IN THE SUPREME COURT
STATE OF GEORGIA

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

MOTION FOR RECONSIDERATION

Submitted By:

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WellStar Kennestone Hospital
Appellee

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Appellee.	:	

MOTION FOR RECONSIDERATION

It is respectfully submitted that the majority of this Court erred by vacating the unanimous Opinion of June 1, 2010 and substituting in its place the Opinion of November 1, 2010, a copy of which is attached hereto as Exhibit "1". First, Section 3 of the Opinion constitutes an improper advisory opinion as it is based on pure hypothesis and speculation, not facts or trial court rulings. Secondly, the majority has improperly expanded on Federal procedural statute to create a substantive right of privacy so as to warrant changing longstanding law and discovery rules in this state. Finally, as pointed out by the dissent, the majority has engaged in judicial legislation by utilizing a Federal procedural statue to change the laws of this state on discovery and privilege. Section 3 must be vacated.

ARGUMENT AND CITATION OF AUTHORITY

This Court in three opinions has confirmed the right of both Plaintiff and Defense counsel to conduct informal, private ("ex parte") discovery interviews in civil, personal injury litigation so long as HIPAA's procedural requirements are initially followed. Moreland v. Austin, 284 Ga. 730 (2008); Baker v. WellStar Health System, 2010 WL 2159372 (June 1, 2010), and Baker v. WellStar Health System, 2010 WL 4272843 (Nov. 1, 2010) (hereinafter "Baker II"). "Ex parte" interviews are those which take place without notice to or the presence of one's opposing party. See Black's Law Dictionary, 4th Edition (1968), at pg. 661. Appellee respectfully urges the Court to vacate Section 3 of its Opinion and, most particularly, the command that trial judges prospectively sanction defense counsel based on mere hypothesis rather than evidence.

First, Section 3 of the November 1, 2010 Opinion constitutes an improper advisory opinion. It instructs trial judges that they "... should consider whether the circumstances-including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds-warrant requiring 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 the interview by a court reporter at the patient–plaintiff's request." Baker II, at 7-8.

(emphasis added). The word "should" is the past tense of the word shall. Black's Law Dictionary, (4th Edition 1968), pg. 1549. Under Georgia Law, the word shall is a word of command and leaves no option but compliance. Emory Clinic v. Houston, 258 Ga. 434 (1988), Ring v. Williams, 192 Ga. App. 329 (1989).

Thus, the majority has ordered trial judges to prospectively assume that defense counsel will engage in unethical efforts to influence a witness' testimony and to include a prospective sanction which effectively ends ex parte interviews in this state. There is absolutely no evidence or allegation of improper conduct in the record before this court upon which to justify these prospective sanctions. This Court under its own prior opinions cannot base a judgment on pure hypotheticals based on "facts" which were not before the trial judge and not in the record.

Secondly, HIPAA is purely procedural and neither bestows nor creates any substantive privilege or right of privacy in protected health information. As such, it has no "spirit" which can or should be utilized to fundamentally change the Rules of Civil Discovery adopted by the Legislature almost forty years ago. Ga. Laws 1972, pg. 510 et sq. The majority has improperly expanded a Federal procedural statute to create a substantive right of privacy, thus overruling O.C.G.A. § 24-9-40 (a), which expressly states that the right to privacy is waived by filing suit.

Finally, the dissent properly points out that Section 3 of the Opinion is judicial legislation. The majority has substituted its own judgment for that of the elected representatives of this state. The majority has determined that a Federal procedural statute creates a privilege in health care that contradicts O.C.G.A. § 24-9-40 (a). The right of privacy thus created is used to change the rules of discovery established at O.C.G.A. § 9-11-26. The Court cannot substitute its own law for that of the Legislature.

There can be no doubt that the plaintiff's bar will actively use the new Baker opinion as a sword to ask trial judges to prospectively sanction defense counsel and prohibit them from interviewing physicians in the future. Attached to this brief as Exhibit "2" is a Motion to Vacate or Modify Qualified Protective Order filed on November 5, 2010 in another WellStar case currently being defended by counsel for Petitioner herein. This motion was filed by a plaintiff's firm whose lead partner, Joseph Watkins, is the former president of the Georgia Trial Lawyers Association. In this motion plaintiff's attorney expresses a "concern" that defense counsel will improperly exercise "influence" over WellStar providers and, therefore, requests that the court enter an order preventing defense counsel from meeting with even WellStar employee physicians who were involved in the treatment of the plaintiff. Arguably, Plaintiffs will even seek to prevent Defense counsel from meeting with or representing WellStar employee providers who are

not named Defendants. Plaintiffs thereby intend to gain a tremendous tactical advantage in all personal injury litigation by restricting the rights of Defendants based upon an unprecedented expansion of a Federal procedural statute. Appellee respectfully requests that this Court reconsider and vacate Section 3 of the November 1, 2010 Opinion.

I.

SECTION 3 OF THE NOVEMBER 1 OPINION CONSTITUTES AN IMPROPER ADVISORY OPINION

In Section 3 of the newly issued Opinion, the majority commands trial judges in this state to prospectively include discovery restrictions and/or sanctions solely on defense counsel in Qualified Protective Orders entered under HIPAA. The use of the word "should" places a legal requirement on trial judges to comply with the requirements of § 3 (b). The use of these words, as well as the word "exhort" assures that no trial judge will deviate from the command of the Court.[1] The Court bases these discovery restrictions and prospective sanctions solely on the "potential" for discovery violations by defense counsel allegedly posed by informal discovery interviews, as well as the so-called "spirit" of HIPAA. Neither

[1] The term exhort when used as a verb means "to incite by argument or advice: urge strongly: make urgent appeals". Webster's New Collegiate Dictionary,1981, pg. 397. The use of this term goes far beyond mere encouragement and is an order by the Court.

of these rationales justifies in any way changing the substantive discovery laws of this state or of the right of defendants to discover their cases in the same fashion as plaintiffs.

It has long been the law in this state that advisory opinions by Appellate Courts are "beyond the bounds" of their authority and that such actions are void and unconstitutional because the court lacks jurisdiction to enter them. Thompson v. Talmadge, 201 Ga. 867, 874 (1947). In recently reversing a Georgia Court of Appeals decision based only on hypotheticals presented by the trial court, this Court wrote that "... the Court of Appeals erred by entertaining an appeal from a ruling in which no conclusions of law were made and no facts of any nature found by the trial court. Georgia Appellate Courts are not authorized to render advisory opinions as to potential error." Bibbins v. The State, 280 Ga. 283, 284-285 (2006) (emphasis added). In the same opinion, the author of the current majority opinion went on to write:

> "An Appellate Court should not reconstruct a legal basis for a trial court's ruling, consider unstipulated evidence never introduced in the trial court, or substitute itself as the initial finder of fact to reach an issue not properly before it, no matter how much confusion that issue has generated in the 'real world'." 280 Ga. at 285.

See also DeKalb County v. Georgia Power Company, 249 Ga. 704 (1982); Board of Trustees of the Employees Retirement System of Georgia v. Kenworthy, 253 Ga. 554 (1984)(court will refuse to issue advisory opinions on hypotheticals); Huff v. The Harpagon Company, LLC, 286 Ga. 809 (2010).

