IN THE NEVADA COUNTY SUPERIOR COURT
SITTING AS APPELLATE DIVISION

Kathleen L. Leonard, Petitioner

vs.

Retailer's Credit Association of Grass Valley, Inc., Respondent.

From the Superior Court for Nevada County,

Civil Case No. L78288-A

APPELLANT'S REPLY BRIEF

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I. Introduction

Respondent has now conceded two critical issues. First, that the Complaint Exhibits and the Trial Exhibits contained PHI. Second, that Respondent is a "business associate" that is subject to HIPAA. Further, Respondent concurs with Appellant that, in view of this Court's "sufficiency test" for PHI under CC §56.05(g), the Court's decision on appeal must be based upon HIPAA and not CIMA.[1]

Respondent now argues in Section VII of its brief that the disclosure of Appellant's PHI was permitted under HIPAA. Respondent then asserts in Section VIII that: (a) the trial court was without jurisdiction or power to apply HIPAA; (b) HIPAA's express rules for the disclosure of PHI in litigation do not apply to a covered entity that is a party to litigation; and (c) that the trial court properly determined that it was not a "confidential" case. Finally, Respondent argues in Section X that Appellant waived her right to produce evidence at trial and failed to show any prejudicial error by the trial court.

Appellant's reply will address these remaining issues and demonstrate that: (a) the trial court had the jurisdiction, power, and the obligation to enforce HIPAA; (b) the rule for the disclosure of PHI in any judicial proceeding under HIPAA extends to any covered entity at any time during the course of a proceeding; and (c) that the trial court erred by ruling that the case was not confidential and that Appellant had no right for a protective order that would have allowed her to present further evidence on her behalf.

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[1] Appellant continues to believe that this Court's ruling on CIMA was in error and reserves the right to raise this decision upon petition to the Court of Appeal.

II. HIPAA

1. The Exhibits Contain PHI And Respondent Is A "Business Associate"

Respondent has now conceded that the Complaint Exhibits and the Trial Exhibits contain PHI as defined by HIPAA. Respondent's Brief p. 8. Under HIPAA, there is a general prohibition on the use or disclosure of PHI except: (1) as the privacy rule permits or requires; or (2) as the individual who is the subject of the information authorizes in writing. 45 C.F.R. § 164.502(a)(1) (hereafter the "Privacy Rule").

Respondent also admits that Sierra Nevada Memorial Hospital ("SNMH"), is a health care provider, is a "covered entity"subject to the Privacy Rule. Respondent's Brief, p. 1. Further, Respondent has conceded that as a collection agency for SNMH. it is a "business associate". Respondent's Brief, pp. 1, 8-9.

2. HIPAA Prohibits Any Use Or Disclosure Of PHI Unless Expressly Authorized

Under HIPAA, a covered entity or business associate may not use or disclose PHI, except as expressly authorized. 45 C.F.R. §164.502(a). In addition, the covered entity may only use or disclose the "minimum necessary" PHI for the authorized purpose. 45 C.F.R. §164.502(b)(2). As a business associate of SNMH, Respondent is subject to these rules.[2]

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[2] Subtitle D of the The Health Information Technology for Economic and Clinical Health Act ("HITECH"), Pub. L. 111-5, 42 U.S.C. §17931, extends the entire definition of a covered entity under both the HIPAA Privacy Rule and Security Rule to "business associates".

HIPAA prohibits any use or disclosure of PHI unless except as expressly authorized. 45 C.F.R. §164.502(a)(1) & (2). Under this provision, a covered entity may disclose PHI only when required by law and the "use or disclosure complies with and is limited to the relevant requirements of such law" and the covered entity meets the further requirements of one of the express exceptions permitting use or disclosure set out at 45 C.F.R. §164.512 (b) through (l).

3. HIPAA Does Not Have An Exception Just For Collection Agencies Or Lawyers

Respondent is unable to direct the Court's attention to any express exception for debt collectors (or their lawyers) under 45 C.F.R. §164.512 ((b) through (l)) or elsewhere under HIPAA. Consequently, Respondent tries to do an "end run" around HIPAA's Privacy Rule by arguing that the definition of "Health Care Operations" acts as an express authorization for lawyers advising covered entities to use or disclose PHI without further restriction. This argument is without merit.

