

**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 REPLY 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 Reply in Support of its Motion to Dismiss Count V of Plaintiffs' Complaint for Declaratory Judgment, showing this Court as follows:

Plaintiffs concede, as they must, that, having placed Mr. Walters' medical condition at issue in this litigation, Mr. Walters' medical condition is "the subject of legitimate investigation by the opposing party." See Plaintiffs' Response, p. 19. Nowhere in their Response do Plaintiffs take issue with the Defendants' right to obtain, toward the end of defending the charges which Plaintiffs have seen fit to levy in this

litigation, Mr. Walters' medical *records*. Rather, Plaintiffs take issue with Defendants' ability to conduct unwritten discovery by way of informal interviews with Mr. Walters' medical providers towards the end of investigating the claims Plaintiffs have asserted against the Defendants. In doing so, Plaintiffs seek to impose a constitutional impediment where there is none, and stretch a federal regulation beyond its intended scope or application. At bottom, Plaintiffs' arguments amount to little more than an effort to impede a medical malpractice defendant's ability to investigate the claims made against it and eviscerate the privacy of its work product, while reserving such a right solely for the plaintiff. In an action where a plaintiff has placed his or her medical condition squarely at issue, neither the constitution nor HIPAA contemplate such a result.

I. O.C.G.A. § 9-11-9.2 does not violate Plaintiffs' due process rights.

As an initial matter, despite Plaintiffs' initial assertion that O.C.G.A. § 9-11-9.2 violates a broad range of provisions found in the United States and Georgia constitutions, Plaintiffs have abandoned all such contentions save one - due process. With respect to due process, Plaintiffs concede that "the filing of a suit alleging personal injury waives a patient's **substantive** due process right to keep his or her medical information private." See Plaintiffs' Response, p. 17 (emphasis in original). Plaintiffs' sole remaining constitutional argument, then, is that O.C.G.A. § 9-11-9.2 violates their *procedural* due process rights.

Plaintiffs' argument, however, turns the due process clause on its head, and begs the questions: "For what right are Plaintiffs entitled the protection of due process?" and "How is due process being violated?" As Plaintiffs correctly note, an individual's "privacy" interest in his or her medical information arises from the term "liberty" in the

Due Process Clause of Article I, Section I, Paragraph I of the Georgia Constitution.¹ King v. State, 272 Ga. 788, 789, 535 S.E.2d 492, 494 (2000). Such an interest is, under normal circumstances, entitled to protections of procedural due process because medical information “is certainly a matter which a reasonable person would consider to be private.” Id. at 790. However, as noted by the Georgia Supreme Court in King, this “reasonable expectation” of privacy is extinguished when an individual waives the right to keep confidential his or her medical information. Id. at 793 (observing that the right to privacy in medical information is not absolute and is subject to waiver). As expressly held by the Court in King, an individual waives his or her privacy interest in medical information when the individual places his or her care and treatment, or the nature and extent of his or her injuries, at issue in a civil proceeding for damages. Id.

As is evident upon examination of the King case, Plaintiffs take the untenable position of seeking procedural due process protections for a right which they affirmatively waived when they filed the present suit. King involved the State’s effort to obtain a patient/defendant’s medical records by way of subpoena and without affording the defendant an opportunity to object. It was the State which sought to place the patient’s medical information at issue; the patient did not do this herself. It was precisely because the patient had not waived her privacy right by placing her medical condition at issue that she was entitled to the procedural due process protection of a hearing and opportunity to object to the obtaining of such information. Id. at 792. The Court observed, however, that the result would have been different had the patient waived her privacy interest in her medical records, observing that such a waiver occurs where “the

¹ Similarly, 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[.]”

patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding.” Id. at 793 (citing O.C.G.A. § 24-9-40(a)).

