

**Missouri Court of Appeals
Western District**

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COMPLETE TITLE OF CASE

STATE OF MISSOURI, ex rel. BOBBIE JEAN PROCTOR and VINCENT PROCTOR,
Relators,

v.

THE HONORABLE EDITH L. MESSINA, CIRCUIT JUDGE, SIXTEENTH
JUDICIAL CIRCUIT, IN JACKSON COUNTY, MISSOURI,
Respondent.

DOCKET NUMBER WD71326

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: November 10, 2009

ORIGINAL PROCEEDING FOR REMEDIAL WRIT OF PROHIBITION

APPELLATE JUDGES

Writ Division: James M. Smart, Jr., P.J., James Edward Welsh and Mark Pfeiffer, JJ.

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI ex rel. BOBBIE)
JEAN PROCTOR and VINCENT)
PROCTOR,)
)
Relators,)
v.)
)
THE HONORABLE EDITH L.)
MESSINA, CIRCUIT JUDGE,)
SIXTEENTH JUDICIAL CIRCUIT, IN)
JACKSON COUNTY, MISSOURI,)
)
Respondent.)

No. WD71326

November 10, 2009

Before Writ Division Judges: Smart, P.J., and Welsh and Pfeiffer, JJ.

Bobbie Jean and Vincent Proctor have sought a writ from this court seeking to prohibit the Circuit Court of Jackson County (trial court) from enforcing its purported discovery order in the pending civil case of *Bobbie Jean Proctor & Vincent Proctor vs. Kansas City Heart Group, P.C., Timothy L. Blackburn, M.D., & St. Joseph Medical Center*, Case No. 0816-CV24576. In the case below, the trial court issued a purported *formal* discovery order advising non-parties that the trial court believed it was permissible for these non-party medical providers to engage in *informal ex parte* communications with attorneys for the defendant medical providers. We issued a preliminary writ on August 25, 2009, to determine the extent to which the federal Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191, 110 Stat.1936 (HIPAA), pre-empted Missouri law on the issue of *ex parte* communications in informal discovery and also to re-examine the State of Missouri’s law on this topic.

PRELIMINARY WRIT OF PROHIBITION IS MADE ABSOLUTE.

Writ Division holds:

HIPAA’s regulations prohibit health care providers from disclosing “protected health information,” whether “oral or recorded in any form or medium,” unless medical providers comply with a narrow list of exceptions separately itemized by the Secretary elsewhere in the Secretary’s regulatory scheme. The HIPAA regulations draw no distinction between formal versus informal disclosures and, instead, broadly prohibit all disclosures in the absence of a specifically enumerated

exception to this general rule of prohibition. This federal regulation's use of the term *oral* communication is clearly broad enough to include *ex parte* "oral" communications with a physician and it is, likewise, broad enough to encompass health information that is part of a written medical record or the physician's memory of his treatment of the patient. For these reasons, we conclude that HIPAA generally prohibits physicians from engaging in an *ex parte* oral disclosure of a patient's protected health information.

The Secretary created exceptions to HIPAA's general prohibition on the disclosure of plaintiff's protected health information and some of those exceptions are listed in 45 C.F.R. § 164.512(e). The trial court, however, erred in its application of 45 C.F.R. § 164.512(e)(1) to this case because the plain and ordinary language of 45 C.F.R. § 164.512(e)(1) does not authorize the disclosure of protected health information during a meeting in which an attorney, without express authorization of the patient, has *ex parte* communications with a physician.

Opinion by: Mark Pfeiffer, Judge

November 10, 2009

Concurring Opinion by Judge James M. Smart, Jr.:

The author agrees that the "order" issued by the court in this case was not within its authority. The author writes separately because he is not convinced that either HIPAA or the common law of Missouri generally prohibits actions by a trial court to facilitate *ex parte* communications with treating physicians.

The author believes, however, that an *ex parte* discussion with a treating physician in a medical malpractice case generally creates a powerful opportunity for the defense to seek to influence the physician's objectivity by prevailing upon the physician's natural loyalties and interests. The author therefore concludes that in a medical malpractice case such an "order" is not within the court's inherent authority to facilitate discovery.

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.