IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO. S25G1418

Court of Appeals Case No. A25A0273

WILLIAM GOODELL,

Appellant/Defendant,

v.

MAGGIE MOULTON,

Appellee/Plaintiff.

APPELLEE'S BRIEF

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I. INTRODUCTION

This is an appeal from the Court of Appeals' reversal of the trial court's order denying the Motion to Compel and Motion for Qualified Protective Orders by which Appellee Maggie Moulton ("Moulton") sought to discover certain medical history and records that would demonstrate Appellant William Goodell ("Goodell") had genital herpes during the parties' thirteen-year romantic relationship. The medical history Moulton sought through the Motions would provide evidence tending to show Goodell infected Moulton with genital herpes. (V2 – 191–271; V3 – 305-391).

As set forth more fully below, Moulton requests this Court affirm the Court of Appeal's decision and that Goodell be required to produce the medical records sought by the Motions, subject to the Qualified Protective Orders ("the Orders") offered by Moulton.

II. STATEMENT OF THE CASE

A. Statement of Proceedings Below

On September 22, 2023, Moulton filed her Complaint against Goodell, alleging several causes of action stemming from the parties' thirteen-year relationship. (V2 – 33-73). In Count VI of the Complaint,

Moulton set forth a cause of action for damages occasioned by Goodell infecting her with genital herpes. (V2 – 54-55). On November 3, 2023, Goodell filed his Answer and Defenses to the Complaint in which he denied he had herpes and infected Moulton. (V2 – 74-126; V2 – 120-21).

On November 21, 2023, Moulton served her first set of discovery on Goodell, comprised of interrogatories, requests for production of documents, and requests for admissions. The scope of the discovery was limited to matters raised in Count VI (the herpes count) of the Complaint.[1] Through that discovery, Moulton sought certain medical

[1] Moulton's first discovery requests were attached in full (but redacted) as exhibits to Plaintiff's Motion to Compel filed February 2, 2024. (V2 – 191-271.) For each pleading filed by Moulton in support of Plaintiff's Motion to Compel and Motion for Qualified Protective Orders, Moulton filed a redacted version with the clerk of Fulton County Superior Court and sent an unredacted copy to the trial court chambers.

Both redacted and unredacted copies of the motions and briefs in support of and in response thereto (from which the required personal information was redacted in accordance with O.C.G.A. § 15-10-54) were filed in the related Court of Appeals application for leave to appeal interlocutory order, A24I0246 and were attached as exhibits listed in the Application Index, in accordance with Ga. Ct. App. R. 30 (e) and (g). (Exhibits 4, 7, 9 and 12 in Court of Appeals case A24I0246.) In that case, the Court of Appeals denied Goodell's Motions to Seal Several Unredacted Filings, Motion to Strike Several Unredacted Filings, and Motion to Amend Case Caption, by order entered July 25, 2024.

records and documentation regarding Goodell's herpes diagnosis and treatment. Goodell responded to Moulton's first discovery requests on December 26, 2023, providing therein essentially no substantive responses. On January 5, 2024, Moulton's counsel sent Goodell's counsel a discovery dispute letter in accordance with the requirements of USCR 6.4(B), to which Goodell's counsel responded on January 31, 2024, again providing no substantive herpes information.

On February 2, 2024, Moulton filed her Motion to Compel, seeking substantive medical records and documentation regarding Goodell's herpes diagnosis and treatment. (V2 – 191-271). On March 4, 2024, Goodell filed Defendant's Response to Plaintiff's Motion to Compel. (V2 – 272-304). On March 18, 2024, Moulton filed her Reply Brief in Support of Motion to Compel. (V3 – 392-415).

In addition to filing the Motion to Compel, on March 13, 2024, Moulton filed her Motion for Qualified Protective Orders and two proposed orders seeking limited, narrowly-tailored medical documentation and records from two of Goodell's primary care physicians who treated him for herpes. (V3 – 305-391). On April 12, 2024, Goodell filed his Response in Opposition to Plaintiff's Motion for Qualified

Protective Orders. (V3 – 416-427). On May 10, 2024, Moulton filed her Reply Brief in Support of Motion for Qualified Protective Orders. (V3 – 428-436). Goodell took Moulton's deposition on March 15, 2024. (V4 – 469-774).

The trial court held a hearing on Moulton's Motion to Compel and Motion for Qualified Protective Orders on May 13, 2024. On June 7, 2024, the trial court entered its Order Partially Granting Plaintiff's Motion to Compel and Denying Motion for Qualified Protective Orders. (V3 – 437-443). On June 14, 2024, Moulton filed her Petition for Certificate of Immediate Review, which the trial court granted and entered on that same date. (V3 – 448-461). On June 24, 2024, Moulton filed her Application for Leave to Appeal an Interlocutory Order. On July 24, 2024, the Court of Appeals entered its order granting Moulton's Application for Interlocutory Appeal. (V3 – 468).

On August 2, 2024, Moulton filed her Notice of Appeal and subsequently filed her Amended Notice of Appeal on August 20, 2024, and Second Amended Notice of Appeal on August 21, 2024. (V2 – 1-32). On August 27, 2024, the appeal was docketed in the Georgia Court of Appeals.

On June 17, 2025, the Court of Appeals held the trial court misapplied the law and abused its discretion by barring Moulton from compelling discovery responses as to the issue of Goodell's alleged herpes infection. The Court of Appeals vacated in part the decision of the trial court and remanded the case with instructions that the trial court enter a narrowly tailored order identifying the discovery that Moulton is authorized to take under applicable case law and to enter any necessary protective orders related thereto. *See* Court of Appeals Decision entered June 17, 2025, Attachment to Appellant's Petition for Writ of Certiorari, filed July 17, 2025.

On July 17, 2025, Goodell filed his Petition for Writ of Certiorari, which this Court granted on January 21, 2026.

B. Statement of Relevant Material Facts

Moulton and Goodell were in a thirteen-year romantic relationship that commenced upon their meeting in June 2010 and ended in May or June 2023, shortly after Moulton was diagnosed with genital herpes.[2]

[2] Moulton's herpes diagnosis in May/June 2023 is set forth in the Affidavit of Robert M. Marcus, M.D., Exhibit 1 to Plaintiff's Reply Brief in Support of Motion for Qualified Protective Orders. (V3 – 431-435).

(V4 – 477, 504, 533-534, 595, 672). The parties lived together from 2014, when Moulton purchased a condominium in Atlanta, Georgia, until 2023. During the time they lived together, the parties spent time in the Atlanta condominium, as well as two different apartments in San Francisco where Goodell was employed from 2015 – 2020.

Because the parties lived together in a committed relationship, Moulton had knowledge of certain of Goodell's medical conditions and treatments. On occasion, Moulton photographed Goodell's medication bottles on the parties' bathroom counter and Goodell's medical records that were received at the parties' home so she could assist in providing accurate medical information when she accompanied Goodell on medical appointments. (V4 – 529, 545-550, 561-563). In July 2020, Goodell executed a Georgia Advance Directive for Health Care, appointing Moulton as his health care agent. (V7 – 2-16; V3 – 401-415).

Moulton helped Goodell manage his various health conditions and frequently accompanied him at his request into exam rooms with physicians, both in San Francisco and Atlanta. (V4 – 512, 518-519, 528, 565). Goodell never told Moulton he had herpes. (V4 – 673, 712-713). Although Moulton took photos of Goodell's medicine bottles, one of which

was valacyclovir, commonly used to treat genital herpes, she did not know the purpose of that medication. (V4 – 528-30, 537, 545-547, 714).

Goodell was treated on December 16, 2021, by Jodi Lynn Chitwood, M.D., for issues including recurrent genital herpes, and she increased his prescription for valacyclovir for the treatment of the condition at that visit. (V7 – 35-38). Moulton testified in her deposition that although she took photographs of the After Visit Summary for that visit, she did not see Dr. Chitwood's herpes diagnosis in that report. (V4 – 562).

Because of the parties' living together and their thirteen-year relationship, Moulton was and is in possession of documents reflecting Goodell's diagnosis of and treatment for recurrent genital herpes during the relationship, prior to her diagnosis with genital herpes in June 2023. At this point, it is clear that Moulton does not have all such evidence that is available, and that evidence has not been authenticated, nor is it clear when Goodell was first diagnosed. Additionally, given Goodell's position with respect to the Motion to Compel, it is clear that Goodell will not

authenticate such records when he is deposed; he will object to the questions based upon privacy grounds.[3]

III. ARGUMENT AND CITATION OF AUTHORITY

The Court has identified four (4) issues it is concerned with here. Moulton will address them in order.

1. What is the nature and scope of the right to privacy at issue in this case?

Under the discovery rules, there is no concept of "reasonable expectation of privacy." *See United States v. Bell*, 217 F.R.D. 335, 343 (M.D. Pa. 2003) (rejecting a Fourth Amendment argument against compelled disclosure, noting that "[t]here is no 'right of privacy' privilege against discovery in civil cases"). For example, a diary entry is perfectly discoverable if it is relevant. *See* Chad DeVeaux, *A Tale of Two Searches: Intrusive Civil Discovery Rules Violate the Fourth Amendment*, 46 Conn. L. Rev. 1083, 1088–89, 1089 n.23 (2014) (listing cases where courts ordered production of diaries).

[3] Moulton has not taken Goodell's deposition yet because Moulton did not want to take the deposition until she had all available medical documents and records related to the herpes claim.

"Instead, the rules speak in terms of privilege. Federal courts recognize that privacy interests are implicated in the discovery rules and that courts should protect privacy interests as part of their issuance of protective orders, but do not treat discovery as constrained by the Fourth Amendment." Allyson Haynes Stuart, *A Right to Privacy for Modern Discovery,* 29 Geo. Mason L. Rev. 675, 714 (2022). Georgia too has recognized privacy interests in connection with discovery, although in the discovery context, as with the constitutional arena, there is no textual basis for such a right.

A. Privacy rights under Georgia law.

The privacy interest at issue in this case is Goodell's asserted right to medical privacy; he invokes that purported right to resist Moulton's legitimate discovery requests seeking evidence regarding his diagnosis of and treatment for genital herpes. Although not explicitly recognized in either document, Georgia courts have recognized that the U.S. Constitution and the Georgia Constitution both contain provisions that imply a "right to privacy," including a "right to medical privacy."

It is a source of jurisprudential distinction that Georgia was the first state to recognize a generalized right to privacy. In *Pavesich v. New*

England Life Ins. Co., 122 Ga. 190, 50 S.E. 68. (1905), this Court found individuals have a cognizable cause of action for invasion of privacy. The Court based the right to privacy on natural law, recognized principles of municipal law, and federal and state constitutions, as recognized in scholarly commentaries. *Id.* at 50 S.E. 70.

In recognizing the right to privacy and a cause of action for its violation, the *Pavesich* Court eschewed the kind of absolutist approach implicit in Goodell's position. The *Pavesich* Court explained, "It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended and the rights of others and of the public began….It may be that there will arise many cases which lie near the border line which marks the right of privacy on the one hand and the right of another individual or of the public on the other." This is such a case, and as the *Pavesich* Court anticipated, the balancing of those rights depends on "the wisdom and integrity of the judiciary." *Id.* at 50 S.E. 72.

As this Court noted in *King v. State* 272 Ga. 788, 553 S.E.2d 492 (2000) ("*King I*"), the Georgia Constitution provides greater protections of an individual's privacy than does the U.S. Constitution. "Because

Georgia recognizes an even broader concept of privacy, the personal medical records of this state's citizens clearly are protected by that right as guaranteed by our constitution." *Id.* at 790, 553 S.E.2d at 495. In so ruling, this Court relied on federal precedent: "Medical records are within the right of privacy afforded by the Federal Constitution," citing *United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 577(IV) (3d Cir.1980). In *Westinghouse,* however, the court explained the right of privacy in medical records is not absolute:

> In recognition that the right of an individual to control access to her or his medical history is not absolute, courts and legislatures have determined that public health or other public concerns may support access to facts an individual might otherwise choose to withhold. On this basis, disclosures regarding past medical history, present illness, or the fact of treatment have been required.
> . . .
> In the cases in which a court has allowed some intrusion into the zone of privacy surrounding medical records, it has usually done so only after finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case.

Id. at 578 (internal citations omitted).

Thus, the scope of Goodell's right to privacy is not absolute or unlimited and must, in some circumstances, yield to recognize the countervailing interests of others who are or could be affected by an individual's enjoyment of his right to privacy. *See Armstead v. State*, 293

Ga. 243, 245, 744 S.E.2d 774, 776 (2013) ("the privacy enjoyed by citizens as to their medical records, including mental health records, is not absolute," citing *King I,* at 793). This Court acknowledged such a boundary in *Pavesich*, and it has consistently recognized the same limits in cases such as *King I,* citing *Westinghouse.*

B. Georgia court have routinely rejected Goodell's absolutist position.

Beginning in 2000, this Court handed down the first of a number of criminal cases that explored the contours and limits of an individual's constitutional right to privacy in connection with medical information. In those cases, *King I*, *King v. State* 276 Ga. 126, 577 S.E.2d 764 (2003) ("*King II*"), *Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011), and *Gates v. State* 317 Ga. 889, 896 S.E.2d 536 (2023), the Court recognized an individual's limited right to medical privacy.

The Court has, for example, consistently explained that medical privacy rights will bend to the state's interest in law enforcement where appropriate procedural safeguards were employed to ensure the individual was afforded due process in the balancing of interests. The Court in *King I* explained, "the prosecution can justify its invasion of Ms. King's privacy only by showing that it acted pursuant to a statute which

effectuates a compelling state interest and which is narrowly tailored to promote only that interest." *King I,* 272 Ga. at 790, 535 S.E.2d at 495.[4] In *King II*, the Court noted, "When an individual challenges the State's action for violating the fundamental right to privacy, the State must show that its intrusion into the individual's private life serves a compelling state interest and is narrowly drawn to achieve that interest." *King II,* 276 Ga.at 127-28, 577 S.E.2d at 765.

