Rel: June 30, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1190159

Ex parte Curt Freudenberger, M.D., and Sportsmed Orthopedic Surgery & Spine Center, P.C.

PETITION FOR WRIT OF MANDAMUS

(In re: Rhonda Brewer and Charlie Brewer

v.

Crestwood Medical Center, LLC; Curt Freudenberger, M.D.; and Sportsmed Orthopedic Surgery & Spine Center, P.C.)

(Madison Circuit Court, CV-19-901640)

SELLERS, Justice.

Two of the defendants below, Curt Freudenberger, M.D., and Sportsmed Orthopedic Surgery & Spine Center, P.C. ("Sportsmed Orthopedic"),[1] petition this Court for a writ of mandamus directing the Madison Circuit Court to vacate its October 10, 2019, protective order to the extent it imposes conditions upon ex parte interviews defense counsel intends to conduct with physicians who treated one of the plaintiffs, Rhonda Brewer, in connection with her injuries. We grant the petition and issue the writ.

I. Facts and Procedural History

In August 2019, Rhonda and her husband, Charlie, sued Dr. Freudenberger and Sportsmed Orthopedic (hereinafter sometimes collectively referred to as "the defendants"), asserting claims of medical malpractice based on injuries Rhonda allegedly suffered during the course of a surgical procedure performed by Dr. Freudenberger. Charlie also asserted a claim of loss of consortium. Before discovery, the defendants moved for the entry of a "qualified protective order," pursuant to the Health Insurance Portability and Accountability Act of

[1]The Brewers also named Crestwood Medical Center, LLC, as a defendant; Crestwood is not a party to this petition.

1996 ("HIPAA"), and filed a proposed order with their motion. Among other things, the defendants' proposed order allowed the parties' attorneys to request ex parte interviews with Rhonda's treating physicians, who could either grant or deny such request;[2] it prohibited the parties from using or disclosing protected health information for any purpose other than the subject litigation; and it required the return or destruction of that information at the end of the litigation. The Brewers objected to the proposed order, arguing that defense counsel's ex parte interviews with Rhonda's treating physicians would violate both HIPAA and the Alabama Rules of Civil Procedure.

The trial court thereafter entered a qualified protective order authorizing the disclosure of Rhonda's protected health information; the order, however, imposed the following

[2]The defendants' proposed order states, in relevant part, that "[t]he attorneys for the parties to the lawsuit may request an interview with any healthcare providers ... in connection with [Rhonda's protected health information]. ... Such healthcare provider ... may grant or deny a request for an interview." We interpret the proposed order as meaning that the attorneys may request interviews with only those physicians with whom Rhonda consulted in connection with her injuries.

conditions upon defense counsel's contacts with her treating physicians:

> "No ex parte interviews will be conducted by [defense counsel] with [Rhonda's] prescribing and treating physicians unless and until [defense counsel] provides [Rhonda's counsel] with at least ten (10) days written notice of the time and place of the interview and the opportunity to attend."

The defendants moved the trial court to reconsider its order, arguing that its limitations, if not elimination, of a valid discovery tool was without any basis in Alabama law or HIPAA. They specifically contended that Alabama law allowed ex parte interviews with treating physicians, that HIPAA did not prohibit ex parte interviews with treating physicians, and that the restrictions imposed effectively deprived them from conducting ex parte interviews. The trial court denied the motion to reconsider. This mandamus petition followed.

II. Standard of Review

> "Discovery matters are within the trial court's sound discretion, and this Court will not reverse a trial court's ruling on a discovery issue unless the trial court has clearly exceeded its discretion. Home Ins. Co. v. Rice, 585 So. 2d 859, 862 (Ala. 1991). Accordingly, mandamus will issue to reverse a trial court's ruling on a discovery issue only (1) where there is a showing that the trial court clearly exceeded its discretion, and (2) where the aggrieved party does not have an adequate remedy by ordinary appeal. The petitioner has an affirmative

> burden to prove the existence of each of these conditions."

