IN THE SUPREME COURT OF FLORIDA

GEORGE FREDERICK ATWELL,

Petitioner,

vs.

CASE NO.: 70,500
1st District - No. BM-476

SACRED HEART HOSPITAL OF PENSACOLA and SISTER MARY CARROLL, Administrator,

Respondent.

APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA, CASE NO.: BM-476 BROUGHT PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(v)

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

DOES SECTION 395.017, FLORIDA STATUTES, REQUIRE A HOSPITAL, UPON PROPER PATIENT REQUEST, TO DISCLOSE COMPLETE PATIENT RECORDS WHEN TO DO SO WOULD COMPROMISE THE PRIVACY INTEREST OF A NON-REQUESTING PATIENT?

ARGUMENT

Atwell takes exception to the Hospital's suggestion that this Court refuse to exercise its discretionary jurisdiction to review the First District Court of Appeal's decision in this case (Hospital's Answer Brief, page 1, 4, and 6). The First District Court of Appeal deemed the issue presented to be of sufficient impact to certify a question of great public importance to this Court. Obviously, this is not a "one-of-a-kind" case nor is it one in which the ramifications of this Court's decision will affect only a limited class of potential litigants.

Atwell argues Section 395.017(1), Florida Statutes (1983) controls when a patient record is created out of a single incident or treatment, such as in the instant case. As pointed out by Atwell in his Initial Brief before this Court, if a natural mother of a child requested all of her patient records regarding her having given birth to a child, she would be provided with the entire record of that birth including all relevant information regarding her child. To do otherwise would violate her disclosural rights pursuant to Section 395.017(1), Florida Statutes (1983), and would permit a hospital to edit or censor her complete record of treatment. Atwell would respectfully submit there are many other conceivable situations which would create similar circumstances where a request for all of one's hospital records would reveal the records of another person whose treatment arose out of the same incident. Certainly, a common hospital record is created in a multiple birth situation; and therefore,

if a twin were to request the record of his birth then that twin would receive a record including not only his mother's treatment, but also his twin's record of treatment. Most importantly, the Hospital has failed to recognize that an entire class of persons will be affected by this Court's decision, to-wit: All foster children who might seek their birth records. The Statute does not make any exception to the right to secure one's entire hospital record. It does not provide for permissive alteration, editing or censorship by the hospital. To so provide would create obvious opportunities for abuse.

The Hospital further suggests this Court should forgo review of the certified question presented to it because the "peculiar facts" of this case arise out of a birth in 1921 when only limited patient records were kept (Hospital's Answer Brief, page 3-4). This argument should be dismissed summarily by this Court as misleading or at the very least as a flimsy excuse for the Hospital's refusal to comply with the statutory directives.

Atwell objects to the Hospital's introduction of the factual issue that Atwell was, in fact, "adopted" (Hospital's Answer Brief, page 2, 7-8). Firstly, the Hospital failed to raise this as an issue either at the trial court level or before the First District Court of Appeal. Secondly, the Hospital made a tacit admission that Atwell remained a foster child in the Hospital's Answer Brief to the First District Court of Appeal which states: "If Appellant was never formally adopted, the statute perhaps will not apply to him." and ". . . the persons who assumed responsibility and custody over Appellant must have intended for the identity of the natural parent to remain confidential." (Hospital's Answer Brief to the First District Court of

Appeal, page 13). Thirdly, in the oral arguments presented before the First District Court of Appeal, this issue was raised by the Court and resolved wherein both Atwell and the Hospital agreed that no formal adoption had occurred.

Based on the foregoing, Atwell would respectfully suggest this factual issue should be deemed waived by the Hospital, and the Hospital should be precluded from raising it at this juncture. Nevertheless, if this Court wishes to consider this issue, then Atwell would direct this Court's attention to the Hospital's Answer Brief wherein the Hospital recognizes there is no evidence of a judgment of adoption having been entered (Hospital's Answer Brief, page 9). The First District Court of Appeal's opinion reflects that assumption as well:

> ". . . and he (Atwell) was never adopted by his foster parents, who are now deceased." Atwell v. Sacred Heart Hospital of Pensacola, 504 So.2d 1367 (Fla. 1st DCA 1987).

