IN THE COURT OF APPEALS
STATE OF GEORGIA

ANDREW E. GREEN, M.D. NORTHEAST GEORGIA PHYSICIANS GROUP, INC., et al, Appellants, v. STEPHANIE KAREN PINNIX and OCTAVIO ORTEGA Appellees.	)	Appeal Case No.: A23A0547

APPELLANTS' INITIAL BRIEF ON APPEAL

R. Page Powell, Jr.
Georgia Bar No.: 586696
M. Scott Bailey
Georgia Bar No.: 032201
Lindsey Cassimus
Georgia Bar No. 301862

ppowell@huffpowellbailey.com
sbailey@huffpowellbailey.com
lcassimus@huffpowellbailey.com

HUFF, POWELL & BAILEY, LLC
999 Peachtree Street, Suite 950
Atlanta, Georgia 30309
(404) 892-4022

Attorneys for Appellants

I. INTRODUCTION

The trial court's Order granting the Appellees' request for "severe sanctions" against the Appellants is unprecedented in Georgia. The Appellants consist of two individual defendants and three corporate healthcare defendants, and multiple employees of the corporate defendants were involved in the medical care provided to Appellee Stephanie Karen Pinnix. The Appellants all are represented by the same counsel, and it is undisputed that no conflict of interest has arisen to date between the corporate Appellants and their non-party employees.

In their Complaint, the Appellees asserted allegations against two individuals—Dr. Andrew Green and Nurse Sheila Armstrong—but also generally asserted claims against other unnamed physicians, nurses, and staff employed by the corporate Appellants. As the case proceeded, the Appellees eventually asked for the deposition of a physician employed by Appellant Northeast Georgia Physicians Group, Inc. ("NGPG"). The physician—Dr. Cecil Brown—was involved in Ms. Pinnix's care but was not named as an individual defendant. The care he provided to Ms. Pinnix, however, was discussed extensively in the Appellees' original Complaint. After Dr. Brown's deposition was requested, counsel for the Appellants advised opposing counsel that he would be representing Dr. Brown because Dr. Brown was an employee of NGPG. Counsel for the Appellees voiced no objection to this plan at any time prior to Dr. Brown's deposition.

Counsel for the Appellants communicated with Dr. Brown in preparation for his deposition and represented Dr. Brown during the deposition. During the deposition, the Appellees for the first time claimed that defense counsel's representation of Dr. Brown was inappropriate and that counsel's prior communications with Dr. Brown violated the prohibition against ex parte communications set forth in the Health Insurance Portability and Accountability Act ("HIPAA"). The Appellees then filed a "Motion for Severe Sanctions," seeking to have the Appellants' Answers to the Complaint stricken for the alleged HIPAA violation. In response, the Appellants argued that no HIPAA violation occurred because Dr. Brown was an employee of NGPG at all relevant times and, as a result, counsel for NGPG was fully entitled to meet with him to discuss his care and treatment of Ms. Pinnix. Nevertheless, the trial court granted the Appellees' motion, imposing sanctions on the Appellants for communicating with Dr. Brown but refusing to strike the Appellants' Answers to the Complaint.[1]

Neither the Appellees nor the trial court cited any direct authority for the proposition that counsel for a defendant healthcare employer violates HIPAA if he speaks with an employee of the defendant regarding a patient. In fact, no Georgia

[1]Although the trial court declined to strike the Appellants' Answers to the Complaint, the court imposed several other sanctions that will significantly prejudice the Appellants, including restrictions on Dr. Brown's testimony, a highly-prejudicial jury instruction, and monetary penalties.

appellate court ever has ruled that such communications violate HIPAA, and the Appellees have not identified any authority from any other jurisdiction to support their argument. The trial court's unprecedented Order should be reversed by this Court so that clear rules may be established which protect the right of healthcare employers, through their counsel, to speak freely with the healthcare providers whom they employ.