Appellant agrees with Respondent that the definition of "Health Care Operations" at 45 C.F.R. §164.501 includes the "conducting or arrangement for ... legal services". However, including "legal services" as part of "Health Care Operations" merely includes legal services as something that is within the purview of day-to-day health care operations by a covered entity. This definition does not, by itself, authorization any use or disclosure outside the covered entity

The only authorization for a covered entity to use or disclose PHI in the course of performing its day-to-day health care operations is set forth at 45 C.F.R. §164.502 which states that a covered entity may not use or disclose PHI except as expressly

permitted. The covered entity is only authorized under 45 C.F.R. §164.502(a)(ii) to use or disclose PHI for "health care operations" as permitted by 45 C.F.R. §164.506. In turn, 45 C.F.R. §164.506(a), which is the provision that authorizes covered entities to use or disclose PHI for their own *internal activities*, without patient authorization. 45 C.F.R. §164.506(c). *There is no express authorization under 45 C.F.R. §164.506(c) whereby a covered entity may use or disclose PHI to anyone that is not a covered entity engaged in the limited health care activities listed therein*. Thus, there is no authorization for the use or disclosure of PHI in a litigation by a collection agency or an attorney for a covered entity.

The use or disclosure of PHI *beyond the confines of internal operations of a covered entity* is governed by 45 C.F.R. §164.508 which prohibits use and disclosure of PHI unless there is patient authorization. Again, there is no exception here that allows the use or disclosure of PHI to any court. *The only express provision under HIPAA that allows for the use or disclosure of PHI in a tribunal or court is 45 C.F.R. §164.512(a)(1),* which is discussed in more detail in Subsection II.5, below.

The only reasonable interpretation of the definition of "Health Care Operations" at 45 C.F.R. §164.501 with respect to legal counsel is that PHI disclosed to an attorney shall remain subject to HIPAA's protection, absent some other express exception that permits its use or disclosure. A covered entity may, in its normal operations, disclose PHI as reasonably necessary to a collection agency, like Respondent. Similarly, a covered entity may, in its normal operations, disclose PHI that is reasonably necessary to a lawyer to obtain legal advice. In both situations, the further use and disclosure of PHI by the collection agency or by the lawyer continues to be restricted under unless

there is an further express exception.

Respondents argument is a faulty *ipso facto* conclusion that, because "legal services" is an operation that a covered entity may engage in its internal day-to-day operations, a covered entity is free to use or disclose PHI to an attorney who, in turn, may use or disclose PHI without further restriction. Not so. Such an interpretation would create such a huge loophole in HIPAA that it would be rendered meaningless and nonsensical. It is inconceivable that Congress or the Department of Health and Human Services intended by the inclusion of "legal services" in the definition of "Health Care Operations" at 45 C.F.R. §164.501 to allow collection agencies and lawyers to "willy nilly" use and disclose PHI in the public domain without restriction.

4. **Respondent Must Obtain A Protective Order For PHI In Any Litigation**

The intent of Congress and Department of Health and Human Services, is clearly discernable from the face of the regulations. Whenever PHI needs to be used or disclosed in a legal context, it must be done only to the extent that such use or disclosure "is required by law and is limited to the relevant requirements of such law." 45 C.F.R. §164.512(a)(1). If a use or disclosure is not "required", it is not permitted.

Furthermore, HIPAA expressly states that whenever the "law" requires the use and disclosure of PHI, a covered entity must still fulfill the requirements specified for one of three categories of use as required by "law". 45 C.F.R. §164.512(a)(2). These three categories are §164.512 (c) which concerns disclosures required by law about domestic abuse victims; subsection §164.512(f) which concerns use by law enforcement; and subsection §164.512(e) for judicial and administrative proceedings. This case does not involve domestic abuse or other use by law enforcement, but use in a judicial

proceeding, and hence, §164.512(e) is the governing rule.

Settled principles of construction mandate that a law's plain meaning controls the court's interpretation unless its words are ambiguous. If the language "permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." *Elk Hills Power, LLC v. Board of Equalization* (August, 2013) California Supreme Court 2013 WL 4046570 at p. 6 ("Elk Hills"), citing to *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512, 527. Furthermore, a law "should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." *Elk Hills* at 6, citing *Stafford v. Los Angeles County Employees' Retirement Bd.* (1954) 42 Cal. 2d 795, 799.

