

STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS

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ANDREA L. HOLMAN, Personal Representative  
of the Estate of LINDA CLIPPERT, deceased,

Plaintiff/Appellant,

SC Docket No.:137993

-vs-

COA Docket No: 279879

MARK RASAK, D.O.,

Oakland County Circuit Court  
Case No.: 05-068493-NH

Defendants/Appellees.

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**PLAINTIFF-APPELLANT'S BRIEF ON APPEAL**

Submitted by:

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**ORDER APPEALED FROM**

Plaintiff-Appellant appeals from the Order and Opinion entered on November 18, 2008, by the Court of Appeals in *Holman v Rasak*, 281 Mich App 507; 761 NW2d 391 (2008).

**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT HIPAA PERMITS SECRET EX PARTE INTERVIEWS WITH HEALTH PROVIDERS UNDER A QUALIFIED PROTECTIVE ORDER?

**Plaintiff answers:** “YES”

**Defendants answer:** “NO”

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

### **I. Factual background.**

This medical malpractice action arises out of Dr. Rasak's failure to properly evaluate and treat Linda Clippert's unstable angina, which proximately caused her to suffer an acute myocardial infarction and death. Defendant, Dr. Mark Rasak, was Ms. Clippert's treating interventional cardiologist.

Linda Clippert was initially treated by Dr. Rasak in March of 2002 when she underwent a cardiac catheterization at Providence Hospital. (*See, Appendix pp. 23a-24a*, Records from March 19, 2002 Admission). After the catheterization was completed, Dr. Rasak consulted with Gary Goodman, M.D., a cardio-thoracic surgeon, regarding his interpretation of the cardiac catheterization. (*See, Appendix pp. 25a-26a*, Catheterization report). Dr. Goodman was consulted to recommend a course of treatment. Dr. Goodman's consultation report set forth the following findings:

- Linda Clippert has triple vessel coronary artery disease.
- The left anterior descending artery was not critical.
- Surgical revascularization should be reserved.
- Angioplasty and stent placement of the proximal right coronary artery should be performed as a temporizing approach and, as she continues to become progressively more distressed, revascularization should be performed. *Id.*

In accordance with Dr. Goodman's recommendations, Ms. Clippert underwent stenting of her right coronary artery. *Id.* Ms. Clippert was then discharged to the care of Dr. Rasak.

On July 16, 2002, Linda Clippert presented to the emergency room of Botsford Hospital with a chief complaint of chest pain. (*See, Appendix pp. 28a-29a*, Records from July 16, 2002

Admission). Nitroglycerine was administered in the emergency room with relief of the pain. *Id.* The emergency room physician, Dr. Diane Paratore, D.O., diagnosed Ms. Clippert as suffering from unstable angina. *Id.* Ms. Clippert was admitted to Dr. Rasak's services. Dr. Rasak was designated as the admitting and attending physician. *Id.* Dr. Rasak never saw Linda Clippert during her July admission. (*See, Appendix pp. 54a-58a*, Deposition of Dr. Rasak, p. 47). Based on Dr. Rasak's recommendation, which was made over the phone, cardiac testing was cancelled. *Id.* **Dr. Rasak failed to order or perform a complete cardiac work-up, even though he acknowledged that the same was required by the standard of care.** *Id.*, at 51. Ms. Clippert was discharged on July 17, 2002, with a diagnosis of GERD (gastroesophageal reflux disease). *Id.*, at 47.

On August 9, 2002, Linda Clippert was readmitted to Botsford Hospital after suffering a significant acute myocardial infarction. (*See, Appendix pp. 30a-37a*, Records from August 9, 2002 admission). She was later transferred to Providence Hospital. At Providence Hospital, a cardiac catheterization was performed to assess her condition. The catheterization revealed severe triple vessel disease with a **total** occlusion of the left anterior descending artery, **total** occlusion of the right coronary artery, and a 90 percent stenosis of the circumflex artery. *Id.* Due to the significance of Ms. Clippert's myocardial infarction, it was initially determined that Ms. Clippert's "prognosis without revascularization was extremely poor" and "further delay in revascularization was exposing her to increased risks." *Id.* Dr. Goodman discussed revascularization with Ms. Clippert and her family. Surgery was scheduled for August 16, 2002. Dr. Goodman described this surgery as "high risk". *Id.* As a result of the severe acute myocardial infarction, Ms. Clippert was subject to a significant risk of death from bypass surgery which did not exist at the time of the July, 2002 hospitalization.

On August 16, 2002, Dr. Goodman performed a triple bypass graft of the coronary arteries.

*Id.* After two unsuccessful attempts to wean Ms. Clippert from cardiopulmonary bypass, Dr. Goodman inserted a thoracic intra-aortic balloon pump. He described the indications for the procedure as follows:

The patient is a 51-year-old woman with an acute myocardial infarction, **severe** left ventricular dysfunction, and **critical** three vessel coronary artery disease. She underwent emergent surgical revascularization but was unable to be easily weaned from cardiopulmonary bypass because of bilateral occlusive iliac disease. It was felt that her best chance for survival was placement of a thoracic intra-aortic balloon pump. *Id.* (emphasis added).

Linda Clippert was transferred to the coronary care unit after the surgery. *Id.* Later that day, she developed ventricular tachycardia and subsequent asystole. *Id.* Cardiopulmonary resuscitation and cardiac massage were unsuccessful. *Id.* Ms. Clippert was pronounced dead on August 16, 2002 at 17:35. *Id.*

## **II. Relevant proceedings in the trial court.**

Plaintiff's Complaint was initially filed against Dr. Rasak in Wayne County Circuit Court in April of 2005 (*See, Appendix pp. 38a-50a*, Complaint). Venue was later changed to Oakland County on August 16, 2005. (*See, Appendix pp. 4a-7a*, Trial Court Docket Entries). The case was assigned to the Honorable John McDonald.

During the initial discovery period, Plaintiff's counsel attempted to contact Dr. Goodman to discuss his care and treatment of Ms. Clippert. **Dr. Goodman refused to speak with Plaintiff's counsel.** Dr. Goodman and the Defendant, Dr. Rasak, are both on staff at Providence Hospital and are colleagues. The doctors also share the same malpractice insurance carrier.

On February 7, 2007, the defendant filed his **third** motion to extend the scheduling order.

(See, **Appendix**, Trial Court Docket Entries). The trial court granted that motion. *Id.* Discovery was extended until June 28, 2007. *Id.* Neither party pursued a deposition of Dr. Goodman during discovery. Plaintiff chose to rely on the medical records, which thoroughly detail Dr. Goodman’s findings.

