IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

CARLOS E. ROJAS
Petitioner

v.

RYDER TRUCK RENTAL, INC., and
WILLIE J. McCRAY,
Respondents

RESPONDENTS' BRIEF ON THE MERITS

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Preface

COMES NOW RESPONDENTS RYDER TRUCK RENTAL, INC. and WILLIE J. McCRAY (hereafter collectively RYDER), and file this response to the Petitioner's (hereafter ROJAS) brief. All emphasis is added unless otherwise noted. Appendix is referred to as "A" with pagination.

I. STATEMENT OF THE CASE

RYDER restates the pertinent facts from the opinion below. The underlying case is an automobile negligence action that occurred in Dade County, Florida and ROJAS resides in Massachusetts. ROJAS claimed personal injuries from the subject automobile accident and also claimed an "aggravation of pre-existing condition." In response to discovery interrogatories directed by RYDER, ROJAS stated that Faulkner Hospital in Massachusetts and Harvard Community Health Plan in Massachusetts provided medical treatment and benefits to him before and after the subject accident. When the Faulkner Hospital and the Health Care Plan were subpoenaed by RYDER, they failed to respond to the subpoenas by sending records. RYDER moved to compel ROJAS to sign specific authorizations directing the Hospital and Health Care Plan to provide RYDER copies of their records. **At no time were there any objections by ROJAS to obtaining the records themselves.** The **procedure** of requiring ROJAS to execute an authorization in favor of the RYDER was his objection.

The trial court heard argument and entered an appropriate Order directing ROJAS to execute **specific** authorizations, specifically directing **only** the Faulkner Hospital and

Harvard Community Health Plan to send records to RYDER'S attorneys.[1] (A. 1-6). ROJAS petitioned the Third District Court of Appeals for Writ of Certiorari which was denied. (A. 1-6). ROJAS appeals this decision. **ROJAS is not arguing that RYDER should not get the records**, he is **only** objecting to the manner in which the RYDER is to receive them.

II. SUMMARY OF ARGUMENT

First, the order is well within the power and broad discretion of the trial court to conduct discovery. The order also accomplishes discovery of the medical records in the most expeditious and practical way possible without burdening judicial resources. The order allows fair litigation by ensuring **full disclosure** of the extent of ROJAS' pre-existing medical condition and does not place a burden on judicial resources. The order ensures that disclosure will be **complete** and this ensures that a fair trial will occur. Finally, the order does not violate any of the patient's rights to protect unrelated, privileged matter because ROJAS could, at any time, request without **any** order his own records and ask the court to review the records prior to RYDER'S receipt of same.

III. ARGUMENT

A. The Order was within the Power and Discretion of the Trial Court

The trial court was well within its authority to order ROJAS to sign **specific** medical record authorizations and therefore did not stray from the essential requirements of the law. A trial court has broad discretion in its treatment of requests for discovery and a court's ruling should not be disturbed unless an abuse of its wide discretion has been shown. American Southern Co. v. Tinter, Inc., 565 So.2d 891 (Fla. 3d DCA 1990); Rosaler v.

[1] This was not a "**blanket**" authorization. It was a **specific** medical records request form directed only to two specific entities. It did **not** provide for any ex parte communications whatsoever.

Rosaler, 442 So.2d 1018 (Fla. 3d DCA 1984) rev. denied 451 So.2d 850 (Fla. 1984). No such abuse has been shown by the Plaintiff and therefore the lower court's ruling should not be disturbed.

1. The records are not privileged and are discoverable

In its opinion, the Third District Court of Appeals notes that ROJAS and RYDER:

> [C]oncede that the medical records at issue here are **not privileged**, but **are discoverable** because they contain information relevant to the aggravation of a previously existing medical condition.... [2]

The records are relevant and discoverable and RYDER was unsuccessful in subpoenaing them directly from the providers. ROJAS is unsatisfied with the manner in which RYDER receives them. This is simply an argument of form over substance.

