

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

Case No. SC09-1006
L.T. No. 1D08-3923

PATRICIA DANNEMANN,
as personal representative of the estate of
Stephen Dannemann,

Respondent.

**On Review From The District Court Of Appeal
First District, State Of Florida**

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent brought the action below against Shands Teaching Hospital and Clinics, Inc. (“Shands”), for negligence of its nursing staff resulting in the death of Respondent’s husband, Stephen Dannemann.

In the course of the lawsuit, Respondent’s counsel sought to schedule depositions of the three Petitioner physicians. Dr. Beaver was one of Mr. Dannemann’s treating physicians. Drs. Normann and Cardona were not involved in Mr. Dannemann’s care; *they are pathologists who participated only in the post-mortem examination of the deceased.*

The doctors and their employer, the University of Florida Board of Trustees (“UFBOT”), are not and will not be defendants in the case. Respondent has represented repeatedly that she does not claim that any of the doctors did anything wrong, and that she will not, and cannot, sue them.¹

Nevertheless, the University of Florida Self-Insurance Program (“SIP” or “UFSIP”), which insures and defends Shands, the University of Florida

¹ The record below makes clear, in addition, that the applicable two-year statute of limitations in section 95.11(4)(b), Fla. Stat., has expired; the three-year notice of claim period in section 768.28(6)(a), Fla. Stat., also has expired; and the doctors, as UFBOT employees, are *statutorily immune from suit* under section 768.28(9)(a), Fla. Stat. (immunity applies absent an allegation of wanton, willful misconduct outside the course and scope of employment).

College of Medicine, and UFBOT's doctors, hired counsel, at SIP's expense, to represent the three doctors in connection with their depositions.

In response, and in reliance on section 456.057(8), Fla. Stat., and the First District's prior decision in *Hannon v. Roper*, 945 So. 2d 534 (Fla. 1st DCA 2006), *rev. denied*, 967 So. 2d 198 (Fla. 2007), Respondent filed a motion for protective order in the trial court. The motion recognized that the doctors have a right to retain counsel, and to consult with counsel prior to their depositions, but sought to prevent the doctors from discussing, with their SIP-appointed attorney or anyone else, privileged medical information concerning Mr. Dannemann. The doctors filed a counter motion in opposition to Respondent's motion.

The trial court denied Respondent's motion and granted the doctors' counter motion, expressly authorizing the doctors to "discuss[] the deceased's medical information with counsel during pre-deposition conferences." Respondent then petitioned the First District for a writ of certiorari to quash the trial court's order. In the decision now under review, *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, ___ So. 3d ___, 2009 WL 1272330 (Fla. 1st DCA 2009), the First District granted the petition and quashed the trial court order.

Respondent has never sought to prevent the doctors from having counsel defend them at their depositions, or to prevent them consulting counsel prior to the depositions. Nor does the First District's decision have any such effect. The issue, instead, is whether the doctors can discuss clearly privileged physician-patient information with counsel (or anyone), outside of their depositions and off the record, where neither the doctors nor their employer, UFBOT, have been sued or reasonably expect to be sued.

The real harm that Respondent has sought to prevent is not so much a disclosure between the doctors and their attorney, but rather the potential for clearly prohibited disclosures between the doctors or their attorney, on the one hand, and, on the other hand, Shands (the only defendant in the case), Shands' counsel, or SIP employees involved in the defense of the case. The whole purpose of Respondent's motion for protective order was to shut the door on Shands' and SIP's using SIP-appointed counsel as a conduit to circumvent section 456.057(8)'s prohibition on ex parte communications with the three doctors.

That this is what is really at stake is made clear by Petitioners' own arguments, both in their jurisdiction brief to this Court and in the courts

below.² These arguments expose that the true interest Petitioners seek to advance is not the doctors' interest in consulting with counsel; it is the interest of Shands, SIP, and their defense team in communicating with the doctors, through the attorney that SIP hired for them.³

² For example, the doctors asserted in the trial court, in identical affidavits prepared for them by their SIP-appointed counsel, that they should be free to discuss the deceased's confidential medical information not only with their SIP-appointed attorney, *but also "with UFBOT and. . .UFSIP, and Shands representatives, including. . .risk management and claims processing personnel, management and administrative employees. . . ."* (Emphasis added). These affidavits were part of the record before the First District.

