IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

CASE NO. **A23A0547**

ANDREW E. GREEN, et al.,

Appellants,

v.

STEPHANIE KAREN PINNIX, et al.,

Appellees.

BRIEF OF APPELLEES

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PART ONE

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The Underlying Case

Stephanie Karen Pinnix filed suit after Dr. Andrew Green failed to repair a surgical incision (enterotomy) he made while performing surgery on Pinnix on March 20, 2018. During surgery Dr. Green realized he had penetrated Pinnix's bowel and had to convert the surgery from a less invasive laparoscopic procedure to a full laparotomy. Post-surgery, Pinnix's condition deteriorated as she developed acute sepsis and an intra-abdominal infection because of the leakage of bowel fluids from the unrepaired damage Dr. Green inflicted during the surgery. (R1.V2—17-20)

On March 23, Dr. Cecil Brown, who was on call for Dr. Green, performed an exploratory laparotomy, reopening Pinnix's abdomen, to determine what was afflicting her. He removed the midline staples from the earlier operation performed by Dr. Green, and green succus poured out. Dr. Brown suctioned off about 2 liters of contaminated fecal fluid from Pinnix's abdomen. He then examined the small bowel and discovered the hole Dr. Green created and failed to repair about halfway along the length of the small bowel. Dr. Brown repaired the incision but

had to leave Pinnix's abdomen open and return her to the ICU because she was severely ill from the sepsis and infection caused by the perforated bowel. Pinnix remained on a ventilator to sustain her life. (R1.V2—18-19)

The next day, March 24, 2018, another doctor washed and irrigated her abdomen, installed a fluid drain, wound vacuum, and closed her abdomen. Pinnix was returned to the ICU and remained on a ventilator. She remained in serious condition for many weeks, suffering a cascade of medical injuries including encephalitis that damaged her brain and other severe life-altering injuries that continue to plague her today. (R1.V2—19-20) Pinnix, and her husband, filed suit on May 20, 2020, naming Dr. Green, Northeast Georgia Physicians Group, Northeast Georgia Medical Center, Inc., and Northeast Georgia Health Systems, Inc. (The corporate Defendants collectively will be referred to as the "N.G. Medical Defendants") as defendants. Plaintiffs alleged that the N.G. Medical Defendants had actual notice before March 18, 2018, that Dr. Green was careless and dangerous. (R1.V2—10)

B. The Issues on Appeal

Appellants' brief presents part of a scheme that resounds solely to their benefit. That scheme violates clearly established law and, thus, represents a *sub rosa* attempt to persuade this Court to create two new rules, the effect of which would be to permit a corporation that employs a doctor the power to trump both patient rights and established law.

First, Appellants directed their counsel to engage in multiple ex parte communications with Karen Pinnix's non-party treating doctor, Dr. Brown, including furnishing him with some 1,500 pages of Pinnix's medical records, with full knowledge that, by doing so, they violated the Health Insurance Portability and Accountability Act ("HIPAA") the law. The trial court ruled this improper. Appellants offer absolutely no explanation or legal justification for their failure to comply with the express mandate of 45 CFR § 164.512 (e) that requires either notice and an opportunity to object or a qualified protective order.

Second, Appellants implicitly ask this Court to overrule established law, and the trial court's holding, that the law and rules of professional conduct prohibit Appellants from asserting a vicarious attorney-client relationship with a non-party corporate employee fact witness.

Third, Dr. Brown owes a duty to his patient, and the Defendant corporations are not free to coerce their employee doctors to violate Plaintiffs' rights. With the corporatization of healthcare providers, Appellants seek to carve out exceptions that swallow all the rules.

In this Court, Appellants argue only that they were not required to obtain Pinnix's consent or a qualified protective order before furnishing Pinnix's medical records to a fact witness. The case below goes much farther because in furtherance of their scheme, Appellants claim that Huff, Powell & Bailey ("HPB") represents not only the named Defendants, but **every** employee healthcare provider, including doctors, who work for one or more of the N.G. Medical Defendants. Appellants claim that HPB has a vicarious attorney-client relationship with every employee, including Dr. Brown, a fact witness, based only on the employee's status as the Defendant's employee. If they are allowed to do so, Appellants can hide the truth under a claim of vicarious attorney-client privilege.

Counsel for the Plaintiffs served a subpoena ad testificandum and Notice of Deposition on the non-party treating physician Dr. Brown. When that deposition was taken, M. Scott Bailey ("Bailey") of HPB

appeared for the named Defendants and asserted a unilaterally imposed (Dr. Brown did not seek out or hire anyone to represent him) vicarious attorney-client relationship to prevent Dr. Brown from answering questions truthfully. The only basis for Bailey's objections was "attorney-client privilege" based only on Defendants' counsel's assertion that the Defendants are free to impose a form of attorney-client relationship on its employees, against those individual's will and against their perceived or even actual interests, while serving the interests of the Defendant employers and the Defendant employer's attorneys.[1]

Appellants, through their prohibited claim of a unilaterally imposed vicarious attorney-client relationship, hope the Court will overlook their attempt to circumvent the prohibition that Defendants'

[1] Bailey refused to offer any law to support his claim of a unilateral attorney-client relationship during the deposition. (R2. V2—94:46:19-25; 47:1-4) This type of employer-imposed attorney-client relationship has been universally rejected. See Plaintiffs' Supplement Brief (R1.V3—399-409); *Brown v. St. Joseph County*, 148 F.R.D. 246, 251 (N.D. Ind. 1993) ("no attorney has the right to appear as counsel for another without the latter's consent." "an attorney-client relationship cannot be created unilaterally or imposed upon the employees"); *Patriarca v. Center for Living & Working, Inc.*, 438 Mass. 132, 135-136. 778 N.E.2d 877, 880 (Mass. 2002) ("[a]n organization may not assert a preemptive and exclusive representation by the organization's lawyer of all current (or former) employees as a means to insulate them from ex parte communication with the lawyers of potential adversary parties.")

counsel may not have ex parte discussions with Plaintiff's non-party treating physicians without obtaining the Plaintiff's permission or a qualified protective order. In addition, as noted, Defendants' counsel sent Dr. Brown over 1,500 pages of medical records without any notice to Plaintiff whatsoever. Appellants' action also violates the doctor-patient privilege and forces all the Defendants' employees to put the Defendant employer's interests above all others, including the privacy protections of HIPAA and the physician-patient privilege.

