IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

TYAKEIA COLEMAN and JAMES WRIGHT, SR.,	*	
Plaintiffs,	*	
v.	*	CV 109-044
NARGIS H.S. HUSAINY, M.D.,	*	
Defendant.	*	

O R D E R

In the captioned case, Plaintiffs have filed a motion for "Review of the Magistrate Judge's Order Granting Defendant's Motion for Qualified Protective Order." (Doc. no. 35.) On June 19, 2009, the Honorable W. Leon Barfield granted Defendant's motion for a qualified protective order pursuant to 45 C.F.R. § 164.512(e), authorizing defense counsel to have *ex parte* interviews with Plaintiffs' treating medical and health care providers. (See Order of June 19, 2009, Doc. no. 33.) Plaintiffs now file their appeal to this Court, requesting that this Court modify or set aside the Magistrate Judge's Order.[1] Defendant opposes this motion. (Doc. no. 46.)

[1] Plaintiffs petition review from this Court pursuant to Rule 72 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 72(a) requires that

Plaintiffs' medical malpractice claim involves the death of their infant son, James D. Wright Jr. Plaintiffs claim that Defendant, their son's pediatrician, was negligent in her care and treatment of their son, causing his death. Defendant contends that there are a number of individuals, including independent medical healthcare providers, witnesses, first responders, EMS crew members, and postmortem evaluators and investigators, who may have information regarding Plaintiffs' claim. In Defendant's view, she should not be required to depose every individual who may have knowledge of Plaintiffs' claims. Rather, through her motion for a qualified protective order, Defendant sought to interview these individuals informally.

Plaintiffs executed a Health Insurance Portability and Accountability Act ("HIPAA") release which permitted Defendant to obtain medical records and autopsy reports and photos for Plaintiffs' son as well as medical records for Plaintiff Coleman's pregnancy. However, Plaintiffs refused to consent to carte blanche *ex parte* communications between Defendant's counsel and medical care providers. Plaintiffs maintained that such communications were permissible, but

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this Court review a magistrate judge's order on a non-dispositive matter under the "clearly erroneous or contrary to law" standard. An error is clearly erroneous "if, after viewing all the evidence, [the court] is left with the definite and firm conviction that a mistake has been committed." Tauber v. Barnhart, 438 F. Supp. 2d. 1366, 1374 (N.D. Ga. 2006) (internal quotations omitted).

not without proper notice to Plaintiffs' counsel, opportunity to object, and an opportunity to be present. In short, Plaintiffs argued that HIPAA required their consent to the required interviews.

In the Order of June 19, 2009, Judge Barfield first noted that *ex parte* communications may only take place pursuant to HIPAA procedure. (Doc. no. 33 at 3.) Judge Barfield explained that "HIPAA prevents a medical provider from disseminating a patient's medical information in litigation, whether orally or in writing, without obtaining a court order or the patient's express consent, or fulfilling certain other procedural requirements designed to safeguard against improper use . . . of the information." (Id. (citing Moreland v. Austin, 284 Ga. 730, 733 (2008)).) Judge Barfield then found that 45 C.F.R § 164.512(e)(1)(i) permits the disclosure of protected health information if expressly authorized by court order, even without Plaintiffs' consent. (Id. at 4.) Thus, Judge Barfield granted Defendant's Motion for a Qualified Protective Order, authorizing defense counsel to conduct *ex parte* interviews of Plaintiffs' health care providers, subject to the entry of a final qualified protective order.

The Court finds no error in the Magistrate Judge's Order. The Code of Federal Regulations ("C.F.R.") provides for the following disclosure of medical information:

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
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> *(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 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
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> (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 C.F.R. § 164.512(e) (emphasis added). Pursuant to this section, the Magistrate Judge correctly held that a health care provider may disclose protected health information through *ex parte* communication if expressly authorized by a court order. Indeed, various district courts have entered

qualified protective orders permitting defense counsel to engage in *ex parte* communications with a plaintiff's treating physician. See Roper v. Williams, No. 4:06-CV-1119 (M.D. Ga. Apr. 18, 2007); Harris v. Whittington, 2007 WL 164031 *2-3 (D. Kan. Jan 19, 2007); Bayne v. Provost, 359 F. Supp. 2d. 234, 240-41 (N.D.N.Y. 2005). Thus, Judge Barfield properly granted Defendant's motion for a qualified protective order, authorizing *ex parte* communications between defense counsel and Plaintiffs' health care providers.

Although the Court finds that Judge Barfield's Order was without error, two of Plaintiffs' arguments warrant discussion. Plaintiffs first argue that the C.F.R. regulations on qualified protective orders do not allow *ex parte* communications. Specifically, Plaintiffs point out that § 164.512(e)(1)(v)(B) requires that protected health information contained within a qualified protective order be returned to the covered entity or destroyed at the end of litigation. Plaintiffs thus argue that because *verbal* communications cannot be returned or destroyed, the C.F.R. does not contemplate *ex parte* verbal communications as the subject of a qualified protective order.

Plaintiff is incorrect. HIPAA and the interpreting federal case law define protected health information to include verbal communications. For example, health

information is defined as "any information whether *oral* or recorded in any mode or medium." 45 C.F.R. § 160.103 (emphasis added). The district of Michigan has explained that "if a qualified protective order consistent with 45 C.F.R. 164.512(e) was in place, then an *ex parte* discussion with a health care provider would be appropriate." Palazzo v. Mann, 2009 WL 728527, at *3 (E.D. Mich., March 19, 2009). It is clear that *ex parte* communications are the proper subject of a qualified protective order under 45 C.F.R. § 164.512(e).

Plaintiffs next argue that the Georgia Supreme Court decision of Moreland v. Austin, 284 Ga. 730 (2008) prohibits this Court from entering a qualified protective order permitting *ex parte* communications. Plaintiffs point to the opening paragraph in Moreland which states that the Georgia Supreme Court "granted a writ of certiorari to determine whether in a medical malpractice case, the privacy rule of [HIPAA] precludes Defendant's attorneys from informally interviewing Plaintiff's prior treating physicians. The short answer is yes." Id. at 730.

While the Georgia Supreme Court may have succinctly provided that the short answer to that inquiry is "yes," that sentence is not the full extent of the court's holding. The court held that not all *ex parte* discussions were prohibited by HIPAA. Id. at 734. Indeed, the court

noted that in order for defense counsel to informally interview a plaintiff's treating physicians, defense counsel was required to follow the procedures outlined in 45 C.F.R. § 164.512(e); specifically, to "first obtain a valid authorization, *or court order*, or otherwise comply with the provisions of 45 C.F.R. § 164.512(e)." Id. (emphasis added). Thus, Moreland does not prohibit *ex parte* interviews between defense counsel and a plaintiff's physicians so long as HIPAA procedures are followed. Here, Judge Barfield granted Defendant's motion for a qualified protective order from this Court, authorizing *ex parte* communications. Moreland does not compel a reversal of that order.

Because this Court finds no error, the Magistrate Judge's Order of June 19, 2009 is **AFFIRMED.**

ORDER ENTERED at Augusta, Georgia, this 17th day of July, 2009.

HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA