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**IN THE SUPREME COURT OF FLORIDA**  
**Case No. SC09-1006**  
**First DCA Case No. 1D08-3923**

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Upon Petition For Discretionary Review  
Of A Decision Of The First District Court Of Appeal

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**UNIVERSITY OF FLORIDA BOARD OF TRUSTEES;**  
**THOMAS M. BEAVER, M.D.; SIGURD J. NORMANN, M.D.;**  
**and DIANA CARDONA, M.D.,**

**Petitioners,**

**v.**

**PATRICIA DANNEMANN, as Personal**  
**Representative of the Estate of**  
**Stephen Dannemann,**

**Respondent.**

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**PETITIONERS' BRIEF ON JURISDICTION**  
**WITH APPENDIX**

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**KELSEY APPELLATE**  
**LAW FIRM, P.A.**

Susan L. Kelsey (FBN 772097)  
115 N. Calhoun St.  
Tallahassee, FL 32301  
Ph. (850) 681-3511  
Fax (850) 681-3611  
susanappeals@embarqmail.com

**GREENBERG TRAURIG, P.A.**

Arthur J. England (FBN 22730)  
1221 Brickell Ave.  
Miami, Florida 33131-3224  
Ph. (305) 579-0605  
Fax (305) 961-5605  
englanda@gtlaw.com

**Counsel for Petitioners**

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## **STATEMENT OF THE CASE AND FACTS**

Petitioners seek review of *Dannemann v. Shands Teaching Hospital & Clinics, Inc.*, 2009 WL 1272330 (Fla. 1st DCA 2009) (“*Dannemann*”). [A 1]<sup>1</sup> Petitioner University of Florida Board of Trustees (the “University Board”) is one of several such boards created under article IX, section 7(b) of the Florida Constitution, and administers the University of Florida and its College of Medicine. *See* § 1001.74, Fla. Stat. (2007). To fulfill its constitutional duty under article IX, section 7(a) to provide medical education, research, and public service, the University Board employs faculty physicians who teach and practice medicine through the University’s College of Medicine “as an integral part of their academic activities and their employment as faculty.” Fla. Bd. of Gov. Reg. 9.107(a). The University Board provides legal services to its physician employees through a self-insurance program that is a component unit of the University Board itself. *See* § 1004.24, Fla. Stat. (2007); Fla. Bd. of Gov. Reg. 10.001.

Petitioners Thomas M. Beaver, M.D., Sigurd J. Normann, M.D., and Diana Cardona, M.D., are physicians employed by the University Board. The Plaintiff/Respondent filed a wrongful death suit against Shands Teaching Hospital

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<sup>1</sup> Although Shands is the named defendant in the wrongful-death claim below, it was not involved in the issues now before the Court, and the First District corrected its original opinion to reflect this fact. *Compare Dannemann*, 2009 WL 633518 (Fla. 1<sup>st</sup> DCA Mar. 13, 2009) *with Dannemann*, 2009 WL 1272330 (Fla. 1<sup>st</sup> DCA May 11, 2009) (On Motion for Rehearing and Clarification granted).

and Clinics, Inc. (“Shands”), and sought to depose Drs. Beaver, Normann, and Cardona, because they had knowledge of the Plaintiff’s decedent’s medical condition. The University Board hired outside lawyers to represent them in connection with their depositions. Plaintiff filed a motion to prevent the physicians from communicating with their lawyers about the decedent’s medical condition and treatment. The trial court denied the motion, authorizing the physicians to discuss decedent’s medical condition with their lawyers.

On certiorari review, the First District reversed, rejecting Petitioners’ as-applied, right-to-counsel constitutional challenges to Florida’s patient confidentiality statute, currently section 456.057(8), Florida Statutes (2007).<sup>2</sup> The court held that under the statute, Florida physicians cannot communicate patients’ medical information to anyone, including the outside attorneys the University Board retained to represent the physicians, unless the physicians or their employer were sued, or reasonably expected to be sued, in a medical negligence action. [A 1] The court held that communications were prohibited here because neither the

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<sup>2</sup> Section 456.057(8) provides in pertinent part as follows:

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 practitioners and 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.

University Board nor its employee physicians were parties to the lawsuit nor expected to be made parties.

The district court relied on its decision in *Hannon v. Roper*, 945 So. 2d 534 (Fla. 1st DCA 2006), *rev. den.*, 967 So. 2d 198 (Fla. 2007). In *Hannon*, the court held that physicians may not disclose patients' medical information in any situation not expressly enumerated in section 456.057(8), not even in attorney-client consultations with the physicians' own attorneys retained by the University Board. Adhering to that interpretation of the statute, the district court expressly rejected Petitioners' First and Fourteenth Amendment arguments. The court also relied on *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), where this Court passed on the validity of the patient confidentiality statute in a different factual context, not involving the physician's *own* attorney or employer. *Id.*

### **SUMMARY OF THE ARGUMENT**

The Court has jurisdiction to review *Dannemann* because it expressly declares valid section 456.057(8), by expressly rejecting Petitioners' constitutional challenge that the statute violated the First Amendment right of free speech and right to counsel, and the Fourteenth Amendment right of due process. The Court has jurisdiction for the independent reason that the case expressly affects state university boards of trustees, a class of constitutional officers created by article IX, section 7, of the Florida Constitution.



