

Cite as: 934 F.2d (1362) **Michael L. BURDITT, M.D., Petitioner, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent. No. 90-4611. United States Court of Appeals, Fifth Circuit. July 9, 1991.**

Physician appealed civil penalty determination of Executive Appeals Board of Department of Health and Human Services for violation of Emergency Medical Treatment and Active Labor Act (EMTALA).

The Court of Appeals, Reavley, Circuit Judge, held that:

- (1) physician's conduct in failing to weigh medical risks and benefits before ordering transfer of severely hypertensive woman in active labor violated Act;
- (2) evidence supported imposition of \$20,000 fine; and
- (3) assessment of fine did not effect public taking of physician's services without just compensation in contravention of Fifth Amendment. **Affirmed and enforced.**

Before REAVLEY, HIGGINBOTHAM and DUHE, Circuit Judges.

REAVLEY, Circuit Judge:

Hospitals that execute Medicare provider agreements with the federal government pursuant to 42 U.S.C. 1395cc must treat all human beings who enter their emergency departments in accordance with the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C.1395dd. The present appeal is from the order of an executive appeals board of the Department of Health and Human Services (DHHS) assessing a \$20,000 fine against Dr. Michael L. Burditt. He contends on appeal that: 1) the government misconstrued EMTALA; 2) findings of fact establishing his violative conduct are not supported by substantial record evidence; and 3) EMTALA unconstitutionally takes the services of physicians without just compensation. **We affirm and enforce.**

I. BACKGROUND

A. FACTS

Mrs. Rosa Rivera arrived in the emergency room of DeTar Hospital in Victoria, Texas at approximately 4:00 p.m. on December 5, 1986. [Court's note:2] At or near term with her sixth child, she was experiencing one-minute, moderate contractions every three minutes and her membranes had ruptured. Two obstetrical nurses, Tammy Kotsur and Donna Keining, examined her and found indicia of labor and dangerously high blood pressure. Because Rivera had received no prenatal care, and had neither a regular doctor nor means of payment, Kotsur telephoned Burditt, who was next on DeTar's rotating call-list of physicians responsible for such "unaligned" obstetrics patients. Upon hearing Rivera's history and condition, Burditt told Kotsur that he "didn't want to take care of this lady" and

asked her to prepare Rivera for transfer to John Sealy Hospital in Galveston, Texas, 170 miles away. Burditt agreed to call back in five to ten minutes.

Kotsur and Keining told the nursing supervisor, Jean Herman, and DeTar's Administrator, Charles Sexton, of their belief that it would be unsafe to transfer Rivera. When Burditt called back, Keining told him that, according to Sexton's understanding of hospital regulations and federal law, Burditt would have to examine Rivera and personally arrange for John Sealy to receive her before he could legally transfer her. Keining asked Burditt for permission to start an intravenous push of magnesium sulfate as a precaution against convulsive seizures. Burditt told Keining to begin administering this medication only if Rivera could be transported by ambulance. He said that otherwise, Keining was not to administer intravenous treatment because Rivera would have to go to John Sealy by private car.

Burditt arrived at approximately 4:50 to examine Rivera. He confirmed her blood pressure to be the highest he had ever seen, 210/130, and he assumed that she had been hypertensive throughout her pregnancy. As the experienced head of DeTar's obstetrics and gynecology department, Burditt knew that there was a strong possibility that Rivera's hypertension would precipitate complications which might kill both Rivera and her baby. He also knew that the infants of hypertensive mothers are at higher-than-normal risk of intrauterine growth retardation. He estimated that Rivera's baby was six pounds--less than normal weight--and arranged her transfer to John Sealy, a perinatal facility better equipped than DeTar to care for underweight infants. Burditt obtained telephonic acceptance of Rivera from a Dr. Downing at John Sealy, and, per Downing's request, instructed Keining to administer magnesium sulfate intravenously and have Rivera transported by ambulance.

At approximately 5:00, Herman showed Burditt DeTar's guidelines regarding EMTALA, but he refused to read them. Burditt told Herman that Rivera represented more risk than he was willing to accept from a malpractice standpoint. Herman explained that Rivera could not be transferred unless Burditt signed a DeTar form entitled "Physician's Certificate Authorizing Transfer." Burditt asked for "that dang piece of paper" and signed his name under the following:

I have examined the patient, _____, and have determined that, based upon the information available to me at this time, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the patient's medical condition from effecting [the] transfer. The basis for my conclusion is as follows: _____

Burditt listed no basis for his conclusion and remarked to Herman that "until DeTar Hospital pays my malpractice insurance, I will pick and choose those patients that I want to treat."

Burditt then went to care for another unaligned patient, Sylvia Ramirez, while the nurses arranged Rivera's transfer. They found another obstetrical nurse, Anita Nichols, to accompany Rivera to John Sealy. Burditt returned to the nurses' station and stayed there from 5:30 to 6:18. He never again examined Rivera or asked about her medical condition, though he inquired several times about the status of her transfer. Burditt delivered the Ramirez baby at 6:22.

Afterward, Nichols told him the results of her examination of Rivera and informed him that the ambulance had arrived. Based exclusively on Nichols' statements, Burditt concluded that Rivera's condition had not changed since his examination two hours before. Burditt did not

reexamine Rivera though he her being wheeled to the ambulance. He did not order any medication or life support equipment for Rivera during her transfer.

Nichols delivered Rivera's healthy baby in the ambulance approximately 40 miles into the 170-mile trip to John Sealy. She directed the driver to nearby Ganado Hospital to get a drug called pitocin to staunch Rivera's bleeding. While there, Nichols telephoned Burditt, who ordered her to continue to John Sealy despite the birth. Instead, per Rivera's wishes, Nichols returned Rivera to DeTar, where Burditt refused to see her because she failed to proceed to John Sealy in accordance with his instructions. Burditt directed that Rivera be discharged if she was stable and not bleeding excessively. A DeTar official pressed Burditt to allow Dr. Shirley Pigott to examine Rivera. Rivera stayed at DeTar under Pigott's care for three days and left in good health.

Afterward, Nichols told him the results of her examination of Rivera and informed him that the ambulance had arrived. Based exclusively on Nichols' statements, Burditt concluded that Rivera's condition had not changed since his examination two hours before. Burditt did not reexamine Rivera though he her being wheeled to the ambulance. He did not order any medication or life support equipment for Rivera during her transfer.

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