

# Florida Medical Business

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## 'Bare' doctor slapped with judgment after bankruptcy denied

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Many Florida doctors are concerned with the threat of license revocation if they don't satisfy \$250,000 in financial responsibility in the event of a successful malpractice suit. Since many physicians are on the brink of making the decision to go bare, it is important to understand what the actual facts are.

In the recent case *Church vs. Hanft* — the supposed benchmark legal case regarding financial responsibility and how it might impact practicing physicians — a patient sued Miami obstetrician, Donald Hanft, MD, for failing to promptly diagnose a tumor. The judge did not discharge the liability, even though all the doctor's assets were well protected. Hanft had taken significant precautions over the years to protect assets, such as homestead retirement plans and annuities.

### The story goes ...

The plaintiff first became a patient of Hanft in March 1980. The malpractice claim arose from a series of office visits beginning in July 1988, when Hanft diagnosed Church's failure to menstruate after discontinuing birth control pills as post-pill amenorrhea. At the time of the consultation, Hanft did not carry malpractice insurance.

On March 14, 1989, Hanft once again diagnosed Church with post-pill amenorrhea. By now, Church had not menstruated for more than a year. The patient had her last visit with Hanft on January 7, 1991, when once again he diagnosed her with post-pill amenorrhea. Hanft told her not to worry, and assured her that there was no problem in her getting pregnant, even though she had not menstruated in two years.

In 1993, after treatment by an ophthalmologist, Church had an MRI, which revealed a tumor that was affecting her vision. The malpractice lawsuit against Hanft was filed on July 13, 1995. At trial, Church's expert witness testified that Hanft was negligent because he failed to perform certain customary tests during Church's visits in 1988 and 1989 that would have revealed the tumor.

Instead, by the time the tumor was discovered by the ophthalmologist, it had to be surgically removed, permanently affecting Ms. Church's vision and leaving her unable to bear children. Church was awarded a \$250,000 judgment against Hanft.

### Bankruptcy not a guarantee

Normally, a physician in this predicament

could offer a reasonable settlement to satisfy the judgment, or if the plaintiff refused to settle, the physician could declare bankruptcy. A Chapter 7 bankruptcy would result in all assets being classified as either exempt or non-exempt. The judge would then allow the physician to keep all exempt assets, and would divide and distribute all non-exempt assets between existing creditors. (Voluntary bankruptcy is allowed once every seven years.)

Immediately thereafter, the judge would discharge all outstanding unsecured debts, including malpractice judgments, essentially wiping the slate clean. Hanft faced just this scenario, and declared voluntary bankruptcy since Church would not agree to settle the case. Bankruptcy court Judge Larry Lessen, a visiting judge to the South District of Florida, heard the case. Several unique factors were raised at trial.

First, Hanft had failed to renew his Florida medical license from 1979 to 1990. While it was never revoked, it was in an "inactive" status for nearly 11 years, even though he continued to have an active medical practice. Second, he didn't carry malpractice coverage or establish an escrow account with funds in it to cover any malpractice lawsuits. He also failed to post a notice in his lobby advising patients that, pursuant to Florida law, he did not carry malpractice insurance.

### Merits of the case

Hanft testified at trial that he was unaware that his license had lapsed, despite proof to the contrary that in February 1989, Hanft corresponded with the Board of Medicine about reactivating his license. Of interest to Judge Lessen was the fact that Hanft's wife also was a physician who had regularly renewed her license on a timely basis.

On Feb. 23, 1990, Hanft's license was reactivated after he paid a renewal fee and completed 203 hours of CME. On October 14, 1991, the Department of Professional Regulation (DPR) filed an administrative complaint regarding Hanft's practice of medicine with an inactive license.

Church argued at trial that were it not for the physician's fraudulent representation that he was a licensed physician, she would never have put herself in the situation where he could have committed malpractice in the first place.

Judge Lessen found that two factors — an inactive license and a failure to inform the patient that he was bare — constituted a "false representation" and "fiduciary fraud"

under the bankruptcy code. Pursuant to Bankruptcy Code sections 523(a)(2) and 523(a)(4), a finding of fraud would lead a judge to refuse to discharge certain liability. That is what happened in this case.

Judge Lessen held that Hanft had breached his fiduciary capacity to Church, since it would have been reasonable for her to have assumed that he was both actively licensed and carried malpractice insurance. The judge did not discharge the \$250,000 judgment due to this "fraud."

### Lessons learned

There are several important lessons to be learned from this case. It is obvious that physicians need to keep their licenses current and in good standing. In addition, bare physicians must be very diligent in complying with state laws regarding disclosure about practicing without coverage.

It is recommended that not only should a sign be placed in a doctor's waiting room, but also the same statement should be on any intake or consent forms that a patient may sign prior to a procedure. This might be especially prudent for surgical patients who may never actually be in the waiting room.

In numerous cases, doctors have been fully discharged of malpractice claims by the court, even though plaintiffs had won multi-million dollar judgments against them. There are several instances where this has occurred without the physician losing their license, even though they did not satisfy the \$250,000 requirement under Florida law.

The logical conclusion is that it would be inappropriate to suspend a doctor's license for failure to pay a judgment that no longer exists.

The most important lesson learned is that it is likely that if Hanft had been properly licensed and provided proper notification of self-insurance, he would most likely have been discharged from the \$250,000 liability. ♦



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