Lastly, as a foster child, Atwell initially sought relief pursuant to Florida's Adoption Statute, Chapter 63, Florida Statutes (1983), wherein he sought a declaratory judgment to have himself declared a "constructive adoptee". However, this Count of Atwell's Complaint was dismissed by the trial court. The Hospital's Motion to Dismiss or Strike Counts of Atwell's Amended Complaint states as follows: "Since there was no adoption, there are no adoption proceedings or records, and thus, Section 63.162, Florida Statutes does not apply to the facts in this case." (R 65). And, the Hospital's Memorandum of Law in Support of the Hospital's Motion to Dismiss or Strike further stated: "There is no doctrine in the State of Florida which accepts

the theory of 'constructive adoption'. Further, there is no authority to establish 'constructive adoption papers', nor is there any authority by any stretch of the imagination to establish that patient records of unknown persons should be considered constructive adoption papers and available to 'constructive adoptees' upon their request." (R 73).

The Hospital submits the judgment of the trial court and the decision of the First District Court of Appeal conform with the public policy of this State (Hospital's Answer Brief, page 6). However, the Hospital fails to state where the legislature or the courts of this State have expressed a policy regarding any "entitlement" a natural mother of a foster child might have to confidentiality regarding her identity. Atwell asserts the legislative intent as expressed in Section 395.017(1) and (5), Florida Statutes (1983) is clear and unambiguous and that there is no compelling reason to extend or alter that statute or to create any exception to that statute through judicial legislation.

When read together, Section 395.017(1) and (5), Florida Statutes (1983) indicate that there is no entitlement to a zone of privacy as the Hospital would suggest. Atwell asserts he has a right to secure the entire record of his birth including information necessary to complete a birth certificate. The record is a history of a single occurrence or incident which is by its very nature inseparable in order to be complete. If the legislature had concerns to the contrary, then it is reasonable to presume the legislature would have expressed those concerns within the statute. It did not.

Atwell argues there was no showing of "good cause" in the evidence or testimony (Hospital's Answer Brief, page 8-9); however, the Hospital ignores the fact that Atwell was successfully precluded

from entering such evidence because, as stated previously, the Hospital's Motion to Dismiss Atwell's Count seeking a declaratory judgment as a "constructive adoptee" was successful. Atwell raises the significance of Chapter 63, Florida Statute (1983) in order to illustrate how the adopted child can use the statutory exception to secure the name of a natural parent. Thus, although there exists a strong public policy favoring adoption, and although the confidentiality and privacy interest involved in an adoption are acknowledged, the adopted child has a remedy available to him. The foster child, on the other hand, is prejudiced and precluded from seeking a similar statutory remedy without a legislative proclamation and without an overriding public policy reason favoring confidentiality for a natural mother of a foster child.

The Hospital argues that Atwell's natural mother "apparently" wanted to remain unidentified and that a court is required to consider "potentially deleterious emotional effects" of the revelation of identify (Hospital's Answer Brief, page 9-10). The Hospital goes on to state as follows:

> "If Petitioner's natural mother were 20 years old, or even 25 years old in 1921, that parent would be approximately between 86 and 91 years of age in 1986. Other children could have been born to that individual and could be approximately the Petitioner's age. Countless women live beyond the age of 85 and most individuals live at least until their mid-60's. Thus, the possibility that Petitioner actually has natural siblings, still living, who have been heretofore unaware of his existence, or at least of their familial relation, is not just the result of some remote speculation, but is easily imaginable and well with the realm of biological capability. Release of confidential information about Petitioner's mother and possibly her family could result in severe emotional and traumatic upset at this time." (Emphasis added)

Atwell asserts this entire argument should be dismissed as it is couched in terms of conjecture and is speculative at best. Furthermore, there is no evidence of record to support the Hospital's statements and the opposite speculation might equally be possible and plausible; that is, the natural mother, if living, as well as all of Atwell's kindred might be desirous of learning of his existence.

