D.A. 5-4-93 097

Case No. 80, 311

In the

Supreme Court of the State of Florida

In re: Matter of Patricia Dubreuil,

Petitioner,

vs.

South Broward Hospital District,

Respondent.

On Discretionary Review
of the District Court of Appeal,
Fourth District — No. 90-1295

REPLY BRIEF FOR PETITIONER

Donald T. Ridley, Esq.
25 Columbia Heights
P.O. Box 023134
Brooklyn, NY 11202-0063
(718) 596-4993

Law Offices of
Elser, Greene & Hodor
Ste. 2100 - Courthouse Tower
44 West Flagler Street
Miami, FL 33130
(305) 577-0090

Attorneys for Petitioner

Table of Contents

Table of Citations

Page

Cases

Statutes

Other Authorities

Books

Periodicals

REPLY ARGUMENT

Using the 'prevention of potential abandonment' as its theme, the Hospital argues 1) that under Florida law, the State of Florida has a compelling, overriding interest in preventing "potential abandonment"; 2) that the Hospital, as a public, tax-financed entity, has basis to 'stand in the shoes' of the State of Florida in this case; 3) that due to the dearth of evidence in this case, the infringement of Mrs. Dubreuil's fundamental state and federal constitutional rights was the least intrusive means of preventing the "potential abandonment" of her children; and 4) that in view of the emergent circumstances of this case, the Hospital carried its "heavy" burden of proof. Petitioner replies 1) that notwithstanding Florida's undisputed general interest in the welfare of children, no positive Florida law supported the Circuit Court's order; 2) that the State of Florida has never appeared in or asserted any interest in this case; 3) that the forcible invasion of Mrs. Dubreuil's body was not the least intrusive means of preventing the "potential abandonment" of her children; and 4) that the Hospital failed to carry its "heavy" burden of proof.

1. No positive Florida law supported the Circuit Court's order

Although the Hospital argues that the State of Florida has a compelling interest in the prevention of "potential abandonment," *Answer Brief* at 2, 3, 4, 11, 15, 17, 20, the courts of this state have said that "abandonment may not be considered prospectively." *In re J.L.P.*, 416 So. 2d 1250, 1252 n.3 (Fla. 4th DCA 1982). Moreover, there is no such thing as "involuntary abandonment" in Florida. *In re P.S.*, 384 So. 2d 656, 657 (Fla. 5th DCA 1980). Contrary to this case law, the Circuit Court's order against Mrs. Dubreuil essentially

amounted to a finding of prospective, involuntary abandonment (or, to borrow the Hospital's term, "potential," involuntary abandonment).

Although the courts in the above cases were applying the dependency provisions of Florida's Juvenile Justice Act and the Circuit Court below was not, the Juvenile Justice Act "constitutes the sole and exclusive means by which the circuit court can declare a child to be dependent." *State v. M.T.S.*, 408 So. 2d 662, 663 (Fla. 3d DCA 1981); 1A Fla. Stat. Ann. § 39.01(10)(a) (West 1988) (dependent children include children found "to have been abandoned"). As the District Court said *In re A.D.J.*, 466 So. 2d 1156 (Fla. 1st DCA 1985), Florida's statutory scheme for protecting abandoned children is "very specific and must be strictly adhered to." *Id.* at 1160.

There can be no dispute that in granting the Hospital authority to violate Mrs. Dubreuil's body against her will, the Circuit Court was acting on its own, completely outside of Florida's child abandonment statute. The obvious question therefore becomes, on what law (if any) did the Circuit Court base its order? As a court of general jurisdiction,[1] did the Circuit Court have inherent equitable or *parens patriae* authority to issue the order it did? Petitioner submits that it did not.

