

IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA

RALPH BROWN, Individually and :  
as the Surviving Parent of :  
Sharon Brown et al., :  
: :  
Plaintiffs, : :  
: : Civil Action File  
vs. : :  
: : No. 11A-37135-4  
JENNIFER BERMAN, M.D. et al., :  
: :  
Defendants. :

O R D E R

Upon consideration of Defendants' motion for a "Qualified Protective Order"<sup>1</sup> authorizing their counsel to do ex parte interviews with Plaintiffs' decedent's treating healthcare providers filed on August 24, 2011; after reviewing the motion, response and other documents in the file and hearing, on December 9, 2011, the arguments of counsel, the Court finds as follows:

1. "[T]he dangers associated with ex parte interviews of health care providers are numerous, including . . . the potential for defense counsel to influence the health care provider's testimony, unwittingly or otherwise, by encouraging solidarity with or rousing sympathy for a defendant health care provider."<sup>2</sup>

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<sup>1</sup>As defined in 45 CFR § 164.512(e)(1)(v).

<sup>2</sup>Baker v. Wellstar Health Sys., 288 Ga. 336, 339 (3)(a) (703 SE2d 601) (2010). The Court does not have any concern that defense counsel in this case would deliberately attempt to influence Plaintiffs' decedent's healthcare providers. This "danger" is, however, an irreducible reality.

2. "Another 'major purpose' of HIPAA's privacy rule is to ensure that patients have access to their own health information.<sup>3</sup> . . . [A]ny statement a health care provider might make in an *ex parte* interview with defense counsel would be 'health information' pursuant to HIPAA's definition, yet it would be health information to which the patient would have no access . . . .";<sup>4</sup>
3. "[M]embers of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. . . . [T]here is a duty of total care; that includes and comprehends a duty to aid the patient in litigation . . . and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation. The doctor, of course, owes a duty to conscience to speak the truth; he need, however, speak only at the proper time. Dr. Ezickson's<sup>5</sup> role in inducing Dr. Murtagh's breach of his confidential relationship to his own patient is to be, and is, condemned.";<sup>6</sup>

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<sup>3</sup>"This regulation ['Standards for Privacy of Individually Identifiable Health Information'] has three major purposes: (1) To protect and enhance the rights of consumers by providing them access to their health information : . . ." 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000)..

<sup>4</sup>Exh. 7 to response, pp. 6-7. This concern, of course, correlates directly with another of the "numerous" "dangers" noted in Baker, *supra* (n.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" (288 Ga. at 339 (3)(a)).

<sup>5</sup>"Dr. Ezickson apparently is a physician who is employed by defense attorneys to interview doctors for injured plaintiffs and to secure a report from them. He secured such [a] report from Dr. Murtagh . . . . This report was given despite the fact that Dr. Murtagh never received his patient's permission to give such report or information." Alexander v. Knight, 25 Pa. D. & C.2d 649, 655 (Court of Common Pleas No. 3 of Philadelphia County 1961), *aff'd*, 177 A.2d 142 (Pa. Super. Ct. 1962).

<sup>6</sup>*Id.*

4. "For attorneys advising doctor witnesses, the safe course is to advise against *ex parte* discussions with counsel adverse to the patient . . . .";<sup>7</sup> and

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<sup>7</sup>Wayne M. Purdom, *Georgia Civil Discovery* § 5:10, at 156 (2011-12 ed.). And see *Horne v. Patton*, 291 Ala. 701, 708-09 (I & II) (287 So2d 824) (1973), recognizing a cause of action by a patient against a doctor for disclosing to the plaintiff's employer, contrary to the patient's expressed instructions, information acquired in the course of a doctor-patient relationship:

[A] medical doctor is under a general duty not to make extra-judicial disclosures of information acquired in the course of the doctor-patient relationship and . . . a breach of that duty will give rise to a cause of action. . . . [T]his duty is subject to exceptions prompted by the supervening interests of society . . . .

\* \* \*

As a federal district court so aptly stated in [a case] involving disclosure of medical information concerning the patient to the patient's insurer:

"When a patient seeks out a doctor and retains him, he must admit him to the most private part of the material domain of man. . . . To promote full disclosure, the medical profession extends the promise of secrecy . . . . But the disclosure is certainly intended to be private. If a doctor should reveal any of these confidences, he surely effects an invasion of the privacy of his patient. . . . [T]he preservation of the patient's privacy is no mere ethical duty . . . ; there is a legal duty as well. The unauthorized revelation of . . . any confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages."

Quoting again from the opinion in the federal case mentioned above, the Court continued:

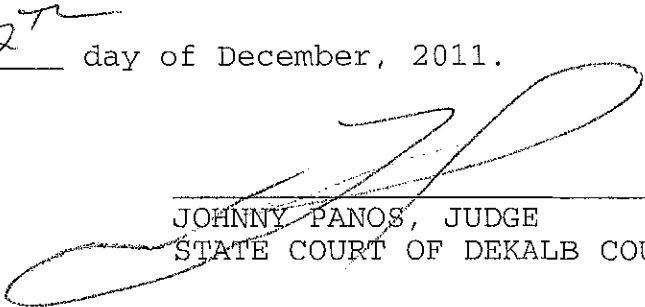
". . . As an implied condition of [the doctor-patient] contract, . . . the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission. . . . [W]hen a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract."

(cont'd)

5. Defendants have not shown how they would be harmed<sup>8</sup> if they had access to the Plaintiffs' decedent's treating healthcare providers only through requests for production, meetings with the providers that all counsel have the opportunity to attend and depositions.

ACCORDINGLY, the motion, in the exercise of the Court's discretion, is hereby DENIED.

SO ORDERED, this 12<sup>th</sup> day of December, 2011.

  
JOHNNY PANOS, JUDGE  
STATE COURT OF DEKALB COUNTY

c: Thomas G. Sampson, Esquire  
Thomas G. Sampson, II, Esquire  
Wade K. Copeland, Esquire  
Ashley E. Sexton, Esquire  
Timothy H. Bendin, Esquire  
Kristin L. Hiscutt, Esquire

FILED IN THIS OFFICE  
THIS 13 DAY OF Dec 20 11

  
Clerk, State Court, DeKalb County

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*Id.*, 291 Ala. at 710 (III).

<sup>8</sup>Other than by expense, but the Court considers the elements mentioned herein more significant.