IN THE COURT OF APPEALS

STATE OF GEORGIA

THOMAS M ALLEN, M.D., FOUR RIVERS ORTHOPEDIC ASSOCIATES, P.C. AND MEADOWS REGIONAL MEDICAL CENTER, INC.,	)	
Appellants-Defendants,	)	
vs.	)	**CASE NO. A06A0662**
ERNESTINE C. WRIGHT,	)	
Appellee-Plaintiff.	)	

BRIEF OF APPELLANTS THOMAS M. ALLEN, MD., FOUR RIVERS ORTHOPEDIC ASSOCIATES, P.C. AND MEADOWS REGIONAL MEDICAL CENTER, INC.

PART I

INTRODUCTION

This appeal presents a case of first impression for this Court regarding whether newly enacted O.C.G.A. § 9-11-9.2, which requires plaintiffs in medical malpractice cases to file with their complaint a medical authorization form, is preempted by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 ("HIPAA").

The trial court denied Appellants' motions to dismiss Plaintiff's complaint for failure to comply with O.C.G.A. § 9-11-9.2, concluding that this newly enacted Code Section conflicts with the formal discovery methods recognized under the Georgia Civil Practice Act and that HIPAA preempts it. (R. at 306). The Order entered by the trial court raises two primary issues. First, does the Georgia legislature have the power to enact statutes that establish the procedures by which medical malpractice lawsuits are initiated as well as define the scope of information disclosed in medical malpractice cases? Second, did the authorization form filed with Plaintiff's Complaint comply with O.C.G.A. § 9-11-9.2 and, if not, does HIPAA excuse non-compliance?

The answer to the first question must be in the affirmative because the legislature has the authority to create the legal framework within which matters are litigated. O.C.G.A. § 9-11-9.2 merely establishes a filing procedure that also provides defendants with an alternative to the traditional forms of discovery utilized to obtain information in medical malpractice cases by requiring plaintiffs to execute a medical authorization form that allows for the release of protected health information ("PHI").

As to the second question, because HIPAA is a purely procedural mechanism for the disclosure of PHI and does not create substantive privacy rights, HIPAA does not determine **whether** PHI is discoverable in civil actions. Thus, the requirement that plaintiffs execute a medical authorization form is not constrained or modified by HIPAA and plaintiffs must meet the procedural requirements of O.C.G.A. § 9-11-9.2 to pursue an action for alleged medical malpractice in this State.

Where, as here, Appellee has failed to meet the initial filing requirements of O.C.G.A. § 9-11-9.2 by failing to attach a valid authorization to her complaint, HIPAA does not excuse her non-compliance and her complaint must be dismissed. Accordingly, Appellants respectfully request that this Court reverse the Order of the trial court and remand this case with instructions to dismiss Appellee's Complaint for failure to comply with O.C.G.A. § 9-11-9.2.

STATEMENT OF PROCEEDINGS BELOW

On May 9, 2005, Appellee Ernestine C. Wright (Plaintiff below and hereinafter "Appellee") filed her lawsuit against Appellants Thomas M. Allen, M.D., Four Rivers Orthopedic Associates, P.C. and Meadows Regional

Medical Center, Inc. (R. at 8-26). Attached to her complaint was a purported medical authorization form signed by Appellee dated May 4, 2005, which specifically stated, "Defendant's attorney is not permitted to use this authorization . . ." (R. at 19-21).

Appellants Thomas M. Allen, Four Rivers Orthopedic Associates, P.C. and Meadows Regional Medical Center (hereinafter collectively referred to as "Appellants") filed timely Answers, and questioned in contemporaneous motions to dismiss whether Appellee had complied with the requirements of O.C.G.A. § 9-11-9.2 because the Appellee had included language that expressly precluded defense counsel from utilizing the purported medical authorization or engaging in *ex parte* conversations with the Appellee's treating physicians. (R. at 66-77, 85-100, 104-123). In response, Appellee argued in briefs and at a hearing that the statute at issue was preempted by HIPAA and that the legislature had created other methods by which the information sought by the Appellants could be obtained. (R. at 143-161; MT. at 19).

