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

RESPONDENTS' SUBSTITUTE BRIEF

Jana V. Richards
Maureen M. Brady
SANDERS CONKRIGHT & WARREN, LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210
FAX: (913) 234-6199
PHONE: (913) 234-6100
EMAIL: j.richards@swrllp.com
m.brady@swrllp.com
ATTORNEYS FOR TIMOTHY L. BLACKBURN, M.D. AND KANSAS CITY HEART GROUP, P.C.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

JURISDICTIONAL STATEMENT ix

STATEMENT OF FACTS 1

POINTS RELIED ON 4

ARGUMENT 6

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A HIPAA-COMPLIANT QUALIFIED PROTECTIVE ORDER BECAUSE SHE DID NOT ACT IN EXCESS OF HER JURISDICTION IN THAT AUTHORITY TO ENTER THE ORDER IS GRANTED THROUGH FEDERAL STATUTE AND THE ORDER DOES NOT VIOLATE MISSOURI LAW 6

A. Standard of Review 6

B. Respondent acted within the bounds of Missouri and Federal law to issue a qualified protective order. A qualified protective order is a device created by HIPAA to access PHI which is restricted by Federal statute 9

1. Missouri enforces fair and equal access to fact witnesses by all parties as a fundamental right of litigation 10

2. HIPAA is a procedural statute which creates general protections for PHI of patients. An integral part of the purpose of HIPAA is to establish a method by which PHI can be obtained during litigation without the necessity of an authorization from the patient 16

a. HIPAA does not prohibit access to PHI of patients through ex parte communication 20

i. Guidance for interpretation of HIPAA is provided from federal court interpretation of federal statutes 22

ii. The use of a protective order is the appropriate way to gain access to a patient-litigant's PHI because it allows permitted access while providing protection to the patient-litigant 23

iii. The qualified protective order was appropriately issued in the course and scope of a judicial proceeding and is an appropriate method of providing covered entities notice that the litigants have provided the patient adequate notice pursuant to 45 C.F.R. §164.512 25

3. The fundamental rights of due process and equal protection under the law require that both parties to the litigation have equal access to fact witnesses and be allowed to conduct informal discovery 29

4. HIPAA expressly creates procedures by which litigants may obtain PHI through informal discovery. This regulatory scheme provides adequate protection of the patient's privacy concerns 32

C. HIPAA does not preempt state law 33

1. HIPAA contains no expressed preemption of Missouri law.....34

2. HIPAA does not impliedly preempt Missouri law 35

D. The Order required under HIPAA does not force a patient-litigant to authorize ex parte communications 39

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A QUALIFIED PROTECTIVE ORDER ALLOWING ACCESS TO ALL PLAINTIFF BOBBIE JEAN PROCTOR'S MEDICAL RECORDS BECAUSE THE ORDER IS LIMITED TO TIME AND CONSISTENT WITH THE SCOPE OF THE ALLEGATIONS MADE BY RELATORS UNDER THE PLEADINGS IN THAT RELATORS ALLEGE THAT PLAINTIFF BOBBIE JEAN PROCTOR'S ENTIRE LIFE HAS BEEN AFFECTED BY THE ALLEGED NEGLIGENCE OF DEFEANTS 42

A. The issuance of the Order granting ex parte communication is not a "de facto authorization" by the Court. Relators' argument elevates form over substance.....42

B. The Order issued by Respondent is appropriately tailored to the scope of the pleadings 44

CONCLUSION 46

CERTIFICATION OF SERVICE AND COMPLIANCE.....47

TABLE OF AUTHORITIES

Cases

Altria Group, Inc. v. Good, 129 S.Ct. 538 (2008) 33, 34, 35

Anglim v. Missouri Pacific Railroad Co., 832 S.W.2d 298 (Mo. en banc. 1992).....7

Arons v. Jutkowitz, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.2d 345 (N.Y.App. 2007) 21

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002).....16

Bayne v. Provost, 359 F.Supp.2d 234 (N.D.N.Y. 2005) 22, 27

Brandt v. Medical Defense Assoc. ("Brandt II"), 856 S.W.2d 667 (Mo. en banc. 1993) 9, 13, 14, 24, 29, 30, 35

Brandt v. Medical Defense Assoc., 856 S.W.2d 667 (Mo. en banc. 1993).. 4, 10, 13

Browne v. Harbor, 6 Misc.3d 780 (N.Y.Supp. 2004).....20

Congress v. Tillman, 2009 WL 1738511 (E.D.Mich. June 16, 2009).....22

Crenshaw v. Mony Life Insurance Co., 318 F.Supp.2d 1015 (D.Cal. 2004) ... 22, 24

Crosky v. BMW of North America, 2005 WL 4704767 (E.D.Mich.).....22

Dalcour v. City of Lakewood, 2009 WL 1392079, *3 (D.Colo. May 15, 2009) 17

Doe v. U.S., 253 F.3d 256 (6th Cir. 2001).....16

Equal Employment Opportunity Commission v. Boston Market Corp., 2004 WL 3327264 (E.D.N.Y. December 16, 2004).....23

Freightliner Corp. v. Myrick, 512 U.S. 280..... 34, 38

In re Zyprexa Products Litigation, 245 F.R.D. 50, 54 (E.D.N.Y. 2008) 17

Jimenez v. Quarterman, 129 S.Ct. 681 (2009).....21

Law v. Zuckerman, 307 F.Supp.2d 705 (D. MD. 2004)..... 22, 24, 27

Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008) 24

Moss v. Amina, 826 N.E.2d 1001 (Ill.App. 2005) 20

Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923 (7th Cir. 2004)16, 17, 22

Palazzolo v. Mann, 2009 WL 728527 (E.D.Mich. March 19, 2009) 22

Pratt v. Petelin, 2010 WL 446474 (D.Kan. February 4, 2010)..... 22, 27

Rosales v. City of Bakersfield, 2006 WL 988605, *1 (E.D.Cal. April 13, 2006)...17

Santaniello v. Sweet, 2007 WL 214605 (D.Conn. January 25, 2007).....22

Sforza v. City of New York, 2008 WL 470131 (S.D.N.Y. October 24, 2008).....22

State ex rel. Brantingham v. Grate, 205 S.W.3d 317 (Mo.App. 2006) 6

State ex rel. Collins v. Roldan, 289 S.W.3d 780 (Mo.App. 2009)..... 12, 39, 41

State ex rel. Costco Wholesale Corp. v. Hartenbach, 267 S.W.3d 725 (Mo.App. 2008).....8

State ex rel. Health Midwest Development Group, Inc. v. Daugherty, 965 S.W.2d 841 (Mo. en banc. 1998).....7

State ex rel. Jones v. Syler, 936 S.W.2d 805 (Mo. en banc. 1997) 5, 44

State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (Mo.App. 2000)..... 5, 38, 44

State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo. en banc. 1968).... 10, 11, 30, 38

State ex rel. Norman v. Dalton, 872 S.W.2d 888 (Mo App. 1994) 37

State ex rel. Proctor v. Messina, -- S.W.3d ---, 2009 WL 3735919, *15 (Mo.App. W.D. November 10, 2009) 1, 2, 8, 15, 26, 27, 29, 41, 44, 45

