SUPREME COURT OF FLORIDA

BERNADETTE AMENTE and SOLOMON AMENTE, individually, and as natural parents and next friend of KATHY AMENTE, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 83,620
WILLIE B. NEWMAN, M.D., and WILLIE B. NEWMAN, M.D., P.A.,	)	District Court of Appeal Fifth District - No. 93-2625
Respondents.	)	

PETITIONERS' BRIEF ON THE MERITS

Petitioners, BERNADETTE AMENTE and SOLOMON AMENTE, individually, and as natural parents and next friend of KATHY AMENTE, a minor, by and through their undersigned counsel, and pursuant to this Court's Order dated May 11, 1994, file this Brief on the Merits.

FACTS

Petitioners have filed a medical malpractice lawsuit against Respondents in this action alleging that the negligence of Respondent, Willie B. Newman, M.D., during delivery of Petitioner, Kathy Amente, caused injury to Kathy Amente, a minor. Petitioner, Bernadette Amente, weighed in excess of three hundred (300) pounds at the time the pregnancy began. Respondent, Willie B. Newman, M.D., classified her as markedly obese, having a high-risk pregnancy.

On August 19, 1992, the unsworn statement of Willie B. Newman, M.D., was taken. On March 19, 1993, the deposition of the Respondent, Willie B. Newman, M.D., was taken and transcribed (see Appendix to Response to Petition for Writ of Certiorari, tabs 1 and 2). In

pertinent parts, Willie B. Newman, M.D., has stated, or testified, that:

(1) the Petitioner's mother, Bernadette Amente, was markedly obese (tab 1, pp. 5-6);

(2) marked maternal obesity is a recognized risk factor in pregnancy (tab 1, p. 6);

(3) Willie B. Newman, M.D.'s, office practice is to place markedly obese pregnant women in an at-risk category (tab 1, p. 6);

(4) there is an increased incidence of traumatic birth-related injuries when the mother is markedly obese (tab 1, p. 8);

(5) Willie B. Newman, M.D., recognized that, because of her marked obesity, Bernadette Amente was at risk for delivering an infant who would suffer an Erb's palsy injury (tab 1, pp. 9-10);

(6) there are certain types of things a physician can do to monitor patients who have risk factors that pre-dispose them to traumatic birth injuries, both antenatally and at labor and delivery (tab 1, pp. 9-11); and,

(7) Willie B. Newman, M.D., based his prenatal treatment and delivery technique, at least in part, on his past experience in delivering children of markedly obese patients (tab 2, pp. 46-50);

(8) Willie B. Newman, M.D., has, in the past, delivered markedly obese women at Central Florida Regional Hospital under similar circumstances as those of Bernadette Amente, and has had no complications when doing so (tab 2, p. 34).

Petitioners served a request to produce on Respondents, dated June 25, 1993, requesting production of:

1. the complete obstetric records of all obstetric patients of Willie B. Newman, M.D., who delivered infants at Central Florida Regional Hospital for the period January 1, 1989, through December 31, 1990, who were markedly obese.

NOTE: This request contemplates the redaction of all patient-identifying information from the records prior to production.

Respondents filed an objection to the request to produce on June 29, 1993 (see Appendix to Petition for Writ of Certiorari, tab 3). The trial court held a hearing on August 30, 1993, which was continued on September 29, 1993, on Respondents' objection to the request to produce the requested records with the names, addresses and other patient-identifying data redacted from the records (see Appendix to Petition for Writ of Certiorari, tab 6, pp. 1-14, and tab 8, pp. 1-12). The trial court ordered compliance with the request to produce by providing the records of other markedly obese obstetric patients with their names and addresses redacted (see Appendix to Petition for Writ of Certiorari, tab 9, pp. 1-2).

Respondents appealed the trial court's order to the Fifth District Court of Appeal through Petition for Writ of Certiorari on November 8, 1993. The Fifth District Court of Appeal granted the Respondents' writ and quashed the trial court's order in an opinion issued on March 31, 1994, ruling that introduction of patient records of third parties, not parties to the subject litigation, is not appropriate on grounds of relevancy and physician-patient confidentiality. The court certified conflict with the Fourth District Court of Appeal, and this (the instant) appeal ensued (see Exhibit 1, attached hereto). On May 11, 1994, this Court entered an Order postponing a decision on jurisdiction, and ordered Petitioners' brief on the merits to be filed on or before June 6, 1994.

