IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CASE NO. 1D14-3178
L.T. CASE NO. 2013-CA-1714

On Appeal from the First Judicial Circuit,
In and For Escambia County, Florida

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

Appellant/Plaintiff,

vs.

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

Appellee/Defendants.

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE REFORM INSTITUTE AND THE FLORIDA MEDICAL ASSOCIATION IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, small business owners, business leaders, doctors, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in the civil justice system in Florida through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices.

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.

As organizations that represents a broad range of interests, the Institute and FMA can provide the Court with perspective on the importance of quickly investigating any alleged instances of medical negligence in order that those with merit can be settled without necessity of litigation. The Institute and FMA can apprise the Court of the benefits of a new law that was adopted to permit the attorneys of a prospective defendant to be able to learn the claimant's health information from the doctor currently treating the claimant in order to be in a

position to evaluate and settle those claims with merit without the need for litigation.

SUMMARY OF THE ARGUMENT

This brief will address some of the arguments raised in the briefs of the Appellant (referred to as the Plaintiff or claimant) and her Amicus Curiae, the Florida Justice Association.

Wisdom of the Legislature

The objective of the Legislature in providing for a pre-suit notice was to encourage a settlement of meritorious medical malpractice claims without the necessity of litigation. This objective was not entirely attained because the doctor threatened with a lawsuit or his or her lawyer could not interview the doctor who was then treating the claimant. As a consequence, the defense was unable to fully evaluate the claim in order to determine whether it should be settled. This dilemma was resolved by Chapter 2013-108 which requires the pre-suit notice to authorize an ex parte interview with a treating doctor thereby providing the defense with sufficient information to settle those claims with merit prior to litigation.

Separation of Powers

When the Legislature enacted the statute requiring the pre-suit notices, the Supreme Court adopted Rule 1.650 by essentially tracking the statute. Rule 1.650(c), as it does today, provided that: "Upon receipt by a prospective defendant

of a notice of intent to initiate litigation, the parties may obtain pre-suit screening discovery by one more of the following methods. . . ." None of these methods authorized the prospective defendant or his or her lawyer to interview the doctor then treating the claimant. The use of the term "may" in the Rule is clearly permissive so there is no conflict with Chapter 2013-108 which merely added as an additional method, the ability to have the ex parte interview.

Furthermore, the courts have consistently found that the pre-suit provisions in medical malpractice suits are "primarily substantive" or "substantive in nature" rather than procedural. Surely, this modest amendment to the pre-suit notice does not violate the separation of powers.

Access to the Court

The Plaintiff and her Amicus contend that because the ex parte interviews might result in disclosing "private protected health information" a plaintiff will have been denied access to the Court.

However, this Court has held that a statute which only imposes a condition to suit, but does not abolish a substantive right must be upheld unless it creates a significantly difficult impediment to the right of access. Henderson v. Crosby, 883 So. 2d 847 (Fla. 1st DCA 2004). Clearly, the possible disclosure of relevant health information does not rise to the level of barring a plaintiff's access to court.

Furthermore, the information they wish to protect is only "private or protected" if it is deemed confidential by reason of the physician/patient privilege. As the courts have explained, this privilege was only created by the Legislature and the Legislature is at liberty to modify it or eliminate it. In this instance, Chapter 2013-108 has simply modified it by allowing all of the relevant health information of the claimant in a medical malpractice action to be available to the defendant doctor or his or her lawyer at an ex parte interview.

The Plaintiff is not denied her access to court.

ARGUMENT

CHAPTER 2013-108 IS NOT UNCONSTITUTIONAL IN ANY RESPECT.

The standard of review in this case is *De Novo*. However, "when the constitutionality of a statute is at issue, the courts must find the statute valid if there is any reasonable basis for doing so." State Farm Auto Ins. v. Warren, 805 So. 2d 1074, 1077 (Fla. 5th DCA 2002).

I. CHAPTER 2013-108 PROMOTES THE SETTLEMENT OF MERITORIOUS MEDICAL MALPRACTICE CLAIMS WITHOUT LITIGATION

The Legislature has long been concerned about the societal cost of medical malpractice litigation. The Comprehensive Medical Malpractice Reform Act of 1985 was enacted to address this concern. In setting forth its purpose in the Act, the Legislature stated: "Our present tort law/liability insurance system for medical

malpractice will eventually break down and the cost will continue to rise above acceptable levels, unless fundamental reforms of said tort law/liability insurance systems are undertaken."

Under the Act, before filing suit the claimant's attorney is required to serve a pre-suit notice upon the prospective defendant which includes an affidavit from an expert outlining the merits of the claim together with the medical records relied upon by the expert and the names and addresses of doctors who have treated the claimant for the past two years. As the Supreme Court explained, the purpose of the statutes establishing pre-suit requirements for medical malpractice actions is to alleviate the high cost of medical malpractice claims through an early determination and prompt resolution of claims, and not to deny access to courts to plaintiffs. Kukral v. Mekras, 679 So. 2d 278 (Fla. 1996). Upon receipt of the pre-suit notice the prospective defendant and his or her insurer is required to conduct a pre-suit investigation with a duty towards settling those claims deemed to be meritorious. If no settlement is reached within a prescribed period of time, the claimant is then permitted to file suit.