**Over two years after this litigation was commenced**, Defendant filed his motion for a qualified protective order to allow his attorney to conduct a secret, *ex parte* meeting with Dr. Goodman. *Id.* The parties convened for oral arguments on June 20, 2007 – one week before the expiration of the third-extended discovery period. *Id.*

Plaintiff opposed the defendant’s motion for a protective order on the basis that the Health Insurance Portability and Accountability Act of 1996 (hereinafter, “HIPAA”) does not allow a protective order for secret, *ex parte* meetings.<sup>1</sup> Plaintiff cited the trial court to 45 CFR § 164.512(e), which pertains to the release of health information for judicial or administrative proceedings. *Id.* Plaintiff also cited the court to 45 CFR § 164.512(e)(1)(v), which requires the “return” or “destruction of the protected health information (including all copies thereof)”. It was Plaintiff’s position that a qualified protective order cannot be obtained for secret, *ex parte* interviews of the decedent’s treating physicians, because the mere filing of a lawsuit does not waive Plaintiff’s right to confidentiality of protected health information under HIPAA. It was also Plaintiff’s position that a qualified protective order cannot be obtained for secret, *ex parte* meetings between defense counsel and the decedent’s treating physicians because orally communicated health information cannot be returned, destroyed, copied, or objected to.

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<sup>1</sup>See, **Appendix 59a-95a**, Plaintiff’s Answer to Defendant’s Motion, and Transcript of Motion Hearing.

After oral arguments, the trial court took the matter under advisement. On June 21, 2007, the trial court issued its opinion and order. (See, **Appendix pp. 12a-13a**, Opinion and Order dated June 21, 2007). The trial court denied the defendant's motion for the following reasons:

[A]n unpublished opinion per curiam by the Michigan Court of Appeals on October 25, 2005 (Docket # 262591) held that "HIPAA prevents a physician from disclosing health information absent a court order, written permission from the patient, or assurances that the patient has been informed of the request and given an opportunity to object.

\* \* \*

In the case before this Court, Plaintiff has not authorized defense counsel to conduct ex parte interviews with her decedent's treating physicians. Further here, defense counsel is not seeking written health care information from Plaintiff's decedent's treating physicians, he is seeking ex parte oral discussions with the treating physicians. Under those circumstances, the Court finds that a qualified protective order that complies with HIPAA (CFR 164.512(E)(1)(v)) cannot be fashioned. This Court believes that HIPAA does not authorize ex parte oral interviews because the HIPAA provision relative to a qualified protective order only seems to pertain to documentary evidence. *Id.*

Defendant filed a motion for reconsideration of the trial court's Opinion and Order on July 3, 2007. (See, **Appendix pp 4a-7a**, Docket Entries). The trial court issued an Opinion and Order on July 25, 2007, denying the defendant's motion for reconsideration. (See, **Appendix pp. 14a-15a**, Opinion and Order dated July 25, 2007).

### **III. Relevant proceedings in the Court of Appeals.**

Defendant filed an Application for Leave to Appeal, which was granted by the Michigan Court of Appeals on September 13, 2007. (See, **Appendix p. 16a**, Order Granting Leave). The Court of Appeals also issued a stay of all lower court proceedings on October 23, 2007. (See, **Appendix p. 17a**, Order Granting Stay).

Prior to the issuance of the stay, Plaintiff filed a motion to dismiss this appeal as moot. (See,

**Appendix pp. 95a-97a**, Plaintiff's Motion to Dismiss Appeal). Plaintiff received a letter from Dr. Goodman's counsel indicating that Dr. Goodman did not want to meet with either party privately, but he would participate in a deposition. *Id.* Plaintiff's motion was denied in a two-to-one decision entered on November 30, 2007. (*See, Appendix p. 18a*, Order Denying Motion to Dismiss Appeal).

On December 10, 2007, Plaintiff filed her Appeal Brief arguing that HIPAA preempted Michigan law to the extent that it provided more stringent requirements for privacy protection of Plaintiff's protected health information. (*See, Appendix pp. 98a- 119a*, Plaintiff's Appeal Brief, pp. 6-12). Unlike prior Michigan law, the mere filing of a lawsuit does not waive the confidentiality or privacy of Plaintiff's protected health information under HIPAA. (*See, Plaintiff's Appeal Brief*, p. 10). Instead, protected health information may only be obtained through one of the exclusive methods set forth in the HIPAA regulations. (*See, Plaintiff's Appeal Brief*, p. 13). The HIPAA regulations do not allow for secret, *ex parte* interviews, nor can *ex parte* interviews be read into the requirements allowing for disclosure of protective health information under a qualified protective order. (*See, Plaintiff's Appeal Brief*, pp. 13-20). HIPAA was enacted in 2003. There has always been an issue related to the defendants' request to meet privately with the plaintiffs' treating physicians. If the legislature had intended to allow such secret meetings, HIPAA would have specifically allowed such meetings.

On November 13, 2008, The Court of Appeals held Oral Argument. Plaintiff argued that 45 CFR § 164.512(e)(1)(ii) only allowed for disclosure of protected health information "in response to a subpoena, discovery request, or other lawful process." The Michigan Court rules provide the Defendants with "lawful processes" whereby they can obtain protected health information in compliance with the HIPAA regulation; e.g., by deposition. *Ex parte* interviews are not

contemplated by the HIPAA regulations which require notice to patient of the requested information, and an opportunity to object by the patient – similar to Michigan Court Rules pertaining to discovery. Secret, *ex parte* interviews are not conducive to such notice and objection procedures, because there is no way for the patient to know what information will be elicited by Defendants in such a secret interview. If Defendants are allowed to conduct *ex parte* interviews of Plaintiff’s decedent’s treating physicians, Plaintiff is denied the ability to object to any questions asked or any information requested. Plaintiff is denied his right under HIPAA to object, assert his right that such information is confidential, and have the court decide whether the asserted privilege impairs Plaintiff’s ability to proceed with litigation under the particular circumstances of the case.

A hypothetical example the Plaintiff offered the Court of Appeals at oral argument, was an ordinary negligence claim involving a broken toe of a plaintiff/patient who happened to be HIV-positive. The Plaintiff suggested that the hypothetical plaintiff’s injury was in no way relevant to his/her HIV status, and that HIPAA’s protections – which make clear that the filing of a lawsuit does not waive the privacy of health information – should protect the Plaintiff from having to reveal his HIV status. Allowing secret, *ex parte* interviews of treating physicians by the opposing side prevents such a patient from having the ability to assert the privacy of such protected health information because the patient has no idea what’s being elicited in the secret meeting.

On November 18, 2008, the Court of Appeals issued its Opinion. *Holman v Rasak*, 281 Mich App 507; 761 NW2d 391 (2008). The Court of Appeals recognized:

Under HIPAA, however, **the filing of a lawsuit does not waive the disclosure of confidential health information**, and unless the patient gives written consent or enters into an agreement, see 45 CFR 164.405; 45 CFR 164.510, the patient’s physician may only disclose confidential health information under limited conditions. *Slip op.*, p. 2. (emphasis added).

The Court of Appeals also agreed with Plaintiff that HIPAA supersedes Michigan’s less stringent laws regarding the confidentiality of health information, as follows:

We agree with plaintiff that HIPAA supersedes Michigan law to the extent that its protections and requirements are more stringent than those provided by state law. Thus, if written consent or an agreement for the disclosure of confidential health information is not provided, a treating physician may only disclose such information under conditions set out in the HIPAA regulations. *Id.*, at 3.

Relying on *Bayne v Provost*, 359 F Supp 2d 234, 241 (ND NY 2005), the Court of Appeals ultimately determined that “defendants may conduct an ex parte oral interview with Clippert’s physician if a qualified protective order, consistent with 45 CFR 164.512(1)(e), is first put in place.”