The record reflects that Appellee made several concessions in the trial court responding to the Motions to Dismiss filed by Appellants. She

conceded that she had "placed her medical care and treatment at issue upon the filing of this lawsuit." (R. at 157). Further, she advised each of her treating physicians that she had no objection to the production of PHI, but rather objected to the prospect of an *ex parte* conference. (R. at 314-330).

Appellee further conceded at the motion hearing that the language of O.C.G.A. § 9-11-9.2 appeared to require her to submit an authorization form granting the Appellants the right to engage in *ex parte* communications with her treating physicians. (MT. at 23). Nonetheless, Appellee's medical authorization form did not authorize Appellants' counsel to engage in *ex parte* conversations with the Appellee's treating physicians. (R. at 19-21).

The trial court agreed with the Appellee and entered an Order denying Appellants' Motions to Dismiss on the grounds that O.C.G.A. § 9-11-9.2 is in conflict with the Georgia Civil Practice Act and that it is preempted by HIPAA. (R. at 305-307).[1] The trial court certified the Order for immediate

[1] The Appellee did not challenge the constitutionality of O.C.G.A. § 9-11-9.2., and it is well-settled that an appellate court "'will not rule on a challenge to the constitutionality of a statute unless the issue has been raised and ruled

review on August 29, 2005. (R. at 308-309). Appellants' Application for Interlocutory Appeal was granted by this Court on October 6, 2005. (R. at 343-344).

PART II

ENUMERATION OF ERRORS

1. The trial court erred in finding that O.C.G.A. § 9-11-9.2 is in conflict with the Georgia Civil Practice Act. (R. at 305-307)

2. The trial court erred in denying Appellant's Motion to Dismiss Plaintiff's Complaint for failure to comply with O.C.G.A. § 9-11-9.2. (R. at 305-307).

3. The trial court erred in finding O.C.G.A. § 9-11-9.2 preempted by HIPAA. (R. at 305-307).

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on in the trial court.'" Anderson v. Ford, 261 Ga. App. 34, 35 (2003)(quoting Lucas v. Lucas, 273 Ga. 240, 242 (2000)). Because the trial court only considered and ruled on Appellee's preemption and conflict of laws arguments, there is no basis to consider any constitutional challenge to O.C.G.A. § 9-11-9.2.

The Court of Appeals for the State of Georgia has appellate jurisdiction based on O.C.G.A. §5-6-34, and the Superior Court's Certificate of Immediate Review of August 30, 2005, certifying that its Order denying the Petitioners' Motion To Dismiss is of such importance to the case that immediate review should be had. (R. at 305-307, 310).

PART III

ARGUMENT AND CITATION OF AUTHORITY

I. THE STANDARD OF REVIEW.

This Court reviews the grant or denial of a motion to dismiss *de novo*. See Johnson v. E. A. Mann & Co., 273 Ga. App. 716 (2005). In addition, this Court reviews *de novo* whether HIPAA preempts O.C.G.A. § 9-11-9.2 See Gentry v. Volkswagen of America, Inc., 238 Ga. App. 785, 786 (1999); Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1012 (11th Cir. 2003), cert. den., 125 S. Ct. (2004).

II. O.C.G.A. § 9-11-9.2 DOES NOT CONFLICT WITH THE GEORIGA CIVIL PRACTICE ACT.

Under Georgia's Constitution, "The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not

repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state." Art. III, Sec. V, Par. I, Ga. Const., 1983. See Northridge Community Association v. Fulton County, 257 Ga. 722 (1988). This broad statement vests the General Assembly with the power to enact statutes and revise the rules that govern practice and procedure. See Bradberry v. Bradberry, 232 Ga. 651 (1974). No person, though, has any vested interest in any particular practice or procedure. Day v. Stokes, 268 Ga. 494 (1997).

From a procedural standpoint, in order for a plaintiff to initiate a valid medical malpractice action the plaintiff must satisfy the filing requirements of O.C.G.A. § 9-11-9.2. To satisfy those requirements he or she must authorize the release of PHI to defense counsel and allow defense counsel to seek interviews with treating physicians.

