SUPREME COURT OF FLORIDA

CASE NO. 83,620

BERNADETTE AMENTE and SOLOMON AMENTE, individually, and as natural parents and next friend of KATHY AMENTE, a minor,

Petitioners,

vs.

WILLIE B. NEWMAN, M.D. and WILLIE B. NEWMAN, M.D., P.A.,

Respondents.
_____/

Fifth District Court of Appeal No. 93-2625

ORIGINAL

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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Respondents, WILLIE B. NEWMAN, M.D. and WILLIE B. NEWMAN, M.D., P.A., pursuant to Florida Rule of Appellate Procedure 9.120(f) and this Court's May 11, 1994 Order, file this Answer Brief on the Merits.

ISSUE PRESENTED

Did the Fifth District Court of Appeal correctly decide that the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County departed from the essential requirements of law when it ordered Respondents to produce the records of other patients not involved in this medical malpractice lawsuit?

FACTS

Respondents agree with the Petitioners' explanation of the facts of this case except to the extent that Petitioners imply that statements made by Dr. Newman make the records of other patients relevant to the issues in this case.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal correctly decided this case in favor of the Respondents in its opinion below. The records of other patients who are not parties to this lawsuit requested by the Petitioners are not relevant to the only issue in this case, which is whether Dr. Amente failed to conform to the standard of care required of him. In addition, the Fifth District Court of Appeal correctly determined that the constitutional right of privacy guaranteed to the other patients by the Florida State Constitution precludes any disclosure of these records even in redacted form.

In their initial brief on the merits the Petitioners had relied on two cases decided by the Fourth District Court of Appeal to support their position in this case. Amisub (Northridge Hospital, Inc.) v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989); and Ventimiglia v. Moffitt, 502 So. 2d 14 (Fla. 4th DCA 1986). However, only one district court of appeal supports the Petitioners' view. In contrast, the Second, Third and Fifth District Courts of Appeal support the Respondents' position. Newman v. Amente, 19 Fla. L. Weekly D722 (Fla. 5th DCA March 31, 1994); Leikensohn v. Cornwell, 434 So. 2d 1030 (Fla. 2d DCA 1983); Teperson v. Donato, 371 So. 2d 703 (Fla. 3d DCA 1979); Argonaut Insurance Company v. Peralta, 358 So. 2d 232 (Fla. 3d DCA 1978). Accordingly, the clear weight of authority of Florida law favors the Respondents' position in the case now before this Court.

The Petitioners have cited several cases in their initial brief from foreign jurisdictions. None of the cases cited by the Petitioners shed any light on the issue of relevance in this case because none of those cases address the relevance of the records of other patients to the issue of the standard of care in a medical malpractice lawsuit. Furthermore, all of those cases interpret various state statutes creating a physician-patient privilege and none of them consider the issue of the right to privacy enjoyed by the other patients involved in those lawsuits or whether any of the state constitutions of those various other states even establish any such right to privacy.

Finally, the Petitioners in their initial brief on the merits failed to present this Court with significant authority from other jurisdictions that supports the Respondents position in this case. Specifically, several cases from foreign jurisdictions support the Respondents' position that the requested medical records are not relevant and disclosure of those records of other patients would impermissibly infringe upon their right to confidentiality and right to privacy even if those records are disclosed only in redacted form.

ARGUMENT

The Fifth District Court of Appeal correctly decided that the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County departed from the essential requirements of law when it ordered Respondents to produce the records of other patients not involved in the medical malpractice lawsuit below. Such records are simply not relevant to the issue of whether Dr. Newman departed from the required standard of care during the delivery of the Amente child. Clearly, Florida Rule of Civil Procedure Rule 1.280(b)(1) allows discovery only of information that is relevant to the issues in a pending action. Furthermore, the privacy rights of Dr. Newman's other patients who are not parties to this lawsuit would be impermissibly intruded upon if the Amentes were permitted to violate those patients' confidential relationship with Dr. Newman in an attempt to obtain information that has no bearing at all on the issue of whether

Dr. Newman departed from the accepted standard of care in the community during the course of his treatment of Mrs. Amente and delivery of the Amente child.