In the instant case, there is no fact, evidence, or even allegation of improper conduct by defense counsel. There was no finding by either Judge Prodgers or this Court in its previous Opinion of any alleged "unwarranted probing" into supposedly irrelevant matters. The record is devoid of any fact, finding, or even assertion that defense counsel attempted to influence any healthcare provider's testimony, unwittingly or otherwise, "... by encouraging solidarity with or arousing sympathy for a defendant healthcare provider". Rather, there is a legal presumption that all members of the State Bar have properly complied with the Bar's ethical directory and disciplinary rules. This presumption may only be overturned with competent evidence. Gene Thompson Lumber Co., Inc. v. Davis Parmer Lumber Co., Inc., 189 Ga. App. 573 (1988). What the majority has done is render an advisory opinion ordering trial judges to prospectively restrict the discovery rights of defendants and their counsel based on nothing more than hypothetical ethical and legal violations.

Interestingly, the majority cites as the primary authority for these prospective discovery restrictions and sanctions on defense counsel an article

written by the Honorable Wayne M. Purdom. Ga Civil Discovery, § 5.10 (6th ed.).[2] At footnote 42 of this article, the author cites with approval an Ohio case that outlines some of the benefits which inure to plaintiff's counsel when given the identity of or prior notice of physicians who are to be interviewed by defense counsel. This will "... afford plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate concerns as to the proper scope of the interview, and the extent to which plaintiff continues to assert the physician-patient privilege with respect to that physician."

If a plaintiff's counsel were to follow this advice and contact an unrepresented physician not a party to the litigation, he would violate not only the Rules of Professional Conduct, but also state law as well by attempting to influence a witness. See O.C.G.A. § 16-10-93. Rule 4.3 (b) of the Georgia Code of Professional Conduct states that a lawyer shall not contact a person who is not a party to the litigation and give him any legal advice other than to seek his own representation. To advise a non-party physician in Georgia that the plaintiff still asserts his physician-patient privilege would be incorrect legal advice. Georgia does not recognize a physician-patient privilege and, to the extent one exists, it is

[2] The other article referenced by the majority is Angela T. Burnette & D'Andrea J. Morning, HIPAA and Ex Parte Interviews – The Beginning of the End, 1 Health & Life Sci. L. 73, 104-105 (April 2008). This article was published six months before this Court's Opinion in Moreland, supra, which made clear ex parte

waived by filing suit. Orr v. Sievert, 162 Ga. App. 677 (1982); O.C.G.A. § 24-9-40 (a). Furthermore, contacting a physician and offering this type of incorrect "advice" could subject the plaintiff's lawyer to prosecution for a violation of O.C.G.A. § 16-10-93 (b) (1) (A), which condemn attempting to improperly influence the testimony of an ordinary witness.[3]

It may be argued that Moreland v. Austin, 284 Ga. 730 (2008) serves as precedent for the discovery sanctions imposed by the majority. It does not. In Moreland, the trial judge determined that requests sent pursuant to O.C.G.A. § 9-11-34 (c) before HIPAA's effective date of April 14, 2003 did not comply with the notice requirements of the Act so as to authorize ex parte discovery interviews. This court upheld that sanction imposed on defense counsel restricting him from interviewing prior treating physicians unless plaintiff or her attorneys had been given prior notice and the right to be present. This sanction, therefore, was based upon evidence presented to the trial judge and a ruling that judge had made.

In contrast, in the instant case, this court has commanded trial judges to prospectively sanction defense attorneys in the same way based not upon facts or evidence, but upon hypotheticals. If allowed to stand, part 3 of the instant Opinion

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interviews could proceed in Georgia after initial compliance with HIPAA's procedures.

[3] Treating physicians under Georgia Law are "ordinary witnesses". Candler General Hospital v. Joiner, 180 Ga. App. 455 (1986), cert denied.

will fundamentally change the rules of discovery in this state. The internal contradiction between allowing ex parte discovery in Sections 1 and 2 of the Opinion but disallowing it in Section 3 cannot be allowed to stand. Appellee respectfully requests that this Court reconsider Section 3 of its Opinion, and vacate same.

II.

NOTHING IN THE HIPAA PRIVACY RULE REQUIRES ADDITIONAL NOTICE TO PLAINTIFF'S COUNSEL BEFORE ORAL DISCOVERY INTERVIEWS AND THIS COURT HAS PREVIOUSLY UNANIMOUSLY REJECTED SUCH A RULE

Section 3 (b) of the majority Opinion strongly urges, if not commands, trial courts to require defense counsel to notify plaintiff's counsel before informal discovery interviews even if HIPAA's procedures have been complied with. 45 C.F.R. § 164.512 (e)[4]. The justifications given by the majority for these new rules are the "spirit" of HIPAA and hypothetical discovery violations on the part of

[4] In the alternative, the majority says trial judges may require that interviews be recorded by a reporter of the Plaintiff's choosing. Presumably, Defendants will be forced to pay for this and turn it over to Plaintiff's counsel, thus exposing their work product and trial strategy to their opponent in violation of O.C.G.A. § 9-11-26 (b) (3). In addition, the cost of this process completely nullifies any savings offered by informal discovery, thus increasing the overall cost of litigation. This is contrary to the spirit of the Civil Practice Act. O.C.G.A. § 9-11-1.

defense counsel. As shown in Argument I, the majority cannot base these advisory commands on mere speculation, so this brief will next address HIPAA.

HIPAA has no "spirit", as it is purely procedural and creates no substantive rights or privileges. As this Court first held unanimously in Moreland v. Austin, supra, as well as in both Opinions in this case, the only requirements of a Qualified Protective Order under the Privacy Rule are that the parties be prohibited from "using or disclosing the protected health information for any purpose other than the litigation or proceeding for which information was requested; and ...(which) requires the return ... or destruction of the protected health information ... at the end of the litigation or proceeding." 45 C.F.R. § 164.512 (e) (v) (A-B). The Privacy Rule is purely procedural and creates neither a federal physician patient-privilege nor a substantive right of privacy. Northwestern Memorial Hospital v. Ashcroft, 362 F. 3d 923, 925-926 (7th Cir. 2004). See also United States of America v. Bek, 493 F. 3d 790, 801-802 (7th Cir. 2007); United States v. Del Campo, 2010 W.L. 2698295 (M.D. Ill., July 7, 2010). The Del Campo Court, supra, reaffirmed HIPAA's purely procedural nature and the fact that it does not prohibit ex parte communications in the context of litigation. The Supreme Court of Michigan also recently upheld ex parte interviews with no additional notice on the basis that Michigan, like Georgia, has a statute similar to O.C.G.A. § 24-9-40 (a). Holman v. Rasak, 486 Mich. 429, 785 N.W.2d 98 (2010).

The majority asks whether the drafters of HIPAA "... would have considered the situation presented here as providing ample notice, where the patient-plaintiff is merely notified that defense counsel intends to conduct ex parte interviews with unspecified health care providers at unspecified times without future notice." Baker, pg. 6. The apparent assumption by the majority is that Congress and the Secretary of Health and Human Services intended to require notice beyond the methods set forth at 45 C.F.R. § 164.512 (e) before oral disclosures of health information would occur. Implicit in the majority's assumption is that HIPAA creates a substantive right of privacy that survives initial compliance with the Act. This assumption is fallacious. The Act specifically contemplates both oral and written disclosures after initial compliance, without further notice or judicial intervention.

The preamble to § 164.512 (e) specifically states that if this section is utilized in litigation, no written consent or authorization as described at 45 C.F.R. § 164.508 is required. The preamble goes on to state that "when the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information ... may be given orally." (emphasis added).

