

IN THE STATE COURT OF CHATHAM COUNTY
STATE OF GEORGIA

LISA ZIPPERER KICKLIGHTER,)
INDIVIDUALLY AND AS)
ADMINISTRATRIX OF THE ESTATE)
OF ALFRED VANBUREN ZIPPERER, JR.,)

Plaintiff,)

v.)

Civil Action No: STCV05-00806

MARK JENKINS, M.D., CARDIOVASCULAR)
CONSULTANTS, P.C., EFFINGHAM)
HOSPITAL, MEMORIAL HEALTH)
UNIVERSITY MEDICAL CENTER, INC., and)
MEMORIAL HEALTH, INC.,)

Defendants.)

**MEMORIAL HEALTH UNIVERSITY MEDICAL CENTER, INC.
AND MEMORIAL HEALTH, INC.'S REPLY BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS**

NOW COME MEMORIAL HEALTH UNIVERSITY MEDICAL CENTER, INC.
("MHUMC") and MEMORIAL HEALTH, INC. ("Memorial") and file this Reply Brief in support
of its Motion to Dismiss Plaintiff's Complaint.

I. FACTS

MHUMC and Memorial filed a Motion to dismiss based upon: 1) Plaintiff's failure to attach
an Affidavit setting forth specifically at least one negligent act or omission on the part of MHUMC
and Memorial and 2) Plaintiff's failure to provide an Authorization as set forth in the applicable
statute.

Plaintiffs filed a response alleging that the Authorization Statute does not require Plaintiff
to authorize *ex parte* communications, that the statute is preempted by HIPAA and that Georgia law
prohibits or should prohibit *ex parte* conversations with treating physicians.

MHUMC and Memorial hereby contend that neither Georgia law nor HIPPA prohibits *ex parte* communications, that the Authorization statute does not prohibit such contact, and that Plaintiff should be required to provide an Authorization containing the provisions of the statute, without alteration. Having failed to do so, Plaintiff's complaint should be dismissed.

II. ARGUMENT AND CITATIONS OF AUTHORITY

Under Georgia law, and under HIPAA, health care providers are authorized to disclose protected health information (in writing or orally) in response to an **authorization** or, if none, in response to a court order, a subpoena, **discovery request**, or **other legal process** after receiving satisfactory assurances that a reasonable effort has been made to notify the patient of the request, **or alternatively, after reasonable efforts have been made to secure a protective order** which restricts the use of the records to the litigation and provides for return or destruction of the records thereafter. *Ex parte* communication can be described as either an informal "discovery" request" or "lawful process" as the practice is legal in Georgia. See Orr v. Seivert, 162 Ga. App. 677, 679-80 (1982); See 45 CFR § 164.512 9e)(1)(ii)(neither limiting nor otherwise defining terms "discovery request" and "lawful process.").

A. It is wrong to assume that *ex parte* discussions violate any right of privacy.

It is wrong to assume that the purpose of *ex parte* discussions is to obtain disclosure of extraneous medical information, which has not previously been disclosed through production of the medical records. To the contrary, *ex parte* discussions normally arise after receipt of medical documentation in order to assist in the translation of a physician's handwriting, clarification of entries, description or explanation as to a named procedure or medication, or seeking to obtain medical opinions relating to information which has already been disclosed in the medical records,

or a hypothetical series of facts.¹ In such case, *ex parte* discussions serve both a legitimate discovery goal without any violation of any privacy rights of plaintiff. In other words, it should not be presumed, in advance, that medical providers will provide new or different health care information outside of that in the medical records that have already been produced.

B. Georgia law does not prohibit *ex parte* contacts with treating physicians.

There is no statute prohibiting *ex parte* contact with treating physicians in Georgia. This established practice is recognized in the jurisprudence of Georgia law and in other states.² See Orr

¹ The presence of opposing counsel at such meetings stifles defense counsel's ability to seeking explanations of medical procedures or elicit candid medical opinions based on facts presented by defense counsel. Plaintiffs are not required to disclose their work product or trial strategy.

² In addition to Georgia's recognition of the practice, (see Orr v. Sievert, 162 Ga. App. at 679-80), such interviews are widely recognized in numerous other jurisdictions. See, e.g., Williams v. Rene, 72 F.3d 1096, 1103 (3rd Cir. 1995) (restricting *ex parte* contact with physicians “hinders settlement negotiations and trial preparation by restricting the gathering of relevant evidence in an informal fashion, thus requiring the more expensive and time-consuming procedures of a formal deposition”); Green v. Bloodsworth, 501 A.2d 1257, 1258-59 (Del. Super. Ct. 1985) (“This Court will not condone the use of the formal discovery rules as a shield against defense counsel’s informal access to a witness when these rules were intended to simplify trials by expediting the flow of litigation and to encourage the production of evidence.”); Street v. Hedgepath, 607 A.2d 1238, 1247 (D.C. 1992) (informal *ex parte* interviews with treating physicians are permissible means of discovery); Morris v. Thomson, 937 P.2d 1212, 1217 (Idaho 1997) (if plaintiff has not retained the treating physician as an expert witness, discovery rules . . . do not limit defense counsel's access); Bryant v. Hilst, 136 F.R.D. 487, 491 (D. Kan. 1991) (a patient who places his

v. Sievert, 162 Ga. App. 677, 679-80, 292 S.E.2d 548 (1982). While Orr is a pre-HIPAA case, nothing in Orr is contrary to HIPAA, therefore, it is not preempted.

