STATE OF MICHIGAN

IN THE SUPREME COURT

ANDREA L. HOLMAN, Personal Representative
of the Estate of Linda Clippert, Deceased,

Plaintiff-Appellant

vs.

Mark Rasak, D.O.,

Defendant-Appellee.

Supreme Court No. 137993

Court of Appeals No.279879

Lower Court No. 05-068-493-NH

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

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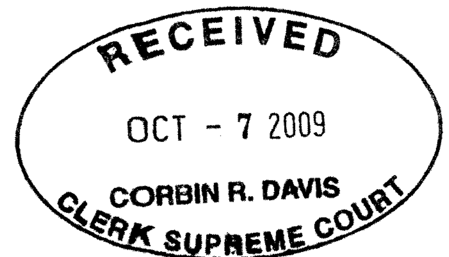

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STATEMENT OF APPELLATE JURISDICTION

Amicus Curiae Michigan State Medical Society relies on the statement of appellate jurisdiction submitted by Defendant-Appellee Mark Rasak, D.O.

STATEMEMT OF QUESTION PRESENTED

Whether the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") allows defense counsel in a medical malpractice lawsuit to conduct ex parte interviews with a plaintiff's treating physicians pursuant to a compliant qualified protective order?

The Trial Court said "no."

The Court of Appeals said "yes."

Plaintiff-Appellant says "no."

Defendant-Appellee says "yes."

Amicus Curiae Michigan State Medical Society says "yes."

STATEMENT OF MATERIAL FACTS

Lacking an independent basis for reciting the facts, Amicus Curiae Michigan State Medical Society relies upon the counter-statement of material facts and proceedings submitted by Defendant-Appellee Mark Rasak, D.O.

STATEMENT OF PROCEEDINGS AND INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 15,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has a continuing interest in the interpretation and application of statutes which govern the access to health care providers during medical malpractice cases. This case involves the application of

HIPAA to defense counsel ex parte interviews of treating physicians in the course of discovery in a medical malpractice case.

One of the reasons Congress enacted HIPAA was to mandate the creation of its Privacy Rule to ensure the privacy of a patient's protected health information ("PHI"). PHI is defined as both written and oral information. HIPAA allows disclosures of PHI during the course of litigation if certain requirements are first met. One such requirement is the obtaining of a qualified protective order issued by a court containing two conditions: (1) prohibiting the parties from using or disclosing PHI for any purpose other than the current litigation, and (2) requiring the return of the information to the physician or the destruction of all copies made of the PHI at the end of the litigation. *See* 45 CFR 164.512(e)(1)(v).

In this case, Defendant-Appellee Mark Rasak, D.O. (hereinafter referred to as "Dr. Rasak" or "Defendant"), brought a motion for a qualified protective order that conformed with 45 CFR 164.512(e)(1)(v) so that Defendant's counsel could engage in oral ex parte interviews with Linda Clippert's treating physicians. The Circuit Court denied the motion, ruling that HIPAA does not authorize oral ex parte interviews because the HIPAA provision relative to a qualified protective order only <u>seems</u> to pertain to documentary evidence. *See* Plaintiff-Appellant's Appendix at 12a. The Court of Appeals reversed the Circuit Court, ruling that HIPAA clearly applies to both written and oral information, and that as long as a qualified protective order consistent with 45 CFR 164.512(e)(1)(v) was first put in place, oral ex parte interviews with a health provider would be appropriate. *See* Plaintiff-Appellant's Appendix at 19a-21a.

MSMS believes that the Court of Appeals properly applied HIPAA to allow defense counsel in a medical malpractice case to engage in ex parte interviews with the plaintiff's

treating physicians pursuant to a qualified protective order containing the provisions required by 45 CFR 164.512(e)(1)(v). MSMS urges this Court to affirm the Court of Appeals' decision.

ARGUMENT

I. Both HIPAA and Michigan law allow defense counsel in a medical malpractice case to conduct ex parte interviews with a plaintiff's treating physicians pursuant to a compliant qualified protective order.

A. Standard of review.

Discovery rulings on appeal are reviewed for an abuse of discretion. *Muci v State Farm Mut Automobile Ins Co,* 478 Mich 178, 200; 732 NW2d 88 (2007). Likewise, a decision regarding a court's decision to grant or deny a motion for a qualified protective order is reviewed for an abuse of discretion. *PT Today, Inc v Comm'r of Office of Financial & Ins Services,* 270 Mich App 110, 151; 715 NW2d 398 (2006).

