years of probation,
6 thousands of dollars in penalties.

7 So if the government decides there's something
8 egregious, they certainly can and do take action. But
9 there's also the private option.

10 But getting back to the statute, because again,
11 the purpose --

12 JUDGE RIVERA: And I'm sorry. Can you address
13 the Article 78? I just want to be clear. Your position is
14 that yes, someone like Ortiz, now the estate, could get a
15 refund for being charged double?

16 MR. LEFKOWITZ: Absolutely. I think that is --

17 JUDGE RIVERA: Okay. But what -- why -- how is
18 it incidental when that is the only thing that they want?

19 MR. LEFKOWITZ: Because it is incidental to a
20 determination that the law was violated. She's not
21 seeking --

22 JUDGE RIVERA: But that's in every case. I mean,
23 the damages then are always incidental. That doesn't seem
24 --

25 MR. LEFKOWITZ: Well --



1 JUDGE RIVERA: -- to really make sense.

2 MR. LEFKOWITZ: No. For example, in Metropolitan
3 Taxicab, the Court made clear that incidental damages are
4 generally confined to monies that an agency, or in this
5 case, Ciox, either collected -- and I'm quoting -- "or
6 withheld from a petitioner" and when -- "and was then
7 obligated to reimburse."

8 In other words, that is the definition of
9 incidental. That's what this Court did in the Bahou case,
10 in the Signature case. It would be different if Ms. Ortiz
11 said --

12 JUDGE RIVERA: No, it's -- it's incidental to a
13 determination of the liability. You concede the liability.
14 I mean, you gave the money back.

15 MR. LEFKOWITZ: No, the --

16 JUDGE RIVERA: It doesn't seem that anybody's
17 arguing over that.

18 MR. LEFKOWITZ: No question, Your Honor. And I
19 believe that Article 78 is an appropriate vehicle for that,
20 and the only argument that Counsel makes is an argument
21 drawn from CPLR 7806, which was completely rejected by this
22 Court in the Gross case, where the Gross case said there is
23 absolutely, quote, "No indication the legislature otherwise
24 intended to limit the power of the court to award
25 incidental monetary damages in an Article 78."



1 But again, I just want to be clear.

2 JUDGE RIVERA: Well, we're back to whether or not
3 it's incidental when it is the -- the reason for the
4 lawsuit. It is the only thing that --

5 MR. LEFKOWITZ: In --

6 JUDGE RIVERA: -- they want, and -- and in this
7 case, you concede the overcharge because you -- you said
8 you paid him.

9 MR. LEFKOWITZ: Your Honor, in Gross itself, the
10 only thing that the City of New York really wanted was the
11 money that the state had improperly held because of an
12 audit that it said was ultra vires. It didn't really need
13 a declaration that the audit was inappropriate. It wanted
14 the \$30 million back, and it was able to do --

15 JUDGE RIVERA: Well, sure. You always want the
16 money, but you can't get there unless the Court renders a
17 particular decision, and there was of course, the -- the
18 core of the -- the litigation was over this audit.

19 MR. LEFKOWITZ: My only point is that the money,
20 which was clearly the only intent for bringing that claim
21 was deemed, even though it was the -- the key point of the
22 case -- deemed to be incidental. Why? Because it was
23 simply money that flowed from a proper interpretation of
24 the statute. The Court says you are only allowed to charge
25 \$0.75 under the law. I order you to disgorge.



1 But again, the most important factor is that
2 under the Sheehy test -- and I've looked at every single
3 case in the last fifty years that this Court has decided
4 considering an implied private right of action, twenty-four
5 cases that I've identified -- the Court has never implied a
6 private right of action in a statute when the condition is
7 met, that there is some enforcement mechanism in the
8 statute, even if it's just a public enforcement mechanism.

9 So even if you wanted to disagree with me as to
10 the availability of the Article 78, there's no question
11 as -- as -- that the Hammer case found involving the
12 cruelty to animals -- that was the case with the dog with
13 the long tail, the Metts case involving civil liability for
14 ship disasters, and the McKesson case and the Martin
15 case -- the Martin Act. All we're dealing with there was a
16 public enforcement action. The legislature made the
17 judgement.

18 And the one last thing I'll say, if I may,
19 elsewhere in Section 18, at the very end of Section 18 -- I
20 think it is in -- in F, there is specifically a private
21 right of action in the situation where you ask for records
22 and its withheld from you. And the Court specifically
23 said, you can go to a committee, and if after a committee
24 determination turns you down, then you can bring an action.
25 Of course, you're limited just to injunctive relief.



1 But the fact that in Section 18, elsewhere, there
2 is actually a specific private right of action. And again
3 as -- as Your Honor pointed out, Justice Singas, in Section
4 19, with respect to the Medicare, they went even further.
5 They did that with nursing home abuse as well. They didn't
6 do it here.

