In The Supreme Court Of Florida

No. SC10-1361

RAMSEY HASAN,

Petitioner,

vs.

LANNY GARVAR, D.M.D., and GARVAR & STEWART, D.M.D,

Respondents.

DCA No.: 4D10-136
Cir. Ct. No.: 09-028342 (04)

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Review from the Fourth District Court of Appeal
State of Florida

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CONSTITUTIONS, STATUTES & RULES

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IN THE SUPREME COURT OF FLORIDA

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RAMSEY HASAN, :

Petitioner, :

vs. :

LANNY GARVAR, D.M.D, et al., :

Respondents. :

STATEMENT OF THE CASE AND FACTS

Respondents rely upon the statement of facts in the Fourth District's opinion, *see Hasan v. Garvar*, 34 So. 3d 785, 786 (Fla. 4th DCA 2010), and do not otherwise respond to the Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner's position that the decision below conflicts with two First District cases and a decision from this Court is unsupported and fails to support jurisdiction. The First District held in its two cases that non-party treating physicians could not discuss a plaintiff's medical condition and history with counsel hired to represent them at depositions. In this case, the order specifically prohibited counsel from discussing Plaintiff's medical condition and history at a

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pre-deposition conference which was entirely consistent with the First District's holding.

The supreme court decision referenced by Petitioner is likewise distinguishable. Unlike the supreme court decision, the counsel seeking to confer with a treating physician in this case is not counsel for a defendant physician, but for the treater herself, hired by the treater and/or her professional liability insurance carrier.

Additionally, because the order which limits any pre-deposition conference to matters outside the Plaintiff's care and treatment does not violate section 456.057, Florida Statutes, Petitioner's contention that it is ethically untenable to undertake a pre-deposition conference under the parameters established by the lower tribunals is without merit. Moreover, as Petitioner points out, there are sufficient parameters to address ethical considerations from the standpoint of both the physician and the attorney involved in the pre-deposition conference. Additional constriction in the form of a complete bar to any right to counsel is far reaching and unnecessary. If this Court were to prohibit the pre-deposition conference contemplated by the trial court's order it would impermissibly undermine the sanctity of the attorney-client relationship and effectively deny Dr. Schaumberg's right to be represented and to consult with an attorney, before providing sworn testimony in a hotly contested dental malpractice action.

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ARGUMENT

I.

THE FOURTH DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION

In order for there to be a conflict that triggers the jurisdiction of this Court, the conflict with decisions must be "express and direct." Art. V, § 3(b)(3), Fla. Const. That is, the conflict must "appear within the four corners of the majority decision" brought for review, *see Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986), and cannot be based on an inherent or implied conflict. *See State Dep't of Health & Rehab. Servs. v. Nat'l Adop. Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986). The conflicting decisions must also involve substantially similar facts or must be analytically the same. *See State Dep't of Revenue v. Johnston*, 442 So. 2d 950, 951 (Fla. 1983); *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

Petitioner claims that the Fourth District's decision in *Hasan v. Garvar*, 34 So. 3d 785 (Fla. 4th DCA 2010), conflicts with two First District decisions and a decision from this Court on the issue of whether counsel for a non-party treating physician may engage in an *ex-parte* pre-deposition conference with the physician in a dental malpractice case. *See Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996); *Danneman v. Shands Teaching Hospital & Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st DCA 2009); *Hannon v.* Roper, 945 So. 2d 534 (Fla. 1st DCA 2007). The trial court

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found that these cases were inapplicable as did the Fourth District on two different occasions--in its written opinion and on rehearing when Petitioner unsuccessfully sought to certify conflict. As discussed below, these cases do not expressly and directly conflict with the Fourth District's decision because they do not involve substantially similar facts and are not analytically the same. Consequently, there is no jurisdiction in this Court to hear the petition.

