

COPY

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

NONNIE HAWKINS AS NEXT FRIEND
AND NATURAL GUARDIAN OF
EMMANUEL HAWKINS, A Minor and
Sole Survivor and Son of TARA HAWKINS,
Decedent, and NONNIE HAWKINS, As
Administrator of the Estate of TARA
HAWKINS,
Plaintiffs,

v.

DEKALB MEDICAL CENTER, INC.,
MARSHALL NASH, M.D.,
DEKALB NEUROLOGY ASSOCIATES, LLC,
MARK POLLACK, M.D., PULMONARY &
SLEEP SPECIALISTS, P.C., SEAN SUE, M.D.,
and JOHN DOES, 1-10,
Defendants.

Civil Action
File No. 06A48715-7

ORDER

Defendants filed a Motion for Qualified Protective Order pursuant to the Health Insurance Portability and Accountability Act (hereinafter "HIPAA"),¹ requesting request that they be permitted to conduct *ex parte* interviews with the treating medical providers of decedent Tara Hawkins and Plaintiff Emmanuel Hawkins. Plaintiffs filed a Brief in Opposition. The Court held a hearing on April 2, 2009.

HIPAA regulates the methods by which a physician may release a patient's health information, including oral medical records. Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008). The intent of HIPAA is to ensure the

¹ At the hearing, Defendants Mark Pollack, M.D., and Pulmonary & Sleep Specialists, P.C., withdrew their separate Motion for Protective Order and informed the Court that they would adopt the Motion for Protective Order filed by Defendant DeKalb Medical Center, Inc.

integrity and confidentiality of patients' information and to protect against unauthorized uses or disclosures of the information. Northlake Medical Center, LLC v. Queen, 280 Ga. App. 510, 634 S.E.2d 486 (2006). The rules promulgating the standards set forth in HIPAA, which govern the disclosure of protected health information by health care providers, are collectively known as the Privacy Rule. Id. at 511-512, 634 S.E.2d at 489. Protected health information includes any information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. Id. at 512, 634 S.E.2d at 489. HIPAA provides the standard for disclosure of protected health information for judicial and administrative proceedings. 45 CFR § 164.512(e).

HIPAA preempts Georgia law with regard to *ex parte* communications between defense counsel and a plaintiff's prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians. Moreland v. Austin, 284 Ga. at 734, 670 S.E.2d at 72. Defense counsel cannot contact a plaintiff's prior

treating physicians to discuss his or her medical history without complying with HIPAA regulations. Moreland v. Austin, 284 Ga. at 735, 670 S.E.2d at 72.²

Those regulations provide that "[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." 45 CFR § 164.512(e)(1); 45 CFR § 164.512(e)(1)(i). A Qualified Protective Order from the court means an order which "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding." 45 CFR § 164.512(e)(1)(i); 45 CFR § 164.512(e)(1)(v)(A); 45 CFR § 164.512(e)(1)(v)(B). The Protective Order must prohibit the use or disclosure of the patient's protected health information for any non-litigation purpose. Moreland v. Austin, 284 Ga. at 734, 670 S.E.2d at 72. Once these steps are taken, a healthcare provider can choose to disclose the protected health information; but it must take reasonable steps to ensure that it only discloses the minimum necessary to accomplish the intended purpose of the disclosure. 45 C.F.R. § 164.508.

² Although defense counsel can engage in such discussions if a plaintiff gives his or her consent, it must be clear that the plaintiff consented to *ex parte* oral communications. Moreland v. Austin, 284 Ga. at 735, 670 S.E.2d at 72.