Accordingly, this Court should affirm the trial court's order because:

1. The trial court followed both 45 CFR § 164.512 (e), the Georgia Supreme Court's interpretation that mandates defense counsel obtain permission or a qualified protective order before they have any ex parte discussion with any non-party treating physician, and this Court's express holding that even agents and employees of a named defendant are required to obtain a qualified protective order.

2. Well settled law and ethics prohibit a defendant corporation from offering representation to non-party employees subpoenaed for a

deposition. The law further prohibits a corporation from asserting a vicarious representation of all corporate employees.

3. Appellants' claim of vicarious representation of Plaintiff's non-party treating physician violates Dr. Brown's duty to his patient and is a breach of legal ethics.

4. Pinnix is entitled to, at a minimum, if not the complete striking of Defendants' answer, the trial court's proposed jury instruction given that Bailey prompted Dr. Brown during his deposition to provide "new" medical treatment information that was neither documented in the medical records nor communicated to Ms. Pinnix.

C. Summary of the Argument

Appellants cannot prevail on their scheme to prevent the discovery of the truth by converting every employee into a client of HPB. Additionally, HPB cannot ethically represent all the named Defendants and a non-party fact witness. This is particularly true when Dr. Brown was not represented, "if at all," until the Defendants' attorney, Bailey, asserted a unilateral vicarious-attorney client relationship to prevent Dr. Brown, a non-party fact witness, from truthfully answering questions. Moreover, the non-party witness is not a member of any of the control

groups of the N.G. Medical Defendants. Dr. Brown never approached Bailey to ask for representation, and no attorney-client relationship was established or discussed. As a result, the non-party fact witness is not within the scope of HPB's representation of the corporate defendants. More to the point, not only are there no indications of any attorney-client relationship with the non-party fact witness or any other corporate employee, but the Defendants also expressly disavow any corporate connection or relationship or legal responsibility for their employee doctors.[2]

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[2] See Plaintiff's Complaint and Defendants' Answer and Jury Demand:
#22. "At all times pertinent and relevant to the incidents described in this this Complaint, Defendant Green was the agent and employee of the N.G. Medical Defendants." (R1.V2—14, n.22)
DEF. ANS.: "The allegations contained in paragraph 22 of the Plaintiffs' Complaint are denied." (R1.V2—48, n.22)
#23. "At all times pertinent and relevant to the incidents described in this this Complaint, Defendant Green performed his services as the agent and employee of the N.G. Medical Defendants, the principals." (R1.V2—14, n.23)
DEF. ANS.: "The allegations contained in paragraph 23 of the Plaintiffs' Complaint are denied." (R1.V2—48, n.23)
#24. "At all times pertinent and relevant to the incidents described in this this Complaint, Defendant Green was acting within the scope of his agency and employment relationship with N.G. Medical Defendants." (R1.V2—48, n.24)
DEF. ANS.: "The allegations contained in paragraph 24 of the Plaintiffs' Complaint are denied." (R1.V2—48, n.24)

The law is also clear that, before sharing Pinnix's medical records with Dr. Brown or having ex parte discussions with him regarding those medical records, defense counsel had to obtain either permission from Pinnix or a qualified protective order. Appellants' claims to the contrary fail to give Pinnix's interests the degree of respect they deserve.

STATEMENT OF FACTS

Appellees supplement the Statement of Material Facts submitted by Appellants.

A. Facts relating to the relationship between HPB and Dr. Brown

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#25. "The acts and omissions of Defendant Green described in this Complaint are imputed to the N.G. Medical Defendants as a matter of law." (R1.V2—15, n.25)
DEF. ANS.: "The allegations contained in paragraph 25 of the Plaintiffs' Complaint are denied." (R1.V2—49, n.25)
#29. "At all times pertinent and relevant to the incidents described in this Complaint, Defendant Green performed his services as the agent and employee of Defendant Northeast Georgia Medical Center, Inc., the principal." (R1.V2—15, n.29)
DEF. ANS.: "The allegations contained in paragraph 29 of the Plaintiffs' Complaint are denied." (R1.V2—49, n.29)
#30. "At all times pertinent and relevant to the incidents described in this Complaint, Defendant Green was acting withing the scope of his agency and employment relationship with Northeast Georgia Medical Center, Inc." (R1.V2—15, n.30)
DEF. ANS.: "The allegations contained in paragraph 30 of the Plaintiffs' Complaint are denied." (R1.V2—49, n.30)

In his deposition, which was taken on February 3, 2022, Dr. Cecil Brown testified that he works for the Northeast Georgia Physicians Group at the Northeast Georgia Medical Center, both of which are named Defendants. (R2.V2—84:8:12-19) He is not, however, an officer or director of any of the N. G. Medical Defendants. (R2.V2—85:10:6-19; 11:7-12) Dr. Brown testified, "I speak on behalf of myself," not for any of the corporations. (R2.V2—85:11:20-13:6) Dr. Brown was not authorized to speak on behalf of any of the N.G. Medical Defendants. (R2.V2—85:12:6-13:6) He knew he was not a named defendant and was "very thankful" for that. (R2.V2—88:22:8-13)

Dr. Brown testified that he learned of the underlying lawsuit when he received the deposition subpoena. (R2.V2—87:20:12-25) After receiving the subpoena, Dr. Brown followed the "unwritten policy" to contact corporate risk management. (R2.V2—94:48:12-18) He contacted Lisa Farmer, the practice administrator at Northeast Georgia Physicians Group. (R2.V2—88:21:8-23) Later, he talked with Bailey. (R2.V2—88:23:10-19) Dr. Brown could not recall who called whom. (R2.V2—88:24:8) They talked "very briefly," about the fact that "we were going to have a deposition and I would get more info later." (R2.V2:88:24:13-16)