The important term here is "agree". Agreement under Georgia law can occur by means of statutory waiver. O.C.G.A. § 1-3-7. This occurs where a party

acts "voluntarily, knowingly, and intelligently. It may be done by counsel for the (party) by failure to act timely or not act at all ...". Mingo v. State, 133 Ga. App. 385 (1974). Waiver may be established by course of conduct. Aaron Rents, Inc. v. Corr, 133 Ga. App. 296 (1974); Hyre v. Denise, 214 Ga. App. 552 (1994). Of course, Georgia statutory law since 1978 has been clear that when a person voluntarily injects his medical condition into the public realm by suing his health care provider, any claim to privilege or privacy is waived, other than as to information subject to a statutory privilege such as HIV treatment. O.C.G.A. § 24-9-40 (a); Orr v. Sievert, supra; King v. The State, 272, Ga. 788 (2000). The preamble of 45 C.F.R. § 164.512 explicitly contemplates oral disclosures of protected health information once the requirements of this section are initially met. Had Congress or the Secretary of Health and Human Services intended to require notice beyond the procedures of 45 C.F.R. § 164.512 (e), they would have said no. They did not. (See Exhibit "4").

The next question, therefore, is whether the Secretary of Health and Human Services believed HIPAA created some form of substantive privacy right so as to warrant the intervention of the judiciary to control discovery to protect that "right". The answer to this question is no.

On December 28, 2000, the Secretary answered a number of questions concerning the intent of the act and the regulations. These were published in 65

Fed. Reg., December 28, 2000. The Secretary specifically defined the contents of a Qualified Protective Order as including only a prohibition from using or disclosing the information outside the litigation process and requiring that the information be returned or destroyed at the end of the proceeding. 65 Fed. Reg. 82530. In response to commentors who argued that protected health information should only be disclosed where there was express consent or a court order, the Secretary responded as follows:

> "The Secretary believes that such an approach would impose an unreasonable burden on covered entities and the judicial system and that greater flexibility is necessary to assure that the judicial and administrative systems function smoothly." 65 Fed. Reg. 82675 (Dec. 28, 2000).

In short, the Secretary provides one method (the Qualified Protective Order) which involves the judiciary and another method which does not involve the judiciary at all. "These rules do not require covered entities or parties seeking the disclosure of protected health information to involve the judiciary; they may choose the notification option rather than seeking a Qualified Protective Order." 65 Fed. Reg. 82674 (Dec. 28, 2000).

If the Secretary had believed that HIPAA created a substantive right of privacy that warranted continued judicial intervention to control the discovery

process under state law, a method of disclosure would not have been provided that did not involve the judiciary at all. Clearly, therefore, the drafters of HIPAA did not contemplate further or additional notice beyond that provided by HIPAA's initial procedures, nor did they contemplate judicial governance of state civil discovery.

This Court itself unanimously recognized in Moreland, supra, that additional notice to plaintiff or his counsel is not required before oral disclosures may occur in informal discovery interviews with defense counsel. In its initial opinion in the Moreland case, this court required additional notice be given to plaintiff or his counsel before discovery interviews. See pg. 9-10, Exhibit "3" attached hereto. In the final opinion issued on December 15, 2008 in response to the Motion for Reconsideration, the language was substantially and unanimously revised to exclude the requirement of additional notice to plaintiff or her counsel before oral interviews took place. This court wrote "(t)hus, 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 revisions of 45 C.F.R. § 164.512 (e). 670 S.E.2d at 72. In 2008, therefore, this Court declined to impose the same requirement which it now orders trial judges to prospectively place on defense counsel alone. The sole justification for this sanction is speculation and a misconstruction of the Federal statute.

The majority in the instant case further overlooked in the record the fact that notice of an intent to interview specific providers had already been provided to Mr. Baker and his counsel. Shortly after the case was filed, Appellee served the first of several Requests for Protected Health Information to Mr. Baker's prior and present health care providers. (R-12-13; 139-145; 171-180). These requests were served by certified mail on Baker's counsel as required by law. They specifically notified plaintiff and his counsel that the health care providers were being asked to disclose "... oral and or written opinions you may possess of the patient's medical diagnosis, prognosis, and or care." (R 139-140). Plaintiff filed no objection to these requests within the twenty-three days allowed by law. O.C.G.A. § 9-11-34 (c) (2) as well as 45 C.F.R. § 164.512 (e) (1) (ii) (A). The Secretary of Health and Human Services has previously approved precisely this type of request as complying with the HIPAA Privacy Rule. 65 Fed. Reg. at 82674.

In short, Plaintiff knowingly waived his rights of privacy by filing this suit. There is no allegation or evidence in the record that any of his health information is subject to a statutory privilege such as that accorded to psychiatrist-patient communications. 45 C.F.R. § 164.512 (e) contemplates both oral and written disclosures of protected health information in litigation if its procedures are initially followed. That has occurred here not once, but twice. There is <u>no</u> requirement in the Federal Act for <u>any</u> further notice. There is no further privacy

spirit in HIPAA that can be manipulated to change Georgia substantive law. This Court must vacate Section 3 of its Opinion.

III.

THE MAJORITY HAS IMPROPERLY USED A FEDERAL PROCEDURAL STATUTE TO CHANGE LAWS OF DISCOVERY AND PRIVILEGE ENACTED BY THE GEORGIA LEGISLATURE

As pointed out by the dissent, Section 3 of the majority Opinion constitutes judicial legislation by the majority to change the laws governing privilege and discovery in this state. O.C.G.A. § 24-9-40 (a) has made clear since 1978 that a Plaintiff waives his claims of privacy and privilege in his health information by filing a personal injury suit in a public forum. In 1972, the Georgia Legislature adopted Rule 26, which follows the 1970 Amendments to the Federal Rules of Civil Procedure. O.C.G.A. § 9-11-26; Ga. Laws 1972, pg. 510 et seq. These enactments by the Legislature provide that parties may discover matters not subject to a specific privilege, with the protections of work product. Section 3 of the majority Opinion constitutes nothing more the overruling of the duly enacted laws based upon an unprecedented substantive expansion of a Federal procedural rule.

This Court has held on many occasions that this "... is exactly the manner in which new laws should not be created, that it is not the role of this Court to formulate new law in the abstract ... the law as it exists should be applied to the

realities of the case presently before the Court." Bragg v. Oxford Construction Co., 285 Ga. 98, 100 (2009). The first Justice of the Supreme Court, Joseph Henry Lumpkin, addressed the subject of judicial legislation as follows:

> "We must not, in this or any other case, permit our sympathy, or anything else, to draw us off from the position so early taken, and so firmly and uniformly adhered to by this Court, namely: that what is or is not sound policy, is a question for the Legislature, and not for the Judiciary. The line between the Legislative and Judicial powers should be kept constantly in view by both these departments, and never invaded or transcended by either. It is our province to expound and apply, and not make or change the law. We protest alike against judge made law, and the exercise of judicial power by the Legislature."
>
> Brawner v. Sterdevant, 9 Ga. 69 (1850).

CONCLUSION

Sixty-four years ago, the United States Supreme Court summarized the duties of a lawyer in civil actions with an eloquence that there bears repetition here:

> "Historically, a lawyer is an officer of the court and is

> bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential That a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interest." Hickman v. Taylor, 329 U.S. 495, 510-511, 67 S.Ct. 385, 393-394 (1947).

