

**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

**ANGIE WALTERS, Individually, and )  
as Administrator of the Estate of JOHN )  
WILLIAM WALTERS and MARTHA A. )  
MILLER, as Trustee in Bankruptcy of John )  
William Walters and Angie Walters, )**

**Plaintiffs, )**

**v. )**

**MANOLO GALLEGO, M.D., )  
Individually, MANOLO GALLEGO, M.D., )  
P.C., MANOLO GALLEGO, M.D., P.C. )  
d/b/a NORTH GEORGIA KIDNEY )  
SPECIALISTS, COBB COUNTY )  
DIALYSIS, L.L.C., WELLSTAR HEALTH )  
SYSTEM, INC. d/b/a KENNESTONE )  
HOSPITAL, and KENNESTONE )  
HOSPITAL, INC., )**

**Defendants. )**

**CIVIL ACTION FILE NO.  
2005 CV 103218**

**DEFENDANT COBB COUNTY DIALYSIS, L.L.C.'S BRIEF IN SUPPORT OF  
MOTION TO DISMISS COUNT V OF PLAINTIFFS' COMPLAINT FOR  
DECLARATORY JUDGMENT**

COMES NOW Defendant Cobb County Dialysis, L.L.C., by and through its attorneys of record, and files this Brief in Support of its Motion to Dismiss Count V of Plaintiffs' Complaint for Declaratory Judgment, showing this Court as follows:

**I. Introduction and Statement of Issues.**

This is a medical malpractice action which has been pending since July of 2002. See Complaint in *Walters v. Gallego, et al.*, Civil Action 02-CV-1480, Superior Court of Cherokee County, attached hereto as Exhibit A. Having been originally filed in the Superior Court of Cherokee County, Plaintiffs voluntarily dismissed their action after

nearly three (3) years of litigation, and have filed the present renewed action in this Court. As part and parcel of their Complaint for Damages, Plaintiffs have asserted a Count for Declaratory Judgment, seeking a ruling from this Court that O.C.G.A. § 9-11-9.2, which provides for the filing of a medical authorization form as a condition of maintaining an action for medical malpractice, is invalid and unconstitutional. See Complaint, Count Count V. In conjunction with their action for declaratory judgment, Plaintiffs’ have filed a Motion for Temporary Injunction and/or Restraining Order pursuant to O.C.G.A. § 9-4-3, seeking to have this Court relieve Plaintiffs of compliance with O.C.G.A. § 9-11-9.2 “until such time that the Court can rule on the substantive legal issues presented[.]” See Brief in Support of Motion for Temporary Injunction, p. 7.

In their brief in support of their motion for a temporary injunction and restraining order, Plaintiffs have provided neither this Court nor the Defendants with the benefit of any argument in support of their assertions. Rather, Plaintiffs baldly assert that O.C.G.A. § 9-11-9.2 conflicts with, and is therefore preempted by, HIPAA.<sup>1</sup> Moreover, Plaintiffs go on to assert, in conclusory fashion, that O.C.G.A. § 9-11-9.2 violates numerous provision of the United States and Georgia Constitutions. The absence of any argument in support of Plaintiffs’ bald and conclusory assertions is revealing, and as is addressed in detail below, O.C.G.A. § 9-11-9.2 is neither inconsistent with, nor preempted by, HIPAA, and is a constitutional exercise of legislative authority.

As an initial matter, and as is set forth in Section II.A. of this brief, the issues Plaintiffs raise in their count for declaratory judgment and brief in support of their motion for temporary injunction and restraining order are moot. While Plaintiffs object to

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<sup>1</sup> “HPIAA” is the acronym commonly used to reference the Health Insurance Portability and Accountability Act of 1996, codified at 42 U.S.C. § 1330(d) *et seq.*

providing Defendants with a medical authorization form so as to enable Defendants to obtain medical information pertinent to the investigation, evaluation, and defense of Plaintiffs' medical malpractice claims, this litigation has been pending for three (3) years, and this medical information has long-since been obtained. These medical records have been obtained pursuant to Georgia's Civil Practice Act, specifically O.C.G.A. §9-11-34(c), with both the knowledge and consent of Plaintiffs. Plaintiffs' objection to Defendants obtaining such information by way of a medical release authorization is therefore moot. Plaintiffs' Complaint for Declaratory Judgment should therefore be dismissed, and the accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

Boiled down, Plaintiffs' argument is that Plaintiffs, despite having placed John William Walters' medical treatment and condition squarely at issue by filing a complaint alleging that medical negligence resulted in his injuries and death, should nonetheless have the ability to claim that medical information pertinent to these claims and defenses thereto are private and therefore privileged. As is set forth in Section II.B below, this is not the law in Georgia, and Georgia has long recognized, by statute, that a plaintiff waives any privacy interest he or she has in his or her medical records by placing the same at issue in an action at law for personal injuries. O.C.G.A. § 24-9-40. Moreover, Georgia law has long recognized the right of defendants in a medical malpractice action to consult with a plaintiff's treating physicians towards the end of preparing a defense to the plaintiff's charges, and that the principles underlying the work product doctrine, as well as concepts of fundamental fairness, dictate that plaintiffs' counsel should not be

able to control or impede a defendant's ability to prepare his defense by requiring that defendants do so only with the consent, and in the presence of, plaintiffs' counsel.

Section II.C notes that neither Georgia's common law nor O.C.G.A. § 9-11-9.2 conflicts with, or is preempted by, HIPAA. Courts construing HIPAA have consistently held that the regulations enacted thereunder do not create any sort of federal physician-patient privilege. Nothing in O.C.G.A. § 9-11-9.2 is inconsistent with the provisions of HIPAA; nor does anything in O.C.G.A. § 9-11-9.2 frustrate the purpose of HIPAA. Moreover, courts have specifically held that HIPAA does not prohibit the ability of medical malpractice defendants to prepare their work product by consulting with a plaintiff's treating physicians apart from the presence or consent of plaintiff's counsel. Consistent with what has been long-established under Georgia law, these courts have noted that nothing in HIPAA was intended to undermine the work product doctrine or provide a party who has placed his or her medical treatment and condition at issue with an unfair tactical advantage in litigation by controlling when, if, and how a medical malpractice defendant may prepare his defense.

Section II.D addresses Plaintiffs' several conclusory constitutional challenges. O.C.G.A. § 9-11-9.2 is not a prohibited "retroactive" law, as it affects only procedural, not substantive, rights of a medical malpractice plaintiff. O.C.G.A. § 9-11-9.2 does not violate the "Due Process," "Equal Protection," or "Privileges and Immunities" provisions of the United States and Georgia Constitutions because it is rationally related to the legitimate end of ensuring that a medical malpractice defendant has the means necessary to obtain medical information which the plaintiff has placed at issue so as to investigate, evaluate, and defend the charges levied against him. Finally, O.C.G.A. § 9-11-9.2 does

not violate the prohibition against a bill containing more than one subject matter because it, like the other statutes either enacted or amended by Senate Bill 3, are unified by the singular purpose of making certain reforms in the civil justice system so as to insure the efficient resolution of civil liability claims, particularly health care liability claims, and health care providers' continued access to affordable liability insurance. As has been recognized by several courts, such legislative objectives fall squarely within the legislature's inherent police power to enact laws for the well-being of its citizenry.

In sum, the issues raised in Plaintiffs' Complaint for Declaratory Judgment and accompanying Motion for Temporary Injunction and/or Restraining Order are moot. Insofar as this Court decides they are not, Plaintiffs' assertion (tellingly devoid of any actual argument) that O.C.G.A. § 9-11-9.2 violates HIPAA or constitutional guarantees is without merit, and Plaintiffs' Complaint for Declaratory Judgment should be dismissed, and Plaintiffs' Motion for Temporary Injunction and/or Restraining Order should be denied.

## **II. Argument and Citation of Authority.**

**A. A declaratory judgment in this matter is not available to Plaintiffs because the rights of the parties have already accrued, and Plaintiff is merely seeking an advisory opinion from this Court regarding the validity of a statute.**

In their renewed Complaint, Plaintiffs have, pursuant to O.C.G.A. § 9-4-2, sought a declaratory judgment regarding their obligations to provide medical authorization forms to the Defendants pursuant to the requirements of O.C.G.A. § 9-11-9.2. In conjunction with their complaint for declaratory relief, Plaintiffs have moved this court for a temporary injunction or restraining order, pursuant to O.C.G.A. § 9-4-3, pending this Court's resolution of the relief sought in Plaintiffs' count for declaratory judgment.

