IN THE SUPREME COURT OF FLORIDA

Case No. SC 10-1361

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

RAMSEY HASAN,

Petitioner,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF JENNIFER SCHAUMBERG, D.M.D. IN SUPPORT OF RESPONDENTS, LANNY GARVAR, D.M.D., AND GARVAR & STEWART, D.M.D.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

This is a dental malpractice action. Dr. Jennifer Schaumberg is a dental practitioner and subsequent treater, but she is not a party to the underlying dental malpractice action. In conjunction with the lawsuit, Petitioner sought to depose Dr. Schaumberg, and her insurer retained counsel for her. At issue in this proceeding is Dr. Schaumberg's right to have a pre-deposition conference with her attorney.

The trial court denied Petitioner's Motion for Protective Order, authorizing the pre-deposition conference with the limitation that there be no discussion of the Petitioner's protected healthcare information. The Fourth District Court of Appeal affirmed the trial court's order, *see Hasan v. Garvar*, 34 So. 3d 785 (Fla. 4th DCA 2010), and the Petitioner seeks review of the appellate decision.

Dr. Schaumberg has a substantial interest in this proceeding. In fact, the Respondents characterized her as "the real party in interest to this proceeding" in their Response to the Petition for Writ of Common Law Certiorari, filed in the Fourth District. (Record, p. 30). Dr. Schaumberg has requested leave to appear as Amicus Curiae in this case to address the issues that affect her individual interest in being represented by counsel in these proceedings and her right to meaningful communication with her attorney. Her Amicus Curiae Brief supports the Respondents' position.

SUMMARY OF THE ARGUMENT

This case is before the Court on a petition to resolve an alleged conflict between the Fourth District Court of Appeals' decision in *Hasan* and the decisions in *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), *Dannemann v. Shands Teaching Hospital & Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st DCA 2009), and *Hannon v. Roper*, 945 So. 2d 534 (Fla. 1st DCA 2007). Contrary to Petitioner's argument, there is no express and direct conflict between *Hasan* and any of these decisions.

All of the decisions alleged to be in conflict are factually distinguishable from the instant case. This is not a case involving *ex parte* communication between defense counsel and a treating physician as in *Acosta*. Nor is it a case in which the court authorized unfettered communication with a treater in blatant disregard for section 456.057, Florida Statutes (2010), the statute which creates a privilege in confidential medical information. In fact, it is Dr. Schaumberg's position that none of these authorities is implicated in this case.

Rather, what is at issue is Dr. Schaumberg's right to exercise her First Amendment right to meaningful, unimpeded communication with her attorney. Petitioner supports a ruling that would deny Dr. Schaumberg the ability to communicate at all with her attorney. The Fourth District Court of Appeal, however, weighed the two competing interests and struck an appropriate balance between the Petitioner's right to maintain the confidentiality of his medical records

and Dr. Schaumberg's right to conference with her attorney. The appellate court's limitation on the communication accommodates both interests and should not be disturbed.

ARGUMENT

I. WHETHER SECTION 456.057, FLORIDA STATUTES, ACTS AS A COMPLETE BAR TO ANY PRIVATE COMMUNICATION BETWEEN A TREATING PHYSICIAN AND HER ATTORNEY AND EFFECTIVELY SUPERSEDES THE PHYSICIAN'S FIRST AMENDMENT RIGHT TO COMMUNICATE WITH HER ATTORNEY.

Dr. Schaumberg has an interest in not only being represented by counsel at her deposition, but also in conferencing with her attorney before the deposition to ensure meaningful representation. Her right to unfettered communication with her attorney is guaranteed by the First Amendment of the United States Constitution. Petitioner, the plaintiff in the underlying action, has a statutory privilege protecting the confidentiality of his medical information. *See* § 456.057, Fla. Stat. (2010) (directing that, with limited exceptions, a person's medical information shall not be disclosed without written authorization from the patient). Dr. Schaumberg does not dispute that privilege and recognizes her legal and professional obligation to respect that privilege. Dr. Schaumberg does, however, dispute the Petitioner's argument that the trial court's order in this case violates the statutory privilege and the suggestion that Petitioner's statutory privilege in the confidentiality of his

medical records supersedes her First Amendment right to communicate with her attorney. The trial court's order, which the Fourth District Court of Appeal affirmed, strikes a balance between these competing interests by affording Dr. Schaumberg the opportunity to meet with her attorney subject to the limitations required to comply with section 456.057, Florida Statutes.

