Florida Supreme Court Issues Important Ruling, Marc J Schleier, Fowler White Burnett

On December 20, 2012, the Supreme Court of Florida issued an opinion in *Hasan v. Garvar*, Case No. SC10-1361, which appears to bar physicians who are not defendants in a medical malpractice action from engaging in communications with an attorney, regardless of whether the discussions involve privileged matters regarding the relationship between the physician and the patient/plaintiff. In *Hasan*, the patient sued a dentist, Dr. Garvar, for failing to diagnose and treat his dental conditions, which allegedly resulted in a bone infection and a worsening of his dental problems. Dr. Garver was insured by OMS National Insurance Company in the litigation and was provided an attorney to represent him by OMS. During discovery, the patient sought to take the deposition of an oral and maxillofacial surgeon, Dr. Schaumberg, who had provided medical treatment to the patient subsequent to Dr. Garver's care. While scheduling the deposition, the patient learned that OMS, which also insured Dr. Schaumberg, retained an attorney (different than the attorney representing Dr. Garver) to consult with her and conduct a private (ex parte) pre-deposition conference. The patient moved for a protective order to prohibit the pre-deposition conference between Dr. Schaumberg and the attorney provided by OMS. The trial court denied the motion. The patient thereafter sought review by the Fourth District Court of Appeal, which approved the trial court's action and denied the patient's petition for writ of certiorari. The Fourth District found that the ex parte conference was permissible because the attorney was not also assigned to Dr. Garvar and would not be discussing privileged medical information pertaining to the patient.

On review of the Fourth District's decision in the Florida Supreme Court, the question presented was whether Florida's patient confidentiality statute, Section 456.057, Florida Statutes, prohibited a non-party treating physician from having an ex parte meeting with an attorney selected and provided by the defendant's insurance company. The Court determined that the statute does, in fact, prohibit such meetings and quashed the Fourth District's decision. The Court reasoned that, given the broad protections afforded to patient information by the statute, such meetings are prohibited irrespective of whether the attorney and physician intend to only discuss non-privileged matters. Notwithstanding the limited scope of the question before the Court, the Court ultimately held that Section 456.057(8) creates a broad and expansive physician-patient privilege of confidentiality for a patient's personal information with only limited, defined exceptions and that the privilege prohibits ex parte meetings between non-party treating physicians and any "outsiders" to the confidential patient-health care provider relationship. While not explicitly set forth in the opinion, the dissenting opinion suggests that the ruling effectively prohibits non-party physicians from obtaining **any** legal counsel, even from lawyers not provided by an insurance company.

The Florida Supreme Court's decision appears to improperly prohibit non-party physicians from independently hiring, and consulting with, a lawyer prior to testifying at a deposition or at trial, a prohibition that does not apply to a person in any other profession. The decision may also operate to prohibit ex parte communications between attorneys for a hospital or other health-related entities and a health care provider employee or agent who has not been sued. Several intermediate appellate cases have held that hospitals and other health-related entities can speak to their own employees or agents for whose actions they may be vicariously liable. *See Royal v. Harnage*, 826 So. 2d 332 (Fla. 2d DCA 2002); *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305 (Fla. 2d DCA 1992); *Public Health Trust of Dade County v. Franklin*, 693 So. 2d 1043 (Fla. 3d DCA 1997); *Alachua General Hospital, Inc. v. Stewart*, 649 So. 2d 357 (Fla. 1st DCA 1995). This includes employees whose care and treatment is not at issue. *See Lee Memorial Health System v. Smith*, 40 So. 3d 106, 108 (Fla. 2d DCA 2010). While *Hassan* does not mention any of those decisions or otherwise expressly state that an entity cannot speak to its own employees, courts may interpret the Florida Supreme Court's broad holding to prohibit such communications. Such an interpretation would severely impair the ability of hospitals and other health-related entities – who can only provide medical care through their health care provider employees and agents – from adequately defending themselves in medical malpractice actions.