IN THE SUPERIOR COURT OF DOUGLAS COUNTY
STATE OF GEORGIA

ANNE SURWILL LUSSIER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No.
MATTHEW TYLER CHRISTIAN,	)	14CV02050
	)	
Defendant.	)	
	)	

PLAINTIFF'S MOTION FOR SANCTIONS REGARDING DEFENDANT'S NUMEROUS *EX PARTE* COMMUNICATIONS WITH PLAINTIFF'S TREATING RADIOLOGIST

COMES NOW Plaintiff Anne Lussier and moves the Court for sanctions against Defendant for conducting ex parte meetings with Plaintiff's treating radiologist, Dr. Barry Jeffries, showing this Court as follows:

STATEMENT OF FACTS

I. BACKGROUND.

Plaintiff Anne Lussier was seriously injured when Defendant's motor vehicle rear-ended her vehicle on September 11, 2012. The wreck is clear liability, and the only anticipated issues at trial are causation and damages. Plaintiff has incurred over $100,000.00 in past medical bills, and future surgery is anticipated.

On October 11, 2012, one month after the wreck, Plaintiff had an MRI for her injuries related to the wreck. Dr. Barry Jeffries was Plaintiff's treating radiologist, and he reviewed imaging studies for Plaintiff and her primary orthopedic. Jeffries then provided

his MRI reading to Plaintiff's treating provider.

Plaintiff filed suit on August 15, 2014. State Farm Mutual Insurance Company's in house counsel, Sharon Ware and Associates, filed an Answer on behalf of Defendant on September 22, 2014. Plaintiff produced Jeffries treating medical records in discovery.

II. DEFENDANT AND DR. JEFFRIES MATERIALLY VIOLATED PLAINTIFF'S HIPAA RIGHTS.

After receiving Jeffries' medical records for Plaintiff, Defendant, through counsel, privately contacted Jeffries to discuss his treatment of Plaintiff and consult him on causation defenses without Plaintiff's knowledge or consent. In December 2015, Defendant privately approached Jeffries and hired him as a "retained" expert consultant without Plaintiff's knowledge or consent—in a clear and material violation of Plaintiff's HIPAA rights. (Ex. 2—Jeffries depo Ex. 12.) As a part of Jeffries' assignment for Defendant, Defendant asked Jeffries to conduct a "file review." Defendant forwarded all medical records from a variety of facilities to Jeffries for review, not just the records Jeffries drafted during his treating examination of Plaintiff. Defendant also asked Jeffries to provide causation opinions related to this case, and **"[b]efore you commit any of your conclusion or findings to a written format or permanent form please contact me so we can discuss the case over the phone**." (Ex. 2 p. 2.) Defendant did not want Dr. Jeffries to make an official finding until his counsel privately met with Jeffries—in clear and direct violation of HIPAA. Jeffries accepted the assignment without regard to Plaintiff's HIPAA rights.

When reviewing the records, Dr. Jeffries knew he was Plaintiff's radiologist. (Jeffries depo p. 21, depo; Ex. 3—p. 2 of Jeffries notes—highlight added.) Without any respect for Plaintiff's HIPAA rights, Defendant and Jeffries proceeded to secretly meet with each other before Jeffries wrote an expert report. Only after this "oral" meeting occurred, and his time billed to Defendant, did Jeffries draft an expert report against his patient. (Ex. 4–5.) Shortly after receiving Jeffries' report, Defendant sent an offer of $25,000.00 to settle the claim, less than 25% of Plaintiff's special damages and only 25% of the $100,000.00 policy limits, relying on Jeffries' "causation" opinions to reduce Plaintiff's claim. (Ex. 6.) Such conduct is forbidden by Federal and Georgia law.

III. DR. JEFFRIES' RELATIONSHIP WITH DEFENDANT'S INSURER AND COUNSEL.

Dr. Jeffries has enjoyed a long-time very profitable relationship with Defendant's insurer, State Farm Mutual Insurance Company, and Defendant's attorneys, Sharon Ware & Associates (now known as Lynn Leonard & Associates).[1] On a yearly basis, Dr. Barry Jeffries consults on 120–150 litigation cases, for which he charges $450.00 per hour, predominantly for insurance companies. Jeffries has the largest amount of cases with Sharon Ware in house counsel for State Farm Mutual Insurance Company. (Jeffries depo p. 12.) Over the years, Dr. Jeffries has had over 600 cases with Sharon Ware alone. (Jeffries depo p. 5.) Attorney Julie Monaghan—who retained, hired and consulted Jeffries—retained Jeffries five to ten times in the past. (*Id*.) Jeffries works for other law

[1] This motion does not relate to Attorney Jay Eidex, newly assigned counsel to this case.

firms who routinely represent State Farm's insureds, so the number of cases in which he represents State Farm insureds is extensive and a large portion of his income. (*Id*. at 7–9.) In a way, Jeffries is the medical arm of State Farm in Georgia personal injury cases. With the close relationship between Jeffries and State Farm, respect for HIPAA was especially important to prevent undue influence and protect the truth.