Where there is an adequate statutory remedy to the problem before the court, the court is not at liberty to exercise its inherent equitable powers to craft what it believes is a better solution to the problem. A court "may not exercise its equity powers when there is an ade-

[1] Contrary to what the Hospital's suggests, *see Answer Brief* at 7, Petitioner has never challenged or objected to the Circuit Court's exercise of jurisdiction over the Hospital's petition. Petitioner agrees the Circuit Court was the appropriate forum for the Hospital's petition. What Petitioner disagrees with and appeals from is the Circuit Court's disposition of that petition.

quate remedy at law." *Lake Tippecanoe Owners Ass'n v. National Lake Dev., Inc.*, 390 So. 2d 185, 187 (Fla. 2d DCA 1980). "Where the Legislature has created . . . a clear remedy for a specifically identified evil, a court of equity will enforce that remedy." *Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1978).[2] The Florida Legislature has created a clear remedy for abandoned children in this state and the Circuit Court was bound to apply that remedy rather than devise its own remedy in derogation of Patricia Dubreuil's fundamental state and federal constitutional rights.

As Petitioner argued in her initial brief, however benevolent the Circuit Court's motives may have been, the court was not free to create a remedy according to its subjective inclinations. In *Flagler v. Flagler*, 94 So. 2d 592 (Fla. 1957), a case involving the care and maintenance of minor children, this Court stated:

> [W]e cannot agree that courts of equity have any right or power under the law of Florida to issue . . . order[s they] consider[] to be in the best interest of "social justice" at the particular moment without regard to established law. . . . [C]ourt[s have] no authority to change the law simply because the law seems . . . to be inadequate in some particular case.

Id. at 594. The same principle was expressed in *Vocelle v. Knight Bros. Paper Co.*, 118 So. 2d 664 (Fla. 1st DCA 1960), where the District Court said that courts do not "have the power to modify the plain purpose and intent of the Legislature as expressed by the language employed in the statutes and thus to bring about what may be conceived in the minds of the judges . . . to be a more practical or proper result." *Id.* at 668.

---

[2] *Accord* Hedges v. Dixon County, 150 U.S. 182, 192, 14 S. Ct. 71, 74-75, 37 L. Ed. 1044, 1048-49 (1893) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law."); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 122, 22 L. Ed. 72, 76 (1874) ("[a] court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law").

In sum, no positive Florida law supported the Circuit Court's order. When a court ignores established statutory law in favor of its own novel remedy, and when that novel remedy overrides fundamental, expressly guaranteed state and federal constitutional rights, something it terribly wrong. Petitioner submits that the primary explanation for this untenable result is the fact that, notwithstanding all the talk about compelling and overriding 'state' interests, the state or sovereign in this case (just as in the *Georgetown* case) was not the moving, petitioning party.

2. The State of Florida has never appeared in or asserted any interest in this case

As Petitioner argued in her initial brief, this whole case turns on the alleged existence of a compelling, overriding 'state' interest that has never been articulated or, much more, advanced by the State of Florida in this or any other case. *Initial Brief for Petitioner* at 10. Appreciating the fundamental problems this reality creates for this case, the Hospital insists that it "stands in the shoes of the state for purposes of demonstrating a compelling state interest." *Answer Brief* at 5 n.1. Petitioner does not dispute that the Hospital is free to vigorously argue what it believes to be the state's interests in this case. But the Hospital cannot, simply on its own initiative, presume to represent or act on behalf of the State of Florida. The Hospital never identifies any authority directing or authorizing it to represent the State of Florida or to advance the state's unarticulated interests in this case. However, despite this lack of authority, the Hospital comes up with several interesting arguments to establish its role as the state's representative.

First, although the District Court, after discussing the facts of the instant case and then referring to the *Wons* case, noted "the dilemma, inherent in most such cases, that the 'state' is not a party," 603 So. 2d at 541, the Hospital argues that in referring to "most such cases" the District Court was not referring to the two cases it had just discussed and referred to (involving public hospitals operated by a statutory hospital district and a public health trust) but rather was referring to private hospitals. *Answer Brief* at 7-8. Petitioner is confident that this Court will agree that the Hospital's creative interpretation of this passage is not supported by the District Court's plain, unambiguous language.

In any event, the Hospital then goes on to argue that because of its status as a public hospital operated by a special taxing district pursuant to Florida statute, it somehow acquires standing or authority to represent the State of Florida or act on its behalf. Again, the Hospital cites no law establishing its authority or role as the state's representative. Petitioner submits that public entities which were created or function according to state statute are not, because of their public status, the agents or representatives of the State of Florida. Indeed, the Hospital acknowledges that a special taxing district "is a unit of local government," not state government. *Answer Brief* at 5 n.1, 7.

