IN THE COURT OF APPEALS
STATE OF GEORGIA

NORTHLAKE MEDICAL CENTER, LLC,	
Appellant-Defendant	
vs.	**CASE NO. A06A0540**
LINDA QUEEN,	
Appellee-Plaintiff.	

AMICUS CURIAE BRIEF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION

Respectfully submitted this 27th day of February, 2006.

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Statement Of Interest By Amicus

The Georgia Trial Lawyers Association ("GTLA") is a voluntary organization of trial lawyers licensed to practice in this State, lawyers whose clients have an interest in preserving access to the courts and equal justice under law. The GTLA's interest in this case lies in securing the civil justice system for use in resolving tort disputes, inasmuch as that system is imperiled by the 2005 omnibus "tort reform" Senate Bill 3 ("SB3"), in general, and SB3's medical authorization provision, O.C.G.A. § 9-11-9.2, in particular.

I. Introduction

In three separate trial courts in three different geographical regions of the State, three different judges (Judge MacMillan in Toombs County, Judge Carriere in DeKalb County, and Judge Salter in Dougherty County) were presented with the same issue: Does newly-enacted O.C.G.A. § 9-11-9.2 ("section 9.2") authorize ex parte communications in medical malpractice cases between defense counsel and Plaintiff's treating physicians? Each of these distinguished trial judges said "no." Thus, the Court of Appeals currently has before it a virtually identical set of legal issues in four separate

cases pending before three different panels, all of which are scheduled for oral argument within the near future.[1]

As stated, the issues before this Court concern the scope and applicability of newly-enacted section 9.2, which was part of the Georgia General Assembly's sweeping "tort reform" legislation of 2005. Collectively, these cases present for determination the following two issues regarding this statute:[2]

1. Section 9.2 imposes, as an initial pleading requirement on a plaintiff in a medical malpractice case, the duty to attach to the complaint a "medical authorization form" allowing the attorney representing the defendant "to obtain and disclose protected health information contained in medical records … which pertain to the plaintiff or, where applicable, the plaintiff's decedent whose treatment is at issue in the complaint." The statute goes on to provide that the authorization "includes the defendant's attorney's right to discuss the care and treatment of the plaintiff … with all of the plaintiff's …

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[1] *See Phoebe Putnam Memorial v. Sanders*, A06A0845; *Thomas Allen, M.D., et al v. Wright*, A06A0662; *Crisp Reg. Hosp. Inc. v. Sanders*, A06A0844. GTLA has filed an identical amicus brief in each of these cases.

[2] The *Sanders* cases (see *infra*) also involve the issue of the statute's retroactive effect, since the complaint in those appeals was filed over a year before the enactment of section 9.2.

treating physicians." Thus, the first issue is whether this statute, or any other provision of Georgia law, in fact allows for "ex parte" communications between defense counsel and the plaintiff's medical providers, without any notice to, or opportunity to object on the part of, the plaintiff?

2. If the Court determines that such ex parte communications are allowed under Georgia law, despite decisions of the Georgia Supreme Court recognizing a constitutional right of privacy in criminal defendants' medical records and prohibiting blanket ex parte communication regarding such records by the State, then, and only then, this Court is confronted with the issue on which all of these cases were disposed of by the respective trial courts: Whether such ex parte communications by defense counsel are preempted by the federal privacy statutes and regulations commonly referred to as "HIPAA"?

Although GTLA agrees that the Health Insurance Portability and Accountability Act (HIPAA) 42 U.S.C. § 210, *et seq.* (2003) [hereinafter "HIPAA"] does preempt any state laws purporting to authorize ex parte communications of the sort sought by the defendants in these cases, this issue has been amply argued and cited by the parties in all of these cases, and it will not be further addressed by GTLA in this amicus brief. Rather, under the "right for any reason rule," GTLA submits that the Court can apply established Georgia law to affirm on independent state law grounds, without the necessity of

reaching the federal issue at all. This state law issue is therefore the focus of this Brief, and is substantively argued and cited in Part III, below.

II. Procedural Posture of the Various Appeals

As stated, the issues set forth above are currently before three distinct panels of this Court (although only two Divisions, due to recusals) in four different appellate cases (two of the cases involve separate appeals from the same action in the lower court).