SUMMARY OF ARGUMENT

The circuit court properly exercised its discretion in granting the discovery requests and ordering compliance with the request to produce the redacted non-party patient records in accordance with applicable case law and the intent of the Florida legislature as evidenced by the plain language of sections 395.017(3), 455.241(2) and 90.510, Florida Statutes. A straightforward reading of these statutes shows that the legislature desired that the physician-patient relationship be given the utmost respect by the court but recognized that there would be situations in which a doctor's information with regard to a patient would be required to execute the notion of fair play and substantial justice between the parties to a lawsuit. Use of this information to impeach the testimony of a party to a lawsuit, to determine the level of knowledge a doctor has through experience regarding a specific procedure on a specific type of patient, and to determine the standard of care a defendant/doctor normally provides his patient, are all relevant reasons for the availability of such evidence.

Protecting the confidentiality of the non-party patients of the Respondent was disposed of by the trial court's order, which provided for the redaction of all names and addresses. The facts of this case are directly on point with those of Ventimiglia el. rel Ventimiglia v. Moffit, 502 So. 2d 14 (Fla. 4th DCA 1986), and Amisub (North Ridge Hospital), Inc. v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989), in that Petitioners have no reason or desire to know the identity of the patients to whom the records pertain, and, in fact, framed their initial request to produce to specifically protect patient confidentiality. Ventimiglia, 502 So. 2d at 14; Amisub, 543 So. 2d 470. Petitioners are only interested in the "data" these files would provide relevant to the subject case, and this can be accomplished if "any possible reference to the identity of the

patients be deleted for the records and protected from discovery." Ventimiglia, 502 So. 2d at 14. This protects the patients from any possible embarrassment from revelation of confidential identifying material because there will be no way to match any such sensitive material to any person.

ARGUMENT

A careful reading of the decision of

the Fifth District Court of Appeal herein reveals an admixture of grounds utilized to support their ultimate decision, including reference to two grounds never raised below by Respondents, or briefed on appeal. Those grounds are, in the order as discussed by the Fifth District Court of Appeal:

(1) a lack of proper notice to the patients, pursuant to section 455.241, Florida Statutes;

(2) relevance as weighed against patient confidentiality;

(3) constitutional right of privacy - citing Article I, Section 23, Florida Constitution.

Each ground will be discussed in the order raised by the Fifth District Court of Appeal, although Petitioners would point out that the well established rule of appellate procedure remains that issues not raised below cannot be raised for the first time on appeal. See, e.g., Wilson v. Health Trust, Inc., 19 FLW D111 (Fla. 4th DCA 1994), and Tillman v. State, 471 So. 2d 32 (Fla. 1985).

The Fifth District does correctly cite to section 455.241, Florida Statutes, as giving the procedural guidance for, in general, obtaining patient medical records and of safeguarding the patient's records confidentiality. However, its attempt to apply that statute to the facts of this

case is confusing at best. Franklin v. Nationwide Mutual Fire Ins. Co., 566 So. 2d 529 (Fla. 1st DCA 1990) review dismissed, 574 So. 2d 142 (Fla. 1990), simply has nothing to do with this case other than the same statute was at issue (albeit in a completely different context).

In order to comply with section 455.241, Florida Statutes, notice requirement, the defendants would initially have been required to submit the plaintiffs the names and addresses of all "markedly obese patients who delivered babies with Dr. Newman in attendance at Central Florida Regional Hospital from 1/1/89 through 12/31/90," as the statute clearly requires ". . . proper notice to the patient or the patient's legal representative by the party seeking such records . . ." (emphasis added). Had plaintiffs/Petitioners submitted such an interrogatory request, what action could the defendants/Respondents have been expected to have taken? Simple - an objection that the disclosure of said names and addresses would have violated patient confidentiality. Even the Fifth District noted the incongruity of this argument, at footnote 4, wherein they said, "We recognize that to give them notice is to interject them into the lawsuit and to name them as patients of Dr. Newman, but the statute requires 'proper notice' as a requisite to disclosure even in redacted form." It is apparent that, where information is sought in a redacted form, such notice is impossible and unnecessary. The Petitioners would submit that the Respondents recognized this same thing, as no notice objection was ever raised below.