Applying these rules of construction to this case is straightforward. 45 C.F.R. §164.512(a)(1)&(2) states in plain, unambiguous language that a covered entity may only disclose PHI if such disclosure is "required" by law. Then, if disclosure is required in a "judicial and administrative tribunal", it is further governed by the express requirements of §164.512(e). There is nothing in this language that indicates that collection agencies and their lawyers should be excepted. Any contrary construction would defeat the entire purpose of HIPAA. The language of 45 C.F.R. §164.512(e) is not limited to a particular forum or nature of the litigation. Thus, it extends to any judicial or administrative tribunal and any type of proceeding and would certainly includes an action such as this proceeding.

Respondent has not proposed a single practical or policy consideration why the simple requirements of HIPAA for use of PHI in a judicial proceeding should not be applied to credit agencies like Respondent. Respondent is asking this court to create

an exception under HIPAA so that it may freely disclose the PHI of any alleged debtor into the public domain via the courtroom. Such an exception would give credit agencies a legal means for extortion by threatening a purported debtor with disclosure of their PHI unless they paid as demanded. Moreover, such an interpretation would strip away the right of privacy in the California and United States Constitutions.

5. **HIPAA's Litigation Exception Applies To The Entire Course of Litigation**

Respondent has tried to distinguish the cases cited by Appellant on the grounds that these cases only involved protective orders in response to discovery requests,[3] not to the "initiation and use of documents at trial." Respondent's Brief at p. 14-15. However, this is not a correct statement of the holdings of these (or any other) cases. For example, the question in *Crenshaw* was whether opposing counsel should be disqualified because of a HIPAA violation from the disclosure of PHI. In finding that there had been a pre-trial violation of HIPAA, the *Crenshaw* Court made it clear that HIPAA covers the entire litigation process, not just discovery requests, with the following language:

> HIPAA's privacy provisions allow for disclosure of medical information **in the course of administrative or judicial proceedings;** however, the Act places certain requirements on both the medical professional providing the information and the party seeking it. See 45 C.F.R. § 164.512(e) (2004); see also Hutton, 219 F.R.D. at 167. Under HIPAA, disclosure is permitted, inter alia, pursuant to a court order, subpoena, or discovery

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[3] See *Crenshaw v. MONY Life Insurance Co.* (S.D. Cal. 2004) 318 F. Supp. 1015 (hereafter "*Crenshaw*"); *Allen v. Woodford* (E.D. Cal. 2007) 2007 WL 309485 (hereafter "*Allen*"); *Brookdale University Hospital and Medical Center, Inc. v. Health Insurance Plan of Greater New York* (E.D. New York 2008) WL 4541014 (hereafter "*Brookdale*").

> request when the healthcare provider "receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order...." 45 C.F.R. § 164.512(1)(e)(ii)(b). The protective order must prohibit "using or disclosing the protected health information for any purpose other than the litigation ..." and "[r]equire [ ] the return to the [physician] or destruction of the protected health information ... at the end of the litigation or proceeding." 45 C.F.R. § 164.512(1)(e)(v). (Emphasis added.) *Crenshaw* at 1029.

Further, the *Crenshaw* court used the broad language that **"[d]uring the course of litigation**, HIPAA authorizes several options for obtaining medical records from healthcare professionals, including court orders, subpoenas, or formal discovery requests pursuant to adequate protective order. *Crenshaw* at 1028.

Respondent goes even further and argues that HIPAA is "silent" about the use of PHI "at trial by a covered entity that is a party to the litigation." Respondent's Brief at 16. This argument is extreme and is unsupported by any authority and any logical reason. The plain language of HIPAA says "***in the course*** of any judicial and administrative tribunal". HIPAA does not differentiate between "discovery" or "trial" or any other portion of a proceeding. It was obviously intended to include any part of a proceeding. That is why it uses the plain language "during the course".

6. **HIPAA Presents A Minimal Burden To Respondent**

Respondent argues *deductio ad absurdum* by saying that if HIPAA is construed to enforce the plain meaning of its language, Respondent would be prevented from filing and prosecuting any action at law to collect a debt. Respondent's Brief at p. 14. This argument is an absurdity and, quite simply, not correct.

When filing a complaint for debt collection, Respondent does not have to disclose any PHI to sufficiently state a cause of action. It only has to disclose the person's

name, a simple allegation that services were provided by a "health care provider"[4] at the person's request, the date of the services, and that a specified amount of the charge for services is allegedly unpaid. See e.g., Witkin, *California Pleading*, 5th ed., *Legal Actions Arising Out Of Contract*. It is completely unnecessary for any PHI to be disclosed unless and until the defendant wants to contest the allegations on the merits.

