In the Supreme Court of Georgia

Decided: June 1, 2010

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

MELTON, Justice.

This action originated with a medical malpractice complaint filed on March 31, 2009 by Russell 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 allowed to conduct ex parte interviews with Baker's health care providers. After oral argument, the trial court granted Wellstar's motion, finding that HIPAA allows ex parte interviews as long as procedural safeguards to ensure privacy are kept in place. See 45 CFR § 164.512. The trial court found support for this finding in Moreland v. Austin, 284 Ga. 730 (670 SE2d 68) (2008). We now review this matter on an interlocutory basis to determine whether the protective order in this case comports with Moreland v. Austin, supra, and the

requirements of HIPAA.

1. As we explained in Moreland v. Austin,

> [Under] Georgia law[, it] 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.

(Footnote omitted.) Id. at 732. "HIPAA[, however,] 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."[1] Id. at 733.

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[1] The pertinent rule and regulation regarding the standard for disclosure of health information for judicial proceedings reads as follows:

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance, as

HIPAA was enacted to ensure the privacy of an individual's medical information, and it allows disclosure of protected health information[2] only under certain circumstances.

> [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." [45 CFR § 164.512 (e) (1).] Of course, the information can be disclosed without a court order, if the patient signs a valid authorization. [45 CFR § 164.508 (c). See also Allen v. Wright, 282 Ga. 9, 12, (644 SE2d 814) (2007).] 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

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> described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

45 CFR § 164.512 (e).

[2] Protected health information includes "any information, whether oral or recorded in any form or medium, that . . . is created or received by . . . health care provider[s] . . . and . . . relates to the past, present, or future physical or mental health or condition of an individual, [or] the provision of health care to an individual." 42 U.S.C. § 1320d (4).

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

(Footnotes omitted.) Id. at 731-732.

HIPAA does not address the propriety of ex parte interviews, and neither its text nor its regulations authorizes or prohibits these interviews. Based upon the policies underlying HIPAA and fairness in litigation, we conclude that ex parte interviews may be conducted under HIPAA, if the procedural requirements for protecting information disclosed during these interviews have been satisfied. As we stated in Moreland, supra, 285 Ga. at 734, " 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)."

One manner of complying with the provisions of HIPAA is to obtain a qualified protective order.

> [A] qualified protective order means, with respect to protected health information requested under paragraph (e) (1) (ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative

> proceeding that: (A) Prohibits 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) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 CFR 164.512 (e) (1) (v). In this case, Wellstar sought and received such an order. The trial court's qualified protective order in this case states:

> It is hereby ordered that Defendant's counsel is hereby permitted to engage in ex parte communications with Russel Baker's treating physicians and other healthcare providers. This Court notes, however, that the 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. It is hereby further ordered that Defendant's counsel are forbidden from using or disclosing Plaintiff's protected health information for any purpose other than this litigation. It is further ordered that Defendant's counsel shall return any protected health information to the physicians and other healthcare providers or destroy the protected healthcare information, including all copies made, at the end of this litigation.

This qualified protective order incorporates the procedural safeguards mandated by HIPAA.

2. Contrary to Baker's contentions, this result does not create bad public policy. Ex parte interviews serve the following beneficial purposes: (1) they

equalize the access to fact witnesses between plaintiffs and defendants; (2) they diminish the overall cost of litigation by reducing the need to perform formal discovery; and (3) they equalize the cost of discovery, as both plaintiffs and defendants can access facts through informal discovery (otherwise, plaintiffs could conduct informal ex parte communications but defendants would have to pursue formal discovery). Moreover,

> [w]here plaintiff has brought the action and waived [his] medical privilege, it seems inconsistent to allow [him] to assert HIPAA privacy to prevent defense discovery of medical conditions and treatment, which would otherwise be permitted and so long as they are used only for the purpose of the litigation. The principles 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 plaintiffs' counsel be present. The interview and 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 privilege as both a sword and a shield.

Shropshire v. Laidlaw Transit, Inc., 2006 WL 63232888 (E.D. Mich. 2006).

3. Our analysis of the qualified protective order in this case, however, cannot end here. In addition to the procedural mandates required by HIPAA, we must also consider the substantive privilege extended by Georgia law with regard to medical information. As discussed previously, a plaintiff waives his

right to privacy with regard to medical records that are *relevant to a medical condition the plaintiff places in issue in a civil or criminal proceeding*. See OCGA § 24-9-40 (a). In light of this substantive law, the qualified protective order entered by the trial court in this matter is too broad. Rather than allowing Wellstar to "discuss [Baker's] medical conditions and any past, present, or future care and treatment with [Wellstar's] counsel," the qualified protective order should have limited Wellstar's inquiry to matters relevant to Baker's medical condition which is at issue in this proceeding. Without this substantive language, the qualified protective order must be considered deficient, and the trial court's finding to the contrary must be reversed.

Judgment reversed. All the Justices concur, except Hunstein, C.J., Carley, P.J., and Thompson, J., who concur in Divisions 1 and 3, and in the judgment.