Dr. Brown testified, that he did not hire or retain Bailey or his law firm to represent him. (R2.V2—93:43:22-25) He testified that "I didn't know I needed representation." (R2.V2—92:38:17; 94:48:406) He explained, "[Bailey is] representing Green and the people I work for, so I guess that extends to me." (R2.V2—92:38:9-19) He did not have any written fee agreement with Bailey and had no discussions with Bailey about representing him or the scope of his representation. (R2.V2—92:38:25-39:4) Dr. Brown was not paying Bailey for his services. (R2.V2: 94:48:1-3)

At the deposition, Bailey prevented Dr. Brown from answering the question – "Is [Scott Bailey] representing you" – and answered the question himself. (R2.V2—92:38:13-16) Bailey did not have any attorney-client relationship with Dr. Brown, and in fact, had to explain the alleged vicarious attorney-client relationship to Dr. Brown in hopes he would follow along, "Dr. Brown and I have an attorney-client relationship because of your relationship with NGPG [Northeast Georgia Physicians Group] and Northeast Georgia Medical Center and Northeast

Georgia Health Systems, all of whom I represent." (R2.V2—94:46:3-13)[3] At several points during the deposition, Bailey interposed objections to questions asserting the unilateral vicarious attorney-client relationship and corresponding privilege to prevent Dr. Brown from answering questions. (R2.V2—88:23:20-24; 93:43:10-16; 98:62:5-17)

Dr. Brown testified that he found the enterotomy in Pinnix's bowel and repaired it. (R2.V2—94:47:13-15; 54:6-8) It was his opinion that he saved Pinnix's life. (R2.V2—94:47:16-19) He testified that it was "[p]resumably" Dr. Green who put the enterotomy there. (R2.V2—95: 51:2-6)

On October 8, 2021, Karen Pinnix scheduled an appointment for treatment at Dr. Brown's office. (R2.V2—88-89:24:24-25:9) Dr. Brown refused to treat, see, or speak with her because the Defendants told him not to. (R2.V2—89:25:14-26:4) He testified that he was unaware that the N.G. Physicians Group office accepted a co-payment from Pinnix on October 8 for the office visit. (R2.V2—89:28:7-9) After talking with Lisa Farmer, the office administrator, and attorney Bailey, Dr. Brown tried to

[3] Bailey declined to advance any legal authority to support his assertion that Dr. Brown was a client by virtue of his employment at one of HPB's corporate clients. (R2. V2—94:46:19-25; 47:1-4)

funnel Pinnix to Dr. Nguyen, another surgeon in the practice. (R2.V2—89:28:13-25; 90:29:5)

B. Facts relating to the Superior Court's ruling

On February 17, 2021, shortly after the deposition of Dr. Brown, Pinnix filed a Motion for Severe Sanctions complaining that HPB improperly claimed to represent Dr. Brown during Dr. Brown's deposition based solely on the premise that he was a corporate employee, held multiple prohibited ex-parte discussions with Pinnix's non-party treating physician Dr. Brown, and improperly provided Pinnix's medical records to Dr. Brown without having obtained either a qualified protective order or Pinnix's consent in violation of Pinnix's HIPAA rights. (R2.V2—2-23)[4] According to the trial court, Pinnix also raised the issue of defense counsel's attorney-client conflicts. (R1.V3—468) Briefing from both parties, including supplemental briefing, followed. Appellants asserted that HPB automatically represents Dr. Brown because he was an employee of Northeast Georgia Physicians Group, which has

[4] Plaintiff also filed supplemental briefs in support of her motion for sanctions on June 10, 2022 (R1.V2—451-455) and on April 22, 2022 (R1.V3—399-431).

"vicarious liability for Dr. Brown's conduct."[5] (R1.V3—323-324) Appellants also argued that sharing Pinnix's medical records with a non-party employee was not a violation of Pinnix's HIPAA rights. (R1.V3—328-329)

The Superior Court concluded, "Plaintiffs' assertion that defense counsel violated HIPAA is correct unless some valid defense exists." (R1.V3—464) It declined to find that Bailey acted in bad faith in declaring that he represented Brown. (R1.V3—467) Even so, the Superior Court observed, "[I]t would be exceedingly difficult to represent NGPG, Dr. Green, and Dr. Brown all at once without a conflict of interest, or at least a knowing acknowledgement that one might exist or could come into being during the representation." (*Id.*) It presumed that Bailey "behaved appropriately in informing Dr. Brown of the chance of conflict," and

[5] Appellees continually argue they can drive on both sides of the street – the N.G. Medical Defendants DENY all vicarious liability for all employees, including Green, and in the same breath attempt to unilaterally impose a vicarious attorney-client relationship on all of their employees so as to both bypass Pinnix's privacy rights under HIPAA and also invoke Rule 4.2 in an effort to prevent legitimate contact between Pinnix and her counsel.

directed him to produce evidence for the record of Dr. Brown's informed consent before continuing to represent him. (R1.V3—468)[6]

The Superior Court held that, because an attorney-client relationship between Bailey and Dr. Brown came into effect, if at all, during the deposition, the ex parte discussions, and the disclosure of Pinnix's HIPAA-protected medical information violated HIPAA because it occurred before the deposition. (R1.V3—468-469) The fact that Dr. Brown is an employee of NGPG "still does not obviate Ms. Pinnix's patient-physician confidence under Georgia law or her rights under HIPAA." (R1.V3—470) Likewise, sharing 1,500 pages of medical records did not fit within an exception for the discussion of anodyne topics like deposition scheduling. (R1.V3—471)

As a remedy, the Superior Court: (1) ordered Bailey to cease ex parte contacts with Dr. Brown until he obtained consent from Pinnix or a qualified protective order; (2) limited the scope of Dr. Brown's testimony to "the facts of the case and . . . those laid out in the medical records;" and

[6] The scheduled hearing did not take place because Appellants' filing seeking an interlocutory appeal divested the Superior Court of jurisdiction over this case pending resolution of the appeal. *See* (R1.V3—468)

(3) offered to add a jury instruction specifically addressing the credibility of Dr. Brown. (R1.V3—472-473) In addition, it levied "reasonable attorney fees and costs of litigation" in an amount to be determined. (R1.V3—474)