Plaintiff's counsel conducts *ex parte* discussions with treating physicians. Presumably, this is permissible because it is authorized by Plaintiff. The Authorization statute expressly provides that, among other things, the required Authorization must "include the defendant's attorney's right to discuss the care and treatment of plaintiff or where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians." O.C.G.A. § 9-11-9.2.

Plaintiff takes issue with the language of the statute and seeks to impose additional limitations. Plaintiff cites to a ruling by Judge Freeseaman accepting such limitations, in which she reasoned that if the Legislature intended to allow *ex parte* communications, it would have expressly stated so.

or her medical condition at issue forgoes right to preclude treating physicians from disclosing relevant information; interested parties should not be given complete control over categories of fact witnesses); Butler-Tulio v. Scroggins, 774 A.2d 1209, 1216-17 (Md. App. 2001) (refusing to create extra-statutory prohibition against informal interviews of treating physicians where patients have placed their medical conditions in issue), cert. denied, 783 A.2d 221 (Md. 2001); Domako v. Rowe, 475 N.W.2d 30, 33 (Mich. 1991) (encouraging open discovery to which both parties have a right); Filz v. Mayo Foundation 136 F.R.D. 165, 169-74 (D. Minn. 1991) (informal interviews with treaters are a valuable component of discovery); Lewis v. Roderick 617 A.2d 119, 122 (R.I. 1992) (informal interviews are beneficial by reducing trial preparation time and expense of litigation); Steinberg v. Jensen, 534 N.W.2d 361, 371-72 (Wis. 1995) (allowing informal interviews with treating physicians to afford a wide latitude of cost-efficient discovery).

According to the same reasoning, if the Legislature wanted to restrict a party's right to conduct *ex parte* interviews, it likewise would have so stated. It did not. Since *ex parte* communications are still a lawful means of discovery under Georgia law, and not expressly prohibited by HIPAA (as apparently mistakenly thought by Judge Freeseaman), and the language of the Authorization Statute does not prevent same, it is improper to restrict this means of discovery. See Smith v. American Home Products Corp, 372 N.J. Super. 105, 855 A.2d 608 (2003) (HIPAA does not expressly forbid *ex parte* contacts, and therefore Congress did not intend to displace any state court rule, statute or case law on *ex parte* interviews.

Not only does Georgia not prohibit *ex parte* communications, Georgia **should not** prohibit them. "The ultimate end of all litigation is the ascertainment and rendition of the truth. The truth can be determined only through the sworn testimony of witnesses. thus any person not privileged having knowledge of the issues being tried should be available to the parties as witnesses." Logan v. Chatham County, 113 Ga. App. 491 (1966). A physician's duty to his patient is to provide medical care in conformance with the standard of care. He does not have the duty to become an expert advocate in a medical malpractice action. He should be an unbiased, neutral fact-finder, as Plaintiffs suggest at trial. As such, he should be available to both sides, as with other fact witnesses.

C. HIPAA does not prohibit *ex parte* contact with treating physicians.

1. HIPAA only preempts conflicting state law.

HIPAA, by its terms, only preempts those situations involving **direct conflict** between the Act and state law. HIPAA's implementation "shall supercede **any contrary provision of State law.**" 42 USC §1320d-7(a)(1) (emphasis added).

1. HIPAA does not prohibit *ex parte* communications.

HIPAA does not prevent disclosure of medical information, but requires certain procedures for disclosure. For example, health care entities are authorized to provide medical information by

written form or orally in response to an authorization. Further, without such authorization, disclosure can be made pursuant to a discovery request or other lawful process if either the patient is notified of a request, or reasonable efforts have been made to secure a protective order. 45 CFR §164.512(e).

While the authorization statute in question, contemplates a written authorization to facilitate the disclosure of such information, even without an authorization, defendants would be entitled to access the medical information.

Informal discovery procedures, such as *ex parte* communications, are not expressly addressed under HIPAA as either endorsed or prohibited. In the absence of controlling legislation, the courts should be governed by state law.

