NO. 13-14637

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADOLFO C. DULAY, M.D. AND ADOLFO C. DULAY, M.D., P.A.,
Defendants / Appellants

and

STATE OF FLORIDA,
Intervenor,

v.

GLEN MURPHY,
Plaintiff/Appellee.

On Appeal from the United States District Court
For the Northern District of Florida, Tallahassee Division
Case No. 4:13-cv-00378-RH-CAS, before the Honorable Robert L. Hinkle

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***AMICUS CURIAE* BRIEF OF TEXAS MEDICAL ASSOCIATION, FLORIDA MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION AND TEXAS ALLIANCE FOR PATIENT ACCESS SUPPORTING REVERSAL**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3, Texas Medical Association ("TMA"), Florida Medical Association ("FMA"), American Medical Association ("AMA") and Texas Alliance for Patient Access ("TAPA") hereby certify that the following is a list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, or other identifiable entities related to a party that have an interest in the outcome of this appeal:

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30. Texas Alliance for Patient Access, *Amicus Curiae*

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Pursuant to Federal Rule of Appellate Procedure 26.1, Texas Medical Association, Florida Medical Association and American Medical Association certify that they are incorporated non-profit professional medical associations and not publicly held corporations that issue stock. Texas Alliance for Patient Access

is an unincorporated non-profit professional association and not a publicly held corporation that issues stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This *amici curiae* brief is filed on behalf of the Texas Medical Association ("TMA"), Florida Medical Association ("FMA"), American Medical Association ("AMA") and Texas Alliance for Patient Access ("TAPA"), collectively hereinafter "*Amici.*"

The Texas Medical Association is a private, voluntary, non-profit association of more than 47,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, TMA's maxim continues in the same directions: Physicians caring for Texans. TMA's diverse physician members practice in all fields of medical specialization. TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

The Florida Medical Association is a professional association dedicated to the service and assistance of Doctors of Medicine and Doctors of Osteopathic Medicine in Florida. The FMA represents more than 19,000 physicians on issues of legislation and regulatory affairs, medical economics, public health, education, and ethical and legal issues. The FMA serves as an advocate for physicians and their patients to promote the public health, to ensure high standards in medical education and ethics, and to enhance the quality and availability of health care.

The FMA is interested in the issues presented in this case because the disposition of those issues directly affects the ability of Florida physicians to evaluate and defend malpractice claims made against them.

The American Medical Association is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Texas and Florida.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

TAPA is an association of over 250 healthcare interests providing medical and health care to Texas residents and others. Its members include physicians, hospitals, nurses, therapists, trade associations, malpractice carriers, managed care

providers, and other individuals and entities that have an interest with respect to affordable and accessible quality medical and health care.

The principal substantive issue on appeal is whether a plaintiff voluntarily waives certain HIPAA rights when waiver of those rights is a pre-condition of filing a state law medical malpractice lawsuit. The District Court concludes the waiver is not voluntary. The District Court's conclusion relies on no controlling authority, dismisses two state Supreme Court decisions to the contrary and recognizes that other federal district courts have reached different conclusions.

The Florida law at issue is patterned after a law passed in Texas in 2003 which requires a plaintiff seeking to pursue a medical professional liability claim to authorize the adverse parties to interview treating physicians about the condition or occurrence at issue. The Texas law has been upheld by the Texas Supreme Court in the face of near-identical challenges to those raised here.

Amici have an interest in this matter, since a ruling from this Court affirming the court below will certainly create new litigation in Texas arguing that a decision from this Court trumps a decision on the same issue from the Texas Supreme Court. Further, an affirmation will likely increase the cost of litigation, decrease the early resolution of meritorious claims, increase the frequency and duration of non-meritorious claims and decrease access to medical care.

STATEMENT PURSUANT TO FRAP 29(C)(5)

Amici hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *Amici*, their members or their counsel, contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The District Court opinion asserts that policy considerations are irrelevant to its decision, that only the statutory language matters. Yet nothing in HIPAA's (Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended at 42 U.S.C. §§1320d to 1320d-8 (2006)) statutory language (or implementing rules) explicitly states than an authorization is invalid or involuntary simply because it must be given as a pre-condition to filing suit. The District Court opinion reaches an incorrect result and ignores precedent and policy in reaching its strained holding.