## ARGUMENT

**I. The Court of Appeals erred in determining that HIPAA permits secret, ex parte oral interviews with Plaintiff’s decedent’s physicians. The Court of Appeals decision raises a significant question as to the application of HIPAA and the validity of MCL 600.2157.**

**A. Standard of review.**

This case raises issues concerning the proper construction of HIPAA. This Court reviews questions of statutory construction *de novo*. *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006).

**B. Michigan’s laws regarding the privacy of health information prior to the enactment of HIPAA.**

Prior to the enactment of HIPAA, the State of Michigan protected a patient’s health information through laws of privilege, court rules, and rulings of our appellate courts. Our Legislature enacted MCL 600.2157, the doctor-patient privilege, to “protect the doctor-patient relationship and ensure that communications between the two are confidential.” *Baker v Oakwood*

*Hosp Corp*, 239 Mich App 461, 470; 608 NW2d 823 (2000). The relevant portion of MCL 600.2157 states as follows:

Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

The doctor-patient privilege belongs to the patient and can only be waived by the patient. *Baker, supra*. Accordingly, in order for a physician to discuss the patient's protected health information with a third party, the physician was required to obtain a waiver of the privilege. The statute, however, is silent as to the method by which that waiver could occur. Traditionally, any authorization, signed by the patient, that identified the patient and authorized the release of the patient's medical information was sufficient to waive the doctor-patient privilege.

In the context of personal injury litigation, however, MCL 600.2157 provided a waiver of the doctor-patient privilege for those medical conditions that are relevant to the litigation, as follows:

If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness on the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, **the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition.**

*See also*, MCL 330.1750. MCL 600.2157's waiver of the doctor-patient privilege for personal injury litigation is also recognized by MCR 2.314. That court rule prohibits the plaintiff from presenting evidence about a medical condition if they assert the doctor-patient privilege and that assertion has the effect of preventing the discovery of otherwise discoverable medical information. *See* MCR 2.314(B)(2).

Also prior to the enactment of HIPAA, our Supreme Court decided that the doctor-patient privilege was not violated when defense counsel conducted an *ex parte* meeting with the plaintiff's treating physician. *See, Damako v Rowe*, 438 Mich 347, 352; 475 NW2d 30 (1991). In reaching its decision, the Court relied on MCL 600.2157 and the absence of any statute or court rule precluding *ex parte* meetings. *Id.* at 358. The Court held that such meetings are permitted as an informal method of discovery but cannot be compelled, as follows:

The omission of interviews from the court rules does not mean that they are prohibited, **because the rules are not meant to be exhaustive**. See MCR 2.302(F)(2)(permitting parties to modify the court rules to use other methods of discovery). Their absence from the court rule does indicate that they are not mandated and that the physician cannot be forced to comply, but there is nothing in the court rules precluding an interview if the physician chooses to cooperate.

*Id.* at 362. However, there is now authority that precludes these *ex parte* meetings. As explained below, HIPAA trumps *Damako*. Unlike the Michigan Court Rules, which are not exhaustive of available methods of discovery, HIPAA regulations are clearly exhaustive of the available methods for obtaining protected health information. The Court of Appeals reasoning – that “**where rules are not meant to be exhaustive**, ‘the omission of oral interviews does not mean that they are prohibited.’” – is in error because it is based on the erroneous determination that HIPAA is not meant to be exhaustive when in fact, HIPAA is meant to provide the minimum protections for privacy and **is an exhaustive list of the protections unless state law is even more stringent**. Such clear error caused manifest injustice to Plaintiff. Moreover, the issue regarding the application of HIPAA reaches far beyond this case, and is of major significance to the jurisprudence in the State of Michigan. Additionally, the proper application of HIPAA questions the validity of a State Statute, MCL 600.2157, which provides for waiver of the confidentiality of health information upon filing a personal injury lawsuit. For these reasons more fully set forth below, the Court of Appeal erred

in holding that HIPAA does not preclude secret *ex parte* interviews with Plaintiff's treating physicians.

**C. HIPAA established new rules ensuring the security and confidentiality of patient information. In the context of litigation, HIPAA regulations prohibit disclosure of oral and written health information except by patient authorization, court order, or formal discovery.**

HIPAA made sweeping changes to the ability of medical providers to release an individual's medical information. Congress passed HIPAA, in substantial part, "to protect the security and privacy of individually identifiable health information." *Smith v American Home Products Corp.*, 372 NJ Super 105; 855 A2d 608, 611 (2003). In that regard, Congress instructed the Secretary of the Dept. of Health and Human Services (hereinafter, "HHS") to create national standards to "ensure the integrity and confidentiality" of health information. *Smith, supra; citing*, HIPAA § 1173(d)(2)(a). "HIPAA's stated purpose of protecting a patient's right to the confidentiality of his or her individual medical information is a compelling federal interest." *Crenshaw v Mony Life Ins. Co.*, 318 F Supp 2d 1015, 1028 (SD Ca 2004).

The HIPAA standards promulgated by the Secretary of Health and Human Services went into effect on April 14, 2003. *See, US v Sutherland*, 143 F Supp 2d 609, 612 (WD Va 2001), *citing*, 65 Fed Reg 82,462 (12/18/00) and 66 Fed Reg 12,434 (2/26/01); 45 CFR § 164.534. The HHS regulations set forth standards and procedures for the collection and disclosure of "protected health information" ("PHI"). *Id.* These are the final standards which must be fully complied with. *Id.*

HIPAA and its regulations define PHI as "any information, whether **oral** or recorded in any form or medium that ... is created and received by a health care provider ... and relates to past, present or future physical or mental health or condition of an individual..." 42 USC § 1320d(4); 45 CFR § 160.103, (emphasis added). "**Covered entities are prohibited from disclosing PHI except**

**as regulations require and permit.”** 45 CFR §§ 164.501 and 160.103, (emphasis added).

“Disclosure” includes divulging or providing access to PHI. 45 CFR § 164.501. As “health care providers,” Plaintiff’s decedent’s treating doctors are “covered entities” and subject to HIPAA. 45 CFR § 160.103.

Plaintiff’s decedent’s health care providers may disclose PHI under HIPAA’s regulations only if (1) Plaintiff executes a proper, written authorization, 45 CFR § 164.508(c); (2) in response to a court order, 45 CFR § 164.512(e)(1); or (3) through formal discovery. *Id.* Because HIPAA defines PHI to include “oral” medical information, its rules apply to interviews with treating doctors. *Law v Zuckerman*, 307 F Supp 2d 705, 708 (D Md 2004); *Crenshaw*, 318 F Supp at 1028; *Belote v Strange*, unpublished per curiam opinion of the Court of Appeals issued October 25, 2005 (Docket No. 262591), *lv den*, 475 Mich 856 (Slip op, p 4), (“An ex parte meeting between a plaintiff’s physician and defendant’s counsel to discuss the plaintiff’s medical history or condition clearly falls within the definition of health information that is subject to the standards promulgated by the Secretary.”).