The strict scrutiny standard applied in *King I* and *King II* is not, however, an impenetrable obstacle to obtaining a party's private medical information. In *King II*, although the defendant was not given notice or opportunity to be heard, the Court held the state did not violate his right to privacy, even under the heightened scrutiny standard, when it

[4] The *King I* Court limited the scope of its holding to the criminal context and contrasted the absence of safeguards in the *ex parte* subpoena process to the judicial safeguards built into the civil discovery context. Specifically, the court noted that (former) O.C.G.A. §24-9-40(a), "does not contain any express provisions to insure (sic) that the constitutional right of privacy in medical records is not unreasonably impacted by the State's use of a subpoena in criminal cases. Compare OCGA § 9–11–34(c)(2) (notice and opportunity to object in civil cases)." *King*, 272 Ga. at 793, 535 S.E.2d at 497. Implicit in this language is a recognition by the Court that the notice and opportunity to be heard in the civil context is sufficient procedural protection and affords the courts the ability to appropriately balance competing interests by deploying appropriate protective tools.

obtained his medical information through the issuance of a search warrant to the hospital where he was treated for injuries following an automobile accident. In so holding, this Court reasoned:

> These provisions show that, unlike the subpoena process used in *King,* the process for obtaining a search warrant has procedural safeguards that limit the State's ability to obtain a defendant's private records. "[W]hen the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue."
> . . .
> Because existing search warrant procedures provide adequate protections for an accused's privacy rights under the Georgia Constitution, we hold that the State does not violate a defendant's right to privacy and due process in obtaining a search warrant for personal medical records without notice or a hearing.

King II, 276 Ga. at 128-29, 577 S.E.2d at 766, *citing King I* (additional internal citations omitted).

In *Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011), this Court held that the state's accessing and using Bowling's medical records which were obtained through the use of a search warrant did not violate his constitutional rights to privacy. The *Bowling* Court catalogued the protections extended in civil cases when the court is asked to compel production of a person's private medical information as follows: "While OCGA § 24-9-40(a) establishes the confidentiality of medical information

concerning a patient, it also authorizes release of information 'on appropriate court order.' The other statutes upon which Bowling relies are inapplicable and, in any event, permit disclosure of confidential records under a host of circumstances, including under a court order. *See* OCGA §§ 24–9–47, 37–3–166, 37–7–166.)." *Bowling,* 289 Ga. at 885, 717 S.E, 2d at 196.

The medical privacy rights of each defendant in *King I, King II,* and *Bowling* were essentially the same: the state sought medical evidence, including blood alcohol test results, obtained at hospitals following a traffic accident or criminal event. Each defendant had essentially the same medical privacy right, and in *King II* and *Bowling* the state overcame the defendant's medical privacy rights by use of a search warrant, the issuance of which included the requisite procedural safeguards.

Goodell here has enjoyed exactly the procedural protections the Court in *King II* suggested were sufficient to protect his rights. Goodell availed himself of civil discovery motions practice and an in-person hearing, and Moulton offered Goodell a qualified protective order that would strictly limit Moulton's use of the discovered information.

That the private medical information of an individual can be obtained without that person's consent is clearly established and recognized in many decisions of the Georgia Court of Appeals. In *Ussery v. Children's Healthcare of Atlanta*, 289 Ga. App. 255, 656 S.E.2d 882 (2008), the court upheld the trial court's order requiring the production of nonparty patient records, subject to notice and opportunity of the nonparties to object. In *Ussery,* the parents of a deceased child brought a medical malpractice action against physicians, a medical practice, and a hospital following the death of their daughter. The court held that documents the hospital quality review panel considered were protected by the statutory privilege accorded the peer review process, but the patient records of nonparty patients were discoverable. *See id.* at 257, 656 S.E.2d at 886-87.

In ruling the medical malpractice plaintiffs could obtain the medical records of nonparties who had been treated at the hospital over an eight-year period, the court noted, "Personal medical records are protected by Georgia's constitutional right of privacy and cannot be disclosed without the consent of the patient **unless their production is otherwise required by Georgia law**." *Ussery*, 289 Ga. App. at 269, 656

S.E.2d at 894-45 (citing *King I, supra*) (emphasis supplied). The court concluded:

> In the absence of a waiver, a patient must be afforded notice and an opportunity to object prior to the disclosure of his medical records via civil discovery requests.
> . . .
> Given the fact that the trial court's orders requiring the production of Scottish Rite's nonparty medical records affords the nonparty patients with notice and an opportunity to object to the disclosure and also provides that the court will conduct a further review to determine the scope of discovery for this information after the initial identification of the nonparty records relevant to plaintiffs' request, we find no abuse of discretion.

Ussery, 289 Ga. App. at 269-70, 656 S.E.2d at 895 (internal citation omitted).[5]

In *National Stop Smoking Clinic-Atlanta, Inc. v. Dean*, 190 Ga. App. 289, 290, 378 S.E.2d 901 (1989), the Court of Appeals upheld the trial court's order directing a clinic to release a list of all patients who had been treated at the clinic. The case was brought by a patient who sought the names and addresses of all patients who had been treated by

[5] There is no subsequent case history that indicates whether the court allowed the discovery of nonparty records of any nonparty that objected to the disclosure once given notice and an opportunity to object.

the clinic to prove his allegations of medical malpractice and fraud. The holding in *National Stop Smoking* that a party can compel the production of non-party medical records was cited in and left undisturbed in *Ussery,* 289 Ga. App at 270, 656 S.E.2d at 895.

