IN THE SUPREME COURT OF FLORIDA

THIRD DISTRICT COURT CASE # 94-1493
SUPREME COURT CASE # 85,905

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.

BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

The relevant facts are contained in the District Court's opinion attached hereto as Appendix 1-26. The Petitioner Lydia Pierre, by and through her husband and legal guardian, Issonel Pierre, commenced a medical malpractice action against the respondents North Shore Hospital and its emergency room physicians due to negligent medical care which has left Lydia Pierre in a chronic vegetative coma.

Shortly after the commencement of suit, North Shore Hospital filed a "Notice of Intent to Interview Witnesses" alleging that North Shore had a constitutional right to interview any and all witnesses without notice to any party or the formality of a deposition. North Shore also alleged that Lydia Pierre waived her statutory rights to confidentiality under Florida Statute Section 455.241 by filing her medical malpractice action. Lydia Pierre responded with a "Motion to Preclude Conferences with Plaintiff's Treating Physicians and Health Care Providers".

On May 23, 1994, the trial court entered an order citing the case of Cameron Johnson vs. Mount Sinai Medical Center, 615 So.2d 257, (Fla. 3d DCA 1993) as precedence, allowing North Shore to hold exparte communications with Pierre's treating providers to discover their opinions on pertinent issues to the malpractice case.[1]

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[1] The trial Court's order and transcript of the hearing are contained in their entirety in the Appendix as A.27 through A.28 and A.29 through A.43 respectively.

Petitioners sought certiorari review[2] contending that defense exparte conferences seeking the opinions of plaintiff's treating physicians on issues pertinent to her malpractice case violate the confidentiality provisions of Florida Statute Section 455.241 (2) and the one-way interview limitation of Johnson.

Following hearing en banc, the Third District denied Pierre's petition, in a majority opinion, holding 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". (A.5)

The Third District certified 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). Petitioners contend that in addition to the certified conflict, the Third District's holding conflicts with Rojas vs. Ryder Truck Rental, 641 So. 2d 855 (Fla.1994), West vs. Branham, 576 So.2d 381 (Fla. 4th DCA 1991) and Franklin vs. Nationwide Mutual Fire Insurance Company, 566 So.2d 529 (Fla. 1st DCA 1990) review dismissed, 574 So. 2d 142 (Fla. 1990). Finally, the Third District's analysis of section 455.241 (2) in its

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[2] The Third District Court of Appeal consolidated the instant case with Castillo-Plaza vs. Green, Case No: 94-1428 and Giron vs. Noy, Case No: 94-1675 for en banc consideration due to the similar issues presented.

majority opinion is erroneous and inconsistent with the legislative intent and purpose of the statute.

SUMMARY OF THE ARGUMENT

The Third District's holding that the confidentiality provisions of Section 455.241 (2), Florida Statutes (1993) do not apply in medical malpractice cases is a clear misapplication of well settled rules of statutory construction. The holding circumvents the legislative intent and purpose of the amendments to the statute as set out in the conflicting opinions of 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). The majority opinion completely ignores the legislative comments giving rise to the 1988 confidentiality amendments to section 455.241 which establish that the waiver **only** applies to providers who are or reasonably expect to be named as a defendant in a medical malpractice case[3].

Likewise, the same can be said for the Court's holding in the alternative that section 455.241 (2) does not preclude exparte conferences of any matter beyond the medical records, care, treatment and medical condition of the patient. In the instant case, the defendants seek to obtain opinions from Pierre's treating providers on "pertinent issues" to her medical malpractice action.

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[3] This position is expressly noted in the dissenting opinion by the Honorable Judge Jorgenson at A.18 through A.19.

The very nature of a medical malpractice action suggests that for any issue to be pertinent as it relates to the opinions of a treating physician, it must therefore relate to the medical status of the plaintiff. To discuss anything otherwise, is to engage in an academic exercise with the treating physician at the risk of inadvertent disclosures. The mere fact that defense counsel characterizes the desire to communicate with a treating physician in terms of the plaintiff's medical malpractice action and sought the court's authority to do so acknowledges the desire to invade the provinces protected by section 455.241 (2).

