SUPREME COURT OF FLORIDA

Case No. SC15-1538
L.T. Case No. 1D14-3178

EMMA GAYLE WEAVER, individually,
and as Personal Representative of the
Estate of THOMAS E. WEAVER, deceased,

Plaintiff-Appellant,

v.

STEPHEN C. MYERS, M.D., et al.,

Defendant-Appellees.

AMICUS BRIEF OF THE FLORIDA HOSPITAL ASSOCIATION, THE FLORIDA MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Hospital Association (the "FHA") is a Florida nonprofit trade association consisting of around 200 hospitals and health systems in Florida. The FHA represents its members on matters of common interest before all three branches of government and regularly appears as amicus curiae to address issues affecting its members in the courts of Florida.

The Florida Medical Association (the "FMA") is a not-for-profit corporation whose approximately 20,000 members are Florida physicians in all medical specialties. FMA exists to further the interests of its members and promote the practice of medicine and quality healthcare for all those receiving health care in Florida. FMA advances these goals through legislative, rule-making and litigation efforts.

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including in Florida.

The FMA and AMA join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

As organizations that represent a broad range of interests, the FHA, AMA and FMA can provide the Court with perspective on the importance of quickly investigating any alleged instances of medical negligence in order to efficiently accomplish the goals set forth in Florida Statutes Chapter 766, namely that those claims with merit can be settled without necessity of litigation. The FHA, AMA and FMA can specifically apprise the Court of the benefits of Section 766.106(6)(b)(5), that allows the attorneys of a prospective defendant to interview a claimant's current treating physicians in order to learn the claimant's health information so that the prospective defendant is in a position to evaluate and settle alleged medical negligence claims that do have merit without the cost and expense of litigation.

SUMMARY OF ARGUMENT

Florida's presuit investigation process was intended to allow both claimants and potential defendants the opportunity to determine whether a claim for medical malpractice is meritorious, and to encourage the early resolution of claims between potential parties without the necessity of a time consuming and costly adversarial proceedings. However, prior to the subject 2013 Amendment, the statute contained a glaring deficiency that in some cases prevented a potential defendant from obtaining necessary information from a claimant's treating physicians so that the stated goals of the statute could be fairly accomplished. The ability to speak to a claimant's treating physicians during the presuit investigation process provides the defendant with valuable insight. A claimant's treating physicians may have opinions or criticisms of the care and treatment rendered by the potential defendant. Treating physicians can provide information critical to issues surrounding causation and the condition of the claimant which would directly impact the value of a potential claim and allow both parties to negotiate on a level playing field. Prior to the enactment of the amendment, potential defendants were required to make decisions to defend claims or to negotiate during presuit without this information or were forced to rely on representations of claimant's counsel. The absolute prohibition regarding speaking with treating physicians during the presuit process resulted in an uneven and unfair advantage to claimants.

The Florida Legislature is empowered to modify the statutorily created physician-patient privilege in a narrowly tailored way to accomplish the goals of the presuit investigation process in medical malpractice cases. Accordingly, the decision of the First District Court of Appeals should be affirmed.

ARGUMENT

I. THE FLORIDA LEGISLATURE IS EMPOWERED TO MODIFY THE PHYSICIAN-PATIENT PRIVILEGE TO ACCOMPLISH THE GOALS OF PRESUIT INVESTIGATION IN MEDICAL MALPRACTICE ACTIONS

Prior to 1988, a physician-patient privilege did not exist in the State of Florida. This Court ruled that, "[n]o law, statutory or common, prohibited" ex parte communications between defendants with a Plaintiff's treating physician. See *Coraluzzo v. Fass*, 450 So. 2d 858, 860 (1984) (holding that ex parte communications between a defendant and a treating physician in a medical malpractice case were permissible and did not violate any established confidentiality between doctor and patient). At the time of the ruling in *Coraluzzo*, only a limited privilege to certain medical records existed under §455.241(2), Fla. Stat. (1983). *Acosta v. Richter,* 671 So. 2d 149 (Fla. 1996). In 1988 the Legislature amended §455.241(2) to add the language, "…the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care providers involved in the care and treatment of the patient, except upon written authorization of the patient." Id. This action by the

Legislature was the first creation of a physician-patient privilege and the genesis of the prohibition on ex parte communication between a defendant and the treating physician of a plaintiff. See id at 156-157. Interestingly, even at the time of the decision in *Acosta*, the Legislature, and in turn this Court, recognized that certain exceptions to the physician-patient privilege were necessary and required. The statute at that time allowed for a limited exception in which physicians who "reasonably expected" to be named as defendants in a medical malpractice action, could disclose the substance of their care in order to assist in their defense. See id at 156. ("Common sense dictates that a defendant health care provider should be able to discuss patient information to defend herself in a medical negligence action brought by the patient"). Because the physician-patient privilege is entirely the creation of the Legislature, the law can be modified or limited by a subsequent statute even when the effect of the new law, "amounts to an implied repeal of all prior Acts in conflict therewith." See *Tamiami Trail Tours, Inc.* v. Lee, 142 Fla. 68 (Fla 1940; *American Bakeries Co. v. Haines City*, 131 Fla. 790 (Fla. 1938). Section 766.1065 does not completely repeal the physician-patient privilege but instead simply modifies it, in a narrow manner, by requiring the plaintiff to include with their presuit notice of intent to initiate a medical malpractice claim, an authorization allowing ex parte meetings with treating physicians. The new statue moves the law to the posture it was in at the time of the *Coraluzzo* decision, and

permits health care providers who are the subject of a claim for medical malpractice to obtain all of the relevant evidence needed to make decisions regarding the viability of their defenses.

Florida's law allowing ex parte communications with physicians is not unique in the United States. Arkansas, *King v. Ahrens,* 798 F. Supp. 1371 (W.D. Ark. 1992); South Carolina, *Felder v. Wyman*, 139 F.R.D. 85 (D.S.C. 1991); Kansas, *Bryant v. Hilst,* 136 F.R.D. 487 (D. Kan. 1991); District of Columbia, *Alston v. Greater S.E. Community Hosp.,* 107 F.R.D. 35 (D. D.C. 1985); Alaska, *Langdon v. Champion,* 745 P.2d 1371 (Alaska 1987); Delaware, *Green v. Bloodsworth,* 501 A.2d 1257 (Del. Super. Ct. 1985); Idaho, *Pearce v. Ollie*, 826 P.2d 888 (Idaho 1992); Kentucky, *Roberts v. Estep*, 845 S.W.2d 544 (Ky. 1993); Michigan, *Domako v. Rowe,* 475 N.W.2d 30 (Mich. 1991); Minnesota, *Blohm v. Minneapolis Urological Surgeons*, 449 N.W.2d 168 (Minn. 1989) (citing Minn. Stat. section 595.02 (1988), which allows for "informal discussion" between treating physicians and defense attorneys in medical malpractice actions); Missouri, *Brandt v. Medical Defense Assoc.,* 856 S.W.2d 667 (Mo. 1993); New Jersey, *Stempler v. Speidell,* 495 A.2d 857 (N.J. 1985); Rhode Island, *Lewis v. Roderick,* 617 A.2d 119 (R.I. 1992); Tennessee, *Quarles v. Sutherland,* 389 S.W.2d 249 (Tenn. 1965) (holding that no physician-patient privilege exists) and Texas, Tex. Civ.Prac. & Rem. Code Ann. §74.052(a)-(c) (Requiring claimants in

medical malpractice actions to provide an authorization along with presuit notice of a claim that allows ex parte communication with treaters) all allow ex parte or "informal communication" between defense counsel and the treating physicians of a Plaintiff or Claimant in civil actions. *See also*, *John Jennings, The Physician-Patient Relationship: The Permissibility of Ex-Parte Communications Between Plaintiff's Treating Physicians and Defense Counsel*, 59 MO. L. REV. 441, 458 (1994).

Perhaps most relevant to the present analysis of the impact the Florida statute has on patients is the law passed by Texas which is similar to §766.1065. See Tex. Civ. Prac. & Rem. Code Ann. §74.052(a)-(c) (requiring a substantially similar authorization by claimants 60 days before filing). There has been no evidence of widespread or common abuses by defense counsel after the implementation of the Texas statute which allows prospective defendants to communicate informally with treating physicians during their investigation of medical negligence claims. Florida's law, in its short existence, likewise has not been the subject of alleged misconduct or violations of irrelevant disclosures of medical information. The lack of significant examples of abuse is likely due in part to the controls that are written into the law. Patients are able to specifically identify treating physicians who are exempt from the required authorization on the basis that the care rendered by those providers is not relevant to the physical, mental or

emotional damages being alleged. §766.1065(3)(a), Fla. Stat. (2013). This ability for the claimant to specifically protect information held by certain physicians eliminates concerns that Defense counsel will use the authorization as an overly invasive tool to harass or intimidate claimants.

