

IN THE SUPREME COURT OF MISSOURI

**STATE ex rel. BOBBIE JEAN PROCTOR
and VINCENT PROCTOR,
Relators**

vs.

Appeal No. SC90610

**THE HONORABLE EDITH L. MESSINA,
Respondent**

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
AT KANSAS CITY
16th JUDICIAL CIRCUIT
THE HONORABLE EDITH L. MESSINA, JUDGE
On Transfer from the Western District Missouri Court of Appeals,
Case No. WD71326**

SUBSTITUTE BRIEF OF RELATORS

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JURISDICTIONAL STATEMENT

This case is before the Court on transfer after opinion of the Missouri Court of Appeals, Western District. This Court has jurisdiction to finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal pursuant to Mo.Const.Art. V, § 10.

STATEMENT OF FACTS

This case is a medical malpractice action brought by relators to recover damages arising out of the Defendants' alleged medical negligence occurring on March 28, 2004 and March 29, 2004. *See* Exhibit A to Petition in Prohibition. Relators have alleged the following:

That on March 28, 2004, Bobbie Jean Proctor was admitted to St. Joseph Medical Center for chest pain and possible myocardial infarction. *Id.* She was to undergo a percutaneous transluminal coronary angioplasty with stenting. *Id.* Upon admission, she was also placed a blood thinner (Heparin). *Id.* The percutaneous transluminal coronary angioplasty with stenting was performed by Dr. Mancuso. *Id.* Heparin was discontinued during the procedure. *Id.* Following the procedure, Dr. Mancuso ordered Heparin to be restarted. *Id.* Bobbie Jean Proctor was to be carefully monitored by Defendant Dr. Blackburn with the Kansas City Heart Group for any post-surgical complications. *Id.* During the evening hours of March 28, 2004, Bobbie Jean Proctor developed post-surgical hemorrhaging at the site of the stenting procedure. *Id.* Later that evening, Bobbie Jean Proctor's hemorrhaging was manifest via her vitals and throughout the night per repeated vitals taken by attending nurse or nurses. *Id.* Signs consistent with the patient's worsening condition resulted in repeated telephone calls throughout the evening by the nurses to Defendant Blackburn. *Id.* However, Defendant Blackburn failed to

come to the hospital or to respond in any effective or meaningful way to address Bobbie Jean Proctor's post-surgical complications. *Id.* As a result, Bobbie Jean Proctor lost blood at a profound rate over the next five hours. *Id.* Throughout this time period, her administration of blood thinners on the order of heparin continued unabated. In the early morning hours of March 29, 2004, the condition of Plaintiff Bobbie Jean Proctor due to blood loss deteriorated to the point that she suffered multi-system failure due to hemorrhagic shock. *Id.* Bobbie Jean Proctor then coded and had to be emergently resuscitated. *Id.* As a result of the unchecked bleeding, Bobbie Jean Proctor sustained numerous injuries, including damage to her right leg resulting in a permanent loss of her ability to walk normally. *Id.*

On or about January 28, 2009, Defendants Timothy L. Blackburn, M.D. and Kansas City Heart Group, P.C. filed their Motion and Suggestions in Support of an Order of *Ex Parte* Communication with Plaintiff Bobbie Proctor's Treating Physicians and Other Health Care Providers. *See* Exhibit B to Petition in Prohibition. At that time, Defendants filed a proposed Order entitled "Order for Inspection and Reproduction of Medical Records and Protected Health Information Pursuant to State and Federal Law (HIPAA) and Notification of Waiver of Physician-Patient Privilege." *See* Exhibit C to Petition in Prohibition. On February 24, 2009, Defendant St. Joseph Medical Center filed a Motion and Suggestions in Support for Order allowing *Ex Parte* Communication with Bobbie Jean Proctor's

Treating Physicians and Other Health Care Providers, essentially joining the motion filed previously by Defendants Blackburn and Kansas City Heart Group. *See* Exhibit D to Petition in Prohibition. Plaintiffs filed their Suggestions in Opposition to the above-referenced motions on or about March 9, 2009. *See* Exhibit E to Petition in Prohibition. Defendants filed their Reply Suggestions on April 8, 2009. *See* Exhibit F to Petition in Prohibition. On or about April 20, 2009, Plaintiffs' filed their Sur-Reply in opposition to Defendants' motions. *See* Exhibit G to Petition in Prohibition. The court heard oral arguments by the parties on June 11, 2009. On July 2, 2009, the Court entered its "Order for Inspection and Reproduction of Medical Records and Protected Health Information Pursuant to State and Federal Law (HIPAA) and Notification of Waiver of Physician-Patient Privilege." *See* Exhibit H to Petition in Prohibition. Thereafter, on July 17, 2009, the Court issued its Order Granting Defendants' Motion for Ex Parte Communication wherein it granted Defendants' Motion(s) and referenced the July 2, 2009 Order. *See* Exhibit I to Petition in Prohibition.

Relators filed their Petition for Prohibition and/or Mandamus in the Western District Court of Appeals on or about August 6, 2009. The Court of Appeals issued a Preliminary Writ in Prohibition on August 25, 2009. After hearing oral arguments, the Court of Appeals issued its opinion on November 10, 2009, making the writ

permanent. Thereafter, this Court sustained Respondent's Application for Transfer on March 2, 2010.

For reasons set forth herein, Respondent, the Honorable Edith L. Messina, has acted without jurisdiction or in excess of her jurisdiction, in granting defendants' motions and entering an order for inspection of medical records and protected health information which authorizes counsel for the defendants to talk with Bobbie Jean Proctor's treating physicians without express authorization from Bobbie Jean Proctor and without her counsel present.

