

DENIED

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA



RODERICK K. LINZIE,

Plaintiff,

v.

JEREMY D. RHODES,

Defendant.

Civil Action No. 17EV002100

**TRIAL BY JURY OF TWELVE
DEMANDED**

**UNNAMED DEFENDANT JAMES RIVER INSURANCE COMPANY, INC.'S MOTION
AND BRIEF IN SUPPORT OF A QUALIFIED PROTECTIVE ORDER**

COMES NOW, James River Insurance Company, Inc. (hereinafter referred to as "JRIC" or "this Defendant"), and submits this Motion and Brief in Support of Qualified Protective Order, respectfully showing the Court the following:

FACTS

This action arises from a motor vehicle accident that occurred on June 21, 2016 between vehicles driven by Plaintiff Roderick Linzie and Defendant Jeremy Rhodes. (See, Complaint, generally.) Plaintiff alleges that Mr. Rhodes negligently operated his vehicle, causing the subject collision to occur. Id. Plaintiff further alleges that he has suffered personal injury as a result of the subject collision, including injuries to his neck, back, and shoulder. Id. Plaintiff received the full limits of Mr. Rhodes liability insurance pursuant to a Limited Release, and now seeks

Uninsured/Underinsured Motorist Benefits from Unnamed Defendant James River Insurance Company. Id.

Mr. Linzie has treated with several healthcare providers since the subject collision on June 21, 2016, and anticipates further treatment. (See, Plaintiff's Response to Defendant JRIC's First Interrogatories to Plaintiff, ¶¶ 6, 20, attached hereto as Exhibit "A"). Specifically, Plaintiff has treated with medical providers at Sparlin Healthcare¹, Ortho Sport and Spine Physicians², and Peachtree Orthopaedics³. Id. Based upon his own testimony and the medical records received from Sparlin Healthcare, Plaintiff also treated at Sparlin Healthcare prior to the subject motor vehicle accident for injuries to his neck and back following a separate motor vehicle collision which occurred in April 2015. (Deposition of Roderick Linzie, pp. 10-13, attached hereto as Exhibit "B"). Further, Plaintiff has indicated that he anticipates undergoing two additional surgeries, one each on his neck and lower back, which will be performed by Lee Kelley at Peachtree Orthopaedics. (See, Plaintiff's Response to Defendant JRIC's First Interrogatories to Plaintiff, ¶¶ 6, 20, attached hereto as Exhibit "A"). Plaintiff has indicated that he will present medical records from each of these providers at the trial of this case. (See, Plaintiff's Notice of Intent to Use Records at Trial filed August 1, 2017).

To facilitate discovery, counsel for Defendants would like to meet with Plaintiff's medical providers at Sparlin Healthcare, Ortho Sport and Spine Physicians, and Peachtree Orthopaedics informally to decide whether formal discovery is necessary. Consistent with Georgia law and HIPAA privacy rules, Defendants request the entry of a Qualified Protective Order, which would

¹ Edward G. Krolikowshi, D.C. and Kim P. Eubanks, M.D.

² Armin Oskouei, M.D., William Sutlive, M.D., Melissa Hagin, NP-C, and Joe Samuel M.D.

³ Lee A. Kelley, M.D.

permit the use and disclosure of protected health information of Roderick Linzie, for use in this litigation alone. Defendants only seek to conduct these *ex parte* interviews with respect to the limited medical conditions which are at issue in this proceeding, specifically, issues and care related to Roderick Linzie's alleged neck and back injuries and his past and future treatment related thereto. As discovery is ongoing, Defendant reserves the right to amend this Motion and seek permission from the Court to meet with additional medical providers as their relevance, importance, and identity become known through the discovery process.

For the reasons stated below, JRIC respectfully requests that this Court grant this Motion for Qualified Protective Order.

