STATEMENT OF JURISDICTION

This Petition is for leave to appeal an interlocutory order from the Superior Court of Toombs County. The Court of Appeals for the State of Georgia has appellate jurisdiction based on O.C.G.A. §5-6-34, and Rule 30 of the Court of Appeals and the Superior Court's Certificate of Immediate Review of August 30, 2005, certifying that its Order denying the Petitioners' Motion To Dismiss is of such importance to the case that immediate review should be had. The Superior Court's Order of August 30, 2005, denying Petitioners' Motion To Dismiss is erroneous and the issue to be decided is dispositive of the case and will adversely affect petitioners' rights. Additionally, this is a matter of first impression and the establishment of precedent is desirable.

A stamped filed copy of the Superior Court's Order to be appealed is attached hereto as Exhibit A and at Tab 1. A stamped filed copy of the Certificate of Immediate Review is attached hereto as Exhibit B and at Tab 2.

ENUMERATIONS OF ERROR

1.

Whether the Superior Court erroneously concluded that O.C.G.A. § 9-11-9.2 is less stringent than the Health Insurance Portability and Accountability Act ("HIPAA") and is preempted by HIPAA pursuant to 45 C.F.R. § 160.203.

2.

Whether the Superior Court erroneously failed to follow the rules of statutory construction and give effect to the language of O.C.G.A. § 9-11-9.2.

3.

Whether the Superior Court erroneously failed to apply the language of O.C.G.A. § 9-11-9.2 to the facts of this case and dismiss the Plaintiff's action against the Defendants where the record established Plaintiff had not executed a medical authorization form in accordance with the requirements of O.C.G.A. § 9-11-9.2.

4.

Whether the Superior Court erroneously failed to apply the language of O.C.G.A. § 9-11-9.2 on the grounds it is in conflict with the formal discovery methods authorized under the Georgia Civil Practice Act.

5.

Whether the Superior Court erroneously failed to apply the language of O.C.G.A. § 9-11-9.2 and dismiss Plaintiff's action against the Defendants where the record evidence established that the Plaintiff had not executed any medical authorization form authorizing defense counsel to meet with Plaintiff's physicians ex parte, and the Plaintiff conceded that O.C.G.A. § 9-11-9.2 creates the right to conduct ex parte interview with treating physicians. Tab 11, MT-23.

STATEMENT OF THE CASE

Proceedings and Disposition in the Court Below

On May 9, 2005, Respondent Ernestine C. Wright (hereinafter "Respondent") filed her lawsuit against Petitioners Thomas M. Allen, M.D. and Four Rivers Orthopedic Associates. Tab 3. Attached to her complaint was a purported medical authorization form signed by Respondent Wright dated May 4, 2005, which specifically stated, "Defendant's attorney is not permitted to use this authorization . . ." Tab 4.

The Petitioners then filed a timely Answer on June 7, 2005. Tab 5. The Petitioners also filed a Motion to Dismiss the Respondent's action based on her failure to attach a medical authorization form contemporaneously with their Answer. Tab 6. The Respondent filed a brief opposing Petitioners' motion on July 5, 2005. Tab 7. Petitioners filed a rebuttal to the Respondent's brief on July 19, 2005. Tab 8. Respondent then filed what amounted to a second reply brief on July 27, 2005. Tab 9.

A hearing on the Petitioners' motion was scheduled for August 4, 2005. Tab 10. On August 4, 2005, the parties to this action appeared before the

Honorable Walter C. McMillan, Jr. and argued their respective positions on this issue. Tab 11.

On August 4, 2005, Judge McMillan granted a consent motion to add a party Defendant, Zimmer US, Inc. Tab 12. Subsequently, an Amended Complaint was filed adding as a party Defendant Zimmer US, Inc. Tab 13.

On August 25, 2005, an Order denying the Petitioners' Motion to Dismiss was entered on the record. Tab 1. Five days later, on August 30, 2005, a Certificate of Immediate Review was entered on the record. Tab 2. Petitioners now appeal the denial of their motion to dismiss and seek interlocutory review to address the Superior Court's erroneous decision concluding the O.C.G.A. § 9-11-9.2 is preempted by HIPAA and inapplicable in light of a purported conflict with the formal discovery rules found in the Georgia Civil Practice Act.

