IN THE SUPREME COURT OF FLORIDA

JOHN DOE[1], M.D.,

Petitioner,

vs. CASE NUMBER: SC07-452

DEPARTMENT OF HEALTH,

Respondent.
_____/

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA
SECOND DCA CASE 2D06-1273 RENDERED DECEMBER 27, 2006

Jon M. Pellett
Fla. Bar Id # 0050679
Barr, Murman, & Tonelli, P.A.
201 East Kennedy Blvd. Suite 1700
Tampa, Florida 33602
Tele: (813) 223-3951 Fax: (813) 229-2254
ATTORNEYS FOR PETITIONER

[1] Identity of Petitioner confidential under Section 456.073(10), Florida Statutes.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions and Statutes

Court Rules

STATEMENT OF THE CASE AND FACTS

Petitioner[2] is a licensed allopathic physician in Florida, having received a medical license in 1983. His license is currently free and clear of any encumbrances. Pursuant to Section 20.43, Florida Statutes, Respondent, Department of Health, is the state agency charged with the regulation of physicians licensed under Chapters 456 and 458, Florida Statutes.

Petitioner is the subject of an investigation by the Department of Health under Section 456.073 and 458.337, Florida Statutes for his having resigned his staff privileges at a Florida hospital on or about May 23, 2005. (App. 1-2). It is alleged that he resigned his staff privileges at the Florida hospital while under investigation or threat of investigation for issues related to professional competence or conduct. (App. 3). As a part of the investigation, the Department of Health, on November 15, 2005, directed a Subpoena to the Florida hospital for what is not disputed as confidential peer review information[3]. Petitioner became aware of the subpoena and filed a timely objection and motion to quash the subpoena. (App. 3-4). The

[2] Given the nature of the proceedings below, Petitioner's identity is confidential under Section 456.073(10), Florida Statutes.

[3] Defined as "[t]he investigations, proceedings, and records of the peer review panel…." Fla. Stat. § 395.0193(8); see also Fla. Stat. § 766.101(5); see e.g., Holly v. Auld, 450 So.2d 217 (Fla. 1984); Cruger v. Love, 599 So.2d 111 (Fla. 1992) (App. 6).

Department of Health denied the Motion to Quash. On March 22, 2006, a timely appeal was taken of the Department's Order to the Second District Court of Appeal. (App. 4). However, on December 27, 2006, the Second District Court of Appeal denied Petitioner's request for review of non-final agency action. (App. 1-10).

In denying the request for review, the Second District Court of Appeal held that the Department of Health was entitled to subpoena the privileged peer review information from the Florida hospital under Sections 456.071, 458.331(9), and 458.337(3), Florida Statutes finding that license disciplinary proceedings involving physicians are not the type of administrative proceedings encompassed by Sections 395.0193(8) and 766.101(5), Florida Statutes.

Rehearing was denied on February 27, 2007 and a timely notice to invoke discretionary review by this Court was filed on March 5, 2007[4]. References to the Appendix shall be designated as (App. xxx-xxx). References are to Florida Statutes (2005) unless otherwise indicated.

---

[4] On March 15, 2007, Petitioner served a proposed brief on jurisdiction and a motion to permit a brief on jurisdiction exceeding 10 pages. By Order entered March 22, 2007, Petitioner's motion was denied, his original brief was stricken, and he was required to serve an amended brief on jurisdiction by to and including April 2, 2007.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to review this matter. In this case, the Second District Court of Appeal held that the Department of Health was entitled under Sections 456.071, 458.331(9) and 458.337(3) to subpoena privileged peer review information from a Florida hospital during an administrative proceeding (license disciplinary investigation of a physician) because the proceeding was not encompassed in the types of administrative proceedings covered by Sections 395.0193(8) and 766.101(5). (App. 8-9). The decision of the Second District Court of Appeal expressly and directly conflicts with the decisions of other districts and this Court where it has been concluded that adding words to a statute is disfavored when the Legislative intent can not be discerned. The decision of the Second District Court of Appeal by expanding agency access to privileged peer review information is in express and direct conflict with decisions of the First and Third District Courts of Appeal where both courts have held in reviewing agency subpoena power and contempt authority that a governmental entity or administrative agency is limited to that power expressly granted by statute. The Second District's decision in allowing the Department of Health access to the identity of patient files (patient names or medical record numbers) reviewed by the committee is in express and direct conflict with the decision of the Third

