No. 125918

In the

Supreme Court of Illinois

AGNIESZKA SURLOCK and EDWARD SURLOCK,

Plaintiffs-Appellees,

v.

DRAGOSLAV STARCEVIC,

Defendant,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Intervenor-Appellant.

ROSEMARIE HAAGE,

Plaintiff-Appellee,

v.

ALFONSO MONTIEL ZAVALA, PATRICIA SANTIAGO, JOSE PACHECO-VILLANUEVO, OKAN ESMEZ and ROSALINA ESMEZ,

Defendants,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Intervenor-Appellant.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
Second Judicial District, Consolidated Nos. 2-19-0499 & 2-19-0500.
There Heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
Lake County, Illinois, Nos. 18 L 39 and 17 L 897.
The Honorable **Mitchell L. Hoffman** and **Diane E. Winter**, Judges Presiding.

AMICUS CURIAE BRIEF OF ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES ROSEMARIE HAAGE and AGNIESZKA SURLOCK

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Illinois Trial Lawyers Association ("ITLA") is a nonprofit association of over 2,000 attorneys representing injured consumers and workers in this state's courts. The questions presented by this case are of great importance to ITLA, its members, and the citizens that ITLA's members represent.

Suppose this Court allows for the entry of the Intervenor-Appellant's protective order in personal injury cases. In that case, those plaintiffs will lose control of their medical data disclosed during litigation, their right to privacy and confidentiality permanently lost. Compelling citizens to abandon control of their medical data as the price to pay to enter the courtroom will chill the participation of injured people in this vital process to seek remedies. Intervenor-Appellant's "HIPAA Qualified Protective Order" permits the collection of any and all of the plaintiffs' medical records. (A.80). It does not include a limitation that the PHI be used only for the instant litigation. *Id*. It also does not have a return-or-destroy requirement, in violation of 45 C.F.R. § 164.512(e)(1)(v) (2018). *Id*.

As ITLA submits in this brief, personal injury plaintiffs who lose control of their medical information are not made whole. Their loss of medical privacy is a continuous constitutional violation for which the plaintiffs do not receive compensation. ITLA respectfully rejects the notion that this Court should allow private insurance companies to retain and use personal injury plaintiffs' medical records to make compilations of anti-fraud information. A plaintiff's constitutional right to privacy cannot be subordinated to a private corporation's interest in data compilation for its business.

ARGUMENT

I. Introduction

Patients tell their doctors intimate and embarrassing details about matters of health, behavior, and other facets of life. Doctors rely on patients' frank disclosures to make an accurate diagnosis. Worries that private medical details may become public or exploited chill the patients' willingness to share medical history with their doctors. Fearing that embarrassing medical details may become public, many patients hide data from their doctors to the detriment of the patients' health.

Congress has recognized the concerns about confidentiality of health information that come with the efficiencies of electronic technology. In 1996, Congress passed the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (HIPAA). Section 262 of HIPAA directed DHHS to develop standards to protect the health information's security, confidentiality, and integrity.

The DHHS published a Notice of Proposed Rulemaking on November 3, 1999. Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (November 3, 1999) (to be codified at 45 C.F.R. pts. 160-164). The DHHS based the proposed rule on several studies that supported the notion that health information privacy is important for patients, doctors, and the public at large. Some of the studies revealed that medical information privacy is so treasured that a significant percentage of patients reported engaging in risky evasive behavior just to keep their information private. For example, the DHHS cited a national survey on health and privacy which found that one-sixth of respondents had "taken some form

of action to avoid the misuse of their information, including providing inaccurate information, frequently changing physicians, or avoiding care." 64 Fed. Reg. 59,918, 59,920, citing to California HealthCare Foundation, "National Survey: Confidentiality of Medical Records," January 1999 ("CHCF 1999 Survey") (conducted by Princeton Survey Research Associates) (http://www.chcf.org).

A more recent survey revealed that privacy concerns persist and cause one-in-eight consumers to put their health at risk by engaging in evasive action to preserve their medical information privacy. Such actions included "avoiding their regular doctor, asking their doctor to fudge a diagnosis, paying for a test because they didn't want to submit a claim, or avoiding a test altogether." California Health Care Foundation, National Consumer Health Privacy Survey 2005 (November 2005) ("CHCF 2005 Survey"), https://www.chcf.org/publication/national-consumer-health-privacy-survey-2005/ (last visited Feb 6, 2021). According to the CHCF 2005 Survey, "[c]chronically ill, younger, and racial and ethnic minority respondents are more likely than average to practice one or more of these risky behaviors." Id.

The November 3, 1999 Proposed Rule generated approximately 52,000 public comments. *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,566 (Final Rule, December 28, 2000, codified at 45 C.F.R. pts. 160-164). After reviewing and responding to the stakeholders' comments, the DHHS enacted the Final Rule on December 28, 2000. 65 Fed. Reg. 82,462.

In the Final Rule, the DHHS recognized that a breach of a person's medical privacy could have multiple consequences, including the person's health and collateral consequences such as the loss of a job and alienation of family and friends,

the loss of health insurance, and public humiliation. The DHHS listed several examples of the profound consequences as a result of loss of medical privacy: A banker sitting on a county health board who gained access to patients' records, identified several people with cancer, and called in their mortgages; A physician who was diagnosed with AIDS at the hospital in which he practiced medicine whose surgical privileges were suspended; An FBI veteran who was put on administrative leave when his pharmacy released information about his treatment for depression. 65 Fed. Reg. 82,462, 82,468. Consumer Reports found that 40 percent of insurers disclose personal health information to lenders, employers, or marketers without customer permission. 65 Fed. Reg. 82,462, 82,468.

Disclosure of medical information may lead people to social and psychological harm, including "embarrassment, economic harm through job discrimination and job loss, patient difficulty in obtaining health insurance, health care fraud, and patient reluctance to share sensitive information with their doctors or pharmacists." *Cohan v. Araba*, 132 Hawai'i 408, 418 (2014), citing to Christopher R. Smith (FNd1), *Somebody's Watching Me: Protecting Patient Privacy in Prescription Health Information*, 36 Vt. L. Rev. 931, 945 (2012) n. 90 (2012).

The case of *A.T. v. State Farm Mut. Auto. Ins. Co.*, 989 P.2d 219, 220 (Colo. App. 1999) illustrates how medical information can be abused to humiliate and intimidate. In that case, the plaintiff was a self-employed chiropractor who made a claim for her personal injuries against State Farm Insurance. In pursuing her claims, the plaintiff provided medical records regarding her mental and psychological history and treatment that disclosed that she had been diagnosed with a psychological disorder.

A.T., 989 P.2d at 220. Later, the chiropractor testified as an expert witness in unrelated litigation on behalf of one of her patients. *Id.* In that case, State Farm's attorney cross-examined the chiropractor about her psychological history and treatment, including the psychological disorder diagnosis about which State Farm had learned during the chiropractor's injury claim. *A.T.*, 989 P.2d at 223.

Medical records include private and intimate communications and details about patients' health, birth, life, family relationships, and death. *In re Estate of Longeway*, 133 Ill. 2d 33, 47 (1989) (discussing when a guardian can refuse medical care for an incompetent person). Medical records have an enormous amount of data: social security numbers, dates of birth, height, and weight, next of kin, addresses, language spoken at home, physical, physiological, genetic, mental, economic, religious, cultural, gender, racial, or social identity. Details include personal and familial medical histories, facts about mental health, sexual health and reproductive choice, and conditions that, if disclosed, may "cause those afflicted to be unfairly stigmatized." *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997).

Records can reveal illnesses, pregnancies, abortions, surgeries, and conditions that may be embarrassing and are not at issue in the pending lawsuit. *Parkson v. Cent. DuPage Hosp.*, 105 Ill. App. 3d 850, 855 (1st Dist. 1982) (refusing to permit disclosure of patients' medical records even with anonymized identities noting that the "patients' admit and discharge summaries arguably contain histories of the patients' prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high"). Medical records may also contain information about religious beliefs. *In re Baby Boy Doe*, 260 Ill. App. 3d 392, 399 (1st

Dist. 1994) (affirming a pregnant woman's right to refuse cesarean section for religious reasons).

Given that medical records have an enormous amount of private data, should a person who becomes an injured victim by a stroke of fate, become a private corporation's data subject? The answer should be "no." A private corporation should not receive, retain, and use medical information it collects in personal injury litigation and exploit it in perpetuity after the end of the litigation for purposes that have nothing to do with the litigation. Such retention and exploitation of protected health information beyond the end of the litigation, for purposes unrelated to the litigation, violates the plaintiffs' privacy rights under the Illinois Constitution, Ill. Const. art. I, § 6, 12, and invades the plaintiffs' physician-patient privilege.

The accidental personal injury plaintiffs have a constitutional right of privacy to prevent access to the private information recorded in their medical records. In seeking a remedy, personal injury plaintiffs, by necessity, produce their relevant medical records in discovery. Use, dissemination, and appropriation of PHI beyond the scope and time of the civil action, for purposes unrelated to the civil action, by parties unconnected with the civil action, revictimizes these victims of negligence by inflicting continuous constitutional injury to their right to privacy that remains uncompensated.

This Court should affirm the lower courts' holdings in favor of privacy. No Illinois insurance regulation expressly requires any automobile or property insurance company to retain protected health information post-litigation; if any did, HIPAA would preempt such regulation as falling below the HIPAA privacy floor. This

Court should also find that, upon the end of the litigation, Illinois constitutional privacy rights and physician-patient privilege require the return or destruction of the medical records and medical information within a reasonable time.

II. Tort plaintiffs who seek remedies for personal injuries do not become whole if they suffer further constitutional injuries to their privacy in losing control over their medical information forever

The compensatory goal of tort law is for an injured plaintiff be made whole. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 406 (1997); 25 C.J.S. Damages § 17. If tort plaintiffs end up losing the privacy in their medical information at the end of the litigation because they sought remedies for their injuries, then they will not be made whole. Regardless of the outcome of the litigation and the fairness of compensation for their personal injuries, plaintiffs who lose control of their medical information will be worse off than before the injury because the loss of the right to control who has access to their medical information remains uncompensated.

For example, plaintiffs who successfully sue for damages for a broken arm will receive compensation for the damages as enumerated in the jury instructions. Ill. Pattern Jury Instr.-Civ. 30.01 *et seq*. However, the plaintiffs will also lose control of their PHI if insurance companies and their data brokers retain, use and redisclose the plaintiffs' PHI. Ending the litigation related to the plaintiffs who suffered a broken arm will not end the injury for the lost control of their PHI. Plaintiffs in such circumstances will continue to suffer loss of privacy and be unable to go back and enjoy their pre-injury seclusion. *Best*, 179 Ill. 2d at 458–59 (stating that the privacy interest referred to in the "certain remedy" clause of section 12 of the Illinois Constitution "has a constitutional source for the protection of the patient's privacy

interest in medical information and records that are not related to the subject matter of the plaintiff's lawsuit"). This Court has held that the "certain remedy" provision in Section 12 of the Illinois Constitution is a "statement of constitutional philosophy," which is reflective of the "strong public policy" in preserving patients' fiduciary and confidential relationship with their physicians. *Best*, 179 Ill. 2d at 458–59; *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 367–68 (2006) (unsolicited faxes violated recipients "right of privacy [which included] an interest in seclusion and an interest in the secrecy of personal information").

As detailed above, medical records contain personal and confidential details that should remain confidential after the end of the litigation. Continuous exploitation of this private medical data for the benefit of a private corporation after litigation has ended violates the plaintiffs' right to privacy and is unconstitutional and contrary to Illinois law. In disclosing their relevant medical information, the tort plaintiffs do not forfeit their right of seclusion and confidentiality of personal health information.

To be made whole, plaintiffs cannot be forced to choose between their constitutional right to privacy or the right to a remedy. Ill. Const. art. I, § 6, 12. The right to privacy and the right to remedy are coexisting and equally worthy of protection. Ill. Const. art. I, § 6, 12. The Illinois Constitution safeguards the privacy and security of persons and papers. Ill. Const. art. I, § 6, 12. Medical records are papers that include private medical information and confidential communications between patient and physician. *People v. Bickham*, 89 Ill. 2d 1, 6, 4 (1982) (recognizing in the context of grand jury subpoenas for medical records the patients' interests in maintaining confidentiality in their "medical dealings with a physician"). Medical

privacy is a constitutional right of the citizens of Illinois. *Kunkel*, 179 Ill. 2d at 531–32.

This Court rejected in the past coercive disclosure requirements under a legislative scheme that would have required personal injury plaintiffs to give a blanket disclosure of all their confidential medical information to avoid dismissal of their lawsuit. *Kunkel*, 179 Ill. 2d at 531–32 (finding that the blanket disclosure rule in 735 ILCS 5/2-1003(a) (1996) went beyond the legitimate objectives of discovery and "seemed to be designated to discourage tort victims from valid claims by subjecting them to the threat of harassment and embarrassment through unreasonable and oppressive disclosure requirements"). The Intervenor-Appellant's proposed QPO similarly would permit a blanket disclosure of any and all medical records and is no less coercive. (A.80). And, if the plaintiff refuses to sign it, the trial court could dismiss the plaintiff's lawsuit. (A.82). It is thus similarly unconstitutional.

The protection of persons' privacy interests in their medical information and records comes from the Illinois Constitution. *Best*, 179 Ill. 2d at 458–59. While a violation of section 6 of the Illinois Bill of Rights requires a state action, the protection of section 12 activates when anyone, including a private actor, encroaches on a privacy interest. *Best*, 179 Ill. 2d at 452–53 (holding that "section 12 of the Illinois Constitution, unlike section 6, does not require state action before its protections are activated"). Plaintiffs' medical information deserves constitutional protection that is of a higher order than the interest of a private corporation to exploit that medical information for its business purposes.

After personal injury litigation ends, so does the need for plaintiffs to disclose their medical records and information, and at that point plaintiffs have a right to be left alone. *Valley Forge Ins. Co.*, 223 Ill. 2d at 367–68 (discussing the definition of "right to privacy"). Plaintiffs will not be made whole if they forever lose their constitutional right to privacy when attempting to be made whole through the courts for their personal injuries. To be made whole, the tort plaintiffs must also be restored to their place of seclusion and be assured of their medical data's secrecy and privacy by enforcing the HIPAA return-or-destroy provision. 45 C.F.R. § 164.512(e)(1)(v). Otherwise, they will continue to incur uncompensated constitutional injury to their right to privacy.

Because casualty insurance companies are not covered entities under 45 C.F.R. § 160.103, Intervenor-Appellant argues that once it receives PHI disclosed in the litigation, it is entitled to keep it and is not bound by the QPO the trial court entered. However, the Intervenor-Appellant does not have an independent right to receive the plaintiff's PHI. It has access to the PHI only pursuant to the QPO, and any access or use of the PHI is limited by the parameters outlined in the QPO.

The HIPAA Privacy Rule recognizes that the limited purpose for the disclosure ends at the end of the litigation and requires any QPO to include the return-or-destroy provision. 45 C.F.R. § 164.512(e)(1)(v). At the end of the litigation, the Intervenor-Appellant must return or destroy the PHI in compliance with HIPAA. Return or destruction of the PHI is the only way to assure personal injury plaintiffs that they will not lose control of their private medical data.

III. Tort plaintiffs whose medical records are used, retained, and disseminated without their consent suffer substantive statutory injury to the right of confidentiality of communication with their physicians

Medical privacy is "a central feature of the physician-patient relationship." *Kunkel*, 179 Ill. 2d at 537. People seeking medical treatment "have a right to be free from the embarrassment and invasion of privacy that often accompany the disclosure of medical information." *Pritchard v. SwedishAmerican Hosp*., 191 Ill. App. 3d 388, 404 (1989), citing to *Petrillo v. Syntex Lab'ys, In*c., 148 Ill. App. 3d 581, 603 (1986). Medical records routinely include confidential communications between patients and their physicians, to which the physician-patient privilege attaches. 735 ILCS 5/8-802. HIPAA and its regulations have a preemption provision, which does not preempt state law if the state law is "more stringent" than HIPAA's privacy requirements. 45 C.F.R. § 160.203(b). A state privacy law is "more stringent" than a HIPAA requirement if the state law "prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted" under HIPAA. 45 C.F.R. § 160.202.

The Illinois physician-patient privilege statute is more stringent than HIPAA as records can only be disclosed under one of its provisions. 735 ILCS 5/8-802(1)-(14). Unless one of the statute's conditions is met, a medical provider may not disclose a patient's medical records, even in response to a subpoena. *People, Dept. of Prof'l Regulation v. Manos*, 326 Ill. App. 3d 698 (1st Dist. 2001). Section 4 of the statute that governs physician-patient privilege permits disclosure "in all actions brought by or against the patient… wherein the patient's physical or mental condition is an issue. 735 ILCS 5/8-802(4). Once the litigation is completed, no condition remains "an issue."

The most reliable indicator of legislative intent is the statute's language, given its plain and ordinary meaning. *Palm v. Holocker*, 2018 IL 123152, ¶ 21. After the conclusion of the case, neither statutory condition is any longer met; there is no medical condition that is "an issue" nor is there an "action" in which the information needs to be disclosed.

While HIPAA permits disclosure pursuant to a request accompanied by a court order, Illinois law permits disclosure only if one of the physician-patient privilege statute enumerated conditions is met. 735 ILCS 5/8-802. (West 2019); *Parkson*, 105 Ill. App. 3d at 850. Because HIPAA expressly permits more stringent state laws to govern how PHI is handled, Illinois medical privacy law, which is more stringent than HIPAA, controls the disclosure and use of protected health information. Under Illinois law, the disclosure, retention, use, or dissemination of medical records and information outside of the statute's expressly authorized provisions is not permitted.

The language of the statute is unambiguous and shows the legislature's intent to limit the disclosure (i) in an action brought by the plaintiff, where (ii) the patient's physical or mental condition is an issue. *Palm v. Holocker*, 2018 IL 123152, ¶ 28 (discussing the physician-patient privilege and holding that a plaintiff cannot obtain the defendant's medical records where the defendant had not placed his condition at issue as part of his defense). In *Nat'l Abortion Fed'n v. Ashcroft*, 04 C 55, 2004 WL 292079, at *3 (N.D. Ill. Feb. 6, 2004), *aff'd sub nom. Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) [N.D. Ill), the District Court found that the Illinois physician-patient privilege statute (735 ILCS 5/8-802), "is more stringent

than HIPAA's disclosure requirements," and it was therefore not superseded by HIPAA. *National Abortion Federation*, 2004 WL 292079, at *3–4; *see* also, *Kraima v. Ausman*, 365 Ill. App. 3d 530, 533 (1st Dist. 2006).

At the end of litigation, plaintiffs no longer have their condition at issue and unless the medical records are in evidence, (and even then they should be sealed), the physician-patient privilege attaches again to the communications between patient and physician. Any continuing possession, ability to view, and use of plaintiffs' medical records and confidential communications after the disposition of an action violates the physician-patient privilege. A personal injury plaintiff who suffers a continuous statutory violation is not made whole but continues to incur a constitutional injury due to the unremedied continuing statutory violation. Ill. Const. 1970, art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly").

IV. Intervenor-Appellant's proposed order does not meet the HIPAA requirements under any of the paragraphs that provide for a Qualified Protective Order

Under HIPAA, a covered entity may disclose PHI as required by law. The regulations define "required by law" as meaning a "mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." 45 C.F.R. § 164.103. Such a mandate includes, in relevant part, "court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an

administrative body authorized to require the production of information; a civil or an authorized investigative demand…." 45 C.F.R. § 164.103.

Because the disclosure mandate must be enforceable in a court of law, 45 C.F.R. § 164.103, a court must have personal jurisdiction over the covered entity to enforce such a mandate. In other words, if a covered entity is a party, or participates in some way in the litigation and is subject to the court's personal jurisdiction, the court can enter an order under 45 C.F.R. § 164.512(e)(1)(i) to disclose specific information. A covered entity may disclose only PHI "expressly authorized" by such a court order. 45 C.F.R. § 164.512(e)(1)(i).

A. Intervenor-Appellant's proposed order is not permitted by 45 C.F.R. § 164.512(e)(1)(i) because it would be without jurisdiction and because it does not expressly authorize specific records

The Intervenor-Appellant's proposed order is not and cannot be an order authorized under 45 C.F.R. § 164.512(e)(1)(i) for two reasons. First, it would not confer personal jurisdiction over the covered entity unless the covered entity is a litigant. The only way for the court to obtain jurisdiction over a nonparty covered entity and compel disclosure of PHI is via a subpoena and a qualified protective order described below.

Second, the Intervenor-Appellant's proposed order is unrestricted and does not specify any particular medical records, from any particular covered entity, nor does it limit the scope of the records in time or medical condition at issue. (A.80). Illinois Supreme Court Rule 201(c) gives discretion to the trial courts as to discovery matters. Ill. S. Ct. R.201(c). The Intervenor-Appellant's proposed order removes the discretion from the court to customize the order to the specific discovery that is

proportionate to the matters litigated. The Intervenor-Appellant's proposed order does not identify any specific records and does not prevent defendants from appending it to a subpoena and seeking "any and all" records, which many invariably do.

B. Intervenor-Appellant's proposed order is not a Qualified Protective Order under 45 C.F.R. § 164.512(e)(1)(ii) because it does not include a return-or-destroy provision

Suppose the requester does not submit a court order for specific records, or the court does not have personal jurisdiction to issue such an order. In that case, the covered entity may only disclose PHI if it receives satisfactory assurances that: (1) the subject of the PHI has received notice and was provided an opportunity to object before a court, 45 C.F.R. § 164.512(e)(1)(ii)(A), (e)(1)(iii); or (2) the requester made reasonable efforts to secure a qualified protective order that meets the HIPAA requirements, 45 C.F.R. § 164.512(e)(1)(ii)(B), (e)(1)(iv); or (3) the covered entity itself may make reasonable efforts to provide notice to the subject of PHI or seek a qualified protective order that meets the regulatory requirements. 45 C.F.R. § 164.512(e)(1)(vi), (e)(1)(iv).

To receive satisfactory assurances that the subject of the PHI has notice, a covered entity must receive documentation that the subject has received a written notice with sufficient information about the proceeding to permit the individual to raise an objection. The assurance must demonstrate that the notice included a deadline to make objections, and that the time for the individual to raise objections to the court or administrative tribunal has elapsed and no objections were filed, or

any objections filed by the individual have been resolved. 45 C.F.R. § 164.512(e)(1)(iii).

Under the notice provision, a plaintiff can object before the court to any disclosure without a qualified protective order, in which case, the requester must seek a qualified protective order under 45 C.F.R. § 164.512(e)(1)(ii)(B). The regulations at 45 C.F.R. § 164.512(e)(1)(v) define a "qualified protective order" as follows:

> (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.

Although captioned "Qualified Protective Order", the Intervenor-Appellant's proposed order does not meet the requirements of 45 C.F.R. § 164.512(e)(1)(v), which expressly require a QPO to include both a use and return-or-destroy provisions. (A.81).

The Intervenor-Appellant's proposed order does not meet the requirements of either 45 C.F.R. § 164.512(e)(1)(i) or 45 C.F.R. § 164.512(e)(1)(ii). It is not a tailored order sent to a covered entity over which the court has personal jurisdiction seeking specific records, nor a regulatory-sufficient QPO that includes a return-or-destroy mandate as required in 45 C.F.R. § 164.512(e)(1)(v). In addition, one of the goals of HIPAA is to reduce the coercive effect of the circumstances surrounding the express legal permission. 45 C.F.R. § 160.202(4) (enumerating when state law's privacy is "more stringent"). The Intervenor-Appellant's proposed order is coercive as it requires a plaintiff and that plaintiff's attorney to sign the order or otherwise the plaintiff's case may be dismissed.

Intervenor-Appellant's proposed order permits an unrestricted disclosure of plaintiffs' PHI, both relevant and irrelevant to the litigation. The Intervenor-Appellant's proposed order if appended to a subpoena for "any and all records" would all but require plaintiffs' attorneys to file motions to quash. In violation of HIPAA, the plaintiffs' constitutional right to privacy, and the physician-patient privilege, the Intervenor-Appellant's proposed order facilitates the collecting and retention of vast amounts of PHI by private corporations, leaving plaintiffs without any recourse or ability to control the access, use, retention and redisclosure of their PHI.

