O/A 11-8-84

IN THE SUPREME COURT OF FLORIDA

Case No. 64,725

MIAMI DAILY NEWS, INC. and
THOMAS H. DUBOCQ,
Petitioners,

vs.

ALICE P., et al.,
Respondents.

On Discretionary Review of a Decision of the District Court of Appeal, Third District

REPLY BRIEF OF PLAINTIFFS/PETITIONERS MIAMI DAILY NEWS, INC. and THOMAS H. DUBOCQ

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PRELIMINARY STATEMENT

The major thrust of the briefs submitted on behalf of Intervenors and their Amicus is not a defense of the rationale underlying the Third District's decision being reviewed here, *Alice P. v. Miami Daily News, Inc.*, 440 So.2d 1300 (Fla. 3d DCA 1983). Rather, the argument advanced works backward from the result which the Third District ordained. The principal argument advanced in

defense of the Third District's decision is that any other result would be an "absurd and unreasonable result." As this Court has made clear, such an argument must be directed to the Legislature and not to this Court. *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

Ignored by Intervenors are the prior decisions of this Court and the language of Florida's Public Records Act. Especially inexplicable is the failure of both Intervenors and their Amicus to address in any way whatsoever the square holding of *State ex rel. Cummer v. Pace*, 118 Fla. 496, 159 So. 679 (1935), where this Court stated, 159 So. at 681:

> This statute applies specifically to all . . . records and where the legislature has preserved no exception to the provisions of the Statute, the Courts are without legal sanction to raise such exceptions by implication. . . .

No attempt is made by Intervenors or their Amicus to defend the obvious departure by the Third District from this Court's mandate that exceptions to the Public Records Act are not to be raised by implication.

Rather, Intervenors and their Amicus create a maze of digressions, often without any support in the record or in the Third District opinion. The most egregious of these digressions are the following:

1. A "Brandeis Brief" and accompanying Appendix apparently intended to make these points:

A. That "Yuppies" (as opposed to Poor Folks) are the most likely targets of any successful marketing campaign by midwives. While in itself an interesting observation, at least from a clinical perspective, this point would

have legal relevance only if Intervenors had somewhere claimed to represent "Yuppies" as a class and that "Yuppies" as a class were being denied equal protection under the law. Happily, that argument has not been made here; this observation remains of merely clinical interest.

B. That midwifery is not universally held in high esteem and may in fact be anathema to medical doctors, another mildly interesting but irrelevant point.

2. A scenario totally unsupported by any evidence but nonetheless painted by Intervenors in which the midwife who created the "birthing records" in question was the dutiful agent of a doctor. In fact, the Third District adopted this postulate even though the uncontradicted record in the trial court was that the "birthing records" incorporated into Ms. Wilson's license application were made by Ms. Wilson herself. (App. 76-78). The trial court made an explicit finding that these records were records of Ms. Wilson and not the records of a doctor. (App. 84). The Third District ignored this explicit finding and adopted Intervenors' scenario. The Miami News had suggested in the trial court that the patient-mother and the midwife have an independent relationship which resulted in a fee agreement between the mother-patient and midwife, with the doctor hired by the midwife and paid by her from the proceeds of her fee arrangement with the patient-mother. Be that as it may, Intervenors dissemble when they suggest the Third District's improvident voyage into *de novo* fact finding should be important to the resolution of this matter in this court. The *de novo* nature of this appellate fact finding is unimportant because *The Miami News* has accepted as true, for purposes of this appellate proceeding, the Third District's conjectural conclusion (contradicted by an express finding by

the trial court and the uncontradicted record in trial court) that the records in question are "patient records" whose distribution by certain licensed health care practitioners is regulated by *Florida Statute* 455.241 (1981). The Initial Brief of The Miami News takes no issue with these documents being "patient records" when in the hands of certain licensed health care practitioners. The point of the Initial Brief of The Miami News is that, even if these records be "patient records" within the meaning of *Florida Statute* 455.241 (1981) when in the hands of certain licensed medical practitioners, *Florida Statute* 455.241 (1981) does not create an exception to the Public Records Act as it pertains to applications for a midwife's license.