That O.C.G.A. § 9-11-9.2 requires the filing of a medical authorization form is neither an unauthorized exercise of legislative power or in conflict with traditional discovery methods. The General Assembly has the constitutional power to create procedural requirements for the filing of malpractice lawsuits as well as the power to create multiple avenues by which

medical information may be obtained. Art. III, Sec. V, Par. I, Ga. Const., 1983. O.C.G.A. § 9-11-9.2 is simply one authorized method of several by which PHI may be obtained, in addition to the traditional formal discovery processes -- third party requests, subpoenas, depositions, notices to produce -- to investigate a malpractice plaintiff's claims. Thus, the trial court erred in concluding that O.C.G.A. § 9-11-9.2 conflicted with the formal discovery methods found in the Georgia Civil Practice Act.

III. PLAINTIFF'S MEDICAL AUTHORIZATION FORM DOES NOT COMPLY WITH THE REQUIREMENTS OF O.C.G.A. § 9-11-9.2.

O.C.G.A. § 9-11-9.2 requires in a medical malpractice action that a plaintiff file a medical authorization form authorizing the attorney for the defendant "to obtain and disclose protected health information contained in medical records to facilitate the investigation, evaluation, and defense of claims and allegations set forth in the complaint . . ." O.C.G.A. § 9-11-9.2. The authorization must also include language that grants defense counsel the "right to discuss the care of and treatment of the plaintiff, or, where

applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians." Id.

Appellee has maintained throughout this litigation that her authorization form complies with O.C.G.A. § 9-11-9.2. (R. at 143-160; Response to Appellants Petition for Interlocutory Appeal). However, a review of the controlling language found in Appellee's purported authorization form reveals otherwise.

The Appellee's authorization **expressly** states that "Defendant's attorney is not permitted to use this authorization, and you are not permitted to disclose Ernestine C. Wright's protected health information to Defendant's attorney, unless Defendant's attorney's request for my protected health information complies with 45 C.F.R. § 164.512(c)." (R. at 19-21). This controlling sentence is written in the conjunctive, and thus, each phrase stands alone and has an independent meaning.

Appellee has **conceded** that this sentence is written in the conjunctive, which confirms that defense counsel cannot utilize this authorization and renders it a total nullity. (Reply to Appellant's Petition for Interlocutory Appeal at. 20). The language of Appellee's purported medical authorization

makes it impossible for Appellants to utilize O.C.G.A. § 9-11-9.2 to obtain PHI and unilaterally forces Appellants to forego obtaining PHI as contemplated under O.C.G.A. § 9-11-9.2. Instead, Appellants are limited to traditional discovery methods like third-party requests, subpoenas and depositions due to the non-compliant language found in Appellee's medical authorization.

The medical authorization also does not permit Appellants to conduct *ex parte* interviews with the Appellee's treating physicians despite the fact that Appellee has conceded that O.C.G.A. § 9-11-9.2 "appears to create that right." (R. at 19-21; MT at 23). The language of Appellee's medical authorization **prohibits** *ex parte* interviews by requiring Appellee's counsel to be present, thus giving Appellee full control over whether any such interview is permitted, authorized or even allowed to occur. Whether the language of the medical authorization is parsed or taken as a whole, the goals of the Appellee's medical authorization are twofold: (1) to preclude Appellants from obtaining PHI as authorized by O.C.G.A. § 9-11-9.2, and (2) to explicitly discourage Appellee's medical providers from releasing

information to defense counsel by including threats of HIPAA violations. (R. at 19-21).

The Appellee's failure to comply with the mandatory requirements of O.C.G.A. § 9-11-9.2 should have prompted the dismissal of Appellee's lawsuit as required by that statute. The trial court therefore erred in denying Appellant's Motion to Dismiss.