The Georgia Rules governing health information in litigation have been equally clear for over thirty years. A patient waives his claim to privacy in his health information (other than that subject to statutory privileges, not claimed here) by choosing voluntarily to place his care, treatment, and health condition at issue in a public, civil proceeding. O.C.G.A. § 24-9-40 (a). Georgia recognizes no physician-patient privilege. Orr v. Sievert, supra. The constitutionality of

O.C.G.A. § 24-9-40 (a) and the waiver of any claim to privacy was reaffirmed by this Court in King v. The State, supra. In the latter case, this Court stated "we do not hold that a Georgia citizen's constitutional right of privacy in medical records is absolute or that O.C.G.A. § 24-9-40 (a) is unconstitutional on its face. "As that enactment provides, the right to privacy can be waived in writing or 'to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding'." 535 S.E.2d at 497. (emphasis added).

The ruling of the majority in Section 3 of the November 1, 2010 Opinion is based on an erroneous assumption that the HIPAA Privacy Rule creates some sort of substantive privacy right that survives compliance with 45 C.F.R. § 164.512 (e). In contrast, the Act itself, the opinion of the Secretary of Health and Human Services, and the opinions of numerous Federal courts are that the Act is purely procedural. No substantive right to privacy survives compliance with 45 C.F.R. § 164.512 (e) to warrant judicial intervention to control discovery by the parties. That is controlled by state law and, in Georgia, ex parte discovery interviews have always been allowed. Orr v. Sievert, supra. Of course, discovery is allowed " ... regarding any matter, not privileged." O.C.G.A. § 9-11-26 (b) (1). Mr. Baker's health information is not privileged and HIPAA cannot serve as a basis to restrict

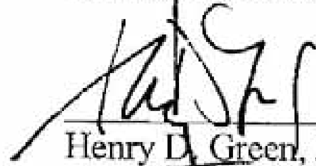
or change the state law rights of discovery accorded equally to Plaintiff and Defense counsel.

The effects of this Court's ruling if allowed to stand will be myriad. Under with scenario proposed in § 3 (b), Plaintiff's counsel will have full access to defense lawyer's work product and trial preparation activities while their own will be protected. Henceforth, Defendants will be unable to meet with and prepare treating physicians as trial witnesses because either Plaintiff's attorney will be present or they will be required to pay for and turn over a recording of the preparation. Defendants will be unable to utilize O.C.G.A. § 24-3-18 (a) because they will be unable to contact treating physicians and have private discussions with them in order to create a written narrative, thus depriving them of the equal protection of the laws. In short, the decision of the majority contradicts the very premise of the Civil Practice Act which is "... to secure the just, speedy, and inexpensive determination of every action." O.C.G.A. § 9-11-1. Appellee respectfully requests that this Court reconsider Section 3 of its Opinion of November 1, 2010 and vacate same.

This 10 day of November, 2010.

Respectfully submitted,

GREEN & SAPP, LLP



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IN THE SUPREME COURT
STATE OF GEORGIA

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served upon all parties the within and foregoing **Motion for Reconsideration** by depositing a true and correct copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon to all counsel of record as follows:

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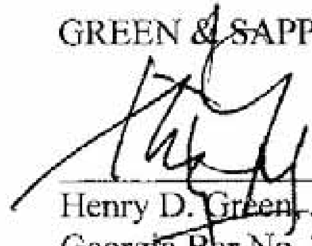
This 10 day of November, 2010.

GREEN & SAPP, LLP



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In the Supreme Court of Georgia

Decided: NOV 1 2010

S10A0994. BAKER et al. v. WELLSTAR HEALTH SYSTEMS, INC. et al.

HUNSTEIN, Chief Justice.

This action originated with a medical malpractice complaint filed on March 31, 2009 by Russel Baker against Wellstar Health Systems, Inc., individually and d/b/a Wellstar Kennestone Hospital. To aid in its discovery, Wellstar filed a motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), requesting that it be permitted to conduct ex parte interviews with Baker's health care providers. After oral argument, the trial court granted Wellstar's motion, finding, under the authority of Moreland v. Austin, 284 Ga. 730 (670 SE2d 68) (2008), that HIPAA allows such ex parte interviews as long as specified procedural safeguards are utilized to protect patient privacy. See 45 CFR § 164.512 (e). We now review this matter on an interlocutory basis to determine whether the protective order in this case comports with HIPAA, as we have recently construed it in Moreland, supra.

1. In proceedings in which a litigant's medical condition is at 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 medical privacy as to the condition at issue has been waived. Moreland, supra, 284 Ga. at 732. See also OCGA § 24-9-40 (a) ("the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding"). However, "HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians." Moreland, supra at 733. Post-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). [Cit.]" Id. at 734.

In this case, Wellstar sought to "otherwise comply" with 45 CFR § 164.512 (e) by obtaining a "qualified protective order." A qualified protective order consists of

> an order of a court . . . that: (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 [health care provider] or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Id. at (1) (v). Under 45 CFR § 164.512 (e), the disclosure of protected health

information[1] is authorized in the course of judicial proceedings if the party seeking the information provides "satisfactory assurance" of its "reasonable efforts . . . to secure a qualified protective order." Id. at (1) (ii) (B).

Here, Wellstar not only made "reasonable efforts" but in fact actually secured a qualified protective order, which provides as follows:

> Defendant's counsel is hereby permitted to engage in *ex parte* communications with Russel Baker's treating physicians and other health care providers. . . . Plaintiff's treating physicians and other healthcare providers are not required to engage in *ex parte* communications with Defendant's counsel, but they may do so at their own choosing. Plaintiff's treating physicians and other healthcare providers may discuss Plaintiff's medical conditions and any past, present, or future care and treatment with Defendant's counsel.

The qualified protective order also expressly (1) forbids Wellstar's counsel from using or disclosing Baker's protected health information outside the instant litigation and (2) requires Wellstar's counsel to either return or destroy the information received at the end of the litigation. Therefore, because the order prohibits the use or disclosure of Baker's health information for purposes other than the instant litigation and requires the return or destruction thereof at the conclusion of proceedings, it constitutes a qualified protective order as defined

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[1]Protected health information includes "any information, whether oral or recorded in any form or medium, that (A) is created or received by a health care provider . . . and (B) relates to the past, present, or future physical or mental health or condition of an individual." 42 USC § 1320d (4), (6); 45 CFR § 160.103.

in 45 CFR § 164.512 (e) (1) (v). Wellstar has thus complied with 45 CFR § 164.512 (e) (1) (ii) (B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under HIPAA.

2. Our analysis of the qualified protective order in this case, however, does not end here. Though HIPAA preempts Georgia law in its imposition of procedural requirements, see Moreland, supra, 284 Ga. at 733, the substantive right to medical privacy under Georgia law endures. See King v. State, 272 Ga. 788 (1) (535 SE2d 492) (2000) (Georgia Constitution guarantees right of medical privacy). As previously noted, a litigant may waive this right to medical privacy under Georgia law only to the extent such information is relevant to the medical condition the litigant has placed in issue in the legal proceeding. OCGA § 24-9-40 (a); Orr v. Sievert, 162 Ga. App. 677 (292 SE2d 548) (1982). In light of this substantive law, the qualified protective order entered by the trial court is too broad regarding the scope of information that may be disclosed. Rather than allowing Baker's healthcare providers to "discuss [his] medical conditions and any past, present, or future care and treatment with [Wellstar's] counsel," the order should have limited Wellstar's inquiry to

matters relevant to the medical condition Baker has placed at issue in this proceeding. Without this limitation, the qualified protective order must be considered deficient.

