

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. _____

Lower Tribunal
Consolidated Case Nos. 3D02-3095; 3D02-2686

MERCY HOSPITAL,

Petitioner,

v.

BARBARA BAUMGARDNER, and
ETHBERT BAUMGARDNER;
ANNE M. JONES VALENTINE,

Respondents.

BRIEF OF PETITIONER ON JURISDICTION

On Discretionary Review From a Decision of the
Third District Court of Appeal

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INTRODUCTION

This jurisdictional brief seeks discretionary review of a decision of the Third District Court of Appeal, rendered April 5, 2004, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

The Third District's decision directly and expressly conflicts with: (i) this Court's decision in *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 986 (Fla. 1994), and (ii) expressly and directly conflicts with the First District Court of Appeal's decision in *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), by imposing strict liability upon Florida hospitals for the failure of uninsured physicians with staff privileges who have failed to comply with Florida's financial responsibility statute. For the reasons discussed below, the Court should grant discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

These were appeals of two trial court orders that entered summary judgment in favor of the Plaintiffs in separate medical malpractice cases, on the basis that Mercy Hospital was strictly liable for the failure of one of its staff physicians¹ to

¹ For purposes here, a staff physician means any independent physician who is not employed by the hospital, but who has been granted privileges to practice medicine at the hospital.

comply with the financial responsibility statute, Fla.Stats. §458.320(2)(b), a statute that regulates physician licensing. The Plaintiffs' Complaints purported to allege a private cause action against the Hospital, i.e., strict liability, for the physician's financial incompetence.

The issue before the lower courts was a pure question of law, i.e., whether Florida's financial responsibility law, a regulatory statute, imposes strict liability on a hospital for a staff physician's failure to comply with the statute.

In an opinion filed December 24, 2003, the Third District Court of Appeal affirmed the summary judgments. The district court relied on *Robert v. Paschall*, 767 So.2d 1227 (Fla. 5th DCA 2000), and *Baker v. Tenet Healthsystem Hospital, Inc.*, 780 So.2d 170 (Fla. 2d DCA 2001). The district court adopted the Fifth District's construction of §458.320 as demonstrating an "obvious intent" on the part of the legislature to make sure that a person injured by a physician's medical malpractice would be able to ultimately recover at least \$250,000 in compensable damages from the hospital with which the physician had staff privileges.

In keeping with the Fifth District's decision in *Robert, supra*, the district court construed §458.320 "as imposing a statutory duty on the hospital to assure the financial responsibility of its staff-privileged physicians who use the hospital for medical treatment and procedures." (Opinion at 4). Although the statute contains

no such language, and there is no evidence of legislative intent, the district court held that “[t]he statute mandates financial responsibility as a condition to maintaining staff privileges and imposes a duty on the hospital to ensure compliance.” (Opinion at 4). Neither the Third District, in this case, nor the Fifth District in *Robert*, considered the fact that §458.320 is a regulatory statute that does *not* provide for a private cause of action.

The district court failed to reconcile - - or even mention - - the First District’s decision in *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), in which the court held that a hospital did *not* have a duty to ensure that its staff physicians were financially responsible.

The district court’s opinion includes a well-reasoned dissent by Judge Green, in which she concluded that “the legislature has not expressly provided, or evidenced any intent to provide, a private cause of action against a hospital for a staff physician’s failure to comply with a licensing statute... .” (Opinion at 5). Judge Green also recognized that “courts have repeatedly declined to infer the existence of a private cause of action to a regulatory statute” in the absence of any language providing a private cause of action or, at a bare minimum, clear legislative intent, citing this Court’s decision in *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 986 (Fla. 1994). (Opinion at 8).

A timely motion for rehearing, rehearing en banc, or for certification was denied by the Third District Court of Appeal, in a divided decision. *See* Appendix. This appeal follows.

SUMMARY OF THE ARGUMENT

At common law, hospitals had no duty to ensure the financial responsibility of their staff physicians. The enactment of Fla.Stats. §458.320 did not - - and was not intended to - - abrogate that common law. There is no language contained within the statute that provides for a private cause of action. Nor is there any language that demonstrates either an intent to create a private cause of action or an intent to impose strict liability upon hospitals for their staff physicians' non-compliance with the financial responsibility statute.

The district court's opinion, as well as the Fifth and Second Districts' opinions in *Robert v. Paschall*, 767 So.2d 1227 (5th DCA 2000), and *Baker v. Tenet Healthsystem Hospital, Inc.*, 780 So.2d 170 (Fla. 2d DCA 2001) are in direct conflict with *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), which holds that there is no common law duty on hospitals to ensure staff physicians' compliance with the financial responsibility statute.

In addition, to the extent that the Third District held that §458.320 "mandates financial responsibility as a condition to maintaining staff privileges and imposes a

duty on the hospital to ensure compliance,” the district court’s opinion conflicts with this Court’s opinion in *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 986 (Fla. 1994), which holds that regulatory statutes do not create private causes of action absent any specific language to that effect or absent any evidence in the legislative history to create a private cause of action. (Opinion at 4).

