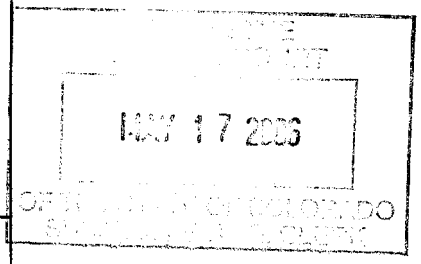
5-17-2006

Reutter v. Weber

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver Colorado 80203 DISTRICT COURT, COUNTY OF PUEBLO, STATE OF COLORADO Case No. 1004CV53, Div. E Honorable David A. Cole	**Word Count: 9471 words** 
In re: Petitioners-Plaintiffs: DUANE REUTTER and PATTY REUTTER Respondents-Defendants: KEVIN WEBER, M.D., MATTHEW SUMPTER, M.D., and PUEBLO CARDIOLOGY ASSOCIATES, P.C and The Pueblo County District Court	**▲ COURT USE ONLY ▲**
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RESPONDENTS MATTHEW SUMPTER, M.D.'S AND PUEBLO CARDIOLOGY ASSOCIATES, P.C'S RESPONSE TO ORDER TO SHOW CAUSE

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I. ISSUE PRESENTED

Did the district court abuse its discretion in permitting defense counsel to proceed with informal ex parte meetings with health care providers who consulted concerning Mr. Reutter's care during the hospitalization at issue, where defense counsel provided notice to Plaintiffs' counsel of their desire for the meetings, presented the issue to the district court, and the court , after considering Plaintiffs' objections, found that there was no potential residual privilege requiring protection?

II. STATEMENT OF FACTS

On January 14, 2002, Mr. Reutter presented to the emergency department of St. Mary Corwin Hospital, complaining of a several-hour history of chest pain and difficulty breathing. He was examined by Dr. Weber, an emergency medicine physician, who noted that Mr. Reutter was significantly hypoxemic. Because of EKG changes suggestive of myocardial infarction, Dr. Webber consulted with Dr. George Gibson, a cardiologist. Dr. Webber faxed a copy of Ms. Reutter's EKG to Dr. Gibson, who reviewed the EKG and advised that he would send his partner, cardiologist Matthew Sumpter, M.D., to the ED to evaluate Mr. Reutter. Dr. Sumpter went to the ED, evaluated Mr. Reutter, and felt that cardiac catheterization was needed to obtain a cardiac angiogram.

Because of Mr. Reutter's hypoxemia and his inability to lie flat for the cardiac

catheterization, Dr. Weber attempted to intubate him, and consulted Dr. Scott Mantel, an anethesiologist, for assistance. Dr. Mantel arrived at the Emergency Department, assessed and spoke to Mr. Reutter, and successfully intubated him. Mr. Reutter was then transferred to the catheterization lab for angiography, which was performed by cardiologist Dr. George Gibson.

After the catheterization, Mr. Reutter continued to have respiratory difficulties and remained on a ventilator. Dr. Gibson requested consultation by Dr. Craig Shapiro, a critical care specialist, who evaluated Mr. Reutter and provided care during the remainder of his hospitalization. All of these physicians, as well as nurses and respiratory therapists, recorded their evaluations, examinations and recommendations in Mr. Reutter's hospital chart, where the information was available to all providers involved in the continuum of his care. On January 18, four days after his admission, Mr. Reutter was transferred to the VA Medical Center.

On January 13, 2004, Mr. and Mrs. Reutter filed their Complaint, claiming that Mr. Reutter had sustained an hypoxic brain injury due to negligent medical care during his January 14, 2002 hospitalization. Plaintiffs sued Dr. Weber, Dr. Sumpter, Dr. Gibson, Pueblo Cardiology Associates (the employer of Dr. Gibson and Dr. Sumpter), St. Mary Corwin Hospital, Dr. Mantel and Dr. Shapiro, claiming that all

of these physicians were negligent in providing care to Mr. Reutter during his January 14, 2002 hospitalization. *Exhibit A.*

On June 9, 2004, Plaintiffs filed an Amended Complaint, deleting their claims against Dr. Mantel and Dr. Shapiro. Plaintiffs' claims against the St. Mary Corwin were dismissed by the Court based on a Motion to Dismiss filed by the Hospital.

On June 30, 2005, after conferring with Plaintiffs' counsel, Dr. Gibson filed a Motion for Determination of Law, requesting the court to determine that Dr. Gibson's counsel could meet ex parte with former defendant Dr. Shapiro, who consulted in Mr. Reutter's care at Dr. Gibson's request. *Exhibit B.* Dr. Weber joined in the motion. Shortly thereafter, Plaintiffs dismissed their claims against Dr. Gibson, and Dr. Weber filed a similar motion on his own behalf, seeking the court's determination that his counsel could meet ex parte with Dr. Shapiro; with former defendant Dr. Mantel, the anaesthesiologist who consulted with Dr. Weber concerning intubation; and with nurses and respiratory therapists who cared for Mr. Reutter during his hospitalization. *Pltf. Exhibit 1.* Dr. Sumpter and Pueblo Cardiology joined in Dr. Weber's motion. *Pltf. Exhibit 3.*

After full briefing, the trial court granted Defendants' motion, ruling that: (1) pursuant to § 13-90-107(1)(d)(II), C.R.S. (2005), no privilege existed with respect

to Dr. Shapiro and Dr. Mantel, who were "in consultation with" the defendant physicians regarding the medical care at issue in this case; (2) pursuant to§ 13-90-107(1)(d)(I), C.R.S., no privilege existed with respect to Dr. Shapiro, who had been sued by Plaintiffs in their original complaint; and (3) Mr. Reutter waived any privilege with respect to medical providers, including nurses and therapists, whose treatment of the Plaintiff was confined to the events and conditions at issue in this case. *See Samms v. District Court,* 908 P.2d 520 (Colo. 1996). Finding that there were no areas of unwaived or "residual" privilege to be protected pursuant to *Samms*, the held that Defendants had the right to meet privately with these witnesses, without the presence of Plaintiffs' counsel. *Pltf. Exhibit 7.*

Plaintiffs filed a motion for reconsideration, arguing that Dr. Mantel and Dr. Shapiro provided actual "treatment" to Mr. Reutter, and therefore were not merely "consultants" within the meaning of § 13-90-107(1)(d)(II). Speculating that Dr. Mantel or Dr. Shapiro might have a memory of some potentially irrelevant aspect of Plaintiff's medical history or condition that could still be privileged, Plaintiffs insisted that they must be present at any meeting in order to protect against disclosure of this unidentified information.

The trial court allowed argument on the motion during a status conference on February 13, 2006. The court specifically asked Plaintiffs' counsel for further explanation as to why Dr. Mantel and Dr. Shapiro were not merely "consultants," and might possess information subject to residual privilege. Plaintiffs' counsel offered no further argument. *Exhibit C*, pp. 5:4-6:23. The court denied the motion, concluding that Drs. Mantel and Shapiro were consultants in the Defendants' care of Mr. Reutter within the meaning of § 13-90-107(1)(d)(II), and that Samms procedures for protecting residual privilege did not apply. *Id.*, p. 6:17-23; *Exhibit D,* Order dated March 21, 2006.

III. SUMMARY OF ARGUMENT

Plaintiffs' Petition rests on four arguments, all fundamentally flawed. First, Plaintiffs misread this Court's decision in *Samms v. District Court* as precluding a trial court from ever authorizing an ex parte meeting, unless Plaintiffs are permitted to attend, even when the court has determined there is no residual privilege to be protected. The sole rationale for allowing the plaintiff to attend the interview is to prevent the disclosure of medical information that remains privileged despite the filing of the lawsuit. That rationale does not exist where, as in this case, there is no colorable argument that the physician or provider possesses any information that

remains privileged. When it is clear that there is no residual privilege at risk, there is nothing in *Samms* that precludes a trial court from allowing ex parte interviews at which the plaintiff is not present.

Second, while admitting that no privilege applies to physicians who were "in consultation with" the defendants, § 13-90-107(1)(d)(II), Plaintiffs eviscerate this exception by insisting that a consultant who *treats* the patient during his consultation becomes a "treating physican" under *Samms*, requiring that Plaintiffs be allowed to attend any ex parte meeting.

Third, Plaintiffs demonstrate precisely how the physician-patient privilege can be manipulated into a sword by their insistence that former defendants' care of the Plaintiff, which was rendered unprivileged by § 13-90-107(1)(d)(I), became cloaked with privilege once again as soon as Plaintiffs decided to withdraw their claims against those defendants.

Finally, Plaintiffs frankly misinterpret federal HIPAA regulations in arguing that those regulations are preemptive and preclude informal ex parte meetings. HIPAA permits disclosure of health information pursuant to a court order or a discovery request in a judicial proceeding, and all requirements for disclosure under HIPAA were met in this case.

IV. ARGUMENT

A. Physician-Patient Privilege –Governing Principles

This Court's analysis must begin with the privilege statute and the jurisprudence that has developed around it. That statute provides that a physician or surgeon may not testify without the consent of his or her patient, as to "information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. . . ." § 13-90-107(1)(d), C.R.S. (2005)

Importantly, the Colorado Generally Assembly has provided that the privilege "shall not apply" to "a physician. . . *who is sued by or on behalf of a patient.* . . on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient." § 13-90-107(1)(d)(I), C.R.S. The privilege also does not apply to "a physician . . .registered professional nurse who was *in consultation with a physician. . . being sued* as provided in subparagraph (I) . . . *on the case out of which said suit arises."* § 13-90-107(1)(d)(II), C.R.S. (emphasis added).

As a testimonial privilege, the physician-patient privilege must be viewed in light of the fundamental maxim that "the public . . . has a right to every man's evidence." *See Jaffee v. Redmond,* 518 U.S. 1, 10 (1996). Further, because the physician-patient privilege is a statutory creation in derogation of the common law,

the privilege must be strictly construed. *People v. Covington,* 19 P.3d 15, 22 (Colo. 2001). The burden of establishing the applicability of the privilege rests with the claimant of the privilege. *Alcon v. Spicer,* 113 P.3d 735, 739 (Colo. 2005).

The privilege may be expressly or impliedly waived by the patient. A patient impliedly waives his physician-patient privilege when he "has injected his physical or mental condition into the case as the basis of a claim or an affirmative defense." *Clark v. District Court,* 668 P.2d 3, 10 (Colo. 1983). And while the burden of establishing an implied waiver of privilege lies with the party seeking to overcome the privilege, *Clark,* 668 P.2d at 8, once that has occurred, the plaintiff who resists discovery based on a claim of privilege bears the burden of showing that the information at issue remains subject to residual privilege. *Alcon,* 113 P.3d at 742; *see also* C.R.C.P. 26(b)(5).[1]

In a series of cases, this Court has made clear that the scope of any implied waiver necessarily depends on the nature of the patient's claim. *Samms*, 908 P.2d

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[1] As the Court noted in *Alcon*, 113 P.3d at 742, the privilege log mechanism of Rule 26(b)(5) "offers a workable solution to, and the best allocation of burdens in, discovery disputes involving claims of privilege for medical records." *See also Pina v. Espinoza,* 29 P.3d 1062, 1069 (N.M. App. 2001), *cert. denied* (plaintiff bears burden of establishing residual privilege, and must provide a privilege log identifying an objectively reasonable basis for each assertion of privilege).

at 529; *Johnson v. Trujillo,* 977 P.2d 152, 156-57 (Colo. 1999); *Weil v. Dillon Companies, Inc.,* 109 P.3d 127, 131 (Colo. 2005); *Alcon,* 113 P.3d at 740-41. The implied waiver extends to medical information and records which relate to the *cause and extent* of the injuries and damages allegedly sustained as a result of the defendant's claimed negligence. *Weil,* 109 P.3d at 131 (emphasis added); *Alcon,* 113 P.3d at 741. The scope of waiver is determined based on a "case-by-case inquiry into 'the cause and extent of the injuries which form the basis for a claim for relief.'" *Weil*, 109 P.3d at 131, *quoting Samms,* 908 P.2d at 525.

B. Application of *Samms v. District Court*

This case is not simply "*Samms II.*" Legally and factually, this case presents issues that *Samms* and its progeny have not addressed.

First, unlike *Samms* (and *Weil, Alcon,* and *Johnson),* the doctors and nurses from whom Defendants seek informal discovery are not merely providers who were involved in Mr. Reutter's medical history, treating him for conditions that may or may not be related to this lawsuit.

Dr. Mantel, Dr. Shapiro, the nurses and the therapists are actual participants in the discrete events that form the basis of Mr. Reutter's claims. They are medical consultants and former defendants who are exempt from the privilege under § 13-90-

107(1)(d)(I) and (II). They are percipient witnesses to Mr. Reutter's course of treatment during the four-day hospitalization in which Plaintiff claims he was injured by medical negligence.

By claiming he suffered hypoxic brain injury due to medical negligence during this four-day hospitalization, Mr. Reutter has waived any privilege concerning his evaluation, treatment and medical conditions during this time. He has waived privilege with respect to all events of his course of treatment, and all information, including medical history, acquired by the physicians and nurses who treated him during this four-day period. His medical treatment during this time is not only relevant to the "cause and extent" of his claimed injuries, *see Samms*, 908 P.2d at 525, but forms the very factual basis for his claim that *some* of this treatment–by Dr. Weber and Dr. Sumpter–was negligent. Nothing that occurred during this four-day hospitalization is irrelevant, unrelated, or residually privileged.

Second, Plaintiffs have not presented any evidence , or even serious argument, that any of these health care providers actually possess privileged information that is unrelated to the course of treatment and medical conditions which are the subjects of this lawsuit.

That is the context in which the Court should examine whether the trial court abused its discretion in ruling that Defendants could meet privately with the providers who cared for Mr. Reutter during the hospitalization in which he allegedly sustained his injuries.

C. *Samms* Does Not Preclude *Ex Parte* Meetings, Without the Presence of Plaintiffs' Counsel, When the Court Has Found That There Is No Residual Privilege Requiring Protection

Plaintiffs insist that their counsel must be allowed to attend any ex parte meeting, even though the trial court, after thoroughly considering their objections, determined that there is no colorable risk that these medical providers possess information that may still be be subject to privilege. Plaintiffs' argument ignores the reasoning underlying the *Samms* decision.

1. The Rationale of *Samms* is Concerned With Protection of Residual Privilege

Samms is concerned with the protection of "residual privilege"–medical information that may remain privileged because it is not related to the plaintiff's claims and not within the scope of the plaintiff's implied waiver.

In *Samms*, the plaintiff sued an emergency room physician for failure to diagnose the plaintiff's myocardial infarction. The defendant's attorneys sought permission of the trial court to interview approximately 20 physicians who had

treated the plaintiff at various times. The trial court allowed the ex parte interviews, reasoning that the plaintiff had waived her privilege as to conditions arguably related to the injuries and damages alleged in her complaint. 908 P.2d at 523-524.

On review in an original proceeding, this Court acknowledged that allowing informal communications between a defense attorney and the plaintiff's treating physician promotes efficient, cost-effective discovery of facts by both parties. 908 P.2d at 526. Indeed, the Court concluded that the rules of discovery *permit* a trial court to authorize informal interviews between defense counsel and treating physician, *without* the presence of the plaintiff or his attorney, as long as: (1) the interview is confined to matters that are not subject to privilege; and (2) the plaintiff is given reasonable notice of the interview. *Id.*[2]

The purpose of notice is to "enable the plaintiff to protect his or her interests." 908 P.2d at 528. The Court acknowledged that in some cases, the plaintiff's waiver of privilege "might extend to *all matters* discussed by the plaintiff with a physician."

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[2] *See also* 908 P.2d at 527 ("To the extent that our decision in *Fields* [v. McNamera, 189 Colo. 284, 540 P.2d 327 (1975)] suggests that in civil actions trial court may not authorize a defense attorney, in the absence of the plaintiff or the plaintiff's attorney, to informally interview physicians who have treated the plaintiff regarding matters that are not subject to the physician-pateint privilege, we disapprove of that decision."

908 P.2d at 525 (emphasis added). However, the Court also recognized that in other cases a physician may possess information for which privilege has not been waived, which may be disclosed before the patient has a meaningful opportunity to object. 908 P.2d at 528. Hence, the Court held that the plaintiff must be given reasonable notice of any proposed ex parte interview "to permit the plaintiff or the plaintiff's attorney to attend or to take other appropriate steps to ensure that privileged information will not be discussed." 908 P.2d at 529.

This Court did not hold that the plaintiff or his attorney invariably must be allowed to attend every ex parte interview. Rather, *Samms* contemplates that the plaintiff, after receiving notice, may pursue a variety of protective steps, which may include attending the interview, or objecting to the proposed interviews and seeking protective orders. [3]

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[3] Throughout the *Samms* opinion, the Court refers to these potential protective measures alternatively, in the disjunctive: *See* 908 P.2d at 528 ("reasonable notice of any proposed interview to permit the plaintiff or the plaintiff's attorney to attend or to seek appropriate protective orders."); 908 P.2d at 529("to permit the plaintiff or the plaintiff's attorney to attend or to take other appropriate steps to ensure that privileged information will not be disclosed); 908 P.2d at 530 ("to permit her attorney to attend or to otherwise ensure that privileged information is not discussed"); see also 908 P.2d at 528 (quoting Interprofessional Code, section 6.3: ("to enable that attorney to object to any such private contact or attend. . . any such consultation. . ."). However, in two places, the Court suggests that the patient must be given the opportunity to attend. *See* 908 P.2d at 526, n. 3 ("because a patient may personally or through his or her attorney attend any

The purpose of these protective steps is to define the plaintiff's waiver of privilege and protect areas which remain privileged. It is the plaintiff's burden to show that there is *some* residual privilege that requires protection. *Alcon,* 113 P.3d at 742[4]. Whether protection is necessary, and if so, the appropriate form of that protection, depends upon the nature of the plaintiff's claims, the breadth of the plaintiff's waiver, and the role of the proposed physician/interviewee in the plaintiff's care.

When the parties cannot agree on the scope of the waiver, the trial court may resolve the issue, delineating the scope of the waiver in light of the nature of the plaintiff's claims. 908 P.2d at 529. Whether additional protection is warranted, either in the form of a protective order, or allowing the plaintiff's attorney to attend the interview, depends upon the court's resolution of the scope of the plaintiff's waiver, and scope of the treating physician's involvement in the plaintiff's course of

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interview of a treating physician scheduled by an adverse party, scheduled ex parte interviews may on occasion not occur."); 908 P.2d at 529 (a trial court determining that interviews without the plaintiff or his attorney are warranted "must also make certain that the plaintiff or the plaintiff's attorney has an opportunity to attend. . . by requiring reasonable notice thereof.")

[4] *See also Samms*, 908 P.2d at 529, n. 5. ("it is encumbent upon the plaintiff to take steps necessary to protect the physician-patient privilege to the extent it has not been waived."

care. *See Stempler v. Speidell,* 100 N.J. 368, 495 A.2d 857, 864-65(1985)(after notice of the interview, plaintiff's attorney may move for protective order; if warranted by potential prejudice, the court may order that plaintiff's attorney be allowed to attend.).

When the court has determined that the waiver extends to "all matters discussed by the plaintiff with the physician," 908 P.2d at 525, there is no need to protect any residual privilege, and no justification for allowing the plaintiff's attorney to monitor the meeting.

2. Defendants and the Trial Court Complied with the Protections Contemplated by *Samms;* Plaintiffs Failed to Meet Their Burden to Identify Any Residual Privilege at Risk

Here, Plaintiffs received all the protections envisioned by *Samms*. Defendants provided notice to Plaintiffs' counsel of their intent to seek interviews with the providers who were involved in Mr. Reutter's care during his hospital admission. Defendants filed a motion thoroughly explaining their basis for believing that the physician-patient privilege did not apply or had been completely waived with respect to these providers. *Pltfs' Exhibit 1.*

Plaintiffs were given full opportunity to object and to show the court any basis for claiming that these providers were subject to some residual or unwaived privilege. Yet in their response to Defendants' motion, Plaintiffs failed to identify any

privileged information that would be placed at risk by ex parte meetings with these percipient witnesses. *See Pltfs' Exhibit 2.* Even now, Plaintiffs can only speculate that Dr. Mantel and Dr. Shapiro "may have" acquired unrelated, privileged information from some third person, that still lurks somewhere in their memories and may be revealed during an ex parte interview. *Pltfs' Exhibit 8, p. 2; Petition, p. 12.*

Plaintiffs seem to believe that the burden is on the Defendants "to affirmatively show that no residual physician-patient privileged information exists." *Petition at 12.* That is not correct. As this Court held in *Alcon,* 113 P.3d at 742, it is the *Plaintiff's* burden, as the privilege-holder, to establish any areas of residual privilege. *See also* C.R.C.P. 26(b)(5). The mere speculation that these doctors may recall some unspecified piece of still-privileged information–more than four years after Mr. Reutter's hospitalization– does not satisfy the burden allocated to Plaintiffs under *Alcon.*

3. Absent Residual Privilege to Protect, the Presence of Plaintiffs' Counsel at Informal Interviews Functions as a Sword, Rather that A Shield

This Court has often cautioned that the physician-patient privilege is to be used as a protective shield, and not offensively, as a sword: "A party should not be permitted to assert a mental or physical condition in seeking damages. . . and at the

same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." *Clark*, 688 P.2d at 10, *quoting Koump v. Smith,* 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969); *Doe v. Eli Lilly & Co., Inc.,* 99 F.R.D. 126, 128-29 (D.D.C. 1983)("The privilege was never intended. . . to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time.")

Absent privilege, an attorney ordinarily has the right to interview any willing witness, in private, and without the presence or consent of opposing counsel. *See Samms,* 908 P.2d at 530 (Kourlis, J., specially concurring)(*citing International Business Machines Corp. v. Edelstein,* 526 F.2d 37, 42 (2d Cir. 1975))

By insisting that his counsel must be allowed to oversee the interviews, Mr. Reutter wields his privilege solely as a sword. Because there is no reason to believe that any of these providers possess information which still warrants the shield of privilege, the presence of Plaintiffs' counsel serves no legitimate protective purpose. Rather, Plaintiffs seek the unilateral and unreciprocated opportunity to monitor Defendants' informal discovery. As the court observed in *Doe v. Eli Lilly,* this strictly offensive use of the privilege is improper:

> It. . . enables the party so wielding the privilege to monitor his adversary's progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny. . . .it would be an abuse of the privilege to allow it to be used in such a manner which has no relation to the purposes for which it exists.

99 F.R.D. at 128-129.

4. The Trial Court's Careful Analysis and Resolution Was Well Within the Bounds of its Discretion

As Justice Kourlis observed in her special concurrence in *Samms*, resolution of these types of discovery disputes, including determination of privilege and waiver issues, are case-by-case determinations which are uniquely well-suited to the discretion of the trial court. 908 P.2d at 531. It is the trial court, in the first instance, which must analyze the competing claims of privilege and waiver in light of the facts of each case, and must "attempt to balance the right to confidentiality in communication and the need to ascertain the truth to serve justice." *Alcon,* 113 P.3d at 739. Utilizing the rules of discovery, Rule 26(b)(5) privilege logs, and the principles of waiver outlined in *Samms, Weil,* and *Alcon*, trial courts are well-equipped to address and resolve these issues based on the unique facts of each case, so as to give full effect to the truth-seeking purpose of discovery, while still protecting any residual areas of physician-patient privilege. That is precisely what the trial court did in this case.

