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U.S. DISTRICT COURT
AUGUSTA, GA.

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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.)	

ORDER

The above-captioned case is before the Court on “Defendant’s Motion for Qualified Protective Order” (doc. no. 18), and Defendant’s “Motion for an Expedited Hearing on Her Motion for Qualified Protective Order.” (Doc. no. 20). Plaintiffs oppose the motions. (Doc. no. 23). For the reasons explained below, Defendant’s motion for qualified protective order is **GRANTED** subject to compliance with this Order, and Defendant’s motion for an expedited hearing is **DENIED**.

I. BACKGROUND

This is a medical malpractice case in which Plaintiffs seek to recover for the death of James D. Wright, Jr., their infant son (“Plaintiffs’ son”). Plaintiffs claim that Defendant, James D. Wright, Jr.’s pediatrician, was negligent in her care and treatment of their son. Defendant seeks an order of the Court granting defense counsel permission to conduct *ex parte* interviews with the medical providers of Plaintiff Coleman and her son.

Defendant contends that her counsel should be permitted to interview these individuals *ex parte* because she should not be unnecessarily put to the trouble and expense of deposing every individual who may have knowledge of Plaintiff Coleman's and her son's medical condition(s), care and treatment, or postmortem evaluations and investigations.¹ (Doc. no. 19, p. 3). Defendant also contends that it is simply unfair for Plaintiffs to have complete and unfettered access to these individuals on the one hand (and for the past two years) and to explicitly refuse to allow Defendant equal access and the opportunity to investigate these serious claims made by Plaintiffs. (*Id.* at 4).

Plaintiffs have executed a Health Insurance Portability and Accountability Act ("HIPAA") release allowing Defendant to obtain any and all medical records and autopsy reports and photos for Plaintiffs' son, and for Plaintiff Coleman's pregnancy. However, Plaintiffs object, and do not consent, to oral *ex parte* communications between Defendant's counsel and Plaintiff Coleman's and Plaintiffs' son's medical providers without proper notice to Plaintiffs' counsel, opportunity to object, and opportunity to be present. Plaintiffs argue that Defendant seeks unfettered access to these medical providers outside the presence of Plaintiffs' counsel and that "unfettered *ex parte* interviews with medical providers do not satisfy HIPAA's requirements for protecting against the disclosure of protected health care information." (Doc. no. 23, p. 3).

II. DISCUSSION

The parties agree that under both federal and Georgia law, the *ex parte* conferences

¹Defendant claims that there are a number of independent medical healthcare provider witnesses, first responders, EMS crew members, and postmortem evaluators and investigators who may have relevant information in their possession regarding Plaintiffs' claims.

sought by Defendant can only take place pursuant to HIPAA procedure. (Doc. no. 19, p. 7; doc. no. 23, p. 3). Indeed, the Georgia Supreme Court recently held that HIPAA preempts Georgia law with regard to *ex parte* communications between defense counsel and plaintiff's prior treating physicians. Moreland v. Austin, 670 S.E.2d 68, 71 (Ga. 2008). The parties, however, disagree as to the HIPAA procedural requirements. Defendant asserts that HIPAA permits *ex parte* communication with the treating health care providers and entities in this case as long as Defendant has obtained a court order allowing such communication. Plaintiffs, on the other hand, argue that HIPAA allows *ex parte* communication between prior medical providers and defense counsel only if Plaintiffs have consented to such communication. Defendant has the better argument.

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 (using the information for any purpose other than the litigation) of the information. Moreland, 670 S.E.2d at 71 (citing 45 C.F.R. § 164.512). Specifically, this federal regulation permits disclosure of medical information 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.

(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

(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). Contrary to Plaintiffs' assertion, 45 C.F.R. § 164.512(e)(1)(i) does not require that Plaintiffs consent to such communication. Rather, the regulation permits the covered entity to disclose only the protected health information expressly authorized by court order. See, e.g., Harris v. Whittington, No. 06-1179-WEB, 2007 WL 164031, slip op. *2-3 (D. Kan. Jan. 19, 2007); Bayne v. Provost, 359 F. Supp. 2d 234, 240-41 (N.D.N.Y. 2005).

Accordingly, Defendant's Motion for a Qualified Protective Order is **GRANTED**. However, the parties shall jointly confer within (7) seven days of the date of this Order, and submit to the Court a proposed Qualified Protective Order that limits the scope of the information released and discussed to the pending litigation. Additionally, the proposed Qualified Protective Order must incorporate the following: (1) Defendant is prohibited from using or disclosing the protected health information for any purpose other than this litigation; (2) Defendant must either return to the medical provider or destroy the protected information at the end of the litigation; (3) state that the purpose of the disclosure is not at the request of the patient, however, the patient has been put on notice of the order; and (4) the medical providers must be informed of his/her right to decline any request for an *ex parte* communication. Finally, within 7 days after conducting the *ex parte* communication, defense

counsel shall inform Plaintiffs' counsel in writing of the person(s) with whom counsel spoke, the location of the meeting, and the date of the conference. Furthermore, defense counsel shall produce to Plaintiffs' counsel, documentation obtained pursuant to the *ex parte* communication that has not previously been exchanged between the parties.

Concerning Defendant's motion for an expedited hearing on the motion for qualified protective order, as indicated by this Order, the Court is not persuaded that a hearing is necessary to resolve the issues raised in Defendant's motion. Thus, Defendant's motion for an expedited hearing is **DENIED**. (Doc. no. 20).

III. CONCLUSION

For the reasons explained above, "Defendant's Motion for Qualified Protective Order" (doc. no. 18) is **GRANTED** subject to the terms stated above, and Defendant's "Motion for an Expedited Hearing on Her Motion for Qualified Protective Order" is **DENIED**. (Doc. no. 20). The proposed Qualified Protective Order described herein shall be submitted within 7 days of the date of this Order.

SO ORDERED this 19th day of June, 2009, at Augusta, Georgia.



W. LEON BARFIELD
UNITED STATES MAGISTRATE JUDGE