The court next addresses the relevance argument, apparently finding, as a matter of law, that other patient records are *per se* irrelevant in a medical malpractice action. It is this analysis that so clearly demonstrates conflict with the more well reasoned approach of the fourth District as espoused in Amisub, Inc. v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989); Ventimiglia el. rel Ventimiglia v. Moffit, 502 So. 2d 14 (Fla. 4th DCA 1986). The Fifth District, through

Judge Thompson, flatly stated:

> Because of the nature of the case, expert testimony will be required in court because the medical testimony will be outside the experience of the jurors. Charles W. Ehrhardt, Florida Evidence §90.702 (1992 ed.). Since an expert will be needed to show that there is evidence of medical negligence by Dr. Newman, what then is the relevance of the information from the patient's records that cannot be gathered from other sources? If Dr. Newman has been sued by obese patients before, there is a record of the lawsuit in the public record in the jurisdiction where he has practiced. Dr. Newman has also given a sworn and unsworn statement concerning his delivery of children when the mother is obese, and any problems the children have experienced as a result of the delivery. 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.

Contrary to this recitation of the Fifth District's view of this evidence, the Petitioners established the following, through Willie B. Newman, M.D.'s, own testimony:

(1) that markedly obese women are high-risk obstetric patients;

(2) that markedly obese women are specifically at increased risk of traumatic birth-related injuries like Erb's palsy;

(3) that he has admitted many women with marked maternal obesity to Central Florida Regional Hospital for pitocin-induced delivery before Bernadette Amente, with no complications;

(4) that he made a conscious decision to leave Bernadette Amente in a labor bed instead of moving her to a drop-down delivery bed, based upon his past experience in delivering infants under similar circumstances.

When questioned by the trial court as to the relevancy issue, Plaintiffs/Petitioners advanced two clearly relevant and admissible uses for this evidence: (1) if Willie B. Newman, M.D., had other Erb's palsy injuries associated with the failure to use a drop-down delivery bed with markedly obese patients, said evidence would be admissible on standard of care - a "prior similars" approach, and causation (please recall Willie B. Newman, M.D., cannot opine what caused this child's injury, only that he did not - Appendix to Response to Petition for Writ of Certiorari, tab 1, pp. 62-66); (2) if Willie B. Newman, M.D., did utilize drop-down delivery beds, or did have other brachial plexus injuries, this evidence would be admissible for direct impeachment. The Fifth District's opinion leaves Willie B. Newman, M.D., free to make grandiose claims about his past experience without fear that Petitioners can ever test the truthfulness of that claim. Of final note, the Petitioners' original citation to East Coast Refuse Service v. Velocci, 416 So. 2d 1276 (Fla. 5th DCA 1982), was only to establish a reminder that this is a discovery debate, and that the definition of "relevancy" in that context is significantly broader than when admissibility is at issue.

The Fifth District also concludes, apparently by application of Article I, section 23, of the Florida Constitution, that these patient records, even if relevant, are absolutely immune from discovery:

> The intricate and intimate details of the lives of patients should not be subject to public display and perhaps opprobrium simply because the Amentes want to look. The constitutional right to privacy and the right to be free from governmental intrusion means nothing if the private medical files of a patient cannot be kept, even in redacted form, from strangers. The harm could be irreparable.

Cut to its underpinnings, the Fifth District Court of Appeal has cut a much wider swath than its predecessors, Argonaut Ins. Co. v. Peralta, 358 So. 2d 232 (Fla. 3d DCA 1978), cert. denied,

364 So. 2d 889 (Fla. 1978); Leikensohn v. Cromwell, 434 So. 2d 1030 (Fla. 2d DCA 1983), and held, even if proper notice given, and even if relevant, and even if all identifying data is removed so as to absolutely shield confidentiality, the records are constitutionally immune from discovery. This is clearly contradictory of the plain language of physician-patient confidentiality statutes for both doctors and hospitals. Fla. Stat. Ann. §§455.241(2) and 395.017(3) (West 1993). Of course, this argument, as well, was never raised below by the Respondents.

As the Fifth District Court of Appeal impliedly noted in the opinion, the legislature was well aware of the privacy provisions of the Florida Constitution when it codified the physician-patient privilege and its exceptions. Newman, 19 FLW at D723-4; Fla. Stat. Ann. §§90.510, 395.017(3) and 455.241(2) (West 1993). Section 455.241(2), Florida Statutes, defines the privileged nature of a doctor's records on a patient and that the doctor cannot release the records without the consent of the patient. Fla. Stat. Ann. §455.241(2) (West 1993). However, it also provides an exception that allows for the discovery of the records in litigation. Id. Furthermore, it makes a distinction between litigation in which the patient is a party and "any civil or criminal action, . . . upon the issuance of a subpoena of competent jurisdiction." Id. Therefore, it is improper to argue or even imply that the legislature, cognizant of the Florida Constitution's privacy provisions, purposefully created these exceptions to the physician-patient privilege in violation of the patient's right to privacy or that they did so with the intent that they be given no effect by the courts. The Fifth District Court of Appeal has effectively ignored the balancing interests of fair play and the pursuit of justice when making its privacy argument in deciding this case.