The trial court's Order, if it is allowed to stand, will have enormous practical implications for medical malpractice cases in Georgia. Currently, counsel for plaintiffs in medical malpractice cases have a virtually unlimited right to confer ex parte with medical professionals who treated the plaintiff, while defendants in such cases generally are denied that right. In common practice, however, an exception to this rule has always applied—counsel for a defendant healthcare corporation has always been permitted to speak with employees of the corporation who were involved in the patient's care. This well-established practice has always made sense, and has rarely been questioned, because such conversations are necessary for a healthcare corporation to investigate, evaluate, and defend against malpractice claims asserted against it.

The trial court's Order purports to change this longstanding practice. If it is upheld, defense counsel would be precluded from speaking with ***anyone*** involved in the patient's care, even individuals who were employed by the defendant and for

whose conduct the defendant could be held vicariously liable. The almost certain result of such an anomalous ruling would be this—plaintiffs will sue only corporate healthcare defendants (rather than individuals), and defense counsel will be absolutely precluded from speaking with anyone employed by their corporate clients regarding the care provided to the patient. Such a result obviously would be untenable and unfair, to put it mildly. Reversal of the trial court's Order is essential, therefore, to ensure that corporate healthcare defendants are given a full and fair opportunity to defend themselves in cases like this one.

PART ONE

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS BELOW

A. Background.

In this medical malpractice action, the Appellees generally allege that Andrew Green, M.D., a gynecologic oncologist, and Sheila Armstrong, RNFA, an advanced practice registered nurse, were negligent in performing surgery to remove a complex mass in Ms. Pinnix's pelvis in March 2018. [R., p. 461.] Dr. Green and Ms. Armstrong are both employees of Appellant Northeast Georgia Physicians Group ("NGPG"). [Id.] In their Complaint, the Appellees not only criticized Dr. Green and Ms. Armstrong, who are individually named as defendants, but also other unnamed physicians, nurses, and staff" of NGPG, Northeast Georgia Medical Center, Inc. ("NGMC") and Northeast Georgia Health System. [R., V2—pp. 16-18, 23-27 (¶¶

35-36, 44, 79-92).] Likewise, in the Complaint, the Appellees repeatedly referred to Dr. Cecil Brown, an employee of NGPG, as one of the individuals who provided relevant care to Ms. Pinnix. [R., V2—pp. 18-19.]

By way of background, on March 20, 2018, Ms. Pinnix presented to Dr. Green for laparoscopic removal of a complex mass in her pelvis. The surgery took place at NGMC. [R., pp. 461-462.] During the surgery, Dr. Green was concerned that there may be an injury to the colon or bowel, so he converted the procedure from a laparoscopy to a laparotomy to check for injury. Finding no injury at the time, Dr. Green finished the surgery and admitted Ms. Pinnix to the hospital for observation. [Id.]

On March 22, 2018, Dr. Green consulted Dr. Cecil Brown, a trauma surgeon who also was employed by NGPG, to evaluate Ms. Pinnix. [Id.] It is undisputed that Dr. Brown was an employee of NGPG at all times relevant to this action. [Id.] Dr. Brown evaluated Ms. Pinnix in the hospital on March 22 and March 23. On March 23, 2018, Dr. Brown decided to operate on Ms. Pinnix due to a suspected bowel leak. During surgery, Dr. Brown located a bowel leak and repaired it. Ms. Pinnix recovered in the hospital until she was discharged on April 9, 2018. [Id.]

B. Request for Dr. Brown's Deposition

On November 4, 2021, counsel for the Appellees served a unilateral notice of deposition and a subpoena for the deposition of Dr. Brown. [Id.] In response, the following email exchange occurred from November 4-9, 2021:

- November 4, email from defense paralegal to Appellees' counsel:

From: Dobrina Petrova de Oliveira <ddeoliveira@huffpowellbailey.com>
Sent: Thursday, November 4, 2021 4:51:35 PM
To: megan lewismurphylaw.com <megan@lewislawwins.com>; ken lewislawwins.com <ken@lewislawwins.com>
Cc: Lindsey L. Costakos <lcostakos@huffpowellbailey.com>; Holly Landivar <hlandivar@huffpowellbailey.com>; Scott Bailey <SBailey@huffpowellbailey.com>
Subject: Pinnix - NOD of Dr. Brown

Megan,

We received the attached notice for Dr. Brown's deposition for November 22. Have you sent any e-mails asking for our availability because we are not available on November 22? Can you please give us some additional dates for her deposition?