A. *Danneman & Hannon*

The decisions in *Danneman* and *Hannon* are distinguishable on two grounds. First, they involved a different issue because, in both decisions, the First District determined that non-party treating physicians could not discuss a plaintiff's *medical condition and history* with counsel hired to represent them at depositions. The order at issue here did not offend this rule of law because it specifically prohibited counsel from discussing Plaintiff's medical condition and history. The Fourth District echoed this exact distinction in its opinion:

> In *Danneman* and *Hannon*, the orders in error would have allowed the plaintiff's nonparty treating physicians to have ex parte conferences with their own attorneys, *including discussion of the patient's medical condition.* Here, the order allows the plaintiff's nonparty treating physician to have an ex parte conference with her own attorney, *excluding the plaintiff's healthcare information. See Royal v. Harnage*, 826 So. 2d 332, 335 (Fla. 2d DCA 2002) ("We are not inclined to believe that [the statute] bars all discussion between a health care provider and his or her attorney concerning an upcoming deposition.").

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Hasan, 34 So. 3d at 787.

Second, in both *Danneman* and *Hannon* counsel for the non-party treating physician was retained by the physician's employer, the University of Florida, which was insured through the same self-insurance program benefitting a party defendant. *See Hannon*, 945 So. 2d at 536-37 (Ervin, J., concurring). Unlike a conventional insurer, whose insureds may from time to time in fact find themselves adverse to one another and thus necessitate attorney restrictions, the "insureds" of the self-insurance program were so closely intertwined pursuant to Florida statutory law that they always would have a unity of interests. *See* § 1004.41(4)(d), Fla. Stat. (2009) (authorizing the University of Florida to provide Shands with "comprehensive general liability insurance including professional liability from a self-insurance trust program").

Accordingly, there is no express and direct conflict between *Danneman* and *Hannon* and the Fourth District's decision in *Hasan*.

B. *Acosta*

This Court's decision in *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), established the broad physician-patient privilege and examined the scope of section 456.057, Florida Statutes. At issue in *Acosta* was whether counsel to a medical negligence *defendant* may have ex-parte discussions with the plaintiffs' treating physicians. *Id.* at 150. In ruling that such discussion were off limits, this Court

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ruled that: (1) section 455.241 did not authorize ex-parte conferences between counsel for a named defendant and the plaintiffs' treaters; (2) the statute did not violate the defendant physicians' First Amendment rights; and (3) the statute did not conflict with the Court's rulemaking powers or any procedural rules. *Id.* at 156.

Unlike *Acosta*, the counsel seeking to confer with a subsequent treating physician in this case was not counsel for a defendant physician, but for the treater herself, hired by the treater or her professional liability insurance carrier. This is a significant distinction because it implicates the attorney-client relationship, an issue *never reached* by this Court in *Acosta*. The Fourth District recognized this precise distinction in its opinion and refused to find that *Acosta* would change the result. The Fourth District rejected Petitioner's reliance on certain quotations in *Acosta* as applying in this case:

> The plaintiff further relies on *Acosta* . . . for other reasons. In *Acosta*, the supreme court "reject[ed] the contention that ex parte conferences with treating physicians may be approved as long as the physicians are not required to say anything." 671 So. 2d at 156. The court "believe[d] it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences." *Id*....
>
> However, it is our understanding that the ex parte conferences to which the foregoing quotes refer were conferences between nonparty treating physicians and *the defendants' attorneys*. We do not believe the temptation to violate a court-ordered prohibition is as strong in situations involving nonparty treating physicians and *their own attorneys*. Though we are not naïve, we also are not so cynical to accept the plaintiff's assumption that the prohibition will be disobeyed simply because the same insurer is providing attorneys to both the

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> defendants and the oral surgeon, albeit separate attorneys. *See* Comment to R. Regulating Fla. Bar 4-1.8(j) ("[T]he representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks."). As the plaintiff states in his petition, "In theory at least, it should make no difference who pays the fees."

Hasan, 34 So. 3d at 787.

This makes absolute sense. A subsequent treating physician asked to provide sworn testimony in a hotly contested malpractice case, has every right to seek counsel of her choice as concerns a variety of legal issues, having nothing to do with the healthcare provided to the patient. Such issues include the right to refuse to answer questions; the right to protect privileged or personal information; the potential for legal exposure for the claim asserted against the prior treating defendant; and the potential of providing testimony that could affect board certification by a peer review process in his or her specialty. To forbid this right is to arrest the basic right to counsel from a person, just because they had the misfortune to provide care to a plaintiff seeking to sue his healthcare professional. Accordingly, there is no express and direct conflict between *Acosta* and the Fourth District's decision.

