IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,905

LYDIA D. PIERRE, by and through her husband and legal guardian, ISSONEL PIERRE, THE PIERRE CHILDREN, and ISSONEL PIERRE,

Petitioners,

vs.

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

Respondents.

_____/

PETITION FOR DISCRETIONARY REVIEW
ON CERTIFICATION OF CONFLICT
FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

AMICUS CURIAE BRIEF
OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

RONALD A. FITZGERALD, ESQ.
FBN: 025140
FLEMING, O'BRYAN & FLEMING, P.A.
Attorneys for Amicus Curiae Florida Defense Layers Association
500 E. Broward Blvd, 17th Floor
P.O. Drawer 7028
Fort Lauderdale, FL 33338-7028
Phone: 305/764-3000

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INTRODUCTION

The FDLA's interest in this case is based on the impact that § 445.241(2) has on the practice of defense lawyers. As a general proposition proper trial preparation by counsel of their clients' cases involves finding, contacting and interviewing all potential witnesses. The FDLA views the restraints of § 455.241(2) as a serious infringement upon a lawyer's right and duty to diligently represent his client. This is particularly true in medical malpractice cases where the plaintiff's medical condition is the primary issue where it involves liability issues as well as damages. The FDLA is therefore, concerned with issues of the impact of the statute on the practice of law by defense lawyers separate and apart from the eccentricities of the cases before this Court.

Additional concerns involve the creation of privileges and confidences to protect the physician/patient relationship to the detriment of the search for truth in the administration of justice. Finally, the expansive interpretation urged in support of an absolute bar to communication not proscribed in the statute to provide a means of enforcement is unnecessary. The rationale for imposing such a bar is based on a demeaning mistrust of both the medical and legal profession. It is with these concerns the FDLA approaches the argument in this case.

STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association ("FDLA") hereby incorporates the Statements of the Case and Facts contained in the briefs filed by the petitioner and respondents in this case.

The case involves the constraints put upon health care practitioners by the 1988 amendment to § 455.241(2), Fla.Stat. The decision below involves an *en banc* ruling by the Third District Court of Appeal in which that Court conclude that the statute properly interpreted did not apply to medical malpractice cases and that the statute does not preclude communications with health care practitioners as to matters not specifically proscribed by the wording of the statute. (Opinion attached as Appendix).

Since the jurisdiction this Court is based on direct conflict with decisions of other district Courts[1] the validity of the rulings in those cases are also brought into question before this Court.

SUMMARY OF THE ARGUMENT

FDLA will attempt to demonstrate the inapplicability of the statute to medical malpractice cases and the limited scope of the statute as written and the reasons for not giving it an expansive interpretation as was done in Kirkland.[2]

The amendment by its own terms excludes medical malpractice cases. This is established by the statutory interpretation of the Third District Court of Appeals *en banc* decision. FDLA submits that the Third District Court of Appeal

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[1] Franklin vs. Nationwide Mut. Fire Ins. Co., 566 So. 2d 529 (Fla. 1st DCA 1990) rev. dismissed, 574 So. 2d 142 (Fla. 1990), Kirkland vs. Middleton, M.D., et. al, 639 So. 2d 1002 (Fla. 5th DCA 1994), 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).

[2] Kirkland vs. Middleton, M.D., et. al, 639 So. 2d 1002 (Fla. 5th DCA 1994), review dismissed, 645 So. 2d 453 (Fla. 1994).

reached the correct conclusion and that its decision should be affirmed and the contrary decisions of the Second and Fifth District Courts of Appeal that the statute applies to malpractice cases should be quashed. FDLA urges that non applicability to malpractice cases is supported by the particularly strong negative impact that the amendment has on defendants in medical malpractice cases and the lawyers defending. In such cases, the plaintiff's present treating physician is not the only health care practitioner restrained. All health care practitioners with whom the plaintiff had a patient physician relationship or who have any knowledge of Plaintiff's medical condition or who has received information from the plaintiff are restrained from discussing the plaintiff's medical condition or the information disclosed by the plaintiff.

Health care practitioners with knowledge of the plaintiff's medical condition and patient history about such conditions are the fact witnesses of medical negligence cases. Therefore, the statute deprives the defendant and his or her lawyer from conducting investigative conferences and pretrial conferences and interviews for the purpose of trial preparation in regard to the testimony of fact witnesses. This seriously impacts the defense counsel's ability to properly prepare the case and to practice law as is required by Rule 4-1.1, 4-1.3 of the Florida Rules of Professional Conduct 35 Fla. Stat. Annot. pp 232, 239 (West's Florida Rules of Court 1995, pp 799, 801). The deprivation of the fundamental tool of trial lawyers, i.e. the witness interview, infringes upon the defendant's right to a fair trial and

right to representation of counsel.

The statute is in derogation of the common law and of fundamental rights and should be construed narrowly. Therefore, at a minimum, the scope of the statute should be confined to such matters specifically proscribed by the legislature rather than it being given an expansive interpretation proscribing all contact with health care practitioners. This is done to provide a means of enforcing the new right of confidentiality allegedly provided which is engrafted onto the statute for policy reasons. The courts should not expand the statute for policy reasons to protect from possible infringement on the perceived to be the protected right by forbidding further conduct by health care practitioners and lawyers not even mentioned in the amendment.[3]

POINTS ON DISCRETIONARY REVIEW (RESTATED)

POINT I
SECTION 455.241(2) DOES NOT APPLY TO MEDICAL MALPRACTICE CASES

The statute specifically describes conduct on the part of

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[3] This law describes what is proscribed for health care providers, but the statutory amendment of 1988 was aimed at defense lawyers. The bill was promoted and sponsored by the Academy of Florida Trial Lawyers. This group in amicus below support in this case both the application of the amendment to medical cases and the expansive interpretations obviously to promote the tactical advantage this statute gives to them in preparing and presenting cases for plaintiffs. Realistically, the effect of the statute is to prevent defense lawyers from having access to witnesses which are fully available to plaintiffs' counsel.

The trial court orders in this case are examples of the form of the constraints imposed by the courts. The rationale seeks to protect this unnecessarily sanctified relationship of patient and physician and it is clearly the defense that is restrained.

health care practitioners since it is the records of the health practitioner that is dealt with in this statute. The amendment clearly impacts on lawyers once a suit is filed since it is the defense lawyers who are interested in discussing the patients medical history and condition when that patient becomes a plaintiff and makes his medical condition and the history of that condition a public issue by filing a lawsuit. Therefore, the amendment as interpreted in Franklin, impacts lawyers in any case in a harmful way but this restraint is devastating in malpractice cases. This is true because it precludes any contact with the fact witnesses of a malpractice case that will testify on liability. We submit this is not the result intended by the Legislature.