Similarly, in *Hickey v. Kostas Chiropractic Clinics, P.A.,* 259 Ga. App. 222, 576 S.E.2d 614 (2003), the court ruled it was an abuse of discretion for the trial court to deny the plaintiff-in-counterclaim's ability to discover the identities of all other patients who had received treatment for whiplash injuries at the chiropractic clinic. The court noted:

> Kostas refused to provide such information on the ground that it was privileged. Kostas's refusal was without merit. This Court has previously held that '[t]he disclosure of the names and addresses of persons receiving treatment from a clinic is not subject to privilege and is discoverable.' . . .Therefore, as such information is clearly discoverable, the trial court abused its discretion in denying Hickey's motion to compel on this ground.

Hickey, 259 Ga. App. at 224, 576 S.E.2d at 616.

In *National Stop Smoking* and *Hickey,* therefore, the Court required the production of evidence by medical providers that would disclose the nature of the treatment of the non-parties, specifically that

those non-parties were smokers or treated for whiplash.[6] The information regarding those patients was discoverable, even though they had not placed their health at issue in the litigation.

C. Georgia public policy favors limited discovery in this case.

Herpes is an incurable sexually-transmitted disease, and OCGA § 16-5-60 (b) makes it a crime to consciously disregard a substantial risk that having unprotected sex will cause harm or endanger the safety of the other person. O.C.G.A. § 31-17-1 classifies sexually transmitted diseases as contagious, including syphilis, gonorrhea, and chlamydia, as well as "any other diseases that the Department of Public Health, through rule or regulation, declares to be contagious, infectious, communicable, and dangerous to the public health." *Id.* The Georgia Department of Public Health has identified genital herpes as an STD caused by 2 different viruses. The Department provides public guidance regarding herpes on its website:

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[6] Smokers have an interest in keeping their habit private. Whether an individual is or was a smoker is a common underwriting question to qualify for health, life, and disability insurance. Because smoking can be done in private, having one's identity as a smoker disclosed in a lawsuit could impair the ability of a "secret smoker" to obtain insurance.

> There is no cure for herpes. Antiviral medications can, however, prevent or shorten outbreaks during the period of time the person takes the medication. In addition, daily suppressive therapy (i.e., daily use of antiviral medication) for herpes can reduce the likelihood of transmission to partners.
>
> There is currently no commercially available vaccine that is protective against genital herpes infection. Candidate vaccines are in clinical trial.[7]

Georgia public policy favors laws, doctrines, and strategies designed to reduce the incidence of transmission of STDs. In Georgia it is a tort to intentionally or negligently transmit herpes to another. In the first case it considered regarding infection of a romantic partner with herpes, the court noted:

> In accordance with the public policy of this state to reduce the incidence of venereal diseases, the injury appellant allegedly suffered is one for which he should be compensated if the case can be properly proved. 'Appellant has alleged that [he] sustained physical injury due to [appellee's] tortious conduct in either negligently or deliberately [infecting him] with venereal disease. The disease which appellant contracted is serious and [thus far] incurable. The tortious nature of [appellee's] conduct, coupled with the interest of this state in the prevention and control of contagious and dangerous diseases, brings appellant's injury within [the sphere of compensable physical injury].'

[7] https://dph.georgia.gov/STDS/information-about-stds/genital-herpes.

Long v. Adams, 175 Ga. App. 538, 541, 333 S.E.2d 852, 856 (1985) (citation omitted).

A trilogy of cases confirms Georgia's recognition of a cause of action for infecting a sexual partner with the herpes virus.[8] None of those cases involved the need for the plaintiff to obtain evidence of the transmitting partner's positive herpes status because in each case it was either admitted or not denied. Here, Goodell put the matter at issue by denying he had the virus.

If the trial court's order denying discovery were to become the law of this state, it would render meaningless and impotent the right of a victim to bring a claim. The plaintiff in such cases has the burden of proving she was infected by the defendant. Of necessity, therefore, the plaintiff must prove the defendant carries the virus. If the public and the bar came to understand the defendant could thwart any effort to bring him to justice simply by denying he had the virus and preventing disclosure of medical evidence, the likelihood a plaintiff could prevail in the most meritorious of cases would be vanishingly small. Certainly, no

[8] *See, generally Long, supra*; *Beller v. Tilbrook*, 275 Ga. 762, 571 S.E.2d 735 (2002); *Doe v. Roe* 362 Ga. App. 23, 864 S.E.2d 206 (2021).

defendant would admit to having the virus should Moulton not be able to overcome Goodell's claim of medical privacy. Such a result would frustrate Georgia public policy to promote public health and to discourage the spread of sexually transmitted diseases.

Goodell claims information regarding his medical condition is "of purely private concern." Such self-absorbed claims are inconsistent with reality and Georgia public policy. That precise information would have been of intense interest to Moulton and any other uninformed victims of his selfish and despicable behavior. Because Goodell has chosen to spread an incurable, contagious disease without the slightest regard for the health or safety of others, his private information is now a matter of public concern.

