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THE FLORIDA SUPREME COURT

CASE NO. 84,413

SECOND DCA CASE NO.: 94-1017

L.T. CASE NO.: 92-7197, DIV. H

Fla Bar No.: 0541877

RUDOLPH ACOSTA, M.D.,

Petitioner,

vs.

NANCY RICHTER and GARY RICHTER, husband and wife,

Respondents.
_____ /

PETITIONER, RUDOLPH ACOSTA, M.D.'S AMENDED JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts, as gleaned from the District Court's Opinion, is as follows: Nancy and Gary Richter (Plaintiffs/Respondents) filed a medical malpractice action against Frank J. Bagala M.D. and Rudolph Acosta, M.D. (Petitioner).

As discovery progressed, the Petitioner Acosta moved the trial court for an order approving ex parte conferences between his counsel and the Plaintiff's treating non-party health care providers. Dr. Bagala joined in this motion.

After a hearing held upon appropriate notice the court granted the motion and issued an order which allowed the Defendant's attorney to have ex parte "general medical discussions" with the treating physicians. The order expressly prohibited the attorneys from discussing the specific medical condition of the Plaintiff with those doctors. In essence, the trial court followed the letter of **Section 455.241(2), Florida Statutes (1993)**, by prohibiting the defense attorneys from discussing the Plaintiff's specific medical condition with the physicians who had treated the Plaintiff.

The Richters petitioned the Second District Court of Appeal for a writ of certiorari to quash the trial court's order. The District Court accepted jurisdiction, 19 FLW D1817, (Fla. 2d DCA, August 24, 1994); (Exhibit "A") and quashed the trial court's order.

Because none of the statutorily specified waivers of the "physician patient privilege" which are set forth in Section

455.241(2) were present, the District Court quashed the order. The court rejected our contention that the order does not violate the statute because it specifically prohibits defense counsel from discussing the Plaintiff's medical condition with the Plaintiff's physicians.

The Second District Court of Appeal recognized that the trial court had relied upon the Third District Court of Appeal's decision in **JOHNSON v. MT. SINAI MED. CTR., INC., 615 So.2d 257 (Fla. 3d DCA 1993)**. The District Court also specifically recognized that in **JOHNSON** the Third District had approved an order which prohibited the attorneys from discussing the patient's medical condition with the treating physicians. (Slip Op. at Page 4).

The Second District thereafter rejected the **JOHNSON** holding as follows:

> It [JOHNSON] went further, however, and in essence only authorized a one way interview between defense counsel and the physicians in which the doctors basically were required to remain silent and the defense counsel were to do the talking. We see no reason to require treating physicians to listen and not respond to an attorney, who is not their attorney, about their professional responsibilities. Furthermore, to the extent that the court in **JOHNSON** approves an ex parte, unsupervised, interview with treating physicians where the patient's attorney cannot be present to protect against disclosure of privileged information, we disagree with the decision. We, instead, agree with our sister court's decision in **KIRKLAND** and **FRANKLIN**. (Slip Op at Page 4-5).

Thereafter, Dr. Acosta filed a notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF THE ARGUMENT

This District Court's opinion directly and expressly conflicts with the decision from the Third District Court of Appeal in **JOHNSON V. MT. SINAI MED CTR., INC., 615 SO.2d 257 (FLA. 3d DCA 1993)**. In fact, the District Court expressly noted that it "disagree[d] with the **[JOHNSON]** decision." Thus, there is express and direct conflict; this Court should exercise its jurisdiction to settle that conflict.

ARGUMENT

THE DISTRICT COURT'S OPINION DIRECTLY, EXPRESSLY AND ADMITTEDLY CONFLICTS WITH THE DECISION FROM THE THIRD DISTRICT COURT OF APPEAL IN **JOHNSON V. MT. SINAI MED CTR., INC., 615 SO.2D 257 (FLA. 3D DCA 1993)**, AND THIS COURT SHOULD THEREFORE EXERCISE ITS DISCRETIONARY JURISDICTION TO SETTLE THIS CONFLICT.

