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# SUPREME COURT OF FLORIDA

CASE NO. 82,692
DISTRICT COURT OF APPEAL
3RD DISTRICT-No. 92-2234

**NOTICE OF FILING INITIAL BRIEF OF PETITIONER**

CARLOS E. ROJAS
v.
RYDER TRUCK RENTAL, INC., ET AL.

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The petitioners, Carlos and Ana Rojas, respectfully files the initial brief in this matter.

I hereby certify that this document has been forwarded by U.S. mail on Monday, December 06, 1993 to:
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## STATEMENT OF CASE

On August 8, 1989, the petitioners (hereafter referred to as ROJAS) and respondents (hereafter referred to as RYDER) were involved in an automobile accident in Dade county, Florida. As a result of this accident ROJAS was injured and sought medical evaluation and treatment.

ROJAS filed a lawsuit against RYDER for bodily injuries on January 30, 1992 in Dade county, Florida.

During the discovery phase of this lawsuit, RYDER, attempted to obtain medical records from two Massachusetts medical facilities that provided medical care and treatment to ROJAS prior to the subject automobile accident. These medical providers, although under subpoena issued by the Florida court, refused to provide RYDER with the requested documents.

RYDER then requested ROJAS to voluntarily execute several medical release and authorization forms so that RYDER could obtain the medical records ex parte from the Massachusetts medical providers. ROJAS refused the request and RYDER, by motion, asked the trial court to order ROJAS to execute the releases. After a hearing on this matter, Margarita Esquiroz, the trail judge ordered ROJAS to furnish to RYDER the signed authorizations.

***At no time during the pendency of this lawsuit did RYDER ever utilize Florida Rule of Civil Procedure 1.350 and request from ROJAS the medical records directly via. a request for production nor did RYDER attempt to depose the medical providers pursuant to section 45 of the Laws of Mas-***

***sachusetts.***

By writ of certiorari, ROJAS petitioned the Third District Court of Appeals to quash the trial court's order requiring ROJAS to execute the medical releases. The Third District denied ROJAS's petition. However, the court acknowledged their decision to be in conflict with decisions in the second and fourth districts on the same question of law.

## SUMMARY OF ARGUMENT

### I

Florida Statute, section 445.241 prohibits the disclosure of ROJAS's medical records in the manner requested by RYDER.

### II

The wholesale execution of medical releases is not a recognized discovery tool. Rather, the proper mode of discovery of the requested medical records is through the Florida Rules of Civil Procedure 1.350 and section 45 of the Laws of Massachusetts.

### III

The trial Court's order, requiring ROJAS to sign and deliver to RYDER medical releases constitutes a departure from the essential requirements of law.

### IV

Requiring trial Courts to oversee the production of medical records via., in camera inspections would saddle the judiciary with an extraordinarily time consuming task and significantly increase the time to complete the discovery process.

V

Forcing plaintiffs to execute and deliver medical releases to defendants, allows defendants to obtain potentially prejudicial and extraneous matters that would otherwise be privileged.

## ARGUMENT

I

Florida Statute, section 445.241 prohibits the disclosure of ROJAS's medical records under the facts of this case.

The Florida legislature has provided for confidentiality of patient medical records, except as specifically provided by statute, in 455.241, Fla. Stat. (1989). 455.241 provides in pertinent part:

> Except as otherwise provided in s. 440.13(2)(c), [medical] records shall not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or his legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient.

The statute provides the following exceptions, ***and only the following exceptions***, to the foregoing confidentiality provision:

> (1) the records may be furnished without written authorization to any person, firm or corporation which has procured or furnished medical examination or treatment with the patient's consent or pursuant to a compulsory physical examination made pursuant to Rule 1.360, Fla. R. Civ. P.; and (2) the records may be furnished pursuant to a subpoena issued by a court of competent jurisdiction.

The confidentiality of the records is further emphasized in the statute

as follows:

> Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

In the instant case RYDER is not the patient of the medical providers from which they seek the records nor is RYDER ROJAS's legal representative or medical provider. Additionally this is not a medical medical malpractice action. Therefore, the records are not discoverable under the plain and unambiguous terms of 445.241.

RYDER is asking this Court to legislate into existence a new and heretofore unknown exception to Florida Statute 445.241. Essentially RYDER is asking this Court to strip away the confidentiality of a patient's medical record if the patient instigates litigation where his or her physical well being is at issue. As justice Zehmer correctly pointed out in Franklin v. Nationwide Mutual Fire Insurance Co., 566 So.2d 529, 534 (Fla. 1st DCA 1990)

> The petitioner [plaintiff]..did not waive the confidentiality guaranteed him by statute [445.241] by the mere filing of a lawsuit, and did not thereby lose the right under the statute to have the respondent [defendant] follow normal channels of discovery in preparing for trial.

It is axiomatic that that the judiciary does not have the right or power to legislate, as it is prohibited by the separation of powers clauses in the state and federal constitutions.

II

The wholesale execution of medical releases is not a recognized discovery tool. Rather, the proper mode of discovery of the requested medical records is through the Florida Rules of Civil Procedure 1.350 and section 45 of the Laws of Massachusetts.

