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AUG 30 1995
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,905

LYDIA D. PIERRE by and through Issonel Pierre, THE PIERRE CHILDREN, and ISSONEL PIERRE,

Petitioners,

vs.

NORTH SHORE MEDICAL CENTER, INC, JAMES W. PORTER, M.D. and HARARI, PORTER, BLUMENTHAL & BROWN, M.D., P.A., d/b/a EMERGENCY MEDICAL SPECIALISTS OF SOUTH FLORIDA,

Respondents.
_____/

ON PETITION FOR DISCRETIONARY REVIEW OF AN ORDER OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

BRIEF OF *AMICI CURIAE* FLORIDA MEDICAL ASSOCIATION AND DADE COUNTY MEDICAL ASSOCIATION

August 25, 1995

ADORNO & ZEDER, P.A.
Raoul G. Cantero, III
2601 So. Bayshore Drive
Suite 1600
Miami, Florida 33133
(305) 858-5555

Attorneys for *amici curiae* Florida Medical Association and Dade County Medical Association

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ADORNO & ZEDER, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

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ADORNO & ZEDER, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

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ADORNO & ZEDER, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

INTRODUCTION

The Florida Medical Association (FMA) and the Dade County Medical Association (DCMA) submit this brief as *amici curiae*. The FMA's purpose is to promote the science and art of medicine and the betterment of the public health, to extend medical knowledge, and to advance medical science. The FMA also represents the interests of its membership. The FMA has 17,000 members throughout the 67 counties of Florida, comprised of physicians and other health care providers licensed under Chapters 458 and 459, Florida Statutes. The DCMA is a similar organization, comprised of physicians and other health care providers in Dade County, Florida.

The district court's order in this case arose from three separate petitions for writs of certiorari filed in the Third District Court of Appeal: *Giron v. Noy*, No. 94-1675, *Pierre v. North Shore Med. Center*, 94-1493, and *Castillo-Plaza v. Green*, 94-1428. The district court issued an opinion as to all three cases in *Castillo-Plaza, M.D. v. Green*, 655 So. 2d 197 (Fla. 3d DCA 1995). The issue in this petition is whether section 455.241(2), Florida Statutes (1993), permits informal contacts between a physician sued for medical malpractice and the former patient's treating physician. The FMA and DCMA submit that it does.

SUMMARY OF ARGUMENT

Amici submit that the plain language of the statute permits any informal communication between a physician being sued for medical malpractice and the former patient's current physician.

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The statute expressly creates an exception in medical malpractice cases to the rule prohibiting such contacts.

Before the statute's amendment in 1988, the common law, expressed in such cases as *Coralluzzo v. Fass*, 450 So. 2d 858 (Fla. 1984), permitted informal interviews between physicians sued for medical negligence and their former patient's new physician. The 1988 amendment to section 455.241(2), Florida Statutes, is consistent with this common law: it creates an exception in medical negligence cases from the new restrictions on informal contacts with treating physicians.

As the Third District recognized in this case, courts applying the 1988 amendment in the medical negligence context have simply misread the statute and ignored the distinction in the statute between medical negligence cases and other cases. *See Kirkland v. Middleton*, 639 So. 2d 1002 (Fla. 5th DCA), *review dismissed*, 645 So. 2d 453 (Fla. 1994); *Richter v. Bagala*, 647 So. 2d 215 (Fla. 2d DCA 1994), *review granted sub nom. Acosta v. Richter*, 650 So. 2d 989 (Fla. 1995). These cases cite to *Franklin v. Nationwide Mut. Ins. Co.*, 566 So. 2d 529 (Fla. 1st DCA), *review dismissed*, 574 So. 2d 142 (Fla. 1990), an ordinary negligence case in which the exception did not apply. They also add language not contained in the statute without any explanation or justification. Using this added language, these cases hold that the exception in the statute for medical negligence cases allows informal contact only with a physician being sued for medical malpractice.

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2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

In this case, however, the Third District recognized that the statute creates a blanket exception. *Castillo-Plaza, M.D. v. Green*, 655 So. 2d 197 (Fla. 3d DCA 1995). The Third District analyzed the statute and concluded that the confidentiality provisions do not apply in "a medical negligence action when a health care provider is or reasonably expects to be named as a defendant." *Id.* at 200 (quoting section 455.241(2), Florida Statutes). The Third District considered *Franklin*, *Kirkland*, and *Richter*, and concluded that those cases misread the statute and added language it did not contain to give the statute a meaning completely opposite to the one expressed. The Third District refused to do the same, and applied the statute as written.