HIPAA's privacy rules and the regulations expressly "supersede any contrary provision of State law," 42 U.S.C. § 1320d-7(a)(1) (implemented by 45 C.F.R. § 160.203). The HIPAA rules recognize the right to privacy in the information contained in medical records. *King v. Cook County Health & Hosps. Sys.*, 1-19-0925, 2020 WL 3287316 (Ill. App. Ct. 1st Dist. June 18, 2020) (Stating that HIPAA regulatory

scheme "reflect a societal understanding of the legitimacy of patients' right to privacy in information relating to their medical health and shared with providers such as hospitals and physicians….").

This Court should affirm the trial and the appellate courts' decisions rejecting the Intervenor-Appellant's proposed order. (A.46 and A.1). It does not meet any HIPAA provision and permits unfettered disclosure and retention of medical records. The Intervenor-Appellant's proposed order does not protect plaintiffs' constitutional right to privacy or statutory rights of the physician-patient privilege.

V. HIPAA preempts record-keeping regulations that fall below the HIPAA-privacy floor

The Intervenor-Appellant does not cite to any law that expressly requires casualty insurance companies to retain personal injury plaintiffs' PHI post-litigation. Even if there were such a law, HIPAA expressly preempts it . As the trial and appellate courts below correctly determined, HIPAA privacy rules preempt insurance regulations requiring retention of records with protected health information as such regulations fall below the federal privacy floor. (A.46 and A.1). HIPAA § 264(c)(2) provides that the privacy regulations promulgated by H.H.S. "shall not supersede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are *more stringent* than the requirements, standards, or implementation specifications imposed under the regulation." HIPAA § 264(c)(2), 110 Stat.2033–34; *see S.C. Med. Ass'n v. Thompson*, 327 F.3d 346, 349 (4th Cir. 2003) (upholding HIPAA constitutionality) (emphasis added).

A state law is "contrary" to HIPAA if a covered entity would find it (1) "impossible" to comply with both the state and federal requirements, or if (2) the provisions of state law stand as an "obstacle" to the accomplishment and execution of the full purposes and objectives of part C of title XI of [HIPPA]. 45 C.F.R. § 160.202. The regulations define "state law" as a "constitution, statute, regulation, rule, common law, or other [s]tate action having the force and effect of law." 45 C.F.R. § 160.202.

State laws exempted from preemption include those that relate to the privacy of individually identifiable health information and are "more stringent" than a "standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter." 45 C.F.R. § 160.203(b). "Relates to privacy" of PHI means with respect to a state law, such law that "has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way." 45 C.F.R. § 160.202.

A law is "more stringent" if it (1) prohibits or restricts a use or disclosure, except if the disclosure is to the subject of the PHI or to the Secretary of Health to ensure compliance; (2) provides greater access or amendment to the subject of the PHI; (3) provides greater amount of information to the subject of the PHI about use, disclosure, rights, and remedies; (4) provides requirements that narrow the scope or duration, increase the privacy protections afforded … or reduces the coercive effect of the circumstances surrounding the express legal permission, as applicable; (5) provides for more detailed accounting of disclosures and retention; and (6) provides greater privacy protection for the individual who is the subject of the PHI. 45 C.F.R. § 160.202.

The regulatory language is a result of extensive nationwide public participation and review of over 52,000 comments from stakeholders. It includes notions like: "restrict a use or disclosure", "use, rights, and remedies", "reduce the coercive effect" of legal permission, and "greater privacy protection." 65 Fed. Reg. 82,462, 82,566. The HIPAA regulations signal privacy of PHI goals, control of PHI, and less legal coercion to disclose PHI.

Ignoring the deliberate regulatory language, the Intervenor-Appellant suggests that a vague notion of "records" permits liability insurers to harvest personal injury victims' PHI to use for their business purposes in perpetuity. Permitting insurers to keep protected health information after the end of the litigation for purposes beyond the litigation will *expand* rather than restrict use or disclosure; will provide *less* rather than more information, rights, and remedies to the subjects of the PHI, who will lose any control over the whereabouts of their PHI; will *expand* rather than narrow the scope or duration of use and retention of PHI; will *decrease,* rather than increase the privacy protections, and will *increase* rather than reduce the "coercive effect" of the requirement of legal permission. In other words, the Intervenor-Appellant urges this Court to disregard every privacy goal of HIPAA.