3. A suggestion by Intervenors' Amicus that the application for a midwife's license is not a public record, a suggestion made for this first time in this court. *Florida Statute* 119.01 (1) (1983) defines "public records" as "all documents . . . received . . . in connection with the transaction of official business by any agency". The license application and supporting documents (including the "birthing records") were clearly received by HRS in connection with "official business"—the granting and denying by HRS of applications for midwives' licenses. These records are clearly "public records." Governmental action was to be predicated on these records.

ARGUMENT

The Third District May Not Create Exceptions To The Public Records Act By Implication.

The Third District incorporated by implication the following statutes into the Public Records Act:

1. *Florida Statute* 382.35 (1981) which makes confidential portions of Birth Certificates in the hands of the Registrar of Vital Statistics; and

2. *Florida Statute* 455.241 (1981) which regulates the distribution by certain licensed health care practitioners of patient records while those records are in the possession of these health care practitioners.

At one point, the Third District expressly admitted it was creating exceptions to the Public Records Act by implication. The Third District held, 440 So.2d at 1303, slip opinion at 6:

> The status of information, as exempt from disclosure does not change because it is submitted to a regulatory body in compliance with another statute or rule which does not *expressly* recognize that protected status. (Emphasis added.)

This holding by the Third District expressly conflicts with the direct holding of *State ex rel. Cummer v. Pace,* supra, 159 So. at 681, that the courts of this State are not to create exceptions to the Public Records Act by implication. The holding of the Third District also conflicts with the prior decisions of this court interpreting the Public Records Act to preclude judicially-created exceptions to the Public Records Act. *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

The Birth Certificate Theory

Florida Statute 382.35 (1981) made confidential certain portions of birth certificates. No birth certificates were requested by The Miami News and no birth certificates are to be found in the application for a midwife's license. Thus, the statute relating to disclosure by the State Registrar of Vital Statistics would seem inconsequential in this action. However, the Third District held that because some information relating to birth is made confidential by *Florida Statute* 382.35 (1981) when that information is in the hands of the State Registrar of Vital Statistics, that same information is to be deemed confidential whenever it appears in an otherwise public record. The Third District's conclusion is totally unsupported by the language of either the Public Records Act or *Florida Statute* 382.35 (1981). It is also totally unsupported by prior case law and in direct conflict with prior decisions of this court. *Wait v. Florida Power & Light Co.,* supra; *State ex rel. Cummer v. Pace,* supra.

Neither Intervenors nor their Amicus point to any specific statutory provision which makes confidential data pertaining to birth, no matter where it appears of public record. The crux of Intervenors' argument is found at page 11 of their brief, where they argue that the Legislature has used the words "information" and "records" interchangeably. Neither this argument nor the holding of the Third District is supported by either of the statutes involved, *Florida Statutes,* Ch. 119 (1981) and *Florida Statute* 382.35 (1981), or any other Florida statute. Nor is the holding of the Third District supported by prior case law. In fact, the holding of the Third District is clearly in conflict with prior case law, including decisions of this Court. There is nothing in the Public Records

Act which permits the construction of judicially-created exceptions by implication to that Act. In fact, the Act itself precludes judicially-created exceptions. So does the Florida case law under the Act, the sole exception being the decision under review.

The Patient Record Theory

Intervenors argue that the requested documents are "patient records" within the meaning of *Florida Statute* 455.241 (1981). Accepting here as true the Third District's conjectural conclusion that these documents were once "patient records" compiled by a health care practitioner enumerated in *Florida Statute* 455.241 (1981), that statute merely regulates the distribution by certain licensed health care practitioners of "patient records".

Under the uncontradicted record, which is supported by the admissions in Intervenors' Answer Brief, these purported "patient records" were incorporated with Intervenors' consent into Ms. Wilson's license application. Nothing in the former Midwifery Act or regulations thereunder required that any such "birthing records" be incorporated into a license application or that Intervenors' consent to the incorporation of such records into Ms. Wilson's license application.

But this consent was given and the documents incorporated into Ms. Wilson's license application. They were filed with HRS so that HRS could review and pass upon Ms. Wilson's qualifications to function as a licensed midwife in the State of Florida. While the purported "patient records" were accorded confidentiality in the hands of the health care practitioners specified in *Florida Statute* 455.241 (1981), that statute permits a licensed health care practitioner to release the records with the consent of a patient. Here, that consent was given. Under Inter-

venors' scenario (a scenario unsupported by the evidence), a licensed health care practitioner then properly distributed the documents lawfully to Ms. Wilson who incorporated them into her application for a midwife's license.