Malpractice cases are universally based on some aspect of the medical condition of the patient. The history the patient gives, the medical condition, the response to the patient's medical condition by the health care provider, the diagnosis made based on the medical condition and the correctness of those decisions form the standard of care issues in malpractice cases. Therefore, the patient's medical condition and the information he discloses, i.e. his or her medical history, are the facts of the case. These are facts that relate to liability issues which is not true in other types of cases. Other health care practitioners who are involved in the patient's care constitute the fact witnesses of the malpractice case. Therefore, if § 455.241(2) is interpreted to apply to malpractice cases, it prevents defendants' trial counsel from engaging in the normal lawyerly conduct of finding,

interviewing, and preparing fact witnesses with regard to their testimony at trial. The defense counsel is deprived of the pretrial interview wherein the witness is evaluated and his or her information and knowledge is weighed and compared with other potential testimony in the case. Significant decisions as to trial tactics and procedure are based on these kinds of interviews.[4]

In hospital based malpractice cases, many health care practitioners are involved in the case of a patient. These practitioners such as radiologists, anesthesiologists and pathologists possess important information on the patient's medical condition or history, yet no meaningful relationship exists with the patient. In analyzing and preparing a case for possible trial, defense counsel may need to contact one or more of such practitioners to learn more about the facts and circumstances surrounding the entries in hospital records. These important and necessary forms of investigation and trial preparation are precluded from one side of the case while fully available to the other side. To suggest that depositions are available so there is no real problem overlooks the need for counsel to investigate and explore for the truth without doing so under the watchful eye of opposing counsel.

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[4] A case ready to be presented at trial is hopefully a harmonious thing. A lawyer may decline to call a witness with helpful information on one point, but with knowledge or opinions that create conflicts within the case if called. This type of careful preparation is precluded to the lawyer who cannot speak to fact witnesses. Depositions are not taken simultaneously and issues arise after a deposition requiring additional discussion. That makes the availability of depositions less than a cure all.

Further, there is no need for this restraint to protect the patient physician relationship which appears to be a source of concern with some judges. There is no real expectation confidence involved in today's health care delivery system. Some health care providers never speak to the patient, and some never see the patient such as radiologists, pathologist and electrocardiogram readers. Yet, they are constrained by the statute from discussing their findings and conclusions, and to what end? To protect a relationship that has become more and more impersonal since the advent of third party payers. Today with the wide spread use of managed care and government scrutiny of and involvement in the delivery of health care services little is left of confidentiality. The suppression of truth appears to be better served by the asserted privilege.

There is a great potential for fraud in such privileges. This truth was an important factor in the decision of the Florida Supreme Court that the first version of this statute did not alter the common law rule that there is no patient physician privilege. In Morrison v. Malmquist, 62 So. 2d 415 (Fla. 1953) Morrison, the plaintiff, was seeking damages for conditions she had before the accident in question. The defense brought in a "physician who examined her before the mishap and who testified that he then found the same disorders and complaints later attributed by her to the accident." 62 So. 2d at p 415. In that case, the plaintiff attempted to use the Hippocratic Oath to muzzle the doctor and suppress the truth. The court stated, "If the oath were to be

given the construction claimed for it, it would in this very case become an instrument of gross fraud." 62 So. 2d at p 416.

The Supreme Court held in Florida Power and Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911 (Fla. 1938), that there was no patient physician privilege at common law and thus none under Florida law. The Court in Morrison considered § 458.16, enacted after the decision in Florida Power and Light Co. v. Bridgeman, supra, and concluded the statute did not alter the common law. In the absence of clear cut language to show a purpose to amend the common law, it was not changed. Therefore, a full and fair disclosure of the plaintiff's medical condition is available when a patient places his or her medical condition in controversy by filing a lawsuit.

It is a convolution, because of fear of collusion and conspiracy against the patient, to make the plaintiff's physician a loyal advocate for the plaintiff in litigation and require it as part of some misplaced extreme duty to the patient. *See* eg Coralluzzo v. Fass, 435 So. 2d 262 (Fla. 3d DCA 1983), dissent of Jorgenson at 264, wherein Judge Jorgenson envisions the relationship involving what is a fiduciary duty involving utmost loyalty to the patient on all matters of concern including the patients litigation. The physician being available to both sides is viewed as comporting with the enemy. This is wrong thinking. Witnesses do not belong to either side. The shield of a confidence becomes the sword of forced side taking and obfuscation of truth.

As pointed out in the majority opinion below, the statute

must be strictly interpreted both because it is in derogation of the common law which imposed no restrictions on the availability of such information and because it involves the creation of a form of privilege. United States v. Nixon, 418 U.S. 683, 710 S. Ct. 3090, 3108 (1974), is quoted for the proposition that such privileges should not lightly be created or expansively construed because such privileges are in derogation for the search for truth.

Mrs. Morrison, who like Nixon, sought to use a privilege to subvert truth. She attempted to acquire an unjust judgment against the defendant for conditions unrelated to the accident on which she based her suit. Forcing the physician to take sides by imposing some unfounded duty of loyalty to one side of a case does not aid the cause of truth seeking and is contrary to what the Legislature appears to have intended for medical malpractice cases.

Florida law contains a history of legislative action wherein medical malpractice cases are treated differently than other cases. We have seen medical mediation panels in the past and now the present provisions of Chapter 766 which provides procedures unique to medical malpractice cases. Also, the provisions of § 766.207 for voluntary binding arbitration and the cap on damages in that section and in § 766.208 are also unique to medical malpractice cases and has been sustained as constitutional. Another example occurred when the legislature undertook to expand recovery under the wrongful death statute by allowing adult children of deceased parents to make claims for emotional damages. The Legislature specifically excluded medical malpractice cases

from this enlargement of the right to recover damages. § 768.21(8)

When the amendment to § 455.241(2) is considered in the light of this legislative deference to medical malpractice cases plus the particular negative impact it has on investigation and trial preparation in such cases, this combination points to the conclusion that the legislature intended to exclude medical malpractice cases from the operation of this statute.

The experience of the First District Court of Appeal in misreading the intent of the Legislature in regard to the impact of 1988 amendment to § 455.241(2) in regard to worker's compensation case is of interest. Though the decision of the First in Franklin did not involve a medical malpractice case the case has been followed in two other districts in malpractice cases without much note of the distinction. In its decision in Franklin the First relied on a series of decisions in worker's compensation cases where the right of carrier representatives to discuss to the claimant's medical information was challenged on the basis of the 1988 amendment to § 455.241(2). In each instance the Court was confronted with this issue, it ruled the restrictions of § 455.241 (2) prevailed over the provisions of § 440.13(2)(f) of the Compensation Law. In response, the Legislature amended the Compensation Act to overrule those decisions.

