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

RESPONSE BRIEF OF THE RESPONDENTS NANCY AND GARY RICHTER

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INTRODUCTION

The issue in this case is whether Section 455.241(2), Fla. Stat. (1993), prohibits any form of ex parte contact between treating physicians and attorneys for the Defendant, including actions for medical malpractice. Amicus Briefs have been filed in this case by the Florida Medical Association (hereinafter "FMA") and the Academy of Florida Trial Lawyers (hereinafter "AFTL"). This case arises from a medical negligence action and the decision on interlocutory appeal of the Second District Court of Appeals in Richter v. Acosta, 19 FLW D 1817 (Fla. 2d DCA August 24, 1994).

I.

STATEMENT OF THE CASE AND FACTS

The relevant facts are stated in the Opinion of the Second District Court of Appeal in Richter v. Acosta, 19 FLW D 1817 (Fla. 2nd DCA August 24, 1994).

II.

ISSUES PRESENTED

A. WHETHER THE TRIAL COURT'S ORDER PERMITTING EX PARTE CONTACT BETWEEN DEFENSE COUNSEL AND NON-PARTY TREATING PHYSICIANS VIOLATED SECTION 455.241(2) FLA. STAT. (1993)

B. IF THE EX PARTE CONTACT VIOLATES SECTION 455.241(2), FLA. STAT. (1993) IS THE STATUTE UNCONSTITUTIONAL?

C. JOHNSON v. MT. SINAI IS THE MINORITY, AND SHOULD BE DISREGARDED. FURTHERMORE, JOHNSON SHOULD BE OVERRULED AS VIOLATIVE OF 455.241(2).

III.

JURISDICTION

This Court accepted jurisdiction over this matter as a result of inter-district conflict between the underlying case and Johnson v. Mt. Sinai Medical Center, 615 So. 2d 257 (Fla. 3d DCA 1993). Johnson is the only case to allow the type of ex parte contact sought by the Petitioners below (the Petitioners have abandoned their trial-level position in this Court, See, infra, Note 1). All other districts to address the issue have denied such contact. The Third District Court of Appeals is in the process of revisiting Johnson in three (3) cases consolidated under Giron v. Noy, Case No.'s 94-1675, 94-1493, and 94-1428. If the Third District Court overrules Johnson, then, most respectfully, the conflict which led to this Court's review would be removed.

IV.

SUMMARY OF ARGUMENT

Florida Statute Section 455.241(2)(1993) is constitutional and has already been held so by this Court. It exists to protect the substantive right of the physician-patient privilege, one of the most critical privileges existing in Florida jurisprudence. Indeed, in the absence of such a privilege, it is chilling to think of the impact upon the candid relationship between a physician and a patient.

The Petitioner's argument that the privilege, in its totality, is waived by the initiation of a lawsuit or the filing of a Notice of Intent in a medical negligence action is misplaced. The privilege exists in spite of the filing of a lawsuit or the serving of a Notice of Intent. In fact, Section 455.241(2) does nothing more than further

reinforce the substantive nature of the privilege by reaffirming the fact that discovery of privileged information is only allowed through limited discovery methods.[1] Indeed, the case which led to this inter-district conflict, Johnson, supra, was a medical negligence case, in which the Court clearly recognized the statutory prohibition against ex parte contact.

The clear language of the statute, its history, and a simple reading of same clearly demonstrates that ACOSTA's position is totally incorrect. The statute does not create a privilege in all cases except medical negligence cases. As this Court and every district court have held, the statute forbids ex parte interviews in all cases, including medical negligence cases, unless the physician is actually a defendant or a target of a medical negligence case.

In addition, the statute violates neither the Court's rule-making authority nor the physicians' First Amendment rights. Section 455.241(2) embraces a clear substantive objective by regulating the manner in which the Defendant interviews a treating physician. It forbids ex parte contact because that is likely to result in the disclosure of irrelevant, privileged information which would not be disclosed in the type of discovery proceeding in which Plaintiff's counsel is present to protect the Plaintiff's rights.

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[1] It must be noted that, in the instant case, ACOSTA has raised three (3) issues on which there is no inter-district conflict. As a result, and since ACOSTA has chosen not to defend Johnson, his arguments are not properly before this Court. See, Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981); Gifford v. Galayie Homes of Tampa, Inc., 204 So. 2d (Fla 1967).