3. (a) In the words of HIPAA's drafters, the purpose of the HIPAA privacy regulations pertinent to this appeal is "[t]o protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use [thereof]." 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000). The situation presented in this case – in which a court signs off on a broad, blanket order authorizing ex parte contacts with any number of unnamed physician-witnesses without further notice to the patient-plaintiff – exposes a gaping loophole in the procedural protections afforded by HIPAA in the context of litigation. Though the HIPAA drafters "presume[d] that parties [to litigation] will have ample notice and an opportunity to object [to disclosures of protected health information] in the context of the proceeding," 65 Fed. Reg. at 82,530, such that the prescribed procedural safeguards would afford those parties sufficient control over disclosures therein, it is questionable whether the drafters would have considered the situation presented here as providing such "ample notice," where the patient-plaintiff is merely notified that defense

counsel intends to conduct ex parte interviews with unspecified health care providers at unspecified times without further notice.

In general, the dangers associated with ex parte interviews of health care providers are numerous, including (1) the potential for unwarranted probing into matters irrelevant to the litigation yet highly sensitive and possibly prejudicial to the patient-plaintiff; (2) the potential for disclosure of information, such as mental impressions not documented in the medical record, that the health care provider has never actually communicated to the patient-plaintiff; and (3) 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 defendant health care provider. Thus, not only in adherence to our finding in Division 2, supra, that the qualified protective order lacks the requisite limitation under Georgia law on the scope of medical information to be disclosed, but also to enforce the spirit of HIPAA's privacy protections and to minimize the risks inherent in the conduct of ex parte interviews, we exhort trial courts, in authorizing such interviews, to fashion their orders carefully and with specificity as to scope.

(b) Specifically, in issuing orders authorizing ex parte interviews, trial

courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. See, e.g., Arons v. Jutkowitz, 880 NE2d 831, 843 n.6 (II) (B) (N.Y. 2007). See also Angela T. Burnette & D'Andrea J. Morning, HIPAA and Ex Parte Interviews–The Beginning of the End?, 1 J. Health & Life Sci. L. 73, 104-105 (April 2008). In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances – including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds – warrant requiring 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 the interview by a court reporter at the patient-plaintiff's request. See Wayne M. Purdom, Ga. Civil Discovery, § 5.10 (6th ed.); Burnette, supra at 104.

In sum, the use of carefully crafted orders specifying precise parameters

within which ex parte interviews may be conducted will serve to enforce the privacy protections afforded under state law and advance HIPAA's purposes while at the same time preserving a mode of informal discovery that may be helpful in streamlining litigation in this State.

Judgment reversed. All the Justices concur, except Nahmias, J., who concurs in Divisions 1, 2, and 3 (b) and the judgment, and Hines and Melton, JJ., who concur specially.

S10A0994. BAKER et al. v. WELLSTAR HEALTH SYSTEMS, INC. et al.

MELTON, Justice, concurring specially.

Although I concur fully in Divisions 1 and 2 of the majority opinion, I

cannot concur in Division 3 thereof. Specifically, although the majority identifies a number of statements which may be generally useful for a trial court to include in an order authorizing ex parte interviews, I do not believe these items are required to create a satisfactory order. To the contrary, I believe that a trial court's discretion in properly adapting an order to the unique facts of each case should not be constrained by a generalized laundry list derived from academic articles rather than relevant state law. In the absence of such law, the development of a list such as the one now espoused by the majority is more akin to a lawmaking process which is better left to the state Legislature.

I am authorized to state that Justice Hines joins in this special concurrence.

State Court of Fulton County
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LexisNexis Transaction ID: 34205595
Date: Nov 5 2010 12:25PM
Mark Harper, Clerk

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

GLENN and MONICA WOOD,

Plaintiffs,

v.

WELLSTAR HEALTH SYSTEM, INC. d/b/a WELLSTAR KENNESTONE HOSPITAL, QUANTUM RADIOLOGY, P.C., BRIAN MARK GORDON, M.D., KENNESTONE NEUROLOGY ASSOCIATES, P.C., ROBERT CARL WALDROP, M.D., DAVID RAY VILLASANA, M.D., WELLSTAR INFECTIOUS DISEASE, LLC, and THOMAS EDWARD LAFEBER, M.D.,

Defendants.

CIVIL ACTION FILE
NO. 2009EV008300A

PLAINTIFFS' MOTION TO VACATE OR MODIFY QUALIFIED PROTECTIVE ORDER AND BRIEF IN SUPPORT

This Court granted Defendants' motion for a qualified protective order following the Supreme Court of Georgia's decision in *Baker v. WellStar Health System, Inc.*,2010 WL 2159372 (June 1, 2010). On Motion for Reconsideration, the Supreme Court modified its decision in *Baker* substantially on November 1, 2010. A copy of the new opinion is attached hereto as Exhibit "A." Specifically, the Court 1) reaffirmed the constitutional right to privacy; 2) reaffirmed that the waiver of that right through litigation is limited to matters relevant to the medical condition placed in issue; 3) held that qualified protective orders allowing *ex parte* interviews of unnamed health care providers without notice to plaintiff exposes a "gaping loophole in the procedural protections afforded by HIPAA" ; 4) deleted all references to "work product" dicta that

existed in the original *Baker* opinion; and 5) noted the numerous dangers associated with ex parte interviews of health care providers including the potential for probing into irrelevant matters that are highly sensitive and possibly prejudicial, the potential for disclosure of mental impressions not included in the medical record and never communicated to the plaintiff, and the potential for defense counsel to influence the health care provider's testimony, even unwittingly, by encouraging solidarity with or arousing sympathy for a defendant health care provider.

Given these rights and concerns, the Court added the following guidance to trial courts:

> Specifically, in issuing orders authorizing ex parte interviews, trial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary.
>
> In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances – including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds – warrant requiring 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 the interview by a court reporter at the patient-plaintiff's request.

In this case, the law firm of Green and Sapp, LLP represents WellStar Health System, Inc., WellStar Infectious Disease, LLC, and Dr. Lafeber ***as well as non-party health care providers*** such as the hospitalists who were also charged with caring for Mr. Wood. WellStar Health System, Inc. obviously carries substantial influence with the members of its medical staff. Without suggesting any improper influence of these witnesses has occurred or will occur, the Supreme Court and Plaintiff herein are

concerned with influence that is unwitting. Moreover, the Supreme Court and Plaintiffs herein are concerned that health care providers might disclose mental impressions not documented in the medical record and that have not been communicated to the Plaintiffs. The Supreme Court suggested specific procedural safeguards to be included in qualified protective orders to protect against these concerns, specifically, providing "the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request."

WHEREFORE, Plaintiffs move the court to 1) vacate its Qualified Protective Order entered in this case; and 2) deny Defendants' motion for qualified protective order; or 3) modify the Qualified Protective Order to comply with the revised *Baker* decision and to provide notice to the Plaintiffs, the opportunity to appear at scheduled interviews, and/or requiring the transcription of the interview by a court reporter of Plaintiffs' choice.

Respectfully submitted this 5th day of November, 2010.