POINTS RELIED ON

POINT I.

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A FORMAL ORDER ADVISING NON-PARTY TREATING HEALTH CARE PROVIDERS THEY ARE AUTHORIZED TO MEET EX PARTE WITH DEFENSE COUNSEL, ABSENT EXPRESS AUTHORIZATION FROM THE PATIENT, BECAUSE HIPAA'S PRIVACY RULES AND MISSOURI LAW PRECLUDE A TRIAL COURT FROM ENTERING A FORMAL DISCOVERY ORDER AUTHORIZING INFORMAL DISCLOSURE OF PROTECTED HEALTH INFORMATION.

State ex rel. Collins v. Roldan, 289 S.W.3d 780 (Mo.App. W.D. 2009);

Brandt v. Medical Defense Associates, 856 S.W.2d 667 (Mo. banc 1993);

Brandt v. Pelican, 856 S.W.2d 658 (Mo. banc 1993);

State ex rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. banc 1989);

45 C.F.R. § 164.512(e); and

45 C.F.R. § 160.103.

POINT II.

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A FORMAL ORDER AUTHORIZING DEFENSE COUNSEL TO OBTAIN “ANY AND ALL” PROTECTED HEALTH INFORMATION, ABSENT EXPRESS AUTHORIZATION, BECAUSE MISSOURI LAW REQUIRES AUTHORIZATIONS BE RESTRICTED IN TIME, SCOPE AND ADDRESSED TO SPECIFIC PROVIDERS.

State ex rel. Stecher v. Dowd, 912 S.W.2d 462 (Mo.banc 1995); and
State ex rel Jones v. Syler, 936 S.W.2d 805, 807 (Mo. banc 1997).

ARGUMENT

POINT I.

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A FORMAL ORDER ADVISING NON-PARTY TREATING HEALTH CARE PROVIDERS THEY ARE AUTHORIZED TO MEET EX PARTE WITH DEFENSE COUNSEL, ABSENT EXPRESS AUTHORIZATION FROM THE PATIENT, BECAUSE HIPAA'S PRIVACY RULES AND MISSOURI LAW PRECLUDE A TRIAL COURT FROM ENTERING A FORMAL DISCOVERY ORDER AUTHORIZING INFORMAL DISCLOSURE OF PROTECTED HEALTH INFORMATION.

A. Standard of Review:

Prohibition is the appropriate remedy where a trial court makes a discovery order that exceeds its jurisdiction. *State ex rel. Mitchell Humphrey & Company v. Provaznik*, 854 S.W.2d 810, 812 (Mo.App. E.D. 1993). The basis for prohibition particularly applies where privileges are at issue. Once the privilege is discarded, and the privileged material produced, damage to the party against whom discovery is sought is both severe and irreparable, and cannot be repaired on appeal. *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 408 (Mo. banc 1996).

Generally, a writ of prohibition will issue: 1) to prevent the usurpation of judicial power, because a court lacked either personal or subject matter jurisdiction; 2) to remedy an excess of jurisdiction or an abuse of discretion, such that the lower court lacked the power to act as contemplated; or 3) where there is no adequate remedy by way of appeal, and irreparable harm will come to a litigant, if justiciable relief is not made available to respond to a court's order. *State ex rel. Chassing v. Mummert*, 887 S.W.2d 574, 577 (Mo. Banc. 1994); *State ex rel. Ford Motor Company v. Westbrooke*, 12 S.W.3d 386, 392 (Mo. Banc. 2000). The discretionary authority of a court to issue a writ of prohibition is exercised where the facts and circumstances of a particular case demonstrate that there exists an extreme need for preventative action. *State ex rel. Premier Marketing v. Kramer*, 2 S.W.3d 118, 120 (Mo.App. W.D. 1999).

Mandamus lies to correct an act done without jurisdiction. *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531, 532 (Mo.App. W.D. 2002). Generally, mandamus will lie where a court has acted unlawfully or wholly outside of its jurisdiction or authority, or has exceeded its jurisdiction. *State ex rel. Keystone Laundry v. McDonald*, 426 S.W.2d 11, 14 (Mo. 1968). A writ of mandamus will lie to compel a court to do that which it is obligated by law to do, and to undo that which a court is prohibited by law from doing. *State ex rel. Planned Parenthood v. Kinder*, 79 S.W.3d 905, 906 (Mo. banc 1998).

A writ of mandamus is the proper remedy for curing discovery rulings that exceed a court's jurisdiction. *Hackler v. Dierker*, 987 S.W.2d 337, 338 (Mo.App. E.D. 1998); *State ex rel. White v. Gray*, 141 S.W.3d 460, 463 (Mo.App. W.D. 2004). So long as anything remains to be done to carry a judgment into effect, a writ of mandamus may lie and it may take on such form as the exigencies of the situation demand. *State ex rel. St. Louis Little Rock Hospital v. Gaertner*, 682 S.W.2d 146, 149 (Mo.App. E.D. 1984).

Where issuance of the writ depends on the interpretation of a statute, this Court reviews the statute's meaning *de novo*. *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 355 (Mo. banc 1995).

