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Evidence: Admissibility of Physician-Patient Communications Under Florida Law

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EVIDENCE: ADMISSIBILITY OF PHYSICIAN-PATIENT COMMUNICATIONS UNDER FLORIDA LAW

Morrison v. Malmquist, 62 So.2d 415 (Fla. 1953)

In a personal injury action plaintiff, dissatisfied with the amount of a judgment in her favor, appealed on the ground that certain damaging testimony should have been excluded. Prior to the accident a physician examined her. His testimony, that she then had certain afflictions which she now alleged were caused by defendant's negligence, was admitted into evidence over plaintiff's objection that it was privileged. Conceding that physician-patient communications were not privileged at common law, plaintiff contended they now were under Section 458.16, Florida Statutes 1951.[1] HELD, the statute does not alter the common law rule as to communications of physicians and patients but deals with a physician's records only.

Unquestionably the privilege did not exist at common law,[2] but statutes providing physician-patient privilege have been enacted in about one half the states,[3] starting with New York in 1828.[4] Florida first enunciated the common law rule in 1938.[5]

The Court, in denying appellant's contention of statutory privilege, properly distinguished between the character of a physician's reports and the testimony of a physician during trial. The purpose of the statute apparently is to insure that a report on a patient will not be released without the patient's permission. If the intent of the

[1]FLA. STAT. §458.16 (1951): "Any doctor or other practitioner of any of the healing sciences making a physical or mental examination of, or administering treatment to any person, shall upon request of such person, his guardian, curator or personal representative in the event of his death, furnish copies of all reports made of such examination or treatment. Such reports shall not be furnished to any person other than the patient, his guardian, curator, or personal representative, except upon the written authorization of the patient; provided, however, that nothing herein shall prevent the furnishing of such reports without such written authorization, to any person, firm or corporation who with the patient's consent shall have procured or furnished such examination or treatment, and where compulsory physical examination is made pursuant to §768.09, Florida Statutes, or court rule copies of the medical report shall be furnished both the defendant and the plaintiff."

[2]Duchess of Kingsdon's Trial, 20 How. St. Tr. 273 (1776).

[3]8 WIGMORE, EVIDENCE §2380 (3d ed. 1940).

[4]2 N.Y. REV. STAT. 406 (1828).

[5]Florida Power and Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911 (1938).

Legislature was to modify the common law rule pertaining to physician-patient privilege, clear-cut language demonstrating such purpose should have been used. The statute, speaking entirely of "reports" and "copies of reports," does not show the requisite intent to modify the established common law rule. That the reports may be privileged per se was not considered. The decision was based on the fact that no analogy may be drawn between a physician's testimony and his reports on a patient.

Section 458.16 may have unfortunate consequences in a procedural field not contemplated by the Legislature. Specifically, has the Legislature barred the production of physical and mental reports not taken pursuant to a court order in response to a subpoena duces tecum either during discovery-deposition proceedings or at the trial? Assume that *A* sues *B* in a personal injury action and *B* desires to know the physical condition of *A* before the accident. Under our statute,[6] *B* decides to take the deposition of *A's* physician for discovery purposes and simultaneously has issued a subpoena duces tecum requiring that relevant records on *A's* medical history be produced. Section 458.16 does not permit the physician to produce the reports without the patient's permission. If *A* withholds his permission *B* is limited to the oral testimony of *A's* physician testifying from his own knowledge. *B* must further appreciate that the Florida Court has not been liberal in forcing the production of documents under a subpoena duces tecum.[7] In this instance the Court's argument that *A's* medical record is privileged is supported not only by statute but also by legislative history. In its initial form the statute contained no exceptions. It was amended in the House, however, by adding the words "or court order pursuant to statute."[8]

The Senate deleted the House amendment and passed the act in its present form setting forth specific exceptions to the general rule.[9] Under a well-recognized canon of statutory interpretation[10] an effective argument can be made that the legislative intent was to insure the confidential nature of such reports unless the reports are taken pursuant to Section 768.09 or court rule.

It therefore appears that an effective weapon in documentary dis-

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[6]FLA. STAT. §91.30 (1951).

[7]Atlantic C.L.R.R. v. Allen, 40 So.2d 115 (Fla. 1949).

[8]FLA. H.J. 156 (1951).

[9]FLA. SEN. J. 389 (1951).

[10]*Expressio unius est exclusio alterius.*