State ex rel. Rosenberg v. Jarrett, 233 S.W.3d 757 (Mo.App. 2007) 7

State ex rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. en banc. 1989)11, 12, 14, 39, 40

Traux v. Corrigan, 257 U.S. 312 (1921) 30

U.S. v. Bek, 493 F.3d 790, 802 (7th Cir. 2007).....17

Wimberly v. Labor and Industrial Relations Commission of Missouri, 688 S.W.2d 344 (Mo. en banc. 1985).....22

Statutes

R.S.Mo. §491.060 11

R.S.Mo. §575.010 26

R.S.Mo. §575.250 26

R.S.Mo. 575.270 26

R.S.Mo. 575.300 26

R.S.Mo. 575.390 26

Regulations

45 C.F.R. §160.103 21

45 C.F.R. §160.203 ..... 15, 34

45 C.F.R. §164.508 ..... 7, 16, 34, 36

45 C.F.R. §164.512 ..... 4, 7, 17, 23, 24, 26, 28, 29, 35, 36

Constitutional Provisions

U.S.C.A., Const. Article VI 33

JURISDICTIONAL STATEMENT

Respondent agrees with Relators' Jurisdictional Statement as submitted in their Substitute Brief for Relators.

STATEMENT OF FACTS

This 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 underwent a percutaneous transluminal coronary angioplasty with stenting. Id. Bobbie Jean Proctor was monitored by Defendant Dr. Blackburn with the Kansas City Heart Group for any post-surgical complications. Id. Following surgery, Bobbie Jean Proctor claims to have developed post-surgical hemorrhaging at the site of the stenting procedure. Id. The patient's condition resulted in telephone calls to Defendant Blackburn. Id. Plaintiffs allege Defendant Blackburn did not satisfactorily address Bobbie Jean Proctor's post-surgical condition. Id. Plaintiffs claim Bobbie Jean Proctor lost blood at a profound rate over the next five hours. Id. In the early morning hours of March 29, 2004, Plaintiff Bobbie Jean Proctor suffered multi-system failure. Id. Bobbie Jean Proctor then coded and had to be emergently resuscitated. Id. Plaintiffs claim Bobbie Jean Proctor sustained numerous injuries, including damage to her right leg resulting in a permanent loss of her ability to walk normally. Id. Plaintiffs claim that her injuries are such that they affect her entire

life. Id. In view of these allegations, Bobbie Jean Proctor's physical condition has been placed squarely at issue concerning both the liability and damage aspects of the case.

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. *See* Exhibit 1 to Respondent's Suggestions in Opposition to Petition in Prohibition. 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 Mandumus 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.

POINTS RELIED ON

POINT I

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A HIPAA-COMPLIANT QUALIFIED PROTECTIVE ORDER BECAUSE SHE DID NOT ACT IN EXCESS OF HER JURISDICTION IN THAT AUTHORITY TO ENTER THE ORDER IS GRANTED THROUGH FEDERAL STATUTE AND THE ORDER DOES NOT VIOLATE MISSOURI LAW.

Brandt v. Medical Defense Assoc., 856 S.W.2d 667 (Mo. *en banc*. 1993)

45 C.F.R. §164.512(e)

POINT II

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A QUALIFIED PROTECTIVE ORDER ALLOWING ACCESS TO ALL PLAINTIFF BOBBIE JEAN PROCTOR'S MEDICAL RECORDS BECAUSE THE ORDER IS LIMITED TO TIME AND CONSISTENT WITH THE SCOPE OF THE ALLEGATIONS MADE BY RELATORS UNDER THE PLEADINGS IN THAT RELATORS ALLEGE THAT PLAINTIFF BOBBIE JEAN PROCTOR'S ENTIRE LIFE HAS BEEN AFFECTED BY THE ALLEGED NEGLIGENCE OF DEFEANTS.

State ex rel. Justice v. O'Malley, 36 S.W.3d 9 (Mo.App. 2000)

State ex rel. Jones v. Syler, 936 S.W.2d 805 (Mo. *en banc*. 1997)

ARGUMENT

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A HIPAA-COMPLIANT QUALIFIED PROTECTIVE ORDER BECAUSE SHE DID NOT ACT IN EXCESS OF HER JURISDICTION IN THAT AUTHORITY TO ENTER THE ORDER IS GRANTED THROUGH FEDERAL STATUTE AND THE ORDER DOES NOT VIOLATE MISSOURI LAW.

A. Standard of Review

"A writ of prohibition is extraordinary and should be used with great caution and only in cases of extreme necessity." State ex rel. Brantingham v. Grate, 205 S.W.3d 317, 319 (Mo.App. 2006). A writ of prohibition is only appropriate where the trial court has abused its discretion **and** acted in excess of its jurisdiction:

> Writs of prohibition are limited to the "fairly rare" situations where (1) the court or tribunal exceeded its personal or subject matter jurisdiction, (2) the court or tribunal lacked the power to act as it did, or (3) "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available[,]" or there is an issue of law that will likely escape review on appeal and cause considerable hardship or expense to the aggrieved party.

State ex rel. Rosenberg v. Jarrett, 233 S.W.3d 757, 760 (Mo.App. 2007).

Relators have the burden of showing that the trial court's ruling is beyond the bounds of judicial discretion. State ex rel. Health Midwest Development Group, Inc. v. Daugherty, 965 S.W.2d 841, 844 (Mo. *en banc*. 1998). Respondent did not act in excess of her jurisdiction. Respondent's jurisdiction to issue the Order allowing the oral release of Protected Health Information ("PHI") by a patient's health care provider to a third party, without authorization from the patient, is established through federal statute. 45 C.F.R. §164.512(e). It is this same federal statute which constrains the health care provider from generally releasing PHI. 45 C.F.R. §164.508.

"Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances . . . and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. . . ." Anglim v. Missouri Pacific Railroad Co., 832 S.W.2d 298, 303 (Mo. *en banc*. 1992). Respondent did not abuse her discretion as the Health Insurance Portability and Accountability Act ("HIPAA") provides procedures for the release of PHI to a third party without authorization of the patient. Respondent followed those procedures and issued the Order consistent with the procedural guidelines of HIPAA.

Likewise, a writ of mandamus is an extraordinary remedy and should only be used under extreme circumstances. "A writ of mandamus is a hard and fast unreasoning writ, and is reserved for extraordinary emergencies." State ex rel. Costco Wholesale Corp. v. Hartenbach, 267 S.W.3d 725, 727 (Mo.App. 2008). The writ of mandamus enforces an existing right of the Relator. Id. "To warrant control by mandamus, there must be an existing, clear, unconditional legal right in relator, and a corresponding present, imperative, unconditional duty upon respondent, and a default upon respondent therein." Id.

Relators have no legal right to deny ex parte access to Bobbie Jean Proctor's treating health care providers because she waived any privilege she held with her health care providers by filing a lawsuit where her physical condition is at issue under the pleadings. As such, Respondent did not deny any right of Relators but acted within her jurisdiction and under both state and federal law to issue an order giving Bobbie Jean Proctor's health care providers assurances that no HIPAA law will be violated should they choose to engage in ex parte communication with Defendants in the underlying case.