B. Respondent Acted in Excess of Her Jurisdiction and Contrary to Missouri

Law:

On July 2, 2009, the Court entered its Order for Inspection and Reproduction of Medical Records and Protected Health Information Pursuant to State and Federal Law (HIPAA) and Notification of Waiver of Physician-Patient Privilege. (*See* Exhibit H). The July 2, 2009 Order clearly states: “counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor’s treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating” *See Id.* Respondent’s July 2, 2009 Order and subsequent July 17, 2009 Order (collectively referred to hereinafter as “the Order”)

were outside the Court's jurisdiction and contrary to Missouri law. In considering whether the Order exceeded the Court's jurisdiction, it is necessary to examine Missouri cases addressing *ex parte* contacts with a plaintiff's treating physician without the plaintiff's express consent.

a. Missouri pre-HIPAA cases addressing informal ex parte contacts:

Respondent's July 2, 2009 Order granting Defendants *ex parte* access to Plaintiff's treating physicians, without Plaintiff's express authorization, violates this Court's precedent regarding informal *ex parte* contacts with a plaintiff's treating physicians. The July 2, 2009 Order is, effectively, the same as if the Court had compelled Bobbie Jean Proctor to sign an authorization allowing *ex parte* interviews, over her objection. On that basis, the Order is contrary to existing Missouri law.

Prior to any discussions of *ex parte* interviews, this Court discussed the physician-patient relationship and waiver of the privilege when a plaintiff placed his or her physical condition in issue by filing a law suit. *State ex rel. McNutt v. Keet*, 432 S.W. 597, 601 (Mo. banc 1968). Subsequently, the issue of *ex parte* interviews with treating physicians surfaced in *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo.App. S.D. 1985), where the Court concluded where a plaintiff had put his or her medical condition at issue in personal injury action, the plaintiff could be ordered to execute an authorization consenting to *ex parte* contacts between the plaintiff's treating physicians and opposing counsel.

Approximately four years later, this Court in *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 395 (Mo. banc 1989), specifically stated: “To the extent that *Stufflebam* sanctioned court authorized *ex parte* discussion under the *Rules*, it is abrogated.” (emphasis in original).

The issue was again presented to this Court in *Brandt v. Pelican*, 856 S.W.2d 658, 662 (Mo. banc 1993) (“*Brandt I*”), where this Court stated: “We reaffirm our holding in *Woytus* we will not require the plaintiff to execute medical authorizations authorizing his treating physician to engage in *ex parte* discussions.” In *Brandt I*, this Court held that neither Missouri common law nor the incompetent witness statute prohibits a patient’s treating physician from having *ex parte* communications with the defendant’s attorney during the discovery period. R.S.Mo. § 491.060¹; 856

¹ The testimonial privilege as set forth in R.S.Mo. § 491.060(5) relates to the disclosure of confidential medical information by testimony in court or by formal discovery. R.S.Mo. § 491.060 (5) expressly states as follows:

The following persons shall be incompetent to testify:

(5) A physician licensed under chapter 334, R.S.Mo., a licensed psychologist or a dentist licensed under chapter 332, R.S.Mo., concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to

S.W.2d at 662. In *Brandt v. Medical Defense Associates*, 856 S.W.2d 667 (Mo. banc 1993), (“*Brandt II*”), the Court held that once an issue concerning a patient’s medical condition is placed in issue during litigation, this serves as a waiver of a physician’s testimonial privilege under Section 491.060(5), R.S.Mo., as well as a waiver of a physician’s fiduciary duty of confidentiality. *Brandt II* at 674.²

The *Brandt* decisions indicate the only bar on a physician’s *ex parte* communication is that he or she cannot go outside the scope of this waiver. *Id.* Thus, the Supreme Court placed the burden of identifying the legal boundaries of permitted disclosures squarely on the shoulders of the physician who is participating in these discussions without the benefit of counsel. *See Brandt II*, 856 S.W.2d 667,

enable him to prescribe and provide treatment for such patient as a physician, psychologist or dentist.

² The *Brandt* court cites RSMo. §§ 578.353, 334.265, 192.067, 191.737, 188.070, 191.743, and 191.656 for the proposition that the legislature has implicitly recognized the existence of a physician's fiduciary duty of confidentiality. By providing specific exceptions to the physician's fiduciary duty of confidentiality, these statutes implicitly acknowledge that, in the absence of such an exemption, there would be a breach of this duty, which, in turn, constitutes a recognition by the legislature of the existence of the physician's fiduciary duty of confidentiality.

674 (“If a physician engages in an *ex parte* conference absent such a waiver or discloses any information beyond the scope of such a waiver, then the patient may maintain an action for damages in tort against the physician.”) (emphasis added).

b. Missouri post-HIPAA law addressing informal ex parte contacts:

Other than the present case, the only relevant Missouri post-HIPAA opinion addressing *ex parte* contacts is *State ex rel. Collins v. Roldan*, 289 S.W.3d 780 (Mo.App. W.D. 2009) (Applic. For Transfer denied September 1, 2009), where the Western District Court of Appeals reaffirmed the holdings in *Woytus*, *Brandt I* and *Brandt II*. While *Collins* involved the denial of a request to compel a plaintiff to execute a medical authorization which authorized *ex parte* contacts, the analysis in this case is the same. In *Collins*, the Court of Appeals stated in pertinent part:

While the Supreme Court has held that any privilege surrounding a plaintiff’s medical information is waived “once there is an issue joined concerning the plaintiff’s medical condition,” and that this principle applies “to an *ex parte* conference that is within the scope of the waiver,” the Court has also emphasized that “we will not require the plaintiff to execute medical authorizations authorizing his treating physician to engage in *ex parte* discussions.” *Brandt v. Med. Defense Assocs.*, 856 S.W.2d 667, 674 (Mo. banc 1993); accord *Brandt v. Pelican*, 856 S.W.2d 658, 662 (Mo. banc 1993) (“We reaffirm our holding in [*State ex rel.*] *Woytus [v. Ryan]*, 776 S.W.2d 389 (Mo.

banc 1989),] that we will not require the plaintiff to execute medical authorizations authorizing his treating physician to engage in ex parte discussions.”); *State ex rel. Norman v. Dalton*, 872 S.W.2d 888, (Mo.App. E.D.1994) (“in *Brandt I*, the Court ruled that a trial court cannot compel the plaintiff to authorize *ex parte* discussions with her physician”).