The Court should exercise its discretion to review *Dannemann* because the First District's narrow interpretation of section 456.057(8) deprives university-employed physicians of their constitutional right to counsel, and makes it impossible for the University Board to carry out its constitutional duties to provide medical education, research, and public service. In both contexts, full and frank communication of patients' medical information is essential, and authorized by other constitutional principles and statutory provisions, which the state's patient confidentiality statute does not, and cannot properly, supersede.

## **ARGUMENT**

### **I. THE COURT HAS JURISDICTION ON TWO INDEPENDENT GROUNDS.**

#### **A. The Decision Expressly Declares Valid a State Statute.**

*Dannemann* expressly declares valid section 456.057(8). It expressly rejects Petitioners' arguments that the statute is unconstitutional if interpreted and applied narrowly to preclude any communication of patient medical information to physicians' own attorneys and employer except when there has been an express authorization, a subpoena, an evidentiary hearing, or a trial. *Dannemann*, 2009 WL 1272330 at \*1. The First District held that it had implicitly rejected those First and Fourteenth Amendment challenges in *Hannon*, and was rejecting those challenges expressly here, to uphold the patient confidentiality statute. *Id.*

This Court's review of *Hannon* was sought under conflict jurisdiction. Review based on statutory validity was unavailable in *Hannon* because, as the *Dannemann* court notes, its rejection of the constitutional challenges in *Hannon* was implied and not express. Thus, despite the similarity of issues and parties between *Hannon* and this case, this is the first opportunity for this Court to review the as-applied constitutional questions created by the First District's narrow interpretation of the statute in *Hannon* and *Dannemann*.

The First District cited *Acosta*, in which this Court held that the statute prohibited a lawyer who represented the defendant from having access to a non-party treating physician, *absent* an attorney-client or employment relationship. This materially different factual context generated a First Amendment argument different from the one Petitioners asserted here. Thus, in *Acosta* this Court held that the First Amendment did not protect a physician's right to speak with an *unrelated* lawyer, where no attorney-client relationship existed. *Acosta*, 671 So. 2d at 156. The issues now before the Court were not raised or addressed in *Acosta*.

**B. The Decision Expressly Affects a Class of Constitutional Officers.**

*Dannemann* expressly affects state university boards of trustees, a class of constitutional officers within the meaning of article V, section 3(b)(3) of the Florida Constitution. Florida has eleven state universities (*see* Ch. 6C-1-6C-11, Fla. Admin. Code), each of which has its own board of trustees established

pursuant to article IX, section 7, of the Florida Constitution. *See* § 1001.71, Fla. Stat. (2007). Each board separately and independently exercises the same powers of government. *Id.* Taken together, these eleven boards constitute a “class.” *See, e.g., Chief Judge of the Eighth Jud. Cir. v. Board of Co. Commrs. of Bradford County*, 401 So. 2d 1330, 1331 (Fla. 1981) (boards of county commissioners are such a class); *Florida State Board of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963) (same); *see also* H.L. Anstead, G. Kogan, T. Hall, and C. Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 29 Nova L. Rev. 419 (2005), at 79 & n.444 (classes include public defenders, sheriffs, property appraisers, state attorneys, and court clerks).

Medical education, treatment, research, and public service programs involving the use of employed faculty physicians presently exist at five of the eleven state universities: the University of Florida; the University of South Florida; Florida State University; Florida International University; and the University of Central Florida. The boards governing these universities are required to have faculty practice plans for providing “educationally oriented clinical practice settings and opportunities . . . as an integral part of their academic activities and their employment as faculty.” Fla. Bd. of Gov. Reg. 9.107(a). The district court’s decision expressly affects this class of constitutional officers because it imposes a narrow interpretation of section 456.057(8) that would prohibit physicians from

communicating patients' medical information to others in the course of education, research, and public service.

## **II. *DANNEMANN* DEPRIVES STATE UNIVERSITY PHYSICIANS OF THEIR CONSTITUTIONAL RIGHTS, AND PREVENTS THE BOARD FROM FULFILLING ITS CONSTITUTIONAL DUTIES.**

Constitutional authorization for this Court to review *Dannemann* is unquestionably present. The need to review *Dannemann* is compelling. The Court should address head-on the clash between the constitutional and statutory rights that the district court has sacrificed with its narrow interpretation of the patient confidentiality statute. The First Amendment guarantees the right to consult with an attorney in a civil matter. *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000) (“[T]he state cannot impede an individual's ability to consult with counsel on legal matters.”). That right necessarily extends to the consultation that inheres in that relationship. *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990), *cert. denied*, 502 U.S. 814 (1991). Those rights exist in Florida. *See Royal v. Harnage*, 826 So. 2d 332, 335 (Fla. 2d DCA 2002).