In Ventimiglia v. Moffit, 502 So. 2d 14 (Fla. 4th DCA 1986), the court upheld an order providing for discovery, stating:

> We deny the petition for writ of certiorari seeking to set aside the trial court's order compelling a physician-witness to produce copies of records of other patients he has treated for conditions similar to that suffered by the claimant. The trial court provided that any possible reference to the identity of the patients be deleted from the records and protected from discovery. The trial court's order relied on the fact that the physician predicated his diagnosis and opinion in claimant's case, at least in part, upon his experience with the other patients. Hence, the court concluded that discovery of the medical history of those patients was relevant to the issues involved in claimant's action against the respondents. We believe the trial court acted within its discretion in permitting discovery of relevant material while protecting the confidentiality of the physician's other patients.

Likewise, in Amisub (North Ridge Hospital), Inc. v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989), the court again upheld a trial court order compelling production, stating:

> We deny this petition for writ of common law certiorari which seeks to set aside an order of the trial court compelling the defendant/petitioner to produce copies of records of other patients who underwent certain specified procedures on the same day as the plaintiff's decedent. *Ventimiglia v. Moffit*, 502 So. 2d 14 (Fla. 4th DCA 1986). The trial court included a provision in its order for the deletion of the names of the other patients before the records were released to counsel. As stated in *Ventimiglia*, we believe the trial court acted within its discretion in permitting discovery of relevant material while protecting the confidentiality of the other patients. *Id.* at 15.

These holdings, by the Fourth District Court of Appeal, are squarely in line with the vast weight of authority upon this point, as virtually every state which has been presented the issue has ruled that (1) other patient records can be relevant in a medical malpractice case, and (2) where relevant, redaction protects patient confidentiality and discovery is, therefore, appropriate. See Hood v. Phillips, 554 S.W.2d 160 (Tex. 1977); Osterman v. Ehrenworth, 256 A.2d 123 (N.J. Sup. Ct. 1969); Rudnick v. Superior Court of Kern County, 523 P.2d 643 (Cal. 1974);

Tucson Medical Center, Inc. v. Rowles, 520 P.2d 518 (Ariz. Ct. App. 1974); Community Hospital Association v. District Court in and for County of Boulder, 570 P.2d 243 (Colo. 1977); Boddy v. Parker, 358 N.Y.S.2d 218 (N.Y. App. Div. 2d 1974); Hyman v. Jewisk Chronic Disease Hospital, 258 N.Y.S.2d 397 (N.Y. 1965); Ziegler v. Superior Court in and for City of Pima, 656 P.2d 1251 (Ariz. Ct. App. 1982). But see contra Parkson v. Central Dupage Hospital, 435 N.E.2d 140 (Ill. App. Ct. 3d 1982).

In Rudnick the trial court had denied discovery on the ground that production would be violative of the physician-patient privilege. The California Supreme Court aptly described the nature of the physician-patient privilege and when a court show allow the discovery of the records of an outsider when it stated:

> The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments (citation omitted). Therefore if the disclosure of the patient's name reveals of any communication concerning the patient's ailments, disclosure of the patient's name does not violate the privilege (citation omitted). If, however, disclosure of the patient's name inevitably in the context of such disclosure reveals the confidential information, namely the ailments, then such disclosure violates the privilege (citation omitted). Conversely if the disclosure reveals the ailments but not the patient's identity, then such disclosure would appear not to violate the privilege (citation omitted) (emphasis added) (footnote 13). *Rudnick*, 523 P.2d at 650-1.

In Rowles, the court considered a request to produce for a blanket inspection of non-party patients' records that was granted by the trial. This was found to be too broad but, that the best avenue may be that the records should be released through the use of an *in camera* inspection of the records to ensure that no privileged information is disseminated. Rowles, 520 P.2d at 524.

Likewise, in Community Hospital Association v. District Court in and for County of Boulder, 570 P.2d 243 (Colo. 1977), the court approved production, in redacted form, of other patient records. There, a patient brought an action against a surgeon and hospital, alleging that the surgeon had negligently performed an unneeded craniotomy on him at the hospital. The trial court ordered the hospital to produce certain medical records, and a rule to show cause was issued. The supreme court held that the order which required the hospital to produce copies of certain medical records concerning 140 patients upon whom the surgeon had performed surgery at the hospital between 1964 and 1968, and which stated, *inter alia*, that all references on records to name, address, marital status, and occupation or employment of the patients was to be removed and that records would be filed with the court and sealed by the court and not opened except upon order of the court, did not violate the physician-patient privilege statute. Specifically, the court said:

> The court has adequately protected the 140 patients from disclosure of their identity and the surgeries performed upon them. It is the position of the Hospital that, while identities are not to be disclosed, the statute forbids any disclosure of this type of information without the consent of the particular patient. We do not agree with this argument and hold that the purpose of the statute has been achieved by the conditions imposed by the respondent court.
>
> [2] This statute is in derogation of the common law. It, and many similar statutes in other states, were adopted to achieve the purpose of placing a patient in a position in which he or she would be more inclined to make a full disclosure to the doctor and to prevent the patient from being humiliated and embarrassed by disclosure of information about the patient by his or her doctor. *C. DeWitt, Privileged Communications Between Physician and Patient,* §*9* (1958); *McCormick's Handbook of the Law of Evidence,* §*98 et seq.* (2d ed. E. Cleary 1972); and *VIII Wigmore on Evidence,* §*2380 et seq.* (J. McNaughton rev. ed. 1961). It appears from the foregoing authorities that by statutory amendment and judicial interpretation far reaching effects of the physician-patient privilege have been eliminated or limited. The reason for this is that in many instances injustice can be caused by application of the privilege.

> We do not have before us the question of admissibility of the papers ordered to be disclosed, and make no indication in that respect. Assuming, however, that these documents are admissible, it is readily conceivable that a prohibition against their production could result in an injustice. We also do not see how this disclosure in any way impinges on the confidential physician-patient relationship the statute was designed to protect.

The inspection of hospital records and patient charts was involved in Hyman v. Jewish Chronic Disease Hospital, 15 N.Y.2d 317, 258 N.Y.S.2d 397, 206 N.E.2d 338 (1965). There the Court of Appeals of New York stated:

> It is argued that the data as to such experiments on patients is privileged [citing statute] and that the patients have not waived the privilege. Any such confidentiality could be amply protected by inserting in the court's order a direction that the names of the particular patients be kept confidential.

In Ziegler v. Superior Court in and for City of Pima, 656 P.2d 1251 (Ariz. App. 1982), the court ordered redacted other patient records produced, stating:

> [M]edical records of other patients who might have had unnecessary pacemaker implantations are relevant to the notice issue. It is thus readily apparent that a blanket prohibition against examination and use against the hospital of such records would result in an injustice. We believe that the order of this court, set forth above, adequately safeguards the privacy of former patients not parties to this litigation and preserves the spirit of the physician-patient privilege. At the same time it furthers the public interest by insuring that hospitals will more scrupulously supervise the members of their medical staffs and prevent exposure of future patients to medical incompetence. We cannot see how any patient would be inhibited in confiding in his doctor when there is no risk of humiliation and embarrassment, and no invasion of the patient's privacy. This is particularly true when the patient knows that hospitals will more diligently supervise the competence of the medical attention he is receiving.

In State ex rel. Benoit v. Randall, 431 S.W.2d 107 (Mo. 1968), the Missouri Supreme Court reversed a discovery order which permitted the plaintiff to examine medical records, unmasked, so that he might designate those he desired produced and copied. The court, however, indicated that it might be inclined otherwise if adequate safeguards had been provided.

The court quoted from an earlier decision discussing the physician-patient privilege:

> On the one hand, it might be so construed as to fritter away the provisions of the law. On the other hand, it might be so literally construed as to work great mischief in the administration of justice. The ultimate object of every judicial inquiry is to get at the truth. Therefore no rule of law standing in the way of getting at the truth should be loosely or mechanically applied. The application of such law must be with discrimination, so that it may have the legislative effect intended for it, and yet the investigation of truth be not unnecessarily thwarted. 431 S.W.2d at 110.

Of particular interest is the case of Reproductive Services, Inc. v. Walker, 439 U.S. 1307, 99 S. Ct. 1, 2, 58 L.Ed. 2d 16, 61 (1978), which is exactly on point with the subject case on a factual basis. Justice Brennan dissolved a prior stay regarding the discovery of the patient records of non-parties under the express condition that the parties agree to a protective order that would ensure the privacy of the patients whose records were sought. The stay was ultimately dissolved because the parties did not comply with the condition regarding the protective order, but Justice Brennan certainly felt that the data in the records could be provided without destroying the physician-patient privilege.