The purpose of a declaratory judgment is to provide judicial guidance when, in the context of an actual dispute, a plaintiff's future obligations or rights are uncertain. A court may properly entertain a petition for declaratory relief when it is necessary "to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest." Glynn-Brunswick Memorial Hosp. Auth. v. Gibbons, 243 Ga. App. 341, 344-345, 530 S.E.2d 736 (2000). At the same time, a declaratory judgment is improper where there is no live and ongoing controversy between the parties, and the issuance of a declaratory judgment would merely answer some academic or abstract question about the state of the law or validity of a particular statute. East Beach Properties, Ltd. v. Taylor, 250 Ga. App. 798, 802, 552 S.E.2d 103 (2001); Burton v. Composite Board of Medical Examiners, 245 Ga. App. 587, 588, 538 S.E.2d 501 (2000); West v. Judicial Council of Georgia, 184 Ga. App. 894, 895, 363 S.E.2d 176 (1987).

"The object of [a] declaratory judgment is to permit determination of a controversy *before* obligations are repudiated or rights are violated." Chastain v. United States Fidelity & Guar. Co., 190 Ga. App. 215, 216, 378 S.E.2d 397 (1989) (emphasis in original); Head v. DeKalb County, 246 Ga. App. 756, 760, 542 S.E.2d 176 (2000). Where rights or obligations have already been acted upon, any petition for declaratory relief merely raises issues which are moot. Barksdale v. DeKalb County, 254 Ga. App. 7, 7, 561 S.E.2d 163 (2002); Dean v. City of Jessup, 249 Ga. App. 623, 624, 549 S.E.2d 466 (2001). Such a petition seeks merely an advisory opinion from the court, which is not permitted under Georgia law. Morgan v. Guaranty National Cos., 268 Ga. 343, 344-345,

489 S.E.2d 803 (1997); State Farm Mut. Auto. Ins. Co. v. Hillhouse, 131 Ga. App. 524, 525, 206 S.E.2d 627 (1974). Where rights and obligations have already been acted upon, any claimed uncertainty of the plaintiff is without legal significance, and a declaratory judgment is improper. Gibbons, 243 Ga. App. at 345; Interactive Learning Systems, Inc. v. Akers, 201 Ga. App. 784, 786, 412 S.E.2d 291 (1991).

Here, the issues raised by Plaintiffs in their Complaint for Declaratory Judgment and accompanying Motion for Temporary Injunction have long-since been rendered moot. While Plaintiffs have just recently filed their renewed complaint, litigation in the prior action has been pending for over three (3) years - since July 5, 2002. Over the course of discovery in the underlying action, this Defendant has obtained medical information, including voluminous medical records, from John William Walters' treating providers. See Non-party Requests for Production of Documents served upon Mr. Walters' several treating providers, attached hereto as Exhibit B. These medical records were obtained pursuant to O.C.G.A. § 9-11-34(c)(2), which expressly allows "discovery against a nonparty who is a practitioner of the healing arts or a hospital or health care facility[.]" Plaintiffs' counsel was served with a copy of these requests, and this Defendant has received the records pursuant to the request *with the consent* of Plaintiffs' counsel. See Plaintiffs' Responses to Defendant's Non-Party Requests, attached hereto as Exhibit C.<sup>2</sup> Indeed, Plaintiffs' counsel himself provided Defendant with authorization forms so as to facilitate obtaining Mr. Walters' medical records,<sup>3</sup> and even provided

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<sup>2</sup> Plaintiffs objected to such requests only to the extent the records may have included mental-health records of Mr. Walters, which unlike medical records, are subject to privilege in litigation under Georgia law. See O.C.G.A. § 24-9-21 (communications between patient and his or her psychiatrist, psychologist, and other enumerated mental health professionals privileged). Neither O.C.G.A. § 9-11-34(c) nor O.C.G.A. § 9-11-9.2(c) purport to abrogate this privilege, and the protection against the disclosure of such information remains intact.

<sup>3</sup> See Exhibit D.

Defendant copies of various medical records pertaining to Mr. Walters which Plaintiff's counsel had obtained.<sup>4</sup> Such medical information has been obtained, of course, for the purpose of enabling this Defendant to prepare its defense, and pertains to issues pertinent to the subject matter and defense of the action, including the treatment at issue, the injuries Mr. Walters is alleged to have suffered as a result of this treatment, preexisting medical conditions Mr. Walters had which demonstrate his predisposition for stroke and tend to negate the contention that any treatment provided by this Defendant was a proximate cause of any injuries suffered by Mr. Walters.

In sum, the issue as to whether Plaintiffs have an obligation to provide Defendants with an authorization so as to obtain medical records and information pertinent to the defense of this medical malpractice action has been rendered moot, as Defendants have already obtained the medical records of Plaintiffs' decedent. This case does not present a live and actual controversy between the parties, and is not a justifiable claim under Georgia's Declaratory Judgment Act. For these reasons, Plaintiffs' Complaint for Declaratory Judgment should be dismissed, and the accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

**B. O.C.G.A. § 9-11-9.2 does not deprive the Plaintiffs of any rights otherwise existing under Georgia law, but merely codifies long-standing principles of Georgia law.**

As part of Senate Bill 3, O.C.G.A. § 9-11-9.2 was enacted into law on February 16, 2005. Simply put, it provides for a procedure designed to streamline and facilitate the exchange of medical records and information in medical malpractice actions - actions in which the plaintiff has placed his or her medical condition squarely in issue. This statute provides that in actions alleging medical negligence against health care professionals or

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<sup>4</sup> See Exhibit E.

facilities, a plaintiff is required to file a medical authorization form contemporaneously with the filing of his or her complaint. O.C.G.A. § 9-11-9.2(a). The plaintiff's failure to file such an authorization subjects the plaintiff's complaint to dismissal. Id.

Subsection (b) of this statute sets forth the purpose of this requirement, as well as information the authorization is required to contain. Specifically, this subsection provides that the "authorization shall provide that the attorney representing the defendant is authorized to obtain and disclose protected health information contained in the medical records to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the complaint which pertain to the plaintiff, or where applicable, the plaintiff's decedent whose treatment is at issue in the complaint." O.C.G.A. § 9-11-9.2(b). This subsection also codifies long-standing Georgia law, as set forth in Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982), by providing that the authorization "includes the defendant's attorneys right to discuss the care and treatment of the plaintiff or, where, applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians." Id.

Subsection (c) of the statute, adopting the language found in the regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (hereinafter "HIPAA"), codified at 42 U.S.C. § 1330(d) *et seq.*, also provides protection from disclosure all "protected health information" of the plaintiff or plaintiff's decedent which is considered to be "privileged." O.C.G.A. § 9-11-9.2(c).

Boiled down, this statute simply ensures that a defendant, against whom a complaint of medical malpractice has been filed, will have the means necessary to defend the charges against him. The statute accomplishes this objective by requiring the

plaintiff, as a condition of maintaining the medical malpractice action, to provide the defendant with the ability to obtain medical information relevant to the defense of action. The statute makes clear that a medical malpractice defendant will have the ability to obtain not only the medical records of the plaintiff, who has placed his treatment and medical condition at issue by filing the action, but will have the ability to consult with the plaintiff's treating physicians, in defense of the charges of medical negligence filed against him.

While the Plaintiffs complain that this statute somehow "requires Plaintiffs to relinquish the 'protection' otherwise provided by law[.]" this statute merely codifies what has been the long-standing law of Georgia. O.C.G.A. § 24-9-40 provides that a patient's privilege in maintaining the confidences of his medical information "shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding." Moreover, under Georgia common law, it is well-established that a plaintiff waives any privilege to his medical condition by placing the same at issue in filing a complaint for personal injuries. See, e.g. Gilmore v. State, 175 Ga. App. 376, 333 S.E.2d 210 (1985); see also Shipes v. BIC Corp., 154 F.R.D. 301, 306 (M.D. Ga. 1994).

It is also well-established that defendants in a medical malpractice action may consult with the plaintiff's treating physicians in an effort to obtain information relevant to the plaintiff's treatment and medical condition so as to enable them to prepare a defense to plaintiff's action. This matter was address in the seminal case of Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982), wherein the plaintiff had sued a physician and hospital for medical malpractice. In the course of litigation, defense

counsel consulted with and obtained the affidavits of plaintiff's subsequent-treating physicians for use with defendants' motion summary judgment, which was granted. On appeal, the plaintiff complained that she had not authorized defendants to consult with her other treating physicians so as to obtain information relevant to the defense of the action.

In rejecting this argument, the court flatly held that there is no physician-patient privilege in Georgia which prevented defendants from obtaining such information without the plaintiff's consent. Id. at 678. The court noted that while the Hippocratic Oath imposed upon physicians a duty to maintain the confidences of their patients, such a duty no longer exists where a plaintiff waives the confidences of his medical condition. Id. The court held that any "qualified right" implicit in the Hippocratic Oath a plaintiff/patient has in the confidentiality of his medical condition is "waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue" in a lawsuit, and that "[l]ogic compels" the conclusion that the plaintiff had done just that in filing a medical malpractice action challenging the care provided by the defendants." Id. 678-679. The court also recognized that any other holding would unfairly allow one party to unilaterally control the flow of information and hinder the other party's ability to obtain information relevant and necessary in the preparation of its defense. Id. at 679-680.