In Pic N' Save v. Singleton, 551 So. 2d 1244 (Fla. 1st DCA 1989) the first held that the representatives of the employer carrier were not permitted to have oral communications with the claimant's physician because of the provision of § 455.241(2)

prohibiting such discussions. In Franklin the Court cited Pic N' Save v. Singleton, as controlling authority for the result in Franklin. Therefore the Court relied on its prior decisions holding that the free exchange of medical information provided for in § 440.13(2)(f) failed against the specific proscription of § 455.241(2). Legislative reaction shows how completely wrong that Court was about legislative intent. The Legislature responded by adding to the compensation law a provision that the carriers representatives could have access to the claimants records a provision that the medical condition of the claimant shall be discussed with such person. See § 440.13(2)(f). The First persisted in Perez v. Eastern Airlines, 569 So. 2d 1290 (Fla. 1st DCA 1990) and Adelman Steel Corporation v. Winters, 610 So. 2d 494 (Fla. 1st DCA 1992) by holding that there was nothing in the amendment that said that such conversations could be *ex parte* and therefore held that the conversations could not be had without first giving notice and affording counsel for the opposing party an opportunity to be present at such discussions. Thus the First, ignoring the clear implications of the addition to § 440.13(4)(f) of words authorizing oral communications, stayed its course and again imposed restriction on the free access to medical information. The Legislative response was again to rebuke the First's interpretation by adding words to the section that specifically provided that the discussions could indeed be had without the consent or presence of any other party his agent or representative and specifically stated legislative policy to be

that there should be reasonable access to medical information by all parties. § 440.13(4)(c), 1994 Supplement to Florida Statute 1993, Vol. II p. 1471.

With the total devastation of the line of cases relied upon by the First as controlling authority in deciding Franklin the validity of Franklin is seriously undermined. But more importantly the lesson of all this is that there are specific areas wherein the Legislature intends that there be full and complete access to medical information by all parties notwithstanding § 455.241(2). Worker's Compensation is one such area and medical malpractice is another. This point is made by the Third in its decision below in noting that the law should be construed in harmony with § 766.106. (A.11)

The progeny of Franklin: Kirkland and Richter did not even consider such elements or that the fact that the cases were malpractice cases was of any significance. Further comment on these two decisions is redundant in the light of the manner in which those decisions are dispatched by footnote four of the Third District Court's Opinion below. (A.9) What more can be said?

POINT II

THE STATUTE SHOULD NOT BE INTERPRETED TO PROSCRIBE COMMUNICATIONS NOT DESCRIBED IN THE STATUTE

No testimonial privilege is actually involved. The amendment creates confidentiality allowing the plaintiff/patient to control both access to the information and its means of disclosure.

Kirkland held that the statute does not permit an *ex parte* interview procedure. By further stating that such non-privileged matters as scheduling depositions should be handled through plaintiff's counsel or set without conferring, the Court suggests that such contact is also barred by the statute. Not only are discussions on matters not covered by the statue also excluded but the most innocuous contact is also forbidden by this decision. This total bar to any contact is allegedly necessary for policy reasons. The policy appears to be that if any contact were permitted and the plaintiff's counsel were not present to supervise the disclosure of privileged information might occur, and that proof that such disclosure might have occurred would be difficult to prove effectively. Therefore a safeguard or means of enforcement is added. The use of such rationale to bar even the most meager contact is first, a sorry commentary of the esteem which the Fifth District Court of Appeal holds for both the legal and medical profession. Second, it clearly goes too far.

The statute deals with health care practitioners: 1) providing records; 2) discussing the medical condition of the patient; and 3) holding confidential information disclosed to the health care practitioner during the course of treatment. There is nothing in this statute that prohibits contact between a defense lawyer and a health care practitioner to discuss nonconfidential matters. A conversation should not be precluded by the statute in which the defense lawyer contacts a health care provider to advise him or her of the reasons for which a subpoena had been served and

why a court appearance is necessary. The lawyer could fairly state that the questions would involve the interpretation of certain tests by the witness and a request that the provider become familiar with that part of the patient's records to become reacquainted with the case in order to be a better witness. A conversation of this nature is entirely appropriate. The plaintiff's bar and some of the district courts would deprive defense counsel of even this meager bit of trial preparations.

These intense restrictions are imposed on the basis of providing a means of enforcing the alleged purpose of the statute. Since the legislature provides no enforcement mechanism this is judicial legislation and an amendatory enlargement of the statute. The policy consideration used to support expansion of the restrictions actually enacted were, however, all rejected by this Court in Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1884) This Court rejected the policy arguments to prohibit *ex parte* interviews when no statute proscribed them. These policy arguments were put forth in the dissenting opinion of Judge Jorgenson to the District Court opinion 262, Coralluzzo v. Fass, 435 So.2d 262 (Fla. 3d DCA 1983) at 264. After the passage of the amendment which has clear cut parameters, those same arguments are now being asserted as grounds for a far greater restriction on communications than provided by the legislature.[5] Those policy arguments should again be rejected

[5] See the dissenting opinion of Judge Jorgenson below (A.17, 23,24) where he asserts the best interpretation is to bar *ex parte* conversations altogether and that such restriction is supported by policy. The policy is based in part on the Hippocratic Oath and its progeny. However this Court chose truth over privilege based on the

by this Court. The sanctification of the physician patient relationship at the expense of the search for truth in the administration of justice should be rejected as not advancing public interest and because it embodies bad policy. A call for restriction based on a demeaning and depreciating appraisal of the trustworthiness of two professions should not hold sway.

In regard to the expansive interpretation given the statue in Franklin and its progeny it is again of interest to note the experience of the First District in the workers compensation cases. After the Legislature made it clear that the intent was to allow carrier representatives to discuss the medical condition of a claimant with the claimant's treating doctor the First persisted in reading into the statute requirements not stated and imposing requirements on the basis of the same policy reasons that underlay the expansive interpretation in of § 455.241(2) made in Franklin. See Adelman Steel Corporation v. Winters, supra. This required the Legislature to again amend the Worker's Compensation Act with explicit language that *ex parte* conversations were clearly intended to be allowed. This situation clearly speaks against an expansive interpretation of the statute.

