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NORTH CAROLINA COURT OF APPEALS

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MELISSA RENEE JENKINS,	)	
	)	
v.	)	From Alexander County
	)	No. 99 CVS 88
HAN PYO CHOONG, M.D. and	)	
ALEXANDER COMMUNITY HOSPITAL,	)	
INC.	)	

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BRIEF OF AMICUS CURIAE  
(North Carolina Academy of Trial Lawyers)

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BRIEF OF AMICUS CURIAE  
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QUESTIONS PRESENTED, STATEMENT OF THE CASE, and STATEMENT OF THE  
FACTS

Amicus Curiae North Carolina Academy of Trial Lawyers incorporates the Questions Presented, Statement of the Case and Statement of the Facts from the Brief of Appellant.

ARGUMENT

I. INTRODUCTION

The North Carolina Academy of Trial Lawyers is a voluntary association of trial lawyers dedicated to protecting the rights of those injured by the wrongful acts of others. Its primary purposes are to maintain and improve the competence and professionalism of those engaged in the representation of plaintiffs and criminal defendants, to improve the administration of justice and to foster and maintain the honor and integrity of the legal profession.

This case presents the issue of whether it is a violation of the Crist v. Moffatt rule against *ex parte* contacts with plaintiff's non-party treating physician to send to the plaintiff's treating physician, without plaintiff's consent, information about the plaintiff and about the litigation. See Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990). The information sent in this case was clearly outside the scope of the nonparty treating physician's personal knowledge and outside the issues presented by his treatment.

This issue is of critical importance to the proper administration of justice and arises in all personal injury cases, but has particular significance in medical malpractice cases. It is an issue having profound implications for protection of the fiduciary relationship between physician and patient within the adversarial litigation process, a fundamental rationale behind the Crist rule. Crist, 326 N.C. at 333, 389 S.E.2d at 45-46.

Defendant defines the Crist rule as prohibiting only "communications from the nonparty physician to defense counsel, communications that might inadvertently contain otherwise privileged information" and not the reverse. Appellee's Brief at 13-14. This view of the rule states the issue so narrowly that it swallows the rule. An honest and fair exploration of the implications of this interpretation compels the result urged by Appellant, if in fact the Crist prohibition and its public policy basis have any meaning at all.

In adopting the rule against *ex parte* contacts for North

Carolina, the Supreme Court focused on protecting the fiduciary relationship between physician and patient from the pressures of litigation. 326 N.C. at 333, 389 S.E.2d at 45. The specific challenge by the defendant in this case to the Crist rule thus must be analyzed within this public policy context as set forth by Crist. Defendant's conduct must be measured against the fiduciary nature of the physician/patient relationship and the centuries-old ethical obligations of physicians to their patients, balancing these important societal interests against interests protected by the adversary process.

The enforcement of the letter and spirit of the Crist rule, as Appellant urges, deprives defendants and their attorneys of nothing more than an opportunity to influence the treating physician to become an expert-advocate for his or her patient's legal adversary. The proper balance is in protecting the fiduciary relationship and preserving the fiduciary obligations owed by doctor to patient.

II. THIS CASE INVOLVES A SUBSTANTIAL RIGHT THAT IS LOST UNDER THE COURT'S ORDER AND RAISES A PUBLIC POLICY ISSUE THAT IS OF GREAT IMPORTANCE IN EVERY PERSONAL INJURY CASE

Plaintiff brings this interlocutory appeal from a denial of a discovery motion for sanctions for defendant's violation of the Crist rule in communicating with her treating physician in anticipation of his deposition. Under the substantial right exception of G.S. §1-277(a), an otherwise interlocutory appeal may be appealed upon a showing by the appellant that (1) the order affects a right that is "substantial"; and (2) absent immediate appeal, enforcement of that right will be lost, prejudiced or

inadequately protected. Norris v. Sattler, 139 N.C. App. 409, 411-12, 533 S.E.2d 483, 485 (2000).

Interlocutory review of discovery orders has been allowed under circumstances such as this, where the right involved relates to privilege, constitutional rights, sanctions imposed or material evidence at trial, and such right will be compromised if review is delayed. Id., 139 N.C. App. at 412, 533 S.E.2d at 485; *see, e.g.*, Sharpe v. Worland, 351 N.C. 159, 164, 522 S.E.2d 577, 580 (1999)(peer review documents); Lockwood v. McCaskill, 261 N.C. 754, 757, 136 S.E.2d 67, 69 (1964)(patient-physician privilege); Shaw v. Williamson, 75 N.C. App. 604, 606, 331 S.E.2d 203, 204, *discr. rev. denied*, 314 N.C. 669, 335 S.E.2d 496 (1985)(constitutional right against self-incrimination).