The trial court carefully considered Plaintiffs' objections to the ex parte interviews, and determined that no privilege existed with respect to Dr. Mantel and Dr. Shapiro, based on the provisions of §§ 13-90-107(1)(d)(I) and (II), and that Mr. Reutter, by his allegations, had impliedly waived any privilege with respect to the nurses and therapists who treated him during the four-day hospitalization during which his claims arose. Despite being given notice and the opportunity to identify any residual areas of privilege, Plaintiffs simply could not show that there was any residual privilege to protect. Therefore, the court properly allowed Defendants to proceed with ex parte interviews, without the presence and oversight of Plaintiffs' attorneys.

D. Because Dr. Mantel and Dr. Shapiro Were Sued by the Plaintiffs, and Also Treated Mr. Reutter in Consultation with the Defendants, the Privilege Does Not Apply

By statute, the physician-patient privilege does not apply to a physician who is sued for his treatment, or to physicians and providers who were "in consultation" with that physician concerning the medical care at issue. § 13-90-107(1)(d)(I) and (II). Both Dr. Mantel and Dr. Shapiro were sued by Plaintiffs in this lawsuit, and both also treated Mr. Reutter "in consultation with" the present Defendants. Accordingly, Mr. Reutter cannot claim any privilege with respect to their care.

The reason for these complementary exemptions is logical: A physician who is sued because of his treatment must be free to discuss the patient's condition, the patient's communications, and all details of his or treatment of the patient, in order to defend the case and to assist defense counsel in preparing the case. It is equally important to the defense of the case that the physicians and nurses who advised, assisted and consulted with the defendant in the care of the plaintiff should also be able to speak candidly and without constraint about the course of care in which they participated. Commonly, such "consultants" include specialists who are called in to advise or to assist in diagnosis or treatment, such as radiologists, pathologists, anaesthesiologists, and critical care specialists, as well as the nursing staff who carry out physician orders and monitor the patient.[5]

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[5] These statutory exceptions are not "waiver" provisions; rather than effecting a waiver, the physician patient privilege "does not apply" to these situations in the first instance. However, these exceptions are consistent with common law principles of implied waiver: Once a plaintiff injects the issue of his medical condition–here, by suing physicians for negligent medical care, he is deemed to have waived the privilege, not only as to the doctors he calls as witnesses, but also as to *all physicians* the plaintiff has consulted concerning the medical conditions at issue. *Kelley v. Holmes,* 28 Colo. App. 79, 470 P.2d 590, 592 (1970).

1. After Suing Dr. Shapiro and Dr. Mantel, Plaintiffs Cannot Drop the Cloak of Privilege over Their Care

The physican-patient privilege does not apply to "a physician. . . who is sued by or on behalf of a patient. . . on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient." § 13-90-107(1)(d)(I).

Plaintiffs chose to sue Dr. Shapiro and Dr. Mantel[6] for their care of Mr. Reutter during the hospitalization of January 14-18, 2002. By the plain terms of § 13-90-107(1)(d)(I), the physician-patient privilege does not apply to their care of Mr. Reutter during that hospitalization.

Plaintiffs argue, without citing any authority, that the privilege has re-attached simply because they decided not to proceed with their claims against these doctors, and dropped them from the suit. However, nothing in the statute indicates that the privilege re-attaches when the plaintiff decides to abandon his claims against some, but not all, of the physicians involved in a patient's course of care.

Such a rule has absurd consequences, particularly in a multiple-defendant case such as this. Under Plaintiffs' argument, a plaintiff may manipulate the privilege,

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[6] Although the trial court's order only addresses Dr. Shapiro, Dr. Mantel was also sued in Plaintiffs' original complaint, *Exhibit A*. Accordingly, privilege is inapplicable to both physicians under the provisions of *both* §§ 13-90-107(1)(d)(I) (sued physician) and (II) (physician "in consultation with" the sued physician)

first by suing a physician and placing his care directly in issue, and then unilaterally restricting other defendants' access to that physician's information by dismissing or settling with the physician.

Plaintiffs are basically arguing that they may waive and un-waive[7] the privilege as it suits them. However, once a privilege as been waived, it generally may not be reasserted. *See People in the Interest of E.H.,* 837 P.2d 284, 292 (Colo. App. 1992). Manipulating privileges in this fashion offends the notion that privileges are not to be used as swords in litigation. *See CP Kelco v. Pharmacia Corp.,* 213 F.R.D. 176, 179 (D. Del. 2003)("A right that is waived is not available to be picked up again as if it were a handy tool."); *cf. Clark,* 668 P.2d at 10.

In any event, regardless of whether the "sued physician" exception of § 13-90-107(1)(d)(I)) applies to physicians, like Dr. Shapiro and Dr. Mantel, who have been sued and then dropped from the suit, principles of implied waiver nevertheless preclude Plaintiffs from arguing that their care of Mr. Reutter is once again privileged. As the trial court determined, by bringing this suit, Mr. Reutter has impliedly waived his privilege with respect to the medical care he received during the

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[7] Again, while the "sued physician" exception set forth in § 13-90-107(1)(d)(I) is not a waiver provision, it is at least analogous to a waiver in this context. There is no reason why the statutory exception to a privilege should be considered more manipulable than a waiver of privilege.

hospitalization at issue–care in which Dr. Shapiro and Dr. Mantel were intimately involved as participants and percipient witnesses. *Kelley,* 470 P.2d at 592 (Colo. App. 1970)(by placing his medical condition in issue, plaintiff waives privilege as to "all physicians consulted concerning these injuries.") Because Plaintiffs failed to identify any remaining areas that may still be privileged with respect to Dr. Shapiro and Dr. Mantel, the court properly ruled that Defendants' counsel may meet ex parte with these physicians, without Plaintiffs' counsel being present.

2. Because Dr. Mantel and Dr. Shapiro Were "In Consultation With" the Defendants, Their Care of Mr. Reutter is Not Subject to Privilege

Plaintiffs acknowledge that the physician patient privilege does not apply to a physican who was "in consultation with" a physician who is being sued by the patient. § 13-90-107(1)(d)(II), C.R.S. Plaintiffs attempt to avoid this exception with the argument that a physician who actually provides *care* to a patient is a "treating physician," and not "consulting physician. " According to Plaintiffs, a "consultant" only offers advice to the defendant physician, and has no interaction with the patient. As soon as the "consultant" examines, treats or even speaks to the patient, he is transformed into a "treating physician," as that term is used in *Samms*, requiring that Plaintiffs be provided notice and an opportunity to be present at any ex parte meeting with that physician. In short, Plaintiffs insist that "consulting physician" and

"treating physician" are mutually exclusive categories–a physician cannot treat the patient and also be "in consultation with" the defendant physician.

That is an absurd construction. In their effort to avoid the "consultation" exception, Plaintiffs twist the ordinary meaning of the statutory terms, and frankly distort the realities of medical practice.

a. Plaintiffs' Interpretation of "Consultants" as Limited to Non-treating Physicians Distorts the Language and Purpose of § 13-90-107(1)(d)(II), and Renders the "Consultant" Exception Virtually Meaningless

Plaintiffs' interpretation cannot be squared with basic principles of statutory construction. Testimonial privileges contravene "the fundamental principle that 'the public ... has a right to every man's evidence'" *Petro-Lewis Corp. v. District Court*, 727 P.2d 41, 43 (Colo. 1986)(citations omitted). The physician-patient privilege is in derogation of the common law, and must be strictly construed. *Belle Bonfils Memorial Blood Center v. District Court,* 763 P.2d 1003, 1009 (Colo. 1988).

In construing a statute, courts look first to the statutory language, and must give words and phrases their plain and ordinary meaning. *Smith v. Zufelt*, 880 P.2d 1178 , 1183 (Colo. 1994). A court may not interpret a law to mean what it does not express, and may not impose qualifications that the legislature did not make. *McNulty v. Kelly*, 141 Colo. 23, 346 P.2d 585, 590 (1959). A statute should be

interpreted in a manner that gives effect to all its provisions and policy objectives, and not in a way that renders any part inoperative or leads to an absurd result. *See, Copeland v. MBNA America Bank,* 907 P.2d 87, 90 (Colo. 1995).

There is nothing in the language of § 13-90-107(1)(d)(II) to support Plaintiffs' restrictive definition of "consultation." To come within the exemption of § 13-90-107(1)(d)(II), the physician need only be "in consultation with the defendant on the case out of which the suit arises." Nothing in the plain language of the statute suggests that the legislature intended to distinguish between consultants who examine or "treat" the patient and consultants who do not.

Indeed, Plaintiffs' definition is illogical. There is no need for a consultant exception if "consultant" is limited to physicians who neither see, speak to, examine, or treat the patient. The privilege is designed to protects "information acquired *in attending the patient* which was necessary to enable [the physician] to *prescribe or act for* the patient. . . ." § 13-90-107(1)(d). Because a consultant, by Plaintiffs' definition, cannot attend, prescribe for or act for the patient, the exception is utterly meaningless if confined as Plaintiffs suggest.

Plaintiffs' interpretation distorts the ordinary meaning of the term "consultation" in the medical context. In ordinary usage, a "consultant" is "one who consults another . . . ; one who gives professional advice *or services*: expert."

Webster's Ninth New Collegiate Dictionary (1984)(emphasis added). In medical usage, the terms "consultant" and "consultation" are equally broad and suggest nothing of the treating vs. non-treating distinction adopted by Plaintiffs. Stedman's Medical Dictionary, 27th Ed. (2000) defines "consultant" as "a physician or surgeon who does not take full responsibility for a patient, buts acts in an advisory capacity, deliberating with and counseling the attending physician or surgeon." A "consultation" is a "meeting of two or more physicians or surgeons to evaluate the nature and progress of disease in a particular patient and to establish diagnosis, prognosis, and/or therapy." *Id.* [8] Thus, a consultant evaluates, diagnoses, and participates in treatment decisions with the attending physician.

Although Colorado courts have not interpreted the term "consultant" or "consultation" in the context of the physician-patient privilege, these terms, as applied in other statutes and judicial decisions, encompass physicians who examine and treat a patient as well as those who merely provide sight-unseen advice. For example, in § 26-4-512(6)(b)(III), C.R.S. (2005), which prescribes criteria for Medicaid coverage of abortion in case of life-endangering psychiatric conditions, the

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[8] *See also* Dorland's Medical Dictionary, 29th Ed. (2000) (A consultation is "a deliberation by two or more physicians with respect to the diagnosis or treatment in any particular case." A consultant is "a physician called in for advice and counsel.")

term "consultation" contemplates examination and diagnosis of the patient: ". . . the attending licensed physician shall obtain consultation from a licensed physician specializing in psychiatry confirming the presence of such a psychiatric condition [and] . . . shall report the findings of such consultation to the state department.").

In case law, the terms "consultant" and "consultation" are likewise used to denote a relationship that includes treatment as well as advice. *See Cole v. Industrial Comm'n*, 144 Colo. 183, 355 P.2d 537, 538 (1960) ("Dr. R., the attending physician, Dr. S., a pathologist, and Dr. M., *the operating surgeon and consultant*, all testified and gave as their opinions that the condition of the portal vein which caused death was the result of the accident on July 11th."); *Cady v. Fraser*, 122 Colo. 252 , 222 P.2d 422 (1950)(". . . Dr. Barnard, a bone and joint surgeon. . . came and examined [plaintiff], in consultation with defendant [Dr. Fraser]. . . ."); *Gleason v. McKeehan,* 100 Colo. 194, 66 P.2d 808 (1937) (". . . [Dr. Gleason]*after examination by himself and also by Dr. Brown, upon consultation,* and recommendation to plaintiff and his wife, performed a Caesarean operation. . . .") (emphasis added).

Thus, depending on the scope and purpose of the consultation, the consulting physician may or may not also be a "treating" physician. Unlike the generic category of "treating physicians" addressed in *Samms*, however, the legislature has specifically

exempted consultants from the physician-patient privilege because of their close involvement with the defendant physician in the same course of care that is the basis for the malpractice suit.

The consultant exemption rightly permits both the plaintiff and the defendant to have equal and unrestricted access to the consultant's information relating to the defendant's course of care of the plaintiff–including any advice or assistance provided by other physicians who have not been sued themselves. To distinguish "treating" and "non-treating" consultants for purposes of applying the exemption is an artificial distinction that leads to absurd results by excluding the most common "consultant" relationships, including critical care specialists, radiologists, assistant surgeons, anaesthesiologists and nurses, all of whom routinely provide examinations or treatment to the patient at the defendant physician's request, and are plainly "in consultation with" the defendant. By limiting the consultant exemption to purely "curbside consults"–a tiny minority of medical consultations–Plaintiffs' interpretation makes § 13-90-107(1)(d)(II) virtually inoperative.

b. The "Residual Privilege" Concern Addressed in *Samms* Has No Application to Dr. Mantel's and Dr. Shapiro's Consultation with the Defendants

Samms did not address the "consultant" exception. Because the principal concern addressed in *Samms* was the protection of unwaived areas of privilege, the

"treating physicians" in that case apparently included approximately 20 physicians who had treated the plaintiff for other conditions that may have been unrelated to the litigation. The Court was not asked to consider any distinction between statutory "consultants" and generic "treating physicians," and certainly did not suggest, anywhere in the opinion, that the two categories are mutually exclusive.

As the statute expressly states, the physician-patient privilege does not apply to medical providers who were "in consultation with" the physician who is sued for malpractice, "on the case out of which the suit arises." § 13-90-107(1)(d)(II). Here, that "case" is the treatment of Mr. Reutter for his complaints of chest pain, his cardiac catheterization, and the conditions that arose during his hospitalization. Dr. Mantel and Dr. Shapiro were actual participants in this course of care, who shared their evaluations, interventions and recommendations with the Defendants orally or in writing through their notes and reports placed in Mr. Reutter's hospital chart. Plaintiffs failed to show that either of these physicians possessed privileged information that was unrelated to their consultation on this case.

The extra degree of control given to plaintiffs under *Samms* with respect to discovery from "treating physicians"– who may have treated the patient for unrelated conditions– is not warranted for consultants, who by definition consulted "in the case

from which the suit arises." By the express terms of the statute, no privilege applies and there is no basis for applying *Samms* so as to require defense counsel to share their private interviews of these consultants with Plaintiffs and their attorneys.

E. There is No Privilege Precluding Communication with Therapists and Non-Registered Nurses

Section 13-90-107(1)(d) only precludes testimonial disclosures by a "physician, surgeon, or registered professional nurse."[9] A "registered professional nurse" is a professional nurse who holds a license to practice nursing pursuant to § 12-38-101 *et seq.*, C.R.S. (2005) using the "R.N." designation. § 12–38-103(11), C.R.S. A registered professional nurse is distinguished from a licensed practical nurse (L.P.N.), a graduate nurse, and a nurse's aide. *Cf.* §§ 12-38-103(6), (8); 12-38.1-102(5), C.R.S. (2005).

By its terms, § 13-90-107(1)(d)–which must be strictly construed–does not create any testimonial privilege for information acquired by non-R.N. nurses, therapists, or other ancillary health care providers not mentioned in the statute. Therefore, while the trial court ruled that Mr. Reutter had impliedly waived any

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[9] § 13-90-107(1)(g), C.R.S. (2005), also extends privilege to certain mental health professionals, including licensed psychologists, marriage and family therapists, social workers and unlicensed psychotherapists. That section is not relevant to the providers who cared for Mr. Reutter in this case.

privilege with respect to the nurses and therapists who provided care during his hospitalization, in fact, no statutory privilege exists for providers who are neither physicians nor registered nurses. *See Belle Bonfils v. District Court,* 763 P.2d at 1009 (privilege does not apply to medical technicians); *Block v. People,* 125 Colo. 36, 240 P.2d 512, 514 (1951), *cert. denied,* 343 U.S. 978 (1952)(same). [10]

F. HIPAA Regulations Do Not Prohibit Ex Parte Meetings

Plaintiffs argue that HIPAA does not authorize ex parte meetings, and that the that the *only* disclosures a court may order without patient consent are those disclosures that are "required by law," 45 C.F.R. § 164.512(a), and which meet requirements for prior notice and/or a qualified protective order, 45 CFR § 164.512(e). Plaintiffs then argue that, because ex parte meetings are not "required by" Colorado or federal law, a court may not authorize such meetings without notice to, and agreement by, the patient.

Plaintiffs have confused the provisions of HIPAA on several levels.

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[10] In *People v. Covington,* 19 P.3d 15, 22 (Colo. 2001), the Court held that the physician-patient privilege extended to a physician's assistant. In so ruling, the Court stated that the statute applied to "a physician, surgeon, or registered professional. . . .", and therefore covered a physician's assistant, who is a "certified medical professional" under § 12-36-106.5, C.R.S. However, the statute refers to a "registered professional *nurse,*" and not merely to a "registered professional."

1. The Trial Court's Order Permitting Ex Parte Interviews with Dr. Mantel, Dr. Shapiro, the Nurses and Therapists Meets HIPAA's Requirements for Disclosure in a Judicial Proceeding

The trial court ruled that federal HIPAA regulations did not preclude the ex parte interviews sought by Defendants, because Mr. Reutter, by virtue of his allegations in this legal proceeding, consented to the release of health information from the medical providers who saw him for his alleged injuries. In so ruling, the court properly applied both HIPAA regulations and Colorado law.

a. HIPAA Allows Disclosure in Judicial Proceedings, Pursuant to Court Order or Discovery Request

As pertinent here, HIPAA establishes various standards for the use and disclosure of private health information. For some uses and disclosures, the patient's authorization is required, 45 CFR § 164.508; other uses require that the individual be given an opportunity to agree or object to the use, § 164.510; still other uses require neither authorization by the patient, nor an opportunity for the patient to agree or object, § 164.512. This last category includes disclosures in "judicial proceedings," § 164.512(e), and disclosures "required by law,"§ 164.512(a). [11]

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[11] Section 164.512 provides that "a covered entity may use or disclose protected health information without the written authorization of the individual. . . or the opportunity for the individual to agree or object. . . , in the situations covered by this section, subject to the applicable requirements of this section." The section goes on to set forth numerous "standards" for permitted disclosures,

HIPAA expressly permits disclosure of health information, orally or in writing, in response to a court order or discovery demand in a judicial proceeding. 45 CFR § 164.512(e). This includes lawsuits in which the patient has impliedly waived his privilege by placing his medical condition in issue. *See Hawes v. Golden,* 2004 Ohio App. LEXIS 4520 at 7 (Ohio App. 9th Dist. 2004) (where patient impliedly waives privilege by filing wrongful death action, disclosure of medical information is permitted under HIPAA "judicial proceedings" provision)(attached, *Exhibit E*); *Holzle v. Healthcare Services Group, Inc.,* 801 N.Y.S. 2d 234, 2005 N.Y. Misc. LEXIS 1031 (Sup. Ct., Niagara Cty. 2005)(by bringing personal injury action raising physical condition, party waives any rights or remedies under HIPAA as to that condition)(*Exhibit F*).

The HIPAA standard for disclosures in judicial proceedings, 45 CFR § 164.512(e), provides that "a covered entity may disclose protected health information in the course of any judicial or administrative proceeding," either in response to a court order, or in response to a subpoena or other discovery request, without a court order. § 164.512(e)(1)(ii). In response to a court order, the entity may disclose "only

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including, for example, disclosures "required by law," disclosures in judicial proceedings, disclosures for public health activities, disclosures for research purposes, and disclosures for law enforcement purposes.

the protected health information expressly authorized by such order." § 164.512(e)(1)(i). In response to a subpoena or discovery request without a court order, the entity may disclose information if the entity obtains satisfactory assurance that *either*: (1) reasonable efforts have been made to provide notice to the patient, and any objections have either been waived or "resolved by the court or administrative tribunal;" *or* (2) that the requesting party has made reasonable efforts to obtain a "qualified protective order," which restricts use of information to the judicial proceeding. § 164.512 (e)(1)(ii)(A), (B) and (iii).[12]

In arguing that a court may only order disclosure of health information if such disclosure is otherwise "required by law," Plaintiffs fail to recognize that "disclosures required by law" and "disclosures in judicial proceedings" are *separate* categories of permitted disclosures under 45 CFR § 164.512. A disclosure of protected health information may be authorized under either provision, or both.

The HIPAA standard for disclosures "required by law" provides that "a covered entity may use or disclose protected health information to the extent that such

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[12] The "satisfactory assurance" requirements of notice, or efforts to obtain a qualified protective order, are alternative requirements. Information may be disclosed pursuant to a discovery request if *either* provision is satisfied. *Croskey v. BMW,* 2005 U.S. Dist. LEXIS 3673 at 31 (E.D. Mich. 2005).

use or disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law." § 164.512(a)(1).

As defined in the HIPAA regulations, disclosures "required by law" include disclosures authorized by to court orders, subpoenas, or civil investigative/discovery demands:

> *Required by law* means a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law. *Required by law* includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court. . . ; a civil or an authorized investigative demand; . . . and statutes or regulations that require the production of information. . . .

45 CFR § 164.501. Thus, a disclosure of information pursuant to a court order or civil discovery request under § 164.512(e) *is* a disclosure "required by law" under § 164.512(a). Contrary to Plaintiffs' argument, there does not need to be an independent legal requirement mandating disclosure (in this case, mandating ex parte interviews) when the disclosure is pursuant to court order or discovery demand.

b. The Requirements of HIPAA Have Been Met

The trial court's order permitting the ex parte interviews more than satisfies all pertinent requirements of the HIPAA "judicial proceedings" standard.

First, HIPAA expressly permits disclosure pursuant to a "court order." 45 CFR § 164.512(e)(1)(i). Defendants satisfied this HIPAA standard by obtaining the trial court's order authorizing the ex parte interviews.

Second, Defendants went even further, and also met the additional conditions required for a discovery disclosure *without* a court order. 45 CFR 164.512(e)(1)(ii). Although notice to the patient is not required when disclosure is pursuant to a court order, Defendants notified Plaintiffs' counsel in advance of their intent to meet with Dr. Mantel, Dr. Shapiro, the nurses and the therapists. See 45 CFR § 164.512(e)(1)(ii)(A)(notice to the individual who is the subject of the protected health information). When Plaintiffs objected, Defendants filed a motion seeking the trial court's determination of the issues.

Plaintiffs were given full opportunity to object and to demonstrate any privilege that may remain with respect to these providers. *See* 45 CFR § 164.512(e)(1)(ii)(B)(opportunity to object). The trial court resolved the objections, ruling that no privilege existed with respect to these providers, and issued an order authorizing ex parte interviews concerning the providers' care of Mr. Reutter during his hospitalization. *See* 45 CFR § 164.512(e)(1)(ii)(C)(2) ("all objections filed by the

individual have been resolved by the court. . . and the disclosures being sought are consistent with such resolution.")

2. HIPAA Does Not Preclude Ex Parte Interviews, Nor Impose More Stringent Requirements than *Samms* and §13-90-107(1)(d)

HIPAA preempts state law in certain areas, superceding any "contrary provision" of state law. 42 U.S.C. § 1320d-7; 45 CFR § 160.203. A provision is "contrary" when compliance with both the state and federal requirements is impossible, or when the state provision stands as an obstacle to accomplishment of the purposes of the HIPAA Privacy Rule. 45 CFR § 160.202.