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II.

INSURER RETENTION OF COUNSEL FOR A NON PARTY TREATING PHYSICIAN WITNESS WHERE DISCUSSION IS LIMITED TO NON MEDICAL INFORMATION IS WITHIN THE ESSENTIAL REQUIRMENTS OF LAW AND PRESENTS NO ETHICAL UNTENABILITY FOR THE PHYSICIAN OR HER COUNSEL

At the outset, this Court needs to be clear what is at stake in this proceeding. Petitioner wishes to block entirely any pre-deposition conference between a non-party treating physician and her counsel despite the physician's counsel agreeing to limit any talks to "general deposition techniques and things like that." (App. 6). In fact, the trial court expressly excepted from the scope of the pre-deposition conference any "protected healthcare information." (App. 3). Plaintiff conveniently overlooks this limitation in his petition and, instead, lodges unsupported and scandalous accusations that the mutual insurer for the treater and the Defendant dentist will willfully violate the court's order and obtain confidential information. However, as Petitioner points out, there are already restrictions in place that establish the statutory and ethical constraints placed upon a physician vis-a-vis the doctor patient privilege. Additionally as Petitioner also notes, Florida Ethics Opinions are replete with the ethical constraints required for attorneys representing insureds at the expense of the insurer. The tripartite relationship is well known, and the ethical obligations of the attorney in this relationship are well-delineated. Additional proscriptions by way of absolute bar to the right to counsel

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is an unnecessary and far reaching means to reach an objective already sufficiently protected, especially by the order under review.

A. *Contact Between a Non-party Treating Physician and Her Counsel About Matters Outside the Plaintiff's Care and Treatment Does Not Violate § 456.057 and therefore does not present an ethically untenable situation*

The starting point for any discussion on the issue of the ethical ramifications governing the physician patient privilege of confidentiality must begin with a careful analysis of the statute governing physician-patient confidentiality. Section 456.057, Florida Statutes (2009), establishes the physician patient privilege:

> (8) *Except in a medical negligence action or administrative proceeding when a health care practitioner or 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 and 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). The medical negligence exception is a limited waiver of an existing privilege. The waiver occurs when the patient chooses to pursue a claim. *See Royal v. Harnage*, 826 So. 2d 332, 335-36 (Fla. 2d DCA 2002). Based on this statute, there are four exceptions to the privilege. A health care practitioner or provider may discuss a patient's medical condition and treatment if: (1) it is necessary in order to defend the practitioner or provider in a medical negligence action in which the practitioner or provider is or expects to be a named defendant;

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(2) health care providers who are involved in the care and treatment of the patient need to discuss the patient's care and treatment with one another; (3) there is written authorization from the patient; or (4) the physician is subpoenaed.

The conduct in question in this case–the non-treating physician's desire to consult with her attorney prior to being deposed about matters not involving the Plaintiff's care and treatment–does not implicate § 456.057 in any manner. Section 456.057(6) only prohibits the disclosure of *"information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient."* Because the trial court's order prevents the disclosure of any protected health care information by Dr. Schaumberg to her lawyer before the deposition, there can be no departure from the essential requirements of law, and there is no ethically untenable situation. The pre-deposition conference cannot involve discussion of the Plaintiff's medical condition. The physician, who has the knowledge about the medical condition, is under the same proscriptions against revealing the patient's confidential medical information as she is every day. Her attorney is not one of the parties which falls under the exceptions carved out by §456.057, by virtue of the specific court ruling in this case. Accordingly there is nothing that has changed with regard to this physician's obligation with regard to her patient's confidentiality, and there is absolutely no evidence that she has previously revealed confidential patient information. In fact, the evidence in this

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case thus far, is to the contrary. Accordingly because there is adequate protection in §456.057 against revealing confidential patient records, and because the lower court has specifically ruled that there is to be no discussion about patient medical records, the physician in this case is not in an untenable position to maintain her ethical obligations simply by partaking in a pre-deposition conference with counsel of her choice. The regular proscriptions under which this physician travels day to day with regard to the confidentiality of her patient's records remains intact.