WATKINS, LOURIE, ROLL & CHANCE, PC

BY

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In the Supreme Court of Georgia

Decided: November 1, 2010

S10A0994. BAKER et al. v. WELLSTAR HEALTH SYSTEMS, INC. et al.

HUNSTEIN, Chief Justice.

This action originated with a medical malpractice complaint filed on March 31, 2009 by Russel Baker against Wellstar Health Systems, Inc., individually and d/b/a Wellstar Kennestone Hospital. To aid in its discovery, Wellstar filed a motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), requesting that it be permitted to conduct ex parte interviews with Baker's health care providers. After oral argument, the trial court granted Wellstar's motion, finding, under the authority of Moreland v. Austin, 284 Ga. 730 (670 SE2d 68) (2008), that HIPAA allows such ex parte interviews as long as specified procedural safeguards are utilized to protect patient privacy. See 45 CFR § 164.512 (e). We now review this matter on an interlocutory basis to determine whether the protective order in this case comports with HIPAA, as we have recently construed it in Moreland, supra.

EXHIBIT
A

1. In proceedings in which a litigant's medical condition is at 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 medical privacy as to the condition at issue has been waived. Moreland, supra, 284 Ga. at 732. See also OCGA § 24-9-40 (a) ("the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding"). However, "HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians." Moreland, supra at 733. Post-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). [Cit.]" Id. at 734.

In this case, Wellstar sought to "otherwise comply" with 45 CFR § 164.512 (e) by obtaining a "qualified protective order." A qualified protective order consists of

> an order of a court . . . that: (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 [health care provider] or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Id. at (1) (v). Under 45 CFR § 164.512 (e), the disclosure of protected health information[1] is authorized in the course of judicial proceedings if the party seeking the information provides "satisfactory assurance" of its "reasonable efforts . . . to secure a qualified protective order." Id. at (1) (ii) (B).

Here, Wellstar not only made "reasonable efforts" but in fact actually secured a qualified protective order, which provides as follows:

> Defendant's counsel is hereby permitted to engage in *ex parte* communications with Russel Baker's treating physicians and other health care providers. . . . Plaintiff's treating physicians and other healthcare providers are not required to engage in *ex parte* communications with Defendant's counsel, but they may do so at their own choosing. Plaintiff's treating physicians and other healthcare providers may discuss Plaintiff's medical conditions and any past, present, or future care and treatment with Defendant's counsel.

The qualified protective order also expressly (1) forbids Wellstar's counsel from using or disclosing Baker's protected health information outside the instant

---

[1]Protected health information includes "any information, whether oral or recorded in any form or medium, that (A) is created or received by a health care provider . . . and (B) relates to the past, present, or future physical or mental health or condition of an individual." 42 USC § 1320d (4), (6); 45 CFR § 160.103.

litigation and (2) requires Wellstar's counsel to either return or destroy the information received at the end of the litigation. Therefore, because the order prohibits the use or disclosure of Baker's health information for purposes other than the instant litigation and requires the return or destruction thereof at the conclusion of proceedings, it constitutes a qualified protective order as defined in 45 CFR § 164.512 (e) (1) (v). Wellstar has thus complied with 45 CFR § 164.512 (e) (1) (ii) (B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under HIPAA.

2. Our analysis of the qualified protective order in this case, however, does not end here. Though HIPAA preempts Georgia law in its imposition of procedural requirements, see Moreland, supra, 284 Ga. at 733, the substantive right to medical privacy under Georgia law endures. See King v. State, 272 Ga. 788 (1) (535 SE2d 492) (2000) (Georgia Constitution guarantees right of medical privacy). As previously noted, a litigant may waive this right to medical privacy under Georgia law only to the extent such information is relevant to the medical condition the litigant has placed in issue in the legal proceeding. OCGA § 24-9-40 (a); Orr v. Sievert, 162 Ga. App. 677 (292 SE2d 548) (1982). In light of this substantive law, the qualified protective order

entered by the trial court is too broad regarding the scope of information that may be disclosed. Rather than allowing Baker's healthcare providers to "discuss [his] medical conditions and any past, present, or future care and treatment with [Wellstar's] counsel," the order should have limited Wellstar's inquiry to matters relevant to the medical condition Baker has placed at issue in this proceeding. Without this limitation, the qualified protective order must be considered deficient.

3. (a) In the words of HIPAA's drafters, the purpose of the HIPAA privacy regulations pertinent to this appeal is "[t]o protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use [thereof]." 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000). The situation presented in this case – in which a court signs off on a broad, blanket order authorizing ex parte contacts with any number of unnamed physician-witnesses without further notice to the patient-plaintiff – exposes a gaping loophole in the procedural protections afforded by HIPAA in the context of litigation. Though the HIPAA drafters "presume[d] that parties [to litigation] will have ample notice and an opportunity to object [to disclosures of protected health information] in the context of the proceeding," 65 Fed. Reg.

at 82,530, such that the prescribed procedural safeguards would afford those parties sufficient control over disclosures therein, it is questionable whether the drafters would have considered the situation presented here as providing such "ample notice," where the patient-plaintiff is merely notified that defense counsel intends to conduct ex parte interviews with unspecified health care providers at unspecified times without further notice.

In general, the dangers associated with ex parte interviews of health care providers are numerous, including (1) the potential for unwarranted probing into matters irrelevant to the litigation yet highly sensitive and possibly prejudicial to the patient-plaintiff; (2) the potential for disclosure of information, such as mental impressions not documented in the medical record, that the health care provider has never actually communicated to the patient-plaintiff; and (3) 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 defendant health care provider. Thus, not only in adherence to our finding in Division 2, supra, that the qualified protective order lacks the requisite limitation under Georgia law on the scope of medical information to be disclosed, but also to enforce the spirit of HIPAA's privacy protections and to

minimize the risks inherent in the conduct of ex parte interviews, we exhort trial courts, in authorizing such interviews, to fashion their orders carefully and with specificity as to scope.

(b) Specifically, in issuing orders authorizing ex parte interviews, trial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. See, e.g., Arons v. Jutkowitz, 880 NE2d 831, 843 n.6 (II) (B) (N.Y. 2007). See also Angela T. Burnette & D'Andrea J. Morning, HIPAA and Ex Parte Interviews–The Beginning of the End?, 1 J. Health & Life Sci. L. 73, 104-105 (April 2008). In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances – including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds – warrant requiring 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 the interview by a court reporter at the patient-plaintiff's request. See Wayne M. Purdom, Ga. Civil Discovery, § 5.10 (6th ed.); Burnette, supra at 104.

In sum, the use of carefully crafted orders specifying precise parameters within which ex parte interviews may be conducted will serve to enforce the privacy protections afforded under state law and advance HIPAA's purposes while at the same time preserving a mode of informal discovery that may be helpful in streamlining litigation in this State.

Judgment reversed. All the Justices concur, except Nahmias, J., who concurs in Divisions 1, 2, and 3 (b) and the judgment, and Hines and Melton, JJ., who concur specially.

S10A0994. BAKER et al. v. WELLSTAR HEALTH SYSTEMS, INC. et al.

MELTON, Justice, concurring specially.

Although I concur fully in Divisions 1 and 2 of the majority opinion, I cannot concur in Division 3 thereof. Specifically, although the majority identifies a number of statements which may be generally useful for a trial court to include in an order authorizing ex parte interviews, I do not believe these items are required to create a satisfactory order. To the contrary, I believe that a trial court's discretion in properly adapting an order to the unique facts of each case should not be constrained by a generalized laundry list derived from academic articles rather than relevant state law. In the absence of such law, the development of a list such as the one now espoused by the majority is more akin to a lawmaking process which is better left to the state Legislature.

