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SID J. WHITE
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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85, 905

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

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

REPLY BRIEF OF PETITIONERS

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REPLY TO ARGUMENT

Although there have actually been four briefs filed on behalf of the respondents,[1] they all make essentially the same arguments: (1) the clear language of §455.241(2), Fla. Stat., shows that it has *no* application in medical malpractice actions; (2) the statute is unconstitutional as an infringement on this Court's power to control procedure and a violation of the guarantees of freedom of speech and due process; and (3) there is no justification for banning all *ex parte* interviews with a plaintiff's treating physicians. As will be shown below, none of these arguments has any merit.

A. Section 455.241(2) does provide confidentiality in medical malpractice actions

Respondents' argument that the protections granted by §455.241(2) do not apply at all in medical malpractice actions is based solely on one clause in one sentence of the statute:

> (2) Except as otherwise provided in s. 440.13(2), such 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. However, such records may be furnished without written authorization to any person, firm, or corporation which has procured or furnished such examination or treatment with the patient's consent or when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff. Such records may be furnished in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the

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[1]Respondent North Shore Medical Center, Inc. filed its own brief and Respondents Porter and Harari, Porter, Blumenthal and Brown, M.D., P.A. filed a brief. In addition, two amicus curiae have filed briefs in support of Respondents' position: Physicians Protective Trust Fund and The Florida Defense Lawyer's Association.

> party seeking such records. ***Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant***, information disclosed to a health care practitioner by a patient in a 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.

As is apparent from the above quote, this clause only prefaces the provision regarding "information disclosed to a health care practitioner." There is no similar exception for the furnishing of medical records or the discussion of the medical condition of a patient. Yet, respondents entirely ignore this distinction and argue that the entire subsection does not apply in a medical malpractice action. This is clearly not supported by the statutory language.

Just as importantly, as Judge Jorgenson pointed out in his dissent in the decision *sub judice*, the respondents' "tortured analysis carries the seeds of its own demise" since it renders language in the statute surplusage:

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

(A-18)

Judge Jorgenson found that the result reached by the majority was not only an unnecessarily strained construction but also contrary to the legislative purpose behind the statute:

> The senate judiciary committee staff report, *see Franklin v. Nationwide Mut. Fire Ins. Co.*, 566 So. 2d 529, 532 (Fla. 1st DCA 1990), confirms the more reasonable conclusion that the confidentiality rules apply to a health care provider or practitioner except when that health care provider or practitioner is or expects to be named in the action at issue.

(A-19). He went on to conclude that "the statute's regrettable lack of precision does not require us to work the dual mischief of reaching an unfathomable result and sanctioning trauma to the physician-patient relationship." (A-19).

This is the same conclusion the other district courts in this state have reached and that this Court has already approved. The First District held in *Franklin v. Nationwide Mutual Fire Ins. Co.*, 566 So. 2d 529, 532 (Fla. 1st DCA 1990) that:

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

Similarly, the Fifth District held in *Kirkland v. Middleton*, 639 So. 2d 1002, 1004 (Fla. 5th DCA 1994) that:

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

(1) when a health care provider is or reasonably expects to be named as a defendant in a medical malpractice action (for that health care providers' records and information) or

(2) when the patient gives written authorization or

(3) when compelled by subpoena at a deposition, evidentiary hearing or trial for which proper notice was given.

(emphasis in original). The Second District agreed with this conclusion in *Richter v. Bagala*, 647 So. 2d 215 (Fla. 2d DCA 1994), *review granted*, 650 So. 2d 989 (Fla. 1995).

Finally, in *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857-858 (Fla. 1994), this Court approved the holding in *Franklin*:

> Likewise, in *Franklin v. Nationwide Mutual Fire Insurance Co.*, 566 So. 2d 529 (Fla. 1st DCA), *review dismissed*, 574 So. 2d 142 (Fla. 1990), the district court ruled that a medical authorization release form authorizing *ex parte* communications was inappropriate . . . [W]e approve the opinion of the First District in Franklin to the extent it held that a court may not authorize a medical release form allowing *ex parte* communications.