B. The tripartite relationship between an insurer, the retained attorney and the insured, is well known and there are sufficient ethical parameters in place that make a total bar of right to counsel unnecessary and far-reaching

Petitioner also asserts that counsel for Dr. Shaumberg would also be prone to somehow violate his ethical obligations under Florida law. Petitioner points to the tripartite relationship between the insured physician, the insurer and the insurer-retained counsel as creating an inherent conflict that does not permit the attorney to act against the interests of the insurer. This is nonsense. Defense counsel engaged by insurers to represent a client often have interests to protect of their client that may be adverse to the insurer that pays for those services. *See* Dan Kohane and Elizabeth Fitzpatrick, "Counsel Error and the Tripartite Relationship," For the Defense: May 2009: P68. Petitioner further asserts that because the same insurer also insures the Defendant in the underlying action, there is an unavoidable ethical untenability inherent to the relationship, and the attorney will use the opportunity

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to somehow gain information previously unknown to the insurer. Petitioner's assertions are without merit.

The tripartite relationship between insured, attorney and insurer is well documented and governed in Florida. *See* R. Regulating Fla. Bar 4-1.7(e). Any potential risks inherent therein are addressed in multiple occasions within the rules governing professional conduct and multiple ethical opinions.

Specifically, as noted in Fl. Eth. Op. 81-5, 1981,

> If the lawyer is engaged by the insurer to represent only the insured, then the commands of DR 5-1076(B) are applicable. Section DR 5-1076(B) provides: A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

Section EC 5 -17 also adds "since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom." (Fl. Eth. Op. 81-5, 1981). Moreover, the Opinion further provides:

> The duty of the lawyer to accept or continue representation of an insured only where the insured may have the full benefit of the lawyer's independent professional judgment is clear. The standards of and responsibilities of counsel retained by a carrier for such purpose are not waived or relaxed by virtue of the source of employment. *See American Employers Ins. Co. v. Globle Aircraft*

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Specialties, 250 Misc. 1066, 1075, 131 N.Y.S.2d. 393, 401 (1954), Motion to Withdraw Appeal Granted, 1 A.D.2d 1008, 154 N.Y.S.2d 835 (1956).

The lower court also focused on this issue in its opinion below, wherein it pointed to the flaw in Petitioner's own argument, i.e., "in theory at least, it should make no difference who pays the fees," and cited to the Comment to R. Regulating Fla. Bar 4-1.8(j) [("[T]he representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks.)] (R.152); *Hasan*, 34 So. 3d at 787.

Petitioner's fabrication of some ethical conundrum is without merit. The ethical considerations are many and specific. Counsel already has in place the framework by which his insured representation must abide. This is nothing new to an attorney who works often with insurance carriers. Additional proscriptions by impositions of a complete and absolute ban on representation in the capacity presented in the instant action are unwarranted and unnecessary. Sufficient parameters are in place to ensure that an ethical attorney will abide by the considerations necessary to adequately represent the interests of the insured, and of the plaintiff, regardless of "who pays the bills" for the retention.[1]

[1] The motive of the Respondents arguing the underlying issues has been questioned as well. It must be noted that the Respondents are interested in maintaining the right in the non-party subsequent treater to seek counsel of her choice for simple and clear reasons. First, the Defendant seeks the discovery deposition with every

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III.