Amici request that this Court also apply the plain language of the statute, and hold that in medical negligence cases the rule of *Coralluzzo*, allowing informal contacts between the defendant physician and the plaintiff's physician, remains valid.

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2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

ARGUMENT

THE STATUTE PERMITS INFORMAL COMMUNICATIONS BETWEEN A PHYSICIAN SUED FOR MEDICAL NEGLIGENCE AND THE PATIENT'S NEW PHYSICIAN

For many years, physicians whose patients have sued them for medical malpractice have felt free to meet informally with their former patient's new treating physician. The common law traditionally has permitted such contacts. The 1988 amendment to section 455.241, while generally prohibiting treating physicians from revealing information about their patients' condition, creates an exception in medical negligence cases.

A. The common law permitted informal contacts between physicians sued for medical malpractice and their patients' new physicians

Traditionally, no physician-patient privilege existed in Florida precluding contact between physicians being sued for medical malpractice and their patients' new physicians. *Morrison v. Malmquist*, 62 So. 2d 415 (Fla. 1953); *Frantz v. Golebiewski*, 407 So. 2d 283, 284 n.2 (Fla. 3d DCA 1981); *Fidelity and Cas. Co. of New York v. Lopez*, 375 So. 2d 59 (Fla. 4th DCA 1979). A treating physician was considered an ordinary fact witness, not an expert to which the restrictions of Florida Rule of Civil Procedure 1.280(b)-(3) would apply. *See Frantz*, 407 So. 2d at 285-86 (citing numerous out-of-state cases).

Thus, in *Coralluzzo v. Fass*, 450 So. 2d 858 (Fla. 1984), this Court specifically permitted informal contacts between physicians sued for medical malpractice and the plaintiff's current

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treating physician. The Court held that no statutory or common law privilege prohibited such meetings:

> No law, statutory or common, prohibits -- even by implication -- respondents' actions. We note that no evidentiary rule of physician/-patient confidentiality exists in Florida and that, although several statutes preserve confidentiality in certain medical records, petitioner has failed to identify a specific statute respondents have infringed. Likewise, no rule of procedure or rule of professional responsibility proscribes respondents' interview with [the treating physician].

Id. at 859. *See also Avis Rent-A-Car System v. Smith*, 548 So. 2d 1193, 1194 (Fla. 4th DCA 1989) (access to treating physicians is not restricted by the expert witness discovery rule, citing *Coralluzzo*).

B. **The amended statute does not change the common law**

Against this common law background, in 1988 the Florida legislature amended section 455.241(2), which originally dealt only with medical records. The amendment added several sentences governing the discovery of information from treating physicians. *See* Ch. 88-208, § 2, Laws of Fla. When it enacts a statute, the legislature is presumed to know the existing law. *Hollar v. Int'l Bankers Ins. Co.*, 572 So. 2d 937, 939 (Fla. 3d DCA 1990), *review dismissed*, 582 So. 2d 624 (Fla. 1991). Thus, it can be assumed that the legislature was aware of *Coralluzzo* and *Frantz* when it amended the statute.

In relevant part, the amendment first provides that "the

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medical condition of a patient may not be discussed with any person other than the patient or his legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient." Another addition several lines later states:

> *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.

(emphasis added).

The statute is clear. The prohibition on informal communications with treating physicians applies *except* in medical negligence cases such as these. In fact, it does not apply whenever *any* health care provider "reasonably expects" to be sued for medical negligence. The amendment does not change the common law, as expressed in *Coralluzzo*, *Frantz*, and other cases.

Petitioners argue (brief at 8-9) that the legislative history shows the statute was meant to exempt only communications with a physician's attorneys. Legislative intent, however, "must be determined primarily from the language of the statute." *AEtna Cas. & Sur. Co. v. Huntington Nat. Bank*, 609 So. 2d 1315, 1317 (Fla. 1992). The legislature is assumed to have expressed its

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intent through the words found in the statute. *Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993). "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." *Id.* The plain words of the statute exempt *all* physicians in medical malpractice cases, not just the defendant.