In Argonaut Insurance Company v. Peralta, 358 So.2d 232 (Fla. 3d DCA 1978), where the respondent sought discovery of any and all business records relating to patients having silicone injections over eleven years, the court stated the request must seek relative matters and must not be so excessive so as to be unduly burdensome to the party ordered to produce. Furthermore, the Argonaut court observed as follows:

> "We have not overlooked West Volusia Hospital Authority v. Williams, 308 So.2d 634 (Fla. 1st DCA 1975) and Springer v. Greer, 341 So.2d 212 (Fla. 4th DCA 1976), relied upon by the respondent. However, we find they are not applicable. Neither of these cases seek specific medical information about persons not a party to the case, but rather they merely seek information about the occurrence of a specific incident which could be provided without going into the medical history of the persons involved." (Emphasis added) Id at 233.

In West Volusia Hospital Authority where the subject matter of an action involved a specific incident and was the same as that of prior reports, the court indicated this specific request for production of incident reports would be discoverable. Id. at 636. In Torrence v. Sacred Heart Hospital, 251 So.2d 899 (Fla. 1st DCA 1971), cited in West Volusia Hospital Authority, the court found the hospital records of non-parties discoverable because they were ". . . relevant and

material to the factual question before the court . . ." and therefore held the court below erred in denying the plaintiff's motion to produce.

The Hospital correctly stated the very nature of the treatment administered at the hospital, delivery of Atwell as an infant, renders his birth records nonseverable from that of his natural mother. Furthermore, the Hospital correctly stated a distinct document separate and apart from the record of Atwell's birth and the name of his natural parents cannot be identified as "it is a record of his birth as well as a record of her giving birth" (Hospital's Answer Brief to the First District Court of Appeal, page 7-8). Therefore, the two records cannot be severed and in accordance with Argonaut, Torrence, and West Volusia Hospital Authority, as well as Section 395.017(1)(5), Florida Statute (1983), Atwell has a right to receive the complete record of his birth.

CONCLUSION

The First District Court of Appeal from the trial court's decision and stated Section 395.017, Florida Statutes (1983) authorizes a hospital to edit or censor a patient's records following a patient's request for release of all patient records. To allow this decision to stand would contravene the clear and unambiguous legislative intent which is precisely set forth in the statute. Furthermore, to allow this decision to stand would create a permissive exception to the statute whereby a hospital would be allowed unbridled discretion to pick and choose from a patient's records that information which it wishes to release.

The question certified by the First District Court of Appeal is one of great public importance; and without a clearly stated legislative policy to the contrary, Atwell asserts that the question must be answered in the affirmative. In the instant case, the Hospital's complete record of Atwell's birth is a record of a single incident and treatment. It is one record, common to two individuals, Atwell and his mother. It contains information regarding one event which is inextricably bound in one notation, a single line journal entry.

Based on the foregoing, it is respectfully submitted that the decision of the trial court and the First District Court of Appeal should be reversed with instructions directing the trial court to order the Hospital to release to Atwell all of his patient records, a complete record of his birth, to which he is entitled pursuant to Section 395.017(1) and (5), Florida Statutes (1983). To do otherwise would

create an exception to the statutory mandate which does not exist. To do otherwise would create judicial legislation with the potential for significant abuse. To do otherwise would prejudice not only Atwell, but the entire class of foster children in this State. To do otherwise would leave this class of foster children without a remedy which is available to the adopted child pursuant to Section 63.162(4), Florida Statute (1985), where the public policy regarding disclosure is well recognized. To do otherwise, would defeat Atwell's constitutional rights to due process and equal protection under the law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Patrick G. Emmanuel, attorney for Respondent, at 30 South Spring Street, Pensacola, Florida, by hand delivery on this the 13th day of July, 1987.

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