CONCLUSION

The proper interpretation of the statute in question plus the better policy support the conclusion that it does not apply to medical malpractice cases. Further the expansive interpretation of

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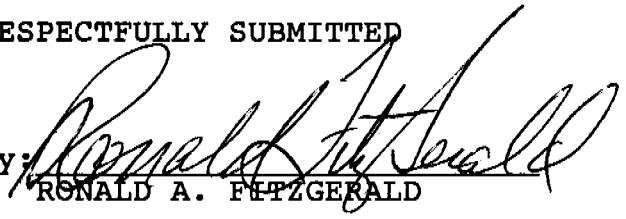
Hippocratic Oath. Morrison v. Malmquist, 62 So.2d 415 (Fla. 1953)

the statute engrafting onto it means of enforcing it by proscribing conduct not described in the statute should be overruled in favor of imposing no greater restrictions than those imposed by the Legislature. Perhaps the legislation itself lacks this wide swinging approach to safeguard the stated confidences as such was decided unnecessary and hopefully is based on a higher regard for the integrity of the medical and legal profession than held by some judges.

The decision of the Third District Court of Appeal should be approved and affirmed while the decision in Richter should be quashed and decisions in Franklin and Kirkland disapproved.

RESPECTFULLY SUBMITTED

By: 
RONALD A. FITZGERALD

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 11th day of August, 1995, to the attached service list:

FLEMING, O'BRYAN & FLEMING, P.A.
Attorneys for Florida Defense Lawyers Association
500 E. Broward Blvd 17th Floor
P.O. Drawer 7028
Fort Lauderdale, FL 33338-7028
Phone: 305/764-3000

By 
RON FITZGERALD
Florida Bar No: 025140

LYDIA D. PIERRE, etc., et al.,
v.
NORTH SHORE MEDICAL CENTER,
INC., et al.,

SERVICE LIST

1. Karen L. Bzdyk, Esq.
   Robert Dickman, Esq.
   Dickman Building
   4500 Le Jeune Road
   Coral Gables, Flroida 33146
   (305) 667-8488/Donna
   (305) 667-8015/fax
   (Counsel for Plaintiffs)

2. Esther Galicia, Esq.
   George, Hartz, Lundeen, et al.
   524 South Andrews Avenue, Suite 333
   Ft. Lauderdale, Florida 33301
   (305) 662-4800/Debbie
   (Counsel for Dr. Porter)

3. Philip D. Parrish, Esq.
   Stephens, Lynn, Klein & McNicholas
   Two Datran Center
   9130 South Dadeland Boulevard
   Miami, Florida 33156
   (305) 670-3700/Laritza
   (305) 670-8592
   (Counsel for Defendants)

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

JUAN CASTILLO-PLAZA, M.D., and JUAN CASTILLO-PLAZA, M.D., P.A.,

Petitioners,

vs.

MARSHA GREEN,

Respondent.

CASE NO. 94-1428

LYDIA D. PIERRE, by and through her husband and legal guardian, ISSONEL PIERRE, THE PIERRE CHILDREN and ISSONEL PIERRE, individually,

Petitioners,

vs.

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

Respondents.

CASE NO. 94-1493

MARGARITA GIRON,

Petitioner,

vs. CASE NO. 94-1675

**

JOSE J. NOY, M.D., JOSE J. NOY M.D., P.A., RAUL RAVELO, M.D., and INTER-AMERICAN INSTITUTE OF HEMATOLOGY AND ONCOLOGY, a Florida corporation,

**

Respondents.

**

Opinion filed May 24, 1995.

Writs of Certiorari to the Circuit Court for Dade County, Ronald M. Friedman, Philip Bloom and Robert P. Kaye, Judges.

Stephens, Lynn, Klein & McNicholas and Philip D. Parrish, for petitioners Juan Castillo-Plaza, M.D., and Juan Castillo-Plaza, M.D., P.A.; Don Russo; Russo & Talisman and Patrice A. Talisman, for petitioner Margarita Giron; Robert J. Dickman and Karen L. Bzdyk, for petitioners Lydia D. Pierre, etc., et al.

Colson, Hicks, Eidson, Colson, Matthews & Gamba and Tomas F. Gamba for respondent Marsha Green; Stephens, Lynn, Klein & McNicholas and Philip D. Parrish for respondents Raul Ravelo, M.D., and Inter-American Institute of Hematology and Oncology and for respondents North Shore Medical Center, Inc.; George, Hartz, Lundeen, Flagg & Fulmer and Esther E. Galicia, for respondents James W. Porter, M.D., and Harrari, Porter, Blumenthal and Brown, M.D., P.A., d/b/a Emergency Medical Specialists of South Florida.

Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel S. Perwin and Joel D. Eaton, for the Academy of Florida Trial Lawyers, as amicus curiae.

Adorno & Zeder and Raoul G. Cantero, III, and Jay A. Ziskind; Christopher L. Nuland, for the Dade County Medical Association and Florida Medical Association, as amici curiae.

Hicks Anderson & Blum and Mark Hicks, for the Physicians Protective Trust Fund, as amicus curiae.

Before SCHWARTZ, C.J., and HUBBART, NESBITT, BASKIN, JORGENSON, COPE, LEVY, GERSTEN, GODERICH and GREEN, JJ.

ON HEARING EN BANC

SCHWARTZ, Chief Judge.

These petitions for certiorari, which have been consolidated

for en banc consideration, raise the common, currently contentious, issue of the effect of section 455.241(2), Florida Statutes (1989) on the right of the defense in a medical malpractice case to ex parte access to the plaintiff's non-party treating physicians. In one of the cases, Castillo-Plaza v. Green, Case no. 94-1428,[1] the trial judge precluded any such communication whatever "except through the use of deposition as provided by the Florida Rules of Civil Procedure," and the defendants petitioned for certiorari review. In the other two, Pierre v. North Shore Medical Center, Case no. 94-1493 and Giron v. Noy, Case no. 94-1675, the trial court precluded ex parte discussions as to the patient's "medical condition," but allowed communications as to "the issues in this case or any other matter not otherwise prohibited by law."[2]

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[1] The order reads as follows:

> THIS CAUSE, having come on to be heard on Thursday, May 12, 1994 pursuant to Plaintiff's Response to Defendant's Notice of Intent to Interview Witnesses; and the Court having reviewed the court file, having heard argument of counsel and being otherwise duly advised in the premises, it is
>
> ORDERED and ADJUDGED, as follows:
>
> 1. Defendant shall not communicate with any treating healthcare provider except through the use of deposition as provided by the Florida Rules of Civil Procedure.

[2] The order in Pierre states:

THIS CAUSE, having come before this Court on Thursday, May 19, 1994, on the Plaintiff's Motion to Preclude Conference with Plaintiff's Treating Physicians and Health Care Providers and Defendants' Motion to Execute Medical Records Releases, and it having been represented to the Court that:

1. Plaintiff seeks an Order pursuant to Florida Statute §455.241 prohibiting all contact and communications between treating physicians of the Plaintiff and defense counsel.

