

IN THE SUPREME COURT
STATE OF GEORGIA

RUSSEL BAKER,)
)
 Appellant)
)
 v.) Case No. S10A0994
)
)
 WELLSTAR HEALTH SYSTEM, INC.,)
 Individually and d/b/a WELLSTAR)
 KENNESTONE HOSPITAL,)
)
 Appellee.)

BRIEF OF *AMICUS CURIAE*
GEORGIA DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF INTEREST

The GEORGIA DEFENSE LAWYERS ASSOCIATION (hereafter "GDLA") consists of approximately 600 attorneys, including sole practitioners and members of law firms of all sizes throughout the State of Georgia who devote a majority of their professional time in litigation primarily for defendants in civil suits. In part, the GDLA and its members work for the improvement of the adversary system of jurisprudence in our courts, the elimination of court congestion and delay in civil litigation, and to promote improvements in the administration of justice. The GDLA strives to develop, establish, and secure court adoption or approval of a high standard code of trial conduct and courtroom manners. Thus, the GDLA has an interest in the uniform application of federal procedural HIPAA laws in the context of substantive privacy laws long established in the state of Georgia.

The GDLA supports the right of defense counsel to conduct informal, private ("*ex parte*") interviews of willing medical fact witnesses so long as the procedural requirements of HIPAA are satisfied. The GDLA specifically disagrees with this Court's Opinion under Section 3 which, in essence, readies trial courts to prospectively sanction defense counsel in

such a way as to create an unlevel playing field at trial without any evidence of impropriety, and based solely on rank speculation, hypothesis, and prejudice. In the instance that a sworn officer of a court intentionally violates the scope of a court's order it may be within a court's discretion to apply certain remedies and sanctions; but, only *after* such behavior has occurred. Further, any such sanction or remedy should be applied equally to either side.

INTRODUCTION

In professional malpractice and tort actions, where a plaintiff has placed his or her medical condition in issue, defense attorneys must be able to test the validity of a plaintiff's claims in order to effectively represent their client, just as a plaintiff's attorney must be able to test the validity of any defense to their claim. One valid method of understanding the care that a plaintiff has placed in dispute is through interactions with the plaintiff's healthcare providers.

In order to fully investigate a plaintiff's claims and defend against the complaint, defense counsel must do more than seek and obtain written evidence, which is often comprised of illegible medical records and reports;

instead, they must communicate with the plaintiff's treating healthcare providers concerning their interactions with the plaintiff on the very issues that the plaintiff contends is in dispute. To thwart defense counsel's ability to interview these medical witnesses in a meaningful, verbal way unfairly hamstrings all defendants in civil litigation to access evidence that may lie at the very heart of the action. Defense counsel must be allowed to thoroughly and completely defend their clients against any claim alleged by a plaintiff without having to close their mouths and shut their ears in discovery to information which may be dispositive at trial. Moreover, out of uniform fairness to both parties, defense counsel should not be forced to reveal protected strategies and work product and unfairly advantage the opposing side.

Thus, since the enactment of HIPAA, defense lawyers have filed motions in courts all over the state of Georgia to obtain a Qualified Protective Order ("QPO") that allows for private, verbal communication with a plaintiff-patient's treating healthcare providers while preserving the procedural requirements of HIPAA. The November 1, 2010 Order of this Court in Baker, et. al. v. Wellstar Heath System, Inc., 2010 Ga. LEXIS 821,

2010 Fulton County D. Rep. 3488 (hereafter referred to as "Baker II") seems to grant with one hand what it, in part, sweeps away with the other. The GDLA, therefore, respectfully urges this Court to VACATE Section 3 of its Opinion wherein the Court mandates trial courts to consider prospective sanctions on defense counsel to thwart private discovery interviews with medical witnesses based on a mere whim that defense counsel may act improperly and violate the scope of QPO rather than for any actual evidence.