Public policy has rightly condemned Goodell's wantonly selfish behavior, and Goodell's claim here that his condition is an entirely private matter that can be legally shielded from his victims is as inconsistent with Georgia public policy as it is narcistic.

D. Goodell's privacy interests are peculiarly weak.

In framing its "concern" regarding the "nature and scope of the right to privacy *at issue in this case,"* the Court captures an important

consideration: the need to focus on the particular right to privacy interest implicated "in this case." Not all privacy interests are equal, and Goodell's are peculiarly weak.

Properly considered, Goodell's entire thesis collapses of its own weight. In examining Goodell's position, one should ask, "What is it that Goodell is attempting to protect"? Goodell claims he is attempting to protect records regarding his medical condition because those are private. That, of course, begs the question, are the records private or is it the information found in the records that is private?

Plainly, it is the information in the records that is private. If the medical records were lacking any raw medical information, there would be no privacy concerns implicated in their discovery. If, for example, the records simply reflected the fact of a doctor visit and simply said, "no change in condition," one could hardly get excited about their disclosure on privacy grounds. It is the fact that the records say more and reflect upon Goodell's medical condition that purportedly makes them private.

But how can Goodell's medical condition be private? Goodell has openly proclaimed what will be found in the records; he has affirmatively announced the medical condition that would be revealed by the records:

he does not have the herpes virus. (V2 – 120-21). That is the only information Moulton seeks to extract from the records, and having revealed that content of the records, Goodell can hardly contend that disclosure of records reflecting upon his condition relative to herpes will violate his right to privacy. *See Bowling, supra* (defendant cannot claim an expectation of privacy in the medical records to the extent that they contain information he disclosed to third parties).

If Goodell's denials are to be believed—an understandably painful stretch[9]—the portion of his medical record Moulton seeks to discover will reveal no more than what he has aggressively asserted in this litigation--unless, of course, he has been dishonest regarding his condition. And, in that regard, he has put his condition at issue.

2. What is the substantive standard a trial court should apply in determining when, if ever, that right should give way to other interests?

In determining the substantive standard that should be applied in determining whether Goodell's privacy interests should give way to Moulton's discovery rights, the Court should engage in a balancing of

[9] It is, of course, intuitively obvious that if Goodell's medical records were consistent with his litigation position, he would be falling over himself to offer them into evidence.

interests. Neither party's interests are absolute. Moulton recognizes that there are limits to her discovery rights involving relevance, proportionality, and others. At the same time, as is shown above, the Georgia Courts have understood the right to privacy has limits. *See Cooper v. State*, 277 Ga. 282, 286, 587 S.E.2d 605 (2003) (("the permissibility of a particular practice `is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'") (overruled on other grounds by *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017)). *See also Brown v. State*, 293 Ga. 787, 700 S.E.2d 148 (2013) (weighing the government interest in law enforcement in the context of a traffic stop against the individual's expectation of privacy: "'[o]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence.'") *Id.* at 792-93, 750 S.E.2d at 155 (citing *United States v. Martinez–Fuerte*, 428 U.S. 543, 544, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)).

The level of scrutiny applied to the interests being considered varies based upon the nature of the rights being protected and the potential threat to those rights. Here, given his absolutist approach to privacy

rights, Goodell would no doubt claim his rights are entitled to primacy in balancing. While Goodell describes privacy rights as "fundamental," it is important to note that privacy is nowhere mentioned in the state or federal constitution, and a right of privacy has never been enshrined in any amendment to the constitution or in any amendment effort, and the Republic existed for nearly 130 years before *Pavesich* recognized a tort based upon a violation of the right to privacy.

On the other hand, it is a "common morality" precept that for sex to be truly consensual, sexual partners need to disclose certain facts to their intended partner, including information about sexually transmissible diseases. That moral precept has been enshrined in the criminal law of Georgia, where it is a crime to engage in sexual intercourse without disclosing a sexually transmitted disease (STD) to a partner. *See* O.C.G.A. § 16-5-60.

Not all privacy interests are equal, and, as is discussed above, here Goodell's privacy interest is particularly weak because Goodell has already announced in this public forum what information would be found in the records Moulton seeks. The interests Moulton seeks to vindicate, on the other hand, are quite compelling. It is widely recognized that

withholding material facts or deceiving a sexual partner regarding medical status deprives a partner of making an informed choice about whether to engage in sex. If consent was dependent on an intentional deception, then consent was coerced rather than freely given, and we have a word for coerced sex.

Hence, the balancing to be done here is weighing the imposition on Goodell's privacy rights in protecting medical records that will purportedly confirm a position he has already aggressively advanced in the litigation versus Moulton's interest in vindicating her right to relief for being infected with an incurable disease, with all the physical, psychological, and social burdens that attach to it.

Additionally, it is important to bear in mind that Moulton's personal interests are not the only interest implicated in this matter. As is discussed above, public health considerations must be weighed in the balancing of interests.

What is the burden of proof on the party asserting those interests?

As with any claim or defense, the party asserting a claim or advancing a defense bears the burden of proving the facts necessary to sustain the position. Here, the burden of proof should be on the party

claiming an interest to make a showing sufficient to support a finding the interest exists.