Here, in contrast to the facts of King, it is the Plaintiffs who have initiated this lawsuit. It is the Plaintiffs who have called into question the medical treatment Mr. Walters received, and it is the Plaintiffs who have placed the nature and extent of Mr. Walters’ injuries at issue. Unlike the patient in King, who did not seek to place her medical condition at issue, the Plaintiffs have affirmatively placed Mr. Walters’ medical treatment and condition squarely at issue. It strains credulity for Plaintiffs to argue that, having placed Mr. Walters’ treatment and medical condition squarely at issue in this lawsuit, Plaintiffs now have a “reasonable expectation” in keeping Mr. Walters’ medical condition private. As recognized by the Supreme Court in King, in filing this lawsuit, Plaintiffs have waived their privacy interest in maintaining the confidentiality of Mr. Walters’ medical condition. Id. at 793.

Because Plaintiffs have waived their privacy right in the confidentiality of Mr. Walters’ medical condition, there, of course, no longer remains a “right” to protect. Id.; see also Atkinson v. City of Roswell, 203 Ga. App. 192, 196, 416 S.E.2d 550, 554 (1992) (“A party is not entitled to procedural due process where the interest which would be impaired by governmental action does not involve that party’s protectable interest in life, liberty, or property.”); Smith v. Crim, 240 Ga. 390, 392, 240 S.E.2d 884 (1977) (procedural due process not implicated where there is no protectable property interest). Plaintiffs’ argument to the contrary is little more than a clever effort to place Mr. Walters’ medical treatment and condition at issue, and yet impede the ability of Defendants to investigate the charges made against them. This is not the law in Georgia,

and Plaintiffs' argument is not supported by due process jurisprudence. Plaintiffs' invocation of a right which they have undisputably waived is without merit, and Plaintiffs' declaratory action should be dismissed.

II. O.C.G.A. § 9-11-9.2 is not preempted by HIPAA.

In a novel form of statutory construction, Plaintiffs repeatedly argue that the "intent" of O.C.G.A. § 9-11-9.2 is to "circumvent" HIPAA. See Plaintiffs' Response, pp. 6-7, 9. Not only does such an argument run afoul of the basic tenant of statutory construction that statutes are not to be presumed to be either illegal or unconstitutional², it presumes that there is an irreconcilable conflict between Georgia law and the regulations enacted pursuant to HIPAA. Federal preemption of state law is never a matter to be lightly inferred, and consistent with jurisprudence as to when preemption may be found to exist³, the HIPAA regulations expressly provide that state law is "contrary" with HIPAA so as to be preempted only where the state law is fundamentally at odds with the purpose and objective of HIPAA, or where a covered entity would find it "impossible" to comply with both HIPAA and state law. 45 C.F.R. § 160.202.

A. The HIPAA regulations do not prevent defense counsel from conducting informal discovery with a plaintiff's medical providers, or require defense counsel from foregoing the confidentiality of this work product.

Plaintiffs do not disguise their true objective in filing their count for declaratory judgment - to secure the ability "to object to any interview by defense counsel with Mr. Walters' doctors." See Plaintiffs' Response, p. 19. Plaintiffs' arguments make it clear

² "All 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).

³ In determining whether state law is preempted by federal law, "[t]he pertinent questions are whether [state law] conflicts with the express terms of federal law and whether its consequences

that they seek to secure a unilateral tactical advantage by hampering the ability of defense counsel to obtain medical information which Plaintiffs have placed at issue, while remaining free of the same sort intrusion upon their own work product.

Courts considering the scope and application of HIPAA have consistently found that the regulations impose no impediment upon the ability of defendants to prepare their work product in private by interviewing a plaintiff's medical providers - apart from the intrusion of plaintiff's counsel - when a plaintiff has placed his or her medical condition at issue in litigation. See, e.g. Smith v. American Home Products Corp., 855 A.2d 608, 621-624 (N.J. Super. Ct. Law Div. 2003) ("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[.]"); In re Diet Drug Litigation, 2005 W.L. 1253530, *4 (N.J. Super. Ct. Law Div. 2005) (HIPAA not a bar to defense counsel conducting informal interviews with plaintiff's medical providers where plaintiff has placed his medical condition at issue); see also 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."). These courts have rightly reasoned that where, as here, a plaintiff has filed a lawsuit placing his or her medical condition at issue, the plaintiff has no "proprietary right" in relevant medical information, and that principles of "fundamental fairness and a level playing field" mitigate against the plaintiff having the ability to unilaterally impede a defendant's ability to interview medical provider's outside of the plaintiff's presence. Steele v. Clifton Springs Hosp., 788 N.Y.S.2d 587, 590 (N.Y.

sufficiently injure the objectives of the federal regulation to require nonrecognition." Lanier v. Lanier, 278 Ga. 881, 883, 608 S.E.2d 213 (2005).

