

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

INCREASE NATHANS and JOY)	
NATHANS,)	
)	
Plaintiffs,)	
)	CIVIL ACTION FILE NO.
v.)	05EV000011F
)	
ANDREW J. DIAMOND, M.D.)	
NORTHSIDE EAR, NOSE & THROAT)	
P.C.; RONALDO E. MABINI, CRNA;)	
and NORTHSIDE HOSPITAL, INC.)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The above-captioned matter came before the Court on Defendant Northside Hospital, Inc.'s (hereinafter, "Northside") Motion to Dismiss. A hearing on the motion was held on July 19, 2005. After considering the motion, the briefs, arguments of the parties and the record for this matter, the Court hereby finds as follows:

Plaintiffs filed the complaint alleging medical malpractice against Northside on March 17, 2005. O.C.G.A. § 9-11-9.1 requires that a plaintiff alleging medical malpractice file contemporaneously with the complaint an affidavit of an expert competent to testify setting forth at least one negligent act or omission by the defendant. An expert is qualified for the purpose of the affidavit requirement of O.C.G.A. § 9-11-9.1 when the purported expert satisfies the requirements of O.C.G.A. § 24-9-67.1.

In support of their complaint, the plaintiffs attached the affidavit of David H. Goldstein, M.D., a pulmonologist. At the hearing on July 19, 2005, the Court found that the affidavit, as drafted, did not conform to the requirements of O.C.G.A. § 24-9-67.1(c)(2)(D), which is the controlling provision when a physician seeks to testify as an

expert as to the standard of care applicable to nurses or medical support staff. Therefore, it is hereby ORDERED that the plaintiffs shall have ten days from the date of this Order to amend Dr. Goldstein's affidavit to conform with O.C.G.A. § 24-9-67.1(c)(2)(D). If the plaintiffs fail to amend the affidavit of Dr. Goldstein to cure the defects within the time prescribed herein, Northside's motion to dismiss will be granted and plaintiffs' complaint against Northside will be dismissed with prejudice.¹

Northside's motion to dismiss was also based on the plaintiffs' failure to comply with the medical authorization requirement of O.C.G.A. § 9-11-9.2. Northside contended that the authorization filed with the plaintiffs' complaint contained an improper limitation that all contact between defense counsel and plaintiff Increase Nathans' treating physicians must be in the presence of plaintiffs' counsel. At the hearing, the Court also heard argument on the conflicts between O.C.G.A. § 9-11-9.2 and the provisions of the Health Insurance Portability and Accountability Act.

O.C.G.A. § 9-11-9.2 requires a plaintiff in a medical malpractice case to file contemporaneously with the complaint, a medical authorization form that directs the plaintiff's treating physicians to release protected health information to the defendant's attorney. Plaintiffs filed a medical authorization form with her complaint. Northside moved to dismiss plaintiffs' complaint on the grounds that the authorization contained an improper limitation that all contact between defense counsel and plaintiff Increase Nathans' treating physicians must be in the presence of plaintiffs' counsel. Plaintiffs responded to the motion asserting that the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d *et seq.*, and its implementing

¹ The Court notes that plaintiffs filed an amendment to affidavit of David H. Goldstein, M.D. on July 29, 2005 and the affidavit of Claude Jefferson Case, CRNA, MS on August 12, 2005.

regulations preempt the requirements of O.C.G.A. § 9-11-9.2. Plaintiffs also assert that O.C.G.A. § 9-11-9.2 violates the U.S. Constitution and the Constitution of the State of Georgia and that the authorization they filed satisfies the requirements of O.C.G.A. § 9-11-9.2 without waiver of HIPAA and other applicable laws.

HIPAA was enacted to establish national standards for protection of the privacy of protected health information. HIPAA and its implementing regulations expressly preempt all contrary provisions of state law except those that are “more stringent” than the federal law. Pub. L. No. 104-191, § 264(c)(2), 110 Stat 1936 (1996)(See Note to 24 U.S.C. § 1320d-2); 45 C.F.R. § 160.203(b)(2005).

Under HIPAA, an authorization for protected health information can be revoked in writing “at any time” by the individual providing the authorization. 45 C.F.R. §§ 164.508(b)(5) and (c)(2)(i). The medical authorization requirement of O.C.G.A. § 9-11-9.2 is less stringent. It does not provide for revocation of the authorization.

Under HIPAA, a state law can be “more stringent” and thus avoid preemption if it “reduce[s] the coercive effect of the circumstances surrounding the express legal permission [to release protected health information].” 45 C.F.R. § 160.202 (2005). In contrast, O.C.G.A. § 9-11-9.2(a) directs the dismissal of a plaintiff’s complaint for failure to file the authorization the statute mandates. Thus O.C.G.A. § 9-11-9.2 does not reduce but rather increases the “coercive effect of the circumstances surrounding the express legal permission” to release protected health information.

HIPAA codifies an individual’s right, in the litigation context, to prior notice of, and opportunity to object to, each particular disclosure of protected information. 45 C.F.R. § 164.512(e)(1)(i)-(vi)(2005). O.C.G.A. § 9-11-9.2 provides no such notice or

opportunity; instead it permits *ex parte* communication between defense counsel and the plaintiff's treating physicians.

Based on a review of the arguments of counsel and the relevant authority, the Court finds that HIPAA and its implementing regulations preempt O.C.G.A. § 9-11-9.2. Accordingly, Defendant Northside Hospital, Inc.'s Motion to Dismiss is **DENIED**.

SO ORDERED, this 19th day of August, 2005.

/s/ Susan B. Forsling
SUSAN B. FORSLING
Judge, State Court of Fulton County