B. Respondent acted within the bounds of Missouri and Federal law to issue a qualified protective order. A qualified protective order is a device created by HIPAA to access PHI which is restricted by Federal statute.

Relators contend that Respondent exceeded her jurisdiction by interjecting the Court into the informal discovery process of the underlying litigation. To the contrary, Respondent's authority was granted by Congress to release heath care providers from the constraints of disclosure placed on them by HIPAA during the course and scope of pending litigation, without the necessity of an authorization from the patient or engaging in formal discovery. In other words, a trial court can release a health care provider to disclose PHI to a third party where that party is engaged in seeking information through the informal discovery process.

This Court has recognized the value and necessity of informal discovery. Brandt v. Medical Defense Assoc. ("*Brandt II*"), 856 S.W.2d 667, 674 (Mo. *en banc*. 1993). However, Respondent did not interject herself into the informal discovery process. Respondent acted with the authority given by HIPAA as procedural guidance for the release of PHI to a third party in litigation. Respondent issued the order pursuant to HIPAA guidelines as the restriction on disclosure originates from federal statute.

1. Missouri enforces fair and equal access to fact witnesses by all parties as a fundamental right of litigation.

As part of this legal philosophy, for over 40 years Missouri has recognized the necessity of granting both parties to litigation equal access to fact witnesses. This legal philosophy is so strong that this Court has repeatedly upheld both sides' right to medical information discovery and access to medical fact witnesses, including treating physicians. This Court has long held that defendants can engage in ex parte communication with a patient-litigant's treating health care providers. This has been the law in the State of Missouri since 1968 and was reaffirmed and clarified in 1993 with the Brandt decisions. The July 2, 2009 Order issued by Respondent did not violate this long established law in Missouri. The Order was issued pursuant to the requirements of Federal law regulating health care providers and the methods by which PHI can be disclosed to third parties.

HIPAA merely provides procedures by which to gain access to generally private information. Where this information cannot be accessed under substantive state law, the procedures provided by HIPAA are not applicable. The analysis of Missouri law begins with the waiver of physician-patient privilege which was first recognized by this Court in 1968 in the case of State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo. *en banc*. 1968).

The McNutt Court was asked to determine if and when a patient-litigant waived physician-patient privilege pursuant to R.S.Mo. §491.060(5)(1959). The Court concluded that when a patient files a petition, putting her physical condition at issue under the pleadings, she waives her physician-patient privilege. McNutt, 432 S.W.2d at 601. The Court reasoned that a plaintiff cannot successfully prosecute her claim for damages without waiving the privilege. Id. The Court went further and held that the timing of the waiver begins at the inception of the case and continues through the entirety of the litigation because both sides should have equal access to information and discovery. Id. at 601-602. Full disclosure "will help in reaching the ultimate object of every trial, which is to get at the truth." Id. at 602. One party cannot be allowed to hinder the search for truth through discovery by secreting away a certain classification of fact witnesses. Id.

Whereas McNutt does not specifically address the issue of ex parte communications, the philosophy and established public policy are clear: both parties should have equal access to fact witnesses. Equal access includes both formal and informal means of discovery.

This Court first addressed the issue of ex parte communications with health care providers 20 years after McNutt in State ex rel. Woytus v. Ryan, 776 S.W.2d 389 (Mo. *en banc*. 1989). The Woytus Court again reinforced the long standing

public policy that the interests of justice require that both parties should have access to the truth.

The primary issue in Woytus was whether or not a plaintiff could be *forced* to sign an authorization allowing opposing counsel to have ex parte communications with her treating physicians. 776 S.W.2d at 390. Woytus is not directly analogous to the instant case on the issue of access because HIPAA does not require authorizations for disclosure of PHI by health care providers. The trial court does not have jurisdiction to *compel* a party to sign an authorization allowing ex parte communication. State ex rel. Collins v. Roldan, 289 S.W.3d 780, 784 (Mo.App. 2009) (transfer denied September 1, 2009). Nonetheless, ex parte communications are allowed with a patient-litigant's treating health care providers. *See generally*, Woytus, 776 S.W.2d 389.

The dicta contained in Woytus includes a discussion of the risks of ex parte communications between treating physicians and defense counsel. Id. at 394-395. The Court expresses concern that the dangers of ex parte communication include disclosure of irrelevant and privileged information, disintegration of the discussion as to the witness' employment and suggestions that the witness might be the next to be sued, or the impact to that witness who might carry the same insurance as the defendant. Id. What is obvious about these comments is that these concerns could apply to **ALL** fact witnesses. Ex parte communications with any classification of

fact witness holds these same risks. Yet, as recognized by this Court, ex parte communication with fact witnesses is a valuable and necessary part of the litigation process. Brandt v. Medical Defense Associates (*Brandt II*), 856 S.W.2d 667, 672-674 (Mo. *en banc*. 1993).

In 1993, just four years following the Woytus decision, this Court directly examined the issue of ex parte communications with a patient-litigant's treating health care providers. In the companion cases of Brandt v. Pelican (*Brandt I*), 856 S.W.2d 658 (Mo. *en banc*. 1993) and Brandt II, 856 S.W.2d 667, the issue of whether or not ex parte communications are allowed in the State of Missouri was put squarely before the Court. The ruling by this Court in Brandt I makes it clear that ex parte communications with a patient-litigant's treating physicians are allowed as part of the informal discovery process of litigation. 856 S.W.2d at 661-662. Brandt II provides a discussion of the value of such ex parte communications. 856 S.W.2d at 672-674.

As outlined in Brandt II, the overriding reason to allow ex parte communications with a patient-litigant's treating health care providers is all parties have a constitutionally recognized right to a fair trial. 856 S.W.2d at 672. The notion of a fair trial where both parties to litigation have equal access to discovery, witnesses and information is the cornerstone of our judicial system. To allow one party to gain an advantage over the opponent by controlling the substance and

manner in which information is released violates the very fabric that binds our legal structure. The foundation of our jurisprudence is that both parties should have equal access to the information placed before a jury of their peers. Brandt II, 856 S.W.2d 672.

Recognizing that treating health care providers are first and foremost fact witnesses, the Brandt II Court concluded that a fair trial requires both parties to have ex parte access to fact witnesses through informal discovery. Id. at 673. The Court further noted that "[m]edical witnesses are, at best, difficult to deal with." Id. at 674. The time and expense of taking formal depositions of every treating physician can become cost prohibitive, especially when the health care provider may be hesitant to become involved in the litigation. Id. In Brandt II, this Court encourages informal discovery as a less expensive alternative to formal discovery. Id.; *see also*, Woytus, 776 S.W.2d at 391.

The Brandt decisions clearly establish that ex parte communications are allowed in the State of Missouri as a form of discovery. Brandt II, 856 S.W.2d at 674. Yet, the law of ex parte communications, like any other law, is not free of controversy. Just as the right to free speech under the First Amendment requires people to tolerate contrary and sometimes unpleasant speech, the law of ex parte communication can be distasteful to the party seeking to prohibit fair access to all fact witnesses. This Court expressed some trepidation about endorsing ex parte

communication and recognized that this freedom comes with responsibility. Attorneys and doctors throughout the State of Missouri have upheld this responsibility since 1968 and the McNutt decision - there are no reported cases of ethics violations for inappropriate ex parte communication involving doctors or attorneys.

