IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,413

RUDOLPH ACOSTA, M.D.,

Petitioner,

vs.

NANCY RICHTER and GARY RICHTER,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW OF AN ORDER OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF *AMICUS CURIAE* FLORIDA MEDICAL ASSOCIATION

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INTRODUCTION

The issue in this case is whether, and to what extent, Section 455.241(2), Florida Statutes (1993), permits *ex parte* contacts between a physican sued for malpractice and the plaintiff's current physician. The Florida Medical Association ("FMA") submits this brief as *amicus curiae* supporting the Petitioner, and argues that the statute permits such contacts without restriction.

SUMMARY OF ARGUMENT

The plain language of section 455.241(2), Florida Statutes, permits communications between a physician being sued for medical malpractice and the patient's current treating physician. The statute expressly creates an exception in medical negligence 2cases to the rule prohibiting such contacts.

Before the statute's amendment in 1988, the common law, expressed in cases such as *Coralluzzo v. Fass*, 450 So. 2d 858 (Fla. 1984), permitted *ex parte* interviews between physicians sued for medical negligence and their former patient's physician. The 1988 amendment to section 455.241(2) is consistent with this common law: it created an exception in medical negligence cases from the new restrictions on *ex parte* contacts with treating physicians.

The Court of Appeal in this case misread the statute and ignored the express exception for medical negligence cases. *Richter v. Bagala*, 19 Fla. L. Weekly D1817 (Fla. 2d DCA Aug. 24, 1994). The Court of Appeal relied on another case that also misread the statute. *See Kirkland v. Middleton*, 639 So. 2d 1002

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(Fla. 5th DCA), *rev. dismissed*, 645 So. 2d 453 (Fla. 1994). Citing that case, the Court of Appeal added language to the statute without any explanation or justification. Using this added language, the Court of Appeal held that the exception in medical negligence cases applies only to the defendant physician's records and statements, not to the treating physician's. The statute's exception, however, contains no distinction between a defendant physician and a treating physician. Like *Kirkland*, the Court of Appeal also relied on *Franklin v. Nationwide Mut. Ins. Co.*, 566 So. 2d 529 (Fla. 1st DCA), *rev. dismissed,* 574 So. 2d 142 (Fla. 1990). *Franklin*, however, did not involve medical negligence, and therefore the statutory exception did not apply.

This Court should apply the plain language of the statute, and hold that in medical negligence cases the rule of *Coralluzzo*, allowing *ex parte* contacts between the defendant physician and the plaintiff's current treating physician, remains valid.

ARGUMENT

THE STATUTE PERMITS *EX PARTE* COMMUNICATIONS BETWEEN A PHYSICIAN BEING SUED FOR MEDICAL NEGLIGENCE AND THE PLAINTIFF'S TREATING PHYSICIAN

As explained below, the plain language of the statute permits not only the one-way interview condoned in *Johnson v. Mt. Sinai Medical Center of Greater Miami, Inc.*, 615 So. 2d 257 (Fla. 3d DCA 1993), but *any* informal communication between a medical malpractice defendant (or his representative) and the plaintiff's current treating physician. The statute expressly excepts medical

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negligence cases from the rule prohibiting such contact.

A. The common law permitted *ex parte* contacts between a physician being sued for medical malpractice and the plaintiff's treating physician

Traditionally, no physician-patient privilege existed in Florida precluding contact between a physician being sued for medical malpractice and the plaintiff's current treating physician. *Morrison v. Malmquist*, 62 So. 2d 415 (Fla. 1953); *Frantz v. Golebiewski*, 407 So. 2d 283, 284 n.2 (Fla. 3d DCA 1981); *Fidelity and Cas. Co. of New York v. Lopez*, 375 So. 2d 59 (Fla. 4th DCA 1979). A treating physician was considered an ordinary fact witness, not an expert to which the restrictions of Rule 1.280(b)(3), Florida Rules of Civil Procedure, would apply. *See Frantz*, 407 So. 2d at 285-86 (citing numerous out-of-state cases).