When Respondent needs to disclose PHI in a litigation, it can simply request a defendant, such as Appellant, to cooperate in drafting a protective order that meets HIPAA's requirements under §164.512(a)(e), or if the defendant is not cooperative, then to file a motion for a protective order with the court. The burden of such a simple procedural requirement, if any burden at all, is nominal and will be far out weighed by the benefits of applying HIPAA in fair manner in all debt collection actions.

III. The Power And Obligation Of State Courts To Apply HIPAA

Respondent next argues that the trial court was: (a) not "charged" with the duty of enforcing HIPAA; (b) had no jurisdiction to enforce HIPAA; (c) and that HIPAA does not apply to courts at all. Respondent's Brief at pp. 11-12. Respondent does not cite a single authority in support of these extreme contentions. As shown below, these arguments are contrary to the entire federal and state constitutional structure.

1. Federal Law Is The Law Of The Land

It is fundamental to the design of our federal system of government that

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[4] The actual name of the health care provider can be PHI. For example, the "Cancer Centers Of America" or "Family Planning Center" reveals very private health care information that can be very personal and embarrassing. The actual name can be released under the protective order.

"[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Claflin v. Houseman* (1876) 93 U.S. 130, 136-137. The laws of the United States and the laws of each state form a single system of jurisprudence that "constitutes the law of the land for the State". *Id*. Accordingly, HIPAA, being comprised of a federal statute, 42 U.S.C. §1320, and regulations issued in accordance therewith, is the law of the United States and is binding upon the citizens of every state[5].

2. **State And Federal Courts Have Concurrent Jurisdiction**

A cornerstone of our federalist system is the concept that state and federal courts have concurrent jurisdiction to apply, interpret, and enforce federal law.[6] This principle goes back to the Judiciary Act of 1789 and has been reaffirmed by the Untied States Supreme Court many times. In *Tafflin v. Levitt* (1990) 493 US 455, at 459, the Supreme Court stated the principle as follows:

> We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.

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[5] Indeed, Congress affirmatively stated in the HIPAA statute it will preempt any state law that is contrary. 42 U.S.C. §1320d-7.

[6] Judicial Power is the power to apply the law to the case at bar, the power to interpret that law, and the power to enforce that law by order or judgment. There could not be any judicial branch of government without these powers.

State courts are only divested of jurisdiction over a federal law when Congress has, "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests" made its will known that state courts should not hear cases on a specific statute. *Tafflin v. Levitt* at 459; citing to *Gulf Offshore Co. v. Mobil Oil Corp.*, () 453 U.S. 473, 478. California courts concur. See *Kingston Constructors, Inc. v. WMATA* (1981)14 Cal. 4th 939, 947-948; *In re Garcia* (2012) 202 Cal. App. 4th 892, 901; *Hall v. Great Western Bank* (1991)231 Cal. App. 3d 713, 717.

Application of this three part test to this case is simple: there is no express directive from Congress that states should be divested of jurisdiction in HIPAA cases; there is no legislative history indicating that Congress intended to divest states of jurisdiction of HIPAA; and lastly, there is no "incompatibility" created with other federal or state laws when concurrent jurisdiction is exercised.

3. **Courts Must Enforce The Law**

It is axiomatic that state and federal courts cannot refuse to both apply and enforce applicable law. As stated by the United States Supreme Court in *Sorrells v. United States* (1932) 287 U.S. 435, 450, it is the duty of the courts in this nation to enforce the laws adopted by the legislature and that *judicial nullification*, for whatever reason that a court may harbor, is not permissible. The California Supreme Court has reached the same conclusion: judicial nullification is not a prerogative. See *Santa*

Clara County Counsel Attorneys Association v. Woodside (1994) 7 Cal. 4th 525, at 540, where the California held:

> It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through normal judicial means. What public policy reasons are there against enforcement of a statutory duty are reasons against the creation of the duty *ab initio*, and should be addressed to the Legislature.

4. **Courts Must Enforce HIPAA**

Respondent has further argued that HIPAA's requirements do not apply to "courts". Respondent does not specify whether that is supposed to include federal courts and/or state courts. In either case, the assertion is again made without authority. Courts have the power to enforce and apply the law to any legal person under a court's jurisdiction. In this case, the trial court had the right and power to enforce HIPAA against both Appellant and Respondent by issuing a protective order that kept Appellant's PHI confidential and out of the public domain and then returning or destroying it upon conclusion of the case.