These three limitations (proper authorization, court order, formal discovery) specifically apply “in the course of any judicial or administrative proceeding.” 45 CFR § 164.512(e)(1). HIPAA regulations provide that a covered entity may disclose protected health information in response to a court order, provided that the entity discloses “only the protected health information expressly authorized by such order.” *Beard v City of Chicago*, 2005 WL 66074, p. 3 (ND Ill 1/10/05), *quoting*, 45 CFR § 164.512(e)(1)(I). In addition:

Section 164.512(e) allows disclosure of protected health information in response to a discovery request, even if unaccompanied by a court order, if **reasonable efforts have been made to ensure that individuals who are the subject of the protected health information requested are given notice of the request**, or the covered entity

receives satisfactory assurance that the requesting party has made reasonable efforts to secure a qualified protective order that provides that the parties (a) will not use or disclose the information for purposes other than the pending proceeding, and (b) will return the information (or destroy it) at the end of the litigation or proceeding. *Beard, supra*, (emphasis added).

HIPAA's new regulations explicitly prohibit disclosure of oral or written patient information unless the patient authorizes release, a court orders the release, or unless the requesting party requests the information, with proper notice, through formal discovery. HIPAA does not authorize informal discovery and certainly does not authorize secret, *ex parte* interviews with a plaintiff's doctors. As a result, the Court of Appeals clearly erred in determining that secret, *ex parte* interviews with Ms. Clippert's physicians were allowable in this case; therefore, it would be proper for this Court to reinstate the trial court's order.

**D. HIPAA does not limit a trial court to entering only a ministerial protective order. National and Michigan courts conclude that *ex parte* interviews are contrary to HIPAA's privacy and notice rules. HIPAA's "qualified protective order" rule applies only when a party seeks protected health information in the context of formal discovery.**

Defendants erroneously argued, and the Court of Appeals decision leads to the erroneous result that HIPAA is merely a procedural rule which requires only the entry of a ministerial protective order to authorize an *ex parte* interview with a treating physician. The Court of Appeals disregarded the plain language of HIPAA's regulations and the repeated holdings of national and Michigan courts recognizing a trial court's authority to deny or impose conditions on *ex parte* interviews.

1. HIPAA's "qualified protective order" rule applies only in the context of formal discovery and does not limit the trial court's authority to enter a court order denying or placing conditions on secret physician interviews.

HIPAA permits release of PHI only if the patient authorizes it, as part of formal discovery, or pursuant to a court order. The formal discovery avenue requires the requesting party to either give

notice to the patient, 45 CFR § 164.512(e)(1)(ii)(A), or give the doctor (i.e., “covered entity”) “satisfactory assurance...that reasonable efforts have been made by such a party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of the Section.” 45 CFR § 164.512(e)(1)(ii)(B).

HIPAA formalized the preclusion of secret, *ex parte* interviews. In *Browne v Horbar*, 792 NYS2d 314, 219 (NY Sup 2004), the court explained:

Requiring the release of patient medical records, which are readily available to the patient or its representative, and directing compliance with disclosure devices by compelling physicians to offer testimony at a deposition, where the patient or its representative has a right to be present, are very different, however from authorizing private interviews.

Private interviews outside the patient or patient representative’s presence present very troubling confidentiality problems. In the course of private interviews a treating physician may release information about a patient that has not even been communicated to that patient. Additionally, there is a very real risk that defense counsel may inquire into matters that do not relate to the condition at issue and, unlike in the context of judicially supervised disclosure proceedings, no one is present to ensure that the patient’s rights are not violated. While it is clear that certain privacy rights are waived by commencement of a medical malpractice action, it is equally clear that there are limitations on the waiver.

*See also, Moss v Amira*, 826 NE2d 1001, 1006 (Ill App 2005), (“Ex parte communications between defense counsel and plaintiff’s treating physician are prohibited as violative of public policy because they jeopardize the sanctity of the confidential and fiduciary relationship between a physician and his patient”).

The risk that *ex parte* interviews may be used to influence or alienate doctors and obtain protected information is too great to permit these interviews without notice to or the presence of plaintiff’s counsel. Convenience and cost savings are not the true rationale for such secret meetings; otherwise, defendants would have no objections to the plaintiff or his representative’s presence at

said meetings. Additionally, most physicians charge for a private meeting as well as for a deposition. In fact, a subpoena fee is usually significantly less than the physician's hourly rate.

Contrary to the Court of Appeals decision in this case, HIPAA did not mandate that the trial court grant Defendant's motion for a qualified protective order authorizing *ex parte* interviews.

HIPAA provides, in pertinent part, that:

A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

- (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; 45 CFR § 164.512(e)(1)(i).

Unlike the formal discovery rule in 45 CFR § 164.512(e)(1)(ii)(B), nothing in subsection (e)(1)(i) limits the trial court's discretion to enter only a "qualified protective order" under subsection (e)(1)(v). In fact, subsection (e)(1)(i) does not even mention a "qualified protective order", let alone state that a trial court is limited to entering a "qualified protective order that meets the requirements of subsection (e)(1)(v)." Instead, this regulation generally refers to "an order of a court" and specifies that only the information "authorized by such order" may be released.

The plain language of 45 CFR § 164.512(e)(1)(i) gives a trial court discretion to grant, deny, or place limitations on the dissemination of PHI. This section does not authorize *ex parte* interviews, which do not allow for **any** limitation on the dissemination of protected health information. The court is not limited to a ministerial entry of a "qualified protective order" under subsection (e)(1)(v). If HIPAA's regulations intended to so limit the court's discretion, they would have said so.

The Court of Appeals decision in this case – allowing a merely ministerial, procedural conduit for *ex parte* interviews of treating physicians – ignores the unambiguous language of (e)(1)(i). It also ignores the holdings of national and Michigan courts recognizing that HIPAA either

precludes secret, *ex parte* interviews, or maintains a trial court's discretion to deny or place conditions on other informal discovery.

2. National and Michigan courts have repeatedly recognized that HIPAA precludes secret, *ex parte* interviews and that trial courts have discretion to deny or place conditions on informal discovery.

The Court of Appeals decision, which results in the application of HIPAA regulations as only a procedural conduit for release of information is untenable. HIPAA creates a foundation, or “mandatory floor,” for the protection of medical information. 65 Fed Reg 82,462, 82,471. HIPAA’s regulations specify that “a covered entity must take reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.” 45 CFR § 164.502(b). HIPAA effectuates the “strong federal policy in favor of protecting the privacy of patient medical records.” *Law, supra*, 307 F Supp 2d at 711.

HIPAA disfavors non-consensual information discovery and, unless the patient consents, “does not authorize *ex parte* contacts with health providers.” *Crenshaw, supra*, 318 F Supp 2d 1029. Based on this fact, and HIPAA’s privacy protections, several courts have held that HIPAA precludes *ex parte* interviews with a plaintiff’s treating doctors. Courts like *EEOC v Boston Market Corp.*, 2004 WL 3327264 (ED NY 12/16/04)(Slip op at 5), reject *ex parte* interviews because the information orally disclosed cannot receive the two mandatory protections of 45 CFR § 164.512(e)(1)(v), (i.e., the prohibition on disclosing PHI for another purpose and destroying PHI at the end of litigation). Other courts hold that HIPAA’s stringent, specific regulations prohibit informal discovery. *Law, supra; Crenshaw, supra* (“Only formal discovery requests appear to satisfy the requirements of § 164. 512(e.)”); *In re Vioxx Products Liability Litigation*, 230 FRD 473, 477-478 (ED La 2005), (denying motion to permit *ex parte* interviews).