PROHIBITING THE CONTACT IN THIS CASE WOULD IMPERMISSIBLY UNDERMINE THE SANCTITY OF THE ATTORNEY-CLIENT RELATIONSHIP AND EFFECTIVELY DENY THE PHYSICIAN HER CONSTITUTIONAL RIGHT TO COUNSEL

If this Court were to grant this petition, it would be allowing the fourteen-year broad physician-patient confidentiality privilege established in *Acosta*[2] to undermine the sanctity of the attorney-client relationship and to override the oldest common law and constitutional privilege of right to counsel. *See United States v. Zolin*, 491 U.S. 554, 562 (1989). It goes without saying that the relationship between a lawyer and his client is a serious, vital and solemn one. *See Richette v. Solomon*, 187 A.2d 910, 912 (Pa. 1963). No third party may interfere with the relationship any more than he may intervene between a doctor and his patient. *Id.;*

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belief that the subsequent treater will be able to provide medical testimony that will prove beneficial to the defense of the claim made by the patient. When Respondent sought to depose the oral surgeon, and she exercised her right to counsel, the Petitioner moved for protective order to bar the deposition. It still has not been taken! Second, the Defendant/Respondent has every right to question the deponent about her choice of care and treatment, and those answers could possibly implicate her in the case as a possible direct defendant, or a *Fabre* defendant. She is entitled to counsel before answering such questions.

[2] Prior to 1988, a limited statutory privilege existed for certain medical records, *see* § 455.241(2), Fla. Stat. (1987), but there was no general statutory physician-patient privilege. In 1988, the legislature amended § 455.241, which was subsequently renumbered as § 456.057, to create a broad and express privilege of confidentiality as to the medical records and medical condition of a patient. *Acosta*, 671 So. 2d at 154.

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accord R. Reg. Fla. Bar 4-5.6 (prohibiting any restriction on a lawyer's right to represent certain clients). As stated by this Court:

> [The attorney-client privilege is] not only an interest long recognized by society but also one traditionally deemed worthy of maximum legal protection. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client." The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." The privilege's purpose is to encourage clients to make a full disclosure to their attorneys.

Am. Tobacco Co. v. State, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997) (quoting *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992)) (citations omitted).

The right to counsel in civil cases is "no less fundamental" than the Sixth Amendment right to counsel in criminal cases. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262 (5th Cir. 1983). Other circuits have likewise held that there is a constitutional right to counsel in civil cases and/or administrative proceedings. *See In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) ("Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if 'compelling reasons' exist."); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986) ("a civil litigant [has] a constitutional

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right, deriving from due process, to retain hired counsel in a civil case"). As declared by the U.S. Supreme Court, counsel denied is due process denied:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 67 (1932); *see also Moseley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 945 (5th Cir. 1981) (finding that the right to counsel in civil cases "inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights").

Similarly, the right to hire and consult with an attorney derives from the First Amendment's guarantee of freedom of speech, association and petition. *See Denius v. Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000); *see also DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (stating that First Amendment protection of attorney-client relationship extends to the consultation inherent in that relationship).

In this case, Petitioner seeks to preclude *any* communications between Dr. Schaumberg and her counsel, denying her the right to counsel. This Court cannot countenance such an extreme result which would: violate Dr. Schaumberg's First Amendment and due process rights and the rights enumerated by the First District

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in *McDermott;* constitute an unconstitutional impairment of contracts; and offend Florida public policy. *See Royal*, 826 So. 2d at 335 ("We are not inclined to believe that section 455.667 bars all discussion between a health care provider and his or her attorney concerning an upcoming deposition."); *So. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) ("Discovery facilitates the truth-finding process, and although this process constitutes the core of any litigation, it must be tempered by the established interest in the free flow of information between an attorney and client.").

Moreover, OMSNIC (OMS National Insurance Company), which insures Dr. Schaumberg and Dr. Garvar, occupies a large portion of the oral surgery malpractice insurance market in Florida.[3] The likelihood that the OMSNIC will insure a defendant oral surgeon and a treating oral surgeon in the same case is very high. If Petitioner's position is accepted, no subsequent treating healthcare provider can gain counsel concerning legal exposure from a deposition, period. This does not follow from *Acosta*, as recognized by the lower tribunals. Such a result would offend constitutional due process on its face.

In sum, there is no basis to hold that section 456.057(6) trumps the attorney-client relationship and privilege. *Cf. Mills v. State*, 476 So. 2d 172, 176 (Fla. 1985)

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[3] See https://www.omsnic.com/omsnic/pages/default.aspx (stating that OMSNIC is "the leading provider of [oral and maxillofacial surgery] professional liability for over 20 years").