The statute is substantive because it regulates the content of the information obtained in the interview. Furthermore, it does not violate the First Amendment because it regulates the time, place, and manner through which information can be obtained. It does this in pursuit of a legitimate governmental objective. Simply put, the statute is constitutional.

The statute is not subject to the narrow construction which ACOSTA advances. The plain wording of the statute demonstrates the inappropriateness of ACOSTA's untenable arguments.

The decision of the Second District Court of Appeals should be approved.

ARGUMENT

A. WHETHER THE TRIAL COURT'S ORDER, PERMITTING EX PARTE CONTACT BETWEEN DEFENSE COUNSEL AND NON-PARTY TREATING PHYSICIANS, VIOLATED FLORIDA STATUTES SECTION 455.241(2), FLA. STAT. (1993).

The answer to this question is that the underlying trial court order clearly violated the statute. As this Court held in Rojas v. Ryder Truck Rental, 641 So. 2d 855, 858 (Fla. 1994), approving Franklin v. Nationwide Mutual Fire Insurance Company, 566 So. 2d 529 (Fla. 1st DCA 1989), rev. dismissed, 574 So. 2d 142 (Fla. 1990), in the absence of a written authorization from the patient, or an appropriate discovery vehicle, the statute allows ex parte contact with the Plaintiff's treating physicians only "in a medical negligence action, when a health care provider is or reasonably expects to be named as a Defendant...." (emphasis added).

As the First District Court in Franklin stated:

> 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 subpoena power of the Court with proper notice and in accordance with the discovery provisions of the Rules of Civil Procedure

ID. at 534. Therefore, it is absolutely clear that unless the doctor is a Defendant or a target of the medical negligence action, the substantive privilege provided by Section 455.241(2), Fla. Stat. (1993), is not waived.

ACOSTA's proposed interpretation of the statute would achieve a baseless result. See, e.g., New v. Miami Herald Publishing Company, 462 So. 2d 821 (Fla. 1985); City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950). The statute does not eliminate the privilege for medical negligence cases. On the contrary, the privilege remains in those cases with the exception of the Defendant doctor.[2]

Furthermore, ACOSTA's proposed construction of the statute is misplaced. By arguing that the statute should have said "the" health care provider is a target, ACOSTA argues that the article "the" refers to the provider in question while use of the article "a" would refer to all health care providers. However, ACOSTA fails to mention that the Legislature used the same language ("a") describing the privilege to extend to all cases except those in which the physician, himself, is a Defendant or a target. Then, in those cases, the contact is limited to those physicians and their lawyers, only.

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[2] RICHTER hereby adopts that portion of the amicus brief of the Academy of Florida Trial Lawyers which discuses the fact that there is no distinction between the necessity of the privilege in a products liability case (or any other personal injury action) and a medical negligence action.

In addition, Chapter 766 of the Florida Statutes is not in conflict with the subject. Those statutes, in fact, prohibit certain types of access. The Court's attention is directed to Section 766.101(5), Fla. Stat., which prohibits access to any information disclosed during the Medical Review Committee's investigation. See, e.g., Cruger v. Love, 599 So. 2d 111 (Fla. 1992); Tarpon Springs General Hospital v. Hudak, 556 So. 2d 831 (Fla. 2d DCA 1990). Section 766.101(5) also forbids the discovery of any material work product, which is considered developed during pre-suit. Thus, the internal investigation is protected.

The confidential nature of the relationship between a physician and his patient is firmly adhered in the law. It is essential to the relationship between the doctor and his patient. See, e.g., Wenniger v. Muesing, 240 N.W. 2d 333 (Minn. 1976); Duquette v. Superior Court of County of Mariopa, 778 P.2d 634 (Ariz. Ct. App. 1989); Loudon v. Mhyre, 756 P. 2d 138 (Wash. 1988).

It must also be noted that the pre-suit portions of Chapter 766 also control discovery. If a doctor, in pre-suit, demonstrates a genuine need for access to another doctor's information, he may file a pre-suit bill of discovery, and take that doctor's discovery deposition. See, e.g., Adventist Health System/Sunbelt, Inc. v. Hedgewood, 569 So. 2d 1295 (Fla. 5th DCA 1990). Section 455.241(2) does the same thing. It allows access to information but only through appropriate discovery methods which protect the confidential nature of the physician-patient relationship. Thus, there is no conflict between Chapter 766 and Section 455.241(2). The arguments raised by ACOSTA, in that regard, are incorrect. The trial court's order violated the Statute.

