

IN THE SUPERIOR COURT OF BEN HILL COUNTY
STATE OF GEORGIA

BRENDA LAMBDIN AND LARRY
LAMBDIN,

Plaintiffs,

v.

THE HOSPITAL AUTHORITY OF
BEN HILL COUNTY, d/b/a DORMINY
MEDICAL CENTER and RODNEY
MERRITT, R.N.,

Defendants.

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* CIVIL ACTION FILE NO. 08CV-277
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ORDER

On or about February 2, 2009, the Defendants filed a Motion to Require Plaintiff to Provide a Medical Authorization, or in the Alternative, Motion for a Qualified Protective Order. Plaintiffs filed a brief in opposition on February 16, 2009. A hearing was held on April 13, 2009. Based on the entire record, this Court hereby grants Defendants' request for a Qualified Protective Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiffs allege that on November 24, 2004, Plaintiff Brenda Lambdin arrived at Dorminy Medical Center seeking medical attention for chest pain. Plaintiffs claim that Defendant Rodney Merritt gave Ms. Lambdin an injection of Epinephrine instead of the Nubain that was prescribed by the emergency room physician, and the administration of the wrong medication by nurse Merritt caused Ms. Lambdin to suffer an acute heart attack.

On or about February 2, 2009, Defendants filed a Motion to Require Plaintiff to Provide a Medical Authorization, or in the Alternative, Motion for a Qualified Protective Order, claiming that the Defendants were entitled to conduct *ex parte* interviews with Plaintiff Brenda Lambdin's treating physicians and medical providers. Defendants requested that the Court either (1) issue an order requiring Mrs. Lambdin (hereinafter "Plaintiff") to produce a medical authorization that permitted the Defendants to conduct

ex parte communications with her medical providers or (2) enter a Qualified Protective Order permitting them to conduct *ex parte* interviews with Plaintiff's medical providers. Plaintiffs assert that the Defendants have failed to establish good cause to conduct *ex parte* interviews. Plaintiffs further contend that Ms. Lambdin has not consented to the Defendants having *ex parte* communications with her medical providers, and her consent is required prior to such communications according to holding of the Georgia Supreme Court in Moreland v. Austin. Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008). Plaintiffs further argue that the Moreland decision requires that Defendants provide notice of any interviews with Mrs. Lambdin's treating physicians and that her attorneys have the opportunity to be present.

The Health Insurance Portability and Accountability Act (hereinafter "HIPPA") regulates the methods by which a physician may release a patient's health information. Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008). The intent of HIPPA is to ensure the 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 HIPPA, 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 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) related 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. HIPPA provides the standard for disclosure of protected health information for judicial and administrative proceedings. 45 CFR § 164.512 (e).

HIPPA preempts Georgia law with regard to *ex parte* communications between defense counsel and a plaintiff's prior treating physicians because HIPPA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians. Moreland v. Austin, 284 Ga. at 634, 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 HIPPA regulations. *Id.* at 635, 670 S.E.2d at 72.

HIPAA 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.

Defendants request that the Court issue a Qualified Protective Order to enable them to ascertain protected health information by conducting *ex parte* interviews with Plaintiff Brenda Lambdin's medical providers. Defendants contend that they are only seeking to interview those medical providers who were identified by name or reference in Plaintiff's medical records. Defendants claim that Plaintiff would merely have to sign a release to authorize *her* attorneys to interview her medical providers, and Plaintiffs would have an unfair advantage if the Defendants were precluded from interviewing witnesses outside the confines of a deposition. Defendants further argue that requiring formal discovery would require defense counsel to reveal trial strategy and work product and that prohibiting *ex parte* communications would make it impossible for defense counsel to obtain medical narratives from Mrs. Lambdin's treating physicians. Plaintiffs argue that Defendants have failed to demonstrate the need for *ex parte* communications. Plaintiff has not consented to *ex parte* communications, and Plaintiffs' attorneys argue

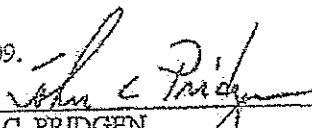
that they have the right to be notified of and to be present for any communications between the defense and Plaintiff's medical providers.

This Court finds that Defendants' request for the issuance of a Qualified Protective Order 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 information. Although in the first paragraph of Moreland the Georgia Supreme Court seems to suggest that HIPAA precludes *ex parte* interviews of Plaintiff's 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.

This Court further finds the Plaintiffs' privacy interests will be adequately protected by the issues of a Qualified Protective Order. In filing the lawsuit, the Plaintiffs voluntarily made issue of their medical conditions and treatments. While the Plaintiffs have a privacy interest in their medical information, the Defendants have a right to defend themselves in the instant litigation. To preclude the Defendants from conducting interviews with Plaintiff's medical providers would give an unfair advantage to the Plaintiffs.

THEREFORE, under the facts and circumstances of this case, the Court HEREBY GRANTS Defendants' request for a Qualified Protective Order. Any health information obtained by the Defendants pursuant to the Qualified Protective Order shall not be disclosed outside of this proceeding and such information shall be destroyed or returned following the termination of the lawsuit. The Court is attaching a separate Qualified Protective Order which permits *ex parte* communications subject to the conditions stated therein.

SO ORDERED, this 17th day of June, 2009.



JOHN C. FRIDGEN
CHIEF JUDGE, SUPERIOR COURTS
CORDELE JUDICIAL CIRCUIT