PART TWO

STANDARD OF REVIEW AND ARGUMENT

THE STANDARD OF REVIEW

"This Court reviews a trial court's decision as to discovery matters, including the application of a privilege, for an abuse of discretion. *Brown v. Howard*, 334 Ga. App. 182, 183-184, 778 S.E. 2d 810, 811 (Ga. App. 2015) (citing, *inter alia*, *Etowah Environmental Group v. Walsh*, 33 Ga. App. 464, 475 (3), 774 S.E. 2d 220 (2015) (attorney-client privilege)). A trial court has broad discretion to control discovery, including the imposition of sanctions, and the appellate court reviews discovery and sanction rulings under the abuse of discretion standard. *Portman v. Zipperer*, 350 Ga. App. 180, 182, 827 S.E. 2d 76, 78 (Ga. App. 2019).

Because Defendants violated the rules of discovery and asserted a baseless claim of attorney-client privilege during a deposition to prevent the deponent from answering questions, the trial court's order falls under

the abuse of discretion standard. Additionally, because Defendants failed to obtain the required qualified protective order prior to holding ex parte communications with Pinnix's non-party prior treating physician, Dr. Brown, their request to review the trial court's order falls under the abuse of discretion standard. Here, Defendants were required to obtain a qualified protective order before Bailey had any ex parte discussion with Dr. Brown.

With respect to the imposition of sanctions, the question is whether those imposed were "too severe for the facts presented." *Motani v. Wallace Enterprises*, 251 Ga. App. 384, 386, 554 S.E. 2d 539, 541 (Ga. App. 2001).

ARGUMENT

The linchpin of the case, which Appellants brush past, is whether HPB can claim a unilateral vicarious attorney-client relationship to represent Dr. Brown (and every other employee of the N.G. Medical Defendants). They cannot. Bailey is prohibited from asserting a vicarious attorney-client relationship and subsequent privilege to prevent Dr. Brown from answering deposition questions. Here, Bailey objected because Dr. Brown's answers would have exposed improper

conduct. In addition, the relationship between Bailey and Dr. Brown required Bailey to obtain a qualified protective order before disclosing HIPAA-protected medical information to Dr. Brown and holding ex parte discussions.

1. HPB cannot represent both Dr. Green and Dr. Brown.

A. There is an inherent conflict of interest present in the concurrent representation of Dr. Green and Dr. Brown by HPB.

In his deposition, Dr. Brown testified that he fixed the enterotomy in Pinnix's bowel, thereby saving her life. (R2.V2—94:47:13-19) He discovered an enterotomy in Pinnix's small bowel after foul-smelling green fluid leaked from the incision in her abdomen on March 22, 2018. (R1.V2—36:n.14-15) That enterotomy appeared after Dr. Green performed surgery on Pinnix on March 20, 2018, converting a laparoscopic procedure into a laparotomy surgery. (R1.V2—35: n.8-9) Dr. Green did so after his trocar penetrated a hollow viscus (R1.V2—35: n. 9) Dr. Brown testified that "[p]resumably" Dr. Green caused the enterotomy because he did "the prior surgery." (R2.V2—95:51:2-6)

If Dr. Green created the enterotomy, and Dr. Brown repaired it, there is an obvious conflict in the testimony of the two physicians. Unless defense counsel confers with Dr. Brown, the non-party fact witness, to

concoct a "defense narrative" or there is another explanation for the appearance of the enterotomy, the two witnesses have entirely different interests.[7] Moreover, the Defendants gain a tremendous unfair and prejudicial litigation advantage if they can "prepare" the testimony of Dr. Brown to support their narrative. To further this unlawful scheme, during the deposition, Bailey elicited oral testimony from Dr. Brown regarding medical observations and treatment **not documented anywhere in the medical records and never communicated to Ms. Pinnix**. (R1.V3—664-65) The trial court recognized the unfair prejudicial conduct and crafted a jury instruction remedy. Moreover, the trial court has left several issues open, including a second deposition of Dr. Brown to discover the extent of the Defendants' fact witness tampering because the alleged attorney-client relationship did not come into effect, if at all, until the middle of the deposition. For these and many other reasons, Dr. Brown cannot be represented by the same law firm that represents Dr. Green and the N.G. Medical Defendants.

B. Without regard to whether there is a conflict, HPB cannot represent a non-party fact witness in response to a notice of

[7] Other than general denials and referrals to the medical records, no such alternate explanation appears on the face of the Answer. (R2.V2—44-68)

deposition or simply because he is employed by a corporate defendant.

In his deposition, Dr. Brown testified that he was not an officer or director of any of the corporate defendants and that he was not authorized to speak for them. (R2.V2—85:12:6-13:6)

Generally, a corporation and its employees are separate and distinct persons under the law. *Kilsheimer v. State*, 250 Ga. 549, 550, 249 S.E. 2d 733, 734 (1983) ("the cardinal rule of corporate law is that the corporation possesses a legal existence separate and apart from that of its officers, employees, shareholders, and directors."). That general rule also applies to attorney-client relationships. *Addley v. Beizer*, 205 Ga. App. 714, 715, 423 S.E. 2d 398, 400 (Ga. App. 1992). It then follows that "[o]ne who serves as attorney for a corporation does not, by virtue of that fact, serve as attorney for the officers of the corporation in their personal capacity." *Id.*; *see also* Restatement 3d of the Law Governing Lawyers, § 96, comment (b) ("By representing the organization, a lawyer does not thereby form a client-lawyer relationship with all or any individuals employed by it."). Instead of being an *ipso facto* relationship, as HPB posited it below, any attorney-client relationship is subject to the rules of professional conduct.

