IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,754

(FOURTH DCA CASE NO. 87-0918)

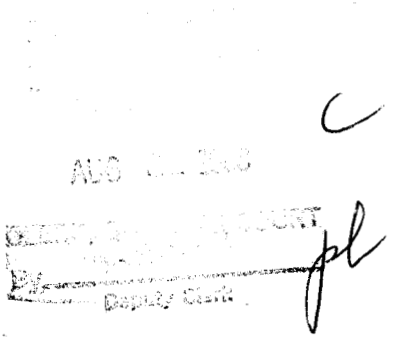
SOPHIE GERSHUNY,

Petitioner,

vs.

MARTIN McFALL MESSENGER ANESTHESIA PROFESSIONAL ASSOCIATION,

Respondent.



ON CERTIFIED QUESTIONS FROM THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT MARTIN McFALL MESSENGER ANESTHESIA PROFESSIONAL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF CITATIONS

COUNTERSTATEMENT OF THE CASE AND FACTS

Respondent submits that the Petitioner's statement of the case and facts is incomplete and misleading. Respondent therefore finds it necessary to supplement Petitioner's statement as follows:

This case is before the Court pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, on questions certified to it by the Fourth District Court of Appeal which reversed the trial court and remanded the cause for entry of an award of attorney's fees to Respondent pursuant to Section 768.56, Florida Statutes (1983).

The case arose when Petitioner Sophie Gershuny ("Gershuny") suffered injury when she fell or crawled from her hospital bed at Imperial Point Medical Center after undergoing electroconvulsive shock therapy (R. 84-85).[1] Gershuny brought a medical malpractice suit against the hospital and the Respondent Martin McFall Messenger Anesthesia Professional Association ("the Association"). It is undisputed that the Association is comprised of physicians engaged in the group practice of anesthesiology. Although a certified registered nurse anesthetist had administered the anesthesia, Gershuny chose to sue the Association as her employer, alleging medical negligence on the part of the Association including its "agents, employees,

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[1] "R." references are to the record as prepared by the Clerk of the trial court. "A." references are to the appendix attached to Petitioner's initial brief on the merits.

personnel, nurses, physicians, staff, and administration" (R. 87-90).[2]

The jury found that the Association had not been negligent toward Gershuny (R. 94). As the prevailing party, the Association moved the trial court, pursuant to Section 768.56, Florida Statutes (1983), for taxation of attorney's fees against Gershuny (R. 93). Gershuny did not challenge the Association's motion, nor did she ever raise any question as to the applicability of the statute to the Association (R. passim).

The trial court held an evidentiary hearing and took evidence on the proper amount of attorney's fees (R. 69-82). After subsequent argument on the motion, the trial court issued an order on March 10, 1987, denying the Association attorney's fees on the grounds that the Association was not a member of the class of health care providers specifically enumerated in Section 768.56, Florida Statutes as being entitled to such fees (R. 98).

The Fourth District Court of Appeal, with one judge dissenting, reversed the trial court. The Fourth District held:

> We cannot agree with the trial court's interpretation of the statute. It is clear that the complaint by [Gershuny] was for medical malpractice by the group of physicians comprising the association. By seeking to hold these physicians liable, albeit as a collective group, we believe that [Gershuny] was subject to the provisions of section 768.56 in the event she failed to prevail.

(A. 2).

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[2] Gershuny's complaint is attached hereto as an appendix.

Gershuny moved for rehearing and/or certification of the issue to this Court. The Fourth District certified the following questions to this Court:

> WHETHER REASONABLE ATTORNEY FEES MAY BE RECOVERED UNDER SECTION 768.56, FLORIDA STATUTES, WHERE A PROFESSIONAL ASSOCIATION IS THE PREVAILING PARTY? IF THE ANSWER TO THIS QUESTION IS IN THE AFFIRMATIVE, THEN DOES SECTION 768.56 AUTHORIZE THE AWARD OF ATTORNEY FEES WHERE THE ALLEGED NEGLIGENCE IS BY AN EMPLOYEE OTHER THAN A HEALTH CARE PROVIDER ENUMERATED IN THE STATUTE?

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal was correct in holding that the Association, comprised of individual physicians who are statutorily entitled to receive attorney's fees as the prevailing parties in a medical malpractice case, could recover attorney's fees. Gershuny knowingly chose to hold the Association vicariously liable for the alleged negligence of its employee nurse; the physicians comprising the Association ought not to be deprived of the statutory protection to which they are entitled simply by the fortuity of their engaging in a group practice.