*Dannemann* and *Hannon*, however, have too rigidly construed the patient confidentiality statute, disregarding university physicians' constitutional rights to counsel, free speech, and due process of law, which protect their right to confer freely with an attorney within the confidential confines of an attorney-client relationship. No other case in Florida or elsewhere has allowed a state statute to

trump the right of a class of individuals to communicate freely and openly with their legal counsel. Nothing in the statute suggests it was intended to prohibit physicians from communicating patient information as needed to obtain legal advice within a confidential attorney-client relationship, whether to prepare for being deposed as in this case, or for some other legitimate purpose.

*Dannemann* also imposes unnecessary and impractical restrictions on the flow of information between state universities and their physician employees. No other case has applied a statute to displace the constitutional and statutory obligations that require state universities to communicate with their employees on subjects within the scope of their employment. Nothing in the statute suggests it was intended to preclude physicians from communicating with the University Board to carry out the Board's constitutional duties of providing medical education, research, and public service; nor to prevent physicians from performing mandatory reporting and peer review functions.

Universities and medical malpractice lawsuits operate in the real world. Florida law in fact imposes on the state universities' boards of trustees, and university physicians, the obligation to communicate about patient medical information for medical education and patient care, research, and public service; and to perform hospital management functions including self-critical analysis and reporting to state and federal agencies. *See, e.g.*, sections 395.0193, 395.0197,

395.1051, 766.101, 766.106(3), 766.110, 766.203, 766.205(4), Fla. Stat. (2007); Fla. Bd. of Gov. Reg. 10.001(1)(c)7. None of these functions could be accomplished if section 456.057(8) were interpreted narrowly to prohibit disclosure of medical information in all but the enumerated situations. As a practical matter, physicians *must* convey medical information to others in the contexts of attorney-client consultation and the provision of medical education, research, and public service. The University Board *must* communicate with its employees about patients' medical information in order to evaluate employees' work; i.e., to address quality of care issues. The patient confidentiality statute neither acknowledges, nor eliminates, such necessary and independently-authorized communications. *See, for example, Estate of Stephens v. Galen Health Care, Inc.*, 911 So. 2d 277 (Fla. 2d DCA 2005), which held that no prohibited disclosure occurs when a hospital discusses patient information with its employees, because hospitals are only able to function through their employees and agents.

The need to communicate about patient medical information in independently-authorized circumstances, coupled with the district court's narrow and rigid interpretation of section 456.057(8), creates a dilemma for the state universities' boards of trustees. While this Court has recognized that legislative solutions are appropriate to solve legislatively-created problems, Florida's courts are not required to stand by helplessly in the face of dilemmas created by the

enactment of conflicting statutory and constitutional mandates. *See, e.g., Department of State v. Martin*, 916 So. 2d 763 (Fla. 2005); *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14, 16 (Fla. 1977).

At stake in this case are issues of grave importance to physicians and healthcare entities, and to the viability of university boards' provision of medical education, research, and public service in Florida. Widespread concern for a sound resolution of the conflicting statutory and constitutional issues presented in this case is reflected in the *amicus curiae* participation before the district court, and the intent to appear here, of the Florida Hospital Association, the Florida Medical Association, and the Florida Defense Lawyers' Association.

### **CONCLUSION**

The Court has jurisdiction to review the district court's express validation of the patient confidentiality statute, and the effect of its decision on the universities' boards of trustees as a class of constitutional officers. The Court should exercise its jurisdiction to address the conflicts in *Dannemann* decision between a literal interpretation of that statute on the one hand, and on the other hand to the constitutional right to counsel and to free speech; the ability of university boards to fulfill their constitutional and statutory duties of providing medical education, research, and public service; and the freedom of communication that inheres in the attorney-client relationship.

Respectfully submitted this 19th day of June, 2009.

**KELSEY APPELLATE  
LAW FIRM, P.A.**

**GREENBERG TRAURIG, P.A.**

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Susan L. Kelsey (FBN 772097)  
115 N. Calhoun St.  
Tallahassee, FL 32301  
Ph. (850) 681-3511  
Fax (850) 681-3611  
susanappeals@embarqmail.com

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Arthur J. England (FBN 22730)  
1221 Brickell Ave.  
Miami, Florida 33131-3224  
Ph. (305) 579-0605  
Fax (305) 961-5605  
englanda@gtlaw.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing with its attachment was furnished by United States mail to appellate counsel for Plaintiff/Respondent, James J. Taylor, Jr., Taylor & Taylor P.A., P.O. Box 2000, Keystone Heights, FL 32656; to trial counsel for Plaintiff/Respondent, Alan E. McMichael, The McMichael Law Firm, P.L., 527 E. University Ave., Gainesville, FL 32601; and to counsel for Defendant Shands Teaching Hospital and Clinics, Inc., Eric P. Gibbs, Estes, Ingram, Foels & Gibbs, P.A., 37 N. Orange Ave. Ste. 300, Orlando, FL 32801, this 19th day of June, 2009.

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Attorney



**CERTIFICATE OF TYPEFACE COMPLIANCE**

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced and in compliance with Florida Rule of Appellate Procedure 9.210.

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Attorney

## **INDEX TO APPENDIX**

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