

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

REPLY BRIEF OF PETITIONER
RAMSEY HASAN

Kaplan and Freedman, P.A.
Counsel for Hasan
9410 S.W. 77th Avenue
Miami, Florida 33156
(305) 274-7533

James C. Blecke
Counsel for Hasan
The Haggard Law Firm, P.A.
330 Alhambra Circle, First Floor
Coral Gables, Florida 33134
Telephone (305) 446-5700
Facsimile (305) 446-1154

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REPLY ARGUMENT

The Answer and Amicus briefs all talk about the right to counsel. Dr. Schaumberg has never asserted her right to counsel. She did not appear at the hearing and did not have her own attorney at the hearing. There is absolutely no evidence in the record Dr. Schaumberg ever requested or retained independent counsel. The case is not about the right to counsel. The case is about witness interference by OMS.

Michael Ragan was retained by OMS and attended the hearing. He did not present evidence or argument on behalf of Dr. Schaumberg. The order under review granted Mr. Ragan, “a pre-deposition conference subject to attorney-client privilege” with Dr. Schaumberg. Mr. Ragan filed a brief in the Fourth District Court of Appeal in support of Garvar’s response to Hasan’s petition.

Mr. Ragan's brief outlined the OMS standard practice to retain counsel for their insureds who are deposed. A careful reading of the brief reveals it was written without consultation with Dr. Schaumberg, the purported client on whose behalf the brief was ostensibly filed. If he did not have an attorney/client relationship with Dr. Schaumberg, he should not have made an appearance at the hearing or filed a brief as her counsel. If he did have an attorney/client relationship, it includes OMS.

The OMS retained attorney for Garvar described the tripartite relationship created by OMS retention of Mr. Ragan in this case:

But what happens in Florida, and we always run into this problem, when an insurance company hires the lawyer for the defendant *or the witness in this case*, there's a tripartite relationship. . . . Just because OMSNIC is paying for that lawyer, there is a three-way relationship and there absolutely is an attorney/client relationship. [App. 7; e.s.].

Mr. Ragan is now a partner in McIntosh, Sawran & Cartaya, P.A., the same law firm representing Garvar. If he did establish an attorney/client relationship with Dr. Schaumberg, then his law firm is disqualified from deposing Dr. Schaumberg and cross-examining her at trial. See, *Narel Apparel Ltd., Inc. v. American Utex International*, 92 A.D.2d 913, 460 N.Y.S.2d 125 (1983); *Smiley v. Director, Office of Workers Compensation Program*, 984 F.2d 278 (9th Cir. 1992); *Selby v. Revlon Consumer Products Corp.*, 6 F.Supp.2d 577 (N.D. Tex. 1997); *In re Cendant Corporation Securi-*

ties Litigation, 124 F.Supp.2d 235 (D. N.J. 2000); *In re Celcyte Genetic Corporation Securities Litigation*, 2008 WL 5000156 (W.D. Wash. 2008).

OMS has apparently hired more attorneys and another law firm to represent Dr. Schaumberg. The brief filed in this Court identifies Kenneth W. Morgan, Jr., Donna M. Krusbe, and Scott C. Cochran as attorneys for Dr. Schaumberg. They make a very interesting statement at page eight of their brief. They say, “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.” (e.s.). Don’t they know?

The record is quite clear. Dr. Schaumberg was not at the hearing. If she wanted to hire an attorney, or have one hired for her, she would have said so. The only “evidence” in the record is the OMS affidavit improperly filed with the District Court by Mr. Ragan. It says, “It has always been the policy that OMSNIC National Insurance Company would provide counsel to represent their insureds’ interests when subpoenaed for deposition as non-party health care practitioners and treaters.” The OMS affidavit implies OMS initiation of the contact. If Dr. Schaumberg had initiated the contact, the OMS affiant certainly would have said so.

Since Mr. Ragan was able to get an affidavit from his client OMS, why didn’t he get one from Dr. Schaumberg — especially if it would have benefitted the brief he filed in support of Garvar’s position in the case? If Mr. Ragan did have an at-

torney/client relationship, and consulted with Dr. Schaumberg, he must have asked her the question in preparation of his brief.

The sequencing of the briefing in the District Court is significant. Hasan's Reply was very pointed on the topic of Dr. Schaumberg's silence. It was served on Mr. Ragan on March 25, 2010. The affidavit attached to Mr. Ragan's "Amicus" brief is dated March 31, 2010. The brief itself was served April 5, 2010.

