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IN THE SUPREME COURT OF FLORIDA

THIRD DISTRICT COURT CASE NO. 94-1493
SUPREME COURT CASE NO. 85,9605

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.

ANSWER BRIEF OF RESPONDENT NORTH SHORE MEDICAL CENTER, INC.

PHILIP D. PARRISH, ESQ.
STEPHENS, LYNN, KLEIN &
McNICHOLAS, P.A.
Attorneys for N.S.M.C.
Two Datran Center, PH2
9130 S. Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 670-3700

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PRELIMINARY STATEMENT

This brief is filed on behalf of Respondent, North Shore Medical Center, Inc., which shall be referred to as the "Hospital". Co-Respondents, James W. Porter, M.D., and Harari, Porter, Blumenthal and Brown, M.D., P.A., d/b/a Emergency Medical Specialists of South Florida, will be referred to collectively as "Dr. Porter". The Petitioners, Lydia D. Pierre, by and through her husband and legal guardian, Issonel Pierre, the Pierre children and Issonel Pierre, individually, will be referred to as either "Pierre", "Petitioners", or "Plaintiffs".

The issues to be addressed in this case are identical to those issues which will be addressed by this Court in **ACOSTA v. RICHTER**, Case No. 84, 413. Oral argument in **ACOSTA** is scheduled to be heard by this Court on October 6, 1995.

STATEMENT OF THE CASE AND FACTS

Lydia Pierre was first seen by an obstetrician/gynecologist at North Shore Hospital when she went into labor; she had sought no previous pre-natal care. Her child was delivered without incident at North Shore and she and her child were discharged. Several days later, she was rushed to the North Shore emergency room in pulmonary distress. It is the position of the Defendants that by the time Ms. Pierre arrived in the emergency room, she was already comatose. The Plaintiffs disagree.

Ms. Pierre has been treated ever since at the hospital by a neurologist assigned to her care by North Shore Hospital. It is undisputed that she was already in a comatose state when her physician/patient relationship began with that "treating physician."

As part of its discovery, the Hospital filed a "Notice of Intent to Interview Witnesses" informing the Plaintiffs that the Hospital intended to rely upon its constitutional rights to interview any and all fact witnesses that would agree to be so interviewed without notice to the Plaintiffs. In response, the Plaintiffs filed a "Motion to Preclude Conference with Plaintiffs Treating Physician", which sought to prohibit any contact or communication between any of the Plaintiff's treating physicians and counsel for the Hospital or Dr. Porter. The trial court

entered an order[1] which precluded any discussion of Lydia Pierre's medical condition between treating physicians and defense counsel. However, the order did provide that defense counsel could "advise [treating physicians] about the issues in this case or any other matter not otherwise prohibited by law."

The Third District Court of Appeal consolidated this matter with the cases of **CASTILLO-PLAZA v. GREEN**, Case No. 94-1428 and **GIRON v. NOY**, Case No. 94-1675, and issued its en banc decision on May 24, 1995. **CASTILLO PLAZA v. GREEN, 655 So. 2d 197 (Fla. 3d DCA 1995)(en banc).**

For reasons which will be discussed in depth in the argument portion of this brief, the Third District Court of Appeal quashed the trial court's order, declared Florida Statute §445.241(2) inapplicable to medical malpractice cases; recognized that the statute must in any event be strictly and narrowly construed; and certified its opinion to be 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).**

SUMMARY OF THE ARGUMENT

The opinion on review, **CASTILLO-PLAZA v. GREEN, 655 So. 2d 197 1995)** should be affirmed and the conflicting opinions in **RICHTER v.**

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[1] The entire text of the order appears in the District Court's opinion, **CASTILLO-PLAZA v. GREEN, 655 So. 2d 197, 199 n.2 (Fla. 3d DCA 1995).**

BAGALA, 647 So. 2d 215 (Fla, 2d DCA 1994), review granted sub. nom ACOSTA v. RICHTER, 650 So. 2d 989 (Fla. 1995) and **KIRKLAND v. MIDDLETON, 639 So. 2d 1002 (Fla. 5th DCA 1994), review dismissed 645 SO. 2d 453 (Fla. 1994)**, should be quashed. The third district has appropriately recognized that the restrictions imposed upon ex parte contact with a plaintiff's treating physician contained within Section 455.241(2) do not apply to medical malpractice actions.

