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Janaury 25, 2012

Clerk
Supreme Court of Georgia
Room 572
244 Washington Street
Atlanta, GA 30334

Re: Petitioners: Arby's Restaurant Group, Inc. and Hartford Insurance Co.
Respondent: Laura S. McRae
Supreme Court Application No.: S12C0714
Georgia Court of Appeals Case No.: A11A1021

Dear Sir or Madam:

Enclosed please find the original and eight copies of Brief of *Amicus Curiae* by Georgia Defense Lawyers Association in Support of Petition for Writ of Certiorari in the above-referenced matter. Please file the original and seven copies and return a stamped copy to me in the enclosed self-addressed envelope.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to call me.

Very truly yours,

McLAIN & MERRITT, P.C.

Clayton E. Robertson

CER:wjg
Enclosures

IN THE SUPREME COURT
STATE OF GEORGIA

ARBY'S RESTAURANT GROUP, INC.,	:	
	:	
and	:	SUPREME COURT
	:	APPLICATION NO.: S12C0714
HARTFORD INSURANCE CO.	:	
c/o SPECIALTY RISK SERVICES,	:	
	:	
Insurer/Servicing Agent,	:	GEORGIA COURT OF APPEALS
	:	CASE NUMBER: A11A1021
Petitioners.	:	
	:	
v.	:	
	:	
LAURA S. MCRAE,	:	
	:	
Respondent.	:	
	:	

BRIEF OF *AMICUS CURIAE* BY GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

W. Melvin Haas, III, President
Robert R. Gunn, II and Jeffrey S. Ward, *Amicus* Committee

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IN THE SUPREME COURT
STATE OF GEORGIA

ARBY'S RESTAURANT GROUP, INC.,	:	
	:	
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STATEMENT OF INTEREST

The Georgia Defense Lawyers Association (hereinafter "GDLA") consists of approximately 600 attorneys, including sole practitioners and members of law firms of all sizes throughout the State, who engage in litigation primarily for defendants in civil cases, as well as workers' compensation claims. In part, GDLA and its members work to improve the adversary system of jurisprudence in our courts, the elimination of court congestion and delay in litigation, and to promote improvements in the administration of justice.

Recent appellate court rulings have affected the ability of GDLA members to communicate with treating physicians in workers' compensation claims. Informal communications with treating physicians have historically been common to the Georgia workers' compensation system because they foster expedited discovery, efficient information sharing, and prompt resolution of issues.

While this Court will have opportunity to hear from the Petitioners and the Respondent, GDLA submits its brief in support of Petitioner Arby's Restaurant Group Inc.'s Petition for Writ of Certiorari from the perspective of Georgia defense lawyers.

INTRODUCTION

In Georgia workers' compensation claims, where a claimant has placed his or her medical condition in issue, defense attorneys must be able to have private communications with treating physicians as this promotes the prompt and efficient sharing of information which aids in providing reasonable, necessary, and appropriate medical care and in returning injured employees to work.

In order to fully investigate claims and defend against those of questionable legitimacy, defense counsel must do more than seek to obtain written evidence, which often lacks information or specific detail within the physician's knowledge. Counsel must communicate with the treating physicians concerning their interactions with the claimant on the very matters which the claimant has placed at issue in his or her workers' compensation claim. To thwart defense counsel's ability to meet and interview these medical witnesses in a meaningful way improperly limits access to relevant evidence and information that may lie at the heart of the claim and be critical to the defense of the particular issue. Thus, the GDLA respectfully urges this Court to

grant the Petition for Writ of Certiorari to consider whether the opinion of the Court of Appeals should be reversed.

ARGUMENT AND CITATION OF AUTHORITY

The GDLA adopts and incorporates by reference the arguments set forth by counsel for the Petitioners in their Petition for Writ of Certiorari and adds the following argument for this Court's consideration.

I. THE GEORGIA COURT OF APPEALS ERRED IN HOLDING THAT PRIVATE COMMUNICATIONS BETWEEN DEFENSE COUNSEL AND A CLAIMANT'S TREATING PHYSICIAN SHOULD BE RESTRICTED.

While the Court of Appeals acknowledged that this case involves a workers' compensation claim, the slim majority held that private communications should be restricted in workers' compensation claims similar to the extent that they are in medical malpractice actions. However, discovery in Georgia workers' compensation claims is very different than other cases and it must be treated accordingly.

Unlike plaintiffs in personal injury and medical malpractice cases, workers' compensation claimants specifically waive confidentiality by virtue of filing a claim. The relevant provision of the Georgia Workers' Compensation Act is O.C.G.A. §34-9-207(a) which provides:

> "When an employee has submitted a claim for workers' compensation benefits or is receiving payment of weekly income benefits or the employer has paid any medical expenses, that employee shall be deemed to have waived any privilege or confidentiality concerning any communications related to the claim or history or treatment of injury arising from the incident that the employee has had with any physician, including, but not limited to, communications with psychiatrists or psychologists. This waiver shall apply to the employee's medical history with respect to any condition or complaint reasonably related to the condition for which such employee claims compensation. Notwithstanding any other provision of law to the contrary, when requested by the employer, any physician who has examined, treated, or tested the employee or consulted about the employee shall provide within a reasonable time and for a reasonable charge all information and records related to the examination, treatment, testing, or consultation concerning the employee." (Emphasis added)

The statute clearly and unambiguously provides that workers' compensation claimants explicitly waive any privilege or confidentiality concerning any communications, and that the treating physician shall provide all information and records when requested by the employer. The dissent opinion by Judge Blackwell correctly noted that "[w]here the language of a statute is plain

and unambiguous, judicial construction is not only unnecessary but forbidden." Six Flags Over Ga. II v. Kull, 276 Ga. 210 (2003). However, despite the clear language of the statute, the majority held "[n]othing in the Act indicates that 'information' was intended to mean anything but tangible documentation." There is absolutely no authority for the conclusion that "information" as used in O.C.G.A. §34-9-207 means only written documents or other tangible things. In fact, the majority opinion cites no authority.

