IN THE SUPREME COURT

OF FLORIDA

* * *

CASE NO. 67,081

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DONALD RASMUSSEN,
Petitioner,

vs.

SOUTH FLORIDA BLOOD SERVICE, INC.,
Respondent.

* * *

DISCRETIONARY PROCEEDING TO REVIEW A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL

* * *

REPLY BRIEF OF PETITIONER, DONALD RASMUSSEN

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SUMMARY OF ARGUMENT

Although Respondent argues otherwise, Florida law does not support the District Court's decision in this case. The Rules of Civil Procedure do not provide for limitations on discovery such as argued by the Respondent. The Rules of Civil Procedure do, however, provide the trial court with adequate power to ensure no abuse of discovery, as envisioned by the Respondent, occurs.

Respondent, once again, argues that the names and addresses of blood donors are medical records. They are not, and none of the cases cited by Respondent state that names and addresses of blood donors are medical records.

Respondent's incorrectly attempts to apply Chapter 85-52 which creates §381.606 to our facts. Chapter 85-52 is an attempt to encourage testing by those who believe they are infected with diseases and has nothing to do with untested blood donors.

Florida has never recognized a constitutionally guaranteed disclosural right of privacy. If, in fact, a disclosural right of privacy would be recognized, it would not occur under facts in which the only disclosures sought are the names and addresses of blood donors to the Petitioner.

Respondent's final point suggests that Rasmussen does not need the discovery he seeks in that he allegedly can

already establish a prima facie case against defendants below. Assuming that to be true, a prima facie case can be rebutted, and Rasmussen is presently without the ability to gather further evidence. Petitioner's hands are tied while defendants below have access to unlimited discovery.

ARGUMENT

I. FLORIDA LAW DOES NOT SUPPORT THE DISTRICT COURT'S DECISION IN THIS CASE BUT RATHER SUPPORTS ORIGINAL RULING OF THE TRIAL COURT.

A. The Rules of Civil Procedure Do Not Provide for Limitation on Discovery Such as Argued by Respondent.

South Florida Service states that the District Court "assumed that the information sought by Rasmussen is irrelevant". (At p.8 of Respondent's Brief.) The District Court did not "assume" but rather determined that the discovery sought by Rasmussen was both relevant and non-privileged information. (A-3).

Apparently Respondent's relevancy argument has two basis:

a) Rasmussen doesn't need the discovery in that he can already establish a prima facie case, and

b) Discovery, if allowed, will not lead to proof of the source of Rasmussen's disease.

Respondent's first Argument fails to take into consideration Rasmussen's need to prove more than a prima facie case. As was pointed out in Petitioner's Initial Brief, defendants in the trial court are sparing no effort to discover evidence which would suggest that Rasmussen was a member of a high risk group other than the recipients of blood transfusions.

Respondent apparently believes that Rasmussen's family should be satisfied to proceed to trial with a rebuttable prima facie case and be denied all discovery of direct proof as to the source of his AIDS.

Respondent secondly extrapolates that if Rasmussen is granted discovery from his donors, the discovery won't help prove his claim. The South Florida Blood Service with such an argument assumes the position of trier of fact. They cannot possibly foretell the substance or value of the discovery they seek to abort.

This Court has promulgated Rules of Procedure under which trial judges are empowered to control discovery and prohibit abuse. Rule 1.280 (c) provides that a court may limit, as well as prohibit discovery to protect a person from annoyance, embarrassment, oppression or undue burden or expense.

If, in fact, the hypothetical abuses envisioned by Respondent occur, the trial court at that point is fully capable of issuing a variety of protective orders to resolve whatever problem exists.

B. The Names and Addresses of Blood Donors Are Not Medical Records.

It is not clear if the South Florida Blood Service argues that the names and addresses of blood donors are confidential medical records or not. At page ten and the top of page eleven of Respondent's Brief, the South Florida Blood Service apparently, once again, argues the question affirmatively. In the last paragraph on page eleven, however, Respondent states that it may "technically be true" that the materials sought by Subpoena Duces Tecum do not constitute medical records. Rasmussen is unaware of a difference between technical truth and ordinary truth. The names and addresses of blood donors are not privileged medical records and apparently Respondent realizes they are not.

Respondent concludes this argument by suggesting that if Rasmussen proceeded to take depositions of blood donors, the information sought on those depositions would be "medical records" of the South Florida Blood Service. That simply is not true. The donors' depositions would be subject to protection by various rules of procedure, but they are not protected as "medical records" as suggested by the South Florida Blood Service.

C. The Florida Legislature by Enacting Chapter 85-52 Which Created §381.606 Did Not Demonstrate a Public Policy of Protecting the Identities of Persons Who Were Afflicted With Infectious Diseases and Simultaneously Donating Blood.