2. Florida Statute §455.241 is not applicable

Florida Statute § 455.241(1) states:

> Any health care practitioner **licensed** pursuant to chapter 457,...who makes a physical or mental examination of, or administers treatment to, any person shall, upon request of such person or his legal representative, furnish, in a timely manner, without delays for legal review, copies of all reports and records relating to such examination or treatment, including X rays and insurance information....

Paragraph (2) states:

> [S]uch 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....**[3] Such records may be furnished in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or his legal representative by the party seeking such records.

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[2] Rojas v. Ryder Truck Rental, Inc., 625 So.2d 106, 107 (Fla. 3d DCA 1993).

[3] The very statute that ROJAS seeks protection from contemplates the procedure used in this case.

This statute, which ROJAS refers to in his brief, is not applicable to hospitals and healthcare plans not licensed pursuant to Florida statutes. It is only applicable to healthcare practitioners licensed pursuant to Chapter 457 and many other Chapters of the Florida Statutes. Such licensed Florida practitioners must furnish a patient's medical records to the patient or his legal representatives, but are not required to release records to anyone else without a subpoena. The only exceptions to the confidentiality provision of the statute are found in 455.241(2) which states that such records of the practitioners may not be furnished to anyone or discussed with anyone except upon **written authorization** of the patient, or in a civil action upon the issuance of a subpoena with proper notice to the patient. [4] The Massachusetts facilities in question, the Faulkner Hospital and the Harvard Health Care plan are not licensed under any Florida Statutes and therefore any alleged statutory confidentiality privilege is non-existent.

3. The Arguments made by ROJAS are inapplicable

There is no statutory doctor/patient privilege at common law. Coralluzzo v. Fass, 450 So.2d 858 (Fla. 1984). It is also axiomatic that statutes in derogation of common law, such as 455.241, must be strictly construed. Therefore, since the out of state medical facilities are not licensed under Florida Statutes, their records enjoy no privilege under the Statutes.

The two cases cited by ROJAS, Johnston v. Donnelly, 581 So.2d 909 (Fla. 2d DCA 1991) and Franklin v. Nationwide Mut. Fire Ins. Co., 566 So.2d 529 (Fla. 1st DCA 1990) provide him no relief from this order.

In Franklin, there was **no objection** by the injured party to sign any authorization to

[4] There are other exceptions to the statute but they are not relevant to this case.

obtain the records from the out of state health care provider. The injured Plaintiff was complaining about the condition in the authorization which stated that the defendant could "discuss these records and my medical condition with him (the health care provider) and give him opinions concerning any of these matters." [5] As Judge Zehmer pointed out:

> "The focus of their objection is the action of the Court compelling them to specifically authorize the ex-parte interviews because they contend it constitutes a departure from the essential requirements of law in direct violation of the provisions of 455.241, Florida Statutes (1989); specifically prohibiting the means of discovery so ordered. We agree."

Accordingly, the Franklin case stands for the proposition that the Court **cannot order** an authorization for ex parte communications between defense counsel and a Plaintiff's Florida licensed treating physicians. [6]

In the Johnston case, the Court's focus was upon the signing of a " **blanket** release of medical information". The First District stated:

> "In simply ordering the execution of a **blanket release** of medical information, the Trial Court bypassed the procedural safeguards of the discovery rules. We find that the order compelling the release of **all medical records from all treating physicians** constitutes a departure from the essential requirements of law."

There is no conflict between the instant case and the Johnston case because Johnston was asked to sign a **blanket release** and in the instant case, the Court ordered **specific releases** as to a **specific** out of state healthcare provider and an out of state healthcare plan. There is a big difference between the signing of a " blanket release" in Johnston and signing **specific** authorizations for **a specific hospital or a specific doctor** which have been **identified**

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[5] No such language was requested by RYDER in the instant authorization and none was ordered.

[6] It should be noted that the applicability of Florida Statute 455.241 to out of state healthcare providers was not brought up in the Franklin case.

by **ROJAS** as prior treating medical providers.