Here, there is no conflict between HIPAA regulations and Colorado law under *Samms* and § 13-90-107(1)(d). HIPAA permits disclosure pursuant to a court order or, after notice and opportunity to object, pursuant to a discovery request in a judicial proceeding, 45 CFR § 164.512(e).

Colorado law, likewise, permits disclosure of privileged information in judicial proceedings. Colorado permits disclosure of information by a sued physician and his consultants, C.R.S. § 13-90-107(1)(d)(I) and (II)), and more generally, pursuant to the patient's implied waiver of privilege when he places his medical condition in issue as the basis for his claim for relief. *See Samms,* 908 P.2d at 524; *see also Hawes v. Golden,* 2004 Ohio App. LEXIS 4520 at 7(where patient impliedly waives

privilege under state law by filing wrongful death action, disclosure is permitted under HIPAA "judicial proceedings" provision; there is no conflict between HIPAA and state law).

In comments accompanied issuance of the final HIPAA regulations, the drafters made it clear that the "judicial proceedings" provision was not intended to limit discovery in cases where the patient placed his medical condition at issue:

> The provisions in [paragraph 164.512(e)] are not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.

65 Fed. Reg. 82530 (December 20, 2000).

Like HIPAA, Colorado law amply provides for notice to the patient and an opportunity to object on grounds of privilege, as set forth in C.R.C.P. 26(b)(5) and the notice procedures discussed in *Samms*. The requirements of HIPAA and Colorado law are not contrary or inconsistent. *See In re Diet Drug Litigation*, 2005 N.J. Super. LEXIS 395 (N.J. Super. 2005) (holding that ex parte interviews of treating physicians are not contrary to HIPAA) (attached, *Exhibit G*).[13]

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[13] In New Jersey, ex parte interviews are authorized pursuant to *Stempler v. Speidell,* 100 N.J. 368, 495 A.2d 857, 863 (1985), which this Court cited in *Samms*

HIPAA does not preclude acquisition of information by means of ex parte interviews. While HIPAA does not address *how* permitted disclosures may occur, HIPAA expressly applies to oral as well as written disclosures of health information.[14] Thus, as long as a disclosure is otherwise permitted, there is nothing in HIPAA precluding oral disclosure in an ex parte interview. *See* 45 CFR 164.512, 45 CFR 160.103.

Plaintiffs argue that "emerging HIPAA case law does not permit" informal discovery or ex parte interviews. *Petition, p. 19, n. 10.* That is not correct. It is

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as the basis for the requirement of notice and opportunity for the patient's attorney to attend or seek appropriate protective orders. 908 P.2d at 528. As in *Samms*, *Stempler* requires that the plaintiff's attorney be given notice of the interview. The plaintiff's attorney does not have a right to attend, but may move for protective order if he or she believes that the interview will be unduly prejudicial, and if warranted, the court may order that the plaintiff's attorney be allowed to attend. 495 A.2d at 864-65. In addition, and unlike *Samms,* the *Stempler* court recognized that physicians are unlikely to give interviews without the patient's written authorization, and therefore held that the plaintiff shall provide authorization for the interview, which may be compelled if the plaintiff refuses. *Id.* at 864. The *Diet Drug* court held that HIPAA preempted New Jersey's *Stempler* procedures *only* with respect to the *content* of the written authorization; therefore, the plaintiff must provide a HIPAA-compliant authorization form for such interviews. 2005 N.J. Super. LEXIS at *18. As *Samms* does not require written authorization for the ex parte interview, and HIPAA does not require the patient's authorization for a disclosure in judicial proceedings, 45 CFR § 164.512(e), there is no conflict between HIPAA and Colorado law.

[14] 45 CFR § 160.103 ("health information means any information, whether oral or recorded in any form or medium. . .")

true that the cases interpreting HIPAA thus far have been quite divergent (and mostly unpublished), with different courts reaching dramatically different results depending upon the facts of the case as well as the peculiarities of individual states' discovery procedures. However, even cases cited by Plaintiffs hold that ex parte interviews are permissible under HIPAA when, as here, they are authorized by court order, or when sought pursuant to a discovery request accompanied by reasonable assurance of notice to the patient or a protective order. *See Croskey v. BMW of North America, Inc.,* at 30-32 (E.D. Mich. 2005)(ex parte interviews permitted if the defendant complies with 164.512(e), either by obtaining a court order, or by making a discovery request accompanied by satisfactory assurance of either notice to the plaintiff, or efforts to obtain a qualified protective order); *Bayne v. Provost,* 359 F.Supp.2d 234, 242 (N.D. N.Y. 2005)(ex parte interviews permissible if the defendants complied with the notice/objection or protective order requirements of § 164.512(e)(1)(ii).[15]

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[15] The *Bayne* court observed that an ex parte interview of the nurse would be particularly important to the defendants, as the nurse was not only a health care provider, but was a "critical witness" who participated in the events giving rise to the plaintiff's suit: "To shield [the nurse] from a proper ex parte interview by the Defendants, by virtue of standing on the strict interpretation of HIPAA as precluding such types of interview, would be tantamount to denying the Defendant of their right to the effective assistance of counsel." 359 F.Supp. 2d at 242.

Under Colorado law, ex parte interviews are expressly permitted by *Samms*, as long as the patient is provided notice and an opportunity to object and to protect any areas of unwaived privilege–just as envisioned by 45 CFR 164.512(e)(1)(ii.) There is no conflict in the state and federal requirements, nor any impossibility of complying with both. *See In re Diet Drug Litigation,* at *18.

Even if HIPAA is considered more restrictive than Colorado law, Defendants have demonstrated that its provisions have been fully met here. Defendants have obtained a court order. In addition, although not required for a disclosure pursuant to court order, Plaintiffs received notice of the request for interviews, and the opportunity to object to the disclosure. Plaintiffs' objections were thoroughly considered and resolved by the trial court, § 164.512(e)(1)(ii). Nothing more is required, either by HIPAA regulations or Colorado law.

V. CONCLUSION

For the reasons set forth herein, Defendants Matthew Sumpter, M.D. and Pueblo Cardiology Associates, P.C. respectfully request that this Court discharge the Rule to Show Cause, and lift the stay of proceedings in the trial court.

Dated this 17th day of May, 2006.

Respectfully submitted,
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ATTORNEYS FOR MATTHEW SUMPTER, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of May, 2006, a true and correct copy of the foregoing **RESPONDENTS MATTHEW SUMPTER, M.D.'S AND PUEBLO CARDIOLOGY ASSOCIATES, P.C'S RESPONSE TO ORDER TO SHOW CAUSE** was served via U.S. Mail on the following:

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Tim Buxton, Esq.
Benjamin Sachs, Esq.
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950 South Cherry Street, Suite 600
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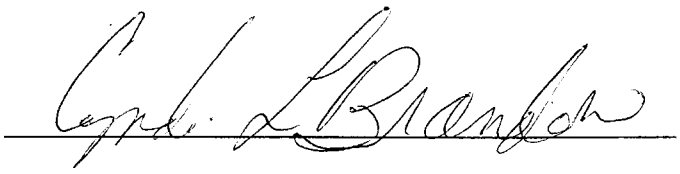
Honorable David A. Cole
Pueblo County Judicial Building
10th Judicial Circuit
320 W. 10th Street
Pueblo, CO 81003



SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver Colorado 80203 DISTRICT COURT, COUNTY OF PUEBLO, STATE OF COLORADO Case No. 1004CV53, Div. E Honorable David A. Cole	
In re: Petitioners-Plaintiffs: DUANE REUTTER and PATTY REUTTER Respondents-Defendants: KEVIN WEBER, M.D., MATTHEW SUMPTER, M.D., and PUEBLO CARDIOLOGY ASSOCIATES, P.C and The Pueblo County District Court	▲ COURT USE ONLY ▲
Attorneys for Respondents Pueblo Cardiology Associates, P.C. Elizabeth C. Moran, No. 16119 Aaron P. Bradford, No. 31115 Pryor Johnson Carney Karr Nixon, P.C. 5619 DTC Parkway, Suite 1200 Greenwood Village, CO 80111 (303) 773-3500 (303) 779-0740 (fax) Attorneys for Respondent Matthew Sumpter, M.D.: Steven J. Hensen, No. 16893 Tiemeier and Hensen, P.C. 1515 Arapahoe Street, Tower I, Suite 1300 Denver CO 80202 (303) 572-1515 (303) 623-1734 (fax)	Case No.: 06SA79

EXHIBITS TO:
RESPONDENTS MATTHEW SUMPTER, M.D.'S AND PUEBLO CARDIOLOGY ASSOCIATES, P.C'S RESPONSE TO ORDER TO SHOW CAUSE

INDEX

DISTRICT COURT, COUNTY OF PUEBLO, COLORADO 10th Judicial District Pueblo County Judicial Building 320 W. 10th Street Pueblo, Colorado 81003	
Plaintiff: DUANE REUTTER and PATTY REUTTER **Defendants:** KEVIN WEBER, M.D., MATTHEW SUMPTER, M.D., CRAIG SHAPIRO, M.D., GEORGE GIBSON, M.D., SCOTT MANTELL, M.D., CATHOLIC HEALTH INITIATIVES COLORADO d/b/a ST. MARY-CORWIN MEDICAL CENTER, and PUEBLO CARDIOLOGY ASSOCIATES, P.C.	**? COURT USE ONLY ?**
Attorney or Party Without Attorney: Jim Leventhal, #5815 Timothy G. Buxton, #25346 Leventhal, Brown & Puga, P.C. 950 S. Cherry Street, Suite 600 Denver, Colorado 80246 Phone Number: (303) 759-9945 FAX Number: (303) 759-9692 E-mail: jim@leventhal-law.com E-mail: tbuxton@leventhal-law.com	Case Number: Div:

COMPLAINT FOR DAMAGES AND JURY DEMAND

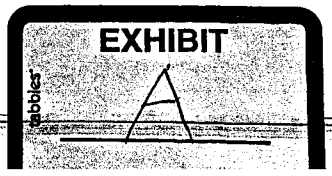
Plaintiffs, DUANE REUTTER and PATTY REUTTER, by and through their attorneys, LEVENTHAL, BROWN & PUGA, P.C., submit the following Complaint for Damages and Jury Demand and allege the following:

GENERAL ALLEGATIONS

1. At all times relevant hereto, the plaintiffs, Duane Reutter and Patty Reutter were husband and wife and were residents of the City of Pueblo, Pueblo County, State of Colorado.

2. At all times relevant hereto, the defendant, Kevin Weber, M.D., was a physician licensed to practice medicine in the State of Colorado.

3. At all times relevant hereto, the defendant, Matthew Sumpter, M.D., was a physician licensed to practice medicine in the State of Colorado.



4. At all times relevant hereto, the defendant, Craig Shapiro, M.D., was a physician licensed to practice medicine in the State of Colorado.

5. At all times relevant hereto, the defendant, George Gibson, M.D., was a physician licensed to practice medicine in the State of Colorado.

6. At all times relevant hereto, the defendant, Scott Mantell, M.D., was a physician licensed to practice medicine in the State of Colorado.

7. At all times relevant hereto, the defendant, Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, (hereinafter "St. Mary-Corwin") was a Colorado corporation, licensed to and doing business in Colorado as a hospital.

8. At all times relevant hereto, the defendant, Pueblo Cardiology Associates, P.C. was a Colorado professional corporation, licensed to and doing business in Colorado, with its principal place of business in Pueblo County, Colorado.

9. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the care and treatment of Defendants Kevin Weber, M.D., Matthew Sumpter, M.D., Craig Shapiro, M.D. and St. Mary-Corwin, when he went to St. Mary-Corwin's emergency department with complaints of chest pain, shortness of breath, dizziness and sweating. Defendants provided care and treatment to Plaintiff at St. Mary-Corwin.

10. On or about January 14, 2002, Plaintiff sustained a hypoxic injury to his brain while a patient of Defendants at St. Mary-Corwin.

FIRST CLAIM FOR RELIEF
(Medical Negligence – Kevin Weber, M.D.)

11. Plaintiffs incorporate paragraphs 1 through 10 herein by reference.

12. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the care and treatment of Defendant Kevin Weber, M.D., for complaints of chest pain, shortness of breath, dizziness and sweating.

13. With respect to his care and treatment of Plaintiff Duane Reutter, the defendant, Kevin Weber, M.D., owed a duty to exercise that degree of care, skill, caution, diligence and foresight exercised by and expected of physicians in similar situations.

14. Defendant Kevin Weber, M.D., deviated from that standard and was negligent in his care and treatment of Plaintiff Duane Reutter, including, but not limited to, the following:

a. Failing to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b. Failing to properly and timely consult with or refer to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c. Failing to obtain appropriate medical testing in order to properly care for and treat Duane Reutter on or about January 14, 2002;

d. Failing to provide appropriate medication in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e. Failing to maintain appropriate oxygenation of Duane Reutter on or about January 14, 2002;

f. Failing to appropriately interpret diagnostic testing performed on Duane Reutter on or about January 14, 2002.

15. As a direct and proximate result of the negligence of the defendant, Kevin Weber, M.D., Plaintiff Duane Reutter suffered injuries, damages and losses including, but not limited to permanent brain injury and dysfunction, impairment of motor and speech, physical impairment, physical disfigurement, emotional distress, mental anguish and physical suffering. His injuries have been and will continue to be disabling and humiliating. The injuries he has suffered are permanent. Plaintiff Duane Reutter has been forced to undergo additional medical procedures. Plaintiff has incurred expenses in the past and will incur expenses in the future for medicines, prescriptions, hospital care, x-rays, doctors' fees, medical procedures, rehabilitation, long-term care, home healthcare costs, special housing costs and other expenses. Plaintiff Duane Reutter has suffered loss of income, damages related to the loss of home services, and will in the future incur future losses and expenses. Plaintiff Duane Reutter has also suffered a loss of earning capacity and a loss of his ability to enjoy a full and useful life. Therefore, Plaintiff Duane Reutter has suffered damages in an amount to be determined by the trier of fact.

SECOND CLAIM FOR RELIEF
(Medical Negligence – Matthew Sumpter, M.D.)

16. Plaintiffs incorporate paragraphs 1 through 15 herein by reference.

17. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the

care and treatment of Defendant Matthew Sumpter, M.D., for complaints of chest pain, shortness of breath, dizziness and sweating.

18. With respect to his care and treatment of Plaintiff Duane Reutter, the defendant, Matthew Sumpter, M.D., owed a duty to exercise that degree of care, skill, caution, diligence and foresight exercised by and expected of physicians in similar situations.

19. Defendant Matthew Sumpter, M.D., deviated from that standard and was negligent in his care and treatment of Plaintiff Duane Reutter, including, but not limited to, the following:

a. Failing to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b. Failing to properly and timely consult with or refer to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c. Failing to obtain appropriate medical testing in order to properly care for and treat Duane Reutter on or about January 14, 2002;

d. Failing to provide appropriate medication in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e. Failing to maintain appropriate oxygenation of Duane Reutter on or about January 14, 2002;

f. Failing to appropriately interpret diagnostic testing performed on Duane Reutter on or about January 14, 2002.

20. As a direct and proximate result of the negligence of the defendant, Matthew Sumpter, M.D., Plaintiff Duane Reutter suffered injuries, damages and losses including, but not limited to permanent brain injury and dysfunction, impairment of motor and speech, physical impairment, physical disfigurement, emotional distress, mental anguish and physical suffering. His injuries have been and will continue to be disabling and humiliating. The injuries he has suffered are permanent. Plaintiff Duane Reutter has been forced to undergo additional medical procedures. Plaintiff has incurred expenses in the past and will incur expenses in the future for medicines, prescriptions, hospital care, x-rays, doctors' fees, medical procedures, rehabilitation, long-term care, home healthcare costs, special housing costs and other expenses. Plaintiff Duane Reutter has suffered loss of income, damages related to the loss of home services, and will in the future incur future losses and expenses. Plaintiff Duane Reutter has also suffered a loss of earning capacity and a loss of his ability to enjoy a full and useful life. Therefore, Plaintiff Duane Reutter

has suffered damages in an amount to be determined by the trier of fact.

THIRD CLAIM FOR RELIEF
(Medical Negligence – Craig Shapiro, M.D.)

21. Plaintiffs incorporate paragraphs 1 through 20 herein by reference.

22. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the care and treatment of Defendant Craig Shapiro, M.D., for complaints of chest pain, shortness of breath, dizziness and sweating.

23. With respect to his care and treatment of Plaintiff Duane Reutter, the defendant, Craig Shapiro, M.D., owed a duty to exercise that degree of care, skill, caution, diligence and foresight exercised by and expected of physicians in similar situations.

24. Defendant Craig Shapiro, M.D., deviated from that standard and was negligent in his care and treatment of Plaintiff Duane Reutter, including, but not limited to, the following:

a. Failing to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b. Failing to properly and timely consult with or refer to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c. Failing to obtain appropriate medical testing in order to properly care for and treat Duane Reutter on or about January 14, 2002;

d. Failing to provide appropriate medication in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e. Failing to maintain appropriate oxygenation of Duane Reutter on or about January 14, 2002;

f. Failing to appropriately interpret diagnostic testing performed on Duane Reutter on or about January 14, 2002.

25. As a direct and proximate result of the negligence of the defendant, Craig Shapiro, M.D., Plaintiff Duane Reutter suffered injuries, damages and losses including, but not limited to permanent brain injury and dysfunction, impairment of motor and speech, physical impairment,

physical disfigurement, emotional distress, mental anguish and physical suffering. His injuries have been and will continue to be disabling and humiliating. The injuries he has suffered are permanent. Plaintiff Duane Reutter has been forced to undergo additional medical procedures. Plaintiff has incurred expenses in the past and will incur expenses in the future for medicines, prescriptions, hospital care, x-rays, doctors' fees, medical procedures, rehabilitation, long-term care, home healthcare costs, special housing costs and other expenses. Plaintiff Duane Reutter has suffered loss of income, damages related to the loss of home services, and will in the future incur future losses and expenses. Plaintiff Duane Reutter has also suffered a loss of earning capacity and a loss of his ability to enjoy a full and useful life. Therefore, Plaintiff Duane Reutter has suffered damages in an amount to be determined by the trier of fact.

FOURTH CLAIM FOR RELIEF
(Medical Negligence – George Gibson, M.D.)

26. Plaintiffs incorporate paragraphs 1 through 25 herein by reference.

27. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the care and treatment of Defendant George Gibson, M.D., for complaints of chest pain, shortness of breath, dizziness and sweating.

28. With respect to his care and treatment of Plaintiff Duane Reutter, the defendant, George Gibson, M.D., owed a duty to exercise that degree of care, skill, caution, diligence and foresight exercised by and expected of physicians in similar situations.

29. Defendant George Gibson, M.D., deviated from that standard and was negligent in his care and treatment of Plaintiff Duane Reutter, including, but not limited to, the following:

a. Failing to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b. Failing to properly and timely consult with or refer to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c. Failing to obtain appropriate medical testing in order to properly care for and treat Duane Reutter on or about January 14, 2002;

d. Failing to provide appropriate medication in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e. Failing to maintain appropriate oxygenation of Duane Reutter on or about January

14, 2002;

f. Failing to appropriately interpret diagnostic testing performed on Duane Reutter on or about January 14, 2002.

30. As a direct and proximate result of the negligence of the defendant, George Gibson, M.D., Plaintiff Duane Reutter suffered injuries, damages and losses including, but not limited to permanent brain injury and dysfunction, impairment of motor and speech, physical impairment, physical disfigurement, emotional distress, mental anguish and physical suffering. His injuries have been and will continue to be disabling and humiliating. The injuries he has suffered are permanent. Plaintiff Duane Reutter has been forced to undergo additional medical procedures. Plaintiff has incurred expenses in the past and will incur expenses in the future for medicines, prescriptions, hospital care, x-rays, doctors' fees, medical procedures, rehabilitation, long-term care, home healthcare costs, special housing costs and other expenses. Plaintiff Duane Reutter has suffered loss of income, damages related to the loss of home services, and will in the future incur future losses and expenses. Plaintiff Duane Reutter has also suffered a loss of earning capacity and a loss of his ability to enjoy a full and useful life. Therefore, Plaintiff Duane Reutter has suffered damages in an amount to be determined by the trier of fact.

FIFTH CLAIM FOR RELIEF
(Medical Negligence – Scott Mantell, M.D.)

31. Plaintiffs incorporate paragraphs 1 through 30 herein by reference.

32. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the care and treatment of Defendant Scott Mantell, M.D., for complaints of chest pain, shortness of breath, dizziness and sweating.

33. With respect to his care and treatment of Plaintiff Duane Reutter, the defendant, Scott Mantell, M.D., owed a duty to exercise that degree of care, skill, caution, diligence and foresight exercised by and expected of physicians in similar situations.

34. Defendant Scott Mantell, M.D., deviated from that standard and was negligent in his care and treatment of Plaintiff Duane Reutter, including, but not limited to, the following:

a. Failing to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b. Failing to properly and timely consult with or refer to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c. Failing to obtain appropriate medical testing in order to properly care for and treat Duane Reutter on or about January 14, 2002;

d. Failing to provide appropriate medication in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e. Failing to maintain appropriate oxygenation of Duane Reutter on or about January 14, 2002;

f. Failing to appropriately interpret diagnostic testing performed on Duane Reutter on or about January 14, 2002.

35. As a direct and proximate result of the negligence of the defendant, Scott Mantell, M.D., Plaintiff Duane Reutter suffered injuries, damages and losses including, but not limited to permanent brain injury and dysfunction, impairment of motor and speech, physical impairment, physical disfigurement, emotional distress, mental anguish and physical suffering. His injuries have been and will continue to be disabling and humiliating. The injuries he has suffered are permanent. Plaintiff Duane Reutter has been forced to undergo additional medical procedures. Plaintiff has incurred expenses in the past and will incur expenses in the future for medicines, prescriptions, hospital care, x-rays, doctors' fees, medical procedures, rehabilitation, long-term care, home healthcare costs, special housing costs and other expenses. Plaintiff Duane Reutter has suffered loss of income, damages related to the loss of home services, and will in the future incur future losses and expenses. Plaintiff Duane Reutter has also suffered a loss of earning capacity and a loss of his ability to enjoy a full and useful life. Therefore, Plaintiff Duane Reutter has suffered damages in an amount to be determined by the trier of fact.

SIXTH CLAIM FOR RELIEF
(Respondeat Superior -- Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center)

36. Plaintiffs incorporate paragraphs 1 through 34 herein by reference.

37. At all times relevant hereto, Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, was a Colorado corporation, licensed to and doing business in Colorado as a hospital.

38. At all times relevant hereto, Kevin Weber, M.D., Matthew Sumpter, M.D., Craig Shapiro, M.D., George Gibson, M.D., Scott Mantell, M.D. and nurses were officers, directors, agents, shareholders, employees and/or partners of Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, acting within their course and scope of employment.

39. Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center is responsible for the acts and omissions of its agents, employees, officers, directors, shareholders and/or partners including, but not limited to, Defendants Kevin Weber, M.D., Matthew Sumpter, M.D., Craig Shapiro, M.D., George Gibson, M.D., and Scott Mantell, M.D., and the nurses of Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center.