In addition, the opinion below is consistent with **CORALLUZZO v. FASS, 450 So. 2d 858 (Fla. 1984)**, and **MORRISON v. MALMQUIST, 62 So. 2d 415 (Fla. 1953)**, The third district's opinion has applied an appropriately narrow construction of the statute because it is in derogation of the common law as expressed by this Court in **MORRISON** and **CORALLUZZO**.

In addition, this Court should go further and declare Section 455.241(2) to be unconstitutional. The statute represents a legislative encroachment upon this Court's inherent rule making authority. It does not create a substantive right; it merely regulates the fashion in which evidence may be obtained. The statute itself provides that a defendant in a medical malpractice or other personal injury case may subpoena a treating physician's records and take that treating physician's deposition. Thus, there is no information which the plaintiff's treating physician has which cannot be discovered. As such, the statute does not create a privilege.

The public policy arguments fashioned by Pierre simply cannot

outweigh the countervailing and dispositive public policy of allowing a litigant the right to effective assistance of counsel by allowing his or her counsel to interview any and all possible fact witnesses. See, **HICKMAN v. TAYLOR, 329 US 495 67 S.Ct. 385, 91 L.Ed. 451 (1947); INTERNATIONAL BUSINESS MACHINES CORP. v. EDELSTEIN, 526 F. 2d 37 (2d Cir. 1975).**

Furthermore, the statute is fundamentally unfair, particularly if it applies to medical malpractice actions. Plaintiff's counsel wishes to have free and unfettered access to a fact witness, yet wishes to preclude defense counsel from that same access, or at the very least wishes to be present when defense counsel interviews the fact witness. Once again, this is an improper infringement upon a defendant's right to counsel, and that counsel's work product.

On the other hand, allowing ex parte conferences serves many purposes. Foremost is the effective marshalling and presentation of a defense. In addition, ex parte conferences provide a cost effective method of determining which witnesses should be deposed, and which need not be deposed. The statute as it was interpreted by the courts in **RICHTER** and **KIRKLAND** allows a so-called "privilege" to be used both as a sword and a shield.

Perhaps most disturbing, is the infringement upon the right to free speech and assembly which the statute purports to impose on the rights of fact witnesses and defense counsel. The statute impermissibly and unconstitutionally abridges the Hospital's right to free speech.

ARGUMENT

I. THE THIRD DISTRICT'S EN BANC DECISION SHOULD BE APPROVED, AND **RICHTER** AND **KIRKLAND** SHOULD BE QUASHED, BECAUSE THE THIRD DISTRICT'S OPINION (A) IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE; (B) RECOGNIZES THE COMMON LAW RIGHT OF A LITIGANT TO CONDUCT EX PARTE INTERVIEWS OF FACT WITNESSES; AND (C) ALTERNATIVELY GIVES THE STATUTE AN APPROPRIATELY NARROW INTERPRETATION BECAUSE THE STATUTE IS IN DEROGATION OF THE COMMON LAW AND THE SEARCH FOR THE TRUTH.

Before we directly address our arguments in support of the third district's opinion, it is appropriate to review - as the third district itself did - the jurisprudential history of this issue.