2. Defense counsel agrees that such physicians may not provide records or advise the Defendants' counsel of the medical condition of the Plaintiff.

3. Defense counsel seeks authority to communicate to such physicians matters such as the issues in this cause.

And the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Pursuant to Florida Statute §455.241, treating physicians, who are not potential defendants in this case, shall not discuss the medical condition of LYDIA D. PIERRE with defense counsel in the absence of an authorization or Subpoena for Deposition. Similarly, any information disclosed to the physician may not be disclosed to defense counsel in the absence of a Release or Subpoena.

2. However, defense counsel may communicate with such physicians to advise them about the issues in this case or any other matter not otherwise prohibited by law.

The order in Giron provides:

THIS CAUSE, having come on to be heard on Thursday, June 23, 1994, pursuant to the Plaintiff's Objection to Defendant Raul Ravelo, M.D.'s Notice of Intent to Interview Witnesses Pursuant to Constitutional Right and/or Waiver of Statutory Privilege, and the Court having reviewed the court file, having heard argument of counsel and being otherwise duly advised in the premises, it is,

ORDERED AND ADJUDGED, as follows:

1. The Plaintiff's objections be and the same are hereby denied; and

2. Pursuant to Florida Statutes §455.241, treating physicians, who are not potential defendants in this

In these cases, the respective plaintiffs seek certiorari review.

We hold alternatively that (1) because of a clearly stated exception contained in the statute, the privilege established by section 455.241(2) does not at all apply to medical malpractice cases like these, and (2) assuming arguendo a contrary determination that it does, there is no basis even under the statute for precluding communications as to any matter beyond the medical records and the care, treatment and medical condition of the patient. Accordingly, the petition in Castillo-Plaza is granted and those in Pierre and Giron are denied.

I.

The present controversy had its genesis in Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984) and Frantz v. Golebiewski, 407 So. 2d 283 (Fla. 3d DCA 1981), in which the Supreme Court and this one respectively held that there was no legal impediment to "ex parte,"

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case, shall not discuss the medical condition of Margarita Giron with defense counsel in the absence of an authorization or Subpoena for deposition. Similarly, any information disclosed to the physician by Margarita Giron or her representative, may not be disclosed to defense counsel in the absence of a Release or Subpoena.

3. However, defense counsel may communicate with such treating physicians to advise them about the issues in this case or any other matter not otherwise prohibited by law.

4. In advance of any discussions with said treating physicians, defense counsel shall show this Order to said physician together with a copy of the case captioned Johnson vs. Mount Sinai Medical Center of Miami, 615 So.2d 257 (Fla.App.3 Dist.1993) which is attached hereto and incorporated herein.

but voluntary, conversations concerning any matter between a patient's treating doctors and those involved in the defense of his personal injury claim, including one for malpractice. In 1988, however, the legislature added the emphasized language to section 455.241(2):

> (2) Such [medical] records shall not be furnished to and the 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. 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 medical record 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 his 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.

Ch. 88-208, § 2, Laws of Fla.(§ 455.241(2), Fla. Stat. (1989))(emphasis supplied). In several, apparently conflicting, decisions since, the district courts have considered the effect of this amendment on the previous rule. See Franklin v. Nationwide Mut. Fire Ins. Co., 566 So. 2d 529 (Fla. 1st DCA 1990)(non-medical

malpractice action), review dismissed, 574 So. 2d 142 (Fla. 1990); Phillips v. Ficarra, 618 So. 2d 312 (Fla. 4th DCA 1993) (same); Johnson v. Mount Sinai Medical Ctr., Inc., 615 So. 2d 257 (Fla. 3d DCA 1993)(malpractice action); Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th DCA 1994)(same), review dismissed, 645 So. 2d 453 (Fla. 1994); Richter v. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994)(same), review granted sub nom. Acosta v. Richter, 650 So. 2d 989 (Fla. 1995). We hold in this case, however, that the amendment itself negates the applicability of the statute in all medical malpractice cases. We base this conclusion--which is adopted here for the first time probably because it seems never to have been previously considered[3]--on the statute's clear provision that the privilege it establishes with respect to

> information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient

applies

> [e]xcept in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant. . . .

§ 455.241(2), Fla. Stat. (1989)(emphasis supplied). Although the statute as a whole is far from a model of clarity, we find it impossible to read the plain language of the exception--which is the primary, if not the exclusive, appropriate source of its

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[3] In Johnson, 615 So. 2d at 257, for example, this court simply assumed the applicability of the privilege in that malpractice case without discussion or decision.

meaning, see 49 Fla.Jur.2d Statutes § 111 (1984)--in any other way. To repeat and rephrase, 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. In this regard, 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 only to a case in which <u>the</u> treating physician was herself the active or potential defendant, the statute would read "except in a medical negligence action when <u>the</u> [or that] health care provider is or reasonably expects to be named as a defendant" or that "information disclosed to <u>the</u> [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).[4]

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[4] That judicial amendment is necessary to reach the contrary result is demonstrated most forcefully by the very cases which have done so. They apparently stem initially from Franklin, which, because it was not a malpractice case, did not involve the present issue at all. Nevertheless, the Franklin court twice referred to the present issue; first correctly, but, second, quite incorrectly:

> This statutory language is abundantly clear on its face. It provides for waiver of confidentiality of covered medical information in only three circumstances:
>
> 1) in a medical negligence action, when a health care provider is or reasonably expects to be named as a defendant.
>
> * * *
>
> In other words, in all cases other than those where the health care provider is a defendant. . . .

Franklin, 566 So. 2d at 532 (emphasis supplied). It is apparent that the unaccountable substitution of "the" for "a," as it appears in the statute, sub silentio effected a total reversal of the meaning of that phrase.

Much the same thing occurred in the Kirkland case, which was a malpractice case in which the present issue was therefore actually presented for the first time. Apparently without recognizing that Franklin was not a malpractice case, the fifth district nevertheless purported to follow that decision. Indeed, it virtually quoted Franklin verbatim on the point--but with one significant but unacknowledged departure. The court said:

> We agree with our sister court in Franklin v. Nationwide Mutual Fire Insurance Co., 566 So. 2d 529 (Fla. 1st DCA), rev. dismissed, 574 So. 2d 142 (Fla. 1990), that this statute waives confidentiality for the medical condition of a patient or information furnished by the patient to a health care provider only in the following situations:
>
> 1) 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' [sic] records and information). . . .

Kirkland, 639 So. 2d at 1004 (emphasis supplied). We do not claim

While resort to canons of statutory construction is probably unnecessary in light of what the statutory exception expressly provides, it is not irrelevant that the application of those rules leads to the same result:

1. 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.

