IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 85,905

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

Petitioners,

vs.

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

Respondents.

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

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's BRIEF OF THE MERITS

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Case No.: 85,905

STATEMENT OF THE CASE AND FACTS

This is a medical negligence action filed by the Petitioners against 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, (hereinafter collectively referred to as "DR. PORTER"), and Respondent NORTH SHORE MEDICAL CENTER, INC., ("North Shore"). [R. 94-110].[1] The Complaint alleges that Respondents were negligent when they treated Petitioner Lydia Pierre in the emergency room at North Shore on July 16, 1991. [R. 94-110].

After the initial exchange of pleadings, North Shore served a "Notice of Intent to Interview Witnesses Pursuant to Constitutional Right and/or Waiver of Statutory Privileges." [R. 34-36]. This put Petitioners on notice that North Shore intended "to exercise its right to interview any and all witnesses in this matter without notice to any party and without the formality of deposition that can be used at trial." [R. 34]. North Shore argued that interpreting Fla. Stat. § 455.241(2) as barring a defendant's attorney from talking to a medical malpractice plaintiff's treating physician is contrary to the plain language of the statute and a violation of both the federal and state constitutional rights of free speech and assembly. [R. 35]. The Petitioners countered with a "Motion to Preclude Conferences with Plaintiff's Treating Physicians and Health Care Providers." [R. 37-39].

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[1]The letter "R." followed by a number(s) refers to the particular page number(s) of the Record which has been transmitted by the Third District Court of Appeal.

The trial court heard argument on Petitioners' motion [R. 19-33] and entered the following order:

> 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.

[R. 17-18, 111-112].

Dissatisfied with the trial court's ruling, Petitioners sought review by the Third District. [R. 1-43]. Petitioners argued that Fla. Stat. § 455.241(2) prevents defendants in a medical malpractice action from engaging in any *ex parte* discussions with a plaintiff's treating physician. [R. 1-43]. Respondents argued that § 455.241(2) has no such preclusive effect and that the statute is otherwise unconstitutional. [R. 49-84, 85-112, 130-153].

The Third District, in an *en banc* decision, disagreed with Petitioners and denied certiorari. [R. 189-214]. Castillo-Plaza v. Green, 655 So. 2d 197 (Fla. 3d DCA 1995). The district court held that the "privilege" created by §455.241(2) does not apply to medical malpractice cases. 655 So. 2d at 199, 200.

> We base this conclusion - which is adopted here for the first time probably because it seems never to have been

> previously considered - on the statute's clear provision that the privilege it establishes with respect to
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> > 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 in original).

655 So. 2d at 200. Alternatively, the Third District held that the statute does not preclude "communications as to any matter beyond the medical records and the care, treatment and medical condition of the patient." 655 So. 2d at 199.

> [The terms of the statute] 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 nonforbidden topics may be conducted. (emphasis supplied in original).

655 So. 2d at 202.

The Third District concluded its *en banc* opinion with a certification of direct conflict with Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th DCA), rev. dism'd, 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). Id., at 203-

204. That certification forms the basis of Petitioners' Notice to Invoke Discretionary Jurisdiction. [R. 215-216]. This Court has in turn postponed its decision on jurisdiction and issued a schedule for the filing of briefs on the merits. [R. 22].

QUESTIONS PRESENTED

Respondents DR. PORTER prefer to restate the questions presented more concisely as follows:

I. WHETHER THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT FLA. STAT. § 455.241(2) PERMITS *EX PARTE* COMMUNICATIONS BETWEEN A MEDICAL MALPRACTICE DEFENDANT AND A PLAINTIFF'S TREATING PHYSICIANS.

II. WHETHER THE THIRD DISTRICT COURT OF APPEAL PROPERLY REFUSED TO EXTEND THE SCOPE OF FLA. STAT. § 455.241(2) BEYOND THE LEGISLATURE'S PLAIN AND SPECIFIC EXPRESSION.

SUMMARY OF THE ARGUMENT

Section 455.241(2), as amended in 1988, excludes medical negligence actions from its protective shield. Moreover, it does not establish a "privilege" barring the disclosure of information a patient has discussed with a physician. Instead, § 455.241(2) merely dictates the methods by which such information may be obtained. As such, § 455.241(2) amounts to an unconstitutional infringement by the legislature upon the rule-making authority of the Florida Supreme Court.