An Historical Prospective

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

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[2] To this day, Florida does not recognize a patient/physician privilege. See, Florida Statute Section 90.501, entitled "Privileges Recognized Only as Provided." See, also Section 90.502 through Section 90.5055 for those privileges which Florida does recognize: lawyer-client; psychotherapist-patient; sexual assault counselor-victim; husband-wife; clergymen; accountant/client.

providers. **450 So. 2d at 859.**

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

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

As the court noted in **FRANTZ**:

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

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

In contrast to a retained medical expert witness, or a

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

The Litigant's Right to Interview Fact Witnesses

It is both anomalous and unfortunate that the first court to interpret and apply Section 455.241(2) following the 1988 amendments did so on the basis of a trial court order which compelled a plaintiff to sign an authorization allowing ex parte conferences between the plaintiff's treating physicians and defense counsel in a non-medical malpractice case. See, **FRANKLIN v. NATIONWIDE MUTUAL FIRE INSURANCE, 566 So. 2d 529 (Fla. 1st DCA 1990), review dismissed, 574 So. 2d 142 (Fla. 1990).** As the court below noted, both the **RICHTER** and **KIRKLAND** decisions simply adopted the **FRANKLIN** court's rationale without noting any of the distinctions between **FRANKLIN** and the matters before those courts.

Chief among those distinctions (aside from the fact that **FRANKLIN** was not a medical malpractice case) is the fact that the order under review in **FRANKLIN** was an order of compulsion. Few would quarrel with the outcome of the **FRANKLIN** case, i.e., that a trial court may not compel a plaintiff to sign such an authorization. Indeed, in **ROJAS v. RYDER TRUCK RENTAL, 641 So. 2d 855, 858 (Fla. 1994)**, this Court unanimously approved that portion of **FRANKLIN** which held that a court may not compel such a medical

release. The reason for that unanimity is obvious. Interviews between counsel for either a plaintiff or a defendant and any fact witness must only be conducted on a voluntary basis. A party should not be compelled by court order to "authorize" a third party (treating physician) to engage in such an interview.

On the other hand, much of the discussion of ex parte interviews which is included in the **FRANKLIN** decision is simply incorrect. That a litigant's counsel may meet "off the record" in an informal discussion with any and all fact witnesses (including those listed by the adverse party) is confirmed by the seminal decision on the work product doctrine. Indeed, **HICKMAN v. TAYLOR, 329 US 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)**, involved a request for one counsel's mental impressions and notes obtained during such informal interviews! Restrictions upon ex parte interviews of fact witnesses are not favored. In **INTERNATIONAL BUSINESS MACHINES CORP. v. EDELSTEIN, 526 F. 2d 37 (2d Cir. 1975)**, the court struck down certain restrictions on such interviews:

> We believe that the restrictions on interviewing set by the trial judge exceeded his authority. They not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel and without a transcript being made.

EDELSTEIN, 526 F. 2d at 42. Accord, **FELDER v. WYMAN, 139 F.R.D. 85, 91 (D.S.C. 1991)** (approving ex parte conferences with treating physicians in medical malpractice case under South Carolina law).

In **DOE v. ELI LILLY & CO., INC. 99 F.R.D. 126 (D.D.C. 1983)**, another case addressing the present issue, the court made the following observation:

> The privilege was never intended, however, to be used as a trial tactic by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time.

Id. at 128-129.

Unfortunately, the **FRANKLIN** court rejected this analysis and accused the **DOE** court of unauthorized rule making. In fact, the **FRANKLIN** court got it exactly backwards. As we will discuss in depth, infra, it is the primary function of the courts to set the parameters of discovery, informal or otherwise. It is Florida's legislature which has engaged in unauthorized rule making by virtue of the 1988 amendments to Section 455.241(2).