ARGUMENT AND CITATION OF AUTHORITY

The GDLA adopts and incorporates by reference the arguments set forth by counsel for Defendant Wellstar Health System, Inc. in its Motion for Reconsideration, and adds the following argument for this Court's consideration:

- I. DEFENSE COUNSEL HAS THE RIGHT TO INTERVIEW A PATIENT-PLAINTIFF'S HEALTHCARE PROVIDERS AS LONG AS HIPAA PROCEDURAL REQUIREMENTS ARE SATISFIED**

Since 2008, this Court has repeatedly upheld the right of defense counsel to communicate *ex parte* with a plaintiff's treating healthcare provider as long as the "procedural requirements" are met prior to doing so. See Moreland v. Austin, 284 Ga. 730 (2008); Baker, et. al. v. WellStar Health System, Inc., 2010 WL 2159372 (June 1, 2010) (hereafter referred to as "Baker I"); and Baker II at *1.("[I]n order for defense counsel to informally interview plaintiff's treating physicians, they must first obtain a valid authorization, or court order or otherwise comply with the provisions of 45 CFR § 164.512.9(e)."); accord Moreland v. Austin, 284 Ga. 730, 734 (2008). The very basis for this opinion are "the policies underlying HIPAA" as drafted by our legislature, and "[in order to achieve] fairness in litigation". Baker I at *5-6. In the most recent Baker II decision, this Court properly upheld two fundamental principles of law in this state:

- (1) "[i]n proceedings in which a litigant's medical condition is in issue, Georgia law generally permits *ex parte* communications between the litigant's treating physicians and opposing counsel, under the theory that the litigant's right to privacy in their medical condition in issue has been waived[;]" and
- (2) "[p]ost-HIPAA, in order for defense counsel to informally interview plaintiff's treating physicians, they

must first obtain a valid authorization, or court order, or otherwise comply with the provisions of 45 CFR 164.512(e)."

Baker II, ¶1 (internal citations omitted).

In all three of the cited decisions above, this Court has held that a defense attorney can "otherwise comply" with 45 CFR §164.512(e) by obtaining a carefully drafted Qualified Protective Order that comports with HIPAA. See, Moreland, *supra*; Baker, *supra*, and Baker II at *2. The only prerequisites for a QPO imposed by HIPAA are that it:

- "(A) [p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
- (B) [r]equires the return to the [healthcare provider] or destruction of the protected health care information (including all copies made) at the end of the litigation or proceeding."

Baker II at *2-3.

In Baker II, this Court considered the substantive privacy rights of patients under Georgia law as set forth in Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982) and O.C.G.A. § 24-9-40, and added a list of guidelines to limit the scope of the health information disclosed. Id. at *5-6.

The Court limited the inquiry to only "matters relevant to the medical condition [the plaintiff-patient] has placed at issue in this proceeding." Id. Language found in Defendant Wellstar's QPO that sought to discuss "any past, present, or future care and treatment" was interpreted as too broad in scope to meet procedural safeguards and deficient. Id. at *6. Specifically, in issuing orders authorizing *ex parte* interviews, this court required trial courts to "state with particularity:

- (1) the name(s) of the healthcare providers who may be interviewed;
- (2) the medical condition(s) at issue in the litigation regarding which the healthcare provider may be interviewed;
- (3) the fact that the interview is at the request of the defendant, not the plaintiff-patient, and is for the purpose of assisting the defense counsel in the litigation; and
- (4) the fact that the healthcare provider's participation in the interview is voluntary."

Id. at *8. Such guidelines, on their face, do not sacrifice the fundamental fairness of the litigation process for any side.

**II. SECTION 3 OF THE BAKER II OPINION SHOULD BE
VACATED TO THE EXTENT IT SEEKS TO**

PROSPECTIVELY SANCTION DEFENSE COUNSEL
WITHOUT ANY EVIDENCE

A. THE BAKER II OPINION, IN PART, IMPROPERLY
MANDATES TRIAL COURTS TO IMPOSE DRASTIC
SANCTIONS UPON DEFENSE COUNSEL PROSPECTIVELY,
WITHOUT ANY EVIDENCE, AND SHOULD THEREFORE
BE VACATED