IV. HIPAA DOES NOT EXCUSE PLAINTIFF'S FAILURE TO COMPLY WITH O.C.G.A. § 9-11-9.2.

A. HIPAA overview.

HIPAA was enacted by the United States Congress to address issues relating to national health care and the health insurance system. The Act's stated goals are "simplifying the administration of health insurance," HIPAA pmbl., 110 Stat. at 1936, and "improving the efficiency and effectiveness of the health care system." HIPAA § 261. Aimed at administrative simplification, the enabling legislation further authorized the promulgation of privacy standards. HIPAA § 264.

The "Privacy Rule" regulations promulgated pursuant to this authority are set forth in 45 C.F.R. pts. 160 and 164. These regulations govern how

select entities may use and/or disclose a patient's medical information and identify several ways PHI can be disclosed. Three types of entities are subject to these privacy regulations (the "covered entities"): (1) health plans; (2) health care clearinghouses, and (3) health care providers who transmit health information in electronic form with a transaction covered by the regulations. 45 C.F.R. §§ 160.102 and 164.104.

The Privacy Rule expressly allows a covered entity to disclose PHI pursuant to a valid medical authorization under 45 C.F.R. § 164.508. 45 C.F.R. 164.502(a)(1)(iv). The Privacy Rule also allows a covered entity to disclose PHI in the context of a judicial or administrative proceeding in response to a court order, or subpoena, discovery request, or other lawful process if the "individual who is the subject of the protected health information that has been requested has been given notice of the request." 45 C.F.R. 164.512(e). The statutory framework of HIPAA is merely procedural and does not create a federal physician-patient privilege or federal privacy rights. Northwestern Memorial Hosp. v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004).

B. HIPAA Does not Preempt State Law Filing Requirements.

O.C.G.A. § 9-11-9.2 creates a filing requirement for medical malpractice plaintiffs. In order to initiate a valid medical malpractice action, the plaintiff must satisfy a variety of procedural requirements that include the filing of an expert affidavit (O.C.G.A. § 9-11-9.1), and a medical authorization form that authorizes the release of PHI and allows defense counsel to seek interviews with the plaintiff's treating physicians. O.C.G.A. § 9-11-9.2.

Those obligations are placed upon the plaintiff and are not governed by HIPAA. HIPAA only governs how a covered entity responds to a request for disclosure. Thus, HIPAA does not -- and cannot excuse non-compliance with the mandatory filing requirements of O.C.G.A. § 9-11-9.2.

C. HIPAA Does not Preempt O.C.G.A. § 9-11-9.2.

1. Statutory Preemption under HIPAA

Preemption "grows from the premise that when state law conflicts or interferes with federal law, state law must give way." Continental Pet Technologies, Inc. v. Palacias, 269 Ga. App. 561, 562 (2004). HIPAA expressly provides that its provisions "supersede any contrary provision of

State Law . . ." 42 U.S.C. § 1320d-7(a)(1). A state law is "contrary" to the regulations promulgated under HIPAA when:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of part C of title IX of the Act or Section 264 of Pub. L. 104-191, as applicable.

45 C.F.R. § 160.202.

Because it is possible to comply with both HIPAA and O.C.G.A. § 9-11-9.2, and because this state law is not an obstacle to the purposes and objectives of HIPAA, it is not preempted.

2. The authorization required by O.C.G.A. § 9-11-9.2 is not contrary to the provisions of HIPAA.

Under HIPAA the use of medical authorization forms to obtain PHI is recognized. 45 C.F.R. § 164.508. Both state and federal courts have repeatedly allowed litigants to obtain PHI by requiring a patient/plaintiff execute a HIPAA compliant medical authorization form. See Hawes v.

Golden, 2004 LEXIS 4520, *4 (affirming trial court's order requiring plaintiff to produce all medical records or execute a HIPAA authorization so that defendant could seek disclosure); Hitchcock v. Suddaby, No. 00219/02, 2005 N.Y. Misc. LEXIS 1019, *8 (ordering plaintiff to supply HIPAA compliant authorization); Smith v. Rafalin, 2005 Misc. LEXIS 546 (ordering plaintiff to supply defendant with appropriate medical authorization). Thus, it is not contrary to HIPAA to require a plaintiff to execute a medical authorization form as contemplated by O.C.G.A. § 9-11-9.2.