The facts relevant to this dispute, however, do not appear to be in dispute. Goodell claims the medical records sought by Moulton contain private medical information, and Moulton certainly hopes that is true. It is undisputed that Moulton had been in a long-term, monogamous relationship with Goodell, that she entered that relationship uninfected with herpes, that she has been diagnosed with herpes, and that she has come to understand that certain of the medicines Goodell was prescribed while they were together are regularly prescribed to persons infected with herpes.[10]

3. Assuming that such a right should ever give way to those other interests, what limitations must be placed on the use of the information otherwise protected by the right?

Current laws, state and federal, are available to balance and protect the interests of Moulton and Goodell. Specifically, Georgia substantive due process and the HIPAA Privacy Rule, in addition to other state

[10] Valacyclovir (oral route) - Side effects & dosage - Mayo Clinic (https://www.mayoclinic.org/drugs-supplements/valacyclovir-oral-route/description/drg-20066635).

statutes regarding discovery of medical information strike a balance between discovery needs and privacy concerns.

In *Moreland v. Austin*, 284 Ga. 730, 670 S.E.2d 68 (2008), this Court held the HIPAA (Health Insurance Portability and Accountability Act of 1996) Privacy Rule preempted state law and prevented a medical malpractice defendant's counsel from informally interviewing the plaintiff's prior treating physicians without consent or observing HIPAA procedures.[11]

Two years later, in *Baker v. Wellstar Health System, Inc.*, 288 Ga. 336, 703 S.E.2d 601 (2010), the issue addressed by the Court was the breadth of a Qualified Protective Order ("QPO") that "authoriz[ed] ex parte contacts with any number of unnamed physician-witnesses without further notice to the patient-plaintiff-expos[ing] a gaping loophole in the procedural protections afforded by HIPAA in the context of litigation." *Id.* at 339, 703 S.E.2d at 604. The Court recognized that a properly drafted QPO should narrowly and precisely define the scope of permitted discovery and limit access to only the information genuinely needed. A properly drafted QPO also clearly defines and strictly limits permissible

[11] HIPAA and HIPAA Privacy Rule, 42 U.S.C. § 1320; 45 C.F.R. §§ 164, 164.512.

uses and disclosure of such information. And QPOs typically require that the requesting party destroy or return the protected information at the conclusion of the litigation. The *Baker* court concluded:

> In sum, the use of carefully crafted orders specifying precise parameters within which *ex parte* interviews may be conducted will serve to enforce the privacy protections afforded under state law and advance HIPAA's purposes while at the same time preserving a mode of informal discovery that may be helpful in streamlining litigation in this State.

Id. at 340, 703 S.E.2d at 605. Moulton offered Goodell two properly drafted QPOs that satisfied all of the above-described criteria.

In both the *Moreland* and *Baker* decisions, this Court relied on the reasoning of the New York court in *Arons v. Jutkowitz,* 9 NY3rd 393, 880 N.E.2d 831 (2007). The *Arons* appeal consolidated three separate medical malpractice actions that presented the same issue: "whether an attorney may interview an adverse party's treating physician privately when the adverse party has affirmatively placed his or her medical condition in controversy." The court determined an attorney may do so, "although the [HIPAA]...through its Privacy Rule...imposes procedural prerequisites unique to the informal discovery of health care professionals." *Id*. at 401-02, 880 N.E.2d at 832-33.

The *Arons* court noted the interplay between the procedural requirements of the HIPAA Privacy Rule and the New York state law procedure that otherwise facilitated the discovery of medical information:

> The Privacy Rule also permits covered entities to use or disclose protected health information without authorization pursuant to a court or administrative order so long as only the protected health information covered by the order is disclosed . . .; or in response to a subpoena, discovery request or other lawful process if the entity has received satisfactory assurances that the party seeking the disclosure has made reasonable efforts to ensure that the individual has been given notice of the request, or has made reasonable efforts to secure a qualified protective order from a court or administrative tribunal

Arons, 9 NY 3rd at 414, 880 N.E. 2d at 841 (internal citation omitted).

Appellate courts routinely apply the guidance provided in *Moreland* and *Baker* to determine if a protective order issued by the trial court adequately complies with HIPAA and relevant state statutes to protect the interests of the one whose medical information is sought. In *Harris v. Tenet Healthsystem Spalding, Inc.,* 322. Ga. App. 894, 746 S.E.2d 618 (2013), the Court evaluated the factors set forth in *Moreland* and *Baker* to rule the trial court had properly protected the parties' decedent's privacy rights when it entered a protective order allowing the defendant to discover certain medical information and records. "[W]e find that the plaintiffs' privacy right as to the decedent's mental conditions is

adequately safeguarded by the terms of the qualified protective order which sufficiently complies with all of the procedural requirements set forth in *Moreland* and *Baker*." *Id.* at 898, 746 S.E.2d at 621.

