

CAROL PRICE

Plaintiff

vs.

SINAI HOSPITAL OF BALTIMORE, INC.

Defendant

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\* IN THE

\* CIRCUIT COURT

\* FOR

\* BALTIMORE CITY

\* CASE NO.: 24-C-04-007323

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**MEMORANDUM**

This case comes before this Court on a Petition for Court Order and Qualified Protective Order filed by the Defendant, Sinai Hospital of Baltimore, Inc, the Plaintiff’s response thereto and oral arguments presented at a hearing on February 11, 2005.

Plaintiff, Carol Price filed suit against the Defendant on September 27, 2004. The suit arises from Plaintiff’s medical malpractice claim that occurred between April 20 and June 10, 2002 while the Plaintiff was under the care of Sinai Hospital of Baltimore. See Amended Complaint (AC) at 2-3. The Plaintiff alleges that after she broke her leg, Sinai Hospital’s treatment caused permanent damage which will cause her to obtain additional treatment and sustain permanent physical damage. Id. at 3-4. The complaint seeks damages and alleges negligence on behalf of the Defendant for failing to recognize and appreciate the seriousness of the Plaintiff’s condition; failing to properly diagnose and treat the Plaintiff’s condition; failing to properly interpret the Plaintiff’s x-rays; and being otherwise negligent, careless and reckless. Id.

On October 21, 2004, the Defendant filed a petition for court order and qualified protective order to gain permission for ex parte communication with the Plaintiff’s treating

physician, Dr. Robert Brumback. On November 3, 2004, the Plaintiff filed an opposition to Defendant's petition, and on November 12, 2004, Defendants filed a response to the Plaintiff's opposition.

The Defendant's Petition for Court Order and Qualified Protective Order argues that there is no physician-patient privilege in Maryland and Maryland's state law has an exception to confidentiality of medical records when a party puts a medical condition at issue. See Defendants' Petition for Court Order and Qualified Protective Order, 1-3. Further, Defendants assert that Maryland law allows for ex parte contact between a lawyer and the treating physician. Id. at 3. Finally, Defendants urge that the Health Insurance Portability and Accountability Act (HIPAA) provides for a narrowly defined order in a judicial proceeding where medical information could be released without consent of the patient. Id. at 4.

Contrary to the Defendant's position, the Plaintiff insists that HIPAA supercedes Maryland law because it is more stringent than Maryland law, conceding that Maryland law does allow ex parte communication. See Plaintiff's Opposition to Defendant's Petition for Court Order and Qualified Protective Order, 1-2. The Plaintiff argues that while HIPAA provides for eventual release of the health information, it is only through the formal discovery process. Id. at 2-3. Plaintiff cites Law v. Zuckerman, a Maryland federal district court case from 2004 that held ex parte communications between the plaintiff's doctor and the defendant were a violation of HIPAA. See Plaintiff's Opposition to Defendant's Petition for Court Order and Qualified Protective Order, 3-4; Law v. Zuckerman, 307 F.Supp.2d 705 (D. Md. 2004). Finally, the Plaintiff argues that the request by the Defendant is too broad and will not "level the playing field."

HIPAA does not preclude limited communication between the Defendant and Plaintiff's treating physician after there has been a court order to allow the communication. Therefore, this Court may, consistent with federal law, grant the Defendant's request for limited ex parte communication with the Plaintiff's treating physician.

### **Maryland State Law**

There is no physician-patient privilege in Maryland. See Butler-Tulio v. Scroggins, 139 Md. App. 122, 135, 774 A.2d 1209, 1216 (2001) (citing Rubin v. Weissman, 59 Md. App. 392, 401, 475 A.2d 1235, 1239 (1984)). Secondly, Maryland law does not prohibit ex parte communication between the Defendant's attorney and the Plaintiff's treating physician. See Butler-Tulio, 139 Md. App. at 150. Butler-Tulio concerned a medical malpractice suit in which the appellant alleged that the doctor who treated a cut in her wrist was negligent in leaving a surgical needle tip in the area during surgery. Id. at 131. The appellant appealed an adverse decision at trial, in part arguing that ex parte communications should not have taken place between a treating physician and the Defendant's attorney. Id. at 149. Interpreting Rule 4.2 of the Maryland Rules of Professional Conduct, the Court of Special Appeals did not prohibit consensual ex parte communication between an attorney and a treating physician of the adverse party where that adverse party's medical condition was at issue. Id. at 150.

