IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ELOISE ROPER,	)	
	)	
Plaintiff,	)	Civil Action No.: 4:06-CV-119
	)	
vs.	)	
	)	
TERRY WILLIAMS, INDIVIDUALLY and d/b/a SIBERTON FENCE, LARRY WILSON TATE, ADMINISTRATOR OF THE ESTATE OF WOODROW TATE, DECEASED, AND SIBERTON FENCE SALES, INC.	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR A QUALIFIED PROTECTIVE ORDER PURSUANT TO HIPAA

COMES NOW Terry Williams, incorrectly identified as d/b/a Siberton Fence, and files his brief in support of his Motion for the Entry of a Qualified Protective Order pursuant to HIPAA, respectfully showing the Court as follows:

BACKGROUND

The Plaintiff seeks to recover money damages for injuries she allegedly sustained in an automobile collision on April 1, 2006. Following the collision, she was a patient and/or resident on a continuous basis at a variety of medical facilities from April 1, 2006 through July 12, 2006. Her medical stay at these various facilities was both costly, as Plaintiff has identified through discovery medical bills totaling $104,061.83, and lengthy.

Discovery is ongoing, but what has become clear is that the Plaintiff was seen by numerous medical professionals and staff at the various facilities. Furthermore, since the Plaintiff spent approximately three and a half months as a patient or resident at four different facilities, including the Medical Center, Columbus Specialty Hospital, Regional Rehabilitation Hospital and Muscogee Manor, the witnesses who are most familiar with the Plaintiff's condition and with any statements she may have made during this time are likely to be employees of these facilities. This Defendant merely wishes to contact these individuals, many of whom are nurses, certified nursing assistants or orderlies, to determine whether the Plaintiff made any statements about the accident, her demeanor and her condition.

This Defendant has every reason to believe that some of these independent witnesses may have relevant information. A review of the medical records in the Defendant's possession has revealed that the Plaintiff described how this accident occurred to her caregivers, and also described in rather unflattering terms the ability or inability of the now deceased co-defendant to drive a car.[1] Moreover, this Defendant cannot rely on the medical chart to determine who may have this information as it is

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[1] The need to conduct these interviews is made all the more important by the fact that Plaintiff now disclaims any cogent memory regarding how this accident occurred and the conduct of the driver of her vehicle. She simply remembers an impact. Additionally, her family members do not recall Plaintiff making statements similar to those found in the medical records. Finally, both Plaintiff and her family members have intimated that the driver of her vehicle was a good driver, which is at odds with a medical record containing a statement by Plaintiff describing him as a "notoriously bad driver."

possible Plaintiff made statements to individuals who either did not chart her comments, or who did not chart to begin with.

Additionally, these same witnesses at these facilities also have significant knowledge about the Plaintiff's demeanor, physical condition and general mental status. This Defendant should be permitted to interview the numerous individuals who cared for or who came in contact with Plaintiff so that a complete picture of her condition can be obtained.

This Defendant anticipates that Plaintiff will oppose this request, but there is simply no underlying valid reason for such opposition.[2] The Plaintiff has not received treatment which would be subject to a legal privilege, such as treatment for a psychiatric condition or HIV. This is not a medical malpractice case, and thus, Plaintiff cannot assert that there is some "white-coat conspiracy" which is of concern to her. Finally, with the Plaintiff and her family contending that Plaintiff suffered very significant injuries, it seems axiomatic that Plaintiff would actually want this Defendant to be fully apprised of her medical condition.

In sum, there are a vast number of independent witnesses who may have information in their possession regarding the Plaintiff and how this accident occurred. These Defendants merely seek to conduct *ex-parte* interviews of these witnesses in an effort to gain a more complete picture of Plaintiff's condition during her hospitalization

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[2] Although this Defendant does not believe that its motion falls within the purview of a Rule 26 motion for a protective order, he does certify that in a good faith effort to resolve this issue without the Court's involvement he has asked Plaintiff's counsel to

and respectfully shows the Court that such interviews would be appropriate under 45 C.F.R. § 164.512(e).