The Appellate Court decision in the underlying action attempts to overturn precedent established by this Court. State ex rel. Proctor v. Messina, -- S.W.3d ---, 2009 WL 3735919, *15 (Mo.App. W.D. November 10, 2009). However, the Appellate Court's conclusion that ex parte communication is no longer allowed is based on the misinterpretation that HIPAA contains substantive law.

The Appellate Court concluded that HIPAA contains substantive law which prohibits ex parte communication. If that were the case, whether Missouri allows ex parte communications or not would be irrelevant because HIPAA, by its very language, would preempt Missouri law. 45 C.F.R. §160.203. However, HIPAA is procedural, not substantive. There is no conflict between HIPAA and Missouri law concerning ex parte communications with health care providers. The only way Missouri courts can prohibit ex parte communication with treating health care providers in a post-HIPAA world is by **overturning 40 years of precedent and abandoning the ideals and foundation of this country's legal system**, because nothing in HIPAA prohibits ex parte communication.

2. HIPAA is a procedural statute which creates general protections for PHI of patients. An integral part of the purpose of HIPAA is to establish a method by which PHI can be obtained during litigation without the necessity of an authorization from the patient.

The procedural structure of HIPAA provides ways by which parties may gain access to otherwise confidential medical information. Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923, 926 (7th Cir. 2004): *see also*, 45 C.F.R §164.512. The United States Congress drafted HIPAA in plain and unambiguous language. If the statutory language is clear and unambiguous, the statute is considered consistent and coherent. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002). One of the primary purposes of HIPAA was to protect patients against fraud and abuse of the disclosure of their medical information to outside parties. Doe v. U.S., 253 F.3d 256, 267 (6th Cir. 2001). HIPAA was drafted on the heels of a rise in awareness of the AIDS epidemic and the devastating effect of public disclosure of an individual's HIV status. Therefore, Congress based HIPAA on the general rule that a patient's health information should be kept private from parties other than the patient and the health care provider. 45 C.F.R. §164.508. However, HIPAA recognizes that at times

disclosure to third parties is, at times, necessary and appropriate, and therefore provides certain exceptions to this general rule. 45 C.F.R. §164.512.

In 2004, Judge Richard Posner of the Seventh Circuit Court carefully analyzed the statutory construct of HIPAA, finding it is a procedural statute and §164.512(e) specifically creates "a procedure for obtaining authority to use medical records in litigation." Northwestern Memorial Hospital, 362 F.3d at 926. Congress drafted these procedural guidelines within HIPAA allowing third parties to gain access to otherwise private information. The ruling of the Seventh Circuit has been followed by courts throughout the nation in recognizing that HIPAA provides procedures for disclosure of PHI in litigation. Rosales v. City of Bakersfield, 2006 WL 988605, *1 (E.D.Cal. April 13, 2006), U.S. v. Bek, 493 F.3d 790, 802 (7th Cir. 2007), In re Zyprexa Products Litigation, 245 F.R.D. 50, 54 (E.D.N.Y. 2008), Dalcour v. City of Lakewood, 2009 WL 1392079, *3 (D.Colo. May 15, 2009).

One such method required by HIPAA to obtain PHI from a health care provider in litigation is for the party seeking the information to obtain an order from the trial court. 45 C.F.R. §164.512(e)(1)(i). 45 C.F.R. §164.512 states in relevant part:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in

§164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law.

(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 (c), (e), or (f) of this section for uses or disclosures required by law.

. . .

(e) Standard: Disclosures for judicial and administrative proceedings.

(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;

. . .

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Respondent followed the guidance of HIPAA by issuing an order allowing ex parte access to Plaintiff's treating health care providers. HIPAA is not a bar to the ex parte communication allowed pursuant to Missouri law.

a. HIPAA does not prohibit access to PHI of patients through ex parte communication.

Relators acknowledge that HIPAA allows for disclosure of PHI in response to: (1) a proper written authorization signed by the patient; (2) a court order; or (3) formal discovery. (Relators' Substitute Brief, pg. 25). However, they argue that HIPAA does not authorize informal discovery or ex parte interviews with plaintiff's health care providers. (Relators' Substitute Brief, pg. 26). Relators are correct. What Relators fail to recognize is that HIPAA does not prohibit informal discovery.

To support their contention that ex parte interviews are not permitted under HIPAA without authorization signed by a patient, Relators fail to cite any federal case law to support that proposition. They instead cite a decision by a lower New York court in Browne v. Harbor, 6 Misc.3d 780 (N.Y.Supp. 2004) and by the Illinois state court in Moss v. Amina, 826 N.E.2d 1001 (Ill.App. 2005). (Relators' Substitute Brief, pgs. 26-27). Both of those courts reached their decisions based on state rules, not HIPAA. Neither is on point to whether HIPAA permits ex parte communication when disclosure of PHI occurs under a court order rather than an

authorization. Further, the Browne case was examined by the New York Court of Appeals in 2007 applying applicable state court rules. In that case, the New York Appellate Court concluded that ex parte interviews in a post-HIPAA world are allowed. Arons v. Jutkowitz, 9 N.Y.3d 393, 415, 880 N.E.2d 831, 842, 850 N.Y.2d 345, 356 (N.Y.App. 2007). The Court concluded that entry of an order in compliance with HIPAA allows ex parte communication during the course of the informal discovery process. Id. Moreover, Relators ignore a substantial body of federal case law finding that HIPAA is a procedural statute that allows for informal discovery under the circumstances involved in this case.

Pursuant to 45 C.F.R. §160.103, disclosure of PHI by a health care provider can be made by either oral or written means. The plain language of the statute conveys Congress' intent to allow oral communication of PHI through informal discovery. Though HIPAA does not specifically refer to "ex parte communication," oral dissemination of PHI is specifically provided for in the regulations. Therefore, it is clear that disclosures can be made through conversation. "It is well established that, when the statutory language is plain, we must enforce it according to its terms." Jimenez v. Quarterman, 129 S.Ct. 681, 685 (2009). HIPAA allows oral communication of a patient's PHI, therefore conversations with health care providers are allowed pursuant to HIPAA.

i. Guidance for interpretation of HIPAA is provided from federal court interpretation of federal statutes.

This Court has established that Missouri is not bound by statutory interpretation of the lower federal courts but is only bound by the United States Supreme Court. Wimberly v. Labor and Industrial Relations Commission of Missouri, 688 S.W.2d 344, 347 (Mo. *en banc*. 1985). However, the Court should look respectfully to the opinions of the federal courts for guidance in interpreting federal statutes. Id. at 347-348. "In some circumstances it may be appropriate for a state court to defer to long established and widely accepted federal court interpretations of federal statutes." Id. Dating back to the inception of HIPAA, federal courts have found the statute allows ex parte communication so long as a protective order is in place. Northwestern Memorial Hospital, 362 F.3d 923 (7th Cir. 2004), Crenshaw v. Mony Life Insurance Co., 318 F.Supp.2d 1015 (D.Cal. 2004), Law v. Zuckerman, 307 F.Supp.2d 705 (D. MD. 2004), Crosky v. BMW of North America, 2005 WL 4704767 (E.D.Mich.), Bayne v. Provost, 359 F.Supp.2d 234 (N.D.N.Y. 2005), Santaniello v. Sweet, 2007 WL 214605 (D.Conn. January 25, 2007), Sforza v. City of New York, 2008 WL 470131 (S.D.N.Y. October 24, 2008), Palazzolo v. Mann, 2009 WL 728527 (E.D.Mich. March 19, 2009), Congress v. Tillman, 2009 WL 1738511 (E.D.Mich. June 16, 2009), Pratt v. Petelin, 2010 WL 446474 (D.Kan. February 4, 2010).

ii. The use of a protective order is the appropriate way to gain access to a patient-litigant's PHI because it allows permitted access while providing protection to the patient-litigant.