Thank you.

Dobrina Petrova de Oliveira
Paralegal | HPB
Direct: 404.969.1841

- November 5, email from Appellees' counsel to defense paralegal:

On Nov 5, 2021, at 10:16 AM, megan lewismurphylaw.com <megan@lewislawwins.com> wrote:

Dobrina,

I'm confused. Dr. Brown is a fact witness.

Kind Regards,

Megan Brown

- November 6, email from defense counsel to Appellees' counsel (with highlight added for emphasis):

From: Scott Bailey <SBailey@huffpowellbailey.com>
Sent: Saturday, November 6, 2021 7:28 PM
To: megan lewismurphylaw.com <megan@lewislawwins.com>
Cc: Dobrina Petrova de Oliveira <ddeoliveira@huffpowellbailey.com>; ken lewislawwins.com <ken@lewislawwins.com>; Lindsey L. Costakos <lcostakos@huffpowellbailey.com>; Holly Landivar <hlandivar@huffpowellbailey.com>
Subject: Re: Pinnix - NOD of Dr. Brown

I think I'm the one who's confused. Are we not scheduling depositions by agreement anymore?

Also, Dr. Brown is an NGPG employee and therefore is our client.

M. Scott Bailey
Huff Powell Bailey LLC
404.892.4022

- November 9, email from Appellees' counsel to defense counsel:

From: megan lewismurphylaw.com
To: Scott Bailey
Cc: Dobrina Petrova de Oliveira; ken lewislawwins.com; Lindsey L. Costakos; Holly Landivar
Subject: Re: Pinnix - NOD of Dr. Brown
Date: Tuesday, November 9, 2021 5:18:55 PM
Attachments: Outlook-signature .png

Mr. Bailey,

This deposition is properly noticed for November 22, 2021 and we will proceed with taking Dr. Brown's deposition on that date.

Kind Regards,

Megan D. Brown, J.D.
Lewis Law
Tel. 770-867-7446
Email: megan@lewislawwins.com
102 W. Athens Street
Winder, GA 30680

[R., V3—pp. 336-338.]

Following this exchange, counsel exchanged numerous emails back and forth for weeks to discuss when and where Dr. Brown would be deposed. [R., V3—pp. 336-347.] After disclosing unequivocally that defense counsel was representing Dr. Brown, defense counsel repeatedly indicated in writing that they were in contact

with Dr. Brown and his office to schedule the deposition. [Id.] Until Dr. Brown's deposition in February 2022, the Appellees never objected to or expressed any concern that defense counsel was speaking with Dr. Brown or planning to represent him in his deposition. [R., pp. 462-463.]

The deposition eventually was scheduled for February 3, 2022, by agreement of counsel. From the time that defense counsel disclosed that they represented Dr. Brown on November 9, 2021, until the deposition on February 3, 2022, Appellees' counsel never indicated any concern about defense counsel's representation of Dr. Brown. [Id.] At his deposition, Dr. Brown was represented by Mr. Scott Bailey, who is lead counsel for all the Appellants, including NGPG—Dr. Brown's employer. [R., pp. 461, 463.] Dr. Brown disclosed during his deposition that defense counsel had engaged in more than one communication with him prior to the deposition and had transmitted to him an electronic link to the patient's medical records. [R., p. 463.] Defense counsel spoke with Dr. Brown prior to his deposition, sent Dr. Brown medical records, and represented Dr. Brown at the deposition, because Dr. Brown was an employee of NGPG.