The Third District's conclusion that "the amendment itself negates the applicability of the statute in all medical malpractice cases," Castillo-Plaza v. Green, 655 So. 2d 197, 200 (Fla. 1995), should be approved as consistent with the common law and the amendment's clear and unambiguous language. Florida's common law has **never** recognized a physician-patient privilege. Any legislation attempting to create such a privilege must accordingly be strictly construed and its exceptions broadly interpreted. Moreover, the exception contained within § 455.241(2) unequivocally indicates that the purported "privilege" does not apply in medical negligence actions. A plaintiff's treating physicians may therefore engage in *ex parte* communications with medical malpractice defendants concerning the plaintiff-patient's medical condition and the information that the patient has disclosed to the treating physicians.

To construe § 455.241(2) as barring all *ex parte* communications with treating physicians, like the courts in Kirkland and Richter have, deprives medical

malpractice defendants of the invaluable informal means of trial preparation. Treating physicians are ordinary fact witnesses. Defendants should therefore have the same unfettered access to treating physicians that plaintiffs have. Otherwise, defendants are unreasonably forced to investigate and defend a case under the direct supervision and scrutiny of their adversary. Defendants would also be placed in the untenable position of having to depose an ordinary fact witness which he/she would not otherwise depose or, at the time of trial, question the treating physician for the first time without a clue as to what the physician will say.

Finally, even if § 455.241(2) applies to medical negligence cases, the purported "privileged information" is expressly and specifically limited to a patient's "medical records", a patient's "medical condition" and "information disclosed to a [physician] by a patient in the course of the care and treatment of the patient." Petitioners argue that the "privilege" should extend to all information and that all *ex parte* communications with treating physicians should be precluded in order to "protect against inadvertent disclosure of privileged information." However, Petitioners' rationale ignores the fact that the "privileged information" can be discovered via a subpoena. It also insults the integrity of both the legal and medical professions. Additionally, Petitioners' interpretation amounts to an impermissible judicial restriction beyond the legislature's mandate. Section 455.241(2) should not "become an instrument of gross fraud." See Morrison v. Malmquist, 62 So. 2d 415, 416 (Fla. 1953).

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT FLA. STAT. § 455.241(2) PERMITS *EX PARTE* COMMUNICATIONS BETWEEN A MEDICAL MALPRACTICE DEFENDANT AND A PLAINTIFF'S TREATING PHYSICIANS.

The 1988 Amendment to Fla. Stat. § 455.241(2) does not create a "privilege" as we have come to understand that term. Stated differently, it does not protect information a patient has disclosed to a physician from discovery. The information purportedly deemed confidential under § 455.241(2) may be disclosed pursuant to a court subpoena. Not one of the six privileges recognized by the Florida Evidence Code,[2] on the other hand, authorizes the disclosure of the privileged or confidential information via a court subpoena. DR. PORTER submits that § 455.241(2) does nothing more than limit the means by which information may be obtained or discovered.

If the legislature truly wanted to enact a physician-patient privilege it would have fashioned a privilege which was a virtual mirror-image of the psychotherapist-patient privilege. Instead, the legislature essentially crafted legislation enunciating

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[2]Those privileges are: (1) the attorney-client privilege - Fla. Stat. § 90.502; (2) the psychotherapist-patient privilege - Fla. Stat. § 90.503; (3) the sexual assault counselor-victim privilege - Fla. Stat. § 90.5035; (4) the husband-wife privilege - Fla. Stat. § 90.504; (5) the communication to clergymen privilege - Fla. Stat. § 90.505; and (6) the accountant-client privilege - Fla. Stat. § 90.5055.

the vehicle to be used to gain access to information. Since the procedural and discovery aspects of litigation are matters within the courts' inherent power, see, e.g., Rojas v. Ryder Truck Rental, 625 So. 2d 106 (Fla. 3d DCA 1993), Fla. Stat. § 455.241(2) is unconstitutional. Section 455.241(2) infringes upon the rule-making function of the Supreme Court in violation of Article V, Section 2(a) of the Florida Constitution. It also amounts to an unconstitutional curtailment of DR. PORTER's and any defendant health care provider's right to freedom of speech and association.[3]