In summary, O.C.G.A. § 9-11-9.2 merely codifies what has been the long-standing law of Georgia. It does not, therefore, "require[] Plaintiffs to relinquish the 'protection' otherwise provided by law[.]" For this reason, Plaintiffs' Complaint for

Declaratory Judgment should be dismissed, and the accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

**C. HIPAA does not create a federal privilege for a plaintiff’s medical information and does not preempt or conflict with Georgia law.**

**1. O.C.G.A. § 9-11-9.2 does not conflict with the “purpose and objective” of HIPAA, and compliance with both HIPAA and O.C.G.A. § 9-11-9.2 and is “possible”; therefore, O.C.G.A. § 9-11-9.2 is not preempted by HIPAA.**

HIPAA was enacted by the United States Congress to ensure increased access to health care by expanding the portability and renewability of health care insurance. See, e.g. In re Diet Drug Litigation, 2005 W.L. 1253530, \*2 (N.J. Super. Ct. Law Div. 2005). As has been observed by the *Ad Hoc* HIPAA Committee of the Tenth Judicial Circuit of Alabama, “the primary purpose of HIPAA as reflected in its legislative history is aimed at regulating the commercial behavior of the national healthcare industry, not the conduct of parties in civil litigation.” *Standard HIPAA Order in Civil Actions*, 65 Ala. Law. 332, 333 (2004) (citing 68 Fed. Regs. 8224-01). As has been noted by several courts, HIPAA does not create a federal patient-physician privilege; rather, it creates a procedure by which medical information can be obtained. Northwestern Memorial Hosp. v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004) (“We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege.”); Smith v. Rafalin, 2005 W.L. 697581, \*2 (N.Y. App. Div. 2005) (“HIPAA does not create a federal physician-patient privilege, but is procedural in setting minimum federal requirements for the production of PHI [protected health information].”).

The regulations promulgated pursuant to HIPAA provide for several ways in which medical records may be obtained. “*Except as otherwise permitted or required by*

*this subchapter*, a covered entity may not use or disclose protected health information<sup>5</sup> without an authorization which is valid under this section.” 45 C.F.R. § 164.508(a)(1) (emphasis supplied).<sup>6</sup> Elsewhere within this subchapter, the regulations specifically contemplate and provide for ways in which medical records may be obtained in the context of litigation. Ashcroft, 362 F.3d at 925 (7th Cir. 2004) (HIPAA regulations “create a procedure for obtaining authority to use medical records in litigation.”). Apart from the use of an authorization, medical records may be obtained by way of: 1) court order; 2) subpoena; 3) discovery request; or 4) “other lawful process.” 45 C.F.R. § 164.512(e)(1)(i). Pursuant to the regulations, these provisions for obtaining medical records under HIPAA preempt “contrary” state law. 45 C.F.R. § 160.203. State law is “contrary” to the regulations only where a “covered entity would find it impossible to comply with both State and federal requirements[,]” or the State law is fundamentally at odds with the “purposes and objectives” of HIPAA. 45 C.F.R. § 160.202.

Any preemption analysis begins with the Supremacy Clause of the United States Constitution, which provides that federal law is the “supreme Law of the Land.” U.S. Const., art. VI, cl. 2. Preemption “grows from the premise that when state law conflicts or interferes with federal law, state law must give way.” Continental Pet Technologies,

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<sup>5</sup> Under the HIPAA regulations, “covered entities” are defined to include health plans, health care clearinghouses, and health care providers. “Protected health information” is defined to include information pertaining to an individual’s health condition and the provision of health care to that individual. See 45 C.F.R. § 160.103.

<sup>6</sup> The section sets forth information the authorization must contain. The “core elements” of an authorization include: 1) a description of the records sought and the purpose for which the records are sought; 2) the identity of the parties authorized to release the records and the identity of the party authorized to receive the records; and 3) the dated signature of the individual whose records are being sought, along with an expiration date or event for the release. 45 C.F.R. § 164.508(c)(1). These requirements are nothing exotic or unusual, and typical of most any authorization. This section also requires that the individual whose records are being sought be provided with written notice regarding: 1) his or her rights to revoke the authorization; 2) the ability or inability of a healthcare provider or plan to condition treatment or coverage upon execution of the authorization; and 3) the potential that information

Inc. v. Palacias, 269 Ga. App. 561, 562, 604 S.E.2d 627 (2004). Federal law may preempt state law:

1) where there is a direct conflict between state and federal regulation; 2) where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”; or 3) where Congress has “occupied the field” in a given area so as to oust all state regulation.

Aman v. State, 261 Ga. 669, 671, 409 S.E.2d 645 (1991).

Preemption is not to be lightly inferred, and “the Supremacy Clause demands that state law be overridden only when it does ‘major damage to clear and substantial federal interests[.]’” Lanier v. Lanier, 278 Ga. 881, 883, 608 S.E.2d 213 (2005); see also State v. Klinakis, 206 Ga. App. 318, 321, 425 S.E.2d 665 (1992) (presumption against preemption in matters traditionally regulated by the states). The enactment of even comprehensive regulations is not sufficient to support the conclusion that Congress intended to preempt state regulation of a matter, and such a finding is “inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence[.]” and “tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.” Brogdon v. National Healthcare Corp., 103 F.Supp.2d 1322, 1340 (N.D. Ga. 2000). At bottom, “[t]he pertinent questions are whether [state law] conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal regulation to require nonrecognition.” Lanier, 278 at 883.

Here, O.C.G.A. § 9-11-9.2 is not fundamentally at odds with “the purposes and objectives” of HIPAA so as to require this court to declare it invalid as preempted by

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disclosed pursuant to the authorization may be redisclosed and no longer protected. 45 C.F.R. § 164.508(c)(2).

federal law. See 45 C.F.R. § 160.202. The text of O.C.G.A. § 9-11-9.2 makes it clear that it is designed to ensure fundamental fairness and a “level playing field” in litigation by ensuring that those against whom a charge of medical malpractice has been brought will have the ability to obtain medical information from the plaintiff’s medical providers - information which plaintiff has squarely placed in issue in his or her lawsuit. By contrast, HIPAA does not purport to create a federal patient-privilege for such information in the context of litigation. Ashcroft, 362 F.3d at 926; Rafalin, 2005 W.L. 697581 at \*2. Indeed, HIPAA specifically exempts litigation from those situations in which an authorization is required to obtain a patient’s medical records, and specifically contemplates that parties to personal injury litigation will have access to plaintiff’s medical records by way of the discovery process. 45 C.F.R. § 160.202. As noted by courts and commentators, the primary purpose of HIPAA is geared towards ensuring the availability of health care insurance, and it seeks primarily to regulate the commercial practices of the healthcare industry, not the conduct of parties in litigation. In re Diet Drug Litigation, 2005 W.L. 1253530 at \*2; see also *Standard HIPAA Order in Civil Actions*, 65 Ala. Law. at 333 (citing 68 Fed. Regs. 8224-01).

Moreover, a healthcare provider would not find it “impossible to comply with both” O.C.G.A. § 9-11-9.2 and HIPAA regulations. See 45 C.F.R. § 160.202. First, and again, HIPAA expressly sanctions a variety of alternative methods in which a party to personal injury litigation may obtain medical records, including by way of court order, subpoena, discovery request, and “other lawful process.” 45 C.F.R. § 164.512(e)(1)(i). Second, nothing in O.C.G.A. § 9-11-9.2 prohibits the authorization which plaintiffs are required to file with the medical malpractice complaint from containing the language

contemplated for “HIPAA-compliant” authorizations as set forth in 45 C.F.R. § 164.508(c)(2).