Defendants request a Qualified Protective Order to enable them to ascertain protected health information by conducting *ex parte* interviews with medical providers of decedent Tara Hawkins and Plaintiff Emmanuel Hawkins. Tara Hawkins died on March 18, 2004, at DeKalb Medical Center after giving birth to her only son Emmanuel Hawkins on March 16, 2004. Plaintiffs claim that the physicians who treated decedent Tara Hawkins during her time at DeKalb Medical Center from November 22, 2003, until March 18, 2004, failed to properly evaluate, diagnose, and treat her injuries, including an alleged failure to obtain the necessary consults, tests, and/or studies. Plaintiffs claim that these alleged breaches of the standard of care "more likely than not, caused and contributed to Tara Hawkins' disabilities, pain, suffering, and death, as well as the injuries suffered by her son Emmanuel *in utero*." (First Amended Complaint, ¶ 38). Additionally, Plaintiffs claim that DeKalb Medical Center and John Does 1-10 tortiously and intentionally terminated the life support of Tara Hawkins on March 16, 2004. (First Amended Complaint, ¶ 67).

In compliance with HIPAA rules governing the disclosure of protected health information by a health care provider, Defendants have requested that the Court issue a Qualified Protective Order. At the hearing, Defendants' counsel argued that forcing them to interview witnesses only in the context of a deposition destroys a "level playing field" for the discovery process by giving Plaintiffs an unfair advantage; that formal discovery is more costly and time consuming; that requiring formal discovery would require counsel to reveal trial strategy and work product; and that prohibiting *ex parte* communications would make it impossible

for counsel to utilize O.C.G.A. § 24-3-18, which permits the parties to obtain medical narratives from treating physicians.

In response, Plaintiffs' counsel argued that in the first paragraph of Moreland v. Austin, *supra*, the Georgia Supreme Court prohibited *ex parte* communications between defense counsel and Plaintiffs' health care providers under any and all circumstances; that if the prohibition is not absolute, prohibition is at least the general rule, and *ex parte* communications should be allowed only if the Defendants' need for *ex parte* discovery outweighs the Plaintiffs' privacy interests; and that, because Plaintiffs' counsel cannot interview employees of Defendants (due to the attorney-client privilege), the uneven playing field imposed against both sides actually creates a level playing field.

Notwithstanding Plaintiffs' argument that HIPAA and Georgia law provide that Plaintiffs have a significant constitutional interest in the privacy of their medical information, the Court finds that Defendants' request does not contravene the intent of HIPAA to ensure the integrity and confidentiality of patients' information and to protect against unauthorized uses or disclosures of the information. See Northlake Medical Center, LLC v. Queen, 280 Ga. App. 510, 634 S.E.2d 486 (2006). Moreover, although in the first paragraph of Moreland v. Austin, *supra*, the Georgia Supreme Court seems to suggest that HIPAA precludes *ex parte* interviews of Plaintiffs' health care providers, the opinion goes on to describe the conditions under which such interviews may take place and what is required in a Court Order so that such communications comply with HIPAA. Therefore, this Court takes the first paragraph of Moreland to mean

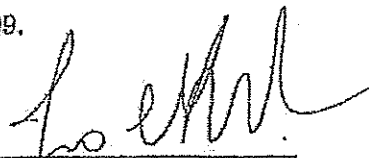
that such communications are prohibited under HIPAA absent compliance with HIPAA requirements, not that such communications are absolutely prohibited.

The Court does not find compelling Plaintiffs' argument that the Court must balance the Defendants' need for *ex parte* discovery against Plaintiffs' privacy interests because those privacy interests can be adequately protected by the issuance of a Qualified Protective Order in compliance with Moreland. The Court notes, however, that even if it were appropriate to apply a balancing test, this Court would find that Defendants' interest in defending themselves in this litigation outweighs Plaintiffs' privacy interests, since Plaintiffs have voluntarily placed their medical conditions and treatment into issue. The Court believes that the issuance of a Qualified Protective Order will be sufficient to protect Plaintiffs' privacy interests from any non-litigation exposure.

Accordingly, under the facts and circumstances of this case, the Court grants Defendants' request for a Qualified Protective Order. The Court is attaching a separate Qualified Protective Order which permits *ex parte* communications subject to the conditions stated therein.

WHEREFORE, Defendants' request for a Qualified Protective Order is GRANTED.

SO ORDERED this 7 day of April, 2009.


JANIS C. GORDON, JUDGE
State Court of DeKalb County

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