Furthermore, in their brief to the First District, the doctors argued that section 456.057(8) could not be applied so as to "prevent *UFSIP risk managers* from having access to information from [the deceased's] treating physicians"; that they should be free to communicate confidential patient information "*to UFBOT employees assigned to UFSIP, such as risk managers*"; that their SIP-appointed attorney *should be free to "transmit to UFSIP or Shands any protected information obtained [by the attorney] during such consultation [between the attorney and the nonparty doctors];* that there should be *no bar to "communications between a UFBOT-employed physician's lawyer, and UFSIP personnel"*; and that *confidential medical information cannot "be kept away from risk and claims [i.e., SIP] personnel."* In sum, the doctors sought a broad ruling that section 456.057(8) "does not preclude attorney-client communications *or communications to risk managers.*" (Emphases added).

³ The record below shows that this concern is real. Contained in the record are excerpts from the trial transcript in a pre-*Hannon* case in which SIP hired the exact same attorney (Ronald L. Harrop, Esq.) to "represent" another nonparty UFBOT physician in another medical malpractice case against Shands. In that case, the doctor testified that Mr. Harrop and a SIP representative had engaged him in an ex parte, pre-trial conference to discuss the details of his treatment of the plaintiff's decedent and how the doctor could best "enlighten the jury" in his testimony.

The First District’s decisions in *Hannon* and *Dannemann* are based on this Court’s holding in *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), that section 456.057(8) (then numbered as section 455.241) “clos[ed] the door to the previous practice of many defense attorneys of meeting privately or otherwise communicating ex parte with plaintiff’s treating physician.” *Id.* at 152. This Court thus foreclosed precisely the sort of impropriety about which Respondent is concerned: that SIP would use the attorney it hired as a conduit to debrief the nonparty physician so that the doctor will know the “party line” of Shands’ SIP-funded defense. *Id.* at 156 (“We believe it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences.”).

This concern is underscored in this case by the fact that two of the three nonparty doctors are *pathologists* who did not see Mr. Dannemann *until after he died*. In the First District, Petitioners sought to justify the three doctors’ disclosure of Mr. Dannemann’s privileged medical information to their attorney on the argument that the doctors needed legal advice to evaluate whether they should reasonably expect to be sued. Petitioners never offered an explanation as to why the *pathologists* would need legal advice as to whether *they* should reasonably expect to be sued.

Respondent submitted in the courts below, and submits here, that the only plausible explanation for this obvious anomaly is the troubling one posited above: that Petitioners – and Shands and SIP – seek to exploit the attorney-client relationship as a subterfuge to circumvent the plain language of section 456.057(8), and make sure that the pathologists know Shands’ and SIP’s defense theory as to the cause of Mr. Dannemann’s death.

SUMMARY OF THE ARGUMENT

Petitioners cite two bases for this Court to exercise its discretionary jurisdiction. However, a plain reading of *Dannemann* shows that neither basis applies here.

Even if there were a basis for discretionary jurisdiction, there is no compelling reason for the Court to exercise its discretion to take this case on the merits. *Dannemann*’s application of section 456.057(8) accords with the statute’s plain, unambiguous language; is consistent with this Court’s holding and discussion in *Acosta, supra*; and raises no legitimate constitutional issue. Further review by this Court is unwarranted.

ARGUMENT

I. *Dannemann* Does Not Expressly Declare Section 456.057(8) Valid.

Nowhere in *Dannemann* does the First District expressly declare section 456.057(8) valid. Rather, in *Dannemann* the First District followed

Hannon – which involved exactly the same material facts and players – holding that “[w]e are bound by *Hannon* under the doctrine of *stare decisis*.” 2009 WL 1272330 at *1.⁴

It may be argued that a finding of statutory validity was necessary to and thus inherent in the First District’s decision in *Dannemann*, but that does not satisfy the constitutional requirement of an express declaration. See Anstead, Kogan, Hall and Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 29 Nova L. Rev. 431 (2005), at 503 (1980 amendments to article V, section 3, overruled the “inherency doctrine” as articulated in older decisions of this Court such as *Harrell’s Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959)).

II. *Dannemann* Does Not Expressly Affect The State University Boards Of Trustees.

Dannemann also does not expressly affect the state university boards of trustees. For jurisdiction on that basis to exist, the decision under review

⁴ This Court denied review in *Hannon*. 967 So. 2d 198 (Fla. 2007). Petitioners attempt to distance themselves from that denial by arguing that in *Hannon* review was *not* sought on the basis of section 456.057(8)’s alleged unconstitutionality as applied. But that is wrong. One of the two jurisdictional arguments made to this Court by the petitioner in *Hannon* was that the Court “should exercise its jurisdiction to review *Hannon* since it raises issues of exceptional importance regarding the right to counsel.” The *Hannon* petitioner specifically argued, in support of jurisdiction, that “[t]he *Hannon* decision violates Dr. Roper’s constitutional rights” to counsel. This Court thus denied review in *Hannon* in the face of the same constitutionality argument that Petitioners seek to rehash here.