Until the enactment of Chapter 2013-108, the Medical Malpractice Act lacked an essential element necessary to fully promote the settlement of meritorious claims without litigation. The Supreme Court had held that the physician/patient privilege prohibited counsel for the defendant doctor from

privately talking to treating doctors. Acosta v. Richter, 671 So. 2d 149 (Fla. 1996). As a consequence, the defendant doctor and his or her insurance carrier was limited in their ability to try to evaluate the claim. In reality, they often had insufficient knowledge to settle the claim without knowing the treating doctor's evaluation of the claimant's current medical condition and his or her view of the merits of the claim.

In order to address this problem, Chapter 2013-108 included a provision requiring the pre-suit notice to include an authorization for the prospective defendant and his or her legal representative to conduct private interviews with the treating doctor. At the same time, in order to protect the rights of the treating doctor, he or she is permitted to decline the interview.

The Plaintiff would have this Court believe that permitting an ex parte interview with the treating doctor is a drastic addition to the medical malpractice legislation. To the contrary, ex parte interviews are a longstanding and significant component of pretrial discovery. Ex parte communications are extra-judicial disclosures made informally by witnesses to one party in a lawsuit without opposing counsel being present. Lawyers and courts have long recognized ex parte interviews as a time-honored method of "informal discovery" that is efficient and cost-effective for both parties when compared to formal depositions.

Furthermore, the ex parte interview with the treating doctor is inexpensive. It can even be done by a simple telephone call. As explained by the court in Transworld Investments v. Drobny, 554 P.2d 1148, 1152 (Alaska 1976):

> We find no legal impediments in existence which limit informal methods of discovery, such as private conferences with the attending physicians, or the voluntary exchange of medical information by the parties. In our opinion such informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with resulting decrease in litigation costs, and represent further the wise application of judicial resources.

Once a lawsuit is filed, some of the pertinent medical information may ultimately be obtained from the treating doctor, but at that point the objective of a pre-suit settlement would have been thwarted. With the ability of the defense to have a private interview with the treating doctor, all the cards are on the table prior to suit. Both parties are then able to fully evaluate the claim and to settle those that are meritorious without litigation.

II. CHAPTER 2013-108 DOES NOT VIOLATE THE SEPARATION OF POWERS PRESCRIBED IN ARTICLE V. SECTION 2 OF THE FLORIDA CONSTITUTION

There is no violation of the separation of powers because Chapter 2013-108 is substantive and does not conflict with Florida Rule of Civil Procedure 1.650. This rule was adopted by the Supreme Court on December 30, 1988 to apply to the amendments to pre-suit screening enacted by the Legislature in Section 758.57,

Florida Statutes (Supp. 1986). The rule, which remains unchanged today, tracked the statute almost word for word and then added a section on time requirements.

Rule 1.650(c) states:

> **(c) Discovery.**
>
> **(1) Types.** Upon receipt by a prospective defendant of a notice of intent to initiate litigation, the parties may obtain presuit screening discovery by one or more of the following methods: unsworn statements upon oral examination; production of documents or things; and physical examinations.

Fla. R. Civ. P. 1.650(c).

In paragraph (c)(2)(A) the Rule goes on to state that the provision for giving unsworn statements is directed to obtaining such statements from other parties. This provision must have been included in the statute because the Legislature earlier that year had adopted new legislation on physician/patient privilege.

There is no conflict between the rule and Chapter 2013-108. This is because Rule 1.650(c)(1) states that the parties "may" obtain pre-suit screening by one or more of the three methods. Provisions from other Rules of Civil Procedure demonstrate that where the court intends for a list to be exclusive that intent is clearly expressed in the rule.[1] Had the court intended for these pre-suit screening

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[1] Florida Rule of Civil Procedure 1.280(b)(5):

> (5) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

types to be exclusive, the court would have chosen the language to clearly indicate that the list was exclusive. The Legislature has now authorized another method of pre-suit screening. There is nothing to prevent litigants from complying with both Rule 1.650 and Section 766.106, as amended by Chapter 2013-108, because the latter merely added an additional informal pre-suit screening tool to those that already existed in the former.

Furthermore, the courts have consistently rejected the contention that the pre-suit notice requirements of Section 766.106 (and its processor, Section 768.57) are procedural and, therefore, in violation of the separation of powers. Thus, the Supreme Court has held that the statute is "primarily substantive," Williams v.

Florida Rule of Civil Procedure 1.310(c), & (f)(1)(3):

> A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d).
>
> . . . .
>
> (3) A copy of a deposition may be filed only under the following circumstances:

Florida Rule of Civil Procedure 1.190(a):

> (a) Amendments. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party.

Florida Rule of Civil Procedure 1.201(b)(3):

Continuance of the trial of a complex action should rarely be granted and then only upon good cause shown.