B. IF THE EX PARTE CONTACT VIOLATES FLORIDA STATUTES SECTION 455.241(2), IS THE STATUTE UNCONSTITUTIONAL?

ACOSTA asserts that Section 455.241(2), Fla.Stat. (1993) is unconstitutional because it infringes upon the rule making function of the Florida Supreme Court. The Petitioner further argues that it also curtails the First Amendment right to free speech and association. Most respectfully, these arguments are without merit and totally misplaced. Indeed, nothing could be further from the truth.

By its very nature, Section 455.241(2), Fla Stat. (1993), created a statutory physician-patient privilege which had not previously existed. Indeed, as a result of this statute, physicians are now ethically and statutorily obligated to maintain the privilege which includes the Plaintiff's condition, records , and all information disclosed to that physician, in confidence. A patient is rightfully entitled to rely upon that privilege and that confidence. Section 455.241(2) created a substantive right, controlling the relationship between patients and doctors and establishing that patients have a right to maintain control over and protect all information, verbal, written or otherwise, which they entrust to their physicians, in confidence. Therefore, under the law laid out by this Court and the district courts of this State, the statute serves the purpose of "fix(ing).... the primary rights of individuals with respect to their person and property". See, e.g., Haven Federal Savings & Loan Association vs. Kirian, 579 So. 2d 730, 732 (Fla. 1991).

Indeed, this matter is similar to other cases which have interpreted the right to access to public records and the "method" by which one can obtain such records. In those cases, the appellate courts of this State have held that the method by which

one obtains access to public record is a matter of substance, See, e.g., Hillsborough County Aviation Authority vs. Azarelli Construction Company, Inc., 436 So. 2d 153 (Fla. 2d DCA 1983). The statute at issue in this case also serves the purpose of setting out the circumstances under which the privilege is waived. That fact alone does not make this a procedural statute. Certainly, the legislature of this State, in granting a privilege, has the right to determine under which circumstances it will be waived and will not be waived. (See, generally, Florida Statutes 415.109 and 415.512, wherein the legislature has already declared that all privileges, with the exception of attorney-client and preacher-penitent, are automatically waived in cases of alleged abuse and neglect of children, the aged, and the disabled). These statutes are neither procedural nor unconstitutional.

Even though Section 455.241(2), Fla. Stat. (1993) contains, within its wording, the circumstances under which the privilege applies and does not apply, these provisions are only a portion of the substantive grant of the privilege. They are, most respectfully, not an attempt, intentional, vague, or otherwise, to set out rules of practice for the Courts. They are not, most respectfully, an attempt, intentional, vague, or otherwise, to usurp the rule making authority of this Court. Indeed, in its ruling, the Second District Court of Appeal, in Richter, already set out that Section 455.241(2), is constitutional for these exact reasons. This position has been echoed by the Fifth District Court of Appeal in Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th DCA 1994).

The other constitutional challenges asserted by the Petitioner in this cause -- the alleged abridgment of their right to free speech and assembly -- is nothing more than a vague attempt to cloud the obvious facts of this case. The statute at issue here balances out the interests of the patient's right to privacy and the need for confidentiality in the patient-physician relationship along with the physician's ethical obligation to maintain the confidences of his patients and, on the other hand, the Defendant's right to obtain discovery, through appropriate means, during the defense of a lawsuit. Petrillo v. Syntex Laboratories, Inc., 499 N.E. 2d 952 (Ill. App. 1986), appeal denied, 505 N.E. 2d 361 (Ill. 1987). Indeed, it is very interesting to note that the Florida Medical Association, which represents the doctors of this State, has filed a brief as Amicus Curiae on behalf of the Petitioners' in this case even though the statute, itself, is in total accord with the doctor's own ethical standards.

The AMA's Principles of Medical Ethics state: "a physician shall respect the rights of patients... and shall safeguard patient confidences within the constraints of the law".

This is further codified by Sections 5.05 through 5.08 of the current Opinions of the Judicial Council of the AMA which provide in part:

> The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree.... The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.
>
> The patient's history, diagnosis, treatment, and prognosis may be discussed with the patient's lawyer with the consent of the patient or the patient's lawful representative.

> Both for the protection of confidentiality and appropriate release of information of records is the rightful expectation of the patient. A physician should respect the patient's expectations of confidentiality concerning medical records that involve the patient's care and treatment.
>
> History, diagnosis, prognosis, and the like, acquired during the physician-patient relationship may be disclosed to an insurance company representative only if the patient or his lawful representative has consented to the disclosure.