Georgia law has long held that courts shall not impose prospective, self-executing orders in cases where the sanction is drastic. Steele v. Colbert, 182 Ga. App. 680, 356 S.E.2d 736 (1987); Delta Equities, Inc. v. Berry, 127 Ga. App. 590, 194 S.E.2d 284 (1972); Thornton v. Burson, 151 Ga. App. 456, 260 S.E.2d 388 (1979). Drastic sanctions can be imposed only when the action is willful, in bad faith, or in conscious disregard of an order. Delta Equities, Inc., supra at 592. Therefore, the determination regarding willful, bad faith or conscious disregard "cannot be made in a prospective, self-executing order. A court cannot assume that a future failure will be unjustifiable." Id. These sanctions cannot be made prospectively because the court must evaluate whether the reason for violating an order or

missing a deadline is willful, or if there is valid excuse. Id. To do so, the court must examine *the evidence* of actual wrongdoing.

Even when a trial court executes a prospective and self-executing order, it takes effect only if the party fails to comply with the order. Sanctions are not, and cannot, be imposed unless a party actually fails to comply with an order, misses a deadline, or violates the law. For example, in Thornton, supra at 460, the prospective, self-executing order in question stated the following: "Failing to comply with this order, defendant's answers to this complaint are ordered stricken." This sanction —although found to be improper because it was the most drastic of sanctions and must only be applied if the violation was willful, in bad faith or with conscious disregard — only applied *if the evidence showed* the defendant failed to comply with the order. Id. The court did not "consider whether the circumstances—including any evidence indicating that [the defendant would not comply with the order] —warrant [striking defendant's answers to this complaint]."

Furthermore, in Moreland, supra, this Court approved the trial court's discretion to enact a remedy which allowed defense counsel to interview treating physicians only upon notice to the plaintiff and an opportunity for

her attorney to attend the meeting, but only *because* the defense had met with prior healthcare providers and failed to meet the procedural requirements of HIPAA. Again, a court should only impose sanctions or remedy upon a party when there is evidence a party has purposefully exceeded the bounds of an order, or in this case, the law.

B. THE SANCTION AFFORDING NOTICE AND ALLOWING PLAINTIFF'S COUNSEL AN OPPORTUNITY TO SIT IN ON DEFENDANT'S EX PARTE INTERVIEWS IS DRASTIC AND RESULTS IN INEQUITIES AND ULTIMATE UNFAIRNESS TO THE DEFENSE AND, THUS, SHOULD NEVER BE ISSUED PROSPECTIVELY

Court sanctions that require defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews, or, alternatively, requiring the transcription of such interviews by a court reporter at the plaintiff-patient's request are a drastic sanction, that ultimately result in disadvantage, inequity, and ultimate unfairness to the defense and should never be issued prospectively. Doing so prejudices defendants by giving plaintiffs an unfair advantage in unhindered access to

fact witnesses healthcare providers who may be critical in the determination of medical negligence and personal injury cases, deprives defendants of a cost-effective means for performing discovery, and thwarts the truth-seeking function of a trial. Such a sanction should *never* be made prospectively in a matter void of evidence of impropriety. Even when an attorney engages in prohibitive behavior, the court should evaluate the circumstances before imposing a drastic sanction. Delta Equities, Inc., *supra* at 592.

The application of the sanctions described fully in Baker II at *9-10 is unduly drastic since it is well established that discovery is allowed "regarding any matter, not privileged." O.C.G.A. § 9-11-26(b)(1)(2010). Regarding discovery, the Civil Practice Act is intended ". . . to secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1(2010). Therefore, Georgia substantive law has always allowed for *ex parte* discovery interviews. Orr v. Sievert, 162 Ga. App. 677 (1982). *Ex parte* interviews are a cost-effective way of performing discovery, unlike depositions, which require substantial preparation, a court reporter, and a transcript. Additionally, these informal interviews do not require notice to all parties, like depositions. In fact, *ex parte*, by its definition, means "on or

from one party only, usually without notice to or argument from the adverse party." Black's Law Dictionary 597 (7th ed. 1999). By withholding *ex parte* access to healthcare providers, Section 3 of the Baker II decision not only deprives defendants of a cost-effective way of gathering critical information used to zealously represent their clients, but it also grants plaintiffs an unfair, unequal access to fact witnesses who may have critical information at the heart of the case.