Just as Mr. Ragan should have spoken to Dr. Schaumberg before filing a brief attributed to her, attorneys Morgan, Krusbe and Cochran should have done the same before filing a brief in this Court attributed to her. Of course it is possible (and perhaps admirable) that none of the OMS attorneys have actually contacted Dr. Schaumberg, pending a decision by this Court. If so, then their advocacy should be given the consideration it deserves, as advocacy on behalf of OMS.

In *Acosta v. Richter*, 671 So.2d 149, 156 (Fla. 1996) , this Court said:

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.

Sophism is defined as clever and plausible but fallacious argument or form of reasoning, whether or not intended to deceive. Sophistry means unsound or misleading but clever, plausible, and subtle argument or reasoning.

The “right to counsel” advocated by Garvar and OMS is a euphemism for OMS’s asserted right to interfere with the physician/patient privilege. OMS wants to deny Hasan access to his treating physician and wants to influence Dr. Schaumberg’s testimony.

Why are Garvar and his attorneys arguing the case so vigorously at both the trial court level and the appellate level? It is obviously so the OMS retained counsel can influence Dr. Schaumberg’s testimony in a manner favorable to Garvar and OMS economic interests. But if the Amicus FDLA is correct about the *Fabre* spectre (FDLA brief at pages 7-8), then the correct advice to Dr. Schaumberg will be antithetical to Garvar and OMS interests. Will Dr. Schaumberg be encouraged to *admit* fault so Garvar can put her on the verdict? Will OMS counsel encourage and assist Dr. Schaumberg in *blaming* Garvar? The conflicts are irreconcilable.

If *Fabre* is a legitimate concern for Dr. Schaumberg, she should run, not walk, to conference with her patient’s attorney. It will be in their mutual best interest to defeat any claim Dr. Schaumberg was negligent. Hasan has consistently taken the position Dr. Schaumberg is not at fault in any way.

In his main brief, Hasan cited *Lee Memorial Health System v. Smith*, 36 Fla.L.Weekly D212, 213, 2011 WL 252316 (Fla. 2d DCA 2011), on the importance of maintaining the physician/patient relationship. Neither the Answer nor the Amicus briefs discuss or distinguish this case or its principles.

OMS retention of counsel for Dr. Schaumberg has clearly impaired Hasan's physician/patient relationship. There is no legal justification for this. Intermeddling in the physician/patient relationship cannot be condoned.

This Court's decision in *Acosta v. Richter* prohibits *ex parte* communication with a nonparty treating physician, even where the physician is not required to say anything. The Fourth District decision is in irreconcilable conflict with this Court's decision.

Acosta and its progeny preclude adverse party obstruction or interference with the physician-patient relationship. The retention of counsel by Garvar's insurer for a nonparty subsequent treating physician witness is both legally and ethically wrong. Hasan is entitled to unfettered access to his health care providers.

CONCLUSION

This Court should quash the decision rendered by the district court in this case and protect Hasan's statutory right to physician/patient confidentiality.

Kaplan and Freedman, P.A.
Counsel for Hasan
9410 S.W. 77th Avenue
Miami, Florida 33156
(305) 274-7533

James C. Blecke
Counsel for Hasan
The Haggard Law Firm, P.A.
330 Alhambra Circle, First Floor
Coral Gables, Florida 33134
Telephone (305) 446-5700

By _____
James C. Blecke
Florida Bar No. 136047

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; Kenneth W. Morgan, Jr., Esquire, Donna M. Krusbe, Esquire, and Scott C. Cochran, Esquire, Billing, Cochran, et al., Sun Trust Center, Sixth Floor, 515 East Las Olas Boulevard, Fort Lauderdale, Florida 33301; and Andrew S. Bolin, Esquire, Beytin, Bolin, et al., 201 N. Franklin Street, Suite 2900, Tampa, Florida 33602, this 25th day of April, 2011.

Kaplan and Freedman, P.A.
Counsel for Hasan
9410 S.W. 77th Avenue
Miami, Florida 33156
(305) 274-7533

James C. Blecke
Counsel for Hasan
The Haggard Law Firm, P.A.
330 Alhambra Circle, First Floor
Coral Gables, Florida 33134
Telephone (305) 446-5700
Facsimile (305) 446-1154

By _____
James C. Blecke
Florida Bar No. 136047

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY compliance with font requirements.

By _____
James C. Blecke