

**IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA**

**GILES DOUGLAS SEXTON and
JAMES BRENT SEXTON,
individually, and as Co-Executors of
the Estate of JAMES DOUGLAS
SEXTON, deceased,**

Plaintiffs,

v.

**DEKALB MEDICAL CENTER,
INC., STEVEN STOREY, M.D. and
RADIOLOGY ASSOCIATES OF
DEKALB, P.C.,**

Defendants.

Case No. 10A26299-6

ORDER

This case came before the Court on Defendants' Joint Motion for a Qualified Protective Order Authorizing Defendants to Communicate *Ex Parte* with Decedent James Sexton's Treating Physicians. Defendants contend that in order to fully investigate Plaintiffs' claims and defend the case, they must be allowed to examine the written medical records and communicate with the decedent's treating healthcare providers. Plaintiffs respond that Defendants' goals can be accomplished through

general discovery allowed under the Georgia Civil Practice Act without the necessity of “secret” meetings.

The determination of this issue addresses itself directly to the discretion of the trial court. Partain v. Royston, 246 Ga. 297, 298, 271 S.E.2d 201 (1980) (“The trial court has broad discretion concerning the use of and limitations upon discovery procedure.”). In Baker v. Wellstar Health Systems, 288 Ga. 336, 703 S.E.2d 601 (2010), the Georgia Supreme Court determined that orders allowing *ex parte* interviews with a party’s treating physicians did not run afoul of Georgia law or HIPAA requirements. However, the Court noted several dangers associated with *ex parte* interviews of treating physicians, including “(1) the potential for unwarranted probing into matters irrelevant to the litigation yet highly sensitive and possibly prejudicial to the patient-plaintiff; (2) the potential 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; and (3) the potential for defense counsel to influence the health care provider’s testimony, unwittingly or otherwise, by encouraging solidarity with or arousing sympathy for a defendant health care provider.” *Id.* at 339. In the case *sub judice*, the Court has reviewed the briefs and argument in light of these dangers.

IT IS HEREBY ORDERED that Counsel for Defendants may conduct informal interviews with James Sexton's health care providers without counsel for Plaintiffs being present as set forth herein.

Controlling federal and state law clearly allows defense counsel to conduct *ex parte* interviews with plaintiff's treating health care providers. See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.S. § 1320 *et seq.* (2008); 45 C.F.R. § 103 *et seq.* (2008); 45 C.F.R. § 164.500 *et seq.* (2008); O.C.G.A. § 24-9-40 (2008); Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008); Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982); Baker v. Wellstar Health Systems, Inc., 2010 Ga. LEXIS 413 (June 1, 2010); Baker v. Wellstar Health Systems, Inc., 288 Ga. 336, 703 S.E.2d 601 (2010).

Pursuant to such law, Counsel for Defendants are hereby authorized to speak informally with James Sexton's treating healthcare providers without opposing counsel being present. Defendants' Counsel is hereby limited, absent good cause shown, to interviewing ten treating healthcare providers. Defendants' Counsel shall provide a list of the ten healthcare providers to Plaintiffs' Counsel prior to any interviews.¹ Such list shall also include the subject matter sought to be discussed

¹ Absent a subsequent Court order on this issue, Defendants' Counsel shall be limited to requesting interviews from the ten healthcare providers on this list.

with each healthcare provider. Defendants' Counsel shall notify Plaintiff within five days of any interview that such interview has taken place. Defendants' counsel shall provide Plaintiffs' Counsel with a copy of any documents or affidavits obtained during the interview within five days thereof.

Defendants may conduct informal interviews of any of the remaining treating physicians in person or by telephone only upon notice to Plaintiffs' Counsel and a meaningful opportunity for Plaintiffs' Counsel to be present. Defendants' Counsel may, however, inquire *ex parte* as to the availability for informal joint interviews as well as "the best methods for service of a subpoena, determining convenient dates to provide trial testimony [or joint interviews], or the most convenient location for the anticipated deposition [or interviews] of the physician." Moreland, supra at 733.

The individuals who may be interviewed include James Sexton's treating healthcare providers identified by name or referenced in his medical records and only after Defendants have obtained those medical records via requests for records pursuant to O.C.G.A. § 9-11-34 (c) or from Plaintiffs' Counsel. The healthcare providers may discuss with Counsel for Defendants information that is relevant to James Sexton's medical conditions which are at issue in this proceeding. The medical conditions at issue in this proceeding are as follows: The medical care and treatment of James Sexton from December 3, 2008 until December 11, 2008, while

he was a patient at DeKalb Medical Center and Mr. Sexton's medical conditions existing prior to his December 3, 2008, admission to DeKalb Medical Center that may be relevant to causation and/or damages (i.e. , full value of life, etc.).

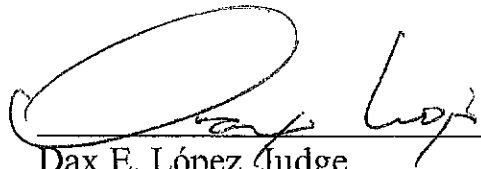
The decision to engage in such *ex parte* communications lies with the treating health care providers, and they are not compelled by this Order to do so and may choose not to be interviewed. Their participation in such meetings is voluntary. Defendants' Counsel is not required to produce any notes or memorandum associated with these interviews, which constitute attorney work product.

Defendants' Counsel is prohibited from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested. At the conclusion of this litigation, Defendants' Counsel must either return to the treating health care providers or destroy the protected health information of James Sexton, including all copies made thereof.

Plaintiffs' Counsel hereby is prohibited from communicating with James Sexton's treating health care providers, orally or in writing, in an effort to prevent or thwart the requested *ex parte* interviews. Plaintiffs' Counsel shall not act in a manner which would tend to intimidate the health care providers or cause them any fear of repercussions should they agree to defense counsel's request for the interviews permitted herein.


A copy of this Order will be given to each healthcare provider.

SO ORDERED, this 8 day of June, 2011.



Dax E. López, Judge
State Court of DeKalb County

cc: William Q. Bird, Esq.
Daniel J. Huff, Esq.
Tim Bendin, Esq.

FILED IN THIS OFFICE
THIS 1 DAY OF June 2011

Clerk, State Court, DeKalb County