The Statute

Prior to 1988, Section 455.241(2), Florida Statutes was a sleepy little medical records statute which provided for the confidentiality of a patient's medical records unless, of course, the patient was involved in litigation, and a litigant had served a subpoena to obtain the records.[3] However, in 1988 the Statute

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[3] Thus, the statute as originally worded,and as it is worded today with respect to medical records, recognizes what must be recognized -- that once a patient sues a physician (or some other alleged tortfeasor) the patient has put his or her medical condition at issue and any attendant confidentiality is thereby waived. See also, **SCHEFF v. MAYO, 645 So.2d 181 (Fla. 3d DCA 1994)** (plaintiff is not entitled to invoke the psychotherapist-patient privilege after placing mental condition in issue by

was altered as a result of intense lobbying efforts on the part of the Plaintiff's Personal Injury Bar. Thus, since 1988, in addition to addressing medical records, the statute has -- at least in non-medical malpractice cases -- placed certain restrictions upon discussion of "the medical condition of a patient" by a physician with any person other than the patient or the patient's legal representative, or other health care providers involved in the care and treatment of the patient.

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

The Language of the Statute Controls

As the Third District noted, the language of the statute itself is the "primary, if not the exclusive, appropriate source of its meaning,...". 655 So. 2d at 200. See, **AETNA CAS. & SUR. CO. v. HUNTINGTON NAT'L BANK, 609 So. 2d 1315, 1317 (Fla. 1992)**. In this regard, the 1988 amendments to the statute added, among other things, the following language:

Except in a medical negligence action when a

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seeking damages for mental anguish); accord, **ARZOLA v. REIGOSA, 534 So.2d 883 (Fla. 3d DCA 1988); YOHO v. LINDSLEY, 248 So.2d 187 (Fla. 4th DCA 1971)**.

> health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

The third district recognized that the highlighted portion of the statute carves out medical malpractice actions from the statute's purported restriction upon ex parte conferences. Because the legislature utilized the indefinite article "a" to modify both of the phrases "health care provider" and "defendant", instead of using the definite article "the", the statutory exception applies to all treating physicians in any medical malpractice case.[4]

As the third district pointed out, both the **KIRKLAND** and **RICHTER** courts found it necessary to engage in acts of "judicial amendment" to reach a contrary result. **655 So. 2d at 201 n.4**. The second district did so in **RICHTER** by adding a parenthetical phrase - "(for that health care providers' records and information". **RICHTER 647 So. 2d at 617**. The second district was without power to judicially amend the statute in that fashion. See, **HOLLY v. AULD, 450 So. 2d 217 (Fla. 1984)**. [5]

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[4] For a more in-depth treatment of this particular issue, the Hospital directs the Court's attention to the Amicus Brief filed on behalf of the Florida Medical Association and The Dade County Medical Association.

[5] The Pierres rely upon an economic impact analysis prepared by a senate committee staffer on May 19, 1988 for their argument that the statute applies to medical malpractice cases.

On a more simple plane, it has to be recognized that it would be completely unnecessary to make such a limited exception. Obviously, a medical malpractice defendant may, indeed must, discuss his or her own care and treatment of the plaintiff with his or her own counsel. That is a matter that is so true, obvious, and evident as to be in need of no clarification. Thus, an exception which simply carves out the medical malpractice defendant would be unnecessary.

Even if resort to canons of statutory construction is necessary, the statute must still be interpreted as it was by the third district. As that court pointed out, 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)**. Furthermore, as we will argue in more detail, infra, statutes which are in derogation of the common law, as this statute clearly is, must be strictly interpreted. Conversely, any exceptions to such statutes must be broadly interpreted. **THORNBER v. CITY OF FORT WALTON BEACH, 568 So. 2d 914 (Fla. 1990)**.

Viewing the statute in its broader scheme yields the same conclusion. The legislature actively addressed the medical malpractice crisis in 1988, the same year in which it adopted the amendments to Section 455.241 which are under review here. In

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Unfortunately, we have no idea whether the legislators who voted for this amendment had ever read this interpretation, or even if the interpretation is correct for that matter. Perhaps the author of that analysis was guilty of the same flawed analysis as the **RICHTER** and **KIRKLAND** courts.

