IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1361

RAMSEY HASAN, :

Petitioner, :

vs. :

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

Respondents. :

ON REVIEW OF A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER RAMSEY HASAN

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INTRODUCTION

This jurisdictional brief is filed on behalf of Ramsey Hasan ("Hasan"), the plaintiff in a dental malpractice case against Lanny Garvar, D.M.D., and his P.A. ("Garvar").

STATEMENT OF THE CASE AND FACTS

In this medical negligence action, the circuit court entered an order allowing a nonparty subsequent treating physician to have an *ex parte* pre-deposition conference with an attorney retained by Dr. Garvar's professional liability carrier. Hasan petitioned the district court for a writ of certiorari seeking to quash the order under *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So.3d 246 (Fla. 1st DCA 2009); *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2007); and *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

SUMMARY OF ARGUMENT

The First District prohibits *ex parte* communication between a nonparty treating physician and an attorney retained by the defendant's malpractice insurer in a malpractice case. The Fourth District now allows *ex parte* communication between a nonparty treating physician and an attorney retained by the defendant's malpractice insurer. There is irreconcilable conflict in these decisions.

This Court prohibits *ex parte* communication with a nonparty treating physician, even where the physician is not required to say anything. The Fourth District allows *ex parte* communication with a nonparty treating physician if the physician is not required to say anything about care and treatment. There is irreconcilable conflict with this Court's decision.

JURISDICTIONAL ARGUMENT

I.

THE FOURTH DISTRICT DECISION CONFLICTS WITH DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL ON THE SAME POINTS OF LAW.

When district courts announce different rules of law on substantially similar facts, this Court has conflict jurisdiction. See, *Wallace v. Dean*, 3 So.3d 1035, 1039 (Fla. 2009); *Aravena v. Miami-Dade County*, 928 So.2d 1163, 1166-7 (Fla. 2006).

The facts in this case are indistinguishable from *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So.3d 246 (Fla. 1st DCA 2009), and *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2007). In all three cases, the malpractice insurers for the defendants in a malpractice case retained counsel to represent nonparty treating physicians who were to be deposed in the malpractice case. The First District has squarely held that separate counsel retained by the insurer cannot conduct *ex parte* conferences with the nonparty treating physician, citing *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).

In *Hannon*, "[t]he trial court issued an order . . . effectively ruling that the patient confidentiality statute does not prohibit communication between a non-party physician/witness and *his own attorney*." 945 So.2d at 535 (emphasis by the district court). The First District found this to be a departure from the essential requirements of the law with no adequate remedy on appeal, and quashed the order.

> Because we are bound by the unambiguous language of section 456.057(6), we grant the petition. . . . Section 456.057(6), Florida Statutes (2005), clearly forbids Dr. Roper from disclosing information concerning Decedent's medical condition and treatment to an attorney hired by a representative of the defendant hospital [the University's self-insurance program]. [945 So.2d at 536].

In *Dannemann*, the First District reiterated its holding in *Hannon* and quashed a similar order on similar facts:

> This court held in *Hannon* that the clear, unambiguous language of the patient confidentiality statute, section 456.057(6), Florida Statutes (2005), presently numbered as subsection (8), prohibits any nonparty physician from disclosing the decedent's medical condition and history to the counsel hired by the defendant's insurer to represent the physician at a deposition. [14 So.3d at 247].

The First District in *Dannemann* also explicitly confirmed the implicit holding in *Hannon*, that the confidentiality statute did not violate the physician's right to counsel under constitutional rights to free speech and due process. *Dannemann*, 14 So.3d at 248. The First District based its ruling on this Court's decision in *Acosta*.

The Fourth District's attempt to distinguish *Dannemann* and *Hannon*, based on the physician's silence during the *ex parte* conference is a distinction without a difference under this Court's decision in *Acosta*.

II.

THE FOURTH DISTRICT DECISION CONFLICTS WITH A DECISION OF THIS COURT ON THE SAME POINTS OF LAW.