The situation here is equally compelling. Not only is the litigation ongoing, with the possibility of depositions of other treating physicians, but the fiduciary relationship with the treating physician involved is ongoing. Damage to this relationship as well as potential contamination of testimony continue to be at issue. This appeal thus implicates a substantial right that may be lost or compromised without immediate appeal. Appeal is therefore proper.

III. THE RULE IN CRIST v. MOFFATT PROHIBITS EX PARTE COMMUNICATION FROM OR TO PLAINTIFF'S TREATING DOCTORS AND PROSCRIBES THE CONDUCT OF DEFENDANT IN THIS CASE

A. NORTH CAROLINA LAW BESTOWS FIDUCIARY STATUS ON THE PHYSICIAN/PATIENT RELATIONSHIP

It is well established under North Carolina law that the relationship of a patient and physician is a special one, having a confidential or fiduciary nature. Black v. Littlejohn, 312 N.C.

626, 646, 325 S.E.2d 469, 482 (1985). A fiduciary relationship exists where there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. Vail v. Vail, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951). The Black court held that the fiduciary status of the physician/patient relationship imposed upon the physician "the duty of good faith and fair dealing." 312 N.C. at 646, 325 S.E.2d at 482.

The seeking of medical care by a patient and the providing of such care by a physician "creates a status or relation," with all its attendant obligations, rather than a mere contract. Kennedy v. Parrott, 243 N.C. 355, 360, 90 S.E.2d 754, 757 (1956). Our courts have thus been quick to recognize and protect the fiduciary nature of the relationship. See Watts v. Cumberland County Hospital System, Inc., 75 N.C. App. 1, 10-11, 330 S.E.2d 242, 249 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)(unauthorized disclosure of patient confidences may result in liability for medical malpractice); Mazza v. Huffaker, 61 N.C. App. 170, 176-77, 300 S.E.2d 833, 837-38 (1983), *discr. rev. denied*, 309 N.C. 192, 305 S.E.2d 734(1983).

B. THE CRIST RULE AGAINST EX PARTE CONTACTS WITH A PLAINTIFF'S TREATING DOCTOR RECOGNIZES THE "UNIQUE AND CONFIDENTIAL NATURE" OF THE PHYSICIAN/PATIENT RELATIONSHIP AND IS GROUNDED IN THE PUBLIC POLICY EFFORT TO PRESERVE THE PHYSICIAN'S FIDUCIARY RESPONSIBILITIES DURING THE LITIGATION PROCESS

The Supreme Court in Crist clearly stated its context and its purpose in establishing the rule against *ex parte* contacts:

[T]he prohibition against *ex parte* contacts "is derived from neither statute nor established common law; rather, it is an emerging court-created effort to preserve the treating physician's fiduciary responsibilities during the litigation process." . . . The primary policy reason against allowing *ex parte* interviews involves the unique and confidential nature of the physician/patient relationship. . . . [O]nce the statutory privilege has been waived, the confidential nature of the physician/patient relationship remains, even though medical information is then subject to discovery.

326 N.C. at 326, 389 S.E.2d at 41 (citations omitted). The Crist court recognized the value of maintaining and preserving the status and character of this relationship even assuming that the privilege had been waived.

Defendant asserts that Crist creates a "unique class of witnesses." This is incorrect. Rather, Crist **recognizes** the unique status of treating physicians as fiduciaries, and applies the rule **because of** this status. There are likewise special

discovery rules applying to many witnesses with special status, such as experts, G.S. §1A-1, Rule 26(b)(4), and parties or witnesses represented by counsel. N.C.R. Prof'l Conduct R. 4.2, 4.3.

Neither has the Crist rule been limited, as defendant asserts, by the decision in Jones v. Asheville Radiological Group, P.A., 351 N.C. 348, 524 S.E.2d 804(2000)(reversing and adopting the dissent in the Court of Appeals opinion, 134 N.C. App. 520, 530, 518 S.E.2d 528, 534 (1999)). That case involved only the disclosure of an x-ray, which would have had to be delivered in the litigation anyway, and there had been no delivery to or receipt of information from the treating doctor. Because the privilege had been waived, and because the plaintiff had agreed to provide her medical records and x-ray films in discovery, no further discovery was necessary for the defendant to allow his expert to review the films. 134 N.C. at 532, 518 S.E.2d at 536. There was no substantive communication between defendant or his expert and the treating doctor; there was merely delivery of the film. The Crist rule against *ex parte* contacts was thus not implicated in any way.