Id. at 784.

In this case, Relators maintain that Respondent’s Order authorizing Defendants *ex parte* access to Plaintiff’s treating physicians violates Missouri law. To enter an Order under the authority of 45 C.F.R. § 164.512(e)(1)(i), which provides procedural safeguards involving formal discovery, authorizing Defendants to meet informally *ex parte* with Bobbie Jean Proctor’s treating physicians ignores the Missouri Supreme Court’s holding in *Woytus*, which clearly stated that a trial court could *not* compel plaintiffs to execute medical authorizations allowing for *ex parte* contact. *Woytus*, 776 S.W.2d 389, 395; *see also Brandt I supra*; and *Brandt II, supra* at 674. Defendants are attempting to circumvent these prior holdings by asking the Court to execute an Order which does not compel production of any information, but merely authorizes defense counsel to meet with Plaintiff’s treating physicians outside the presence of Plaintiff or her representative. The *Collins* Court further stated:

We recognize that the holding of the *Brandt* cases—that a court will not compel a patient to execute a medical authorization authorizing *ex parte* discussions-

may be anachronistic in a post-HIPAA world, where disclosures of protected health information to third parties require relatively formal, explicit authorization.^{FN6} Nevertheless, this is the balance struck by the Supreme Court in the *Brandt* cases: while *ex parte* contacts are not prohibited to the extent they fall within the privilege waiver triggered by the patient's pleadings, a third party seeking such *ex parte* contacts may not ask the court to compel the patient to consent to, or to compel *the physician* to actually participate in, such discussions. To the extent this aspect of the *Brandt* cases' holding needs to be re-examined in light of HIPAA's requirements, that is an issue for the Supreme Court.

FN6. At oral argument, Collins' counsel acknowledged that, to the extent Missouri law authorized *ex parte* interviews in the absence of a valid medical authorization, it would be contrary to, and preempted by, the Privacy Rule. While we need not decide that issue here, Collins' argument underscores the tension between the holding of the *Brandt* cases and HIPAA's requirements.

Id. at 784.

The July 2, 2009 Order authorizing the Defendants to approach Bobbie Jean Proctor's treating physicians, and authorizing *ex parte* discussions, is the same as Respondent compelling Bobbie Jean Proctor to execute an authorization allowing

defense counsel to meet privately with her treating physicians. Such a result is in direct conflict with the *Woytus* holding, both *Brandt I* and *Brandt II*, and *Collins* decisions, and, as discussed further below, HIPAA privacy protections preempt Missouri's less stringent waiver rule. Additionally, to the extent *Woytus*, *Brandt I*, *Brandt II*, and *Collins* held that a plaintiff could not be compelled to sign an authorization authorizing *ex parte* contacts, those decisions would be rendered meaningless if the Order in this case is permitted.

C. In the context of litigation, HIPAA regulations prohibit disclosure of oral and written health information except by patient authorization, court order, or formal discovery:

Congress passed the Health Insurance Portability and Accountability Act (“HIPAA”), in part, “to protect the security and privacy of individually identifiable health information.” *Smith v. American Home Products Corp.*, 372 N.J. Super. 105, 855 A.2d 608, 611 (2003). Congress delegated to the Secretary of the Department of Health and Human Services (hereinafter “the Secretary”) to create national standards to “ensure the integrity and confidentiality” of health information. *Smith, supra*; *citing* HIPAA § 1173(d)(2)(a). “HIPAA’s stated purpose of protecting a patient’s right to the confidentiality of his or her individual medical information is a compelling federal interest.” *Crenshaw v. Mony Life Ins. Co.*, 318 F.Supp.2d 1015, 1028 (S.D. Ca. 2004).

The regulations promulgated by the Secretary setting forth standards and procedures for the collection and disclosure of “protected health information” (“PHI”) went into effect on April 14, 2003. *See* 45 C.F.R. §§ 160.103 and 164.534. HIPAA and its regulations define PHI as “any information, whether oral or recorded in any form or medium that ... is created and received by a health care provider ... and relates to past, present or future physical or mental health or condition of an individual ...” 42 U.S.C. § 1320d(4); 45 C.F.R. § 160.103. “Covered entities are prohibited from disclosing PHI except as regulations require and permit.” 45 C.F.R. §§ 164.501 and 160.103. “Disclosure” includes divulging or providing access to PHI. 45 C.F.R. § 164.501.

Bobbie Jean Proctor’s health care providers may disclose PHI under HIPAA’s regulations only if (1) Plaintiff executes a proper, written authorization, 45 C.F.R. §164.508(c); (2) in response to a court order, 45 C.F.R. §164.512(e)(1); or (3) through formal discovery. *Id.* Since HIPAA defines PHI to include “oral” medical information, its rules apply to informal *ex parte* interviews with treating physicians. *See Law v. Zuckerman*, 307 F.Supp.2d 705, 708 (D.Md. 2004); *Crenshaw*, 318 F.Supp.2d at 1028.