This appeal also presents questions of statutory interpretation of HIPAA. A court's interpretation of a statute or statutory construction is reviewed *de novo*. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003), amended on other grounds 468 Mich 1216 (2003).

B. Michigan law permits ex parte interviews in medical malpractice cases.

In Michigan, a plaintiff that produces any physician as a witness in his or her own behalf waives the patient-physician privilege in a malpractice action as to the plaintiff's other treating physicians. *See* MCL 600.2157. MCL 600.2157 provides:

> If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have **waived the privilege** provided in this section as to **another physician** who has treated the patient for the injuries, disease, or condition.

MCL 600.2157 (emphasis added).

The Michigan Court Rules also allow discovery of medical information when the physical condition of a party is in controversy. *See* MCR 2.310; *see also* MCR 2.302(B). Thus, once a plaintiff produces any physician as a witness to support the plaintiff's claim of medical malpractice, the plaintiff has waived the patient-physician privilege as to any other treating physician.

In *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991), this Court held that ex parte physician interviews are permissible in malpractice cases once the plaintiff waives the patient-physician privilege:

> MCR 1.105 expressly states that the court rules are "to be construed to secure the just, speedy, and economical determination of every action . . . ." Ex parte interviews appear to advance each of these aims. As recognized by other jurisdictions, **<u>such informal methods are to be encouraged</u>**, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources. ***There is no justification for requiring costly depositions, for example, without knowing in advance that the testimony will be useful.***

Domako, 438 Mich at 360-361 (emphasis added).

Furthermore, the Court held that once a plaintiff waives the physician-patient privilege, "there are no sound legal or policy grounds for restricting access to the witness." *Id.* at 361. Thus, once a plaintiff in a medical malpractice action has produced one physician as a witness, Michigan law permits defense counsel to engage in ex parte interviews with the plaintiff's treating physicians. Also, there is no requirement under Michigan law that defense counsel provide notice to the plaintiff or plaintiff's counsel prior to conducting ex parte interviews. *See Domako*; *see also Barnes v Beattie,* 2006 Mich App LEXIS 2405, *6-*7 (July 27, 2006) (Docket No. 266468).

Pursuant to MCR 2.314(B)(2), "...if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical

information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." *See Domako*, 438 Mich at 360; *see also Barnes* at *6-*7. Because a plaintiff in most, if not all, medical malpractice cases will require a physician to testify on the plaintiff's behalf, a plaintiff cannot prevent defense counsel from interviewing any of the plaintiff's treating physicians.

Based on the plain language of MCL 600.2157, the Michigan Court Rules and this Court's ruling in *Domako*, it is clear that Michigan law permits defense counsel to conduct ex parte interviews with a plaintiff's treating physicians in medical malpractice actions once the plaintiff waives the patient-physician privilege. Furthermore, a plaintiff cannot prevent defense counsel from conducting ex parte interviews without sacrificing the plaintiff's ability to produce even one physician to testify about the plaintiff's medical history or mental or physical condition. Finally, there is no requirement under Michigan law that defense counsel notify the plaintiff or plaintiff's counsel of the ex parte interviews.

C. HIPAA does not prevent defense counsel from conducting ex parte interviews with a plaintiff's treating physicians in medical malpractice actions.

1. HIPAA Background.

HIPAA was enacted in 1996 to increase the portability of health insurance and to ensure the privacy and security of a patient's PHI. HIPAA permitted the Department of Health and Human Services ("HHS") to create national standards governing PHI if Congress chose not to enact privacy laws within three years of HIPAA's enactment. HHS promulgated privacy regulations effective on April 14, 2003. These regulations are codified at 45 CFR Parts 160 and 164.

The HIPAA privacy regulations forbid a covered entity from using or disclosing PHI except as permitted or required under the regulations. 45 CFR 164.502(a). The privacy regulations define "covered entity" as a health plan, health care clearinghouse, or health care provider who transmits any health information in electronic form. 45 CFR 160.103. "PHI" includes "...**any information**, whether **oral** or recorded in any form or medium, that relates to the past, present, or future physical or mental health or condition of an individual [and] the provision of health care to an individual..." 42 USC 1320d(4) (emphasis added); 45 CFR 160.103. "Disclosure" is defined as "...the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information." 45 CFR 160.103.

There is no dispute that a plaintiff's treating physician is a covered entity under HIPAA. Furthermore, there is no dispute that information regarding the plaintiff's medical care or mental or physical condition of the plaintiff that a plaintiff's treating physician provides to defense counsel during an ex parte interview constitutes disclosure of PHI subject to HIPAA.

2. HIPAA allows for the discovery of PHI during litigation pursuant to a qualified protective order.

A covered entity may disclose PHI without the written authorization of the plaintiff or the opportunity for the plaintiff to agree or object as described in 45 CFR 164.512. One such permitted disclosure pertains to the disclosure of PHI during judicial proceedings. *See* 45 CFR 164.512(e).

There are multiple permitted ways that a covered entity may disclose PHI to defense counsel during litigation pursuant to 45 CFR 164.512(e):

1. "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[.]" 45 CFR 164.512(e)(1)(i).; **or**

2. In response to a subpoena, **discovery request**, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if either subsection (A) or (B) is met:

(A) "The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request" (45 CFR 164.512(e)(1)(ii)(A)), **or**

(B) "The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure **a qualified protective order** that **meets the requirements of paragraph (e)(1)(v)** of this section." 45 CFR 164.512(e)(1)(ii)(B) (emphasis added); **or**

3. "[I]n response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section." 45 CFR 164.512(e)(1)(vi).

In this case, Defendant sought a qualified protective order pursuant to 45 CFR 164.512(e)(1)(ii)(B) to engage in ex parte interviews of Ms. Clippert's treating physicians (i.e., to engage in discovery). HIPAA defines "qualified protective order" as follows:

> [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.

45 CFR 164.512(e)(1)(v) (emphasis added).

As stated earlier, PHI is defined to include "...**any information**, whether **oral** or recorded in any form or medium, that relates to the past, present, or future physical or mental

health or condition of an individual [and] the provision of health care to an individual..." 42 USC 1320d(4) (emphasis added); 45 CFR 160.103. Using a plain language meaning of 45 CFR 164.512(e)(1)(v) and reading it in conjunction with 42 USC 1320d(4) and 45 CFR 160.103, HIPAA effectively defines "qualified protective order" as follows:

> [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 **any information**, whether **oral** or recorded in any form or medium, that relates to the past, present, or future physical or mental health or condition of an individual and the provision of health care to an individual [PHI] 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 **any information**, whether **oral** or recorded in any form or medium, that relates to the past, present, or future physical or mental health or condition of an individual and the provision of health care to an individual [PHI] (including all copies made) at the end of the litigation or proceeding.[1]

See 45 CFR 164.512(e)(1)(v); 42 USC 1320d(4); 45 CFR 160.103.

Based on the plain language of HIPAA and the corresponding regulations, it is clear that oral information may be subject to a qualified protective order.

MSMS concurs with Plaintiff's assertion that the plain language of a statute must be given effect unless there is a reason that Congress intended a more restrictive interpretation. *See Thomas v UPS*, 241 Mich App 171, 174; 614 NW2d 707 (2000). Furthermore, Plaintiff also has correctly asserted that "[w]hen construing a statute, the Court must read the statute to avoid any word surplusage or **nugatory**." *National Ctr for Mfg Sciences v City of Ann Arbor*, 221 Mich App 541, 548; 563 NW2d 65 (1997) (emphasis added); *see also People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009).

[1] This definition is the same as 45 CFR 164.512(e)(1)(v), except that this definition substitutes the HIPAA definition of protected health information in place of the term "protected health information" and inserts "[PHI]" next to the definition to signify the substitution.

When interpreting 45 CFR 164.512(e)(1)(v), however, Plaintiff ignores the plain language of this regulation, which states that PHI is the proper subject of a qualified protective order. The definition uses the term "protected health information." *See* 45 CFR 164.512(e)(1)(v). PHI is unambiguously defined to include to both written and oral information. Thus, there is no ambiguity or undefined term to construe.