The purported "privilege" established by the 1988 Amendment to Fla. Stat. § 455.241(2) does not, as the Third District properly held, extend or apply to medical negligence actions. Castillo-Plaza v. Green, 655 So. 2d 197, 199-200 (Fla. 3d DCA 1995). That amendment added the following language to § 451.241(2):

> [S]uch [medical] records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient. . . . 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,

[3]DR. PORTER hereby adopts and incorporates by reference the arguments in Respondent North Shore's Brief on the Merits with respect to the unconstitutionality of § 455.241(2).

evidentiary hearing, or trial for which proper notice has been given. (emphasis added)

The new and above-underscored language permits a medical malpractice defendant to engage in *ex parte* communications with a plaintiff's treating physicians.[4] Stated differently, "the amendment itself negates the applicability of the statute in all medical malpractice cases." Castillo-Plaza, 655 So. 2d at 200. The Third District's construction and interpretation of the limited "privilege" established by § 455.241(2) should be upheld in light of the long-standing common law and the applicable rules of statutory construction.

A. The Common Law.

Florida's common law has never recognized a physician-patient privilege. See Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984); Frantz v. Golebiewski, 407 So. 2d 283 (Fla. 3d DCA 1981). Fourteen years ago, the Third District in Frantz stated that a treating physician is an ordinary fact witness, not an expert witness, and therefore the expert discovery rules do not apply. The court reasoned that a treating physician "does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well" and "he is just. . . an 'actor' in the case and a 'viewer' of the [plaintiff-patient's] condition who is to be 'treated as an ordinary witness.'" 407 So. 2d at 285. Accordingly, "[c]ounsel are free to speak to and

[4] Petitioners' reliance on Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Tx. 1994), is misplaced. Horner involved an attorney's fraudulent scheme to engage in ex parte conversations with the plaintiff's treating physicians.

record the statements of any [treating physician] who is willing to make them." Id., at 284.

The Third District's decision in Frantz was the foundation for the Florida Supreme Court's decision in Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984), two and one-half years later. The court in Coralluzzo reviewed the district court's refusal to prohibit the defendants' unilateral, *ex parte* contacts with plaintiff's treating physicians. In approving the district court's decision, the Supreme Court reasoned as follows:

> We 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 [the plaintiff's treating physician].

450 So. 2d at 859.

In response to Coralluzzo and at the insistence of the Plaintiffs' Trial Bar, the Florida Legislature amended Fla. Stat. § 455.241(2) and established the purported "privilege" which the Third District in the instant case held does not apply in medical negligence actions.

B. Fla. Stat. § 455.241(2) is in Derogation of the Common Law and it Must be Strictly Construed.

The 1988 Amendment to § 455.241(2) is, without dispute, in derogation of Florida's common law. The amendment was the legislature's attempt to create the statutory law prohibiting *ex parte* communications with treating physicians which the Supreme Court in Coralluzzo indicated was notably absent. As a result, the statute must be strictly interpreted and its exceptions broadly construed. See Thornber v. City of Fort Walton Beach, 568 So. 2d 914 (Fla. 1990); Graham v. Edwards, 472 So. 2d 803 (Fla. 3d DCA 1985), review denied, 482 So. 2d 348 (Fla. 1986). Moreover, those rules of statutory construction must be adhered to because the statute arguably establishes a testimonial "privilege" and the United States Supreme Court has stated that such a privilege "may not [be] lightly construed 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* Castillo-Plaza v. Green, 655 So. 2d 197, 201 (Fla. 3d DCA 1985).

C. Interpretation of the Plain Language of Fla. Stat. § 455.241(2).

The plain language of the statute specifically creates an exception in medical negligence actions. The "privilege" established 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 "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. (1989) (emphasis added). The clear and unambiguous language of the exception unequivocally indicates that the "privilege" does **not** apply in medical negligence actions. When a medical negligence action is or is reasonably expected to be brought against **any** physician, treating physicians are **not** foreclosed from engaging in *ex parte* discussions with defendants concerning the plaintiff-patient's medical condition and the information the patient has disclosed to the treating physicians.