C. Cases interpreting the amended statute have ignored the exception in the statute for medical negligence cases

Some cases interpreting the amendment to the statute have overlooked the exception in the statute for medical negligence cases. In *Franklin v. Nationwide Mut. Ins. Co.*, 566 So. 2d 529 (Fla. 1st DCA), *review dismissed*, 574 So. 2d 142 (Fla. 1990), the first case to consider the amended statute, no allegation of medical negligence was involved. Therefore, the statute's exception did not apply. The First District recognized that "[t]he statutory language is abundantly clear on its face." *Id.* at 532. The court then stated, in interpreting the statute,

> In other words, in all cases *other than those where the health care provider is a defendant*, unless the plaintiff voluntarily provides a written authorization to the defendant, the defendant's discovery of the privileged matter can be compelled only through the subpoena power of the court with proper notice in accordance with the discovery provisions of the rules of civil procedure.

566 So. 2d at 532 (emphasis added). The court invalidated an order

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providing for informal discussions between an *insurer*'s counsel and plaintiff's treating physician. Although purely *dictum*, the court inexplicably stated that the statute does not apply "where *the* health care provider is a defendant" instead of "where *a* health care provider is a defendant," as the statute provides. Despite this ill-conceived *dictum*, the court's holding was consistent with the statute because no medical malpractice was involved.

Two later cases involving medical malpractice, however, applied the *dictum* in *Franklin*. In *Kirkland v. Middleton*, 639 So. 2d 1002 (Fla. 5th DCA), *review dismissed*, 645 So. 2d 453 (Fla. 1994), the court held that the statute permits disclosure of confidential patient information "when a health care provider is or reasonably expects to be named as a defendant in a medical malpractice action *(for that health care providers' records and information)*." *Id.* at 1004 (emphasis added). The emphasized language appears neither in *Franklin* nor in the statute. The court simply added it. The court did not explain why it added the phrase, and did not address the conflict between its phrase and the statute's plain language. Apparently it did not even notice.

In *Richter v. Bagala*, 647 So. 2d 215 (Fla. 2d DCA 1994), *review granted sub nom. Acosta v. Richter*, 650 So. 2d 989 (Fla. 1995),[1] another district court made the same mistake. *Richter*, like *Kirkland*, quoted the statute in its entirety. Then, however,

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[1] Oral argument before this Court in *Acosta v. Richter* is scheduled for October 6.

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citing *Kirkland* and *Franklin*, the court repeated *Kirkland*'s unsupported statement that the statute allows disclosure of patient information when "a health care provider is or reasonably expects to be named as a defendant in a medical malpractice action *(for that health care providers' records and information)*." *Id.* at 1817 (emphasis added). Again, the court did not address the conflict between the statute's plain language and the court's added phrase, and did not indicate from whence the engrafted language had come.

Kirkland and *Richter* essentially held that the exception in the statute for medical negligence cases applies only to the defendant physician, not to the treating physician, thus allowing a physician sued for medical malpractice to discuss the patient's condition with his attorney, but not with the new physician. Nothing in the statute, however, limits the exception in such a way. The statute creates a blanket exception in medical negligence cases, consistent with *Coralluzzo*. These two interpretations of the statute, more accurately described as judicial amendments, violate several rules of statutory construction: (1) they ignore the statute's clear and unambiguous language; (2) they add language not found in the statute; and (3) they fail to harmonize the statute with the existing common law.

1) *Kirkland* and *Richter* ignore the statute's clear and unambiguous language

Although it has become a cliché of statutory construction, it bears repeating that when a statute is clear and unambigu-

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ous, it must be given its plain and ordinary meaning. *See, e.g., In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993). The holdings in *Kirkland* and *Richter* ignore the statute's plain language, which, as the court in *Franklin* recognized, is "abundantly clear on its face." 566 So. 2d at 532. That language creates an exception in all medical negligence cases from the prohibitions on communications with treating physicians.

2) *Kirkland* and *Richter* added words not found in the statute

Courts should not add words to a statute, especially where the legislature's intent is uncertain. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1137 (Fla. 1990). The courts' engrafted language in *Kirkland* and *Richter* constitutes an insupportable revision of the statute. As this Court has said,

> It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. . . . We trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity.

State v. Jett, 626 So. 2d 691 (Fla. 1993).

It would have been easy for the legislature to have included the parenthetical language the Second and Fifth Districts added, but it chose not to. This Court should not add language the legislature omitted.

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3) *Kirkland* and *Richter* failed to harmonize the statute with the existing common law

Statutes should be construed to reflect the common law unless the legislature clearly indicates otherwise. *Deehl v. Knox*, 414 So. 2d 1089, 1092 (Fla. 3d DCA 1982).

> 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).