In addition, negating oral information from the plain language definition of PHI would render the word "oral" nugatory. As Plaintiff has correctly pointed out, a court must read a statute to avoid any word nugatory. *National* at 548. If Congress or HHS wanted to exclude oral information from the definition of a qualified protective order, it could have done so. However, the current definition includes PHI, which is unambiguously defined in 42 USC 1320d(4) and 45 CFR 160.103. As such, neither Congress nor HHS has elected to limit the scope of PHI with respect to a qualified protective order to documentary evidence only. Thus, where PHI is referenced in HIPAA and HIPAA regulations, both written and oral information should be included in the definition unless the statute or regulation specifically excludes either written or oral information.

Even if there were an ambiguity in the definition of PHI, Plaintiff's argument that oral information should be excluded because defense counsel cannot "empty his or her brain of the [PHI] and return it to the physician or destroy it at the conclusion of litigation" makes no sense. If Plaintiff's reasoning were adopted, a qualified protective order would never be appropriate. Defense counsel cannot empty his or her brain of information learned by reading a document any more than by listening to a physician during an interview. Clearly, Plaintiff's reasoning relies on faulty logic and should not be adopted.

In addition, Plaintiff's argument fails to account for the possibility (and even likelihood) that during ex parte interviews, defense counsel would obtain documentary PHI that could be returned to the physician or destroyed at the end of litigation. For example, defense counsel may record the interview. The recording or transcribed document would contain PHI such that the recording or document would have to be returned to the physician or destroyed at the end of litigation. The physician may even produce copies of charts, pictures or other visual aids that contain PHI. The list could continue, but the point is clear. When Plaintiff's logic is tested practically, it renders the qualified protective order provision meaningless and negates the purpose of the entire provision. Even had Congress not unambiguously defined PHI such that further statutory interpretation were necessary, neither Congress nor HHS meant to render the qualified protective order provision meaningless.

The Circuit Court's ruling that the HIPAA qualified protective order provision only seems to pertain to documentary evidence contravenes the plain language requirement of statutory interpretation and relies on Plaintiff's faulty logic. In addition, the Circuit Court's ruling renders the word "oral" nugatory. The Court of Appeals correctly applied HIPAA's own definition of PHI to the qualified protective order provision and ruled that both written and oral information (PHI as defined by HIPAA) could be the subject of a qualified protective order. This Court should affirm the decision of the Court of Appeals and apply the unambiguous definition of PHI with respect to the definition of a qualified protective order under 45 CFR 164.512(e)(1)(v).

3. Ex parte interviews pursuant to a compliant qualified protective order satisfies both HIPAA and Michigan law.

MSMS concurs in Defendant's argument that HIPAA does not preempt Michigan law regarding ex parte interviews; rather, HIPAA imposes additional requirements that can occur

harmoniously with Michigan law. Michigan law allows defense counsel to conduct ex parte interviews as soon as a plaintiff waives his or her physician-patient privilege. HIPAA simply requires that in addition to Michigan law, defense counsel obtain a qualified protective order that complies with 45 CFR 164.512(e)(1)(v). Thus, it is not impossible to comply with both HIPAA and Michigan law simultaneously.

Even if HIPAA were to completely preempt Michigan law, as stated in the previous section, HIPAA permits defense counsel to conduct ex parte interviews pursuant to a compliant qualified protective order based on the plain language of 45 CFR 164.512(e)(1)(v). Plaintiff's argument regarding preemption is a red herring because the Court of Appeals assumed that HIPAA preempted Michigan law because Michigan law was less stringent. The Court of Appeals, however, properly concluded that HIPAA itself permitted ex parte interviews under the qualified protective order provision.

Whether HIPAA preempts Michigan law or is read harmoniously with Michigan law, the same conclusion results. Michigan law allows ex parte interviews once a patient waives the physician-patient privilege under MCL 600.2157. HIPAA only requires that before defense counsel proceed with collecting PHI, counsel obtain a qualified protective order or comply with some other subpart of 45 CFR 164.512(e). Whether the two laws are read together or HIPAA is read alone, defense counsel may obtain PHI from a plaintiff's treating physicians pursuant to a qualified protective order once the plaintiff waives the physician-patient privilege.