1988, the legislature provided a vehicle for arbitration of medical malpractice cases, which has been deemed constitutional by this Court. See, **UNIVERSITY OF MIAMI v. ECHARTE, 618 So. 2d 189 (Fla. 1993)** It also provided for a birth related neurological injury compensation plan; and it went "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 [medical malpractice] cases outside of court." **CASTILLO-PLAZA v. GREEN, 655 So. 2d at 202.** See, **Section 766.101 -.316, Fla. Stat. (1993).** The "informal discovery" provided for by the legislature would - as the third district noted - "be severely subverted" by an interpretation of the statute such as that suggested by the Pierres. Surely it is important to the statutory intent of the pre-suit screening process that a patient's treating physician be allowed to speak about the patient's condition to potential malpractice defendants.

The Statute Must Be Narrowly Construed, And Its Exceptions Must Be Broadly Construed

The courts of this state recognize only privileges which are provided by Florida statutes, by constitutional interpretation or by the Florida Supreme Court's rule making power. See, generally, Fla. Stat. §90.501; See, e.g., **GIRARADAU v. STATE, 403 So. 2d 513 (Fla. 1st DCA 1981), review dismissed, 408 So. 2d 1093.** This is because testimonial privileges should not be "lightly created nor expansively construed, for they are in derogation of the search for truth." **UNITED STATES v. NIXON, 418 US 683, 710, 94 S.Ct. 3090, 3108 41 L.Ed.2d 1039, 1065 (1974); MARSHALL v. ANDERSON, 459 So. 2d**

384, 386 n.3 (Fla. 3d DCA 1984); CASTILLO-PLAZA v. GREEN, 655 So. 2d at 201.

As we have previously noted, there is no patient/physician testimonial privilege in this state. **MORRISON v. MALMQUIST, supra; §90.501 Fla.Stat.** Furthermore, at common law, it has always been perfectly acceptable for a litigant's counsel to conduct voluntary ex parte discussions with any and all non-party fact witnesses. **HICKMAN v. TAYLOR, supra.**

Indeed, the third district itself recently ruled in favor of allowing plaintiff's counsel to engage in ex parte conferences with "non-party" fact witnesses in **REYNOSO v. GREYNOLDS PARK MANOR, INC., 20 F.L.W. D1852 (Fla. 3d DCA August 10, 1995).** In that action, brought pursuant to Section 400.022, Florida's Nursing Home Statute, plaintiff's counsel wished to contact approximately sixty former employees of the defendant nursing home, but was precluded from doing so by the trial court's reliance upon **BARFUSS v. DIVERSICARE CORP. OR AMERICA, 20 F.L.W. D241 (Fla. 2d DCA January 20, 1995)**, which held that under most circumstances it is impermissible for a plaintiff's counsel to have ex parte contact with a defendant's former employees. The Third District Court of Appeal quashed that order and certified conflict with **BARFUSS.** The court made a practical observation about the trial court's order:

> By virtue of the protective order, plaintiff's counsel is precluded from contacting, or using an investigator to interview, the sixty former nursing home employees who previously cared for the ward. Instead, plaintiff may only obtain discovery from those individuals by scheduling sixty depositions.

20 F.L.W. at D1852.

Thus, the court observed what we have observed throughout these proceedings, i.e., the extreme financial and time burden which requiring the taking of depositions places upon all parties to litigation.

What Other Jurisdictions Have Held

Courts in other jurisdictions are divided on the subject of voluntary ex parte conferences. Many courts have allowed ex parte access to treating physicians to both plaintiffs and defendants.[6] Other courts, however, (typically by interpreting a physician/ patient privilege which Florida does not recognize) have precluded defense counsel from participating in voluntary ex parte conferences with treating physicians.[7]