Relators allege that Respondent is combining two exceptions of HIPAA to conclude that a HIPAA requires a protective order under the exceptions found in 45 C.F. R. §164.512 (e). (Relators' Substitute Brief pgs. 27-28). Whereas the regulation under which Respondent issued her order does not require a "protective order" within §164.512(e)(1)(i), "the use of a protective order in conjunction with a court order advances the 'strong federal policy in favor of protecting the privacy of patient medical records.'" Equal Employment Opportunity Commission v. Boston Market Corp., 2004 WL 3327264 at *4, fn. 5 (E.D.N.Y. December 16, 2004).

An "order" pursuant to §164.512 (e)(1) means a protective order that will prohibit the dissemination of the patient-litigant's PHI to the general public and restrict the disclosure of such information for use solely in the litigation. 45 C.F.R. §164.512(e)(1)(v)(A). Therefore, HIPAA allows a defendant to have access to otherwise private PHI under a protective order such as the one issued by Respondent in this case. Though Missouri has not addressed this specific issue, many other courts throughout the country have recognized the qualified protective

order requirement as a legitimate means to gain access to a patient-litigant's PHI through ex parte communication. Law v. Zuckerman, 307 F.Supp.2d at 708 ("[C]ounsel may obtain a court order which allows the health care provider to disclose [PHI]"); Crenshaw v. MONY Life Ins. Co., 318 F.Supp.2d at 1028 (HIPAA allows access to PHI through the use of a protective order.); Moreland v. Austin, 284 Ga. 730, 734, 670 S.E.2d 68, 72 (2008)("[I]n order for defense counsel to informally interview plaintiff's treating physicians, they must first obtain a valid authorization, or court order or otherwise comply with the provisions of 45 C.F.R. §164.512(e)."); *see also* 45 C.F.R. §164.512 (e)(1)(v)("For the purposes of (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court. . . .")

By issuing a protective order, the health care provider can be assured that the release of the information will not violate any independent HIPAA regulation. Additionally, patients who do not wish their private health information to be made public can be reassured that the information will not go beyond use by the parties to the litigation because the protective order is limited by both Missouri and Federal law. Brandt II, 856 S.W.2d at 672; 45 C.F.R. §164.512(1)(e)(v).

iii. The qualified protective order was appropriately issued in the course and scope of a judicial proceeding and is an appropriate method of providing covered entities notice that the litigants have provided the patient adequate notice pursuant to 45 C.F.R. §164.512.

Relators contend that HIPAA requires the "court order" referenced in §164.512(e)(1)(i) be issued in the course and scope of a judicial proceeding so as to allow judicial oversight of the order (Relators' Substitute Brief pgs. 28-30). HIPAA does not require court oversight for the administration of an order pursuant to §164.512(e). Further, there is no need for court oversight of this order because it is not a part of formal discovery. Federal law has placed a restriction on the release of PHI by health care providers. That same federal law allows the restriction to be rescinded during the litigation process. The court involvement in lifting the restriction is limited to issuing a protective order notifying the health care provider that releasing PHI to the third party will not violate existing HIPAA restrictions. HIPAA does not contemplate or require court oversight for the administration of this protective order.

The Appellate Court opinion in the underlying action concludes that the exception to the general privacy rule of HIPAA applies only to a protected entities

disclosure of PHI "in the course of" a "judicial proceeding."[1] Proctor, 2009 WL 3735919, *11. The Appellate Court then attempts to define what Congress meant by "in the course of any judicial or administrative proceeding." Instead of looking at the plain language of HIPAA, the Appellate Court relied on Black's Law Dictionary and Missouri criminal law statutes, R.S. Mo. §575.010. Id. at *12. The Appellate Court concluded, based on a Missouri criminal statute, what Congress meant by 'judicial proceeding' in a federal statute is a "proceeding authorized or held under the supervision of the court." Id. What the Appellate Court failed to consider is R.S.Mo. §575.010, the definition section of the Missouri law chapter on crimes against the administration of justice. At the beginning of the section, the introduction reads: "the following definitions shall apply to this chapter and chapter 576 RSMo". R.S.Mo.§575.010. Despite this limitation, the Appellate Court concluded that a judicial proceeding in the context of HIPAA, a Federal Statute, requires direct, constant court supervision.

However, Chapter 575 references crimes such as juror tampering, witness tampering, and interfering with a judicial proceeding. R.S.Mo. §§575.250, 575.270, 575.300, and 575.390. The plain understanding of criminal activity

[1] The original language of HIPAA provides for permitted disclosures by a covered entity without the necessity of an authorization from the patient "in the course of any judicial or administrative proceeding. . . ." 45 C.F.R. §164.512(e).

pursuant to these statutes contemplates that these crimes would be committed outside the presence of the Court and without the direct supervision of the Court. Further, the statutes contemplate that a judicial proceeding begins at the filing of the indictment and continues through trial. Therefore, the Appellate Court's reasoning that HIPAA requires direct court supervision for the release of PHI is flawed by its own precedential interpretation.

The Kansas Federal District Court recently examined the Missouri Appellate Court's reasoning in the underlying action. The Kansas Federal Court declined to follow the Appellate Court's reasoning in Proctor stating that disclosure "in the course of" a judicial proceeding contemplates that ex parte disclosure, like all informal discovery, occurs "as incidental to a pending law suit and to that extent may be regarded as 'in the course of' a judicial proceeding.'" Pratt, 2010 WL 446474, *8. Additionally, other federal courts interpreting the plain language of HIPAA have concluded that a court order granting ex parte communication does not require direct court supervision but occurs during the course of discovery. Law, 307 F.Supp.2d at 712. ("Paragraph (e) of §164.512, 'disclosures for judicial and administrative proceedings,' applies to medical information disclosed during discovery."); Bayne, 359 F.Supp.2d at 242 (during the course of discovery, "a covered entity may disclose health information after receiving satisfactory assurances that proper notice has been given to the protected person, or the party

attempting to secure the health information has secured a qualified protective order. . . .”).

Further, looking at the plain language of HIPAA, Congress contemplated *various* scenarios under which disclosure could occur without authorization of the patient. Congress allowed for disclosure to occur through informal discovery, §164.512(e)(1)(i) (disclosure in response to an order of a court or administrative tribunal), and through formal discovery, §164.512 (e)(1)(ii) (disclosure 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). To argue that Congress requires supervision of the disclosure by a covered entity responding to a court order pursuant to §164.512(e)(1)(i) is erroneous. The logical conclusion of such an argument is the old adage: “heads I win, tails you lose.” The argument that an authorization is required for disclosure **and** disclosure requires court supervision does not stand up under scrutiny. To deduce that Congress would be that redundant overlooks the plain meaning of the language of HIPAA.