As stated above, Petitioner does not dispute that the Hospital has every right to argue what it believes are the state's interests in this case, just as Petitioner is free to argue what it sincerely believes the state's interests are in this case. But neither the Hospital nor the Petitioner is the State of Florida, and the Hospital's status as a public entity does not make its arguments about the state's interests any more valid than Petitioner's. Thus, although both the Petitioner and the Hospital believe they are urging the State of Florida's true interests in this case, the

fact remains that the State of Florida itself has never appeared in nor asserted any interest in this case.

To the extent that the Hospital suggests that the sovereign immunity enjoyed by certain governmental entities in Florida negates any possibility that the Hospital or the doctors who work there could have any motive other than altruistically protecting innocent third parties, Petitioner points out that the sovereign immunity enjoyed by governmental entities in Florida is not absolute. Governmental entities are liable for up to $100,000 per person per claim (with a cap of $200,000 for all claims by all persons for any one incident or occurrence). *See* 21A Fla. Stat. Ann. § 768.28(5) (West Supp. 1993). Furthermore, this limited sovereign immunity can be waived if the governmental entity has purchased liability insurance coverage.[3] As for doctors, private physicians who have staff privileges at public hospital are independent contractors, not employees of the hospital.[4] They therefore could easily be motivated by concerns about their own liability rather than simply by concerns about the state's *parens patriae* interest in the welfare of their patients' dependents.

The reality is that liability concerns, whether legally founded or not, are a driving force in the delivery of health care services today.[5] The record in this case does not reveal whether

---

[3] *See, e.g.*, Lower Florida Keys Hosp. Dist. v. Littlejohn, 520 So. 2d 56, 57 (Fla. 3d DCA 1988); Whitney v. Marion County Hosp. Dist., 416 So. 2d 500, 502 n.2 (Fla. 5th DCA 1982).

[4] *See* Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 601 (Fla. 1987); Baldwin v. Dellerson, 541 So. 2d 779, 780 (Fla. 4th DCA 1989).

[5] *See* Solomon, et al., *Decisions Near the End of Life: Professional Views on Life-Sustaining Treatments*, 83 Am. J. Pub. Health 14, 19 (1993) (survey shows that physicians' reluctance to withdraw life-sustaining interventions even when legally required to do so is based in part on their fear of lawsuits). *See also* Localio, et al., *Relationship Between Malpractice Claims and Cesarean Delivery*, 269 JAMA 366 (1993).

the Hospital had waived its limited sovereign immunity by acquiring liability insurance nor does it reveal whether the doctors who treated Mrs. Dubreuil were employees of the Hospital or merely private physicians with staff privileges. But regardless of these details, the point remains—the Hospital is not the State of Florida.[6]

As for the Hospital's arguments that the Hospital is a "state actor" and that its application for a court order to transfuse Mrs. Dubreuil amounted to "state action," this all is irrelevant to this appeal and seems to confuse this case with a plaintiff's claim for damages under 42 U.S.C. § 1983. Petitioner does not dispute that a violation of an individual's state or federal constitutional rights requires some type of action by the state (or at least by private persons acting in concert with state actors[7]). But what this federal civil rights law has to do with this appeal escapes the Petitioner. Although the Hospital, as an entity of local government, apparently is a "state actor" under Eleventh Circuit case law construing 42 U.S.C. § 1983,[8] a "state actor" is not synonymous with the state itself. If it were, any state actor for purposes of 42 U.S.C. § 1983—for example, any public school teacher, police officer or local government official—would become a representative of the state.

---

[6] In addition, the Hospital's suggestion that the sovereign immunity enjoyed by governmental entities, including special hospital taxing districts, *see* 21A Fla. Stat. Ann. § 768.28 (West Supp. 1993), somehow makes the Hospital the representative of the state in a lawsuit such as this one still runs into the plain reality that the Hospital is nothing more than a unit of local government, not the state.

[7] *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980); Bendiburg v. Dempsey, 909 F.2d 463, 468-69 (11th Cir. 1990).