In Argonaut Insurance Company v. Peralta, 358 So. 2d 232 (Fla. 3d DCA 1978), cert. denied, 364 So. 2d 889 (Fla. 1978), the Third District Court of Appeal addressed the relevance of the records of other patients in a medical malpractice suit and held that it is not proper for a trial court to order the production of the medical records of other patients who are not parties to a lawsuit. Specifically, the Third District Court of Appeal stated:

> to permit a party to inject into the public record medical information of a stranger to the suit, under the guise that it has a bearing on the competency of the doctor, would be unconscionable. The question in medical malpractice is whether or not the doctor, in treating the plaintiff, used a standard of care commensurate with that used in the community and that question can be answered by utilizing other methods of proof than the invasion into medical records of strangers.

Id. at 233 (citing Holl v. Talcott, 191 So. 2d 40 (Fla. 1966) and Talcott v. Holl, 224 So. 2d 420 (Fla. 3d DCA 1969)). In its opinion quashing the order of the trial court in this case the Fifth District Court of appeal specifically endorsed this statement of the law by the Third District Court of Appeal in Newman v. Amente, 19 Fla. L. Weekly D722, D724 (Fla. 5th DCA March 31, 1994).

In Peralta, just as in the case presently before this court, the trial court had ordered that the medical records at issue should be produced but that the patients' names and addresses should be deleted from the records. Despite the fact that all references to the identity of the patients would be redacted, the Third District Court of Appeal protected the integrity of the confidential relationship between patients and their doctor and quashed the order of the trial court compelling the production of records related to patients that were not parties to the lawsuit. Essentially, the Peralta court held that such records are not relevant to the issues presented by a medical malpractice suit. In addition, the Fifth District Court of Appeal found in Newman that the privacy of the other patients whose records are at issue could not be sufficiently protected by redaction of those records. Newman, 19 Fla. L. Weekly at D724.

The Third District Court of Appeal has consistently followed its precedent in Peralta. In Teperson v. Donato, 371 So. 2d 703 (Fla. 3d DCA 1979), the court cited Peralta and once again quashed a trial court's order compelling production of records related to patients who were not parties to the medical malpractice lawsuit even though the trial court order had contemplated redaction of the identities of those patients.

In North Miami General Hospital v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033 (Fla. 3d DCA 1981), the Third District Court of Appeal once again reiterated the reasoning for this rule. In that case, the court stated that:

> Any revelation of the contents of the documents concerning other patients who have no connection whatever with this litigation will, to a greater or lesser extent, impermissibly compromise their right to the confidentiality of their medical records which is protected from such incursions by both decisional and statutory law.

Id. at 1035 (citing Dade County Medical Association v. HLIS, 372 So. 2d 117 (Fla. 3d DCA 1979); American Health Plan, Inc. v. Kostner, 367 So. 2d 276 (Fla. 3d DCA 1979); Argonaut Insurance Company v. Peralta, 358 So. 2d 232 (Fla. 3d DCA 1978), cert. denied, 364 So. 2d 889 (Fla. 1978); and Florida Statute Sections 90.503, 390.002, 394.459(9), 395.19, 395.202, 397.053, 827.07(15)).

The Second District Court of Appeal has followed the rule established by the Third District Court of Appeal. In Leikensohn v. Cornwell, 434 So. 2d 1030 (Fla. 2d DCA 1983), the Second District Court of Appeal cited Peralta and held that the petitioners in Leikensohn, the defendant doctors in the case, did not have any obligation to produce the records of other patients even if careful attention was given to patient confidentiality. The Second District Court of Appeal quashed the order of the trial court that had denied the petitioner's motion for protective order.

The Fifth District Court of Appeal has also consistently endorsed this view. It impliedly endorsed this view in Big Sun Healthcare Systems v. Prescott, 582 So. 2d 756 (Fla. 5th DCA

1991), and expressly endorsed this view in Newman v. Amente, 19 Fla. L. Weekly D722.

The First District Court of Appeal has not expressed any opinion on this issue. The Fourth District Court of Appeal stands alone with its minority view of this issue in Amisub (Northridge Hospital, Inc.) v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989), and Ventimiglia v. Moffitt, 502 So. 2d 14 (Fla. 4th DCA 1986), discussed below.

