

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

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.

**PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT/APPELLEE'S RESPONSE TO
PLAINTIFF/APPELLANT'S BRIEF ON APPEAL**

Submitted by:

BLUM, KONHEIM, ELKIN & CEGLAREK
JOSEPH L. KONHEIM (P34317)
KAMRON K. LESSANI (P63238)
Attorney for Plaintiff/Appellant
15815 West Twelve Mile Road
Southfield, MI 48076
(248) 552-8500

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STATEMENT OF QUESTION 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”

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. HIPAA places protections on the scope of protected health information which may be released in the context of litigation. Such protections on scope or subject matter cannot be effectuated through the use of a qualified protective order allowing for an *ex parte* interview with Plaintiff's treating physicians. As a result, *ex parte* interviews are barred by HIPAA.**

It is undisputed that "protected health information" (hereinafter, "PHI") includes "oral" information; thus, a "health care provider" is prohibited from disclosing PHI in any form, *oral*, written or electronic, unless an exception applies. 42 USC § 1320d-(a)(3); 45 CFR § 164.502(a). Defendant relies upon the litigation exception, codified at 45 CFR § 164.512(e) in support of Defendant's contention that Defendant is entitled to a qualified protective order allowing for an *ex parte* interview. However, the litigation exception relied upon by the Defendant-Appellee has no express language allowing for *ex parte* interviews. The reason that the exception does not allow for secret *ex parte* interviews is because Defendant does not particularize the specific protected health information that is being sought in such secret meetings. The Court of Appeals would simply allow a Defendant to obtain a merely ministerial qualified protective order allowing for a secret *ex parte* interview with no limitation on the scope of disclosure. A secret, oral *ex parte* interview, without the presence of the patient or his counsel, cannot receive adequate protections and limitations on the scope of disclosure, thus violating HIPAA. Adequate safeguards simply cannot be devised to protect the oral disclosure of PHI in secret *ex parte* interviews.

In fact, 45 CFR § 164.512(e) presumes that the parties are aware of the PHI that has been

requested **before** entry of a qualified protective order. Section 164.512(e)(1)(v), which defines “a qualified protective order”, assumes that specific PHI has been requested:

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 the court...

This definition clearly assumes that specific PHI has already been requested prior to entry of the qualified protective order. Further support is found in the referenced subsection, § 164.512(e)(1)(ii) which provides, “In response to a subpoena, discovery request, or other lawful process...” This assumes that PHI is requested by subpoena, discovery request, or other process prior to entry of a qualified protective order addressing that particular request. An *ex parte* interview does not fit within the confines of the rule, because in the context of an *ex parte* interview, no particular PHI is requested until after the entry of the qualified protective order. At that time, neither the court nor the patient is aware of what PHI has been requested. Such a scenario is not contemplated by the plain language of 45 CRF § 164.512(e) and is therefore not permissible.¹

Defendant conveniently ignores the scope limitations on disclosure of PHI contemplated by HIPAA. Considering the limitations on the scope of information that a health care provider may disclose under the litigation exception, it is clear that a qualified protective order cannot be crafted in a manner satisfactory to protect the scope of disclosure and at the same time allow for an *ex parte* interview. As a result, *ex parte* interviews must be prohibited by HIPAA.

Defendant relies upon the Standards for Privacy of Individually Identifiable Health

¹In this case, Defendant is using the procedure for a qualified protective order as a “request to make a request” for PHI. The statute clearly envisions a qualified protective order be entered upon a request for PHI, or where the parties have notice of the PHI requested and an opportunity to object.

Information, 65 FR 82530 (December 28, 2000). Defendant has conveniently ignored that 65 FR 82530 specifically addresses the fact that the health care provider must limit his response to a qualified protective order to the express scope of such an order:

[I]n response to an order of a court or administrative tribunal, the covered entity may disclose **only** the protected health information that is **expressly** authorized by such an order. Where a disclosure is not considered under this rule to be required by law, the minimum necessary requirements apply, and the covered entity must make reasonable efforts to limit the information disclosed to that which is reasonably necessary to fill the request. A covered entity is not required to second guess the scope or purpose of the request, or take action to resist the request because they believe that it is over broad. In complying with the request, however, the covered entity must make reasonable efforts not to disclose more information than is requested. **For example, a covered entity may not provide a party free access to its medical records under the theory that the party can identify the information necessary for the request.** *Id.* (Emphasis added)

The purpose of these secret *ex parte* interviews is for the Defendant to gather PHI that is not disclosed to the patient or his counsel. This cannot be done in compliance with HIPAA. This court should compare the scope limitation explained in the federal register to the qualified protective order sought by the Defendant. The qualified protective order contains no limit on scope because it allows for an *ex parte* interview. Neither the trial court, nor the Plaintiff, will ever know the information requested by the Defendant in the context of an *ex parte* interview. In other words, the qualified protective order approved by the Court of Appeals does not encompass what information the moving party is seeking from the treating physician. An *ex parte* interview, allows the moving party to seek information of unlimited scope including allowing “a party free access” to medical information, which is prohibited by HIPAA. 65 FR 82530. Contrary to Defendant’s argument, this federal register section certainly does not allow an opposing party equal and unfettered access to the all of the patient’s PHI.