C. The Appellees' Motion and the Trial Court's Order.

Following Dr. Brown's deposition, the Appellees filed a motion seeking sanctions, alleging that the communications that occurred between defense counsel and Dr. Brown constituted prohibited ex parte communications under HIPAA. [R.,

V2—pp. 216-270.] In their motion, the Appellees sought to have the Appellants' Answers stricken and even alleged that defense counsel had committed a felony by meeting with Dr. Brown. [Id., pp. 3-4.] The Appellants responded by arguing that, because Dr. Brown indisputably was an employee of NGPG, counsel for NGPG was free to speak with him and therefore no improper ex parte communications occurred. The issues were thoroughly briefed, and the trial court held a lengthy hearing. [See R., V3—pp. 323-382, 432-441.]

On July 15, 2022, the trial court issued its Order on the sanctions motion. The court concluded that defense counsel, Mr. Bailey, did not act in bad faith but, instead, acted upon a good faith belief that he represented Dr. Brown and that the representation, arising from Dr. Brown's status as an employee of NGPG, allowed him to communicate with Dr. Brown prior to his deposition. [R., pp. 466-467.] Further, the court found no evidence of any willful violation on the part of defense counsel, and therefore the court declined to strike the Appellants' Answers to the Complaint. [R., p. 472.] However, even though it was undisputed that Dr. Brown was an employee of NGPG at all relevant times, the trial court concluded that the conversations between defense counsel and Dr. Brown violated HIPAA. [Id.] As a result, the court ordered the following sanctions:

1. Dr. Brown's testimony at trial must be limited to factual information from the medical records rather than opinion testimony. [R., p. 473.]

2. If Dr. Brown testifies at trial, the jury will be instructed that defense counsel improperly interviewed Dr. Brown, which was "improper under Georgia law," and that the interview may or may not have affected "Dr. Brown's testimony or that of any related witness." [Id.]

3. An award of attorney's fees and costs of litigation against the Appellants in an amount to be determined at a future hearing. [R., p. 474.]

D. Preservation of Error

The Appellants preserved the error enumerated by this appeal by opposing the Appellees' Motion for Severe Sanctions, receiving an adverse ruling on the motion, obtaining a certificate of immediate review from the trial court, and obtaining permission from this Court to proceed with an interlocutory appeal. [R., V3—pp. 323-382, 432-441 (Briefing); R., pp. 461-474 (Order); R., V3—p. 499 (Certificate of Immediate Review); R, V3—p. 500 (Order Granting Application for Interlocutory Appeal).]

PART TWO

ENUMERATION OF ERROR AND STATEMENT OF JURISDICTION

The trial court erred by imposing sanctions on the Appellants for meeting with an employee of NGPG, Dr. Cecil Brown. Neither the Appellees nor the trial court cited any direct authority, from Georgia or elsewhere, holding that a HIPAA violation occurs when an attorney for a healthcare organization communicates ex parte with an employee of that organization. The trial court's decision is

unprecedented in Georgia and, if upheld, will have severe practical implications for corporate healthcare defendants. The decision should be reversed.

The Georgia Court of Appeals has jurisdiction over this appeal pursuant to Article 6, Section 5, Paragraph 3 of the Constitution of the State of Georgia because this is not a case reserved to the Supreme Court of Georgia or conferred upon any other court by law.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

A. No Improper Communications Occurred Because Dr. Brown Was An Employee Of NGPG.

This Court should reverse the trial court's Order to re-enforce the common-sense rule that employers have an absolute right to communicate with their employees, through their counsel, especially when the employer could be held vicariously liable for the employee's conduct. Here, there was no improper communication between defense counsel and Dr. Brown and therefore no violation of HIPAA. It is undisputed that Dr. Brown was an employee of Appellant NGPG at all times relevant to this case. [R., pp. 461-463, 466.] As a result, NGPG, through its counsel, had the right to communicate with Dr. Brown, its employee. This is especially true since NGPG could be held vicariously liable for Dr. Brown's conduct. In fact, in their Complaint, the Appellees alleged medical malpractice not only against Dr. Green and Ms. Armstrong, who are individually named, but also

against "other physicians, nurses, and staff" of NGPG, NGMC, and Northeast Georgia Health System. [R., V2—pp. 16-18, 23-27 (¶¶ 35-36, 44, 79-92).] The Complaint also specifically references Dr. Brown, who is an NGPG employee, because he spoke with Dr. Green about Ms. Pinnix two days after the surgery at issue, examined her (at Dr. Green's request), and then performed a subsequent surgery. [R., V2—pp. 18-19 (¶¶ 50-55).] Unless there is a conflict of interest, which indisputably does not exist here, defense counsel's communication with and representation of Dr. Brown (and any other physicians, nurses, or staff employed by NGPG, NGMC, and Northeast Georgia Health System) was entirely proper and consistent with the longstanding habit and custom of Georgia attorneys who defend corporate healthcare entities.