Appellant has cited numerous cases where the federal courts have interpreted, applied and enforced 45 C.F.R. §164.512(e) by requiring a suitable protective order. See *Crenshaw, Allen, and Brookdale*.

Appellant has also found an excellent example of a California court interpreting, enforcing and applying HIPAA. In *Bugarin v. Chartone, Inc.* (2006) 135 Cal. App. 4th 1558, the California Court of Appeals first interpreted the meaning and intent of HIPAA's regulations regarding the cost of copying medical records. Then the Court of Appeal applied that interpretation and held that third parties may be charged more than

a patient for copying medical records. This case refutes all of the assertions raised by Respondent about the ability of state courts to hear and enforce cases involving HIPAA.

IV. HIPAA Does Not Forbid The Disclosure Of PHI For Litigation: It Just Requires A Protective Order Or Patient Authorization

Respondent argues at great length in its brief at pages 13-16 that HIPAA should be interpreted to allow a credit agency to disclose PHI without patient authorization or a court order anytime that a credit agency has to file suit for a medical debt. Respondent does not cite a single authority in support of this proposition.

Appellant has already addressed Respondent's unsupported arguments that HIPAA only applies to discovery requests and not to trial of a matter. See Section II.7, *supra*. Appellant has also addressed Respondent's argument that HIPAA does not apply to a "party" to a litigation. See Section II5. See *Crenshaw* where the court enforced HIPAA against both the plaintiff, the defendant, and an independent expert witness.

Limiting HIPAA to "non-parties" or only to "discovery" would emasculate HIPAA without any logical or even plausible reason.

It is clear that Respondent wants this Court to carve out an unprecedented exception for credit agencies and their lawyers. There is no basis for such an exception. Moreover, such an exception would give medical debt collectors power of extortion by simple threat to disclose a purported debtor's PHI if the demand was not met. There is no reason why the law should give a collection

agency such power.

V. The Trial Court's Failure To Enforce HIPAA Was Error

1. The Trial Court Erred By Finding That There Was No Confidential Medical Information

With Respondent's concession that there was PHI in the Complaint Exhibits and the Trial Exhibits, and further, that there was no written permission by Appellant to use her PHI in this case, the question is narrowed to this: did the trial court error by failing to find that it was a "confidential" case when Appellant asserted that there was PHI and asked that the courtroom be closed? As shown above, the trial court was obligated to enforce HIPAA as the governing law. HIPAA clearly defines PHI as "any" identifiable information *related* to the past, present or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual.

With PHI admittedly present in all of the Respondent's Exhibits, the trial court should have enforced HIPAA's Privacy Rule, ruled that the case involved confidential information that the court was obligated to protect, and then closed the courtroom.

2. The Trial Court Error By Denying Appellant's Motion To Close The Courtroom

There is a factual dispute about why Appellant asked for the courtroom to be closed. Respondent has conceded that Appellant did so because of the

evidence Respondent intended to present. Respondent's Brief at 16. Consistent with this, Appellant has asserted on appeal that she did not want the PHI in the Complaint Exhibits and Trial Exhibits to be made available to the public by presentation in the courtroom or the testimony of Respondent's witnesses. Furthermore, Appellant wanted to introduce other evidence in her defense and in support of her cross complaint, but since it contained PHI, she was unwilling to place it into the public domain.

Respondent argues that Appellant waived her right to produce evidence because she did not make an offer of proof. Respondent's Brief p. 18. However, this is a contested fact for which there is a wholly inadequate record to base a finding upon. There was no transcript of the proceedings and the only record of what happened was the trial court minutes set forth at CT 36 which are, on their face, wholly insufficient to determine this issue. When there is an insufficient factual record to sustain a court finding, the question should be returned to the trial court for further evidentiary proceedings. *See e.g., Rielli v. Workers' Comp. Appeals Bd.* (1982) 134 Cal. App. 3d 721.

Appellant contends that she did make such an offer of proof. This is strongly supported by the "Exhibit List" she filed with the trial court on the morning of the trial. This list describes evidence that she wanted to introduce to support her case. However, when the trial court refused to close the courtroom, she was unwilling to put this evidence into the public domain and thereby waive her rights

under HIPAA . See CT 112-113; CT 120-127; CT 134-135.

3. **The Trial Court Erred By Admitting Respondent's Exhibits**

Since it is now admitted that Respondent's Exhibits contained PHI, and further, it has been established as a matter of law that the trial court was obligated to enforce HIPAA, it was error for the trial court to overrule Appellant's objection to the introduction of these Exhibits. This error limited Appellant's cross examination and her admission of rebuttal evidence, thereby seriously prejudicing Appellant's case.