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(finding that the attorney-client privilege is of broader and deeper significance than a statute relating to confidentiality of juvenile records). Accordingly, the ruling of the lower court should be upheld.

IV.

PROHIBITION AGAINST ANY CONTACT WITH THE PHYSICIAN AND HER COUNSEL DOES NOT PREVENT "BACK DOOR" PROVISION OF CONFIDENTIAL MEDICAL INFORMATION TO THE DEFENDANT'S INSURER, THE INFORMATION IS ALREADY AVAILABLE TO THE INSURER BY VIRTUE OF ITS DEFENSE OF THE DEFENDANT

While Dr. Garvar does *not* agree that a plaintiff may forbid communications between a non-party treater and his or her counsel about that treater's care and treatment, that issue is not before this Court. The narrow issue before this Court is whether a non-party treater may have discussions with her counsel about matters unrelated to the treater's care of a patient (*i.e.*, deposition procedures, liability exposure in the case, etc.). Nevertheless, Dr. Garvar addresses this former issue should the Court wish to speak on it.

Plaintiff's grave concern about the non-party treater disclosing confidential care and treatment information about him is elevating form over substance. Plaintiff's chief argument for prohibiting pre-deposition conference between Dr. Schaumberg and her counsel is that OMSNIC, the mutual insurer for Dr. Garvar and treater Dr. Schaumberg, will obtain "through the backdoor" confidential information about Plaintiff's medical condition. However, the reality of the

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situation does not pose any threat of disclosure of information that is not already legitimately available to OMSNIC.

In this case, Dr. Garvar has been named as a defendant along with the partnership to which he belongs. Thus, there can be no dispute that Plaintiff has waived the physician-patient privilege as to Dr. Garvar's care and treatment. *See* §456.057(8), Fla. Stat. (2009). As such, these Defendants may share the Plaintiff's medical information with their lawyers and discuss their treatment of Plaintiff without limitation. *See id.* Further, by nature of the tripartite relationship between OMSNIC, Dr. Garvar, and Dr. Garvar's counsel, Dr. Garvar's lawyers may also share this information with OMSNIC. Therefore, Plaintiff's claims that OMSNIC will obtain confidential protected health information through a "back-door" is without merit since it will necessarily obtain this information directly through its defense of Dr. Garvar.[4]

Similarly, another exception under section 456.057 to patient confidentiality exists when a treating physician is subpoenaed for deposition. Therefore, once Dr. Schaumberg's deposition is allowed to proceed, Dr. Garvar and Dr. Garvar's counsel will be allowed to explore every aspect of Dr. Schaumberg's treatment of Plaintiff to mount a defense. Therefore, even if this court disallows a pre-

[4] Plaintiff's position is also based on the assumption that the same OMSNIC adjuster will be assigned to both Dr. Garvar and Dr. Schaumberg or that the two separate adjusters will share this information. There is no record evidence that this is the case (indeed, that is never done by prudent insurers).

deposition conference, the confidential information that Plaintiff fears will be disclosed during a pre-deposition conference will, absolutely, be disclosed during Dr. Schaumberg's deposition.

In the same vein, there was no privilege before this lawsuit was filed which would have prevented Dr. Schaumberg from discussing Plaintiff's medical care and treatment with Dr. Garvar. Nothing in the statute suggests that the filing of a lawsuit, which is normally an exception or waiver of the privilege, creates a new privilege. *See Harnage*, 826 So. 2d at 336. Therefore, why should this Court block the revelation of any information about Dr. Schaumberg's treatment which may occur during a pre-deposition conference that was not privileged between them at an earlier time?