Ex parte Ocwen Federal Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003). "Generally, an appeal of a discovery order is an adequate remedy .... In certain exceptional cases, however, review by appeal of a discovery order may be inadequate, for example, ... when a privilege is disregarded ...." Ex parte Ocwen, 872 So. 2d at 813.

III. Analysis

1. Mandamus Review

Mandamus review is appropriate in this case because the trial court's protective order involves a disregard of the work-product privilege. Ex parte Stephens, 676 So. 2d 1307, 1310 (Ala. 1996), overruled on other grounds, Ex parte Henry, 770 So. 2d 76 (Ala. 2000). As the defendants point out, the trial court's order allows the Brewers' counsel to peer into defense counsel's mental impressions and effectively discloses defense strategies. Rule 26(b)(4), Ala. R. Civ. P., expressly states that "the trial court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the ligation." See also Hickman v. Taylor, 329

U.S. 495, 510 (1947)(explaining that a lawyer's work product is reflected in many intangible ways, including interviews, and that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel").

2. The Role of HIPAA in Regulating Ex Parte Interviews

In 1996, the United States Congress enacted, and the President signed into law, HIPAA. (Pub. L. No. 104-191, 110 Stat. 1936 (1996)).[3] Congress enacted HIPAA, in part, to protect the privacy of an individual's health information.[4] The Department of Health and Human Services subsequently proposed and adopted the "Privacy Rule," which consists of a series of regulations governing permitted uses and disclosures of protected health information.[5] The Privacy Rule prohibits

[3]HIPAA, as amended, is codified in various sections of Titles 18, 26, 29, and 42 of the United States Code.

[4]See 45 C.F.R. § 160.103 (1997)(defining "protected health information" and its subset "individually identifiable health information").

[5]The Privacy Rule is codified at parts 160 and 164 of Title 45 of the Code of Federal Regulations (45 C.F.R. pt. 160, 164 (2018)).

a "covered entity"[6] such as a health-care provider from using or disclosing protected health information without written authorization, unless the use or disclosure of that information is specifically permitted or required by the Privacy Rule. 45 C.F.R. §§ 164.502, 164.506, 164.508, 164.510, 164.512 (2018).

Relevant to medical-malpractice cases in general and to this dispute in particular, the Privacy Rule permits a health-care provider to disclose protected health information "in the course of any judicial or administrative proceeding," pursuant to a court order; in such situation, written authorization is not required. 45 C.F.R. § 164.512(e)(2018). This permissive disclosure is known as the "judicial exception" to the Privacy Rule. Under the Privacy Rule, a "qualified protective order" is an order of a court or administrative tribunal or a stipulation by the parties that (1) prohibits the use or disclosure of protected health information "for any purpose other than the litigation or proceeding for which such information was requested" and (2) requires the return or

[6]A "covered entity" is defined to include health plans, health-care clearinghouses, and health-care providers, such as physicians and hospitals.

destruction of that information at the end of the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(v)(A).

In this case, the parties dispute whether the judicial exception is applicable to ex parte interviews with treating physicians such that HIPAA requirements would supersede longstanding Alabama law by severely limiting ex parte interviews. It is undisputed that the Privacy Rule does not expressly mention ex parte interviews between counsel and treating physicians. However, the definition in the Privacy Rule of "health information" includes oral information; thus, it is widely accepted that, by its terms, HIPAA covers oral interviews. See 45 C.F.R. § 160.103(e) (2016). The Brewers argue that ex parte interviews do not fall within the judicial exception because, they say, the nature of the interviews renders them outside the course of any judicial proceeding. The Brewers rely on State ex rel. Proctor v. Messina, 320 S.W.3d 145 (Mo. 2010), in which the Missouri Supreme Court interpreted the language "in the course of a judicial ... proceeding," as precluding ex parte communications because, the Court reasoned, such communications were not "under the supervisory authority of the court either through discovery or

through other formal court procedures." 320 S.W.3d at 156. The Missouri Supreme Court noted that, because the Missouri Rules of Civil Procedure did not provide a mechanism for courts to oversee ex parte communications, a meeting where those communications occurred was not a judicial proceeding. Id. at 157. Taken to its logical conclusion, the adoption of such a rule would require trial courts to directly participate in discovery matters where the health information of a plaintiff was relevant.