“must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state.” *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974). The decision “must *directly* and, in some way, *exclusively* affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.” *Id.* (Emphases in original).

This case does not satisfy that standard. The First District simply applied an unambiguous statute to bar discussion of privileged patient medical information where neither the doctors nor their employer (UFBOT) had been sued or reasonably expected to be sued. Nothing in the decision *directly* affects the functions of the state university boards of trustees. Petitioners’ jurisdiction brief itself makes this clear. The purported effects mentioned there are, at best, vague, conjectural, indirect and attenuated.

Moreover, the decision does not *exclusively* affect the boards of trustees. To be sure, *Dannemann* applied section 456.057(8) in a factual context peculiar to Petitioners, Shands and SIP. Nevertheless, the decision affects (i.e., it is precedent for) *all* health care providers and their employers in this state. The exclusivity requirement cannot be met where, as here, the members of the asserted class (the boards of trustees) are affected simply

because they are “bound by [the decision] the same as any other” health care provider. *Spradley, supra* at 701-702.

III. There Is No Compelling Reason For This Court To Exercise Its Discretionary Jurisdiction.

This Court need not exercise its discretionary jurisdiction. *See, e.g., Wainwright v. Taylor*, 476 So. 2d 669, 670-671 (Fla. 1985). Even if the Court were persuaded that a basis for discretionary jurisdiction exists, there is no compelling reason for the Court to exercise its discretion to take this case on the merits.

The First District’s application of section 456.057(8) in *Dannemann* is consistent with this Court’s “common sense interpretation” of the statute in *Acosta, supra* at 156. It is consistent with this Court’s observation in *Acosta* that “a defendant-physician is free, under the statute, to discuss his knowledge of the patient in order to properly defend himself” – that is, otherwise confidential patient information “may be disclosed by a health care provider to his attorney *if* the provider expects to be named as a defendant in a negligence case.” *Id.* (quoting legislative history of the statute; emphasis added).

In *Acosta* this Court further found that the legislature’s “balancing [of] a patient’s individual privacy with society’s reasonable need for limited disclosure of medical information,” as that balance was struck in section

456.057(8), raised no constitutional concern, and was within the legislature’s “considerable latitude in providing Florida citizens with a high degree of privacy in their medical information.” *Id.*⁵

Perhaps most important, *under the facts of this case*, is that the First District’s decision properly forecloses the pre-*Hannon* practice engaged in by UFBOT, Shands and SIP, *see supra* at 4, n. 3, of using SIP-appointed counsel as a conduit to funnel information about their defense theories to nonparty physicians who have no expectation whatsoever of being sued. That practice patently violates section 456.057(8), cannot be squared with *Acosta*, and enjoys absolutely no constitutional protection.

CONCLUSION

For the foregoing reasons, this Court lacks discretionary jurisdiction, but even if jurisdiction existed, the Court should not exercise its discretion to consider the merits of Petitioners’ arguments.

⁵ The two First Amendment right-to-counsel cases on which Petitioners rely – *Denius v. Dunlap*, 209 F. 3d 944 (7th Cir. 2000), and *DeLoach v. Bevers*, 922 F. 2d 618 (10th Cir. 1990) – are distinguishable, because they did not involve disclosure of privileged information in violation of a statute prohibiting disclosure. Those cases also recognize that the right to consult legal counsel is not absolute. *See, e.g., Denius*, 209 F. 3d at 952, 955 (right to counsel is “subject to a number of restrictions and exceptions,” including where the state has “appropriate justification”). As noted in the text, *Acosta* expressly found “appropriate justification” for section 456.057(8)’s restrictions on disclosure. *Royal v. Harnage*, 826 So. 2d 332 (Fla. 2d DCA 2002), which Petitioners also cite, does not hold to the contrary.

Respectfully submitted this ____ day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. Mail to Susan L. Kelsey, Kelsey Appellate Law Firm, P.A., 115 North Calhoun Street, Tallahassee, Florida 32301, Arthur J. England, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131-3224, and Alan E. McMichael, The McMichael Law Firm, P.L., 527 East University Avenue, Gainesville, Florida 32601, this _____ day of July, 2009.

James J. Taylor Jr.

CERTIFICATE OF COMPLIANCE

In accordance with Fla.R.App.P. 9.210(a)(2), I hereby certify that this Brief was typed in Times New Roman 14-point font.

James J. Taylor Jr.