ARGUMENT AND CITATION OF AUTHORITY

I. OVERVIEW OF HIPAA

HIPAA was enacted by the United States Congress to address issues relating to national health care and the health insurance system. The Act's stated goals are "simplifying the administration of health insurance," HIPAA pmbl., 110 Stat. at 1936, and "improving the efficiency and effectiveness of the health care system." HIPAA § 261. Aimed at administrative simplification, the enabling legislation further authorized the promulgation of privacy standards. HIPAA § 264.

The "Privacy Rule" regulations promulgated pursuant to this authority are set forth in 45 C.F.R. pts. 160 and 164. These regulations govern how selected entities may use and/or disclose a patient's medical information and identify several ways protected health information ("PHI") can be disclosed. Three types of entities are subject to these privacy regulations (the "covered entities"); (1) health plans; (2) health care clearing houses, and (3) health care providers who transmit health information in electronic form with a transaction covered by regulations. 45 C.F.R. §§ 160.102 and 164.104.

The Privacy Rule expressly allows a covered entity to disclose PHI in the context of a judicial or administrative proceeding in response to a court order, or subpoena, discovery request, or other lawful process if the "individual who is the

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consent to the entry of a qualified protective order and shows that such request was politely rejected.

subject of the protected health information has been requested has been given notice of the request." 45 C.F.R. § 164.512(e).

The statutory framework of HIPAA is merely procedural and does not create a federal physician-patient privilege or federal privacy rights. Northwestern Memorial Hosp. v. Ashcroft, 362 F.3d. 923, 926 (7th Cir. 2004). Thus, HIPAA does not define what is properly discoverable or relevant in litigation. 45 C.F.R. § 164.512(e). Rather, it provides this Court with the authority to enter a qualified protective order that would allow this Defendant to interview medical witnesses. Id.

II. HIPAA AUTHORIZES EX-PARTE INTERVIEWS

Georgia has long recognized that in the context of litigation a patient puts his care and treatment at issue when suit is filed and waives any privilege "to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in a civil proceeding." O.C.G.A. § 29-9-40. Georgia has also long recognized that *ex-parte* conferences to discuss a plaintiff's medical care are authorized under O.C.G.A. § 24-9-40. Orr v. Sievert, 162 Ga. App. 677 (1982). However, under current federal law those *ex-parte* conferences can only take place pursuant to a HIPAA compliant procedure.

HIPAA does not prohibit *ex-parte* interviews and numerous courts have concluded that such interviews should be permitted. See Smith v. Am. Home Prod. Corp. Wyeth-Ayerst Pharmaceutical, 855 A.2d 609, 624 (N. J. Super. Ct. Law Div. 2003); Croskey v. BMW of North America, Inc., 2005 U.S. Dist. Lexis 3673 (E.D. Mich. 2005)(holding *ex-parte* conferences permitted under Michigan law with HIPAA

compliant authorization); Bayne v. Provost, 359 F. Supp. 2d. 234 (N.D.N.Y 2005) (holding *ex-parte* conferences permitted under New York law pursuant to qualified protective order); Shropshire v. Taylor, 2006 U.S. Dist. Lexis 52943 (E.D. Mich. 2006) (granting motion for a qualified protective order to conduct *ex-parte* interviews of medical witnesses); McCloud v. Bd. of Dirs. of Geary Cmty. Hosp., 2006 U.S. Dist. Lexis 58087 (D. Kan. 2006); Harris v. Whittington, 2007 U.S. Dist. Lexis 5482 (D. Kan. 2007) (granting defendant's motion to conduct *ex-parte* interviews of plaintiff's treating physicians).