The first of these cases scheduled for argument (on March 2, 2006) is *Allen v. Wright*, No. A06A0662. This case is assigned to Division 3 but, Presiding Judge Blackburn having recused, it will be heard by Presiding Judge Andrews and Judges Mikell and Adams. The second case, *Northlake Medical Center, LLC v. Queen*, No. A06A0540, is scheduled to be argued on March 9, 2006. This case is assigned to Division 4 but, Presiding Judge Smith having recused, it will be heard by Presiding Judge Andrews, Chief Judge Ruffin, and Judge Phipps.

Crisp Regional Hospital, Inc. v. Sanders, No. A06A0844, and *Phoebe Putney Memorial Hospital, Inc. v. Sanders*, No. A06A0845, are the companion cases referred to above, which both involve interlocutory appeals from an order of the State Court of Dougherty County in a case in which Sanders is the plaintiff and both Crisp Regional and Phoebe Putney are defendants. Although these cases have separate numbers in this

Court, due to the defendants having pursued independent interlocutory appeals, the issues are the same, and it is assumed these cases will be consolidated for decisional purposes, as they have been for argument. These cases are also assigned to Division 3, and are scheduled for oral argument before Presiding Judge Blackburn and Judges Mikell and Adams at a special session of this Court in Savannah on April 20, 2006.

III. Argument and Citation of Authorities

Each of the trial courts in these cases based their rulings primarily on the ground that ex parte communication with, and otherwise obtaining protected health information by ex parte means from, Plaintiff's medical providers violates federal HIPAA regulations, which therefore preempt Georgia law. This issue has been thoroughly briefed by the parties in all cases, and, although GTLA endorses the trial courts' rulings as substantively correct, they impliedly involve an unwarranted assumption that Georgia law in fact permits such communications. Thus, GTLA wishes to advance an independent basis for decision in these cases: Prior to the enactment of section 9.2, the Georgia Supreme Court had recognized a substantive constitutional privacy right in medical information; section 9.2 on its face does not provide for ex parte communications; and this Court should therefore apply well-recognized principles of statutory construction so as not to abridge this substantive right of the Plaintiffs by implication.

A. A decision of a court below which is "right for any reason" will be affirmed by this Court. "Under the 'right for any reason' rule, an appellate court will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied." *City of Gainesville v. Dodd*, 275 Ga. 834, 835, 573 S.E.2d 369 (2002); *accord*, *Crisp Regional Hospital, Inc. v. Oliver*, 275 Ga. App. 578(3), 621 S.E.2d 554 (2005) (opinion by Andrews, P.J.). Thus, this Court, as one of the great organs of public policy in this state (see *Mutual Life Insurance Co. v. Durden*, 9 Ga. App. 797, 800, 72 S.E. 295 (1911)), is not simply limited to passing upon the merits of the trial courts' reasoning, but is free, within jurisdictional boundaries, to develop its own independent rationale for affirmance.

B. Georgia law prior to the enactment of O.C.G.A. § 9-11-9.2 did not authorize ex parte communications between defense counsel and plaintiff's health providers. All would agree on the following basic premise: "It is presumed that when enacting legislation, the General Assembly acts with full knowledge of the existing state of the law …" *DOT v. Woods*, 269 Ga. 53, 55, 494 S.E.2d 507 (1998). Section 9.2, which was passed as part of the so-called "tort reform" legislation of 2005, significantly says *nothing* about permitting ex parte communications between defense counsel and plaintiff's medical providers in a medical malpractice case. Rather, the statute simply states that the "authorization includes the defendant's attorney's right to discuss the care and treatment

of the plaintiff or, where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians." Contrary to assumptions made and authorities cited by these Appellants, existing Georgia law at the time section 9.2 was enacted did *not* provide for ex parte communications, and it is certainly not proper for any court to construe such a significant change in the law into this statute by implication.

Since nothing in the language of section 9.2 allows ex parte communications, Appellants have fallen back on the disingenuous assertion that Georgia law provided for such communications anyway. At least after 2000, nothing could be further from the truth. The fact that a plaintiff puts his physical condition at issue for purposes of a personal injury or tort claim does not mean that he gives up his expectation of privacy in all matters connected with his medical treatment or records. For the contention that Georgia sanctions ex parte communications, Appellants have relied exclusively on *Orr v. Sievert*, 162 Ga. App. 677, 292 S.E.2d 548 (1982), and *Jones v. Thornton*, 172 Ga. App. 412, 323 S.E.2d 217 (1984). Appellants assert these cases as authority for the proposition that, once a patient places his care and treatment at issue in a civil proceeding, his doctor has no duty to protect the patient's privacy. This is not an accurate statement of the law to begin with. Even in *Jones*, this Court recognized that the expectation of privacy was surrendered *only* as to matters "within the parameters of the complaint." Thus, any other health information of Plaintiff, even under the view prevailing at the time of *Jones*, was

still protected. Furthermore, neither *Orr*, *Jones*, nor any other reported Georgia decision gives any explicit sanction to a physician's communicating about patient health information on an ex parte basis, and, such communications, in fact, are in violation of the physician's Hippocratic Oath.