Congress allowed for disclosure of PHI during the course of litigation, from the initial filing all the way through to the verdict, through formal and informal discovery procedures. Congress recognized that a third party seeking information otherwise would not have been able to conduct an independent investigation of the allegations made by a patient-litigant because HIPAA placed restrictions on the

release of that information by covered entities such as treating physicians. Therefore, Congress provided a means to obtain that information, through independent investigation, and ensure the covered entity is aware it will not violate the laws of HIPAA by disclosing a patient-litigant's PHI, *either* by court order *or* formal discovery. §164.512 (e)(1)

Defendants Blackburn and Kansas City Heart Group filed a motion with the trial court requesting a HIPAA-compliant Order as required under 45 C.F.R. §164.512(e)(1) allowing Defendants ex parte communication with Bobbie Jean Proctor's treating health care providers. Respondent properly issued an Order in compliance with HIPAA regulations and Missouri law.

3. The fundamental rights of due process and equal protection under the law require that both parties to the litigation have equal access to fact witnesses and be allowed to conduct informal discovery.

Missouri law is well established on the issue of ex parte communication. When a plaintiff engages in litigation placing his medical condition squarely at issue under the pleadings, he has waived any medical privilege with his health care providers. Brandt II, 856 S.W.2d at 674. This waiver includes disclosures made through ex parte communications with his treating physicians. Id. It is clear that a treating physician can give testimony in court about a patient whose health issues are

the subject of the litigation but that waiver also exists from the inception of and through the course of the litigation. Id. at 671. Treating doctors can be interviewed during the litigation process, prior to giving testimony at trial, because "*treating doctors are fact witnesses*." McNutt, 432 S.W.2d at 602(emphasis added).

In litigation, a plaintiff who files suit already has access to his or her treating health care providers. Treating health care providers are fact witnesses and both parties should have equal access to such witnesses. Plaintiffs cannot pick and choose which witnesses should be made available to the opposing party on an informal basis. Brandt II, 856 S.W.2d at 672. To allow a plaintiff this type of control is giving the plaintiff an unfair advantage in the litigation. Id. at 672-673. Informal discovery is a useful tool for both parties to assess liability and damages in the case. McNutt, 432 S.W.2d at 602. Allowing defendants to gain better perspective on the case is an advantage to plaintiff by possible early resolution of the case and negating the necessity of depositions that could potentially draw out the litigation over years. A 20 minute conversation with a fact witness could potentially alleviate the need for hours of depositions where multiple attorneys and parties must coordinate schedules with the physician.

Denying equal access to any fact witnesses violates the due process clause of the United States and Missouri constitutions. Due process guarantees equal treatment to litigants. Traux v. Corrigan, 257 U.S. 312, 332 (1921). Plaintiff's

treating health care providers are fact witnesses. Prohibiting defendants from interviewing certain fact witnesses is a violation of their due process rights. Plaintiffs enjoy free and unrestricted access to their treating physicians. A Court's denial of equal access to all fact witnesses results in a court-sanctioned advantage to plaintiffs which is a violation of due process.

The order contemplated by HIPAA allows disclosure during the informal discovery process. By implication, Congress recognized there are times when a patient does not wish to authorize the release of PHI to a third party, even when that third party is entitled to the disclosure. One such circumstance is when patients are involved in litigation. Therefore, Congress drafted procedures by which covered entities are allowed to disclose PHI to a third party during the litigation process. Congress also recognized that both formal and informal methods of seeking information are utilized during litigation. Where a litigant wishes to use informal discovery, Congress has laid out a method for the litigant to obtain that information without putting the covered entity at risk.

Respondent's Order is consistent with long established Missouri law and is required by federal law. To deny defendants the right to engage in ex parte communication with a patient-litigant's treating health care providers would violate their constitutionally protected rights. This Court should deny Relators' Petition.

4. HIPAA expressly creates procedures by which litigants may obtain PHI through informal discovery. This regulatory scheme provides adequate protection of the patient's privacy concerns.

Relators quote a comment in the Federal Register and the Final Rule that states the Privacy Rule will not "disrupt current practice" of allowing a defendant access to PHI where a plaintiff has put his or her medical condition at issue. (Relators' Substitute Brief, pg. 31). Relators acknowledge that HIPAA's Privacy Rule was not intended to interfere with formal discovery rules. Id. Nothing in the Federal Register or the Final Rule suggest HIPAA was intended to interfere with informal discovery either. Indeed, the "current practice" in Missouri allows for both formal and informal discovery of PHI from a physician when a plaintiff has put his or her medical condition at issue.

Relators argue that "just because the Privacy Rule was not intended to interfere with formal discovery does not mean HIPAA's privacy protections should not be complied with during the course of the litigation, especially in the context of informal discovery methods." (Relators' Substitute Brief, pgs. 31-32). They misconstrue the role of the Privacy Rule when a lawsuit is on file.

A court can uphold the privacy protections of HIPAA by restricting access to PHI under a protective order and still allow informal discovery. A protective

order can restrict use of the PHI to the lawsuit and require return of the PHI when the lawsuit is concluded, thereby protecting against dissemination of the PHI to members of the general public who are not parties to the litigation. In other words, the Privacy Rule still may apply to members of the public who are not parties to the lawsuit.

The Federal Register expressly recognizes that the Privacy Rule does not apply to a defendant in a lawsuit where the plaintiff has placed his or her medical condition at issue. A patient waives the privacy of the PHI for the parties that she has sued. Nothing in the Federal Register or the Final Rule supports the Relators' argument that the Privacy Rule does not apply to formal discovery but somehow still applies to informal discovery under that circumstance. Thus, their argument that the Privacy Rule calls for preemption of informal discovery is unfounded.

C. HIPAA does not preempt state law.

The question of whether a federal statute preempts state law begins with the Supremacy Clause. Altria Group, Inc. v. Good, 129 S.Ct. 538, 543 (2008). The laws of the United States are the supreme laws of the land and state laws that conflict with federal law are without effect. Id.; *see also*, U.S.C.A., Const. Article VI, cl. 2. In order to determine if a federal statute preempts state law one must examine the intent of Congress either expressed or implied in the statute. Id. "Congress may indicate pre-emptive intent through a statute's express language or

through its structure and purpose." Id. "Pre-emptive intent may also be inferred if the scope of the statute indicated that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." Id. (*citing*: Freightliner Corp. v. Myrick, 512 U.S. 280, 287).

1. HIPAA contains no expressed preemption of Missouri law.

HIPAA addresses the issue of preemption in 45 C.F.R. §160.203 which states:

> 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. This general rule applies, expect if one or more of the following conditions is met:
>
> (b) The provision of State law related to the privacy of the individually identifiable health information and is *more stringent* than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.[2]
>
> (emphasis added).

[2] Subpart E of part 164 of this subchapter deals with exceptions to the general privacy rule under 45 C.F.R. §164.508, including disclosure of Protected Health Information which does not require authorization from the patient.