The Appellees argue, without any direct support, that HIPAA prohibits counsel for a healthcare employer from speaking with a corporate employee if the conversation involves a discussion of a patient's protected health information. By this logic, defense counsel would not be permitted to conduct interviews or communicate with (1) any of the Appellants' employed physicians, nurses, or staff who were involved in Ms. Pinnix's care (even though the Appellees accused these unnamed individuals of negligence in the Complaint), or (2) any of the employees of the corporate Appellants to investigate the Appellees' claims for negligent hiring, retention, and credentialing claims or punitive damages claim. [See R., V2—pp. 27-

30.] If Dr. Brown were added to the lawsuit, the Appellants' counsel would represent him just as they represent Dr. Green and Ms. Armstrong. See GA. R. PROF. CONDUCT § 1.13(a) and Comment 1 ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); ("An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents," and employees are constituents of the organizational client.")[2] Given this undeniable fact, it makes no sense to argue that counsel was prohibited from speaking with Dr. Brown prior to his requested deposition.[3]

In the trial court, the Appellees cited several cases which discuss the pitfalls of allowing ex parte interviews of treating physicians by defense counsel. Significantly, none of the cases previously cited by the Appellees apply to representation of current employees of medical malpractice defendants. For example, Moreland v. Austin stands for the proposition that HIPAA preempts

[2] In contrast, in the case of a treating provider who is not employed by any of the Appellants, the Appellants agree that communication with and representation of such a provider would be inappropriate and a violation of HIPAA, even if the physician or other provider is credentialed at the hospital.

[3] The trial court also referenced Dr. Brown's "apparent confusion" in his deposition regarding whether counsel for NGPG represented him (Dr. Brown) personally. [R., p. 462.]] Dr. Brown's subjective belief regarding his representation is not pertinent to whether the communications that occurred between Dr. Brown and Mr. Bailey were permitted by law. The communications undeniably were appropriate because Dr. Brown was an employee of NGPG and Mr. Bailey was counsel for NGPG.

Georgia law with respect to ex parte communications between defense counsel and prior treating physicians. 284 Ga. 730 (2008). In Moreland, the named defendants were Michael Austin, M.D. and his employer, DR Services, Inc. Defense counsel communicated with three of the plaintiff's prior treating providers. Id. None of these physicians were employed by the defendants. See Austin v. Moreland, 288 Ga. App. 270, 271 (2007), *vacated and remanded,* Moreland v. Austin, 274 Ga. 730 (2008). In Moreland, defense counsel freely admitted that they had contacted prior treating physicians who were not employed by either defendant, and the Court was left to decide, as a matter of first impression, whether HIPAA preempts Georgia law and prevents such communications. See generally id. The Court concluded that such ex parte communications are considered violations of HIPPA unless procedural prerequisites are satisfied, including notice to the patient or a qualified protective order. See id. at 733-34.

Additionally, Baker v. Wellstar Health System, Inc., which was decided two years after Moreland, reiterated the dangers of ex parte interviews of non-party health care providers and expounded upon the ruling in Moreland. 288 Ga. 336 (2010). Like Moreland, Baker has little applicability here because the defendant hospital in Baker did not employ the treating physicians (only nurses) and had no agency relationship with or vicarious responsibility for the physician with whom ex parte communications occurred. Thus, no Georgia appellate court ever has held that

conversations between counsel for a corporate healthcare defendant and that defendant's employees violates HIPAA.