Because preemptive "blanket" representation by a defendant corporation's attorney is prohibited, a defendant corporation is generally prohibited from offering representation to non-party employees subpoenaed for deposition. *See generally, Addley*, 205 Ga. App. 714; *Zielinski v. Clorox Co.,* 270 Ga. 38, 504 S.E. 2d 683 (Ga. 1998). Further, in its Formal Ethics Opinion 956-386, the ABA Committee on Ethics and Professional Responsibility prohibits this practice, stating that Model Rule 4.2 "does not contemplate that a lawyer representing the entity can invoke the rule's prohibition to cover all employees of the entity, by asserting a blanket representation of all of them." ABA Formal Op. 95-396, § VI, p.15 (1995). As the formal opinion makes perfectly clear, "[a]n organization may not assert a preemptive and exclusive representation by the organization's lawyer of all current (or former) employees as a means to invoke Rule 4.2 and insulate them from ex parte communication with the lawyers of potential adversary parties." *Patriarca v. Ctr. For Living & Working Inc.*, 778 N.E. 2d at 880; see also *Sanifill of Ga. v. Roberts*, 232 Ga. App. 510, 510-11 (1998) (Rule 4.2 of the American Bar Association Model Rules of Professional Conduct is analogous to Georgia's Rule 4.2).

Any other interpretation of Rule 4.2 would empower an organization to "thwart the purpose of Rule 4.2 simply by unilaterally pronouncing its representation of all of its employees." *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 903 (E.D. Pa. 1995). Such a broad interpretation of the Rule would allow the employer to unilaterally impose a novel, limited form of attorney-client relationship on its employees, against those individuals' will and against their perceived or even actual interests, while serving the interests of the employer and the employer's attorneys. Such a position is both illogical and unethical. The attorney-client relationship cannot be created unilaterally or imposed upon the employees without their consent. See *Estate of Nixon v. Barber*, 340 Ga. App. 103, 109, 796 S.E. 2d 489, 495 (Ga. App. 2017) ("attorney-client relationship is personal, not vicarious."); *Newberry v. Cotton States Mut. Ins. Co.*, 242 Ga. App. 784, 785, 531 S.E. 2d 362, 363 (2000 Ga. App.) (the attorney-client relationship cannot be created unilaterally – "[t]he basic question in regard to the formation of the attorney-client relationship is whether it has been established by the appellant that advice or assistance of the attorney **is both sought and received.**…") (emphasis added).

Georgia Rule of Professional Conduct 1.13(g) provides:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented.

In that regard, Rule 1.7 addresses conflicts of interest, and Rule 1.7(c)(2) precludes an informed waiver of the conflict when the representation "includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding."[8] Before HPB can represent Dr. Green, Dr. Brown, and the three corporate N.G. Medical Defendants, it must demonstrate that each of them has made an informed waiver of the potential conflicts.[9]

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[8] Viewed in that light, HPB's common representation of Dr. Green and the N.G. Medical Defendants is problematic. If Dr. Green was negligent, and his negligence can be imputed to one or more of the N.G Medical Defendants, their interests conflict. (R1.V3—467) ("It appears clear to this Court that it would be exceedingly difficult to represent NGPG, Dr. Green, and Dr. Brown all at once without a conflict of interest, or at least a knowing acknowledgment that one might exist or could come into being during the representation.").

[9] Again, because of the filing of this interlocutory appeal, the Superior Court has not been able to address the potential conflict between Dr. Green and Dr. Brown, much less the other potential conflicts. It should be instructed to do so on remand. See (R1.V3—468)

Georgia Rule of Professional Conduct 4.2(a) prohibits a lawyer in a matter from communicating about that matter with a person who is represented by counsel. Comment 4 to the Rule explains that, for an organization:

> The Rule prohibits communications with an agent or employee of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Measured against these standards, Dr, Brown is not part of the organization who is immune from contact by either counsel. Dr. Brown does not supervise, direct, or regularly consult with the N.G. Medical Defendants' lawyers. Moreover, he cannot obligate any of the N.G. Medical Defendants to settle the matter or to accept a proposed settlement. Finally, it is the conduct of Dr. Green, not Dr. Brown, that is being imputed to the N.G. Medical Defendants. More importantly, because Dr. Brown has a confidential relationship with Pinnix, Dr. Brown owes a duty to Pinnix. This duty includes discussing the treatment he provided to Ms. Pinnix with Ms. Pinnix and protecting the confidential patient-physician relationship.

As a result, Dr. Brown is an unrepresented party. Either counsel can have access to him to discuss anodyne topics, but none of the communications between them are privileged.[10]

Appellants' reliance on an email exchange between counsel is not sufficient to overcome the law and the facts cited above.[11] See Brief of Appellants at 7-8. That email exchange was simply notice of Defendants intention to engage in unlawful conduct that did not come to fruition until Bailey asserted the vicarious attorney-client privilege to block questioning in the deposition designed to explore whether Dr. Brown had ex parte communications or, in fact, hired Bailey. Before those objections were made, there was nothing for Appellees to complain about.

2. The evidence does not support the factual assertion that an attorney-client relationship between HPB and Dr. Brown was in existence at the time of Dr. Brown's deposition.

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[10] Defendants' scheme prevents any contact between a plaintiff patient's medical providers, including non-party treating doctors, and the patient and her counsel, while simultaneously giving the Defendants' attorney's unfettered access to a plaintiff patient's non-party medical providers and doctors secreted under a veil of vicarious attorney-client privilege.

[11] These Defendants routinely assert positions in letters and emails that are inconsistent with the law. They opposed Plaintiffs' properly noticed depositions and after asserting legally unsupported positions via letters and emails, they filed motions for protective orders that were summarily denied. See Order Denying [Defendants'] Motion for Protective Order (R1.V2—136); Order Denying Defendant's Motion 2/15/2022 (R1.V2—214-215)

In his deposition, Dr. Brown testified that, before the day of the deposition, he did not "realize that I needed an attorney. I thought [Bailey] was representing Dr. Green and the company I work for and I was being called to ask about what surgical procedure I did." (R2. V2—94:47:7-12) He never contacted Bailey to ask Bailey to represent him. (R2. V2—96:59:21-25) Dr. Brown "assum[ed]" that Bailey was representing him at the deposition because Bailey said so but did not know it before that. (R2.V2:93:43:22-44:2)

There was no fee agreement whatsoever and Dr. Brown was not paying Bailey. (R2.V2—92:38:25—39:1; 94:47:23-48:3) Dr. Brown and Bailey did not discuss the "scope of [Bailey's] representation." (R2.V2—92:39:2-4)

The Supreme Court of Georgia has outlined when "a corporate employee may establish an individual attorney-client privilege with respect to communications the employee has had with corporate counsel." *Zielinski v. Clorox Co*., 270 Ga. 38, 40, 504 S.E. 2d 683, 686 (Ga. 1998), The test includes the requirement that the employee first show that "they approached [counsel] for the purpose of seeking legal advice." *Id*., 504 S.E. 2d at 686. Then, the employee must show that the approach was

made in an individual, not a corporate capacity. *Id*. Third, counsel must have informed the employee of the possibility of a conflict. *Id*., 504 S.E. 2d at 686.