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

[7] HORNER v. ROWAN COMPANIES, INC., 153 F.R.D. 597 (S.D. Tex. 1994); HARLAN v. LEWIS, 141 F.R.D. 107 (E.D. Ark. 1929); MANION v. N.P.W. MEDICAL CTR OF N.E. PENNSYLVANIA, INC., 676 F.Supp. 585 (M.D. Pa. 1987); ALSTON v. GREATER SOUTHWEST COMMUNITY HOSPITAL, 107 F.R.D. 35 (D.D.C. 1985); DUQUETTE v. SUPERIOR COURT, 878 P.2d 634 (Ariz. App. 1989); KARSTEN v. MCCRAY, 509 N.E.2d 1376 (Ill. App. 1987), appeal denied, 517 N.E.2d 1086 (Ill. 1987); CUA v. MORRISON, 626 N.E.2d 581 (Ind. App. 1983), opinion adopted, 636 N.E.2d 1248 (Ind. 1994); ROOSEVELT HOTEL LIMITED PARTNERSHIP v. SWEENEY, 394 N.W.2d 353 (Iowa 1986); WENNINGER v. MUESING, 240

Of those cases which allow ex parte contact between defense counsel and a plaintiff's treating physician, the recent decision of the Missouri Supreme Court is enlightening, particularly with respect to the notion that there is some type of inviolable "fiduciary" relationship between a physician and a patient as it pertains to the search for truth within the confines of litigation:

> The Plaintiffs' contention here seems to be bottomed on the assumption that a treating physician's duty to act with good faith requires the physician to give testimony that is favorable and beneficial to the patient and detrimental to the opponent. Such an assumption is invalid; a trial is a search for the truth and the primary obligation that the treating physician or any other witness owes in a trial is to tell the truth. If, for instance, a treating physician has determined that a patient made a full recovery and this issue is relevant to the litigation, the treating physician may, in fact, should, testify to this fact even though the patient may be claiming to the contrary.

BRANDT v. PELICAN, 856 S.W. 2d 667, 673 (MO. 1993).

The foregoing analysis more than adequately rebuts the position maintained by the Pierres (and the dissenters below) that there is something "magical" about the physician/patient relationship which should preclude a physician from discussing his patient's already public medical condition in an informal setting. A physician is retained by a patient for the purposes of treating or healing the patient. Indeed, there is something sinister in the belief that the physician is retained for some other purpose, such

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N.W.2d 333 (Minn. 1976); NELSON v. LEWIS, 534 A.2d 720 (N.H. 1987); ANKER v. BRODNITZ, 413 N.Y.S.2d 582 (N.Y. Sup. Ct. 1979); LOUDON v. MHYRE, 756 P.2d 138 (Wash. 1988); KITZMILLER v. HENNING, 437 S.E.2d 452 (W.Va., 1993).

as to assist the patient in litigation. What the physician has to say may or may not help his patient in the course of litigation and may or may not help his patient's adversary.

Furthermore, the notion that the patient will be less than forthcoming when discussing his or her condition with a treating physician if the patient knows that the treating physician may speak informally with defense counsel is unpersuasive. In fact, medical records are presumed to be trustworthy for the very reason that it is presumed that a patient will be candid with his or her physician out of the purest form of self interest; the patient's interest in getting better. See, generally, **LOVE v. GARCIA, 634 So. 2d 158 (Fla. 1994).**

In opposition to these arguments, the Pierres and the dissenters below continue to adhere to the notion that the Hippocratic Oath somehow precludes voluntary ex parte conferences. However, as this Court noted in **MORRISON v. MALMQUIST, supra**, the Hippocratic Oath does not require a physician to remain silent with respect to the condition of a patient who has already voluntarily made his or her medical condition a matter of public record by virtue of filing suit. This Court reconfirmed that holding in the particular context of ex parte conferences in **CORALLUZZO v. FASS, supra**.

As one leading expert has put it:

> It is not human, natural, or understandable to claim protection from exposure by asserting a privilege for communications to doctors at the very same time when the patient is parading before the public the mental or physical condition as to which he consulted the doctor

> by bringing an action for damages arising from that same condition.