Whatever this Court may have held in *Orr* or *Jones*, however, has been superseded by subsequent decisions of the Georgia Supreme Court. In the context of private medical information, the Supreme Court has affirmed the constitutional right of privacy in medical records in *King v. State*, 272 Ga. 788, 535 S.E.2d 492 (2000) ("*King I*"), and *King v. State*, 276 Ga. 126, 577 S.E.2d 704 (2003) ("*King II*," unrelated to the party in *King I*). In *King I*, the Court followed its landmark precedent in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1904), to recognize a constitutional privacy right that protected a patient's medical records. The Court found that the right had been violated when the State acquired those records by an ex parte subpoena, even though the patient's medical condition (intoxication) was a legitimate issue in the case; indeed, the central issue. In *King II*, which involved a search warrant to obtain medical records, the Court continued to recognize that the patient had privacy rights in his medical records and that, although law enforcement and public safety are compelling state interests, any intrusion into the privacy of the patient's medical information must be "narrowly tailored" to provide procedural protection to the patient. Unlike the ex parte

subpoena in *King I*, the numerous procedural safeguards built into the process for obtaining a search warrant in *King II* provided constitutionally adequate protection against improper or abusive disclosures of the patient's constitutionally protected private health information.

A similar analysis applies to civil cases. Although the filing of a suit alleging personal injuries will impliedly waive a patient's *substantive* right to keep his or her medical information private to the extent it relates to the issues in the case, due process under the Georgia Constitution still entitles the patient to *procedural* protections regarding the disclosure. Procedural due process protections necessarily apply to the disclosure of private personal medical information for two reasons. First, the right of privacy arises from the concept of "liberty" within Ga. Const., Art. I, Sec. I, Par. I, which provides that "No person shall be deprived of life, liberty, or property except by due process of law." Second, procedural due process pervades our entire system of justice, so that *any* compulsory disclosure of information must be accompanied by the protections of procedural due process. The judiciary strikes the balance between competing interests in the disclosure of private information. Hence, such notice should be required as will allow a patient to seek judicial intervention before a disclosure is made. As noted above, the Court in *Pavesich* found that the right of privacy was guaranteed by the constitutions of the United States and Georgia in the prohibition of deprivation of liberty without due

process of law. 122 Ga. at 196-97. *See generally*, Charles R. Adams III, *Georgia Law of Torts*, § 29-3, at 586-87 (2006 ed.). Therefore, simply put, a patient may not be deprived of the liberty of privacy in his medical information "except by due process of law." Ga. Const., Art. I, Sec. I, Par. I. Thus, even when the substantive right of privacy yields to the right of adversaries to know the facts, due process is still required. "[T]he principles of [procedural] due process 'extend to every proceeding ... judicial or administrative or executive in its nature' at which a party may be deprived of life, liberty, or property." *Cobb County School District v. Barker*, 271 Ga. 35, 37(2), 518 S.E.2d 126 (1999).

Any particular waiver of the right to privacy does not result in *total* loss of the right:

> The existence of the waiver [of the right to privacy] carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. [Privacy] may be waived for one purpose and still asserted for another; it may be waived in behalf of one class and retained as against another class; it may be waived as to one individual and retained as against all other persons.

Pavesich, *supra*, 122 Ga. at 199. For example, in the context of the Open Records Law, the Supreme Court has observed that a party may waive a privacy right, and that the

waiver may be made expressly or by implication, and that the waiver may be in whole or in part. *Doe v. Sears*, 245 Ga. 83, 86-87, 263 S.E.2d 119 (1980). Therefore, where there is a waiver, there is a right to "invade" the person's privacy "only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver." *Id*.