7 JUDGE FAHEY: I think we have enough, Counsel.
8 Yeah. We have it. Thank you.

9 MR. LEFKOWITZ: Thank you, Your Honor.

10 JUDGE FAHEY: Thank you. Thank you.

11 Mr. Pope?

12 MR. POPE: Thank you. May it please the Court,
13 John Houston Pope, Epstein Beckham & Green on behalf of the
14 New York and Presbyterian Hospitals.

15 JUDGE FAHEY: You know, I can't hear you. Pull
16 the microphone up a little. Thanks.

17 MR. POPE: Yeah. That's a -- is that better.

18 JUDGE FAHEY: You're a little taller.

19 MR. POPE: The third prong of the Sheehy test has
20 been well discussed. I want to talk about one and two for
21 a minute because I think it's important, and particularly
22 because appellant's counsel makes this argument, well, we --
23 -- we've had this implied right of action floating around
24 for thirty years.

25 I don't think the record bears that out. I don't



1 think if you go through the cases, it bears it out. But I
2 want to point out to this Court that in the Rocanova case
3 in 1994, it decided that insurance law, Section 40-D did
4 not have an implied right of action. But it had, for over
5 fifteen years before that, entertained the possibility that
6 there might be one, and it floated around in the lower
7 courts.

8 So it's not some sort of bar to this court, or
9 some sort of plus for finding an implied right of action,
10 that there has been some discussion in the lower courts
11 about the possibility that one exists, or that they may
12 have entertained it as one might exist.

13 We have these citation on page 28 of our brief.
14 I think the Court should look at that because it takes away
15 substantial power from appellant's argument, what they
16 think is unique about this case.

17 But I want to talk about the idea of whether or
18 not private right of action would promote the legislative
19 purpose because this Court in Burns Jackson said, let's not
20 have over deterrents. Let's not have crushing burdens
21 placed through the private right of action on those who
22 were affected by it. That's the important consideration in
23 trying to decide whether or not you're going to imply a
24 private right of action.

25 But this is a case where there would be a



1 crushing burden. And this isn't something that just comes
2 out of the mouths of my hospital. You know, the Amici
3 brief from the Greater New York Hospital Association, and
4 from the Hospital Association of New York, those entities,
5 which have a broader scope, and a broader vision of all the
6 hospitals in this country, point out that there are so
7 many -- there are so many legislative acts out there.
8 There is so much work that is being done to try to be in
9 compliance that this private right of action could be yet
10 another crushing blow to the difficult situation that the
11 hospitals in the state are in, only complicated by the
12 pandemic.

13 Perfection is not possible --

14 JUDGE CANNATARO: Mr. Pope, you know, Mr.
15 Lefkowitz says I could ask the Attorney General to, you
16 know, seek a -- a restitution from you, but to tell
17 honestly, I wouldn't even personally know where to begin in
18 how to do that.

19 And I know how to start an Article 78, but
20 that's a complicated and fairly sophisticated piece of
21 litigation.

22 What I -- what I think everyone can do quite
23 easily is just go down to small claims court and file a
24 claim for -- for the overcharge. And wouldn't that just be
25 the easiest way to protect the consumers? It -- and



1 doesn't it -- I -- what's the term -- coalesce perfectly
2 with the legislative scheme if the goal is to make sure
3 that they're not overcharged for their medical records?

4 MR. POPE: Well, I -- I'm going to -- I'm going
5 to put a pin on whether or not that's the goal of the
6 statute, but I don't believe that that is easiest.

7 First off, there's a hotline at the Commissioner
8 of Health's office that entertains these complaints. And
9 the Commissioner of Health, people there call back to the
10 hospital, to the ROI, to whomever, and says, what's going
11 on here. And that's -- the refunds happen.

12 I mean, the fact is, the refund happened here
13 just by the virtue of learning of the fact that the
14 overcharge occurred. And that's mostly the situation for
15 overcharges, Your Honor, is not that Vicky Ortiz herself
16 sent in a request for her records, and they came back.
17 It's because her lawyer sent it in, and somehow the
18 paperwork got separated that showed he was the lawyer for
19 her so that the lower price would be applied.

20 Those lawyers are sophisticated individuals who
21 can read an invoice and go through the process of pushing
22 back a little bit and getting the right price charged. The
23 statute entitles them to getting the right price charged,
24 and they can push back easily. That's the easiest process,
25 Your Honor.



1 The easiest process is for interaction to happen
2 between the people requesting and the people providing.
3 And you saw that here. It happened immediately following.
4 So that's -- that's one of the best ways.