2. More importantly, the statute must be strictly interpreted and exceptions to it broadly construed both because it is in derogation of the common law as expressed in Coralluzzo and Frantz, which impose no restrictions on the availability of this information, see Thornber v. City of Fort Walton Beach, 568 So. 2d 914 (Fla. 1990); Graham v. Edwards, 472 So. 2d 803 (Fla. 3d DCA

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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. Finally, in Richter, the second district compounded the error by merely copying the Kirkland language without comment or concern. 647 So. 2d at 217. We find no difficulty in disagreeing with statements of the law which, like those in Kirkland and Richter, are justified only by iteration and repetition.

1985), review denied, 482 So. 2d 348 (1986), and because it erects a testimonial privilege which may "not [be] lightly created nor expansively construed, for [it is] in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974), quoted in Marshall v. Anderson, 459 So. 2d 384, 386 n.3 (Fla. 3d DCA 1984).

3. Even more significant, it is apodictic that:

> A law should be construed together with any other law relating to the same purpose such that they are in harmony. Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981); Garner v. Ward, 251 So. 2d 252 (Fla. 1971). Courts should avoid a construction which places in conflict statutes which cover the same general field. Howarth v. City of Deland, 117 Fla. 692, 158 So. 294 (1934).

State Dep't of Revenue v. Stafford, 646 So. 2d 803, 807 (Fla. 4th DCA 1994). 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 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 privilege does not apply to those cases.

II.

Even applying the confidentiality provisions of section 455.241(2), we reach the same conclusion that the trial judge in Castillo-Plaza was wrong in precluding all ex parte discussions and that those in Pierre and Giron were at least not wrong in permitting those discussions on subjects not protected by the statute.

Two factors are preeminent in the consideration of the scope of the statutory privilege and the role, if any, that the trial courts should play in enforcing it. 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. See Coralluzzo; Frantz. Particularly viewing them strictly as we are required, see Graham, 472 So. 2d at 807; Marshall, 459 So. 2d at 386-87, 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. Thus, while Johnson, 615 So. 2d at 257, was correct so far as it went in upholding a trial court order which authorized--because that was the only relief requested by the defendant hospital in that case--a so-called "one-way" conversation in which defense counsel was to inform the doctor of his theory of the case, voluntary "two-way" conversations on unprivileged subjects are likewise permissible.

Because this is true, it is error to preclude, as do Richter, Kirkland, and perhaps Franklin, all such conversations and contacts by restricting counsel to formal discovery. And we thoroughly disagree with the indication in theses cases that the presence of the patient's attorney is required "to protect against the disclosure of privileged information." Richter, 647 So. 2d at 217. We do so both because it is quite impermissible for the judiciary to restrict any communication beyond that which is forbidden by the legislature, and, of equal or greater importance, because there is no reason whatever to believe that any witness, including--perhaps particularly--a physician, will violate his statutory obligations by revealing privileged material unless a court prevents him from doing so. Whether we treat a protective order like the one in Castillo-Plaza as a pure injunction against communication or as an order in aid of discovery, see Humble Oil & Ref. Co. v. Sun Oil Co., 175 F.2d 670 (5th Cir. 1949)(error to enjoin defendants from interfering with making of survey under discovery rules); Humble

Oil & Ref. Co. v. Harang, 262 F. Supp. 39 (E.D. La. 1966)(error to enjoin destruction of documents subject to production), it is settled law that no such restriction may be issued in the absence of a well grounded apprehension of injury to a clearly established right. See Humble Oil, 175 F.2d at 670; Humble Oil, 262 F. Supp. at 39; Crawford v. Bradford, 23 Fla. 404, 2 So. 782 (1887); State ex rel. Reynolds County v. Riden, 621 S.W.2d 366 (Mo. App. 1981); Hudson v. School Dist. of Kansas City, 578 S.W.2d 301 (Mo. App. 1979); St. Louis 221 Club v. Melbourne Hotel Corp., 227 S.W.2d 764 (Mo. App. 1950); Eckhardt v. Bock, 159 S.W.2d 395 (Mo. App. 1942); 29 Fla.Jur.2d Injunctions § 12 (1981). In this case there has been no such showing. With no more than anecdotes to support the claim, the plaintiffs suggest that treating doctors--who are free to decline to speak to counsel altogether[5]--will, among other things, breach their duty to their patients, jeopardize their licenses, and expose themselves to personal liability, see Morris v. Consolidated Coal Co., 191 W. Va. 426, 446 S.E.2d 648 (1994), and cases collected at 16 Med. Liab. Rep. (MG-H) 299-301 (Dec. 1994), by violating the privilege--all supposedly out of feelings of camaraderie with their fellow physicians. We consider that such

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[5] Of course, plaintiff's counsel is also free to inform the treating physician of this fact, as well as of the parameters of the statutory privilege. In fact, the likelihood that they have not done so or that the treating physicians in these very cases would now agree to talk to the defendants under any circumstances is so infinitesimal as a practical matter that these petitions might well be dismissed as moot.

a claim amounts to no more than a baseless attack not only upon the good faith, but the good sense of the doctors in question. Moreover, because any such violation requires the connivance of counsel, the argument impugns our profession as well. We will not approve orders based on any such assumptions.

For the same reason--and although the issue is not technically before us in the absence of cross-petitions by the defendants in the Giron and Pierre cases--we think the provisions of these orders which specifically forbid a violation of the statutory privilege are, at least, unnecessary and likely unwise. It is inappropriate --on the theory that it "can't hurt"--to order others simply to obey the law in the absence of any indication that they would otherwise fail to do so. Humble Oil, 175 F.2d at 670; Humble Oil, 262 F. Supp. at 39; see Dodge Center v. Superior Court, 199 Cal. App. 3d 332, 244 Cal. Rptr. 789 (1988)(presumed that every person will obey the law); Bentley v. State, 411 So. 2d 1361 (Fla. 5th DCA 1982)(same; probationer), review denied, 419 So. 2d 1195 (Fla. 1982); Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977)(same); accord Crawford, 23 Fla. at 404, 2 So. at 782 (no jurisdiction to enjoin collection of personal tax where no ground for apprehending enforcement of collection); Tubular Threading, Inc. v. Scandaliato, 443 So. 2d 712 (La. App. 1983)(injunction against using, selling, distributing or disseminating documents relating to trade secrets would not lie absent present or compelling need or threatened misappropriation); Hudson, 578 S.W.2d

at 301 (injunction to restrain future violations of sunshine law where no proof that school board contemplated meetings in violation of statute inappropriate).[6] In the absence of some extreme circumstances which do not exist in these cases, we think it inadvisable that there be any prospective court action at all in this field.[7]

III.