Florida courts have always implicitly recognized that the disclosure of confidential or privileged information to an attorney's agents or representatives does not constitute a waiver of the privilege or an actual "disclosure" of the protected information. *See Mills v. State*, 476 So. 2d 172, 176 (Fla. 1985) (stating that the "attorney-client privilege preserves the confidentiality of private communications"). For example, when a client reveals confidential information to his attorney, the attorney is generally not considered to be disclosing that information in violation of the attorney-client privilege by sharing the information with firm partners, associates, paralegals, secretaries, experts, and nurse

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consultants. *See Estate of Stephens v. Galen Healthcare, Inc.*, 911 So. 2d 277, 282 (Fla. 2d DCA 2005); *see also* R. Reg. Fla. Bar 4-1.6(c). Instead, these people are bound by the attorney-client privilege thereby allowing the free flow of information within the confines of the attorney-client relationship. *See Stephens*, 911 So. 2d at 282. The same principles apply in a joint defense or common interest situation. *See Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 442-43 (Fla. 3d DCA 1987). It is for this reason that the legislature decided to create an exception to patient confidentiality in the context of medical malpractice actions–a defendant may share the patient's confidential information in his possession with that defendant's own attorney without violating section 456.057(6). *See Acosta*, 671 So. 2d at 156.

There have been other situations where Florida courts have relaxed the privilege under section 456.057 when employees or agents of treaters are involved. *See, e.g., Stephens*, 911 So. 2d at 277 [reasoning that Hospital's attorneys should be able to speak to its employees and agents, and that such communication would not be a disclosure in violation of the doctor-patient privilege]; *Royal v. Harnage*, 826 So. 2d 332 (Fla. 2d DCA 2002)[concluding that the filing of a lawsuit does not create a privilege where none existed in the past, and allowing the attorneys representing the defendants to discuss the plaintiff's medical condition with any health care provider with whom their clients were authorized to communicate prior

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to the lawsuit]; *Pub. Health Trust of Dade County v. Franklin*, 693 So. 2d 1043 (Fla. 3d DCA 1997)[holding that a hospital faced with potential liability for the negligent care provided by its health care providers can conduct *ex parte* interviews with its former employees]; *Alachua Gen. Hosp., Inc. v. Stewart*, 649 So. 2d 357 (Fla. 1st DCA 1995) [holding that the statutory privilege (of doctor-patient confidentiality) is waived even between a hospital and health care providers for whom the hospital denies responsibility]; *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305 (Fla. 2d DCA 1992) [holding that nursing home defendant in wrongful death action was not prohibited from contacting former employees and conducting *ex parte* interviews].

Florida courts have held that in the context of a medical malpractice case, a defendant hospital may have *ex parte* discussions concerning the plaintiff's confidential medical information with that hospital's current and former employees and agents when the hospital is being sued on a theory of vicarious liability. *Harnage*, 826 So. 2d at 336; *Melody v. State Dept. of Health and Rehabilitative Services*, 706 So. 2d 115,118 (Fla. 4th DCA 1998) (recognizing that the statutory physician-patient privilege would not prevent discussions between a defendant and its agents or employees); *Franklin*, 693 So. 2d at 1046 (same); *cf. Stephens*, 911 So. 2d at 282 (holding that communication between corporations that managed

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hospital and physicians employed by such managers regarding patient's treatment did not constitute "disclosure" of patient information under § 456.057).

To reach its holding in *Franklin,* the Third District relied heavily on *Alachua* and *Manor Care.* In *Alachua*, plaintiff alleged that the hospital should be held vicariously liable for the negligence of three physicians based on *respondeat superior* or agency principles. None of the three physicians had been named as defendants in the lawsuit. In its answer, the hospital denied the existence of an employment or agency relationship. Subsequently, the trial court denied the hospital's request to conduct ex parte interviews with those three physicians. The hospital then sought a writ of certiorari from the district court quashing the trial court's order.

The issue in *Alachua* was "whether a hospital charged with liability for the negligence of a physician alleged to be an agent of the hospital may conduct ex parte interviews with that physician without admitting before trial that the physician was the hospital's agent or employee." 649 So. 2d at 357. The First District relied heavily on *Manor Care* which construed the exception to the general rule of patient confidentiality and reasoned that:

> The only reasonable construction of this provision is that the legislature intended to impose no impediment to health care practitioners' disclosure of patient data *in their possession* once litigation is imminent, at least to the extent necessary to defend against such litigation. Moreover, the statute should present no

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> impediment to informal investigatory contact with former employees, since their knowledge can only have arisen while in the service of the particular provider/defendant.

Manor Care, 611 So. 2d at 1307 (emphasis added).