The Appellees have cited no authority supporting the imposition of sanctions against a defendant based upon its counsel's communication with an individual employed by the defendant and for whose conduct the defendant could be held vicariously responsible.[4] The Appellants are aware of no such authority, and the trial court did not cite any such authority in its Order. This Court should reverse the trial court's Order, therefore, to clearly affirm the rule that healthcare employers, through their counsel, may speak freely with their own employees without violating HIPAA.

B. HIPAA Supports The Appellants' Position That Healthcare Entities And Their Counsel Are Permitted To Discuss Protected Health Information With Corporate Employees.

HIPAA sets forth the circumstances under which an individual's protected health information may be disclosed. Generally, in judicial proceedings, health information may be disclosed in response to a court order or in response to a subpoena, discovery request, or lawful process. HIPAA permits the disclosure in

[4] In the trial court, the Appellees cited several cases from other states, none of which stand for this proposition. See, e.g., Nelson v. Lewis, 130 N.H. 106 (1987) (where only defendant was an individual physician, a plaintiff who places her medical condition at issue in an action for medical negligence does not waive the physician-patient privilege so as to permit defendants to interview treating physicians ex parte); Crist v. Moffatt, 389 S.E.2d 41, 46 (N.C. 1990) (where defendant was an individual physician, communications between defense counsel and other treating physicians was not proper.)

response to a court order of only specific health information expressly authorized by the order. 45 CFR § 164.512(e)(1)(i).

A covered entity under HIPAA, like NGPG, may use a patient's protected health information for certain purposes, such as to provide treatment, to obtain payment, or in healthcare operations, which include activities such as conducting quality assessment, reviewing the competence of healthcare professionals, and, importantly, "arranging for legal services." See 45 CFR § 164.501. Further, a covered entity may share protected health information with business associates, such as its attorneys. 45 CFR § 164.502(e)(1). Also, HIPAA provides that "[a] covered entity that participates in an organized health care arrangement may disclose protected health information about an individual to other participants in the organized health care arrangement for any health care operations activities of the organized health care arrangement." 45 CFR § 164.506(c)(5). Thus, HIPAA expressly authorizes communications between employees of healthcare organizations and between separate organizations that are part of an organized health care arrangement.

Here, NGPG, NGMC, and Northeast Georgia Health System constitute the type of "organized health care arrangement" envisioned by HIPAA. It is undisputed that employees of these entities would be permitted under HIPAA to communicate with each other regarding a patient's protected health information. The same right

extends to counsel for these entities under 45 CFR §§ 164.501 and 164.502(e)(1). Because counsel for the Appellants represents all these entities, and because Dr. Brown was an employee of NGPG, counsel was plainly authorized under HIPAA to speak with Dr. Brown regarding his treatment of Ms. Pinnix, and the trial court erred in concluding otherwise.

C. The Trial Court's Order Is Not Supported By Any Direct Legal Authority, And Persuasive Authority From Georgia And Other Jurisdictions Supports The Appellants' Position.

As mentioned above, neither the Appellees nor the trial court have cited any direct authority holding that counsel for a healthcare entity violates HIPAA if counsel speaks with an employee of that entity regarding care provided to a patient. Georgia appellate courts have not squarely addressed this issue, but at least two Georgia trial courts have done so. In both instances, the trial courts concluded that no HIPAA violation occurred when counsel spoke ex parte with a current employee of a healthcare organization who was involved in a patient's care.[5] In fact, Judge Stacey Hydrick in Dekalb County went further, holding that counsel for the defendant could even speak with former employees of the defendant, provided the former employees were employed by the defendant at the time of the care at issue. [R., V3—pp. 487-498.] Likewise, Judge Jane Manning in Cobb County recently

[5] The referenced trial court orders were attached as exhibits to the Appellants' trial court briefing and request for a certificate of immediate review. [R., V3—435-438, 487-498.]

found no violation of HIPAA even though counsel spoke with a "borrowed employee" of the corporate healthcare defendant, Children's Healthcare of Atlanta ("CHOA"). [R., V3—435-438.] Judge Manning held: "CHOA is not only the custodian of Plaintiff's information, but also the *de facto* employer of [the non-party treating physician] at the time of CHOA's care of [the patient] . . . . As such, there was no *ex parte* communication." [Id.] Both courts, therefore, refused to impose sanctions for allegedly improper ex parte communications, recognizing that conversations between counsel and employees of a corporate healthcare defendant do not violate HIPAA.