Petrillo v. Syntex Laboratories, Inc., 148 Ill.App.3d 581, 499 N.E.2d 952 (1986), *appeal denied*, 106 Ill.Dec. 55, 505 N.E.2d 361 (1987), *cert. denied*, 483 U.S. 1007 (1987), upon which the Crist court relied, discussed at length the implication of the fiduciary nature of the relationship, deciding that protection of this special relationship between physician and patient along with its legally-imposed duties was an important public policy. *Ex parte* conferences with the treating physician were inconsistent with the

fiduciary relationship and its obligation of good faith. Id., 148 Ill. App. at 594-95, 499 N.E.2d at 961-62. *Accord*, Smith v. Ashby, 106 N.M. 358, 360, 743 P.2d 114, 116 (1987).

The Crist prohibition of *ex parte* contacts is thus aimed at preserving the fiduciary obligations assumed by physicians in treating patients, safeguarding the patient's trust in the doctor, and preventing a "chilling effect" on these relationships. Crist, 326 N.C. at 333, 389 S.E.2d at 45-45; *see Loudon v. Mhyre*, 110 Wn.2d 675, 679-80, 756 P.2d 138, 141 (1988).

C. THE CRIST RULE PROHIBITS ANY COMMUNICATION WITH A PLAINTIFF'S TREATING DOCTOR THAT INTERFERES WITH THE TRUST BETWEEN DOCTOR AND PATIENT OR DISRUPTS THE DOCTOR'S OBLIGATIONS OF LOYALTY TO THE PATIENT

The Crist rule is broadly based and, read conceptually rather than technically, would prohibit any communication – whether mutual or simply one-sided – that interferes with the fiduciary relationship it protects. The essence of a fiduciary relationship is trust and loyalty, and it creates a duty to act in good faith and in the best interests of the patient. Vail, 233 N.C. at 114, 63 S.E.2d at 206.

In the adversarial context of a lawsuit, especially a medical malpractice lawsuit, where a colleague of the treating doctor may be a defendant, information that suggests that the claims have no merit or that the plaintiff is not credible will surely undermine the loyalty and trust a physician has for the patient. The physician may wonder if he or she will be the next target. A treating doctor may also have limited knowledge of the facts surrounding the negligence or may be of a different specialty than

the defendant and thus be completely unprepared and unable to assess the various arguments on negligence.

Importantly, medical malpractice cases can engender extreme and passionate emotions among physicians. Many physicians feel great sympathy and affiliation with a colleague who has been sued. By way of example, this court recently recognized claims for intentional infliction of emotional distress, obstruction of justice, and punitive damages by jurors arising out of conduct by a physician whose case they had heard. The jury found that physician not liable but found his co-defendant liable. He then notified all the doctors at the local hospital of the names and addresses of the jurors, identifying them as "jurors who have found a doctor guilty." Burgess v. Busby, \_\_\_ N.C. App. \_\_\_, 544 S.E.2d 4 (2001). In this context, delivery of "extra" information such as was done here is a call for help and has the potential to turn a treating doctor against the patient, doing great damage to the fiduciary relationship between doctor and patient.

An Illinois court has addressed the issue raised here, where written information and documents outside the doctor's particular treatment, including depositions and information about the merit of the claim of negligence, were sent to treating doctors. The court held that these communications violated the rule against *ex parte* contacts in spite of the fact that no confidential information had been disclosed as a result. The court said:

We believe that these communications plainly violate the rule [against *ex parte* contact]. Although there was

no evidence that plaintiff's treating physicians actually disclosed any of plaintiff's confidences or breached their fiduciary duty to him, such evidence was not required. ***What matters is the potential harm to the physician/patient relationship. . . . That potential is obvious here.***

Natasi v. United Mine Workers Union Hospital, 209 Ill.App.3d 830, \_\_\_, 567 N.E.2d 1358, 1365 (1991)(citations omitted)(emphasis added).

Part of the duty a physician has to a patient relates to the obligation to cooperate in legal proceedings. North Carolina Medico-Legal Guidelines, "Introduction" (2000). The Medico-Legal Guidelines, adopted by the Joint Committee of the North Carolina Medical Society and North Carolina Bar Association, and approved by the governing bodies of each of those organizations, states in its Introduction:

Medical testimony is generally indispensable in legal cases to prove or disprove the nature or extent of injuries or other legally relevant medical conditions. Therefore, when accepting a patient, a physician also accepts the incidental obligation to cooperate in any legal proceedings in which the patient may become involved.

