>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR.
GIVE ATTENTION, YOU SHALL
BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING.
WELCOME TO THE FLORIDA
SUPREME COURT.
THE FIRST CASE ON THE DOCKET IS
WEAVER V. MYERS.
WHENEVER YOU'RE READY, COUNSEL.
>> MR. CHIEF JUSTICE AND MAY IT
PLEASE THE COURT, THE 2013
AMENDMENTS THAT ARE AT ISSUE IN
THIS CASE REQUIRED A PUNITIVE
PLAINTIFF TO AUTHORIZE EX PARTE
INTERVIEWS SOMETIMES IN SECRET
AND WITHOUT NOTICE OF TREATING
PHYSICIANS IN ANY PUNITIVE
MEDICAL MALPRACTICE CASE.
THE AUTHORIZATION HAS TO INCLUDE
TREATING PHYSICIANS THAT GO BACK
TWO YEARS BEFORE THE ALLEGED
MALPRACTICE.
IN ADDITION, THE AMENDMENTS
REQUIRE DISCLOSURE OF TREATING
DOCTORS AND DATES THAT HAVE
NOTHING TO DO WITH THE
UNDERLYING CLAIM.
AND--
>> IS THERE ANYTHING IN THE
STATUTE WHICH TALKS ABOUT THE
PURPOSE OF THESE AMENDMENTS AND
WHAT THEY ARE DESIGNED THE
PROMOTE?
>> THE STATUTE ITSELF DOES NOT.
THERE ARE NO FINDINGS, AND SO
THE COURTS BLOW ALL ASSUMED IT
WAS 766.106 WHICH IS TO
ENCOURAGE SETTLEMENT AND TO HELP
IN THE AID OF DEFENSE.

>> WELL, IN THAT AS FAR AS THE TREATING DOCTOR WHO, IN A MALPRACTICE CASE, WHO MAY OR MAY NOT BE THE DEFENDANT, YOU KNOW, THE DEFENDANT, OBVIOUSLY, THE DEFENSE HAS THE DEFENDANT TO TALK TO AS MUCH AS THEY WANT. BUT WHAT I-- IS IT CORRECT THAT THE INTERVIEWS NOT ONLY ARE EX PARTE, BUT THERE'S NO LIMIT ON THE NUMBER OF INTERVIEWS, AND IT COULD BE THE DEFENDANT'S EXPERT, IT COULD BE THE ACTUAL DEFENDANT IN THE MALPRACTICE CASE TO BE THERE TALKING TO THE DOCTORS?
>> THAT IS CORRECT, JUSTICE PARIENTE.
IT IS UNLIMITED IN NUMBER, AND THE PEOPLE WHO MAY BE AUTHORIZED TO CONDUCT THESE INTERVIEWS INCLUDE DEFENSE COUNSEL, THE DEFENDANT, THE CONSULTING EXPERTS OF THE DEFENSE, THE CONSULTS EXPERTS' ATTORNEYS AND EVEN THE INSURANCE COMPANY THAT INSURES THE PUNITIVE DEFENDANT DOCTOR AND COULD BE THE INSURANCE ADJUSTOR.
>> AND, AND THAT PERSON WHO IS BEING INTERVIEWED DOES NOT HAVE THE RIGHT TO HAVE ANYBODY THERE WITH THEM?
>> THE STATUTE IS SILENT ON THAT.
BUT, CERTAINLY, PLAINTIFF'S COUNSEL IS NOT PERMITTED TO BE THERE OR TO SAY ANYTHING THAT MIGHT DISCOURAGE THE TREATING PHYSICIAN FROM PARTICIPATING.
THE TREATING PHYSICIAN DOES HAVE THE OPTION TO REFUSE AN INTERVIEW OF THIS KIND.
>> THEY DO HAVE THE OPTION TO REFUSE?
>> YES.
>> AND IS THERE ANY CONSEQUENCE TO THAT?
>> NO, THERE IS NONE.
SO THIS COURT IN ACOSTA AND HASSAN AS WELL AS COURTS IN

SISTER STATES HAVE RECOGNIZED
THE INHERENT DANGER OF THESE
KINDS OF.
[AUDIO DIFFICULTY]
THIS COURT EXERCISED THAT
AUTHORITY TO PROMULGATE 1.650.
AND 1.650 IS A FORM OF INFORMAL
PROCEDURE DURING THIS PRESUIT
PROCESS.
AND IT ALLOWS FOR ONE OF, ONE OR
MORE OF THREE DIFFERENT TYPES OF
APPROACHES TO INFORMAL
DISCOVERY, AND THAT IS UNSWORN
STATEMENTS BY A PARTY OF ORAL
EXAMINATION, THE PRODUCTION OF
EVIDENCE, DOCUMENTS AND OTHER
THINGS AS WELL AS EXAMINATIONS.
>> LET ME ASK YOU A QUESTION
ABOUT THESE STATUTES.
ARE THEY THE KINDS OF PROVISIONS
THAT YOU FOUND IN OTHER STATES?
>> THERE ARE ONLY A SMALL NUMBER
OF STATES THAT HAVE OTHER
PRETRIAL PROCEDURES OF ANY KIND,
BUT THESE ARE CONSISTENT WITH
THOSE.
>> EXCUSE ME?
>> THESE PROVISIONS ARE
CONSISTENT WITH THE STATES THAT
DO--
>> THEY'RE CONSISTENT.
AND HAS THERE EVER BEEN A
DETERMINATION THAT ANY OF THOSE
PROVISIONS VIOLATE ANY OF THESE
CONSTITUTIONAL PROVISIONS THAT
YOU ARE SAYING--
>> THERE HAVE BEEN
DETERMINATIONS THAT SOMETIMES
WHERE A VERIFIED AFFIDAVIT OF
CERTIFICATE OF MERIT, A
VIOLATION OF THEIR COMPLAINT
RULE.
>> PRESUIT DISCOVERY IN MEDICAL
MALPRACTICE CASES, IS THERE
SIMILAR REQUIREMENTS IN ANY
OTHER TYPE OF TORT BESIDES
MEDICAL MALL PRACTICE?
>> I'M SORRY?
>> IS THERE A SIMILAR
REQUIREMENT ANY PLACE ELSE IN

THE COUNTRY IN SOMETHING OTHER
THAN MEDICAL MALPRACTICE?
>> I'M NOT AWARE OF ANY.
>> IN COMMERCIAL CASES, PRESUIT
REQUIREMENTS LIKE THAT?
>> I'M NOT AWARE OF ANY.
>> ANY OTHER TYPE OF TORTS, YOU
KNOW, SLIP AND FALL?
>> AS I SAID, THERE ARE SOME
STATES THAT DO HAVE A
CERTIFICATE OF MERIT
REQUIREMENT.
>> AS FAR AS ALLOWING THIS
UNILATERAL, EX PARTE TYPE OF
DISCOVERY, DO YOU KNOW OF ANY
INSTANCE WHERE THAT'S ALLOWED
ANYWHERE IN THE COUNTRY?
>> I DO NOT KNOW OF ANY INSTANCE
WHERE IT'S ALLOWED THAN IN
MEDICAL MALPRACTICE.
IN TEXAS THEY DO HAVE SOMETHING
SIMILAR.
>> WHAT IS YOUR UNDERSTANDING OF
THE REASON WHY MEDICAL
MALPRACTICE IS TREATED SPECIALLY
OR DIFFERENTLY THAN ANY PLACE
ELSE?
>> WELL, THE ASSERTION IS MADE
THAT THIS SOMEHOW HELPS THE
AFFORDABILITY AND AVAILABILITY
OF HEALTH CARE.
NOW, IT'S HARD TO UNDERSTAND HOW
THAT IS ACCOMPLISHED BY ENGAGING
IN EX PARTE INTERVIEWS WITH
TREATING PHYSICIANS.
>> WELL, LET'S BE PERFECTLY
HONEST, IT'S THE HARDEST THING
TO GET A TREATING PHYSICIAN TO
ACTUALLY SAY, GIVE AN OPINION IN
A MEDICAL MALPRACTICE CASE IF
THEY'RE NOT THE DEFENDANT.
YOU HAVE ADJUSTORS AND EXPERTS
AND THE TREATING DOCTOR COMING
IN TO TALK TO THE TREATING
DOCTOR, AND THAT'S PROBABLY THE
END OF THE TREATING DOCTOR.
SO IT HELPS THE AFFORDABILITY BY
CHILLING MEDICAL MALPRACTICE
CASES.
>> WELL--

>> I MEAN, YOU KNOW, IT'S-- THE REAL WORLD, THAT'S WHAT IT'S ABOUT.
>> ABSOLUTELY.
IN THE REAL WORLD, THAT IS EXACTLY WHAT IT'S ABOUT.
YOU KNOW, THE EXCUSE WAS MADE DURING THE LEGISLATIVE DEBATES THAT THIS WOULD LOWER ADMINISTRATIVE COSTS OF PROSECUTING THE MALPRACTICE CASE.
THE NEW HAMPSHIRE SUPREME COURT FOUND VERY LITTLE SIGNIFICANCE IN THAT CLAIM, AND IT DOES SEEM LIKE SOMETHING THAT'S NOT WORTHY OF INVADING THE PRIVACY RIGHTS OF A PUNITIVE PLAINTIFF.
IF I CAN RETURN TO SUBVERSION POWERS, THE FIRST DISTRICT COURT OF APPEALS SAID THAT IN THE COURT IN PROMULGATING 1.650 EXHIBITED DEFERENCE TO THE LEGISLATURE; ESSENTIALLY, ALLOWING THE LEGISLATURE TO SUPPLEMENT THE RULE AT FURTHER POINTS DURING THE COURSE OF ITS LIFE.
AND THE, DR. MIERS IS DEFENDED BY SAYING THE USE OF THE WORD "NAY" IN THE RULE EXECUTES THERE IS SOME FLEXIBILITY FOR SUPPLEMENTATION.
THE REASON THAT "MAY" IS THERE IS BECAUSE YOU'RE NOT OBLIGATING ANY DEFENDANT TO UTILIZE THESE EXISTING PROCEDURES, AND IT DOESN'T HAVE ANYTHING TO DO WITH SAYING THAT THE LEGISLATURE-- [INAUDIBLE]
WHEN THIS COURT INTENDS TO ALLOW THIS LEGISLATURE SOME AUTHORITY TO CHANGE THE RULE, IT USES LANGUAGE LIKE "AUTHORIZED BY LAW," AS WE POINT OUT 1.070A AND 1.410D.
IS SO YOU SHOULD TRADITIONAL INTERPRETATION-- UNDER TRADITIONAL INTERPRETATION, THE

FACT THAT YOU WOULD HAVE LIFTED
THREE FORMS OF FORMAL
DISCOVERY IS THE EXCLUSION OF
ALL OTHERS.
THE 1ST DISTRICT ALSO SAID THAT
BECAUSE THE UNDERLYING STATUTE
IS SUBSTANTIVE, THESE PROVISIONS
ARE SUBSTANTIVE TOO.
OF COURSE, DISCOVERY IS
INHERENTLY PROCEDURAL IN NATURE.
AND THE IDEA THAT SOMEHOW IT
REQUIRES THE CONSTITUTIONAL
STATUS-- ACQUIRES THE
CONSTITUTIONAL STATUS IN
EXISTING LAW SEEMS VERY ODD AND
WOULD ALLOW THE LEGISLATURE,
ESSENTIALLY, TO ADD ORNAMENTS AS
IT CHOOSES AT ANY TIME
REGARDLESS OF THE PROCEDURAL
NATURE OF THOSE ORNAMENTS.
IT IS ALSO NOT INTIMATELY
INTERTWINED WITH ANY SUBSTANTIVE
PROVISION THAT WAS ADDED TO THE
LAW OR ANY SUBSTANTIVE PROVISION
THAT WAS NOT PREVIOUSLY
IMPLEMENTED.
THERE'S NO INFORMATION THAT
COULD NOT BE OBTAINED THROUGH
THE EXISTING PROCEDURES THAT EX
PARTE INTERVIEWS WOULD PERMIT.
THERE IS ALSO THE ARGUMENT THAT
DR. MYERS HAS MADE THAT THIS IS
SOMEHOW--
[INAUDIBLE]
DO NOT HAVE THE AUTHORITY IN THE
FIRST PLACE TO PROMULGATES
1.650, AND THEREFORE, THE
LEGISLATURE COULD DO WHAT IT
WANTED HERE.
OF COURSE, THE AUTHORITY OF THIS
COURT IS OVER RULES OF PRACTICE
AND PROCEDURE.
IF SOMEONE WERE TO ABUSE THE
RULE OR ABUSE THE EX PARTE
PROCEDURE, THEY WOULDN'T GO TO
THE EXECUTIVE BRANCH, THEY
WOULDN'T GO TO THE LEGISLATIVE
BRANCH TO SEEK SANCTIONS OR
TO--
>> WELL, HOW DOES THAT WORK IN

THE RULE 1.650?
WE'VE GOT, AGAIN, THERE'S AMPLE ABILITY TO GET DISCOVERY PRETRIAL.
THERE ARE UNSWORN STATEMENTS WHICH I ASSUME BOTH PARTIES ARE PRESSING FOR.
THERE'S OBTAINING ALL THE DOCUMENTS, MEDICAL RECORDS.
WHAT IF THIS IS AN OBJECTION OR WHATEVER?
DOES THAT GO TO PRESUIT?
HOW DOES THAT GET RESOLVED, DO YOU KNOW?
>> AGAIN, THERE'S NO HARM IN GOING TO COURTS SEEKING A PROTECTIVE ORDER OF SOME SORT OR SEEKING SANCTIONS--
>> THERE'S NO PENDING-- IS THERE ALREADY-- HELP ME-- IS THERE ALREADY A PENDING CASE FILED, AND THEN THIS IS JUST PRESUIT?
I-- IT'S BEEN A LONG TIME.
>> NO, THIS IS A JUDGMENT ACTION.
AND SO THE LAWSUIT HAS NOT BEEN FILED--
>> WELL, IT COULD BE, IT COULD HAVE BEEN FILED IF THERE'S THE STATUTE LIMITATIONS, THERE COULD BE A LAWSUIT--
>> RIGHT.
WE'RE TOTALLY IN AGREEMENT THAT IT'S ALLOWED US TO PURSUE THE SANCTION.
SO FOR THOSE REASONS, WE MITT THAT IT'S-- WE SUBMIT THAT IT VIOLATES THE SEPARATION OF POWERS AND INTERFERES WITH AN EXISTING RULE PROMULGATED BY THIS COURT UNDER MASSEY AND HAVENS FEDERAL AND A MORE RECENT DECISION IN ABDUL SHOULD BE TREATED AS NULL AND VOID.
I'D LIKE TO MOVE ON NOW TO THE PRIVACY ISSUE.
AND UNDER PRIVACY THE FLORIDA CONSTITUTION GUARANTEES A VERY STRONG RIGHT OF PRIVACY.

IT GIVES AN INDIVIDUAL THE RIGHT
TO CONTROL WHAT, HOW AND WHEN
INFORMATION THEY WANT TO KEEP IT
FROM BEING DISCLOSED WITHIN
THEIR CONTROL.
AND MRS. WEAVER HERE IS
CONCERNED ABOUT INFORMATION THAT
IS IRRELEVANT TO HER UNDERLYING
CLAIM.
AND SO SHE'S CONCERNED THAT SHE
HAS TO DISCLOSE OTHER DOCTORS
WHO-- AND THE TREATMENT DATES.
NOW, THAT'S VERY REVELATORY
BECAUSE, IN FACT, WHEN YOU
INDICATE THAT YOU'RE SEEING A
PSYCHOLOGIST OR SOMEONE WHO
SPECIALIZES IN SEX THERAPY OR
SOMETHING, YOU ARE GIVING
SIGNALS ABOUT SOMETHING THAT YOU
MIGHT WANT TO IMPLY THAT HAS
NOTHING TO DO WITH THE
UNDERLYING MALPRACTICE ACTION.
>> LET ME STOP YOU THERE, AND
LET'S TALK A LITTLE BIT ABOUT
HER STANDING TO MAINTAIN THIS
ACTION.
I MEAN, THIS IS A PRIVACY
ACTION.
THE PRIVACY IS A WRONGFUL DEATH
CASE.
IT'S A WRONGFUL DEATH CASE,
CORRECT?
>> YES, IT IS.
>> AND, OF COURSE, THE PRIVACY
RIGHTS THAT YOU'RE SEEKING TO
PROTECT ARE PRIVACY RIGHTS THAT,
ACCORDING TO OUR CASE LAW, DIED
WITH HIM.
SO WHAT STANDING DOES SHE HAVE
UNLESS WE RECEDE FROM OUR CASE
LAW, WHERE'S THE STANDING?
>> FIRST OF ALL,S THIS IS A
DECLARATORY JUDGMENT ACTION
TRUSTING THE CONSTITUTIONALITY
OF THE STATUTE--
>> RIGHT.
>>-- AND WHETHER IT'S
APPLICABLE.
SO SHE'S CERTAINLY ABLE TO TEST
THE AUTHORITY, TO TEST ITS

CONSTITUTIONALITY.
SECOND, THE FACT IS THAT THIS IS NOT AN INVASION OF PRIVACY ACTION, THIS IS NOT A COURT ACTION, BUT THIS IS A QUESTION OF THE CONSTITUTIONALITY USING THE PRIVACY AMENDMENT TO THE FLORIDA CONSTITUTION.
THAT AMENDMENT USES THE TERM "NATURAL PERSONS," BUT THIS COURT HAS PREVIOUSLY READ THE WORDS "NATURAL PERSONS" TO APPLY TO DECEDESCENTS.
IT DOES SO IN THE HOMESTEAD EXEMPTION AND UNDER EQUAL PROTECTION.
AND SO, THEREFORE, IT FULLY APPLIES TO MRS. WEAVER AS WELL AS TO HER HUSBAND.
PLUS, THIS COURT HAS USED THE--
[INAUDIBLE]
PRINCIPLE WHICH WAS DESCRIBED IN THE ALTURA CASE TO DESCRIBE WHEN PRIVACY RIGHTS CAN BE ASSERTED.
THAT MEANS THERE HAS TO BE INJURY OF FACT, THERE HAS TO BE A CLOSE RELATIONSHIP BETWEEN THE PERSON WHOSE RIGHTS YOU MIGHT BE ASSERTING, AND THERE HAS TO BE AN ABILITY TO PROTECT YOUR OWN INTERESTS THAT ARE PERSONAL TO YOU.
OBVIOUSLY, THIS IS A CASE THAT WILL INVOLVE RIGHTS OF CONSORTIUM THAT THE WIFE HAS, IT'S GOING TO INVOLVE POTENTIALLY THE REVELATION OF INFORMATION HAVING TO DO WITH THE COUPLE AS A MARRIED COUPLE, THAT HE MAY HAVE DISCLOSED TO TREATING PHYSICIANS THAT MAY HAVE, AGAIN, NOTHING TO DO WITH THE UNDERLYING CASE.
AND SO, THEREFORE, HER RIGHTS OF PRIVACY ARE BOUND UP WITH HIS X SHE'S ASSERTING NOT ONLY HIS RIGHTS, BUT SHE HAS THE RIGHT TO DO UNDER THE DOCTRINE, BUT AS WELL AS HER RIGHTS--
>> WHY WOULD THE STATE UNDER OUR

CURRENT STATUS OF FLORIDA LAW
NOT HAVE THE RIGHTS THAT THE
DECEDENT HAD AT THE TIME OF THE
DECEDENT'S DEATH?
>> THERE'S NO REASON PRECISELY
BECAUSE OF THAT DOCTRINE.
THAT DOCTRINE OPENS UP THE DOOR
FOR THESE SURPLUS RIGHTS.
>> IS THERE-- ARE YOU AWARE OF
ANY CASES TO THE CONTRARY WITH
REGARD TO THE ESTATE AND HOW AN
ESTATE OPERATES, WHAT IT IS,
WHAT IT DOES UNDER FLORIDA LAW?
>> I'M AWARE OF NO CASE THAT
DEALS WITH THE CONSTITUTIONAL
RIGHT OF PRIVACY AS OPPOSED TO
AN INVASION OF PRIVACY TORT.
SO AS A RESULT, SHE HAS THAT
KIND OF STANDING.
I KNOW DR. MYERS ALSO ASSERTED
THAT HE'S A PRIVATE INDIVIDUAL,
HOW CAN YOU BRING AN ACTION
AGAINST HIM.
BUT, OBVIOUSLY, THE STATE ACTION
HERE IS THE PASSAGE OF THE
STATUTE, AND THE STATUTE IS WHAT
CONSTITUTIONALITY WE'RE TESTING.
WE'RE NOT TESTING THE
CONSTITUTIONALITY OF ANYTHING
ELSE.
THE FACT THAT HE WANTS TO USE
THIS STATUTE IS WHAT GIVES US
THE STANDING TO RAISE THESE
ISSUES.
>> WOULD YOU ADDRESS BRIEFLY FOR
ME THE ACCESS TO COURT ISSUE?
IT SEEMS TO ME YOU'VE GOT THIS
PROVISION, AND AN ATTORNEY CAN'T
COME WITH A POSITION TO THESE
KINDS OF INFORMAL DISCOVERY
QUESTIONING, THAT THERE IS SOME
ACCESS TO COURT ISSUE HERE.
>> YOU KNOW, AGAIN, THE
PRACTICAL NATURE OF THIS IS TO
CUT OFF MANY OF THESE CASES.
IF, FOR EXAMPLE, YOU ARE
CONCERNED ABOUT YOUR PRIVACY AND
THOSE CONCERNS
OUTWEIGH THE OPPORTUNITY
TO GO TO COURT TO

INDICATE THE NEGLIGENT
MEDICAL CARE YOU HAVE HAD,
OBVIOUSLY, IT SHUTS THE DOOR ON
IT.
IF YOU REVOKE YOUR AUTHORIZATION
TO CAUSE ABUSE OF IT, YOU AGAIN
LOSE YOUR CAUSE OF ACTION
BECAUSE RETROACTIVELY YOU LOSE
THE TOLLING PROVISION IN THE
STATUTE.
SO AS A RESULT, IT DOES DEEPLY
AFFECT THE CAUSE OF ACTION.
BUT, YOU KNOW, THE 1ST DCA ALSO
FOCUSED ON THE FACT THAT IT
DOESN'T SIMPLY ELIMINATE OR
ABOLISH THE CAUSE OF ACTION, AND
I QUOTE THIS COURT IN SMITH V.
DEPARTMENT OF INSURANCE WHEN
EXPRESSLY REFUSED TO GO ALONG
WITH THE IDEA THAT HAD BEEN
EXPRESSED BY THE 1ST DCA AND THE
JUDGE ON THE CASE THAT ABOLITION
WAS NECESSARY.
>> YOU'RE INTO YOUR REBUTTAL
TIME.
>> THANK YOU VERY MUCH.
I WILL RESERVE THE REST OF MY
TIME.
>> MORNING, YOUR HONORS, MAY IT
PLEASE THE COURT, MY NAME'S ERIK
BARTENHAGEN, I'M HERE ON BEHALF
OF DR. MYERS--
>> WOULD YOU COME A LITTLE
CLOSER TO THE MIC?
>> THE STATUTE WAS ENACTED TO
ACCOMPLISH THE SUBSTANTIVE GOAL
OF PERMITTING, AS A MATTER OF
PUBLIC POLICY, DEFENSE IN A
MEDICAL MALPRACTICE TO INTERVIEW
OTHER CONDITIONS ON AN EX PARTE
BASIS.
AT LEAST A DOZEN OTHER STATES IN
THIS COUNTRY HAVE ENACTED LAWS
THAT ALLOW EX PARTE INTERVIEWS,
AND THEY BALANCED THE PROS AND
CONS OF THIS KIND OF LAW, AND
SOME STATES CAME TO THE
DETERMINATION THAT THESE LAWS,
THE PROS OUTWEIGH THE CONS, AND
SOME COME TO THE ALTERNATIVE.

>> WHAT IS THE--
[INAUDIBLE]
FOR ENACTING THAT?
>> WELL, IN COORDINATION WITH AN ACT OF THE ENTIRE PRESUIT, THE PURPOSE OF IT IS TO HAVE A FULL AND FREE EXCHANGE OF ALL INFORMATION RELATING TO THE CLAIM PRIOR TO ENTERING THE COURTHOUSE DOORS IN ORDER TO WEED OUT FRIVOLOUS CASES AND SETTLE MERITORIOUS CASES.
>> COULD THAT BE ACCOMPLISHED BY NOT ALLOWING THE PLAINTIFFS' ATTORNEYS TO ATTEND?
>> WELL, THIS IS ALLOWED TO THE FREE EXCHANGE OF INFORMATION BETWEEN THE TREATING PHYSICIAN BECAUSE THEY'RE-- IF THE PLAINTIFF HAS TO ATTEND AND PLAINTIFF'S ATTORNEY HAS TO ATTEND, THE RATIONALE BEING THAT, WELL, THAT IS MORE LIKE AN UNSWORN STATEMENT.
YOU HAVE TO COORDINATE EVERYTHING.
WHEREAS THIS WOULD ALLOW THE DEFENDANT DOCTOR TO JUST PICK UP THE PHONE AND CALL HIS ATTORNEY, THIS TREATING PHYSICIAN, AND OBTAIN ANY INFORMATION THAT THAT TREATING--
>> ANY INFORMATION THAT MAY OR MAY NOT BE RELEVANT TO THE--
>> AND IF IT ISN'T RELEVANT, THERE'S NO NEED TO GO THROUGH A FORMAL PROCESS OF DEPOSING--
>> BUT WHO'S--
>> EXCUSE ME, YOUR HONOR?
>> IS THIS MONITORING?
>> THE AUTHORIZATION FORM ITSELF DESCRIBES WHAT CAN AND CANNOT BE REVEALED.
>> I KNOW, BUT WHO'S THERE TO OBJECT TO IF SOMETHING INADVERTENTLY COMES OUT?
IF THE PLAINTIFF'S ATTORNEY CAN'T BE PRESENT?
>> WELL, YOU SAID-- BY ASSUMING THE VIOLATION OF THE

AUTHORIZATION FORM, YOU'RE
PUTTING THE CART BEFORE THE
HORSE.
I MEAN, THIS INFORMATION WILL BE
COMING OUT EVENTUALLY ANYWAY AS
LONG AS-- IF YOU ASSUME THAT
THE AUTHORIZATION FORM AND THE
DOCTOR AND THE DEFENDANT WILL
COMPLY WITH THE SPIRIT AND THE
LETTER OF THE LAW WHICH THE
FLORIDA LEGISLATURE HAS SAID
THAT THEY BELIEVE THIS WILL
HAPPEN, THEN THERE WAS NO ISSUE
OF REVEALING ANY EXTRA
NON-RELEVANT INFORMATION.
AND IF THERE IS, THERE ARE
PLENTY OF SANCTIONS AVAILABLE
AND ACTIONS AVAILABLE THAT CAN
REMEDY A VIOLATION OF--
>> HOW WOULD ANYONE KNOW WHEN A
PRIVATE CONVERSATION IS
OCCURRING BETWEEN THE DEFENDANT
WHO'S BEING SUED IN A
MALPRACTICE CASE AND THE
INSURANCE ADJUSTOR AND THE
DEFENSE ATTORNEY AND THE EXPERT,
CALLS THE TREATING DOCTOR AND
SAYS, HEY, THIS DEFENDANT--
THIS PLAINTIFF IS TRYING TO SUE
US FOR $2 MILLION, YOU CERTAINLY
DON'T WANT TO BE PART OF WHAT'S
GOING ON HERE, DO YOU?
HOW WOULD-- I MEAN, THERE'S,
DOES THAT-- ARE YOU SAYING THAT
WOULDN'T EVER HAPPEN?
>> I AM SAYING THAT--
>> I MEAN, IS THAT--
[INAUDIBLE CONVERSATIONS]
TRYING TO TALK SOMEBODY OUT OF
WHAT THEIR TESTIMONY MIGHT
EVENTUALLY BE?
LET'S BE--
>>, MANY STATES HAVE ALLOWED EX
PARTE INTERVIEWS, AND THERE'S NO
EVIDENCE IN THOSE STATES,
INCLUDING TEXAS WHICH PASSED A
LAW JUST LIKE THIS, WITH BUT
THOSE ABUSES ARE OCCURRING--
>> SO THERE'S NO REASON THAT YOU
COULD HAVE THE SAME RULES IN

EVERY PERSONAL INJURY CASE.
>> WELL, OTHER THAN CASES
INVOLVING TREATING PHYSICIANS,
INFORMAL INTERVIEWS CAN HAPPEN
IN ANY SINGLE KIND OF CASE.
IT JUST SO HAPPENS BECAUSE WE'RE
IN A MEDICAL MALPRACTICE CASE
AND PATIENT CONSIDERABLY, THAT
THAT'S THE ONLY BAR TO HAVING
THESE TYPE OF INTERVIEWS.
SO IN THE RUN OF THE MILL TORT
CASE--
>> WE'RE TALKING ABOUT--
>> YEAH.
AND TO ADDRESS JUSTICE LABARGA'S
POINT, IT DOES HAPPEN--
INFORMAL INTERVIEWS CAN HAPPEN
AS A MATTER OF COURSE IN ANY
KIND OF CASE OTHER THAN ONES
INVOLVING PHYSICIANS.
>> I THOUGHT-- PHYSICIANS.
BUT NOT IN ANY, I THOUGHT HE WAS
ASKING YOU ABOUT ARE THEY IN
OTHER KINDS OF CIVIL CASES WHERE
A DEFENSE LAWYER CAN INFORMALLY
TALK TO THE TREATING DOCTORS.
AND I GUESS MY OTHER CONCERN IS
THAT YOU SAY, WELL, IF
CONFIDENTIAL INFORMATION IS
REVEALED, THERE'S A WAY TO
IMPOSE SANCTIONS.
BUT HOW WOULD YOU KNOW?
I MEAN, HOW WOULD YOU KNOW IN
ORDER TO BE ABLE TO REDRESS
THAT, YOU KNOW, SHARING, OH, SHE
SHARED THAT SHE WAS HAVING
TROUBLE WITH HER HUSBAND.
SHE SHARED THAT WITH ME.
HOW WOULD SOMEONE KNOW THAT THAT
EVEN HAPPENED?
>> WELL, THAT-- THE REVELATION
WOULD ONLY BE MEANINGFUL IN A
CIVIL JUSTICE SENSE IF THAT WAS
TRYING TO BE USED AGAINST THE
PLAINTIFF IN SOME FORM OF
FASHION.
AND IN THAT CASE, YOU WOULD KNOW
THE PARTY MUST HAVE GONE BEYOND
THE STRICTURES OF THE
AUTHORIZATION FORM.

AND I JUST WANT TO POINT OUT
THAT REVEALING THE INFORMATION,
YOU KNOW, OF DOCTORS WHO DON'T
HAVE RELEVANT INFORMATION ON THE
FORM, THERE'S A STANDARD
INTERROGATORY FORM IN RULE
NUMBER 16 THAT AUTHORIZES A
DEFENDANT TO ASK A PLAINTIFF IN
ANY PERSONAL INJURY AND MEDICAL
MALPRACTICE CASES LIST THE
PHYSICIANS YOU'VE SEEN IN THE
LAST TEN YEARS AND WHAT YOU WERE
TREATED FOR, THE INJURY.
SO THIS ISN'T SOMETHING IN THIS
FORM THAT'S NOT GOING TO BE
REVEALED EVENTUALLY IN THE
LAWSUIT ANYWAY, WE'RE JUST
MOVING THE--
>> YOU DO THEN AGREE THAT THE
INFORMATION, WHATEVER IT MAY BE
IN THESE CLANDESTINE, EX PARTE
MEETINGS, THAT THAT CAN BE
OBTAINED THROUGH THE EXISTING
PROCEDURES WITHOUT ALLOWING EX
PARTE NEEDS?
>> THEY-- THIS SESSION
ADDRESSES THE TIMING OF THAT
DISCLOSURE IN AN EFFORT TO--
>> IT'S A VERY SIMPLE QUESTION.
COULD YOU JUST PLEASE ANSWER,
THEN YOU CAN EXPLAIN IT TO ME.
CAN YOU GET THE SAME
INFORMATION-- YOU EXPLAINED
HOW, BUT I'M TRYING TO
UNDERSTAND CAN YOU GET THE SAME
INFORMATION WITHOUT THE EX PARTE
MEETING?
THROUGH DISCOVERY?
>> THROUGH DISCOVERY AND THE
LITIGATION PROCESS--
>> WELL, HOW ABOUT IN PRETRIAL?
>> I DON'T THINK IN PRETRIAL YOU
CAN WITHOUT THE PLAINTIFF BEING
PRESENT.
AND THAT INSTANCE YOU'D PICK UP
AN UNSWORN STATEMENT--
>> WELL, THAT'S WHAT I SAID.
WE'RE NOT COMMUNICATING.
THE INFORMATION THAT YOU
ALLEGEDLY WANT TO GET IN THESE

SECRET MEETINGS, CAN YOU GET THE INFORMATION THROUGH THE PRETRIAL PROCESS FROM EITHER STATEMENTS OR INTERROGATORIES OR WHATEVER? CAN YOU GET THE SAME INFORMATION JUST WITHOUT THE SECRECY?
>> I THINK FOR THE MOST PART, YOU CAN.
I THINK THERE'S A FEELING THAT THE TREATING PHYSICIANS AREN'T AS FREE TO DISCUSS THE CASE WITH, AS THEY MIGHT OTHERWISE WITH THE PRESENCE OF THEIR PLAINTIFFS AND THE PLAINTIFFS' ATTORNEYS AND EVERYTHING THERE.
SO I THINK THE FEELING IS THAT THIS WILL LEAD TO MORE OPEN AND FREE DISCUSSION AND THAT, THEREFORE, THE VALUE OF THE CASE WILL BE DETERMINED EARLIER.
RIGHT NOW THERE'S NO WAY FOR THESE, FRANKLY, CANDID DISCUSSIONS BETWEEN THE DEFENSE AND OTHER TREATING PHYSICIANS TO HAPPEN UNTIL YOU TAKE A FORMAL DEPOSITION OR YOU SCHEDULE A SWORN STATEMENT WITH THE PLAINTIFF THERE.
>> ISN'T IT INTERESTING THAT YOU DESCRIBE THEM AS FRANK AND HONEST DISCUSSIONS, AND THE OTHER SIDE WOULD DESCRIBE THEM AS PRESSURE BEING PLACED ON ANOTHER PROFESSIONAL.
>> RIGHT.
AND I THINK THE LEGISLATURE HEARD BOTH OF THOSE POINTS OF VIEW AND MADE THE POLICY DECISION AND THE SUBSTANTIVE DECISION TO ALLOW THESE TO PROCEED.
AND SO THEY BALANCED--
>> WELL, YOU KNOW, UNDER THE FOURTH AMENDMENT, WE COULD ALLOW THE POLICE TO BEAT THE HECK OUT OF FOLKS--
>> RIGHT.
>> BUT WE HAVE A CONSTITUTION THAT PROHIBITS IT.
>> RIGHT, AND I THINK THAT'S THE

POINT.
I THINK HERE IF YOU LOOK CAREFULLY AT THESE FOUR CLAIMS OF CONSTITUTIONAL VIOLATIONS, THE MERITS, THE PROS AND CONS AND THE MERITS OF EX PARTE INTERVIEWS DON'T ACTUALLY FACTOR INTO THEM IF YOU JUST LOOK AT WHETHER THE SEPARATION OF POWERS ISSUE, THE POLICY DECISIONS BEHIND THIS SHOULDN'T AFFECT THE OUTCOME OF THOSE CASES, OF THE CONSTITUTIONAL ARGUMENTS.
>> CAN I JUST ASK IS A QUESTION ABOUT THAT POLICY.
WHEN I ASKED COUNSEL ABOUT OTHER INSTANCES IN WHICH THIS IS ALLOWED, IN A COMMERCIAL ASPECT SYSTEM, I CAN'T IMAGINE A CORPORATION SUING ANOTHER CORPORATION FOR BREACH OF CONTRACT AND BEING TOLD BY LAW THAT BEFORE YOU CAN SUE THE OTHER CORPORATE ENTITY, YOU HAVE TO GIVE AN AUTHORIZATION FORM ALLOWING THE DEFENDANT WHO'S ABOUT TO BE SUED FOR BREACH OF CONTRACT TO TALK TO EVERYBODY IN THERE OR VICE VERSA, THE PLAINTIFFS AS WELL, TO TALK TO EVERYONE, ALLOWING A IT WAS TO TALK TO EVERYONE IN A CORPORATION SUING ABOUT THE CASE.
IT DOESN'T HAPPEN ANY PLACE ELSE SO TELL ME, WHY IS IT SO SPECIAL ABOUT MEDICAL?
WHAT IS THE REASON WHY IN THIS INSTANCE THAT'S ALLOWED IN OUR SYSTEM?
>> WELL, THE PRESUIT STRUCTURE HAS BEEN UPHELD BY THIS COURT ON MULTIPLE OCCASIONS AGAINST CONSTITUTIONAL TEXT.
SO THERE IS AND THERE HAS BEEN A CONSTITUTIONAL JUSTIFICATION FOR THIS KIND OF PRESUIT BEHAVIOR.
AND ALL THIS STATUTE DID WAS CHANGE ONE ASPECT OF IT.
AND SO--

>> BUT YOU CHANGE THAT ONE ASPECT, IT'S NOTHING.
THIS IS PRETTY SIGNIFICANT.
>> THE 41988 EX PARTE INTERVIEWS COULD HAPPEN AT ANY POINT IN TIME.
AND IF YOU READ THE CORPS LOSE SEW CASE THAT SAID BACK THEN BEFORE THE LEGISLATURE ENACTED THESE CONFIDENTIALITY PROTECTIONS, EX PARTE INTERVIEWS COULD HAVE BEEN AT ANY POINT IN TIME WITHOUT, THERE'S NO COMMON LAW OR STATUTORY RULE THAT WOULD HAVE PREVENTED IT.
>> YOU'RE SAYING THAT IN THE '70s AND '80s THAT DEFENSE LAWYERS COULD GO TALK TO DOCTORS AND THAT WOULD HAPPEN AS A ROUTINE IN PERSONAL INJURY CASES IN.
>> A FLORIDA SUPREME COURT CASE FROM 1984, ITS ACKNOWLEDGED THE FACT THAT IT WAS A CREATURE-- THAT AT THAT POINT IN TIME THERE HAD BEEN NO STATUTE AND NO COMMON LAW THAT WOULD HAVE PREVENTED EX PARTE INTERVIEWS FROM COMING AND, IN FACT, THAT WAS THE VERY HOLDING OF THAT CASE.
EX PARTE INTERVIEWS CAN GO AHEAD AND HAPPEN BECAUSE THERE'S NOTHING TO PREVENT IT.
AS A RESULT, THE LEGISLATURE MADE THE POLICY DECISION TO ENACT THE PATIENT/PHYSICIAN CONFIDENTIALITY STATUTE.
AND, THEREFORE, IF THEY HAVE THE ABILITY TO CREATE THIS, THEY HAVE THE ABILITY TO TINKER WITH IT AND ADJUST THE CONTOURS OF IT.
AND SO WHAT THEY'VE DECIDED HERE IS THAT, WELL, WE WANT TO ADJUST THE CONTOURS OF THE CONFIDENTIALITY OF PATIENT/PHYSICIANS TO ALLOW FOR EX PARTE INTERVIEWS.
AND SO IF THEY ARE ALLOWED TO

CREATE IT TO BEGIN WITH, IT
SEEMS THAT IT WOULD BE UNFAIR
FOR THEM TO PREVENT THEM FROM
CHANGING IT WHEN THEY COULD JUST
ELIMINATE IT ALTOGETHER.
AND SO I THINK--
>> AND SO THERE WOULD BE, A
PATIENT WOULD HAVE NO PRIVACY
INTEREST WHATSOEVER IN THAT KIND
OF SITUATION?
YOU CAN JUST GO AND ASK A
PATIENT ABOUT ANY OF THEIR
PRIVATE MEDICAL ISSUES?
>> THERE WOULD BE TWO
CONSTRAINTS.
THERE WOULD BE THE PHYSICIAN'S
FIDUCIARY DUTY, AND THAT WOULD
BE UP TO THE PHYSICIAN AND
POLICED BY THE PROFESSIONAL
MEDICAL ASSOCIATIONS DIRECTLY,
AND SINCE 2003 THE FEDERAL HIPAA
STATUTE HAS BEEN PASSED WHICH
ALSO ADDRESSES PRIVACY ISSUES.
AND SO, BUT--
>> WHAT ABOUT UNDER THE PRIVACY
CLAUSES OF--
>> THAT AFFECTS GOVERNMENT
ACTIONS.
AND, AGAIN, IN CORALUZZA, THERE
WAS NO LIMITATION PLACED ON THAT
BY A CONSTITUTIONAL PROVISION
EITHER, AND THAT PRIVACY
REFERENDUM HAD PASSED FOUR YEARS
BEFORE THE CORALUZZA DECISION.
AND SO, NO, I DON'T THINK THERE
WOULD BE ANY COMMON LAW,
STATUTORY OR CONSTITUTIONAL
PROHIBITION--
>> WHAT WOULD BE THE
CONSEQUENCES IF PERSON CAME TO
ONE OF THESE PRIVATE MEETINGS
AND SAID, NO, I'M NOT GOING TO
TELL YOU ABOUT WHEN I SAW DR. SO
AND SO TWO YEARS AGO?
>> YOU MEAN THE TREATING
PHYSICIAN?
>> YEAH.
>> YEAH.
>> WHAT'S THE CONSEQUENCE?
>> THERE IS NO CONSEQUENCE.

THE TREATING PHYSICIAN IS FREE
TO DECLINE TO BE INTERVIEWED.
THIS AUTHORIZATION FORM JUST
ALLOWS OBLIGING TREATING
PHYSICIANS TO BE ABLE TO SPEAK
WITH THE DEFENSE IF THEY WANT
TO.
BUT IF THEY DON'T WANT TO, NO
INTERVIEW WILL OCCUR.
>> IF WE'RE JUST TINKERING WITH
IT, WHY DON'T WE JUST TINKER
WITH IT AND SAY THAT DEFENDANTS
AND THEIR LAWYERS AND ADJUSTORS
AND ALL OF THE DEFENSE PEOPLE
CAN HAVE EX PARTE MEETINGS WITH
AN INJURED PLAINTIFF?
>> WELL, THAT WOULD VIOLATE THE
DIFFERENT SECTIONS OF-- THAT
WOULD BE ATTORNEY/CLIENT
PRIVILEGE ISSUE.
>> ATTORNEY/CLIENT.
YOU'RE ASKING ABOUT MEDICAL
TREATMENT.
YOU'RE NOT ASKING ABOUT WHAT THE
LAWYER SAID.
>> WELL, YOU CAN'T TALK TO A
CLIENT THAT'S REPRESENTED BY AN
ATTORNEY, SO THAT WOULD BE A
SEPARATE ISSUE.
>> WELL, TINKER WITH IT.
YOU SAY, YOU CALLED THIS
TINKERING WITH IT.
SO WHO CARES ABOUT
CONSTITUTIONAL PROVISIONS IF
WE'RE GOING TO TINKER OR WITH
IT, BECAUSE THIS COURT HAS
ALREADY APPROVED TINKERING WITH
IT.
>> THEY'VE ADJUSTED, THEY'VE
ADJUSTED IT, AND TO MY WORD,
TINKERED WITH IT--
>> YOUR WORDS, THAT'S NOT MINE.
>>-- IN A WAY THAT'S
CONSTITUTIONAL IN THIS CASE.
IF YOU LOOK AT THE SEPARATION OF
POWERS ISSUE, WE'RE JUST
DISCUSSING THE MERITS OF EX
PARTE INTERVIEWS, SO I'D LIKE TO
BE ABLE TO ADDRESS THE
CONSTITUTIONAL ISSUES, BUT I

THINK THIS IS SEPARATE.
I THINK YOU'LL FIND WHATEVER YOU
OR I MIGHT THINK ABOUT THE
MERITS OF EX PARTE INTERVIEWS
AND WHETHER THEY SHOULD OCCUR
AND WHAT ABUSES MAY OR MAY NOT
OCCUR, WHETHER THAT VIOLATES THE
ACCESS TO COURTS OR SEPARATION
OF POWERS IS A SEPARATE ISSUE.
AND I THINK IT'S THE
LEGISLATURE'S PREROGATIVE TO
ADJUST AND EXPAND AND CONTRACT
THEIR VERY CREATION, THE
POSITION OF PATIENT/PHYSICIAN
CONFIDENTIALITY.
>>
[INAUDIBLE]
>> EXCUSE ME, YOUR HONOR?
>> ARE THERE ANY LIMITS TO THAT?
CAN THEY EXPAND AND CONTRACT AS
MUCH AS THEY WANT?
>> THEY CAN ELIMINATE IT
ALTOGETHER.
I DON'T THINK IT'S ANYWHERE ON
THEIR RADAR SCREEN, BUT THEY
COULD--
>> WELL, MY QUESTION IS YOU SAID
THAT IT'S THEIR PREROGATIVE TO
EXPAND OR CONTRACT THIS, THIS
AMENDMENT.
IS THERE A LIMIT TO THEIR
EXPANSION OF IT WHERE ANYONE CAN
SAY YOU CAN'T DO THAT, IT'S
UNCONSTITUTIONAL?
OR DOES THE LEGISLATURE JUST
HAVE 100% PREROGATIVE TO DO
WHATEVER IT WANTS?
>> I THINK HIPAA,
THE STATUTE,
WOULD PREVENT DISCLOSURE OF
IRRELEVANT INFORMATION.
BECAUSE IF THERE ARE LAWS THAT
ARE COUNTER TO THE PURPOSES AND
GOALS OF HIPAA WHICH IS NOT ONLY
TO PROTECT PRIVATE INFORMATION,
BUT ALSO TO ALLOW TRANSMISSION
AND ACCESS AS WELL, BUT I THINK
IF THERE WERE SOME LAW THAT WENT
ABOVE AND BEYOND THE PURPOSES OF
HIPAA IN THE ABSENCE OF A

STATUTE--
>> WELL, BUT LET'S TALK ABOUT BASIC CONSTITUTIONAL PRINCIPLES, ACCESS TO THE COURTS.
RIGHT TO PRIVACY.
BASED ON THOSE ALONE, ARE THERE ANY LIMITS TO WHAT THE LEGISLATURE CAN DO JUST REGARDING THOSE?
>> WITH ACCESS TO COURTS, I THINK THERE ARE A NUMBER OF CASES THAT DESCRIBE WHAT YOU AND CANNOT DO.
AND IF YOU CAN'T ABOLISH CAUSE OF ACTION, YOU CAN'T ELIMINATE IT, YOU CAN'T IMPOSE PRECONDITIONS ON THE ACCESS THAT ARE THE EFFECTIVE EQUIVALENT OF A BAR-ISSUED COURT.
>> OKAY, SO IF THAT HAPPENS, IF THAT HAPPENS, CAN THIS COURT SAY YOU CAN'T DO IT?
>> OF COURSE.
BUT WHAT I'M SAYING IS THIS LAW DOESN'T EVEN APPROACH THAT.
UNDER WARREN--
>> YOU'RE ASKING, YOU KNOW, WE HAVE THIS PRINCIPLE CALLED THE UNCONSTITUTIONAL PROVISION DOCTRINE WHERE IT BASICALLY SAYS THAT A PERSON SHOULD NOT BE REQUIRED TO GIVE UP ONE RIGHT IN ORDER TO OBTAIN ANOTHER.
HERE YOU'RE ASKING THIS PERSON TO GIVE UP THEIR RIGHT TO PRIVACY SO THEY CAN EXERCISE THEIR RIGHT TO MAINTAIN AN ACTION IN OUR COURTS.
I MEAN--
>> THAT PRINCIPLE HAS NEVER BEEN APPLIED TO PRIVACY ACTIONS.
THIS COURT HAS TYPICALLY LIMITED TO FREEDOM OF SPEECH IN FEDERAL CASES OUTSIDE FLORIDA.
AND I THINK THAT THIS IS NOT GIVING UP THE RIGHT TO PRIVACY.
BECAUSE, LIKE I SAID IN MY BRIEFS, THE INFORMATION HERE IS WAIVED.
THEY'VE PUT THEIR HEALTH

INFORMATION AT ISSUE BY
VOLUNTARILY BRINGING A MEDICAL
MALPRACTICE CLAIM X THE
AUTHORIZATION FORM THAT'S
REQUIRED TO BE GIVEN IN PRESUIT
ONLY REQUIRES DISCLOSURE OF AN
EFFECTIVE MANDATE ONLY
DISCLOSURE OF RELEVANT
INFORMATION.
AND IT ALLOWS THE CLAIMANT TO
LIST WHAT IS RELEVANT AND WHAT
IS NOT.
SO THERE'S NO DANGERING OF A
RIGHT TO PRIVACY VIOLATION HERE.
THE ONLY WAY THAT THE STATE OF
FLORIDA, THE LEGISLATURE, COULD
ENACT EX PARTE INTERVIEWS WAS
THROUGH AN AUTHORIZATION FORM
LIKE THIS.
BECAUSE OF HIPAA.
AND SO IF THE STATE, IF THE
STATE LEGISLATURE'S NOT ALLOWED
TO ACCOMPLISH THE POLICY GOAL OF
ALLOWING EX PARTE INTERVIEWS
THROUGH THIS METHOD, THEN IT
CAN'T BE ALLOWED AT ALL, AND
THERE ARE DOZENS OF STATES THAT
DO.
AND I THINK THAT IS WITHIN THE
PURVIEW OF THE LEGISLATURE TO
DECIDE WHETHER THE PROS OUTWEIGH
THE CONS.
AND IN THIS--
>> THE STATES, DO THEY HAVE
FREE-STANDING PRIVACY CLAUSE AS
WE DO?
>> YES--
>> ALL OF THEM?
>> WELL, MOST OF THOSE STATES
ENACTED THE EX PARTE INTERVIEWS
PRIOR TO HIPAA BEING ENACTED
IN--
>> FREE-STANDING PRIVACY CLAUSE
IN THEIR CONSTITUTION?
THAT'S A VERY SIMPLE QUESTION.
>> I'M NOT SURE IF THEY DO.
>> DON'T YOU THINK THAT'S OF
SIGNIFICANCE?
>> I DON'T THINK SO BECAUSE I
DON'T THINK THE ISSUE OF WHETHER

A STATE'S LEGISLATURE CAN, IF
IT'S WITHIN ITS POWERS TO ALLOW
EX PARTE INTERVIEWS BETWEEN
DEFENDANTS AND TREATING
PHYSICIANS IS A MATTER OF
SUBSTANCE AND PUBLIC POLICY.
AND THEN YOU LOOK-- ONCE YOU
DECIDE THAT STATE LEGISLATURES
AND SHOULD BE ABLE TO MAKE THAT
POLICY DECISION, THEN THE NEXT
QUESTION IS, OKAY, WELL, IS
THERE ANYTHING ABOUT THE WAY
THEY'VE UNDERTAKEN IT THAT
VIOLATES ANY CONSTITUTIONAL--
>> YOU'RE SAYING THEN THAT AFTER
SUIT THE LEGISLATURE COULD ENACT
THESE SAME PROVISIONS THAT
OVERTURN OUR PROCEDURAL RULES
AND ALLOW THESE EX PARTE
INTERVIEWS WITHOUT ANY
PROTECTION?
CAN THEY DO THAT?
>> THE ONLY WAY THAT THEY COULD
HAVE DONE IT IS THROUGH AN
AUTHORIZATION FORM AFTER
HIPAA--
>> NO, I'M NOT ASKING-- IT
WOULD CONFLICT WITH ALL THE
PROCEDURAL RULES AND, AGAIN, WE
ALLOW A LOT OF OPEN DISCOVERY IN
THIS STATE BECAUSE WE BELIEVE IN
PROMOTING THE FAIR EXCHANGE OF
INFORMATION.
SO WHAT I'M ASKING IS COULD THE
SAME IDEA OF JUST ALLOWING IT,
YOU'RE SAYING, YES?
HIPAA WOULDN'T APPLY BECAUSE THE
LEGISLATURE COULD SAY THAT
PLAINTIFF HAS TO GIVE THE
AUTHORIZATION.
SO COULD IT BE DONE AFTER SUIT
IS FILED IN THE SAME WAY AS
BEFORE?
IN ALL CASES?
>> I'M NOT SURE I UNDERSTAND THE
QUESTION.
>> IS IT, IF IT'S SUBSTANTIVE,
IT'S SUBSTANTIVE IN POLICY.
SO COULD THE LEGISLATURE JUST
SAY, GO BACK AND SAY WE'RE GOING

TO ALLOW IT FOR ALL CIVIL CASES,
ALLOW EX PARTE INTERVIEWS WITH
DOCTORS?
>> WELL, THEY WOULD-- I THINK
THE AUTHORIZATION FORM ALLOWS
THESE INTERVIEWS TO CONTINUE TO
OCCUR AFTER THE LAWSUIT IS
FILED.
THEY CAN'T JUST-- IT JUST CAN'T
BE USED IN COURT.
SO I THINK THAT'S ALREADY THE
ISSUE HERE.
>> OKAY.
I DIDN'T REALIZE THAT THAT WAS,
THAT THAT EXTENDED TO AFTER SUIT
WAS FILED.
AND YOU'RE STILL SAYING IT'S
SUBSTANTIVE, NOT PROCEDURAL.
>> IT IS SUBSTANTIVE--
>> EVEN THOUGH IT CONFLICTS WITH
ALL AFTER SUITS FILED WITH ALL
THE DISCOVERY RULES THAT WE
HAVE?
>> BUT IT'S NOT-- IT'S,
DISCOVERY'S IN COURT.
THIS IS NOT USED IN COURT, THIS
CANNOT BE USED IN COURT UNDER
1.650C3, IT CANNOT.
>> YOU KNOW, AND I APPRECIATE
YOUR ARGUMENTS.
YOU'VE OBVIOUSLY THOUGHT ABOUT
IT, AND I KNOW YOU'RE NOT NAIVE.
THE IDEA THAT WHEN YOU LEARN
INFORMATION THAT IT ISN'T USED
IS NOT-- IT DEFIES ANY NOTION
OF WHAT REALLY HAPPENS IN-- BUT
YOU'RE IN YOUR--
>> I'M SORRY.
>> YOU'RE OUT OF TIME.
>> I'LL GIVE YOU A COUPLE OF
MINUTES.
WE HELPED YOU OUT WITH USING
YOUR TIME.
>> OKAY.
[LAUGHTER]
JUST TO RESPOND TO THAT, OTHER
THAN NOT MEDICAL MALPRACTICE
CASES, INFORMAL INTERVIEWS CAN
HAPPEN PRE AND POST-SUIT--
>> AND I UNDERSTAND WE CAN HAVE

INFORMAL INTERVIEWS WITH-- BUT
WE'RE TALKING ABOUT DOCTORS,
RIGHT?
>> RIGHT.
>> AND MEDICAL INFORMATION.
>> THE LEGISLATURE DECIDED THAT
THERE SHOULD BE NO REASON WHY
THAT SHOULDN'T OCCUR.
WE NOW DISAGREE WITH THAT, YOU
KNOW, YOU OR I, THAT SHOULDN'T
IMPACT THE CONSTITUTIONALITY OF
WHAT IT DECIDED TO DO.
>> BUT YOUR MEDICAL INFORMATION
IS THE MOST, ONE OF THE MOST
PRIVATE OF WHAT YOU POSSESS AS A
CITIZEN.
YOU KNOW?
WHAT YOU TALK TO YOUR DOCTOR
ABOUT OR YOUR TREATING DOCTORS,
AND IT COULD GO FAR FROM JUST
YOUR MEDICAL CONDITION.
YOU DON'T SEE THAT AS BEING
FUNDAMENTAL TO--
>> THE ONLY LEGAL INFORMATION
THAT CAN BE OBTAINED THROUGH
THIS FORM IS INFORMATION
RELEVANT TO THE LAWSUIT WHICH IS
GOING TO BE REVEALED ANYWAY.
SO YOU'RE ASSUMING ILLEGALITY--
>> THERE'S NO ONE THERE TO SAY,
HEY, THAT'S NOT RELEVANT, DON'T
GO THERE.
I MEAN, IT'S LIKE--
>> I MEAN--
>> HOW CAN YOU PROTECT AGAINST
IT, NOBODY KNOWS IT'S GOING ON?
>> I THINK PEOPLE WILL KNOW
WHAT'S GOING ON IF IT'S GOING TO
BE USED TO SOME KIND OF
ADVANTAGE.
I THINK IF IT'S GOING TO BE USED
IN COURT, THEN THE PLAINTIFF
WILL KNOW, WAIT, HOLD ON, HOW
DID YOU GET THAT INFORMATION?
THAT'S NOT WITHIN THE CONSTRICT
OF THIS AUTHORIZATION FORM, SO
I'M GOING TO MOVE FOR SANCTIONS,
YOU KNOW, DEFAULT JUDGMENT.
I THINK, I THINK THE LEGISLATURE
DECIDED THAT THE PROS OF THAT

OUTWEIGH THE CONS, AND THERE'S
NO VIOLATION OF PRIVACY BY JUST
ALLOWING AN INTERVIEW.
AND YOU'RE ASSUMING THAT THE
DOCTORS ARE GOING TO VIOLATE ALL
KINDS OF ETHICAL CANONS IN THE
LAW BY MAKING THAT ASSUMPTION
INVALIDATED BEFORE IT HAS A
CHANCE TO OCCUR.
I'M SORRY.
THANK YOU, YOUR HONORS.
>> THANK YOU.
>> I FIRST STARTED OUT BY SAYING
THE GOAL OF THIS LEGISLATION IS
TO ALLOW FOR EX PARTE
INTERVIEWS, THEREFORE, ALLOWING
EX PARTE INTERVIEWS IS RATIONAL
WAY TO ACCOMPLISH THAT GOAL.
THIS IS CIRCULAR REASONING.
NOW, THE FACT OF THE MATTER IS
THAT'S NOT NECESSARILY A
LEGITIMATE GOAL, BUT ANY
EXERCISE OF THE LEGISLATURE'S
POWER EVEN WHEN IT HAS AUTHORITY
MUST BE EXERCISED WITHIN
CONSTITUTIONAL LIMITATIONS.
AND WE SUBMIT THAT THEY HAVE NOT
DONE SO HERE.
YOUR EXAMPLE, MR. CHIEF JUSTICE,
OF A CORPORATION SUING A
CORPORATION, YOU KNOW, WE HAVE
RULES ABOUT WHO YOU CAN CONTACT
WITHIN THE CORPORATION AND WHO
IT'S LEGITIMATE NOT TO CONTACT
IN PART BECAUSE THE CORPORATION
ITSELF IS REPRESENTED BY
COUNSEL.
AND SO THAT IS THE KEY TO
DECIDING THAT.
BUT HERE YOU'RE ASKING THE
DOCTOR, THE TREATING DOCTOR TO
MAKE THE JUDGMENT ABOUT WHAT MAY
BE RELEVANT OR NOT RELEVANT TO A
LAWSUIT.
ESSENTIALLY, IT'S A LEGAL
JUDGMENT UPON WHICH LAWYERS
DISAGREE AND OFTEN HAS TO BE
ARBITRATED BY A COURT WHEN THEY
DO DISAGREE DURING DISCOVERY.
>> I WOULD IMAGINE, I'M THINKING

OF SOME OF THE MOST INTIMATE
DETAILS THAT COULD BE IN
RECORDS, YOU KNOW, COULD BE
ABOUT YOU'RE CONCERNED YOUR
DAUGHTER IS DOING SOMETHING THAT
IS, YOU KNOW, INAPPROPRIATE
BEHAVIOR-- I MEAN, YOU COULD
HAVE SHARED THAT.
MAYBE THE DOCTOR PUT IT IN THE
RECORD.
SO I'M ASSUMING THAT WITH THESE
DISCLOSURE OF RECORDS THAT THE
PLAINTIFF HAS THE ABILITY TO NOT
ALLOW INFORMATION THAT WOULD
BE--
>> THAT IS CORRECT.
>>-- SO THAT THE RECORDS WHEN
THEY GET DISCLOSED DON'T HAVE
INAPPROPRIATE DISCLOSURES.
>> THAT IS CORRECT.
THAT'S CORRECT.
AND THE SUPREME COURT OBSERVED
IN THIS INSTANCE TOO, YOU KNOW,
ASKING A DOCTOR TO MAKE THIS
KIND OF LEGAL JUDGMENT WHEN,
POTENTIALLY, THE PERSON ASKING
IT IS A REPRESENTATIVE OF THE
SAME INSURANCE COMPANY THAT
INSURES THEM FOR THEIR OWN
MEDICAL MALPRACTICE IS ASKING
TOO MUCH.
THEY'RE GOING TO SHADE IN A WAY
THAT FAVORS THEIR COMPANY
BECAUSE THEY, OF COURSE, TO NOT
WANT THEIR PREMIUMS AFFECTED.
THEY'VE GOT A SELF-INTEREST
THERE.
>> LET ME-- THERE'S NOTHING
THAT WOULD ACTUALLY PREVENT A
DOCTOR FROM CALLING ANOTHER
DOCTOR TO SAY, HEY, I'M BEING
SUED AND, YOU KNOW, YOU'RE
TREATING THIS PERSON.
I MEAN, THERE ARE ALREADY INFORM
ALWAYS OF WHAT MIGHT BE SEEN AS
INTIMIDATION WHICH IS WHY
EXPERTS SOMETIMES HAVE TO COME
FROM OUT OF STATE OR OTHER
AREAS.
SO WE UNDERSTAND THIS HAPPENS--

>> RIGHT.
>>-- ANYWAY.
>> AND THERE ARE REMEDIES.
>> THEY CAN CALL THEIR FRIEND OR
SEE THEM AT THE MEDICAL SOCIETY,
AND WE KNOW THESE, THAT IT
ALREADY OCCURS.
>> IT'S TRUE.
BUT THERE ARE REMEDIES FOR THAT.
BUT ONE OTHER POINT THAT I DO
WANT TO MAKE--
>> WELL, THERE'S NOTHING WRONG
WITH A DEFENDANT WHO'S SUED TO
BE ABLE TO SAY, HEY, YOU KNOW,
I'M BEING SUED,
AND THIS GUY IS YOUR
PATIENT--
>> THERE'S NO REVELATION OF
CONFIDENTIAL INFORMATION.
>> RIGHT.
BUT IT STILL HAS THE SAME
EFFECT--
>> LET ME GO BACK TO YOUR VERY
CAPABLE OPPONENT WHO HAS SAID,
LOOK, THE COURTS IN FLORIDA HAVE
APPROVED THE PRESUIT CONCEPT,
AND THIS IS JUST ONE VERY MINOR
ELEMENT.
HE USED THE WORD "TINKERING"--
THAT'S NOT MY WORD-- TO CHANGE
WHAT WE'RE GOING TO ALLOW FOR
THESE.
WHAT'S WRONG WITH THAT?
>> WELL, THIS IS NOT A MINOR,
THIS IS NOT A MERE MINISTERIAL
ACT.
IT INDICATES NOT ONLY PRIVATE
INFORMATION UNDER THE PRIVACY
AMENDMENTS TO THE FLORIDA
CONSTITUTION WHICH DOES INCLUDE
THE COVERAGE OF MEDICAL
INFORMATION IN STATE V. JOHNSON
IN 1990 SUBSEQUENT--
[INAUDIBLE]
CITED TO YOU, THIS COURT SAID
SO, AND SO I THINK THAT DOES
CHANGE THE CALCULUS ON WHETHER
THE LEGISLATURE CAN ABOLISH
CLIENT-- PATIENT/DOCTOR
PRIVILEGE.

AND SO THE FACT IS THIS REACHES
DEEP INTO THE LAWSUIT.
IT IS DESIGNED TO DISCOURAGE
THESE KINDS OF LAWSUITS.
IT DOES NOT EXPOSE INFORMATION
THAT WOULD NOT OTHERWISE BE
DISCOVERABLE THROUGH THE
INFORMAL DISCOVERY
ALREADY AUTHORIZED AND
SO, THEREFORE, ALL IT DOES IS
CREATE ANOTHER MECHANISM FOR
GETTING THAT INFORMATION THAT
HAS ALL THESE DANGERS TO IT THAT
THIS COURT SHOULD NOT APPROVE.
SO WITH THAT, WE ASK THAT THE
1ST DISTRICT BE REVERSED AND
THAT THESE AMENDMENTS DECLARED
UNCONSTITUTIONAL.
>> THANK YOU FOR YOUR LIVELY
ARGUMENT.