In *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996), this Court said and did a number of things. First, it reviewed the history of the physician-patient privilege in Florida. Second, it interpreted the 1988 statutory enactments as creating a physician-patient privilege with explicit and limited circumstances when medical information can

be disclosed. Third, the Court expressly disapproved of *ex parte* conferences with nonparty treating physicians in malpractice cases and specifically held:

> Finally, we reject the contention that ex parte conferences with treating physicians may be approved so long as the physicians are not required to say anything. We believe it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences.

The Fourth District decision here is indistinguishable from *Johnson v. Mt. Sinai Medical Center of Greater Miami, Inc.*, 615 So.2d 257 (Fla. 3d DCA 1993), *quashed sub nom., Acosta v. Richter,* 671 So.2d 149 (Fla. 1996), where attorneys constrained by law and ethics from violating the statutory privilege were allowed *ex parte* contact with treating physicians. The insurance plan attorneys retained to represent the witnesses in *Dannemann* and *Hannon* are governed by the identical ethical requirements governing counsel retained by the defendant's insurer in this case. Physician silence while listening to *ex parte* communication from anyone concerning the malpractice case is not a statutory exception under *Acosta*.

The flaw in the Fourth District's reasoning is revealed in the following:

> 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. [Slip op. at 3].

Any "assumption" that may be made by the plaintiff, or any contrary assumption that may be made by a judge is not controlling. *Acosta* did not "assume" improper conduct by counsel when it rejected *ex parte* communication with a silent physician. *Acosta* simply recognizes that discussion of the physician's care and treatment is unavoidable in any *ex parte* conference preparatory to the treating physician's deposition — where the questions will be all about care and treatment.

The rule of law announced in *Acosta* is not based on motives of counsel, but on the inability of the plaintiff-patient to demonstrate whether the physician-patient privilege has been violated during the *ex parte* conference. *Acosta* protects against both the intentional and the inadvertent violation of the statutory physician-patient privilege. See, *Kirkland v. Middleton*, 639 So.2d 1002, 1004 (Fla. 5th DCA 1994):

> Respondents also argue they merely intend to question Kirkland's current health care providers about such non-privileged matters as scheduling deposition testimony and arranging medical records production. . . . Were unsupervised *ex parte* interviews allowed, medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place. . . . Petitioners' remedy is here and now with this court or it does not exist.

In *Dannemann* and *Hannon*, *supra*, the First District rejected an attorney-client exception to physician-patient confidentiality. In *Acosta*, this Court held:

> We further reject the suggestion that the statute, with its limitations on disclosure, is somehow violative of a defendant physician's First Amendment rights to free speech. We find no First Amendment flaw in the legislature's particular scheme for balancing a patient's individual privacy with society's reasonable need for limited disclosure of medical information. [671 So.2d at 156].

The rule of law is simply stated and is absolute. See, *Lemieux v. Tandem Health Care of Florida, Inc.*, 862 So.2d 745, 748 (Fla. 2d DCA 2003):

> Under the plain language of this statute, patient information is privileged and may not be disclosed unless the disclosure falls within one of the statutory exceptions. *Acosta*, 671 So.2d at 155. . . . *No other disclosures are statutorily permitted, and an order allowing for disclosure in any other context departs from the essential requirements of the law*. [e.s.].

The Fourth District decision in this case is in conflict with the rule of law established by this Court in *Acosta*, and followed by the other district courts.

CONCLUSION

This Court should accept jurisdiction and quash the decision rendered by the district court in this case.

By_____
James C. Blecke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy was served on Paul Freedman, Esquire, Kaplan and Freedman, P.A., 9410 S.W. 77th Avenue, Miami, Florida 33156; Michael Barzyk, Esquire, McIntosh, Sawran, et al., 1776 E. Sunrise Boulevard, P.O. Box 7990, Ft. Lauderdale, Florida 33338-7990; and Michael Ragan, Esquire, Demahy, Labrador, et al., 150 Alhambra Circle, Penthouse, Coral Gables, Florida 33134, this 23d day of July, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY compliance with font requirements.

By_____
James C. Blecke