RYDER asserts that it is having difficulty getting the medical providers located in Massachusetts to respond to subpoenas issued by the Florida court. However, the mere inconvenience or delay involved in getting medical records from out-of-state medical providers is insufficient to ignore the requirements of 455.241. Pic n' Save v. Singleton, 551 So.2d 1244 (Fla. 1st DCA 1989).

If medical providers in Massachusetts are not complying with Florida issued subpoenas, it is incumbent on the defense to determine what action they need to take under Massachusetts law to obtain compliance. Perhaps a Florida subpoena is inadequate and other procedures must be followed. Perhaps a Florida subpoena is adequate and the defense must seek the aid of the courts in Massachusetts to obtain compliance. In any event, the mere fact that the respondent is having difficulties in this regard does not negate the confidentiality provisions of 455.241.

In fact, Massachusetts does provide a mechanism whereby RYDER can obtain the medical records in a cost effective manner. Section 45 of the laws of Massachusetts provides that persons located in Massachusetts must sit for depositions in a cause pending in a Court in another state as long as that person is properly summoned. It would be a simple matter to note on

the subpoena that documents may be requested in lieu of the oral deposition as is the general practice within Florida.

Of course, there is an even more expedient way to obtain the medical records, and that is through Florida Rule of Civil Procedure 1.350 via a request for production directed to ROJAS. This procedure is far safer and effective than the signing of medical authorizations as it has built in safety mechanisms to prevent the discovery and distribution of privileged and confidential material. By PER CURIAM opinion in Johnston v. Donnelly, 581 So.2d 909,910 (Fla. 2nd DCA 1991) the Court stated;

> By using the discovery methods provided by the Rules of Civil Procedure, the parties may seek to compel compliance with a discovery request for disclosure or to prohibit any unnecessary disclosure of unrelated, confidential medical information. In simply ordering the execution of a blanket release of medical information, the trial court bypassed the procedural safeguards of the discovery rules.

The expediency of executing the medical releases into the hands of the RYDER is far outweighed by ROJAS statutory right of confidentiality under Florida Statute 455.241. See Franklin, id at 535.

III

The trial Court's order, requiring ROJAS to sign and deliver to RYDER medical releases constitutes a departure from the essential requirements of law. As has been discussed RYDER requested ROJAS to sign the medical releases without first trying to obtain the documents through the normal and already established channels. Neither the Florida Rules of Civil Procedure nor section 45 of the Laws of Massachusetts were utilized. The Fourth District faced with essentially the same facts in the present case stated;

> In the absence of a showing that the records could not

> be obtained by the use of discovery procedures already provided by the Florida Rules of Civil Procedure, the trial court's order constitutes a departure from the essential requirements of the law. Accordingly, we grant certiorari and quash the trial court's order. Reinhardt v. Northside Motors, Inc. 479 So.2d 240, 241 (Fla. 4th DCA 1985).

## IV

It would overburden Trial Court's limited resources and significantly increase the time to complete the discovery process to require an in camera inspection of all medical records obtained by releases.

The Third District Court of Appeal, in rendering it's decision in the instant case stated that the ROJAS and other plaintiffs faced with the same situation could ask the trial court for an in camera inspection of all documents received pursuant to medical releases.

Since, under this new scheme of discovery, the defendants will be able to review the documents ex parte, it is incumbent on all plaintiff's attorneys to request an in camera inspection in all instances. As in camera inspections are time consuming, its not likely that they can be reviewed during motion calendar. Rather, the inspections would probably have to be specially set by the judge. The documents themselves could be thousands of pages long and require literally hundreds of hours of the court's time. It is not an effective use of the trial court's time to perform these in camera inspections. Additionally, this new discovery tool coupled with the in camera inspection could add many months to the time it takes to complete discovery.

## V

Forcing ROJAS to execute and deliver medical releases to RYDER, allows RYDER to obtain potentially prejudicial and extraneous matters that would otherwise be privileged.

RYDER's ex parte contact with ROJAS's medical providers is bereft of any supervision or other safeguards. What is to stop RYDER or any defendant in a similar situation from hand delivering the release and asking the doctor for a brief interview? Or what if the defendant were to mail the release to the medical provider and then call the provider's office and ask to speak to the medical provider? Additionally, once ROJAS signs and delivers the release to RYDER how is ROJAS to know whether the documents received by RYDER are the same as the documents submitted to the court for the in camera inspection? Wouldn't it be a simple matter to leave out a page or two of potentially damaging material?

If discovery by "medical release" is adopted in Florida, then what is stop its use in **all** situations where defendants want ex parte access to plaintiffs medical records? What is to stop a defendant from obtaining medical releases to obtain records from in-state medical providers? A defendant could certainly argue that this procedure is certainly more efficient as it does not require the Court to issue a subpoena.

These questions, and their obvious answers, dramatically point out the absolute necessity for all litigants, including RYDER, to utilize the established Rules of Civil Procedure as they have proved to keep deception, fraud, mistake and inadvertence during the discovery phase of litigation to a minimum.

## CONCLUSION

Based on the law and argument presented in this brief, ROJAS respectfully asks this Court to quash the trial court's order requiring ROJAS to execute and deliver the medical releases to RYDER.

Submitted by,

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