

IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

LETTY SCHILLING, )  
Plaintiff, )  
 )  
v. ) CIVIL ACTION FILE  
 ) NO. 2010EV009883-J  
DAVID G. O'DAY, M.D., et al, )  
Defendants. )  
\_\_\_\_\_ )

**ORDER DENYING DEFENDANTS' MOTION FOR  
EX PARTE MEETING WITH TREATING PHYSICIAN**

This medical malpractice action arises out of certain medical treatment provided to Plaintiff in June of 2008 by Defendant O'Day. According to the allegations in the Complaint, Defendant O'Day performed cataract surgery on Plaintiff, during which she suffered various complications which required additional surgery. Although Defendant performed the additional surgery, Plaintiff alleges that Defendant O'Day failed to remove all of the lens fragments from her eye, requiring further emergency surgery and leaving Plaintiff with on-going problems with her vision. This action was filed on April 19, 2010 seeking damages and compensation for those injuries. Currently pending is Defendants' motion for permission to meet *ex parte* with Plaintiff's treating physician. Plaintiff responded and objected.

After review, this Court finds that entry of a qualified protective order such as the one sought in this case is not warranted. Initially, in ruling on the motion, this Court notes that it is well-settled that once a patient places her care and treatment at issue in a civil proceeding, there no longer remains any restraint upon a doctor in the release of medical information concerning the patient *within the parameters of the complaint*. Orr v. Sievert, 162 Ga. App. 677 (1982); see also, Jones v. Thornton, 172 Ga. App. 412 (1984). Therefore, under the discovery statutes and

case law, the defendant has a right to discover the relevant medical information, regarding the plaintiff's treatment, from her treating physicians.<sup>1</sup> However, if the physician reveals information which is not within the parameters of the Complaint, and which is not relevant to the lawsuit, then a patient has an action for damages for breach of duty. Orr, supra.

Additionally, under Georgia law, discovery of this medical information – and, in fact, all formal discovery – is governed by the Civil Practice Act and the discovery statutes. Specific discovery methods include: depositions, interrogatories, requests for documents or admissions, physical and mental examinations, or entry upon land for inspection and other purposes. O.C.G.A. § 9-11-26(a). For all of these discovery methods, Georgia law contemplates an opposing party's absolute right to notice, and an opportunity to object.<sup>2</sup>

While it may be common practice to contact some witnesses and informally communicate with them regarding the facts of the case, this Court does not find such methods appropriate as a substitute for formal discovery. Although a plaintiff subjects her relevant medical information to discovery by filing a civil action, she does not necessarily give her treating physician *carte blanche* to speak freely on all of the information which might have been disclosed to the doctor. If this Court permitted the Plaintiff's treating physicians to be interviewed *ex parte* by defense counsel as suggested, there would be no safeguards against the revelation of matters irrelevant to the lawsuit.

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1 This does not conflict with HIPAA, which contemplates disclosure of otherwise protected health information under certain conditions in judicial proceedings. 45 CFR § 164.512(e)(1).

2 For example, under § 9-11-30(b), "[a] party desiring to take the deposition of any person ... **shall** give reasonable notice in writing to every other party to the action." (Emphasis added). Similar mandatory notice requirements are contained within Code sections 9-11-31 (pertaining to depositions upon written questions), 9-11-34(c) (pertaining to requests for documents, including non-parties), and 9-11-35 (pertaining to physical and mental examinations).

Despite these protections under Georgia law, in addressing the HIPAA issue, the Georgia Supreme Court, in Moreland v. Austin, 284 Ga. 730 (2008), stated that HIPAA pre-empts Georgia law regarding *ex parte* communication with treating physicians, and further stated that such contact *may* be permitted *if* the patient is given “reasonable notice and an opportunity to object.” Id. at 733. Counsel may contact a physician without prior notice to the patient *only* to “make inquiries which are not intended to elicit protected health information.” Id. Furthermore, under Moreland, the decision regarding any *ex parte* discovery order is “best left to the discretion of the trial court.” Id. at 735 (*citing* O.C.G.A. § 9-11-37).

In this case, the proposed order submitted by the Defendants permits them to engage in *ex parte* conversations with the Plaintiff’s treating physician, regarding Plaintiff’s medical condition, without prior notice to Plaintiffs or counsel, and which further provides that counsel for Plaintiff cannot “prevent or thwart” such interview. The proposed Order also states that defense counsel will notify Plaintiff’s counsel of the meeting ten days after it occurs, and provides that any notes taken during the interview are “work product” and not subject to discovery. In effect, Defendants seek to by-pass formal discovery and conduct their discovery in secret without giving Plaintiff notice or an opportunity to object. This Court views this position as completely inconsistent with the intent of the Civil Practice Act, which seeks to ensure that discovery is conducted in a fair and open manner, and as violating the strictures in HIPAA. Moreover, even if this Court were inclined to permit *ex parte* meetings, this Court finds that the proposed protective order unfairly restricts Plaintiff’s access to information provided by her own treating physician.

For all of these reasons, and based upon this Court discretionary authority to control the time, place and manner of discovery, this Court finds that Defendants' request for entry of a qualified protective order permitting *ex parte* communications with the Plaintiff's treating physician should be and hereby is **DENIED**. In so ruling, this Court reminds counsel for Plaintiff and Defendants that this Order affects only defense counsel's **methods** of discovery, and does not limit the **substance** of what is discoverable. This Order also does not in any way restrict Defendants' ability to use all methods of formal discovery permitted under O.C.G.A. § 9-11-26(a) to discover the relevant medical information which may not be contained in the medical documents previously produced; however, any such discovery must be conducted with notice to Plaintiff and an opportunity to object.

**SO ORDERED**, this 25<sup>th</sup> day of August, 2010.



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Judge Diane E. Bessen  
State Court of Fulton County

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