Petitioners contend that the exception refers only to a case in which the treating physician is an actual or potential defendant. In other words, Petitioners contend that the treating physicians who are not sued and who do not reasonably expect to be sued are not at liberty to disclose the "privileged" information. If that were the case, the legislature could and would have very easily so stated. Specifically, the legislature would have phrased the amendment to read "except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to [the or that] health care practitioner by a patient. . .is confidential." Alternatively, the amendment would state "except in a medical negligence action when [the] health care provider is or reasonably expects to be named as a defendant, information disclosed to [that] health care practitioner by a patient. . .is confidential." Moreover, the legislature would not have identified the potential defendant as a "health care provider" and the physician to whom the information was disclosed as a "health care practitioner" if the

legislature intended those two individuals to be one and the same person, as Petitioners' suggest.

The legislature instead chose the following language: "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. . .is confidential and may be disclosed only to other health care providers. . ." (emphasis added). Applying the general rules of grammar, the legislature's above-underscored repeated and exclusive use of the word "a" before the phrases "health care provider" and "health care practitioner" means "any" such "provider" or "practitioner." Izadi v. Machado (Gus) Ford, Inc., 550 So. 2d 1135, 1138 n.3 (Fla. 3d DCA 1989). Furthermore, application of the rule of statutory construction that the legislature is deemed to intend different meanings by the use of different words, Ocasio v. Bureau of Crimes Compensation Division of Workers' Compensation, 408 So. 2d 751 (Fla. 3d DCA 1982), leads to the inescapable conclusion that the potential defendant "health care provider" and the "health care practitioner" to whom information was disclosed are **not** the same person. Thus, information a plaintiff-patient has disclosed to **any** "health care practitioner" is exempt from the confidentiality shield when **any** "health care provider" is or expects to be sued for medical negligence.

Petitioners' reliance on the analogy to the attorney-client privilege to support their "restrictive" interpretation of § 455.241(2) is misplaced. Fla. Stat. § 90.502, which codifies the attorney-client privilege, expressly and specifically exempts

communications between the client and attorney that are relevant to an issue relating to the breach of a duty arising within that particular attorney-client relationship. Fla. Stat. § 90.502(4)(c). By contrast, the exception to the "privilege" established by § 455.241(2) is **not** as narrow as Petitioners would have this Court believe. As discussed above, the legislature's use of the word "a" instead of the word "the" and its use of different words when referring to the potential defendant and the person to whom information was disclosed indicate that the exception to the "privilege" is **not** restricted to the doctor being sued.

DR. PORTER submits that a comparison to the psychotherapist-patient privilege is more accurate and appropriate given the obvious similarities between the physician-patient and psychotherapist-patient relationships. The psychotherapist-patient privilege contains an exception which is, in effect, virtually identical to the medical malpractice action exception found in § 455.241(2). Specifically, Fla. Stat. § 90.503(4)(c) provides that there is no privilege with respect to "communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense. . ." This exception does **not** limit its scope to the psychotherapist being sued. Instead, it encompasses all those psychotherapists with whom the patient has had discussions which are relevant to the condition which the patient is basing his/her claim. The rationale for this exception can be found in the reasoning of the Third District in Frantz v. Golebiewski, 407 So. 2d 283 (Fla. 3d DCA 1981). A

treating psychotherapist is akin to a treating physician, not an expert witness. The non-expert witness psychotherapist possesses factual information about the patient's mental and emotional condition by virtue of treating the patient. In other words, a treating psychotherapist is an "actor" in the case and "viewer" of the condition at issue. The treating psychotherapist is therefore an ordinary fact witness, not someone who has been retained by a litigant to assist in the prosecution of a claim. As such, "[c]ounsel are free to speak to and record the statements of any [treating psychotherapist] who is willing to make them." 407 So. 2d at 284.

Similarly, since a medical malpractice claimant necessarily places his/her medical condition at issue, the Third District correctly construed the exception in § 455.241(2) to apply to **all** treating physicians, not simply the physician being sued.[5] To hold otherwise would be to place medical malpractice defendants at a distinct disadvantage because the plaintiff who is placing his/her medical condition at issue has exclusive and unfettered access to the treating physicians.[6] The defendant, on

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[5]The Third District's decision also finds support in Fla. Stat. § 90.510. Under that provision, when a party claims a privilege as to a communication necessary to an adverse party, a court may dismiss the claim for relief to which the privileged testimony would relate. Here, instead of dismissing a plaintiff's medical malpractice action based on the assertion of a "privilege" with respect to disclosures to treating physicians, the legislature opted to, as interpreted by the Third District, exclude the communication from the "privilege" in medical malpractice cases.