The Petitioners have stressed the fact that the request to produce and the order compelling compliance with the request in this case contemplated the redaction of information that might identify the other patients who are not parties to this lawsuit. In doing so, they have relied on cases decided by the Fourth District Court of Appeal. However, they have offered no explanation of how redaction would sufficiently protect the privacy of other patients and have offered no satisfactory explanation of how those redacted records would be relevant to the issue of whether Dr. Newman departed from the standard of care in this medical malpractice case. Petitioners must show that Dr. Newman's treatment did not conform to the treatment that a reasonable obstetrician/gynecologist in the community would have rendered to Mrs. Amente. These records will not help them do this.

The Fifth District Court of Appeal explained the relevance issue in this case as clearly and succinctly as possible. That court stated:

> The fact that Dr. Newman has delivered children of other obese women is not relevant to his delivery method of the Amente child. It is not relevant to show that he deviated from the applicable standard of care that is required by Dr. Newman. The applicable standard of care required is the standard observed by the medical community, not that of Dr. Newman alone. The question before the trial court will be whether he was negligent when he delivered the Amente child, not whether he was negligent in other cases with obese mothers.

Newman, 19 Fla. L. Weekly at D724.

In Ventimiglia v. Moffitt, 502 So. 2d 14 (Fla. 4th DCA 1986), relied on by Petitioners, the Fourth District Court of Appeal denied a petition for writ of certiorari that sought to set aside a trial court's order compelling a physician to produce copies of records of other patients who were not related to the lawsuit. In that case, the Fourth District Court of Appeal noted that the trial court's order "relied on the fact that the physician predicated his diagnosis and opinion in the claimant's case, at least in part, upon his experience with the other patients." Id. at 14.

Although the trial court's order in the case presently before this Court does not rely on any such fact, the Petitioners have noted in their initial brief on the merits that Dr. Newman indicated that the decisions he made concerning his care of Mrs. amente were influenced by his experience with previous patients. However, it is always the case that a physician refers to and relies on his previous experience when making treatment and care decisions concerning subsequent patients. This fact in itself is

not sufficient to make the records of those previous patients relevant to the issue of whether the physician departed from the required standard of care in his treatment of the subsequent patient.

Petitioners also rely on Amisub (Northridge Hospital, Inc.) v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989). In that case the Fourth District Court of Appeal upheld the order of the trial court compelling the petitioner to produce copies of records of other patients. The Fourth District Court of Appeal apparently based this decision on its observation that the trial court provided in its order that the names of the other patients should be deleted before the records were produced. Id.

However, the Amisub court also observed, without explaining why, that the records requested were somehow relevant in that particular case. Id. It is not clear from the opinion whether the Fourth District Court of Appeal simply contradicts the decisions of the Second, Third, and Fifth District Courts of Appeal or whether the Fourth District Court of Appeal intended to limit its holding to the facts presented in Amisub. The per curiam opinion in Amisub did not include any discussion of the facts presented by the case.

Nevertheless, there are no facts in the case presently before this Court to demonstrate the relevance of the records of other patients and the Fifth District Court of Appeal concluded that the position of the Fourth District Court of Appeal directly conflicts with the positions of the Second, Third, and Fifth

District Courts of Appeal. The records requested by Respondents are simply not relevant to the issues presented by this medical malpractice claim and the trial court did not make any specific finding that they are.

Accordingly, the rule adopted by the Second, Third, and Fifth District Courts of Appeal that protects the private, confidential relationship between doctors and patients and prevents the production of the records of other patients should be followed and adopted by this Court. Moreover, the redacted records exception to that general rule, formulated by the Fourth District Court of Appeal and specifically rejected by the Fifth District Court of appeal in its opinion in this case below, should not be adopted to erode the protection of privacy enjoyed by a doctor's patients.

In addition to finding that the records at issue in this case are not relevant to the issues presented by this case, the Fifth District Court of Appeal found that the constitutional right of privacy found in Article 1, Section 23 of the Florida Constitution demonstrates that the State of Florida has determined that an individual's right of privacy takes precedence in any balancing of competing interests. Certainly, there are circumstances under which an individual voluntarily gives up this right of privacy, such as by voluntarily bringing a personal injury action and allowing other parties to obtain their medical records through the subpoena process. However, in a situation in which an individual has not voluntarily waived their right of

privacy this constitutionally protected right should take precedence in any balancing of interests. Clearly, under the facts presented by this case there is no indication that any of the individuals whose records the Petitioners seek to discover have indicated that they wish to give up their right of privacy or the confidential relationship they enjoy with their physician.