In other words, HIPAA does not preempt Missouri law unless the Missouri law is contrary to HIPAA or if Missouri law is more stringent than HIPAA. HIPAA allows PHI, oral or written, to be disclosed to the parties to litigation without restriction on the substantive information or materials contained in the record. 45 C.R.F. §160.103, 45 C.F.R. §164.512. HIPAA does, however, require procedural methods to obtain the PHI due to the restrictions laid upon the health care providers independent of state law. §164.512 (e). Missouri allows parties to engage in ex parte communication with a patient-litigant's treating physicians. Brandt II, 856 S.W.2d at 674. Missouri has not placed procedural restrictions or limitations on this rule. There is nothing contained in HIPAA which expressly addresses ex parte communication either granting or denying access. The federal regulations do not specifically address that subject. Therefore, HIPAA does not expressly preempt Missouri law on this issue.

2. HIPAA does not impliedly preempt Missouri law.

Congress has not impliedly preempted Missouri law through HIPAA because nothing in HIPAA indicates that Congress intended to displace state law. Implied preemption occurs when HIPAA occupies an area of the law traditionally held by the State so exclusively as to conflict with state law. Altria Group, Inc., 129 S.Ct. at 543. In other words, implied preemption arises when the two laws, federal and state, cannot coexist to cover the same subject matter. The analysis

begins with the assumption that laws of the State of Missouri will not be superseded by Federal law unless that is the "clear and manifest purpose of Congress." Id.

The fact that C.F.R. §160.203 expressly states that state law is preempted only when HIPAA is "contrary" to state law reveals that **Congress did not intend to completely occupy the field**. HIPAA outlines privacy regulations for the disclosure of a patient's medical information. The general rule is that a patient's medical information is private and disclosure of the information requires authorization from the patient. 45 C.F.R. §164.508. However, *patient authorization is not required*, and disclosure can also be effected if there is an applicable privacy exception under 45 C.F.R. §164.512(emphasis added).

The relevant exception sought in this case pursuant to 45 C.F.R. §164.512 states in part:

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in §164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. . .
>
> (e) Standard: Disclosures for judicial and administrative proceedings.

> (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. . . .

The privacy rules outlined in HIPAA do not prohibit disclosure of PHI without authorization from the patient. To the contrary, if the patient is not willing to sign an authorization, a defendant still may obtain access to the patient's PHI through a HIPAA compliant order. Under either scenario, HIPAA provides procedural prerequisites to obtaining patient information for the protection of the patient and the health care provider. In order to obtain access to a patient's PHI under Missouri law, there are no procedural restrictions to the information so long as litigation concerning a patient-litigant's health condition has been filed. However, Missouri is substantively more stringent than HIPAA as Missouri places a restriction on the *scope* of information to be obtained.

Only those issues of the patient-litigant's medical condition *brought under the pleadings* are allowed disclosure to the parties. State ex rel. Norman v. Dalton, 872 S.W.2d 888, 890 (Mo App. 1994) (emphasis added). Missouri recognizes a limitation on the information as it relates to the substance of the law suit. Missouri

would limit PHI access to those records which reflected information about the effect on plaintiff's entire life, where a plaintiff filed a medical malpractice suit alleging injury caused by negligence which had an effect on the plaintiff's entire life,. State ex rel. Justice v. O'Malley, 36 S.W.3d 9, 12 (Mo.App. 2000)(*citing* McNutt, 432 S.W.2d at 602).

Implied preemption occurs where State and Federal law cannot co-exist in a certain subject area. Freightliner Corp., 514 U.S. at 287. When it is impossible for a party to comply with both State and Federal requirements, there is implied conflict preemption. Id. Missouri and Federal law do not conflict with each other when seeking ex parte communication with treating physicians. Both require certain control on the release of the information, but neither *prohibits* the release of the information.

Missouri law allows ex parte communication with treating physicians as to those issues brought to bear under the pleadings. HIPAA contains a procedural requirement before a litigant can gain the ex parte access allowed under Missouri law. By first seeking a qualified protective order from the trial court, which limits the accessible information under Missouri law and offers a HIPAA-compliant order allowing ex parte communication, Defendants met HIPAA regulations and therefore were granted ex parte access. Respondent's order is allowed pursuant to

Missouri law and required under Federal law. Therefore, a writ of prohibition or mandamus is not necessary or appropriate.

D. The Order required under HIPAA does not force a patient-litigant to authorize ex parte communications.

Relators argue that the analysis issued by the Western District in State ex rel. Collins v. Roldan is the same analysis applicable in this matter. (Relators' Substitute Brief pg. 13). From the argument contained in Relators' brief it appears they contend that Collins stands with the Brandt cases for the proposition that ex parte communications are allowed in Missouri, which is true. However to the extent that Relators argue, and the Appellate Court opinion implies, that the order outlined in §164.512(e)(1)(i) is akin to forcing a patient to sign an authorization granting ex parte communication, the argument reflects a leap of logic that does not exist in Missouri or HIPAA law.

Missouri recognizes that when a patient files suit involving her physical condition, she has waived the physician-patient privilege. Missouri law allows ex parte communication without the necessity of a protective order. Woytus, 776 S.W.2d at 395. Prior to HIPAA, pursuant to Missouri law, parties to the litigation could immediately seek ex parte communication with fact witnesses to investigate the allegations made by the patient-litigant. The Woytus Court established that a patient cannot be required to sign an authorization granting the opposing party ex

parte access to her treating physicians. Id. at 395. This ruling was upheld in the Collins decision. However, both the Woytus Court and the Collins Court were addressing the issue of whether or not a patient could be forced to sign an authorization granting ex parte access. Neither of those cases addressed whether ex parte communication was permitted if disclosure was authorized by a court order rather than an authorization signed by the patient. Both Missouri law and HIPAA recognizes there are times in which an authorization from the patient is not practical or necessary for disclosure.

HIPAA's order, pursuant to §164.512(e), is intended to benefit the covered entity, not the patient. Just as HIPAA restricts disclosure by a covered entity, it also allows that entity to disclose PHI under certain circumstances. HIPAA restrictions are placed on health care providers. The order allowing disclosure is directed to those same health care providers to give them assurance that the laws of HIPAA will not be violated if they choose to disclose the patient-litigant's PHI to a third party. There is no similarity to the analysis of Collins or Woytus other than the patient might not choose to consent.

Relators' also cite to Collins for the proposition that Respondent acted beyond her jurisdiction by becoming involved in the parties' informal discovery. The Court in the Collins indicated that Judge Roldan was right in denying the motion to compel plaintiff to sign an authorization granting ex parte

communication. "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." Collins, 2009 WL 1586689, *4 (Mo.App. W.D. June 9, 2009). Whereas no Missouri law or Missouri discovery rule authorized Judge Roldan to issue an Order under the circumstances of his case, Federal law has authorized Respondent to act as she did.

Pursuant to the exceptions of disclosure of PHI without patient authorization, HIPAA mandates that a trial court issue an order assuring the covered entity that disclosure is allowed without violation of HIPAA regulations. This is the very interplay between Missouri law and Federal law that is the crux of this dispute.