Thus, it is clear that neither the express language of the statute nor its legislative history support the respondents' conclusion that the privilege established by Section 455.241 does not apply at all in medical malpractice actions.

There is also nothing in the presuit procedures set out in Chapter 766 of the Florida Statutes which supports such a conclusion. No provision of this Chapter expressly authorizes *ex parte* interviews with treating physicians or a waiver of the privilege expressly granted by §455.241. Although Section 766.106(7)(a) does authorize unsworn statements it does so only upon "reasonable notice in writing to all parties." Further, "the notice must state the time and place for taking the

statement and the name and address of the party to be examined." §766.106(7)(a), Fla. Stat. In fact, §766.106(8) expressly states that:

> Each request for and notice concerning informal presuit discovery pursuant to this section must be in writing, and a copy thereof must be sent to all parties.

Accordingly, it is clear that Chapter 766 does not expressly waive or render inapplicable the doctor-patient privilege created by the legislature under §455.241. Any argument that it should contain such a provision must be directed to that body, not this Court.

B. Section 455.241 is not unconstitutional

Next, respondents assert that §455.241 is unconstitutional because it infringes on the rule-making function of this Court, violates due process and curtails the rights to freedom of speech and association. Once again, it is respectfully submitted that these arguments have no merit.

It is quite clear that §455.241 creates a statutory physician/patient privilege that did not exist before. A doctor is now statutorily — as well as ethically[2] — required to hold a patient's

[2]The code of ethics for the medical profession is comprised of three separate "prongs": (1) the Hippocratic Oath; (2) The American Medical Association's (AMA) principles of medical ethics; and (3) the current opinions of the Judicial Counsel of the AMA (1984 ed.). Each of these three "prongs" underscores the highly confidential nature of the physician-patient relationship. *See Petrillo v. Syntex Lab., Inc.*, 499 N.E. 2d 952, 957-58 (Ill. App. Ct. 1986), *appeal denied*, 505 N.E.2d 361 (Ill. 1987). The Hippocratic oath states: "Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret." Principle IV of the AMA's Principles of Medicine, states: "A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law." Section 5.05 of the Current Opinions states: "The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. ... The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law." Section 5.07 states: "Both the

medical records and his medical condition and information disclosed to him by the patient in confidence and a patient is entitled to rely on his doing so. Without a doubt, this constitutes the creation of a *substantive* right — it controls the relationship between patients and their doctors and establishes that patients have the right to retain control over and protect the information they entrust to their doctors. Thus, the statute "fix[es] and declare[s] the primary rights of individuals with respect towards their person and property." *Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). *See Hillsborough County Aviation Authority v. Azarelli Construction Co., Inc.*, 436 So. 2d 153 (Fla. 2d DCA 1983)(access to public records is a matter of substance).

Since the statute is substantive, it is also constitutional. That §455.241 sets forth the circumstances under which the privilege it grants is waived does not render it procedural. The legislature in granting a privilege has the right to declare under what circumstances it will and will not be respected. Thus, the legislature has declared that all privileges, except attorney-client and clergyman-penitent, are abrogated in cases of alleged abuse and neglect of children and the aged and disabled. §§415.109 and 415.512, Fla. Stat. Certainly, these statutes are neither procedural nor unconstitutional. Nor is §455.241 — even though it contains within itself the circumstances under which the privilege it grants will not apply. These provisions are an integral part of the grant of the privilege — not an attempt to prescribe rules of practice for the courts.