The following unassailable facts are expressed on the face of the District Court's opinion. The trial court's order, which the District Court has quashed, was premised upon the Third District Court of Appeal's decision in **JOHNSON v. MT. SINAI, supra**. In quashing that order, the District Court expressly noted that it "disagree[d] with the [**JOHNSON**] decision." The District Court instead adopted the decisions in **KIRKLAND v. MIDDLETON, 19 FLW D1213 (Fla. 5th DCA, Opinion issued June 3, 1994)**[1] and **FRANKLIN v. NATIONWIDE MUTUAL FIRE INS. CO., 566 So.2d 529 (Fla. 1st DCA 1990), rev. dism'd, 574 So.2d 142 (Fla. 1990)**.[2]

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[1]This Court currently has before it jurisdictional briefs filed by three of the Petitioners in the **KIRKLAND** case. Yogendra v. Kirkland, Case No.: 84,284; Frost v. Kirkland, Case No.: 84,286; and Pearlman v. Kirkland, Case No.: 84,287. In the interest of uniformity, and because we believe that the present case presents a much more compelling argument for Supreme Court jurisdiction, we would ask that this Court hold its determination on the jurisdictional issue on those cases until such time as the court decides whether to exercise jurisdiction in this case.

[2]We are aware that in their brief on jurisdiction the Respondents in the **KIRKLAND** case have suggested to this Court that it should not accept jurisdiction in **KIRKLAND**, because, among other reasons, this Court has recently "approved" the decision in **FRANKLIN** and has therefore already determined that Section 455.241(2) is both constitutional and does not allow any type of ex

This Court has jurisdiction over this case. See, **Florida Constitution, Article V, Section 3(b)(3). See generally, JENKINS v. STATE, 385 So.2d 1356 (Fla. 1980).**

Even under the fairly stringent standards which the amendment to Article V, Section 3(b)(3) was intended to require, and which this Court discussed in **JENKINS,** the District Court's opinion conflicts with **JOHNSON v. MT. SINAI,** and this Court should exercise jurisdiction. The District Court clearly "represented in words" and "gave expression to" its disagreement with and rejection of **JOHNSON v. MT. SINAI**. And given the fact that the District Court quashed an order which was clearly authorized by **JOHNSON v. MT. SINAI**, it simply cannot be argued that the District Court's opinion is not in express and direct conflict with **JOHNSON**. Therefore, we respectfully request this Court to exercise its discretionary jurisdiction to settle the conflict.

In addition to the conflict, it is apparent from the decisions which have been issued by the various district courts of appeal that this is an issue of great public importance which ought to be

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parte contact, even a **JOHNSON** type contact. See, **ROJAS v. RYDER TRUCK RENTAL, INC., 19 FLW S4136 (Fla. Sup. Ct., September 1, 1994)**. We respectfully disagree with that position. It seems to us that this Court's reference in **ROJAS** to an approval of the **FRANKLIN** decision was simply the recognition that a court could not require (we believe that the Court's use of the word "authorize" was intended to mean "require") a party to sign a release allowing ex parte conference where the plaintiff otherwise did not wish to do so. That was the scenario presented in **FRANKLIN**, and that was the context in which **FRANKLIN** was discussed in this Court's opinion in **ROJAS**. This Court was not asked to interpret Section 455.241(2) in **ROJAS**, nor do we read this Court's opinion as having passed upon either the constitutionality or the applicability of that statute in any situation other than where a court has ordered a plaintiff to sign a release allowing such a conference.

addressed, once and for all, by the State's highest court. Both the District Court in this opinion and the Fifth District Court of Appeal in its opinion **KIRKLAND v. MIDDLETON, supra**, have made passing reference to "constitutional" arguments raised by the defendants in those cases, and have rejected those arguments, without any expression of the nature of the arguments themselves or the analysis utilized in rejecting those arguments. Therefore, a synopsis of those arguments is in order.