Absent an express authorization, a health care provider may disclose protected health information in the course of any judicial proceeding under either of two circumstances. First, the information can be disclosed if the provider is ordered to do

so by a court. 45 C.F.R. § 164.512(e)(1)(i). Second, the information can be disclosed by a health care provider in response to traditional methods of formal discovery, i.e. “subpoena, discovery request or other legal process that is not accompanied by an order of a court” as long as certain conditions are met. 45 C.F.R. § 164.512(e)(1)(ii). This second method requires that a) the health care provider must be assured that the requesting entity or its representative has provided the patient with written notice and opportunity to object, or b) that in relation to the information contemplated by the discovery request or subpoena, the requesting entity has moved the court for a “qualified protective order.” 45 C.F.R. § 164.512(e)(1)(ii)(A) and (B).

HIPAA’s regulations explicitly prohibit disclosure of oral or written information unless the patient authorizes release, a court orders the release, or unless the requesting party requests the information, with proper notice, through formal discovery. HIPAA does not authorize informal discovery and clearly does not authorize secret, *ex parte* interviews with the plaintiff’s treating physicians. In *Browne v. Horbar*, 6 Misc. 3d 780 (N.Y. Sup. 2004), the Court reasoned:

Requiring the release of patient medical records, which are readily available to the patient or its representative, and directing compliance with disclosure devices by compelling physicians to offer testimony at a deposition, where the

patient or its representative has a right to be present, are very different, however, from authorizing private interviews.

Private interviews outside the patient or patient's representative's presence present very troubling confidentiality problems. In the course of private interviews, a treating physician may release information about a patient that has not even been communicated to that patient. Additionally, there is a very real risk that defense counsel may inquire into matters that do not relate to the condition at issue and, unlike in the context of judicially supervised disclosure proceedings, no one is present to ensure that the patient's rights are not violated. While it is clear that certain privacy rights are waived by commencement of a medical malpractice action, it is equally clear that there are limitations on the waiver.

See also Moss v. Amira, 826 N.E.2d 1001, 1006 (Ill. App. 2005) (“Ex parte communications between defense counsel and plaintiff’s treating physician are prohibited as violative of public policy because they jeopardize the sanctity of the confidential and fiduciary relationship between a physician and his patient.”).

D. The Order executed by Respondent is irreconcilable with HIPAA:

Here, Respondent scatters citations to HIPAA regulations throughout the Order. Respondent mistakenly relies upon 45 C.F.R. § 164.512(e)(1)(ii) to justify the Order signed by Respondent. However, Respondent is combining the provisions of

45 C.F.R. § 164.512(e)(1) to achieve a desired result. The provisions concerning notice and an opportunity to object strictly relate to the formal discovery methods listed under 45 C.F.R. § 164.512(e)(1)(ii).

The Court of Appeals correctly focused its discussion on the language contained in 45 C.F.R. § 164.512(e)(1)(i), which states:

(1) 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; or

State ex rel. Proctor v. Messina, WL 3735919, 11 (Mo.App. W.D. 2009).

The Order here is not compelling production of information. It merely advises a non-party that they may engage in *ex parte* communications with defense counsel if they choose to do so. The Order allowing informal *ex parte* discussions between the physician and defense counsel provides no oversight by the Court. As stated within the *Proctor* Court of Appeals decision, "... we conclude that 45 C.F.R. 164.512(e) permits a covered entity, pursuant to a court order or subpoena, discovery request, or

other lawful process, to disclose information *during* or *in* any official proceeding in court, or *during* or *in* any proceeding in which the trial court empowers the parties to act or in which the trial court acts in an oversight capacity.” *Proctor v. Messina*, WL 3735919, 12. (emphasis in original). Importantly, the Court of Appeals in this case discussed the language “in the course of any judicial or administrative proceeding” and that the language “in conjunction with” any judicial or administrative proceeding was considered but declined by the Department of Health and Human Services. *Id.* Thus, the Order here allowing *ex parte* discussions provides no oversight capacity for the Court as it would have in the formal discovery process pursuant to the Missouri Supreme Court Rules. Moreover, an *ex parte* interview cannot be reconciled with the protections provided by HIPAA because the disclosure occurs without affording Plaintiff an opportunity to object. Unless defense counsel provides exclusive written questions to be asked of a treating physician, Plaintiff will not have notice or an opportunity to object to the questions asked by defense counsel.

The *Proctor* decision emphasized the Missouri Supreme Court “relied upon the fact that there was no legal ‘prohibition’ of informal and voluntary *ex parte* communications with plaintiff’s physicians at the time *Brandt I* was authored.” *Proctor* at 13. “The enactment of HIPAA now presents a statutory framework that does, in fact, encompass a ‘prohibition’ of physician disclosure of a patient’s

protected health information in formal **and** informal settings. *Id.* (*emphasis in original*).

Furthermore, the Order executed by Respondent in this matter announced a complete waiver of Plaintiff's physician-patient privilege and authorized secret *ex parte* meetings with Relator Bobbie Jean Proctor's treating physicians. The Court of Appeals noted the Order executed by Respondent amounts to an advisory opinion to non-parties. *Proctor* at 10, fn.5. Respondent's Order also stated it was a "qualified protective order" consistent with 45 C.F.R. § 164.512(e)(1). However, the "qualified protective order" is not applicable to *ex parte* oral communications because that provision relates to formal requests for discovery and information orally disclosed cannot be returned or destroyed at the end of the litigation.

a. Preemption:

HIPAA's implementing regulations "explicitly define the extent to which" HIPAA pre-empts State law. *See MI Cannery and Freezers Ass'n, Inc. v. Agricultural Marketing*, 467 U.S. 461, 469 (1984). HIPAA regulations expressly provide that "[a] standard, requirement, or implementation specification adopted under this subchapter *that is contrary to a provision of State law preempts the provision of State law.*" 45 C.F.R. § 160.203 (*emphasis added*). The regulations further provide that State law is not preempted if "[t]he provision of State law relates to the privacy of individually identifiable health information and is *more stringent*

than” than the privacy protections provided by HIPAA. 45 C.F.R. § 160.203 (emphasis added). To the extent that a State’s law is less stringent than HIPAA, HIPAA controls.