40. As a direct and proximate result of the negligence of Kevin Weber, M.D., Matthew Sumpter, M.D., Craig Shapiro, M.D., George Gibson, M.D., Scott Mantell, M.D., and the nurses, agents, employees, officers, directors, shareholders and/or partners of Defendant Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, Plaintiff Duane Reutter suffered injuries, damages and losses as more fully described above.

SEVENTH CLAIM FOR RELIEF
(**Medical Negligence** – Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center)

41. Plaintiffs incorporate paragraphs 1 through 40 herein by reference.

42. On or about January 14, 2002, Plaintiff Duane Reutter placed himself under the care and treatment of Defendant Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center's emergency medicine department and nurses for complaints of chest pain, shortness of breath, dizziness and sweating.

43. With respect to its care and treatment of Plaintiff Duane Reutter, the defendant, Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, owed a duty to exercise that degree of care, skill, caution, diligence and foresight exercised by and expected of hospital emergency medicine departments in similar situations.

44. Defendant Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center deviated from that standard and was negligent in its care and treatment of Plaintiff Duane Reutter, including, but not limited to, the following:

a. Failing to provide appropriate emergency medical and nursing services to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b. Failing to provide appropriate emergency medical and nursing services to ensure proper and timely consultation with or referal to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c. Failing to provide appropriate emergency medical and nursing services to ensure proper medical testing was performed in order to properly care for and ttreat Duane Reutter on or about January 14, 2002;

d. Failing to provide appropriate emergency medical and nursing services to ensure proper medication was provided in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e. Failing to provide appropriate emergency medical and nursing services to ensure that appropriate oxygenation of Duane Reutter was maintained on or about January 14, 2002;

f. Failing to provide appropriate emergency medical and nursing services to ensure that diagnostic testing performed on Duane Reutter on or about January 14, 2002 was properly interpreted.

45. As a direct and proximate result of the negligence of the defendant, Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, Plaintiff Duane Reutter suffered injuries, damages and losses including, but not limited to permanent brain injury and dysfunction, impairment of motor and speech, physical impairment, physical disfigurement, emotional distress, mental anguish and physical suffering. His injuries have been and will continue to be disabling and humiliating. The injuries he has suffered are permanent. Plaintiff Duane Reutter has been forced to undergo additional medical procedures. Plaintiff has incurred expenses in the past and will incur expenses in the future for medicines, prescriptions, hospital care, x-rays, doctors' fees, medical procedures, rehabilitation, long-term care, home healthcare costs, special housing costs and other expenses. Plaintiff Duane Reutter has suffered loss of income, damages related to the loss of home services, and will in the future incur future losses and expenses. Plaintiff Duane Reutter has also suffered a loss of earning capacity and a loss of his ability to enjoy a full and useful life. Therefore, Plaintiff Duane Reutter has suffered damages in an amount to be determined by the trier of fact.

EIGHTH CLAIM FOR RELIEF
(Respondeat Superior -- Pueblo Cardiology Associates, P.C.)

46. Plaintiffs incorporate paragraphs 1 through 45 herein by reference.

47. At all times relevant hereto, Pueblo Cardiology Associates, P.C., was a Colorado corporation, licensed to and doing business in Colorado as a professional corporation.

48. At all times relevant hereto, Matthew Sumpter,M.D. and George Gibson, M.D., were officers, directors, agents, shareholders, employees and/or partners of Pueblo Cardiology

Associates, P.C., acting within their course and scope of employment.

49. Pueblo Cardiology Associates, P.C. is responsible for the acts and omissions of its agents, employees, officers, directors, shareholders and/or partners including, but not limited to, Defendants Matthew Sumpter,M.D. and George Gibson, M.D.

50. As a direct and proximate result of the negligence of Matthew Sumpter,M.D. and George Gibson, M.D., agents, employees, officers, directors, shareholders and/or partners of Defendant, Pueblo Cardiology Associates, P.C., Plaintiff Duane Reutter suffered injuries, damages and losses as more fully described above.

NINTH CLAIM FOR RELIEF
(Loss of Consortium – Patty Reutter)

51. Plaintiffs incorporate Paragraphs 1 through 50 herein by reference.

52. As a result of the negligence of Defendants Kevin Weber, M.D., Matthew Sumpter, M.D., Craig Shapiro, M.D., George Gibson, M.D., Scott Mantell, M.D., Pueblo Cardiology Associates, P.C. and Catholic Health Initiatives Colorado d/b/a St. Mary-Corwin Medical Center, individually or jointly, Duane Reutter suffered injuries, damages and losses. As a result, Patty Reutter has suffered a loss of society, companionship, comfort and consortium of her husband, Duane Reutter.

TENTH CLAIM FOR RELIEF
(Informed Consent)

53. Plaintiffs incorporate Paragraphs 1 through 52 herein by reference.

54. With respect to the care and treatment provided to Plaintiff Duane Reutter by all Defendants herein, Defendants were negligent in failing to properly obtain informed consent from Plaintiff Duane Reutter.

55. Had Defendants timely and properly informed Plaintiff Duane Reutter of the true nature of his medical condition and the risks of and alternatives to the treatment provided, Plaintiff Duane Reutter would not have chosen to follow the course of treatment provided by Defendants and would not have suffered injuries, damages and losses. No reasonable person in the same or similar situation would have followed the course of treatment provided by Defendants, had such reasonable

person been properly informed of the true nature of his medical condition and the risks and alternatives to the treatment provided.

56. As a direct and proximate result of Defendants' failure to obtain Plaintiff Duane Reutter's informed consent, Plaintiff Duane Reutter suffered injuries and damages as more fully described above.

WHEREFORE, the plaintiffs, Duane Reutter and Patty Reutter, pray for judgment against the defendants and for damages in an amount to be determined by the trier of fact, pre and post-judgment interest as allowed by law, expert witness fees, filing fees, deposition expenses, attorney's fees and for such other and further relief as this Court may deem appropriate, including all costs.

PLAINTIFFS REQUEST A TRIAL BY JURY.

Respectfully submitted this 13th day of January, 2004.

LEVENTHAL, BROWN & PUGA, P.C.

A duly signed original is available at the offices of Leventhal, Brown & Puga, P.C.

Jim Leventhal, # 5815
Timothy G. Buxton, #25346
Attorneys for Plaintiffs

Address of Plaintiffs:
4405 Lucille Street
Pueblo 81005

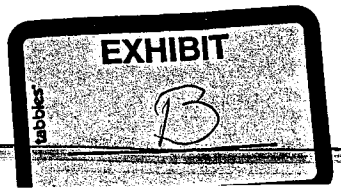
DISTRICT COURT, COUNTY OF PUEBLO, COLORADO 10th Judicial District Pueblo County Judicial Building 320 W. 10th Street Pueblo, Colorado 81003	
Plaintiffs: DUANE REUTTER and PATTY REUTTER vs. **Defendants:** KEVIN WEBER, M.D., MATTHEW SUMPTER, M.D., GEORGE GIBSON, M.D., CATHOLIC HEALTH INITIATIVES COLORADO d/b/a ST. MARY-CORWIN MEDICAL CENTER, and PUEBLO CARDIOLOGY ASSOCIATES, P.C.	▲COURT USE ONLY▲ Case Number: 2004CV53 Division E
Kevin J. Kuhn, #10965 Amy Cook-Olson, #27237 Montgomery Little & McGrew, P.C. 5445 DTC Parkway, Suite 800 Greenwood Village, Coloado 80111 Phone Number: (303) 773-8100	

DEFENDANT GEORGE GIBSON, M.D.'S MOTION FOR DETERMINATION OF LAW: *EX PARTE* CONTACT WITH CONSULTING PHYSICIAN CRAIG SHAPIRO, M.D.

Defendant George Gibson, M.D., by and through his counsel of Montgomery Little & McGrew, P.C., pursuant to C.R.C.P. 56(h), hereby moves for a Determination of Law to allow his counsel to contact consulting physician Craig Shapiro, M.D. *ex parte* stating in support as follows:

Certificate of Compliance with C.R.C.P. 121 §1-15(8)

The undersigned has conferred with counsel for the Plaintiffs who has objected to the relief sought herein.



Introduction

This is a case alleging medical negligence against Dr. Gibson and many other physicians related to the medical care rendered to Duane Reutter on January 14, 2002. Dr. Shapiro was originally named as a defendant in this matter related to his own care rendered on January 14, 2002.[1] Here, there is no physician-patient privilege between Mr. Reutter and Dr. Shapiro because Dr. Shapiro was initially sued in this litigation. Further, Dr. Gibson was in consultation with Dr. Shapiro, and the consult is not covered by the physician-patient privilege. Therefore, the undersigned must be allowed to meet with Dr. Shapiro *ex parte* and without notice to the Plaintiff.

Discussion

C.R.S. § 13-90-107(1)(d), which sets forth the scope and terms of the physician-patient privilege, provides:

> A physician, surgeon, or registered professional nurse duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient, **but this paragraph (d) shall not apply to**:
>
> (I) **A physician...who is sued** by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's or nurse's care or treatment of such patient;
>
> (II) A physician...**who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises**;

(Emphasis added.)

Here, there is no physician-patient privilege between Mr. Reutter and Dr. Shapiro because Dr. Shapiro has been sued. Mr. Reutter named Craig Shapiro, M.D. in his initial Complaint in this litigation claiming:

> Defendant Craig Shapiro, M.D., deviated from that standard and was negligent in his care and treatment of Plaintiff Duane Reutter, including, but not limited to the following:

[1] *See,* January 13, 2004, Complaint.

a) Failing to properly diagnose, treat, monitor and supervise the care and treatment of Duane Reutter on or about January 14, 2002;

b) Failing to properly and timely consult with or refer to appropriate medical specialists regarding the care and treatment of Duane Reutter on or about January 14, 2002;

c) Failing to obtain appropriate medical testing in order to properly care for and treat Duane Reutter on or about January 14, 2002;

d) Failing to provide appropriate medication in order to properly care for and treat Duane Reutter on or about January 14, 2002;

e) Failing to maintain appropriate oxygenation of Duane Reutter on or about January 14, 2002;

f) Failing to appropriately interpret diagnostic testing performed on Duane Reutter on or about January 14, 2002

Since Dr. Shapiro has been sued by Mr. Reutter in this suit, C.R.S. § 13-90-107(1)(d) provides that the physician-patient privilege "shall not apply," rendering *ex parte* contact with Dr. Shapiro appropriate.

Secondly, the physician-patient privilege does not apply to consulting physicians, any more than it applies to the defendant physician, with respect to any matter "arising out of or connected with" the lawsuit against the defendant physician. The Colorado Supreme Court explicitly addressed this fact in *Clark v. District Court*, 668 P.2d 3, 8 (Colo. 1983) holding:

> The statute creating this privilege expressly provides that it shall not apply to the following situations: a malpractice action arising out of or connected with the physician's care or treatment of the patient [and] **communications made to a physician who was in consultation with the physician being sued for malpractice...**

(Emphasis added.)

Here, there is no physician-patient privilege between Mr. Reutter and Dr. Gibson because Dr. Gibson has been sued. Additionally, C.R.S. § 13-90-107(1)(d)(II) provides that the physician-patient privilege "shall not apply to" physicians who were "in consultation with" Dr. Gibson, the physician who is being sued, "on the case out of which said suit arises." Dr. Gibson's consultations, while rendering care to Ms. Reutter, eliminated any physician-patient privilege as to those physicians pursuant to C.R.S. § 13-90-107(1)(d)(II).

On January 14, 2002, Dr. Gibson consulted with Dr. Shapiro to transfer care following Dr. Gibson's cardiac catheterization. Indeed, Dr. Shapiro's January 14, 2002, report is entitled

"Consultation Report" and references that he [Dr. Shapiro] "has been asked to see him post cardiac catheterization."[2] Dr. Shapiro notes in his report that he was unable to obtain any information from Mr. Reutter during his consultation, as Mr. Reutter was on a ventilator and could not communicate. Mr. Reutter remained in a non-communicative state throughout his entire hospitalization at St. Mary Corwin. He was later transferred to the VA Medical Center.

Dr. Shapiro's status as Dr. Gibson's consultant renders the physician-patient relationship statutorily waived. Plaintiffs will likely argue that informal interviews with consulting physicians are precluded by the *Samms v. District Court*, 908 P.2d 520 (Colo. 1996) decision. However, the issue of *ex parte* contact with consulting physicians (for whom the physician-patient privilege does not apply) was not addressed in this decision. The factual situation of the *Samms v. District Court*, 908 P.2d 520 (Colo. 1996) is further distinguished, as it applied only to those instances where some "residual" physician-patient privilege may remain despite the filing of the lawsuit. These are no "residual" privileges here to protect, as there were no communications between Mr. Reutter and Dr. Shapiro during his entire hospitalization due to his intubated status. There similarly could not be any "residual" physician-patient privilege to protect with regard to Dr. Gibson's telephone conversations with Dr. Shapiro, as the patient was not even present. Therefore, the concerns of the *Samms* court are simply not present here.

The purpose of the undersigned meetings with Dr. Shapiro is to allow access to the information related to the consultation so that Dr. Gibson and his counsel may fairly prepare for trial. Since there is no privilege to protect, Plaintiffs have no purpose of attending this interview other than to gain a tactical advantage of monitoring the defense's trial preparation. Dr. Gibson should be allowed to have equal access to trial witnesses and a cost-effective means by which to prepare his defense. The Colorado Supreme Court recognized that "no party to litigation has anything resembling a propriety right to any witness." *See Samms* at 530.

Several Colorado District Courts have addressed this very issue and determined that the physician-patient privilege does not attach to consultants in the context of medical negligence litigation. *See Thomas Polk v. Ernest L. Sink, M.D.*, 02 CV 5088, Denver District Court, Judge Manzanares, January 9, 2003 ("as to any health care providers who treated Plaintiff only for conditions relating to the issues in this case, any privilege is ruled to have been waived by the filing of this lawsuit. If there is no legitimate claim of privilege with respect to any health care provider, *Samms* does not apply and defense counsel may meet with that provider with out notifying Plaintiff's counsel") *Attached* as Exhibit 2; *Roybal v. Surek*, 96-CV 1067, Denver District Court, October 29, 1997 ("Dr. Daniels was in consultation with Dr. Surek on Plaintiff's case, and therefore is not covered by the physician-patient privilege. Defense counsel is entitled to meet with Dr. Daniels *ex parte* and without notice to Plaintiff's counsel.") *Attached* as Exhibit 3; *Snarich v. Howe*, 99 CV 560, Pueblo County District Court, Judge Maes, August 14, 2001 (Dr. Smiley and Bertoldo are consulting physicians. These providers are specifically exempt from C.R.S. 13-90-107, and thus given their consulting relationship with Dr. Howe the physician-patient privilege does not apply.") *Attached* as Exhibit 4; *Lopez v. Garbowski*, 02 CV 2906 Denver District Court, Judge H. Jeffrey Bayless, October 2, 2002, *Attached* as Exhibit 5;

[2] *See* Exhibit 1, Dr. Shapiro's January 14, 2002, Consultation.

Blanchard v. Presbyterian-St. Luke's, 01 CV 0235, Denver District Court, Judge John McMullen, October 31, 2001, *Attached* as Exhibit 6; *Morris v. Griffiths,* Denver District Court, Judge Jeffrey Bayless, May 26, 1998, *Attached* as Exhibit 7.

Considering Colorado's statutory scheme specifically allows for the defense to consult *ex parte* with consulting physicians, the undersigned should be allowed to freely meet with Dr. Shapiro without notice, because the privilege "shall not apply" and the statute must be strictly construed.

WHEREFORE, Defendant George Gibson, M.D. respectfully requests that his counsel be granted the authority to contact consulting physician Dr. Shapiro *ex parte*.

Respectfully submitted this 30th day of June, 2005.

MONTGOMERY LITTLE & McGREW, P.C.

By: /s/ Amy E. Cook-Olson
Kevin J. Kuhn
Amy Cook-Olson
Kara Knowles
ATTORNEYS FOR DEFENDANT GEORGE GIBSON, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2005, a true and correct copy of the foregoing **DEFENDANT GEORGE GIBSON, M.D.'S MOTION FOR DETERMINATION OF LAW: *EX PARTE* CONTACT WITH CONSULTING PHYSICIAN CRAIG SHAPIRO, M.D.** was filed with the Court and served upon the following parties via LexisNexis File & Serve:

Jim Leventhal, Esq.
Erin C. Genullis, Esq.
LEVENTHAL, BROWN, & PUGA, P.C.
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/s/ Kim Creasey
For Montgomery Little & McGrew, P.C.

In accordance with C.R.C.P. 121 §1-26(9) a printed copy of this document with signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

ST. MARY CORWIN MEDICAL CENTER

NAME: Reutter, Duane
MR#: 413699
DOB: 07/06/1947
ATTENDING: George D. Gibson, M.D. (504)
CONSULTING: Craig Shapiro, M.D. (367)
ADMISSION: 01/14/2002

2012-1

PAGE 1

CONSULTATION REPORT

REASON FOR CONSULTATION: Respiratory failure.

HISTORY OF PRESENT ILLNESS: The patient is a 54-year-old gentleman who was admitted to the emergency room with severe chest pain, hypoxemia. It was initially felt to be cardiac in nature. The patient underwent a cardiac catheterization which was normal. The wife reports that the patient had pain with deep inspiration. He complained of severe shortness of breath and dyspnea. He had no associated nausea, vomiting. He was not sick prior to the event. It apparently began around 4 this morning and by 9 a.m. he was basically unable to breathe. He was brought to the emergency room in distress and required intubation. I have been asked to see him post cardiac catheterization. He is a smoker of 2 packs per day for many years. He does not have documentation as far as asthma component or emphysema. No history of DVT or pulmonary bleb. No history of TB or TB exposure.

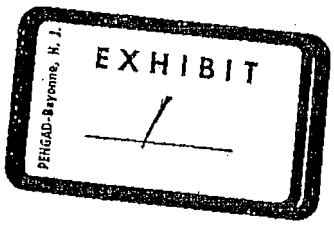
PAST MEDICAL HISTORY:
ALLERGIES: NO KNOWN DRUG ALLERGIES.
ILLNESSES: History of hypertension, obstructive sleep apnea.
CURRENT MEDICATIONS: Antihypertensive, B12 and pain meds.
PAST SURGICAL HISTORY: Right elbow surgery.

SOCIAL HISTORY/FAMILY HISTORY/REVIEW OF SYSTEMS: All are not obtainable as the patient is currently on the ventilator in respiratory failure.

PHYSICAL EXAMINATION

GENERAL: Gentleman sedated, on the ventilator.

VITAL SIGNS: Blood pressure 90/70, pulse is 110, respiratory rate 14 on the ventilator. He is afebrile.



CONSULTATION REPORT

NAME: Reutter, Duane
MR#: 413699
CONSULTING: Craig Shapiro, M.D. (367)
ADMISSION: 01/14/2002

PAGE: 2

HEENT: Normocephalic, extraocular muscles are intact, Pupils equal, round, reactive to light and accommodation. Oral is grossly normal.

NECK: Supple, no adenopathy, jugular venous distention or thyromegaly.

CHEST: Symmetrical breath sounds, clear bilaterally.

HEART: Regular rate and rhythm, no murmur, gallops or rubs.

ABDOMEN: Soft, bowel sounds are present, no hepatosplenomegaly, masses or bruits.

EXTREMITIES: No clubbing, cyanosis or edema. Pulses are present.

NEUROLOGICAL: Grossly intact.

GENITORECTAL: Not performed.

LABORATORY FINDINGS: Blood gas PO2 of 157, PCO2 of 44, pH 7.33 on 100% assist control of 12, INR is 1, PTT is 32.7(2.6), white count is 18.6, hemoglobin 15.8, platelets 235, sodium 134, BUN 16, creatinine 0.7, glucose 106, potassium 4, chloride 101, carbon dioxide is 23, calcium 9.4, troponin I is 0, CK 63. Chest x-ray is not available to me.

IMPRESSION:
Respiratory failure, suspect pneumonitis, pulmonary embolus, vasculitis, or even perhaps pneumothoraces. Also rule out an aortic dissection.
2. Chest pain as above.
3. Hypertension.
4. Chronic back pain.
5. Obstructive sleep apnea.

PLAN:
1. A spiral CT.
2. Vent management.
3. IV heparin.

CONSULTATION REPORT

NAME: Reutter, Duane
MR#: 413699
CONSULTING: Craig Shapiro, M.D. (367)
ADMISSION: 01/14/2002

PAGE: 3

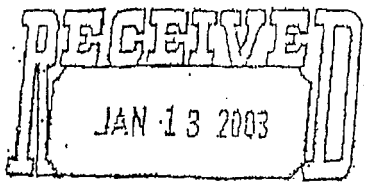
4. Will monitor closely for need for further management.
5. DVT, GI prophylaxis.

Thank you for allowing me to see this critically ill gentleman in consultation. I will follow him with you.

DICTATED BY: Craig Shapiro, M.D. (367)

jd/019024/634546
D: 01/14/2002 3:21 P
T: 01/14/2002 3:51 P

cc:

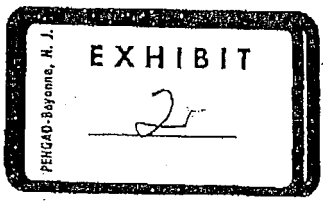
DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock, Denver, Colorado 80202	 MONTGOMERY, LITTLE & McGREW, P.C σCOURT USE ONLYσ
Plaintiff: THOMAS POLK v. Defendants: ERNEST L. SINK, M.D., and THE CHILDREN'S HOSPITAL	Case No: 02 CV 5088 Division/Courtroom: 5

PROPOSED ORDER RE: DEFENDANT SINK'S COMBINED MOTION TO COMPEL APPROPRIATE RELEASES AND MOTION FOR AN ORDER AUTHORIZING *EX PARTE* CONTACT WITH CONSULTING PHYSICIANS

THE COURT, having reviewed the Combined Motion To Compel Appropriate Releases And Motion For An Order Authorizing *Ex Parte* Contact With Consulting Physicians, the Response and Reply thereto, and having heard argument from counsel for all parties on November 20, 2002 at 8:30 a.m., hereby finds and orders as follows:

The Case Management Order is amended to require disclosure of experts pursuant to C.R.C.P. 26(a)(2) as follows: Plaintiff, 180 days before trial; Defendants, 130 days before trial; Rebuttal Experts, 100 days before trial.

Plaintiff shall sign a medical release in the form attached to the Motion as Exhibit A, but with the addition of language compliant with *Samms v. District Court*, 908 P.2d 520 (Colo. 1995) to the effect that the health care provider to whom the release is directed may meet and speak with attorneys for the Defendants if notice and an opportunity to attend such a meeting is given to Plaintiff's counsel.



Plaintiff's counsel represented that Mr. Polk is not going to be alleging anything beyond normal emotional distress as damages, *i.e.* he is not claiming psychiatric injury in this case. Based upon that representation, Defendants are not entitled to psychiatric records at this time.

The parties have agreed to a limited protected Order regarding Thomas Polk's medical records. Defendants have agreed to keep Plaintiff's medical records confidential except for purposes attendant to litigation and related purposes including but not limited to credentialing, privileging, and Board matters.