ARGUMENT AND CITATION OF AUTHORITY

A. *Ex parte* Meetings Between Defense Counsel and the Treating Healthcare Providers of Roderick Linzie are Authorized by HIPAA and Georgia Law.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") permits oral and written disclosure of protected health information from a covered entity, such as a physician or other healthcare provider, in the course of a judicial proceeding in response to a court order. 45 C.F.R. § 164.512(e)(1)(i). The Georgia Supreme Court has interpreted HIPAA in the context of *ex parte* communications between defense counsel and a plaintiff's treating medical providers. See Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008). In Moreland, the Court recognized the longstanding practice of conducting *ex parte* interviews with treating physicians, stating as follows:

Georgia law is clear that a plaintiff waives his right to privacy with regard to medical records that are relevant to a medical condition the plaintiff placed in issue in a civil or criminal proceeding. O. C.G.A. § 24-9-40(a); Orr v. Sievert, 162 Ga. App. 677 (1982). Therefore, under Georgia law, once a plaintiff puts his medical

condition in issue, defendants can seek plaintiff's protected health information by formal discovery, or informally, by communicating orally with a plaintiff's physician.

Id. at 734. In light of the procedural requirements imposed by HIPAA, the Georgia Supreme Court held that HIPAA must be satisfied before *ex parte* interviews with medical providers may take place, which could be accomplished either pursuant to a HIPAA-compliant medical authorization executed by Plaintiff or through a qualified protective order that prohibits the use or disclosure of the patient's protected health information for any non-litigation purpose. Id. at 731, 734. The Court specifically referenced 45 C.F.R. § 164.512(e)(1)(v) in a footnote, which requires that a protective order (1) prohibit parties from using or disclosing the health information for any purpose other than the litigation and (2) requires the return to the covered entity or destruction of the health information, including all copies made, at the end of the litigation. See 45 C.F.R. § 164.512(e)(1)(v).

Subsequent to Moreland, the Supreme Court of Georgia revisited the propriety of *ex parte* communications between defense counsel and a plaintiff's treating physicians. See Baker v. Wellstar Health Systems, Inc., 288 Ga. 336, 703 S.E.2d 601 (2010). In Baker, the Georgia Supreme Court held that *ex parte* interviews of plaintiff's treating physicians are permitted under HIPAA and the substantive privilege extended by Georgia law to medical information, and are limited to matters relevant to plaintiff's medical condition which is at issue in the subject proceeding. The Baker Court recognized the benefits of *ex parte* interviews:

In proceedings in which a litigant's medical condition is at issue, Georgia law generally permits *ex parte* communications between the litigant's treating physicians and opposing counsel, under the theory that the litigant's right to medical privacy as to the condition at issue has been waived.

Id. at 337. In Baker, the Georgia Supreme Court considered a Qualified Protective Order entered in a medical malpractice case that only contained the two HIPAA-required elements outlined in Moreland (which requires any protective order to prohibit parties from using or disclosing the health information for any purpose other than the litigation *and* requires the return to the covered entity or destruction of the health information, including all copies made, at the end of the litigation). The Georgia Supreme Court found that language contained in the order allowing the defendants to "discuss [plaintiff's] medical conditions and any past, present, or future care or treatment with [defense] counsel," was too broad, and consequently, the Court limited the scope of the interview to "matters relevant to [plaintiff's] medical condition which [was] at issue in [the] proceeding." Id. at 338. Furthermore, the Court identified other language and items that should be included in a qualified protective order:

(1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendants, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary.

Id. at 339. The Supreme Court of Georgia's allowance of *ex parte* communications between defense counsel and a plaintiff's treating physicians regarding "matters relevant to [a plaintiff's] medical condition which is at issue" underscores the value of such informal interviews in the litigation process.

Thus, both HIPAA and Georgia law permit a patient's treating physicians to disclose, share, divulge, use, transmit, and communicate a patient's protected health information, including oral communications. Moreover, HIPAA does not forbid defense counsel and treating physicians from engaging in *ex parte* communications regarding a patient's medical information. The Moreland

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