94-4801/lo

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 REPLY BRIEF ON THE MERITS

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Clarifying Some Misperceptions

The Briefs filed on behalf of the Respondents and the Amicus, Academy of Florida Trial Lawyers, evidence a number of misperceptions concerning the issues raised in our initial brief.[1]

The first misperception on the part of both Respondents and the Academy is that Dr. Acosta has somehow "abandoned" any argument that the district court's opinion is in conflict with **JOHNSON v. MT. SINAI MEDICAL CENTER OF MIAMI, 615 So.2d 257 (Fla. 3d DCA 1993)**, or that the **JOHNSON** decision is correct. (See, R.B. at Page 3 n.2; A.B. at Page 2 n.2). This argument, first made by the Academy, and cheerfully echoed by the Respondents, is wrong.

If there is any doubt about whether the Petitioner has "abandoned" its arguments made first in the trial court and then before the Second District, this Court need look no further than Page 14 of Dr. Acosta's initial brief on the merits. Furthermore, the jurisdictional brief filed by Dr. Acosta was premised entirely upon the conflict between the district court opinion and **JOHNSON**. That jurisdictional brief is still before this Court and was not "abandoned" by the filing of a brief on the merits.

Furthermore, little need be said about **JOHNSON** given its rather limited holding. However, we specifically reject the notion (fostered by the Academy) that the Third District Court of Appeal

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[1]References to the Respondent's Brief will be designated by the symbol (R.B.) filed by the page number. Reference to the Academy's Brief will be indicated by the symbol (A.B.) followed by the page number.

has already rejected the arguments raised in this matter by virtue of its decision in **JOHNSON**. The court there dealt with a limited issue, i.e., whether a one-way interview violated **Section §455.241(2)**. The court was in no way asked to, and did not address, the application of that Statute to a two-way ex parte conference in a medical malpractice case or otherwise. The issue was simply not put to the Third District in the **JOHNSON** case.[2]

The Academy also misperceives our position when it argues (A.B. Page 2) that Dr. Acosta has urged a construction of the statute which forbids ex parte interviews between defense counsel and treating physicians in all litigation except medical malpractice cases. While it is true that we have argued that the statute by its very language does not apply to medical malpractice cases, we have also argued that the Statute (a) does not forbid ex parte interviews in <u>any type</u> of case with respect to certain issues and (b) that at any rate the statute is unconstitutional because it infringes upon the rule-making authority of this Court.

Finally, the Academy has suggested that our argument for a limited reading of the statute, and the statute's unconstitutionality are <u>contingent</u> upon acceptance of our first argument, i.e., that the statute by its very language does not apply to medical malpractice actions. Specifically, on Page 3 of the Academy's Brief the following incorrect statement is made: "Dr.

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[2]However, these issues are currently before Third District Court of Appeal for en banc consideration in three cases consolidated under the style of **Giron v. Noy, Case Nos. 94-1675, 94-1493 and 94-1428**. Oral argument was held in early November 1994.

Acosta argued second that this interpretation of the Statute [i.e. that the Statute by its very language does not apply to medical malpractice cases], if correct, renders the Statute unconstitutional..." Clearly, the Academy hopes that this Court will (erroneously) assume that our arguments concerning the unconstitutionality of the Statute are conditioned exclusively upon acceptance of our first argument. This is incorrect. Each of the arguments raised by Dr. Acosta in his initial brief are independent of one another, and each should be addressed by the court.

The Statute Does Not Apply To Medical Malpractice Actions

Rather than belabor the point, we will chiefly rely upon the arguments raised in our initial brief. The Academy essentially argues that our construction of the statute makes no sense because medical malpractice actions should not be treated different from other personal injury actions or worker's compensation cases. First, we must note that the legislature has further excepted worker's compensation cases from the provisions of **§455.241(2)**, by amendment to **§440.13(4)(c)**.

Apart and aside from that point, there is a very basic reason that medical malpractice actions should be excepted from the statute, as the legislature has done. Unlike the scenario in a products liability action or an automobile accident case, the defendant in a medical malpractice action is himself a (former) treating physician. He or she needs, indeed is entitled to, greater access to the plaintiff's "medical condition" than is the driver of an automobile or manufacturer of a product. Although

such things typically do not reveal themselves in a "legislative history," it is not beyond the realm of possibility that medical malpractice actions were carved out of the statute as a quid pro quo between the plaintiff's personal injury bar and the defense bar.

Again, we rely upon our initial brief, as well as the amicus brief filed on behalf of the Florida Medical Association in support of our argument. The failure to reiterate each and every point raised in our initial brief on the merits should not be construed as an abandonment of those issues.

The "So-Called" Physician-Patient Privilege

The thrust of our constitutional challenge to the Statute is that the statute really does not create a privilege because it does not create a class of privileged information. It simply regulates the form in which the information is obtained. It has been well-established in this Court that no such privilege existed at common law. See **CORALLUZZO v. FASS, 450 So.2d 858 (Fla. 1984); MORRISON v. MALMQUIST, 62 So.2d 415 (Fla. 1953)**. Thus, the real issue here is whether the 1988 amendments to **Section 455.241(2)** created such a privilege, and if so, whether that "creation" nevertheless is unconstitutional.

The Academy for its part concedes (as it must) that no such privilege existed prior to 1988. Respondents, on the other hand, treat the physician-patient privilege as if it has been established since the dawn of time. Perhaps the confusion on the part of the Respondents is between the concept of the physician-patient

privilege in a general sense, and the physician-patient privilege in the context of litigation. Surely nobody will quarrel with the idea that a physician may not go about in a willy-nilly fashion speaking to perfect strangers about the medical condition of its patients. But that is not what this case is all about, and that is not what the amendments to the statute are all about.

The Respondents dramatically overstates this case by referring to the physician-patient (testimonial) privilege as "one of the most critical privileges existing in Florida's jurisprudence." (R.B. Page 2). The Respondents believe that "it is chilling to think of the impact upon the candid relationship between a physician and patient," if the Court accepts Dr. Acosta's position. Do the Respondents really think that most patients are even aware of the provisions of **Section §455.241(2)**? Are we to assume that prior to 1988 patients throughout the State of Florida were not candid when discussing their medical condition with their physicians for fear of that in the event that they filed a lawsuit at some point their condition would be revealed to their litigational adversary? And if so, does the statute really change that given that it does allow (as it must) discovery of such discussions through subpoena and deposition?

The Academy and the Respondents would have this Court believe that the free-flow of information from patient to physician did not exist prior to 1988, but somehow sprang to life by virtue of the amendments to the statute in question. That supposition, to use a word which was greatly overworked in the Academy's Brief, is the

purest form of "nonsense."

In fact, medical records are presumed to be trustworthy for the very reason that it is presumed that a patient will be candid with his physician out of the purest form of self-interest: the patient's interest in getting better. See generally, **LOVE v. GARCIA, 634 So.2d 158 (Fla. 1994); Fla. Stat. §90.803(6)(a).**

The Statute Affects Procedural Rights, Not Substantive Rights

The Respondents and the Academy suggest that because the statute "creates" a physician-patient privilege, it is substantive and not procedural. However, as we pointed out in our initial brief, **§455.241(2)** does not create any such thing. Neither the District Court below, or the District Courts in **KIRKLAND** or **FRANKLIN** nor the Respondents or the Academy have ever identified any information whatsoever that is protected from discovery by the statute. They simply assume that the information that would be discussed by a treating physician in an ex parte conference is substantively different from information which could be discussed in the context of a deposition. Even the cases relied upon by the Academy and the Respondents recognize that a rule (whether legislative or court fashioned) which precludes ex parte contact only regulates how defense counsel may obtain information from a treating physician, not the substance of what is discoverable. See, **HORNER v. ROWAN COMPANIES, INC., 153 F.R.D 597, 602 (S.D. Tex. 1994); MANION v. N.P.W. MEDICAL CENTER OF NORTHEAST PENNSYLVANIA, INC., 676 F.Supp 585, 593 (M.D. Pa. 1987).** In fact, in those cases the rule against ex parte conferences was fashioned by the courts

themselves. Clearly, this is an issue which is procedural and which is within the inherent rule-making authority of this Court, not the legislature.