Within one week from November 20, 2002, and based upon reasonable investigation, Plaintiff shall identify any information that he reasonably believes remains privileged that is in the possession of the treating health care providers. With regard to those healthcare providers, Plaintiff may seek protection of the Court via a motion for protective order regarding providing releases. As to health care providers who treated Plaintiff only for conditions relating to the issues in this case, any privilege is ruled to have been waived by the filing of this lawsuit. If there is no legitimate claim of privilege with respect to any health care provider, *Samms* does not apply and defense counsel may meet *ex parte* with that provider without notifying Plaintiff's counsel and giving her an opportunity to attend.

Plaintiff shall produce all releases Defendants request unless Plaintiff can identify information at which a release is directed that is privileged. At argument, Plaintiff's counsel indicated no objection to providing tax information and insurance information except that which contains information regarding any area which he believes is privileged. Plaintiff will promptly evaluate whether there is any claim of privilege with respect to the other types of records requested in Defendant's motion. Plaintiff shall identify any claim of privilege within one week of the November 20, 2002 hearing.

DATED this 9th day of ~~December~~ January, 2003 (nunc pro tunc 11-20-02)

BY THE COURT:

Judge Lawrence Manzanares
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 96 CV 0167, Courtroom 1

ORDER DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

MICHAEL ROYBAL,

Plaintiff,

vs.

CHRISTOPHER L. SUREK, D.O., AND ALL OTHER UNKNOWN HOSPITALS, PHYSICIANS, HEALTH CARE PROVIDERS, OR HEALTH CARE SUPPLIERS,

Defendants.

The Court, having considered Plaintiff's Motion for Protective Order, and otherwise being informed in the premise,

ORDERS that the Motion is DENIED. Dr. Daniels was in consultation with Dr. Surek on Plaintiff's case, and therefore is not covered by the physician-patient privilege. Defense counsel is entitled to meet with Dr. Daniels *ex parte* and without notice to Plaintiff's counsel.

Dated this 29th day of Oct, 1997.

BY THE COURT:

DISTRICT COURT JUDGE

EXHIBIT 3

PENGAD-Bayonne, N. J.

DISTRICT COURT, COUNTY OF PUEBLO, COLORADO Court Address: 320 West 10TH Street Pueblo County	▲ COURT USE ONLY ▲
Plaintiffs: KENNETH SNARICH, deceased, by and through his wife, DARLENE SNARICH, DARLENE SNARICH, Individually and as next friend, parent and natural guardian of KENNA RAE SNARICH, a minor, CARLEE JANEY SNARICH, a minor, and TRENT SNARICH, a minor, Defendants: CLIFFORD SCOTT HOWE, M.D. and PARKVIEW MEDICAL CENTER, INC., d/b/a/ PARK VIEW MEDICAL CENTER,	Case No. 99 CV 560 Division: B
Attorney: Mark A. Fogg, #9723 Valerie A. Garcia, #30015 KENNEDY & CHRISTOPHER, P.C. 1660 Wynkoop Street, Suite 900 Denver, CO 80202 Phone Number: 303-825-2700	

ORDER RE: MOTION FOR DETERMINATION OF QUESTION OF LAW

THIS MATTER comes before the Court on defendants, Clifford Scott Howe, M.D. ("Dr. Howe") and Parkview Medical Center, Inc. ("Parkview"), Motion for Determination of Question of Law, and the Court having reviewed the file and being otherwise fully advised of the premises; hereby

GRANTS defendants' Motion. It is Ordered that: (1) Dr. Rocha's autopsy of Mr. Snarich is not covered by the physician-patient privilege, (2) Dr. Smiley and Dr. Bertoldo are consulting physicians. These providers are specifically exempt from C.R.S. § 13-90-107, and thus given their consulting relationship with Dr. Howe the physician-patient privilege does not

apply, and (3) emergency medical technicians (EMT) are not included in the provisions of C.R.S. Section 13-90-107(1)(d) and thus the physician-patient privilege does not apply. It is further Ordered that Dr. Howe and Parkview are allowed to conduct for ex-parte communications with Dr. Rocha, Dr. Smiley, Dr. Bertoldo, and any emergency medical technicians or personnel who responded to the Snarich family home on July 17, 1998.

Dated on this 14th day of August, 2001.

BY THE COURT:

DISTRICT COURT JUDGE

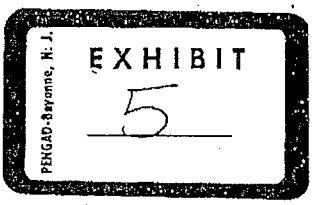
DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	RECEIVED OCT 07 2002 KENNEDY & CHRISTOPHER, P.C.
Plaintiff: DELORES L LOPEZ	▲ COURT USE ONLY ▲
Defendants: MIROSLAWA GARBOWSKI, R.N.; PORTERCARE ADVENTIST HEALTH SYSTEM, a Colorado corporation; and KAREN N. RATNER, M.D.	Case Number: 02 CV 2906 Courtroom 8

O R D E R

THIS MATTER comes before the court on Defendant Karen Ratner, M.D.'s motion for *ex parte* interviews with consulting physicians. Defendant Ratner invites the court's attention to the case of Samms v. District Court, 908 P.2d 520 (Colo. 1996) and the doctor-patient privilege statute, C.R.S. §13-90-107(1)(d). She argues that the doctors she seeks to speak with fall under the exceptions to the privilege contained in the statute. Included in the exceptions most prominently are "a physician, surgeon or registered professional nurse who was in consultation with the physician, surgeon or registered professional nurse being sued. . . ." (C.R.S. §13-90-107(1)(d)(II)) Plaintiff also makes reference to Clark v. District Court, 668 P.2d 3 (Colo. 1983) as confirming the words of the above-quoted subsection.

Plaintiff objects alleging that the doctors who Defendant Ratner attempts to speak to were not in consultation with Dr. Ratner but rather were separate treating physicians with whom a separate physician-patient privilege existed.

The court concludes that the physicians who Defendant Ratner seeks to speak with, Drs. Bilir, Fenton, Heller and Link were in fact doctors who were in consultation with Defendant Ratner and therefore the privilege does not attach. Accordingly, the motion for *ex parte* interviews with those physicians is granted without the necessity of providing notice to Plaintiff when those interviews are conducted.



Dr. Henry is the doctor who performed the autopsy after the death of Julia Tapia. By virtue of his performing the autopsy, no doctor-patient privilege was established. Plaintiff objects to the inquiry as to Dr. Henry on personal privacy grounds. The court finds that those privacy grounds are not sufficient to deny the motion for *ex parte* interview with the pathologist who performed the autopsy. Accordingly, the motion for *ex parte* interview with Dr. Henry is also granted without the necessity of providing notice to Plaintiff.

Done this 2 day of October, 2002.

BY THE COURT:

H. Jeffrey Barbless
District Judge

cc: Miller
Clor
Moseley

DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): STEPHEN CLYDE BLANCHARD, individually and as statutory good faith representative, trustee, and fiduciary of Tyler James Kuiper Defendant(s): PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, Division of HealthONE; RODERICK G. LAMOND, M.D.; and JULIANNA M. SUTARIK, M.D.	▲ COURT USE ONLY ▲ Case Number: 01 CV 0235 Ctrm.: 2
Attorney or Party Without Attorney: Name: Barbara H. Glogiewicz, Esq., #15995 Laura M. Wassmuth, Esq., #26292 David W. Gerbus, Esq., #32962 Address: Kennedy & Christopher, P.C. 1660 Wynkoop Street, Suite 900 Denver, CO 80202 Phone Number: 303-825-2700 FAX Number: 303-825-0434	

ORDER RE: DR. LAMOND'S MOTION TO CONDUCT *EX PARTE* INTERVIEWS WITH CONSULTING PHYSICIANS

THIS MATTER comes before the Court on Defendant Roderick G. Lamond, M.D.'s Motion to Conduct *Ex Parte* Interviews with Consulting Physicians. The Court, having reviewed the Motion, and being otherwise fully advised of the premises; hereby

GRANTS Dr. Lamond's Motion and Orders that defense counsel may meet with Drs. Moritz, Wiggs, Chowdhury, Wein, Sutarik, Manke, Fitting and Atchley *ex parte* and without further notice to Plaintiffs' counsel, because they were in consultation with Dr. Lamond regarding Ms. Geiger's care and treatment.

Dated this 30 day of Oct, 2001.

BY THE COURT:

District Court Judge

JAN 2 1 1999

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 97 CV 7196, Courtroom 3

ORDER

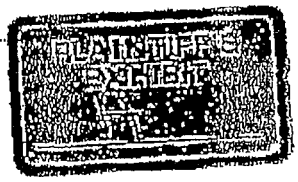
DONALD E. MORRIS,

Plaintiff,

v.

CINDY L. GRIFFITHS, M.D., THOMAS J. KEYES, J.D., PAUL S. LEO, M.D., CATHOLIC HEALTH INITIATIVES MOUNTAIN REGION, doing business as St. Anthony Hospitals, a Colorado corporation, and JANE OR JOHN DOES I - XX, whose true names are presently unknown,

Defendants.

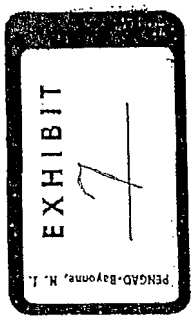


This matter comes before the Court pursuant to Plaintiff's motion for protective order and alternative request for notification of identity of persons Defendants characterize as "consultants." Plaintiff indicates that in Rule 16 Conferences defense counsel have stated they intend to conduct ex parte interviews of non-party health care providers of Plaintiff without adhering to the notification procedures established by Samms v. District Court, 908 P.2d 520 (Colo. 1995). Plaintiff indicates that Defendants believe no privilege attaches to non-party doctors who are "consultants" to their clients.

Defendants respond that in this case the doctors they intend to speak to ex parte were consultants to Defendants and therefore exempted under C.R.S. §13-90-107(1)(d)(II). Defendants take the position that any nurse or physician whose name appears on the chart of the Plaintiff while he was in the hospital for the surgical procedure which underlies this action is a "consultant" and therefore exempt from the Samms ruling.

The pertinent language in Samms is found at page 526:

> In view of these considerations, we conclude that our rules of discovery permit a defense attorney to conduct informal interviews in the absence of a plaintiff or the plaintiff's attorney with physicians who have treated the plaintiff. Consequently, trial courts may authorize such informal interviews. However, we also conclude that such informal questioning must be confined to matters that are not subject to a physician-patient



> privilege and that the plaintiff must be given reasonable notice of any proposed informal interview. Such notice will afford a plaintiff or the plaintiff's attorney an opportunity to attend any scheduled interview. Such notice will also enable a plaintiff to take other appropriate steps to ensure that interviews are limited to matters not subject to the plaintiff's physician-patient privilege, such as to inform the physician of the plaintiff's belief that certain information known to the physician remains subject to the physician-patient privilege or to seek appropriate protective orders from the trial court.

908 P.2d 526.

The statutory authority cited by Defendants, §13-90-107(1)(d)(II) provides that the physician-patient privilege shall not apply to "A physician, surgeon, or registered professional nurse who was in consultation with a physician, surgeon, or registered professional nurse being sued as provided in subparagraph (I) of this paragraph (d) on the case out of which said suit arises."

This Court notes that in entering its ruling in Samms v. District Court, supra, the Colorado Supreme Court emphasized the physician-patient privilege. That opinion did not address §13-90-107(1)(d)(II) relating to physicians in consultation with defendant physicians to whom the privilege does not attach. The circumstances presented by this case seemingly have occurred frequently since Samms, and both sides have submitted cases to the Court in which trial courts have ruled in different ways concerning this precise issue.

Both counsel seem to agree that the term "in consultation with" has been loosely defined in some cases not specific to this particular issue. The Court is not satisfied that the broad definition urged by Defendants, anyone whose name appears on the chart, is equivalent to a doctor or a nurse who was "in consultation with" one of the defendants. By the same token, the Court is satisfied that if a doctor was called in as part of the treatment team, or was solicited for advice or information on this particular case, then that doctor would be commonly understood to be "in consultation with" defendant doctor. If, for example, Plaintiff had never had any contact with a physician called in for advice on the case underlying this case it would appear that even if that doctor was not deemed a consultant, the information would nevertheless relate only to the case and have no privilege attached to it.

The Court concludes that the emphasis in the Samms opinion was on preserving the physician-patient privilege. The Court concludes that the notice provision which was ordered by the Supreme Court

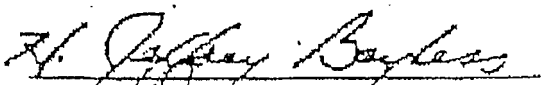
was a notice designed to preserve that physician-patient privilege. Upon receiving notice of a scheduled interview if plaintiff's counsel knew that the doctor to be interviewed had never seen his client outside the framework of the underlying treatment there could be nothing which was privileged, and therefore no objection could be made and presumably no attendance to protect the privilege could be made at the interview. If the notice provided the name of a physician that plaintiff had seen previously or for other medical conditions then surely plaintiff's counsel may speak to that physician, appear at the interview, or move the court for a protective order.

The Samms court discussed a number of issues, including an extended discussion of attorney ethics. This Court is of the opinion that in so doing the Supreme Court was reminding counsel for both plaintiffs and defendants that it expected ethical conduct from both sides.

The Court orders that notice of the anticipated ex parte conferences with physicians need be given in all cases. If Plaintiff has had no contact with a physician or nurse other than the care underlying this action, then there is no privilege to protect and Plaintiff would have no ground to contact the doctor or nurse, appear at the conference, or contact the court for a protective order. If Plaintiff, knowing of no privilege took one of the steps authorized in Samms to protect a privilege various types of sanctions could be in order.

SO ORDERED this 26th day of May, 1998.

BY THE COURT:



RT JEFFREY BAYLESS
District Court Judge

cc: IRA M. LONG, JR.
600 - 17th St., #2010-S
Denver, CO 80202

COLLIE E. NORMAN
MARCI L. LADDUSAW
400 S. Colorado Blvd., #900
Glendale, CO 80246

ALAN E. RICHMAN
C. TODD DRAKE
1775 Sherman St., #1717
Denver, CO 80203

DAVID A. KARR
THERESA A. RAYNOR
6400 S. Fiddler's Green Cir., #1313
Englewood, CO 80111

Catherine E. Knapp

From: LexisNexis File & Serve [eFile@fileandserve.lexisnexis.com]
Sent: Thursday, June 30, 2005 3:27 PM
To: Catherine E. Knapp
Subject: Case: 2004CV53; Filing: 6127607 - Notification of Service


DEFENDANT ORGE GIB.pdf (81 K


Exhibits 1 through 7.pdf (380 ...


Order.pdf (64 KB)

Aaron P Bradford requested that you, Catherine E Knapp, receive a copy of this notification for Filing ID 6127607. The details for this transaction are listed below.

To: Aaron P Bradford
From: LexisNexis File & Serve
Subject: Service of Documents in REUTTER, DUANE et al vs. WEBER MD, KEVIN et al

You are being served documents that have been electronically submitted in REUTTER, DUANE et al vs. WEBER MD, KEVIN et al through LexisNexis File & Serve. The details for this transaction are listed below.

Court: CO Pueblo County District Court 10th JD
Case Name: REUTTER, DUANE et al vs. WEBER MD, KEVIN et al
Case Number: 2004CV53
Filing ID: 6127607
Document Title(s):
DEFENDANT GEORGE GIBSON, M.D.'S MOTION FOR DETERMINATION OF LAW: EX PARTE CONTACT WITH CONSULTING PHYSICIAN CRAIG SHAPIRO, M.D.
Exhibits 1 through 7
Order
Authorized Date/Time: Jun 30 2005 3:26PM MDT
Authorizing Attorney: Amy Elizabeth Cook-Olson
Authorizing Attorney Firm: Montgomery Little & McGrew PC-Greenwood Village
Filing Parties:
GIBSON MD, GEORGE
Served Parties:
PUEBLO CARDIOLOGY ASSOCIATES PC

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<<DEFENDANT GEORGE GIB.pdf>>
<<Exhibits 1 through 7.pdf>> <<Order.pdf>>

☐ Small Claims ☐ County Court ☐ District Court ☐ Probate Court ☐ Juvenile Court ☐ Water Court ____ County, Colorado Court Address:	
DUANE REUTTER AND MARY REUTTER, **Plaintiffs,** **Vs.** **KEVIN WEBER, M.D., ET AL,** **Defendants.**	▲ COURT USE ONLY ▲ Case Number: 04CV53 Div.:E Ctrm:
Attorney or Party Without Attorney: (Name & Address) Phone Number: FAX Number: E-mail: Atty. Reg. #:	

TRANSCRIPT OF PROCEEDINGS HELD FEBRAURY 13, 2006

The matter came on for hearing on February 13, 2006, before the HONORABLE DAVID. A. COLE, Judge of the District Court, and the following proceedings were had.

FOR THE PLAINTIFFS: TIM BUXTON

FOR THE DEFENDANTS: JOHN PALMERI
AARON BRADFORD
STEVEN HENSEN

EXHIBIT C

I N D E X

THE COURT: Case number 04 C - V - 53 captioned Duane and Patty Reutter versus Kevin Weber, Matthew Sumpter and Pueblo Cardiologists Associates.

MR. PALMERI: Good afternoon Your Honor, John Palmeri and Kimberly Wells appearing on behalf of Dr. Weber.

THE COURT: All right, good afternoon.

MR. BRADFORD: Good afternoon Your Honor. Aaron Bradford on behalf of Pueblo Cardiology.

THE COURT: All right.

MR. BUXTON: Tim Buxton, Your Honor, on behalf of the Plaintiffs.

MR. HENSEN: Good afternoon Your Honor, Steven Henson appearing on behalf of Dr. Matthew Sumpter.

THE COURT: Okay, for everybody that's here on the civil case let me apologize to you for the delay. I know when we set this, I believe it was back in October, was that correct?

MR. PALMERI: That's right Your Honor.

MR. BRADFORD: Yes.

THE COURT: Well since that time, we've now been assigned the juvenile delinquency docket and we're told when we would be having those. So, we had to work that in to your detriment. I apologize.

MR. PALMERI: That's fine Your Honor.

MR. BRADFORD: I understand.

MR. HENSEN: That's fine.

THE COURT: Civil case really take a backseat. It's beginning to really bother me.

MR. PALMERI: We saw you grab the thick file Judge and realized it was our file.

THE COURT: Okay, all right, let me just make sure --- I'm trying to see if everybody that's here today was here last time. I have Mr. Buxton ---

MR. HENSEN: There's one missing.

THE COURT: I'm sorry?

MR. HENSEN: There's one missing Your Honor, Kevin Kuhn for Dr. Gibson, was here before but he's since been dismissed.

THE COURT: I thought it was awful quiet.

MR. BRADFORD: That would be silence effect.

THE COURT: And that's because Dr. Gibson was dismissed.

MR. HENSEN: That's correct.

MR. PALMERI: That's correct.

MR. BRADFORD: That's correct.

MR. PALMERI: Your Honor, if I may, from our perspective I think we just have two items to address. You'd ruled on the ex-parte contact in a fairly detailed order. Mr. Buxton's firm's filed a motion for reconsideration.

THE COURT: Right.

MR. PALMERI: Other than that we had an issue on the deposition and we had filed a motion that was confessed. You entered an order on that. So I think the only pending motion is

the motion for reconsideration and again, from Dr. Weber's perspective, the only other issue that I would raise, if the Court would entertain it, is maybe we just get a trial date.

THE COURT: Okay, and I thought this was on today for basically a status conference and trial setting and I know that since we set that, then the issue came up with the motion for ex parte contact, my ruling and the motion for reconsideration. So, I wasn't sure if it was on today for any further argument for the motion for reconsideration since I wasn't sure that everybody knew that that's what we'd be addressing but I indicated that I wanted a further hearing on that because some of the things that I think you mentioned Mr. Buxton in your motion are things that I need to find out about. So, is everybody ready to proceed on that today?

MR. PALMERI: We are Your Honor. It was our original motion, I'm not sure if Mr. Buxton is but I think it may be appropriate to address it now.

THE COURT: Okay, Mr. Buxton since it's your motion for reconsideration, is that something you're prepared to address today?

MR. BUXTON: Unless the Court has questions Your Honor. We were just going to rely on the brief.

THE COURT: As I said, I didn't think this was on today for that reason and let me just check here. I guess the concern I had was that in your reply you keep mentioning that Mr. Reutter has a residual physician / patient privilege that I think I need

more argument about and also the issue of whether or not the doctors that I indicated could be contacted ex-parte were actually consultants. I think, I got the impression from your arguments, that you didn't feel that was the case. Apparently that they had been contacted as more than just consultants and I think that might make a difference on the ruling in this particular matter. So, I guess, those are the issues that I was concerned about and if you anything else that you wanted to add to that that's fine.

MR. BUXTON: No Your Honor I was just looking through, and I'll be honest with you, I didn't write the brief.

THE COURT: Okay.

MR. BUXTON: So that was our appellate lawyer wrote the brief. So --- but I did review it before it came to the Court.

THE COURT: All right.

MR. BUXTON: And unless the Court has specific questions of me.

THE COURT: Well I think the order that I entered in this particular matter was fairly clear. I got the impression that these doctors were called in simply as consultants. I did not feel that the Samms rules applied then and, you know, so that's still going to be my position unless anybody else has anything else that they feel is appropriate for me to reconsider at this point.

MR. PALMERI: Your Honor we have nothing further. I think your order was very detailed.

THE COURT: Well I'll indicate I didn't draft the order either.

MR. PALMERI: It was well drafted nonetheless.

THE COURT: All right, well if that's the case then there are some other discovery matters that needed to be addressed today.

MR. PALMERI: I think just two issues Your Honor. One which you've already ruled on which is the deposition of Mr. Reutter. The Plaintiff's have confessed a motion to compel that. The second is we've got to conclude the deposition of Mrs. Reutter. I will tell you since I took the lead on Mrs. Reutter's deposition and Mr. Buxton was not there, one of his partners was, I do think we're going to have some issue come up that perhaps we could get Your Honor's guidance in. It's not in the form of a motion before the Court but one of the issues that you may recall we were here before on was, what's the medical issue at issue in the case because that will key what discovery can flow from that. And we got into a situation in Mrs. Reutter's deposition where we were asking her questions about her husband's medical condition and Mr. Buxton's partner instructed her not to answer saying that that particular medical issue wasn't at issue and therefore not entitled to do discovery on it. And I can tell you right now I'm still not clear on what they think the medical issue was. For example, we'd ask about Mr. Reutter's cardiac history. You may recall Your Honor, my client is a cardiologist.

E-FILED cc BCM

DISTRICT COURT, COUNTY OF PUEBLO, COLORADO Address: 320 West 10th Street Pueblo, Colorado 81003 Telephone:	**COURT USE ONLY**
DUANE REUTTER and PATTY REUTTER, Plaintiffs, v. KEVIN WEBER, M.D., MATTHEW SUMPTER, M.D., GEORGE GIBSON, M.D., CATHOLIC HEALTH INITIATIVES COLORADO d/b/a ST. MARY-CORWIN MEDICAL CENTER and PUEBLO CARDIOLOGY ASSOCIATES, P.C., Defendants.	Case No.: 04 CV 53 Division: E BCM COPY

ORDERS

The Court makes the following Orders after the hearing on February 13, 2006.