The defendants, on the other hand, argue that the Privacy Rule does not prohibit ex parte interviews with treating physicians; rather, they say, it merely imposes procedural prerequisites to authorize and protect the disclosure of private health information. The defendants cite Arons v. Jutkowitz, 9 N.Y.3d 393, 415, 850 N.Y.S.2d 345, 356, 880 N.E.2d 831, 842 (2007), in which the New York Court of Appeals concluded that New York law permitting ex parte interviews and HIPAA could coexist because, the court reasoned, HIPAA "merely superimposes procedural requirements" onto state law:

> "[T]he Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites. As a practical matter, this means that the attorney who wishes to contact

> an adverse party's treating physician must first obtain a valid HIPAA authorization or a court or administrative order; or must issue a subpoena, discovery request or other lawful process with satisfactory assurances relating to either notification or a qualified protective order."

(Emphasis added.)

Although ex parte interviews are not under the direct supervision of a court, they proceed alongside a pending lawsuit and, in that respect, are considered to be "in the course" of a judicial proceeding. To this extent, we agree with the Arons court's analysis, and find it to be the more persuasive, as well as an appropriate and practical interpretation of the Privacy Rule. We conclude that the federal Privacy Rule does not negate long-standing Alabama law allowing ex parte interviews with treating physicians; rather, it merely superimposes procedural prerequisites by requiring defense counsel to obtain a valid HIPAA authorization or, in this case, a court order complying with the provisions of 45 C.F.R. § 164.512(e). See also, e.g., Murphy v. Dulay, 768 F.3d 1360, 1377 (11th Cir. 2014)("Once a plaintiff executes a valid HIPAA authorization [or obtains a qualified protective order] as part of his presuit obligations, his physician can, consistent with HIPAA, convey relevant health information

about the plaintiff to the defendant. A medical provider can simultaneously comply with state and federal requirements.") Ex parte interviews are allowed under Alabama common law[7] and nothing in HIPAA specifically precludes them. Accordingly, Alabama law permitting ex parte interviews and HIPAA can coexist so long as the procedural requirements of 45 C.F.R. § 164.512(e) are met.

3. Preemption

Finally, there is no federal preemption issue in this case. Although the Privacy Rule expressly preempts any "contrary" state law, there is no preemption when privacy protections afforded by a state are more stringent than HIPAA's regulations. 45 C.F.R. § 160.203. A state law is "contrary" to HIPAA only if a health-care provider would find it impossible to comply with both the state and federal

[7]Before the enactment of HIPAA, it was common practice in Alabama for defense counsel to conduct informal ex parte interviews with a plaintiff's treating physicians. As this Court has noted, "when a party files a lawsuit that makes an issue of his physical condition, he waives his privacy rights in favor of the public's interest in full disclosure." Ex parte Dumas, 778 So. 2d 798, 801 (Ala. 2000). See also Romine v. Medicenters of America, Inc., 476 So. 2d 51, 55 (Ala. 1985)(discussing ex parte interviews); and Zaden v. Elkus, 881 So. 2d 993 (Ala. 2003)(same).

requirements or if the state law stands as an obstacle to the accomplishment of HIPAA's purposes. 45 C.F.R. § 160.202 (2016). The Privacy Rule defines "State law" as "a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law." 45 C.F.R. § 160.202(6)(2016). Under these definitions, no laws in Alabama could be deemed "contrary" to HIPAA.