As discussed above, preemption is not to be lightly inferred, and “[a]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it; they are therefore to be construed in connection and in harmony with the existing law.” Dowis v. Mud Slinger Concrete, Inc., 269 Ga. App. 805, 807, 605 S.E.2d 615 (2004); see also Blackmon v. State, 266 Ga. App. 877, 879, 598 S.E.2d 542 (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, 589 S.E.2d 81 (2003). Because the provisions of O.C.G.A. § 9-11-9.2 are not at fundamental odds with the purposes and objectives of HIPAA, and because it is not “impossible” to comply the provisions of both O.C.G.A. § 9-11-9.2 and HIPAA, O.C.G.A. § 9-11-9.2 is not preempted by HIPAA. Accordingly, Plaintiffs’ Complaint for Declaratory Judgment should be dismissed, and the accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

**2. HIPAA does not prohibit Georgia law which allows counsel defending an action in which the plaintiff has placed his treatment or medical condition at issue from conducting informal interviews with plaintiff’s treating physicians without the consent of plaintiff’s counsel.**

Despite Georgia law, Plaintiff now challenges the right of defense counsel to prepare a defense, unimpeded by plaintiff’s counsel, by claiming that this long-recognized right is prohibited by HIPAA. Specifically, Plaintiff argues that O.C.G.A. § 9-11-9.2, “by requiring Plaintiffs to give Defendants’ attorneys the right to discuss John William Walters’ medical care and treatment with his treating doctors, . . . expressly

requires Plaintiffs to relinquish the ‘protection’ otherwise provided by” HIPAA. See Plaintiffs’ Brief in Support of Motion for Temporary Injunction, p. 5. Plaintiff also argues that, should the Court find that this well-established right of defense counsel is not prohibited by federal law, this Court should nonetheless “order that Plaintiffs’ counsel be allowed to be present at any meeting of Defendants and/or their counsel wherein John William Walters’ medical treatment is discussed with his medical providers.” See Count V, para. 26 of Plaintiff’s Complaint for Damages and Declaratory Judgment.

The desired relief that Plaintiffs seek - to prevent defense counsel from privately consulting with a plaintiffs’ treating physicians notwithstanding the fact that the plaintiff has placed in issue his treatment and medical condition - is nothing more than an effort to procure an unfair and unilateral tactical advantage in litigation. Plaintiffs seek to control the timing and ability of defense counsel in obtaining information relevant to the defense of the action. By claiming that defense counsel should be able to consult with a plaintiff’s treating physicians *only* in the presence of plaintiff’s counsel, Plaintiffs seek to deprive defense counsel of the ability to prepare their work product unless it falls under the microscope of plaintiffs, while remaining free of the same sort intrusion upon their own work product.

Plaintiffs’ argument must fail. Plaintiffs’ position is contrary to the law in Georgia, and as noted above, HIPAA does not create a federal patient-physician privilege. Ashcroft, 362 F.3d at 926; Rafalin, 2005 W.L. 697581 at \*2. Moreover, and perhaps more importantly, it is well-established that HIPAA does not speak to the propriety of defense counsel’s informal interviews with a plaintiff’s treating physicians in litigation wherein plaintiff has placed his medical condition in issue, and does not operate

as a bar to such well-accepted discovery methods. See, e.g. In re Diet Drug Litigation, 2005 W.L. 1253530, \*4 (N.J. Super. Ct. Law Div. 2005). Notwithstanding the enactment of HIPAA, the regulation of discovery in civil litigation in state courts is matter which has been historically vested in, and remains vested in, the states. Smith v. American Home Products Corp., 855 A.2d 608, 621-624 (N.J. Super. Ct. Law Div. 2003) (“Nowhere in HIPAA does the issue of *ex parte* interviews with treating physicians, as an informal discovery device, come into view. The court is aware of no intent by Congress to displace any specific state court rule, statute or case law on *ex parte* interviews. . . . Because informal discovery is not expressly addressed under HIPAA, the courts should be governed by state law[.]”).

The fact that HIPAA does not operate to abolish informal discovery methods historically regulated by state law rests not only upon principles of federalism described above, but also upon principles of fundamental fairness and ensuring a “level playing field.” As was persuasively stated by the court in Steele v. Clifton Springs Hosp., 788 N.Y.S.2d 587 (N.Y. App. Div. 2005), in noting that HIPAA does not prevent defense counsel from conducting interviews with the plaintiff’s treating physicians outside the presence, and without the consent, of plaintiff’s counsel:

In order to foster the truth seeking function of a trial and in order to ensure fundamental fairness and a level playing field, a plaintiff should not be allowed to simply refuse to provide an appropriate authorization to defendants yet seek to interview these same health care providers for potential trial testimony. . . . [N]o party has a proprietary interest in any evidence, and that absent unfair prejudice each party has the right to marshal . . . the testimony that best supports each position.

Id. at 590.

Similarly, the fact HIPAA does not abolish a defendant's attorneys ability to conduct informal interviews with a plaintiff's treating physicians outside the presence, and without the express consent, of plaintiff's counsel is supported by the principles underlying the work product doctrine. In Smith v. Rafalin, 2005 W.L. 697581 (N.Y. App. Div. 2005)<sup>7</sup>, the court rejected the argument that HIPAA abolished a medical malpractice defense attorney's right under state law to conduct discovery by way of informal interviews with plaintiff's treating physicians, noting that the plaintiff, in filing the medical malpractice suit, had waived any privilege which attached to her relevant medical conditions. Id. at \*3. The court observed that to disallow defense counsel from engaging in such discovery would lead to the "manifestly unfair" result of enabling plaintiff's counsel to "control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time[.]" thereby enabling plaintiff's counsel "to monitor his adversary's progress in preparing his case . . . while his own preparation is under no such scrutiny." Id. The court concluded that to disallow such interviews would not only increase the burden and expense of litigation by requiring formal depositions every time informal discovery would suffice, but would directly encroach upon a medical malpractice defense attorney's ability to compile information and develop case strategy outside the scrutiny of his opponent, a fundamental aspect of work product sanctioned by the Supreme Court's seminal holding in Hickman v. Taylor. Id. at 4.

In sum, HIPAA does not create a federal doctor-patient privilege, and the enactment of HIPAA does not change or alter the ability of defense counsel to informally consult with a plaintiff's treating physicians in medical malpractice actions so as to

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<sup>7</sup> A copy of this case is attached hereto as Exhibit F.

prepare a defense to a plaintiff's claim. Ashcroft, 362 F.3d at 925-926; In re Diet Drug Litigation, 2005 W.L. 1253530 at \*4. This practice remains, as it has traditionally been, within the realm of a state's ability to regulate litigation in its own courts. American Home Products Corp., 855 A.2d at 621-624. This result is dictated not only by principles of federalism, but also by concepts of fundamental fairness. One can only imagine the disadvantage to which a defendant, sued for medical malpractice, would be placed if the plaintiff's counsel were to have unfettered access to the plaintiff's treating physicians to develop evidence and theories in the prosecution of the action, while having the ability to deprive defense counsel the same opportunity. See Steele, 788 N.Y.S.2d at 590; Rafalin, 2005 W.L. 697581 at \*3. Plaintiff's suggestion that this is, or should be, the law constitutes little more than an effort to obtain an unfair tactical advantage to control if, when, and how defense counsel may prepare their case. This is not the state of the law under either Georgia or HIPAA.

Plaintiffs' "compromise" position - that if the Court is to "graciously" allow defense counsel the opportunity to prepare its defense in accordance with Georgia law by speaking to John William Walters' treating physicians, defense counsel only be allowed to do so in the presence of Plaintiffs' counsel - has been rejected as repugnant to the ability of counsel to develop defense theories without being held under the microscope of opposing counsel, a cornerstone on the work product doctrine enunciated by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947). Rafalin, 2005 W.L. 697581 at \*4. The reasoning of Hickman v. Taylor has been adopted by the Georgia Supreme Court (indeed, in a medical malpractice case), which has observed:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by

opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference[.]

McKinnon v. Smock, 264 Ga. 375, 376, 445 S.E.2d 526 (1994) (citing Hickman, 329 U.U. at 510-511)). Defense counsel do not seek to intrude upon the private consultations Plaintiffs' counsel have with Mr. Walters' treating providers in their prosecution of this action, and the rationale articulated in favor of the work product doctrine compels the result that Plaintiffs' counsel not be permitted to do the same.

For these reasons, Plaintiffs' Complaint for Declaratory Judgment should be dismissed, and the accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

**D. O.C.G.A. § 9-11-9.2 is constitutional.**

Without providing either this Court or the Defendants the benefit of any argument in support of their assertions, Plaintiffs nonetheless contend that O.C.G.A. § 9-11-9.2 is violative of six (6) provisions of Georgia's Constitution, and two (2) provisions of the United States Constitution. Before addressing Plaintiffs' individual contentions, it is important to note that "[a]n act of the General Assembly carries a strong presumption of constitutionality, and therefore, should not be set aside unless it 'plainly and palpably' conflicts with a constitutional provision." Glisson v. Hospital Auth. of Valdosta, 224 Ga. App. 649, 651, 481 S.E.2d 612 (1997). The legislature is presumed to enact laws with knowledge of and reference to existing law, and "whenever possible, a statute must be construed so as to affirm its constitutionality[.]" Hamilton v. Renewed Hope, Inc., 277 Ga. 465, 467, 589 S.E.2d 81 (2003); Old South Duck Tours v. Mayor and Aldermen of Savannah, 272 Ga. 869, 871, 535 S.E.2d 751 (2000). Because, as is discussed in detail

below, O.C.G.A. § 9-11-9.2 is not violative of any constitutional provision, Plaintiffs' Complaint for Declaratory Judgment should be dismissed, and the accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

**1. O.C.G.A. § 9-11-9.2 does not violate the prohibition against the enactment of retroactive laws under the Georgia Constitution (Ga. Const. Art. 1, § 1, Para. 10).**

Art. 1, § 1, Para. 10 of the Constitution of the State of Georgia provides that “[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.” Courts construing this constitutional provision have consistently held that the prohibition against the enactment of retroactive laws applies only with respect to rights which are *substantive* in nature, not rights which are *procedural* in nature. Dowdy v. Earthwise Restaurant Management, Inc., 221 Ga. App. 220, 224, 471 S.E.2d 42 (1996).