ARGUMENT

Florida Statute Section 455.241 (2) as amended in 1988 creates a statutory privilege rendering medical information of a patient possessed by a health care provider confidential. The purpose of this privilege is to enable a patient to secure complete and appropriate medical treatment by encouraging candid communication between patient and physician free from the fear of possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information. Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Tex 1994).[4] The fostering of open and honest

[4] The Florida courts have always recognized the sensitive and private nature of medical information. Based on this concern, the Third District in Yeste vs. Miami Herald Pub. Co., 451 So. 2d 491, 494 (Fla. 3d DCA 1984), petition for review denied, 461 So. 2d 115 (Fla. 1984), held that it would construe section 382.35 (4), Fla. Stat., to render the cause of death listed on a death certificate as confidential and not subject to public inspection and copying even though the statute did not expressly provide such protection:

> The underlying justification for making such cause of death information confidential seems obvious enough. **The**

communication within this relationship, just as within the attorney-client relationship, is deemed to outweigh society's interest in obtaining the information. **Id.** [5]

Specifically relevant to the instant case, the statute further provides that in instances where litigation is involved, disclosure of such medical information may occur where certain conditions are met. Thus, section 455.241 (2) sets out specific circumstances under which defendants may obtain information from a plaintiff's treating health care providers.

THE DISTRICT COURT'S CONCLUSION THAT FLORIDA STATUTE SECTION 455.241 EXPRESSLY WAIVES PHYSICIAN-PATIENT CONFIDENTIALITY IN MEDICAL MALPRACTICE CASES IS INCONSISTENT WITH STATUTORY CONSTRUCTION, THE LEGISLATIVE INTENT OF THE AMENDMENTS CREATING THE CONFIDENTIALITY PRIVILEGE AND CONFLICTS WITH THE DECISIONS OF THE FIRST DISTRICT IN FRANKLIN, THE SECOND DISTRICT IN RICHTER, THE FOURTH DISTRICT IN WEST AND THE FIFTH DISTRICT IN KIRKLAND .

A. Statutory Construction and Legislative Intent

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cause of death as stated in a death certificate represents sensitive and generally private information. If made public, this information could cause public embarrassment to the deceased's family

The court found that protection broader than that the statute provided was necessary in order to keep the medical information confidential: "We are constrained by law to avoid a literalistic reading of a statute where, as here, such a reading would defeat the entire legislative purpose behind the statute." **Id.**

[5] The statutory privilege is also well recognized in the practice of medicine. In footnote 4 of the dissent by the Hon. Judge Jorgenson, strong public policy support for confidentiality is cited via the Hippocratic Oath, the American Medical Association's Principles of Medical Ethics, and the Current Opinions of the Judicial Council of the AMA.

In order to recognize the error of the Third District's conclusion that the privilege created by the 1988 amendments to section 455.241 (2) is waived in a medical malpractice action, one must look to the provisions of the statute itself.

Florida Statute Section 455.241 (2) (1992) provides in pertinent part that:

> **[t]he medical condition of a patient may not be discussed with any person** other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, **except upon written authorization of the patient ...Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing or trial for which proper notice has been given** (emphasis added).

A basic interpretation of the statutory language reveals that the only exceptions to disclosure by a health care provider are (1) when the health care provider is or reasonably expects to be named as a defendant in a medical negligence action; (2) in the course of care or treatment of the patient with another health care provider; (3) upon written authorization; and (4) when compelled by law.

As the primary basis for its opinion, the Third District mistakenly gets caught up in the legislature's use of the word "a" [provider] as opposed to "the" [provider] to justify its conclusion that the disclosure exception for medical malpractice is not specific to a potential or actual defendant provider but rather

applies to all health care providers of the plaintiff patient.

To accept this conclusion would mean that the legislature literally intended all health care providers of a plaintiff to be free to disclose confidential information to a provider's attorney at any time. The provider need only have a reasonable belief that he/she may be named in a medical negligence action and the potential plaintiff's medical confidences may be disclosed without any notice whatsoever.