ARGUMENT AND CITATION OF AUTHORITY

Under O.C.G.A. § 15-1-3, "[e]very court has the power [among others]:… to control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto…." In the exercise of this Court's inherent powers, Plaintiff respectfully requests, for the reasons set forth below, that the Court issue severe sanctions against Defendant and his insurer, State Farm Insurance Company, for gross violations of HIPAA.

I. DEFENDANT AND JEFFRIES MATERIALLY VIOLATED PLAINTIFF'S HIPAA RIGHTS.

Defendant and State Farm materially violated HIPAA when they privately contacted, hired, consulted, and retained Dr. Barry Jeffries as an expert witness against his own patient. The fundamental purpose of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is to protect and ensure the privacy of patients' medical information. Baker v. Wellstar Health Systems, Inc., 288 Ga. 336, 338 (2010) ("The purpose of HIPAA's privacy regulations is "[t]o protect and enhance the rights of consumers by providing them access to their health information and controlling the

inappropriate use of that information.") "The intent of HIPAA is to 'ensure the integrity and confidentiality of patients' information and to protect against unauthorized uses or disclosures of the information.'" Allen v. Wright, 282 Ga. 9, 11 (2007). Even where disclosure of a patient's health information is allowed under HIPAA, it must be made in strict accordance with specific restrictions imposed under the statute and narrowly limited to the "minimum necessary" to accomplish the intended purpose of the disclosure. Moreland v. Austin, 284 Ga. 730, 731 (2008).

Despite the enactment of HIPAA, some lawyers continue to argue their ability to conduct private meetings with a plaintiff's treating doctors. Such arguments were considered and soundly rejected by a unanimous Georgia Supreme Court on *November 3, 2008* in Moreland v. Austin, supra. In Moreland, the Georgia Supreme Court observed that "[a]fter reviewing HIPAA, Georgia law, and the case law of other jurisdictions, we find that HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians…." 284 Ga. at 732-33. The Court explained that "HIPAA…prevents a medical provider from disseminating a patient's medical information in litigation, whether orally or in writing, without obtaining a court order or the patient's express consent, or fulfilling certain other procedural requirements designed to safeguard against improper use of the information…. In other words, HIPAA requires

a physician to protect a patient's health information, unless the patient is given reasonable notice and an opportunity to object." 284 Ga. at 733.

The Georgia Court of Appeals has likewise observed that notice to the patient and opportunity to object are *mandatory prerequisites* under HIPAA. See, Northlake Med. Ctr., LLC v. Queen, 280 Ga.App. 510, 515 (2006) ("Clearly, HIPAA contemplates a process in which disclosures are limited to relevant information, and a patient may object to particular disclosures that exceed the scope of the relevant inquiry.") In its most recent opinion dealing with this subject, the Georgia Supreme Court observed that "the HIPAA drafters 'presumed that parties to litigation will have ample notice and an opportunity to object to disclosures of protected health information in the context of the proceeding,'…." Baker v. Wellstar Health Systems, Inc., 288 Ga. 336, 339 (2010).

Here, Defendant did not seek a court order before contacting and meeting with Plaintiff's radiologist. Defendant did not have Plaintiff's consent to contact her radiologist. Nor did Defendant otherwise attempt to comply with procedural safeguards that Georgia's appellate courts have recognized are statutorily required under HIPAA before meeting with Plaintiff's providers. Instead, Defendant privately met with Jeffries and discussed Plaintiff's medical condition and presumably helped him craft his causation opinions, with no notice to Plaintiff or her attorney. Defendant's and Jeffries' conduct are egregious violations of HIPAA.

II. DEFENDANT'S AND JEFFRIES' ACTIONS ARE GROUNDS FOR SEVERE SANCTIONS.

Georgia Courts have recognized sanctions are appropriate against a Defendant when he or she purposefully has ex parte communications with a treating physician. In 2008, in Moreland v. Austin, the Supreme Court held that defense counsel violated HIPAA by contacting the plaintiff's treating providers without first providing notice to the plaintiff and in defiance of the plaintiff's right to object to the ex parte communication, and that "the appropriate remedy to be fashioned in cases of this kind is best left to the discretion of the trial court." 284 Ga. at 734. In light of the fact that the defense counsel in the Moreland case had "contacted plaintiff's prior treating physicians at a time when the applicability of HIPAA to ex parte communications was uncertain," the Supreme Court stated that an "extreme sanction" was unwarranted. 284 Ga. at 734. In the present action, however, Defendant's counsel contacted Plaintiff's prior treating doctor at a time when there was no uncertainty regarding the impropriety of such conduct. Rather, Defendant's ex parte meetings came more than six years after the Supreme Court's decision in Moreland (this case was filed a year after Moreland was decided). Thus, unlike the situation in Moreland, the *only* appropriate sanction in light of the facts in this case would be an "extreme" sanction.