Generally statutes prescribe for the future and that is the construction to be given unless there is a clear contrary intention shown. [*Cits. omitted*] On the other hand, where a statute governs only procedure of the courts, including the rules of evidence, it is to be given retroactive effect absent an expressed contrary intention.

Polito v. Holland, 258 Ga. 54, 55, 365 S.E.2d 273 (1988).

In determining the distinction between laws which are substantive and laws which are procedural, the Georgia Supreme Court has held that substantive law is that law which “creates rights, duties, and obligations[,]” whereas procedural law is that law which “prescribes the methods of enforcement of rights, duties, and obligations.” Id. The Georgia courts have consistently held that the sister statute of O.C.G.A. § 9-11-9.2 - O.C.G.A. § 9-11-9.1, which requires the filing of an expert's affidavit contemporaneously with a complaint alleging professional malpractice, including

medical malpractice - is a procedural law which is to be retroactively applied. Mug a Bug Pest Control v. Vester, 270 Ga. 407, 509 S.E.2d 925 (1999); Kneip v. Southern Engineering Co., 260 Ga. 409, 395 S.E.2d 809 (1990); Blackmon v. Thompson, 195 Ga. App. 589, 394 S.E.2d 795 (1990). These courts have so found because the statute neither altered “the standard of care to be applied not the measure of recovery”; rather, the “statute merely prescribes a procedure for enforcing that right” to bring an action for professional malpractice. Precision Planning, Inc. v. Wall, 193 Ga. App. 331, 332, 387 S.E.2d 610 (1989).

Here, like O.C.G.A. § 9-11-9.1, O.C.G.A. § 9-11-9.2 does not alter the standard of care nor the measure of recovery in a medical malpractice action. The statute does not alter the circumstances under which a plaintiff’s cause of action sounding in medical malpractice accrues. Rather, the statute merely provides for a procedure by which a plaintiff must comply to enforce his or her right to maintain a cause of action for medical malpractice. The statute does this by codifying preexisting Georgia law that where a plaintiff places his or her medical condition at issue by filing a complaint challenging the treatment provided, and seeking recovery for his or her injuries as a result of said medical treatment, the plaintiff waives whatever qualified right she had to maintain the confidentiality of his or her medical condition for purposes of prosecuting the action. See, e.g. Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982); Shipes v. BIC Corp., 154 F.R.D. 301, 306 (M.D. Ga. 1994).

As a law which is procedural in nature, the constitutional proscription against retroactive laws is inapplicable, and Plaintiffs’ contention that O.C.G.A. § 9-11-9.2

violates the proscription against retroactive laws as provided by Art. 1, § 1, Para. 10 of the Constitution of the State of Georgia is without merit.

**2. O.C.G.A. § 9-11-9.2 is not constitutionally infirm under the Due Process Clauses of the United States (14th Amendment) or Georgia Constitutions (Ga. Const. Art. I, § I, Para. I).**

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property without due process of law[.]” Similarly, Art. I, § I, Para. I of the Georgia Constitution provides that “[n]o person shall be deprived of life, liberty, or property except by due process of law.” O.C.G.A. § 9-11-9.2 does not violate these constitutional provisions because, in the first instance, it does not intrude upon any privacy interest of Plaintiffs, who have waived any right to keep medical records pertaining to Mr. Walters’ medical treatment and condition private by placing Mr. Walters’ medical treatment and condition at issue in filing their medical malpractice action. Moreover, the statute is a legitimate exercise of the legislature’s police power, and is rationally related to a legitimate, and indeed, a compelling, governmental interest.

**a. O.C.G.A. § 9-11-9.2 does not violate Due Process because no constitutional right of Plaintiff is implicated.**

It is recognized that, in general, an individual has a constitutional right, recognized under the Due Process Clause, of privacy in his or her medical information. King v. State, 272 Ga. 788, 789-790, 535 S.E.2d 492 (2000). This right has been recognized by the Georgia Supreme Court because “a patient’s medical information . . . is certainly a matter which a reasonable person would consider to be private.” Id. at 790. However, at the same time, the Georgia Supreme Court has held that this right of privacy

is not absolute, and is waived when a plaintiff files a civil action placing at issue his or her medical treatment and injuries. Id. at 793.

Indeed, the fact that a patient waives his or her right to maintain the privacy of his or her medical information is expressly set forth by statute - O.C.G.A. § 24-9-40(a) - which provides in pertinent part that a patient's right to privacy in his or her medical information is waived "to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding." The fact that a patient who places his or her medical treatment and injuries at issue by filing a complaint for medical malpractice waives his or her right to maintain the privacy of his or her medical information for purposes of the litigation has also been long-recognized under Georgia's common-law. See, e.g. Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982); Gilmore v. State, 175 Ga. App. 376, 333 S.E.2d 210 (1985); Shipes v. BIC Corp., 154 F.R.D. 301, 306 (M.D. Ga. 1994).

Here, Plaintiff cannot legitimately argue that they have not placed John William Walters' medical care and treatment, or the injuries he has allegedly suffered as a result, directly at issue by filing this medical malpractice action against the several Defendants. By placing Mr. Walters' medical treatment and condition at issue in this case, it cannot be said that Plaintiffs have a "reasonable expectation" that information relevant to the prosecution of their claims, or information relevant to the defense of the action, would continue to remain private for purposes of this litigation. In filing this lawsuit, Plaintiffs have waived their right to maintain the confidentiality of Mr. Walters' medical conditions and condition so as to enable Defendants to investigate, evaluate, and prepare defenses to the charges Plaintiffs have levied against the Defendants. Because Plaintiffs have waived

this right for purposes of maintaining the present medical malpractice action, Plaintiffs' contention that O.C.G.A. § 9-11-9.2 violates due process guarantees is without merit.

**b. O.C.G.A. § 9-11-9.2 does not violate Due Process because the statute is rationally related to a legitimate government objective.**

Plaintiffs have been nondescript as to how O.C.G.A. § 9-11-9.2 allegedly invades their due process rights, leaving this Court and Defendants to guess as to what Plaintiffs' true contentions are. However, it being established that Plaintiffs, having placed Mr. Walters' medical treatment and injuries at issue in this litigation, no longer have a reasonable expectation of privacy in Mr. Walters' medical information, and thus no fundamental privacy right in Mr. Walters' medical information, Defendant now notes that O.C.G.A. § 9-11-9.2 is constitutionally sound for the additional reason that it falls squarely within the legislature's inherent police power to regulate litigation, an exercise of legislative authority historically sanctioned by the United States and Georgia Supreme Courts.

It is established that individuals can have a recognized "property interest" in a cause of action.<sup>8</sup> Georgia Dept. of Med. Assistance v. Columbia Convalescent Center, 265 Ga. 638, 639, 458 S.E.2d 635 (1995); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982). Where such a property interest does exist, an individual cannot be deprived of it without due process of law. Columbia Convalescent Center, 265 Ga. at 639. Due process prevents a state from denying a litigant the use of an established

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<sup>8</sup> Individuals *can* have a property interest in a cause of action, but they do not always have such an interest. An individual has no property interest in a cause of action when it has been abolished by statute before it even accrued, and in such a case, an individual's "due process" rights are not even implicated. It is only when a statute is enacted after a cause of action has accrued that due process is even implicated. Santana v. Georgia Power Co., 269 Ga. 127, 129, 498 S.E.2d 521 (1998) ("the enactment of a statute that delineates or even abolishes a cause of action before it has accrued deprives a plaintiff of no vested right and, thus, does not deny due process."); Love v. Whirlpool Corp., 264 Ga. 701, 705, 449 S.E.2d 602 (1994)

cause of action only where “such action would be ‘the equivalent of denying [the litigant] an opportunity to be heard upon their claimed rights.’” Sisson v. Douglas County School District, 181 Ga. App. 77, 80, 351 S.E.2d 272 (1986) (citing Logan, 455 U.S. at 430). It is recognized, however, that legislatures have the inherent police power to place conditions upon the maintenance of causes of action, and may exercise this authority consistently with the requirements of due process. Columbia Convalescent Center, 265 Ga. at 639. As is true with the legislature’s inherent right to adjust and modify the benefits a welfare recipient receives, the legislature may define, adjust, and even abolish causes of action. Sisson, 181 Ga. App. at 80. “In each case, the legislative determination provides all the process that is due.” Id. (citing Logan, 455 U.S. at 432).