See Section 5.05 through 5.08 of the Current Opinions of the Judicial Council of the AMA. (Emphasis added).

Finally, the Hippocratic Oath, which is the basic tenet of the medical profession and has been in existence since the 5th Century BC.E., and which is sworn to by every medical student as they graduate and receive their medical degree, clearly states:

> "Whatever, in connection with my professional practice or not in connection with that practice, I see or hear, in the life of men, which ought naught to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."

Plainly, Section 455.241(2), Fla. Stat. (1993), is in clear alignment with the ethical standards of the medical profession. To now come in here and argue, as amicus in this matter, that the FMA is not obligated to abide by these standards simply because a medical negligence action is filed runs directly contrary to their own standards and directly contrary to the clear wording of 455.241(2). Indeed, that statute is almost a verbatim copy of their own ethical standards.

The constitutionality of this statute is not lessened simply because the Defendants argue that they can obtain the same information through discovery methods. That could not be further from the truth. The fact that they can get the same information through discovery methods demonstrates that the statute is, by its very nature, constitutional. Discovery methods allow for the appropriate dissemination of material information which is not privileged or, which, although privileged, may be discovered only through appropriate methods.

Arguments that the statute is unconstitutional which are based on policy grounds, must also fail. The constitutionality of this statute should not be overturned by this Court. The policy, wisdom or necessity of a particular statute, if constitutional, is a matter of legislative prerogative which cannot be second guessed by the judicial branch. See, e.g., 10 Fla. Jur. 2d, Constitutional Law, p.59, pp. 261. Section 455.241(2), Fla. Stat. (1993) is the law of the State of Florida. It is the law which sets out the substantive right of the physician-patient privilege. The mere fact that the Petitioners feel that it does not allow them the full, open, and unrestrained discovery which they seek, is irrelevant. This Court should not be used as the forum for these Petitioners to seek to overturn a privilege which the legislature has seen fit to enact in order to protect the rights of patients.[3]

[3] Indeed, it is also chilling to think that the doctors of this State have elected to side with the Petitioners in this matter seeking to waive the privilege which they themselves have ingrained in them from medical school and onward and which they, as a national body, have set within their own standards.

C. JOHNSON v. MT. SINAI IS IN THE MINORITY AND SHOULD BE DISREGARDED. FURTHERMORE, JOHNSON SHOULD BE OVERRULED AS VIOLATIVE OF 455.241(2).

The only District Court of Appeal in this State which is allowed any form of ex parte contact between counsel for the Defendant and a treating physician who is not the Defendant, is the Third District Court. In Johnson v. Mt. Sinai Medical Center, 615 So. 2d 257 (Fla. 3rd DCA 1993), the Third District Court allowed a soliloquy wherein the attorney does all the talking and the physician remains silent. However, even the seemingly nonsensical ruling of the Third District Court does little to protect the privilege.

Physicians are not attorneys. They do not know, nor can they be expected to be bound, by the same ethical standards with respect to the statutory privilege. There would be absolutely no remedy for a Plaintiff if the physician or the attorney violates the one way soliloquy rule and speaks regarding matters which are privileged. Indeed, the "cat would already be out of the bag" and the damage could not be reversed. This was exactly the circumstance which the Second District Court was wary of in ruling in the underlying case, Richter, supra. Indeed, two (2) other District Courts, other than the Second District Court, have already come out directly in opposition to the holding of the Third District in Johnson, (See, e,g., Kirkland vs. Middleton, 639 So. 2d 1002 (Fla. 5th DCA 1994); Franklin vs. Nationwide Mutual Fire Insurance Company, 566 So. 2d 529 (Fla. 1st DCA 1990), rev. denied, 574 So. 2d 142 (Fla. 1990).

RICHTER does not dispute the fact that treating physicians are fact witnesses, as argued by the Petitioner (PB.7). Treating physicians do, in fact, come within the purview of Rule 1.280 (b)(3), Fla. R. Civ. P.; however, the fact that they come within the purview of a Rule of Procedure concerning discovery does not mean that the statutory privilege which exists between a physician and a patient is automatically waived by the filing of a lawsuit or the initiation of a medical negligence action through the filing of a Notice of Intent. Indeed, the very reason that they fall within the purview of Rule 1.280 (b)(3) indicates that they are subject to the same rules of discovery as any fact witness.