4. There has been no judicial notice of the Laws of Massachusetts

In his brief, ROJAS brings up the Laws of Massachusetts **for the first time** in this case and therefore he has waived his right to do so. Jones v. Neibergall, 47 So.2d 605 (Fla. 1950).[7] He claims that Section 45 of the Laws of Massachusetts should rule this case. ROJAS fails to attach or provide copies of this law, or cite to language in it and has not even asked this Court to take judicial notice of this undisclosed law. [8] This portion of his brief is irrelevant and inapplicable and should be stricken.

B. The Order accomplishes expeditious and practical discovery

In the instant case, discovery was sought from an out of state healthcare provider. This provider refused to honor a subpoena and requested that RYDER obtain a medical authorization. The healthcare plan providing health care benefits at the time of the subject accident was also located outside of Florida and also refused to honor a valid subpoena, requiring specific authorization. An appropriate motion to compel authorization for records was filed and argument was heard. There was **no objection** by ROJAS with respect to the relevancy or discoverability of the materials sought and the **only objection** voiced was the manner and **procedure** of requiring ROJAS to sign the written authorization allowing RYDER to directly obtain the records requested from the original source.

The fastest, most practical and least burdensome way for RYDER to receive these

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[7] In Neibergall, the Supreme Court held that issues not ruled upon by the trial court shall not be adjudicated by the Supreme Court.

[8] Florida Statutes §§ 90.201(2) and 90.202 require Florida Courts to take judicial notice of the laws of other states only if a party requests this of the Court and also gives each adverse party timely written notice of the request and also furnishes the Court with sufficient information to enable it to take judicial notice of the matter. ROJAS has failed to meet any of the requirements of these statutes.

relevant materials that are necessary to prepare their defense is to get the authorization from ROJAS. This method imposes no burden upon ROJAS other than the signing of his name to the two **specific** medical release forms.

The method of production of the medical records allowed by the trial court is a more desirable process than a request for production under rule 1.350 of the Florida Rules of Civil Procedure, because in that scenario, as pointed out by the Third District, there is a potential for abuse. (A.5). The method of sending the records directly to RYDER also allows the records to be sent in a more expeditious, readable and uncensored fashion.

ROJAS also cites to Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla. 4th DCA 1985). The Rojas and Reinhardt opinions are not in conflict for one very important reason. In Reinhardt, the Defendant made no attempt to get the medical records at issue by any means other than requesting that the Plaintiff sign a medical authorization. The Reinhardt court reasoned that the order was improper because the Defendants had made **no attempt** to get the records in any other manner other than a request to the plaintiff to sign an authorization. In the instant case, RYDER attempted to subpoena the medical records **without success.** It was proper for the trial court to order ROJAS to sign the specific limited medical record authorizations because RYDER has a valid need to receive the **complete** medical records of ROJAS and were unable to procure them through the usual method of subpoena.

Furthermore, the opinion of the Third District Court of Appeals in this case is more well thought out, more reasonable and more practical than that of the Reinhardt court. The method proscribed by the appellate court in this case is also more productive, less expensive, and more thorough than the method ordered in Reinhardt.

C. The Order Places the smallest possible burden on Judicial Resources

The only possible burden upon the judicial resources is the possibility of an in camera inspection of the records prior to the receipt by RYDER. The appellate court, in their opinion on this issue stated that for ROJAS to request an in camera inspection of the records prior to RYDER'S receipt of them is a common procedure and within the power of the trial court. See, e.g., United Service. Auto Assn. v. Crews, 614 So.2d 1213 (Fla. 4th DCA 1993); Wood v. Tallahassee Memorial Regional Medical Ctr., Inc., 593 So.2d 1140 (Fla. 1st DCA 1992), rev. denied, 599 So.2d 1281 (Fla. 1992); Austin v. Barnett Bank of S. Fla., N.A., 472 So.2d 830 (Fla. 4th DCA 1985).

