SUPREME COURT OF FLORIDA
CASE NO. _______
L.T. CONSOLIDATED CASE NOS. 3D02-3095 and 3D02-2686

MERCY HOSPITAL, INC.,

Petitioner,

vs.

ANNE M. JONES VALENTINE,

Respondent.
_______________________________/

MERCY HOSPITAL,

Petitioner,

vs.

BARBARA BAUMGARDNER and
ETHBERT BAUMGARDNER,

Respondents.
_______________________________________/

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENTS' BRIEF ON JURISDICTION

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I
STATEMENT OF THE CASE AND FACTS

All of the courts which have addressed the specific question of whether or not §482.320, Fla. Stat., imposes an actionable duty upon hospitals to insure that their staff physicians comply with the statute's financial-responsibility requirements--representing eleven of the twelve judges to address this issue--have agreed that such a cause of action exists--indeed, that the statute (as it relates to the financial responsibility of hospital staff physicians) would be completely meaningless without it. In addition to the district court's decision in the instant case, *see Baker v. Tenet Healthsystem Hospital, Inc.*, 780 So.2d 170 (Fla. 2nd DCA 2001); *Robert v. Paschall*, 767 So.2d 1227 (Fla. 5th DCA 2000), *review denied*, 786 So.2d 1187 (Fla. 2001). Although Petitioner Mercy Hospital (hereinafter "Mercy") has not included the full citation to *Robert* (*see* brief at 2), this Court denied review in *Robert*, in which the same arguments for conflict had been presented.

We agree with the few factual statements in Mercy's Statement of Facts (pp. 1-4). The rest is argument on the merits of this issue, unrelated to conflict jurisdiction, and is not relevant to the jurisdictional question before the Court.

II
SUMMARY OF THE ARGUMENT

The district court's decision does not conflict with either *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), or *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994). As Mercy acknowledges (brief at 3, 9), *Beam* held

that hospitals did not have a common-law duty to assure the financial responsibility of their staff physicians. As Mercy also acknowledges (brief at 9), the court in *Beam* "did not discuss the statute," which was not in existence at the time the cause of action in *Beam* had arisen, and therefore could not apply. Mercy's contention (brief at 9)--that "Beam cannot be reconciled with *Robert* and *Baker* or the district court's decision in this case"--is incorrect. *Beam* addressed the existence of a common-law cause of action; *Robert*, *Baker* and the instant case address the issue of a statutory cause of action. There is no conflict in these decisions.

Nor, as the Third District Court held in the instant case, is there any conflict with *Murthy*, which addressed the language of an entirely different statute, with an entirely different legislative history. *Murthy* thus has no precedential value outside the parameters of that statute, and could not conflict with the district court's construction of a different statute.

III
ARGUMENT

A. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH *MURTHY*.

Mercy's statement of this argument (brief at 5) is based not on conflict but on factual contentions and legal argument--that §458.320 contains "no language [which] creates or evidences an [sic] legislative intent to create such an action." This contention argues the merits, does not address the language of the opinion itself, and

is not relevant to conflict jurisdiction. *See Reaves v. State*, 485 So.2d 829, 830 & n. 3 (Fla. 1986); *Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981). Moreover, as *Reaves* also holds, conflict jurisdiction cannot be based on any facts or arguments presented in a dissenting opinion.

Stripped of its reliance on asserted facts outside the four corners of the opinion at issue, Mercy's reference to *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994), provides no basis for conflict jurisdiction, because *Murthy* addressed a different statute, focusing on its particular language and legislative history. This Court held in *Murthy* that "legislative intent . . . should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one." *Id.* at 985. The Court then examined the specific "language of the statute," the "statutory structure," and the "legislative history", *id.* at 986, before concluding that the specific statute in question did not create a cause of action. In light of this case-specific ruling, the court in *Evans v. Taylor*, 711 So.2d 1317 (Fla. 3rd DCA 1998), held that *Murthy* was inapplicable because *Evans* and *Murthy* addressed different statutes.

In the instant case, the district court followed faithfully this Court's direction in *Murthy* to consider "legislative intent . . . ." *Murthy*, 644 So.2d at 985. The district court quoted the *Robert* holding, 767 So.2d at 1228, that "[t]he obvious intent of the legislature . . . was to make sure that a person injured by the medical malpractice of a doctor with staff privileges would be able to ultimately recover at least $250,000 of

compensable damages." Like *Robert*, the instant decision was based on the legislature's intent, and therefore was consistent with the principles articulated by this Court in *Murthy*. But the ultimate holding of *Murthy*--the application of those principles--was based on a different statute, a different statutory purpose, and a different legislative history. There can be no conflict.

B. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH *BEAM*.

Mercy's representation (brief at 3)--that the "district court failed to recognize--or even mention--the First District's decision in *Beam*"--is misleading. Mercy's reliance on *Beam* was fully briefed and fully argued by both sides in the instant case, and the district court obviously rejected Mercy's argument.

It did so with good reason. *Beam* addressed only one issue (and *Beam* is the only decision which has addressed that issue)--whether a hospital had a common-law duty to assure the financial responsibility of its staff physicians. Although §458.320 was in existence at the time *Beam* was decided, it was not an existence at the time the cause of action arose, and therefore could not have been applicable. We therefore strongly disagree with Mercy's representation (brief at 9) that "[a]lthough §458.320 was already in effect [when *Beam* was decided], the First District did not discuss the statute. Since §458.320 does not create a private cause of action, it is not surprising that the First District's opinion contains no discussion of the statute." To the contrary, *Beam* "contains no discussion of the statute" because the statute was simply

not at issue. And at the least, a decision which "contains no discussion of" an issue can hardly provide a basis for conflict jurisdiction.

Nor do we agree with Mercy's contention that *Beam*'s disclaimer of a common-law cause of action conflicts with three district-court decisions addressing the viability of a statutory cause of action. Mercy's contention (brief at 9)--that "*Beam* cannot be reconciled with *Robert* and *Baker* or the district court's decision in this case"--mixes apples and oranges. The absence of a common-law cause of action does not necessarily preclude a statutory cause of action, based on the statute's language, history and purpose, any more than the absence of a statutory cause of action would preclude the existence of a common-law cause of action. The two are entirely different considerations. There is no conflict with *Beam*.

IV
CONCLUSION

It is respectfully submitted that the Petition for Discretionary Review should be denied.

Respectfully submitted,

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of May, 2004, to all counsel of record on the attached service list.

CERTIFICATE OF COMPLIANCE AND TYPE SIZE AND FONT

I certify that this brief complies with the type-volume limitation set forth in Florida Rule of Appellate Procedure 9.210(a). This brief is typed in Times New Roman 14.

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