The one limitation on the legislature’s authority to regulate litigation is that the legislature cannot act in a way which is “wholly arbitrary or irrational.” Sisson, 181 Ga. App. at 80. In other words, the legislature’s ability to define the circumstances under which a cause of action may be had is subject to the “rational basis” test of due process jurisprudence - the statute must merely bear a “rational relationship” to “legitimate state interests.” Columbia Convalescent Center, 265 Ga. at 639; Love v. Whirlpool Corp., 264 Ga. 701, 705, 449 S.E.2d 602 (1994).

A statute serves a “legitimate state interest” where it is “substantially related to the public health, safety, or general welfare[.]” and “any plausible or arguable reason” supporting the statute’s enactment will satisfy this test. City of Lilburn v. Sanchez, 268 Ga. 520, 522, 491 S.E.2d 353 (1997). Statutes related to the provision of health care, and statutes seeking to impose limitations on liability, have both been recognized to serve

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(“The enactment of a statute delineating, or indeed, even abolishing a cause of action, before it has accrued, deprives the plaintiff of no vested right.”).

legitimate governmental interests. See Foster v. Georgia Board of Chiropractic Examiners, 257 Ga. 409, 419, 359 S.E.2d 877 (1987) (“The regulation of health professions, for the preservation and protection of public health, is universally regarded as a duty of the State in the exercise of inherent police power.”); Love, 264 Ga. at 705 (“Liability limitation is a ‘classic example of an economic regulation -- a legislative effort to structure and accommodate the burdens and benefits of economic life[,]’ and is thus presumed constitutional unless the legislature is shown to have acted in an irrational or arbitrary way.”).<sup>9</sup> A statute is “rationally related” to such an end where it “realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose[.]” Sanchez, 268 Ga. at 522. It is not required that a statute “adopt the best, or even the least intrusive, means available to achieve its objective[,]” and “fairly debatable questions as to [a statute’s] reasonableness, wisdom, and propriety are not for the determination of the courts, but that of the legislative body on which rests the duty and responsibility of the decision.” Id.; see also Old South Duck Tours, 272 Ga. at 872.

Here, one need go no further than the very text of O.C.G.A. § 9-11-9.2 to ascertain the objective of the statute. As set forth in Subsection (b) of the statute, its objective falls within what is undeniably a legitimate governmental purpose, namely, “to facilitate the investigation, evaluation, and defense of the claims and allegations set forth

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<sup>9</sup> See also Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 437 S.E.2d 308 (1993) (statute limiting ability to bring medical malpractice action by providing for five year statute of repose did not offend due process and was rationally related to legitimate governmental objective of eliminating stale claims); Eubanks v. Ferrier, 245 Ga. 763, 267 S.E.2d 230 (1980) (statute preventing medical malpractice plaintiff from discovering hospital’s peer review materials pertaining to malpractice complained of did not offend due process and was rationally related to legitimate governmental objective of enabling medical providers to engage in candid self-critical analysis to improve the provision of medical services); Cannon v. Georgia Farm Bureau Mut. Ins. Co., 240 Ga. 479, 241 S.E.2d 238 (1978) (statute limiting survivor’s

in the [medical malpractice] complaint which pertain to the plaintiff’ or plaintiff’s decedent. Moreover, the statute is rationally related to this objective. By requiring a plaintiff to file a medical authorization form with a complaint for medical malpractice, a defendant is assured that it will have the means to obtain medical information pertaining to the plaintiff so as enable the defendant to “investigat[e], evaluat[e], and defen[d]” the claims against it.

Unlike the many other statutes which have been held to be constitutional as discussed in the cases cited above, O.C.G.A. § 9-11-9.2 does not even abolish a “right” of medical malpractice plaintiffs; rather, it is merely a codification of the long-standing common law principle that a defendant against whom an action alleging medical malpractice has been filed has the ability to obtain medical information pertinent to plaintiff’s claims so as to investigate, evaluate, and defend the claims brought against it. Moreover, unlike the several statutes discussed in the cases above which were held constitutional despite the fact they precluded a plaintiff’s cause of action, O.C.G.A. § 9-11-9.2 does not purport preclude a cause of action - it merely places a reasonable condition upon a medical malpractice plaintiff’s ability to maintain his action by requiring that defendants have equal ability to obtain records pertinent to the plaintiff’s claims and defense of the action.

Further still, in ensuring that defendants will have equal access to medical information of a medical malpractice plaintiff, the statute is rationally-related to the overarching purpose of Senate Bill 3, of which O.C.G.A. § 9-11-9.2 was part. Section 1 of Senate Bill 3 expressly provides for the over-arching purpose as follows:

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benefits to spouse or dependent children, and excluding all others, did not offend due process and was rationally related to legitimate governmental objective of reducing litigation).

The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care service in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.

Senate Bill 3, Section 1. Thus, the Legislature has determined that a “crisis” exists, wherein health care providers are having increasing difficulty in procuring affordable liability insurance, with the resultant potential for a diminution in the availability of health care services within the state. Towards the end of abating this crisis, the legislature has enacted certain civil justice reforms, of which O.C.G.A. § 9-11-9.2 is one, to “promote the resolution of health care liability claims,” thereby “promoting the provision of health care liability insurance by insurance providers.”<sup>10</sup> Courts have consistently upheld over constitutional challenges a legislature’s effort to promote the availability of health care services within the state by enacting laws designed to promote the availability of affordable health care liability insurance. See, e.g. Smith v. Cobb County-Kennestone Hosp. Auth., 262 Ga. 566, 423 S.E.2d 235 (1992) (statute of limitation shortening time in which minor plaintiff had to bring medical malpractice

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<sup>10</sup> Included in the Act are statutes: 1) heightening the requirements pertaining to the filing of affidavits in medical, as well as other, professional malpractice actions (O.C.G.A. § 9-11-9.2); 2) heightening the evidentiary requirements applicable to experts in medical malpractice actions (O.C.G.A. § 24-9-67.1); 3) heightening the requirements to maintain a medical malpractice action against those involved in the provision of emergency care (O.C.G.A. § 51-1-29.5); 4) altering the circumstances under which hospitals may be held vicariously liable for the acts its independent contractors (O.C.G.A. § 51-2-

action rationally related to promoting availability of affordable health care liability insurance); Anderson v. Little & Davenport Funeral Home, Inc., 242 Ga. 751, 251 S.E.2d 250 (1978) (statute providing “good faith” immunity from suit to ambulance services providing emergency care rationally related to objective of ameliorating the difficulty and expense in obtaining liability insurance for ambulance services).

O.C.G.A. § 9-11-9.2 is rationally related to a legitimate, and indeed, compelling, governmental interest, and Plaintiffs’ contention that the statute somehow runs afoul of Due Process is without merit.

**3. O.C.G.A. § 9-11-9.2 does not violate the equal protection guarantees of the United States (14th Amendment) or Georgia constitutions (Ga. Const. Art. I, § I, Para. II).**

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Similarly, Art. I, § I, Para. II of the Georgia Constitution provides that “[n]o person shall be denied the equal protection of the laws.” The Equal Protection Clauses of the United States Constitution and the Georgia Constitution are construed alike, and both “require[] that the State treat similarly situated individuals in a similar manner.” City of Atlanta v. Watson, 267 Ga. 185, 187, 475 S.E.2d 896 (1996) (emphasis supplied). Thus, as an initial matter, before the guarantee of equal protection is even implicated, it must be shown that a plaintiff is “similarly situated to members of the class who are treated differently from him[,]” and “[i]f that point cannot be established, there is no need to continue with an equal protection analysis.” Santana v. Georgia Power Co., 269 Ga. 127, 129; see also Lowe v. State, 267 Ga. 754, 755, 482

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5.1); and 5) limiting noneconomic damages recoverable in medical malpractice actions (O.C.G.A. § 51-13-1).

S.E.2d 344 (1997) (where plaintiffs argued that the state violated their equal protection rights by providing grant money to the parents of children attending private schools for grade K through 12, but not to the parents of children in pre-K and post-12 education, no equal protection violation because, while the two classes were treated differently, they were not similarly situated).

The Equal Protection Clause does not prohibit the state from treating different classes of persons in different ways, and indeed, “permits states wide discretion in enacting laws which affect some group of citizens differently from others[.]” Foster v. Georgia Board of Chiropractic Examiners, 257 Ga. 409, 419, 359 S.E.2d 877 (1987). Rather, the guarantee of equal protection prohibits the State from legislating that “different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute.” Gaines v. State, 260 Ga. 267, 268, 392 S.E.2d 524 (1990). The guarantee of equal protection is offended “only if the resultant classifications . . . rest on grounds wholly irrelevant to a reasonable state objective.” Foster, 257 Ga. at 419. As is true under the due process analysis, legislation is “presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” Love v. Whirlpool Corp., 264 Ga. 701, 704, 449 S.E.2d 602 (1994) (citing Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985)).