In *Alachua*, the First District applied the same rationale and concluded that

> the only knowledge possessed by these physicians concerning the patient's condition was acquired while they provided the medical care and treatment to the patient at [the hospital]. By asserting that any negligence on the part of these physicians is imputed to the hospital, plaintiff must also recognize that any information possessed by these physicians concerning the patient's condition is likewise imputed to the hospital. Allowing ex parte communications by petitioner with these three physicians in the case at bar would fulfill the statute's intent of allowing medical malpractice defendants to use information in their possession pertaining to a patient's condition in order to develop those facts pertinent to their defense of plaintiff's allegations.

Alachua, 649 So. 2d at 358-59. Based on the First and Second District's construction of section 456.057(6), the *Franklin* court found that "the hospital as an institutional health care provider has a right to conduct ex parte interviews with its own agents or employees for whom it might be vicariously liable. 693 So. 2d at 1045. The *Franklin* court also found its decision consistent with *Acosta*. *Id.* at 1046.

This Court should extend the foregoing reasoning to that information protected under section 456.057 vis-a-vis a non-party treater's personal counsel. *See Manor Care*, 611 So. 2d at 1307 n.4 (theorizing that exception under § 456.057(8) for health care providers named as defendants may extend to attorneys,

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paralegals and experts retained for the defense of the suit); *cf. Cardiovascular Surgeons, P.A. v. Anthony*, 773 So. 2d 633 (Fla. 5th DCA 2000) (finding that health care provider may be compelled to produce to a deceased patient's legal representative the patient's medical records). A treater who is not named as a defendant but who may need representation for a deposition or trial testimony should be able to share the patient's medical care and treatment with the treater's counsel in order to adequately prepare and possibly protect herself in the legal proceedings.

In the final analysis, this Court also should not place too much stock in the fact that a treater has not been named as a defendant or on plaintiff's representations that he does not intend to join the treater as a defendant. When a non-party treating physician is listed as a fact witness by any party, it is possible that the physician can bolster the plaintiff's negligence claims against a prior treating physician, support the plaintiff's claims as to present condition and future damages, or support the defense of any party defendant. Thus, a physician placed in this position could conceivably implicate or support care provided by others, or even implicate that physician's own care. As a result of such testimony, that physician could be exposed to liability, either by being added to the pending lawsuit, or being sued for contribution or indemnity at the end of the case (even if the statute of limitations has run as to being named as a direct party to the main

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suit).[5] The physician himself, his employer, or other healthcare providers affiliated with the employer or another party could also face outside regulatory action or internal action such as licensure review, peer review or credentialing issues as a result of the physician's testimony. In each and every one of these scenarios, the need for independent counsel is heightened.

Considering what is at stake, it is hard to imagine any restriction on a non-party treater's ability to consult with an attorney about a patient's medical condition. *See Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982) (holding that employees could discuss information confidential under the Freedom of Information Act with counsel in order to discuss filing a suit based on a workforce reduction). In any event, as stated in Sections I-III, the lower court order at issue did not cross the *Acosta* "line," and thus there is no issue about "back door" release of protected health information in this dispute.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court uphold the decision rendered by the district court and protect Dr. Schaumberg's right to pre-deposition conference with counsel of her choice, within the

[5] As to Dr. Schaumberg, it is arguable that neither the 2-year statute of limitations nor the 4-year statute of repose has run as of the date of this filing. *See* § 95.11(4)(b), Fla. Stat. (2009).

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parameters established by the lower tribunal so that a fair discovery deposition might finally be accomplished as desired by the Respondents.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy was served on Paul Freedman, Esq., Kaplan and Freedman, P.A., 9410 S.W. 77th Avenue, Miami, Florida 33156; Ken Morgan, Esq., Billing, Cochran, Lyles, Mauro & Ramsey, P.A., SunTrust Center, Sixth Floor, 515 East Las Olas Boulevard, Fort Lauderdale, Florida 33301 and James C. Blecke, Esq. The Haggard Law Firm, P.A., 330 Alhambra Circle, First Floor, Coral Gables, Florida 33134, this 28th day of March, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY compliance with font requirements.

By _____
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