In promulgating the Privacy Rule (45 C.F.R. §§160 et. seq., 164 et seq.; 65 Fed. Reg. 82462), the government indicated that HIPAA was not intended to interfere with litigation discovery as permitted by state law. The Final Rule promulgating the Rule directly addressed the issue of state litigation practice:

[T]he provisions in this paragraph 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. 82462, 82530 (emphasis added).

The Federal Register and the Final Rule confirm that in the context of civil litigation, health care providers such as treating physicians could continue to disclose patient-plaintiffs’ health care information as a matter of course. Thus, the HIPAA Privacy Rule was not intended to interfere with state rules for formal discovery allowing access to PHI. However, just because the Privacy Rule was not intended to interfere with formal discovery rules does not mean HIPAA’s privacy protections should not

be complied with during the course of litigation, especially in the context of informal discovery methods. Because HIPAA does not even purport to reach state-law litigation practices, especially with regard to informal discovery, there is no preemption analysis required, because preemption under HIPAA is expressly limited to “contrary” state law. On the other hand, to the extent the requirements for oral disclosure of PHI pursuant to HIPAA cannot be complied with because Missouri law does not prohibit ex parte contacts pursuant to the *Brandt* decisions, Missouri law would be preempted. As such, there is no conflicting provisions requiring preemption. *See, generally Beverly Cohen, Reconciling the HIPAA Privacy Rules with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 Hous. L.Rev. 1091, 1133 (Winter 2006). However, both Missouri law not prohibiting ex parte contacts and HIPAA’s disclosure requirements can be complied with by obtaining the patient’s express authorization.

E. The Order executed by Respondent is irreconcilable with Missouri Law:

a. Informal Discovery Methods in Missouri:

The July 2, 2009 Order is essentially a *medical authorization* permitting disclosure of protected health information. The July 2, 2009 Order begins by declaring: “You are hereby authorized, directed, and ordered...to make available for examination and reproduction by the parties and their counsel denominated in this

lawsuit any and all medical records of any type or nature whatsoever...” See Exhibit H at page 1. Further, the Order states that “counsel for the defendants are hereby authorized to talk with Bobbie Jean Proctor’s treating physicians or other health care providers, without counsel or the parties, including the plaintiff, being present or participating” See Exhibit H at page 2. The purported HIPAA-compliant July 2, 2009 Order is nothing more than an authorization form authorizing the disclosure of protected health information disguised as a Court Order. The July 2, 2009 Order was entered over the objection of Plaintiffs.

However, medical authorizations, which is what the July 2, 2009 Court order is *de facto*, is not a matter of formal discovery. The concurring opinion in *Collins* noted that the issue of whether or not the plaintiff in that case must execute a medical authorization form is a matter of informal discovery, and Judge Marco Roldan in that case appropriately refused to compel the plaintiff to execute the medical authorization form. *Collins* at 785. “Judge Roldan did not have the authority to compel the plaintiff to sign a medical authorization form and thus embroil himself in what is essentially an informal discovery process.” *Id.* Here, by signing the July 2, 2009 Order submitted by Defendants, Respondent embroiled herself in an informal discovery process. The *Collins* concurring opinion further stated in relevant part as follows:

Parties involved in litigation have the right to perform discovery. Parties may freely conduct their discovery, as long as both parties follow the rules of discovery, as explicitly enacted by the Missouri Supreme Court.” *State ex rel. Norman v. Dalton*, 872 S.W.2d 888, 890 (Mo.App.1994) (citing *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389, 392 (Mo. banc 1989)). When the parties dispute the legal parameters of the discovery rules, it is within the circuit court's discretion to rule on such a dispute. *Id.* The circuit court's discretion, however, is limited by the parameters of the rules. *Id.*

Id.

The July 2, 2009 Order is outside the parameters of the discovery rules. As stated within the *Collins* concurring opinion, authorizations to engage in *ex parte* informal interviews is a matter of informal discovery:

In balancing the interests involved, however, this Court will not require that a non-enumerated discovery method be added to those already available under the *Rules*. Information or evidence that can be obtained legitimately through *ex parte* discussion can also be obtained through the methods of discovery listed in the *Rules*. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the potential risks to the physician-patient relationship in deviating from those procedures.

Id. at 787 (quoting *Woytus*, 776 S.W.2d 389, 395).

The addition of a new discovery method, the court enforced waiver of privilege leading to *ex parte* informal interviews with physicians, purportedly authorized by HIPAA and state law, should be accomplished by a change in the Missouri Rules of Civil Procedure, not by judicial order.