I am authorized to state that Justice Hines joins in this special concurrence.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the within and foregoing pleading with the Clerk of Court via electronic transmission through the LexisNexis File & Serve system, which will automatically serve a copy of same upon all parties/counsel of record:

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In the Supreme Court of Georgia

Decided: November 3, 2008

S08G0498. MORELAND et al. v. AUSTIN et al.

THOMPSON, Justice.

We granted a writ of certiorari to the Court of Appeals in Austin v. Moreland, 288 Ga. App. 270 (653 SE2d 347) (2007), to determine whether, in a medical malpractice case, the Privacy Rule of the Health Insurance Portability and Accountability Act ("HIPAA") precludes defendant's attorneys from informally interviewing plaintiff's prior treating physicians. The short answer is "yes."

Following the death of her husband, Jimmy Lee Moreland, plaintiff Amanda Moreland brought this malpractice action against Dr. Michael Austin in the State Court of Bibb County. Plaintiff produced her husband's medical records, including documents pertaining to his treatment by Dr. Jose Rodriguez, Dr. Juan Esnard, and Dr. Edward Young. Each of these physicians treated Mr. Moreland before defendant treated him. Thereafter, defense counsel contacted each of the physicians and asked them to assess Mr. Moreland's "cardiovascular

status and his prognosis." Plaintiff objected to these "ex parte" contacts, asserting they violated HIPAA. When the trial court disagreed, plaintiff dismissed her complaint and refiled in the Superior Court of Bibb County. In that forum, in addition to her medical malpractice claims, plaintiff sought injunctive relief to prevent defendant from "inducing any healthcare provider to divulge protected health information concerning [Mr.] Moreland" except in compliance with HIPAA. The trial court granted injunctive relief, ruling that defendant could interview Mr. Moreland's prior treating physicians, but only after giving plaintiff notice to enable her attorneys to be present during the interviews. Defendant appealed and the Court of Appeals reversed and remanded, holding that as long as a physician discloses protected health information in compliance with HIPAA and Georgia law, defense counsel can continue to communicate with the physician in an ex parte fashion. Id. at 275. The Court of Appeals remanded to the superior court, however, to determine whether plaintiff consented to the disclosure of Mr. Moreland's protected health information prior to April 14, 2003 (the effective date of the HIPAA privacy provisions), in which case the physicians can be contacted and interviewed by defendant without restriction; or whether the physicians possess any protected

health information that has not been disclosed already, in which case "the trial court may issue an order restricting the ability of the prior treating physicians to disclose such information to [defendant] except in accordance with the HIPAA privacy rule and the Georgia Civil Practice Act." Id. at 275-276.

HIPAA

With the advent of digital technology and digital record keeping came the fear that electronically maintained medical records could be disseminated without the consent of patients. Congress responded to that fear by enacting HIPAA. The act authorized the Secretary of the Department of Health and Human Services to promulgate rules and regulations which would ensure the privacy of patients' medical information. 42 USCA § 1320d-2 (d) (2) (A). The Secretary used his authority to prohibit healthcare providers from disclosing protected health information, whether "oral or recorded in any form or medium,"[1] unless the providers comply with the Secretary's rules and regulations.

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[1] 45 CFR § 160.103. Health information is protected whether it lies within a physician's memory or a written record. See Arons v. Jutkowitz, 9 NY3d 393, 415, 416 (880 NE2d 831) (N.Y. 2007) (citing 65 Fed. Reg. 82462, 82620, which explained the "rationale for treating verbal communications the same as paper and electronically based information.")

One of the regulations authorizing disclosure provides that a "covered entity may disclose protected health information in the course of any judicial . . . proceeding" either in response to an order of a court or in response to a subpoena, a request for discovery, "or other lawful process."[2] Of course, the information can be disclosed without a court order, if the patient signs a valid authorization.[3] In the absence of a patient's consent, a healthcare provider cannot disclose protected health information unless it receives "satisfactory assurance . . . that reasonable efforts have been made [either] (A) . . . to ensure that the individual who is the subject of the [requested] protected health information . . . has been given notice of the request" and an opportunity to object or "(B) . . . to secure a qualified protective order" prohibiting the litigants from disclosing the information outside of the proceeding and requiring the destruction or return of the information following the termination of the

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[2] 45 CFR § 164.512 (e) (1).

[3] 45 CFR § 164.508 (c). See also Allen v. Wright, 282 Ga. 9, 12 (644 SE2d 814) (2007).

proceeding.[4] Once these steps are taken, a healthcare provider can choose[5] to disclose the protected health information; but it must take reasonable steps to ensure that it only discloses the "minimum necessary" to accomplish the intended purpose of the disclosure.[6]

The Opinion of the Court of Appeals

The Court of Appeals ruled that "HIPAA does not preclude ex parte communications between defense counsel and a plaintiff's prior treating physicians." Moreland, supra at 275. It reasoned that "in the context of a judicial proceeding, the Georgia Civil Practice Act places more stringent requirements than HIPAA does on requests for documents from a third-party health care provider" and that, therefore, "OCGA § 9-11-34 (c) is not preempted by HIPAA." Id. at 274. This analysis misses the mark. We are not concerned here with the disclosure of protected health information pursuant to a request for

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[4] 45 CFR § 164.512 (e) (1) (ii) - (v).

[5] Healthcare providers are "free to decide whether or not to cooperate with defense counsel. HIPAA-compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place." Arons v. Jutkowitz, supra at 416.

[6] 45 CFR § 164.508.

production of documents. Rather, the question centers on whether, *after* Mr. Moreland's medical records were requested and produced pursuant to discovery, defense counsel could then engage in ex parte communications with Mr. Moreland's treating physicians. That is because the proper focus of this case, is on the *methods* used to discover evidence of plaintiff's medical condition; it is not on the "discoverability" of that evidence.

Waiver of Right to Privacy in Medical Records Under Georgia Law

Georgia law is clear that a plaintiff waives his right to privacy with regard to medical records that are relevant to a medical condition the plaintiff placed in issue in a civil or criminal proceeding. OCGA § 24-9-40 (a); Orr v. Sievert, 162 Ga. App. 677 (292 SE2d 548) (1982). Therefore, under Georgia law, once a plaintiff puts his medical condition in issue, defendant can seek plaintiff's protected health information by formal discovery, or informally, by communicating orally with a plaintiff's physicians.[7] The question, then is whether ex parte communications between defense counsel and plaintiff's

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[7] Courts have encouraged informal contacts as a way to minimize the high costs of medical malpractice litigation. See, e.g., Arons v. Jutkowitz, supra at 406-408; Stempler v. Speidell, 495 A2d 857, 859-864 (N.J. 1985). But see Givens v. Mullikin, 75 SW3d 383 (Tenn. 2002) (ex parte interviews of patients' physician improper without authorization).

physicians violate the HIPAA privacy rule. They do if HIPAA preempts state law in this area.

HIPAA Preempts Georgia Law

This Court recently held:

> HIPAA and the related provisions established in the Code of Federal Regulations expressly supercede any contrary provisions of State law except as provided in 42 U.S.C. § 1320d-7 (a) (2). Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of individually identifiable health information and is "more stringent" than HIPAA's requirements. "More stringent" means laws that afford patients more control over their medical records.