[6]DR. PORTER recognizes that any case where a plaintiff's medical condition is at issue, not just a medical malpractice action, should fall under the exception based upon the foregoing argument. However, the legislature's deference to medical malpractice cases dates back several years and said deference has withstood constitutional scrutiny. For example, medical malpractice cases have been the

the other hand, is deprived of the right to informally confer with an ordinary fact witness - the treating physician. Defense counsel is placed in the untenable position of having to investigate the case under the direct supervision of opposing counsel. Moreover, the medical malpractice defendant is forced to memorialize and preserve the testimony of an ordinary fact witness he would not necessarily otherwise depose, or, at trial, do the unspeakable and ask a question to which he/she does not know the answer.

Finally, Petitioners resort to unnecessary speculation by pointing to the Senate Staff Analysis for support. DR. PORTER submits that there is no need to decipher the Senate Staff Analysis. The plain and unambiguous language of the exception in § 455.241(2), which the Third District correctly stated is the only appropriate source of its meaning, can only be interpreted as applying to **all** treating physicians, regardless of whether they are a defendant in the medical negligence case. As this Court stated in Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993), "[i]f the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." Moreover, the Senate Staff Analysis represents nothing more than the first drafts or an outline of the 1988 Amendment to §

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subject of medical panels, pre-suit procedures, voluntary binding arbitration, and caps on damages. Moreover, medical malpractice cases have been exempted from the enlarged group of individuals who may recover damages in wrongful death actions. Fla. Stat. § 768.21(8). The judiciary's approval of the legislature's deference to medical malpractice cases should extend to the deference to found in § 455.241(2).

455.241(2). The Senate Staff Analysis does not contain nor does it purport to set forth the legislative purpose and intent. Accordingly, the final version, as it is found in § 455.241(2), Fla. Stat. § (1989), provides us with the best evidence of the legislature's intent.

D. The Cases Purportedly in Conflict with the Third District's Decision Ignore the Plain Language of the Medical Malpractice Exception

Petitioners contend that the Third District "failed to appreciate the conclusions reached in" Franklin v. Nationwide Mutual Fire Insurance Company, 566 So. 2d 529 (Fla. 1st DCA), rev. dism'd., 574 So. 2d 142 (Fla. 1990); Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th DCA), rev. den., 645 So. 2d 453 (Fla. 1994); and Richter v. Bagala, 647 So. 2d 215 (Fla. 2d DCA 1994), rev. granted sub. nom., Acosta v. Richter, 650 So. 2d 989 (Fla. 1995). DR. PORTER submits that those cases ignored the exception in § 455.241(2) for medical negligence actions and that the Third District properly refused to follow them.

Contrary to Petitioners' representation, Franklin did **not** involve the present issue at all. Franklin was **not** a medical malpractice case! Instead, Franklin involved an action by an insured against his insurer for damages stemming from an automobile accident. Section 455.241(2)'s exception consequently did **not** apply.

Furthermore, the district court in Franklin quashed the trial court's order compelling the insured to execute a medical authorization for *ex parte* communications between the insurer and the insured's treating physicians. The First

District's decision was consequently mandated by § 455.241(2) since the case did **not** involve medical negligence.[7]

While both Kirkland and Richter involved medical negligence, they relied on Franklin which did not. The Fifth District in Kirkland adhered to Franklin's interpretation that the information deemed confidential under the statute may only disclosed in four situations. The first of those instances is the medical malpractice exception. However, in setting forth that exception, the Kirkland court added, without explanation or discussion, a parenthetical clause found neither in the statute nor in Franklin. Specifically, the court stated: "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)." 639 So. 2d at 1004. That judicial "legislation" narrows what the statute actually states and constitutes an exercise of unauthorized and unconstitutional judicial power. See Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

The Second District in Richter followed Kirkland's flawed footsteps. Not only did the Richter court mistakenly agree with Franklin but, to add insult to injury, it recited Kirkland's baseless and unsubstantiated parenthetical to the medical malpractice exception.

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[7]However, as the Third District below recognized, the Franklin court judicially amended the statute by, without explanation or justification, substituting the word "the" for the word "a" which precedes"health care provider" in the exception clause.

