IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

4th DCA Case No. 08-1399

Lower Tribunal Case Nos. 50-2006 CA 012024 XXXX MB AE
consolidated with 50-2007 CA 003345 XXXX MB AE
In the Circuit Court of the 15th Judicial Circuit,
In and for Palm Beach County, Florida

ALLAN J. DINNERSTEIN, M.D., and
BETHESDA MEMORIAL HOSPITAL,

Defendants/Petitioners

v.

JUANITA MORAGA,

Plaintiffs/Respondents.
_____/

PETITION FOR COMMON LAW WRIT OF CETIORARI
TO THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

COMES NOW THE DEFENDANTS/PETITIONERS, ALLAN J. DINNERSTEIN, M.D., AND BETHESDA MEMORIAL HOSPITAL, and petitions the District Court of Appeal, Fourth District, for the issuance of a Writ for Certiorari to quash the Lower Court's order rendered on March 6, 2008, which determined that a recorded conversation was admissible, and to

direct the Lower Court to enter an order finding the recording to be inadmissible. Specifically, the Petitioners show to this Appellate Court:

I. BASIS FOR JURISDICTION

This Petition for a Common Law Writ of Certiorari is brought under *Article V, Section 4(b)(3) of the Florida Constitution* and under *Fla. R. App. P. 9.030 (b)(2)* and *9.100*.

II. THE UNDISPUTED FACTS UPON WHICH THE PEITIONERS RELY [1]

1. This case originated as a slander action brought by Dr. Allan J. Dinnerstein, M.D., against one of his former midwives, Juanita Moraga. See *Allan J. Dinnerstein, M.D. v. Juanita Moraga*, Case no. 50-2006 CA 012024 XXXX MB AE, in the Circuit Court of the 15th Judicial Circuit, in and for Palm Beach County, Florida (hereinafter referred to as "Dinnerstein 1"). A. 4-7. Subsequent to the filing of the slander action, Juanita Moraga filed a separate action against Allan J. Dinnerstein, M.D., for assault and battery and for a temporary restraining order. See *Juanita Moraga v.*

[1] An appendix under *Fla. R. App. P. 9.220* accompanies this petition. All citations to the appendix will be indicated by the symbol "A" followed by the appropriate page from that appendix.

Allan J. Dinnerstein, M.D., Case no. 50-2007 CA 003345 XXXX MB AE, in the Circuit Court of the 15th Judicial Circuit, in and for Palm Beach County, Florida (hereinafter referred to as "Moraga 1"). A. 8-15. The Lower Court, in *Moraga 1*, found against Juanita Moraga and in favor of Allan J. Dinnerstein, M.D., on the TRO hearing for assault and battery on the finding, inter alia, that it was Moraga chasing Dr. Dinnerstein out the door and not the other way around; and, hence, the Court denied issuing a temporary restraining order. A. 16-20.

2. Nearly a year later, the complaint in *Moraga 1* was then amended to add the Hospital/Petitioner, Bethesda Memorial Hospital, as an additional defendant, and to set forth an additional claim alleging that both Dr. Dinnerstein and Bethesda Memorial Hospital violated the Whistle Blower Act by essentially forcing Moraga to resign on the claimed basis that she refused to illegally alter medical records relative to a delivery that occurred on May 24, 2005. A. 21-31.
3. In its most recent form, the claim for slander brought by Dr. Dinnerstein (as set forth in the counterclaim of Dr. Dinnerstein in Moraga 1) alleges that Moraga slandered him by telling others that

Dr. Dinnerstein demanded her to alter medical records regarding the May 24th delivery of a child in order to show that an umbilical cord was wrapped around the neck of the child (i.e., what is known in medical vernacular as a "nuchal cord"), in order to provide a defense to a medical malpractice claim that would be premised on hypoxic injuries having been sustained by the child. A. 32-38.

4. This May 24th delivery was of the child known as Jorge Maldonado. The delivery was subsequently made the subject of a medical malpractice action which was later made the subject of a collateral appeal brought before this Appellate Court in the case styled as *Allan J. Dinnerstein, M.D., P.A. vs. Maria Maldonado, et. al.*, 4th DCA Case no. 08-150, in the District Court of Appeals, Fourth District, on the issue of whether illegal aliens could bring a civil cause of action under the Federal and State Constitutions.