Indeed, before we reach the constitutional argument, there is a matter of well-defined statutory construction which separates the **JOHNSON** decision from the decisions rendered by other District Courts of Appeal when construing this particular statute. The statute is clearly in derogation of the common law, and should therefore be narrowly construed. See, **STATE v. EGEN, 287 So.2d 1 (Fla. 1973); SOUTHERN ATTRACTIONS, INC. v. GRAU, 93 So.2d 120 (Fla. 1957); SULLIVAN v. LEATHERMAN, 48 So.2d 836 (Fla. 1950); ARIAS v. STATE FARM FIRE AND CASUALTY CO., 426 So.2d 1136 (Fla. 1st DCA 1983)** (statute in derogation of common law must be strictly construed and will not be interpreted so as to displace common law further than is expressly declared).

The **JOHNSON** court, by refusing to hold that a one-way interview violated the statute took the correct approach to the statute in question. It construed the statute narrowly, and so as not to displace common law -- which would allow counsel for any party to litigation to speak freely off the record with any fact witness -- any further than was expressly declared by the statute

in question. By contrast, the other District Courts of Appeal have broadly construed **Section §455.241(2)** so as to prohibit any contact, including -- for heaven's sake -- the Fifth District's holding in **KIRKLAND** which precludes defense counsel from contacting treating physicians for purposes of setting depositions.

With respect to the constitutionality of the statute, we believe that the statute as construed by each of the District Courts other than the Third District represents an abridgment of all personal injury defendants' First Amendment rights to freedom of speech and association, and likewise infringes upon those rights held by the treating physicians in question.

Furthermore, the statute is unconstitutional because it infringes upon the rule making function of this Court. Under this Court's articulated distinction between substantive and procedural matters, **see**, **HAVEN FEDERAL SAVINGS AND LOAN ASSOC. v. KIRIAN, 579 So.2d 730 (Fla. 1991)**, the statute clearly falls within the procedural realm where this Court has supreme authority. That is because the statute does not really create a privilege, as the "privilege" evaporates the moment that a subpoena is served or a witness is sworn in at a deposition. All that the statute does is regulate "the method of conducting litigation involving rights and corresponding defenses." **KIRIAN, 579 So.2d at 732.** There is no evidentiary physician/patient privilege, and the evaporating "privilege" that is purportedly created by the statute is really no privilege at all. The statute is unconstitutional because it represents a legislative encroachment into the machinery of the

judiciary. The statute should be held to be unconstitutional.

CONCLUSION

For the foregoing reasons, and because the Second District Court of Appeal has expressly created conflict with the Third District Court of Appeal's decision in **JOHNSON v. MT. SINAI**, the Petitioners RUDOLPH ACOSTA, M.D. and RUDOLPH ACOSTA, M.D. P.A. respectfully request this Court to exercise jurisdiction over this matter.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 3rd day of October, 1994; to: DAVID ENNIS, ESQ., Conroy, Simberg and Lewis, P.A., Venture Corporate Center I, Second Floor, 3440 Hollywood Blvd., Hollywood, FL 33021; C. HOWARD HUNTER, ESQ., 201 EAST KENNEDY BLVD, S/1950, TAMPA, FL 33602; and KENNETH S. SPIEGELMAN, ESQ., 777 Arthur Godfrey Road, 2nd Floor, Miami Beach, FL 33140.

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By: _____
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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NANCY RICHTER and GARY RICHTER, husband and wife, Petitioners, v. FRANK J. BAGALA, M.D., and RUDOLPH ACOSTA, M.D., Respondents.	)	CASE NO. 94-01017

Opinion filed August 24, 1994.

Petition for Writ of Certiorari to the Circuit Court for Hillsborough County; Daniel E. Gallagher, Judge.

Kenneth S. Spiegelman of Grover, Ciment, Weinstein, Stauber, Friedman & Ennis, P.A., Miami Beach, for Petitioners.

C. Howard Hunter and Sara B. Kehoe of Freeman, Hunter & Malloy, Tampa, for Respondent, Frank J. Bagala, M.D.; Philip D. Parrish of Stephens, Lynn, Klein & McNicholas, P.A., Miami, for Respondent, Rudolph Acosta, M.D.