The defendants' remaining constitutional challenges, including the perceived abridgment of their rights to free speech and assembly, are as readily disposed of. The statute in

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protection of confidentiality and the appropriate release of information in records is the rightful expectation of the patient. A physician should respect the patient's expectations of confidentiality concerning medical records that involve the patient's care and treatment."

question carefully balances the several competing interests represented by a patient's right of privacy and the need for confidentially in the patient/physician relationship, the physician's ethical obligation to maintain his patient's confidences, and a tort defendant's right to obtain discovery during the defense of a lawsuit. *See, e.g., Wenninger v. Muesing*, 240 N.W. 2d 333 (Minn. 1976); *Petrillo, supra.* As the respondents admit, the statute does not prohibit the disclosure of relevant information. It merely regulates the time, place and manner of communication. This is permissible in support of a valid governmental objective and not unconstitutional.[3]

Since the defendants are entitled to discover all relevant information, there is no impediment to the search for truth and no due process violation. As the court noted in *Franklin*, "although *ex parte* 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 apply." 566 So. 2d at 534. In addition, the requirement that the interview with the treating physician take place with consent of the patient or within the confines of formal discovery simply ensures that privileged and irrelevant information will not be inadvertently disclosed. As the Court held in *Kirkland*, 639 So. 2d at 1004:

> [W]ere unsupervised *ex parte* interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosures of privileged information, nor could they effectively prove that improper disclosure actually took place.

Accordingly, §455.241 is constitutional.

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[3]*See McGuire v. State*, 489 So. 2d 729 (Fla. 1986); *State v. Elder*, 382 So. 2d 687 (Fla. 1980); *Weidner v. State*, 380 So. 2d 1286 (Fla. 1980); *City of Miami v. Sternbenz*, 203 So. 2d 4 (Fla. 1967); *Smith v. Ervin*, 64 So. 2d 166 (Fla. 1953); *State v. Ucciferri*, 61 So. 2d 374 (Fla. 1952); *State ex rel Nicholas v. Headley*, 48 So. 2d 80 (Fla. 1950); *Local Union No. 519 v. Robertson*, 44 So. 2d 899 (Fla. 1950).

C. All *ex parte* interviews should be barred

The need to protect against inadvertent disclosures also establishes why all *ex parte* interviews with treating physicians are banned. As the legislature obviously found since it requires that any disclosures take place with notice in the formal discovery context, *ex parte* interviews do create the occasion for improper conduct. *See also Horner v. Rowan Companies, Inc.*, 153 F.R.D. 597, 601-02 (S.D. Tex. 1994); *Manion v. N.P.W. Medical Center of N.E. Pennsylvania, Inc.*, 676 F. Supp. 585, 594-95 (M.D. Pa. 1987); *Miles v. Farrell*, 549 F. Supp. 82, 84 n. 3 (N.D. Ill. 1982); *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 803-05 (N.D. Ohio 1965); *Crist v. Moffatt*, 389 S.E. 2d 41 (N.C. 1990).

Although the Third District concluded — without any proof — that most treating physicians will refuse to attend *ex parte* conferences, this does not mean that the problem with abuse is non-existent. As Judge Jorgenson pointed out in his dissent:

> I agree that the number of physicians who would engage in *ex parte* interviews is likely small. But it is precisely this handful of practitioners — whose cavalier disregard of their duty to their patient permits them to provide affirmative assistance to the patient's antagonist in litigation — who justify an *ex parte* communication bar. The court's decision would allow defense counsel to avoid depositions for only these few physicians who would accede to an *ex parte* interview — the vast majority of the physicians would still require a subpoena for deposition or waiver by the patient. The inconvenience of instead having to set depositions for the few errant physicians is infinitesimal in relation to the potential for abuse, intentional or otherwise, by the court's allowing free, unmonitored access to them by defense counsel[2] and the resulting uncertainty of the bounds of the confidentiality privileges.
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>
> 2 The majority dismisses this concern as arising from anecdotal evidence. Not only is there record evidence in these cases of the pressure to overreach inherent in our adversary system, but this

> phenomenon has been recognized and documented by decisions in other jurisdictions throughout the country.

(A-21-22).