5. The gravamen of the slander Counterclaim, in *Moraga 1*, is that Moraga's statements (that Dr. Dinnerstein was forcing her to illegally alter medical records) were made to both the chief of labor and delivery at Bethesda Memorial Hospital prior to the commencement of the medical malpractice action and to the

plaintiff's attorney in the malpractice case even prior to the commencement of the pre-suit investigation period that was later undertaken as a predicate to the eventual malpractice action. Id.

6. At the time of the hearing to determine the admissibility of the audio taped conversation of Dr. Dinnerstein, the Respondent, Moraga testified that she had already tendered her resignation to Dr. Dinnerstein on June 1, 2005, which was even prior to her initial unrecorded conversation with Dr. Dinnerstein, the contents of which (as she contends) prompted her subsequently orchestrate and record the second conversation with Dr. Dinnerstein, the latter of which is the subject matter of this Petition. A. 177, lines 12-14; A. 181, lines 14-25.
7. The recorded conversation between Moraga and Dinnerstein, according to the testimony of Moraga, is essentially a reiteration of the first conversation with two key differences. A. 297, infra. Moraga admitted, and this Court can hear for itself by listening to the recording, that the recorded conversation contained no demand to alter any records or that there would be any negative consequences to her if she didn't alter the records. A. 293, lines

23-25; A. 214, lines 1-8; A. 297, lines 19-25; A. 298, lines 1-13; A. 303, lines 12-14; By her own admission, the recording Moraga made, without the consent of Dr. Dinnerstein (A. 295, lines 6-8), was made sometime between June 5 to June 6, 2005-five days after the tender of Moraga's resignation, and 12 to 13 days after the delivery. A. 292, lines 19-25; A. 293, lines 1-6.

8. Moraga further testified, at that same hearing, that the reason for her June 1st resignation had nothing to do with the alleged demand to alter records (which she had claimed came during the first conversation with Dr. Dinnerstein that motivated her to record the subsequent conversation that took place a day later either on June 5th or 6th) or any statements made by Dinnerstein on the audio recording. A. 216, lines 6-25. She testified that she resigned because she no longer wanted to attend to the delivery of babies over 4000 grams, which she contends is macrosomic and would require a Cesarean Section for the delivery. Id.
9. As for the recording itself, which is the subject matter of this Petition for a Common Law Writ of Certiorari, it occurred at least 5 days after Moraga tendered her resignation (A. 186, lines 12-25;

A. 187; lines 1-2) and took place on the campus of Bethesda Memorial Hospital; specifically, in the physician's (also known as the midwives') office in the labor and delivery department. A. 184, lines 1-8. The door was left open during the recording of this conversation. Id.

10. Moraga herself, in response to a judicial inquiry, stated that there was no other person in the physician's office at the time of the recording; A. 172, lines 3-10; that she herself believed that this second conversation was private and kept in compliance with the confidentiality provisions of HIPAA; A. 183, lines 3-24; A. 184, lines 1-10; and, that even though she noted that there were other people were in the Labor and Delivery area, she couldn't specifically identify anyone; A. 170-171; and, in particular, no one testified that anyone did in fact overhear the conversation taking place between Moraga and Dr. Dinnerstein at the time it was being secretly recorded. At best, when Moraga was asked "did you think that other people might be able to hear you in the hallway", she answered, "(t)hey could have". A. 174, lines 6-8. And when

Moraga was asked more specifically, "(d)o you know if anyone did", her answer was "I wouldn't know". A. 174, lines 9-10.

11. Dr. Dinnerstein, in his deposition, testified that he subjectively expected his unknowingly, recorded conversation with Moraga to be a private conversation with her since he, like Moraga, was cognizant of the HIPAA regulations requiring the maintenance of privacy regarding such medical information. A. 163-165. He corroborated that the conversation was conducted in his office and while on the campus of Bethesda Memorial Hospital in its Labor and Delivery Department. A. 349, lines 4-8.

12. The Respondent acknowledges and admits that Dr. Dinnerstein was totally unaware that he was being secretly recorded. A. 295, lines 6-8; A. 317, lines 18-22.

13. During the actual conversation, there were no other voices heard on the tape except for those of Moraga and Dr. Dinnerstein. A. 332.

14. Moraga testified that no demand to alter the medical records was ever heard on the recording (A. 213; lines 23-25; A. 214, lines 1-5); that what was being requested of her by Dr. Dinnerstein in the

recording, was to make a late entry to the chart, which is something she admitted having done in the past on other cases (A. 315, lines 21-25; A. 316; A. 317, lines 1-4); and, which, when appropriately done, in the manner described by Dr. Dinnerstein on the recording, would be by merely dating the entry as of the date it was actually made and to add it to the chart without crossing out anything else. A. 214, lines 6-12; A. 356, lines 12-15.