Concededly, the filing of a lawsuit for personal injuries amounts to an implied waiver of the plaintiff's privacy to the extent that the defendant may conduct a reasonable investigation regarding the validity of the plaintiff's claim, but "only in a reasonable and proper manner and only in furtherance of its interest with regard to the suit against it," and the reasonableness of the investigation is a question of fact. *Ellenberg v. Pinkerton's, Inc.*, 125 Ga. App. 648, 651-52, 188 S.E.2d 911 (1972). For this reason, even if an investigating agency may ultimately be entitled to obtain confidential records, a custodian may not simply turn them over to the agency without violating a patient's or client's rights to privacy. For example, a disclosure made voluntarily, without requiring the investigating agency to comply with procedures designed to ensure due process, subjects a professional to liability. *Roberts v. Chaple*, 187 Ga. App. 123, 369 S.E.2d 482 (1988) (accountant who disclosed client's confidential information to special agent for the IRS without waiting for an administrative summons or judicial process was subject to liability for invasion of privacy). *See also Jones v. Thornton*, *supra*, 172 Ga. App. 412, 323

S.E.2d 217 (1984) (treating physician, who responded to a request for production of documents filed by the patient's adversary in tort litigation by mailing a copy of medical records on the date of receipt of the request, without waiting for the ten-day period in which the patient was authorized to object, "was lucky" that all records related to health matters in issue in the tort case, and thus was not liable for a breach of confidentiality).

Procedural due process protections are important not only for protecting against disclosure of all completely irrelevant medical conditions, but also for privileged conditions, such as the "psychiatrist-patient privilege" under O.C.G.A. § 24-9-21(5, 6) and § 37-3-166. Although section 9.2 purports to exempt from disclosure that which is privileged, the lack of procedural rights implicated by ex parte contact will, in many cases, make that exemption illusory. Most doctors are not aware that the "psychiatric privilege" in Georgia is not waived even when the patient seeks to recover damages for mental and emotional distress (*Kennestone Hospital v. Hopson*, 273 Ga. 145, 149, 538 S.E.2d 742 (2000)) and that it applies to any medical doctor who spends a substantial portion of time in the diagnosis or treatment of a mental or emotional condition. *Wiles v. Wiles*, 264 Ga. 594, 597-98, 448 S.E.2d 681 (1994). Thus, although such a privileged communication is not one that is properly within the scope of a request for production, the lack of procedural protections inherent in ex parte communications by adversaries will likely result in frequent, albeit inadvertent violations of patients' constitutional right

to privacy. This certainly does not comport with Senate Bill 3's ostensible purpose of "improving health care" conditions for all Georgia citizens.

Procedural due process protections of the right of privacy survive for the plaintiff in a personal injury case for the same reasons that they survived for the criminal defendants in *King I* and *King II*, *supra*. In both situations, the condition of the patient is the subject of legitimate investigation by the patient's adversary. In the final analysis, however, the judiciary must decide any contested issues over the scope of disclosures to be made; the records custodian is not legally (or practically) qualified to do so. *Harris v. Cox Enterprises, Inc.*, 256 Ga. 299, 301-02(1)(2), 348 S.E.2d 448 (1986). In order to invoke judicial oversight in civil cases, notice must be given to the patient (or patient's counsel in a pending case). The patient will know whether there is, or may be, private medical information that is not relevant to the issues in a pending case or information that is protected by other privileges, whereas the adversary or medical records custodian (clerk) will very likely not know or care; the custodian will probably not even know what the issues are in a pending case. The patient must be given notice so that he or she can seek protective orders limiting the scope of the disclosure, or at least an *in camera* review of the records to be disclosed. *Apple Investment Properties, Inc. v. Watts*, 220 Ga. App. 226, 229(3), 469 S.E.2d 356 (1996). Otherwise, the scope of the patient's privacy rights will be decided by: (a) the patient's adversary who is trained in the law and who knows

the consequences of particular disclosures in a particular case, and (b) a medical records custodian or physician who are not trained in the law and who thus will likely rely entirely upon the patient's adversary to understand the issues in the case. This would inevitably lead to violation of the patient's procedural due process rights to notice to prevent excessive or inappropriate disclosures of medical information, particularly given the small number of medical malpractice insurers in Georgia, and the concomitant result that the treating physician will often be insured by the same carrier as the defendant. The entire subject of ex parte communications with treating physicians is comprehensively discussed in Annot., *Discovery: Right to Ex Parte Interview with Injured Party's Treating Physician*, 50 A.L.R. 4th 714 (2005). This Annotation collects authorities nationally, and shows that the very substantial weight of those authorities is against allowing such communications.