Even if the possibility of overreaching is discounted, it is unrealistic to place the decision as to what material is privileged into the hands of doctors, who have no training in the law, and defense counsel, who have no interest in protecting the patient's privilege.[4] This is especially true since the extent of the privilege is unclear. Defendants contend that questions directed toward determining whether a treating physician approves of the defendant's treatment of the plaintiff or how the treating physician would deal with such a case do not invade the statutory privilege. Yet, it seems quite clear that a doctor cannot render an opinion as to another doctor's negligence in treating a patient or how he would have done so without also revealing the medical condition of the patient and information learned by the physician in the course of treating the patient. Yet, this is exactly the information which is rendered confidential by §455.241(2).

Finally, defendant's claims of unfairness have no basis in reality. If defendants are actually worried about the costs associated with formal discovery or that a deposition may be used against them at trial, plaintiffs are more than willing to consent to informal interviews with their treating physicians — as long as they have notice of such and are allowed to attend. However, there is simply no question that treating physicians will be deposed and will be witnesses in every medical malpractice action — whether defendants want them to be or not. Such physicians are important

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[4]Several courts have pointed out that doctors may not even realize they have a choice not to participate in *ex parte* interviews. *Harlan v. Lewis*, 141 F.R.D. 107, 111 (E.D. Ark. 1991), *aff'd* 982 F. 2d 1255 (8th Cir. 1993); *Manion* 676 F. Supp. at 594-95; *Duquette v. Superior Court*, 778 P. 2d 634, 641 (Ariz. Ct. App. 1989).

fact witnesses. A defendant's foreknowledge of such a witness' testimony would not keep him from being deposed or called to testify at trial; and at such time, any interrogation by defense counsel would be available to the plaintiff. Therefore, there is no work product violation. Accordingly, respondents' arguments in this regard are illusory. They certainly do not support this Court ignoring the privilege granted by the legislature.[5] This is especially true since complaints about the unfairness of prohibiting *ex parte* conversations are arguments which must be addressed to the legislature — not this Court.

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[5]All of the respondents' arguments have been analyzed in detail and rejected in other cases. *See Manion, supra; Duquette, supra; Karsten v.* McCrary, 509 N.E.2d 1376 (Ill. App. 1987), *appeal denied*, 517 N.E. 2d 1086 (Ill. 1987); *Petrillo, supra; Cua v. Morrison*, 626 N.E.2d 581 (Ind. App. 1993), *opinion adopted*, 636 N.E. 2d 1248 (Ind. 1994); *Jordan v. Sinai Hospital of Detroit, Inc.*, 429 N.W. 2d 891 (Mich. App. 1988); *Nelson v. Lewis*, 534 A. 2d 720 (N.H. 1987); *Smith v. Ashby*, 743 P. 2d 114 (N.M. 1987); *Loudon v. Mhyre*, 756 P.2d 138 (Wash. 1988); *State ex rel. Kitzmiller v. Henning*, 437 S.E.2d 452 (W.Va. 1993).

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that the decision appealed should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners was mailed this 2nd day of October, 1995 to: PHILLIP PARRISH, ESQUIRE, Attorneys for Defendant North Shore, Stephens, Lynn, Klein & McNicholas, P.A., Two Datran Center, PH2, 9130 South Dadeland Boulevard, Miami, Florida 33156; ESTHER E. GALICIA, ESQUIRE, Attorneys for Defendant James Porter, M.D., Harari, Porter, Blumenthal and Brown, M.D., P.A., George, Hartz, Lundeen, Flagg & Fulmer, 524 South Andrews Avenue, Suite 333, Fort Lauderdale, Florida 33301; RONALD A. FITZGERALD, ESQUIRE, Attorneys for Amicus Curiae Florida Defense Lawyers Association, Fleming, O'Bryan & Fleming, P.A., 500 E. Broward Boulevard, 17th Floor, P.O. Drawer 7028, Fort Lauderdale, Florida 33338-7028; MARK HICKS, ESQUIRE, Attorneys for Amicus Curiae Physicians Protective Trust Fund, Hicks, Anderson & Blum, P.A., Suite 2402, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132.

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