Section 621.07, Florida Statutes imposes liability upon the Association for acts of its employees performed under supervision. Florida law requires certified registered nurse anesthetists to act only under the supervision of a physician. There is no evidence in this case that the nurse who administered Gershuny the anesthesia acted contrary to this requirement; indeed, Gershuny sued the Association on the basis that it had

control over her. Gershuny cannot now go outside the record and raise a new issue which is contrary to her allegations, and the facts and evidence adduced in this case.

ARGUMENT

REASONABLE ATTORNEY FEES MAY BE RECOVERED PURSUANT TO SECTION 768.56, FLORIDA STATUTES, WHERE A PROFESSIONAL ASSOCIATION IS THE PREVAILING PARTY, EVEN IF THE ALLEGED NEGLIGENCE IS BY AN EMPLOYEE OTHER THAN A HEALTH CARE PROVIDER AS ENUMERATED IN THE STATUTE

Section 768.56, Florida Statutes (1983) provides, in pertinent part, that "the court shall award a reasonable attorney's fee to the prevailing party" in a malpractice action brought against "any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization...." Gershuny relies, as did the trial court, upon this Court's decision in Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986) to defeat the Association's entitlement to attorney's fees under the statute on the basis that a professional association is not one of the statutorily enumerated entities authorized to recover such fees. In Finkelstein, the plaintiff in a medical malpractice suit specifically named a nurse as a defendant. This Court refused to allow recovery of attorney's fees against the nurse, despite the fact that the plaintiff prevailed in the lawsuit. The Court reasoned that the defendant nurse was "not one of the enumerated health care professionals affected by Section 768.56." 484 So.2d at 1243.

As the Fourth District implicitly recognized, Finkelstein

has no application to the instant case. Gershuny could have chosen to name the allegedly negligent nurse as an individual defendant, as did the plaintiff in Finkelstein. Instead, she chose to reach for the deeper pocket and sue the nurse's employer, which is nothing more than a group of physicians who are specifically enumerated health care providers entitled to attorney's fees under the statute. Indeed, she expressly sued the Association including its "agents, employees, personnel, nurses, physicians, staff and administration" (R. 87-90). As the Fourth District recognized, the real consideration is not whether these physicians have chosen to practice as a group, but whether, having done so, they lose the protection which the legislature obviously sought to afford them. The Fourth District properly concluded that they did not.

The correctness of the Fourth District's decision is illustrated by the fact that medical malpractice plaintiffs routinely sue hospitals for the alleged negligence of their employee nurses and other staff personnel. Hospitals operate in many different forms, such as corporations, partnerships, or sole proprietorships. They, unlike their nurses and other staff personnel, are specifically entitled to or liable for attorney's fees under the statute. Such entitlement or obligation is without regard to the type of business entity by which they operate. Hospitals alleged to be vicariously liable for the actions of their personnel are, as a generic class, routinely required to pay or entitled to collect attorney's fees under the

statute depending on who prevails. See Folta v. Bolton, 493 So.2d 440 (Fla. 1986).[3] Similarly, the statute entitles or obligates physicians as a generic class to receive or pay attorney's fees when they are sued for medical malpractice. As the Fourth District recognized, the proper consideration in this case is the fact that Gershuny expressly and knowingly sued physicians, not the form in which those physicians chose to conduct their practice.

Gershuny argues that the Fourth District erroneously assumed that the physicians comprising the professional association could have been held vicariously liable for the acts of their employee nurse. Gershuny relies upon Section 621.07, Florida Statutes (1979), governing professional associations, which provides, in pertinent part:

> [A]ny officer, agent, or employee of a corporation organized under this act shall be personally liable and accountable only for the negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered...

Gershuny contends that the nurse in the instant case was unsupervised, and that this statute therefore shields the

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[3] Indeed, Gershuny herself sued the hospital, and prevailed, based upon the acts of its "agents, employees, personnel, nurses, physicians, hospital staff and hospital administration..." (R. 85). Of these, only physicians are specifically enumerated in the statute as being entitled to collect or obligated to pay attorney's fees.

individual physicians from liability. Gershuny's argument is both improper and spurious.

