



Following Plaintiff's request for deposition, the MUSC employee deponents requested the advice and protection of MUSC litigation counsel in relation to giving the deposition. The Plaintiff, however, has served a Motion for Protection to prevent the undersigned Counsel of Record for MUSC from advising the MUSC employee deponents prior to their depositions, citing patient privacy rules.

### DISCUSSION

Plaintiff argues that the MUSC employee deponents are non-party treating physicians who may not privately speak with or be represented by MUSC litigation counsel. She argues that because the MUSC employee deponents are not part of the standard of care allegations, that MUSC's counsel cannot represent the MUSC employee deponents. The MUSC employee deponents, however, are not merely non-party treating medical providers, but rather are employees of Defendant MUSC. The testimony given by the MUSC employee deponents has the capacity to impact the liability of MUSC. MUSC's litigation counsel, therefore, is permitted to privately meet with, consult and openly discuss all aspects of this litigation, including the medical treatment provided by MUSC's employees to Scarlett W. and the medical conditions of Scarlett W. at issue in this litigation.

**I. The MUSC employee deponents are clients of MUSC litigation counsel.**

The MUSC employee deponents are clients of MUSC litigation counsel via their employment by MUSC. The South Carolina Rules of Professional Conduct explicitly state that "a lawyer representing an organization may also represent any of its directors, officers, **employees**, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [regarding conflicts of interest]." S.C.R.P.C.



1.13(g)(emphasis added). In this case, the MUSC employee deponents are being compelled to testify and have specifically requested the advice and representation of MUSC's counsel in relation to the depositions.

**II. Communications between MUSC litigation counsel and the MUSC employee deponents are protected by the attorney/client privilege.**

The communications between the MUSC employee deponents and MUSC litigation counsel are also protected by the attorney/client privilege, even though there are no allegations of negligence against the employees. In Upjohn Co. v. United States, 449 U.S. 383, the United States Supreme Court held that a corporation's low- and mid- level employees' information was protected by the attorney-client privilege where it was necessary to defend against potential litigation.

In this case, the MUSC employee deponents were not involved in the negligence allegations, but they do have information related to the Plaintiff's subsequent medical care, injuries and damages. Being MUSC employees, they have the capacity to impact the liability of MUSC through their testimony. MUSC is an organizational client that can only act by and through its employees, and the MUSC employee deponents are entitled to representation in relation to their depositions and to the protection of the attorney/client privilege.

Even if an MUSC employee chooses not to be "represented" by MUSC litigation counsel, MUSC counsel has an independent right to confidentially speak to MUSC's own employees about a patient; a right that springs from the employer-employee relationship. (See Hall v. Crenshaw, 449 S.W.3d 463, 464 (Tenn. App. 2014); Phoenix Children's Hosp., Inc. v. Grant, 265 P.3d 417, 422 (Ariz. Ct. App.

  
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Div.1 2011). Because MUSC can only act through its agents and employees, MUSC's knowledge is acquired only through such agents and employees. That knowledge is then imputed to the employer, MUSC. Id.

**III. No state or federal privacy laws prohibit the communications.**

Plaintiff argues that she has a right to privacy that prevents MUSC's litigation counsel from communicating with the MUSC employee deponents. Though South Carolina State Bd. of Medical Examiners v. Hedgepath, 325 S.C. 166, 480 S.E. 2d 724 (1997), generally holds that a physician may commit ethical misconduct when he reveals a patient's confidences when not compelled by law or consented to by the patient, and McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) recognizes a common law tort of breach of a physician's duty of confidentiality, neither case supports Plaintiff's argument under these circumstances.

Neither Hedgepath nor McCormick were medical malpractice cases which would place a plaintiff's medical condition directly at issue. In this case, the Plaintiff has put both her and her child's medical care at issue by bringing this action against MUSC. Therefore, no violation of patient confidentiality would exist as to any communications between MUSC employees and MUSC's counsel.

Further, the Health Insurance Portability and Accountability Act (HIPAA) contains a specific exception for disclosure of health information in the context of litigation. When a covered entity, such as MUSC, is a party to a legal proceeding, the covered entity may use or disclose protected health information for purposes of litigation as part of its health care operations. 45 CFR 164.501, *et. seq.* It would be highly prejudicial to allow a Plaintiff to sue MUSC, put the Plaintiff's own medical



treatment at issue and then use privacy rules to forbid MUSC's counsel from speaking to MUSC's own employees about the Plaintiff's treatment and damages.

As further support for its ruling, this Court relies upon the fact that the United States Department of Health and Human Services ("HHS") has posed and answered the following question on its own website<sup>1</sup>: "May a covered entity that is a plaintiff or defendant in a legal proceeding use or disclose protected health information for the litigation?" HHS's response, in pertinent part, is as follows:

**Yes. Where a covered entity is a party to a legal proceeding, such as a plaintiff or defendant, the covered entity may use or disclose protected health information for purposes of the litigation as part of its health care operations. The definition of "health care operations" at 45 CFR 164.501 includes a covered entity's activities of conducting or arranging for legal services to the extent such activities are related to the covered entity's covered functions (i.e., those functions that make the entity a health plan, health care provider, or health care clearinghouse). Thus, for example, a covered entity that is a defendant in a malpractice action, or a plaintiff in a suit to obtain payment, may use or disclose protected health information for such litigation as part of its health care operations. (emphasis added).**

In short, there are no state or federal privacy laws that prevent MUSC litigation counsel from speaking with MUSC's own employees, even those not involved in the allegations of negligence, about a patient who has specifically put his or her own medical care at issue in a medical malpractice action.

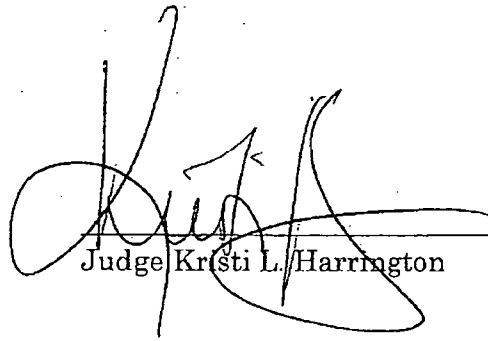
**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that litigation counsel for MUSC shall be permitted to meet and speak with any MUSC employee who provided treatment to Plaintiff or has knowledge related to any and all allegations or defenses. Such communications are protected by the attorney/client privilege and are not discoverable through deposition or other discovery efforts.

<sup>1</sup> <http://www.hhs.gov/hipaa/for-professionals/faq/705/may-a-covered-entity-in-a-legal-proceeding-use-protected-health-information/index.html>



IT IS SO ORDERED.

May 9, 2016  
Charleston, South Carolina

  
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Judge Kristi L. Harrington