Here, that showing has clearly not been made. Dr. Brown's deposition testimony demonstrates that he did not approach or seek any legal advice and his testimony regarding the "unwritten rule" further highlights the Defendants' scheme to force corporate employees to abandon the physician-patient privilege and duty they owe their patients in favor of their employer's interests. As he said, before the deposition, he "didn't know [he] needed an attorney." (R2.V2—94:47:7-10) In that regard, the Superior Court found that "Dr. Brown **did not** have a reasonable belief that he was represented by Defense Counsel at the start of his deposition." (R1.V3—471) (emphasis in original). In addition, the connection was corporate, not individual: "I thought [Bailey] was representing Dr. Green and the company I work for and I was being called to ask about what surgical procedure I did." (R2.V2—94:47:10-12)

"Generally, the payment of a fee is an important factor in determining the existence of an attorney-client relationship." *Mays v. Askin*, 262 Ga. App. 417, 419, 585 S.E. 2d 735, 737 (Ga. App. 2003). In

this case, that factor has not been met; Dr. Brown is not paying for the services of HPB. In the same way, Dr. Brown and Bailey had not discussed the "scope of [Bailey's] representation." (R2.V2—93:39:2-4).

3. Appellants were required to obtain a qualified protective order or the consent of Pinnix before disclosing and discussing Pinnix's medical records with Dr. Brown.

Appellants contend that neither a qualified protective order nor the consent of Pinnix was required before they could provide or discuss Pinnix's medical records. They argue that, because Dr. Brown was an employee of one of the N.G. Medical Defendants, no protective measures were required. Appellants also invoke the protection of "longstanding habit and custom" to justify their behavior. Brief of Appellants at 13. These contentions lack merit.

In his deposition, Dr. Brown testified that Bailey sent him nearly 1,500 pages of Pinnix's medical records. (R2.V2—84:7:16-19) Before he did that, he did not obtain a HIPAA release from Pinnix (R2.V2—92:39:8-22) Likewise, defense counsel did not show Dr. Brown a qualified protective order that would allow him to discuss Pinnix's medical treatment. (R2.V2—92:39:23-40:1)

At the outset, Appellees noted in their motions that Dr. Brown's first duty is owed to Pinnix, not his corporate employer. This Court has recognized that "[t]he physician-patient relationship is a confidential one." *Rowell v. McCue*, 188 Ga. App. 528, 530, 373 S.E. 2d 243, 245 (Ga. App. 1988). In such a confidential relationship, "the party acting for another [has] the duty of protecting and furthering the interests of the person for whom he is acting, not those of himself or of any one else." *Dover v. Burns*, 186 Ga. 19, 25, 196 S.E. 785, 789 (Ga. 1938). In contrast, the relationship between an employer and employee "is not the type of relationship such as that of principal and agent from which the law will necessarily imply confidentiality." *Cochran v. Murrah*, 235 Ga. 304, 307, 219 S.E. 2d 421, 424 (Ga. 1975). Neither the Defendants nor HPB have any privilege to interfere with Dr. Brown's duty to his patient, Pinnix.

In pertinent part, HIPAA regulations provide that, in the absence of a patient's consent, a healthcare provider can disclose protected health information if it "receives satisfactory assurance…that the individual who is the subject of the protected healthcare information that has been given notice of the request; or...reasonable efforts have been made to secure a qualified protective order." 45 C.F.R. § 164.512(e). In this case,

there is no evidence that Ms. Pinnix's consent to the disclosure of her medical records to Dr. Brown was sought. There is likewise no evidence that HPB secured, much less sought to secure, a qualified protective order.

Instead, Appellants contend that they were not required to obtain a qualified protective order before disclosing Pinnix's protected healthcare information to Dr. Brown. Their argument fails as a matter of law.

The Georgia Supreme Court has concluded that the "short answer" to the question whether counsel in the position of HPB must comply with the privacy protections in the HIPAA regulations before "informally interviewing" a medical malpractice plaintiff's treating physician is "yes." *Moreland v. Austin*, 284 Ga. 730, 730, 670 S.E. 2d 68, 69 (Ga. 2008). As the court explained, the regulations generally prohibit disclosure, subject to exceptions. *Id.*, 670 S.E. 2d at 70. More particularly, disclosure is not permitted unless a healthcare provider receives "satisfactory assurance . . . that reasonable efforts have been made [either] (A) . . . to ensure that the individual who is the subject of the [requested] protected health information . . . has been given notice of the request" and an opportunity

to object, or "(B) . . . to secure a qualified protective order' limiting the scope of disclosure. *Id.* (quoting and adding brackets to 45 C.F.R. § 164.512(e)(1)(ii-iv)).

As Appellants recognize, the court also held that HIPAA preempts Georgia law.[12] The court explained the effect of such preemption:

> Under Georgia law, once a patient files suit and puts his medical condition in issue, his treating physician can then disclose his medical records and *defendant's* lawyer can informally contact those physicians and orally communicate with them about plaintiff's medical condition. HIPAA, on the other hand, prevents a medical provider from disseminating a patient's medical information in litigation, whether orally or in writing, without obtaining a court order or patient's express consent, or fulfilling certain other procedural requirements designed to safeguard against improper use of the information.