This Court, in discussing the "broad discretion" the trial court has in granting discovery or protecting a party against abuse has stated, "[t]he adversary and the court are entitled to the whole factual picture to the end that an independent complete understanding and evaluation may be had." Orlowitz v. Orlowitz, 199 So. 2d 97, 98 (Fla. 1967) (quoting Parker v. Parker, 182 So. 2d 498 (Fla. 4th DCA 1966)). This Court has also noted that "[m]alpractice is hard to prove. The physician has all of the advantage of position. . . . What therefore might be slight

evidence when there is no such advantage, as in ordinary negligence cases, takes on greater weight in malpractice suits." Atkins v. Humes, 110 So. 2d 663, 666 (Fla. 1959). Interestingly, in Reproductive Services, Inc. v. Walker, 99 S. Ct. 1, 2, Justices Brennan's lack of discussion regarding the relevancy of the records implies that it was understood that non-party patient records would be relevant in a medical malpractice suit. In both hearings before the trial court in this matter, the relevancy issue as it pertains to the facts of this case was discussed in detail (Appendix to Petition for Writ of Certiorari, tab 6, pp. 9-10; tab 8, pp. 7-8), and the trial judge determined in the exercise of his discretion that discovery should be had.

CONCLUSION

The Respondents have failed to demonstrate that the trial court's order constitutes a departure from the essential requirements of law and an abuse of its discretion. Accordingly, the trial court's order should be upheld and the ruling of the Fifth District Court of Appeal should be overturned. Redaction of any patient-identifying material protects the confidentiality of the physician-patient privilege while providing for a fair resolution of this controversy. The records are relevant to the present litigation because they are needed for impeachment purposes. They are also relevant for proving that the Respondents did not provide the appropriate level of care for standard in the community and that the doctor's knowledge regarding the medical techniques undertaken was insufficient. No privacy claim was ever asserted below, nor was any notice issue raised, and redaction obviates the problems those claims question.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. mail this 3rd day of June 1994, to JENNINGS L. HURT, III, ESQ., 201 E. Pine Street, 15th

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EXHIBIT 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

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

Petitioners,

v. Case No. 93-2625

BERNADETTE AMENTE and
SOLOMON AMENTE, etc.,

Respondents.

Opinion filed March 31, 1994

Petition for Certiorari Review of
Order from the Circuit Court
for Seminole County,
Newman Brock, Judge.

Jennings L. Hurt, III, Randall M. Bolinger
and Michael V. Hammond of Rissman, Weisberg,
Barrett, Hurt, Donahue & McLain, P.A., Orlando
for Petitioners.

H. Scott Bates of Morgan, Colling
& Gilbert, P.A., Orlando, for Respondents.

THOMPSON, J.

Dr. Willie B. Newman and his professional association petition this court for a writ of certiorari to review the trial court's order allowing Bernadette and Soloman Amente, parents and legal guardians of a minor child, to discover certain medical records belonging to Dr. Newman's other patients. We grant the writ.

Dr. Newman treated Mrs. Amente during the prenatal period and the delivery of the minor child. Because the mother weighed over 300 pounds, Dr.

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Newman termed her pregnancy high-risk. The parents allege that the doctor was negligent in the treatment of the minor child. The parents contend that as a result of his negligence, the child is now afflicted with Erb's palsy, a brachial plexus injury. At issue is Dr. Newman's obstetrical care and treatment in connection with the childbirth.

During discovery, the Amentes sought production of the complete medical records for all of Dr. Newman's "markedly obese" obstetric patients giving birth between 1 January 1989 and 31 December 1990. The Amentes' request specifically contemplated "redaction of all patient identifying information from the reports prior to production." The trial court's order granted the Amentes' request for production of the patients' files with their identifying information redacted from the file and further provided that they reimburse Dr. Newman "for the cost of retrieval of the records and redaction of patient identification data."

Dr. Newman raises three issues in his petition as reasons why the discovery order should be quashed: 1) the retrieval of the records would be too burdensome for Dr. Newman and his staff because it would take several days and they would have to go through a minimum of 500 patient files; 2) the records are not indexed in the form requested by the Amentes and Dr. Newman would be forced to create records that do not now exist; and finally, 3) the confidentiality of the patient and physician would be invaded by the production of information that is not relevant to this lawsuit.