Missouri does not require an order before defense counsel engages in ex parte communication with treating health care providers. However, because those health care providers are subject to not only Missouri law but Federal regulations, HIPAA requires a court order prior to the covered entity disclosing PHI to a third party. The order is a Federal device to facilitate informal discovery which is otherwise restricted by Federal law. Respondent has not surpassed her jurisdiction nor has she involved herself in informal discovery. She acted as directed by Federal law and in conjunction with Missouri law to issue a HIPAA compliant order instructing Bobbie Jean Proctor's health care providers that no HIPAA

regulation will be violated should he or she choose to engage in ex parte communication with defense counsel in the underlying litigation. Therefore, Relators' Petition for Writ of Prohibition or Mandamus should be denied.

POINT II

RELATORS ARE NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENTERING A QUALIFIED PROTECTIVE ORDER ALLOWING ACCESS TO ALL PLAINTIFF BOBBIE JEAN PROCTOR'S MEDICAL RECORDS BECAUSE THE ORDER IS LIMITED TO TIME AND CONSISTENT WITH THE SCOPE OF THE ALLEGATIONS MADE BY RELATORS UNDER THE PLEADINGS IN THAT RELATORS ALLEGE THAT PLAINTIFF BOBBIE JEAN PROCTOR'S ENTIRE LIFE HAS BEEN AFFECTED BY THE ALLEGED NEGLIGENCE OF DEFEANTS.

A. The issuance of the Order granting ex parte communication is not a "de facto authorization" by the Court. Relators' argument elevates form over substance.

The reason Defendants sought an order from the Court is based on the requirements of HIPAA. Before a health care provider can release PHI to a third party, that health care provider must *either* have an authorization from the patient client *or* an order or other court related document, like a subpoena, which assures the health care provider that the release of the patient's PHI to the third party will

not violate the laws of HIPAA. Relators' argument that Respondent's July 2, 2009 amounts to a court compelled authorization is a misunderstanding of the purpose of a HIPAA complaint order and who the order should benefit.

The order is not to benefit or hinder either of the parties but to assure the health care providers that if they choose to engage in ex parte communication with defense counsel in the litigation, he or she will not be in violation of HIPAA regulations. The salient part of the order at issue in this case contains the following language:

> You are further notified that, pursuant to federal and state law, 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, provided the health care provider consents to the interview. This is based on the Court's finding that the plaintiff has made a claim for personal injuries, and in filing this lawsuit has waived any privilege existing between the patient and health care provider. This Order does not require you to meet or speak with any attorney in this proceeding. You have the right to decline an attorney's request to speak or meet with you informally.

The word that Relators seem to find objectionable is "authorized" in the first sentence of the paragraph. The trial court held a hearing to address any objections to the proposed order which Relators might have. Relators did not specifically address the concern about the use of the term "authorized" and Relators offered no alternative to the wording of the Order. (*See* **Exhibit 1**).

Respondent followed the guidelines of HIPAA by holding a hearing, giving notice to Relators of the intent of Defendants to seek ex parte communication, and an opportunity to object to the scope of the order. Relators did object, however because the allegations of the pleadings were so broad as to encompass Bobbie Jean Proctor's entire life, Respondent found that the limitation to the Order should cover Bobbie Jean Proctor's entire life for only the five years previous to filing the Petition. This ruling is consistent with Missouri law regarding the scope of the waiver pursuant to *Brandt I* and *Brandt II*.

B. The Order issued by Respondent is appropriately tailored to the scope of the pleadings.

This Court in Justice defined the scope of the waiver where the plaintiff's physical and mental condition is brought to issue under the pleadings. "[T]he narrowness and breadth of the [waiver] is directly controlled by the narrowness and breadth of the allegations in plaintiff's petition." Justice, 36 S.W.3d at 12(*citing* State ex rel. Jones v. Syler, 936 S.W.2d 805, 807 (Mo. *en banc*. 1997)).

In this case, Relators have pled:

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 by 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.

These allegations include Relator Bobbie Jean Proctor's entire life. Therefore the scope of the pleadings dictated the scope of the Order issued by Respondent. Bobbie Jean Proctor has waived physician patient privilege to her entire life. The scope of Respondent's Order was appropriate based on the scope of the pleadings, therefore a writ of prohibition or mandamus is not warranted.

CONCLUSION

Respondent's July 2, 2009 Order granting ex parte contact with Bobbie Jean Proctor's treating physicians is in compliance with State and Federal law and is not an abuse of discretion or beyond her jurisdiction. Accordingly, this Court should deny Relators' Petition in Prohibition/Alternative Petition in Mandamus.

Respectfully submitted,

/s/ Jana V. Richards

Jana V. Richards MO #41244
Maureen M. Brady MO #57800
SANDERS CONKRIGHT & WARREN, LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210
FAX: (913) 234-6199
PHONE: (913) 234-6100
EMAIL: j.richards@swrllp.com
m.brady@swrllp.com
ATTORNEYS FOR TIMOTHY L. BLACKBURN, M.D. AND KANSAS CITY HEART GROUP, P.C.

CERTIFICATION OF SERVICE AND COMPLIANCE WITH RULE 84.06(b) and (c)

The undersigned hereby certified that on this _30th___ 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 (2003) format, and one (1) copy of the Appendix were mailed, postage prepaid, to:

Honorable Edith L. Messina
Circuit Court of Jackson County, Division 12
415 East 12th Street
Kansas City, Missouri 64106
FAX: (816) 881-3233
RESPONDENT

Michael T. Yonke
Hans H. van Zanten
YONKE & POTTENGER, L.L.C.
1100 Main Street, Suite 2450
Kansas City, Missouri 64105
FAX (816) 221-6400
ATTORNEYS FOR RELATORS

Sean T. McGrevey
Scott M. Adam
ADAM & McDONALD, PA
9300 West 110th Street, Suite 470
Overland Park, Kansas 66210
FAX: (913) 647-0671
ATTORNEYS FOR ST. JOSEPH MEDICAL CENTER

Robert W. Cotter
Matthew M. Geary
DYSART TAYLOR LAY COTTER & MCMONIGLE, PC
4420 Madison Avenue
Kansas City, Missouri 64111
FAX: (816) 931-7377
ATTORNEYS FOR AMICUS CURIAE MISSOURI ORGANIZATION OF DEFENSE LAWYERS

Leland F. Dempsey
Ashley L. Baird
DEMPSEY & KINGSLAND, P.C.
1100 Main Street, Ste. 1860
Kansas City, MO 64105
FAX: (816) 421-2610
ATTORNEYS FOR AMICUS CURIAE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

The undersigned further certifies that the foregoing Brief complies with the limitations contained in Rule No. 84.06(b), and that the Brief contained 9,582 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,

/s/ Jana V. Richards

_____

Jana V. Richards MO #41244
Maureen M. Brady MO #57800
SANDERS CONKRIGHT & WARREN, LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210
FAX: (913) 234-6199
PHONE: (913) 234-6100
EMAIL: j.richards@swrllp.com
m.brady@swrllp.com
ATTORNEYS FOR TIMOTHY L. BLACKBURN, M.D. AND KANSAS CITY HEART GROUP, P.C.