4. Other federal and state courts agree with the Court of Appeals' ruling.

Several federal and state courts have held that HIPAA allows defense counsel to conduct ex parte interviews with a plaintiff's treating physicians once the plaintiff has waived the physician-patient privilege. In *Holmes v Nightingale*, 2007 OK 15; 158 P3d 1039 (2007), the

Oklahoma Supreme Court held that HIPAA permitted ex parte interviews when a compliant court order was first put in place. In addition, the court ruled that the plaintiff's reliance on *Law v Zuckerman*, 307 F Supp 2d 705 (D Md 2004) and *Crenshaw v MONY Life Ins Co*, 318 F Supp 2d 1015 (SD Cal 2004) for the proposition that HIPAA barred ex parte interviews was misplaced. *Holmes*, 158 P3d at 1044.

In *Law*, the court held that HIPAA allowed ex parte interviews when they were conducted pursuant to a qualified protective order under 45 CFR 164.512(e)(1)(v). *Law* at 712-713.

In *Crenshaw*, the court held that defense counsel violated HIPAA because defense counsel conducted ex parte interviews without first obtaining a qualified protective order from the court. *Crenshaw* at 1029. Plaintiff cites *Crenshaw* out of context. Plaintiff presents the quote: "[HIPAA] does not authorize ex parte contacts with health providers." *Crenshaw* at 1029. However, Plaintiff failed to include the next sentence, which states: "In this case, where no protective order safeguarding Crenshaw's privacy is in place, HIPAA's disclosure procedures apply." *Id.* In *Crenshaw*, defense counsel violated HIPAA because there was no qualified protective order in place authorizing ex parte interviews. When the court ruled that HIPAA does not authorize ex parte interviews, the court clearly meant that HIPAA does not expressly authorize ex parte interviews in the absence of a qualified protective order. The court did not rule that ex parte interviews are never permitted. This assertion is supported in the conclusion of the *Crenshaw* opinion: "[p]laintiff has shown that Defendant violated HIPAA by contacting Dr. Harris ex parte **in the absence of a qualified protective order** and without a formal discovery request. *Id.* at 1030 (emphasis added).

In *Sforza v City of New York*, 2008 US Dist LEXIS 86141 (SDNY 2008), the court held that the defendants were entitled to conduct ex parte interviews with non-party emergency medicine technicians. The court allowed defendants to conduct ex parte interviews notwithstanding its citation to the ruling in *EEOC v Boston Mkt Corp*, 2004 U.S. Dist. LEXIS 27338, 2004 WL 3327264 (EDNY Dec. 16, 2004). In *EEOC*, while the court declined to allow ex parte interviews with the plaintiff's treating psychologists, the court acknowledged that ex parte interviews were "not expressly prohibited by HIPAA." *Sforza* at *6-*7, citing *EEOC*, 2004 U.S. Dist. LEXIS 27338 at *5. Furthermore, the court left open the possibility that the defendant could move for a new protective order that included the requirements of HIPAA. *EEOC* at * 21.

In *Sample v Zancanelli Mgmt Corp*, 2008 US Dist LEXIS 13674 (D Kan 2008), the court held that the defendants were permitted to conduct ex parte interviews with the plaintiff's treating physicians because the defendants complied with HIPAA by obtaining a qualified protective order from the court. *Sample* at * 6-*7. In addition, the court held that the defendants were not required to give the plaintiff notice of the ex parte interviews. *Id.* at *7; *see also Hulse v Suburban Mobile Home Supply Co,* 2006 US Dist LEXIS 74468 at *7 (D Ka October 12, 2006): Qualified protective orders under HIPAA authorizing ex parte physician interviews must "include provisions that prohibit use of the information for any purpose other than the litigation and require the return of the information to the covered entity at the end of the litigation."

Federal courts in Michigan have followed the Court of Appeals' proper interpretation of HIPAA. *See Congress v Tillman*, 2009 US Dist LEXIS 50501 (ED Mich June 16, 2009) (citing the Court of Appeals decision for the proposition that HIPAA allows ex parte interviews once a compliant qualified protective order is first entered); *see also Palazzolo v Mann*, 2009 US Dist LEXIS 22348 at *8 (ED Mich March 19, 2009) (holding that "[t]he [c]ourt agrees with the

holding in *Holman.* Defendants may conduct *ex parte* interviews with plaintiff's treating physicians consistent with HIPAA. Defendants have also cited numerous cases by courts in various jurisdictions, including this district, which have held that *ex parte* interviews are permitted under HIPAA so long as there is a protective order in place consistent with 45 C.F.R. § 164.512(e). There is no need to cite these cases here, other than to note that they are consistent with the court of appeals' decision in *Holman.*").

