THE FLORIDA SUPREME COURT

Case No. 84,413

SECOND DCA CASE NO.: 94-1017

L.T. CASE NO.: 92-7197 (DIV. H)

RUDOLPH ACOSTA, M.D.,

Petitioner,

vs.

NANCY RICHTER &
GARY RICHTER,

Respondents.
_____/

original

RESPONDENTS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondents acknowledge the majority of the STATEMENT OF THE CASE AND FACTS as filed by the Petitioner, ACOSTA. This is a discovery matter in which the Second District Court of Appeals quashed a trial court order which improperly allowed the attorneys for the Petitioners to hold unsupervised, ex parte conferences with the RICHTERs' treating physicians.

The RICHTERs' petition for writ of certiorari was granted by the Second District Court of Appeals.[1] Richter v. Acosta, et al., 19 FLW D1817 (Fla. 2d DCA August 24, 1994). Subsequent thereto, ACOSTA filed his notice of discretionary jurisdiction with this Court and filed his Brief on Jurisdiction. Several days later, ACOSTA filed his Amended Jurisdictional Brief. This Brief follows.

SUMMARY OF ARGUMENT

The opinion of the Second District Court of Appeal was correct and constitutional. It neither expressly nor directly conflicts with the Third District Court of Appeals decision in Johnson v. Mt. Sinai Med. Ctr., Inc., 615 So. 2d 257 (Fla. 3d DCA 1993). As such, this Court should, most respectfully, decline to exercise jurisdiction over this matter.

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[1]The Second District Court of Appeals noted that none of the waivers of privilege, which would otherwise allow such a conference under F.S. 455.241 (2), were present in the underlying case.

ARGUMENT

THERE IS NO EXPRESS OR DIRECT CONFLICT BETWEEN THIS CASE AND THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IN JOHNSON.

The Petitioner argues that the language used by the Second District in stating that it "disagree[d] with the [Johnson] decision" establishes an express conflict with the Johnson decision. However, a closer examination of the two decisions demonstrates that they are not, in fact, in conflict. Indeed, the Second District has, in actuality, only ruled in accordance with what was actually the apparent intent of the Third District in Johnson. That is, that there may be no conversations between the attorneys for the Defendant and the plaintiff's treating physicians.[2]

The Johnson decision still does not allow the physician to speak to the Defendant's attorneys. It is likely that the reason for this is the fear that discussions concerning prohibited, privileged matters will still take place. Indeed, that was clearly the logic behind the decision in this case, as evidenced by the Second District's statement that:

> 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,

[2]To that extent, the Third District's decision (Johnson) appears to be an anomaly since it only, apparently, allows a lawyer's soliloquy while the physician remains absolutely silent.

> unsupervised interview with treating physicians where the patient's attorney cannot be present to protect against disclosure of privileged information, we disagree[3] with the decision.

Richter, 19 FLW D1817.

Furthermore, ACOSTA's arguments that F.S. 455.241(2) is unconstitutional are moot. This Court, in Rojas v. Ryder Truck Rental, Inc., 19 FLW S4136 (Fla. September 1, 1994), already approved the decision of the First District in Franklin v. Nationwide Mutual Fire Ins. Co., 566 So. 2d 529 (Fla. 1st DCA 1990), rev. dism'd. 574 So. 2d 142 (Fla. 1990), and has, therefore, implicitly ruled that the statute is constitutional. Notwithstanding the creatively manufactured arguments of ACOSTA is Footnote 2 of his brief, the underlying statute is, by previous ruling of this Court, constitutional. See also, Phillips v. Ficarra, 616 So. 2d 312 (Fla. 4th DCA 1993).

In addition, ACOSTA's arguments concerning the alleged unconstitutionality of the statute due to supposed violations of the distinction between substantive and procedural matters are also misplaced. F.S. 455.241 (2) exists to regulate the confidentiality of the relationship between physician and patient. To that end, and since the statute is in accordance with Court Rules, most specifically Rule 1.360, Fla. R. Civ. P., and the rules governing production, discovery and deposition, it is, therefore, constitutional. See, e.g., Van Bibber v. Hartford Accident & Indemnity Ins. Co., 439 So. 2d 880 (Fla. 1983).

There is, most respectfully, absolutely no "legislative encroachment into the

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[3]Again, it is respectfully submitted, that simple "disagreement" does not indicate "express" conflict. The Third District Court of Appeals is still not authorizing actual conferences between defense counsel and the plaintiff's treating physicians, similar to how the Second District ruled.

machinery of the judiciary" as ACOSTA so freely, and without substantiation, asserts. There is only a constitutional legislative effort to strengthen the crucial confidential nature of the relationship between the physician and the patient. For the legislature to have acted otherwise would have had a chilling effect on the relationship between physician and patient, and would violate the sanctity of the confidential relationship sought to be protected under F.S. 455.241 (2).

CONCLUSION

In light of the fact that there is no express or direct conflict between the underlying decision and Johnson, and because F.S. 455.241 (2) is constitutional, this Court should, most respectfully, decline to assert jurisdiction over this matter.[4]

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[4]ACOSTA also makes a passing reference to an argument that this case raises a question of great public importance. ACOSTA raises this point without any legal support. It should be similarly discounted by this Court as lacking any legal foundation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent, via U.S. Mail, this 17th day of October, 1994, to PHILIP PARISH, Esq., STEPHENS, LYNN, et al., 2 Datran Center, PH 2, 9130 South Dadeland Blvd., Miami, FL 33156, DAVID ENNIS, Esq., CONROY, SIMBERG, et al., Venture Corporate Center I, 2d Floor, 3440 Hollywood Blvd., Hollywood, FL 33021, & C. HOWARD HUNTER, Esq., 201 East Kennedy Blvd., Suite 1950, Tampa, FL 33602.

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