The review of the records would not be too burdensome. The request covers a relatively small period of time, from 1 January 1989 to 31 December 1990, and the Amentes have been required to reimburse Dr. Newman any additional costs he incurs to produce these records. McAdoo v. Ogden, 573 So.

2d 1084 (Fla. 4th DCA 1991) (the party required to produce records sought during discovery can produce bill or advise the requesting party on the cost of production). Also, the records that actually are to be produced and photocopied are women who are "overly obese." Dr. Newman admitted during deposition that there would be a small number of women in this category. Courts have held requests to be unduly burdensome when the number of files to be reviewed is extremely large. North Miami Gen. Hosp. v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033 (Fla. 3d DCA 1981) (over 37,000 admission files found to be overly burdensome); Argonaut Ins. Co. v. Peralta, 358 So. 2d 232 (Fla. 3d DCA), cert. denied, 364 So. 2d 889 (Fla. 1978) (records over an 11 year period overly burdensome). This case does not approach the level or volume of files to be classified as overly burdensome.

The next argument, likewise, has no merit. Dr. Newman argues that the information requested would have to be "created" because the information is not indexed in the form requested by the Amentes.[1] This argument is not correct. The information does exist and is in each of the patients' files, i.e., the weight of the mother, but the information would have to be retrieved and reviewed manually. The task is more onerous because it must be done manually, but it can be done.

The final issue involves the confidentiality of patients' records who are not parties to this lawsuit and the relevance of the information sought

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[1] Dr. Newman presented the trial court with a sworn affidavit in which he alleged:

> 3. My patient files are not indexed by weight, nor are they indexed by where the infant was delivered.
> 4. Many patient files for the period of time requested are in storage.

from these patients' confidential medical files. The patient files of Bernadette Amente are subject to inspection by the plaintiff and the defendant in this case. By bringing the lawsuit, Bernadette waives the confidentiality of her medical file.[2] However, the records sought are from patients who have no interest or involvement in this litigation. Information is sought from their records with no precise reason being given for the request. The Amentes do argue that a review of Dr. Newman's patients' files would let them see if there was a different form of treatment and delivery given to other obese patients and if they had children born without spinal injury as opposed to the one used on Bernadette Amente. In other words, these records would allow the Amentes to compare the method of delivery used by Dr. Newman on Bernadette Amente with the method used on his other obese patients. The Amentes also argue that discovery allows the search for relevant evidence and is extended by Rule 1.280(b)(1), Florida Rules of Civil Procedure.

Citing East Colonial Refuse Service, Inc. v. Velocci, 416 So. 2d 1276 (Fla. 5th DCA 1982), the Amentes argue that "any information relevant to the subject matter of the case, or information reasonably calculated to lead to the discovery of information relevant to the subject matter of the case" should be allowed even though the information may not be introduced at trial. We agree with the principle, however, a closer reading of Velocci indicates that the court granted the writ and quashed the trial court's discovery order because the request sought irrelevant information and trade secrets of a corporation. The court further ruled that some information is not subject to discovery, even though relevant because it "may be privileged and therefore

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[2] § 455.241(2), Fla. Stat. (1991); Fla. R. Civ. P. 1.360.

beyond permissible discovery." Id. at 1277-1278. So it is with the information sought in the case sub judice.

We hold that the trial court erred when it ordered Dr. Newman to produce records of patients not a party to this lawsuit without their permission. The error is not cured by having identifying information redacted from the patients' file. There are several reasons for our ruling.

First, section 455.241, Florida Statutes (1991)[3] requires that a patient's records be kept confidential unless the patient signs a written authorization, unless they are needed for medical treatment, unless the patient brings a civil or criminal action against the treating physician or unless production is court ordered. Franklin v. Nationwide Mut. Fire Ins. Co., 566 So. 2d 529 (Fla. 1st DCA), review dismissed, 574 So. 2d 142 (Fla. 1990) (discusses the purpose of section 455.241, Florida Statutes and its

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[3] Section 455.241(2), Florida Statutes (1991) reads in pertinent part:

> such records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or [the patient's] legal representative or other health care providers involved in the care or treatment of the patient, except upon written authorization of the patient....Such records may be furnished in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and **proper notice to the patient or his legal representative** by the party seeking such records (emphasis supplied). Except in a medical negligence action when a health care provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which **proper notice** has been given (emphasis supplied).

implementation when medical records are sought). Also, the statute requires that the patients whose records are being sought to be disclosed must receive "proper notice" that their records are being sought. The records sought are not from litigants in this case and these patients have not brought any type of action against Dr. Newman. Nothing in the record before us indicates that the court, Dr. Newman or the Amentes gave notice to the patients that their records are being sought.[4] Because the statute was not complied with, the records cannot be released, even in redacted form.