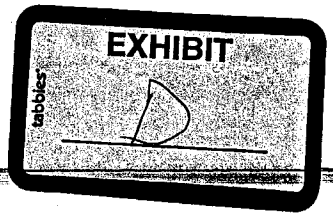
1. This Court, having considered Plaintiffs' Motion for Reconsideration Re: *Ex Parte* Contact with Medical Providers, hereby denies Plaintiffs' Motion after being fully advised and hearing oral arguments on the matter.

2. Plaintiffs' are ordered to produce any and all medical records, including hospital admissions, involving care and treatment received subsequent to the care provided by the Defendants.

3. Plaintiffs' are ordered to produce any and all pre-injury medical records, including hospital admissions, for Duane Reutter that involve sleep apnea, cardiology care, neuropsychological evaluations and treatment, neurology evaluations and treatment, respiratory care and treatment, and pulmonary care and treatment.

4. It is ordered that Expert Disclosure deadlines pursuant to the Second Modified Case Management Order are still in effect; however, Defendants may have an extension of time to disclose damages experts upon written motion.

5. Trial has been scheduled to begin on April 17, 2007, lasting four (4) weeks in length and to commence Tuesday through Fridays only.



So ordered this 21st day of March, 2006, NPT 2/13/06.

BY THE COURT

David A Cole

District Court Judge

LEXSEE 2004 OHIO APP LEXIS 4520

JUDY HAWES, EXECUTRIX, Appellant v. JAMES R. GOLDEN, et al., Appellees

C.A. No. 03CA008398

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

2004 Ohio 4957; 2004 Ohio App. LEXIS 4520

September 22, 2004, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by Hawes v. Golden, 2005 Ohio 531, 2005 Ohio LEXIS 237 (Ohio, Feb. 16, 2005)

PRIOR HISTORY: [**1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO. CASE No. 02CV133202.

DISPOSITION: Judgment of the Court of Common Pleas affirmed.

COUNSEL: ORVILLE E. STIFEL, II, Attorney at Law, Cleveland, OH, for appellant.

JAMES P. SAMMON, Attorney at Law, Sandusky, OH, for appellees James R. Golden, Baker Hi-Way Express, Inc., T.A.B. Leasing, Inc., and Parkway Leasing, Inc.

JUDGES: DONNA J. CARR, Presiding Judge. SLABY, J., BATCHELDER, J. CONCUR.

OPINIONBY: DONNA J. CARR

OPINION:

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

[*P1] Appellant, Judy Hawes, appeals from the decision of the Lorain County Common Pleas Court which ordered her to disclose privileged medical information of her husband, the decedent, to appellees arising out of a fatal traffic accident in which the decedent struck the rear-end of appellee James R. Golden's tractor-trailer. This Court affirms.

I.

[*P2] This action arises out of a fatal automobile accident occurring on November 7, 2001. The decedent was driving on State Route 10 and struck the rear end of appellee's tractor-trailer which [**2] was apparently stopped in the right-hand lane of travel. Appellant, as representative of her husband's estate, filed a wrongful death action against the appellees in Lorain County Common Pleas Court.

[*P3] During the course of discovery, appellees filed interrogatories which requested information regarding all chronic health conditions of which the decedent suffered. Appellant objected to this interrogatory on the grounds that the information sought was not relevant or reasonably calculated to lead to the discovery of relevant information. Appellant then admitted that the decedent suffered from an eye condition known as macular degeneration and was examined and/or treated for this condition by three different physicians. Appellees then attempted to obtain medical releases from appellant for the records of these medical providers. Appellant refused to execute any medical authorizations. n1 Appellees then subpoenaed these records directly from the providers. Two of the providers complied with the subpoena and one objected to providing the records on the grounds of federal privacy protections under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). [**3]

n1 Apparently, appellees attempted to obtain releases from appellant twice -- once with a general medical authorization form and once with a HIPAA-compliant medical authorization. Appellant refused to execute either.

[*P4] On July 17, 2003, appellees filed a motion to compel discovery of the medical records and a notice of filing records under protective seal and appellant filed a motion for a protective order. The trial court conducted a hearing on October 20, 2003, and held that the medical records of the decedent are relevant, but not directly

discoverable from the health care providers under HIPAA regulations n2. The court found that appellant waived her patient/physician privilege under R.C. 2317.02(B)(1) and could be compelled to produce these records. It then ordered her to produce all medical records or execute a HIPAA authorization/release in order for appellees to obtain these records.

n2 The trial court also ordered that appellee return all medical information obtained pursuant to the subpoenas to the court.

[**4]

[*P5] Appellant continued to refuse to execute such medical authorizations and filed a motion to reconsider and vacate order. The trial court denied the motion and appellant filed this appeal.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN HOLDING THAT, PURSUANT TO R.C. SECTION 2317.02(B)(1), APPELLANT WAIVED THE PRIVILEGE ACCORDED HER DECEDENT'S MEDICAL FILES UNDER THE FEDERAL HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT ('HIPAA'), SINCE (1) HIPAA PREEMPTS STATE LAW, (2) R.C. SECTION 2317.02(B)(1) DOES NOT PURPORT TO EFFECTUATE A WAIVER OF FEDERALLY CREATED PRIVILEGES AND (3) IF IT DID, SECTION 2317.02(B)(1) WOULD VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION."

[*P6] Appellant claims that R.C. Section 2317.02(B)(1)(a)(iii) which waives the physician-patient privilege upon filing a wrongful death action is preempted by HIPAA and its newly-enacted privacy rules which grant nationwide protection of certain medical information. HIPAA provides guidelines under which a medical provider, referred to as a 'covered entity,' may disclose an individual's medical [**5] information

[*P7] Interpretations of state or federal law are questions of law which are reviewed by this Court de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684. In this case, the Court finds that HIPAA does not preempt state law regarding discovery of medical evidence in legal proceedings deemed relevant under state law.

[*P8] Under HIPAA, a medical provider/covered entity is permitted to disclose medical evidence required by law under 45 C.F.R. 164.512. 45 C.F.R. 164.512 (a)(1) and (2) state:

"(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

"(2) A covered entity must meet the requirements described in paragraph *** (e) *** of this section for uses or disclosures required by law."

[*P9] Under 45 C.F.R. 164.512(e) a covered entity may disclose medical evidence for judicial and administrative proceedings in two circumstances:

"(1) [**6] Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

"(i) In response to an *order of the court* or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

"(ii) In response to a *subpoena, discovery request,* or other lawful process, that is not accompanied by an order of a court or administrative tribunal[.]" (Emphasis added.).

[*P10] Either of these provisions apply to permit the medical providers/covered entities to disclose the decedent's medical evidence in this case.

[*P11] It is true that HIPAA does preempt state law in certain areas. See 42 U.S.C. 1320d-7: "[A] provision or requirement under this part, or a standard or implementation specification adopted or established under sections [42 U.S.C. 1320d-1 through 1320-d3] of this title, shall supersede any contrary provision of State law[.]"

[*P12] Whether R.C. Section 2317.02(B)(1)(a)(iii) is preempted by HIPAA depends on whether it [**7] is 'contrary' to federal law. 'Contrary' is defined in 45

C.F.R. 160.202 as the impossibility of complying with both state and federal requirements. In this case, it is not impossible for the medical provider/covered entity to comply with both federal and state law. Under state law, the patient/physician privilege is waived upon filing a wrongful death action such that medical evidence is discoverable from a medical provider/covered entity. R.C. Section 2317.02(B)(1)(a)(iii). And, as discussed above, HIPAA likewise permits disclosure of medical evidence either pursuant to a court order, discovery request or subpoena. Consequently, there is no conflict

[*P13] Appellant claims that HIPAA does not contain any provisions comparable to Section 2317.02(B)(1)(a)(iii) regarding waiver of her decedent's privacy rights. She claims that disclosure of the decedent's medical records is governed solely by 45 C.F.R. 164.512(g) and (h). She does not, however, cite 45 C.F.R. 164.512(e), regarding judicial and administrative proceedings, discussed above, which clearly apply to this case. These [**8] provisions specifically authorize release of medical records pursuant to a court order, subpoena, or discovery request. This Court finds that these provisions permit discovery of medical evidence relevant to wrongful death cases. They are not superseded or preempted by HIPAA.

[*P14] Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING DISCLOSURE OF REV. HAWES MEDICAL FILE WITHOUT CONDUCTING AN IN CAMERA REVIEW."

[*P15] Appellant argues in her second assignment of error that the trial court abused its discretion in ordering 'wholesale disclosure' of Rev. Hawke's medical files without conducting an in camera review. Appellees argue that at the hearing the parties stipulated that only medical records of the decedent which related to his vision were relevant and that only these records are sought by appellees.

[*P16] Discovery matters are reviewed by this Court under an abuse of discretion standard. Abuse of discretion means more than an error of law or judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore,* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140. [**9]

[*P17] In this case, this Court finds that the trial court did not abuse its discretion in resolving the discovery dispute. The trial court properly found that appellant had waived the patient/physician privilege by bringing a wrongful death action and appropriately narrowed the scope of discovery to issues involving the decedent's vision.

[*P18] Furthermore, the trial court acted appropriately in ordering all improperly obtained medical information be deemed not usable. Last, this Court finds that the trial court was not obligated to conduct an in camera review of the medical records, particularly in view of its finding that appellant had waived the decedent's patient/physician privilege by filing suit and the parties' stipulation that the only medical records discoverable were related to decedent's vision.

[*P19] Accordingly, this Court finds that the trial court did not abuse its discretion in its resolution of the discovery matter. Appellant's second assignment of error is without merit.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN COMPELLING DISCLOSURE OF APPELLANT'S DECEDENT'S MEDICAL RECORDS WHERE (1) R.C. SECTION 2317.02(B)(1) [**10] 'S WAIVER IS LIMITED TO INFORMATION THAT IS 'RELEVANT TO [THE] ISSUES,' (2) THE AVOWED NEED FOR REV. HAWES' MEDICAL FILES IS TO ENABLE APPELLEES TO EXPLORE A CONTRIBUTORY NEGLIGENCE DEFENSE, AND (3) CONTRIBUTORY NEGLIGENCY IS NOT A DEFENSE IN THIS CASE."

[*P20] Appellant argues that the medical information at issue here is not relevant because it relates to a possible defense of contributory or comparative negligence which cannot be asserted when the appellee is guilty of willful, wanton or reckless misconduct. This Court reviews discovery issues under an abuse of discretion standard, *Blakemore,* 5 Ohio St. 3d at 219.

[*P21] This Court finds that the issues of the relevance and validity of these defenses are not matters appropriately determined during the discovery stage. Discovery under Ohio law is deliberately broad in order to determine all facts and issues before trial. Civ. R. 26(A). It is not a good use of scarce judicial resources to bifurcate a trial. If a determination on the merits of such defense must be made, a more proper forum is at trial where the court will have before it all evidence relevant to the case. The trial [**11] court did not abuse its discretion in compelling disclosure of the decedent's medical records.

[*P22] Appellant's third assignment of error is

overruled.

III.

[*P23] Appellant's three assignments of error are overruled. The judgment of the Lorain County Common Pleas Court is affirmed. This Court remands this case for further proceedings before the trial court.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30 [**12] .

Costs taxed to appellant.

Exceptions.

DONNA J. CARR

FOR THE COURT

SLABY, J.
BATCHELDER, J.
CONCUR

2005 NY Slip Op 50770U, *; 7 Misc. 3d 1027A, **;
801 N.Y.S.2d 234; 2005 N.Y. Misc. LEXIS 1031, ***

LEXSEE 2005 NY MISC LEXIS 1031

[*1] Tammy Holzle and Ralph Holzle, Plaintiffs, v. Healthcare Services Group, Inc. and Thyssen Krupp Elevator Corp., Defendants.

110376

SUPREME COURT OF NEW YORK, NIAGARA COUNTY

2005 NY Slip Op 50770U; 7 Misc. 3d 1027A; 801 N.Y.S.2d 234; 2005 N.Y. Misc. LEXIS 1031

May 24, 2005, Decided

NOTICE: [***1] THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES: [**1027A] Disclosure--Medical Records and Reports--Authorization permitting defense counsel to interview plaintiff's nonparty treating physicians post-note of issue.

COUNSEL: Grossman & Civiletto, Attorneys for Plaintiffs, By: Samual J. Civiletto, Esq., of Counsel.

Damon & Morey, LLP, Attorneys for Defendant Healthcare Services Group, Inc., By: Marylou K. Roshia, Esq., of Counsel.

Osborn, Reed & Burke, LLP, Attorneys for Defendant Thyssen Krupp Elevator Corp., By: Jeffrey M. Wilkins, Esq., of Counsel.

JUDGES: HON. JOHN M. CURRAN, J.S.C.

OPINIONBY: John M. Curran

OPINION: John M. Curran, J.

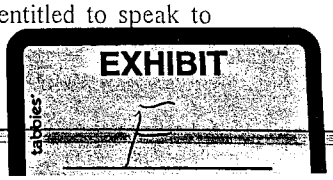
Defendant, Healthcare Services Group, Inc. ("HSG"), has moved for an Order vacating plaintiffs' note of issue and certificate of readiness ("note of issue"), and compelling plaintiff, Tammy Holzle ("plaintiff"), to comply with its demand for medical authorizations permitting defense counsel to privately interview plaintiff's treating physicians. Alternatively, HSG requests that the Court enter an Order precluding plaintiffs from offering testimony or records of plaintiff's treating physicians at trial and further [***2] prohibiting plaintiffs' attorneys from speaking with plaintiff's treating physicians prior to trial. Defendant, Thyssen Krupp Elevator Corp. ("TKEC"), moves for an Order requiring plaintiff to provide medical authorizations which permit defendant's counsel to speak with plaintiff's treating physicians prior to trial. [*2]

In support of its motion, HSG has submitted the Notice of Motion dated February 14, 2005, the Affidavit of Marylou K. Roshia, Esq., sworn to on February 14, 2005, together with exhibits, and the Reply Affidavit of Marylou K. Roshia, Esq., sworn to on April 29, 2005. In support of its motion, TKEC has submitted the Notice of Motion dated February 16, 2005 and the Affidavit of Jeffrey M. Wilkins, Esq., sworn to on February 16, 2005, together with exhibits. In opposition to the motions, plaintiffs have submitted the Affirmation in Opposition from Samual J. Civiletto, Esq., affirmed on March 30, 2005, together with exhibits. Oral argument was conducted on May 5, 2005, whereupon the Court heard from Ms. Roshia on behalf of defendants in support of the motions and from Mr. Civiletto on behalf of plaintiffs in opposition thereto. Mr. Wilkins submitted on papers.

This action [***3] was commenced in 2001 and involves plaintiff's allegations that she suffered personal injuries as a result of a fall at the geriatric center owned by defendant HSG on December 23, 1998, and as a result of being struck by an elevator door maintained by defendant TKEC on February 24, 1999. Following a conference conducted with the attorneys on August 30, 2004, the Court entered a Scheduling Order dated September 1, 2004, setting forth deadlines which were agreed upon by counsel. Pursuant to that Scheduling Order, all discovery was to be complete by December 31, 2004, and plaintiff was to file a note of issue on or before February 1, 2005. The Court conducted a pretrial conference on January 7, 2005, at which time a trial was set for September 8, 2005. Plaintiffs filed and served a note of issue on January 25, 2005.

On January 12, 2005, HSG demanded that plaintiff provide authorizations permitting defense counsel to speak with plaintiff's treating physicians. Counsel for TKEC joined in this request on or about January 31, 2005. Plaintiff rejected the demand for the authorizations which precipitated these motions.

Defendants claim that they are entitled to speak to



plaintiff's treating [***4] physicians after the note of issue is filed and before trial. However, according to the defendants, regulations recently adopted pursuant to the federal Health Insurance Portability and Accountability Act ("HIPAA") make it necessary for plaintiff to provide authorizations permitting defense counsel to speak with her treating physicians.

The interplay between New York law and HIPAA is becoming an area garnering substantial attention in the courts. There are now numerous state and federal decisions addressing whether and/or to what extent HIPAA has altered state court practice with respect to disclosure and trial preparation.

Historical Background

In 1969, the Court of Appeals made clear that a plaintiff n1 in a personal injury action waives the physician-patient privilege by commencing the action as to the conditions complained of in the action (*Koump v Smith*, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 303 N.Y.S.2d 858 [1969]).

> "We hold, therefore, that by bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue, a party *waives* the privilege. As a practical matter, a [*3] plaintiff or a defendant, who affirmatively asserts [***5] a mental or physical condition, must eventually waive the privilege to prove his case or his defense. To uphold the privilege would allow a party to use it as a sword rather than a shield. A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition."

(*Koump*, 25 N.Y.2d at 294). The courts also have disallowed any tort claims for a breach of confidentiality so long as the information was disclosed pursuant to a waiver or consent (*see Fedell v Wierzbieniec*, 127 Misc. 2d 124, 485 N.Y.S.2d 460, *affd* 116 A.D.2d 990, 498 N.Y.S.2d 1013 [4th Dept. 1986]; *Steiner v University of Rochester*, 278 A.D.2d 827, 719 N.Y.S.2d 407 [4th Dept 2000]).

> n1 When referring to a "plaintiff" in this Decision, the word encompasses any party who affirmatively asserts a mental or physical condition.

[***6]

CPLR § 3121 has for decades contained a provision requiring a person claiming injuries to provide "duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of all specified hospitals relating to such mental or physical condition or blood relationship." Further, the Uniform Rules for the New York State Trial Courts ("Uniform Rules"), effective in 1986, contain a provision which provides that, at least twenty days before the mental or physical examination provided for in the Uniform Rules and under CPLR § 3121, the party to be examined must provide: "duly executed and acknowledged written authorizations permitting all parties to obtain and make copies of all hospital records and such other records, including x-ray and technicians' reports as may be referred to and identified in the reports of those medical providers who have treated or examined the parties seeking recovery." (Uniform Rules for Trial Ct [22 NYCRR] § 202.17 [b]).

The courts appear to have taken a largely restrictive view of the statute and rules with respect to the types [***7] of information which can be authorized to be made available in the course of discovery. Before the Uniform Rule was adopted, and during the time the Fourth Department had its own local rule, the Fourth Department held that neither the rules nor the CPLR authorized an informal interview of a medical witness (*Cwick v City of Rochester*, 54 A.D.2d 1078, 388 N.Y.S.2d 753 [4th Dept 1976]). Additionally, in *Feretich v Parsons Hosp.* (88 A.D.2d 903, 450 N.Y.S.2d 594 [2d Dept 1982], the Second Department agreed that an authorization provided by a personal injury plaintiff could contain language that the authorization was not intended to permit the medical provider to discuss the plaintiff's case. Similarly, in *Frasier v Conklin* (105 A.D.2d 1018, 483 N.Y.S.2d 460 [3d Dept 1984]), the Third Department struck a provision from the lower court's order requiring the plaintiff to provide continuing discovery in the form of medical records from treating physicians because it exceeded what the local rules and statute require.

As noted, the decisions in *Cwick*, *Feretich* and *Frasier* were all rendered before the Uniform Rule with respect to authorizations was promulgated. The Uniform Rule [***8] contains no language retreating from this restrictive view. Thus, the rationale of all three cases is still valid.

The issue of a defense counsel's informal interview of plaintiffs' treating physicians was directly addressed in *Anker v Brodnitz* (98 Misc. 2d 148, 413 N.Y.S.2d 582 [Sup Ct, Queens County [*4] 1979], *affd* 73 A.D.2d 589, 422 N.Y.S.2d 887 [2d Dept 1979], *lv dismissed* 51 N.Y.2d 743, 411 N.E.2d 783, 432 N.Y.S.2d 364 [1980]).

There, the court held that private interviews of treating physicians were specifically prohibited:

> Although the private interviews in the case at bar occurred prior to the formal exchange of medical records, the rationale of this decision is applicable to private interviews sought after such exchange. The adequacy of formal discovery procedures, the difficulty of determining what medical information is relevant, and the possibility of doctors or insurers becoming the object of lawsuits for unauthorized disclosure require that there be no private interviews without a patient's express consent.

(*Anker*, 98 Misc. 2d at 154).

Significantly, *Anker* relies in part on the Fourth Department's decision in *Cwick* for the proposition that "medical [***9] discovery should be limited to that obtainable by rule, statute, or express consent and private interviews would not be allowed even after the exchange of medical records." (98 Misc. 2d at 151). Further, in *Feretich*, *supra*, the Second Department made clear that *Anker* was not founded on the physician-patient privilege, but rather "by the very design of the *specific disclosure devices* available in CPLR Article 31." (88 A.D.2d at 904) (Emphasis added). These cases all appear to stand for the proposition that a defense counsel's desire to informally interview a plaintiff's treating physician is not authorized by any statute or rule and therefore the courts do not involve themselves.

The decision in *Anker* has been limited over the course of time. In essence, the appellate divisions have held that there is no ethical or other legal prohibition against interviewing plaintiff's treating physicians in personal injury actions when the interviews occur after the note of issue has been filed (see*Zimmerman v Jamaica Hosp., Inc.*, 143 A.D.2d 86, 531 N.Y.S.2d 337 [2d Dept 1988]; *Tiborsky v Martorella*, 188 A.D.2d 795, 591 N.Y.S.2d 547 [***10] [3d Dept 1992]; *Levande v Dines*, 153 A.D.2d 671, 544 N.Y.S.2d 864 [2d Dept 1989]; *Fraylich v Maimonides Hosp.*, 251 A.D.2d 251, 674 N.Y.S.2d 668 [1st Dept 1998]). Nevertheless, none of these cases *required* a plaintiff to *consent* to the interviews.

HIPAA and the Privacy Rule

HIPAA was adopted in 1996 to improve the efficiency and effectiveness of the health care system. Congress incorporated into HIPAA provisions that mandated the adoption of federal privacy protections for individually identifiable health information. The Department of Health and Human Services ("HHS") implemented its Privacy Rule in 2002 which requires all "covered entities" to establish standards to guard against the misuse of individually identifiable health information (45 CFR part 160 and Subparts A and E of Part 164).

The Privacy Rule authorizes a covered entity that is not a party to a legal proceeding to disclose protected health information in response to a subpoena, discovery request, or other lawful process that is not accompanied by a court order. In that situation, the covered entity must receive a statement and accompanying documentation from the party seeking the information [***11] that reasonable efforts have been made either to ensure that the individual who is the subject of information has been notified of the request or to secure a qualified protective order for the information. Otherwise, the health care entity must itself make reasonable efforts to provide notice or to seek a qualified protective order (45 CFR 164.512 [e]). [*5]

The issue that has arisen since HIPAA's Privacy Rule was implemented involves the practical problem defense counsel are encountering in attempting to interview a plaintiff's treating physicians after a note of issue has been filed and in preparation for the potential trial testimony of such physicians. Specifically, it appears that treating physicians are requiring either written authorizations signed by the plaintiff which comply with HIPAA and which permit oral communications, or a court order authorizing such oral communications which likewise comply with HIPAA.

