

Professional Liability

Fla. Court Ruling on Doctor Interviews a Victory for Plaintiffs

A split Florida Supreme Court has handed medical malpractice plaintiffs an important legal victory for the second time this fall.

The state high court Nov. 9 held invalid, under the Florida Constitution, statutory provisions that require plaintiffs to agree before filing suit to allow defendants to meet with a plaintiff's treating physicians outside the plaintiff's presence. This informal discovery device is known as an *ex parte* interview (*Weaver v. Myers*, 2017 BL 402847, Fla., No. SC15-1538, 11/9/17).

States differ widely in their acceptance of the *ex parte* interview process in medical malpractice cases. Some allow *ex parte* interviews, and some—like Florida after this decision—do not. The controversy centers around fears that doctors would reveal a great deal of irrelevant private health information during these unsupervised meetings. *Ex parte* interviews, however, aren't part of the formal discovery process, so they can save money and time.

Influential Decision The state high court held the Florida Constitution's express right of privacy barred two provisions of state law mandating plaintiffs' agreement to *ex parte* interviews. The decision could have an impact outside of Florida, even though it was grounded in the state constitution, Robert S. Peck, founder and president of the Center for Constitutional Litigation, New York, told Bloomberg Law. Peck represented plaintiff Emma Weaver.

"It's an important decision on the right to privacy," he said.

The Florida Constitution, unlike the federal Constitution, includes the right to privacy among its enumerated rights. A few other states, such as California, also have a constitutional right of privacy, so the decision could have an impact in those states.

This decision also could have relevance in states where privacy is not among the rights expressly guaranteed by their constitutions, Peck said. Many courts, including the U.S. Supreme Court, have recognized that certain rights are so well regarded and widely accepted that they are deserving of constitutional protection even if not explicitly enumerated, he said.

Greatly Expands Right The decision "greatly expands" right-to-privacy law in Florida, Florida Justice Reform Institute President William W. Large told Bloomberg Law.

He agreed with Peck that the decision will be cited often in future cases concerning the privacy right and that its effect could be felt outside the state. Large's Tallahassee, Fla.-based organization champions medical liability reform. It filed an amicus brief supporting the defendant doctor's position that the *ex parte* provisions were constitutional.

Large "respectfully disagreed" with the majority's conclusion. The Florida Legislature developed an "elegant solution" to a problem faced by medical malpractice defendants, namely their inability to access the same type of information as plaintiffs, Large said.

Large told Bloomberg Law the provisions at issue sought to level the playing field by giving defendants access to information that is readily available to the plaintiff's attorneys. The Legislature weighed both sides of the issue and came to a reasonable compromise, he said.

**The decision could influence
privacy rights rulings in other states
even if their constitutions lack
specific privacy right protections.**

**Robert S. Peck,
Center for Constitutional Litigation,
New York**

Access to treating physicians can be important, Large said, because doctors who treated a plaintiff before the alleged negligence occurred might be able to say the complained-of condition predated the alleged negligence, or a doctor who treated the plaintiff post-injury might have an alternative explanation for the condition.

Most often, treating physicians have no independent memory of the plaintiff or his or her condition. In those cases, defendants who are permitted to contact a physician without having to go through a formal discovery process save time and money, Large said.

Medical malpractice cases, by their nature, involve the plaintiff's medical condition. Thus, the plaintiff's privacy interest in certain confidential health information has been waived as soon as a lawsuit is filed, Large said. He noted that once a medical malpractice case goes to trial, the public has access to all the information

discussed in the courtroom, so the privacy right is limited in these cases.

Tort Reform Law A medical malpractice plaintiff in Florida must satisfy certain statutory requirements before filing a lawsuit. The plaintiff must conduct an investigation, give a notice to each potential defendant that includes a list of all health-care providers seen by the plaintiff before and after the alleged medical negligence, and give the potential defendant(s) all medical records examined during the presuit investigation.

The Legislature amended the law in 2013 to require plaintiffs to allow defendants or their representatives to informally interview the plaintiffs' treating physicians. There is no limit on the number of interviews allowed, and the defendant may schedule the interviews unilaterally and without notice to the plaintiff.

Weaver, as the representative of her husband's estate, argued that the ex parte interview provisions violated the state constitution's right to privacy, right of access to the courts, and separation of powers doctrine, Peck said. The court didn't rule on the separation of powers argument, but said the provisions violated the court access guarantee, as well as the right to privacy.

The provisions challenged here would require Weaver to agree to give up her late husband's constitutional right to privacy in his medical information as a condition of filing a medical malpractice action, the court said. The Florida Constitution's guaranteed right of access to the courts didn't allow that, the court said.

Peck told Bloomberg Law the court rejected the defendant's argument that the access provision applies

only to laws that totally would bar a plaintiff's entry into court. Instead, the court banned provisions that make it more difficult, but not impossible, to sue for medical negligence.

This is the second pro-plaintiff ruling issued by a split Florida Supreme Court in two months. In October, the court said the Florida Constitution's Amendment 7 gives medical malpractice plaintiffs, and patients generally, the right to access external peer review reports as well as documents produced during a hospital's internal peer review process. A plaintiffs' attorney called that decision "a big win" for all Floridians.

Justice R. Fred Lewis wrote the opinion. Chief Justice Jorge Labarga and Justices Barbara J. Pariente and Peggy A. Quince joined the majority. Justice Charles T. Canady dissented. He was joined by Justices Ricky L. Polston and C. Alan Lawson.

Virginia M. Buchanan, of Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor PA, Pensacola, Fla.; and Robert S. Peck, of the Center for Constitutional Litigation PC, New York, represented Weaver. Mark Hicks and Erik P. Bartenhagen, of Hicks, Porter, Ebenfield & Stein PA, Miami, represented defendant Stephen Myers.

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