Moulton sought to have the trial court issue two QPOs in seeking to compel production of Goodell's medical records. The QPOs would have limited Moulton's access only to records reflecting upon any diagnosis or treatment of Goodell for genital herpes and/or recurrent genital herpes during the period of the parties' relationship. The QPOs directed that the records not be used or disclosed for any purpose unrelated to the litigation and that the records were to be destroyed or returned to counsel for Goodell at the conclusion of the litigation. In short, the QPOs were narrowly tailored to Moulton's needs in the case and were designed to afford Goodell maximum privacy protection. Those are the limitations that protect all parties.

4. Assuming that the information at issue here would otherwise not be subject to disclosure to plaintiff, has defendant waived his right to protect the information from disclosure to plaintiff?

The parties agree that when a party places his medical condition at issue, he waives his right to privacy regarding that issue. Goodell has put his medical condition at issue. The Complaint alleged Goodell had

herpes and he infected Moulton. Goodell could have avoided putting his condition at issue by invoking his purported privacy rights in his Answer and refusing to respond to that allegation, but he did not do that. Instead, he answered that allegation with one word: "DENIED." The denial of an allegation in a Complaint puts the matter at issue. ***It is not at issue until it is denied.***

Goodell is correct that the cases in which the "at issue" question has arisen have generally involved plaintiffs making allegations regarding their medical condition. Of course, that is hardly surprising, given that it is generally the plaintiff who is raising the subject of injury or physical condition. But that is not particularly meaningful to the "at issue" analysis because it tells us nothing about how to deal with situations in which the defendant's condition is at issue.

There is sensible authority for the proposition that a defendant puts his condition at issue when he denies allegations regarding his condition. The court in *Arons*, cited above, agreed that "a litigant is deemed to have waived the [physician-patient] privilege when, in bringing **or defending** a personal injury action, that person has affirmatively placed his or her

mental or physical condition in issue." *Arons*, 9 NY 3rd at 409, 880 N.E. 2d at 837-38 (emphases added). The court explained:

> This waiver is called for as a matter of basic fairness: '[A] party should not be permitted to affirmatively assert a medical condition in seeking damages **or in defending against liability** while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim[.]'

Id.

Other courts have likewise found that denying herpes infection places a defendant's condition at issue. The court in *Doe v. Weinzweig*, 2015 IL App (1st) 133424-B, ordered physical examinations and medical testing when the defendant denied STD exposure allegations. The court explained that "Defendant placed his physical condition squarely 'in issue' by offering affirmative matter to rebut plaintiff's claim that defendant was infected with *Herpes* II before and after their encounter." *Id.* at ¶*23.* The court granted a motion requiring the defendant to undergo "visual and manual physical examination," including discussion of medical and sexual history, followed by blood testing for herpes. *Id.* at ¶*7.* By placing his condition at issue, Goodell waived his right to invoke privacy rights to limit discovery concerning his condition.

Finally, Goodell waived his right to medical privacy as to Moulton.

Moulton managed Goodell's health care to a significant extent. She has, for example, possession of an After Visit Summary from a doctor's appointment in 2021 that Goodell left behind when he moved out of their shared residence that reports that Goodell has recurrent genital herpes. (V7 – 35-38.) In 2020, Goodell executed a Georgia Advance Directive for Health Care, designating Moulton as his health care agent.[12] Goodell forwarded an email from his New York physician with lab results and follow-up recommendations to Moulton with the notation "fyi." (V7 – 17-34.)

Apparently, Goodell was not terribly concerned about his privacy when Moulton was taking care of him.[13] Indeed, prior to this litigation,

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[12] Moulton could have obtained the records she now seeks from Dr. Chitwood pursuant to the Georgia Advance Directive for Health Care when she was diagnosed with herpes in June 2023. "My health care agent will be my personal representative for all purposes of federal or state law related to privacy of medical records. This includes the Health Insurance Potability and Accountability Act (HIPAA) of 1996. My health care agent will have the same access to my medical records that I have and can disclose the contents of my medical records to others for my ongoing health care." (emphasis in original.) (V7 2-16; specifically, V7 6).

[13] If the Court were inclined to rule for Goodell, Moulton requests that the Court make clear that seeking authentication of such a document that Moulton already possesses would not invade Goodell's privacy.

Goodell had no apparent objection to Moulton knowing everything about his medical care other than the fact he had herpes.

IV. CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the decision of the Court of Appeals and remand this case to the trial court for entry of an order requiring Appellant to produce the medical records sought by the Motions, subject to the Qualified Protective Orders offered by Appellee.

This submission does not exceed the word-count limit imposed by Rule 20.

Dated: March 23, 2026

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CERTIFICATE OF SERVICE

This is to certify that the undersigned served a true and accurate copy of the foregoing **Appellee's Brief** through the Court's electronic filing system and a PDF copy by email, addressed as follows:

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I certify that there is a prior agreement with counsel for Appellant, to allow documents in a PDF format sent via e-mail to suffice for service under Supreme Court Rule 14.

Dated: March 23, 2026.

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