In addition, defense counsel is under no obligation to notify plaintiff's counsel of the ex parte interview. In *Shropshire v Taylor*, the court granted a qualified protective order, stating that "principles of fundamental fairness to investigate the health condition of a plaintiff seeking money damages for injuries mandates that it is not necessary to give notice to plaintiff of a physician interview or contact, nor is it required that plaintiffs' counsel be present." *Shropshire v Taylor*, 2006 US Dist LEXIS 52943 at *7 (ED Mich 2006). In *Croskey v BMW of N Am,* 2005 US Dist LEXIS 43442 at *5-*6 (ED Mich 2005), the court held that a magistrate judge erred as a matter of law when he ruled that a qualified protective order requires specific notice to plaintiff's counsel of a proposed ex parte meeting and plaintiff's consent, a requirement not mandated by HIPAA.

Some of the cases Plaintiff cites disallowing ex parte interviews relate to state law prohibitions that are more stringent than HIPAA or do not involve HIPAA at all. For example, the *Crist v Moffat* decision was decided before HIPAA even existed. *See Crist v Moffat*, 326 NC 326, 389 SE 2d 41 (1990). This case dealt with North Carolina state law regarding the physician-patient relationship and cannot possibly interpret HIPAA because HIPAA did not exist in 1990. In *Sorenson v Barbuto*, 143 P3d 295 (Utah App 2006), the court's denial to allow ex parte interviews was based on Utah state law. The court held that ex parte interviews

"constitutes a breach of the physician's fiduciary duty of confidentiality." *Sorenson* at 300. The ruling had nothing to do with HIPAA. HIPAA is mentioned once in the case as a footnote regarding the plaintiff's independent claim of a breach of professional standards. Similarly, *Givens v Mullikin*, 75 SW3d 383 (Tenn 2002) is inapplicable to the HIPAA analysis. In *Givens*, the court declined to permit ex parte interviews based on Tennessee state law alone. *See Givens* at note 13.

As explained previously in the brief, however, this Court has expressly held that Michigan law, notwithstanding HIPAA, permits ex parte interviews with a plaintiff's treating physicians. *See generally Domako*. None of the cases in the preceding paragraph consider whether HIPAA allows ex parte interviews when the state law is less stringent that HIPAA. In those cases, state law prohibited ex parte interviews. This appeal has nothing to do with whether this Court's ruling in *Domako* was proper; rather, this appeal is limited to the question stated in the "question presented" section. Thus, those cases in the preceding paragraph are irrelevant to the analysis in Plaintiff's appeal to this Court and should be ignored.

CONCLUSION

There is no dispute that Michigan law allows defense counsel to conduct ex parte interviews with a plaintiff's treating physicians once the plaintiff has waived the physician-patient privilege. HIPAA also allows defense counsel to conduct ex parte interviews with a plaintiff's treating physicians if a qualified protective order is first entered that contains two requirements: (1) that the PHI obtained from the interview only be used for the pending litigation and (2) that the PHI be returned to the physician or destroyed at the end of the litigation. There is no requirement that defense counsel notify the plaintiff's counsel or give the plaintiff's counsel an opportunity to attend the interview. Furthermore, to strike the word "oral" from HIPAA's unambiguous definition of PHI would violate a plain language reading of HIPAA, would render

the word "oral" nugatory and would effectively make the qualified protective order provision meaningless. Based on Michigan law and a plain language reading of HIPAA, once defense counsel has obtained a compliant qualified protective order from the court, defense counsel may conduct ex parte interviews with a plaintiff's treating physicians in medical malpractice cases.

RELIEF REQUESTED

WHEREFORE, MSMS respectfully requests that this Court affirm the holding of the Court of Appeals that once a plaintiff has waived his or her physician-patient privilege, defense counsel may conduct ex parte interviews with a plaintiff's treating physicians once a compliant qualified protective order is first put in place pursuant to 45 CFR 164.512(e)(1)(ii)(B) and (e)(1)(v).

Respectfully submitted,

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By:

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