SCHOONOVER, Judge.

Nancy Richter and Gary Richter, plaintiffs in a medical malpractice action filed against the respondents, Frank J. Bagala, M.D., and Rudolph Acosta, M.D., seek a writ of certiorari

quashing a trial court order allowing ex parte conferences with treating physicians. We grant the petition and issue the writ.

During pretrial proceedings in this matter, Dr. Rudolph Acosta, one of the defendants in the trial court, moved the court for an order approving ex parte conferences between his counsel and the plaintiffs' treating, nonparty, health care providers. Dr. Bagala, the other defendant, joined in the motion. At the conclusion of the hearing on the doctors' motion, the court granted the motion and entered an order allowing their attorneys to have ex parte, general medical discussions with the treating physicians. The order prohibited the attorneys from discussing the specific medical condition of the patient with the doctors. The Richters filed this timely petition seeking a writ of certiorari.

Section 455.241(2), Florida Statutes (1993), provides in pertinent part that medical records:

> [M]ay not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization to any person, firm, or corporation which has procured or furnished such examination or treatment with the patient's consent or when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff. 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 the patient's

> legal representative by the party seeking such records. 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 order to obtain an injured plaintiff's medical records from the plaintiff's treating physician, or to discuss the plaintiff's medical condition with him, a person seeking such a disclosure under section 455.241(2) must, absent a waiver, use a statutory method or follow the applicable Florida Rule of Civil Procedure. Johnston v. Donnelly, 581 So. 2d 909 (Fla. 2d DCA 1991). The statute waives confidentiality for the medical condition of a patient or information furnished by the patient to a health care provider when (a) 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), (b) the patient gives written authorization, (c) compelled by subpoena at a deposition, evidentiary hearing or trial for which proper notice was given, or (d) two or more current health care providers find it necessary to communicate. Kirkland v. Middleton, 19 Fla. L. Weekly D1213 (Fla. 5th DCA June 3, 1994). See also Franklin v. Nationwide Mut. Fire Ins. Co., 566 So. 2d 529 (Fla. 1st DCA 1990), rev. dismissed, 574 So. 2d 142 (Fla. 1990); Phillips v. Ficarra, 618 So. 2d 312 (Fla. 4th

DCA 1993). Since none of the reasons for waiver exist in this case, the trial court erred in entering its order.

The respondents collectively argue that certiorari should be denied because the trial court's decision was proper and, alternatively, that any error can be corrected on appeal. Dr. Acosta also contends that the statute is unconstitutional. We disagree. We agree with our sister court's holding in Kirkland and, accordingly, find that the statute is constitutional and that the protection against disclosure of privileged information does not require a showing of irreparable harm beyond the threat of disclosure itself. Kirkland. See also Manor Care, Inc. v. Keiser, 611 So. 2d 1305 (Fla. 2d DCA 1992).

We also reject the respondents' contention that because the order provides that the respondents' attorney cannot discuss the petitioners' medical contention with the physicians, it does not violate the statute. The respondents, as well as the trial court in its ruling, rely upon the Third District Court of Appeal's holding in Johnson v. Mt. Sinai Medical Center, Inc., 615 So. 2d 257 (Fla. 3d DCA 1993), in advancing this position. We agree that in Johnson our sister court approved an order which prohibited the attorneys from discussing the patient's medical condition with the treating physicians. It went further, however, and in essence only authorized a one way interview between defense counsel and the physicians in which the doctors basically were required to remain silent and the defense counsel were to do the talking. We see no reason to require treating

physicians to listen and not respond to an attorney, who is not their attorney, about their professional responsibilities. Furthermore, to the extent that the court in Johnson approves an ex parte, unsupervised, interview with treating physicians where the patient's attorney cannot be present to protect against disclosure of privileged information, we disagree with the decision. We, instead, agree with our sister courts' decisions in Kirkland and Franklin.

We, accordingly, grant the petition for writ of certiorari and quash the trial court's order.

CAMPBELL, A.C.J., and HALL, J., Concur.