I. The District Court opinion reaches an incorrect result.

As a routine matter, a patient/potential plaintiff walks into her attorney's office, seeking advice about the possibility of filing a medical malpractice claim. The plaintiff attorney will want to investigate the claim. The patient/potential plaintiff will be required to give her attorney a HIPAA release so the attorney can

gather the relevant medical records and discuss the claim with the treating physician. After reviewing the records and discussing the matter with the treating physician the attorney will decide whether the case has merit, and if so, how much merit it has.

The attorney decides to take the case and sends a claim letter to the defendant doctor. The defendant doctor goes to his attorney. The defense attorney will want to investigate the claim. The patient/now plaintiff is required to give the defense attorney a HIPAA release so the defense attorney can gather the relevant medical records and have the opportunity to discuss the claim with the treating physician. After reviewing the records and discussing the matter with the treating physician the defense attorney can decide whether the case has merit, and if so, how much merit it has.

Both situations are identical yet the District Court concludes that the goose and gander rule does not apply, that a plaintiff attorney may legally conduct an interview using a valid authorization but allowing the defense attorney to conduct an interview is impermissible under HIPAA.

The error of the holding is heightened when one realizes that the opinion's logic reaches beyond an interview with the treating physician. If Florida can't require a patient/ plaintiff to give a release to interview the treating physician, then

logic would hold that Florida also can't require a patient/ plaintiff to give a release for the medical records.

Further, logically, if Florida can't require the patient/potential plaintiff to give a HIPAA release, then neither can the plaintiff attorney require his client to provide him with a release. Ironically, the plaintiff attorney, the defense attorney and Florida stand in the same shoes with respect to access to information: all three parties require an authorization as a condition of participation in the judicial system and all three parties want an authorization so the case can be evaluated early in the judicial process.

It is worth noting that garnering the information is inevitable once the suit is filed. No one contends that what the treating physician knows is off limits to the accused parties. No one denies that the treating physician may be interviewed by the accused parties if suit is filed. Thus this case is not about whether, but, rather, when the interview might take place.

II. Early examination of a medical negligence claim is in everyone's best interest.

The Florida "…legislature enacted chapter 766 to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding." *See Cohen v. Dauphinee*, 739 So. 2d 68, 71 (Fla. 1999). "[T]he prevailing policy of [Florida] relative to medical malpractice actions is to encourage the early settlement of meritorious claims and to screen out frivolous

claims." *Id.* "This policy is best served by the free and open exchange of information during the pre-suit screening process." *Id.* At 72.

In 2003, Texas passed House Bill 4, a tort reform measure that included a medical authorization requirement similar to the Florida provision before this Court. The Texas statute has been upheld in the face of a challenge remarkably similar to the one raised here. *In re Collins,* 286 S.W.3d 911 (Tex. 2009).

The Texas law containing the authorization requirement is HB 4[1]. In the years preceding the 2003 passage of HB 4, Texas saw an increase in the frequency of medical malpractice suits dismissed without merit. Simultaneously, Texas courts saw an explosion in the severity of awards in certain jurisdictions, even though cases with similar fact patterns in other areas of the state yielded considerably lower verdicts. Physicians saw their liability insurance premiums double in just four years. Many insurance carriers became insolvent or went bankrupt, left the state or withdrew from writing medical professional liability coverage. Thousands of physicians lost insurance coverage. As much as one-fourth of the commercial market sought coverage in the state run medical liability insurance pool of last resort. Many physicians began to deny or refer the treatment of high-risk patients so as to avoid liability exposure. Others simply stopped taking emergency call. Hospitals closed their doors, reduced their acuity care

[1] The events leading up to the passage of HB 4, discussed herein, are described in substantial detail in Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Parts One and Three*, 36 Tex. Tech L. Rev. 1 (2005)

levels, or delayed planned upgrades of equipment or facilities. This set of conditions, led Texas lawmakers to pass comprehensive medical lawsuit reforms. Among those reforms was an authorization substantially similar to the one at issue here as a pre-condition to filing suit.

A study conducted by the state's three largest physician liability carriers revealed that, prior to the passage of reform, six out of seven medical liability claims in Texas were being closed without indemnity. And yet, physicians were collectively incurring tens of millions of dollars in legal costs to defend these unsuccessful claims. Lawmakers took several steps to address the frequency problem.