F. Formal Discovery Methods allow for the same information while protecting all parties:

There is nothing to indicate formal discovery methods do not allow access to the same information as informal discovery methods. Saving money and convenience are not enough to justify *ex parte* contacts with plaintiff's treating physicians by defense counsel; if that were the primary concern, defendants would not object to the presence of plaintiff's counsel at such meetings. Additionally, physicians routinely charge for any meeting, as well as deposition. Denying defendants *ex parte* access to a plaintiff's treating physicians, absent express authorization, does not deprive defendants the opportunity to obtain the same information while, at the same time, protecting all parties involved. As stated by the Court in *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722, 727 (Tenn. 2006):

We simply are not persuaded that the defendants here would be impeded from learning all the decedent's relevant medical information by being prohibited from communicating *ex parte* with non-party physicians. “ [A] prohibition against ... *ex parte* contacts regulates only how defense counsel may obtain

information from a plaintiff's treating physician, i.e., it affects defense counsel's methods, not the substance of what is discoverable.” *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41, 45 (1990) (quoting *Manion v. N.P.W. Med. Ctr.*, 676 F.Supp. 585, 593 (M.D.Penn.1987)). On this point, all the parties to this case, and their amici, agree: not only did the defendant here have access to “any and all” of the decedent's medical records pursuant to an agreed order, the defendant also may obtain discovery of all relevant medical information via any of the formal procedures prescribed in Tennessee Rule of Civil Procedure 26.01, including deposition upon oral examination or written questions, written interrogatories, and requests for admissions. The plaintiff here fully concedes that the decedent's relevant medical information is discoverable—the question is simply *how* the defendant may discover it. “[I]t is undisputed that ex parte conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery.” *Petrillo v. Syntex Lab., Inc.*, 148 Ill.App.3d 581, 102 Ill.Dec. 172, 499 N.E.2d 952, 956 (1986). We agree with numerous “[o]ther courts [that have] concluded that formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process....” *Crist*, 389 S.E.2d at 46 (citing *Petrillo v. Syntex Lab.*,

Inc., 102 Ill.Dec. 172, 499 N.E.2d at 963; *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 356 (Iowa 1986); *Anker v. Brodnitz*, 98 Misc.2d 148, 413 N.Y.S.2d 582, 585-86 (N.Y.Sup.Ct.1979)).

Similarly, in Missouri, the limits of authorized discovery in the State of Missouri commences with Rule 56. *See Woytus* at 391; Missouri Supreme Court Rule 56.01. Following formal discovery channels also affords Court oversight. While it may be deemed that the plaintiff has waived the statutory privilege with regard to certain information, the filing of a lawsuit does not constitute a waiver of the plaintiff's right to the protections afforded by Missouri's Rules of Civil Procedure. Likewise, the filing of a personal injury suit does not waive the protections afforded by HIPAA.

Even though this Court did not prohibit *ex parte* contacts before the enactment of HIPAA, the Court of Appeals noted:

Lest anyone attempt to suggest that our Missouri Supreme Court ever enthusiastically endorsed the slippery slope that presents itself when one of plaintiff's treating physicians is called upon to engage in *ex parte* communications with a defendant or defendant's representatives in which the interests of the physician's patient are often pitted against the interest of a member of the physician's profession, we remind lawyers and litigants alike of the following statement from our Missouri Supreme Court in *Brandt II*:

In reaching our conclusion, we stop short of enthusiastically endorsing the idea that a physician should freely engage in *ex parte* discussions regarding a patient's condition. When a doctor engages in *ex parte* communications with a patient's adversaries, there is a risk that the disclosure will exceed the bounds of the waiver of the privilege. 856 S.W.2d at 674-75.

In both of the *Brandt* opinions, our Missouri Supreme Court reiterated its conclusion from *Woytus* that a plaintiff cannot be compelled by a trial court to sign an authorization consenting to *ex parte* communications with his treating physicians in favor of defendants or their attorneys. It is our Supreme Court's rationale for this conclusion that is particularly relevant to our discussion today:

[T]his court will not require that a non-enumerated discovery method be added to those already available under the [Missouri Rules of Civil Procedure]. Information or evidence that can be obtained legitimately through *ex parte* discussion [with treating physicians] can also be obtained through the methods of discovery listed in the [Missouri Rules of Civil Procedure]. Any burdens caused defendants by being restricted to the specially enumerated discovery procedures are outweighed by the

potential risks to the physician-patient relationship in deviating from those procedures.

Woytus, 776 S.W.2d at 395.

Litigants and lawyers involved in lawsuits have a right to perform discovery, and they are entitled to do so within the parameters of rules of discovery enacted by our Missouri Supreme Court. *Id.* at 392. When the parties dispute the legal parameters of the rules of discovery, the trial court has discretion to rule on the dispute, ***but the trial court is limited by the enumerated discovery rules and the parameters of those rules.*** *Norman*, 872 S.W.2d at 890.

State ex rel. Proctor v. Messina, 2009 WL 3735919, 13-14 (Mo.App. W.D.,2009) (emphasis in original).

In addition to the above, the Order in this case does not inform the health care provider that they may be held personally liable for disclosure outside the relevance of the litigation. To put the physician in a position to determine what information should properly be disclosed is not only unfair to the physician, but it creates the potential risk of disclosure outside the scope of the litigation. For these reasons, and in light of the standards promulgated by HIPAA and its implementing regulations, Respondent's Order is entirely inappropriate.

POINT II.

RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A FORMAL ORDER AUTHORIZING DEFENSE COUNSEL TO OBTAIN “ANY AND ALL” PROTECTED HEALTH INFORMATION, ABSENT EXPRESS AUTHORIZATION, BECAUSE MISSOURI LAW REQUIRES AUTHORIZATIONS BE RESTRICTED IN TIME, SCOPE AND ADDRESSED TO SPECIFIC PROVIDERS.

A. Standard of Review:

Prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001). It is a discretionary writ that only issues “to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.” *Id.* at 856-57.