In fact, in Alabama, there is no statutory law or Rule of Civil Procedure prohibiting a litigant's ability to conduct ex parte interviews with the opposing party's treating physicians. Thus, Alabama law allowing such ex parte interviews cannot be "contrary" to HIPAA, and no preemption issue is presented. See Arons, 9 N.Y.3d at 415, 850 N.Y.S.2d at 356, 880 N.E.2d at 842 ("[W]here 'there is a State provision and no comparable or analogous federal provision, or the converse is the case,' there is no possibility of preemption because in the absence of anything to compare 'there cannot be ... a "contrary" requirement' ....") (citing Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918, 59,995) (Nov. 3, 1999)).

IV. Conclusion

Based on the foregoing, we conclude that nothing in Alabama law prohibits defense counsel from seeking ex parte interviews with a plaintiff's treating physicians. We similarly conclude that HIPAA does not prohibit ex parte interviews with treating physicians as a means of informal discovery. A physician's ability to disclose private health information in an ex parte correspondence is regulated by HIPAA, so disclosure of that information may be permitted pursuant to a qualified protective order that satisfies 45 C.F.R. 164.512(e). To this extent, we hold that the trial court exceeded its discretion by requiring the Brewers' counsel to receive notice of, and have an opportunity to attend, ex parte interviews that defense counsel intended to conduct with Rhonda's treating physicians. The defendants sought a protective order satisfying the requirements of 45 C.F.R. 164.512(e). Accordingly, the additional conditions imposed by the trial court were not justified based on the Brewers' objection that ex parte communications would violate HIPAA and the Alabama Rules of Civil Procedure. We emphasize that trial courts remain gatekeepers of discovery, and there may be special or exceptional circumstances, if good cause is

shown, justifying the imposition of conditions and/or restrictions upon ex parte interviews with a litigant's treating physicians. However, in this case, the Brewers failed to demonstrate the existence of any circumstances warranting limitations on ex parte communications with Rhonda's treating physicians. Therefore, we direct the trial court to vacate its order to the extent it imposes conditions upon defense counsel's ex parte interviews with Rhonda's treating physicians.

PETITION GRANTED; WRIT ISSUED.

Bolin, J., concurs.

Mendheim and Mitchell, JJ., concur specially.

Shaw,[8] Wise, Bryan, and Stewart, JJ., concur in the result.

Parker, C.J., dissents.

[8]Although Justice Shaw was not present at the oral argument in this case, he has reviewed a recording of that oral argument.

MENDHEIM, Justice (concurring specially).

I agree with the main opinion's conclusion that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") allows the defendants, Dr. Curt Freudenberger and Sportsmed Orthopedic Surgery & Spine Center, P.C., to conduct ex parte interviews with Rhonda Brewer's treating physicians provided the defendants first obtain a "qualified protective order" that places safeguards on the use and dissemination of the plaintiff's private medical information. See generally, 45 C.F.R. § 164.512(e). I write separately to express my view regarding the main opinion's final observation that "trial courts remain gatekeepers of discovery, and there may be special or exceptional circumstances, if good cause is shown, justifying the imposition of conditions and/or restrictions upon ex parte interviews with a litigant's treating physicians." ___ So. 3d at ___.

This Court has continually emphasized that "[w]hen a dispute arises over discovery matters, the resolution of the dispute is left to the sound discretion of the trial court." Ex parte Henry, 770 So. 2d 76, 79 (Ala. 2000). "The Alabama Rules of Civil Procedure permit very broad discovery; however,

Rule 26(c)[, Ala. R. Civ. P.,] recognizes that this right to discovery is not unlimited and accordingly vests the trial court with broad discretionary power to control the use of the process and prevent its abuse by any party." Ex parte Mack, 461 So. 2d 799, 801 (Ala. 1984). Thus, we intervene in the discovery process only when "the trial court has clearly exceeded its discretion." Ex parte Ocwen Fed. Bank, FSB, 872 So. 2d 810, 813 (Ala. 2003).