[8] Faucher v. Rodziewicz, 891 F.2d 864, 868 (11th Cir. 1990); Morrison v. Washington County, 700 F.2d 678, 682-83 (11th Cir. 1983).

Whether or not the Hospital itself was or is a state actor, it was perfectly free to apply to the Circuit Court for an order to transfuse Patricia Dubreuil; the Hospital violated no state or federal constitutional rights of Mrs. Dubreuil by doing so. The intrusion on Mrs. Dubreuil's rights occurred after the Hospital obtained the court order when, pursuant to the authority it had received through the Circuit Court's order, it proceeded to transfuse Mrs. Dubreuil over her state and federal constitutional rights of personal privacy, bodily self-determination, and religious freedom. The Circuit Court clearly was purporting to exercise the state's *parens patriae* authority and it was the Circuit Court's order that constituted the governmental action in this case. Quite obviously, it is the Circuit Court's order and not the Hospital's application for that order that is the subject of this appeal.[9]

Although the State of Florida has never appeared in this or any other 'innocent-third-party' case, the State of Florida has articulated its general *parens patriae* interest on the subject of abandoned children. In Florida's Juvenile Justice Act, 1A Fla. Stat. Ann. ch. 39 (West 1988 & Supp. 1993), the people of this state, through their elected representatives, have codified

---

[9] At the risk of confusing this appeal with what is at best an extremely peripheral if not wholly irrelevant discussion, Petitioner suggests that the Hospital may not be a "state actor" for 42 U.S.C. § 1983 purposes simply because of its status as a local governmental entity. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368, 1383 (1943). Thus, it is not status but the function or role played by the person or entity that determines the presence of state action. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935-36 n.18, 102 S. Ct. 2744, 2753 n.18, 73 L. Ed. 2d 482, 494 n.18 (1982); West v. Atkins, 487 U.S. 42, 54-57 & n.15, 108 S. Ct. 2250, 2258-60 & n.15, 101 L. Ed. 2d 40, 52-55 & n.15 (1988). In applying for a court order to transfuse Mrs. Dubreuil, the Hospital was exercising no special governmental power vested in it by state law. Any private hospital or physician could have acted in the same way and applied for an identical order. It was only after the court order was granted and the Hospital proceeded to act thereunder that the Hospital acted under color of state law. *See* Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488, 497-98 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968); McKenzie v. Doctors' Hosp. of Hollywood, Inc., 765 F. Supp. 1504, 1506 (S.D. Fla. 1991).

the state's *parens patriae* interest in abandoned and other dependent children. Petitioner submits that if the State of Florida (or its Department of Health and Rehabilitative Services) had been the petitioning or complaining party in this case, it would have proceeded according to Florida's Juvenile Justice Act and would have sought a remedy provided therein. The fact that it was the Hospital that instituted this action seeking a 'remedy' unknown to Florida's statutory scheme for cases of child abandonment is perhaps the strongest proof that the Hospital was and is acting completely on its own and is in no way acting as the official or unofficial representative of the State of Florida. In sum, the State of Florida has never appeared in or asserted any interest in this case or any other case involving innocent third parties.

3. The forcible administration of nonconsensual medical treatment is not the least intrusive means of protecting innocent third parties

If one ignores the fact that no Florida law supported the Circuit Court order, and if one ignores the fact that a party other than the state, on the basis of nothing more than its own initiative, has asserted an allegedly compelling, overriding interest that the state itself has never articulated or asserted in any case, one can then reach the question whether the forcible violation of a competent adult's body was the least intrusive means of protecting the endangered 'state' interest. The Hospital acknowledges the serious problems this question poses for the Circuit Court's order in the face of the statutory duty imposed on Mr. Dubreuil to care for his children. 21A Fla. Stat. Ann. § 744.301 (West Supp. 1993). In fact, the Hospital does not dispute that Mr. Dubreuil had a legal duty to care for his children. *Answer Brief* at 18. Nevertheless, the Hospital argues that the nonconsensual invasion of Mrs. Dubreuil's body was less intrusive than requiring her separated husband to live up to his statutory duties

because the "sad facts" were that Mr. Dubreuil disagreed with his wife's refusal of blood and, in the Hospital's view, evinced a reluctance to assume his parental responsibilities. *Id.*