This practical problem for defense counsel has now engendered eight (8) published and unpublished decisions of which this Court is aware pertaining to how and under what terms defense counsel may gain access to treating physicians for interviews [***12] after the note of issue has been filed (*see Beano v Post*, Sup Ct, Queens County, March 12, 2004, Dollard, J., Index No. 5694/01; *Keshecki v St. Vincent's Medical Ctr.*, 5 Misc. 3d 539, 785 N.Y.S.2d 300 [Sup Ct, Richmond County 2004]; *O'Neil v Klass,* Sup Ct, Kings County, October 29, 2004, Rosenberg, J., Index No. 3808/02; *Browne v Horbar*, 6 Misc. 3d 780, 792 N.Y.S.2d 314 [Sup Ct, New York County, 2004]; *Steele v Clifton Springs Hosp.*, 6 Misc. 3d 953, 788 N.Y.S.2d 587 [Sup Ct, Monroe County 2005]; *Smith v Rafalin*, 6 Misc. 3d 1041A[A], 2005 NY Slip Op 50385[U] [Sup Ct, New York County 2005]; *Valli v Viviani*, 7 Misc. 3d 1002[A], 2005 NY Slip Op 50409[U][Sup Ct, Suffolk County 2005]; *Hitchcock v Suddaby*, 2005 N.Y. Misc. LEXIS 1019, Sup Ct, Erie County, May 11, 2005, Mintz, J., Index No. 219/02). These cases are from eight different Supreme Court Justices in seven (7) different counties. Each case tends to reach a slightly different result although six (6) of them appear to resolve in a similar way.

In *Beano*, *Keshecki*, *O'Neil*, *Steele*, *Smith* and *Hitchcock*, the learned Justices elected to grant [***13] orders sought by defense counsel seeking to require

plaintiffs to execute HIPAA compliant authorizations to permit interviews of treating physicians. The only exception to this point is *Keshecki* which also granted a motion to preclude testimony from treating physicians who communicated with defense counsel allegedly in violation of the Privacy Rule. Each of the courts in those six decisions devised language for an authorization to be executed by the plaintiff and in some instances required the disclosure by defense counsel of statements, documents and recordings from the interviews.

Some of these decisions are founded on the premise that was articulated in *Beano*:

> It would appear to the court that implicit in that waiver (of the physician-patient privilege) is an obligation to provide an authorization to interview a treating physician or hospital employee who treated the plaintiff in which PHI (personal health information) may be disclosed.

Some of these justices also were concerned with the perceived unfairness to defense counsel as revealed in *Smith*:

> Fairness in providing equal access to the physicians militates in favor of permitting continuation [***14] of interviews by defense counsel.

The contrary views on this issue are in *Browne* and *Valli*. In *Browne*, the court denied the defendant's motion seeking a qualified protective order to communicate with [*6] plaintiff's treating physicians. The court perceived pre-HIPAA case law as providing for a policy of non-involvement in the interviews and that there is nothing in that case law which requires the court to "actively assist a party desirous of interviewing a treating physician." In essence, the court denied the motion "for the very simple reason that judicial participation in the informal interview process . . . would improperly permit medical malpractice defendants to obtain discovery after the note of issue has been filed without requiring adherence to the rules governing disclosure." On this basis, the court also suggested that the appropriate mechanism for interviews with treating physicians would be at examinations before trial during the discovery process. n2

> n2 The same Justice who decided *Browne* has recently held that HIPAA is an unusual or unanticipated circumstance permitting a post-note of issue deposition of a non-party treating physician (*Raynor v St. Vincent's Hospital* [Sup Ct, New York County, NYLJ, May 17, 2005]).

[***15]

In *Valli*, the court came to a different conclusion by declining to follow *Keshecki* on the grounds that: "It is for the Legislature to determine if an amendment to the CPLR is warranted to protect a plaintiff's health information. Until such time, the law in the Second Department is that post-note of issue interviews with treating physicians are proper." In essence, the court declined to require the plaintiff to execute an authorization for an interview because nothing under the law requires it and HIPAA does not otherwise change the pre-existing case law in New York.

Analysis

> This Court takes its own view of the issue just as the other Justices did in the aforementioned cases. In fact, the variety of views by each Justice is a significant problem for all parties in personal injury actions because the rules of the game can change depending on the judge. Moreover, having each judge devise her or her own rules for authorizations will only invite further litigation as to the appropriate language of each authorization for each such Justice and whether the authorization as prepared by counsel matches what each Justice wanted. For these reasons, this Court [***16] is most closely aligned with the views expressed in *Valli*.

The analysis starts with the foundation that HIPAA did not create any substantive rights or remedies for plaintiffs. In fact, the Seventh Circuit has held that HIPAA did not create a federal physician-patient privilege and that the Privacy Rule is procedural in nature (*Northwestern Memorial Hosp. v Ashcroft*, 362 F.3d 923, 926 [7th Cir 2004]). This point is further underscored by the fact that all the district courts that have addressed the issue have found that HIPAA does not create any private right of action. Instead, patients who perceive themselves aggrieved by non-compliance with HIPAA are relegated to filing a complaint pursuing an administrative process under HIPAA, thereby allowing the Secretary of HHS to pursue any rights or remedies on behalf of the patient (*see e.g. Rigaud v Garofalo*, 2005 U.S. Dist LEXIS 7791 [ED PA May 2, 2005]; *Johnson v Quander*, 2005 U.S. Dist LEXIS 5020 [DC DC March 21, 2005]).

Some of the other Justices who have decided this issue seem to infer that the Privacy Rule provides substantive rights for plaintiffs in New York litigation [***17] practice. For [*7] example, in *Keshecki*, the court observed that it would follow *Beano* by establishing protections "that would afford the patient

with his or her HIPAA rights." On this basis, the *Keshecki* court also imposed a HIPAA-based remedy by granting the plaintiff's motion to preclude the testimony of two treating physicians. This Court finds nothing under New York law or HIPAA bestowing such rights or authorizing such a remedy.

Nevertheless, even if it were proper to conclude that the Privacy Rule does create some form of rights or remedies for plaintiffs in state litigation, this Court believes it proper to apply *Koump* to any such rights and remedies for the same reasons articulated by the Court of Appeals in that case. Thus, any rights or remedies which a plaintiff claims to possess under HIPAA in New York litigation must be deemed to have been waived in the context of that litigation just as the physician-patient privilege was deemed to have been waived in *Koump*.

The same reasons for construing a waiver of the physician-patient privilege that existed in *Koump* also exist here. A party who affirmatively asserts a mental or physical condition must eventually [***18] consent to a waiver of any HIPAA rights in order to prove his or her case. Moreover, to construe any HIPAA rights as a sword against defendants but as a shield for plaintiffs would have the same unfair result which the Court of Appeals guarded against in *Koump*. Accordingly, this Court holds that by bringing or defending a personal injury action in which a party's mental or physical condition is affirmatively raised, that party waives any rights or remedies under HIPAA as to the mental or physical conditions asserted in the litigation.

The waiver of any HIPAA rights as implicit in the waiver of the physician-patient privilege is more consistent with the principles of separation of powers and statutory construction than requiring plaintiffs to execute an authorization consenting to an interview to which they object and feel is unfair. This construction of a waiver of any HIPAA rights more closely adheres to the principles annunciated by the Court of Appeals in *Koump* and is therefore completely within established common law. Further, by adhering to the common law, the Court need not be concerned about creating legislation or regulatory schemes specifying the language of authorizations [***19] without the benefit of any guidance from the Legislature or the Uniform Rules. The parties to the litigation and non-party physicians also do not need to be concerned with whether plaintiff's counsel must be notified of or present at the interview, whether an authorization is properly worded as directed by the court, or whether attorney work product must be disclosed after the interview.

Perhaps most importantly, the construction of a waiver of any HIPAA rights fulfills the same purpose which *Koump* ultimately served by protecting defense counsel and treating physicians who participate in post-note of issue interviews. The practice has been for defense counsel, after the note of issue has been filed, to provide treating physicians either with an authorization for medical records executed by the plaintiff and/or with a subpoena for trial testimony. Apparently because the treating physicians could take comfort in the waiver of the physician-patient privilege, the physicians who were willing to meet with defense counsel did not require the plaintiff to execute a written authorization permitting the interview. This pre-HIPAA practice was premised solely on the waiver of the doctor-patient [***20] privilege rather than on any piece of paper such as a records authorization or trial subpoena.

Under this Court's approach, all parties can rely on the point that New York common law provides for a waiver of any rights or remedies under HIPAA. Accordingly, the [*8] waiver of any HIPAA rights for plaintiffs has the practical effect of assuring defense counsel that the state court will not impose any remedy for a purported violation of HIPAA, i.e., the type of preclusion that occurred in *Keshecki*. Additionally, treating physicians can be assured that HIPAA does not provide any private right of action for plaintiffs and, when faced with any administrative complaint by a plaintiff, the treating physician can point to New York common law which construes a waiver of HIPAA rights. This result also is consistent with pre-HIPAA New York law which, as noted above, disallowed any tort remedies for breach of confidentiality where the privilege has been waived.

Essentially, the construction of a waiver of any HIPAA rights puts all parties in the same position they were in before the Privacy Rule was adopted. The same case law which prohibited pre-note of issue interviews of treating physicians [***21] and refused to prohibit post-note of issue interviews still stands.

It may be that this conclusion does not adequately address the concerns of defense counsel. Rather, defense counsel may still be confronted by the practical problem that physicians may insist upon HIPAA-compliant authorizations or a court order before participating in interviews. However, this is a problem which was encountered in a similar way by defense counsel before the Privacy Rule was implemented because not all treating physicians would meet with them. The problem was overcome then through no statute or regulation requiring authorizations for oral interviews but apparently by reminding physicians that the physician-patient privilege had been waived and by providing physicians with a records authorization and/or trial subpoena. Given this Court's conclusion that any HIPAA rights are waived by plaintiffs, this practice need not change.

Through this conclusion, the Court maintains a wise policy of non-involvement in activities which are not formal disclosure authorized by the CPLR or the

Uniform Rules. The courts should not become involved in post-note of issue trial preparation matters and should not dictate [***22] to plaintiffs or defense counsel the terms under which interviews with non-party witnesses may be conducted.

This Court is struck by the fact that there has never been anything under the CPLR or Uniform Rules requiring plaintiffs to execute an authorization permitting oral interviews of treating physicians after the note of issue has been filed. This is despite the fact that the debate over whether such interviews are appropriate, permissible or required has been ongoing for decades. Instead, the most the Legislature has authorized is a written authorization for hospital and medical records. This decision of the Legislature to provide for one type of authorization and not another cannot be overlooked. As the First Department articulated in *D'Amico v Manufacturers Hanover Trust Co.* (182 A.D.2d 462, 581 N.Y.S.2d 790 [1st Dept 1992]), the usual statutory construction rule is founded upon the principle of *"expressio unius est exclusio alterius"* ("the expression of one thing is to the exclusion of another"). Thus, the courts should not construe a form of authorization where a more limited form of authorization has been specifically authorized by the Legislature.

In the absence of [***23] any statute or rule requiring plaintiffs to execute an authorization [*9] permitting oral interviews, this Court will not contrive such a rule, regulation or authorization. n3 This Court agrees with the court in *Valli* that: "such legislation on the part of the courts leads only to more confusion among litigators and doctors as to how any individual court will proceed." Thus, the guidance needs to come from the Legislature, the Uniform Rules, or an appellate court.

n3 Strangely, the OCA-approved form for a HIPAA-compliant authorization has a provision which allows a plaintiff to check a box and complete information permitting a healthcare provider "to discuss my health information with my attorney." (Emphasis added). Thus, it appears that OCA has complicated this debate by issuing an approved form which authorizes oral communications with only one party's attorney despite the absence of any such language in the CPLR or the Uniform Rules. Undoubtedly, this OCA-approved form will become an even further source of angst for defense counsel who may perceive that there should be a provision in the form authorizing discussions with defense counsel.

[***24]

For all of the above reasons, the motions by the defendants are in all respects DENIED.

This Decision shall constitute the Order of the Court once it has been entered with the Clerk and served with Notice of Entry.

Dated: May 24, 2005

HON. JOHN M. CURRAN, J.S.C.

3 of 4 DOCUMENTS

IN RE: DIET DRUG LITIGATION; FRANKIE A. BRIGMAN, Plaintiff, v. WYETH, Inc., Defendant. SARAH ANN GIBSON, Plaintiff, v. WYETH, Inc., Defendant. PAMELA L. GRABER-KEITH, Plaintiff, v. WYETH, INC., Defendant. LEA M. MORRISON, Plaintiff, v. WYETH, INC., Defendant. ELIZABETH W. WARD, Plaintiff, v. WYETH, INC., Defendant. SHEILA M. ALLEN, Plaintiff, v. WYETH, INC., Defendant. INEZ E. BRYANT, Plaintiff, v. WYETH, INC., Defendant. NAIDA T. CATERINA, Plaintiff, v. WYETH, INC., Defendant. MAROLYN J. EFIRD, Plaintiff, v. WYETH, INC., Defendant. PATRICIA GAUTHIER, Plaintiff, v. WYETH, INC., Defendant. LINDA A. SEGAL, Plaintiff, v. WYETH, INC., Defendant. MARION F. SHOLAR, Plaintiff, v. WYETH, INC., Defendant. SHIRLEY A. WHITE, Plaintiff, v. WYETH, INC., Defendant.

Master Docket No.: BER-L-13379-04MT, Docket No. BER-L-2547-04MT, Docket No. BER-L-2561-04MT, Docket No. BER-L-2562-04MT, Docket No. BER-L-2565-04MT, Docket No. BER-L-2571-04MT, Docket No. BER-L-5599-04MT, Docket No. BER-L-2549-04MT, Docket No. BER-L-2551-04MT, Docket No. BER-L-2554-04MT, Docket No. BER-L-2559-04MT, Docket No. BER-L-2567-04MT, Docket No. BER-L-2568-04MT, Docket No. BER-L-2572-04MT

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY

2005 N.J. Super. LEXIS 395

April 28, 2005, Decided

SUBSEQUENT HISTORY: [*1] Approved for Publication March 8, 2006.

PRIOR HISTORY: Brigman v. Wyeth, Inc. (In re Diet Drug Litig.), 2005 N.J. Super. LEXIS 394 (Law Div., Apr. 7, 2005)

COUNSEL: *Amy M. Carter*, for plaintiffs Frankie A. Brigman, Sarah Ann Gibson, Pamela L. Graber-Keith, Lea M. Morrison, Elizabeth W. Ward, Sheila M. Allen, Inez E. Bryant, Naida T. Caterina, Marolyn J. Efird, Patricia Gauthier, Linda A. Segal, Marion F. Sholar, and Shirley A. White. (*William Bailey Law Firm,* attorneys).

Connie A. Matteo, (*Porzio, Bromberg, Newman*, attorneys) and *Anand Agneshwar*, (*Arnold & Porter*, attorneys) for defendant.

JUDGES: WALSH, J.S.C.

OPINIONBY: Walsh

OPINION:

Civil Action

Walsh, J.S.C.

Pondimin(R) and Redux TM are two prescription diet drugs manufactured by defendant, Wyeth (formerly known as American Home Products Corporation). Both drugs were approved by the United States Food & Drug Administration (FDA) for the treatment of obesity. n1 Both Pondimin(R) and Redux TM are anoretics, causing a decrease in one's appetite. *Stedman's Medical Dictionary* 90 (25th ed. 1990).

n1 In 1973, the FDA approved the New Drug Application (NDA) for Pondimin(R), finding it to be safe and effective for the obesity indication. In April 1996, the FDA approved Redux TM, which was thereafter marketed by AHP and another company.

[*2]

On July 8, 1997, physicians at the Mayo Clinic publicly reported findings of unusual heart valve lesions and/or valvular regurgitation in twenty-four patients being treated for obesity with phen-fen. Mayo Clinic press release, July 8, 1997. Simultaneously, the FDA issued a Public Health Advisory to health care professionals notifying them of the twenty-four Mayo Clinic cases and nine additional cases of "unusual valvular morphology and regurgitation" in women who had received phen-fen therapy for an average of ten months.

During the next several weeks, these findings and subsequent developments related to them were widely reported in the media. n2 Wyeth responded by issuing a "Dear Doctor Letter" to health care providers and subsequently, at the direction of the FDA, revising the labeling on the drugs. n3 However, after additional adverse information became available, Wyeth withdrew Pondimin(R) and ReduxTM from the market on September 15, 1997.

n2 The FDA republished its Health Advisory in the *Journal of the American Medical Association. Health Advisory on Concomitant Fenfluramine and Phentermine Use,* JAMA, 278:5:379 (Aug. 6, 1997).

[*3]

n3 On August 29, 1997, the FDA approved revised labeling for Pondimin(R) that included a black box warning for valvular heart disease. On September 3, 1997, the FDA approved similar revised ReduxTM labeling.

Litigation ensued, with claims made that Pondimin(R) and ReduxTM (phenfen) n4 cause valvular heart disease and that Wyeth, among other things, should have warned the plaintiffs' health care providers of that risk. Thirteen cases currently are scheduled for trial on May 31, 2005. n5 In its April 7, 2005 Opinion, the court held that the heeding presumption will apply to these thirteen cases. n6 Subsequent to that holding, Wyeth sought additional depositions of the plaintiffs' prescribing physicians in order to attempt to rebut this presumption. This motion was granted and commissions to depose the physicians in North Carolina issued. Wyeth now seeks an order permitting its attorneys to meet *ex parte* with plaintiffs' treating physicians prior to their deposition testimony. That motion is the subject of this opinion.

n4 The term phen-fen, which is often written fen-phen, refers to the use of fenfluramine or dexfenfluramine in combination with phentermine. For purposes of this Opinion, phen-fen will refer to fenfluramine or dexfenfluramine, whether used in combination with phentermine or not.

[*4]

n5 Following the procedure discussed in its Opinion, *In re Diet Drug Litigation,* BER-L-7718-03 (August 4, 2004), the Court has consolidated five (5) cases for trial: *Frankie A. Brigman v. Wyeth,* BER-L-2547-04, *Sarah Ann Gibson v. Wyeth,* BER-L-2561-04, *Pamela L. Graber-Keith v. Wyeth,* BER-L-2562-04, *Lea M. Morrison v. Wyeth,* BER-L-2565-04, and *Elizabeth Ward v. Wyeth,* BER-L-2571-04, with the remaining cases serving as backups (*Inez E. Bryant v. Wyeth,* BER-L-2549-04, *Sheila M. Allen v. Wyeth,* BER-L-5599-03, *Marolyn J. Efird v. Wyeth,* BER-L-2554-04, *Naida Caterina v. Wyeth,* BER-L-2551-04, *Patricia Gauthier v. Wyeth,* BER-L-2559-04, *Linda Segal v. Wyeth,* BER-L-2567-04, *Marion "Frances" Sholar v. Wyeth,* BER-L-2568-04, and *Shirley A. White v. Wyeth,* BER-L-2572-04).

n6 A heeding presumption will shift to Wyeth the burden of proceeding with evidence on the issue of whether a physician armed with appropriate risk information regarding the possibility of associated valvular disease nevertheless would have prescribed Pondimin(R) and/or ReduxTM. *See Coffman v. Keene Corp.,* 133 N.J. 581, 628 A.2d 710 (1993).

[*5]

I.

Ex parte interviews are an informal discovery technique. Wyeth seeks to employ this technique in advance of the treating physicians' depositions. Plaintiffs oppose this and challenge the availability of *ex parte* interviews where the plaintiffs' treating physicians live and practice in North Carolina. To resolve this dispute, the court must examine federal preemption principles and the following competing interests: (1) the New Jersey Supreme Court's directives in *Stempler v. Speidell,* 100 N.J. 368, 495 A.2d 857 (1985); n7 (2) plaintiffs' and their physicians' interests in privacy and the duty of loyalty as reflected in North Carolina law; n8 and (3) the federal policy of uniformly guarding against the over disclosure of privileged patient information. n9

N7 The defendant in *Stempler* asked for the "right to interview decedent's treating physicians, rather than be restricted to the formality, expense, and inconvenience of depositions conducted pursuant to the Court Rules." *Stempler,* 100 N.J. at 381, 495 A.2d 857. The New Jersey Supreme Court aptly noted that defendant's "unexpressed interest" is the "hope that one or more of these physicians might provide evidence or testimony that would be helpful to the defendant at trial. Unquestionably, defendant's counsel would prefer to seek out such evidence or discuss the prospect of such testimony in an ex parte interview rather than during a deposition attended by plaintiff's counsel." *Id.* Wyeth has argued that the *ex parte* nature "serves to maximize unhampered access to information, to reduce unnecessary expenditure of time and resources by all concerned -- including the physician -- and to insure the presentation of a more streamlined and effective case at trial." Wyeth Brief at 8.

[*6]

n8 The *Stempler* Court identified plaintiff's interest as "twofold." *Stempler,* 100 N.J. at 381, 495 A.2d 857. The primary interest is "the desire to protect from disclosure by the physician confidential information not relevant to the litigation and therefore still protected by the patient-physician privilege and the physician's professional obligation to preserve confidentiality." *Id.* The other interest is "the desire to preserve the physician's loyalty to the plaintiff in the hope that the physician will not voluntarily provide evidence or testimony that will assist the defendant's cause." *Id.*

n9 The physician's interest was described by the *Stempler* court as "focusing on prevention of inadvertent disclosure of information still protected by the privilege, since an unauthorized disclosure of such information may be unethical and actionable." *Id.* at 382, 495 A.2d 857.

II.

A.

In order to further federal goals of increased access to health care, Congress passed The Health Insurance Portability and Accountability Act of 1996 (HIPAA). n10 Congress sought to increase [*7] access by expanding portability and renewability of insurance. Diane Kutzko et al., *HIPAA In Real Time: Practical Implications Of The Federal Privacy Rule,* 51 *Drake L. Rev.* 403, 406 (2003) (citation omitted). During the legislative process, concern was expressed that innovations in technology might endanger the ability to protect health information; hence the adoption of privacy and security standards reflected in the HIPAA Privacy Rule (the Privacy Rule). *Standards for Privacy of Individually Identifiable Health Information,* 65 *Fed. Reg.* 82,462 (Dec. 28, 2000) (to be codified at 45 *C.F.R.* 160 and 164). n11 Congress delegated to the Secretary of the Department of Health and Human Services the task of adopting national standards "to ensure the integrity and confidentiality of the information." *Id.* at 82,453; 42 *U.S.C.* § 1320d-2(d)(2)(A).

n10 *Pub. L. No.* 104-191, 110 *Stat.* 1936 (1996).

n11 The Act's first objective was not to protect privacy. *See* Tamela J. White & Charlotte A. Hoffman, *The Privacy Standards Under The Health Insurance Portability And Accountability Act: A Practical Guide To Promote Order And Avoid Potential Chaos,* 106 *W. Va. L. Rev.* 709, 713 (2004). Privacy concerns became prevalent with the advent of electronic information sharing, *e.g.,* the Internet, facsimile, and cellular phone

communications. *Id.* With this technology came the risk of unauthorized individuals accessing private medical information. *Id.*

[*8]

The Privacy Rule controls the "use and disclosure" of "protected health information" by "covered entit[ies]." n12 *See* 45 *C.F.R.* § 164.502 (explaining rules regarding use and disclosure of protected health information); 45 *C.F.R.* § 160.103 (defining relevant terms). It creates a foundation or "mandatory floor" for the protection of medical information. 65 *Fed. Reg.* 82,462, 82,471. n13 Covered entities, including health care providers like doctors, must develop, implement, monitor, and maintain compliance policies and procedures to ensure against unauthorized disclosure of private health information. 45 *C.F.R.* § 164.530.

n12 "Protected health information" encompasses medical information, "in any form or medium," *i.e.*, oral communications regarding medical information or information preserved on paper or in electronic format. Alex L. Bednar, *HIPAA Implications For Attorney-Client Privilege,* 35 *St. Mary's L.J.* 871, 885 (2004) (citing 45 *C.F.R.* § 160.103).