Particularly where social or economic legislation is at issue, “[a] legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived.” Love, 264 Ga. at 704 (citing Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382 (1982)). The classifications created by the legislature need not be

“perfectly symmetrical or mathematically precise[.]” Department of Transportation v. Georgia Mining Association, 252 Ga. 128, 129-130, 311 S.E.2d 443 (1984). Moreover, it “is not necessary that the classification scheme be the perfect or the best one[.]” Georgia Dept. of Med. Assistance v. Columbia Convalescent Center, 265 Ga. 638, 640, 458 S.E.2d 635 (1995). Laws are presumptively constitutional, and where a classification is challenged under the equal protection guarantees, “they will be upheld if there is any set of facts upon which they could be sustained.” Georgia Mining Association, 252 Ga. at 129.

Courts have consistently upheld over equal protection challenges statutes which place various conditions and limitations on various classes’ ability to maintain actions at law. For instance, statutes of repose and limitation have been upheld over equal protection challenges despite the fact that such statutes preclude that class of individuals whose injuries arise only after a certain date from maintaining an action at law for their injuries because such statutes are “rationally related” to the legitimate governmental objective of eliminating stale claims. See, e.g. Craven v. Loundes County Hosp. Auth., 263 Ga. 657, 437 S.E.2d 308 (1993) (five year statute of repose in medical malpractice actions constitutional); Love v. Whirlpool Corp., 264 Ga. 701, 704, 449 S.E.2d 602 (1994) (ten year statute of repose in product liability actions constitutional); Allrid v. Emory University, 249 Ga. 35, 38, 285 S.E.2d 521 (1982) (statute of limitation applicable to medical malpractice actions represents a “separate classification” which is a “rational exercise of legislative power”). Moreover, statutes which not only limit, but entirely abolish, the right of certain classes of individuals to maintain actions at law have been upheld over equal protection challenges when rationally related to the governmental

objectives they seek to attain. See, e.g. Robeson v. International Indem. Co., 248 Ga. 306, 282 S.E.2d 896 (1981) (statute precluding one spouse from maintaining action against the other spouse rationally related to governmental objective of preserving marital harmony and preventing collusive claims); Cannon v. Georgia Farm Bureau Mut. Ins. Co., 240 Ga. 479, 241 S.E.2d 238 (1978) (statute precluding persons other than spouse or dependent children from obtaining survivor benefits under no fault insurance rationally related to governmental objective of reducing litigation).

In Anderson v. Little & Davenport Funeral Home, Inc., 242 Ga. 751, 753-754, 251 S.E.2d 250 (1978), the Georgia Supreme Court rejected an equal protection challenge to a statute which sought to address a problem similar that which Senate Bill 3, including O.C.G.A. § 9-11-9.2, is designed to address, albeit by much broader means. The statute at issue - O.C.G.A. § 31-11-8 (formerly Ga. Code § 88-3114) - provided “good faith” immunity from civil liability to providers of ambulance services in the provision of emergency care. The Court held that the statute did not offend equal protection guarantees because, while it prevented one class of plaintiffs - those having received emergency services from an ambulance service - from maintaining a successful lawsuit under certain circumstances, it was rationally related to a legitimate governmental objective of ameliorating the difficulty and expense in obtaining liability insurance for ambulance services. Id. at 754. Similar to the broad governmental objective which Senate Bill 3 is designed to address, the court observed that the problem experience by ambulance services in obtaining affordable insurance, when combined with lawsuits against these providers, “could be enough to drive many providers of ambulance service out of the business and greatly discourage others from entering. The effect, in many

areas of the state, would be to make emergency ambulance service unobtainable.” Id. at 754.

Here, it is doubtful as to whether, in the first instance, an equal protection analysis is even warranted with respect to O.C.G.A. § 9-11-9.2’s requirement that a plaintiff file a medical authorization form as a condition of maintaining a suit for medical malpractice. Equal protection in no way limits the State’s ability to treat different classes of persons differently, and it is obvious that a medical malpractice plaintiff is in a unique and distinct class of plaintiffs. Unlike other actions at law, the very nature of an action for medical malpractice entails a plaintiff bringing into issue the medical care he or she has received from a medical provider(s). The statute simply ensures that a defendant against whom such charges have been levied will have the ability to obtain information pertinent to the plaintiff’s claim and the provider’s defense. Because medical malpractice plaintiffs are, by definition, in a distinct class of plaintiffs, they are not “similarly situated” with other plaintiffs in the variety of civil actions which exist under law, and the guarantee of equal protection is not even implicated in the first instance. See, e.g. Santana, 269 Ga. at 129; Lowe, 267 Ga. at 754.

Even assuming an equal protection analysis is implicated, it is clear that O.C.G.A. § 9-11-9.2 passes constitutional muster, as the classification drawn by the statute is rationally related to a legitimate governmental objective. As is discussed above in addressing Plaintiffs’ Due Process challenge, the very text of the statute makes clear its purpose: “to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the [medical malpractice] complaint which pertain to the plaintiff” or plaintiff’s decedent. The statute is rationally related to this purpose, as in requiring a

plaintiff to file a medical authorization form with a complaint for medical malpractice, a defendant is assured that it will have the means to obtain medical information pertaining to the plaintiff so as enable the defendant to “investigat[e], evaluat[e], and defen[d]” the claims against it.

Again, the statute does nothing more than codify what has been a long-standing tenant of Georgia law; namely, that where a plaintiff places his or her medical treatment at issue by filing a complaint that a medical provider’s negligence was the cause of the plaintiff’s injuries, fundamental fairness dictates that a defendant have the ability to prepare an adequate defense to such charges by having access to medical information pertinent to the claim and defense of the claim. See Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982). Clearly, O.C.G.A. § 9-11-9.2 is more than rationally related to this governmental objective of ensuring a “level playing field” in litigation. Similarly, in ensuring that defendants will have equal access to these records, the statute is rationally-related to the overarching purpose of Senate Bill 3, of which O.C.G.A. § 9-11-9.2 was part, “in promoting the resolution of health care liability claims[.]”

For these reasons, Plaintiffs’ contention that O.C.G.A. § 9-11-9.2 somehow runs afoul of Equal Protection guarantees is without merit.

**4. O.C.G.A. § 9-11-9.2 does not deny Plaintiffs the rights, privileges, or immunities due citizens of the State of Georgia (Ga. Const. Art. I, § I, Para. VII).**

Art. I, § I, Para. VII of the Georgia Constitution provides that it is the duty of the legislature to enact laws which will protect Georgia citizens “in the full enjoyment of the rights, privileges, and immunities due to such citizenship.” Case law construing this constitutional provision is sparse; however, the case law which has construed this

constitutional provision has employed the analysis used under the Due Process and Equal Protection Clauses of the United States and Georgia constitutions. Ambles v. State, 259 Ga. 406, 407, 383 S.E.2d 555 (1989).

For instance, in Smith v. Cobb County-Kennestone Hosp. Auth., 262 Ga. 566, 423 S.E.2d 235 (1992), the plaintiff mounted a challenge to the retroactive application of the medical malpractice statute of limitation found in O.C.G.A. § 9-7-73. At the time of the injury suffered by the plaintiff, a minor, the statute of limitation was tolled until the plaintiff reached the age of majority. However, O.C.G.A. § 9-7-73 was subsequently enacted, providing that the plaintiff had only until two years after she had reached the age of five in which to maintain an action for the medical malpractice resulting in the injury. In upholding the statute under the Equal Protection and Privileges and Immunities Clauses, the Court first found that the separate classification of minors for purposes of medical malpractice actions established by O.C.G.A. § 9-7-73 was constitutional because it was rationally related to the abatement of a crisis the legislature had perceived in the state's health care industry. Id. at 570-571. In this regard, the Court observed that "[t]he reduction of the period within which minors could bring suit certainly would tend to achieve the stated legislative objectives, as, e.g., it would tend to prevent stale medical malpractice claims, and would also tend to lower insurance and medical costs by decreasing the period in which health care providers and their insurers would be exposed to suit." Id. at 571. Moreover, the Court found that the legislature may constitutionally place limitations on a plaintiff's ability to maintain a cause of action, and that the retroactive application of such a statute, being remedial in nature and thus affecting no vested right of plaintiff, did not run afoul of constitutional guarantees. Id. at 572.