STATEMENT OF FACTS

This is an alleged medical malpractice case arising from a hip replacement surgical procedure that was performed May 4, 2004. Tab 3. The Respondent alleges in her complaint that Petitioner Allen failed to ensure that there was the necessary equipment available at the hospital to perform the scheduled surgery. Tab 3. However, in discovery responses Petitioner Allen established that the equipment was tested pre-operatively and intra-operatively and found to be functioning properly. Tab 15. Meadows Regional Medical Center (hereinafter "MRMC") disclosed in its discovery responses that Zimmer Orthopedic representatives reviewed the instrumentation at issue pre-operatively and assured the staff at MRMC that it would function properly. Tab 16. Since the disclosure of this information, Zimmer US, Inc. has been added as a party Defendant. Tab 13.

ARGUMENT AND CITATION OF AUTHORITY

I. Introduction

Petitioners seek leave to appeal an Order from the Superior Court of Toombs County denying their Motion to Dismiss based on O.C.G.A. § 9-11-9.2. The lower Court has also concluded that the statute at issue, O.C.G.A. §

9-11-9.2, is preempted by HIPAA thereby rendering it a nullity and wholly meaningless. To the Petitioners' knowledge this statute has not been interpreted by any appellate division of this State and, therefore, the case before the Court is ripe for review for the foregoing reasons.

O.C.G.A. § 9-11-9.2 is applicable and enforceable, and the lower Court's ruling is clearly erroneous. Moreover, once the requirements of O.C.G.A. § 9-11-9.2 are applied to this case the Petitioners are entitled to be dismissed from the action pursuant to the clear language of the statute.

II. Statute at Issue

Prior to the filing of this action, legislation was adopted by the Georgia Legislature and signed into law by the Governor of the State of Georgia which created, among other things, O.C.G.A. § 9-11-9.2. Senate Bill 3.

O.C.G.A.§ 9-11-9.2, as enacted and signed into law, requires in an action for medical malpractice that a Plaintiff "shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal." (O.C.G.A.§ 9-11-9.2(a)).

Said Act goes on to further require that the medical authorization form shall allow the defense attorney to obtain protected health information

contained in the plaintiff's medical records. Moreover, the Act provides that the authorization shall provide that the defendant's attorney shall be authorized to discuss the care and treatment of the individual whose care is at issue in the action with individual's treating physicians. (O.C.G.A. § 9-11-9.2(b)).

O.C.G.A.§ 9-11-9.2 specifically acknowledges that the authorization shall allow the defense attorney to obtain medical records and to discuss the patient's medical care with their medical healthcare providers 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, to plaintiff's decedent whose treatment is at issue in the complaint." (O.C.G.A.§ 9-11-9.2(b)). Respondent in this case acknowledges that this language creates the right for defense counsel to conduct ex parte interviews. Tab 11, MT-23.

Under O.C.G.A. § 9-11-9.2, a plaintiff must attach a valid medical authorization that is capable of being utilized by defense counsel. The medical authorization under O.C.G.A. § 9-11-9.2 must also authorize defense counsel to conduct ex parte interviews with the plaintiff's treating physicians. Failure to comply with either of these requirements mandates dismissal of the

action, and in the instant matter Respondent has failed to meet any of the requirements of O.C.G.A. § 9-11-9.2.

III. Statutory Framework

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, Not reported in A.2d, 2005 W.L. 1253530, *2 (N.J. Super. Ct. Law Div. 2005). 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.").

The regulations promulgated pursuant to HIPAA are intended to provide the minimum and States are free to create rules that meet or exceed the requirements of HIPAA. 45 C.F.R. § 160.203(b). HIPAA regulations recognize that in the context of litigation the involuntary release of information is permissible and expected and identify several ways protected health information (hereinafter "PHI") can be obtained: 1) authorization; 2) court order; 3) subpoena; 4) discovery request; or 5) "other lawful process."

45 C.F.R. §§ 160.508, 160.512(e)(1)(i). The regulations promulgated pursuant to HIPAA clearly recognize that a patient or litigant can authorize the release of PHI and do not contain any language that establishes an authorization may only be obtained on a voluntary basis. 45 C.F.R. § 160.508.