5 An administrative process has an additional
6 strength that the small claims court --

7 JUDGE RIVERA: I'm sorry. I -- I've got the --
8 if I can interrupt, Counsel.

9 MR. POPE: Sure, judge Rivera.

10 JUDGE RIVERA: I -- I just want to clarify. I
11 may have misunderstood the record. I thought the refund
12 came after they filed the lawsuit.

13 MR. POPE: That's the first we learned that there
14 was an overcharge, Your Honor.

15 JUDGE RIVERA: No. I thought he actually
16 complained before then.

17 MR. POPE: No. There was -- there was no record
18 of any complaint.

19 JUDGE RIVERA: But that -- that -- I thought
20 there was a letter sent saying that there was an incorrect
21 amount. But I'm -- if that's the record, I'll certainly
22 confirm that.

23 But I'm sorry, I may have missed it. Did you
24 respond to Judge Cannataro's point, which I thought was
25 it -- it -- do they have an action that they can go to



1 small claims court to seek the refund?

2 MR. POPE: It --

3 JUDGE RIVERA: That's a yes or no. Did you
4 answer that? I'm sorry.

5 MR. POPE: I -- there's not an implied right of
6 action, so there wouldn't be a right to go to small claims
7 court. And frankly small claims court, as much as I would
8 like to think that it is a wonderful process that moves
9 along, I've been in New York City small claims court, and
10 it is -- it is a nightmare. You have to show up about five
11 times before you get your case heard.

12 JUDGE RIVERA: So Counsel, if that's so, why is
13 Article 78 any better?

14 MR. POPE: On Article 78 proceeding -- well, I'm
15 not sure that Article 78 is this -- the most superior
16 remedy here. I think the administrative process is. But
17 an Article 78 is certainly a -- a process that is available
18 here, particularly when you're talking about mostly
19 mistakes that involve attorney requests, and attorneys are
20 able to maneuver that process well. And --

21 JUDGE RIVERA: Well, then it wouldn't be -- it
22 wouldn't be so crushing then, it strikes me, which is where
23 you started, that if we recognize private right of action,
24 it would be crushing to the industry. I'm not so sure
25 because you're -- you've made it quite clear that once



1 you're on notice that there's an error, because there's
2 human error, you'd repay it. And these sophisticated
3 lawyers would understand, you get repaid.

4 But for then the small number, if that's what it
5 ends up being -- the small number of individuals -- let's
6 say Ms. Ortiz was doing this on her own. You know, the
7 small number of individuals would try and get their
8 documentation and just get told it's \$1.50, maybe they
9 don't know that the max is \$0.75 or maybe not. Maybe it's
10 even less because the reasonable cost may less than \$0.75,
11 right?

12 Why -- why -- why is it such crushing -- why is
13 it so crushing to the industry? I'm a little confused
14 about that.

15 MR. POPE: Well, because crushing, Your Honor --
16 because it becomes the class action litigation that you see
17 in this -- in this case, which --

18 JUDGE RIVERA: Yeah. But there's not going to be
19 any basis. But Counsel, there's no basis for it unless
20 she's alleging there's 86,000 of these errors over a period
21 of time. It doesn't sound like something happened here. I
22 mean, let's assume for one moment that a large percentage
23 of the 86,000 are indeed overcharges that are not supported
24 by -- by the public health law. Obviously, that fell
25 through the cracks. The AG didn't bring that action. The



1 Commissioner didn't bring that action.

2 I guess it's fortunate that the -- Ms. Ortiz's
3 counsel brought that action, right? The estate.

4 MR. POPE: Well, Your Honor, the 86,000 figure is
5 not an accurate statement of what's going on here, and it's
6 not in the record. It's -- there's briefs. It's not in
7 the record. I would point out that the -- the reason you
8 don't have whatever remedy there is for whatever number of
9 86,000 have a remedy with the Attorney General or the
10 Commissioner is because nobody's complained to them.

11 And -- and I think it's because, you know,
12 appellant's counsel has no reason to complain to them.
13 That would get -- put them out of work on this particular
14 case. And -- and I don't who else has complained to them.

15 I will tell you a little story I heard from
16 somebody, which is that this often happens with plaintiff's
17 counsels who are doing personal injury cases. And they
18 don't realize until the end of it that -- and they've
19 settled that case, they got overcharged on the amount of
20 the records. And since they pass it through to their
21 client, they don't care.

22 That's the little story I heard from a personal
23 injury --

24 JUDGE RIVERA: Well, I'm more interested in --

25 MR. POPE: I don't know if it's true or not.



1 JUDGE RIVERA: I'm more interested -- I'm more
2 interested in the record than the story because of
3 course --

4 MR. POPE: Yeah. But I'm -- I'm saying that --

5 JUDGE RIVERA: -- that -- that can obviously
6 happen to an individual who's not sophisticated like a
7 lawyer, who doesn't know, first of all that there's a cap,
8 desperately need the documents, and -- and pays it, and for
9 some reason later on, does become aware of the fact that
10 they may have very well paid more than they should have
11 paid, and tries on their own to -- to regain that money.