Moreover, Florida's law provides even greater safeguards against such theoretical harms than the law passed in Texas. §766.1065 only requires the claimant to identify treating physicians for a period of two years prior to the alleged malpractice as compared to the Texas law requiring disclosure for a five-year period. The Florida law also uniquely requires the prospective defendants to withhold directly contacting a claimant's treating physician prior to requesting that the claimant's attorney arrange an interview. Only if the claimant's attorney does not arrange the interview within fifteen days of the request, may the defendant conduct the interview without notice to the claimant or his counsel. See Fla. Stat. §766.106(6)(b)(5). This notice provision allows claimant, through his or her counsel, to be fully aware of the activities of Defense counsel to ensure that only those physicians who have been listed as relevant providers are being interviewed. Allowing the patient/claimant to serve in the role as "gatekeeper" for the disclosure of relevant medical information, as well as providing notice to the claimant of the intent to contact a physician identified in their presuit notice, enhances privacy and virtually eliminates the opportunity for abuses.

If there is isolated bad faith by a defendant, the Courts are well-equipped to handle such conduct. A trial court possesses the inherent authority to impose attorney's fees against an attorney for bad faith conduct. *Moakley v. Smallwood,* 826 So. 2d 221, (Fla. 2002).

II. PREVENTING EX PARTE INTERVIEWS ONLY SERVES TO IMPEDE DISCOVERY AND FRUSTRATE THE PURPOSE OF THE PRESUIT INVESTIGATION PROCESS

It is well settled in Florida, that a Plaintiff places their medical condition at issue when they choose to bring a claim for personal injuries. *See Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005) (stating that the right to privacy is waived where a parties mental and physical condition is at issue). Therefore, the objection to a prospective defendant's ability to obtain information from a treating physician under §766.1065 only serves to impede discovery that will certainly take place during suit. Claimants intending to file a medical malpractice action already must disclose and produce relevant medical records to the prospective defendants during the presuit period. See §766.106(2)(a), Fla. Stat. (2013) (requiring disclosure of "copies of all the medical records" relied upon by claimant and claimant's expert). Once a case goes into suit, the Rules of Civil Procedure further illuminate the concept of allowing parties to have a fair chance to fully explore their opponents' medical condition when that condition has been placed at issue. For example, a

party may even force their opponent to sit for a Compulsory Medical Examination by a physician of their choosing. Fla. R. Civ. P. 1.360.

Attempts to prevent ex parte interviews between defense counsel and treating physicians during presuit also serves to frustrate the purpose of the presuit investigation process under Chapter 766. In passing the Medical Malpractice Act the Legislature stated that the intent was to "provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, *presuit investigation* and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses…." §766.201(2), Fla. Stat. (2003) (emphasis added). Further, the intent of the parties taking part in presuit investigation was to, "eliminate frivolous claims and defenses." §766.201(2)(a)(1). With the passage of §766.1065, the Legislature was recognizing and responding to a common refrain from advocates and clients on both sides of the system: medical malpractice lawsuits take too long to be brought to ultimate resolution. Fla. S. Judiciary Comm. Workshop, recording of proceedings (Feb. 5,2013) (discussion and testimony on civil litigation reform), at 15-21. The Legislature created, with the passage of §766.1065, a mechanism of informal discovery with treating physician witnesses who will be central to determining the relative merit and value of a case that is efficient, expedient and cost-effective. Efficiency in investigating and identifying frivolous claims and

defenses is an extension of the goal of presuit as a whole. Establishing a presuit investigation process was intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding. *Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991); *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993) ("[T]he purpose of the chapter 766 presuit requirements is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims"). If prospective defendants are not permitted this discovery, they are forced to obtain the exact same information through a formal discovery process that is cumbersome, time consuming and expensive. The necessity of added costs in time and financial resources are unfortunately uniquely shouldered by defendants. The ability to determine what if anything a treating physician has to say, and the impact that it will have on the case, can be accomplished by the Plaintiff's attorney through a phone call in a relatively short period of time. If the current law is struck, Defendants will return to being forced to enter litigation at the unfair disadvantage of not knowing the impact of the knowledge or opinion of central witnesses. Moreover, relevant treaters' depositions must be set at a time that is convenient for both Plaintiff and Defense counsel. A court reporter must be hired and the treating physician must set aside time and space in his or her office for a deposition to be conducted. The deposition can disrupt the office practice and displace patients on the physician's schedule. If the