Here, for the same reasons that O.C.G.A. § 9-11-9.2 is valid under the Due Process and Equal Protection Clauses of the Georgia Constitution, the statute is valid under the Privileges and Immunities Clause of the Georgia Constitution. As is discussed above, O.C.G.A. § 9-11-9.2 is rationally related to a legitimate governmental interest, and merely codifies the long-standing common law principle that a plaintiff who places his medical treatment and condition at issue by filing an action for medical malpractice cannot, and should not be able to, prevent defendants against whom such charges have been levied from obtaining medical information pertinent to the action and their defense of the same. See Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982). The statute, being merely procedural in nature and a mere codification of the common law, strips Plaintiffs of no rights they otherwise had under common law, and therefore, is valid under the Privileges and Immunities Clause. Plaintiffs' contention that O.C.G.A. § 9-11-9.2 is violative of the Privileges and Immunities Clause is therefore without merit.

**5. O.C.G.A. § 9-11-9.2 does not violate Art. III, § V, Para. III of the Georgia Constitution.**

Art. III, § 5, Para. III of the Georgia Constitution provides that “[n]o bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof.” The purpose of this provision is, simply, to protect the public against “surprise legislation.” Lutz v. Foran, 262 Ga. 819, 821, 427 S.E.2d 248 (1993). In requiring that an Act’s title relate to the subject matter contained within the Act, the courts have emphasized that this provision must be given a “reasonable interpretation.” Hussey v. Chatham County, 268 Ga. 871, 872, 494 S.E.2d 510 (1998). It was, of course, “never intended that the entire act should be set forth in the caption[,]” and “[i]t was not contemplated that every detail stated in the body should be mentioned in

the caption.” Mead Corp. v. Collins, 258 Ga. 239, 240, 367 S.E.2d 790 (1988). “If what follows after the enacting clause is definitely related to what is expressed in the caption; if it be naturally connected therewith, and relates to the main object or subject matter of the legislation and is not in conflict therewith, there is no infringement of the constitutional inhibition of including within the Act matter not referred to in the caption.” State v. Resolute Ins. Co., 221 Ga. 815, 817, 147 S.E.2d 433 (1966).

“Whether an act violates the multiple subject matter rule depends on whether all of the bill’s provisions seek to accomplish a single objective.” Lutz, 262 Ga. at 823. The term “subject matter” is given a “broad and extended” meaning, and permits the legislature to include within one act “all matters having a logical or natural connection” with one another. Wall v. Board of Elections of Chatham County, 242 Ga. 566, 570, 250 S.E.2d 408 (1978). To constitute the prohibited plurality of subject matter, “an Act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any logical connection or relation with each other.” Id. Similarly, the fact that a bill amends several different code sections does not render the bill constitutionally suspect. American Booksellers Assoc. v. Webb, 254 Ga. 399, 400, 329 S.E.2d 495 (1985). “All that our Constitution requires is that the Act embrace only one general subject; and by this is meant, merely, that all matters treated by the Act should be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one subject.” Crews v. Cook, 220 Ga. 479, 481, 139 S.E.2d 490 (1964). The courts should not construe this provision so as to “interfere with the very commendable policy or practice of incorporating the entire body of statutory law upon one general subject in a single Act, instead of dividing it into a number of separate

Acts.” Id. at 482. Such a construction would “not only be contrary to [the constitutional provision’s] spirit, but also seriously embarrassing to honest legislation.” Id.

Here, any argument that O.C.G.A. § 9-11-9.2 does not correspond with the caption of Senate Bill 3 would be disingenuous. As is set forth in the Act’s caption, one of the specific purposes of the Act is “to provide for defendants’ access to plaintiffs’ health information in medical malpractice cases.” Not only does the Act specifically delineate the object of O.C.G.A. § 9-11-9.2, it is hard to imagine how the legislature could have made object of this statutory provision any clearer.

Similarly, any argument O.C.G.A. § 9-11-9.2 is constitutionally suspect because it was enacted as part of Senate Bill 3 would be without merit. As is set forth in Section 1 of this Act, the code sections enacted and amended under Senate Bill 3 are all geared towards the general purpose of abating a “crisis affecting the provision and quality of health care service” due to the difficulty of health care providers are perceived to have in obtaining affordable insurance. While some of the code sections affected pertain specifically to reforms made in the context of medical malpractice litigation, and others pertain more broadly to reforms made in civil litigation and health care regulation in general, all reforms are unified by this singular purpose. Specifically, as provided by Section 1 of this Act:

The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care service in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health

care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.

Given the fact that these reforms all seek to achieve to attain a “single objective,” Senate Bill 3 does not run afoul of the single “subject matter” requirement, which is to be given a “broad and extended” meaning. Lutz, 262 Ga. at 823; Wall, 242 Ga. at 570; Crews, 220 Ga. at 481-482. It is true that Senate Bill 3 enacts and amends several different code sections; however, it is well-recognized that this is within the constitutional prerogative of the legislature. Webb, 254 Ga. at 400.

For these reasons, Plaintiffs’ challenge on the basis of this constitutional provision must fail.

**6. O.C.G.A. § 9-11-9.2 does not violate Art. I, § I, Para. XVIII of the Georgia Constitution.**

Plaintiffs assert that O.C.G.A. § 9-11-9.2 violates “Art. I, § I, Para. XVIII (enumeration of rights not denial of others)” of the Georgia Constitution. This constitutional provision provides that “[n]o person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial.” As can be seen from the very text, this constitutional provision addresses the concept of “double jeopardy” in matters of criminal law, and has absolutely no application to any issue in this case.

Defendant assumes that Plaintiffs intend to assert that O.C.G.A § 9-11-9.2 is violative of Art. I, § I, Para. XXVIII of the Georgia Constitution, which provides that “[t]he enumeration of rights herein contained as part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto

enjoyed.” Case law is sparse, and it does not appear that this constitutional provision has been addressed since the prohibition era of the early twentieth century. See Saddler v. State, 148 Ga. 462, 97 S.E. 79 (1918) (affirming that prohibition laws, prior to the constitutional amendment repealing same, were not violative of this constitutional provision, among others). However, case law construing the similar provision found in the Ninth Amendment of the United States Constitution<sup>11</sup> has held that it is not a source of constitutional rights, but rather, a rule of construction. Metz v. McKinley, 583 F.Supp. 683, 689 n.4 (1984); Clynch v. Chapman, 285 F.Supp.2d 213, 219 (2003). The provision simply ensures that “the maxim *expression unius est exclusion alterius*” would not be used at a later time to deny fundamental rights because they were not specifically enumerated”; it does not confer substantive rights in addition to those conferred by other provisions of law. Gibson v. Matthews, 926 F.2d 532, 537 (1991).

Here, as discussed extensively above, O.C.G.A. § 9-11-9.2 deprives Plaintiffs of no substantive rights, and is merely a codification of principles contained within the common law. Because this constitutional provision is merely a rule of construction, and provides for no substantive rights, Plaintiffs argument that O.C.G.A. § 9-11-9.2 violates this provision is without merit.

#### **IV. Conclusion.**

Plaintiffs, without providing any support for their assertions, challenge the validity of O.C.G.A. § 9-11-9.2 in an effort to impede the ability of defendant in a medical malpractice action to consult with the plaintiff’s treating providers. This right has been long-recognized at common law as consistent with fundamental fairness and a

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<sup>11</sup> The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

defendant's ability to prepare his work-product apart from the intrusion of plaintiff's counsel. In reality, Plaintiffs only seek to procure an unfair tactical advantage in litigation by controlling when, if, and how a defendant may investigate the claim and prepare a defense.

This right - a long-established right under common law - is not inconsistent with HIPAA, which does not create any sort of federal doctor-patient privilege, and does not prevent a defendant from preparing his defense by communicating informally with a plaintiff's treating physicians in cases wherein a plaintiff has placed his medical condition at issue. O.C.G.A. § 9-11-9.2 is in no sense unconstitutional, but represents the legislature's legitimate exercise of its inherent police power to enact laws for the welfare and benefit of the public, including laws which delineate the contours of litigation within its borders. In the most immediate sense, the statute seeks to ensure that medical malpractice defendants will have the ability to obtain information pertaining to the plaintiff's treatment and medical condition - issues which a plaintiff has placed squarely at issue - so as to be able to investigate, evaluate, and defend the charges brought by the plaintiff. Ensuring that medical malpractice defendants will have access to such information relates to one of the broader purposes of Senate Bill 3, of which O.C.G.A. § 9-11-9.2, namely, promoting the resolution of health care liability claims. Plaintiffs' challenges to the validity and constitutionality of O.C.G.A. § 9-11-9.2 are without merit. Accordingly, Plaintiffs' Complaint for Declaratory Judgment should be dismissed, and Plaintiffs' accompanying Motion for Temporary Injunction and/or Restraining Order should be denied.

Respectfully submitted this the \_\_\_\_ day of August, 2005.

**GORBY, REEVES, & PETERS, P.C.**

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This \_\_\_\_\_ day of August, 2005

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