First, the argument is improper because Gershuny raised the issue of the nurse's supervision for the first time in her petition for rehearing to the Fourth District Court of Appeal. It was never presented to the trial court or on appeal to the Fourth District. Gershuny is therefore precluded from raising it here. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); Cowart v. City of West Palm Beach, 255 So.2d 673 (Fla. 1971).

Second, there is no evidence in this case that the nurse acted without supervision contrary to Florida law, which requires nurse anesthetists to perform their duties only under the supervision of a physician. See Sections 464.003(c), 464.012 and 458.348, Florida Statutes; Rule 210-16.002, Florida Administrative Code. See also Florida Ass'n of Nurse Anesthetists v. Dept. of Professional Regulation, Board of Dentistry, 21 Fla. Supp. 2d 239, 242 (Fla. Div. of Admin. Hearings 1986), aff'd, 500 So.2d 324 (Fla. 1st DCA 1986). Gershuny's assertion to the contrary is completely outside the record. As the Third District Court of Appeal has held:

> "Appellate courts do not exist for the purpose of conducting a trial de novo and it is highly improper for counsel to insert in their briefs matters and things which are not a part of the trial record and which have not been brought to the attention of the trial court for its consideration."

Barton v. Keyes Co., 305 So.2d 269, 270 n.1 (Fla. 3d DCA 1974), quoting Florida Livestock Bd. v. Hygrade Food Prods. Corp., 141

So.2d 6 (Fla. 1st DCA 1962).

Nor has Gershuny made any allegation in her complaint that the nurse acted unsupervised (R. 83-91). Indeed, the disingenuousness of Gershuny's argument is apparent since she based her entire cause of action against the Association on the theory that the Association, "by and through its agents, employees, personnel, nurses, physicians, staff and administration" failed to render her adequate medical care. By attempting to hold the Association vicariously liable for the actions of its employee nurse anesthetist, Gershuny necessarily implied that the physicians had some degree of control. See, e.g., DeRosa v. Shands Teaching Hosp. & Clinics, Inc., 504 So.2d 1313, 1315 (Fla. 1st DCA 1987). Gershuny's naked assertion that the nurse anesthetist here "was not under the direct supervision of a physician while rendering professional services within the meaning of [Florida Statutes Section 621.07]" (Br. 5), unsupported by any evidence, contrary to the allegations of Gershuny's complaint as well as applicable law, and never timely or properly raised, should be given no countenance by this Court. See Chrysler Corp. v. Miller, 450 So.2d 330 (Fla. 4th DCA 1984); Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1016-1017 (Fla. 4th DCA 1982).

For similar reasons, Gershuny's argument that this case is analogous to a lawsuit against ABC Nursing Service or Walt Disney World makes no sense (Br. 6). First, this argument misses the crucial point that the Association, unlike ABC Nursing Service or

Disney World, is comprised of a group of physicians who are expressly covered by the statute. Second, neither of these entities could employ a nurse anesthetist unless they also employed a physician to supervise her. If the plaintiff then sued the physician for vicarious liability based on the nurse's conduct, the physician would in fact be able to recover (or be obligated to pay) attorney's fees under the statute.

The Fourth District was thus correct when it ruled that Gershuny sought to hold the collective group of physicians comprising the Association liable, and that the instant case is distinguishable from Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986) wherein plaintiff sued the nurse directly. This Court should not allow Gershuny to escape the clear import of Section 768.56, Florida Statutes, by accepting either her interpretation of that statute which is clearly contrary to the intention of the legislature, or her reliance on Section 621.07, Florida Statutes (1979) which is not supported by either the allegations, facts, or evidence presented in the instant case.

CONCLUSION

For the foregoing reasons, Respondent MARTIN McFALL MESSENGER ANESTHESIA PROFESSIONAL ASSOCIATION requests this Court to affirm the judgment of the Fourth District Court of Appeal and answer the certified questions in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of August, 1988 to: **ELLEN MILLS GIBBS, ESQ.**, 224 S.E. 9th Street, Fort Lauderdale, FL 33316; **ROBERT J. COUSINS, ESQ.**, Bernard & Mauro, P.O. Box 14126, Fort Lauderdale, FL 33302; **SHELDON J. SCHLESINGER, P.A.**, 1212 Southeast Third Avenue, P.O. Box 21704, Fort Lauderdale, FL 33335; **JANE KREUSLER-WALSH, ESQ. and LARRY KLEIN, ESQ**, Klein & Beranek, P.A., Suite 503 - Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401.

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