Unless exempted by a specific statutory provision, the records of HRS, including applications for a midwife's license are public record. *Florida Statute* Ch. 119 (1981).

Yet, Intervenors assert, at pp. 14-15 of their brief:

> There is no authority or logic which even implies that once the medical records are placed in the hands of the State agency, they magically lose their confidentiality.

Intervenors missed the point entirely. It is painful to point out that the authority which "magically" makes public a midwife's license application, including supporting documents, is the Public Records Act. It establishes the general rule in Florida that all public records are open for inspection. The only exemptions to this general rule are created by specific statutory exception. Intervenors can point to no such exception. Instead they must argue that the statute which places limitations on the distribution of "patient records" by some licensed health care practitioners imparts to "patient records" a lingering confidentiality which travels with those records even after they are properly distributed by a health care practitioner to third persons. By its terms, *Florida Statute* 455.241 (1981) does not establish the result which Intervenors seek. Moreover, the Public Records Act specifically precludes such a result. Having been properly disclosed by a health care practitioner and later incorporated into a public file, the requested documents were available for inspection under the Public Records Act. There is nothing magical about it.

The Constitutional Right Of Privacy Does Not Preclude Disclosure Of Public Records

Intervenors now eschew any claim of constitutional privacy underpinned by a broad constitutional right of "confidentiality". They now admit, Intervenors' brief pp. 22-25, that any constitutional protection they may have against disclosure of the requested documents emanates from constitutional protection afforded "decisional autonomy".

The Consent Of Intervenors

It is uncontradicted (even admitted) that Intervenors consented to the inclusion of Ms. Wilson's "birthing records" as a part of her license application. As this court recently held in *The Tribune Co. v. Cannella,* ..... So.2d ..... (1984) (Case Nos. 64,450 and 64,453, opinion filed September 6, 1984; Petition for Rehearing pending):

> The public disclosure of the content of all non-exempt records occurs at the moment they became records.

The facts contained in the requested license application are public facts. They have been public facts since they were filed, with the Intervenors' consent, as a part of Ms. Wilson's license application. The facts here do not permit Intervenors to belatedly assert a privacy interest in public documents. *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct. 2727, 53 L.Ed.2d 867 (1977).

The Right Of "Disclosural Privacy" And The Case At Hand

Intervenors admit that whatever right of "disclosural privacy" they may enjoy is an aspect of constitutional right of privacy which limits the power of government to inhibit conduct and decision-making in the recognized

zones of personal autonomy. Intervenors do not dispute the assertion that the elements of this "disclosural privacy" right are:

1. Governmental coercion
2. which compels individuals to disclose
3. personally intimate information
4. under such circumstances that such disclosure inhibits decision-making in constitutionally protected areas of personal autonomy.

Contemplation of the individual elements of this right of "disclosural privacy" reveals how far afield Intervenors' claim of protection really is.

In absolutely no meaningful sense can it be said that the State of Florida compelled Intervenors publicly to disclose any information. Intervenors were always free to utilize the services of a licensed health care practitioner, including a licensed midwife, without participating in Ms. Wilson's licensing process in any way. They were also free to utilize the services of Ms. Wilson, an unlicensed midwife, provided she rendered her services under the supervision of a licensed health care practitioner. Even if they availed themselves of the services of Ms. Wilson, an unlicensed midwife supervised by a licensed medical practitioner, there was still no governmental coercion to disclose any information—whether through participation in a licensing process or otherwise. Intervenors were at all times totally free to participate or not participate in the process by which Ms. Wilson sought a midwife's license. Of their own volition, they chose to participate. The State of Florida required nothing of Intervenors. There was simply no hint of governmental power acting upon Intervenors which compelled them to participate in the process initiated by Ms. Wilson to secure a

midwife's license. As far as the State of Florida was concerned, Intervenors had absolutely no obligation to participate in the licensure processing initiated by Ms. Wilson. Curiously, Ms. Wilson also had no obligation to incorporate the "birthing records" into her license application. But she chose to do so of her own free will and was able to do so because of the consent of Intervenors. Governmental coercion, an essential aspect of "decisional autonomy," is totally absent from this situation.