D. The Order Ensures Fair Litigation and Full Disclosure

It is undisputed by ROJAS that the medical records are relevant to this case, but it is also necessary that RYDER receive any and all medical records that relate, even remotely, to ROJAS' pre-existing medical conditions. This order, requiring that ROJAS' medical records be released to RYDER, ensures that full disclosure will occur so that RYDER can fully and fairly litigate their liability. If ROJAS had received medical treatment from a licensed medical practitioner in the state of Florida, that practitioner would be obligated to reply to RYDER'S subpoena. Because the Massachusetts providers refused to comply with the subpoena, it is only fair that RYDER be allowed to receive the records in a expeditious fashion.

This process is far more desirable than a request for production, because in a request for production, the producing party determines which documents are discoverable and which ones are not. Allowing the court, in camera to act as the arbiter is much more conducive to efficient and complete discovery.

E. The Order Does not violate the Right to protect unrelated, undiscoverable matters.

If there are interposed objections by ROJAS as to the relevancy, materiality or confidentiality of such records prior to signing the medical authorization, there is an easy remedy by having an in camera inspection. [9]

The Trial Court's order gives ROJAS this option of allowing the court to conduct an in camera review of the records prior to the review by RYDER. This is the exact procedure recently prescribed by the court in Trend South, Inc. v. Antomarchy, 623 So.2d 815 (Fla. 3d DCA 1993). In that case, the appellate court held that a trial court could order an expert witness, **a nonparty, to provide authorization to obtain 1099 forms** directly from the Internal Revenue Service. The process of getting the witness to merely sign the authorization and then have the documents reviewed by the trial court was less burdensome to the nonmoving party and the expert witness than another method of discovery. In the instant case, ROJAS has failed to demonstrate how the requirement that he a sign form is so unduly burdensome as to be oppressive, and therefore the trial court order was proper. see Young v. Santos, 611 So.2d 586, 587 (Fla. 4th DCA 1983).

The authorizations ordered by the trial court **do not** allow any ex parte communications between the Massachusetts medical providers and RYDER, nor did RYDER request any such communications. RYDER only wants to be sure that they have received a complete set of records that are authentic and verified by the providers. A set of records sent from ROJAS cannot be verified as being complete. RYDER requires such complete discovery in order to determine if they need to depose any of the providers in Massachusetts and to ensure that the records received are all of the records with regards

[9] There is no such objection in this case.

to ROJAS' pre-existing medical condition, a very relevant and important issue in this case.

The authorizations requested and ordered by the lower court do not provide for a blanket authorization. ROJAS, himself, agrees that such medical records are relevant and discoverable, he just does not agree with RYDER'S method of receiving them.

IV. CONCLUSION

For the above-cited reasons, the trial court's order requiring that ROJAS sign medical releases to obtain records pertinent to the defending of this case should be affirmed. The trial court and the appellate court did not depart from the essential requirements of the law and therefore their rulings were correct and should remain undisturbed. This Court should affirm the Third District Court of Appeals' decision in the instant case and overrule any other decisions in conflict.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed to Andy Treusch, Esq. Counsel for Petitioners, 11900 Biscayne Blvd., Suite 400, Miami, FL 33181, Jeffrey Fox, Esq., Attorney for Petitioners, 11900 Biscayne Blvd. #808, North Miami, FL 33181, Scott Mager, Esq., Attorney for Amicus Curie, 7th Floor Barnett Bank Tower, One East Broward Blvd., Ft. Lauderdale, FL 33301. this 30th day of December, 1993.

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1993

CARLOS E. ROJAS and ANA ROJAS,	**	
Petitioners,	**	
vs.	**	CASE NO. 92-2234
RYDER TRUCK RENTAL, INC. and WILLIE J. MCCRAY,	**	
Respondents.	**	

Opinion filed October 12, 1993.

On Petition for Writ of Certiorari to the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Andy Treusch, for petitioners.

Gaebe, Murphy, Mullen & Antonelli and Michael J. Murphy, for respondents.