Under HIPAA, courts are free to create protective orders allowing for the release of PHI through ex parte conferences or order parties to execute authorizations that accomplish the same purpose. Bayne v. Provost, 359 F. Supp. 2d 234, 2005 U.S. Dist. Lexis 6935 (N.D. N.Y., January 25, 2005); Croskey v. BMW of North America, Inc., 2005 U.S. Dist. Lexis 3673 (E.D. Mich. February 14, 2005). Legislatures are likewise free to create a statutory framework that accomplishes the same goal, which is what the Georgia legislature has done in this instance by enacting O.C.G.A. § 9-11-9.2.

IV. O.C.G.A. § 9-1-9.2 is not preempted by HIPAA

Preemption "grows from the premise that when state law conflicts or interferes with federal law, state law must give way." Continental Pet Technologies, Inc. v. Palacias, 269 Ga. App. 561, 562 (2004). HIPAA

expressly addresses the scope of preemption and provides, in relevant part, as follows:

> §160.203. A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:
>
> (b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

45 C.F.R. § 160.203.

The regulations promulgated pursuant to HIPAA therefore limit preemption to those State regulations that do not meet the minimum requirements created by HIPAA, yet recognize and allow States to promulgate their own regulations that meet or exceed the requirements of HIPAA. 45 C.F.R. § 160.203. Consequently, State laws that comply with the requirements of HIPAA are not preempted.

It is within this framework that this Honorable Court must undertake to determine whether O.C.G.A. § 9-11-9.2 meets or exceeds HIPAA's requirements. If O.C.G.A. § 9-11-9.2 meets or exceeds those requirements, as it most surely does, then this Court must give full effect to O.C.G.A. § 9-11-9.2 and reverse the lower Court's Order denying Petitioners' Motion to Dismiss.

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

Since O.C.G.A. § 9-11-9.2 merely requires litigants to comply with the requirements of 45 C.F.R. § 160.508(c) and execute a HIPAA compliant

medical authorization form allowing for the release of PHI, it is clear that O.C.G.A. § 9-11-9.2 is not preempted by HIPAA.

The regulations promulgated under HIPAA contemplate the use of medical authorizations to obtain PHI. 45 C.F.R. § 164.508. Under HIPAA, a medical authorization's "core elements" are: (1) a description of the information to be used or disclosed; (2) the name or class of persons authorized to make the requested disclosure; (3) a description of the purpose or requested use for disclosure; (4) an expiration date or expiration event; and, (5) the signature of the individual or authorized personal representative. 45 C.F.R § 164.508(c).

Medical authorizations created by court order in the context of litigation have been cited with approval. Croskey v. BMW of North America, Inc., 2005 U.S. Dist. Lexis 3673 (E.D. Mich. February 14, 2005). There, the Court concluded that under HIPAA the plaintiff could be required to execute an authorization allowing for ex parte conferences and specifically referenced several Michigan State Court decisions which required the plaintiff to execute an authorization for ex parte communication, including one that referenced an authorization that stated, "I am authorizing, but not requesting, that you meet

with [defense attorney] to discuss the care and treatment of the above-named patient. Please be advised that this authorization does not require you to meet with [defense attorney]. You may decline such a meeting without being in violation of any Michigan or federal law." Lance v. Grassl, Case No. 03-00-0287 NH (Kalamazoo County Court, January 2004.). See Croskey v. BMW at 28, 29.

O.C.G.A. § 9-11-9.2 merely creates a requirement that when an individual chooses to file a medical malpractice action he or she must contemporaneously file a medical authorization form that complies with the requirements of 45 C.F.R. 164.508(c). That requirement is simple and complies with the regulations promulgated pursuant to HIPAA.

The release of medical information is not unfettered, as O.C.G.A. § 9-11-9.2 provides, "The authorization shall provide for the release of all protected health information except information that is considered privileged . . ." Thus, O.C.G.A. § 9-11-9.2 provides reasonable safeguards and appropriately limits the scope of a medical authorization. Moreover, Georgia law is more stringent than the federal medical authorization regulation (45 C.F.R. § 164.508) because it does not permit the release of privileged PHI

such as psychotherapy notes pursuant to a medical authorization, while the federal regulation clearly states that this kind of sensitive information can be released with a medical authorization. 45 C.F.R. § 164.508(a)(2).