District Court of Appeal in Mercy Hospital v. Department of Professional Regulation, 467 So.2d 1058, 1060-1061 (Fla. 3d DCA 1985). Thus, the Petitioner contends this Court has jurisdiction to review the Second District Court of Appeal's opinion pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure and Article V, Section 3(b)(3) of the Florida Constitution, as the opinion of the Second District Court of Appeal expressly and directly conflicts with the opinions of another district court of appeal or of prior opinion of this Court.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Article V, § 3(b)(3) Fla. Const.; Fla. R. App.P. 9.030(a)(2)(A)(iv).

ARGUMENT

I. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH ARMSTRONG V. CITY OF EDGEMATER, 157 SO.2D 422, 425 (FLA. 1963); HAYWORTH V. CHAPMAN, 152 SO. 663, 664-666 (FLA. 1933)

In 1990, the Florida Legislature added the phrase "or administrative" to Sections 395.0193(8) and 766.101(5), Florida Statutes. 1990 Laws of Florida

Chs. 90-341 § 9 & 90-344 § 14. The Second District Court of Appeal could not discern the legislative intent behind the addition of the "or administrative" language to the statutes in 1990. (App. 9, fn.8). Even though the 1990 amendment adding the "or administrative" language to the statutes post-dated a 1985 opinion of the Third District Court of Appeal in Mercy Hospital[5], the Second District Court of Appeal then guessed that it was possible that the added language was somehow related to the 1988 creation of the Florida Birth-Related Neurological Compensation Act (NICA) when the "or administrative" language was clearly not added at the time NICA was created. (App. 9, fn.8). By having guessed at the intent of the Legislature in adding the "or administrative" language to Sections 395.0193(8) and 766.101(5) in 1990, which intent the Second District Court of Appeal acknowledges it can not discern from the statutes, and ignoring principles of statutory construction holding that the Legislature is presumed to know the judicial constructions of a law when enacting a new version of that law, and then implying words in Sections 395.0193(8) and 766.101(5), the Second District Court of Appeal's

[5] "Florida, like most other states, follows the rule that the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law. (citation omitted). Furthermore, the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version." Brannon v. Tampa Tribune, 711 So.2d 97, 100 (Fla. 1st DCA 1998)

decision is expressly and directly in conflict with Hayworth v. Chapman, 152 So. 663, 664-666 (Fla. 1933); Armstrong v. City of Edgewater, 157 So.2d 422, 425 (Fla. 1963); and Brannon v. Tampa Tribune, 711 So.2d 97, 100 (Fla. 1st DCA 1998).

"The courts cannot and should not undertake to supply words purposely omitted. When there is doubt as to the legislative intent or where speculation is necessary, then the doubts should be resolved against the power of the courts to supply missing words." Armstrong at 425. Or put another way "Where it appears from the context that certain words have been inadvertently omitted from a statute, the Court may supply such words as are necessary to complete the sense and to express the legislative intent, but it cannot supply words purposely omitted and should supply an omission only when the omission is palpable and the omitted word plainly indicated by the context; and words will not be added except when necessary to make the statute conform to the obvious intent of the legislature, or to prevent the Act from being absurd; and **where the legislative intent cannot be accurately determined because of the omission, the Court cannot add words to express what might or might not be intended**." Hayworth at 666 (citation omitted) (emphasis added).

Accordingly, this Court should grant discretionary review and resolve the conflict by quashing the decision of the Second District Court of Appeal.

II. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN BARRY V. GARCIA, 573 SO.2D 932, 933-939 (FLA. 3d DCA 1991) AND WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN GREENBERG V. FLORIDA STATE BOARD OF DENTISTRY, 297 SO.2D 628 (FLA. 1st DCA), CERT. DISMISSED, 300 SO.2D 900 (FLA. 1974)

In holding that the Department of Health may subpoena peer review information by reading an exemption for physician disciplinary proceedings into Sections 395.0193(8) and 766.101(5), Florida Statutes, the Second District Court of Appeal has expanded the authority and power of the Department of Health under Sections 456.071 and 458.337(3), Florida Statutes. Their decision expressly and directly conflicts with the holding of the Third District Court of Appeal in Barry and the First District Court of Appeal in Greenberg where the courts found that governmental entities and agencies have no power or authority except that expressly granted them by the Legislature. Accordingly, this Court should grant discretionary review and resolve the conflict by quashing the decision of the Second District Court of Appeal.

III. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY

CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN MERCY HOSPITAL V. DEPARTMENT OF PROFESSIONAL REGULATION, 467 SO.2D 1059, 1060-1061 (FLA. 3d DCA 1985)

In holding that the Department of Health may subpoena peer review information and identities of patients (patient names or medical record numbers) whose records might have been considered by the peer review committee, the Second District Court of Appeal's decision has essentially permitted the Department of Health access to confidential patient records under Section 395.3025(4), Florida Statutes. (App. 4, fn.4). Their decision expressly and directly conflicts with the holding of the Third District Court of Appeal in Mercy Hospital finding that a predecessor agency lacked authority to subpoena patient records from a hospital during a licensed disciplinary proceeding. While the nature of the information permitted (patient names or medical record numbers) is less than the full patient record sought in Mercy Hospital, the lack of statutory authority under Section 395.3025(4), Florida Statutes (formerly 395.017(3), Florida Statutes) remains. Accordingly, this Court should grant discretionary review and resolve the conflict by quashing that portion of the decision of the Second District Court of Appeal that would permit the Department of Health to subpoena the identities of the

patients (patient names or medical record numbers) whose records might have been considered by a peer review committee at the Florida hospital.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the court should exercise that jurisdiction to consider the merits of the petitioner's argument.

Respectfully submitted,

_____
Jon M. Pellett
Fla. Bar Id # 0050679
BARR, MURMAN, TONELLI, SLOTHER & SLEET
201 E. Kennedy Blvd. Suite 1700
Tampa, Florida 33602
Tele: (813) 222-8200 Fax: (813) 229-2254
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Jurisdiction Brief with attached appendix has been furnished by overnight courier and electronic correspondence as follows:

Wings S. Benton
Appellate Section Head
Department of Health
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399
E-mail: Wings_Benton@doh.state.fl.us
Diane Kiesling
Assistant Attorney General

Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399
E-mail: Diane_Kiesling@doh.state.fl.us

Susan LaPenta
Horty, Springer & Mattern
4614 5th Avenue
Pittsburgh, PA 15213
E-mail: slapenta@HortySpringer.Com

Kevin Cooper
Vice President/General Counsel
NCH Healthcare System
350 Seventh Street North
Naples, Florida 34102
E-mail: kevin.cooper@nchmd.org

this _____ day of April 2007.

_____
Jon M. Pellett

CERTIFICATE OF COMPLIANCE
WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the foregoing Petition has been submitted using Times New Roman 14 Point Font.

_____
Jon M. Pellett

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
IN THE SUPREME COURT OF FLORIDA

JOHN DOE[6], M.D.

Petitioner,

vs. CASE NUMBER: SC07-452

DEPARTMENT OF HEALTH,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA
SECOND DCA CASE 2D06-1273 RENDERED DECEMBER 27, 2006

APPENDIX

Jon M. Pellett
Fla. Bar Id # 0050679
Barr, Murman, & Tonelli, P.A.
201 East Kennedy Blvd. Suite 1700
Tampa, Florida 33602
Tele: (813) 223-3951 Fax: (813) 229-2254
ATTORNEYS FOR PETITIONER

[6] Identity of Petitioner confidential under Section 456.073(10), Florida Statutes.

TABLE OF CONTENTS