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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 BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The District Court's Opinion, **RICHTER v. BAGALA, 19 FLW D1817 (Fla. 2d DCA, Opinion issued August 24, 1994)**, directly and expressly conflicts with **JOHNSON v. MT. SINAI MEDICAL CENTER, 615 So.2d 257 (Fla. 3d DCA 1993)**. This Court has jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution.

At issue in this appeal is the interpretation and application of **Florida Statute §455.241(2) (1993)**. The trial court had granted Dr. Acosta's motion for a limited ex parte conference with her treating physicians which excluded discussion of the specific medical condition of the patient/Plaintiff.

Ms. Richter and her derivative claim husband have sued Dr. Acosta and Dr. Bagala alleging surgical negligence and lack of informed consent.[1] As part of his pretrial preparation, counsel for Dr. Acosta filed a motion, consistent with **JOHNSON v. MT. SINAI MED CTR., 615 So.2d 257 (Fla. 3d DCA 1993)**, to be allowed to participate in ex parte conferences with any of the plaintiffs non-party treating physicians who would agree to such a conference.

After entertaining argument on the motion, the trial court entered an order which allowed defense counsel to have general medical discussions with the treating physicians. However, the order prohibited the attorneys from discussing the specific medical condition of the patient with the doctors.

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[1]Although the complaint was not included in the respective Appendices filed by the Petitioner and Respondent below, it is included in Dr. Acosta's Appendix before this Court for the court's edification.

The Second District Court of Appeal, without hearing oral argument, entertained the petition and quashed the order. **19 FLW D1817 (Fla. 2d DCA, Opinion issued August 24, 1994).**[2] The District Court set forth the text of the Statute, and then held that the statute waived confidentiality of the medical condition of a patient, or of information furnished by the patient to a health care provider in four limited instances: (a) when a health care provider is or reasonably expects to be named as a defendant in a medical malpractice (for that health care provider's records and information); (b) when the patient gives written authorization; (c) when compelled by subpoena in a deposition, evidentiary hearing or trial for which proper notice was given, or (d) when two or more current health care providers find it necessary to communicate. **19 FLW at D1817.**

The underlined parenthetical phrase listed under subheading (a) above was simply appended to the statute by the district court. It does not appear in the statute, and it negates what was intended to be an exception to the statute for all medical malpractice cases. The district court then reasoned that since none of the above-noted waivers existed in this case the trial court had erred by entering its order. **Id.**

In doing so, the court dispensed with Dr. Acosta's jurisdictional argument (i.e., certiorari review was improper where the Plaintiff/Petitioner could show no irremediable harm as a

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[2]As of the date of service of this brief there is no reported citation in the official reporter for this case.

result of the conferences which would simply reveal information which was otherwise obtainable by deposition), and Dr. Acosta's constitutional argument (i.e., that the statute is an unconstitutional infringement upon the rule-making authority of the courts).

Finally, in response to Dr. Acosta's argument that the trial court's order did not violate the plain wording of the statute because it prohibited defense counsel from discussing the Plaintiff's specific medical condition, the district Court rejected the holding of the Third District in **JOHNSON v. MT. SINAI MED CTR, 615 So.2d 257 (Fla. 3d DCA 1993)**, noting 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." **RICHTER, 19 FLW at D1817**. The court further disagreed with the **JOHNSON** decision because it allowed an "unsupervised" conference with treating physicians "where the patient's attorney cannot be present to protect against the disclosure of privileged information." **Id**. The court specifically adopted the opinions of its sister courts in **KIRKLAND v. MIDDLETON, 639 So.2d 1002 (Fla 5th DCA 1994)**, and **FRANKLIN v. NATIONWIDE MUTUAL FIRE INS. CO., 566 So.2d 529 (Fla. 1st DCA 1990), rev. den'd 574 So.2d 142 (Fla. 1990)**. After entertaining jurisdictional briefs from the parties, this Court accepted jurisdiction of this matter on January 13, 1995.