The main opinion correctly observes that, before the enactment of HIPAA, ex parte interviews of the plaintiff's treating physicians conducted by the defendant were permitted in Alabama medical-malpractice cases. See, e.g., Romine v. Medicenters of America, Inc., 476 So. 2d 51, 55 (Ala. 1985) (quoting with approval Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D. D.C. 1983), for the proposition that "While the Federal Rules of Civil Procedure have provided certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal, discovery techniques as the ex parte interview of a witness who is willing to speak."). However, because of the broad

discretion trial courts are afforded concerning discovery, trial courts could also restrict or even prohibit such interviews if the particular circumstances warranted such measures. See, e.g., Zaden v. Elkus, 881 So. 2d 993, 999 n.7, 1011 (Ala. 2003) (describing an order in Ballew v. Eagan, CV-00-6528, in which the circuit court disallowed "any ex parte communications between defense counsel or insurance investigators and the treating physicians of the deceased patient" as the "circuit judge's exercise of discretion concerning discovery matters").

HIPAA did not change the fact that such ex parte interviews are allowed in Alabama or a trial court's discretion in overseeing such discovery issues; instead, HIPAA added procedural prerequisites to obtaining the plaintiff's health-care information in order to safeguard the plaintiff's medical privacy. In addition to providing some general privacy safeguards, HIPAA's requirement that the defendant seek a qualified protective order that places specified restrictions on any "protected health information" the defendant obtains through such informal discovery also exists

so that a plaintiff is able to offer any objections he or she has to that method of disclosure. 45 C.F.R. § 164.512(e)(1).

> "Of course, qualified protective orders for ex parte interviews do not issue automatically, and HIPAA does not require a court to issue them. 'If a plaintiff shows a specific reason for restricting access to her or his treating physicians, such as sensitive medical history irrelevant to the lawsuit, a court may restrict ex parte interviews and disclosure of medical records.' Pratt v. Petelin, 09-2252-CM-GLR (D. Kan. Feb. 4, 2010) [(not selected for publication in F. Supp.)]."

Thomas v. 1156729 Ontario Inc., 979 F. Supp. 2d 780, 784 (E.D. Mich. 2013). Thus, as was the case before the enactment of HIPAA, a plaintiff may establish a reasonable privacy concern other than just tactical litigation strategy that warrants further restrictions than those listed in 45 C.F.R. § 164.512(e)(1)(v) or that justifies prohibiting such interviews altogether. Such privacy concerns could include the involvement of a minor, an independent confidentiality issue, sexual issues, unnecessary embarrassment, and so forth. The Thomas court noted that one requirement federal district courts sometimes add in qualified protective orders that address ex parte interviews is "'clear and explicit' notice to the plaintiff's physician about the purpose of the interview and that the physician is not required to speak to defense

counsel." 979 F. Supp. 2d at 785-86 (quoting Croskey v. BMW of North America, No. 02-73747, Nov. 10, 2005 (E.D. Mich. 2005) (not selected for publication in F. Supp.)). Other courts have suggested "affording plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate concerns as to the proper scope of the interview and the extent to which plaintiff continues to assert the patient-physician privilege." Smith v. American Home Prods. Corp. Wyeth-Ayerst Pharm., 372 N.J. Super. 105, 133, 855 A.2d 608, 625 (2003). Generally speaking, I believe regulations such as these could be deemed appropriate as "standard language" in a HIPAA qualified protective order.

In my opinion, the trial court's error in this case was issuing a "blanket" prohibition on ex parte interviews by Dr. Freudenberger's lawyers of Rhonda Brewer's medical providers without any other considerations. The trial court should have considered the specific facts and issues of the case, balanced the competing positions of the litigants regarding ex parte interviews, and then issued an appropriate qualified protective order. The starting point for a trial

court's analysis in this type of case should be that ex parte interviews are allowed, and it should then consider specific exceptions or regulations from the plaintiff that could be incorporated into the qualified protective order. If the plaintiff has presented sound reasons other than tactical litigation strategy for the exceptions or regulations, then I believe this Court should uphold the trial court's ruling as consistent with the trial court's broad authority to oversee discovery.

