

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' JURISDICTIONAL ANSWER BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Respondents rely, as this Court will, 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 which is misleading and incomplete.

SUMMARY OF ARGUMENT

Petitioner's position that the decision below conflicts with two First District cases and a decision from this Court is without merit. 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 pre-deposition conference which was entirely consistent with the First District's holding.

The supreme court decision 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 or her professional liability insurance carrier.

Finally, Petitioner posits no reason why this Court should exercise its discretion assuming there were conflict jurisdiction. No further clarification of this

Court's prior decision or the First District's decisions is warranted in light of the decision below which is not inconsistent with these decisions.

ARGUMENT

I

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

In order for this Court to have jurisdiction, 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 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.

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.").

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 be 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.¹ At issue in *Acosta* was whether counsel to a medical negligence *defendant* may have ex-parte discussions with the plaintiffs’ treating

¹*Acosta* involved the penultimate predecessor statute which was found at § 455.241. In 1997, this section was renumbered as section 455.667, Florida Statutes.

physicians. *Id.* at 150. In ruling that such discussion were off limits, this Court 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 of procedure. *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. *See Hasan*, 34 So. 3d at 787.

Based on similar grounds, 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 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.”

Id.

Accordingly, there is no express and direct conflict between *Acosta* and the Fourth District’s decision.

II

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE FOURTH DISTRICT’S DECISION

Petitioner fails to argue why this Court should exercise its discretion assuming there were conflict jurisdiction. *See* Fla. R. App. P. 9.120 Comm. Notes (1977 Amend.). On this issue, no further clarification or modification of *Acosta*, *Hannon*, or *Danneman* is required in light of the decision below which is not inconsistent with these decisions.

Moreover, there is no reason to reexamine the current state of Florida law on this issue. On the contrary, if this Court were to consider modifying current law it would have to grapple with numerous constitutional issues and the sanctity of the attorney-client relationship. The ultimate relief Petitioner seeks—to block entirely

a treating physician from consulting with her attorney prior to a deposition—exceeds the bounds of current Florida law. Accordingly, even if this Court were to possess jurisdiction, it should decline to exercise its discretion and review the decision below.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court not accept jurisdiction in this case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that copies of the foregoing were mailed to the persons listed on the attached Service List this 26th day of August, 2010.

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CERTIFICATE OF COMPLIANCE

Respondent hereby certifies that the font used in this brief is Times New Roman 14-point pursuant to Florida Rule of Appellate Procedure 9.210(a)(2).

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