If, as a practical matter, nothing more than a father's unwillingness to shoulder his parental responsibilities is enough to defeat the duty imposed on him by Florida statute, the statute might as well not exist. Petitioner assumes that section 744.301 means what it says. As the District Court said *In re D.J.S.*, 563 So. 2d 655 (Fla. 1st DCA 1990): "The law imposes an equal duty on each parent for the protection, maintenance, and care of the child. . . . **'Each parent has an equal duty to support and protect the child and cannot stand passively by and refuse to do so when it is reasonably within his power.'"** *Id.* at 566 (quoting 59 Am. Jur. 2d *Parent and Child* § 13; emphasis in original). The Hospital presented no evidence of Mr. Dubreuil's inability to care for his children.

If a spouse's disagreement with his mate's choice of treatment is legally sufficient to defeat his mate's fundamental rights of personal privacy, bodily self-determination and religious freedom, the law in effect will allow indirectly that which both the majority and dissent below agreed the law does not allow directly. As the majority said below, "a spouse's concurrence in such a decision is irrelevant to the exercise of a first amendment or privacy right." *In re Dubreuil*, 603 So. 2d 538, 541 (Fla. 4th DCA 1992). The dissent expressed the same view when it said that "one spouse does not have the right to overrule the competent decisions of the other spouse regarding the spouse's own medical treatment." *Id.* at 542 (Warner, J., dissenting).

"The basic rule on spousal consent is simple: if the patient is conscious, mentally capable of consent, and gives his or her consent, the consent of the spouse is not necessary, nor is it otherwise material." 2 Health Law Center, *The Hospital Law Manual* 180 (P. Young 3d 1989).

> Marriage or other kinship relations do not create agency relationships. One spouse may not consent to care for the other spouse. This is a particular problem for married women seeking medical care. . . . [A married woman's] husband has no legal right to consent to her care, or to veto her care. The law is very clear on this point, but the medical-legal mythology is not. Many health care providers believe a husband could sue them for rendering care to his wife without his consent. . . . There is absolutely no support for this position. . . .
>
> . . . Spousal consent requirements, whether for the husband or the wife, are an anachronism that can lead to serious legal difficulties.

E. Richards & K. Rathbun, *Medical Risk Management* 265-66 (1983). The case law cited by the dissent, see 603 So. 2d at 542, corroborates these authorities. In view of the known presence of the children's father as well as the presence of Mrs. Dubreuil's mother and adult siblings, it cannot be seriously argued that the nonconsensual violation of Mrs. Dubreuil's body was the least intrusive means of protecting her children.

4. The Hospital failed to carry its "heavy" burden of proof

If one ignores the lack of any positive Florida law supporting the Circuit Court's order, and if one ignores the absence of the State of Florida in a case allegedly involving a compelling, overriding 'state' interest that the state has never articulated or advanced, and if one somehow comes to the conclusion that the forcible violation of Mrs. Dubreuil's body was the least intrusive means of protecting this alleged 'state' interest, one can finally reach the question whether the Hospital (presuming to act on behalf of the state) carried the "heavy" burden

of proof necessary to override Mrs. Dubreuil's fundamental constitutional rights.[10] Since, as the District Court acknowledged, there was no evidence at all before the Circuit Court about the future of the Dubreuil children, 603 So. 2d at 541, it must be conceded that the Hospital failed to carry its burden of proof. Despite this lack of evidence about the children's future, the Circuit Court presumed that, in the absence of any contrary evidence from Mrs. Dubreuil, her children would become abandoned and effectively relieved the Hospital of its burden of proof. The District Court then endorsed this presumption of abandonment.