In sum, because HIPAA already places some restrictions on a defendant's use and dissemination of a plaintiff's medical information to safeguard the plaintiff's privacy, to warrant further restrictions the plaintiff must establish that specific circumstances exist in his or her situation that justify the additional restrictions. If a plaintiff demonstrates that such circumstances exist, trial courts maintain the discretion to place additional restrictions and regulations upon ex parte interviews with treating physicians or even to prohibit such interviews altogether. "A general argument, however, that ex parte communications would conflict with public policy does not suffice to warrant restriction of

such communications." Pratt v. Petelin, No. 09-2252-CM-GLR, Feb. 4, 2010 (D. Kan. 2010) (not selected for publication in F. Supp.). In this case, the Brewers offered no patient-specific reason why any restrictions beyond those listed in 45 C.F.R. § 164.512(e)(1)(v) should be placed upon Dr. Freudenberger's ex parte interviews of Rhonda's treating physicians. Accordingly, as the main opinion concluded, the trial court in this case exceeded its discretion by requiring additional restrictions without sufficient justification of privacy concerns from the Brewers. On return of the case to the trial court, I believe that the Brewers would have the opportunity to present specific arguments to the trial court consistent with the parameters discussed herein.

Mitchell, J., concurs.

SHAW, Justice (concurring in the result).

I do not believe that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") requires the specific conditions imposed by the trial court in this case on the defendants' ability to conduct ex parte witness interviews, which are otherwise allowed by law. With the specific considerations of HIPAA resolved and certain other issues of medical confidentiality waived by law or not applicable, I see nothing providing the trial court the discretion to restrict, with no exception or limitation, only one party's ability to conduct witness interviews in the fashion found in this case. Any concerns that ex parte interviews might be abused could be remedied by a more narrowly tailored and equitable order. I therefore agree that the writ should be issued, and I concur in the result.

Bryan, J., concurs.

STEWART, Justice (concurring in the result).

I agree with the main opinion insofar as it concludes that defense counsel's ex parte interviews of a plaintiff's treating physicians are authorized under Alabama law. I also agree that the defendant's right to conduct such interviews is not prohibited by HIPAA. As the main opinion notes, the disclosure of the plaintiff's health information can be authorized pursuant to the issuance of a qualified protective order under 45 C.F.R. 164.512(e). In addition, ex parte interviews of treating physicians provide a vital and efficient information-gathering tool that comports with the purpose of discovery, which is "to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the presentation of his case." Committee Comments on 1973 Adoption of Rule 26, Ala. R. Civ. P. As the Delaware Supreme Court has stated:

> "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 ...."

Green v. Bloodsworth, 501 A.2d 1257, 1258-59 (Del. Super. Ct. 1985).

Equally important to the right of the defendant in a medical-malpractice action to prepare a defense with work-product-privilege protection is the privacy right of the plaintiff to his or her medical information, especially medical information that is not relevant to the claims or defenses raised in the litigation. This Court has held that "when a party files a lawsuit that makes an issue of his physical condition, he waives his privacy rights in favor of the public's interest in full disclosure." Ex parte Dumas, 778 So. 2d 798, 801 (Ala. 2000). A party filing such a lawsuit, however, cannot be said to have consented to the disclosure and discovery of his or her entire medical history, in particular if medical information is not relevant to the lawsuit. In such situations, the Alabama Rules of Civil Procedure provide an avenue for a party to seek judicial intervention to protect the disclosure of privileged information. Indeed, this Court in Ex parte Dumas went on to say:

> "The Alabama Rules of Civil Procedure allow broad and liberal discovery. Ex parte O'Neal, 713 So. 2d

> 956, 959 (Ala. 1998). Rule 26(b)(1), Ala. R. Civ. P., allows '[p]arties [to] obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action' and which is 'reasonably calculated to lead to the discovery of admissible evidence.' This Court has written: 'A trial judge, who has broad discretion in this area, should nevertheless incline toward permitting the broadest discovery and utilize his discretion to issue protective orders to protect the interests of parties opposing discovery.' Ex parte AMI West Alabama Gen. Hosp., 582 So. 2d 484, 486 (Ala. 1991). In fact, this Court has suggested that it issues more writs of mandamus to correct orders improperly restricting discovery than it issues to correct orders permitting too much discovery. Id. A party subject to discovery can prevent the disclosure of confidential matters not subject to discovery by securing a protective order pursuant to Rule 26(c), Ala. R. Civ. P."