In their initial brief on the merits, the Petitioners have repeatedly asserted that the Fifth District Court of Appeal somehow improperly based its decision, in part, on this constitutional right of privacy. Specifically, Petitioners assert that because this issue was not briefed or argued below, Respondents have no right to raise the issue on appeal. However, Petitioners conveniently ignore the fact that the Fifth District Court of Appeal voluntarily engaged in a consideration of the constitutional right of privacy on its own initiate.

Although Petitioners assert that the privacy argument is an entirely new ground for the Fifth District Court of Appeal's holding, it would more properly be considered simply an extension of the analysis already provided in cases decided by the Second and Third District Courts of Appeal such as Peralta. Essentially, this constitutional right of privacy is simply additional weight on the scales in favor of protecting the confidential records of other patients and not an additional ground upon which to base a decision. Petitioners have failed to cite any authority to establish that a district court of appeal is not entitled to insert additional legal analysis into an

opinion on its own initiative despite the fact that the parties had not necessarily briefed it.

Moreover, at least one district court of appeal has held that a Florida appellate court can properly rule on constitutional issues that are revealed in the record on appeal. American Home Assurance Co. v. Keller Industries, 347 So. 2d 767 (Fla. 3d DCA 1977). In addition, this Court has held that once it has jurisdiction in a case "it may, at its discretion, consider any issue affecting the case." Cantor v. Davis, 489 So. 2d 18 (Fla. 1986). Therefore, there is no reason that the Fifth District Court of Appeal should have been precluded from considering the constitutional privacy issue and no reason why this Court should be precluded from affirming the opinion of the Fifth District Court of Appeal.

Because of the relative scarcity of Florida law supporting the Petitioners' position in this case, they have attempted to persuade this Court to endorse their view by citing several cases from foreign jurisdictions that they claim support their position in this case. However, a careful analysis of all of these cases reveals that they are factually distinguishable from the case presently under consideration by this Court.

Petitioners have also cited a decision by the United States Supreme Court in an attempt to support their position in this case. However, once again, this case should not be viewed as dispositive of the issues presented by the case presently before the Court. It is a matter of black letter constitutional law

that the courts of the State of Florida, interpreting the Florida State Constitution, can provide for a greater degree of protection of a right of privacy for Florida citizens than the minimum established by the United States Supreme Court interpreting the United States Constitution.

In fact, the Fifth District Court of Appeal in its decision below in Newman v. Amente made no reference whatsoever to the right of privacy guaranteed by the United States Constitution. Rather, the Fifth District Court of Appeal relied exclusively on the right of privacy established by the Florida Constitution. Consequently, even if the United States Supreme Court establishes the base line level of privacy that a state must protect, there is nothing that would prevent this Court from establishing a heightened level of protection for the right of privacy under the Florida State Constitution.

Most of the cases from foreign jurisdictions cited by the Petitioners in this case can be distinguished because the facts of those individual cases clearly established the relevance of the requested documents to the specific issues in the particular case or because the courts in those cases engaged in no discussion whatsoever concerning the relevance of the requested documents. Because the Respondents' position in the case presently before the Court is primarily that the requested records are not relevant to the issues presented by the case, these cases from foreign jurisdictions that do not deal with the question of relevance specifically presented by the case now

before this Court should not be viewed as dispositive in this matter. Furthermore, the foreign cases interpret various state statutes that establish a physician/patient privilege and none of them provide any analysis of a right of privacy under any state constitution.

In Tucson Medical Center, Inc. v. Rowles, 520 P.2d 518 (Ariz. Ct. App. 1974), the Arizona Court of Appeals was called upon to interpret a specific state statute that created a physician-patient privilege. Rowles involved a plaintiff's medical malpractice claim against a hospital based on a theory that the hospital was negligent during an emergency situation just before the delivery of Mrs. Rowles' baby. Specifically, the plaintiff believed that the hospital had a duty to contact another obstetrician who may have been on the hospital premises at the time of the emergency when the plaintiff's own doctor was not available. The plaintiff wanted to review the hospital records in order to determine whether, in fact, there was another obstetrician available on the hospital premises at the time of the emergency.