HIPAA preempts state law and is therefore controlling. However, HIPAA does not preclude every ex parte communication between a treating physician and an adverse counsel when the health issue has been put into question by the Plaintiff. HIPAA only requires that a court pass on the suitability of any disclosure before it is made. See Law, 307 F.Supp.2d at 709 (stating that HIPAA preempts the Maryland Confidentiality of Medical Records Act)).

## **The Health Insurance Portability and Accountability Act**

HIPAA has greatly limited the disclosure of medical information since it was passed in 1996. In passing HIPAA, Congress stated its purpose was to “. . . improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes." Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

HIPAA prohibits the disclosure of a patient’s personal health information without consent, except in the case of “any judicial or administrative proceeding.” 45 C.F.R. § 164.512(e)(1). HIPAA specifically provides three ways to obtain protected health information in a judicial proceeding. One route permits counsel to obtain a court order which allows the health care provider to disclose protected health information explicitly authorized by a court order. 45 C.F.R. § 164.512(e)(1)(i). HIPAA states, “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 a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order.” Id.

HIPAA preempts state law and therefore is controlling. Accordingly, this Court will issue a limited court order and qualified protective order. This Court permits only a narrow and limited disclosure. The disclosure extends only to the health information/medical records relating to any care and/or treatment rendered to Carol Price by her treating physician, Robert

Brumback, M.D., for those injuries allegedly suffered at or around the time of her orthopedic surgery on or about April 21, 2002. No other information/medical records are permitted to be disclosed without the consent of Carol Price. In addition, Robert Brumback, M.D. is permitted to communicate with any attorney for any party in this action only if that communication pertains to the care and/or treatment provided to Carol Price, for the injuries allegedly suffered at or around the time of her orthopedic surgery on or about April 21, 2002. Another limitation is that the health information/medical records shall be returned to the provider/institution or otherwise destroyed at the conclusion of the litigation or proceeding. This Court is mindful of HIPPA's purpose and intends that these limitations protect Carol Price's privacy as to all health information/medical records that do not relate to the specific injury at issue in this case.

Neither Maryland law, nor HIPAA, precludes ex parte communication between an adverse party and a doctor who has treated a health matter that has been put at issue in a civil case as long as a narrow, limited qualified protective order has been requested and granted. That is precisely the situation presented to this court.

**Conclusion**

For the aforementioned reasons, the Court grants the Defendant's Petition for a Court Order and Qualified Protective Order.

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Date

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Kaye A. Allison  
Judge

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ORDER

Upon consideration of the Petition for Court Order and Qualified Protective Order filed by Defendant, Sinai Hospital of Baltimore, Inc., the Opposition filed thereto by Plaintiff, Carol Price, and oral argument heard on February 11, 2005, and for the reasons stated in the foregoing Memorandum, it is this \_\_\_\_ day of April, 2005, by the Circuit Court for Baltimore City,

**ORDERED** that the Petition for Court Order is hereby GRANTED, subject to the Qualified Protective Order as follows:

1. This Court Order and Qualified Protective Order is authorized by and issued in accordance with the provisions of the Health Insurance and Portability Accountability Act of 1996, 42 U.S.C. 1320d et. seq. (HIPAA) and 45 C.F.R. § 164.512(e)(1)(i).
2. This Court Order and Qualified Protective Order authorizes Robert Brumback, M.D., who rendered care and treatment to Carol Price to use or disclose protected health information (a) without the written authorization of Carol Price, and/or (b) without further opportunity for Carol Price, to agree or object to the use or disclosure of protected health information.

3. This Court Order and Qualified Protective Order authorizes Robert Brumback, M.D., to use or disclose only health information/medical records relating to any care and treatment rendered to Carol Price, for the injuries allegedly suffered at or around the time of her orthopedic surgery on or about April 21, 2002.

4. This Court Order and Qualified Protective Order permits Robert Brumback, M.D., herein to communicate (orally or in writing) with any attorney for any party in this action pertaining to the care and/or treatment provided to Carol Price, for the injuries allegedly suffered at or around the time of her orthopedic surgery on or about April 21, 2002.

5. The use or disclosure of the protected health information for any purposes other than this litigation is expressly prohibited.

6. At the conclusion of the litigation or proceeding, the records shall either be returned to the provider/institution or otherwise destroyed.

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Kaye A. Allison  
Judge