The Hospital all but acknowledges that the Circuit Court employed and the District Court confirmed a presumption of abandonment against Mrs. Dubreuil. Thus, even though this Court has placed a "heavy" burden on hospitals seeking to override patients' refusals of treatment, and even though this Court has cautioned that the protection of innocent third parties is not a "bright-line test" for overriding such refusals, the Hospital argues that a presumption of abandonment which shifts the burden of proof to the patient is a "necessary safeguard" in emergency cases where the patient has failed to adduce "any evidence" that her children will be cared for. *Answer Brief* at 18. In this way, the Hospital essentially blames Patricia Dubreuil and her trial counsel for not "easily" producing any evidence to rebut the presumption of abandonment adopted by the Circuit Court.

By shifting the blame to the patient and by suggesting that such orders will be granted only when necessary in emergency situations, the Hospital tries to minimize its responsibility and downplay the impact of this precedent. Unfortunately, the effect of this case cannot be so

---

[10] Contrary to the Hospital's suggestion, *see Answer Brief* at 2, 10, Petitioner has never asserted that the Hospital's burden of proof was heavier than the burden of proof the state would have when it seeks to override fundamental constitutional rights in order to protect compelling state interests.

neatly and quietly contained. The reality is that what happened to Patricia Dubreuil is really quite typical of refusal of treatment cases involving innocent third parties. All of the cases cited in the footnote below arose under allegedly emergent circumstances that afforded the patient or her representatives little or no time to respond to the hospitals' or doctors' claims of abandonment.[11]

In view of the irregular, expedited circumstances in which these cases typically arise, it is unrealistic to put the burden of proof on the hospitalized patient to rebut a presumption that her fundamental state and constitutional rights ought to be violated. As the District of Columbia Court of Appeals said *In re A.C.*, 573 A.2d 1235 (D.C. 1990):

> [A]ny judicial proceeding in a case such as this will ordinarily take place—like the one before us here—under time constraints so pressing that it is difficult or impossible for the mother to communicate adequately with counsel, or for counsel to organize an effective factual and legal presentation in defense of her liberty and privacy interests and bodily integrity. Any intrusion implicating such basic values ought not to be lightly undertaken when the mother not only is precluded from conducting pre-trial discovery (to which she would be entitled as a matter of course in any controversy over even a modest amount of money) but also is in no position to prepare meaningfully for trial.

Id. at 1248.

> For the lawyers opposing judicial intervention, the risk of error due to medical uncertainty is compounded by the irregularity of court proceedings. . . . Evidence is almost always one-sided. The doctors recommending [treatment] are on hand to testify, but lawyers summoned with no notice to represent the patient have no time to find independent

---

[11] Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989); St. Mary's Hosp. v. Ramsey, 465 So. 2d 666 (Fla. 4th DCA 1985); Norwood Hosp. v Munoz, 564 N.E.2d 1017 (Mass. 1991); Fosmire v. Nicoleau, 551 N.E.2d 77 (N.Y. 1990); Mercy Hosp., Inc. v. Jackson, 489 A.2d 1130 (Md. Ct. Spec. App. 1985); In re Winthrop Univ. Hosp., 490 N.Y.S.2d 996 (Sup. Ct. Nassau County 1985); Crouse Irving Mem. Hosp., Inc. v. Paddock, 485 N.Y.S.2d 443 (Sup. Ct. Onondaga County 1985); In re Osborne, 294 A.2d 372 (D.C. 1972); Powell v. Columbian Presbyterian Medical Ctr., 267 N.Y.S.2d 450 (Sup. Ct. N.Y. County 1965); In re President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) (Wright, J., in camera); *cf.* In re A.C., 573 A.2d 1235 (D.C. 1990); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981); Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964).

> experts. Lawyers for the patient also are likely to be less knowledgeable about the legal and medical issues than the attorneys who represent the hospital or doctors.