The 1988 amendments to the statute are consistent with the existing common law, and specifically *Coralluzzo*. Just as that case held that physicians being sued for medical malpractice have every right to speak informally to the plaintiff's treating physician, the amendments create an exception to the prohibitions on informal communications precisely in medical negligence cases. The Second and Fifth Districts should have construed the amendments as consistent with the common law. *See Graham v. Edwards*, 472 So. 2d 803 (Fla. 3d DCA 1985) (statutes in derogation of the common law must be construed very strictly), *review denied*, 482 So. 2d 348 (Fla. 1986). Instead, they interpreted the statute by adding language it did not contain.

ADORNO & ZEDER, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

D. The Third District correctly applied the statute's plain language creating an exception in medical negligence cases

The Third District Court of Appeal considered three separate cases involving a defendant physician's communications with the plaintiff's physician. *Castillo-Plaza, M.D. v. Green*, 655 So. 2d 197 (Fla. 3d DCA 1995). The Third District analyzed the statute and concluded that "the privilege of confidentiality for information disclosed to 'a health care practitioner' -- like the treating physicians involved in these cases -- does not apply in 'a medical negligence action when a health care provider is or reasonably expects to be named as a defendant' -- which describes the present actions perfectly." *Id.* at 200 (quoting section 455.241-(2), Florida Statutes).

The Third District discussed the previous cases analyzing the statute. The court demonstrated how in *Franklin*, 566 So. 2d at 532, the First District substituted "the" for "a" in the clause "[e]xcept in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, . . . " (emphasis added), and thereby "effected a total reversal of the meaning of that phrase." *Id.* at 201. The Third District also recognized the disturbing phrase, discussed above, that *Kirkland* engrafted onto the statute: "We do not claim to understand the source of the parenthetical expression which is not in the statute or in *Franklin* and which, again without discussion, resolves the present issue to the direct contrary of what the statute provides."

ADORNO & ZEDER, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

Id. Finally, the Third District noted that "in *Richter*, the second district compounded the error by merely copying the *Kirkland* language without comment or concern." *Id.* The Third District refused to do the same, and applied the statute as written.[2]

The Third District also demonstrated that applying the plain meaning of the statute is consistent with the public policy of encouraging the free flow of information before and during medical malpractice lawsuits to encourage settlement of such cases. *Id.* at 202. *See* § 766.106(7), Fla. Stat. (1993) (providing for informal pre-suit discovery in medical malpractice cases).

CONCLUSION

This Court should apply the statute as it reads and hold that it creates an exception in medical negligence cases to its restrictions on informal contacts with treating physicians, and clearly permits such contacts between a physician being sued for medical negligence and the plaintiff's physician. Such a holding would be consistent with both the statute's plain language and the common law.

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[2] Although Petitioners argue (brief at 2, 11-12) that *Green* also conflicts with *Rojas v. Ryder Truck Rental*, 641 So. 2d 855 (Fla. 1994) and *West v. Branham*, 576 So. 2d 381 (Fla. 4th DCA), *review dismissed*, 583 So. 2d 1034 (Fla. 1991), neither case involved medical negligence, and therefore the exception in the statute was not involved.

ADORNO & ZEDER, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305) 858-5555 • TELEFAX 858-4777

Respectfully submitted,

ADORNO & ZEDER, P.A.

Raoul G. Cantero, III
Florida Bar # 552356
2601 S. Bayshore Drive
Suite 1600
Miami, FL 33133
(305) 858-5555

Counsel for amici curiae
Florida Medical Ass'n
and Dade County Medical Ass'n

Christopher L. Nuland
Florida Bar # 893332
Florida Medical Association
760 Riverside Avenue
Jacksonville, FL 32204
(904) 356-1571

Co-counsel for
Florida Medical Association

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this brief was mailed on August 25, 1995 to:

Phillip D. Parrish, Esq.
Stephens, Lynn, et al.
9130 S. Dadeland Blvd., PH2
Two Datran Center
Miami, Florida 33156

Karen Bzdyk, Esq.
Robert J. Dickman, P.A.
4500 S. Le Jeune Road
Coral Gables, FL 33146

Ronald Fitzgerald
500 East Broward Blvd., 17th Floor
P. O. Drawer 7028
Miami, Florida 33338

Esther Galicia, Esq.
George, Hartz, et al.
4800 Le Jeune Road
Coral Gables, FL 33146

Patrice Talisman, Esq.
Russo & Talisman
2601 S. Bayshore Drive
Suite 2001
Miami, FL 33133