Thus, in *Coralluzzo v. Fass*, 450 So. 2d 858 (Fla. 1984), this Court specifically approved *ex parte* contacts between physicians who were being sued for medical malpractice and the plaintiff's current treating physician. This Court held that no statutory or common law privilege prohibited such meetings. *Id.* at 859. *See also Avis Rent-A-Car System, Inc. v. Smith*, 548 So. 2d 1193, 1194 (Fla. 4th DCA 1989) (access to treating physicians not restricted by the expert witness discovery rule, citing *Coralluzzo*).

B. The amended statute does not change the common law

Against this background, in 1988 the Florida legislature amended section 455.241(2), which originally dealt only with

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medical records. The amendment added several sentences governing the discovery of information from treating physicians. *See* Ch. 88-208, § 2, Laws of Fla. The legislature, of course, is presumed to know the existing law at the time it enacts a statute. *Hollar v. Int'l Bankers Ins. Co.*, 572 So. 2d 937, 939 (Fla. 3d DCA 1990), *rev. dismissed*, 582 So. 2d 624 (Fla. 1991). Thus, the legislature was aware of *Coralluzzo* and *Frantz* when it enacted the amendment.

In relevant part, the amendment provides that "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." Another addition several lines later states:

> *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.

(emphasis added).

The statute is clear. The prohibition on informal communications with treating physicians does *not* apply to medical negligence actions. The amendment does not change the common law, as expressed in *Coralluzzo*, *Frantz*, and other cases, specifically

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allowing *ex parte* interviews between defendant physicians and treating physicians in medical malpractice cases.

C. The Court of Appeal's interpretation ignores the exception for medical negligence cases

Few cases have interpreted the amendment to the statute. Of those that have, some have overlooked the distinction in the statute between medical negligence cases and other cases.

The first case to consider the amended statute was *Franklin v. Nationwide Mut. Ins. Co.*, 566 So. 2d 529 (Fla. 1st DCA), *rev. dismissed*, 574 So. 2d 142 (Fla. 1990). In *Franklin*, no allegation of medical negligence was involved. The plaintiffs sued their insurer for damages arising out of a car accident. Therefore, the statute's exception did not apply. The First District recognized that "[t]he statutory language is abundantly clear on its face." *Id.* at 532. The court also recognized that the statute carved an exception for medical negligence cases:

> In other words, in all cases *other than those where the health care provider is a defendant*, unless the plaintiff voluntarily provides a written authorization to the defendant, the defendant's discovery of the privileged matter can be compelled only through the subpeona power of the court with proper notice in accordance with the discovery provisions of the rules of civil procedure.

566 So. 2d at 532 (emphasis added). The court invalidated an order providing for *ex parte* discussions between an *insurer's* counsel and plaintiff's treating physician. The court's holding was perfectly

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consistent with the statute because no medical malpractice was involved.

The problem began last year, when the Fifth District cited *Franklin* without recognizing the distinctions it made or the fact that *Franklin* did not involve medical malpractice. In *Kirkland v. Middleton*, 639 So. 2d 1002 (Fla. 5th DCA), *rev. dismissed*, 645 So. 2d 453 (Fla. 1994), the court held that the statute allows disclosure of confidential patient information only "when a health care provider is or reasonably expects to be named as a defendant in a medical malpractice action *(for that health care provider's records and information)*." *Id.* at 1004 (emphasis added). The parenthetical appears neither in *Franklin* nor in the statute. The court simply added it. It never addressed the conflict between its added language and the statute's plain meaning.

Two months later, the Court of Appeal decided this case. *Richter v. Bagala*, 19 Fla. L. Weekly D1817 (Fla. 2d DCA Aug. 24, 1994). The Court of Appeal, like *Kirkland*, quoted the statute in its entirety, including the exception for medical negligence cases. Then, however, citing *Kirkland* and *Franklin*, the court repeated *Kirkland*'s unsupported statement that the statute allows disclosure of patient information only when "a health care provider is or reasonably expects to be named as a defendant in a medical malpractice action *(for that health care providers' records and information)*." *Id.* at 1817 (emphasis added). Again, the Court of Appeal neither justified nor even addressed the striking conflict between

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the statute's plain language and the court's amendment.