Clearly, if this were the result that the legislature intended it would seem logical that a blanket statement excepting section 455.241 (2) from medical malpractice actions would be more effective.[6]

Likewise, the Third District relies on the legislature's use of two terms, "provider" and "practitioner" to further its conclusion that the waiver of confidentiality is general to all "practitioners" and not specific to a potential defendant "provider". Generally speaking the two terms are synonymous from a medical point of view and are often used interchangeably but for an educational distinction.

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[6] The legislature has done so in the past. For example, in amending the Wrongful Death Act, Section 768.21, Fla. Stat. (1990) to include recoveries by adult children and adult parents, the legislature also specifically excepted medical malpractice actions from such recoveries:

(8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s. 766.106(1).

Rather, Pierre submits that if one looks to the substance of 455.241 (2), its meaning is clear. The provisions are restrictive creating a confidential privilege, which by logic and a literal reading, are waived as to any health care provider who finds the need to defend himself/herself. The analogy would be similar to attorney/client privilege. Certainly an attorney would be free to disclose client confidences to his/her own counsel in the course of a defense as the confidences relates to the defense. [7] However, it cannot be said that all other attorney practitioners who represented the same client are free to disclose confidences to the defense just because a malpractice case is anticipated or actually initiated.

The legislative comments to the 1988 amendments creating the confidentiality privilege provide insight to this reasoning. The Senate staff comments expressly define the waiver in terms of disclosure by the provider **"to his attorney"**. The specific legislative intent behind the statute is set forth in the Senate Staff comments to the confidentiality amendments to Florida Statute Section 455.241 (2),[8] which specifically provides in pertinent

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[7] Similarly, disclosure of medical information should relate to the defense. Thus, it makes no sense that a gynecologist would be free to waive confidences to defense counsel for an orthopedic surgeon merely because the surgeon anticipates being sued. Certainly, an action would have to exist and notice given to the female plaintiff.

[8] Senate Staff Analysis and Economic Impact Statement, CS/SB 1076, Senate Judiciary Civil Committee, May 19, 1988. The staff analysis and impact statement is contained in the appendix as A.44 through A.47.

part:

> The bill amends s. 455.241, F.S., to specify that, in addition to medical records, **the medical condition of a patient may not be disclosed** to any person other than the patient, the patient's legal representative, or other health care providers involved in the treatment of the patient, except upon written consent of the patient. **Further, ...information disclosed to a health care practitioner by a patient is confidential** and may be disclosed only to other health care providers involved in the care of the patient or by written authorization of the patient or by subpoena. In addition, this information may be disclosed by a health care provider to his attorney if the provider expects to be named as a defendant in a negligence case (emphasis added)(A.45)

The Senate Staff's use of the words, **"in addition"**, preceding the disclosure exception by **"a provider to his attorney"** supports Pierre's argument that the exception is specific to an individual and not generally intended to apply to all treating practitioners or providers when a medical malpractice action is initiated. The exception is clearly explained yet the Third District failed to consider the explanation in reaching its conclusion. Thus, it is apparent that the confidentiality privilege derived from section 455.241 (2) is **not** automatically waived in medical malpractice actions.

B. Conflict with other District Courts

For similar reasons, the Third District failed to appreciate the conclusions reached in 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) 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) which all held that exparte conferences are prohibited by section 455.241 (2).

In footnote number 4 of the majority opinion, the Third District challenged the results obtained in these cases stating that they do not understand the source of the parenthetical expression below:

> "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)...(A.9)

However, it is clear that the source comes from the Senate Staff comments which were cited in Franklin vs. Nationwide Mut. Fire Ins. Co., 566 So. 2d 529, 532 (Fla. 1st DCA 1990) rev. dismissed, 574 So. 2d 142 (Fla. 1990).