SUMMARY OF THE ARGUMENTS

The District Court's opinion should be quashed for several reasons. First, the District Court failed to recognize that the restrictions placed upon an ex parte contact with a plaintiff's treating physicians do not, by the very language of the statute, apply to medical malpractice actions.

Second, the District Court failed to narrowly construe the restrictions placed upon a defendant's common law right to conduct such ex parte conferences, see, e.g. **CORALLUZZO v. FASS, 450 So.2d 858 (Fla. 1984)**, by the statute which has been enacted in derogation of the common law.

Third, the District Court erred when it held the statute to be constitutional. The statute represents a legislative encroachment upon this Court's inherent rule-making authority. It does not create a substantive right, it merely regulates the fashion in which evidence may be obtained. See, **GORDON v. DAVIS, 267 So.2d 874 (Fla. 3d DCA 1972)**. The statute is also an unconstitutional abridgement of freedom of speech and association.

Our position can be crystallized by making reference to and analyzing a portion of the recent decision in **KIRKLAND v. MIDDLETON, 639 So.2d 1002 (Fla. 5th DCA 1994)**. There the court made the following observation:

> Were unsupervised ex parte interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place.

639 So.2d at 1004.

The question arises: Precisely what privileged information is the court talking about? There is no patient/physician testimonial privilege. **MORRISON v. MALMQUIST, 62 So.2d 415 (Fla. 1953).** The statute, by its very terms, provides that a defendant in a medical malpractice or other personal injury case may subpoena a treating physician's records and take that treating physician's deposition. Thus, there is no information which the Plaintiff's treating physician has which cannot be discovered. What then can possibly be disclosed inadvertently (or advertently) during an ex parte conference? Absolutely nothing. The Fifth District Court of Appeal has unwittingly exposed the folly of the statute by articulating the purported reason for applying the statute; the Second District has now followed suit.

The statute creates the only non-party class of fact witnesses on the face of the earth who cannot -- if they so desire -- speak off the record with counsel for either party. The statute is an act of legislative legerdemain. The legislature has enacted a privilege which is not really a privilege, and which dissolves the moment a subpoena is served or a deposition is taken. The statute protects nothing from discovery; it simply regulates the fashion in which information may be discovered. There is thus absolutely no harm, let alone irreparable harm, that could possibly be established by a plaintiff if ex parte conferences occur.

ISSUE PRESENTED

1. WHETHER THE TRIAL COURT'S ORDER, WHICH ALLOWED DEFENSE COUNSEL IN A MEDICAL MALPRACTICE CASE TO PARTICIPATE IN VOLUNTARY EX PARTE CONFERENCES WITH NON-PARTY TREATING PHYSICIANS WITH THE PROVISO THAT THE PLAINTIFF'S SPECIFIC MEDICAL CONDITION NOT BE DISCUSSED, VIOLATES FLORIDA STATUTE §455.241(2) (1993)?

2. IF SO, WHETHER THE STATUTE IS AN UNCONSTITUTIONAL INFRINGEMENT BY THE LEGISLATURE ON THIS COURT'S INHERENT RULE-MAKING AUTHORITY?

ARGUMENT

THE TRIAL COURT'S ORDER, WHICH ALLOWED DEFENSE COUNSEL IN A MEDICAL MALPRACTICE CASE TO PARTICIPATE IN VOLUNTARY EX PARTE CONFERENCES WITH NON-PARTY TREATING PHYSICIANS WITH THE PROVISO THAT THE PLAINTIFF'S SPECIFIC MEDICAL CONDITION NOT BE DISCUSSED, DOES NOT VIOLATE FLORIDA STATUTE §455.241(2).