This obligation of physicians to cooperate in legal proceedings has been specifically referenced by courts analyzing the need for a rule against *ex parte* communications. A New York court describes a physician's duty in adversarial proceedings as that of a fiduciary:

They owe their patients more than just medical care for

which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation. The doctor, of course, owes a duty to conscience to speak the truth; he need, however, speak only at the proper time.

Anker v. Brodnitz, 98 Misc.2d 148, 152, 413 N.Y.S.2d 582, 585, *aff'd*, 73 A.D. 589, 422 N.Y.S.2d 887 (1979). This duty is not to render favorable testimony; it is a duty to resist invitations to become advocates for the patient's adversary and to carefully guard the duty of good faith.

Surely this obligation is disrupted and the relationship harmed if the physician receives an argumentative selection of "evidence" from the patient's legal adversary and feels an urge to "help" his colleague. The truth must be told, but it must be told without the ambivalence or anxiety of divided loyalties and with an assurance that treatment can continue. Inspiring suspicion of the patient is likely to create such ambivalence and endanger the continuation of care.

D. THE DOCUMENTS AND INFORMATION SENT EX PARTE<sup>1</sup> BY DEFENDANT TO PLAINTIFF'S TREATING DOCTOR CREATED AT LEAST THE POTENTIAL FOR HARM TO THE FIDUCIARY RELATIONSHIP BY

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<sup>1</sup> Defendant no doubt disputes that this was an *ex parte* communication. It most certainly was, however, as Ms. McConnell waited five days to send the copy of the letter to plaintiff's counsel, and the ability to be "present" for a communication by correspondence is certainly an empty opportunity.

SUGGESTING THAT PLAINTIFF WAS NOT CREDIBLE AND HAD FILED  
A NON-MERITORIOUS CASE

Ms. McConnell's letter to Dr. McMurchy and the enclosed extensive medical records and depositions provided a significant amount of information that was irrelevant to his treatment, asserted that plaintiff was not credible, and suggested that her lawsuit was not meritorious. Further, it invited divided loyalties for Dr. McMurchy between his current patient and a colleague of a different specialty, whose opinion Dr. McMurchy lacked the training to thoroughly evaluate.<sup>2</sup> Further, the letter very clearly implied that plaintiff and her counsel had not been fair to him because they had not provided all of the same material for him to review.

A brief analysis of the materials sent and statements made in Ms. McConnell's *ex parte* communication reveals significant potential for harm to the relationship of Ms. Jenkins and her doctor<sup>3</sup>:

<i>Ex Parte</i> Representation	Omitted Facts	Potential Harm
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<sup>2</sup> Dr. McMurchy is a gastroenterologist and the local expert a surgeon. The negligence issue was a surgical question, about which he was not expert.

<sup>3</sup> The deposition of Dr. McMurchy confirms this effect, as described in the Plaintiff's Reply Brief at 3-6.

<b>Ex Parte Representation</b>	<b>Omitted Facts</b>	<b>Potential Harm</b>
<p>That Ms. Jenkins claimed in the lawsuit that she had suffered total and permanent disability as a result of her bile duct injury</p>	<p>That she was claiming injury and impairment as a result of the bile duct injury and the resulting additional surgery and complications, including peritonitis and pancreatitis</p>	<p>Suggests that his current patient was exaggerating her situation in order to obtain money damages and through her lawyer, attempting to use his testimony to establish these exaggerated injuries</p>
<p>Through the opinion provided, that she had sought disability status through the Social Security Administration and that this finding had been denied, and that the judge had found her to be untruthful</p>	<p>That she had sought disability status through the SSA and that this finding had been denied; the judge's conclusions as to her untruthfulness were unfair and based on incorrect facts and misperceptions by him, as she had explained in a detailed written response</p>	<p>Suggests that his current patient was untruthful and had lied to her doctors as well as having lied in the disability hearing</p>
<p>That she had retained experts from other states or other parts of North Carolina and that they claimed that the bile duct injury in itself was proof of negligence, and that the basis for the suit was nothing more than a bad result</p>	<p>That the experts were of the opinion that this injury, as it occurred in this case, would not occur without negligence, that other conduct by the defendant was negligent, including leaving town for the weekend after the surgery without ensuring there was a physician on call to cover for him</p>	<p>Suggests that his current patient is merely suing over a bad result, which can happen to any doctor, even him</p>
<p>That Dr. Howerton, who practiced in the same town as Dr. McMurchy, gave the opinion that this was simply a bad result, not malpractice, and that the plaintiff's problems Dr. McMurchy was treating were not the result of the bile duct injury but could result from removal of the gall bladder alone</p>	<p>That plaintiff's experts found additional acts of negligence, including failure to convert to an open surgical procedure when he was unable to see clearly in the operative site, and leaving town after the surgery and failing to arrange for coverage; that her current condition was caused by all these acts</p>	<p>May create a concern that the plaintiff will sue him also if she is not pleased with the results; or that his opinion on causation should not differ from that of a colleague he may have regular professional contact with or with whom he may have a referral relationship</p>