Jost, *Mother Versus Child*, A.B.A. J., Apr. 1989, at 84, 86. The presumption adopted by the Circuit and District Courts in favor of overriding fundamental constitutional rights is contrary to this Court's precedent in *Wons* and *Browning*. The lack of any evidentiary record in this case conclusively proves that the Hospital did not carry its burden of proof.[12]

Conclusion

The need for a clear and authoritative statement of Florida law as it relates to "innocent third parties" is patent. Is it the public policy of this state to let hospitals (whether public or private) or trial courts act on their own conception of the state's *parens patriae* interest in 'potentially abandoned' children despite the existence of a statutory scheme designed specifically to address the same problem? When the infringement of fundamental constitutional rights is the price of such a novel, unstructured, ill-considered use of state power, the need for

---

[12] Although not directly argued by the Hospital, one might infer from the *Answer Brief* as well as from the District and Circuit Court opinions that the fact of an emergency alone somehow diminishes the patient's rights of personal privacy, bodily self-determination, and (in this case) religious freedom. This, however, is not the law. Although a doctor may administer necessary treatment in an emergency without the patient's consent if the patient is unable to give consent, the doctor may not administer such treatment when the doctor knows that the patient has refused it. "[C]onsent will not be implied if the patient has previously stated that he would not consent." In re Storar, 420 N.E.2d 64, 70 (N.Y. 1981). If a doctor

> knows that the patient has refused to consent to the proposed procedure, he is not empowered to overrule the patient's decision by substituting his decision for hers even though he, and most others, may think hers a foolish or unreasonable decision. In these circumstances the assumption upon which consent is set aside in an emergency could no longer be made. The doctor has no authority to intervene in the face of a patient's declared wishes to the contrary.

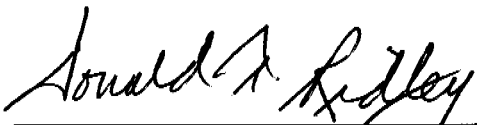
Malette v. Shulman, 72 O.R.2d 417, 431 (Ont. Ct. App. 1990); *accord* Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990) ("The emergency doctrine is inapplicable [where] . . . the patient clearly stated before admission to the hospital and throughout her stay that she would not consent to blood transfusions."). *See generally* E. Richards & K. Rathbun, *Medical Risk Management* 253-54 (1983); President's Commission for Study of Ethical Problems in Medicine, *Making Health Care Decisions* 93 (1982); 1 Health Law Center, *The Hospital Law Manual* ¶ 1-9, at b (Supp. 1991).

the "slings and arrows" of the legislative process is manifest. The implications of the *Georgetown* 'innocent third party' rule are too controversial, too far-reaching and too complex to be left to hospitals and trial judges.

No Florida law supported the Circuit Court's order. For this reason primarily the Circuit Court order and the District Court opinion should be reversed. However, even if the lack of any positive Florida law is disregarded, the Circuit Court's order was not the least intrusive means of protecting the 'state's' interest in this case. In addition, the Circuit and District Court did not require the Hospital to carry its "heavy" burden of proof but instead adopted an unconstitutional presumption of proof. For these latter two reasons also, the Circuit Court order and the District Court opinion should be reversed.

Dated: April 2, 1993
Brooklyn, New York

Respectfully submitted,



DONALD T. RIDLEY
25 Columbia Heights
P.O. Box 023134
Brooklyn, NY 11202-0063

LAW OFFICES OF
ELSER, GREENE & HODOR
Suite 2100 - Courthouse Tower
44 West Flagler Street
Miami, FL 33130

Attorneys for Petitioner

Certificate of Service

Pursuant to Fla. R. App. P. 9.420(c)(2), I certify that a copy hereof has been furnished to:

F. Philip Blank, Esq.
William D. Anderson, Esq.
Blank, Rigsby & Meenan, P.A.
204-B South Monroe Street
P.O. Box 11068
Tallahassee, FL 32302-3068

Attorneys for Respondent

Clarke Walden, Esq.
Five East Tower - Room 533
3501 Johnson Street
Hollywood, FL 33021

Attorney for Respondent

William E. Hoey, Esq.
222 U.S. Highway One - Suite 213
Tequesta, FL 33469

Attorney for Amicus Curiae Watchtower Bible and Tract Society of New York, Inc.

Rebecca C. Morgan, Esq.
Stetson University College of Law
1401 61st Street South
St. Petersburg, FL 33707

Attorney for Amicus Curiae American Civil Liberties Union Foundation of Florida, Inc.

by mail this 2nd day of April, 1993.

Donald T. Ridley, Esq.
25 Columbia Heights
P.O. Box 023134
Brooklyn, NY 11202-0063

Attorney for Petitioner