What O.C.G.A. § 9-11-9.2 quite reasonably insists upon is that a plaintiff authorize the disclosure of his PHI, as a plaintiff cannot maintain the privacy of his medical history during the course of a medical malpractice action while at the same time attempt to utilize that very information to establish that a defendant is liable and must pay money damages. Such a scheme would invariably violate the due process rights of the defendant, and accordingly is nowhere to be found within the regulations promulgated pursuant to HIPAA. The statutory framework of O.C.G.A. § 9-11-9.2 complies with the regulatory framework of HIPAA and, therefore, is not preempted. Accordingly, the Superior Court erred when it reached the conclusion that O.C.G.A. § 9-11-9.2 is preempted by HIPAA.

V. HIPAA does not apply to Public Health Investigations

State laws are not preempted by HIPAA where those regulations play a role in public health investigations. 45 C.F.R. § 160.203(c). Georgia law recognizes and contemplates that public health investigations are a public-

private partnership between the Composite Board of Medical Examiners (hereinafter "Board") and litigants. In that regard, Georgia law provides in the first instance that every settlement or judgment returned against a licensed physician shall be reported to the Board. O.C.G.A. § 33-3-27.

> (b) Every insurer providing medical malpractice insurance coverage in this state shall notify in writing the Composite State Board of Medical Examiners when it pays a judgment or enters into an agreement to pay an amount to settle a medical malpractice claim against a person authorized by law to practice medicine in this state. Such judgments or agreements shall be reported to the board regardless of the dollar amount. Such notice shall be sent within 30 days after the judgment has been paid or the agreement has been entered into by the parties involved in the claim.

O.C.G.A. 33-3-27(b). Georgia law further creates a mandatory duty to investigate a licensee's fitness to practice medicine where there has been a judgment or settlement in excess of a certain amount. O.C.G.A. § 43-34-37.

> (i) The board shall investigate a licensee's fitness to practice medicine if the board has received regarding that licensee a

> notification, pursuant to Code Section 33-3-27, of a medical malpractice judgment or **settlement** in excess of $100,000.00 or a notification pursuant to Code Section 33-3-27 that there have been two or more previous judgments against or **settlements** with the licensee relating to the practice of medicine. Every licensee shall notify the board of any **settlement** involving the licensee and relating to the practice of medicine in excess of $20,000.00.

O.C.G.A. § 43-34-37(i). Thus, Georgia's statutory framework contemplates that public health investigations encompass medical malpractice actions and, in certain situations, that the Board must conduct an additional mandatory investigation based upon the amount of a settlement or judgment.

HIPAA does not apply to public health investigations or statutes promulgated to further those investigations. 45 C.F.R. § 160.203(c). A medical authorization form executed pursuant to O.C.G.A. § 9-11-9.2 is an integral part of any public health investigation of a licensee's fitness to practice medicine, because without access to a plaintiff's PHI private litigants cannot pursue or defend claims whose result will ultimately be utilized by the Board to make a threshold determination as to whether an additional

investigation is warranted. O.C.G.A. § 9-11-9.2 is a statute that is intended to be utilized to further the public health interests of this State and to further investigations into whether a licensee is fit to practice medicine. Accordingly, it is not preempted by HIPAA pursuant to 45 C.F.R. § 160.203(c) and the lower Court erred in entering an Order to the contrary.

VI. The medical authorization is a nullity

As O.C.G.A. § 9-11-9.2 is not preempted by HIPAA, the next issue for this Court to determine is whether the Respondent executed a medical authorization form that complies with the requirements of O.C.G.A. § 9-11-9.2. Clearly, the record establishes that the Respondent did not.

The language contained in the medical authorization form renders it meaningless because the Respondent has expressly directed her treating physicians not to honor her purported medical authorization form if it is presented by defense counsel. The medical authorization form expressly states:

> Defendant's attorney is not permitted to use this authorization, and you are not permitted to disclose Ernestine C. Wright's protected health information to Defendant's attorney, unless Defendant's attorney's

request for my protected health information complies with 45 C.F.R. §164.512(e).

The above sentence is written in the conjunctive and, therefore, each phrase stands alone. The first phrase, "Defendant's attorney is not permitted to use this authorization", expressly instructs the Respondent's healthcare providers that this medical authorization shall not be used by defense counsel to secure any of the Respondent's protected healthcare information.

The second phrase of the above sentence also instructs the Respondent's treating physicians not to release protected health information pursuant to the purported medical authorization form because the regulation cited, 45 C.F.R. § 164.512(e), specifically refers to situations where no authorization is required and only references discovery situations involving court orders, subpoena's and discovery devices. The second phrase in this paragraph therefore also establishes that the Respondent's medical authorization form cannot be utilized by defense counsel. The medical authorization form provided by the Respondent ignores the requirements of the statute in an unmistakable manner by containing language which renders

it a worthless nullity and, therefore, the Respondent's complaint against the Petitioners must be dismissed.