Both Kirkland and Richter implicitly concluded that the medical negligence exception only applies to information held by the defendant health care provider.[8] The statute, on the other hand, crafted an exception which extends to **all** health care providers, regardless of whether they are the one being sued. The Third District therefore properly disagreed with Kirkland's and Richter's statements of law which were "justified only by iteration and repetition," Castillo-Plaza, 655 So. 2d at 201 n.4, and which ignore the statute's clear and unambiguous language.

II. THE THIRD DISTRICT COURT OF APPEAL PROPERLY REFUSED TO EXTEND THE SCOPE OF FLA. STAT. § 455.241(2) BEYOND THE LEGISLATURE'S PLAIN AND SPECIFIC EXPRESSION.

Even if the prohibitions in § 455.241(2) apply to medical negligence actions, the information protected by the "privilege" purportedly created by that section is confined to the specifically identified information, to wit: the patient's "medical records", the patient's "medical condition", and "information disclosed to a [physician] by a patient in the course of the care and treatment of the patient." The statute does **not** prohibit communications between a defendant and a plaintiff's treating physician

[8]Petitioners' suggestion that the decision below is in conflict with West v. Branham, 576 So. 2d 381 (Fla. 4th DCA), rev. dism'd., 483 So. 2d 1034 (Fla. 1991), fails because West is **not** a medical malpractice case and because West relied on Franklin, another non-medical malpractice case. West is also distinguishable since it concerned the issue of whether a party examined under Rule 1.360 is entitled to unfettered *ex parte* access to an independent medical examiner while the requesting party's access is restricted to a formal deposition or trial. The instant case does **not** involve access to physicians who examine patients under Rule 1.360.

concerning non-"privileged" topics. For example, the statute does **not** proscribe communications concerning the issues in the case,[9] the propriety of the care and treatment rendered, general hypothetical questions or those concerning other patients, or simple academic-type medical questions which are not patient-specific. Accordingly, since the statute is, without dispute, in derogation of the common law, the Third District correctly construed and limited the scope of the statute to the specifically forbidden topics of discussion. Moreover, the Third District's interpretation is consistent with and in recognition of DR. PORTER's and all potential defendants' right to free speech and assembly under the Florida and United States Constitutions.

Nevertheless, Petitioners embark upon a parade of horribles to justify their expansive yet totally unfounded interpretation of Section 455.241(2). First, the Petitioners (and the courts in Kirkland and Richter) contend that § 455.241(2) must be construed as precluding **all** *ex parte* conversations and contacts with treating physicians in order "to protect against inadvertent disclosure of privileged information." The Petitioners' enforcement mechanism is, however, too far-reaching. The allegedly "privileged information" can actually be disclosed via court subpoena.

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[9]Contrary to Petitioners' suggestion, the "pertinent" issues are not limited to Mrs. Pierre's "medical condition." Since this is a medical malpractice case, the "pertinent" issues include the applicable standard of care, whether there was a departure from that standard of care and whether any such departure was the proximate cause of the patient's alleged injury.

Moreover, adopting Petitioners' interpretation would amount to an impermissible judicial restriction beyond that which the legislature has forbidden.

Petitioners' said argument is, ironically, tailored after Judge Jorgensen's dissenting opinion in Coralluzzo v. Fass, 435 So. 2d 262 (Fla. 3d DCA 1983), which this Court rejected in the absence of a statute prohibiting *ex parte* communications. Coralluzzo v. Fass, 450 So. 2d 858 (Fla. 1984). The 1988 Amendment to § 455.241(2) obviously instigated Petitioners' blind assertion of an argument flatly rejected by the Florida Supreme Court. The nature and scope of the Amendment to § 455.241(2) is specific and narrowly tailored. This Court should accordingly reject the policy argument asserted by Petitioners and previously rejected in Coralluzzo, as well as the proposed absolute restrictions on communications which clearly exceed those statutorily prescribed. The fear that a physician will violate his statutory obligations does not justify the proposed obstacle to the search for truth.