15. On the basis that Moraga's nurses notes were, by her own admission, silent as to the involvement of a nuchal chord (i.e., an umbilical cord wrapped around the child's neck – A. 371, lines 4-6), and since a consultation report authored by a pediatric cardiologist, who saw the child within two hours after delivery, charted that a bedside nurse had informed the pediatric cardiologist that a nuchal cord was involved and that the chart was not complete (due to its absence in the chart), the Lower Court made a finding that what Dr. Dinnerstein was attempting to do during his recorded conversation was in fact legal and appropriate. A. 261, lines 1-3.

16. Dr. Dinnerstein had testified that he was not involved in the delivery (A. 340, lines 17-22). Moraga agreed that since he is the director of the clinical program for the public health patient referrals at Bethesda Memorial Hospital, and since he was not present at the delivery, that he had the right and duty to see that the chart was completed (A. 309, lines 16-25; A. 310, lines 1-10). Dr. Dinnerstein further testified that this inquiry with Moraga was prompted by his reading of the consultation report regarding the presence of a nuchal cord with nothing being charted by those at bedside. A. 342, lines 15-23; A. 343, lines 10-16; A. 371, lines 22-25; A. 372; lines 1-3; A. 382, lines 16-25.

17. Now that the recording was deemed admissible, Moraga's counsel, in these consolidated actions (*Dinnerstein 1* and *Moraga 1*), intends, by his own statement, to conduct further discovery surrounding the recorded statement. A. 410; lines 6-16. Likewise, Plaintiff's counsel for the malpractice action, who was present during this hearing, and who assisted Moraga in having this recording being deemed admissible, stated that he too will seek its

admission in the medical malpractice action against Bethesda Memorial Hospital. A. 83, lines 16-25; A. 84-88.

18. The judge, who issued the subject order, and who heard this motion to determine the admissibility of the recorded conversation, is also the same judge sitting on the medical malpractice action.

III. THE NATURE OF THE RELIEF SOUGHT

The Petitioners request that this Honorable Court issue an order to show cause to the Respondent, and ultimately issue its common law writ of certiorari to the Circuit Court of the 15th Judicial Circuit, in and for Palm Beach County, Florida, quashing the Lower Court's order rendered on March 6, 2008 and requiring the Lower Court to enter an order finding the audio recording of Allan J. Dinnerstein, M.D. to be inadmissible as an illegal intercept under the *Florida Security of Communications Act, Chapter 934.01 et. seq. of the Florida Statutes.*

IV. ARGUMENT

A. An order to show cause should be issued in this case because the writ of certiorari is the appropriate method to review the Order of

the Lower Court rendered March 6, 2008 which determined that a non-consensual recorded conversation is admissible.

In the case at bar, the net effect of allowing the admission of an otherwise inadmissible, non-consensual recording will be to taint all further discovery with questions regarding its contents and meaning in light of Moraga's oral testimony as to what she said was stated between the two during her first claimed encounter with Dr. Dinnerstein that had not been recorded. Moraga will most certainly use this recorded conversation to bolster her testimony of the initial unrecorded conversation—where she insists that a demand to alter records was made with the threat of termination was made even though the recording makes no such demand, requests no alterations, and seeks only to complete a chart based upon a consultant's written report.

The point is that such a ruling on admissibility carves the landscape for future inquiries that should never be permitted. This type of order, which has the effect of allowing for a whole new field of inquiry, is the proper subject of certiorari review.

In *Globe Newspaper v. King*, 658 So.2d 518 (Fla. 1995), the Florida Supreme Court held that the District Court of Appeal does indeed have

certiorari jurisdiction to review an order allowing an action to proceed with a punitive damages claim since the allegations would permit further discovery into the financial matters of the defendant which would not otherwise be permissible until after a judgment is obtained in favor of the plaintiff. Although the Florida Supreme Court noted in its majority opinion in *King* that certiorari is not appropriate to review the sufficiency of the evidence, this petition is not requesting that this Appellate Court reweigh the evidence, but merely to decide that the decision was erroneous and constituted a departure from the essential requirements of law based upon the undisputed facts that were put forth in both the depositions and testimony that was presented at the time of the hearing.

The consequences for the Petitioners, in the case at bar, are much like that of the defendant in the *King* decision. A whole new line of what would otherwise be impermissible discovery will commence if the order is left to stand. The attorney for Moraga, at the time of the taking of the deposition of Dr. Dinnerstein, intimated that many further questions on the topic will need to be asked and that the inquiries made during the deposition didn't even begin to scratch the surface. Likewise, this same sentiment was expressed

by the plaintiff's attorney in the medical malpractice action, who like Moraga obviously seeks its admission to use against the Petitioner, Hospital.

The most compelling case, for why certiorari is the appropriate method of review for the instant order, is the one decided by the Fourth District in *Duckworth v. State*, 923 So.2d 530 (Fla. 4th DCA 2006), wherein this Court held that a Petition for Writ of Certiorari was appropriate to review an order that was authorizing the continued release of what was otherwise privileged information that had already come "out of the bag". In *Duckworth*, the petitioner was seeking to quash an order requiring the Department of Motor Vehicles to release medical information even though the State had already obtained copies of these same reports directly from the physicians themselves which was done prior to the filing of the petition. The *Duckworth* Court held that such information—albeit one that has already been obtained by the other party—being nevertheless precluded by statutes from admissibility into evidence, was still subject to an order of non-disclosure, and warranted the issuance of the writ quashing the existing order below that allowed for their continued display.

Thus, not only will material harm result, but such a negative impact could never be remedied on plenary appeal due to untoward collateral

actions that could arise such as the filing of criminal or administrative proceedings on the one hand against Dr. Dinnerstein, or its misuse in the prosecution of Bethesda Memorial Hospital on the other hand, in the collateral medical malpractice claim. An example this type of irreversible harm that could only be remedied by the issuance of a writ of certiorari can be seen in the case of *Vermette v. Ludwig*, 707 So.2d 742 (Fla.2nd DCA 1997) wherein the Court held that certiorari was the appropriate method for reviewing an order dispensing with a qualified immunity for some of the defendants. In *Vermette*, the Court reasoned that "(b)ecause of the nature and purpose of a claim of immunity from suit, an appeal after final judgment would not be an adequate remedy; a party cannot be reimmunized from suit after-the-fact".

Here too, in the case at bar, once the aforementioned collateral consequences take effect, they cannot be undone. This is much like protecting the use and misuse of what would otherwise be protected trade secrets or protecting the identity of a confidential informant. See *Allstate Insurance v. Langston*, 655 So.2d 91 (Fla. 1995)(Certain types of evidence if disclosed, such as with trade secrets or what is otherwise privileged matters, can cause irreparable harm if disclosure is not prevented.)

In conclusion, the instant order of the Lower Court, rendered March 6, 2008, is appropriate for certiorari review since the continued disclosure of such evidence would cause material harm to the Petitioners that could not be adequately remedied on plenary appeal, and, as will be argued, the order's rendition constituted a departure from the essential requirements of law.

B. This court should issue a writ of certiorari to quash the order below because it departed from the essential requirements of law in that the Petitioner, Allan J. Dinnerstein, M.D. did not consent to being recorded, and had a justifiable subjective expectation that the conversation with the Respondent, Juanita Moraga would remain private due to the confidentiality mandates imposed by HIPAA.

There is no dispute that the 13-minute recorded conversation of the Petitioner, Allan J. Dinnerstein, M.D. was done without his consent. There is also no dispute that it took place after Moraga's resignation; on the campus of Bethesda Memorial Hospital; and, in particular, at the physicians' office in the Labor and Delivery Department.

The contents of the recorded conversation was prompted by the reading of the consultation report of the pediatric cardiologist who charted that a bedside nurse informed him that a nuchal cord was involved in the delivery and that the chart was incomplete since nothing about the chord had been referenced in the medical record. The recorded conversation of Dr. Dinnerstein and Moraga revealed that no demands were ever made to alter or change anything in the record. The Respondent, Moraga, testified that all of this subject matter, about alleged demands being made to alter the record, came (as she claims) during an earlier unrecorded conversation that took place a day earlier between Moraga and Dr. Dinnerstein. Moraga admitted that what was being requested of her during the taped conversation of Dr. Dinnerstein was to make a late entry, which is something that she had done in the past using the same methodology prescribed by Dr. Dinnerstein in the recording; namely, by adding the reference to the nuchal cord and dating it on the exact date that it was made.

On this basis, the Lower Court found nothing illegal about the recorded conversation. However, the Order that was ultimately rendered by that same Court, determined that the recording was nonetheless admissible since Dr. Dinnerstein had no reasonable right to have an expectation of

privacy due to public policy considerations. Succinctly, the Order was erroneous and departed from the essential requirements of law since the court's determination that the doctor had no justifiable expectation of privacy was based solely on the potential of having his recorded conversation overheard by someone in close proximity since others, who could not be positively identified, were in the area at the time. This applies an objective test to what is supposed to be, by law, a subjective expectation of privacy tempered only by public policy considerations that arise only under very limited circumstances—namely when criminality is involved during or in the conversation. The instant Order totally ignores or discounts all the other undisputed facts, and never limits its inquiry into the mind of the physician even though the Court ruled that there was illegality perceived during the making of the recorded conversation.

a.) The standard for whether a person has a reasonable expectation of privacy is a subjective one limited only by public policy considerations under very limited circumstances.

In the case of *State v. Incairrano, 473 So. 2d 1272 (Fla. 1985),* the Florida Supreme Court "… addressed the requirement of *section 934.02 (2)* that there be a reasonable expectation of privacy in the oral communication in order for it to be protected under the security of communications statute". *Id.* at page 1275. If the person, whose conversation was recorded, had no justifiable expectation of privacy, then the statute would not apply to prevent its admission into evidence. For the Court, in *Incairrano,* this meant that the person had to have a reasonable expectation of privacy when engaging in the conversation that was secretly being recorded. The Court held that "(a) reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize* this expectation as reasonable". *Id.* at page 1276. Thus, the first question to be asked under *Inciarrano* is whether the person, whose conversation is secretly being recorded, has a subjective expectation of privacy. In most instances, this would end the inquiry; but under the particular circumstances found in *Inciarrano,* the Florida Supreme Court added the caveat that the subjective expectation of privacy would be subject to public policy considerations when criminality manifests itself during the conversation.

In that case, the Defendant, Inciarrano, whose conversation was being recorded, came to the house of the person who did the recording and murdered him while the recording was taking place. The Florida Supreme Court held that society at large, under the particular facts of *Inciarrano*, would never accept such a conclusion that the expectation of privacy was reasonable, and hence justified, in light of murderous intentions of defendant. Specifically, the "…expectation under the circumstances must have been one that society is prepared to recognize as reasonable". *Id.* Clearly, a murderer is not entitled to have a justifiable expectation of privacy no matter what his subjective expectations are.

In the absence of these aberrant circumstances, however, the test for whether a justifiable expectation of privacy exists turns simply on the person's subjective expectation of privacy. In *State v. Sells*, 582 So. 2d 1244 (Fla. 4th DCA 1991), the Fourth District Court of Appeals made the broad sweeping observation that the Legislature, in enacting Chapter 934, "…intended that each party to a private conversation should enjoy an expectation of privacy in that conversation". In reviewing the Florida Supreme Court's decision in *Incairrano*, the *Sells* Court expressly held that the criminal activity exception noted therein, which brings into play a

consideration of public policy, was limited only to the particular facts of that case. Thus, the only issue to decide when dealing with the admissibility of a secretly recorded conversation is whether the individual had a subjective expectation of privacy which would be vitiated if the content and subject matter of the conversation constituted, in and of itself, criminal activity.

In the case at bar, the Lower Court had made a finding that the content of the conversation was not of itself illegal and that what the physician was doing was proper.[2] Therefore, since a consideration of public policy should not have been undertaken (due to the absence of any illegality referenced in the recording), the only issue for the lower court's consideration should have been limited to whether Dr. Dinnerstein had a subjective expectation that the conversation that he was having with Moraga was private. The fact that there were other people in proximity, that might have overheard the conversation, in and by itself, does not dilute in any way the expectation that

[2] See *OBG Management*, a Dowden Publication Vol. 20, No. 3, March 2008, *Focus on Professional Liability;* "10 Keys to Defending (or, better, keeping clear of) a shoulder dystocia suit", by Andrew K. Worek. Esq., which stresses notifying risk management if late entries need to be made and making sure the chart is complete. A. 417-423. And see A. 163-165, wherein Dr. Dinnerstein testifies as to his desire for completeness, what caused that desire, and his notification of risk management of the need for a late entry.

a conversation involving the medical information of a patient will be other than private.

Possibilities always exist in this day and age that someone might be eavesdropping; but that does not detract from a person's justifiable expectation of privacy. In *Sells*, supra., the employee deputy was charged under the statute for an unauthorized interception of a conversation he recorded with his employee, the County Sheriff. While it was true, the County Sheriff had a suspicion that his deputy would record their conversation, based upon what others had been saying, the Court in *Sells*, nonetheless, determined that the subjective expectation of privacy was still justified by the County Sheriff. The fact that one has a suspicion that one is being recorded, or even overheard, does not vitiate that expectation of privacy. In so holding, the *Sells* Court stated that "(t)he message would be that do hold otherwise would be to endorse the interception of private communications so "….long as one does so in a manner that might suggest the conversation is being intercepted"; or, as in the case at bar, might be overheard. *Id.* at page 1245.

b.) What did Dr. Dinnerstein expect when talking about the medical information of a patient to another health care provider when the conversation took place inside the physicians' office in the Labor and Delivery Department at Bethesda Memorial Hospital?

Clearly, to answer this question, the Lower Court should have looked at Dr. Dinnerstein'a frame of reference once it was determined that what he was doing during the recorded conversation was legal. The legality of the conversation should have restricted the Lower Court's inquiry to what the physician was subjectively thinking at the time of the recording. Nothing further was permissible.

Dr. Dinnerstein testified that he was always cognizant of the confidential nature of a patient's medical information. Essentially, he (like all other health care providers) lives in a constant state of HIPAA awareness. This awareness is activated especially when discussing a patient's medical information with another health care provider within the confines of the Labor and Delivery Department, which is inside the four walls of the Hospital and located within the physicians' designated office.

The fact that the door to the office was open does not offend his expectation of privacy since male doctors, and in particular obstetricians and gynecologists, are trained never to be in a closed room alone with a woman patient or nurse. This is certainly to avoid claims of assault and battery, which unfortunately was something that was eventually claimed by Moraga, albeit unsuccessfully, early on in *Moraga 1*.

In order to assess the subjective expectations of Dr. Dinnerstein, the lower court's inquiry should have focused on the mindset of Dr. Dinnerstein which is one shrouded with privacy mandates and disclosure restrictions. At the Federal level, disclosure of medical information is controlled by *the Health Insurance Portability and Accountability Act" of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936,* which provides that health care providers are required to protect the confidentiality of a patient's health information. See *PAL, M.D. v. NEW YORK UNIVERSITY*, 2007 U.S. Dist. LEXIS 32641 (S.D.N.Y., 2007). The requirements of HIPAA govern the release of health information which can be in either written or oral form and can relate to either the present, future or past medical conditions. *BAYNE v. PROVOST*, 359 F. Supp. 2d 234 (N.Y.N.D. 2005). Clearly then, discussions pertaining to the past medical condition of the baby, Jorge Maldonado,

between Dr. Dinnerstein and Moraga fall within the parameters of HIPAA. Moraga herself testified that this too was her expectation. All were mindful that the privacy requirements had to be maintained which is why the recorded conversation took place inside the physicians' office. The application of the privacy requirements of HIPAA applied to both the participants to the conversation, and was appropriately maintained per their own testimony. To suggest otherwise would be to require that all medical dictation be done behind closed, locked doors with no one in potential viewing or listening distance. This would be an impossible restriction to place on any medical staff member given the busy nature of the hospital, and the necessity of always being in close proximity to the patients.

The conditions surrounding the subject recorded conversation should be looked at from two vantage points—neither of which would denigrate the subjective expectation of privacy held by Dr. Dinnerstein. First, like in *Sells*, the mere possibility of being overheard by those in the Labor and Delivery Department should not negate the subjective expectations of privacy. Likewise, the fact that the Labor and Delivery Department may be occupied by people other than health care providers should not alter the privacy concerns of the physician since the other people in the department

area are not there specifically to eavesdrop on this conversation; especially in a forum which is buzzing with activity and noise at all levels. One can confidently say that the last thing on the mind of a woman in labor, or on the mind of her family, is a conversation that is taking place between a nurse and doctor on an unrelated matter. Conversely, Dr. Dinnerstein would not have held to the subjective belief in privacy if Moraga approached him at a time when he was lecturing to residents who were there specifically hanging on his every word, but that was not the case.

The undisputed fact is that this recorded conversation took place under the normal state of hospital circumstances, in a Labor and Delivery Department, where information like the type addressed in the recorded conversation is transmitted, dictated and discussed on a continual basis; but all with a sense of privacy. This mindset goes back to the Hippocratic Oath and to the continual and ever present privacy concerns of a patient's medical condition.

The fact that the Plaintiff's attorney attempted to waive the requirements of HIPAA at the time of the hearing, does not relate back to remove the veil of privacy that existed when the conversation was actually taking place and being recorded more than two years prior. The privacy

requirements surrounding the release of medical records and medical information of a patient is fluid; and, simply because a release is tendered 2 years later doesn't mean that an unauthorized release of medical information can be retroactively corrected. See, e.g. *LEMIEUX v. TANDEM HEALTH CARE OF FLORIDA, INC.,* 862 So.2d 745 (Fla. 2003).

When treatment ends, in the absence of a subpoena, medical information cannot be transmitted. When a subpoena allows for disclosure, the moment after it is disclosed, privacy resumes. This was seen in the case of *LEMIEUX v. TANDEM HEALTH CARE OF FLORIDA, INC.,* 862 So.2d 745 (Fla. 2003). In *Lemieux*, the plaintiff filed a claim for negligent retention and hiring after being treated at the facility for orthopedic injuries. The defendant sought to have ex parte interviews with the treating doctors none of whom were employed by the defendant. All treatment had ceased when the complaint was filed. In so noting, the *Lemieux* Court held that when the treatment stops, disclosure under that exception in the statute also ceases. The confidential nature of the medical records and medical information of the patient ebbs and flows depending on whether treatment is in progress or has ceased. In *Lemieux,* since none of the defendants were in active treatment of the plaintiff, no information could be exchanged without

violating the confidential nature of the patient's medical records and medical information. In dicta, however, the Court noted that employed physicians can always speak to their employer since presumably their knowledge is imputable to the principle.

Thus, the discussion between Moraga and Dr. Dinnerstein was proper, and was rightly considered to be private. Both participants to the recorded conversation were cognizant of this restriction and the proximity of unidentified passers-by did not change that result.

Furthermore, the location where the recording in the case at bar was conducted was as secure as the situs in *Guilder v. State*, 899 So. 2d 412 (Fla. 4th DCA 2005), wherein the defendant conducted a recorded interview under false pretenses with a former juror who was on the porch of the juror's home; yet, the *Guilder* Court found that the juror still had an expectation of privacy even though the interviewer purported to be a reporter who was conducting the interview in an open-air environment.

The subjective expectation of Dr. Dinnerstein was that the conversation that he was having with Moraga, which was ultimately recorded without his knowledge and consent, was one that was to be conducted as a private face-to-face dialogue that was centered on discussing

the medical information of a patient; all of which was covered under HIPAA. Since Moraga herself articulated the desire to protect the conversation under HIPAA, it was subjectively reasonable for Dr. Dinnerstein to also espouse this same desire for privacy. Traditionally, these conversations always take place in a hospital setting under circumstances just like those in the case at bar. To conclude that the presence of disinterested individuals, whose identity cannot be established or even that they overheard anything, would make the expectation of privacy unjustified in all instances, would be to unreasonably require all medical conferences to be held in total isolation. This is neither practical nor feasible given the intensity of activity that occurs on a daily basis in any Labor and Delivery unit. Physicians, on call, need to be ever watchful and be always within minutes of the delivery area to address any complications that may arise from time to time. Their only respite comes when they can dictate their notes or exchange medical information while waiting in the designated physician area which in this case is the physicians' office wherein this subject conversation occurred.

If the prevailing law in this State is that the expectation of privacy is reasonably justified even while conversing outside of a home to an apparent

news reporter (Guilder), or while conversing to a fellow employee who is suspected of possibly recording the conversation (Sells), then a physician, conversing with his nurse, in the physicians' office located inside the Labor and Delivery Department, over the completion of a medical chart referencing protected HIPAA information, is even more than justified in expecting the conversation to be, at that moment, a private matter between the doctor and nurse.

The Lower Court's order, in the case sub judice, which found to the contrary is therefore erroneous and constitutes a serious departure from the essential requirements of law.

c.) A recording replete with instances of One-sided, Self-serving Hearsay statements should never be admitted.

As admitted during argument by Moraga's own counsel, Moraga will rely on this recording in order to lend credibility to her certain testimony that the 1st conversation, which was not recorded, did in fact contain a demand to alter the records. With that in mind, Moraga orchestrated this second conversation in a manner that would have been objected to if this had been

undertaken during a deposition. Her melodramatic and argumentative style that was coursed throughout the entire tape, which she monopolizes, would never have been permitted if done during trial.

The problem becomes that the self-serving, out of court statements of Moraga could be used in an attempt to bolster and lend support to her claim regarding the contents of the first conversation which is something that is vehemently denied by Dr. Dinnerstein. These self-serving statements of Moraga, on the audio recording, present a situation very much akin to the problems addressed in the case of *Mitchell v. State*, 965 So.2nd 246 (Fla. 4th DCA 2007). In *Mitchell*, the defendant claimed self-defense to a charge of first degree murder. In preparing his defense, the defendant met with a psychologist who at trial testified that in his opinion the defendant had acted in self-defense. The Court in *Mitchell* held that the trial court properly excluded the expert's testimony since it was based on the Defendant's own self serving statements given during his meeting with the psychologist and was hence inadmissible as hearsay.

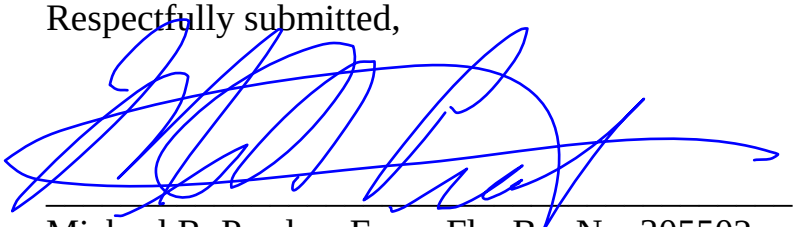
Setting someone up in one conversation that you know is going to be recorded in order to bolster the credibility of your own testimony regarding the contents of an unrecorded prior conversation, which claims to have had

two material differences, is fundamentally and inherently unfair. During depositions, the deponent has the ability on his or her own, or through the assistance of counsel, to stop leading or, as in this case sub judice, misleading questions or remarks which could give a jury hearing it (on replay) the false notion that a smoking gun has been found which will lead back to the deponent. For this reason as well, the order below constituted a departure from the essential requirements of law for admitting a tape replete with multiple instances of self-serving hearsay statements.

Wherefore, these Petitioners respectfully request that this Honorable Court issue an order to show cause and to ultimately issue its writ of certiorari to the Circuit Court of the 15h Judicial Circuit, in and for Palm Beach County, Florida quashing the order rendered March 6, 2008, and directing the Lower Court to enter an order denying the admissibility of the recorded conversation of Allan J. Dinnerstein, M.D..

Dated this 7th day of April 2008.

Respectfully submitted,

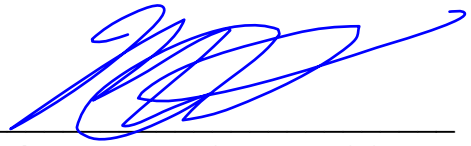


Michael R. Presley, Esq. - Fla. Bar No. 305502
Presley Law Center, LLC
Attorney for Defendant/Petitioner, Allan J. Dinnerstein, M.D.

10006 Cross Creek Blvd. - 521
Tampa, Florida 33467
Tel. 786.837.7093 / Fax. 866.922.8035
e-mail: mpresley@presleylawcenter.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of this Petition and Appendix has been mailed by regular mail on this 7th day of April 2008 to: William Price, Esq., Counsel for Respondent, Juanita Moraga, 320 Fern Street, West Palm Beach, Florida 33401; G. Joseph Curley, Esq. co-counsel for Respondent, 777 South Flagler Drive, Phillips Point, Suite 500, West Palm Beach, Florida 33401; to a non-party whose notification of all pleadings were ordered by the lower court, to wit: Craig Goldenfarb, Esq., attorney for Maria Maldonado, 2090 Palm Beach Lakes Blvd., Suite 402, West Palm Beach, Florida 33409; and to the person issuing the order as required by Fla. R. App. P. 9.100 (c); to wit: The Honorable Kenneth D. Stern, 205 North Dixie Highway, Room 10.1208, West Palm Beach, Florida 33401.



MICHAEL R. PRESLEY, ESQ.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this NOTICE complies with the Font requirements of Fla. R. App. P. 9.210 (a)(2).

MICHAEL R. PRESLEY, ESQ.

NOTICE OF JOINDER STATEMENT FILED IN ACCORDANCE WITH FLA. R. APP. P. 9.360 (A)

THIS PETITION IS JOINED IN AND FULLY ADOPTED BY THE CO-PETITIONER, BETHESDA MEMORIAL HOSPITAL.

Dated this ___ day of April 2008.

_____

William T. Viergever, Esq.
Fla. Bar. No. 92916
Sonneborn, Rutter, Cooney, Klingensmith, P.A.
Attorney for Defendant/Petitioner, Bethesda Memorial Hospital
1545 Centrepark Drive North
West Palm Beach, Florida 33401
Tel. 561.684.2000 / Fax. 684.2312
E-Mail: wtv@srcke.com