Campagnulo, 588 So. 2d 982 (Fla. 1991), and this Court has held that the statute is "substantive in nature." Fitchner v. Life South Cmty Blood Centers, Inc., 88 So. 3d 269 (Fla. 1st DCA 2012). Significantly, in Acosta, the Supreme Court relied upon the wording of the statute rather than the Rule when it held back in 1996 that the ex parte meeting was not permitted.

The modest amendment to Section 766.106 under attack by the Plaintiff is substantive, in itself, because it facilitates the very purpose of pre-suit screening, which is to promote the settlement of meritorious medical malpractice claims. There is no violation of the separation of powers.

III. CHAPTER 2013-108 DOES NOT VIOLATE THE PLAINTIFF'S RIGHT OF ACCESS TO THE COURTS

The Plaintiff and her Amicus argue that Chapter 2013-108 unconstitutionally denies the Plaintiff access to the Court. Their premise is that the ex parte meeting authorized by the statute may result in a disclosure of "private, protected health information" such as an abortion or HIV/AIDS.

At the outset, the Plaintiff and her Amicus mischaracterize what constitutes a denial of access to this Court. The Supreme Court held in Kluger v. White, 281 So. 2d 1 (Fla. 1973), that unless a statute abolishes or eliminates a substantive right to redress for an injury, there is no denial of access to the court. The Supreme Court has also held that the Legislature is free to impose a reasonable condition

precedent to the filing of a lawsuit. Warren v. State Farm Mut. Auto Ins. Co., 899 So. 2d 1090 (Fla. 2005).

Likewise, this Court has held that a statute which only imposes a condition to filing suit, but does not abolish a substantive right must be upheld unless it imposes a "significantly difficult impediment" to the right of access. Henderson v. Crosby, 883 So. 2d 847 (Fla. 1st DCA 2004). How could the requirement to authorize an ex parte interview with the treating doctor constitute a "significantly difficult impediment" to the filing of a lawsuit to seek redress for an injury?

Furthermore, the Plaintiff and her Amicus cannot claim that the Plaintiff's relevant healthcare information should remain protected at the ex parte conference with the treating doctor because it no longer falls within the confidential provisions of the physician/patient privilege under those circumstances.

In Coralluzzo v. Fass, 450 So. 2d 858, 860 (1984), the Supreme Court upheld the right of the defendant doctor in a medical malpractice to have an ex parte meeting with the treating doctor. The court held that: "No law, statutory or common, prohibited the meeting." The court further noted that no evidentiary rule of physician/patient confidentiality exists in Florida. Subsequently, however, in Acosta v. Richter, 671 So. 2d 149 (Fla. 1996), the Supreme Court explained that in 1988 the Legislature had enacted a statute which provided for a physician/patient privilege of confidentiality for the plaintiff's healthcare information in a medical

malpractice action. Therefore, the court held that the attorney for a defendant doctor in a medical malpractice action could no longer have an ex parte conference with a plaintiff's treating doctor. In Hasan v. Garvar, 108 So. 3d 570 (Fla. 2012), the court went so far as to interpret the statutory privilege to prohibit the treating doctor in that case from having an ex parte discussion with the attorney that had been provided to her by her insurance company.

Since the physician/patient privilege is a creature of statute, the Legislature can modify it or even eliminate it in its entirety. Section 2013-108 simply modified it by requiring the plaintiff to include in the pre-suit notice an authorization for the ex parte meeting. In other words, the law is now back in the posture it was when the Coralluzzo case was decided with respect to whether the ex parte meeting is permitted, and the accused doctor in this case or his lawyer can obtain all of the relevant health information of the plaintiff's decedent that the treating doctor is willing to disclose.[2]

The case of Stempler v. Speidel, 495 A.2d 857 (N.J. 1985), is insightful. The issue in that case was also whether or not a medical malpractice defendant could conduct an ex parte interview with the treating physician. As in the instant case, the court noted that the plaintiff's objections to the interview had its roots in

[2] As a result of the statutory changes, the holdings of both the Acosta and Hasan cases are no longer applicable. Therefore, the treating doctor can now also discuss the patient's health information with his or her own lawyer.

the testimonial physician/patient privilege. No such privilege existed in New Jersey. In upholding the right to have an ex parte interview, the court stated:

> The weighing of policy has been done by the Legislature in the definition of privileges and the terms in which they are lost or surrendered. To speculate about sinister motives of attorneys and treating doctors and to establish additional limitations on the right to seek out evidence as a matter of policy would do mischief to the adversary system.

In actuality, the Plaintiff and her Amicus are not really worried about the right of access, as such. They are only concerned that by virtue of the ex parte meeting the defense may learn that the treating doctor has doubts about whether the defendant violated the standard of care, thereby reducing the value of the plaintiff's claim.

Since there is no law which would prevent the ex parte interview, the requirement to authorize it cannot possibly constitute a "significantly difficult impediment" to the Plaintiff's access to court in order to proceed with her medical malpractice action.

CONCLUSION

Chapter 2013-108 is both beneficial and constitutional.

Respectfully submitted this 9th day of February, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been electronically filed and that a copy has been served by e-mail to the following all on this 9th day of February, 2015:

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I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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