The Georgia Supreme Court in Baker v. Wellstar Health Systems, Inc., highlighted the importance of adhering to HIPAA laws, and the dangers of *ex parte* communications between doctors and defense counsel:

> In general, the dangers associated with ex parte interviews of health care providers are numerous, including (1) the potential for unwarranted probing into matters irrelevant to the litigation yet highly sensitive and possibly prejudicial to the patient-plaintiff; (2) the potential for disclosure of information, such as mental impressions not documented in the medical record, that the health care provider has never actually communicated to the patient-plaintiff; and (3) the potential 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.

288 Ga. at 338-339.

Defendant purposefully chose to violate the laws of this state, as well as Federal laws. Unless there are meaningful sanctions against Defendant or State Farm, such conduct will be rewarded. In In re E.I. du Pont de Nemours and Co., 918 F.Supp. 1524, 1543 (M.D.Ga.1995), *rev'd 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 interests." Otherwise, Judge Elliot noted, the advantage of the improper litigation conduct will outweigh the benefits and parties and counsel will have the incentive to ignore the rules. Instructively, Judge Elliot stated, "The 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." Id.

At least one other Georgia trial court has faced a similar set of circumstances and properly concluded that striking the defendant's Answer was the only appropriate remedy. In Buttacavoli v. Cartersville Med. Ctr., et al., Civ. Action No. 06-CV-1067, the Hon. David Smith of the Bartow County Superior Court concluded that because one of the defendant's attorneys spent part of a fifteen-minute pre-deposition conversation with one of the plaintiff's treating doctor discussing the lawsuit, "the only viable remedy is to strike the Answer." (See Ex. 6 copy of 3/17/10 Order on Plaintiffs' Motion for Sanctions in Buttacavoli, p. 11). It is noteworthy that the defense attorney whose conduct was at issue in Buttacavoli denied discussing the plaintiff's medical care and treatment with the doctor, and she claimed that she only discussed the status of the lawsuit with the doctor, including the allegations against her clients. (Ex. 7.)

The rationale for striking the defendant's Answer as "the only viable remedy" for defense counsel's conduct in Buttacavoli applies to the facts of the present action. Whereas Buttacavoli dealt with just one several minute discussion with a single doctor prior to the doctor's deposition that the lawyer claimed only related to the status of the case and the nature of the claims against her clients (which the court there did not dispute), our case involves direct and secret interference with the treating radiologist's opinions concerning medical condition and diagnosis—the core issues of this case. In fact, Defendant in this case directed Jeffries not to write down his findings unless they spoke privately first, in direct and unequivocal violation of Federal law.

The only arguable distinction between the operative facts of Buttacavoli and those in the present action is that the judge in Buttacavoli had previously entered a Qualified Protective Order requiring that the plaintiff's attorney be given prior notice of any communication between defense counsel and the plaintiff's doctors before such communication could take place. Plaintiff respectfully submit that this is a distinction without a difference. The Supreme Court of Georgia in Moreland addressed the precise question and unequivocally ruled on the issue a year before this case was filed: *ex parte* contact between defense counsel and a plaintiff's treating doctors is prohibited without the plaintiff's authorization or a Qualified Protective Order. When Defendant sought out and colluded with Plaintiff's doctor, such an act was in direct contravention of binding precedent expressly proscribing such conduct. Such conduct warrants a severe penalty, and as recognized in Buttacavoli an award of attorney's fees or some lesser alternative remedy is insufficient to cure the violation.

If the law requiring the patient's permission or a court order before meeting with a Plaintiff's treating doctor is to have any meaning at all, such breaches have to be strongly addressed. If not, they will be encouraged and will continue to occur. Therefore, Plaintiff respectfully requests that the Court: strike the Defendant's Answer on the issue of causation, and order that Defendant be precluded from contesting issues relating to causation at trial. In the alternative, this Court should consider all other remedies it deems just and proper.

This ____ day of August, 2016.

EDWARD A. PIASTA, LLC

_____
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing ***Plaintiff's Motion for Sanctions Regarding Defendant's Ex parte Communications with Plaintiff's Treating Radiologist*** and ***Notice of Filing Deposition*** by U.S. Mail with sufficient postage attached thereto the following persons:

Jay Eidex, Esq.
Lynn Leonard & Associates
2400 Century Parkway, NE, Suite 200
P.O. Box 29200
Atlanta, GA 30359

This _____ day of August, 2016.

EDWARD A. PIASTA, LLC

Edward A. Piasta
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Attorney for Plaintiff