The Courts have consistently recognized that a deposition is not the same as an *ex-parte* interview. See Bayne v. Provost, 359 F. Supp. 2d. 234 (N.D.N.Y 2005) ("a deposition is not the same as an *ex-parte* interview and this court does not have the authority to limit, control, or nullify the benefits an interview may have over a deposition, and neither should the plaintiff."); see also Smith v. Rafalin, 2005 N.Y. Misc. Lexis 545, at *4 ("manifestly unfair" if plaintiff could refuse to execute a HIPAA compliant authorization and thereby prevent defense counsel from interviewing her physicians *ex-parte*, because it would allow plaintiff one-sided access to her physicians); Shropshire v. Taylor, 2006 U.S. Dist. Lexis 52943, at *7("the principals of fundamental fairness to investigate the health condition of a plaintiff seeking money damages for injuries mandates that it is not necessary to give notice to plaintiff of a physician interview or contact, nor is it required that plaintiff's counsel be present"); Harris v. Whittington, 2007 U.S. Dist. Lexis 5482, at *2 (describing treating physicians as fact witnesses). Finally, it has been recognized that HIPAA was never intended to

allow plaintiffs to control the timing of the release of information that is otherwise relevant or discoverable. Bayne v. Provost, supra.

Here, the Defendant seeks to investigate the health condition of the Plaintiff, and to also determine whether any of the various medical personnel overheard her describing how the accident occurred. In order to conduct this sort of investigation the Defendant must attempt to contact a vast number of witnesses because the Plaintiff was a patient or resident at *four* different facilities during a three and a half month period.[3]

This Defendant proposes that this Court enter a HIPAA qualified protective order similar to that entered in Shropshire v. Taylor. In that case, the Court granted a motion for a qualified protective order and held as follows:

> The principals of fundamental fairness to investigate the health condition of a plaintiff seeking money damages for injuries mandates that it is not necessary to give notice to plaintiff of a physician interview or contact, nor is it required that plaintiff's counsel be present. The interview or any notes thereof become defense counsel's work product and not subject to disclosure, but subject to destruction at the conclusion of the case. To rule otherwise would permit plaintiff to use the physician-patient privileges as both a sword and a shield. In an effort to accommodate the concerns of plaintiff's counsel regarding intimidation, the protective order shall contain additional language advising the witness that he or she need not speak with the lawyer at all.

Shropshire v. Taylor, 2006 U.S. Dist. Lexis 52943 (E.D. Mich. 2006).

In making this request, this Defendant recognizes that the Plaintiff has identified as "retained" expert witnesses five physician defendants: (1) Dr. Edmund Molnar; (2)

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[3] This Defendant shows by way of example that between 30 and 35 individuals charted on Plaintiff's medical chart at the Medical Center during her initial 11 day stay. It is conceivable that Plaintiff had contact with between 60 and 100 individuals at the various facilities.

Dr. Debra Schilling; (3) Dr. Vladimir Slutsker; (4) Dr. Lamar Carden; and, (5) Dr. Robert A. Janks. It is unclear from these disclosures whether they are retained experts as they are all treating physicians, but this Defendant does not seek to conduct *ex parte* interviews of physician witnesses who are also the Plaintiff's retained expert witnesses. Rather, this Defendant seeks equal access to non-retained independent physician fact witnesses and the vast panoply of other medical providers such as emergency medical technicians, nurses, certified nursing assistants, orderlies, x-ray technicians, food service workers and administrative staff such as the social service workers, secretaries or bookkeepers at the various facilities.

WHEREFORE, for the foregoing reasons, this Defendant respectfully requests that the Court GRANT his motion for a protective order.

Respectfully submitted this 7th day of March, 2007.

s/David N. Nelson
Georgia Bar Number 537760
Chambless, Higdon, Richardson,
Katz & Griggs, LLP
Post Office Box 246
Macon, Georgia 31202-0246
Phone: 478-745-1181
Fax: 478-746-9479
dnelson@chrkglaw.com

Attorney for Defendant Terry Williams

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM-ECF participants:

Mr. G. Michael Agnew
Agnew & Agnew
Post Office Box 1175
Columbus, Georgia 31902

Counsel for Plaintiff

Mr. Paul D. Ivey, Jr.
Ms. Michele C. Ivey
Tisinger Vance, P.C.
1445 Second Avenue
Columbus, Georgia 31901

Counsel for Defendant Tate

Respectfully submitted,

s/David N. Nelson
Georgia Bar Number 537760
Chambless, Higdon, Richardson,
Katz & Griggs, LLP
Post Office Box 246
Macon, Georgia 31202-0246
Phone: 478-745-1181
Fax: 478-746-9479
dnelson@chrkglaw.com