Moreover, Petitioners' totally uncorroborated and unsubstantiated fears are an insult to both the medical and legal professions. As the Third District stated below:

> 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 - will, among other things, breach their duty to their patients, jeopardize their licenses, and expose themselves to personal liability. . .by violating the privilege - all supposedly out of feelings of camaraderie with their fellow physicians. We consider that such a claim amounts to no more than a baseless attack not only upon the good faith, but the good sense of the doctors in questions. Moreover, because any such violation requires the connivance of counsel, the argument impugns

> our profession as well. We will not approve orders based on such assumptions.

Castillo-Plaza, 655 So.2d at 203.[10]

Petitioners' bold assertion that the communications permitted by § 455.241(2), as interpreted by the Third District, will adversely impact the physician-patient relationship further disparages and belittles the medical profession in the hopes of concealing the true facts. Petitioners' suppression efforts are analogous to those of the plaintiff in Morrison v. Malmquist, 62 So. 2d 415 (Fla. 1953). There, the plaintiff attempted to use the Hippocratic Oath as reins for the withholding of the truth. This Court, however, rejected any suggestion that the Hippocratic Oath barred physicians from testifying in legal proceedings.

> [T]he relevant part of the "Oath". . .is an obligation to "keep secret" knowledge "in the exercise of my profession or *outside of my profession or in daily commerce with men, which ought not to be spread abroad. . ."* (italics supplied in original). So the secrets to be kept are not confined to those arising from professional services, and the promise is qualified by the commitment not to give them unseemingly circulation. We apprehend that no physician under the protection of this code, time-honored as it is, and laudable as his determination to respect it might be, could

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[10]It should be noted that the persuasion, influence and overreaching the Petitioners and the Plaintiffs' Trial Bar fear defendants will exert upon a plaintiff's treating physicians is the persuasion, influence and overreaching which plaintiffs want to monopolize and make sure only they can exert. The Plaintiffs' Trial Bar certainly is not coming into court with clean hands. Petitioners and the Plaintiffs' Trial Bar are simply striving to obtain an unfair advantage over the defense. DR. PORTER submits that the solution is allow both sides equal access to treating physicians, with the understanding that any abuses or misconduct will be severely sanctioned.

> refuse to tell in a court of justice news that had reached him, inside or outside his profession, or from intercourse with his fellow men, himself determine whether he should divulge it, and whether telling it at the command of a court would amount to spreading it abroad.
>
> The charge in the brief that the witness violated "this Oath" when he was told to answer the questions about appellant-wife's physical condition prior to the collision is wholly unfounded.

62 So. 2d at 615-416. Thus, DR. PORTER submits that the physician-patient relationship does **not** impose a "fiduciary duty" upon physicians which "become[s] an instrument of gross fraud" and precludes all *ex parte* communication. 62 So. 2d at 416.

CONCLUSION

Based upon the foregoing, 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, respectfully request that this Court approve the Third District's decision and conclusion that the restrictions imposed by Fla. Stat. § 455.241(2) do not apply in medical negligence actions. Alternatively, Respondents respectfully request that this Court approve the Third District's conclusion that § 455.241(2) permits discussions on subjects not specifically protected by the statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on the Merits was furnished by mail on this 5th day of September, 1995 to: **Karen L. Bzdyk, Esquire,** Robert J. Dickman, P.A., 4500 LeJeune Road, Coral Gables, Florida 33146; **Phillip D. Parrish, Esquire**, Stephens, Lynn, et al., 9130 South Dadeland Blvd., PH II, Miami, Florida 33156; **Raoul G. Cantero, III, Esquire,** Adorno & Zeder, 2601 South Bayshore Drive, Miami, FL 33133; **Ronald A. Fitzgerald, Esquire**, Fleming, O'Bryan & Fleming, P.A., 500 E. Broward Boulevard, 17th Floor, P. O. Drawer 7028, Fort Lauderdale, Florida 33338-7028; and, **Mark Hicks, Esquire,** Hicks, Anderson & Blum, P.A., Suite 2402 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132-2513.

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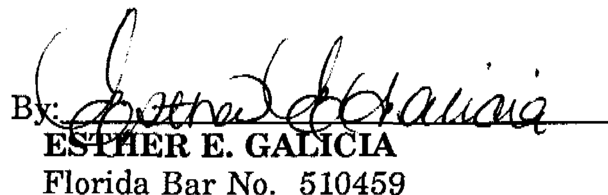
By: 

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