Indeed, it is not contrary to the provisions of HIPAA to require a malpractice plaintiff to authorize defense counsel to speak with his or her treating physicians, and state laws governing *ex parte* interviews are not preempted by HIPAA. See Smith v. Am Home Prod. Corp. Wyeth-Ayerst Pharmaceutical, 855 A.2d 608, 624 (N.J. Super. Ct. Law Div. 2003)(holding that since *ex parte* interviews are not addressed by HIPAA, state laws which authorize *ex parte* interviews must be upheld provided the interview is conducted pursuant to a HIPAA compliant authorization form); Steele v. Clifton Springs Hosp., NO. 200/9813, 2005 N.Y. Misc LEXIS 59 (Sup. Ct. N.Y. Jan. 21, 2005)(granting defense motion to compel plaintiff to provide

HIPAA compliant authorizations permitting defense counsel to meet *ex parte* with plaintiff's treating physicians); Smith v. Rafalin, 2005 N.Y. Misc LEXIS 546 (holding that HIPAA does not preclude *ex parte* interviews of health care providers so long as a plaintiff executes an authorization to that effect or defense counsel provides notice); Croskey v. BMW of North America, Inc., 2005 U.S. Dist. LEXIS 3673 (E.D. Mich. Feb. 14, 2005)(holding that under HIPAA plaintiff could execute an authorization form allowing defense counsel to conduct *ex parte* conferences with plaintiff's treating physicians).

In enacting O.C.G.A. § 9-11-9.2, the Georgia legislature is presumed to have enacted this Code Section with knowledge of regulatory requirements of HIPAA and, therefore, it must "be construed in connection and in harmony with the existing law." Dowis v. Mud Slinger Concrete, Inc., 269 Ga. App. 805, 807 (2004); see also Blackmon v. State, 266 Ga. App. 877, 879 (2004). "[T]he courts will not presume the legislature intended to enact an unconstitutional law[,]" and "whenever possible, a statute must be construed to affirm its constitutionality[.]" Hamilton v. Renewed Hope, Inc., 277 Ga. 465, 467 (2003).

O.C.G.A. § 9-11-9.2 merely requires a malpractice plaintiff to execute a medical authorization form at the time suit is filed allowing defense counsel to obtain PHI and to seek *ex parte* interviews with the plaintiff's treating physicians. The regulations promulgated under HIPAA are not at odds with O.C.G.A. § 9-11-9.2 and both this Code Section and HIPAA can easily be complied with.[2]

[2] Appellee has acknowledged that O.C.G.A. § 9-11-9.2 can be read in harmony with HIPAA. (See Appellee's Reply to Appellant's Petition for Interlocutory Appeal at 13-15). Appellee takes the position that the issue of preemption only arises if O.C.G.A. § 9-11-9.2 precludes a malpractice plaintiff from placing conditions on *ex parte* contact with her treating physicians. (See Appellee's Reply to Appellant's Petition for Interlocutory Appeal at 13-15).

3. HIPAA does not preempt state laws governing the waiver of of physician-patient confidentiality or the relevancy of a plaintiff's PHI in litigation.

It is well-settled that HIPAA does not create any substantive rights or a private right of action. See Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004). "All that 45 C.F.R. § 164.512(e) should be understood to do, therefore, is create a procedure for obtaining authority to use medical records in litigation." Id. at 925-926. HIPAA does not define what is properly discoverable or relevant in medical malpractice litigation, or for that matter, other types of litigation. 45 C.F.R. § 164.512(e).

Whether medical information regarding a plaintiff remains private, is relevant or is discoverable is therefore governed by Georgia law, and not HIPAA. Georgia has long recognized that in the context of litigation a patient puts his care and treatment at issue when suit is filed and waives any privilege "to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil proceeding." O.C.G.A. § 29-9-40. Georgia has also long recognized that *ex parte* conferences to discuss a

plaintiff's medical care are authorized under O.C.G.A. § 24-9-40. Orr v. Sievert, 162 Ga. App. 677 (1982).