[*9]

n13 It has been described as the "first comprehensive federal privacy rule protecting an individual's medical information." Diane Kutzko et al., 51 *Drake L. Rev.* at 405. "HIPAA provides a national floor for the protection of privacy interests pursuant to Congress' right to control interstate commerce, and to promote[] Equal Protection, Due Process, and First Amendment protections." Tamela J. White & Charlotte A. Hoffman, 106 *W. Va. L. Rev.* at 720.

B.

In *Stempler v. Speidell,* 100 N.J. 368, 495 A.2d 857 (1985), the New Jersey Supreme Court was asked to determine whether defense counsel could conduct an *ex parte* interview with plaintiff's decedent's physicians. More specifically, the issue presented was whether a court should compel a plaintiff to authorize *ex parte* communications between defense counsel and decedent's physicians; and if compelled, what protective conditions would be imposed." *Id.* at 373, 495 A.2d 857.

There, the defendant Speidell diagnosed decedent with a fecal impaction. The day after the decedent was admitted to the hospital, [*10] she suffered cardiac arrest and died. Since the decedent had received medical care from numerous physicians, defendant sought authorizations from plaintiff to compel other physicians to release information about the decedent. Plaintiff resisted providing unrestricted authorizations permitting such interviews of these doctors by Speidell's counsel. The New Jersey Supreme Court "weighed the interests protected by the patient-physician privilege and the physician's professional obligation of confidentiality against the interests advanced by permitting defense counsel to conduct *ex parte* interviews with decedent's physicians regarding those conditions pertinent to the claims asserted in the litigation." n14 *Id.* at 373-74, 495 A.2d 857.

n14 The Court also considered the sparse law relating to this procedure, noting that

> because such interviews would take place in a nontestimonial context, no statute or Court Rule expressly precludes defense counsel from interviewing decedent's treating physicians regarding confidential communications. Moreover, even if the testimonial privilege could be imputed to such interviews, no statute or rule expressly precludes *ex parte* interviews concerning unprivileged communications, and the initiation of suit abrogates the privilege as to medical conditions pertinent to the litigation. However, ... treating physicians are not likely to cooperate with defense counsel in the absence of authorization from the patient.

Stempler, 100 N.J. at 373, 495 A.2d 857. Interestingly, other courts have noted that the prohibition against *ex parte* contact "is derived from neither statute nor established common law; rather, it is an emerging court-created effort to preserve the treating physician's fiduciary responsibilities during the litigation process." *Crist v. Moffatt,*

326 N.C. 326, 389 S.E.2d 41, 45 (N.C. 1990) (quoting *Manion v. N.P.W. Medical Center of N.E. Pa., Inc.*, 676 F.Supp. 585, 593 (M.D.Pa. 1987).

[*11]

The Supreme Court held that such *ex parte* interviews could be conducted. In doing so, the *Stempler* Court noted that personal interviews are "an accepted, informal method of assembling facts and documents in preparation of trial." *Id.* at 382, 495 A.2d 857. n15 However, the Supreme Court imposed procedural safeguards. While a plaintiff must provide an authorization for such *ex parte* interviews, n16 defense counsel must: (1) give plaintiff's counsel "reasonable" notice of the time and place for the interviews; and (2) provide the physician with a description of the expected scope of the interview and indicate, with "unmistakable clarity," that the doctor's participation in the interview is voluntary. *Id.* at 382, 495 A.2d 857. n17

n15 The interview is also recognized by various courts as a "more efficient and less expensive method of trial preparation." *Stempler,* 100 N.J. at 378, 495 A.2d 857 (citing *e.g., Doe v. Eli Lilly & Co., Inc.*, 99 *F.R.D.* 126, 128 (D.D.C. 1983); *Trans-World Investments v. Drobny,* 554 P.2d 1148, 1151-52 (Alaska 1976)).

n16 If the authorizations are "unreasonably" withheld, the defendant can move to compel their production. *Stempler,* 100 N.J. at 382,495 A.2d 857.

[*12]

n17 In addition, the *Stempler* court indicated that plaintiff could get a protective order "if under the circumstances a proposed *ex parte* interview with a specific physician threatens to cause such substantial prejudice to plaintiff as to warrant the supervision of the trial court. Such supervision could take the form of an order requiring the presence of plaintiff's counsel during the interview or, in extreme cases, requiring defendant's counsel to proceed by deposition." *Stempler,* 100 N.J. at 383, 495 A.2d 857.

The Privacy Rule appears to have narrowed the scope of disclosure of relevant medical information in litigation. Because the Privacy Rule is federally directed to the disclosure of medical information, the court must first consider federal preemption principles.

C.

Preemption is rooted in the Supremacy Clause of the United States Constitution. n18 There are two types of preemption, express and implied. n19 The difference lies in whether "Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. The Rath Packing Co.,* 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) [*13] (citation omitted). Express preemption occurs when the federal law, statute, or regulation n20 contains explicit language regarding whether it preempts the State law, statute, regulation or common law. *See e.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (interpreting statutory provision that expressly preempts state law); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (same). Implied preemption is present when a Congressional intent to preempt can be discerned. *See e.g., Jones v. The Rath Packing Co.,* 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) (dealing with labeling and packaging regulations and assessing preemption principles); *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) (dealing with state and federal regulations for maturity certification of avocados and assessing whether state regulation was obstacle to accomplishing purposes and objectives of Congress). Implied preemption is found where the state law conflicts with the federal law n21 or the federal law is "so pervasive [in the field] as to make reasonable the inference that Congress left no room for the States to supplement it." [*14] *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (citation omitted), *rev'd on other grounds,* 331 U.S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468 (1947).

n18 The Supremacy Clause provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S.CONST.* art. VI.

n19 According to the Third Circuit, there are three (3) types of preemption -- express, implied, and conflict. *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 247 (3d Cir. 1999).

n20 "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). *Accord Feldman v. Lederle Labs.*, 125 N.J. 117, 134, 592 A.2d 1176 (1991) (citation omitted).

n21 "Conflicts" means either it is impossible to comply with both (*i.e.,* "irreconcilable conflict") or the state law is an "obstacle" to Congress accomplishing its purposes and objectives. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) (citations omitted) (recognizing the "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them."). "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers,* 373 U.S. at 142. The Court continued that "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Id.* at 142-43 (citations omitted).

[*15]

Here, there is an express preemption provision contained in the Privacy Rule, 45 *C.F.R.* § 160.203. It provides that "[a] standard, requirement, or implementation specification adopted under this subchapter that is contrary n22 to a provision of State law preempts the provision of State law." However, if "the provision of State law relates to the privacy of individually identifiable health information and is more stringent n23 [than the Act's Privacy Rule,]" the preemption provision is inapplicable. *Id.* at 160.203 (b). n24 Hence, the court must conduct a two-step analysis to determine whether a State law is preempted by the Privacy Rule. *See e.g., Stewart v. The Louisiana Clinic,* 2002 U.S. Dist. LEXIS 24062, 2002 WL 31819130 (E.D.La.) (conducting preemption analysis to see if state law was contrary and whether it fell under an exception). First, a court must determine whether the State law is contrary to the Privacy Rule, *i.e.,* when compliance with both State and federal rules would be impossible; or the State law is an "obstacle to the accomplishment and execution of the full purposes and objectives of [the Privacy Rule]." 45 *C.F.R.* § 160.202 [*16] . If the State law falls within this category, then the second step seeks to determine whether one of the exceptions enumerated in 45 *C.F.R.* § 160.203 applies. n25

n22 45 *C.F.R.* § 160.202 defines "contrary." It has the same definition as "conflict" above, *supra* note 21.

n23 45 *C.F.R.* § 160.202 defines "more stringent." For example, a state law is more stringent where it requires "express legal permission" from the individual before disclosure and "provides requirements that narrow the scope or duration, increase the privacy protections afforded ..., or reduce the coercive effect of the circumstances surrounding the express legal permission...." 45 *C.F.R.* § 160.202. The "catch-all" provision is that any state law providing "greater privacy protection for the individual who is the subject of the individually identifiable health information" is a "more stringent" state law. *Id.*

n24 The other exceptions, including one where the Secretary determines that the state law is not preempted, are contained in 45 *C.F.R.* § 160.203(a), (c), and (d). In addition, 45 *C.F.R.* § 164.512(e) provides, in pertinent part,

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial proceeding or administrative proceeding:
> (i) In response to an order of a court ... provided that the covered entity discloses only the protected health information expressly authorized by such order; or
> (ii) In response to a [] discovery request, or other lawful process, that is not accompanied by an order of a court ... if:
> (A) The covered entity receives satisfactory assurance ... that reasonable efforts have been made ... to ensure that the individual who is the subject of the protected information ... has been given notice of the request; or

(B) The covered entity receives satisfactory assurance ... from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order ...."

[*17]

n25 In *Medtronic,* the court was dealing with an express preemption provision. The court explained that

> while the pre-emptive language of § 360k(a) [the preemption provision] means that we need not go beyond that language to determine whether Congress intended the MDA [Medical Device Amendments] to pre-empt at least some state law, we must nonetheless "identify the domain expressly pre-empted" by that language. Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption.
>
> * * * *
>
> Congress does not cavalierly pre-empt state-law causes of action.
>
> * * * *
>
> [And the] "purpose of Congress is the ultimate touchstone" in every preemption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of congressional purpose." Congress' intent ... primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. Also relevant []is the "structure and purpose of the statute as a whole" as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."

Medtronic, 518 U.S. at 484-86 (citations omitted). Here, as noted, the Privacy Rule was intended as a framework or floor for privacy protection.

[*18]

Here, HIPAA and the *Stempler ex parte* interview can co-exist. n26 The court agrees with *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical,* 372 N.J.Super. 105, 855 A.2d 608 (Law Div. 2003), to the extent that it found HIPAA preemption only with respect to the authorization. The *Stempler* interview itself is not preempted. In *Smith,* the court held that: (1) HIPAA does not preempt the informal interview authorized by *Stempler;* but (2) HIPAA does preempt *Stempler* with regard to the authorization content. n27 The *Smith* court reasoned that HIPAA does not conflict with the discovery techniques allowed under *Stempler,* but the *Stempler* safeguards in disclosure authorizations fall below the HIPAA requirements. *Id.* at 110, 131, 855 A.2d 608. n28 This court's preemption analysis agrees with that conclusion.

n26 In fact, Judge Marina Corodemus noted that "nowhere in HIPAA does the issue of *ex parte* interviews with treating physicians, as an informal discovery device, come into view. The court is aware of no intent by Congress to displace any specific state court rule, statute or case law (e.g., *Stempler*) on *ex parte* interviews." *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical,* 372 N.J.Super. 105, 128, 855 A.2d 608 (Law Div. 2003). In addition, "HIPAA, by its own terms, does not exclusively dominate the field of protecting individual privacy interests in health information." Tamela J. White & Charlotte A. Hoffman, 106 *W. Va. L. Rev.* at 716 (citing 45 *C.F.R.* § § 160.202-203). In fact, privacy protection, while of national importance, is being balanced with discovery issues, which would suggest that it is an area of traditional tort litigation, and therefore within the State's control. Areas typically within the States police powers are not "superceded" by federal action unless it was the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (citation omitted), *rev'd on other grounds,* 331 U.S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468 (1947). *See Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 347, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001) (citation omitted) (noting that there is a presumption against finding federal preemption where the field is one traditionally occupied by the states).

[*19]

n27 Judge Corodemus classified this as "express but selective preemption" of New Jersey law. *Smith,* 372 N.J.Super. at 110, 855 A.2d 608.

n28 This is consistent with the notion that generally "HIPAA should be applied in pari materia with other federal and state laws, as in most instances the laws compliment one another." Tamela J. White & Charlotte A. Hoffman, 106 *W. Va. L. Rev.* at 716 (citing 45 *C.F.R.* § § 160.202-203)

D.

Privacy is a fundamental right. n29 The United States Supreme Court plainly has recognized personal health information as constitutionally protected. *Whalen v. Roe,* 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (noting that "few experiences are as fundamental to liberty and autonomy as maintaining control over when, how, to whom, and where you disclose personal material."). The filing of a complaint against Wyeth clearly has eroded some of these plaintiffs' privacy interests. By filing a personal injury suit, plaintiffs have placed their medical condition in issue and therefore waived significant rights to privacy. *See Stempler,* 100 N.J. at 372-73, 495 A.2d 857 [*20] (noting that "plaintiff concedes that instituting suit extinguishes the [patient-physician] privilege to the extent that decedent's medical condition will be a factor in the litigation."); ***N.J.S.A.*** 2A:84A-22.4 (providing that "there is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient ..."). Generally, the procedural safeguards suggested in *Stempler* will serve to protect plaintiff's privacy interest and does survive HIPAA's adoption. n30

n29 Louis D. Brandeis and Samuel D. Warren defined it as "the right to be let alone." *The Right To Privacy,* 4 *Harv. L. Rev.* 193 (1890).

n30 "In light of the burgeoning importance of protecting an individual's privacy, particularly in regard to his or her medical information, the broad use of *Stempler* must somehow be readjusted to ensure compliance with the federal objectives under HIPAA. The Privacy Rule affords the use and disclosure of an individual's medical information for administrative and judicial proceedings, yet HIPAA safeguards (reasonable notice and patient's opportunity to object) [should be included in the authorizations]." *Smith,* 372 N.J.Super. at 134, 855 A.2d 608. This Court accordingly orders that certain safeguards be employed, *see supra* part IV.

[*21]

III.

The plaintiffs complain that even if *Stempler* does not conflict with Federal law, North Carolina law does not permit *ex parte* interviews in cases such as these. The court agrees that the North Carolina courts do not permit *ex parte* interviews with a plaintiff's treating physician absent consent. *See Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (N.C. 1990). Since the plaintiffs and their physicians reside in North Carolina, the court must consider conflict of law principles. Plaintiffs' complaints were filed in New Jersey. However, the treating physicians who are the subject of this motion reside in and are licensed in North Carolina. Moreover, it is almost certain that the *ex parte* interviews requested will take place in North Carolina. In any case, North Carolina plainly has a significant interest in regulating the conduct of its licensed physicians.

New Jersey is the forum. Accordingly, New Jersey's choice of law rules are followed. *Erny v. Estate of Merola,* 171 N.J. 86, 94, 792 A.2d 1208 (2002), *Fu v. Fu,* 160 N.J. 108, 117, 733 A.2d 1133 (1999), *Gantes v. Kason Corp.,* 145 N.J. 478, 484, 679 A.2d 106 (1996). New Jersey applies the [*22] "'governmental-interest' test that seeks to apply the law of the state with the greatest interest in governing the specific issue in the underlying litigation." *Fu, supra,* 160 N.J. at 118, 733 A.2d 1133 (citation omitted). The analysis is two-pronged. The first prong requires the court to determine, on an issue-by-issue basis, whether there is an actual conflict between the laws of the states. *Ibid.* (Citation omitted). If so, it must determine which state has the most significant relationship to the parties and occurrence. *Id.* at 119, 733 A.2d 1133 (citation omitted). n31

n31 A court has to determine the interest each State has in resolving the specific disputed issue. *Gantes, supra,* 145 N.J. at 485, 679 A.2d 106. This requires a court to "identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties." *Ibid.* (Citation omitted). There are various factors that guide a court's analysis: "(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." *Fu, supra,* 160 N.J. at 122, 733 A.2d 1133. Contacts that are important in the analysis are: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered." *Erny,* 171 N.J., *supra,* at 103, 792 A.2d 1208 (citations omitted).

[*23]

North Carolina generally prohibits *ex parte* communications between plaintiff's treating physicians and defense counsel. In *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (N.C. 1990), the defendant's attorney had *ex parte* meetings with two of plaintiff's physicians, who were expected to testify "as to facts and circumstances" surrounding the plaintiff's treatment. In both instances, the defendant's attorney also told the doctors that plaintiff had waived the physician-patient privilege when, in fact, she had not. The North Carolina court was guided by its public policy concerns that a physician might become liable for inadvertent disclosures and/or the interview might disintegrate into improper discussions beyond waived matters. n32

n32 Interestingly, the procedural safeguards employed by the *Stempler* court would protect against these dangers.

The *Crist* Court concluded that "considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal [*24] discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery.... Thus ... defense counsel may not interview plaintiff's nonparty treating physicians privately *without plaintiff's express consent." Id.* at 47 (emphasis added). The defendant there was thus left with traditional and more formal discovery methods, such as a deposition.

Notably, that court stressed its holding was not meant to discourage "consensual informal discovery." *Ibid.* But in North Carolina consent is a key component. This point is embodied in the Medico-Legal Guidelines of North Carolina, which provide:

> Authorization. Proper authorization is necessary before a physician can release medical information. No attorney should request and no physician should furnish any medical information concerning the history, physical or mental examination, condition, diagnosis or prognosis of a patient except *with the written consent* of the patient, the patient's authorized representative, a *judicial or administrative order,* or in conformity with other [*25] applicable legal authority. The scope of the authorization determines the scope of the inspection, release, copying or report: If the requesting attorney wants information beyond what is authorized to be released, the attorney must obtain additional authorization. n33

Id. at IV.A.3.b at 575 (2004) (footnotes omitted) (emphasis added). n34

n33 These regulations are not inconsistent with *Stempler.*

n34 The Court notes that another portion of the North Carolina regulations indicates that patients' physicians "may not communicate with an attorney or any other person about a patient's treatment, evaluation, or condition without the written consent of the patient or the patient's authorized representative, or a court order, or other lawful authority." MEDICO-LEGAL GUIDELINES OF NORTH CAROLINA, IV.B.1 at 575. However, this section apparently deals with discussions between the patient's physician and the *patient's* attorney. The Guidelines further note that normally the deposition is the method of communicating with the physician; "the attorney opposing the patient's claim is [generally] prohibited from communicating with the patient's physician prior to trial except at a deposition." *Id.* at IV.B.2 at 576 n. 32.

[*26]

Clearly, if the plaintiff consents, New Jersey and North Carolina are in accord in concluding that treating physicians are free to participate in *ex parte* interviews with defense counsel. In this respect, New Jersey and North Carolina are consistent. n35

n35 If one were to conclude that these state laws conflict, New Jersey law would apply here because New Jersey has a greater interest and plaintiffs, by filing in our courts, have sought protection under our laws. In addition, as a matter of procedure (*i.e.,* discovery method), the law of the forum state controls. *REST. (SECOND) OF CONFLICT OF LAWS* (1971) § 127 (noting that "local law of the forum governs rules of pleading and the conduct of proceedings of court" including pre-trial practice like discovery); *REST. (FIRST) OF CONFLICT OF LAWS* (1934) § 585 (noting that "all matters of procedure are governed by the law of the forum.").

IV.

The court concludes that *ex parte* interviews of plaintiffs' [*27] treating physicians can be allowed without compromising HIPAA, or colliding with North Carolina law. While the court has not had the chance to fully explore all aspects of implementing the *Stempler* procedures due to the timing of this motion, n36 it intends to employ certain procedural safeguards. These safeguards, which the court may well revisit and revise in the light of experience, will help to insure HIPAA compliance, while at the same time allowing Wyeth to conduct discovery consistent with *Stempler.*

n36 As noted, the trial in these cases is scheduled for May 31, 2005.

Specifically, the court will permit Wyeth to conduct *ex parte* interviews with plaintiffs' treating physicians subject to *Stempler's* constraints, but any interview must be recorded and transcribed. A copy of that transcript will be made available to plaintiffs' counsel at the time of each physician's deposition. n37 Plaintiffs will sign the Authorization, enclosed as Appendix A to this opinion, permitting such interviews. After [*28] signing this release, the plaintiffs and their attorneys are directed to take no steps designed to interfere or discourage the physician's participation. However, plaintiffs' counsel may communicate with the physicians, in writing only, regarding any concerns about the scope and the extent to which the plaintiffs continue to assert the physician-patient privilege, and the Authorization shall clearly indicate that the physician's participation is voluntary. n38

n37 Any statement may be introduced during a subsequent deposition or during trial testimony under ***N.J.R.E.*** 803(a)(1) or (a)(2) as a prior statement of the witness.

n38 Authority to fashion this solution is found in *Stempler, supra,* 100 N.J. at 383, 495 A.2d 857, where the New Jersey Supreme Court noted that "the flexibility afforded by our decision will permit trial courts and counsel to fashion appropriate procedures in unusual cases without interfering unnecessarily with the use of personal interviews in routine cases."

This [*29] court, though following the same path, reaches a somewhat different result than *Smith v. American Home Products Corp. Wyeth-Ayerst Pharmaceutical,* 372 N.J.Super. 105, 855 A.2d 608 (Law Div. 2003). There the court did not permit the *Stempler* interviews to proceed. But these seemingly different results are easily harmonized. In *Smith,* Judge Corodemus did not permit the *Stempler* interviews because approximately 300 PPA cases were docketed for trial in only one and a half months. The *Smith* court reasoned that the PPA cases were "extreme" cases and "the holding in *Stempler* reserves judicial discretion with regard to the appropriateness of *ex parte* interviews even under 'extreme cases.'" *Smith, supra,* 372 N.J.Super. at 136, 855 A.2d 608. According to the *Smith* court

> mass tort cases with their inherent complexity fall within the definition of extreme cases. Therefore under this court's authority, and given the magnitude of the potential intricacies of entirely redoing the discovery process to include informal discovery with HIPAA-compliant authorizations, the most practical recourse is to deny the use of *Stempler* interviews. This court [*30] sees no necessity for informal discovery so

> late into the PPA litigation. This however, does not imply that *Stempler* is not available as an informal discovery tool for mass tort cases. Rather, given the complexity of such cases, special hearings early during case management for the design of HIPAA-compliant authorization forms may become the custom for the conduct of *Stempler* interviews in future mass tort litigation.

Ibid. (footnote omitted). The court agrees with Judge Corodemus that mass tort cases are "extreme" cases, requiring special management.

In these thirteen cases, the court recently ruled that the plaintiffs may avail themselves of the heeding presumption where a prescription drug product is involved. *In re Diet Drug Litigation,* 2005 N.J. Super. LEXIS 394, *5, BER-L-13379-04MT (April 7, 2005); *Coffman v. Keene Corp.,* 133 N.J. 581, 628 A.2d 710 (1993); *Theer v. Philip Casey Co.,* 133 N.J. 610, 628 A.2d 724 (1993). This ruling has shifted the burden of going forward with evidence on proximate cause issues to Wyeth. Under these circumstances, Wyeth should be given appropriate formal and informal discovery tools to seek to accomplish its litigation tasks. [*31] Moreover, unlike the *Smith* court, this court is not required to completely revamp discovery schedules on the eve of trial. This decision also is confined to the thirteen plaintiffs scheduled for trial on May 31, 2005. Here, the litigants clearly have the resources to accomplish these limited discovery objectives while at the same time preparing for trial.

V.

For the reasons set forth in this opinion, Wyeth's motion is granted in part. Wyeth may conduct *ex parte* interviews of the physicians for these thirteen plaintiffs, employing the procedural safeguards detailed in the Authorization, a copy of which is attached as Appendix A, and the enclosed Order.