VII. The medical authorization improperly limits ex parte contact

O.C.G.A. §9-11-9.2 requires that the medical authorization form executed by a plaintiff allow defense counsel to meet with her treating physicians ex parte, and the Respondent has conceded that this Code Section in fact "appears to create that right." Tab 11, MT-23. Nonetheless, the purported medical authorization form executed by Respondent prohibits ex parte contact, stating that she "further request[s] that no meeting or any type of communication or discussion with defense counsel take place unless the patient's attorney . . . is present." Tab 4. Because the purported medical authorization form contains this language limiting counsel's right to engage in ex parte contact it is in violation of the requirements of O.C.G.A. § 9-11-9.2.

The statutory mandate requiring the authorization of ex parte conferences is clear when the rules of statutory construction are applied and this Court gives each and every word of O.C.G.A. § 9-11-9.2 effect. Butterworth v. Butterworth, 227 Ga. 301 (1971). To give full effect to the second sentence of O.C.G.A. § 9-11-9.2(b), which allows defense counsel to

discuss the plaintiff's medical care with his healthcare providers, this Court must reasonably conclude that this statute requires a plaintiff to give consent for an ex parte conference with her treating physicians, which is the interpretation given to this language by the Respondent. Tab 11, MT-23. Construing that language to refer to deposition testimony would be nonsensical, since there is no need under state or federal law to obtain an authorization for a deposition.

HIPAA does not alter the Petitioners' rights under Georgia law as the regulations do not preclude or prohibit ex parte interviews. Bayne v.Provost, 359 F. Supp. 2d 234 (N.D.N.Y. 2005). "Absent within the four corners of the relevant rules and regulations and the enabling statute is any mention of an ex-parte interview of a health provider, such as whether to prescribe or proscribe such actions, unless we refer to 42 U.S.C. §1320d(4) as providing a definitive address to the matter. Section 1320d(4) states that 'health information means any information, whether **oral** or recorded in any form or medium.' (emphasis added). Presumably, the only reasonable method to gain health information that remains oral and not reduced to writing is by an interview." Bayne v.Provost, 359 F. Supp. 2d 234 (N.D.N.Y. 2005).

In Bayne v. Provost, the District Court recognized that to shield a health care provider from a proper ex parte interview by a defendant "would be tantamount to denying the defendants of their right to effective assistance of counsel." See IBM v. Edelstein, 526 F.2d 37 (2nd Cir. 1975). The District Court went on to note that a deposition would not resolve this issue, because "a deposition is not the same as an ex parte interview and this Court does not have the authority to limit, control, or nullify the benefits an interview may have over a deposition, and neither should the plaintiff." Id. The District Court's reasoning, particularly in light of controlling Georgia law which permits ex parte interviews of medical providers, is persuasive. See Orr v. Sievert, 162 Ga. App. 677 (1982)(ex parte conferences to discuss plaintiff's medical care are authorized under O.C.G.A. §24-9-40 once suit is filed).

Other Courts have reached a similar conclusion, which is that HIPAA permits ex parte interviews. In Croskey v. BMW of North America, Inc., 2005 U.S. Dist. Lexis 3673 (E.D. Mich. February 14, 2005), the defendant, BMW, filed an emergency motion to permit its counsel to meet ex parte with all of the Plaintiff's treating physicians and healthcare providers. The Court held that the defendant could satisfy HIPAA and conduct ex parte conferences

with the Plaintiff's treating physicians, and also concluded that under HIPAA the Plaintiff could execute an authorization allowing for ex parte conferences. Id The Court specifically referenced several Michigan State Court decisions that have required a plaintiff to execute an authorization for ex parte communication which stated, "I am authorizing, but not requesting, that you meet with [defense attorney] to discuss the care and treatment of the above-named patient. Please be advised that this authorization does not require you to meet with [defense attorney]. You may decline such a meeting without being in violation of any Michigan or federal law. Lance v. Grassl, Case No. 03-00-0287 NH (Kalamazoo County Court, January 2004.)"