An Historical Perspective

Over forty years ago this Court affirmed that the State of Florida does not recognize a patient-physician testimonial privilege. **MORRISON v. MALMQUIST, 62 So.2d 415 (Fla. 1953).** Eleven Years ago that holding was reaffirmed in the context of a challenge to voluntary ex parte contact between defense counsel and a plaintiff's treating physicians. See, **CORALLUZZO v. FASS, 450 So.2d 858 (Fla. 1984).** In **CORALLUZZO** this Court could find "no reason in law or in equity to disapprove the decision of the district court," which had authorized a voluntary ex parte conference between defense counsel and a treating health care provider. **450 So.2d at 859.**

In doing so, this Court recognized that treating physicians are fact witnesses, not retained experts. Thus, they do not come within the purview of **Florida Rule of Civil Procedure 1.280(b)(3),** such that any conversation between defense counsel and a treating physician or statement taken of a treating physician need not be disclosed or provided to plaintiff's counsel. See, **FRANTZ v. GOLEBIEWSKI, 407 So.2d 283 (Fla. 3d DCA 1981),** which was discussed and adopted in **CORALLUZZO.**

In **FRANTZ** the Third District had held that the defendant in a

medical malpractice action who had taken a sworn statement from one of plaintiff's treating physicians without giving notice to the plaintiff could not be compelled to provide a copy of the sworn statement to the plaintiff. Again, this decision was based upon the common sense notion that the treating physician, unlike a retained medical expert, has gained his knowledge as a fact witness, and not as an expert retained in anticipation of litigation.

As the court noted in **FRANTZ**:

> Counsel are free to speak to and record the statements of any such witness who is willing to make them.

FRANTZ, 407 So.2d at 284. (footnote omitted). Relying upon **MORRISON v. MALMQUIST, supra**, the court pointed out that there is no physician-patient privilege in the State of Florida which would preclude such contact because of the witness' professional relationship with the plaintiff.

In contrast to a retained medical expert witness, or a retained IME witness, a treating doctor, "while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well." **407 So.2d at 285.** Thus, the treating physician should be "treated as an ordinary [fact] witness." **Id.**

The Statute

Prior to 1988, Section 455.241(2), Florida Statutes was a sleepy little medical records statute which provided for the confidentiality of a patient's medical records unless, of course,

the patient was involved in litigation, and a litigant had served a subpoena to obtain the records.[3] However, in 1988 the Statute was dramatically altered as a result of intense lobbying efforts on the part of the Plaintiff's Personal Injury Bar. Thus, since 1988, in addition to addressing medical records, the statute has placed certain restrictions upon discussion of "the medical condition of a patient" by a physician with any person other than the patient or the patient's legal representative, or other health care providers involved in the care and treatment of the patient.

This amendment, and the intermediate appellate court decisions which have construed it, have set off a firestorm of controversy, particularly in the medical malpractice arena. At issue is the intent of the legislature in amending the statute, and the wisdom, indeed the constitutionality, of precluding voluntary ex parte conferences between defense counsel and treating physicians, particularly with respect to medical malpractice actions.

To date, with the exception of the Third District Court of Appeal's decision in **JOHNSON v. MT. SINAI, supra**, the intermediate district courts of appeal have given the statute an expansive interpretation. We will argue in this brief that an expansive

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[3]Thus, the statute as originally worded,and as it is worded today with respect to medical records, recognizes what must be recognized -- that once a patient sues a physician (or some other alleged tortfeasor) the patient has put his or her medical condition at issue and any attendant confidentiality is thereby waived. See e.g., **SCHEFF v. MAYO, 645 So.2d 181 (Fla. 3d DCA 1994)** (plaintiff is not entitled to invoke the psychotherapist-patient privilege after placing mental condition in issue by seeking damages for mental anguish); accord, **ARZOLA v. REIGOSA, 534 So.2d 883 (Fla. 3d DCA 1988); YOHO v. LINDSLEY, 248 So.2d 187 (Fla. 4th DCA 1971)**.

interpretation is unwise as a matter of public policy, unreasonable in light of the statutory language, and unconstitutional as applied.

The Exception For Medical Malpractice Cases[4]

The Statute provides in pertinent part that:

> 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.

The highlighted portion of the statute carves out medical malpractice actions from the statute's restrictions upon ex parte conferences. Unfortunately, both the district court below, and the Fifth District in **KIRKLAND, supra**, have added words to the statute which do not appear in the statute. **KIRKLAND, 639 So.2d at 1004**. Those courts have concluded that the highlighted language simply creates an exception for the medical malpractice defendant himself. That position does not withstand analysis for two reasons.

First, it would be completely unnecessary to make this limited

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[4]Although this argument was not pursued by Dr. Acosta below, the District Court's opinion squarely addresses this issue by "amending" the statute by virtue of asserting the language which does not appear in the statute. Because this Court has taken jurisdiction, it may address any and all issues which are necessary to the determination of this matter.

exception. Obviously, a medical malpractice defendant may, indeed must, discuss his own care and treatment of the patient/plaintiff with his own counsel. Thus, an exception which simply carves out the medical malpractice defendant himself (or herself) would be unnecessary.

Second, if the exception was only intended to apply to the medical malpractice defendant, then the highlighted language above should read "Except in a medical negligence action when the healthcare provider is or reasonably expects to be named as a defendant." The statute uses the indefinite article "a" instead of the definite article "the." If the legislature had intended to limit the exception solely to medical malpractice defendants, then it would have used the definite article "the," which could only apply to the defendant.

The restrictions on informal communications with treating physicians simply do not apply to medical negligence actions such as the present case. The legislature 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. dism'd, 582 So.2d 624 (Fla. 1991)**. Thus, given the plain language of the amendment, and the foregoing rule of statutory construction, it follows that the amendment does not change the common law as expressed in **CORALLUZZO** and **FRANTZ** which specifically allowed ex parte interviews between defendant physicians and treating physicians in medical malpractice cases.

The portion of the exception noted above which includes in the

exception a health care provider who "reasonably expects to be named as a defendant," is an obvious reference to Florida Statute §766.106, which compels health care providers who are on notice of a claim and their insurance carrier to conduct a good faith presuit investigation, review, and evaluation of a malpractice claim. The defendant and his carrier are required by that statute to undertake a good faith examination of the claim so that the defendant can make an informed decision to reject the claim, make a settlement offer, or offer to admit liability and arbitrate the issue of damages at the conclusion of the presuit period. Obviously, defendants and their insurance carriers will need to consult with any and all treating physicians during this presuit process.[5]

The language which has been added to the statute by the District Court below, and the court in **KIRKLAND**, **supra**, brings Fla. Stat.§455.241 into conflict with Chapter 766.[6] Yet the statutes must be read in pari materia so as to harmonize the statutes rather than to create conflict between them. See, **WOODGATE DEVELOPMENT CORP. v. HAMILTON INVESTMENT TRUST, 351 So.2d 14 (Fla. 1977).**

Courts in other jurisdictions are divided on the subject of

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[5]See, **Section §766.101(3)(a)** which refers to health care providers as participants who will furnish information to medical review committees, and **Section §766.106(5)** which anticipates the participation of physicians in the presuit process.

[6]In contrast to **RICHTER** and **KIRKLAND**, the opinion in **FRANKLIN v. NATIONWIDE MUTUAL FIRE INS. CO., 566 So.2d 529 (Fla. 1st DCA 1990), rev. den'd., 574 So.2d 142 (Fla. 1990)**, did not involve a medical malpractice action. Thus, the applicability of the exception did not come into play. Unfortunately, the **KIRKLAND** case simply engrafted the **FRANKLIN** opinion's ratio decendi to the medical malpractice case before it, and the **RICHTER** court followed suit.

voluntary ex parte conferences. Many courts have allowed ex parte access to treating physicians to both plaintiffs and defendants.[7] Other courts, however, (typically either interpreting an evidentiary privilege or announcing a broad statement of public policy), have precluded defense counsel from participating in voluntary ex parte conferences with treating physicians.[8]

Although these cases from other jurisdictions will certainly help to crystalize the issues involved in voluntary ex parte conferencing, this Court's focus must necessarily be upon the common law history in this State, and the impact vel non of the 1988 Amendment to Fla. Stat. §455.241 upon that common law background.

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[7]See, **BRANDT v. PELICAN, 856 S.W.2d 658 (Mo. 1993), transferred to 856 S.W. 2d 667 (Mo. 1993); STREET v. HEDGEPATH, 607 A.2d 1238 (App. D.C. 1992); LEWIS v. RODERICK, 617 A.2d 119 (R.I. 1992); STEMPLER v. SPEIDELL, 495 A.2d 857 (N.J. 1985); COVINGTON v. SAWYER, 458 N.E.2d 465 (Ohio App. 1983); ARCTIC MOTOR FREIGHT, INC. v. STOVER, 571 P.2d 1006 (Alaska 1977); TRANS-WORLD INVESTMENTS v. DROBNY, 554 P.2d 1148 (Alaska 1976); LANGDON v. CHAMPION, 745 P.2d 1371 (Alaska 1987); GREEN v. BLOODSWORTH, 501 A.2d 1257 (Del. Sup. 1985); GLENN v. KERLIN, 248 So.2d 834 (La. App. 1971); FELDER v. WYMAN, 139 F.R.D. 85 (D.S.C. 1991); DOE v. ELI LILLY & CO., INC., 99 F.R.D. 126 (D.D.C. 1983); DODD-ANDERSON v. STEVENS, 1993 U.S. Dist. Lexis 5620 (D. Kan. 1993).**

[8]**HORNER v. ROWAN COMPANIES, INC., 153 F.R.D. 597 (S.D. Tex. 1994); HARLAN v. LEWIS, 141 F.R.D. 107 (E.D. Ark. 1929); MANION v. N.P.W. MEDICAL CTR OF N.E. PENNSYLVANIA, INC., 676 F.Supp. 585 (M.D. Pa. 1987); ALSTON v. GREATER SOUTHWEST COMMUNITY HOSPITAL, 107 F.R.D. 35 (D.D.C. 1985); DUQUETTE v. SUPERIOR COURT, 878 P.2d 634 (Ariz. App. 1989); KARSTEN v. MCCRAY, 509 N.E.2d 1376 (Ill. App. 1987), appeal denied, 517 N.E.2d 1086 (Ill. 1987); CUA v. MORRISON, 626 N.E.2d 581 (Ind. App. 1983), opinion adopted, 636 N.E.2d 1248 (Ind. 1994); ROOSEVELT HOTEL LIMITED PARTNERSHIP v. SWEENEY, 394 N.W.2d 353 (Iowa 1986); WENNINGER v. MUESING, 240 N.W.2d 333 (Minn. 1976); NELSON v. LEWIS, 534 A.2d 720 (N.H. 1987); ANKER v. BRODNITZ, 413 N.Y.S.2d 582 (N.Y. Sup. Ct. 1979); LOUDON v. MHYRE, 756 P.2d 138 (Wash. 1988); KITZMILLER v. HENNING, 437 S.E.2d 452 (W.Va., 1993).**

The Statute Is In Derogation Of The Common Law

Like any statute which is enacted in derogation of common law, Section 455.241(2) must 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 Third District's opinion in **JOHNSON v. MT. SINAI** is an example of an appropriately narrow construction of this statute. The order which was under review in that case simply did not violate even an expansive interpretation of the statute (Nor did it require physicians to "listen...to an attorney, who is not their attorney, about their professional responsibilities," **RICHTER, 19 FLW at** D1817). The **JOHNSON** decision simply applied the appropriate narrow interpretation of the statute.

The Statute Is Unconstitutional

We believe that the statute under consideration is unconstitutional as written, and also as applied. The statute is unconstitutional because it infringes upon the rule-making function of the Supreme Court and thus violates Article V Section 2(a) of the Florida Constitution. It is also unconstitutional as applied because it impermissibly curtails both defendant physicians' and all treating physicians' right to freedom of speech and association.

It is quite settled that matters of substantive law lie within the legislative domain, whereas matters of practice and procedure lie within the exclusive authority of the Supreme Court. **HAVEN FEDERAL SAVINGS & LOAN ASSOC. v. KIRIAN, 579 So.2d 730 (Fla. 1991); MARKERT v. JOHNSTON, 367 So.2d 1003 (Fla. 1978).** The difference between the two areas has been summarized by this Court in **KIRIAN**:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, and that part of the law which courts are established to administer. (Citations omitted.) It includes those rules and principles which state and declare the primary rights of individuals with respect towards their persons and property. (Citations omitted.) On the other hand, practice and procedure 'encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof.' (Citations omitted.) It is the method of conducting litigation involving rights and corresponding defenses. Citations omitted.

579 So.2d at 732. (Emphasis added). See, also, **GORDON v. DAVIS, 267 So.2d 874 (Fla. 3d DCA 1972)** (holding that Fla. R. Civ. P. 1.360, concerning independent medical examinations, is procedural because it relates exclusively to the obtaining of evidence). So, too, does the statute in question.

The Plaintiff's Bar has been arguing that this statute is a protector of the physician/patient relationship, and its attendant

confidentiality. Quite apart from the obvious fallacy of this argument, i.e., that any such confidentiality is waived by virtue of filing a medical malpractice action, see, footnote 3, supra. the argument is fallacious because the statute really does not protect anything from discovery. It simply controls the way that discovery is conducted. That is a matter that is within the inherent power of the courts. See, e.g., **ROJAS v. RYDER TRUCK RENTAL, 625 So.2d 106 (Fla. 3d DCA 1993). aff'd., 641 So.2d 855 (Fla. 1994).**

Section 455.241(2) violates the doctrine of separation of powers which prohibits any one branch of the state government from encroaching upon the powers of another. See, **CHILES v. CHILDREN, A,B,C,D, and E, 589 So.2d 260 (Fla. 1991).** As we have explained elsewhere the statute really does nothing more than create a rule of practice and procedure. It protects absolutely nothing from discovery; it simply regulates the method of discovery. The legislature has no constitutional authority to enact any law relating to practice and procedure. **IN RE CLARIFICATION OF FLORIDA' RULES OF PRACTICE AND PROCEDURE (FLORIDA CONSTITUTION, ARTICLE V, SECTION 2(A), 281 So.2d 204 (Fla. 1973).** This is particularly true where what the legislature has done directly or indirectly interferes with or impairs an attorney's exercise of his ethical duties as an attorney and officer of the court. See, **GRAHAM v. MURRELL, 462 So.2d 34 (Fla. 1st DCA 1984)** (declaring unconstitutional a law that directed public defenders to move the court to assess attorney's fees and costs against the defendant).

Thus, whether the statute is viewed as setting forth the mechanics by which medical malpractice plaintiffs' can assert their substantive right to a physician-patient confidentiality (which is pierced by the simple mechanism of utilizing the discovery process), or whether it is viewed as setting forth the mechanics by which a medical malpractice defendant may realize his substantive right to discovery, it is a statute which deals with practice and procedure and is thus void, in the absence of evidence that the Florida Supreme Court has formulated a rule conforming with the intent of the legislature as framed by the enactment. See, e.g., **STATE v. SMITH, 260 So.2d 489 (Fla. 1972).**

Furthermore, unlike the offer of settlement statute reviewed in **LEAPAI v. MILTON, 595 So.2d 12 (Fla. 1992)**, the procedural details here cannot be "severed" from the substantive aspects of the statute. Rather, this statute is more like the statute which was held to be unconstitutional in **WATSON v. FIRST FLORIDA LEASING INC., 537 So.2d 1370 (Fla. 1989)** which required a claimant to file a written notice of action against an estate in the probate court. Cf., **SMITH v. DEPT. OF INS., 507 So.2d 1080 (Fla. 1987)** (portion of tort reform and insurance act which provided for settlement conferences did not violate separation of powers provision where the legislature made conferences entirely optional with courts).

To The Extent That The Statute Creates A Privilege, The Privilege Must Be Narrowly Construed

Typically, Florida courts recognize only privileges which are provided by Florida Statutes, by constitutional interpretation or by the Florida Supreme Court's rule-making power. **Fla. Stat.**

§90.501; see, e.g., **GIRARDEAU v. STATE, 403 So.2d 513 (Fla. 1st DCA 1981), rev. dism'd, 408 So.2d 1093.** As this court noted in **MORRISON v. MALMQUIST**, and **CORALLUZZO v. FASS, supra**, there is no physician-patient privilege.

And where there is no privilege, "no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance." **DOE v. ELI LILLY & CO., 99 F.R.D. 126, 128 (D.C. 1983).**

Although Judge Jackson's opinion in **DOE v. ELI LILLY** was rejected by the First District Court of Appeal in **FRANKLIN v. NATIONWIDE MUTUAL FIRE INS. CO., 566 So.2d 529, 534 (Fla. 1st DCA 1990),** we believe that the better reasoned approach is that of the **DOE** court.[9] In **DOE**, when faced with a defendant's efforts to compel discovery, the plaintiffs argued that a similar statute precluded ex parte contact between defense counsel and treating physicians.[10] Although the court noted that the statute enveloped

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[9]In **ROJAS v. RYDER TRUCK RENTAL, 641 So.2d 855, 858 (Fla. 1954)**, this Court approved **FRANKLIN** to the extent that it held that a trial court may not require a plaintiff to sign an authorization for the plaintiff's treating physician to participate in ex parte conferences with defense counsel. However, neither **FRANKLIN** nor this Court in **ROJAS** addressed the issue of whether a plaintiff's treating physician may voluntarily participate in ex parte discussions with defense counsel.

[10]The statute at issue in **DOE** provided that:

> ... a physician or surgeon... may not be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity that was

the physician-patient relationship in a "cloak of confidence," and would typically prevent disclosure of information obtained through that relationship, the court noted that:

> The privilege was never intended, however, to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time. The inchoate threat implicit in refusing or qualifying permission to speak to a witness in possession of privileged information operates to intimidate the witness, who is then placed in the position or withholding or divulging what he knows at his peril, and is itself a species of improper influence. It also enables the party so wielding the privilege to monitor his adversary's progress in preparing his case by his presence on each occasion such information is revealed while his own preparation is under no such scrutiny. The Court concludes that it would be an abuse of the privilege to allow it to be used in such a manner which has no relation to the purpose for which it exists.

DOE, 99 F.R.D. at 128-29. See also, **STUFFLEBAM, M.D. v. APPELQUIST, 694 S.W.2d 882 (Mo. 1985)** (defense attorneys in medical malpractice action entitled to court ordered authorization

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> necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.

D.C. Code Section 14-307 (1991).

permitting them to privately interview treating physician); **DOMAKO v. ROE, 475 N.W.2d 30 (Mich. 1991), 438 Mich. 347 (Mich. 1991)** (defendant's counsel conducted ex parte interview with plaintiff's treating physician despite existence of statute which protects the information related by the patient to the physician).

As an example of a subject which is not prohibited by the statute, we offer the following. Typically what a medical malpractice defendant wants to discuss in ex-parte fashion with a plaintiff's current treating physician is not the plaintiff's current medical condition. That information could be obtained simply by subpoenaing the patient's medical records. The first and foremost issue which every medical malpractice defendant wants to learn from an interview with a current treating physician is that treating physician's opinion as to the care and treatment rendered to the plaintiff by the defendant physician.[11] Since any information concerning the care and treatment rendered by the defendant is by definition waived by virtue of filing the lawsuit against that defendant -- and because the defendant's care and treatment is excepted from the prohibition against ex-parte conferences by the very language of the statute in question -- we fail to see how the statute could work to prevent defense counsel from inquiring at least as to that limited issue.