Additionally, courts from neighboring jurisdictions have addressed this issue and found no HIPAA violation. For example, in Estate of Stephens Clark v. Galen Health Care Inc., 911 So.2d 277 (Fla. Dis. Ct. App. 2005), the plaintiff sought to quash an order that allowed ex parte communications between defense counsel for a defendant hospital and treating physicians who were employed by the same hospital. In its ruling, the court explained that "the hospital, a corporation, can function only through its employees and agents," and that attorneys should therefore be able to freely speak with the agents of its corporation. Stephens Clark, 911 So.2d at 281-82. The opinion continued by declaring that because a corporation can only function through its agents "there is no 'disclosure' [of PHI] when a hospital corporation

discusses information obtained in the course of employment with its employees." Id. at 282.

Similarly, in Wade v. Vabnick-Wener, 922 F.Supp.2d 679 (W.D. Tenn. 2010), the patient's widow brought a wrongful death suit against a physician, and defense counsel sought a limited protective order that would allow them to represent all the doctors and the medical partnership during depositions. The court first held that Tennessee law regarding ex parte communications was more stringent than HIPAA, and therefore was not preempted. Id. at 692. Next, the court addressed the question of whether ex parte conversations with non-party physicians in the same partnership was allowed under Tennessee law. It declared in no uncertain terms that ***"the court would certainly allow the partnership's attorneys to communicate ex parte with non-party, treating physicians who were employees or members of the partnership."*** Id. at 693 (emphasis supplied). The Wade case is instructive because the court applied a stricter law than HIPAA and still held that an organization's attorneys were "certainly" authorized to communicate ex parte with a non-party treating physician who is also an employee of the organization.

D. The Trial Court's Ruling Is Contrary To Common Practice And Common Sense.

As discussed, no Georgia appellate court ever has held that counsel for a defendant healthcare employer is barred by HIPAA from speaking with the defendant's employees. A probable reason for the lack of case law directly on point

in Georgia is that nearly all experienced medical malpractice attorneys and courts find it obvious that counsel for a corporate defendant should have the ability to communicate ex parte with corporate employees. As a result, the question of a HIPAA violation in such circumstances rarely becomes an issue.

If the trial court's Order stands, it would fundamentally change the way that medical malpractice cases are litigated. Often, the sole defendant in a medical malpractice case is a corporation—for example, a hospital or a nursing home—and defense counsel must meet with the employees of that corporation in order to investigate, evaluate, and defend the case. In many cases, like this one, plaintiffs name a healthcare corporation as a defendant and then include allegations of malpractice against unnamed employees of the corporation. [See R., V2—pp. 16-18, 23-27.] This approach requires defense counsel to meet with all current employees of the corporation who were involved in the care at issue to, at a minimum, investigate and evaluate the merits of the plaintiff's allegations, respond to discovery, and make witnesses available for deposition. The trial court's Order, however, would preclude defense counsel from conducting any such investigation for fear of violating HIPAA, in essence preventing the defendant from adequately defending itself against the plaintiffs' claims.

Further, if the trial court's Order is allowed to stand, it will result in a true anomaly—counsel for corporate healthcare defendants would be precluded by

HIPAA from speaking with their client's employees, but counsel for the plaintiff arguably would have free reign (at least under HIPAA) to do so. Further, if the ruling is upheld, it almost certainly will result in plaintiffs naming only corporate healthcare entities as defendants in medical malpractice cases which, under the trial court's ruling, would preclude defense counsel from speaking with ***anyone*** involved in the patient's care. The impracticality of the trial court's decision becomes readily apparent when viewed in this context. The Appellants therefore ask this Court to reverse the trial court's decision so that clear rules in this area of law may be established by a definitive appellate opinion.