(Citations and punctuation omitted; emphasis deleted.) Allen v. Wright, supra at 12.

After reviewing HIPAA, Georgia law, and the case law of other jurisdictions, we find that HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians. Under Georgia law, once a patient files suit and puts his medical condition in issue, his treating physicians can then disclose his medical records and

defendant's lawyer can informally contact those physicians and orally communicate with them about plaintiff's medical condition. HIPAA, on the other hand, prevents a medical provider from disseminating a patient's medical information, whether orally or in writing, without obtaining a court order or the patient's express consent. In other words, HIPAA requires a physician to protect a patient's health information, unless the patient is given reasonable notice and an opportunity to object. Georgia law stands in sharp contrast: it facilitates and streamlines the litigation process; it was not designed to protect a patient's private health information in the course of oral communications between the patient's physicians and defense counsel. It follows that HIPAA is more stringent and that it governs ex parte communications between defense counsel and healthcare providers. Id. This is not to say that all oral communications between defense counsel and a plaintiff's prior treating physicians are forbidden. Certainly, counsel can contact a physician and make inquiries which are not intended to elicit protected health information. "Such contact could include discussion of many benign topics, including but not limited to, the best methods for service of a subpoena, determining convenient dates to provide trial testimony, or the most convenient location for the

anticipated deposition of the physician. However, HIPAA clearly regulates the methods by which a physician may release a patient's health information, including 'oral' medical records." Law v. Zuckerman, 307 FSupp2d 705, 708 (D.Md. 2004). See also Bayne v. Provost, 359 FSupp2d 234 (NDNY 2005) (ex parte contacts with medical provider are permissible if HIPAA requirements are satisfied).

These methods include a subpoena, discovery request or other lawful process with assurances pertaining to notification or a protective order. 45 CFR § 164.512 (e) (1). See Arons, supra at 415 (privacy rule does not prohibit informal discovery, "it merely superimposes procedural prerequisites"). See also McCloud v. Bd. of Directors of Geary Community Hosp., Case No. 06-1002-MLB (D. Kan. 2006) (defendants complied with HIPAA by seeking court order permitting production of medical records and ex parte contact with treating physicians); Holmes v. Nightingale, 158 P3d 1039 (Okla. 2007) (ex parte communication with physician may be sought pursuant to a court order issued in compliance with HIPAA). Thus, in order for defense counsel to informally interview plaintiff's treating physicians, they must first obtain a valid authorization, or a protective order, or ensure that the patient has been given

notice and an opportunity to object to the ex parte contact, all in complance with the requirements of HIPAA as set forth in 45 CFR § 164.512 (e). See Crenshaw v. MONY Life Ins. Co., 318 FSupp2d 1015, 1029 (S.D.Cal. 2004) ("HIPAA does not authorize ex parte contacts with healthcare providers"). The protective order must prohibit the use or disclosure of the patient's protected health information for any non-litigation purpose.[8] In this case, service of a request for production of documents is insufficient because, although it gave plaintiff notice and an opportunity to object to the production of written documents, it did not give plaintiff an opportunity to object to the ex parte oral contact and the discovery of the physicians' recollections and mental impressions.

Remedies for HIPAA Violations

The remedies for HIPAA violations are set forth in 42 USC § 1320d-5. That code section merely authorizes the Secretary to impose a fine not to exceed $100 for each violation. It does not authorize a remedy or penalty in the context of a civil lawsuit. In our view, the appropriate remedy to be fashioned in cases of this kind is best left to the discretion of the trial court. See generally OCGA

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[8] 45 CFR § 164.512 (1) (e) (v).

§ 9-11-37. Where, as here, defense counsel contacted plaintiff's prior treating physicians at a time when the applicability of HIPAA to ex parte communications was uncertain, a trial court would be well-advised to avoid an extreme sanction. See Law v. Zuckerman, supra at 713 (court remedied HIPAA violation by ordering that either party could speak to physician before trial and if physician "strayed in his testimony from the medical records and offered any opinions beyond his experience as plaintiff's treating physician such testimony would be prohibited"); Crenshaw, supra at 1030 (court remedied HIPAA violation by ordering defendant to produce physician for deposition at its expense and prohibiting further ex parte contacts). The remedy fashioned by the trial court in this case, permitting defense counsel to interview Mr. Moreland's prior treating physicians, but only after giving plaintiff notice and enabling her attorneys to be present when the physicians are interviewed, lies well within a trial court's discretion.

Conclusion

HIPAA protects a patient from the unauthorized disclosure of protected health information and it is applicable to ex parte oral communications between defense counsel and a plaintiff's prior treating physicians. Accordingly, defense

counsel cannot contact a plaintiff's prior treating physicians to discuss his or her medical history without complying with HIPAA regulations. Although defense counsel can engage in such discussions if a plaintiff gives his or her consent,[9] it must be clear that the plaintiff consented to ex parte oral communications. We will not presume a plaintiff consented to such communications simply because the plaintiff did not object when defendant sought plaintiff's medical records pursuant to a subpoena or request for production of documents.

Judgment reversed. All the Justices concur.

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[9] We agree with the Court of Appeals that if, as defendant claims, plaintiff consented to the disclosure of all protected health information prior to the effective date of the HIPAA privacy rule, and if the authorization "specifically permits [the intended] use or disclosure and there is no agreed to restriction in accordance with 45 CFR § 164.522 (a)," the physicians may continue to disclose the information without violating HIPAA. See 45 CFR § 164.532 (a) (b); Austin v. Moreland, supra at 275. This is a matter for the trial court's determination.

Health Information Privacy

May a covered entity use or disclose protected health information for litigation?

Answer:

A covered entity may use or disclose protected health information as permitted or required by the Privacy Rule, see 45 CFR 164.502(a) (PDF); and, subject to certain conditions the Rule typically permits uses and disclosures for litigation, whether for judicial or administrative proceedings, under particular provisions for judicial and administrative proceedings set forth at 45 CFR 164.512(e) (GPO), or as part of the covered entity's health care operations, 45 CFR 164.506(a) (PDF). Depending on the context, a covered entity's use or disclosure of protected health information in the course of litigation also may be permitted under a number of other provisions of the Rule, including uses or disclosures that are:

- required by law (as when the court has ordered certain disclosures),
- for a proceeding before a health oversight agency (as in a contested licensing revocation),
- for payment purposes (as in a collection action on an unpaid claim), or
- with the individual's written authorization.

Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations. The definition of "health care operations" at 45 CFR 164.501 (GPO) includes a covered entity's activities of conducting or arranging for legal services to the extent such activities are related to the covered entity's covered functions (i.e., those functions that make the entity a health plan, health care provider, or health care clearinghouse), including legal services related to an entity's treatment or payment functions. Thus, for example, a covered entity that is a defendant in a malpractice action or a plaintiff in a suit to obtain payment may use or disclose protected health information for such litigation as part of its health care operations. The covered entity, however, must make reasonable efforts to limit such uses and disclosures to the minimum necessary to accomplish the intended purpose. See 45 CFR 164.502(b) (PDF), 164.514(d).

Where the covered entity is not a party to the proceeding, the covered entity may disclose protected health information for the litigation in response to a court order, subpoena, discovery request, or other lawful process, provided the applicable requirements of 45 CFR 164.512(e) (GPO) for disclosures for judicial and administrative proceedings are met.

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