

IN THE STATE COURT OF FULTON COUNTY

FILED IN OFFICE

STATE OF GEORGIA

AUG 12 2005
MA

DEPUTY CLERK STATE COURT
FULTON COUNTY, GA.

JAMES ALAN DAVIDSON and)
GEORGE RAYMOND DAVIDSON,)
Individually and as the legal representative)
of the ESTATE OF ETHEL LORRAINE)
BARR, Decedent,)
Plaintiffs,)

CIVIL ACTION FILE

v.)

NO. 03 VS 050911

RICHARD CORY, ABC CORPORATION)
JOHN HARVEY, AMERICANA HEALTH-)
CARE SERVICES, d/b/a MANOR CARE)
OF MARIETTA NURSING AND)
REHABILITATION CENTER,)
Defendants.

ORDER

The above styled action came regularly before the Court on Defendant's Americana Healthcare Services d/b/a Manor Care of Marietta Nursing and Rehabilitation Center *Motion To Dismiss, Or, In The Alternative, Motion To Compel*. All parties were represented by counsel. After considering the applicable record, the Court hereby issues the following Order:

In the present motion to dismiss Defendant invokes the recently enacted statute O.C.G.A. § 9-11-9.2 1 and contends that this action is subject to dismissal for the failure to attach a conforming medical authorization contemporaneously with the complaint. Alternatively,

1 O.C.G.A. § 9-11-9.2 (a) In any action for damages alleging medical malpractice against a professional licensed by the State of Georgia and listed in subsection (d) of Code Section 9-11-9.1, against a professional corporation or other legal entity that provides health care services through a professional licensed by the State of Georgia and listed in subsection (d) of Code Section 9-11-9.1, or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (d) of Code Section 9-11-9.1, contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.

(b) The authorization shall provide that the attorney representing the defendant is authorized to obtain and disclose protected health information contained in 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. This authorization includes the defendant's attorney's 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.

(c) The authorization shall provide for the release of all protected health information except information that is considered

Defendants move for an order compelling Plaintiffs to provide an authorization that tracks the terms of the statute. Plaintiffs have opposed the motion to dismiss raising several arguments including: (1) that it is temporally impossible to file an authorization contemporaneously with the complaint when the action is already pending; (2) that O.C.G.A. § 9-11-9.2 is preempted by federal law; and (3) that O.C.G.A. § 9-11-9.2 is unconstitutional.

Contemporaneous Filing Requirement

The hallmark of statutory construction is to discern the intent of the legislature. O.C.G.A. § 1-3-1 (a). An interpretation of a statute which would give effect to the legislative intent is favored over a construction which would necessarily vitiate the Act. Fulton County &c. Fund v. Teachers Retirement &c., 176 Ga. App. 612 (1985). Fidelity Nat. Bank v. Kneller, 194 Ga. App. 55, (1989). "Repeals by implication are not favored by law, and a subsequent statute repeals prior legislative acts by implication only when they are clearly and indubitably contradictory, when they are in irreconcilable conflict with each other, and when they can not reasonably stand together." Kilpatrick v. State, 243 Ga. 799 (256 S.E.2d 900) (1979)." Sutton v. Garmon, 245 Ga. 685 (1980). For purposes of interpretation, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent. See Dixon v. State, 278 Ga. 4 (2004)² While there is an incompatibility between the scope of the more general retroactive provision and the implication of prospective application that attends an initial filing requirement, the intention that the enactments be applied to all cases currently pending was clearly expressed.³ Notwithstanding this expression, summary dismissal, although authorized by the statute, would be clearly inappropriate since the "legislature may constitutionally provide for the retroactive application of

privileged and shall authorize the release of such information by any physician or health care facility by which health care records of the plaintiff or the plaintiff's decedent would be maintained.

² Statutes generally are applied prospectively unless a clear contrary intention is indicated; however, if a statute governs only procedure, it is given retroactive application unless a contrary intention is expressed. Polito v. Holland, 258 Ga. 54 (365 S.E.2d 273) (1988). "Substantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations." Walker v. Willis 210 Ga. App. 239 (1993).

³ Several statutes, not relevant here, were expressly excluded from the general scope of retroactive application. See Section

a remedial statute (or a procedural one) provided a time be fixed subsequent to the passage of the statute which allows citizens affected by it a reasonable time to protect their rights.” LFE Corporation v. Edenfield, 187 Ga. App. 785 (1988); Jaro, Inc. v. Shields, 123 Ga. App. 391 (1971). In the context of a pending action, as here, a literal and retroactive application of the contemporaneous filing requirement with resulting dismissal for non-compliance would operate to the extreme prejudice of litigants without affording them the ability to protect their interests. Moreover, while the statute authorizes dismissal, it does not mandate it. Language which “subjects” an action to dismissal, without requiring it, permits a Court some discretion in ensuring compliance without immediate resort to dismissal.