<b>Ex Parte Representation</b>	<b>Omitted Facts</b>	<b>Potential Harm</b>
<p>That she cannot discuss the plaintiff's care, but that because Dr. McMurchy may be called upon to give an opinion as to how Ms. Jenkins is doing, it is only fair that he have information that may be of some assistance to him</p>	<p>He may testify without seeing all these additional records, about his own treatment, what the basis for his treatment was and is, and his opinion as to the cause of her current condition, if in fact he has one; there is no need for him to "take sides" in order to be truthful; he need not testify about matters outside his care</p>	<p>Suggests that the plaintiff and her lawyer are being unfair or have concealed information from him because they have not provided him the documents provided by Ms. McConnell, or that he is being manipulated or used if he is asked to testify without being given all this information</p>
<p>That he needs to see the plaintiff's complete medical records, including the surgical records, psychiatric records and SSA records, in order to discuss his own care; that he needs to see the allegations of the complaint and know the defense opinions about negligence in order to be able to testify completely</p>	<p>He has not found a need to see those complete records during his treatment of her, and is able to give testimony about his own care and the opinions he formed while treating her, without seeing that incredible quantity of records; he does not need to form an opinion about negligence in order to give truthful testimony</p>	<p>May create irritation and frustration at being drawn into the legal dispute and at the demands made on his time to review all this material; may create a concern that if he doesn't review it and is uninformed, the plaintiff will "use" him to unfairly "convict" another doctor of malpractice for a known bad complication</p>

Under Crist and under the Natasi explanation of the application of the rule in this context, Ms. McConnell's communication was substantive and clearly had the potential to harm the plaintiff's relationship with her doctor. Moreover, indications are that it likely did cause such harm. The court below erred as a matter of law when it held this communication did not violate Crist. The Crist rule can be enforced only if it is recognized as a bright line rule. Otherwise, litigation will be endless and confusion rampant over the meaning of Crist. The technical interpretation defendant urges will swallow the rule, and return us to the days

before the court in Crist so carefully and wisely imposed a zone of safety around this fiduciary relationship.

B. ADOPTING DEFENDANT'S INTERPRETATION OF THE CRIST RULE CREATES THE POTENTIAL FOR EGREGIOUS ABUSES AND COULD CREATE ENDLESS LITIGATION ABOUT WHAT IS OR IS NOT PERMITTED

Under defendant's interpretation of the Crist rule, there is no limit to what would be permissible, to the point that the rule will have no substance. If it is "fair" to send the treating physician the complaint, medical records relating to treatment occurring before or after the treatment of the nonparty doctor, psychiatric records, the opinions of experts, and legal documents assessing the plaintiff's credibility, as the defendant did here, would it also be "fair" to send divorce files, criminal files, statements from witnesses, or videotapes and information gathered by a private investigator? Would it be fair to send information from tort reform organizations or insurance companies about the "malpractice crisis"? If the treating doctor is insured by the same insurance company as the defendant, would it be "fair" to send insurance information?<sup>4</sup> What if the defense lawyer called on the phone and simply talked, giving the doctor information orally about their case without any information being given in return? If the treating doctor hired an attorney, can it be the same

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<sup>4</sup> In North Carolina, this is more often true than not, as a significant majority of physicians are insured by the doctor owned insurance carrier.

attorney who represents the defendant?<sup>5</sup>

Without a bright line interpretation of Crist that enforces both the letter and the spirit of the rule, the possibilities for abuse are endless, and the potential for satellite litigation enormous. The amount of litigation that would ensue would, in all likelihood, dwarf what has arisen out of Rule 9(j). It is important and necessary to enforce the limits inherent in the conceptual framework set forth by the Supreme Court in Crist.

CONCLUSION

For the foregoing reasons, Amicus Curiae prays that the court reverse the trial court and find a violation of the Crist v. Moffatt.

Respectfully submitted this 11<sup>th</sup> day of June, 2001.

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<sup>5</sup> This situation has occurred in the experience of this brief writer.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Brief of Amicus Curiae** was this served on the parties by mailing a copy thereof, first class mail, addressed to:

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This the 11<sup>th</sup> day of June, 2001.

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