While Plaintiff has cited to a ruling by Judge Turner which Judge states that *ex parte* contacts are contrary to HIPAA, the opinion does not cite any law or analysis to explain this position, which may, on the face of it, be merely the recitation of an erroneous assumption. Further the case is not over, and while the court declined to allow to be considered for interlocutory review, no higher court has had the opportunity to review this ruling. (Incidentally, this also holds true with respect to Judge Freeseaman's ruling). Further, it is contrary to opinions of other courts. See State Court Judge Phillips' ruling in the case of Moreland v. Austin et al, State Court of Bibb County, State of Georgia, File No. 49523 (2004), attached as Exhibit A, in which the Court denied Plaintiff's Motion to Disqualify medial witnesses due to defendant's *ex parte* contacts, finding that HIPAA does not apply, and that Georgia law permits same. See also, Smith v. American Home Products Corp., 372 N.J. Super. 105, 855 A.2d 608 (2003)(HIPAA does not preempt state law allowing *ex parte* contacts), attached as Exhibit B; Steele v. Clifton Springs Hospital and Clinic, 788 N.Y.S.2d 587 (Sup. Ct. Monroe Co. 2005) (HIPAA not an impediment to defendant's Motion to compel

Authorization to permit *ex parte* discussions with treating physician, as required by state law.) attached as Exhibit C.

Even courts which construe a preemption by HIPAA permit *ex parte* contacts, where HIPAA procedures are followed by providing an Authorization, discovery request, court order or the like. Law v. Zuckerman, 307 F. Supp.2d 705 (D. Md. 2004) (*Ex parte* contacts are permissible when HIPAA procedures are followed); Bayne v. Provost, 359 F. Supp.2d 234 (N.D.N.Y. 2005) (Defendant's motion for *ex parte* contacts with home health nurse granted.)

D. The Authorization Statute does not prohibit *ex parte* contact with treating physicians.

As noted earlier, O.C.G.A. § 9-11-9.2 does not restrict counsel's right to conduct *ex parte* interviews. Since these are otherwise permissible under Georgia law, it is to be presumed that the Legislature did not intend to alter this.

E. Plaintiff's Authorization is deficient for other reasons.

In addition to the reasons already discussed, Plaintiff's Authorization is deficient in that it fails to include a provision which "authorize[s] the release of such information by an **physician or health care facility** by which health care records of the plaintiff or plaintiff's decedent would be maintained." The form filed in this case only authorizes **the attorney representing defendants** to obtain and disclose protected health information contained in the records. Failure to include the required authorization for health care providers renders the form defective and non-compliant, which requires dismissal of the action.

F. Plaintiff's Affidavit fails to specify the act or omission which allegedly violates the standard of care.

Plaintiff apparently misunderstood Memorial/MHUMC's concern with respect to the conclusory allegations of Plaintiff's Affidavit. Defendants' did not challenge the foundation of Dr. Schroeder's opinions, but rather the substance of it. It is not sufficient for an Expert to opine that a

person has violated the standard of care without specifying at least one negligent act or omission attributable to that person. No such allegation was raised in Plaintiff's Affidavit.

Further, while Plaintiff claims that he lacks information sufficient to determine whether Dr. Jenkins was an agent or employee, Plaintiff has Dr. Jenkins admission that he was not an employee or agent (Jenkins' Answer to Plaintiff's complaint, Par. 6), and Memorial/MHUMC's affirmative statement that he was neither an agent or employee. (Memorial/MHUMC's Answer, Par. 6). Plaintiff states that he is waiting on records to demonstrate this fact. No such records exist. Since neither Memorial nor MHUMC has a relationship with Jenkins, there are no records relating the two.

III. CONCLUSION

Plaintiff has failed to provide an expert Affidavit alleging any negligent act or omission against any employee or agent of MHUMC or Memorial. As a result, Plaintiff's Complaint should be dismissed against these Defendants.

Plaintiff failed to provide an Authorization permitting Defendants access to the relevant medical records, with the exception of those that are privileged. As a result of said failure, Plaintiff's Complaint should be dismissed.

WHEREFORE, Defendants pray that the Court will grant their Motion to Dismiss.

This ____ day of May, 2005.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of MHUMC and Memorial Reply
Brief in support of their Motion to Dismiss upon all parties to this matter by depositing a true copy
of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

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This ____ day of May, 2005.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

By: _____

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ORDER

Having read and considered Memorial Health University Medical Center, Inc. and Memorial Health, Inc.'s Motion to Dismiss Plaintiff's Complaint and brief in support and any response thereto, it is hereby

ORDERED, DECREED, AND ADJUDGED that Memorial Health University Medical Center, Inc. and Memorial Health, Inc.'s Motion to Dismiss Plaintiff's Complaint is hereby GRANTED.

Judge, State Court Of Chatham County,

Georgia

PREPARED BY:
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