Id., 670 S.E. 2d at 71 (Emphasis added) (citing 45 C.F.R. § 164.512(e)). In short, HIPAA is "more stringent" than Georgia law. *Id.*, 670 S.E. 2d at 72; *see also Allen v. Wright*, 282 Ga. 9, 12, 644 S.E. 2d 814, 816-17 (2007).

Subsequently, the Georgia Supreme Court criticized the content of a qualified protective order because it went too far. *Baker v. Wellstar*, 288 Ga. 336, 338-339, 703 S.E. 2d 601, 604 (Ga. 2010). That order was a

[12] Given that HIPAA preempts Georgia law, it likewise preempts the alleged "longstanding habit and custom" reflecting Georgia law and practice on which Appellants claim to rely.

"broad, blanket order" that "authoriz[ed] ex parte contacts with any number of unnamed physician-witnesses without further notice to the patient-plaintiff." *Id.*, 288 Ga. at 339. That order "expose[d] a gaping loophole in the procedural protections afforded by HIPAA in the context of litigation." *Id.* As the court observed, the "dangers associated with ex parte interviews of health care providers" include the opportunity for "defense counsel to influence the health care provider's testimony, unwittingly or otherwise, by encouraging solidarity with or arousing sympathy for a defendant health care provider." *Id.*

Appellants contend that neither *Austin* nor *Baker* involves a healthcare provider's communications with its employees, but a subsequent case, *Tender Loving Health Care Servs. of Ga., LLC v. Ehrlich*, 318 Ga. App. 560, 734 S.E. 2d 276 (Ga. App. 2012), explicitly recognizes that a named defendant is required to obtain a qualified protective order before conducting ex parte interviews with its agents or employees. As this Court states in *Ehrlich*,

> …defendants have failed to support their assertions that the ex parte interviews are, in fact, necessary…. Nor have they shown why they need to meet with the healthcare providers ex parte in order to "prepare" them for their trial testimony, especially since the providers are not parties to the litigation, are not the defendants' expert witnesses, **are not agents or**

> **employees of the defendants or represented by their attorneys**, were in a confidential patient-physician relationship with the decedent at the time they obtained her medical information, and have an ongoing fiduciary duty to the decedent…to protect that confidential information to the extent required under federal and state law.

Ehrlich, 318 Ga. App. at 568.[13] (emphasis added). More specifically, this Court explicitly identified factors relevant to a trial court's decision on whether to grant a defendant corporate healthcare provider's request for a qualified protective order. *Id.* Because a defendant has no right to "prepare" a fact witness for deposition or trial testimony, a qualified protective order is not mandated. If the treating doctor was an agent or employee, or represented by the same attorney, of the defendant corporate healthcare provider, this might weigh in favor of granting a qualified protective order authorizing ex parte communication. *Id.* As expressly held in *Ehrlich*, if the N.G Medical Defendants' attorney wanted to share Pinnix's protected healthcare information, appointment, or discuss the same with Dr. Brown, a non-party treating physician employee, HIPAA prohibits such communication without first obtaining

[13] In *Wellstar Health System, Inc. v. Jordan*, 293 Ga. 12, 743 S.E. 2d 375, 380 n. 6 (Ga. 2021), the Supreme Court of Georgia overruled *Ehrlich* on a point not relevant to this argument.

a qualified protective order. The broad authorization Appellants seek has been explicitly **and repeatedly rejected** and is inconsistent with Georgia law and HIPAA, which seeks "[t]o protect and enhance the rights of consumers by providing them access to their health information and controlling [its] inappropriate use." 65 Fed. Reg. 82462,82,463 (Dec. 28, 2000). Appellants provide no authority whatsoever to overturn existing law or the privacy interests of Pinnix because doing so is inconsistent with HIPPA's purpose and runs afoul of existing Georgia law.

Further, the regulations Appellants cite allow for communications that serve the internal operations of a healthcare provider, not clearly its litigation conduct. As the Superior Court observed, "In the present litigation, the alleged ex parte communication . . . occurred not between an employee and his employer, not between a doctor and the hospital's risk manager, but between an employee doctor and the corporation's third party counsel retained to defend the hospital from a lawsuit to which the doctor is not a party."[14] (R1.V3—469-470) While Appellants

[14] *Ehrlich* also identified whether the healthcare provider is a party to the litigation as a factor to weigh on whether a trial court grants a qualified protective order – not whether a qualified protective order is required. *Ehrlich*, 318 Ga. App. at 568.

point to ways in which healthcare providers can lawfully use patient healthcare information, they overlook the express prohibition and the way in which the consolidation of the healthcare industry reflected in their common structure and practice contribute to the erosion of HIPAA protections.

In any case, none of the lawful purposes excepting disclosure apply here. The disclosures here did not serve internal healthcare provider functions. More particularly, the HIPAA exception for "[c]onducting or arranging for . . . legal services" cannot be read as broadly as Appellants do. See (R1.V3—471) (Counsel didn't just discuss "benign topics" with Dr. Brown, he provided him with "more than 1500 pages of Plaintiff's medical records in order to assist him in preparing his deposition testimony.").

Appellants complain without merit that they will have to change the way they do business. In fact, other medical malpractice defense counsel follow the law and seek qualified protective orders before holding ex parte discussions with non-party physician witnesses. The published decisions of the Georgia appellate courts, and the arguments of Appellees below show that. See (R1.V3— 399-419) (Judge Jay Roth denied Defendants Saint Joseph's Health System, Inc., and Saint Joseph's

Hospital of Atlanta, Inc. request to interview physicians employed by Defendant Saint Joseph Hospital).

More importantly, because Appellants are not automatically entitled to hold ex parte discussions with a patient's non-party treating physician, they do it and simply hope that plaintiff's will not notice their unlawful conduct. In any event, Defendants can either get the plaintiff's consent or a qualified protective order from the court, or they can use formal discovery. Appellants offer no legal support for their positions and the only case they cite in support of their position does not interpret HIPAA, but rather a Florida Statute (456.057). See Appellants Brief p.19 citing *Estate of Stephens Clark v. Galen Health Care Inc.*, 911 So.2d 277 (Fla. Dis. Ct App. 2005). As the trial court noted in its Order, "the resolution of the *Stephens Clark* case hinges on the Florida court's analysis of the word "disclosure" as used in a Florida statute [Florida Statute 456.057(6)].

