
IN THE SUPREME COURT OF FLORIDA

Case No. SC04-2042

On Petition For Discretionary Review Of A
Decision Of The Fourth District Court Of Appeal

**DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,**

Petitioner,

v.

VICTOR ORTIZ,

Respondent.

**PETITIONER'S BRIEF ON JURISDICTION
AND APPENDIX**

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PREFACE

Petitioner, the Florida Department of Health, Board of Medicine (Board) promulgated Florida Administrative Code Rule 64B8-9.009(6)(b)1.a. The court below held that the Board exceeded its delegated authority in enacting the last sentence of that rule. *Ortiz v. Department of Health*, 2004 WL 1621440 (Fla. 4th DCA July 21, 2004).

Pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the Board seeks review of this decision because of its conflict with the decision of the First District Court of Appeal in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243 (Fla. 1st DCA 2002), which held that the Board had acted within its delegated authority in promulgating the last sentence of the very same rule.

STATEMENT OF THE CASE AND FACTS

To make certain that physicians do not practice beyond their level of competency, the Legislature has authorized the Board to establish rules governing standards of practice in various practice settings. § 458.331(1)(v), Florida Statutes (2002); *Ortiz* at *1. Pursuant to that authority, the Board adopted standards of care for conducting surgery in office settings. Fla. Admin. Code R. 64B8-9.009; *Ortiz* at *2. For Level III surgeries, which require general anesthesia and are the most complicated surgeries that can be performed in an office, the Board enacted Florida Administrative Code Rule 64B8-9.009(6)(b)1.a., which states as follows:

1. Training Required.

a. The surgeon must have staff privileges at a licensed hospital to perform the same procedure in that hospital as that being performed in the office setting or must be able to document satisfactory completion of training such as Board certification or Board qualification by a Board approved by the American Board of Medical Specialties or any other board approved by the Board of Medicine or must be able to demonstrate to the accrediting organization or to the Department comparable background, training and experience. In addition, the surgeon must have knowledge of the principles of general anesthesia. *If the anesthesia provider is not an anesthesiologist, there must be a licensed M.D., or D.O., anesthesiologist, other than the surgeon, to provide direct supervision of the administration and maintenance of the anesthesia.*

(Emphasis supplied). *Ortiz* at *2.

The Respondent, Victor Ortiz (Ortiz), a Certified Registered Nurse Anesthetist, challenged the Board's authority to enact the last sentence of the rule,

which mandates that an anesthesiologist directly supervise the administration of anesthesia when surgery is not being performed in a physician's office. *Id.* at *1, *2. The administrative law judge determined that the Board acted within its authority in adopting the rule. *Id.* at *1. However, the Fourth District Court of Appeal reversed and held that portion of the rule invalid. *Id.* at *6. The court reasoned that the Board's rulemaking authority was limited by section 458.303(2), Florida Statutes, which provides that rules enacted pursuant to section 458.331, Florida Statutes, shall not be construed to "prohibit the service rendered by a registered nurse or licensed practical nurse, if such service is rendered under the direct supervision and control of a licensed physician to provide specific direction for any services to be performed that gives final approval for all services to be performed." *Ortiz* at *4.

A conformed copy of the decision of the Fourth District Court of Appeal is contained in the Appendix attached hereto. (A-1). That court denied the Board's timely filed Motion for Rehearing, Rehearing En Banc, and Certification on September 17, 2004. The Board filed its Notice to Invoke, seeking review of this decision, on October 18, 2004.

SUMMARY OF THE ARGUMENT

Level III surgeries are those that require general anesthesia and are the most complicated surgeries that can be performed in a physician's office. Most Level III surgeries take place in hospitals and ambulatory surgical centers. Indeed,

physicians are prohibited from performing a Level III surgery in an office setting unless the patient is a healthy Class I or Class II patient. Patients with other medical problems such as obesity or high blood pressure may not undergo Level III surgery in a physician's office and must be operated on in an ambulatory surgical center or hospital. Fla. Admin. Code Rule 64B8-9.009(6)(a)2. A certified registered nurse anesthetist may administer general anesthesia in any practice setting only under the supervision of a physician and only as authorized by an established protocol approved by the medical staff of the facility in which the anesthetic service is performed. § 464.012(4), Florida Statutes (2003). Recognizing that many surgeons are not trained to supervise the administration of general anesthesia, the Board enacted the rule issue requiring that in Level III surgeries, anesthesiologists should be present to administer or to supervise the administration of the general anesthesia rather than allowing the surgeon, who may have no anesthesia training, to supervise the certified registered nurse anesthetist. However, the court below held that the Board exceeded its delegated authority in promulgating that portion of the rule. 808 So. 2d at 261.

In *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery*, 808 So. 2d 243 (Fla. 1st DCA 2002), the court rejected a challenge to the same portion of the same rule. That court held that the Board acted within its delegated authority in promulgating the rule.

The two cases are in conflict, and this Court should accept jurisdiction in order to determine the validity of the rule.

ARGUMENT

I. Conflict of Decisions

As in *Ortiz*, the last sentence of Rule 64B8-9.009(6)(b)1.a., was also challenged as being beyond the Board's rulemaking authority in *Academy*. In *Academy*, the administrative law judge held that the requirement that an anesthesiologist be present to administer or to supervise the administration of general anesthesia in all Level III office surgeries unreasonably restricted competition in violation of section 455.517(4), Florida Statutes (2001). The First District Court of Appeal reversed on the basis that there was competent substantial evidence to support the Board's authority to conclude that anesthesiologists must be present to administer or to supervise certified registered nurse anesthetists in providing general anesthesia for Level III office surgery. *Academy*, 808 So. 2d at 261. Thus, one court has upheld the rule and another court has held it to be invalid.