A plaintiff who puts his or her medical condition at issue in a lawsuit waives any assertion of privilege **when disclosure furthers the goals of discovery**. *Howe v Detroit Free Press, Inc.*, 440 Mich 203, 214; 487 NW2d 374 (1992); *Domako v Rowe*, 438 Mich 347,354; 475 NW2d 30 (1991), (emphasis added). Pursuant to MCR 2.302(B)(1), “Parties may obtain discovery regarding any matter, not privileged, which is **relevant** to the subject matter involved in the pending action, [or] appears **reasonably calculated to lead to the discovery of admissible evidence**.” This Court should agree that in the context of a personal injury lawsuit, it may be the case that at least a portion of Plaintiff’s PHI may not be relevant and may not be reasonably calculated to lead to the discovery of admissible information. Moreover, the privilege should not be waived as to such protected health information that is irrelevant and unlikely to lead to admissible evidence.

Even Michigan’s statute concerning the waiver of the physician-patient privilege is limited in scope. MCL 600.2157 states 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 in the patient’s own behalf who has treated the patient for the injury...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**.

The language of the statute limits the scope of the waiver to treatment of the patient for “the injuries, disease or condition” as opposed to any injuries, diseases or conditions. Plaintiff may have received treatment from a physician for an injury, disease or condition that is totally unrelated to the injury or malpractice that is the subject of the lawsuit. The plain language of the statute does not contend that the Plaintiff has waived her privilege as to such unrelated injuries, diseases or conditions.

Similarly, Defendant’s quotations to the language contained in MCL 600.2912f have parsed out the plain language limiting the scope of the waiver of patient-physician privilege in a medical

malpractice action. § 2912f(1) states as follows:

A person who has given notice under section 2912b or who has commenced an action alleging medical malpractice waives for purposes of that claim or action the privilege created by section 2157 and any other similar privilege created by law with respect to a person or entity who was involved in the acts, transactions, events or occurrences that are **the basis for the claim or action** or who provided care or treatment to the claimant or plaintiff in the claim or action **for that condition or a condition related to the claim or action** either before or after those acts, transactions, events, or occurrences...

This language makes clear that for other treating physicians, plaintiff's waiver of privilege is limited in scope to "that condition or a condition related to the claim or action." The plain language of the statute cannot be ignored. It indicates that plaintiff has not waived any privilege as to treatment for a condition unrelated to the claim or action. Without a limitation on scope and adequate safeguards, the Defendant has unfettered access to all of the Plaintiff's PHI.

Defendant makes no attempt to explain how a qualified protective order allowing for an *ex parte* interview with Plaintiff's treating physician protects the scope of PHI disclosed during such an interview. The very purpose of HIPAA is frustrated by allowing a defendant to secretly formulate requests for information from Plaintiff's treaters. In such a situation, a Defendant could request any PHI unrelated to the lawsuit for an improper purpose.

The Federal Register states as follows with regard to importance of protecting a person's right to privacy in his or her health information:

A breach of a person's health privacy can have significant implications well beyond the physical health of that person, including the loss of a job, alienation of family and friends, the loss of health insurance, and public humiliation. For example:

- A banker who also sat on a county health board gained access to patients' records and identified several people with cancer and called in their mortgages. See the National Law Journal, May 30, 1994.
- A physician was diagnosed with AIDS at the hospital in which he practiced medicine. His surgical privileges were suspended. See Estate of Behringer v. Medical

Center at Princeton, 249 N.J. Super. 597.

- A candidate for Congress nearly saw her campaign derailed when newspapers published the fact that she had sought psychiatric treatment after a suicide attempt. See New York Times, October 10, 1992, Section 1, page 25.

- A 30-year FBI veteran was put on administrative leave when, without his permission, his pharmacy released information about his treatment for depression. (Los Angeles Times, September 1, 1998) Consumer Reports found that 40 percent of insurers disclose personal health information to lenders, employers, or marketers without customer permission. "Who's reading your Medical Records," Consumer Reports, October 1994, at 628, paraphrasing Sweeny, Latanya, "Weaving Technology and Policy Together to Maintain Confidentiality," The Journal Of Law Medicine and Ethics(Summer & Fall 1997) Vol. 25, Numbers 2,3.

The answer to these concerns is not for consumers to withdraw from society and the health care system, but for society to establish a clear national legal framework for privacy. By spelling out what is and what is not an allowable use of a person's identifiable health information, such standards can help to **restore and preserve trust in the health care system** and the individuals and institutions that comprise that system. As medical historian Paul Starr wrote: "Patients have a strong interest in preserving the privacy of their personal health information but they also have an interest in medical research and other efforts by health care organizations to improve the medical care they receive. As members of the wider community, they have an interest in public health measures that require the collection of personal data." (P. Starr, "Health and the Right to Privacy," American Journal of Law & Medicine, 25, nos. 2&3 (1999) 193-201). The task of society and its government is to create a balance in which the individual's needs and rights are balanced against the needs and rights of society as a whole. 65 FR 82468 (December 28, 2000).