The Court should view the Intervenor-Appellant's proposed order with the same heightened level of scrutiny as a government action that infringes on fundamental constitutional rights because the proposed order infringes on the fundamental right to privacy as guaranteed by the Illinois Constitution. The constitutional right to privacy in one's medical information cannot be subordinated

to a private business's use, permitting it to collect, maintain and use the information for its own business purposes.

Before the United States District Court, N.D. West Virginia in *Small v. Ramsey*, the Intervenor-Appellant in this case, State Farm, unsuccessfully argued in that case that it had a duty to gather and disseminate protected health information to assist in investigation of criminal activity. *Small v. Ramsey*, 280 F.R.D. 264, 276 (N.D.W. Va. 2012). In rejecting State Farm's justification for data gathering, the *Small* court stated that Executive Order 13181 of December 20, 2000, restricts investigative and prosecutorial authorities' use of PHI gathered by health oversight authorities in the pursuit of criminal investigation to specific instances where a judicial officer has determined "whether there is good cause by weighing the public interest and the need for disclosure against the potential for injury to the patient, to the physician patient relationship, and to the treatment services.'" *Small*, 280 F.R.D. at 276 (*citing* To Protect the Privacy of Protected Health Information in Oversight Investigations, 65 FR 81,321, Exec. Order No. 13,181 (Pres.)). As in the case here, since no judicial officer had made any determination nor any government agency had begun a criminal investigation that involved the plaintiff's records, State Farm had no duty to gather or disseminate the plaintiff's private medical information. *Id.*

Intervenor-Appellant has not cited any regulation that specifically requires liability insurers to retain medical records or protected health information after the conclusion of litigation. Retaining and disseminating injured plaintiffs' private medical information to build data-driven algorithms for profit allegedly in the pursuit of a hypothetical criminal investigation of hypothetical doctors or individuals is an

abusive, continuous, uncompensated violation of the plaintiffs' constitutional and statutory right to privacy.

CONCLUSION

While Intervenor-Appellant tries to justify retaining PHI indefinitely and for reasons unrelated to the litigation for which the PHI was provided based solely on a vague reference to "records" in insurance regulations, in reality, it has an ulterior motive for the retention. It wants this Court to allow liability insurers like itself to use and share private and confidential patient information with various third parties. The need for a Qualified Protective Order under 45 C.F.R. § 164.512(e) that limits the scope, retention, and dissemination of protected health information cannot be emphasized enough. However, a form Qualified Protective Order that limits the judges' discretion and does not meet the HIPAA requirements under any of its various provisions should be rejected. This Court should affirm the decision of the trial court and the appellate court.

Respectfully Submitted,

/s/ Sofia Zneimer

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341 (h)(1) table of contents and statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 22 pages.

/s/ Sofia Zneimer
Sofia Zneimer

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

AGNIESZKA SURLOCK, et al., *Plaintiff-Appellees,* v. DRAGOSLAV STARCEVIC, et al., *Defendant,* STATE FARM MUTUAL INSURANCE AUTO-MOBILE INSURANCE COMPANY, *Intervenor-Appellant.* _____ ROSEMARIE HAAGE, *Plaintiff-Appellee*, v. ALFONSO MONTIEL ZAVALA, et al., *Defendant*, STATE FARM MUTUAL INSURANCE AUTO-MOBILE INSURANCE COMPANY, *Intervenor-Appellant.*	)	No. 125918

The undersigned, being first duly sworn, deposes and states that on April 8, 2021, there was electronically filed and served upon the Clerk of the above court the *Amicus Curiae* Brief of Illinois Trial Lawyers Association in Support of Agnieszka Surlock and Rosemarie Haage. On April 8, 2021, service of the Brief will be accomplished via by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Sofia Zneimer
Sofia Zneimer

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Sofia Zneimer
Sofia Zneimer

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4/14/2021 3:25 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK