IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,905
3d DCA No. 94-01493

LYDIA D. PIERRE, etc., et al.,

Petitioners,

vs.

NORTH SHORE MEDICAL CENTER, INC., et al.,

Respondents.

BRIEF OF PHYSICIANS PROTECTIVE TRUST FUND AS AMICUS CURIAE

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INTRODUCTION

Physicians Protective Trust Fund ("PPTF") submits this brief as amicus curiae and seeks affirmance of the underlying decision construing Section 455.241(2), Florida Statutes. The Third District Court of Appeal held that the plain language of the 1988 amendment to Section 455.241(2) entirely excludes medical malpractice actions from its purview. In the alternative, the Third District concluded that the statute does not prohibit all ex parte communications between the defense and a plaintiff's health care practitioners, but only those specifically protected under the statute. The Third District certified that its decision was in direct conflict with Kirkland v. Middleton, 639 So. 2d 1002, (Fla. 5th DCA), rev. dismissed, 645 So. 2d 453 (Fla. 1994), and Richter v. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994), rev. granted sub nom., 650 So. 2d 989 (Fla. 1995).

SUMMARY OF THE ARGUMENT

PPTF is one of the largest medical malpractice self-insurance trust funds in the State of Florida. As such, PPTF functions as a statutory medical review committee and is under a statutory obligation to conduct a good faith presuit investigation, medical review and evaluation of medical malpractice claims. This statutory duty requires PPTF to contact all material witnesses, which may include treating physicians, who possess first hand knowledge of crucial facts related to liability and causation.

The Third District properly interpreted Section 455.241(2), Florida Statutes, in light of Chapter 766 which governs presuit

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investigations and found that the statutory provisions should be read in harmony. Section 455.241(2), which provides a limited privilege of confidentiality in medical information of a patient, expressly excludes medical malpractice actions from its scope. Thus, the plain language of the statute demonstrates that there is no impediment preventing an insurer from contacting a plaintiff's treating physicians as part of its presuit investigation. Moreover, the legislature's knowledge of the existing law -- Chapter 766 and the common law permitting ex parte conferences in general between a medical malpractice defendant and a plaintiff's treating physicians -- further shows that the legislature intended to continue to allow the free exchange of information in medical malpractice actions and that Section 455.241(2) does not hinder an insurer's good faith investigation of medical malpractice claims.

PPTF respectfully submits that Section 455.241(2) is entirely inapplicable to medical malpractice actions. In the alternative, PPTF respectfully submits that the provision granting confidentiality does not apply to the presuit investigation and review of medical malpractice claims. PPTF further submits that to the extent that Section 455.241(2) enables plaintiffs to gain an unfair tactical advantage in litigation, it denies defendants due process of law, and to the extent that it governs the method of discovery from treating physicians, it constitutes an unconstitutional encroachment on the powers of the judiciary.

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ARGUMENT

I. Section 455.241(2), Florida Statutes, Permits Ex Parte Conferences between Medical Malpractice Defendants and Non-Party Treating Physicians, and Must be Construed in Pari Materia with Chapter 766 Which Governs Presuit Investigations of Medical Malpractice Claims.

Section 455.241(2), Florida Statutes, as amended in 1988, creates a limited privilege of confidentiality in medical information of a patient in the possession of a health care practitioner. In 1988, the legislature added the emphasized language to the statute:

> Except as otherwise provided in s. 440.13(2), such records may 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 medial 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....

Section 455.241(2).

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To date, only the Third District Court of Appeal has considered the proper interpretation of the 1988 amendment to Section 455.241(2), in light of Chapter 766. Pursuant to Chapter 766, insurers like PPTF have a statutory obligation, under penalty of sanctions, to obtain all relevant information from all witnesses, which includes treating physicians, without qualification or exception, because Section 766.106, Florida Statutes, compels insurers to conduct a good faith presuit investigation, review, and evaluation of malpractice claims. The standard of good faith, mandated by statute, requires an insurer to do its utmost to discover the truth toward the end of making an informed and reasonable decision to reject the claim, make a settlement offer, or offer to admit liability and arbitrate the issue of damages at the end of the presuit period. § 766.106. A good faith investigation, review, and response to claims many times cannot be made without obtaining information from treating physicians who possess first hand knowledge of crucial facts relevant to issues of liability, causation and damages. Indeed, Chapter 766 specifically envisions that the insurer's medical review body will interview all witnesses, including treating physicians, in the fulfillment of its statutory duties.[1]

The petitioners' reliance on the 1988 amendment to Section 455.241(2), to absolutely prohibit those involved in the defense of

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

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a medical malpractice action from contacting a plaintiff's treating physicians outside the realm of formal discovery, is misplaced. There is nothing in the language of the 1988 amendment to Section 455.241(2) which purports to restrict an insurer conducting mandatory medical review pursuant to Chapter 766 from obtaining relevant information from treating physicians. In fact, the plain language of Section 455.241(2) entirely excludes medical malpractice actions from the provision granting confidentiality, through the prefatory except clause. Hence, "information disclosed to a health care practitioner by a patient in the course and treatment of such patient is confidential" "except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant."

The statute does not limit the exception to information possessed by the medical provider who is himself sued, but entirely excludes from the confidentiality provision all actions in which any health care provider is sued. Likewise, the statute does not limit the exception to cases in which the plaintiff's treating physician is sued. As the Third District correctly stated below:

> it is well established, in accordance with the ordinary rules of grammar and rhetoric, that the word "a," as repeatedly and exclusively used in the operative portions of the statute, means "any." Izadi v. Machado (Gus) Ford, Inc., 550 So. 2d 1135, 1138 n. 3 (Fla. 3d DCA 1989); State ex rel. Roberts v. Snyder, 149 Ohio St. 333, 78 N.E.2d 716 (1948); First Am. Nat'l Bank v. Olsen, 751 S.W.2d 417 (Tenn. 1987), appeal dismissed, 485 U.S. 1001 (1988); see United States Fidelity & Guar. Co. v. State Farm Mut. Auto. Ins. Co., 369 So. 2d 410, 412 (Fla. 3d DCA 1979) ("an"). If, as the plaintiffs argue, the exception refers to a case in which the treating physician was herself the active or potential defendant, the statute would read "except in a medical negligence

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> action when the [or that] health care provider is or reasonably expects to be named as a defendant" or that "information disclosed to the [or that] health care practitioner ... is confidential." But it does not read that way and we are powerless judicially to amend the statute to provide that it does. See Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

Thus, the plain language of Section 455.241(2) demonstrates that the confidentiality provision does not apply to medical malpractice actions. See Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993) ("the legislature is assumed to have expressed its intent through the words found in a statute.... If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended"); Aetna Cas. & Sur. v. Huntington Nat'l Bank, 609 So. 2d 1315 (Fla. 1992) ("When the language of a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning"); Florida State Racing Comm. v. Bourquardez, 42 So. 2d 87 (Fla. 1949) ("The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act but to the manner in which it is punctuated").

The petitioners contrary contention that the confidentiality provision is waived only where the plaintiff's treating physician is or reasonably expects to be named as a defendant is not supported in the law and was properly rejected by the Third District. The petitioners rely on, as did the court in Franklin v.

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Nationwide Mutual Fire Insurance Company, 566 So. 2d 529 (Fla. 1st DCA), rev. dismissed, 574 So. 2d 142 (Fla. 1990), a proposed change to Section 455.241(2) that was not adopted when the statute was amended:

> In addition, this information may be disclosed by a health care provider to his attorney if the provider expects to be named as a defendant in a negligence case.[2]

Legislative intent cannot be derived from legislative comments that were not enacted into legislation. See Piezo Technology v. Smith, 413 So. 2d 121 (Fla. 1st DCA 1982), approved, 427 So. 2d 182 (Fla. 1983) ("Where the journals recording the history of enactment of the statute show that language that gave a particular construction to it was taken out by an amendment, *another provision being substituted that gives a different meaning*, a construction based on the provision before its amendment will be avoided"); Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended"). Consequently, an interpretation consistent with language previously considered by the legislature but not adopted when the statute was enacted cannot stand. Here, the legislature in enacting the confidentiality provision of Section 455.241(2) expressly excluded all medical malpractice actions from its purview.

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[2] Senate Staff Analysis and Economic Impact Statement, CS/SB 1076, Senate Judiciary-Civil Committee, May 19, 1988.

The legislature's use of the term health care provider and health care practitioner to differentiate between the medical malpractice defendant and a plaintiff's treating physician also evidences its intent to exclude medical malpractice actions from the confidentiality provision of Section 455.241(2). As the Third District recognized:

> Because the legislature is deemed to intend different meanings by the use of different words, Ocasio v. Bureau of Crimes Compensation Div. of Workers' Compensation, 408 So. 2d 751 (Fla. 3d DCA 1982); 49 Fla.Jur.2d Statutes §133 (1984), the fact that it referred to a health care provider who is a potential defendant and to a health care practitioner to whom information had been given must mean that they are not the same person and that the exception to confidentiality therefore is not restricted to a case in which only that doctor is being sued.

Under Florida law, health care practitioner and health care provider have different legal meanings. See § 455.01(4)[3], Fla. Stat.; §§ 766.101(1)(b)[4], .102(1)[5], .105(1)(b)[6], Fla. Stat. A

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[3] Section 455.01(4) defines health care practitioner as "any person" licensed under chapters 457-466, 468 (parts I, III, V or X), 474, 484, 486, 490 or 491.

[4] Section 766.101(1)(b), defines health care providers as physicians, osteopaths, podiatrists, optometrists, dentists, chiropractors, pharmacists, or hospitals or ambulatory surgical centers licensed under the corresponding chapter of Florida law.

[5] Section 766.102(1) incorporates by reference the definition of health care provider found in section 768.50(2)(b). See Weinstock v. Groth, 629 So. 2d 835 (Fla. 1993). That section defines health care providers as Florida licensed hospitals, physicians, osteopaths, podiatrists, dentists, chiropractors, naturopaths, nurses or physical therapist assistants; registered clinical laboratories; certified physicians' assistants; licensed health maintenance organizations or ambulatory surgical centers; blood banks, plasma centers, industrial clinics, and renal dialysis facilities; or professional associations, partnerships, corporations, joint ventures, or other associations for professional activity by health care providers.

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health care practitioner is "any person" enumerated under Section 455.01(4) who practices medicine whereas a health care provider, as described in Chapter 766, may be either an individual who practices medicine or an entity that provides health care services. Since the terms health care practitioner and health care provider are not necessarily synonymous, it is clear that the legislature intended to accord a different meaning to these terms as used in Section 455.241(2). Therefore, the petitioners' argument that the confidentiality provision is limited to information possessed by a health care practitioner who is himself sued is erroneous because the legislature would not have used the broader term health care provider in the exception clause to denote that the confidentiality provision is entirely inapplicable to any medical malpractice defendant who is sued.

Moreover, the legislature is presumed to know the existing law when enacting legislation. Woodgate Dev. Corp. v. Hamilton Inv. Trust, 351 So. 2d 14 (Fla. 1977); Hollar v. Int'l Bankers Ins. Co., 572 So. 2d 937, 939 (Fla. 3d DCA 1990), rev. dismissed, 582 So. 2d

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[6] Section 766.105(1)(b) defines health care provider as any:

1. Hospital licensed under chapter 395.
2. Physician licensed under chapter 458.
3. Osteopath licensed under chapter 459.
4. Podiatrist licensed under chapter 461.
5. Health maintenance organization certified under part I of chapter 641.
6. Ambulatory surgical center licensed under chapter 395.
7. "Other medical facility" as defined in paragraph (c).
8. Professional association, partnership, corporation, joint venture, or other association by the individuals set forth in subparagraphs 2., 3., and 4., for professional activity.

624 (Fla. 1991). An insurer's statutory duty to obtain relevant information from treating physicians in their presuit investigation and medical review of malpractice claims has existed since 1985 (Ch. 85-175, §14, Laws of Florida) and still exists today, notwithstanding the 1988 amendment to Section 455.241(2). Indeed, it is absurd to suggest that the legislature imposed a duty of good faith presuit investigation, medical review, and evaluation of medical malpractice claims upon insurers, yet simultaneously handcuffed and blindfolded the insurers by restricting their access to the most relevant and material fact witnesses. Accordingly, Section 455.241(2) must be construed, in pari materia with Chapter 766, as inapplicable to an insurer's presuit investigation of medical malpractice claims, so as to harmonize the statutes rather than create conflict between them. See Woodgate Dev. Corp., 351 So. 2d at 16 (statutes must be construed in harmony so as to reconcile their provisions); Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981) (statutes should be construed in pari materia).

The legislature did not amend the applicable provisions of Chapter 766 when it amended Section 455.241(2) and, thus, evidenced its intent that the presuit screening statutes and Section 455.241(2) be read in harmony with one another. As the Third District aptly noted:

> In the malpractice field, the legislature has gone to great lengths to encourage the free flow and exchange of information during and even before the filing of suit in order to encourage the disposition of these cases outside of court. See §§ 766.101-.316, Fla. Stat. (1993). There can be no doubt that this policy, particularly including

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> the "informal discovery" provided by the statute, see § 766.106(7), Fla. Stat. (1993) -- which was adopted almost simultaneously with the 1988 amendment to section 455.241, see Ch. 88-277, § 48, Laws of Fla. -- would be severely subverted by a holding that the patient's treating doctor cannot even speak about his condition to potential malpractice defendants. Thus, it makes perfect sense for the legislature to provide, as we think it clearly did, that the [confidentiality] privilege does not apply to those cases.[7]

While PPTF maintains that Section 455.241(2) does not apply to medical malpractice actions, PPTF recognizes that other courts have applied the statute to malpractice cases without considering the clause excepting medical malpractice actions from the provision

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[7] Furthermore, statutes should be strictly construed to reflect the common law unless the legislature clearly indicates otherwise. Graham v. Edwards, 472 So. 2d 803, 807 (Fla. 3d DCA 1985), rev. denied, 482 So. 2d 348 (Fla. 1986); Arias v. State Farm Fire & Cas. Co., 426 So. 2d 1136, 1139 (Fla. 1st DCA 1983).

> The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.

Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 918 (Fla. 1990) (citations omitted).

Section 455.241(2) must be strictly construed because it is in derogation of the common law as expressed in Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984), and Frantz v. Golebiewski, 407 So. 2d 283 (Fla. 3d DCA 1981). Coralluzzo and Frantz held that there was no legal impediment to "ex parte" but voluntary conversations between a patient's treating doctors and those involved in the defense of a patient's personal injury action, including one for medical malpractice. These decisions recognized that there is no physician-patient privilege in Florida precluding contact between a physician being sued for malpractice and the plaintiff's current treating physician. Because Section 455.241(2) is in derogation of the common law, its provisions should not be expansively construed. Rather, a strict construction of Section 455.241(2) requires that the confidentiality provision be read to exclude medical malpractice actions from its purview.

granting confidentiality.[8] Assuming arguendo that Section 455.241(2) is applicable to medical malpractice actions, Chapter 766 governing presuit screening, nevertheless, should be exempt from the confidentiality provision of Section 455.241(2). To begin with, a patient's interest in confidentiality of medical information disclosed during presuit investigation and review is adequately protected because information elicited from physicians in the medical review process remains confidential and records of medical review committees, including matters not generated by, but merely considered by such committees, are privileged and immune from discovery. Feldman v. Glucroft, 522 So. 2d 798, 800-01 (Fla. 1988); Cruger v. Love, 599 So. 2d 111 (Fla. 1992). Similarly, other provisions of the presuit screening statutes facilitate the goal of good faith investigation and medical review while providing adequate protection for the claimant's interests in confidentiality.[9] Thus, the entire presuit review process functions under an umbrella of confidentiality.

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[8] See Kirkland v. Middleton, 639 So. 2d 1002, (Fla. 5th DCA), rev. dismissed, 645 So. 2d 453 (Fla. 1994), and Richter v. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994), rev. granted sub nom., 650 So. 2d 989 (Fla. 1995).

[9] See Section 766.106(7)(a), Fla. Stat., (unsworn statements of parties taken during presuit screening "may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party"); Section 766.106(7)(c) (report of examination of claimant made during presuit screening "may be provided only to parties and their attorneys and may be used only for the purpose of presuit screening"); Section 766.106(5) ("No statement, discussion, written document, report, or other work product generated by the presuit screening process is discoverable or admissible in any civil action for any purpose by the opposing party").

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Furthermore, although the manifest intent of Section 455.241(2) is to provide for the confidentiality of medical information in general, the statutory privilege is not absolute. Indeed, there are many instances in which the privilege does not apply, is overcome, or is waived, although these circumstances are not enumerated in Section 455.241(2). See e.g., Pedroso v. State, 450 So. 2d 902 (Fla. 3d DCA 1984) (Section 455.241(2) does not apply to medicaid fraud investigations: "The more specific statutes dealing with Medicaid fraud investigations control over this general statutory provision"); § 627.736(6)(b), Fla. Stat. (requiring physicians who have provided any services in connection with any injury on a P.I.P. claim, or any other previous or subsequent injury or connected condition, to furnish written reports of the history, condition, and treatment of the claimant); § 415.504, Fla. Stat. (mandatory reporting requirements for physician with knowledge or reasonable cause to suspect child abuse); Hunter v. State, 639 So. 2d 72 (Fla. 5th DCA) (confidentiality of information contained in medical records is overcome by compelling State interest when relevant to criminal investigation), rev. denied, 649 So. 2d 233 (Fla. 1994); § 90.507, Fla. Stat. (waiver of privileges of confidentiality by voluntary disclosure).

The provisions of Chapter 766 governing presuit medical review clearly indicate that insurers can (indeed in many cases must) obtain factual information from treating physicians in the fulfillment of their statutory investigation obligations,

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notwithstanding Section 455.241(2). Thus, the more specific provisions of Chapter 766 control, and the patient authorization requirements of Section 455.241(2) are inapplicable. Pedroso, supra.

In sum, PPTF respectfully submits that the plain language of the confidentiality provision of Section 455.241(2) entirely excludes medical malpractice actions from its purview. The judicial construction of Section 455.241(2) sought by the petitioners in this case would create an irreconcilable conflict with Chapter 766 by preventing insurers from fulfilling their statutory medical review obligation, and would potentially subject insurers, defendants, defense counsel, and participating experts to sanctions. See §§ 766.106(3)(a); .206(3); .206(5)(a); Duffy v. Brooker, 614 So. 2d 539, 546 (Fla. 1st DCA), rev. denied, 624 So. 2d 267 (Fla. 1993). All of these participants are obligated to ensure that there is a good faith factual basis supporting any rejection of a claim and supporting an expert's corroborating opinion. Moreover, acceptance of the petitioners' position would clearly defeat the legislative intent of providing for prompt, cost-effective, presuit evaluation and resolution of malpractice claims, adding to the already prohibitive costs of medical malpractice litigation. See § 766.201. Therefore, Section 455.241(2) must be construed in pari materia with Chapter 766 so as to harmonize the statutes rather than create conflict between them.

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II. To the Extent that Section 455.241(2) Governs the Manner of Discovering Evidence and Enables Plaintiffs to Obtain an Unfair Litigation Advantage, it Constitutes an Unconstitutional Encroachment on the Powers of the Judiciary and Denies Defendants Procedural Due Process.

The petitioners seek, under the guise of a claim of confidentiality, to gain an unfair tactical advantage in litigation by precluding defendants from having equal access to fact witnesses. It is disingenuous for medical malpractice plaintiffs to claim that their confidentiality will be invaded by defense counsel's contact with treating physicians when they, themselves, have placed their medical condition at issue, and have otherwise disclosed the information.[10] It is evident that the petitioners' concern here is not to protect any privilege, but to control the method of defendants' discovery of relevant non-privileged information.[11] The petitioners concede that information possessed by their treating physicians is discoverable, but that it is the method of discovery to which they object. Essentially the petitioners contend that Section 455.241(2) grants them a right to

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[10] Indeed, medical malpractice plaintiffs are fully aware that their medical condition is necessarily subject to detailed exploration and thorough examination in a medical malpractice action, even to the extent of a compelled medical examination (which is obviously more intrusive than the complained of contact with a treating physician).

[11] If there is any irrelevant information for which plaintiffs' have a legitimate claim of confidentiality, this information can be protected from disclosure by preconference court orders delineating the scope of the plaintiff's waiver. There is no reason to assume that defense counsel and doctors, bound by the ethics of their professions, will ignore or violate the provisions of court orders as plaintiffs suggest. If unethical and improper conduct is plaintiffs' concern, it is unlikely that an order prohibiting all contact will deter such conduct by those who are bound and determined to break the law in any event.

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restrict defendants' method of discovering relevant non-privileged facts from plaintiffs' treating physicians, while permitting plaintiffs unfettered access to the same physicians.[12]

Therefore, to the extent that Section 455.241(2) governs the method of acquiring information in litigation, it unconstitutionally encroaches on the powers of the judiciary. See Gordon v. Davis, 267 So. 2d 874, 876 (Fla. 3d DCA 1972) (rule permitting compulsory physical examination "does not affect 'substantive' rights of the litigants, since it relates exclusively to the obtaining of evidence, and is therefore procedural"); Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991) (matters of practice and procedure are within the exclusive power of the judiciary and "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").

Medical malpractice plaintiffs have no right to hold critical fact witnesses hostage to their beck and call and have no legally protected interest in facts known or opinions held by their

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[12] Courts in other jurisdictions have allowed equal ex parte access to treating physicians to both plaintiffs and defendants. See Brandt v. Pelican, 856 S.W.2d 658 (Missouri 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 & Company, Inc., 99 F.R.D. 126 (D. D.C. 1983); Dodd-Anderson v. Stevens, 1993 WL 135426 (D. Kan 1993).

treating physicians. See Cruz v. Angelides, 574 So. 2d 278 (Fla. 3d DCA 1991) (a patient has no cause of action against his treating physician for breach of fiduciary duty for providing the defense with a sworn pretrial affidavit expressing an expert medical opinion favorable to the defendant in the patient's prior malpractice action). To accept the petitioners' position here would grant a fundamentally unfair litigation advantage to plaintiffs and deny procedural due process to defendants whom the plaintiffs have sued. See e.g., Gregory v. United States, 369 F. 2d 185, 188 (D.C. Cir. 1966) (prosecutor's advice to witnesses not to speak to anyone without the prosecutor's presence violated due process: "Both sides have an equal right, and should have an equal opportunity, to interview [witnesses]. Here the defendant was denied that opportunity which, not only the statute, but elemental fairness and due process required that he have"). See also Wardius v. State of Oregon, 412 U.S. 470, 37 L.Ed.2d 82, 93 S.Ct. 2208 (1973) (due process requires that defendants be given discovery rights which are reciprocal to those granted the State).

Additionally, allowing medical malpractice plaintiffs to monitor defense counsel's contact with witnesses invades the attorney work product privilege by giving plaintiffs access to defense counsel's mental impressions, legal theories, and strategies. See Smith v. Florida Power & Light Co., 632 So. 2d 696 (Fla. 3d DCA 1994) (discovery of all documents generated by the defendant in the possession of plaintiff's attorney is barred as an intrusion into the mental impressions and legal opinions of

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counsel); Surf Drugs v. Vermette, 236 So. 2d 108, 112 (Fla. 1970) ("...it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. ... This work is reflected, of course, in interviews, statements, memoranda ...") (quoting Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)); Felder v. Wyman, 139 F.R.D. 85 (D.S.C. 1991) (allowing plaintiff's counsel to monitor defense counsel's interview of treating physicians would violate attorney work product privilege and give plaintiff an unfair advantage in the discovery process).

III. In the alternative, Section 455.241(2) Does Not Preclude Ex Parte Communications on Any Matter Other Than the Medical Records, Care, Treatment and Condition of the Patient.

In the alternative, Section 455.241(2) does not preclude all ex parte contact between defense counsel and a plaintiff's treating physician. As the Third District explained:

> First, the treating physician, like any other witness or any other person, is free to speak with the defense or to decline to do so entirely as a voluntary matter. Second, he is precluded from doing so only insofar as that right is restricted by the statute. Particularly, viewing them strictly as we are required, ... the terms of the statute confine the requirement of confidentiality to the "medical records" and the "medical condition" of the patient, including "information disclosed to [the doctor] ... in the course of [his] care and treatment." They do not restrict communication concerning anything else -- the issues in the case, hypothetical questions concerning other patients and their treatment, or, indeed, anything beyond what the statute actually says. Moreover, there is no restriction on the manner in which conversations or discussions as to the non-forbidden topics may be conducted. [Citations omitted.]

Indeed, it is quite ordinary and proper conduct on the part of a trial attorney who must, by necessity, advise a medical witness of

the areas in which he will be called upon to testify so that the witness has an opportunity to adequately prepare for deposition and is not surprised by questions on matters he had not previously considered.

PPTF agrees with the Third District's conclusion that the courts in Richter, Kirkland and Franklin erroneously precluded all ex parte conversations and contact between the defense and the plaintiff's treating physicians. Section 455.241(1) only provides for the confidentiality of the medical records, care, treatment and condition of the patient. As the Third District reasoned, "it is quite impermissible for the judiciary to restrict any communication beyond that which is forbidden by the legislature." Moreover, because the statute is in derogation of the common law, its provisions must be strictly construed and should not be given an overly expansive interpretation. See Thornber, supra; Graham, supra; Arias, supra. Because Section 455.241(2) clearly does not prohibit all ex parte conferences, this Court should affirm the order under review and allow the defense to communicate with plaintiff's treating physicians on any matter not specifically protected under the statute.

CONCLUSION

For the reasons stated above, this Court should construe Section 455.241(2) as inapplicable to medical malpractice actions entirely or, at the very least, to presuit investigation and review of medical malpractice claims. Additionally, to the extent that Section 455.241(2) governs the method of discovering information

from treating physicians and enables plaintiffs to gain an unfair litigation advantage it unconstitutionally encroaches on the powers of the judiciary and denies defendants procedural due process. In the alternative, this Court should affirm the order under review which permits the defense to communicate with treating physicians to advise them of the issues in the case or any other matter not otherwise prohibited by law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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