McCormick On Evidence, Section 103, as quoted in **BRANDT v. PELICAN, 856 S.W. 2d at 674.**

The courts of this state have consistently held the same to be true with respect to the psychotherapist patient privilege; once the plaintiff files suit putting his or her mental state at issue, the privilege disappears. See, footnote 3, **supra**.

In his dissenting opinion below, Judge Jorgenson cites **HORNER v. ROWAN COMPANIES, INC., 153 F.R.D. 597 (S.D. Tex. 1994)**, as representative of those jurisdictions which do not allow ex parte contact with a treating physician. However, in that case, the sanction arose not simply because ex parte contact occurred, but rather because defense counsel had lied to plaintiff's counsel about why he "canceled" the previously scheduled discovery deposition of the out-of-town physician with whom he then proceeded to engage in an ex parte conference. Finally, the Federal District Court in that case decided to disallow ex parte conferences primarily because Texas Rule of Evidence 509 specifically creates a physician/patient privilege. No such privilege exists in Florida. If anything, the result in **HORNER**, as well as the cases cited there, confirms that if and when any impropriety occurs with respect to ex parte conferences, such impropriety can be rooted out and dealt with as with any other form of discovery violation.

II. THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT INTRUDES UPON THIS COURT'S RULE MAKING AUTHORITY AND BECAUSE IT VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

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

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

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

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

Indeed, even those cases which preclude ex parte conferences between defense counsel and a plaintiff's treating physician recognize that the rule of law which they have pronounced is "court-created." **MANION v. N.P.W. MEDICAL CENTER OF N.E. Pa., Inc., 676 F. Supp. 585, 593 (M.D.Pa. 1987); CRIST v. MOFFATT, 389 S.E. 2d 41, 45 (N.C. 1990).**

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

Section 455.241(2) violates the doctrine of separation of powers which prohibits any one branch of the state government from encroaching upon the powers of another. See, **CHILES v. CHILDREN, A,B,C,D, and E, 589 So.2d 260 (Fla. 1991).** The statute really does

nothing more than create a rule of practice and procedure. It protects absolutely nothing from discovery; it simply regulates the method of discovery. The legislature has no constitutional authority to enact any law relating to practice and procedure. **IN RE CLARIFICATION OF FLORIDA RULES OF PRACTICE AND PROCEDURE (FLORIDA CONSTITUTION, ARTICLE V, SECTION 2(A), 281 So.2d 204 (Fla. 1973)**. This is particularly true where what the legislature has done directly or indirectly interferes with or impairs an attorney's exercise of his ethical duties as an attorney and officer of the court. See, **GRAHAM v. MURRELL, 462 So. 2d 34 (Fla. 1st DCA 1984)** (declaring unconstitutional a law that directed public defenders to move the court to assess attorney's fees and costs against the defendant).

Section 455.241(2) is a statute which regulates practice and procedure and is thus void in the absence of evidence that this Court has formulated a rule conforming with the intent of the legislature as framed by the enactment. See, e.g., **STATE v. SMITH, 260 So. 2d 489 (Fla. 1972)**.

The Inequity Of The Statute

Because the statute allows, as it must, for the discovery of any and all information about a patient which is in the custody of a physician, the statute can hardly be said to "protect" or even address any type of physician/patient privilege. What the statute does is force defense counsel to gain knowledge that they are clearly entitled to gain -- but to restrict the means by which the

information is obtained. That means, i.e., a discovery deposition, can then be utilized against the defendants, in the event that the opinions of the treating physicians are critical of the defendants. See, e.g., **ROBISON v. FAINE, 525 So.2d 903 (Fla. 3d DCA 1987)** (noting that deposition testimony of defendant's expert witness is admissible in plaintiff's case-in-chief). See generally, **Fla. R. Civ. P. 1.330(a)**.

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

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

elect to question a potentially critical and extremely damaging witness for the first time before the jury.