No balance between the individual's rights and the rights of society as a whole are created by allowing an *ex parte* interviews of Plaintiff's treating physicians. Just as in the examples outlined above, such a breach of a litigant's privacy can have significant implications not limited to loss of job, alienation of friends and family, loss of health insurance, and public humiliation. Just because a litigant in a personal injury matter has placed one aspect of his medical information at issue, does not mean that the litigant has waived all of his or her privacy rights in all of his or her PHI. Some of Plaintiff's PHI may be irrelevant and inadmissible in the litigation. In the context of an *ex parte* interview, where any information could be exchanged, there is a real danger that PHI of unlimited

scope will be disclosed and thus have the unintended effect of having consumers “withdraw from society and the health care system”. The important goal of “restoring and preserving trust in the health care system” is not furthered by allowing secret *ex parte* meeting to occur between Plaintiff’s treating physicians and Defendant’s counsel. Rather, the purpose of HIPAA is best served by allowing the Defendant access to PHI by way of specific subpoenas, specific requests for PHI, and depositions, where the patient has a right to object to the dissemination of PHI that is not relevant to the litigation at issue.

B. HIPAA preempts Michigan law because it is in conflict with Michigan law. HIPAA places requirements on the disclosure of PHI that cannot be effectuated within the context of an *ex parte* interview. As a result, *ex parte* interviews cannot be permitted under HIPAA.

It is undisputed that prior to the enactment of HIPAA, Michigan Courts interpreted Michigan law to allow for *ex parte* interviews with Plaintiff’s treating physicians. HIPAA is contrary to Michigan law because it is impossible to comply with HIPAA’s protections on the disclosure of PHI and allow for *ex parte* interviews.

In support of his argument, Defendant relies heavily upon the New York case, *Arons v Jutkowski*, 9 NY3d 393; 880 NE2d 831 (2007). In *Arons*, the New York Court of Appeals recognized that a HIPAA compliant authorization “must contain **specific** ‘core elements and requirements,’ including a ‘**specific and meaningful**’ **description of the protected health information to be used or disclosed.**” *Id.*, at 414. An *ex parte* interview circumvents the HIPAA requirement that the authorization notify the parties of a specific and meaningful description of the PHI to be disclosed. There are absolutely no safeguards in place which can effectively monitor secret *ex parte* interviews to prevent the disclosure of irrelevant PHI. This should be obvious to this

Court because during an *ex parte* interview any PHI may be disclosed. The plaintiff/patient cannot properly object to any information disclosed in an *ex parte* interview because the plaintiff/patient has received no specific or meaningful description of the PHI requested or the PHI disclosed. PHI is not even requested by the Defendant until after Defendant has already received an qualified protective order allowing the *ex parte* interview. Defendant's argument is flawed because it is akin to a double hearsay situation where a party only has an exception to the first instance of hearsay but not the second instance. Similarly, in this instance Defendant wishes to argue that it's request for an *ex parte* interview meets HIPAA's procedural requirements, yet Defendant has failed to address how the actual request for PHI and the actual disclosure of PHI during that *ex parte* interview complies with HIPAA's privacy rule. Simply stated, an *ex parte* interview will never comply with HIPAA's privacy requirements because it circumvents those requirements through secret disclosure of PHI.

The reasoning employed by the *Arons* court, and followed by the Michigan Court of Appeals, is flawed in stating:

[T]here can be no conflict between New York law and HIPAA on the subject of *ex parte* interviews because HIPAA does not address the subject. Accordingly, the Privacy Rule does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites. *Id.*, at 415.

In fact, HIPAA does expressly include orally disseminated health information in its definition of PHI; therefore, HIPAA does regulate the information requested and disclosed during the course of the proposed *ex parte* interview with Plaintiff's treating physicians. By HIPAA's plain language, it is the **disclosure** of PHI itself that is regulated, not the request for a secret forum for disclosure. Unlike other forms of informal discovery, an *ex parte* interview creates such a secret forum where the patient will never know what PHI is disclosed and will never have an opportunity to object to

the disclosure of PHI.² Such a secret forum totally eviscerates HIPAA's protections on the disclosure of PHI. As a result, a qualified protective order cannot give rise to an *ex parte* interview under HIPAA. Since an *ex parte* interview is not permitted under HIPAA, and since Michigan law prior to HIPAA permits *ex parte* interviews, there is a conflict which is impossible to resolve. Under this circumstance HIPAA preempts Michigan law and an *ex parte* interview should not occur.

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.

²It is not Plaintiff's position that informal discovery can never be HIPAA compliant. In fact, Plaintiff's counsel can imagine many situations in which a party may wish to submit questions to a treating physician (with notice and an opportunity to object to the requests submitted) without the requirement that the physician answer the request in the form of a sworn statement. As long as Plaintiff is informed of the information requested and the information disclosed, informal discovery can easily be obtained under a qualified protective order.

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