For these reasons, certiorari is granted and the order under review in case number 94-1428 is quashed; in case numbers 94-1493 and 94-1675, certiorari is denied.[8] We certify to the Supreme Court that this decision is in direct conflict with Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th DCA 1994), review dismissed, 645 So. 2d 453 (Fla. 1994), and Richter v. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994), review granted sub nom. Acosta v. Richter, 650 So. 2d 989 (Fla. 1995).

Certiorari granted in part, denied in part. Conflict certified.

HUBBART, NESBITT, COPE, LEVY, GERSTEN and GREEN, JJ., concur.

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[6] Moreover, the very existence of such an order may counter-productively imply to a physician to whom it is shown that the court is somehow authorizing or approving an ex parte discussion which the doctor is, in fact, entirely free to decline.

[7] Ample remedies already exist if an actual violation of the privilege takes place. Morris, 191 W. Va. at 426, 446 S.E.2d at 648; Steinberg v. Jensen, 186 Wis. 2d 237, 519 N.W.2d 753 (1994)(new trial ordered upon discovery of defense violation of privilege), review granted, 525 N.W.2d 732 (Wis. 1994); see § 458.331, Fla. Stat. (1993).

[8] In accordance with the views expressed in both parts of this opinion, however, the orders in these cases should be vacated after remand.

JORGENSON, Judge, dissenting.

I respectfully dissent and would hold that the 1988 amendments to section 455.241(2), Florida Statutes, do apply to non-defendant treating physicians in medical malpractice cases. Further, rather than relegate the definition of the limits of the privileges embodied by the amendments to the transgressions of the least vigilant of doctors and the most zealous of advocates in an off-the-record, behind-closed-doors setting, I would prohibit ex-parte contacts between non-defendant treating physicians and the defense attorneys. I would thus recede from Johnson v. Mount Sinai Medical Center, Inc., 615 So. 2d 257 (Fla. 3d DCA 1993), as its approval of one-way interviews is inconsistent with the ex-parte communication bar.

In part I of the opinion, the court employs a broad battery of canons of statutory construction to reach its erroneous conclusion that the 1988 amendment to section 455.241(2), Florida Statutes, "negates the applicability of the statute in all medical malpractice cases." The court's tortured analysis carries the seeds of its own demise. The court relies on a portion of the statute which provides that confidentiality rules apply

except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant . . . .

§ 455.241(2), Fla. Stat. (1993)(emphasis added). If the legislature had meant to merely exclude all medical malpractice actions from the confidentiality rules of the statute, one would expect the above quoted provision to end with the phrase "except in a medical malpractice action." The court suggests that the legislature intended to exclude all medical malpractice actions by specifying "medical negligence action[s] when a health care provider is or reasonably expects to be named as a defendant." The court's rule of construction that different words are intended to have different meanings would require us to give some meaning to the extra (underlined) words. This leads inescapably to the conclusion that there must be some class of medical negligence actions where no health care provider is or reasonably expects to be named as a defendant and that the legislature has taken pains to specifically leave these actions within the statute's ambit. It is difficult, if not impossible, to conceive of medical negligence actions where no health care provider is a defendant, and unfathomable that the legislature had contemplated such actions.

Rather, the senate judiciary committee staff report, see Franklin v. Nationwide Mut. Fire Ins. Co., 566 So. 2d 529, 532 (Fla. 1st DCA 1990), confirms the more reasonable conclusion that the confidentiality rules apply to a health care provider or practitioner except when that health care provider or practitioner

is or expects to be named in the action at issue. The essence of the flaw in the court's contrary stance is captured by Sir Edward Coke's "Mischief Rule":

> When faced with an argument that the literal meaning of a statute is at variance with the legislative purpose, a court can follow no better guide than Sir Edward Coke's 'Mischief Rule': 'The Office of Judges is always to make such construction as to suppress the Mischief and advance the Remedy; and to suppress subtle Inventions and Evasions for Continuance of the Mischief.'

United States v. Second Nat'l Bank of North Miami, 502 F.2d 535, 541 (5th Cir. 1974)(quoting Heydon's Case, 3 Co. 7a, 7b, Magdalon College Case, 11 Co. 66b, 73b). It is true that the legislature, by specifying "a" rather than "the" health care provider and in interchanging the words "provider" and "practitioner,"[1] failed to achieve precise formalism in its drafting. However, the statute's regrettable lack of precision does not require us to work the dual mischief of reaching an unfathomable result and sanctioning trauma to the physician-patient relationship.

Thus the confidentiality amendments to the statute govern the orders at issue. Contrary to the court's analysis in part II, the effect of the amendments should be to bar ex-parte communication between defense counsel and non-defendant treating physicians. Prior to the amendments to section 455.241(2), Florida Statutes

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[1] The majority's argument that the drafters could not have meant the "provider" to be the same person as the "practitioner" carries little weight. Further on in the same sentence of the statute where these words are interchanged, the drafters revert to the word provider when referring to others involved in the treatment of the patient with whom the practitioner may speak.

(1989), the Florida Supreme Court in Coralluzzo v. Fass, 450 So. 2d 858, 859 (Fla. 1984), considered the question:

> Does a court have the authority to prevent a treating physician from extrajudicially disclosing information obtained from his patient and information concerning the treatment of his patient where the patient has not consented to such disclosure?

The Court answered this question in the negative noting that

> Petitioner urges this Court to exercise its jurisdiction to do equity between the parties. We can find no reason in law or in equity to disapprove the decision of the district court. 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 Dr. Magnacca.

Id. (emphasis added). The Court's rationale in Coralluzzo has been abrogated by the legislature's subsequent amendments to section 455.241(2), now mandating the opposite answer to the above-quoted question considered in Coralluzzo. The statute now expressly prohibits a physician's extrajudicial disclosure of information obtained from a patient and information concerning the treatment of that patient. This conclusion does not, however, end the analysis.

The Castillo-Plaza order goes beyond merely prohibiting discussion of the expressly enumerated areas in the statute and prohibits all discussions, while the Pierre and Giron orders merely direct the parties to follow the prescripts of the statute. Although it is clear that the legislature intended the

confidentiality amendments to impose privileges in each of these cases, the legislature did not indicate the effect the existence of these confidentiality privileges should have on discovery. The court would limit the amendments to a mere statement of the confidentially obligations of physicians, without a means to ensure their observance. However, it is my view that the 1988 amendments fill the void in statutory authority that prevented the Coralluzzo Court from doing equity between the parties and prohibiting ex-parte physician contacts. Under the 1988 amendments, communications should be now conducted within the safeguards of the civil discovery procedures, and ex-parte communications should be prohibited to give meaning to the statute's broad prohibition of the discussion of the medical condition of, furnishing medical records of, and disclosing information provided by the patient.