Of course, treating physicians possess information which they do not always reflect in their notes. Otherwise, it would never be necessary to take medical depositions. Certainly, anyone who has deposed a physician will agree that information is often shared during a deposition that would have otherwise never have been revealed. The GDLA contends, as did Judge Blackwell in his dissent, that the General Assembly intended "information" to include any knowledge or data, regardless of whether it was memorialized. Citing an amicus curiae brief, the majority held that to construe "information" to include private communications between defense counsel and treating physicians "necessarily defines information in a bizarre existential manner...as being

matter residing in the mind of treating physicians..." However, all medical opinions reside in the mind of treating physicians, even after they are put to paper. The opinion has no more or less informational value based on the fact that it was written down.

The majority opinion of the Court of Appeals correctly noted that O.C.G.A. §34-9-207 was added to the Act to facilitate the collection of medical data and streamline the workers' compensation process. However, the majority now seeks to frustrate that process by essentially requiring employer/insurers to depose treating physicians in virtually every claim where additional information and/or clarification is sought. The GDLA contend that was clearly not the intent of the General Assembly.

The majority opinion concluded that giving defense counsel "unbridled" access to privately communicate with treating physicians would create numerous potential "dangers," including a) the potential to influence the physician's testimony; b) to probe into irrelevant but highly prejudicial matters; and c) the disclosure of information never disclosed to the patient. In reaching this conclusion, the Court of Appeal cited the Baker

decision which was not even a workers' compensation case. Baker v. Wellstar Health Systems, Inc., 288 Ga. 336 (2010).

More importantly, the Court of Appeals gave no explanation as to how these supposed potential "dangers" could occur in a workers' compensation setting. Of course, a meeting with a treating physician has the potential to influence the physician's testimony. However, the Court's decision in Baker further explained that the potential to influence the physician's testimony in a medical malpractice case can be a danger "by encouraging solidarity with or arousing sympathy for a defendant health care provider." Id. at 338. No such concern exists in a workers' compensation claim. Moreover, communications by claimants and their counsel with treating physicians are equally likely, if not more, to influence the physician's testimony.

The Court of Appeals' concern regarding defense counsel probing into "irrelevant but highly prejudicial matters" is misplaced. Certainly, information irrelevant to the workers' compensation claim would not be useful to the defense, so one would expect that inquiry into irrelevant matters would cease once the matter was determined irrelevant. Regardless, the administrative law judge will necessarily exclude and refuse to

consider anything not relevant or prejudicial to the workers' compensation claim.

Finally, the Court of Appeals expresses concern regarding the potential disclosure of "information" never disclosed to the patient. Ironically, this use of the word "information" is in direct conflict with the majority's prior limitation of "information" as being only documents and tangible items. Nevertheless, as the Court noted in Baker, this information includes "mental impressions not documented in the medical record." Id. at 338. While this might be a concern in a medical malpractice case, no such concern exists in a workers' compensation claim. Treating physicians often provide mental impressions through deposition that are not reflected in their medical notes. However, the disclosure of this information is certainly necessary and helpful in resolving the issues in a particular claim.

II. THE GEORGIA COURT OF APPEALS ERRED IN HOLDING THAT HIPAA APPLIES IN WORKERS' COMPENSATION PROCEEDINGS.

With very little explanation, the Court of Appeals majority incorrectly disagreed with the superior court's holding that the medical privacy constraints of HIPAA are inapplicable in workers' compensation proceedings. Because workers' compensation insurance is not a "health plan," HIPAA simply does not apply. The Department of Health and Human Services (HHS) clarifies in the privacy regulation that HIPAA is not intended to impede disclosures necessary for workers' compensation programs. In fact, the HIPAA regulation specifically excludes workers' compensation or similar programs.

45 C.F.R. § 164.512(l) provides:

> "Standard: Disclosures for workers' compensation. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault."

Of course, this means that a medical provider may disclose otherwise HIPAA-protected health information "as authorized by and to the extent necessary to comply with" O.C.G.A. §34-9-207. Because the Georgia Workers' Compensation Act requires the

treating physician to disclose information and records when requested, HIPAA is made inapplicable by the regulations' own provisions. As a result, the majority's conclusion that "the Privacy Rule" applies in the context of workers' compensation proceedings is simply incorrect.

CONCLUSION

For the reasons cited in Petitioner Arby's Restaurant Group Inc.'s Petition for Writ of Certiorari and above, the Georgia Defense Lawyers Association hereby urges this Court to grant the Petition for Writ of Certiorari to consider whether the opinion of the Court of Appeals should be reversed.

Respectfully submitted,

GEORGIA DEFENSE LAWYERS ASSOCIATION

W.Melvin Haas, III
President

Robert R. Gunn, II
Jeffrey S. Ward
Co-chairs of *Amicus Curiae* Committee

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BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing **BRIEF OF *AMICUS CURIAE* BY GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** upon all parties by depositing same in the United States Mail in an envelope with sufficient postage affixed thereon to ensure delivery addressed as follows:

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This the 25 day of January, 2012.

McLAIN & MERRITT, P.C.

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