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

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

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

The statute in question, as interpreted by the district courts in **RICHTER** and **KIRKLAND**, **supra**, places civil defense counsel in a similar predicament. If defense counsel is forced to ascertain what may be either very helpful or very harmful information only via a discovery deposition, whereas plaintiff's counsel is allowed unfettered access to such vital fact witnesses, defense counsel is at a distinct disadvantage. Furthermore, if defense counsel is

forced to obtain information from these fact witnesses solely via deposition, or, in a conference attended by Plaintiff's counsel, then defense counsel's work product privilege will have been violated. See, **FRANTZ v. GOLEBIEWSKI,** citing, **SURF DRUGS, INC. v. VERMETTE, 236 So. 2d 108 (Fla. 1970). HICKMAN v. TAYLOR,** supra.

The Statute is an Impermissible Infringement Upon Treating Physicians and Litigants Freedom of Speech

Although first amendment protection may in some instances be subject to reasonable "time, place and manner" restrictions, see, e.g., **MCGUIRE v. STATE, 489 So. 2d 729 (Fla. 1986)**, the statute in question does not meet that stringent test. In the first place, there is no class of information which is protected by the statute. Anything that can be disclosed in a deposition can be disclosed in an ex parte interview, and vice versa. And if the statute purports to regulate content, only the most extraordinary circumstances will justify regulation based upon content. See, **DIMMITT v. CITY OF CLEARWATER, 985 F. 2d 1565 (11th Cir. 1993).** There are no such extraordinary circumstances in the context of this statute's application to medical malpractice or any other personal injury litigation.

It must also be remembered that the 1988 amendment to the statute was designed to "protect" only that class of patients which have instituted a lawsuit. Patients who have not instituted a claim were already protected by the statute's general protection of medical records. But see, **AMENTE v. NEWMAN, 653 So. 2d 1030 (Fla. 1995).** Thus, given the fact that the class of persons who are the

intended beneficiaries of the statute is small -- and given the fact that they have consented to the release of their medical records by virtue of filing suit -- the First Amendment analysis necessarily places a great burden upon the state to establish a compelling interest for this "time, place and manner" restriction. No such compelling interest has been shown. Indeed, any argument that the statute imposes a "time, place and manner" restriction proves our point that the statute is purely procedural.

CONCLUSION

This Court should affirm the **CASTILLO-PLAZA** opinion. That opinion appropriately recognizes that the legislature has carved out an exception to the provisions of the statute for medical malpractice cases. The decision also utilizes an appropriately narrow construction of the statute, and an appropriately broad construction of the statute's exception. **RICHTER** and **KIRKLAND**, on the other hand, are examples of impermissible "judicial amendment" by virtue of adding words to the statute.

Finally, whether the statute is deemed to apply to medical malpractice cases or not, the purported regulation of ex parte conferences is unconstitutional because it violates this Court's rule making authority, and because it constitutes an impermissible infringement upon freedom of speech and assembly.

CASTILLO-PLAZA should be affirmed, and **RICHTER** and **KIRKLAND** should be quashed. Furthermore, anything in **FRANKLIN v. NATIONWIDE** which is inconsistent with **CASTILLO-PLAZA** should also be quashed.

Respectfully submitted,

STEPHENS, LYNN, KLEIN &
McNICHOLAS, P.A.
Attorneys for N.S.M.C.
Two Datran Center, PH2
9130 S. Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 662-2626

By: _____
PHILIP D. PARRISH, ESQ.
Fla Bar No.: 0541877

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 5th day of September, 1995 to: See Service List attached hereto.

STEPHENS, LYNN, KLEIN &
McNICHOLAS, P.A.
Attorneys for N.S.M.C.
Two Datran Center, PH2
9130 S. Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 662-2626

By: _____
PHILIP D. PARRISH, ESQ.
Fla Bar No.: 0541877

SERVICE LIST

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

Esther Galicia, Esq.
George, Hartz, Lundeen, et al
4800 Le Jeune Road
Coral Gables, Florida 33146
(305) 662-4800/Debbie
[Counsel for Dr. Porter]