"Defendants ought to have the same right of access as plaintiffs have to potential witnesses, even if they are treating physicians." Lazorick v. Brown, 480 A.2d 223, 229 (N.J. Super. Ct. App. Div. 1984). Discovery should ensure that one party is not placed at a disadvantage simply because it does not have custody of certain evidence or because it is diligent and examines evidence early in the litigation. Int'l Harvester Co. v. Cunningham, 245 Ga. App. 736, 738 (2000). The Georgia Supreme Court, by way of its decision in Section 3 of Baker II, has effectively prejudiced the defense bar based on speculation and irrational fears. "To speculate about sinister motives of attorneys and treating doctors and to establish additional limitations on the right to seek out evidence as a matter of policy would do

mischievous to the adversary system." Lazorick v. Brown, 480 A.2d 223, 229 (N.J. Super. Ct. App. Div. 1984).

The healthcare providers the defendants seek to interview *ex parte* are simply fact witnesses to the injury, which serves as the basis for the lawsuit. A plaintiff has unfettered access to his or her healthcare providers before the lawsuit is filed, up until the last day of trial. The sanctions proposed by this Court in Section 3 of Baker II result in the only circumstance in civil jurisprudence where one party is granted greater access to third-party fact witnesses than another. Preventing defendants from performing informal and *ex parte* interviews with healthcare providers prejudices defendants in, at least, the following three ways:

- (1) Defendant's counsel cannot meet with healthcare providers, even on the eve of trial, to prepare them for trial testimony, and must blindly hope that the provider can recall treatment which may have occurred years before trial, and discuss the treatment relevant to the action. Conversely, plaintiff's counsel may meet at will with a medical witness, prepare them for their testimony for hours, and present a

witness to the jury who testifies clearly, concisely, and succinctly; thus, making a good impression on the jury and on plaintiff's case in general, and saving the court and jury valuable time.

(2) Defendants will be unable to avail themselves of O.C.G.A. §24-3-18 (the "Medical Narrative" statute). To obtain a medical narrative from a treating healthcare provider, defendant's counsel must speak to that provider and discuss plaintiff's medical treatment so that a narrative can be drafted. Preventing informal and *ex parte* access to healthcare providers infringes upon defendant's constitutional right to equal protection, as they will be unable to utilize a tool otherwise at their disposal to defend themselves in a lawsuit and as provided by the Georgia Civil Practice Act. Further, healthcare providers will be coerced to attend trial, thus, creating additional costs and delay to already burdened and congested court dockets.

(3) Defense counsel will also be unable to obtain affidavits from treating healthcare providers to support a motion for

summary judgment or any other such motion that may be necessary without a show of cards to the other side. Importantly, *nothing* in the Georgia Civil Practice Act conditions defense counsel's ability to avail themselves of these two litigation tools on the presence of a plaintiff-patient's counsel in communicating with a healthcare provider to draft a medical narrative or an affidavit.

"It is the role of the jury to resolve conflicts in the evidence and to determine the credibility of witnesses," and therefore, absent privileges or unfair prejudice, the jury has the right to hear all the evidence that supports each party's position. Linson v. State, 700 S.E.2d 394, 2010 Ga. LEXIS 639, *4 (Oct. 4, 2010). In many cases, it would be cost-prohibitive for defendants to depose all of a plaintiff's treating healthcare providers who may possess information relevant to the case. Therefore, by allowing *ex parte* interviews, this Court is facilitating the discovery process and promoting the truth seeking function of a trial. Moreover, the goal of discovery is the fair resolution of legal disputes, "to remove the potential for

secrecy and hiding material." Int'l Harvester Co. v. Cunningham, 245 Ga. App. 736, 738, 538 S.E.2d 82, 84 (2000).