The Respondent may argue that in the *Academy* case the rule was not challenged on the basis that it impinged upon the provisions of section 458.303(2). However, the fact remains that the *Ortiz* court held that in promulgating the rule the Board exceeded its delegated authority while the *Academy* court held that the rule constituted a valid exercise of the Board's delegated authority. Moreover, while the *Academy* court did not specifically address section 458.303(2), its rationale was directly contrary to the very reason why the court below held the rule to be invalid. In upholding the rule, the *Academy* court addressed the impact of the rule on CRNA's as follows:

Pursuant to the proposed rule, a patient undergoing level III office surgery may choose either an M.D. anesthesiologist, a D.O. anesthesiologist, or a CRNA supervised by an anesthesiologist. On its face, the proposed rule does not eliminate the option of a CRNA. It merely requires that he or she be supervised by an anesthesiologist. The fact that it may not prove economically practicable to make such a choice does not, as a matter of law, create an internal inconsistency that renders the provision arbitrary or capricious.

Academy, 808 So. 2d at 256.

The *Academy* court also explained that the Board enacted the rule in response to “having become aware of a number of office deaths and other adverse incidents.”

Academy, 808 So. 2d at 248. The court below obviously rejected this conclusion when it said:

We preface our analysis of this rule by noting that the parties agree that patient safety is not an issue in this proceeding. While the Board has studies to support its rule, this same rule was challenged on other grounds in *Florida Academy of Cosmetic Surgery v. Department of Health, Board of Medicine*, No. 00-951RP (DOAH Nov. 16, 2000), and the administrative law judge found that there was no evidence to indicate any significant difference in patient outcomes whether anesthesia was administered by a CRNA or an anesthesiologist. *See id.* at 25. The judge’s ruling was reversed in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243 (Fla. 1st DCA 2002), only because the judge used the wrong standard of review of the evidence.

Ortiz at *2.

The finding of the administrative law judge in *Academy* that there was no difference in patient outcome was obviously incorrect, because the First District Court of Appeal held there *was* competent substantial evidence to support the Board’s determination that anesthesiologists should supervise CRNAs in Level III office surgeries as a matter of avoiding "office deaths and other adverse incidents."

Rather than using the wrong standard of review, the reason the administrative law judge in *Academy* was reversed was because he erroneously found that there was *no* competent evidence to support the Board's finding. *Academy*, 808 So. 2d at 261.

The statement by the *Ortiz* court that the parties agreed that patient safety was not an issue in that case pertained to the fact that the rule was not being challenged as being arbitrary and capricious; *not* that patient safety played no part in the promulgation of the rule. The court below erroneously concluded that “no rules can prohibit such services [anesthesia] by a registered nurse” so long as the licensed physician has direct supervision and control. *Ortiz* at *4. The court ignored the facts found by the Board, and upheld by the *Academy* court as the basis for the rule, that many doctors are not skilled in the administration of anesthesia and are, therefore, not capable of supervising a CRNA in the administration of general anesthesia. Indeed, under Florida law a CRNA may not administer general anesthesia except under the direction of a physician or dentist. § 464.012(4)(a), Fla. Stat. (2003). The CRNA must also be performing pursuant to an established protocol entered into with the supervising physician and, "approved by the medical staff of the facility in which the anesthetic service is performed." *Id.* Because there is technically no "medical staff" in a physician's office other than the physician, the Board determined that in order to make sure that the physician is competent to supervise the CRNA, as would be the case if the protocol were reviewed by the medical staff of a hospital or ambulatory surgical center, the Board

needed to step in and require that the physician supervising the CRNA have adequate skill and training in anesthesia. The Board determined that in order to make the standard of care in the office comparable to the prevailing standard of care in the hospitals and ambulatory surgical centers in most of Florida, anesthesiologists had to be present. The Board certainly had the authority to conclude that a doctor trained in anesthesiology, rather than just a surgeon who may have no anesthesia training, should be present when Level III surgery is performed in a physician's office. The decision of the Fourth District Court of Appeal eviscerates the Board's ability to set standards of care for the supervision of nurses in an office setting.

II. Importance of the Case

The Fourth District Court of Appeal placed an unwarranted limitation on the Board's authority to enact a rule that is important to public safety. See *Academy*, 808 So. 2d at 248. The Court should exercise its jurisdiction to review this case because if the ruling below is allowed to stand, the Board has no further remedy. In ordinary situations, one district court of appeal may render a decision contrary to an earlier decision of another district court of appeal, thereby creating a conflict of decisions that is subject to review by the Florida Supreme Court. In this case, however, without this Court's intervention the rule will remain irrevocably invalid because under section 120.56(3), Florida Statutes (2004), when a rule is declared invalid, it "shall become void when the time for filing an appeal expires." There will be no other opportunity for another court to come to a contrary decision with respect to this rule.

The Court should accept jurisdiction of this case and decide, once and for all, whether this important rule is valid.

CONCLUSION

The issue in this case is whether the Board has authority to set a standard of care under Section 455.331(1)(v), Florida Statutes, to require anesthesiologists to be present to administer or to supervise the administration of general anesthesia during Level III office surgery. One court has held that it does, while another court has held that it does not. This Court should accept jurisdiction and decide this important issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing with its Appendix has been furnished by United States Mail to: William E. Williams, Esquire, and J. Andrew Bertron, Jr., Esquire, Huey, Guilday, Tucker, Schwartz & Williams, P.A., P.O. Box 12500, Tallahassee, Florida 32317-2500, this _____ day of _____, 2004.

Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using the font Times New Roman 14 point.

Attorney

APPENDIX

A-1 *Ortiz v. Department of Health*, 2004 WL 1621440 (Fla. 4th DCA July 21, 2004)