The Third District took issue with the fact that Franklin was not a medical malpractice action. However, the issue of exparte communications is the same as in the instant case. In Franklin, the First District granted certiorari quashing a court order allowing exparte communications between defense counsel and plaintiff's treating physicians. After citing Florida Statute Section 455.241, the Franklin court noted that the statutory language was 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, (2) by written authorization of the patient, or (3) when compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given. **Id.**

The First District in Franklin pointed out that:

> The reference to "proper notice" is unquestionably included to preclude the type of unilateral, exparte interrogation of a physician permitted by the order under review... Id.
>
> Although informal exparte communication with petitioner's physician may be more expedient, that is no reason why the procedures provided for by the statute and the Florida Rules of Civil Procedure should not be followed. Id.

The First District in Franklin went to great pains in its analysis to explain its holding that a trial court has no authority to compel a medical authorization from a plaintiff allowing exparte communications between the defense and treating physicians. Furthermore, the Franklin decision was expressly upheld by this court in Rojas vs. Ryder Truck Rental, 641 So. 2d 855 (Fla. 1994), to the extent that a court may not authorize a medical release form allowing ex parte communications.

Following the analysis of Franklin, the Fifth District held that Florida Statute Section 455.241 (2) does not permit exparte interviews. Kirkland at 1004. In the case of Richter vs. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994), review granted sub nom. Acosta v. Richter, 650 So. 2d 989 (Fla. 1995), the Second District followed suit quashing the trial court's order authorizing exparte conferences holding that in order to obtain an injured plaintiff's medical records from the plaintiff's treating physicians, or to discuss the plaintiff's medical condition with him, a person seeking such disclosure under section 455.241 (2) **must, absent a waiver, use a statutory method or follow the applicable Florida**

Rule of Civil Procedure (citing Johnston v. Donnelly, 581 So. 2d 909 (Fla. 2d DCA 1991) (emphasis added).

Similarly, in West v. Branham, 576 So. 2d 381, 383 (Fla. 4DCA 1991), the Fourth District granted certiorari and quashed a trial court order finding that the "purpose of the statute is to preserve a patient's right to confidentiality with respect to information disclosed to a health care provider in the course of care and treatment of a patient and to limit the conditions under which such information may be disclosed to others. **This includes closing the door to the previous practice of many defense attorneys of meeting privately or otherwise communicating exparte with the plaintiff's treating physicians**". (emphasis added)

> **THE DISTRICT COURT'S ALTERNATIVE CONCLUSION THAT SECTION 455.241 (2) DOES NOT PRECLUDE EXPARTE CONFERENCES OF ANY MATTER BEYOND THE MEDICAL RECORDS, CARE, TREATMENT AND MEDICAL CONDITION OF THE PATIENT CONFLICTS WITH THE PURPOSE OF SECTION 455.241 (2) AND THE DECISIONS OF THE FIRST DISTRICT IN FRANKLIN, THE SECOND DISTRICT IN RICHTER, THE FOURTH DISTRICT IN WEST AND THE FIFTH DISTRICT IN KIRKLAND .**

As previously stated above, there are numerous district court decisions to support Pierre's position that section 455.241 (2) prohibits exparte conferences under all circumstances except those expressly provided for within the language of the statute.[9]

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[9] Franklin vs. Nationwide Mutual Fire Insurance Company, 566 So.2d 529 (Fla. 1st DCA 1990) review dismissed, 574 So. 2d 142 (Fla. 1990); Richter v. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994), review granted sub nom. Acosta v. Richter, 650 So. 2d 989 (Fla. 1995); Johnston v. Donnelly, 581 So. 2d 909 (Fla. 2d DCA 1991); West vs. Branham, 576 So.2d 381 (Fla. 4th DCA 1991); Kirkland v. Middleton, M.D., et.al, 639 So. 2d 1002 (Fla. 5th DCA 1994), review dismissed, 645 So. 2d 453 (Fla. 1994).

The Third District's conclusion that exparte discussions of non-privileged matters is not precluded by section 455.241 (2) loses sight of the protections intended by the amendments to section 455.241 (2) which created the confidentiality privilege. As the Fifth District pointed out in Kirkland, 639 So. 2d 1002, 1004:

> "Were unsupervised exparte interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place".