Georgia law controls the scope of medical information or history that may remain private in the litigation context, and O.C.G.A. § 9-11-9.2 simply provides that in a malpractice case a plaintiff's medical history is information within the pertinent scope of inquiry. State law also governs the propriety of *ex parte* interviews, and laws that have been interpreted as allowing *ex parte* interviews are not preempted by HIPAA. See Smith v. Am. Home Prod. Corp. Wyeth-Ayerst Pharmaceutical, 855 A.2d 609, 624 (N.J Super. Ct. Law Div. 2003); Croskey v. BMW of North America, Inc., 2005 U.S. Dist. LEXIS 3673 (E.D. Mich. February 14, 2005)(*ex parte* conferences permitted under Michigan law with HIPAA compliant authorization); Bayne v. Provost, 359 F. Supp. 2d 234 (N.D.N.Y. 2005)(*ex parte* conferences permitted under New York law pursuant to qualified protective order).

Courts have also recognized that a deposition is not the same as an *ex parte* interview. Bayne v. Provost, 359 F. Supp. 2d 234 (N.D.N.Y. 2005)("a deposition is not the same as an *ex parte* interview and this Court does not have the authority to limit, control, or nullify the benefits an interview may

have over a deposition, and neither should the plaintiff."); see also Smith v. Rafalin, 2005 N.Y. Misc. LEXIS 545, at *4 (it would be "manifestly unfair" if plaintiff could refuse to execute a HIPAA compliant authorization, and thereby prevent defense counsel from interviewing her physicians *ex parte*, because it would allow plaintiff one-side access to her physicians). HIPAA was never intended to allow medical malpractice plaintiffs to control the timing of the release of information that is otherwise relevant or discoverable. Bayne v. Provost, supra.

CONCLUSION

For the foregoing reasons, Appellants Thomas M. Allen, M.D., Four Rivers Orthopedic Associates, P.C. and Meadows Regional Medical Center hereby request that this Court reverse the trial court's Order denying Appellants' Motion to Dismiss.

Respectfully submitted this _____ day of _____, 2005.

Signatures on following page

_____
David N. Nelson
Georgia Bar No. 537760

Attorney for Defendants
Thomas M. Allen, M.D. and Four Rivers
Orthopedic Associates, P.C.

OF COUNSEL:
CHAMBLESS, HIGDON, RICHARDSON,
KATZ & GRIGGS, LLP
577 Walnut Street - Suite 200
P. O. Box 246
Macon, Georgia 31298
478/745-1181

_____
John C. Daniel, III
Georgia Bar No. 204222

Attorney for Defendant Meadows
Regional Medical Center, Inc.

OF COUNSEL:
MARTIN SNOW, LLP
240 Third Street
P.O. Box 1606
Macon, Georgia 31202
478/749-1700

CERTIFICATE OF SERVICE

I, David N. Nelson, Attorney of Record for Appellants, THOMAS M. ALLEN, M.D. AND FOUR RIVERS ORTHOPEDIC ASSOCIATES, P.C., do hereby certify that I have this day served the within and foregoing BRIEF OF APPELLANTS THOMAS M. ALLEN, M.D., FOUR RIVERS ORTHOPEDIC ASSOCIATES, P.C. AND MEADOWS REGIONAL MEDICAL CENTER, INC. upon Mr. William H. Pinson, Jr., Attorney of Record for Appellee-Plaintiff Ernestine C. Wright by mailing a true and correct copy thereof, properly addressed and with sufficient postage affixed thereon to ensure delivery to them at their address of record, to wit:

Mr. William H. Pinson, Jr.
Savage, Turner, Pinson & Karsman
Post Office Box 10600
Savannah, Georgia 31401

Counsel for Ernestine C. Wright

Appellee-Plaintiff

Mr. Lawrence J. Meyers
Smith Moore LLP
3700 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309

Counsel for Defendant
Zimmer US, Inc.

This _____ day of _____, 2005.

_____
David N. Nelson