In 1995, Texas implemented a series of measures designed to get all of the information about the case to the parties at the earliest opportunity. These measures included an early exchange of all written medical records and a review of those records by experienced physicians practicing in the medical area in dispute. The early information phase was premised on the idea that if both the complaining patients and the accused had early access to the relevant information then informed parties could make decisions about matters - at the claim stage or early in the lawsuit. A key component of the early information stage is an interview of the treating physician by the accused so the physician can receive honest and candid

information about the matters at issue and thereby make informed decisions about the dispute at the earliest possible stage of the litigation.

The early information stage has been an acknowledged success. The frequency of meritless claims has dropped substantially. Access to care has improved. Texas has seen a per capita increase in physicians, in general, and a robust growth among specialists serving high-risk patients. Rural communities now have specialists they previously lacked. Texas adopted statutory requirements for increased information as early as 1995. However, there was no sustained drop in suit frequency until after the 2003 reforms were passed. Thus, it can be said that the frequency provisions in HB 4, including the requirement for an authorization to conduct a private interview, has helped reduce the frequency of filing of unmeritorious claims in Texas.

III. Private interviews of treating physicians has long been recognized as a method to secure early resolution of claims.

Early information, leads to two laudable goals: the dismissal of claims lacking merit and early resolution of claims with merit. Using early information as a way to evaluate claims is hardly new to Florida or Texas. Texas began looking at early access to information in 1977. However, the provision had limited teeth until passage of the 2003 reforms clarifying that private interviews by the defense counsel were authorized. *Doe v. Eli Lilly &Co., Inc.*, 99 F.R.D. 126, 128 (D.D.C. 1983) recognized that private interviews of treating physicians are quicker and

more efficient than subsequent formal discovery. *King v. Ahrens*, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992), *affirmed*, 16 F.3d 265 (8th Cir. 1994) recognized that private interviews promote the "early evaluation and settlement of claims," thereby reducing the expense of litigation. *See also Lewis v. Roderick*, 617 A.2d 119, 122 (R.I. 1992); *Domako v. Rowe*, 475 N.W.2d 30, 34 n.5 (Mich. 1991) recognized that allowing both counsel to conduct private interviews is consistent with the goose and gander rule, since a plaintiff should not have free access to a witness without the defense being accorded similar treatment. Numerous cases recognize that private interviews promote the fair and inexpensive resolution of disputes. *See Bryant v. Hilst*, 136 F.R.D. 487, 492 (D. Kan. 1991); *Domako*, 475 N.W.2d at 35-36; *Stempler v. Speidel*, 495 A.2d 857, 863 (N.J. 1985).

IV. The scary monster has not shown its face in Texas.

The plaintiff trial bar argues against a HIPAA authorization by raising the specter of the Scary Monster. These lawyers contend that a defense lawyer will violate the law and ask questions of the treating physician that go beyond the instant case and the authorization. Again, one wonders why that same concern wouldn't apply with equal force to the plaintiff attorney conducting a private interview under a similar authorization. The argument runs contrary to common sense: does one refuse to grant any driver's license because someone may run a

stop sign? Further, the argument ignores the Court's power to manage a case with sanctions and contempt orders if such a situation were to occur.

Finally, it is worth noting that similar arguments were raised in Texas prior to the passage of HB 4 yet the undersigned is unaware of a single reported case in the years since the passage of HB 4 in 2003 where such a complaint has been raised and resolved in favor of the plaintiff.

Conclusion

The narrowness of the inquiry before the Court should be emphasized. HIPAA explicitly authorizes a court to "grant" a waiver and a patient to issue a waiver. The plaintiff attorney cannot conduct a private interview without a waiver given by the patient. So the inquiry here is whether a waiver given by a patient for the purpose of evaluating whether a claim has merit is valid when the same patient gives the same waiver for the same purpose to a defense attorney in the absence of a specific prohibition in HIPAA. There is no controlling precedent to the contrary, nor does express legislative language or administrative rules prohibit Florida from requiring the waiver, or prohibit plaintiff's counsel from requiring one.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 2,550 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Michael S. Hull
Michael S. Hull

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which generates a Notice of Electronic Filing to all attorneys of record.

DATED this 23rd day of January, 2014.

/s/ Michael S. Hull
Michael S. Hull