E. The Sanctions Imposed By The Trial Court Are Not Authorized.

HIPAA does not provide a separate cause of action for damages by an individual. Moreland v. Austin, 284 Ga. 730, 734 (2008). The remedy for a HIPAA violation is the imposition of a fine by the Secretary of the Department of Health and Human Services of no more than $100, not a claim for damages by the patient. Id. Some courts have questioned whether a court may enforce a plaintiff's HIPAA rights under the guise of a motion for sanctions under Rule 37. See Baines v. City of Atlanta, 2021WL2457209 *8 (N.D. Ga. 2021). Even courts that have been willing to analyze alleged HIPAA violations in the context of a Rule 37 motion for sanctions have noted that a court's discretion in considering extreme sanctions should be guided by the fact that the penalty under HIPAA for its violation is relatively mild.

See Estate of Lillis v. Bd. Of Comm'rs of Arapahoe Cty., 2019WL3386471 *5 (D. Colo. July 26, 2019) (declining to impose sanctions for a HIPAA violation in part because the prescribed penalties for HIPAA violations are minimal); Frye v. Ayers, 2009WL1312924 *3 (E.D. Cal. May 12, 2009) ("HIPAA does not provide for exclusion of evidence as a remedy for its violation."); Law v. Zuckerman, 307 F.Supp.2d 705, 712 (2004) (declining to preclude defense counsel from speaking further with treating physician as sanction); Sanchez v. McCray, 2008WL11452601 *3 (S.D. Fla. February 25, 2008) (declining to exclude medical records from evidence as penalty for alleged HIPAA violation).

Here, although the trial court correctly refused to impose the harsh sanction of striking the Appellants' Answers to the Complaint, the sanctions imposed by the court are still too harsh. Even if the communications between counsel and Dr. Brown somehow were inappropriate (which the Appellants obviously dispute), the trial court unequivocally found that there was no willful violation of any rule and that the Appellants' counsel at all times acted in good faith.[R., pp. 466-467, 472.] Further, counsel's conduct was consistent with existing law in Georgia, as there is no authority in this State which prohibited his conversations with Dr. Brown. Under such circumstances, no sanctions of any type were authorized, much less the sanctions chosen by the trial court which include unwarranted limitations on Dr. Brown's testimony, a highly prejudicial jury instruction, and likely monetary

sanctions. The unwarranted, harsh sanctions imposed by the trial court provide an additional compelling reason for this Court to reverse the trial court's decision.

CONCLUSION

For the foregoing reasons, Appellants Andrew E. Green M.D., Northeast Georgia Physicians Group, Inc., et al respectfully request that this Court reverse the trial court's Order imposing sanctions against them and issue an Opinion affirming the rights of counsel for healthcare corporations to confer with their clients' employees.

Respectfully submitted, this 16th day of November 2022.

The attorneys signing below hereby certify that this submission does not exceed the word count limit imposed by Rule 24.

HUFF, POWELL & BAILEY, LLC

/s/ R. Page Powell, Jr.
R. PAGE POWELL, JR.
Georgia Bar No. 586696
M. SCOTT BAILEY
Georgia Bar No. 032201
LINDSEY CASSIMUS
Georgia Bar No. 301862

999 Peachtree Street
Suite 950
Atlanta, Georgia 30309

Counsel for Appellants

(404) 892-4022
(404) 892-4033 (Fax)

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served true and correct copies of the within and foregoing **APPELLANTS' INITIAL BRIEF ON APPEAL** upon the following counsel of record via U.S. Mail, First Class Postage pre-paid, to said parties or their counsel of record as follows:

Kenneth J. Lewis, Esq.
Megan D. Brown, Esq.
Lewis & Murphy
149 W. Athens Street
Winder, Georgia 30680
ken@lewismurphy.com
megan@lewislawwins.com

This 16th day of November 2022.

HUFF, POWELL & BAILEY, LLC

/s/ R. Page Powell, Jr.
R. PAGE POWELL, JR.
Ga. Bar No. 586696

999 Peachtree Street
Suite 950
Atlanta, Georgia 30309
(404) 892-4022
(404) 892-4033 (Fax)

Counsel for Appellants