4. **The Trial Court Denied Appellant's Due Process Rights**

By refusing to close the courtroom and/or issue any protective order to safeguard Appellant's PHI, the trial court failed to provide the protections required under 45 C.F.R. §164.512(e). Without these protections, Appellant was faced with an impossible choice: waive her rights to keep her PHI confidential or forego her defenses to the Complaint and her evidence in support of her cross complaint. The trail court, by forcing Appellant to make this choice, denied Appellant her due process right to present evidence in support of her case. *Buchman v. Buchman* (1954) 123 Cal. App. 2d 546, 560.

It would have been a simple matter for a trial court to have closed the courtroom to enable Appellant to safely disclose her PHI. The burden of doing so, both to the trial court and Respondent, was nominal at best. This was not harmless error and it must be reversed as a *per se* violation of Appellant's due process rights under the Fourteenth

Amendment and Article I, Sections 7 & 15 of the California Constitution.

VI. Medical Records Are Protected Under CIMA and The US and California Constitutions Right To Privacy

Although this Court's decision to apply a "sufficiency" test under CIMA led to its preemption by HIPAA, there is a recent decision of the Court of Appeal that is very instructive.

In *Oiye v. Fox* (Dec. 2012) 211 Cal. App. 4th 1036, 1062-1070, the Court of Appeal upheld a Superior court's protective order issued under CRC 2.550 to protect a party's medical records. The Court of Appeal found that it was obligated to seal the records under both the state and federal constitutions and under CIMA.[7] In so holding, the Court of Appeal found:

> [T]his court has recognized 'that a person's medical history, including psychological records, falls within the zone of informational privacy protected' by the state and federal Constitutions. (*People v. Martinez* (2001) 88 Cal. App. 4th 465, 474–475.

In addition, the Court of Appeal found that California had enacted the Confidentiality of Medical Information Act (Civ Code § 56 et seq.) In 1981 to:

> protect the confidentiality of individually identifiable medical information obtained from a patient by a health care provider, while at the same time setting forth limited circumstances in which the release of such information to specified entities or individuals is permissible. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 859.).

Further, the Court held that there was a presumption that medical records were private and were to be kept private:

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[7] HIPAA was not raised in this case because, presumably, CIMA was regarded as more stringent than HIPAA, and thus, not preempted. However, there is no discussion of this question.

> We regard medical records as presumptively private, such that plaintiff was not required to state the obvious in a declaration, that she would be personally embarrassed to have her medical records copied into court records. The public, through its courts and legislatures, has recognized that medical records are constitutionally private and statutorily confidential. While “[p]rivacy concerns are not absolute [and] must be balanced against other important interests” (*Hill v. National Collegiate Athletic Assn.*, supra, 7 Cal.4th 1, 37, 26 Cal.Rptr.2d 834, 865 P.2d 633), we conclude that the public's general right of access to court records recognized in rule 2.550 must give way to the public's concern about the privacy of medical information in this case, particularly when the information appears so tangentially related to the litigation.

The holding in *Oiye* confirms that Appellant has a constitutional right of privacy in her medical records and that these records can be protected by a motion to seal and or a suitable protective order.

VII. **Conclusion**

Based upon the factual and legal arguments in support of this Appeal, Appellant respectfully requests that this Court set aside the judgment of the trial court and grant Appellant such relief as the Court of Appeal deems appropriate.

Respectfully Submitted,

September 2, 2013

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Patrick H. Dwyer,
Attorney for Appellant

Certificate of Word Count

I hereby certify under penalty of perjury under the laws of the State of California that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through VII) is approximately 4980.

_____
Patrick H. Dwyer,
Attorney for Appellant

Date: September 2, 2013

PROOF OF SERVICE

I hereby certify under penalty of perjury that I am at least 18 years of age, not a party to the action, and that I caused a copy of a copy of Appellant's Reply Brief, in the matter of Retailer's Credit Association v. Kathleen Leonard, Case No. L78288-A was served as follows.

By United States first class mail addressed to:

1. Jennifer Walters, 830 Zion Street, Nevada City, California, 95959.

I declare under penalty of perjury under the laws of the State of California that the foregoing Certification by Patrick H. Dwyer is true and correct.

_____
Signature

_____
Print Name

Date: September __, 2013

Penn Valley, CA 95946