ARGUMENT

The District Court’s Decision Conflicts With This Court’s Decision in *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994) Because the District Court Essentially Created a Private Cause of Action for Violation of a Regulatory Statute Where No Language Creates or Evidences an Legislative Intent to Create Such an Action.

In *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994), this Court held that a licensing and regulatory chapter that governed construction contracting *did not* create a private cause of action, absent any evidence in the language or legislative history of any legislative intent to create such a private cause of action.

Specifically, in *Murthy*, the Court stated 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. 644 So.2d at 986. The statute at issue in *Murthy* established licensing procedures and regulatory duties for the construction industry and created a board to enforce the performance of these

duties and procedures. The Court found that the language of Chapter 489 indicated that it was created merely to secure the safety and welfare of the public by regulating the construction in industry. The Court declined to infer any civil liability where there was no evidence in the language or the legislative history of the chapter of a legislative intent to create a private remedy against a qualifying agent.

In this case, the statute at issue, Fla.Stats. Chapter 458, regulates physician licensing.² The district court cited to no language in the statute that creates a private cause of action against physicians - - let alone hospitals - - and none exists. Nor did the district court cite to any language that evidenced any legislative intent to create a private cause of action. Rather, the lower court simply joined its sister courts in *Robert v. Paschall*, 767 So.2d 1227 (Fla. 5th DCA 2000) and *Baker v. Tenet Healthsystem Hospital, Inc.*, 780 So.2d 170 (Fla. 2d DCA 2001), in which neither court pointed to any language in the statute creating a private cause of action or evidencing any legislative intent to create a private cause of action. Instead, each court merely concluded that such legislative intent was “obvious.” *Robert, supra* at 1228.

In this case, the district court relied on the *Robert* decision in order to conclude that it was:

² The statute does not regulate hospitals. Chapter 395 does.

[t]he obvious intent of the legislature ... 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. We read section 458.320(2)(b) as imposing a statutory duty on the hospital to assure the financial responsibility of its staff-privileged physicians who use the hospital for medical treatment and procedure.

(Opinion at 3-4, quoting *Robert, supra* at 1228).

The district court failed to mention the source of the legislature’s “obvious” intent. There is neither language nor any other evidence of legislative intent to support the district court’s decision. Rather, like the statute in *Murthy*, which established licensing and regulatory duties for the construction industry, Chapter 458 establishes licensing and regulatory duties for physicians. (Most notably, Chapter 458 *does not* even regulate hospitals.)

The district court found an “obvious intent” of the legislature in enacting §458.320 to make sure that persons injured by medical malpractice are able to ultimately recover at least \$250,000 of compensable damages by imposing a statutory duty on hospitals to assure the financial responsibility of its staff-privileged physicians, (Opinion at 7-8), notwithstanding that the stated intent of the legislature does not even remotely suggest any such intent. Rather, the statute provides, in pertinent part:

The Legislature recognized that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. The Legislature finds further that it is difficult for the public to make an informed choice when selecting a physician and that the consequences of a wrong decision could seriously harm the public health and safety. The primary legislative purposes in enacting this chapter is to ensure that every physician practicing in this state meets the minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

Fla.Stats. §458.301.

In the absence of any language in Chapter 458 either creating a private cause of action or evidencing legislative intent to create such a cause of action, particularly against hospitals, the district court's opinion conflicts with this Court's decision in *Murthy, supra*.

The District Court's Decision Conflicts With the First District Court of Appeal's Decision in *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), Which Holds That Hospitals Do Not Have a Duty to Assure the Financial Responsibility of Staff-Privileged Physicians.

In *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), after the enactment of Fla.Stats. §458.320, the First District held that no cause of action existed for a hospital's selection of a "financially incompetent

physician.” 486 So.2d at 672. The court noted the absence of any public reliance “on a hospital’s monitoring of a staff physician’s malpractice judgment-paying skills.” Although §458.320 was already in effect, 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.

If the Legislature had intended to abrogate the common law rule in §458.320, it would have - - and was required to have - - stated so in clear, unambiguous and affirmative language.

The Fifth District in *Robert* attempted to distinguish *Beam* on the basis that it does not mention the Medical Malpractice Reform Act but, rather simply holds that hospitals do not have a *common law* duty to provide financially responsible physicians to their patients. The distinction, however, is one without a difference. Both the Reform Act and §4548.320 were in effect when *Beam* was decided.

Beam cannot be reconciled with *Robert* and *Baker* or the district court’s decision in this case. The First District does not hold hospitals strictly liable for staff physicians’ noncompliance with the financial responsibility statute. The Fifth and Second Districts do. Thus, a conflict exists amongst the district courts of appeal.

CONCLUSION

By concluding that Fla.Stats. §458.320 “mandates financial responsibility as a condition to maintaining staff privileges and imposes a duty on [hospitals] to ensure compliance,” in the absence of any language to that effect or any legislative intent to create a private cause of action in a regulatory statute, the Third District’s opinion directly conflicts with this Court’s decision in *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 986 (Fla. 1994). The district court’s opinion also directly conflicts with the decision of the First District Court of Appeal in *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986), which held that a hospital had no common law duty to ensure that its staff physicians were financially responsible.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this _____ day of May, 2004, to: All Counsel on the attached Service List.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this computer-generated Brief is submitted in Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2).

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