Before NESBITT, LEVY, and GODERICH, JJ.

LEVY, Judge.

By Petition for Writ of Certiorari, personal injury plaintiffs seek review of a trial court discovery order compelling the release of certain medical records directly to the defendants.

We deny the petition based upon our finding that the trial court was well within its power to enter the order in question, and therefore did not stray from the essential requirements of the law.

The Petitioners, Carlos and Ana Rojas, are residents of Massachusetts who were injured in an automobile accident which occurred in Florida. The Respondents are the defendants in the Petitioners' personal injury action filed in Dade Circuit Court. In their complaint, the Petitioners sought damages for injuries arising directly out of the accident, and damages for the aggravation of previously existing medical conditions. During discovery, the Respondents sought the Petitioners' medical records from a Massachusetts hospital and a Massachusetts health care plan, both of which had treated the Petitioners before and after the accident. These institutions failed to respond to the Respondents' subpoenas requesting the records. The Respondents then moved the trial court to compel the Petitioners to sign written authorizations, directed at the two health care institutions, permitting release of the medical records directly to the Respondents. The trial court granted the motion, and ordered the Petitioners to execute authorizations for the release of their medical records.

As a preliminary matter, we note that both the Petitioners and Respondents concede that the medical records at issue here are not privileged, but are discoverable because they contain information relevant to the aggravation of a previously existing medical condition as alleged in the Petitioners' complaint. The

Petitioners object, however, to releasing their entire medical records to the Respondents, claiming that portions of the records are irrelevant to the underlying lawsuit, and therefore not discoverable. The Petitioners contend that the trial court erred in granting the Respondents' motion, and that the Respondents' only recourse, once their subpoenas were unsuccessful, was to file a request for production under Florida Rule of Civil Procedure 1.350. We are now called upon to evaluate the discovery procedure employed below.

The order entered here was well within the power and discretion of the trial court. A trial court possesses broad discretion in overseeing discovery, and protecting the parties that come before it. American Southern Co. v. Tinter, Inc., 565 So. 2d 891 (Fla. 3d DCA 1990); Rosaler v. Rosaler, 442 So. 2d 1018 (Fla. 3d DCA 1983), rev. denied, 451 So. 2d 850 (Fla. 1984). The order entered here accomplishes the discovery of the sought after medical records in the most expeditious and practical way possible, by having the records released directly to the Respondents. It burdens judicial resources the least, and does the most to ensure full disclosure so that defendants in personal injury litigation can fully and fairly litigate their liability. In fact, orders such as this are regularly entered by trial courts, and acquiesced to by plaintiffs.

Furthermore, ordering the Petitioners to sign written authorizations for the release of medical records does not necessitate a violation of their right to protect unrelated, undiscoverable matters. A party, such as the Petitioners, who

objects to the disclosure of parts of a medical record is free to request that the entire medical record be submitted to the trial court to review in camera. The trial court may then excise or redact the non-discoverable material, if any, prior to releasing the records to the party seeking them. The use of such an in camera procedure to facilitate discovery is common, and within the power of the trial court. See, e.g., United Servs. Auto. Ass'n v. Crews, 614 So. 2d 1213 (Fla. 4th DCA 1993); Wood v. Tallahassee Memorial Regional Medical Ctr., Inc., 593 So. 2d 1140 (Fla. 1st DCA), rev. denied, 599 So. 2d 1281 (Fla. 1992); Austin v. Barnett Bank of S. Fla., N.A., 472 So. 2d 830 (Fla. 4th DCA 1985). See also Walton v. Dugger, 18 Fla. L. Weekly S309 (Fla. May 27, 1993)(advocating use of an in camera inspection in the context of a Chapter 119 public records request); Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993)(Warner, J., concurring specially) (emphasizing desirability of expeditious discovery including use of in camera inspections); Ventimiglia ex rel. Ventimiglia v. Moffitt, 502 So. 2d 14 (Fla. 4th DCA 1986)(approving discovery of patient medical records after deletion of names to protect confidentiality).