Moreover, it is very unclear that "personally intimate information" is here involved. Intervenors cannot seriously claim that their names and addresses are such "personally intimate information" as to fall within the ambit of "disclosural privacy." Intervenors do claim that "medical details" asserted to be included in the records would fall within the ambit of "personally intimate information." But the trial court found to the contrary, having ordered disclosure. The records are not before this court, having been returned by the trial court to HRS after an in-camera inspection. Proof by Intervenors of this aspect of their claim is totally lacking.

Nor can Intervenors claim inhibition of personal decision-making in constitutionally-protected areas of personal autonomy. Intervenors fail to demonstrate which, if any, "fundamental" right would be invaded by disclosure of the license application. Certainly the right to utilize the services of a midwife is not a "fundamental" right in the sense of constitutional privacy. No court has ever so held. For years, some states have effectively and lawfully banned midwifery. Pursuant to an increasingly rigorous regulatory scheme, enacted pursuant to the state's police power, Florida regulates the availability of the services of a midwife. This is lawfully done by Florida,

without inhibiting the exercise by the Intervenors of any constitutionally-protected "fundamental" right.

In fact, the only "right" that can be plausibly asserted here by Intervenors is not a right at all. Intervenors must claim (under these facts) that they have the "right" to voluntarily support the license application of Ms. Wilson on their own informational terms. This "right" clearly does not exist. *McElrath v. Califano*, 615 F.2d 434 (7th Cir. 1980). In short, Intervenors have demonstrated no impact on any right which can be deemed "fundamental" or "implicit in the concept of ordered liberty." Any claim by Intervenors of a "right" to the services of a midwife, whether licensed or unlicensed, or of the "right" to support an application for midwife's license on their own informational terms clearly does not rise to the level of a constitutional guarantee.

Moreover, Intervenors have provided no evidence to support a claim that any "right" which they may be asserting has been impacted. The trial court heard what evidence was offered and ordered disclosure. Assuming arguendo the existence of a right falling within the ambit of "disclosural privacy" in the constitutional sense, the trial court is properly to be assumed to have balanced such a right against the governmental interests implicated. And where (as here) any "right" asserted is clearly far beyond the limited ambit of rights, implicit "of the concept of ordered liberty," the trial court is to be properly assumed to have balanced any compelled disclosure to determine if disclosure is compelled is rationally related to a lawful governmental purpose. Only where a "fundamental" right "implicit in the concept of ordered liberty" is demonstrably impacted must the trial court balance the impact of the compelled disclosure on such right against the governmental interest to be advanced by disclosure.

While here there was no governmental compulsion to disclose, the trial court is to be affirmed unless it has clearly abused its discretion. No such showing has been made and disclosure must be affirmed.

CONCLUSION

Based on the arguments and authorities in this Reply Brief and in the Initial Brief on the Merits, it is respectfully submitted that there is no basis for declining full disclosure. No birth certificates are sought or even involved. Neither the "patient records" statute nor the statute precluding disclosure of portions of birth certificates by the State Registrar creates an exemption to the Public Records Act. Pursuant to the Public Records Act, the midwife's license application of Ms. Wilson is clearly open to inspection.

Nor does the constitutional right of "privacy" preclude inspection of the license application. Simply stated, Intervenors have failed to show that any element of this asserted right is impacted in the slightest. Clearly, there is and was no governmental coercion which resulted in the disclosure. Moreover, no "fundamental" right—a right "implicit in the concept of ordered liberty"—is here involved. The Constitution simply does not reach as far as Intervenors would have it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Plaintiffs/Petitioners, was mailed this 25th day of October, 1984 to Thomas G. Sherman, Esq., De Meo and Sherman, P.A., 3081 Salzedo, Coral Gables, Florida 33134, Morton Laitner, Esq., 1350 N.W. 14th Street, Miami, Florida 33125, Charlene Miller Carres, Esq., University of Miami School of Law, P.O. Box 248087, Coral Gables, Florida 33124, Bruce Rogow, Esq., Nova University Law School, 3100 S.W. 9th Avenue, Ft. Lauderdale, Florida 33315, Parker D. Thomson, Esq., 1000 Southeast Bank Building, 100 South Biscayne Boulevard, Miami, Florida 33131, Paul Levine, Esq., Morgan, Lewis & Bockius, 3200 Miami Center, 100 Chopin Plaza, Miami, Florida 33131 and to Richard J. Ovelmen, Esq., One Herald Plaza, The Miami Herald Publishing Company, Miami, Florida 33101.

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