physician's testimony has a relatively insignificant impact on the case, the time and money expended in securing formal discovery is lost to both parties. If the treater has a significant impact detrimental to the meritorious defense of a case, the potential for resolution has been delayed for months and more expenses have been incurred making the case more expensive to resolve. If the treating physician has information detrimental to the patient's claim, it is outrageously inapposite to the notions of fairness and justice to suggest that such information should be hidden from the Defendant during the critical presuit investigation phase. The time, expense and potential asymmetry of information can be cured by allowing the current law to stand. A phone call between defense counsel and the treating physician can serve to facilitate the same information that would be revealed during a formal deposition. The information gleaned can be evaluated by defense counsel and counsel for the claimant alike. In cases where the information is potentially supportive of a meritorious claim, the goal of early resolution will be aided. If the case does move forward into litigation, the discovery can be streamlined based on the information learned and only the physicians with the most relevant information need to be deposed.

In some cases, requiring lengthy, costly formal discovery drives up costs of litigation to a point where resolution is impossible. Not infrequently, both parties recognize the potential for an unsuccessful outcome at trial. Many litigants

recognize the utility of resolving cases prior to trial. However, no Plaintiff (or their attorney) is typically open to the idea of resolving a case that results in little to no actual payment to the Plaintiff after satisfaction of attorney's fees, costs and liens. As a result, spending significant sums on formal discovery, that could otherwise be accomplished through informal telephone calls, creates scenarios where some cases simply cannot be settled because the costs, together with the other financial obligations of the Plaintiff, have exceeded the reasonable settlement value of the claim. Those cases linger in the system even longer and take up valuable space on the Court's increasingly overtaxed dockets.

III. PREVENTING PROSPECTIVE DEFENDANTS FROM OBTAINING NECESSARY INFORMATION FROM TREATING PHYSICIANS DURING PRESUIT CAN CREATE IRREPARABLE HARM

Making decisions regarding whether to defend or resolve a case during presuit without information from a claimant's treating physicians can cause irreparable harm to potential defendants. §766.207(2), Fla. Stat. (2003) allows a potential defendant to limit his or her exposure to damages by admitting liability at the conclusion of the presuit investigation process and demanding arbitration as to damages only. Electing this option furthers the goals of the presuit process by eliminating the need for a jury trial and the obligation for a Plaintiff to prove liability. §766.207(7), Fla. Stat. (2003). The statutory framework also provides guidance as to total damages that can help parties resolve cases due to the

knowledge of what the likely total award range will be at the conclusion of the arbitration process. If arbitration is accepted by the Claimant, net economic damages are awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments. §766.207(7)(a), Fla. Stat. (2003). Noneconomic damages are limited to a maximum of $250,000 per incident, calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life warrants an award of not more than $125,000 noneconomic damages. §766.207(7)(b), Fla. Stat. (2003). If the demand for arbitration is rejected, the damages awardable at trial are limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. §766.209(4)(a), Fla. Stat. (2003).

If the demand for arbitration is not made at the conclusion of the 90-day presuit investigation period, such limitations on liability are no longer available and there is no mechanism for a potential defendant to reclaim them. If a treating physician, intends to offer criticisms or can provide key insight into a piece of evidence that would likely result in a finding of fault against the potential defendant, that information should be available to all parties so that well-reasoned and informed decisions regarding the election to admit or deny liability at the

conclusion of presuit can be made. Allowing a claimant to withhold key information until after the window of opportunity to limit damages has passed, unfairly prejudices potential defendants and circumvents the worthy goals of the presuit investigation process and of the ability to elect arbitration in medical malpractice cases.

CONCLUSION

The decision of the First District Court of Appeals should be upheld. §766.1065 corrects a previous imbalance in the presuit investigation statute for medical malpractice claims. The authorization required that allows ex-parte communication between defense counsel and a claimant's treating physicians is an allowable and necessary modification to the physician-patient privilege in Florida. Allowing this informal discovery creates a fair process that furthers the stated goal of the Legislature in creating the Medical Malpractice Act and prevents health care providers from being prejudiced in their evaluation of claims being made against them. If the right to conduct this informal discovery is removed, the result will be the return to an uneven playing field and the inability to avoid cumbersome and costly formal discovery.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to the individuals identified on the attached Service List this July 8th of 2016.

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CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this Amicus Brief has been typed using the 14 point Times New Roman font as required by Rule 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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