Many state courts have held that their analogous privacy rules now bar *ex parte* interviews. *See, Givens v Mullikin*, 75 SW3d 383, 409 n 13 (Tenn 2002). “The emerging consensus adheres to the position that defense counsel is limited to the formal methods of discovery enumerated by the jurisdictions rules of civil procedure, absent the patient’s express consent to the counsel’s *ex parte* contact with her treating physician.” *Crist v Moffat*, 389 DE2d 41, 45 (NC 1990), (citations omitted). A “strong majority view” in state courts “condemns *ex parte* conferences.” *Sorenson v Barbuto*, 143 P3d 295, 301 (Utah App 2006), (citation omitted); *see also, An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys and Plaintiffs’ Treating Physicians*, 27 Am J Trial Advoc 1, 2 (Summer 2003).

At a minimum, numerous national courts have recognized that HIPAA establishes a trial court’s discretion to deny or impose conditions on informal physician interviews beyond a protective order under 45 CFR § 164.512(e)(1)(v). *See, Smith, supra*, 855 A2d 626-627 (after recognizing that, “to ensure compliance with the federal objectives under HIPAA,” the broad use of *ex parte* interviews must be “readjusted,” the trial court denied *ex parte* interviews as there was no necessity for informal discovery); *In re Diet Drug Litigation*, 2005 WL 1253530 (NJ Super 4/28/05), (requiring defense counsel to record and transcribe the informal physician interview and provide plaintiff’s counsel with a copy of the transcript); *Deitch v City of Olympia*, 2007 WL 1813852 (WD Wash 2007), (granting motion to preclude *ex parte* interviews).

In addition, over the past two years, Michigan circuit courts have repeatedly denied defendants' motions to meet secretly with a plaintiff's treating doctors:

*Phipps-Gego v Bandera*, Washtenaw County Circuit Court case no. 05-19-NI (J. Shelton) (2/16/06) (rescinding qualified protective order permitting defense counsel to conduct *ex parte* meetings with plaintiff's treating doctors);

*Pham v Henry Ford Health System*, Wayne County Circuit Court case no. 05-520232-NH (J. Gillis) (denying motion to allow ex parte interviews);

*Kamisar v St John Providence Hospital*, Oakland County Circuit Court, case no. 04-060136 (J. Schnelz) (1/11/06) (denying defendant's request for ex parte meetings; only permitting defendant to take plaintiff's treaters' depositions);

*Sands v St John Providence Hospital*, Oakland County Circuit Court, case no. 03-050889 (J. Grant) (1/11/06) (denying defendant's request for ex parte communication and barring any treating physicians who engage in ex parte communications with defense counsel from testifying at trial);

*Brockman v Courtney*, Oakland County Circuit Court, case no. 04-060930 (J. Goldsmith) (11/10/05) (prohibiting defendant from engaging in ex parte interviews as violative of HIPAA; requiring defendant to depose plaintiff's treating physicians);

*Hooks v Terrell*, Oakland County Circuit Court, case no. 05-067547 (J. Langford Morris) (10/28/05) (denying defendant's request for ex parte meetings between defense counsel and defense attorneys);

*Ball v Tacia*, St Joseph Circuit Court, case no. 04-438-NH (8/16/04) (denying defendant's request that plaintiff sign an authorization requiring consent to ex parte communications and denying defendant's motion for summary disposition);

*Hitson v McLaughlin*, Kalamazoo Circuit Court, case no. 03-000384-NH (J. Lamb) (1/23/04) (denying defendant's request for authorization permitting oral communications between defense counsel and treating physicians);

*Rogers v Three Rivers Area Hospital*, St. Joseph Circuit Court, case no. 03-226-NH (J. Noecker) (denying defendant's request for plaintiff to sign an authorization permitting ex parte meetings).

Other circuit courts have entered orders under HIPAA permitting informal interviews only if plaintiff's counsel is given notice and an opportunity to attend:

*Holland v Trinity Health Michigan*, Washtenaw County Circuit Court, case no. 05-158 (J. Connors) (1/20/06) (denying defendant's motion to compel plaintiff to sign authorization; requiring plaintiff's counsel's attendance at any "informal interview of treating physicians");

*Jones v St. John Health System*, Wayne County Circuit Court, case no. 06-601375 (J. Sapala) (12/12/05) (requiring notice to and attendance of plaintiff's counsel at any

meetings between defense counsel and plaintiff's treating physicians);

*Jackson v Hutzel Hospital*, Wayne County Circuit Court, case no. 05-337782 (J. Means Curtis) (4/25/05) (requiring notice to and attendance of plaintiff's counsel at any meeting between plaintiff's high school counselor and defendant);

*Williams v Patel et al*, Genesee County Circuit Court, case no. 07-87046-NH (J. Farah) (requiring notice and attendance of plaintiff's counsel at any meetings between defense counsel and plaintiff's health care providers).

The trial court accordingly was not limited to entry of a "qualified protective order" under 45 CFR § 164.512(e)(1)(v) and had the discretion to either deny or impose conditions on informal physician interviews. In the present case, the trial court did not err in denying Defendant's Motion for a Qualified Protective Order to allow for an *ex parte* interview. The Court of Appeals clearly erred in reversing the trial court, and this Court may properly reinstate the trial court's ruling.

**E. HIPAA preempts state law unless state law has "more stringent" protections for the privacy of individually identifiable health information.**

Congress passed HIPAA to effectuate the "compelling" federal interest in protecting the privacy of individual health information. *Smith, supra; Crenshaw, supra*. As such, HIPAA "expressly supersedes any contrary provisions of state law except as provided in 42 USC § 1320d-7(a)(2)." *Law*, 307 F.Supp.2d at 708-709. HIPAA and its regulations do not preempt contrary state law "if the state law 'relates to the privacy of individually identifiable health information,' . . . and is 'more stringent' than HIPAA's requirements." *US ex rel Stewart v Louisiana Clinic*, 2002 WL 31819130, p 3 (ED La 2002); 42 U.S.C § 1320d-7(a)(2)(B). Under the HIPAA regulations, a state law is "more stringent" if it affords patients "more control over their medical records" than HIPAA. *Law*, 307 F Supp 2d at 709 (original emphasis). If "a state law can force disclosure without a court order, or the patient's consent, it is **not** 'more stringent' than the HIPAA regulations." *Id.*, at 711 (emphasis added).

1. Michigan's allowance of secret, *ex parte* interviews of a plaintiff's treating doctors without notice to counsel based on an implicit waiver of physician-patient privilege is clearly less stringent than HIPAA and is therefore preempted. HIPAA precludes informal discovery without patient consent.