App. Div. 2005). As also recognized by the courts, to rule that HIPAA precludes such informal interviews by defense counsel 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.” Smith v. Rafalin, 2005 W.L. 697581, *3 (N.Y. App. Div. 2005).

Plaintiffs are not truly concerned about the privacy of Mr. Walters’ medical information. To the contrary, Plaintiffs have made Mr. Walters’ medical treatment and condition the centerpiece of a lawsuit, which is a matter of public record. Despite the fact that the primary purpose of HIPAA is not geared towards the conduct of parties in litigation, Plaintiffs have attempted to contort and stretch HIPAA beyond its intended scope⁴ and to their unilateral tactical advantage. This court should recognize this “gamesmanship” for what it is, and deny Plaintiffs’ count for declaratory judgment.

B. O.C.G.A. § 9-11-9.2 does not conflict with the HIPAA regulations.

The fact that the HIPAA regulations were not intended to address informal discovery methods in litigation is evident upon examination of the regulations themselves. Whereas a party desiring to obtain a patient’s medical information is ordinarily required to obtain an authorization from the patient⁵, the HIPAA regulations specifically provide that no such authorization is required in litigation, and that a party

⁴ As has been previously noted, the fundamental purpose and objective of HIPAA was to ensure increased access to health care by expanding the portability and renewability of health care insurance, not regulate the conduct of parties in litigation. See, e.g. In re Diet Drug Litigation, 2005 W.L. 1253530, *2 (N.J. Super. Ct. Law Div. 2005); Standard HIPAA Order in Civil Actions, 65 Ala. Law. 332, 333 (2004) (wherein the *Ad Hoc* HIPAA Committee of the Tenth Judicial Circuit of Alabama observed that “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.”).

may obtain such information in several traditional ways. These include obtaining medical information 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). Plaintiffs conveniently neglect to bring to this court’s attention this fourth method - “other legal process” - by which medical information may be obtained in litigation.⁶

It cannot be gainsaid that O.C.G.A. § 9-11-9.2, a statute duly-enacted into law by the Georgia legislature and designed to regulate the discovery process in litigation, constitutes such “other lawful process.” It is well-established that legislatures may, within the constitutional exercise of their inherent police powers, places conditions on the right to maintain a cause of action, and “[i]n each case, the legislative determination provides all the process that is due.” Sisson v. Douglas County School District, 181 Ga. App. 77, 80, 351 S.E.2d 272 (1986); Georgia Dept. of Med. Assistance v. Columbia Convalescent Center, 265 Ga. 638, 639, 458 S.E.2d 635 (1995). As noted above, the privacy interest which Plaintiffs previously had in Mr. Walters’ medical information operates as no “due process” impediment to the validity of this statute, as Plaintiffs waived that privacy interest when they placed Mr. Walters’ medical condition at issue in this litigation. King v. State, 272 Ga. at 793; see also O.C.G.A. § 24-9-40; 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 (M.D. Ga. 1994). The statute is a legitimate exercise of legislative authority, rationally related to the goal of

⁵ 45 C.F.R. § 164.508.

⁶ See Plaintiffs’ Response, pp. 10, where Plaintiffs argue that HIPAA “permits the release of information only by way of court order, subpoena or formal discovery request”, but neglect to mention that such information can also be obtained by “other lawful process” pursuant to the express language of the regulations.

“facilitat[ing] the investigation, evaluation, and defense of the claims and allegations set forth in the complaint[.]”