Although it is clear that, since the various forms of discovery available to litigants are not exclusive, the determination of which discovery method to pursue remains the choice of the requesting party, the procedure invoked here (i.e. executing written authorizations, followed by an in camera review, if requested) is a far more desirable process than a request for production under Florida Rule of Civil Procedure 1.350. In a

simple request for production, the producing-party decides which parts of their medical records to produce, and which to retain as non-discoverable, thereby acting as the arbiter of the requesting-party's discovery request. Although there is no allegation of bad faith in this case, the potential for abuse by unscrupulous litigants in other cases by withholding records is obvious. However, by conducting an in camera review of all the medical records, the trial court, and not the producing-party, would make the determination of what is discoverable. This is much more conducive to the conduct of ethical and efficient litigation.[1]

Consequently, the petition for certiorari is denied without prejudice to the Petitioners to object to the disclosure of the entire contents of the records, and to have them submitted to the trial court for an in camera inspection.

Petition denied.

GODERICH, J., concurs.

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[1] We acknowledge that a contrary position has been taken by the Second and Fourth Districts and, therefore, certify conflict with Johnston v. Donnelly, 581 So. 2d 909 (Fla. 2d DCA 1991) and Reinhardt v. Northside Motors, Inc., 479 So. 2d 240 (Fla. 4th DCA 1985).

NESBITT, J. (dissenting and concurring):

When production of documents by an adverse party is sought, Florida Rule of Civil Procedure 1.350, by its plain terms, provides the established remedy. In the indistinguishable decisions of Reinhardt v. Northside Motors, Inc., 479 So. 2d 240 (Fla. 4th DCA 1985) and Johnston v. Donnelly, 581 So. 2d 909 (Fla. 2d DCA 1991), those courts of appeal so held. My real concern is, however, that the failure to apply the rule in the present case may well cause the plaintiff to lose or compromise her substantive rights to the confidentiality of her medical records. § 455.241(2), Fla. Stat. (1991). Such records commonly contain a patient's medical history and quickly attract extraneous or collateral matters that have no relevancy to a claimant's cause of action. As a rule, patients never examine their records and consequently have little or no knowledge as to what they actually contain. Although it is the patient who controls access to such records (evidenced here by the movant's request for written authorization), she very likely does not have actual access to them. Consequently, until she does, she cannot legitimately object to prejudicial and extraneous matters. If she cannot procure her medical records timely, they may be dumped carte blanche in the movant's lap before she can even object. Evenhandedness and common sense dictate that production of documents be allowed only by the established remedy.

I agree in certification of conflict.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA. IN AND FOR DADE COUNTY

GENERAL JURISDICTION DIVISION

CASE NO: 92-02773 CA 10

CARLOS E. ROJAS and
ANA ROJAS,

Plaintiffs,

vs.

RYDER TRUCK RENTAL, INC.
and WILLIE J. MCCRAY,

Defendants.
_____/

ORDER ON MOTION TO COMPEL PLAINTIFFS' AUTHORIZATIONS

Sept 3, 19

THIS CAUSE having come on to be heard by the Court on Defendant, RYDER TRUCK RENTAL, INC.'S, Motions to Compel Plaintiffs' Authorizations to Faulkner Hospital and Harvard Community Health Plan, and the Court having heard argument of counsel, and being otherwise fully advised in the Premises, it is hereby,

ORDERED AND ADJUDGED as follows:

1. That Defendant's Motions be and the same are hereby granted.

2. That the Plaintiff shall have ten (10) days from the signing of this Order to furnish to the Defendant a written authorization allowing this Defendant to obtain the Plaintiff's medical records from Faulkner Hospital and Harvard Community Health Plan in the forms attached as Exhibits A & B to this Order.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 18th day of September, 1992.

CIRCUIT COURT JUDGE
JUDGE MARGARITA ESQUIROZ

Copies furnished to:

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