The court notes that the likelihood that the treating physicians in these cases would agree to talk to the defendants ex parte is "so infinitesimal as a practical matter that these petitions might well be dismissed as moot." I agree that the number of physicians who would engage in ex-parte interviews is likely small. But it is precisely this handful of practitioners--whose cavalier disregard of their duty to their patients permits them to provide affirmative assistance to the patient's antagonist in litigation--who justify an ex-parte communication bar. The court's decision would allow defense counsel to avoid depositions for only these few physicians who would accede to an ex-parte

interview--the vast majority of the physicians would still require a subpoena for deposition or waiver by the patient. The inconvenience of instead having to set depositions for the few errant physicians is infinitesimal in relation to the potential for abuse, intentional or otherwise, by the court's allowing free, unmonitored access to them by defense counsel[2] and the resulting uncertainty of the bounds of the confidentiality privileges.

Section 455.241(2) now provides that absent waiver by the patient, medical records shall not be furnished except in response to a subpoena; information disclosed to a nondefendant health care practitioner may only be disclosed at a deposition, hearing, or trial; and the medical condition of the patient may not be discussed. The precise reaches of the prohibition against discussing the medical condition of the patient are not defined by the statute and not at issue in this case.[3] The court relegates the definition of the limits of this privilege to the doctors and

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[2] The majority dismisses this concern as arising from anecdotal evidence. Not only is there record evidence in these cases of the pressure to overreach inherent in our adversary system, but this phenomenon has been recognized and documented by decisions in other jurisdictions throughout the country. In this court's decision in Coralluzzo v. Fass, 435 So. 2d 262 (Fla. 3d DCA 1983), the dissent surveyed some of the other jurisdictional support for this proposition. Id. (Pearson, Jorgenson, JJ., dissenting). An updated survey of jurisdictions barring ex-parte communications can be found in, e.g., Horner v. Rowan Cos., 153 F.R.D. 597 (S.D. Tex. 1994).

[3] Nor is there an issue in this case whether the ex-parte bar conflicts with the presuit screening scheme of chapter 766. The orders at issue here have arisen in already-filed lawsuits.

defense counsel. The better interpretation is to bar the ex-parte communication altogether--the logical effect to be ascribed to the change in the statute, with strong public policy support in, among other things, the Hippocratic Oath, the American Medical Association's Principles of Medical Ethics, and the Current Opinions of the Judicial Council of the AMA.[4]

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[4] In prohibiting similar ex-parte conferences, the court in Petrillo v. Syntex Lab., Inc., 499 N.E.2d 952, 957-58 (Ill. App. Ct. 1986), appeal denied, 505 N.E.2d 361 (Ill. 1987), set forth the public policy dictates of medical ethics:

> The code of ethics for the medical profession is comprised of three separate "prongs": (1) the Hippocratic Oath; (2) The American Medical Association's (AMA) Principles of Medical Ethics; and (3) The Current Opinions of the Judicial Council of the AMA (1984 ed.). These three "prongs" underscore the highly confidential nature of the physician-patient relationship and, perhaps more importantly, affirmatively advertise to the public that a patient can properly expect his physician to protect those medical confidences which are disclosed during the physician-patient relationship.
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> . . . .
>
> The [Hippocratic] oath [provides]:
>
> > Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret.
>
> . . . .
>
> The AMA's Principles of Medical Ethics . . . were adopted in 1977 and are eight in number. Principle II [provides] in relevant part: "A physician shall deal honestly with his patients and colleagues. . . ." Principle IV [provides]: "A physician shall respect the rights of patients, of colleagues, and of other health

The 1988 amendments to section 455.241(2) follow my longstanding, yet unavailing, view that defense counsel should be allowed to confer with non-party physicians who have treated the plaintiff "only with the knowledge and consent of the plaintiff and

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> professionals, and shall safeguard patient confidences within the constraints of the law."
>
> . . . .
>
> [T]he Current Opinions of the Judicial Council of the AMA . . . reflect the AMA's position on how a physician should act in particular circumstances. Section 5.05 of the Current Opinions, for example, [provides]:
>
> > The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. . . . The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.
>
> . . . .
>
> Section 5.06 deals specifically with the attorney-physician relationship and again reiterates the requirement of patient consent: "The patient's history, diagnosis, treatment, and prognosis may be discussed with the patient's lawyer with the consent of the patient or the patient's lawful representative."
>
> . . . .
>
> Moreover, Sections 5.07 and 5.08 [provide]:
>
> > History, diagnosis, prognosis, and the like acquired during the physician-patient relationship may be disclosed to an insurance company representative only if the patient or his lawful representative has consented to the disclosure.

counsel. Not only is that the fair way, but it avoids any implication of collusion or conspiracy which may appear from clandestine consultations." Coralluzzo v. Fass, 435 So. 2d 262, 264-65 (Fla. 3d DCA 1983)(Jorgenson, J., dissenting)(citation omitted, emphasis in original), aff'd, 450 So. 2d 858 (Fla. 1984). Allowing such ex-parte communications "necessarily sanctions trauma to the physician-patient relationship." Id. at 264. The court today reopens the wound healed by the legislature and reintroduces the infection of patient-physician distrust.

BASKIN and GODERICH, JJ., concur.

GODERICH, Judge, (dissenting).

I respectfully dissent, and as I disagree with the arguments raised in both Section I and II of the majority opinion I would deny certiorari in Castillo-Plaza v. Green and grant certiorari in Pierre v. North Shore Medical Center and Giron v. Nov. Further, I would recede from Johnson v. Mount Sinai Medical Center, Inc., 615 So. 2d 257 (Fla. 3d DCA 1993), in so far as it authorizes a "one-way interview" in which "the physicians essentially remain silent and the defense counsel do all the talking." Johnson, 615 So. 2d at 258. As stated in Richter v. Bagala, 647 So. 2d 215, 217 (Fla. 2d DCA 1994), review granted sub nom. Acosta v. Richter, (Fla. Case no. 84,413, Jan. 13, 1995), I "see no reason to require treating physicians to listen and not respond to an attorney, who is not their attorney, about their professional responsibilities." Instead, I would follow Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th DCA), review dismissed, 645 So. 2d 453 (Fla. 1994), and Franklin v. Nationwide Mutual Fire Insurance Co., 566 So. 2d 529 (Fla. 1st DCA), review dismissed, 574 So. 2d 142 (Fla. 1990), which prohibits ex parte interviews between a defense counsel and the plaintiffs' treating physicians.

BASKIN, J., concurs.