A trial court simply does not have the authority to engage in prospective sanctions against defense counsel for hypothetical or speculative violations involving *ex parte* interviews with medical witnesses. The rules that govern lawyers are designed to punish unethical and unlawful behavior *after* it has occurred, and are not based on circumstantial evidence that an attorney's conduct may "stray beyond proper bounds." There is a legal presumption at work that all members of the State Bar, *which includes defense attorneys*, have, and will, comply with the State Bar's ethical directory and disciplinary rules. Gene Thompson Lumber Co., Inc. v. Davis Parmer Lumber Co., Inc., 189 Ga. App. 573, 377 S.E.2d (1988)(emphasis added). This Court acts beyond its powers when it directs lower courts to issue or modify QPOs based upon a trial court's suspicion, a defense lawyer will behave unethically if allowed to interview a healthcare provider without the supervision of plaintiff's counsel. In litigation, there is always a risk that a party may exceed boundaries. Lawyers on both sides are guided by the Rules of Professional Responsibility and Ethics to conduct themselves

properly. If and when such a situation arises, the courts and the State Bar of Georgia have many weapons to punish an offending party on either side including, but not limited to, Rule of Professional Responsibility 4.3, 4.4, and 8.4, as well as O.C.G.A. §§ 9-11-37 and 16-10-93. Moreover, HIPAA sets forth certain monetary sanctions for violations of the Privacy Act.¹ For this Court to prospectively sanction counsel for the defendants for acts that have not occurred forever sets a tone that defense lawyers cannot be trusted and ultimately undermines the ethics of the profession as a whole. All lawyers, *including those who concentrate in the defense*, take an oath to "truly and honestly, justly and uprightly conduct [himself or herself] as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor and that [he or she] will support and defend the Constitution of the United States and the Constitution of the State of Georgia." See, Attorney's Oath 2002 found at http://www.gabar.org/public/pdf/2004_lawdaypacket.pdf. Merely because certain hypothetical or speculative "dangers" may theoretically exist in conducting *ex parte* interviews, this Court does not have authority to

¹ See, www.hhs.gov/ocr/privacy/psa/enforcement/index.html.

unfairly single out and prospectively sanction defense counsel. Particularly when the facts of the matter are void of any impropriety by any defense lawyer, as is the case in Baker, it is especially abhorrent for this Court to ready every trial court in Georgia to prospectively sanction defense counsel in such a way to result in an unequal playing field simply because they represent a defendant.

Furthermore, in Baker II this Court warned of certain dangers associated with *ex parte* interviews, but only for plaintiff-patients: "the potential for defense counsel to influence the health care provider's testimony, unwittingly or otherwise, by encouraging solidarity with or arousing sympathy for a healthcare provider". Baker II at *7-8. In doing so, the Court wholly neglected to consider an equally abhorrent danger for defendants should the patient-plaintiff and his or her counsel gain unilateral access to healthcare providers and garner sympathy from those providers for the plaintiff's medical or financial predicament, or arouse contempt or competition against the defendant and/or his insurance company. Should a plaintiff or their counsel unduly influence a treating healthcare provider or non-party medical provider to position himself or herself against the

defendant, this Court should apply comparably harsh remedies or sanctions, and not just single-out for punishment those attorneys who represent defendants. However, even in those instances, this Court would be remiss to mandate trial courts to prospectively sanction any lawyer *before* they have acted.

III. CONCLUSION

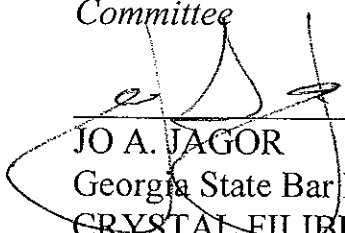
For the reasons cited in Defendant Wellstar Health System, Inc.'s Motion For Reconsideration and above, the Georgia Defense Lawyers Association hereby urges this Court to VACATE Section 3 of the Baker II Opinion because trial courts shall not impose prospective, self-executing orders in actions where the sanctions are drastic, and defendants would be unfairly, singled out and disadvantaged if plaintiffs possess superior access to and knowledge of fact witness testimony critical to the litigation.

This 30th day of NOVEMBER, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served upon all parties the within and foregoing **BRIEF OF *AMICUS CURIAE* by the Georgia Defense Lawyers Association** by depositing a true and correct copy of same in the United States Mail in a properly addressed envelope with adequate postage to all counsel of record as follows:

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This 30th day of November, 2010.



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