Although the Arizona appellate court did not engage in any specific discussion concerning the relevance of these documents to the plaintiff's theory of liability in the case, it is likely that the Rowles court simply accepted the relevance of the requested information. Without determining whether the plaintiff's theory of liability was viable, the court found that the plaintiff should be entitled to review nonprivileged

information in patient records in order to determine whether there was another obstetrician on the hospital premises. The court ordered an in camera inspection to remove all privileged information before the plaintiff was allowed to review the documents.

Clearly, the facts of Rowles are distinguishable from the facts of the case presently before this Court. The records sought by the plaintiff were arguably relevant to the issue of whether there was, in fact, another obstetrician on the hospital premises at the time of the emergency. The plaintiff did not seek review of those records in order to establish that her theory of liability should be endorsed by the court. Rather, she simply wished to review those records in order to ascertain a relevant fact: whether or not there was another obstetrician available.

If the plaintiff had been able to establish that another obstetrician was available on the premises of the hospital she then would have had to establish that the hospital had notice of his presence and that the hospital had a duty to call him to her aid. In contrast, the records at issue in the case presently before this Court are not in any way relevant to the only issue in this case: whether or not Dr. Newman conformed to the standard of care required of him during his treatment and care of Ms. Amente.

In Ziegler v. Superior Court of Pima County, 656 P.2d 1251 (Ariz. Ct. App. 1982), the Second Division of the Arizona Court

of Appeals was once again called upon to interpret the statute creating a physician-patient privilege in Arizona. In that case, the medical malpractice plaintiffs sued Tucson General Hospital and alleged that the hospital negligently allowed heart surgeons to perform unnecessary pacemaker implants at the hospital. In an attempt to establish that the hospital had notice of the unnecessary operations, the plaintiffs sought to discover records of other patients who had had pacemakers implanted at the hospital.

Accordingly, the issue in the case was whether the hospital had negligently supervised doctors who performed unnecessary pacemaker implants. Plaintiffs were seeking to show that the hospital knew, or should have known, that these unnecessary operations were taking place. The only way the plaintiffs could have established this was by reviewing the records of other patients who had had pacemakers implanted.

This is clearly a different issue than the issue presented by the case presently before this Court. In fact, the Ziegler court noted this distinction in stating that:

> [i]f the claim against the hospital is predicated on its negligent supervision of members of the medical staff, an essential factor to be proved by the plaintiff is the hospital's knowledge, actual or constructive. Therefore, medical records of other patients who might have had unnecessary pacemaker implantation are relevant to the notice issue.

Id. at 1255.

From this quotation it is clear that the Arizona court of appeals made a specific finding that the records requested by the plaintiff were relevant to the specific issue involved in the case. Because of this, the court held that the records should be produced but that the names of the patients should be deleted to help protect their identity. There has not been, and cannot be, any specific finding that the records sought by the Petitioners in the case now before this Court are in any way relevant to the issues involved. In fact, the Ziegler court also noted this fact. The defendants in Ziegler had relied on Argonaut Insurance Company v. Peralta, 358 So. 2d 232 (Fla. 3d DCA 1978). The Ziegler court specifically noted that

> Argonaut, however, was a medical malpractice action against a doctor. The court correctly denied disclosure of the defendant's medical records of strangers because the question was whether or not the doctor, in treating the plaintiff, used the standard of care commensurate with that used in the community.

Id. at 1256. It is indeed interesting that a case relied upon by the Petitioners in their brief actually distinguishes the facts of the case presently before this Court and endorses the position of the Respondents based on Peralta.

In Rudnick v. Superior Court of Kern County, 523 P.2d 643 (Cal. 1974), the California Supreme Court was called upon to decide the very narrow issue of whether a third party drug company could assert the physician-patient privilege in an attempt to prevent disclosure of privileged medical records. The California Supreme Court's narrow holding was that a third party

can, in fact, assert the physician-patient privilege when neither the physician nor the patient are involved in the litigation.

Although the Petitioners in the case presently before this Court quote an extensive passage from Rudnick in an attempt to bolster their position in this case, a careful reading of Rudnick indicates that this quotation is simply dicta. Moreover, the Rudnick court engaged in no analysis whatsoever dealing with whether the requested records were relevant to the issues in the case.

In Rudnick the plaintiffs were attempting to obtain reports from the drug companies that may have revealed adverse reactions to a specific drug. The plaintiffs in the drug product liability case were attempting to recover damages and alleged that the drug company knew, or should have known, that the drug taken by the plaintiffs would produce an adverse reaction. Accordingly, the reports of potential adverse reaction by previous patients were relevant to the issue of whether or not the drug company had notice of the potential for adverse reactions. Once again, the facts of Rudnick are clearly distinguishable from the facts of the case presently before this Court.