The "Mechanics" Of The Statute

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[11]There is, of course, no requirement that a treating physician formulate such an opinion; however, if he or she does, the opinion is discoverable. See, **MELTZER v. CORALLUZZO, 499 So.2d 69 (Fla. 3d DCA 1986).**

If this Court does not quash the opinion of the Second District, defense counsel would still be entitled to gather the "statutorily protected" information via a properly noticed discovery deposition. **KIRKLAND, supra**. Thus, the statute can hardly be said to "protect" or even address the physician/patient privilege. What the statute does is force defense counsel to gain knowledge that they are clearly entitled to gain -- but to restrict the means by which the information is obtained. That means, the discovery deposition, can then be utilized against the defendants, in the event that the opinions of the treating physicians are critical of the defendants. See, e.g., **ROBISON v. FAINE, 525 So.2d 903 (Fla. 3d DCA 1987)** (noting that deposition testimony of defendant's expert witness is admissible in plaintiff's case-in-chief). See generally, **Fla. R. Civ. P. 1.330(a)**.

Thus, the statute, under the guise of protecting patient physician confidentiality -- which the statute itself provides can be "pierced" by simply filing a notice of taking deposition -- really does nothing more than create an imbalance of power between plaintiffs and defendants in personal injury litigation. It creates the only category of non-party fact witnesses that exists on the face of the Earth who may not be contacted directly by counsel for either party in an off-the-record fashion so that counsel can prudently and intelligently decide who to call as a witness and who not to call as a witness, or whose testimony to preserve for the record and whose not to preserve.

Because discovery depositions may be utilized at trial for

virtually any purpose, see **Florida Rule of Civil Procedure 1.330**, allowing defense counsel to question a plaintiff's treating physician only via deposition is akin to forcing defense counsel to question plaintiff's treating physicians (a) not at all or (b) for the first time at trial. Defendants face the dilemma of choosing between two equally unfair and unpalatable choices. The defendant must elect not to depose a potentially helpful witness, or it must elect to question a potentially critical and extremely damaging witness for the first time before the jury.

This catch 22 situation is similar to the dilemma which was addressed -- and avoided -- by this Court in **BOLIN v. STATE, 642 So.2d 540, 541 n.4 (Fla. 1994)**. The issue before the Court then was whether a criminal defendant waived his spousal testimonial privilege by taking his ex-wife's deposition where he did not use the deposition at trial and otherwise maintained the privilege throughout the proceedings. The court noted that:

> The defense needs to ascertain what a spouse might know, but, if the privilege will be waived by merely asking, engaging in discovery can become extremely risky.

642 So.2d at 541. Then, in a footnote, the court noted that a criminal defendant's attorney faced a claim of ineffective assistance of counsel if he chose not to take the ex-wife's deposition, but also faced a similar claim if he decided to forego discovery to maintain the privilege and then was surprised at trial by something that should have been discovered beforehand. **Id. at n.4.**

The statute in question, as interpreted by the district court below and by the district court in **KIRKLAND**, **supra**, places civil defense counsel in a similar predicament. If defense counsel is forced to ascertain what may be either very helpful or very harmful information only via a discovery deposition, whereas plaintiff's counsel is allowed unfettered access to such vital fact witnesses, defense counsel is at a distinct disadvantage. Furthermore, if defense counsel is forced to obtain information from these fact witnesses solely via deposition, or, as the Plaintiff requested below, in a conference attended by Plaintiff's counsel, then defense counsel's work product privilege will have been violated. See, **FRANTZ v. GOLEBIEWSKI**, citing, **SURF DRUGS, INC. v. VERMETTE, 236 So.2d 108 (Fla. 1970)**.

CONCLUSION

For the reasons set forth in this brief, Dr. Acosta respectfully requests that this Court quash the opinion of the Second District Court of Appeal and affirm the trial court's order either by giving the statute an appropriately narrow construction; by recognizing the exception of medical malpractice cases from the statute; or by declaring the statute to be unconstitutional.

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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 1st day of February, 1995; 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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