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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' REPLY BRIEF ON THE MERITS

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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 in reply to Respondents' Answer Brief on the Merits, file this Reply Brief on the Merits.

ARGUMENT

Respondents' argument remains two-pronged: (1) other patient records are not relevant in this case, and (2) production of other patient records is violative of patient confidentiality, regardless of relevance and regardless of whether redacted or not. Both arguments are flawed.

(a) Patient Confidentiality (Privacy)

Neither Respondents nor the Fifth District Court of Appeal have yet offered any realistic explanation of how REDACTED patient records could ever violate an individual patient's right to privacy. At page D724 of the Fifth DCA's opinion, the court said:

> 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 the use of the public record of the lawsuit, the parents' identity can be determined.

Newman v. Amente, 19 F.L.W. D722 (Fla. 5th DCA March 31, 1994).

If this Court can make sense of that line of thought, it is far ahead of the Petitioners. How the time and date of birth, with race of parents included, could ever lead to the identification of the parents without Herculean effort is unknown. However, the trial court's order, AT PETITIONERS' REQUEST, ordered the redaction of ALL identifying information, and if the Fifth District and this Court deem such additional information potentially "identifying," redact it. Petitioners are only

interested in the hard medical data these records provide - total length of labor, time of second stage, method, location and ease of delivery, birth condition of the infant, traumatic birth-related injuries to the infant, etc.

Interestingly, nowhere in Respondents' briefs to the Fifth District do they argue that redacted records do not protect patient confidentiality. Likewise, nowhere in their brief to this Court do they attempt to adopt the Fifth District's analysis of the flaws associated with redacted patient records, or to explain how patients could be identified after redaction. Redaction clearly protects patient "identity" confidentiality.

Thus, on the confidentiality point, the issue comes down to this - are "other patient" records *per se* undiscoverable by virtue of the constitutional right of privacy enjoyed by every individual in any litigation not involving the patient himself, i.e., medical malpractice, product liability, general negligence, administrative, peer review, etc.? The answer is no.

Florida Statutes sections 395.017, 349.459, 396.112, 397.053, 455.241, and 405.01 are littered with exceptions to the absolute patient right to privacy espoused by the Fifth DCA. For example, section 395.017 provides for third-party disclosure without patient consent to (a) hospital medical personnel, (b) hospital administrators, (c) the health care cost containment board, (d) anybody, after notice and subpoena, (e) DPR and its administrative board, (f) HRS for trauma registry and compliance purposes, and (g) state and district nursing home and long-term care facility ombudsman councils. The additional exceptions disclosed by the other cited statutes are likewise lengthy. To argue that the Florida Constitution creates an absolute right of privacy is to, in effect, rule these statutes unconstitutional. Such an argument is seriously flawed.

In summary, the law recognizes patient confidentiality. Redacting identifying information protects patient confidentiality. Where a litigant desires to invade patient confidentiality by putting a name and address to patient medical records, the law even provides a vehicle for accomplishing that: the "notice to patient" provision of section 455.241(2). Redacted medical records are not violative of either patient confidentiality or any constitutional right of privacy, and this Court should so rule.

(b) Relevance

By virtue of the explicit language of both *Newman*, at page D724, and the Second District Court of Appeal in *Argonaut Ins. Co. v. Peralta*, 358 So. 2d 232 (Fla. 3d DCA), *cert. denied*, 364 So. 2d 889 (Fla. 1978), this Court must deal with the broad issue first - can other patient records ever be relevant in a medical malpractice action - before it reaches the ultimate question presented by this appeal - can they be relevant when measured by the record in this case.

Again, the definitional use of "relevance" in the context presented by this appeal must be recalled. Relevant evidence, in the context of discovery, is defined as ". . . 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 . . . ." *East Colonial Refuse Service, Inc. v. Velocci*, 416 So. 2d 1276 (Fla. 5th DCA 1982).

What, then, could be the relevance of other patient records in the prototypical medical malpractice case? In *Ventimiglia v. Moffitt*, 502 So. 2d 14 (Fla. 4th DCA 1986), the Fourth District noted that, where the record established that the defendant physician "predicated his diagnosis and opinion in claimant's case, at least in part, upon his experience with other patients," *id.* at 14, those other patient records would become relevant for discovery purposes. In cases in

which causation is in dispute, wouldn't other patients with different diagnosis and/or treatment provide relevant evidence as to the cause of the litigant's injury? Wouldn't prior similar injuries using the same technique provide notice to the defendant that the technique was deficient? If a physician installed a Shiley heart valve in his patient after four prior patients with Shiley valves had died after valve failure, wouldn't those other patient records provide relevant evidence that the physician was negligent in selecting a Shiley valve for implantation? If a physician continued to prescribe for his patients the Dalkon Shield after other patients of his had developed serious complications with its use, wouldn't those records be relevant to show negligence in the prescription of the Dalkon Shield without sufficient warning? The list is endless, and to adopt a *per se* non-discoverability rule would be inconsistent with the fair administration of justice. As the Colorado Supreme Court aptly noted in *Community Hospital Association v. District Court in and for County of Boulder*, 570 P.2d 243 (Colo. 1977):

> 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.

In *State ex rel. Benoit v. Randall*, 431 S.W.2d 107 (Mo. 1968), the Missouri Supreme Court noted:

> 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.

This Court should not adopt such a harsh and unrigid non-discovery rule.

Turning to the relevance issue herein, three grounds for relevance have been advanced: (1) standard of care, (2) causation, and (3) impeachment.

The record below reflects that Dr. Newman relied upon his past experience in delivering morbidly obese women without complication in selecting his delivery method for Mrs. Amente (Appendix to Response to Petition for Writ of Certiorari, tab 2, pp. 45-50). If there are other delivery injuries to infants associated with this delivery technique, i.e., failure to use drop-down delivery bed, then that evidence is relevant to show notice to Dr. Newman that the technique was deficient and, therefore, relevant to show that Dr. Newman was negligent in utilizing the technique.

The record below also reflects that Dr. Newman opines that his delivery technique did not cause the minor plaintiff's injury (Appendix to Response to Petition for Writ of Certiorari, tab 1, p. 62), but cannot explain what did cause said injury (Appendix to Response to Petition for Writ of Certiorari, tab 1, p. 62), and does admit that the vast majority of birth injuries similar to that of the minor plaintiff, as reported by the medical literature, are caused by delivery technique (Appendix to Response to Petition for Writ of Certiorari, tab 1, pp. 62-64). If Dr. Newman

utilized drop-down delivery beds on all his other morbidly obese patients and had no injuries to the infants, wouldn't this evidence be relevant to causation? Likewise, if he had other birth-related injuries where no drop-down bed was used, wouldn't that evidence be relevant to causation?

Finally, Dr. Newman claims he has followed this technique for some time, without injury to the infant (Appendix to Response to Petition for Writ of Certiorari, tab 1, p. 65, tab 2 pp. 49-50). If the discovery reveals the opposite, wouldn't that evidence become relevant for impeachment?

The evidence requested is clearly relevant herein, from a discovery standpoint. The issue of its ultimate admissibility is for another day.

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 on the issue of the cause of the infant's injury. 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. They may, as well, be relevant for impeachment purposes. No constitutional privacy claim was ever asserted below, 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 11th day of July 1994, to JENNINGS L. HURT, III, ESQ., 201 E. Pine Street, 15th Floor,

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