

## Vares-Ebert v. Kelberg

Superior Court of New Jersey, Appellate Division  
December 21, 2011, Argued; January 9, 2012, Decided  
DOCKET NO. A-4581-10T2

### Reporter

2012 N.J. Super. Unpub. LEXIS 29 \*; 2012 WL 33902

REBECCA A. VARES-EBERT, Individually and as Executrix of the ESTATE OF PATRICIA VARES, Plaintiff-Appellant, vs. BERNARD KELBERG, D.O., Defendant-Respondent, and MICHAEL GERSTEN, M.D., Defendant.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** [\*1] On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-156-05.

### Core Terms

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settlement, confidentiality provision, settlement agreement, terms of the

settlement, conditions, provisions, Severance, contends, modified, notice, funds, terms

**Counsel:** Lawrence B. Ebert argued the cause for appellant.

Douglas M. Singleterry argued the cause for respondent (Dughi & Hewit, attorneys; Gary L. Riveles, on the brief).

**Judges:** Before Judges Cuff, Waugh and St. John.

### Opinion

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PER CURIAM

Plaintiff Rebecca A. Vares-Ebert, individually and as executrix of the estate of Patricia Vares, filed a complaint seeking damages for the wrongful death of Patricia Vares, plaintiff's mother. She alleged that defendants Bernard Kelberg, D.O., and

Michael Gersten, M.D., misdiagnosed her mother's medical condition. The matter settled prior to trial. Plaintiff appeals from the April 12, 2011 order that permitted defendant Kelberg to deposit in court the funds to effectuate the settlement, dismissed the complaint, and enforced the settlement. The order also directed that plaintiff could withdraw the settlement funds when she signed the Stipulation of Dismissal and Release in the form attached to the order.<sup>1</sup>

On appeal, plaintiff argues that the parties never agreed on the terms of the settlement. She also contends that the conditions contained in the settlement agreement restricting her ability to provide details of the case are unenforceable because the conditions are an unconstitutional prior restraint of her right of free speech. Plaintiff also contends that the terms of the release are not consistent with the terms of the settlement agreement.

The confidentiality provisions of the settlement agreement are inconsistent with *N.J.S.A. 45:9-22.21 to -22.25*, specifically, *N.J.S.A. 45:9-22.23(a)(10)* and *Rule 1:38*, which permit free access by the public to the information sought to be concealed. Severance of these provisions ordinarily would not permit enforcement of the agreement. Defendant, however, advised this court at oral argument that the provisions [\*3] are not central to the settlement and urged enforcement of the settlement as modified by elimination of the confidentiality provisions.

Although the confidentiality provisions

cannot be enforced and are severed from the settlement agreement, we discern no discrepancy between the terms of the settlement agreement and the release. We, therefore, affirm the April 12, 2011 order as modified.

Affirmed.

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<sup>1</sup> An order dated May 14, 2010, enforced the settlement between plaintiff and defendant Kelberg and ordered plaintiff to sign the Stipulation of Dismissal with prejudice, [\*2] the Release, and the Certification of Medicare eligibility within fifteen days. Plaintiff has not designated this order in the notice of appeal or amended notice of appeal. Therefore, none of the terms of this order are subject to review. *Rule 2:5-1(f)(3)(A)*; see *W.H. Indus., Inc. v. Fundicao Balancins, Ltda*, 397 N.J. Super. 455, 458, 937 A.2d 1022 (App. Div. 2008).