In Community Hospital Association v. District Court of County of Boulder, 570 P.2d 243 (Colo. 1977), the Colorado Supreme Court was called upon to decide a case with facts virtually identical to the facts presented by the case of Ziegler v. Superior Court of Pima County discussed above. Specifically, the plaintiffs in Community Hospital Association alleged that the

defendant hospital knew, or should have known, that the defendant physician was performing unnecessary surgeries at the facility.

The Plaintiffs sought to review the records of nearly 140 additional patients of the defendant hospital for the purpose of determining whether their surgeries were also unnecessary. Based on its specific finding that the records of other patients were relevant to the specific issues involved, the Colorado Supreme Court held that the records of the other patients could be revealed with identifying information deleted without violating the statutorily created physician-patient privilege in Colorado. However, the Colorado Supreme Court engaged in absolutely no analysis of whether or not disclosure of these redacted records would violate the individual patient's right of privacy or whether any such right exists in Colorado.

In State ex rel. Benoit v. Randall, 431 S.W.2d 107 (Mo. 1968), the Missouri Supreme Court considered whether the disclosure of patients' records would violate the Missouri statutory physician-client privilege. Randall involved a suit by one doctor against several other doctors in which the first doctor alleged that the others conspired to reduce the privileges he enjoyed as a staff member of a research hospital. In an effort to demonstrate that the defendant physicians held him to a higher standard of performance than other doctors at the facility, the plaintiff sought to discover the patient records of patients treated by 55 other physicians at the research hospital.

The trial court's order would have allowed the plaintiff to review the other patients' records without any protection of the privacy right of those patients. The Missouri Supreme Court simply held that this was improper without any specific holding on whether those records could have been produced in redacted form.

Clearly, this is not a medical malpractice case at all and offers little, if any, guidance concerning whether the records of other patients are in any way relevant to the issues involved in a medical malpractice suit. The Petitioners have apparently cited this case for the sole purpose of demonstrating that the State of Missouri would allow the disclosure of other patients' records if the identifying information were deleted from those records. However, there is no discussion whatsoever of relevance and this case should, therefore, have no bearing whatsoever on the outcome of the case presently before this Court.

In Osterman v. Ehrenworth, 256 A.2d 123 (N.J. Super. Ct. Law Div. 1969), a New Jersey appellate court was also called upon to determine the parameters of a statutory physician-patient privilege. In that case the plaintiff alleged that the defendant doctor negligently prescribed the drug Prednizone for arthritis. The plaintiff propounded interrogatories that asked specifically for the names and addresses of all of the defendant doctors' other patients who had been treated with the same drug.

After finding that New Jersey's statute revealed a legislative determination that the policy protecting the patient-

physician privilege was of greater weight than the evidence it makes unavailable, the New Jersey appellate court specifically held that any order compelling the defendant physician to reveal the names and address of his other patients would violate the physician-patient privilege. The court engaged in no analysis at all of whether the records could have been disclosed with the names and addresses of the patients deleted. Apparently, the plaintiff wished to discover the other patients' names and addresses so that he could contact those other patients. The court did not engage in any analysis at all of whether the records requested would be relevant to the issues presented by the medical malpractice case.

Curiously, the Petitioners cited the New York case of Boddy v. Parker, 358 N.Y.S.2d 218 (App. Div. 1974), in an attempt to support their position in the case presently before this Court. However, the decision in that case actually supports the Respondents' position.

The plaintiff in Parker requested discovery of the records of every hysterectomy performed by the defendant doctor at the defendant hospital during the two years previous to the alleged malpractice. The New York appellate court simply held that the records of medical procedures performed on persons other than the plaintiff were privileged and confidential communications which the defendant hospital could not disclose without an express waiver by the patients whose records were involved. Once again, the court did not engage in analysis of the relevance of the

requested documents to the issues in the case or whether a right of privacy may also preclude the disclosure of those records.