Moreover, while the statute provides for the execution of an authorization, nothing in O.C.G.A. § 9-11-9.2 conflicts with HIPAA’s requirements with respect to such authorizations. O.C.G.A. § 9-11-9.2 merely addresses the requirement that an authorization be provided in the context of medical malpractice litigation. As HIPAA creates no federal physician/patient privilege, it operates as no bar to this requirement. Ashcroft, 362 F.3d at 926; Rafalin, 2005 W.L. 697581 at *2. Rather, the HIPAA regulations address the form and content of such authorizations, a matter which O.C.G.A. § 9-11-9.2 does not purport to address. See 45 C.F.R. § 164.508 (discussing the “core elements” and required notice to be contained in such authorizations). Compliance with both O.C.G.A. § 9-11-9.2 and HIPAA is thus entirely possible, and this court should not, as Plaintiffs suggest, read conflict into these statutory and regulatory schemes where there is none. Dowis v. Mud Slinger Concrete, Inc., 269 Ga. App. 805, 807, 605 S.E.2d 615 (2004) (“All 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.”).

III. Conclusion.

It is well-established that a patient waives his interest in maintaining the privacy of his medical information where, as here, the patient files a lawsuit making such information the centerpiece of litigation. With this privacy interest having been waived, there is not constitutional impediment to a defendant charged with medical malpractice obtaining this information so as to be able to defend the charges levied against it. Nor

was HIPAA intended to operate as a bar to the ability of a defendant to have “ex parte” communications with a plaintiff’s medical providers towards the end of defending the charges against it. Plaintiffs are attempting to contort and stretch the concept of due process, as well as the HIPAA regulations, beyond their intended scope or application.

At bottom, the relief Plaintiffs really seek is to secure a unilateral advantage in litigation by depriving these medical malpractice Defendants equal access to medical information which is indisputably relevant and necessary to the defense of Plaintiffs’ claims, while retaining this access solely for themselves. In seeking to curtail, if not entirely abolish, Defendants’ ability to speak with Plaintiffs’ medical providers in private, Plaintiffs seek to deprive the ability of Defendants’ counsel to conduct their investigations and develop defense theories unhampered by Plaintiffs’ counsel. Plaintiffs seek the ability to place a “flashlight” upon defense counsels’ work product by controlling when and if defense counsel will have the ability to consult with Plaintiffs’ treating providers in private towards the end of preparing their defense, while remaining free of any such intrusion on their own work product. Nothing in the law contemplates such a result, and Plaintiffs’ count for declaratory judgment should therefore be denied.

Respectfully submitted this the _____ day of September 2005.

GORBY, REEVES, & PETERS, P.C.

MICHAEL J. GORBY, Esq.
Georgia Bar No: 301950
JAMES W. STANDARD, JR., Esq.
Georgia Bar No: 001098

Two Ravinia Drive
Suite 1500
Atlanta, GA 30346
404-239-1150

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STATE OF GEORGIA**

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**MANOLO GALLEGO, M.D.,)
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HOSPITAL, and KENNESTONE)
HOSPITAL, INC.,)
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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in the foregoing matter with a copy of **COBB COUNTY DIALYSIS, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS COUNT V OF PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT** by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon to:

Gary B. Blasingame, Esq.
Henry G. Garrard, III, Esq.
Blasingame, Burch, Garrard, Bryant & Ashley, P.C.
P.O. Box 832
Athens, GA 30603

Henry D. Green, Jr., Esq.
David A. Sapp, Esq.
Green, Johnson & Landers, LLP
One Overton Park, Suite 600
3625 Cumberland Boulevard
Atlanta, GA 30339

Robert L. Berry, Esq.
Stephen B. Moseley, Esq.
Brinson, Askew, Berry, Seigler, Richardson & Davis, LLP
615 W. 1st
P. O. Box 5513
Rome, GA 30162-5513

This _____ day of September 2005

James W. Standard, Jr.

Two Ravinia Drive
Suite 1500
Atlanta, GA 30346
404-239-1150