The trial court's order in this case does not run afoul of *Acosta*. As the Fourth District recognized, and as Respondents have pointed out in their Answer Brief, there is no express and direct conflict because, unlike in the cases cited by the Petitioner, the situation presented here is not one in which the defense attorney seeks to have an *ex parte* communication with a treater. *See Hasan*, 34 So. 3d at 787. Rather, the issue in this case involves a conference between the non-party treater and her own attorney, an issue which this Court expressly did not decide in *Acosta*. *See Acosta*, 671 So. 2d at 150 ("At issue is whether *defense counsel* in a medical negligence action is barred from having an ex parte conference with a claimant's current treating physicians under the provisions of section 455.241(2), Florida Statutes (1993)."") (emphasis added). Under the facts of this case, not only is there no conflict with *Acosta*, but *Acosta* and the statute it interprets are not even implicated.

Nor is *Hasan* contrary to any of the other cases alleged to be in conflict. *See, e.g. Dannemann v. Shands Teaching Hosp. and Clinics, Inc.*, 14 So. 3d 246

(Fla. 1st DCA 2009); *Hannon v. Roper*, 945 So. 2d 534 (Fla. 1st DCA 2007). As the Fourth District stated, "[i]n *Dannemann* 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*." *Hasan*, 34 So. 3d at 787 (emphasis in original). In the instant case, the order allowing Dr. Schaumberg to have a pre-deposition conference with her own attorney explicitly prohibits discussion of Petitioner's medical condition and care.

Section 456.057, Florida Statutes (2010), formerly section 455.241, creates a "broad physician-patient privilege of confidentiality" in a patient's medical information. *Acosta*, 671 So. 2d at 150. The statute has been interpreted as limiting *ex parte* communications between defense counsel and the plaintiff's treating physicians without the plaintiff's consent. The statute is not, however, a complete bar to all communications between a treating physician and her attorney. *See Royal v. Harnage*, 826 So. 2d 332, 335 (Fla. 2d DCA 2002) ("We are not inclined to believe that section 455.667 [now renumbered as section 456.057] bars all discussion between a health care provider and his or her attorney concerning an upcoming deposition."). The trial court in this case correctly recognized the distinction and fashioned a remedy that protects the Petitioner's statutory privilege yet affords Dr. Schaumberg the opportunity to conference with her attorney.

Petitioner ignores the language in the trial court's order that imposes a limitation on the communication in accordance with section 456.057. Clearly, the court's order maintains the privilege in Petitioner's medical information.

Petitioner's position also ignores the fact that, in addition to the statute and the trial court's order, both Dr. Schaumberg and her attorney have independent ethical and legal obligations to maintain the confidentiality of Petitioner's medical information. But, Petitioner is not satisfied with these three safeguards of his statutory privilege. Indeed, Petitioner's entire argument is based on the assumption that if Dr. Schaumberg and her counsel are permitted to have a pre-deposition conference, they will most certainly, willfully violate the trial court's order, the law, and their ethical obligations. Dr. Schaumberg urges this Court to reject such rank speculation, just as the Fourth District did. *See Hasan*, 34 So. 3d at 787 ("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.").

Elevating his interest over Dr. Schaumberg's, Petitioner advocates for a complete bar to any communication between Dr. Schaumberg and her attorney. Dr. Schaumberg urges this Court to uphold the trial court's order and her First Amendment right to meaningfully communicate with her attorney and to reject the

Petitioner's unfounded suggestion that the professionals involved will disregard the law and their independent duties.

Petitioner's position is overkill and unnecessary. No Florida court has held that the privilege afforded by section 456.057 dictates such a result. On the contrary, the Second District Court of Appeal concluded that an order barring any pre-deposition communication between a treating physician and his attorney was an overly broad restriction. *See Royal*, 826 So. 2d at 332. In *Royal*, the order at issue prohibited *any attorney* from contacting the plaintiff's treating physician before his deposition. *Id.* at 334-35. The court stated that even if the trial court's order were otherwise proper, its language was "unnecessarily broad" because "[i]t prohibits any lawyer from talking to [the treater] *about anything* prior to a deposition or trial in this case." *Id.* at 335 (emphasis added). The court also expressed concern about the order's effect on the treater's ability to retain counsel:

> the order appears to prevent Dr. Letson from obtaining legal advice from his own lawyer prior to his deposition in this case. We are not inclined to believe that section 455.667 [now renumbered as section 456.057] bars all discussion between a health care provider and his or her attorney concerning an upcoming deposition.

Id. Citing *Royal*, the Fourth District in *Hasan* affirmed the trial court's order because, while it upheld the statutory privilege, it did not bar all communication. *See Hasan*, 34 So. 3d at 787.