In Hyman v. Jewish Chronic Disease Hospital, 258 N.Y.S.2d 397 (N.Y. 1965), the New York Court of Appeals was called upon to determine whether a hospital administrator was authorized to review the medical records of patients at the hospital for the purpose of investigating claims of improper experimentation on patients. The case did not involve any medical malpractice charges or the relevance of any documents of other patients to the issues involved in a medical malpractice case.

The New York court of last resort held that because the director of the hospital corporation was entitled as a matter of law to inspect the records of the hospital for the purpose of investigating the allegations, the confidentiality of the patients whose records were involved would not be violated. Although the court noted that the confidentiality of these patient records could be protected by keeping confidential the names of particular patients involved, it also noted that any such strict secrecy was not required in the case. The secrecy was not required because the hospital director, as an employee of the hospital, was a person qualified to review the records and because hospital records are also reviewed and seen by other qualified hospital staff members and employees. In any event, the court's observation concerning keeping confidential the names of particular patients is dicta given the facts of the case.

In Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977), the Texas Supreme Court was called upon to determine whether the records of other patients should be protected from discovery by a Texas statute that makes confidential any records and proceedings of a hospital committee, medical organization committee, or extended care facility committee established in Texas under any state or federal law. The court held that the records of other patients of a medical malpractice defendant physician would not be protected by this statute even if the documents may also be contained in the records of one of the hospital committees.

In this case, the plaintiff alleged that it was medical malpractice for the doctor to perform a certain surgical procedure as treatment for emphysema. The plaintiff wanted to review the records of all other patients on whom this physician had performed a similar operation. The plaintiff wanted to review these records for the sole purpose of determining whether the doctors' claimed results from previous operations were substantiated by the records.

The Texas Supreme Court specifically held that this material would be relevant to the issue of whether the defendant physician correctly informed the plaintiff of the actual success rate of the surgical procedure. Because the Texas Supreme Court specifically found that the requested records were relevant and that they were not protected by any confidential requirement of a Texas statute, the appellate court indicated that the trial court would be allowed to disclose the records after performing an in

camera inspection to protect the privacy of the physicians' other patients. The Texas Supreme Court did not engage in any analysis concerning whether these records would be protected by any specific right of privacy, if any exists, under the Texas Constitution.

Taken together, all of the cases from foreign jurisdictions cited by the Petitioners in this case should not be viewed by this Court as dispositive of the issues presented by the case now before this Court. None of those cited cases shed any light on the issue of whether the records requested by the Petitioners are relevant to the issues involved in this case. Furthermore, nearly all of the foreign cases relied on by the Petitioners simply construe a statutory physician-patient confidentiality. None of those cases provide any analysis concerning whether disclosure of those patient records would violate the other patients' privacy rights.

The simple fact is that the records sought by the Petitioners are not relevant to the issue of whether Dr. Newman conformed to the required standard of care in this case. Furthermore, none of the cases cited by the Petitioners in any way negate the Fifth District Court of Appeal's holding that the constitutional right of privacy found in the Florida Constitution would preclude disclosure of these records even in redacted form.

Petitioners also rely on Reproductive Services, Inc. v. Walker, 439 U.S. 1307, 99 S. Ct. 1 (1978), in an attempt to support their position in this case. In Walker, the plaintiff

sought to discover the records of other patients who had undergone an abortion procedure at a Texas abortion clinic. The plaintiff alleged that the doctor who performed the abortion committed malpractice during the course of that operation.

By simple observation of the fact that this case was decided in the federal court system it is clear that the Court was considering the parameters of the right to privacy found in the United States Constitution. In Walker the United States Supreme Court implied that if the parties to the action would stipulate to an order disclosing the records of other patients with all identifying information deleted, then the privacy right of those other patients embodied in the United States Constitution would not be violated.

However, as stated earlier in this brief, it is important to note that the Fifth District Court of Appeal based its holding that the right of privacy would preclude disclosure of the records involved in this case entirely on the right of privacy found in the Florida State Constitution. Arguably, Reproductive Services, Inc. v. Walker establishes the constitutional floor beneath which no state can fall in the protection of its citizens' right to privacy. However, if the State of Florida determined that a patient's right to privacy merited a heightened level of protection than that guaranteed by the United States Constitution there is nothing whatsoever that would preclude Florida from establishing that heightened level of protection

based on its own constitution.[1] In short, Reproductive Services, Inc. v. Walker does not control this Court's authority to interpret the constitutional right of privacy contained within the Florida Constitution except to the extent that this Court could not establish a level of protection beneath that floor established by the United States Supreme Court.