While there is authority which holds that a remedial statute of repose in force at the time the complaint is filed governs over a subsequently enacted statute, See LFE Corporation v. Edenfield, 187 Ga. App. 785 (1988); here, the legislature clearly intended O.C.G.A. § 9-11-9.2 to apply to pending cases. However, given the discretion implied by the terms of the statute and the interpretative rule which requires reconciliation of statutory provisions where possible, it will be assumed for purposes of the remaining discussion that the failure to file an authorization in the context of a pending case is an amendable defect. The Court will now consider whether substantive compliance with the statute is excused under Plaintiff’s remaining arguments.

Preemption

In Plaintiff’s second argument opposing enforcement of the statute, it is contended that O.C.G.A. § 9-11-9.2 is preempted by the *Health Insurance Portability Act of 1996* (HIPAA) and various administrative provisions promulgated under the Act at 45 C.F.R. 160 through 164. The Court agrees.⁴ While Congress did not intend field preemption of health care record privacy

¹⁵ (a).

⁴ While Plaintiff has argued that the standard governing disclosure to provide the “minimum necessary,” this standard is inapplicable where the use or disclosure is pursuant to an authorization under § 164.508. See 45 C.F.R. § 164.502 (b)(2)(iii).

since the States may provide greater protection than that provided by HIPAA, O.C.G.A. § 9-11-9.2 is deficient in numerous respects because it fails to satisfy the minimum standards provided in HIPAA and is therefore preempted by the express terms of 45 C.F.R. § 160.203.

First, § 164.508 (c)(1) sets forth the core elements that an authorization must contain to be HIPAA compliant. Among these elements are the requirements that: (1) the authorization identify specifically the information to be disclosed; (2) the persons authorized to make the request must be specifically identified; (3) the persons to whom the entity may make the disclosure must be specifically identified; (4) a description of each purpose of the requested disclosure be provided; (5) an expiration date for the purpose of disclosure be provided.

In addition to the core elements, § 164.508 (c)(2) requires that the authorization also contain: (1) notice of the individual's right to revoke the authorization; (2) notice of the ability or inability to condition treatment, payment, enrollment, or eligibility for benefits on the authorization; (3) notice of the potential for information disclosed pursuant to the authorization to be subject to re-disclosure by the recipient and no longer be protected by the Act.

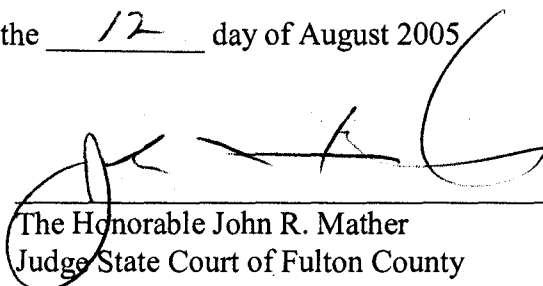
An authorization which would conform to the terms of O.C.G.A. § 9-11-9.2 provides little in the way of compliance with the above requirements of HIPAA. The Georgia statute provides that the authorization should release all non-privileged, protected health care information and grant the defending attorney the right to obtain and disclose the information for purposes of defending the allegations of the complaint. Also conferred is the categorical right of the defending attorney to discuss, ex parte, issues of care of treatment with Plaintiff's treating physicians. As an authorization conforming to the Georgia enactment does not meet the minimal requirements of § 164.508, it is preempted by the terms of § 164.203.

Moreover, the right conferred by O.C.G.A. § 9-11-9.2 to discuss the Plaintiff's treatment, ex parte, with the treating physicians is similarly preempted. Included in the definition of health

information is "any information, whether oral or recorded." 45 C.F.R. § 160.103. When protected health information is disclosed in the context of a judicial proceeding, the covered entity is required to disclose only that information expressly authorized by an order. If the request is made pursuant to other discovery requests, then the covered entity must receive assurances that reasonable efforts have been made to provide notice of the request to the subject of the information and that reasonable efforts have been made to secured a qualified protective order. See 45 CFR 164.512(e). Significantly, the above protections are entirely absent from the sanctioned right to freely discuss and obtain protected health information from Plaintiff's treating physicians. O.C.G.A. § 9-11-9.2 provides absolutely no protection or notification to the patient of the degree to which his protected information has been disclosed and provides no restriction on further dissemination. Practically, the notice requirements of 45 CFR 164.512(e) may be functionally incompatible with the right to conduct ex parte communications with a treating physician. For the foregoing reasons, the Court finds that the right to discuss issues of treatment ex parte is preempted. Discussion of Plaintiff's remaining arguments is unnecessary.

While the Court has found that the foregoing provisions of O.C.G.A. § 9-11-9.2 have been substantively preempted, the Court will GRANT the alternative relief requested in Defendant's motion and DIRECT that the parties prepare and execute a HIPAA compliant authorization within thirty days. Any and all use of this authorization by Defendants to obtain medical records shall be accompanied by contemporaneous notice of the request to Plaintiff's counsel.

SO ORDERED this the 12 day of August 2005


The Honorable John R. Mather
Judge State Court of Fulton County