Second, the Amentes have not shown that the patient records are relevant and that the relevancy outweighs the patients' statutory right to confidentiality of their medical files. Before a medical malpractice lawsuit can be filed, the plaintiff's attorney must make a "reasonable investigation...to determine... that there has been negligence in the care or treatment of the claimant." § 766.104(1), Fla. Stat. (1991). This belief can be based upon a written opinion of an expert who is a "similar health care provider" as the defendant/health care provider. §§ 766.104(1), 766.102(2), Fla. Stat. (1991). We assume, because we do not have a copy, that the complaint contains the sworn allegations of the Amentes' attorney. Because of the nature of the case, expert testimony will be required in court because the medical testimony will be outside the experience of the jurors. Charles W. Ehrhardt, Florida Evidence § 90.702 (1992 ed.). Since an expert will be needed to show that there is evidence of medical negligence by Dr. Newman, what then is the relevance of the information from the patient's records that

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[4] We recognize that to give them notice is to interject them into the lawsuit and to name them as patients of Dr. Newman, but the statute requires "proper notice" as a requisite to disclosure even in redacted form.

cannot be gathered from other sources? If Dr. Newman has been sued by obese patients before, there is a record of the lawsuit in the public record in the jurisdiction where he has practiced. Dr. Newman has also given a sworn and unsworn statement concerning his delivery of children when the mother is obese, and any problems the children have experienced as a result of the delivery. 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. The Amentes present no compelling reason for the production of the confidential records of non-parties other than it may lead to relevant evidence. This allegation alone is not sufficient where the relevancy of the evidence the production may lead to is questionable at best, and is clearly outweighed by the patients' statutory right to confidentiality of their medical files.

Finally, the Florida legislature and the people of the state of Florida have agreed that the people of Florida have a constitutional right to be "free from governmental intrusion into [their] private life." Art. I, § 23, Fla. Const.[5] This section of the constitution has codified the right of privacy

[5] Section 23. Right to privacy.--Every natural person has the right to be let alone and free from governmental intrusion into [that person's] private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

and the right to be left alone. Nothing could be more intrusive than to have one's private medical files disclosed to the general public. 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.

The patient file may have information that is embarrassing to the patient. Examples could be whether she is abused, whether she is sexually active with someone other than her husband, whether she has a husband, whether the child is her husband's child, whether she has ever used drugs, alcohol or controlled substances, whether she or her spouse has ever been treated for any sexually transmitted diseases. The list of information that is vital to a physician for proper care of his patient is endless. To redact all of the information that potentially could identify the patient or her spouse would effectively eviscerate the patients' records. The intricate and intimate details of the lives of patients should not be subject to public display and perhaps opprobrium simply because the Amentes want to look. The constitutional right to privacy and the right to be free from governmental intrusion means nothing if the private medical files of a patient cannot be kept, even in redacted form, from strangers. The harm could be irreparable.

We realize that there is a conflict among our sister courts on this issue. The Third District Court of Appeal has adopted the position that disclosure is inappropriate. North Miami Gen. Hosp., 397 So. 2d 1033; Teperson v. Donato, 371 So. 2d 703 (Fla. 3d DCA 1979); Peralta, 358 So. 2d

232. The Second District Court of Appeal has followed the position of the Third District. Leikensohn v. Cornwell, 434 So. 2d 1030 (Fla. 2d DCA 1983). The Fourth District Court of Appeal has a contrary view. In two recent cases, the Fourth District, without certifying conflict with the decisions of the Third and the Second Districts, has allowed patients' records to be produced as long as the patients' names were redacted. Amisub, Inc. v. Kemper, 543 So. 2d 470 (Fla. 4th DCA 1989); Ventimiglia el. rel Ventimiglia v. Moffit, 502 So. 2d 14 (Fla. 4th DCA 1986).

We find the language of Peralta very persuasive:

> 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.

358 So. 2d at 223. We grant the writ and quash the order of the trial court. The case is remanded for further proceedings consistent with this opinion. We certify conflict with the decisions of the Fourth District Court of Appeal.

WRIT GRANTED; ORDER QUASHED; REMANDED

HARRIS, C.J. , concurs.
DAUKSCH, J., dissents without opinion.