Respondent's reliance on Chapter 85-52 which created §381.606 is misplaced. Chapter 85-52 is an attempt by the Florida Legislature to encourage persons who suspect they may have an infectious disease, such as AIDS, to obtain tests to confirm or deny the disease. To stimulate testing, confidentiality is provided by the statute.

It does not follow, however, that a similar desire exists on the part of the legislature to encourage blood donation by those who suspect themselves to be afflicted with infectious diseases. The opposite must surely be true. Every effort should be made to discourage blood donation by those afflicted with AIDS and no public policy intent exists in the new legislation to promote the concealment of the names of persons afflicted with AIDS who have never been tested.

The new testing procedures as enacted by the legislature should not be used to punish an innocent victim in the position of Rasmussen. Encouragement of voluntary testing under Chapter 85-52 has nothing to do with the facts of Petitioner's case.

D. Florida (and Federal) Constitutional Provisions Protecting Citizens' Privacy Are Not Here Applicable.

Three zones of privacy or catagories of privacy rights are recognized under the Florida and Federal Constitutions. The right to be free of governmental intrusions into one's private life is the first of these zones of privacy and it protects citizens from acts such as the unwarranted "bugging" of their homes. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1976).

The second zone of privacy protects an individual's "decisional right of privacy" with respect to highly personal matters such as marriage, childbearing and education. This powerful right frequently is the basis for deeming legislative acts unconstitutional, see eg. Griswold v. Connecticut, 381 U.S. 471, 85 S.Ct. 1678 (1965); Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010 (1978); Rowe v. Wade, 410 U.S. 113, 93 S.Ct. 70 (1973).

The third catagory of privacy rights is described as the "disclosural right of privacy" which concerns an individual's interest in protecting the public disclosure of private information. It is only this relatively weak privacy claim which is at issue in our case. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977); Nixon v. Administrator of General

Services, 433 U.S. 425, 97 S.Ct. 2777 (1977) and Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976).

In Paul v. Davis, supra, the United States Supreme Court dealt directly with the scope of the Federal disclosural privacy right and described it as follows:

> "...[O]ur other 'right of privacy' cases, while defining categorical description deal generally with substantive aspect of the Fourteenth Amendment. In Roe, the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit' in the concept of ordered liberty as described in Palko v. Connecticut, 301 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection -- in matters relating to marriage, procreation, contraception, family relationships, child rearing, and education. In these areas, it has been held that there are limitations on the State's power to substantively regulate conduct."

Paul v Davis, 424 U.S. at 713, 96 S.Ct. at 1166. In Laird v. State, 342 So.2d 962 (Fla. 1977), this Court adopted the United States Supreme Court's description and stated: "This statement of the scope of the constitutional right of privacy remains the definitive statement of the law in this area." Id. at 964.

Both the Respondent's Brief and the Brief of Amicus Curiae Council of Community Blood Centers consistently fail to acknowledge or recognize the distinct categories of

privacy rights which have been recognized by this Court and the United States Supreme Court in an effort to argue that the strong privacy interests represented by cases dealing with violation of "intrusive" and "decisional" rights are here applicable. They are not. Only the disclosural right to privacy is here involved and this Court has flatly refused to recognize a disclosural right to privacy under Florida law. On this point, in order to avoid duplication, Petitioner will not provide additional argument and adopt the argument contained in the amicus brief filed by the Miami Herald Publishing Company under Argument I (A) and I (B).

II. THE INTERESTS OF RASMUSSEN IN PROVING THE SOURCE OF HIS DISEASE MUST PREVAIL OVER HYPOTHETICAL RESULTS ENVISIONED IF DISCOVERY IS ALLOWED.

A. The Discovery Sought by Rasmussen is Vital if He is to Prove Liability on Defendants Below for His Wrongful Death.

In point II (A), Respondent assumes that Rasmussen's discovery is an attempt to prove negligence on the part of the South Florida Blood Service and then goes on to extrapolate that even if such discovery were allowed, Rasmussen would not be able to prove negligence on the part of Respondent. Rasmussen is not trying to prove negligence by the South Florida Blood Service. The Respondent's references to the date

when knowledge concerning the transmission of AIDS by blood transfusion first became known to the South Florida Blood Service is not the present issue. Negligence in the South Florida Blood Service's screening of donors is not the present issue. Respondent raises these questions and then offers self-serving responses while at the same time avoiding the central issue to Petitioner and that is simply without reasonable discovery, how can he prove the cause of his death in the claim below?

Respondent wishes to maximize the hypothetical abuses which might occur despite adequate protection for donors' rights as encompassed in our Rules of Procedure. It at the same time wishes to minimize the discovery rights of Rasmussen and totally ignore the trial court's powers to restrict and limit discovery by Petitioner.

CONCLUSION

Based upon the foregoing argument and authority and on the Arguments contained in the amicus brief of The Miami Herald Publishing Company in this cause, the decision of the District Court of Appeal, Third District of Florida, should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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