The Court of Appeals contention that Michigan law authorizes *ex parte* interviews without notice to Plaintiff's counsel is misplaced. The Court of Appeals decision ignores the fact that HIPAA precludes informal discovery and clearly preempts Michigan law on this issue. In light of HIPAA, the waiver of privacy of medical information contained in MCL 600.2157 is no longer valid law in the State of Michigan. An appeal regarding the validity of a State of Michigan statute presents proper grounds for review by this Honorable Court. *See*, MCR 7.302(B)(1)

The HHS Secretary rejected a proposed regulation that mirrored Michigan's waiver rule. Moreover, *Belote, supra*, and other cases correctly hold that HIPAA preempts the waiver rule.

Unlike many states that have disallowed this practice (*see, e.g., Petrillo v Syntax Labs, Inc*, 148 Ill App 581, 595-596; 499 NE2d 952 (1986); Anno, *Discovery: right to ex parte interview with injured party's physician*, 50 ALR4th 714; 27 Am J Trial Advoc, *supra* at 2), Michigan courts have historically permitted defense counsel to conduct informal *ex parte* interviews with a plaintiff's treating doctors. *Domako v Rowe*, 438 Mich 347, 362; 475 NW2d 30 (1991); *Davis v Dow Corning Corp*, 209 Mich App 287, 293; 530 NW2d 178 (1995). Michigan law did not require defense counsel to notify plaintiff's attorney of the interview. Michigan law only required that defense counsel "specifically advise the physicians that they were free to grant or decline an *ex parte* interview." *Davis, supra* at 291; *Domako, supra* at 362.

Since Michigan permitted *ex parte* interviews without written authorizations, a court order, or issuance of a subpoena with notice to opposing counsel, its rule of law was not "more stringent"

than HIPAA. In stark contrast to Michigan's rule, HIPAA prohibits "[i]nformal discovery of protected health information . . . unless the patient consents." *Law*, 307 F Supp 2d at 711; *see also*, *Crenshaw*, 318 F Supp 2d at 1029 ("HIPAA does not authorize ex parte contacts with healthcare providers." Absent a protective order, "[o]nly formal discovery requests appear to satisfy the requirements of § 164.512(e).").

HIPAA unquestionably preempts Michigan's waiver rule. An early draft of the HIPAA regulations mirrored Michigan's waiver rule and would have permitted disclosure of PHI where a litigant puts his or her medical condition or history at issue. *See, Standards for Privacy of Individually Identifiable Health Information*, 64 Fed Reg 59,918, 60,056-57 (Nov 3, 1999). The HHS Secretary rejected this proposal and deleted it from the final rule. *See, e.g., Alsip v Johnson City Medical Center*, 2005 WL 1536192 (Tenn App 6/30/05) (Slip op, p. 9). Obviously, the HIPAA legislation did not intend to allow secret, *ex parte* meetings.

When considering each of the factors set forth in 45 CFR 160.202, it is clear that HIPAA is more stringent than Michigan's privacy protection laws. HIPAA's regulations provide greater restrictions for the use and disclosure of protected health information. For example, HIPAA sets forth very specific requirements regarding authorizations for the release of medical information. Pursuant to 45 CFR 164.508(c), a HIPAA-compliant authorization must state each of the following:

- i. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;
- ii. The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;
- iii. The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure; an expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;
- iv. A statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke, together with a description of how

- v. the individual may revoke the authorization;
- v. A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer be protected by this rule;
- vi. Signature of the individual and date; and
- vii. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual. *See*, 45 CFR § 164.508(c).

HIPAA also establishes specific requirements for the release of protected health information in various legal proceedings. For instance, 45 CFR § 164.512(c) sets forth the requirements for obtaining protected health information in a abuse, neglect, or domestic violence proceedings. 45 CFR § 164.512(f) addresses law enforcement's ability to obtain protected health information for its investigations. 45 CFR § 164.512(e) sets forth the requirements for obtaining protected health information in judicial or administrative proceedings.

Michigan law, in contrast to HIPAA, does not contain any specific requirements regarding the content of a medical authorization. Michigan law is silent as to the duration of an authorization or the potentially coercive circumstances that could surround the signing of the authorization. Michigan law also does not speak to the individual's right of access to their protected health information or their right to revoke an authorization. Michigan law also fails to establish specific requirements for the release of protected health information in situations such as abuse or neglect proceedings, law enforcement investigations, or other judicial proceedings. In fact, subpoenas essentially provide law enforcement and other agencies with unrestricted access to an individual's protected health information.

Moreover, Michigan and national cases hold that HIPAA preempts state laws permitting *ex parte* physician interviews based on implicit waiver of the physician-patient privilege. In *Belote v Strange, supra*, this Court held that Michigan's rule permitting *ex parte* interviews with a treating

doctor, because the patient waived the physician-patient privilege by filing suit, is not "more stringent" than HIPAA's requirements. HIPAA accordingly preempts Michigan law – including the implicit waiver rule. *Belote* explained:

. . . it is clear that a patient may not informally waive the protections afforded by HIPAA. Indeed, the detailed requirements imposed by HIPAA on health information disclosures give the patient extensive control over the dissemination of his or her health information. Even in the discovery context, HIPAA prevents a physician from disclosing health information absent a court order, written permission from the patient, or assurances that the patient has been informed of the request and given an opportunity to object. 'If state law can force disclosure without a court order, or the patient's consent, it is not 'more stringent' than the HIPAA regulations' [*Law, supra* at 711]. Because the requirements and standards imposed by HIPAA are stricter and afford more protection for a patient's health information than MCL 600.2157 and the Michigan Court Rules, HIPAA controls. 42 USC 1320d-7(a)(1). Therefore, defendant was required to obtain plaintiff's written consent pursuant to 45 CFR 164.508 or to comply with the discovery procedures detailed under 45 CFR 164.512(e), before conducting an *ex parte* interview with plaintiff's treating physician. *Id.*, slip opinion, p. 6.

The Court of Appeals then concluded that, because "defendant's trial counsel" conducted an *ex parte* interview and obtained a physician's affidavit "in violation of HIPAA," the trial court did not abuse its discretion in sanctioning defendant's counsel. *Id.*, pp 6-7.

Like *Belote*, several national courts have held that HIPAA preempts state law permitting *ex parte* interviews or contacts with treating physicians. *See, Crenshaw, supra* (HIPAA supersedes less stringent state law permitting *ex parte* physician interviews; information disclosed during such interviews is "in violation of HIPAA"); *Law, supra* at 709, 711 (HIPAA preempts less stringent state law; "all *ex parte* communications must be conducted in accordance with the procedures set forth in HIPAA"); *US v Louisiana Clinic, supra*, (HIPAA preempts less stringent state law permitting disclosure of nonparty patient records without consent); *Smith, supra* (while *ex parte* interviews are permitted under New Jersey law, HIPAA requires that a reasonable notice provision and an

opportunity for the patient to object to *ex parte* contacts were necessary to bring a New Jersey law into compliance with HIPAA); and *Moss v Amira*, 826 NE2d 1001, 1009 (Ill App 2005) (Quinn, J, concurring) (noting that Illinois rule abolishing *ex parte* interviews and limiting contact with a plaintiff's treating physician to formal discovery has now been extended "to medical patients throughout the United States" by HIPAA).

In this case, the trial court correctly held that HIPAA preempts Michigan's previous rule permitting *ex parte* physician interviews. The Court of Appeals mistakenly relied on *Domako*. HIPAA, and not Michigan's "less stringent" waiver rule, now governs this issue. It is proper for this Honorable Court to reinstate the ruling of the trial court.