However, there is an additional protection provided by Section 455.241(2) which indicates that there is a privilege which must supersede the rules of ordinary discovery. In order to obtain information protected by the privilege, an attorney must act within the rules of discovery, or must obtain one of the other waivers or methods of waiver established within the statutes.

The Petitioners argue that the statute is automatically waived in a "medical negligence action" because of the following language of the statute:

> Except in a medical negligence action when a health care provider is or reasonably expects to be named as a Defendant...
>
> Section 455.241(2), Fla. Stat. (1993).

However, their logic could not be more displaced. That portion of the statute, read alone, does nothing more than reaffirm the Respondent's position. Certainly, a Defendant in a medical negligence action is entitled to speak with his own attorney. To argue otherwise would abrogate the attorney-client privilege and that is not the

Respondent's intent, nor is it within the purview of the statute. The portion of the statute which reads "reasonably expects to be named as a defendant" also does not apply. In the underlying lawsuit, Richter vs. Acosta, all of the Defendants have been named. The key element of the statute is the phrase "reasonably". The position raised by the Petitioner goes beyond the scope of being reasonable into the scope of what is "unreasonable" and allows full and open ex parte discussions between all treating physicians and all defense attorneys. That is not the intent of the statute and that is not the purpose of the physician-patient privilege. Indeed, the Committee Notes on this statute make this abundantly clear. During its staff analysis, the Florida Senate indicated as follows:

> The Bill amends Section 455.241, F.S., to specify that, in addition to medical records the medical condition of a patient may not be disclosed to any person other than the patient, the patient's legal representative, or other health care providers involved in the treatment of the patient, except with written consent of the patient. Further, the Bill specifies that information disclosed to a health care practitioner by a patient is confidential and may be disclosed only to other health care providers involved in the care of the patient or by written authorization of the patient or by subpoena. In addition, this information may be disclosed by health care providers to his attorney if the provider expects to be named as a defendant in a negligence case.

Senate Staff Analysis and Economic Statement, CS/SB 1076, Senate Judiciary-Civil Committee, May 19, 1988, quoted by the First District Court in Franklin vs. Nationwide Mutual Fire Insurance Company, 566 So. 2d 529, 532 (Fla. 1st DCA 1990).

The legislature created a statutory privilege for all information disclosed by a patient to his physician and all information as it pertains to the medical condition of

the patient. The very important purpose of this privilege enables the patient to secure appropriate, complete, and thorough medical treatment by encouraging open, candid, and complete communication between the patient and the physician free of any possible fear of the invasion of privacy, embarrassment, or breach, which would be allowed or which could occur under the unauthorized complete and open disclosure of information to defense attorneys. See, e.g., Horner v. Rowen Companies, Inc. 153 F.R.D. 597 (S.D.Tex. 1994).

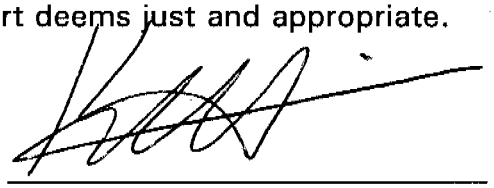
Indeed, the Courts of this State have always noted the private nature of medical information. The court in Sydeste vs. Miami Herald Publishing Company, 451 So. 2d 491, 494 (Fla. 3d DCA 1984), rev. denied, 461 So. 2d 115 (Fla. 1984), noted that Section 382.35(4), Fla. Stat., even though it does not expressly provide protection for keeping confidential the cause of death on a Death Certificate thereby not rendering same open to public inspection, noted that;

> The underlying justification for making such cause of death information confidential seems obvious enough. The cause of death as stated in the Death Certificate represents sensitive and generally private information. If made public, this information could cause public embarrassment to the deceased's family.
>
> The Court went further and said that "We are constrained by law to avoid a literalistic reading of a statute where, as here, such a reading would defeat the entire legislative purpose behind the Statute." Id. at 494.

Ultimately, then, the statute is constitutional and should be upheld. Johnson is beyond the realm of common sense and should be overturned. Richter should, most respectfully, be upheld.

CONCLUSION

For all of the reasons set forth herein, the Respondents, NANCY RICHTER and GARY RICHTER, herein respectfully request that this Court affirm the ruling of the Second District Court of Appeal and deny the relief sought by the Petitioners herein, together with whatever relief this Court deems just and appropriate.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed Via U.S. MAIL this 20th day of March, 1995, to ALL COUNSEL ON THE ATTACHED SERVICE LIST.

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