Just as there is no untoward motive in Dr. Schaumberg's wish to consult

with her attorney, there is also no evidence to support Petitioner's suggestion that the insurer had some sinister motive in hiring counsel for Dr. Schaumberg. In fact, the record is not clear as to who initiated the hiring of the lawyer, i.e. whether the insurer approached Dr. Schaumberg or whether Dr. Schaumberg requested that her insurer provide her an attorney. Regardless, as explained below, the law is clear that Dr. Schaumberg has a right to retain counsel:

> Although there do not appear to be any civil cases on this point, the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process. *See, e.g. Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed.767 (1925). The right develops out of the principle that notice and hearing are preliminary steps essential to the passing of an enforceable judgment and that they constitute basic elements of the constitutional requirement of due process of law. [citations omitted].

Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1117-1118 (5th Cir. 1980). Further, that right includes the right to consult with her attorney. *Id.* at 1118 (recognizing that parties have the right to the guidance of their attorney at all stages in the proceedings and stating that, "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement").

In addition, it is pure speculation to suggest that Dr. Schaumberg or her attorney will collude with Dr. Garvar's attorney simply because the two are hired

by the same insurer. This situation is not much different than one in which a lawyer or other staff member moves to an opposing firm and is ethically bound not to reveal any of the confidential information regarding former clients. *See, e.g.* R. Regulating Fla. Bar 4-5.3. The rules allow for appropriate screening mechanisms to be put in place to avoid disclosure of confidential information within the law firm. Petitioner asks this Court to conclude at the outset, with no evidentiary basis, that the attorneys will disregard their ethical obligations simply because they are hired by the same insurer. This Court should not countenance such a drastic measure that will undermine the integrity of our system.

Aside from Petitioner's confidential medical information, there are a number of issues about which Dr. Schaumberg is entitled to seek counsel before her deposition. These may include her general questions about the deposition and trial procedure, her right to protect her own personal information, her ability to refuse to answer certain questions, and her risk of exposure in the lawsuit either as a *Fabre*[1] defendant or in a subsequent indemnity action. Surely the legislature in enacting section 456.057 did not intend to squelch all such communication between treating

[1] *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

physicians and their attorneys. There is no indication that the legislature intended to elevate a patient's right to maintain the confidentiality of his medical information over his treating physician's right to counsel.

In *Taylor v. Searcy Denney Scarola Barnhart & Shipley, P.A.*, 651 So. 2d 97, 100 (Fla. 4th DCA 1994), a law firm obtained an injunction to prohibit an attorney who had left the firm from communicating with his clients who wished to follow him to his new firm. The opinion concerned the propriety of a fine for the attorney's violation of the injunction, but in his opinion concurring in part and dissenting in part, the Honorable Gerald Mager questioned whether a court even had the authority to enjoin communication between a client and her lawyer:

> Communication between an individual (who is a client or prospective client) and an attorney is a subject matter that may be beyond the authority of the court to restrict, vis-a-vis the injunction process. If judicial restrictions upon such communications were permissible, the scope of any injunction would require precision in implementation and not overbreadth in incantation.
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> * * *
>
> I fervently believe that communications between lawyer and client, lawyer and prospective client, and lawyer and client of another law firm represent the type of subject matter that ought *not* be barred and restrained through the use of injunction. Any such order transcends the power and authority of a court. [footnote omitted] The notion that a court can enjoin communications between a client and counsel or prospective counsel seems to me to constitute an inappropriate, if not prohibited interference

> with the right of free expression, not to mention an unwarranted intrusion into a lawyer-client relationship, either existing or sought to be created.

Id. at 100, 104. Judge Mager's concern is justified.

Although the medical records privilege is broad, courts should take care not to trample on, or erode altogether, other privileges that are as equally valued. In fact, the legislature recognized these competing principles in providing exceptions to the confidentiality provided in section 456.057. *See* § 456.057(7)(a), Fla. Stat. (2010). Here, Dr. Schaumberg does not seek an exception to 456.057. Rather, she asks only that the court apply it in a way that accommodates both privileges at issue. The Fourth District Court of Appeal's decision does just that, and should be affirmed.

CONCLUSION

Amicus Curiae, Dr. Jennifer Schaumberg, respectfully requests that this Court dismiss this appeal for lack of conflict jurisdiction or, alternatively, affirm the Fourth District Court of Appeal's decision in *Hasan*.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 14th day of April, 2011, to: James C. Blecke, Esq., The Haggard Law Firm, P.A., 330 Alhambra Circle, First Floor, Coral Gables, Florida 33134; Paul Freedman, Esq., Kaplan and Freedman, P.A., 9410 S.W. 77th Avenue, Miami, Florida 33156; Douglas M. McIntosh, Esq., and Michael Barzyk, Esq., McIntosh Sawran & Cartaya, P.A., P.O. Box 7990, Fort Lauderdale, Florida 33338-7990.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief uses Times New Roman 14 point font and complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

_____/s/_____
Donna M. Krusbe