**F. The HIPAA regulations provide a definition of “qualified protective order” that cannot be reconciled with an allowance of secret, *ex parte* interviews.**

HIPAA permits release of PHI only if the patient authorizes it, as part of formal discovery, or pursuant to a court order. Michigan's pre-HIPAA practice of allowing defense counsel *ex parte* interviews with the plaintiff's treating physicians cannot be reconciled with the clear and unambiguous language of HIPAA's regulations.

In accordance with HIPAA, the decedent's protected health information must be obtained through one of the exclusive methods set forth by the regulations. In this case, Defendant sought a “qualified protective order” pursuant to 45 CFR § 164.512(e)(1)(ii)(B) – this regulation reads as follows:

- (ii) **In response to a subpoena, discovery request, or other lawful process,** that is not accompanied by an order of a court or administrative tribunal, if:
  - (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

- (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. *Id.*, (emphasis added).

The term “qualified protective order” is thereafter defined in subsection (v) of § 164.512(e)(1) as follows:

- (v) For purposes of paragraph (e)(1) of this section, **a qualified protective order means**, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, **an order of a court** or an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
- (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; **and**
- (B) **Requires the return to the covered entity or destruction of** the protected health information (**including all copies made**) at the end of the litigation or proceeding. *Id.* (emphasis added).

In this case, the trial court denied the defendant’s requested qualified protective order based on the clear and unambiguous language of subsection (v). As the trial court noted, “HIPAA does not authorize ex parte oral interviews because the HIPAA provision relative to a qualified protective order only seems to pertain to documentary evidence.” (*See, Exhibit 10*, p. 2) The court did not abuse its discretion in its interpretation of § 164.512(e)(1)(v). The court’s decision was a reasonable and principled outcome made in accordance with our rules of statutory analysis.

When interpreting a federal statute, it is the function of this Court to determine Congress’ intent. “Congressional intent is to be gleaned from the text, structure, and purpose of the statute as a whole, including the manner in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Thomas v United Parcel Service*, 241 Mich App 171, 174; 614 NW2d 707 (2000). “The plain meaning of a statute **must** be given effect unless there is reason to believe that Congress intended a more restrictive reading.” *Id.* at 174 (emphasis added)

“When construing a statute, the Court must read the statute to avoid rendering any word surplusage or nugatory.” *Nat’l Center for Mfg Sciences, Inc v City of Ann Arbor*, 221 Mich App 541, 548; 563 NW2d 65 (1997) Undefined statutory terms are given their plain and ordinary meanings. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 313; 645 NW2d 34 (2002), *see also Moore v Fennville Public Schools Bd of Ed*, 223 Mich App 196, 202; 566 NW2d 31 (1997). “Reference to a dictionary is appropriate to ascertain what the ordinary meaning of a word is.” *Moore, supra* at 202; *Koontz, supra* at 313. Unambiguous language should be enforced as written. *Patrick, supra* at 204.

Applying these principles of statutory interpretation to 45 CFR § 164.512(e)(1)(v) clearly demonstrates that a qualified protective order was intended to apply only to documentary, tangible protected health information and not to secret, ex parte oral communications between defense counsel and the decedent’s treating physician. For instance, the regulations preconditioned the grant of a qualified protective order on the recipient’s ability to “return” or destroy the information at the conclusion of the litigation. *Random House Unabridged Dictionary* defines “return” as “to revert to a former owner; to put, bring, take, give, or send back to the original place”. “Destruction” is defined as “the act of destroying”. The dictionary further defines “destroy” as “to reduce (an object) to useless fragments, a useless form, or remains as by rending, burning or dissolving; to injure beyond repair or renewal; demolish; ruin; annihilate”. These terms clearly reference tangible, documentary information. These terms do not apply to intangible, oral communications. Defense counsel cannot empty his or her brain of the protected health information and return it to the physician or destroy it at the conclusion of the litigation.

The definition of “copy” further supports the conclusion that a qualified protective order does not apply to secret, ex parte meetings. According to § 164.512(e)(1)(v), a qualified protective order

must state that all copies of the protected health information are to be returned or destroyed at the conclusion of the litigation. *Random House Unabridged Dictionary* defines “copy” as “an imitation, reproduction, or transcript of an original; written matter intended to be reproduced in written form.” (emphasis added) This definition clearly evidences the intent that a qualified protective order only applies to tangible forms of health information. *Ex parte* oral communications that are conducted behind closed doors cannot be copied.

Plaintiff’s analysis of 45 CFR § 164.512(e) is further supported by Congress’ intent in enacting HIPAA. “Congress enacted HIPAA, in part, to protect the security and privacy of individually identifiable health information.” *Law v Zuckerman*, 307 F Supp 705, 710 (MD 2004). HIPAA represents a “strong federal policy in favor of protecting the privacy of patient medical records.” *Id.* at 711. The overriding principle behind HIPAA is that protected health information belongs to the patient. “HIPAA’s permissive disclosure requirements give each patient more control over the dissemination of their medical records . . . .” *Id.* The hypothetical case – of an HIV-positive patient allowed an opportunity to object to the elicitation of his HIV status in a secret meeting in the context of litigation regarding issues unrelated to his/her HIV status – will be lost based on the lower court’s decision in this case.

The strong federal policy reasons underlying HIPAA were also considered in *Equal Employment Opportunity Commission v Boston Market Corp*, order of US District Court, ED NY, issued December 16, 2004 (Case No. CV 03-4227 LDW WDW). **In that case, the court denied the defendant’s request for ex parte meetings with the plaintiff’s psychologists**, as follows:

ex parte communications regarding the disclosure of health information, while not expressly prohibited by HIPAA, create, as the court in *Law* warned, too great a risk of running afoul of that statute’s strong federal policy in favor of protecting the

privacy of patient medical records.

\* \* \*

**The strong policy underlying HIPAA would appear to trump the reasoning of those pre-HIPAA decisions that allowed defense counsel ex parte access to plaintiff’s treating physicians . . . . *Id.* at 5, 6. (emphasis added).**

*Ex parte* meetings between defense counsel and a plaintiff’s treating physician are directly contrary to Congress’ intent in enacting HIPAA. Secret, *ex parte* meetings strip the patient of control over their protected health information. Defense counsel, whose interest is entirely adverse to the patient’s, is allowed unfettered access to the patient’s health information. Neither the patient nor their agent can object to the protected health information disclosed. There are risks that irrelevant health information will be disclosed. There are risks that the health information maybe misconstrued or mischaracterized. There are risks that the physician could feel compelled to render a certain opinion because they are affiliated with the same hospital as the defendant. There are risks that the physician could feel compelled to render a certain opinion because he or she is affiliated with the same malpractice carrier as the defendant. Physicians are not lawyers; they simply cannot be held to understand the legal ramifications of what they disclose during a secret, *ex parte* meeting. If such an informal meeting is allowed, the plaintiff or his representative must be allowed to be present to assert any objections to health information that is not relevant to the proceedings.