What this argument really boils down to is a distrust of physicians (and presumably defense counsel). This "distrust" is apparently so valid, and the problem identified by the distrust so pervasive that those physicians' (and attorneys') right of free speech and association my be trammeled under the guise of a reasonable time, place or manner limitation. Respectfully, none of the cases cited by the Academy concerning reasonable time, place and manner restrictions on free speech support the statute's infringement on First Amendment Rights.

In support of its argument against the constitutional infirmities which we have raised, the Academy cites to the court, inter alia, a case dealing with "free speech" which consisted of a citizen's claim to First Amendment protection for nude jogging in public, see, **MCGUIRE v. STATE, 489 So.2d 729 (Fla. 1986)**, a matter which is protected speech only when combined with some mode expression which is itself protected by the First Amendment. Although the Academy persists in claiming that there is a class of information which is protected by the statute that would be disclosed in an ex parte interview but would otherwise not be disclosed in a discovery deposition, no such information has been identified. However, to the extent that the statute purports to regulate content, only the most extraordinary circumstances will justify regulation based upon content. See, **DIMMITT v. CITY OF**

CLEARWATER, 985 F.2d 1565 (11th Cir. 1993). There are no such extraordinary circumstances in the context of this statute's application to medical malpractice or other personal injury litigation.

It must also be remembered that the 1988 amendment to the statute was designed to "protect" only that class of patients which have instituted a lawsuit. Patients who have not instituted a claim were already protected by the statute's general protection of medical records. Thus, the fact that the class of persons who are supposed to have been the beneficiaries of the statute is small -- and given the fact that they have waived, i.e., consented, to the release of their medical records by virtue of filing suit -- the First Amendment analysis necessarily places a great burden upon the state to establish a compelling interest for this time, place and manner restriction.[3]

The "parade of horribles" which the Academy suggests the Statute was enacted to prevent, (yet which must have been perfectly acceptable to this Court, see, **CORALLUZZO v. FASS, supra**) simply does not exist. The Academy offers four cases involving "improper conduct." (A.B. Page 13 n.6) In **HORNER v. ROWAN COMPANIES, INC., 153 F.R.D 597 (S.D. Tex. 1994)**, the issue of ex parte contact with a treating physician was recognized to be an issue of first impression by the court. What was sanctioned in that case was not

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[3]Ironically, the Academy's reference to the statute as a "time, place and manner" restriction proves our point on the procedural/substantive dichotomy. If all that the statute does is restrict the time, place and manner of speech, then clearly the statute is procedural, not substantive.

the ex parte contact, but rather the fact that defense counsel lied to plaintiff's counsel about "canceling" a discovery deposition which had been scheduled.[4] Furthermore, the discussion in **MANION v. N.P.W. MEDICAL CTR OF NORTHEAST PENNSYLVANIA, INC., 676 F.Supp 585, 594-95 (M.D. Pa. 1987)**, was purely hypothetical. The concerns expressed there, i.e., that such an ex parte conference might dwell on an issue such as the rising cost of insurance due to large medical malpractice verdicts, is not much of a reason to preclude such ex parte conferences. Does this Court really believe that there is a single doctor in the State of Florida that is not already aware of and particularly sensitive to that issue?

MILES v. FARREL, 549 F.Supp 82 (S.D. Ill. 1982), involved a scenario where a doctor who had been retained as an expert witness by defendants in a medical malpractice action thereafter became a treating physician of the plaintiff, without informing the plaintiff that he had already been retained as an advocate by the plaintiff's litigational adversary. Quite frankly, that is not an issue that will likely be repeated, and can in any event be dealt with accordingly. It has nothing to do with the issue of ex parte conferences. If anything, these cases reveal that if and when any impropriety occurs, it can be ferreted out and dealt with, as with any other form of discovery violation.

Respondents argue that the Statute is substantive because it

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[4]Furthermore, the district court came down upon the side of disallowing ex parte conferences primarily because Texas Rule of Evidence 509 specifically creates a physician-patient privilege. There is no such rule of evidence in Florida.

regulates the content of the information obtained in an ex parte interview versus a deposition. By this implosive logic all procedural rules should be deemed substantive. Did the non-joinder statute which this Court held to be procedural in **MARKERT v. JOHNSTON, 367 So.2d 1003 (Fla. 1978)**, not affect, in some fashion, the substantive right of plaintiffs? Furthermore, as we noted previously, the Respondents can point to no information, i.e., "content" that is affected by the Statute.[5]

Respondents' reliance upon **HILLSBOROUGH CTY AVIATION AUTHORITY v. AZZARELLI CONST. CO., INC., 436 So.2d 153 (Fla. 2d DCA 1983)**, is misplaced. The issue in that case was whether trial preparation materials prepared on behalf of a government agency are "work product," and thus not discoverable. The court held that they were discoverable pursuant to the access to public record statute. The decision clearly involved the Hillsborough County Aviation Authority's substantive rights. There the difference in outcome was whether the information would be shielded from discovery or not. Here, the issue is the forum <u>in</u> which and the method <u>by</u> which information which everybody agrees is discoverable may be discovered. That is a procedural distinction, not a substantive

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[5]Our arguments that the statute forces defense counsel to take a treating physician's deposition either not at all or for the first time in front of the jury in no way regulates the content of the information which can be obtained from the physician. The very same questions <u>can</u> be asked at a deposition as would be asked in an ex parte interview. The problem is a tactical one. Thus, any difference in the information that is obtained under the statute, as opposed to the common law rule set forth in **CORALLUZZO v. FASS, <u>supra</u>**, has nothing to do with content or substance. It is simply a matter of procedure and strategy.

distinction. For the same reason, the Respondents' suggestion that the Statute is substantive and seeks to preclude "improper" discovery by which privileged information will be disclosed in a "cat out of the bag" manner, is also wrong. Here, all parties agree that the cat may be taken out of the bag. The only issue is whether a court reporter will be present when the cat is let out of the bag. Again, that is a procedural issue, not a substantive issue.

Next, the Academy seeks to recast our constitutional arguments as simple arguments against the "wisdom" (or lack thereof) of the legislature, and thus chastises us for addressing these arguments to the Court. Each of the arguments which the Academy relegates to the realm of "public policy arguments" are part and parcel to our challenge to the constitutionality of the statute. Again, by pointing out the lack of substance in the statute, we simply strengthen our argument that the statute is procedural and not substantive. When we point out the "unfair advantage" that the Statute reposes in plaintiff's counsel versus defense counsel, we are buttressing our argument that the statute does not affect any substantive rights, only procedural rights. When we point out the inherent risk in taking the deposition of a treating physician we are not just "complaining" about the wisdom underlying the statute. Again, we are pointing out that although we are "free" to obtain the very same information in a deposition that we could obtain in an ex parte interview, we are not truly free in a procedural or strategic sense for the very reasons stated in our initial brief.

In this regard, the Academy's argument (A.B. Page 15) which echoes the decision 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)**, to the affect that a court should not be engaged in "unauthorized rule-making beyond its authority," has got it exactly backwards. It is the legislature which has engaged in unauthorized rule-making beyond its authority by virtue of enacting this statute. Clearly, no one can argue with the notion that it is perfectly appropriate for counsel for either party to speak off the record with fact witnesses.[6]

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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[6]Ironically, because this is "discovery" which is outside of the rules of discovery -- not outside in the sense of being contrary to the rules of discovery, rather outside in the context of not being explicitly prohibited by the rules of discovery -- there is in fact no "rule" to which we can cite the court as being in conflict with the Statute. It is simply an unwritten rule of discovery which has always been maintained and recognized. See generally, **CORALLUZZO v. FASS, supra; FRANTZ v. GOLEBIEWSKI, 407 So.2d 283 (Fla. 3d DCA 1981)**.

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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 11th day of April, 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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