The Croskey v. BMW Court went on to hold that under HIPAA a defendant could also satisfy HIPAA's requirements by securing an appropriate qualified protective order pursuant to 45 C.F.R. § 164.512(e)(1). It held that under 45 C.F.R. § 164.512(e) there were three ways which BMW might comply with this Code section: (1) by obtaining a qualified court order; (2) by sending a subpoena or discovery request where plaintiff has been given notice of the request; or (3) by sending a subpoena or discovery request where reasonable effort has been made to obtain a qualified protective order. After

weighing these considerations, the Court wrote: "I decline to enter an order prohibiting defense counsel from scheduling ex parte meetings with Drs. Keoleian, Krasnick or Frank, as BMW might do so by complying with my foregoing conclusions." Id.

A similar holding was reached in a recent unpublished opinion out of New York. Smith v. Rafalin, 2005 NY Slip Op 50385U; 6 Misc. 3d 1041A; 2005 N.Y. Misc. Lexis 546. The Court there noted that as a general proposition no party to litigation "has anything resembling a proprietary right to any witness's evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting on some notion of allegiance." Id.[1] It also noted that privilege was never intended to be used as a trial tactic by which a party may control to his

[1] Georgia's Rules of Professional conduct support this proposition and prohibit a lawyer from requesting that a person, other than his client, "refrain from voluntarily giving information to another party" unless the information is subject to an assertion of privilege. Georgia Rules Professional Conduct, Rule 3.4(f).

advantage the timing and circumstances of the release of information that must inevitably be revealed at some time. Id. Finally, the Court concluded that formal depositions are no substitute for informal, off the record interviews to learn and assemble information. Id. The Court in Smith v. Rafalin then ordered the Plaintiff to provide an authorization to defense counsel to conduct ex parte interviews, and also instructed defense counsel to turn over any medical records that the physician had not previously produced which were received during the interview.

By commencing this action for damages, the Respondent has placed her care and medical conditions at issue, and has conceded that point. Tab 7, p. 15. She has conceded in her briefings to the lower Court on this issue that she "does not dispute that she has placed her medical care and treatment at issue upon the filing of this lawsuit." Id.

Instead, the Respondent seeks to control the manner and timing of the dissemination of her protected health information and has implicitly conceded that this is her objective in briefings to the lower Court. The Respondent has also advised each of her medical providers in writing that she has no objection to the release of her PHI, but merely objects to the prospect of an ex-parte

conference to obtain oral PHI. Tab 13.[2] In short, the record establishes that the Respondent has interposed no objection to the release of her PHI, just the timing and manner of its release, something which HIPAA does not govern thereby leaving this State free to create O.C.G.A. § 9-11-9.2 and mandate ex parte conferences.

VIII. Conclusion

O.C.G.A. § 9-11-9.2 is not preempted by HIPAA and governs this matter. The Respondent has ignored the requirements of O.C.G.A. § 9-11-9.2 and failed to execute a medical authorization in this matter. Accordingly, the lower Court's Order denying the Petitioners' motion to dismiss is erroneous.

[2] Respondent wrote each of her medical advisers in response to the Petitioner's third-party requests to produce all PHI, including oral PHI, that, "We [respondent] have no objection to your furnishing Mr. Nelson [defense counsel] with copies of Ms. Wright's medical records as long as the records produced comply with the protection afforded by Georgia law as it relates to certain types of records." Tab 14.

Wherefore, for the foregoing reasons, Petitioners respectfully request that this Honorable Court grant their Petition for Interlocutory Review.

Respectfully submitted this _____ day of _____, 2005.

_____
David N. Nelson
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OF COUNSEL:

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CERTIFICATE OF SERVICE

I, David N. Nelson, Attorney of Record for Petitioners, THOMAS M. ALLEN, M.D. AND FOUR RIVERS ORTHOPEDIC ASSOCIATES, P.C., do hereby certify that I have this day served the within and foregoing Petition For Leave to File Interlocutory Appeal upon Mr. William H. Pinson, Jr., Attorney of Record for Respondent Ernestine C. Wright and Mr. John C. Daniel, III, Attorney of Record for Defendant Meadows Regional Medical Center by mailing a true and correct copy thereof, properly addressed and with sufficient postage affixed thereon to ensure delivery to them at their address of record, to wit:

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Counsel for Defendant Meadows
Regional Medical Center

This _____ day of _____, 2005.

_____
David N. Nelson