One of the best-reasoned and most frequently cited cases on this issue in the country is *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 499 N.E.2d 952 (Ill. App. 1st Dist. 1986). In holding that ex parte communications violate public policy, the court in that case made the following very cogent analysis of the reasons for prohibiting them:

> [W]e believe that modern public policy strongly favors the confidential and fiduciary relationship existing between a patient and his

physician. We further believe that this public policy arises from the fact that society possesses an established and beneficial interest in the sanctity of the physician-patient relationship. We find this public policy to be reflected in at least two separate indicia: (1) The promulgated code of ethics adopted by the medical profession and upon which the public relies to be faithfully executed so as to protect the confidential relationship existing between a patient and his physician; and (2) the fiduciary relationship … which exists between a patient and his treating physician. Because public policy strongly favors both the confidential and fiduciary nature of the physician-patient relationship, it is thus axiomatic that conduct which threatens the sanctity of that relationship runs afoul of public policy…. Our determination … is bolstered evermore by the fact that *no appreciative gain (regarding the evidence to be obtained) can be had through such meetings*. Accordingly, we join the growing number of courts which have found that public policy strongly favors the confidentiality of the physician-patient relationship and thereby prohibits, because of the threat posed to the sanctity of that relationship, extra-judicial, ex parte discussion of a patient's medical confidences.

499 N.E.2d at 957 (emphasis added). Thus, any advantage to be gained by Defendants from such communications is speculative at best, and it certainly does not "level the playing field" to allow wholesale abridgement of one of the player's legal rights.

C. This Court should apply well-settled principles of statutory construction so as not to limit substantive rights by implication. As pointed out in Part B, above, the Georgia Supreme Court has clearly and unambiguously recognized a constitutionally-protected privacy right of individuals in their medical records. Although this right was applied to defendants in criminal proceedings by the Supreme Court, there is nothing in the language or reasoning of the *King* cases which suggests that this constitutional right should only be enjoyed by criminal defendants. Indeed, given the Court's overarching concern with protecting the procedural due process rights of parties to litigation with regard to the privacy of their medical information, it is even more important not to allow such ex parte communications in civil cases, where specific constitutional safeguards such as the Fourth Amendment are not present. As a matter of logic and of sound public policy, the constitutional privacy protections announced by the Supreme Court in *King* should apply to *all* litigants, both civil and criminal, and this Court should recognize that reality. "The Court of Appeals has jurisdiction to decide questions of law that involve the application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given state of facts and that do not involve construction of some

constitutional provision directly in question and doubtful either under its own terms or under the decisions of the Supreme Court of Georgia or the Supreme Court of the United States." *Pollard v. State*, 229 Ga. 698, 698, 194 S.E.2d 107 (1972). The application of *King's* no-ex-parte rule to civil litigants is thus well within the competence of this Court.

It is a first principle of statutory construction that any statute which is in derogation of a common-law right (in this case a *constitutional* common-law right) "must be limited in strict accordance with the statutory language used therein, and such language 'can never be extended beyond its plain and ordinary meaning'" *Killearn Partners, Inc. v. Southeast Properties, Inc.*, 279 Ga. 144, 146, 611 S.E.2d 26 (2005) (quoting *Tolbert v. Maner*, 271 Ga. 207, 208, 518 S.E.2d 423 (1999)); *accord*, *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E.2d 245 (2005) (opinion by Blackburn, P.J.). This means that "the express language of [such a statute] must 'be followed literally and no exceptions to the requirements of the Act will be read into the statute by the courts'" *Killearn, supra,* 279 Ga. at 146 (quoting *Tolbert, supra,* 271 Ga. at 208). Appellants ask for an "ex parte communication" exception not expressed in the statute, and this should not be judicially engrafted by implication.

Application of these rules reveals the real risk of the exegesis demanded by the Appellants herein. This Court should decline their invitation to ignore the clearly-established mandate of our Supreme Court that ex parte communications with respect to

medical records is not allowed, and should even more strongly resist the invitation to "read into" section 9.2 such an additional curtailment of the rights of injured persons, when the legislature itself could have done so specifically, but did not.

IV. Conclusion

For the reasons set forth above, GTLA respectfully submits that the judgments of the trial courts in these cases should be affirmed, initially on the ground that nothing about section 9.2, or Georgia law otherwise, provides for ex parte communications. Failing that, GTLA endorses affirmance of these decisions on the grounds of HIPAA preemption.

Respectfully submitted this 27th day of February, 2006.

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