The Court of Appeal essentially held that the exception in the statute for medical negligence cases applies only to the defendant physician's statements and records, not the treating physician's. Of course, nothing in the statute says so. The statute creates a blanket exception in medical negligence cases, consistent with *Coralluzzo*. The Court of Appeal's interpretation violates several rules of statutory construction: (1) it ignores the statute's clear and unambiguous language; (2) it inappropriately adds language to the statute; and (3) it fails to harmonize the statute with the common law. These are discussed below.

1) The Court of Appeal ignores the statute's clear and unambiguous language

Although it has become a cliché of statutory construction, it bears repeating that when a statute is clear and unambiguous, it must be given its plain and ordinary meaning. *See, e.g., In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993). "If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." *Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993).

As *Franklin* recognized, the language of the statute is "abundantly clear on its face." 566 So. 2d at 532. The statute specifically creates an exception in medical negligence cases from the prohibitions on *ex parte* contacts with treating physicians.

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2) The Court of Appeal added words to the statute

Courts should not add words to a statute not placed by the legislature, especially where uncertainty exists as to the legislature's intent. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1137 (Fla. 1990). The Court of Appeal's engrafted language constitutes an unsupportable revision of the statute. The Court of Appeal never addressed the discrepancy between the statute's plain language and its revision; nor did it offer any explanation or justification for it. In fact, there is none. As this Court has said,

> It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. . . . We trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity.

State v. Jett, 626 So. 2d 691 (Fla. 1993). The legislature could have easily included the parenthetical language the Court of Appeal added; but it did not do so. Neither should this Court.

3) The Court of Appeal failed to harmonize the statute with the existing common law

Another rule of statutory construction is that statutes should be construed to reflect the common law unless the legislature clearly indicates otherwise. *Deehl v. Knox*, 414 So. 2d 1089, 1092 (Fla. 3d DCA 1982).

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> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.

Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (citations omitted).

The 1988 amendments to the statute are perfectly consistent with the existing common law, and specifically *Coralluzzo*. Just as that case held that physicians being sued for medical malpractice have every right to speak informally to the plaintiff's treating physician, the amendments create an exception to the prohibitions on informal communications precisely in medical negligence cases. The Court of Appeal should have construed the amendments as consistent with the common law. *See Graham v. Edwards*, 472 So. 2d 803 (Fla. 3d DCA 1985) (statutes in derogation of the common law must be construed very strictly), *review denied*, 482 So. 2d 348 (Fla. 1986).

D. This Court should apply the plain language of the statute and hold that it does not apply to cases involving medical negligence

Consistent with settled rules of statutory construction, this Court should apply the statute just as it reads. It should hold that the statute creates an exception in medical negligence cases to its restrictions on *ex parte* contacts, and clearly permits such contacts between a physician being sued for medical negligence

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and the plaintiff's current treating physician. Such a holding would be consistent with the statute's plain language; with the common law as expressed in *Coralluzzo*; and with *Franklin*, 566 So. 2d at 532, which recognized that the amended statute applies in cases other than those where a health care provider is a defendant.

CONCLUSION

For the reasons stated, this Court should hold that Section 455.241(2), Florida Statutes (1993) does not prohibit physicians who are defendants in medical malpractice actions from conducting *ex parte* discussions with the plaintiff's treating physicians, affirm the circuit court's order, and quash the writ of certiorari.

Respectfully submitted,

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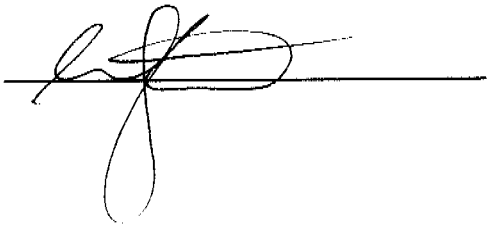

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