In the instant case, defense counsel seek to discover, through exparte discussions, opinions from Pierre's treating physicians on pertinent issues to Pierre's medical malpractice action. Any opinions expressed by Pierre's treating health care providers on issues "pertinent" to her malpractice action are tantamount to disclosing Pierre's medical condition. Lydia Pierre's health care providers are treating her specifically for **the** medical condition that is the subject of the medical malpractice action. Thus, Lydia Pierre's medical condition is the primary pertinent issue to the medical malpractice action.

Florida Statute Section 455.241 (2) clearly and broadly prohibits the patient's medical **condition** from being discussed. It does not limit the privilege to care and treatment rendered. Every patient seeking health care from a practitioner takes with them their entire medical history as an integral part of managing any

"condition". Because a patient's condition cannot be separated into segments, every aspect of it is protected from disclosure.

This position is supported by the Senate comments which distinguish between disclosure of the patient's medical condition and disclosure of information obtained by the provider from the patient during care and treatment. "[I]t would appear that the wording of the statute, insofar as our issues are concerned, was intended to prevent the practice of defense counsel discussing a patient's condition with the patient's treating physician".[10] West v. Branham, 576 So 2d 381, 384 (Fla. 4DCA 1991). Clearly the legislative intent behind the confidentiality amendments to Florida Statute Section 455.241(2) prohibits disclosure of any kind by a non-party treating provider to third persons in the absence of consent, subpoena or order of court.

Nonetheless, in the instant case, defense counsel has every intention of violating this statute by seeking disclosure under the authority of the trial court's order and now the blanket authority of the Third District's majority opinion. As counsel for Dr. Porter stated during the hearing, " **we are trying to appreciate the medical condition and issues involved, to be able to discuss with the doctor the facts and the issues...**" (A.35)

This blatant overreaching by defense counsel cannot be corrected once the damage has been done. If the trial courts and attorneys are unsure of the lines to be drawn during exparte

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[10] The opinion in West refers to the Senate Staff Comments as part of the record in analyzing the statute.

communications, how can we expect the physicians to know where to draw the line to protect their patient and themselves?

Furthermore, placing Pierre's treating providers in a position to express exparte opinions in her malpractice action creates an overwhelming conflict to the detriment of her patient-provider relationship. The purpose of the exparte communications as expressed by the defendants is to apprise plaintiff's treating providers of the pertinent medical issues as viewed by the Defendants and seek the provider's opinions on same (A.32,35,36) Thus, the primary objective is to prejudice Plaintiff's treating providers to the benefit of the defense and the detriment of the plaintiff. Allowing such an act to occur when Pierre remains constantly and totally dependent on these practitioner/providers not only circumvents every aspect of the law but is totally violative of her right to have a fiduciary relationship with her providers free of intentional interference or loss of trust. She has been placed in the unfortunate situation of needing her providers. Her life depends on them. Requiring the defendants to follow the rules of civil procedure poses no prejudice to the defense. Circumventing those procedures, however, places Pierre at total risk for loss of confidence and integrity in her care without recourse.

CONCLUSION

In sum, should defense counsel, during exparte conferences, succeed in prejudicing Pierre's providers and/or obtain opinions from them which effectively render the providers adversaries to

Pierre, not only will Lydia Pierre have lost her statutorily protected privilege, but most importantly, she will have the lost the only true advocates which exist to maintain her health and well-being.

North Shore should not be allowed to discover the opinions of Pierre's treating health care providers without notice or consent. These exparte communications are in violation of Florida Statute Section 455.241 (2) and the majority of the opinions of the District Courts of FLorida. Accordingly, Petitioner respectfully requests that this Court grant Pierre's Petition and overturn the opinion of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 17th day of July, 1995 to: PHILLIP PARRISH, ESQ., Atty. for Def., North Shore, 9130 South Dadeland Blvd., Penthouse II, Miami, Florida 33156; ESTHER E. GALICIA, ESQ, Atty. for Def., Porter, et al., 524 South Andrews Avenue, Suite 333, Ft. Lauderdale, FL 33301; and Honorable Judge Philip Bloom, Dade County Courthouse, 73 West Flagler Street, Room 1307, Miami, Florida 33130.