This Court should also recall that “Michigan adheres to the rule that a state court is bound by the authoritative holdings of federal courts upon federal questions, including interpretations of federal statutes.” *Yellow Freight Systems, Inc v State*, 464 Mich 21, 29 n 10; 627 NW2d 236 (2001) *rev’d on other grounds* 537 US 36 (2002) (emphasis added). “Where there is no United States Supreme Court decision upon the interpretation in question, the lower federal courts’ decisions, while entitled to respectful consideration, are not binding upon this Court.” *Id.* See also *Schueler*

*v Weintrib*, 360 Mich 621, 634-35; 105 NW2d 42 (1960); *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). Presently, there is no United States Supreme Court decision that has addressed this issue and would bind this Court.

Defendant’s brief to the Court of Appeals, predominantly relied on the decision in *Croskey v BMW of North America, Inc*, memorandum opinion of US District Court, ED Mich, issued February 14, 2005 (Case No. 02-CV-73747-DT) (hereafter: *Croskey I*). *Croskey I* is an unpublished decision of a United States District Court and is not binding on Michigan Courts. *See Abela, supra*. In *Croskey I*, the issue of ex parte meetings with the plaintiff’s treating physicians was originally presented to Magistrate Judge Paul Komives. In considering the arguments of the parties, Magistrate Komives decided (1) that HIPAA preempts Michigan’s laws regarding the privacy of health information and (2) that HIPAA does not permit informal discovery such as ex parte interviews. *Id.* at 9. Magistrate Komives then inexplicably granted the defendants a qualified protective order, citing to 45 CFR 164.512(e)(1)(ii). *Id.* at 20. However, in doing so, **Magistrate Komives never considered the impact of the requirements expressed in subsection (v).**<sup>2</sup> He never addressed how orally communicated health information could be returned or destroyed at the conclusion of the litigation, or timely objected to. Instead, the magistrate formulated additional requirements not contained within the regulation. **There is absolutely no analysis of subsection (v)(B) in the magistrate’s decision.**

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<sup>2</sup> The same error was made by Magistrate Judge Treece in *Bayne v Provost*, 359 F Supp 2d 234 (2005). Magistrate Treece discussed the “safety valves” created by HIPAA but then completely ignored those “safety valves” in his ultimate decision. *Id.* at 242. Magistrate Treece failed to consider how oral, ex parte communications would be returned or destroyed at the conclusion of the litigation. Instead, Magistrate Treece crafted a result that he personally found to be “fitting”. *Id.*

The defendants objected to Magistrate Komives decision in *Croskey I*.<sup>3</sup> Judge Nancy Edmunds reviewed the magistrate’s memorandum opinion and issued her own order on November 10, 2005. *See Croskey v BMW of North America, Inc*, order of US District Court, ED Mich, issued November 10, 2005 (Case No. 02-CV-73747)(hereafter: *Croskey II*) In her order, **Judge Edmunds questioned the applicability of § 164.512(e) to ex parte meetings between defense counsel and the treating physicians.** Judge Edmunds noted that the unambiguous language of subsection (v) indicates that qualified protective orders only apply to *documentary* health information; she stated as follows:

The problem with 45 CFR § 164.512(e) is that it does not explicitly mention ex parte interviews. **In fact, the requirements of a “qualified protective order” include “the return to the covered entity or destruction of the protected health information (including all copies made,” which suggests that this Section may have been intended only to cover *documentary* evidence.**

*Croskey II, supra* at 6 (emphasis added). Notwithstanding her concerns, Judge Edmunds limited her decision to only those issues raised by the defendants’ objections. However, the tone of her decision seems to indicate that a different disposition would have resulted if the plaintiff had objected to the issuance of the qualified protective order.

The trial court did not err by declining to follow the decisions rendered in *Croskey v BMW North America*. Magistrate Komives clearly erred by ignoring the strict requirements set forth in subsection (v)(B). His memorandum opinion was devoid of any analysis as of how *ex parte*, oral communications can be returned, destroyed, copied, or objected to. Likewise, the trial court did not err by declining to adopt the ultimate decision of Judge Edmunds. Judge Edmunds’ Order questioned the very issue that was before the trial court and seems to indicate that a different

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<sup>3</sup> The plaintiff did not object to the magistrate’s order.

disposition of the defendants' motion would have been reached if she had been the original authority to decide this issue. In light of these glaring issues, the trial court properly relied on the clear and unambiguous language of § 164.512(e)(1). The trial court's decision was a reasonable and principled outcome that should be affirmed by this Court. The Court of Appeals clearly erred in reversing the trial court's decision.

**G. Defendant can obtain the requested health information through formal discovery methods without jeopardizing the decedent's right to privacy in her health information.**

This Court should further note that HIPAA, specifically 45 CFR § 164.512(e), does not unduly prejudice Defendant's ability to prepare his case. The Michigan Court Rules provide a variety of methods by which Defendant can obtain Dr. Goodman's opinions. For instance, Defendant has subpoenaed Dr. Goodman's records. These records contain detailed accounts of Dr. Goodman's findings and impressions. Defendant could have also subpoenaed Dr. Goodman for deposition. MCR 2.305(A)(3). Defendant could have even requested an order for Dr. Goodman's discovery-only deposition. *See* MCR 2.302(C)(7)<sup>4</sup>. Instead of pursuing formalized discovery, Defendant waited until two weeks before the close of discovery (which had been extended thrice before) to move for a protective order for an ex parte meeting with Dr. Goodman. Defendant's attempts to meet secretly with Ms. Clippert's treating physician are not supported by HIPAA and should not be supported by this Court. Further, the Court of Appeals proceeded to render an opinion

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<sup>4</sup> Defendant's request for a qualified protective order was initially made pursuant to MCR 2.302(C)(7). Defendant, however, failed to meet the requirements of the Court Rule. Defendant failed to establish "good cause" as it has been defined (i.e. that justice requires the issuance of the order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . ."). The physician with whom the defendant seeks to meet privately has refused to meet with either side to the litigation. The lower court denied the Plaintiff's motion to dismiss the appeal as a moot issue.

in this case notwithstanding Dr. Goodman's choice not to meet privately with counsel for either party.

### **CONCLUSION AND RELIEF REQUESTED**

The qualified protective order requested by Defendant runs afoul of the clear intent of HIPAA. The Court of Appeals ignored the heightened privacy standards adopted by HIPAA so that Defense counsel can continue the practice of secretly meeting with a plaintiff's treating physicians.

The HIPAA regulations establish very specific requirements for the disclosure of protected health information in judicial proceedings. Those requirements must be complied with, and they preempt prior Michigan law allowing a waiver of Plaintiff's privacy rights. The Court of Appeals decision allows for *ex parte* interviews with a Plaintiff's treating physicians after entry of a merely ministerial qualified protective order. Such a decision is not within the clear and unambiguous language of HIPAA and other case law properly applying the HIPAA regulations.

There are more than adequate grounds for this Court to grant relief in favor of Plaintiff and reinstate the trial court's order because the decision of the Court of Appeals is clearly erroneous and causes a manifest injustice to Plaintiff's decedent by failing to protect Ms. Clippert's privacy rights.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court reverse the Court of Appeals Opinion and Order and reinstate the ruling of the trial court.