B. The July 2, 2009 Order is not restricted in scope:

Even if the Missouri discovery rules authorized the entry of the July 2, 2009 Order, which they do not, the Order is not restricted in scope violating longstanding and unequivocal Missouri law. Medical authorizations that are not tailored to the pleadings and not addressed to specific health care providers are overly broad and impermissible. *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464-65 (Mo.banc

1995). Unless special circumstances can be shown, the language of the Order, which is essentially a *de facto* authorization, should track the plaintiff's allegation of injury in the petition. *State ex rel Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. banc 1997). With regard to designations of health care providers, these limitations tie the authorizations to the particular case and the injuries pleaded. *Id.* An authorization lacking them is improper because it would entitle a defendant to any and all of a plaintiff's or a decedent's medical records, from any provider who treated the plaintiff. *Stecher*, 912 S.W.2d at 465 (emphasis added).

In this case, the July 2, 2009 Order specifically states that the parties and their counsel are entitled to “any and all medical records of any type or nature whatsoever and/or any protected health information.” *See* Exhibit H, page 1. The July 2, 2009 Order further states that the protected health information subject to this order include “any and all records related to HIV testing, HIV status, AIDS or sexually transmitted diseases; and any and all records related to the diagnosis and treatment of mental, alcoholic, drug dependency, or emotional condition; psychiatric and psychotherapy notes.” Notwithstanding any restrictions required by HIPAA regarding the release of psychological or HIV records, the above language contained within the Order is entirely overbroad.

Bobbie Jean Proctor has alleged numerous injuries. Specifically, Plaintiff alleged the following injuries as direct and proximate result of the defendants' collective negligence:

a. She has suffered severe injury secondary to the unchecked bleeding and hemorrhaging including damage to her right leg resulting in a permanent loss of her ability to walk normally;

b. She suffered profound hypoxia during the Code Blue resulting in her long term hospitalization secondary to her injuries secondary to the undiagnosed and untreated blood loss;

c. She has received injuries secondary to the above trauma with consequences unknown to Plaintiff at present;

d. She has been caused great physical and mental anguish;

e. She has incurred reasonable and necessary medical expenses, including but not limited to, hospital bills, surgeon's and doctor's bills, and other related bills for medical treatment, the exact amount of which is unknown at this time;

f. She has suffered a loss of her ability to lead a normal life;

g. She has suffered a loss of her enjoyment of life;

h. She has been put at risk for several other complications including, but not limited to, those secondary to the receipt of additional blood products, the code

blue hypoxic event and other conditions presently unknown to Plaintiff Bobbie Jean Proctor; and

- i. She has suffered permanent injuries and disabilities.

See Exhibit 1.

The Order clearly violates the rule established in *Stecher*. *See Stecher*, 912 S.W.2d at 464 (holding that “broad allegations of injuries do not automatically entitle defendants to an essentially unlimited medical authorization.”). Medical records are subject to the physician-patient privilege codified under §491.060(5) R.S.Mo. 2000. Any information that a physician acquires from a patient while attending to that patient and which is necessary to enable the physician to treat that patient is privileged. *Jones*, 936 S.W.2d at 807. Once a plaintiff puts the matter of his or her physical condition at issue under the pleadings, however, he or she waives that privilege insofar as information from physicians or medical or hospital records bears on that issue. *Id.*

In *Stecher*, 912 S.W.2d at 464-65, the Missouri Supreme Court addressed three ways in which medical authorizations can be overly broad: 1) authorizations that are not tailored to the pleadings, 2) authorizations that are not limited in time, and 3) authorizations that are not addressed to specific health care providers.

The *Stecher* court defined the proper scope of medical authorizations by stating as follows:

[D]efendants are not entitled to any and all medical records, *but only those medical records that relate to the physical conditions at issue under the pleadings*. It follows that medical authorizations must be tailored to the pleadings, and this can only be achieved on a case-by-case basis.

Id. at 464 (emphasis added).

If a plaintiff has alleged an injury or injuries, a defendant is entitled to only those medical records related to the physical conditions at issue under the pleadings. *Id.* Accordingly, unless special circumstances can be shown, the language of defendant's requested authorization should track plaintiff's allegation of injury in the petition. *Id.* Respondent's Order of July 2, 2009 is inconsistent with the *Stecher* Court's ruling, in that the authorization to release records relating to HIV, alcoholic, drug dependency and psychiatric conditions is simply not related to the alleged injuries in this case.

CONCLUSION

Respondent acted without jurisdiction or in excess of its jurisdiction by entering the July 2, 2009 and July 17, 2009 Orders. The July 2, 2009 Order cloaked with HIPAA certification to permit *ex parte* interviews runs afoul of the clear intent of HIPAA and the heightened privacy standards adopted by HIPAA. The HIPAA regulations establish very specific requirements for the disclosure of protected health information in the context of litigation. Those requirements must be complied with, and they preempt Missouri law allowing a waiver of the Plaintiff's privacy rights.

Additionally, the Court Order authorizing any and all records is overbroad and violates existing Missouri law.

Relators pray that this Court, upon hearing of all matters at issue herein, will make Relators' writ of prohibition or mandamus absolute, and will grant Relators such other processes, orders and remedies as may to the Court appear fair, just and appropriate under the circumstances.

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CERTIFICATION OF SERVICE AND COMPLIANCE

WITH RULE 84.06(b) and (c)

The undersigned hereby certified that on this 1st day of April, 2010, one true and correct copy of the foregoing Brief, and one CD-ROM disk containing the foregoing Brief, in Microsoft Word (2007) format, and one (1) copy of the Appendix were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing Brief complies with the limitations contained in Rule No. 84.06(b), and that the Brief contained 8,761 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the Brief, has been scanned for viruses and is virus free.

Respectfully submitted,

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