As the Georgia Supreme Court has explained, "Based upon the policies underlying HIPAA and fairness in litigation, we conclude that ex parte interviews may be conducted under HIPAA, if the procedural requirements for protecting information disclosed during these

interviews have been satisfied." *Baker v. Wellstar Health System*, 2010 Ga. Lexis 413 * 4 (Ga. June 1, 2010).

Appellants also indulge in rampant speculation, suggesting that medical malpractice plaintiffs will sue corporations only, not the offending physician, to derive a tactical advantage. Aside from being speculative since the corporations will deny any liability, it gives unsympathetic dismissal to the interests of malpractice plaintiffs, who, if they proceed as they have in this case, can have their medical records shared with 8,000[15] employees of three corporations at will. And, if one law firm can represent all those corporate employees simply because they are employees, they can effectively bury the truth and discovery under claims of attorney-client privilege. In any event, the Appellants' assertion is wholly unsupported and has yet to come to pass.

In *Northlake Medical Center v. Queen*, 280 Ga. App. 510, 634 S.E. 2d 486 (Ga. App. 2006), the plaintiff filed the authorization then required

[15] Anderson, Ben. "What the Finances of Northeast Georgia Health System Look Like." *The Gainesville Times*, 22 Dec 2022, https://www.gainesvilletimes.com/news/health-care/nghs-reinstated-mask-requirements-for-staff-heres-why/ (Northeast Georgia Health System employs "more than 8,000 people and is Hall County's top employer.")

by O.C.G.A. 9-11-9.2(a) with her complaint. That authorization would have allowed defense counsel 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." *Id.*, 634 S.E. 2d at 488. The court noted that the Georgia statute did not "satisfy the requirements for a valid HIPAA authorization." *Id.* at 490. It further held that the statute did not "constitute 'lawful process' within the context of HIPAA" and its implementing regulations. *Id.* at 491.

In effect, HPB only argues their wish to continue to follow O.C.G.A. § 9-11-9.2. But, as the Supreme Court of Georgia has held, HIPAA preempts Georgia law.

Finally, the N.G. Medical Defendants' treatment of Pinnix demonstrates both their scheme to violate HIPAA and put their interests above everyone else. When Pinnix arrived at her October 2022 appointment to see Dr. Brown, the N.G. Medical Defendants conscripted Dr. Brown to jettison his physician-patient duty and privilege. In direct violation of HIPAA, the N.G. Medical Defendants directed Dr. Brown to have ex parte discussions regarding the care and treatment of his patient, Pinnix, with a defense counsel. The Defendants blocked Pinnix's access

to her treating physician – and a key fact witness – to further their scheme. They refused treatment and repelled Pinnix's medical concerns. As *Ehrlich* points out, a doctor is in a confidential patient-physician relationship, and he has an ongoing duty to protect it. *Ehrlich*, 318 at 568.

4. The Superior Court's imposition of limited sanctions should be affirmed or in the alternative Defendants answer stricken.

The Superior Court declined to impose the harsh sanctions of striking the answer and entering a default, choosing instead to impose lesser sanctions. As the courts have made clear, the use of harsher sanctions of dismissal and default are reserved for "extreme cases." *See*, *e.g.*, *Foundation Contractors, Inc. v. Home Depot, U.S.A.*, 359 Ga. App. 26, 30, 855 S.E. 2d 434, 437 (Ga. App. 2021). In choosing not to impose them here, the Superior Court cannot be said to have imposed sanctions that are "too severe for the facts presented." *Motani*, 554 S.E. 2d at 541.

In directing Bailey and HPB to cease ex parte contacts with "Plaintiff's non-party treating physicians in the absence of the protections required by federal HIPAA law," (R1.V3—472), the court soundly balanced the interests of both parties. It did not cut off those witnesses from defense counsel, since they can always use formal

discovery or seek a qualified protective order, and it protected Pinnix's privacy interests.

The Superior Court's testimonial remedy reflect the fact that Dr. Brown is a non-party fact witness who is not within the scope of the representation HPB provides to the N.G. Medical Defendants. His testimony can appropriately be limited to what is in the medical records. In addition, his credibility may become an issue. As noted, either party can contact him, but those contacts are not privileged. If Dr. Brown cooperates or colludes with one side to the exclusion of the other, his credibility can appropriately be questioned.

The severe sanction of striking Defendants Answer is supported by the evidence. Despite the clear mandate from the Georgia Supreme Court in 2008 in *Moreland,* 284 Ga. 730, some medical malpractice defendants and their attorneys continue to willfully flout the law by holding ex parte discussions in hope that no one will notice. Unless and until there are meaningful sanctions against these defendants and their counsel, such conduct will continue to be rewarded. In *In re E.I. du Pont de Nemours and Co.*, 918 F. Supp. 1524, 1543 (M.D. Ga. 1995), rev's on other grounds 99 F.3d 363 (11th Cir. 1996)), U.S. District Court Judge

Robert Elliot observed that the only effective means to combat willful misconduct by litigants and their attorneys is through the imposition of harsh sanctions, stating that "[o]nly by [imposing harsh sanctions] can the courts empower their officers to refuse involvement in such misconduct, and give them the power to persuade their clients that such is not in their best interest." Otherwise, Judge Elliot noted, the advantage of improper litigation conduct will outweigh the benefits, and parties and counsel will have the incentive to ignore the rules. Instructively, Judge Elliot said. "[t]he choice can and should be made simple and clear: Litigate in our courts honestly and by the rules, or suffer the consequences. The public expects and deserves no less if confidence in our judicial system is to be preserved as it must be." 918 F. Supp at 1543.

The record justifies the severe sanction of striking the Defendants Answer.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the trial court or in the alternative, remand for the trial court to strike the Defendants Answer.

This the 5th day of January 2023.

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

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **Brief of Appellees** upon the opposing party by placing a copy of the same in the United States mail in a properly addressed envelope with adequate postage affixed thereto to insure delivery to the following:

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