Finally, although the Petitioners' brief cites the cases of several foreign jurisdictions to demonstrate that other states may allow disclosure of documents of other patients in redacted form, there are other cases from foreign jurisdictions that support the Respondents' position in this case. In Parkson v. Central DuPage Hospital, 435 N.E.2d 140 (Ill. App. Ct. 1982), an Illinois appellate court relied on Argonaut Insurance Company v. Peralta, supra, and held that the medical records of nonparty patients could not be disclosed even if the patients' names and identifying numbers were excluded from the records. The Illinois court specifically stated that "[w]hether the patients' identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best." Id. at 144. The court found that the information in the patients'

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[1] A longstanding rule of American jurisprudence protects the right of state courts to interpret their state constitutions as they see fit, provided that the interpretation does not offend the Constitution or laws of the United States. See Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874). Accordingly, state courts may interpret their state constitutions to afford more protection of individual citizens' rights than that afforded by the United States Constitution.

records contained "information that in the cumulative can make the possibility of recognition very high." Id.

The Illinois Appellate Court for the Second District has upheld this decision on at least one additional occasion. In Ekstrom v. Temple, 553 N.E.2d 424 (Ill. App. Ct. 1990), the Illinois appellate court reiterated its holding in Parkson. In that case the court stated specifically that even though "the trial court ordered that patient names should be deleted, this may not sufficiently protect the confidentiality to which the nonparty patients are entitled." Id. at 430.

In Benton v. Snyder, 825 S.W.2d 409 (Tenn. 1992), the Tennessee Supreme Court touched briefly on the issue presented by this appeal. In that medical malpractice case the plaintiff claimed that the defendant doctor had sterilized her without her consent during performance of cesarian section. In order to help substantiate this claim the plaintiff wanted to discover the records of all other patients who underwent sterilizations performed by the defendant doctor in order to establish the type of sterilization procedure he regularly used. The trial court refused to allow discovery of the records of other patients not a party to the suit. The Tennessee Supreme Court upheld the trial court's decision in the matter.

On at least two occasions lower level appellate courts in New York have determined that medical malpractice plaintiffs who brought claims for alleged negligence during the course of childbirth were not required to disclose to the defendant

physician the medical records related to the births of their other children. The courts reasoned that because these siblings were not parties to a particular suit for medical malpractice any disclosure of those records would violate the physician-client privilege. See Dalley v. LaGuardia Hospital, 515 N.Y.S.2d 276 (N.Y. App. Div. 1987) and Lezell v. State, 538 N.Y.S.2d 902 (N.Y. Ct. Cl. 1989).

Finally, in Leonard v. Latrobe Area Hospital, 549 A.2d 997 (Pa. Super. Ct. 1988), a Pennsylvania appellate court held that plaintiffs in a medical malpractice action against a hospital were not entitled to discover records of other patients who were not parties to the lawsuit because those records were protected by confidentiality provisions of a Pennsylvania statute.

CONCLUSION

The Fifth District Court of Appeal correctly held that the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County departed from the essential requirements of law when it ordered the Respondents to produce the medical records of other patients who are not parties to this lawsuit. None of those records are relevant to the only issue in this case, which is whether Dr. Newman failed to conform to the standard of care among obstetricians/gynecologists in his community.

Furthermore, any discovery of other patients' records would impermissibly infringe on those patients' right to privacy guaranteed by the Florida Constitution because it is impossible

to ensure beyond doubt that their identity could not be determined even from redacted records. As the Fifth District Court of appeal persuasively stated in its Newman opinion:

> The argument that redaction will protect the non-party patient is not practicable nor reasonable when compared with the invasion of a person's medical files. For example, even if the name and address of the patient is redacted, by observing the time and date the child was delivered along with the age and race of the parents, i.e., by use of the public record of the lawsuit, the parents' identity can be determined.

Newman v. Amente, 19 Fla. L. Weekly at D724 (Fla. 5th DCA March 31, 1994).

Accordingly, this Court should affirm the decision of the Fifth District Court of Appeal and overrule any conflicting authority from any other district court of appeal.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 29 day of June, 1994, by U.S. Mail to H. SCOTT BATES, ESQ., Suite 1607, 20 North Orange Avenue, Orlando, Florida 32801

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