12 I just want to be clear. Your position is that
13 the AG can bring those kinds of actions, the Commissioner
14 can bring that kind of action, and that the -- are you too
15 of the school of thought that this would be incidental and
16 available in an Article 78?

17 MR. POPE: I really haven't drilled down on the
18 Article 78, Your Honor. I -- but I think Mr. Lefkowitz
19 has, and -- and I've read his brief, and I'm convinced by
20 his argument. I really haven't drilled down on the Article
21 78 as well. I think that the administrative apparatus in
22 this is sufficient for the Court to find that there is no
23 implied private right of action, that that's something
24 for --

25 JUDGE RIVERA: Okay. So just to be clear -- just



1 to be clear, you -- you -- you cannot represent to us today
2 that should a -- should the hospital be sued over an
3 overcharge in an Article 78, that they wouldn't take the
4 position that that is the wrong -- that there is no such
5 action in the Article 78 for this kind of remedy? You --
6 you -- you're not able to represent that today; is that
7 correct?

8 MR. POPE: We haven't -- we haven't looked into
9 it, Your Honor. As I told you, I'm -- I'm -- I find Mr.
10 Lefkowitz's arguments to be persuasive, but it's not
11 something that we've taken a position on.

12 JUDGE FAHEY: Okay. Thank you.

13 Ms. Nam, you have two minutes.

14 MS. NAM: Your Honors, if this Court concludes
15 there is no private right of action, it doesn't exist for
16 anyone protected by the charge cap. It doesn't exist for
17 patients. It doesn't exist for the parents of the
18 patients. It doesn't exist for the guardians of patients,
19 and it doesn't exist -- exists for the attorneys of
20 patients that are working on their behalf, advocating for
21 the patient.

22 Given the --

23 JUDGE RIVERA: Counsel, can you address the --
24 the finance law provision that was referred to by your
25 adversary?



1 MS. NAM: Your Honor, there -- there's no
2 question that the government has vast powers when it
3 chooses to exercise it. The problem is that it is very
4 difficult to get the government to decide that this is the
5 case out of the many, many catastrophic issues facing New
6 York State, that this is the case they're going to bring on
7 behalf of all consumers. And then refund that, whatever
8 they earned, to those specific consumers who were harmed.

9 That is where the class action platform was
10 specifically designed to do. Here, the -- the issue is who
11 bears the burden of the systematic errors. Is it the
12 individual who has to call up the medical industrial
13 complex and be on the phone for hours, or is it the
14 provider who can make systemic changes that can provide the
15 relief in a policy way. And --

16 JUDGE RIVERA: Counsel, I'm sorry. Can you --
17 can you clarify that point that I was asking about the
18 record? Is he correct that they were not aware of the
19 overcharge until after the filing? I thought there was
20 correspondence, so perhaps you can clarify this for me.

21 MS. NAM: Your Honor, the record is that the
22 attorney did notify in writing that this was an overcharge
23 and did file suit. It -- they did not dispute it at the
24 time because they needed the record, frankly. Most people
25 do need their medical records quickly when they're asking



1 for it. So it was after the fact.

2 JUDGE RIVERA: Well, I just wanted to know
3 whether or not the lawyer made a demand for the refund
4 before filing suit.

5 MS. NAM: That --

6 JUDGE RIVERA: Or is that unclear from the
7 record?

8 MS. NAM: It -- it's unclear, as far as I'm
9 concerned, from the record. But it shouldn't be up to the
10 provider to decide unilaterally who gets a refund. The
11 statute applies to everybody who's qualified. It isn't for
12 the people who can speak English and can be on the phone
13 for several hours. It isn't for the people who even know
14 that there is a \$0.75 cap. I certainly didn't know that
15 before this litigation.

16 It shouldn't be for those people who are like us
17 who can advocate for themselves. It is for everybody who's
18 in this vulnerable state. Think of when do you ask for
19 medical records. It is a dark time in your life. And for
20 those people to be burdened with the obligation to track
21 down whether they were overcharged, to seek that refund on
22 an individual basis when tens of thousands of those people
23 exist, and millions in dollars are being taken by the
24 medical providers, it just cannot be what the legislature
25 intended.



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Thank you, Your Honor.

JUDGE FAHEY: Thank you, Ms. Nam.

(Court is adjourned)



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

I, Karen Schwarzlose, certify that the foregoing transcript of proceedings in the Court of Appeals of Ortiz v. Ciox Health, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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