778 So. 2d at 801. Accordingly, a plaintiff seeking to limit the scope of an ex parte interview with a treating physician is authorized under the Alabama Rules of Civil Procedure to seek a protective order to prevent the disclosure of medical information that is irrelevant to the disposition of a claim or defense raised in the action.

Of further importance in the context of ex parte interviews are the interests of the treating physician. Informal interviews provide an efficient mechanism for information-gathering from the treating physician, whereas depositions can be timely and costly. In addition,

establishing parameters could aid in the prevention of inadvertent disclosure of nonrelevant medical information.

Balancing the interests of the parties and the physician witnesses, I would reject any notion that ex parte interviews cannot be conducted without the presence of the plaintiff or the plaintiff's counsel. Likewise, I would reject any notion that defense counsel's work-product privilege outweighs the plaintiff's privacy rights at all costs. Instead, I would adhere to this Court's long-held sentiment that trial courts are afforded broad discretion in matters concerning discovery, and a trial court's ruling on discovery matters will not be reversed unless the trial court exceeds its discretion. Ex parte Wal-Mart, Inc., 809 So. 2d 818, 822 (Ala. 2001). The trial court is in the best position to craft, on a case-by-case basis, a protective order specific to the facts of the case setting forth the precise parameters within which ex parte interviews of treating physicians may be conducted. I would adopt the reasoning of the Georgia Supreme Court in Baker v. Wellstar Health System, Inc., 288 Ga. 336, 339, 703 S.E.2d 601, 605 (2010), in which the Georgia Supreme Court "exhort[ed] trial courts, in authorizing [ex parte] interviews

[of treating physicians], to fashion their orders carefully and with specificity as to scope" and in which that court developed a framework for trial courts in that state to follow when issuing such orders:

> "[I]n issuing orders authorizing ex parte interviews, trial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary. See, e.g., Arons v. Jutkowitz, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831, 843, n. 6 (II)(B) (2007). See also Angela T. Burnette & D'Andrea J. Morning, HIPAA and Ex Parte Interviews—The Beginning of the End?, 1 J. Health & Life Sci. L. 73, 104–105 (April 2008). In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances--including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds--warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request. See Wayne M. Purdom, Ga. Civil Discovery, § 5.10 (6th ed.); Burnette, supra at 104.
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> "In sum, the use of carefully crafted orders specifying precise parameters within which ex parte interviews may be conducted will serve to enforce the privacy protections afforded under state law and

> advance HIPAA's purposes while at the same time preserving a mode of informal discovery that may be helpful in streamlining litigation in this State."

Baker, 288 Ga. at 339-40, 703 S.E.2d at 605. Although the Baker court concluded that HIPAA preempted Georgia law, the standards provided therein to be included in a protective order authorizing ex parte interviews of treating physicians provide a balanced approach that seeks to protect the interests of the parties and the witnesses.

In the present case, the qualified protective order entered by the Madison Circuit Court ("the trial court") required counsel for Curt Freudenberger, M.D., and Sportsmed Orthopedic Surgery & Spine Center, P.C., to provide notice of the ex parte interview to counsel for Rhonda and Charlie Brewer and to allow the Brewers' counsel to attend the interview. Nothing in the materials presented to this Court indicate that the proposed depositions would stray beyond the bounds of information relevant to the discovery of information pertinent to the claims and defenses raised by the parties in the case. Accordingly, I would issue the writ, but with direction to the trial court to conduct a hearing to allow the

parties to present evidence in conjunction with the aforementioned parameters.