OK 7 w/app

IN THE SUPREME COURT OF FLORIDA

ELOIS POSEY CRUGER, as
Parent and Guardian of
the Minor, ASHANTI POSEY,

Petitioner,

vs.

DOUGLAS J. LOVE, M.D.,

Respondent.
_____/

CASE NO.: 77,293
4th DCA CASE NO: 90-2077

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Respondent takes no issue with the Statement of the Case and Facts as contained in Petitioner's Brief on Jurisdiction.

SUMMARY OF THE ARGUMENT

The opinion of the Fourth District Court of Appeals is not in direct and express conflict with the decision of the First District Court of Appeal in Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (FLA. 1st DCA 1990). That case involved facts and circumstances that are different and distinguishable from the present case.

The Fourth District's Decision is, however, consistent with the opinion of the Second District Court of Appeal in Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (FLA. 2nd DCA 1990), and Burton v. Becker, 516 So.2d 283 (FLA 2nd DCA 1987). Those cases held that the statutory privileges granted to records of medical review committees prevent disclosure of records like the ones being sought in the instant case.

It is respectfully urged that this court not invoke its conflict jurisdiction, since there is no conflict here.

ARGUMENT

JURISDICTIONAL POINT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEALS IS NOT IN DIRECT AND EXPRESS CONFLICT ON THE SAME POINT OF LAW WITH THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN JACKSONVILLE MEDICAL CENTER V. AKERS, 560 SO.2D 1313 (FLA. 1ST DCA 1990).

In Nielson v. City of Sarasota, 117 So.2d 731 (FLA. 1960), this Court set standards by which a decisional conflict would properly justify the invocation of Supreme Court review of appellate court decisions under Article V, Section 3(b)(3) of the Florida Constitution. These situations would arise by either the announcement of a rule of law which conflicts with a rule previously announced by this Court or another district, or the application of a rule of law to produce a different result in a case which involves substantially the same facts. Id, at 734; Mancini v. State, 312 So.2d 732, 733 (FLA. 1975). Further, there can be no direct conflict when the cases cited for conflict are factually distinguishable from each other. Codie v. State, 313 So.2d 754 (FLA. 1975).

Applying these principles to the case at bar, there is no conflict here, since the surrounding circumstances are substantially different. In Jacksonville Medical Center v. Akers, the documents that the plaintiff had requested were the doctor's applications and renewal applications. Jacksonville

Medical Center objected, but the doctor had already complied and produced his application. The First District Court of Appeal held that, because the doctor had already complied with the discovery request, Jacksonville Medical Center could not in good faith claim that the same application was simultaneously immune from discovery. Jacksonville Medical Center v. Akers, 560 So.2d at 1316.

The case at bar presented no such situation, since the request for discovery of Respondent's application for privileges was never complied with, therefore making the analysis between the doctor in Jacksonville Medical Center and Respondent ill-founded. Further, part of the analysis in Jacksonville Medical Center deals with the fact that, there, the records requested were not exclusively records of the hospital's medical review committee within the meaning of the statutes prohibiting discovery, since the request was for the doctor's applications which had been generated by the doctor and submitted by him to the hospital for its consideration. This, again, is not analogous to the present case, since here the records requested of Respondent also were to include a copy of the delineation of Respondent's privileges.

Thus, using the rationale enumerated in Jacksonville Medical Center, this information would be privileged, since this documentation had been generated by the medical review committee and not by the Respondent.

JURISDICTIONAL POINT II

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEALS IS CONSISTENT WITH THE SECOND DISTRICT COURT OF APPEAL'S DECISION ON THE SAME POINT OF LAW IN TARPON SPRINGS GENERAL HOSPITAL V. HUDAK, 556 So.2d 831 (FLA. 2nd DCA 1990), AND BURTON V. BECKER, 516 So.2d 283 (FLA. 2nd DCA 1987).

In Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (FLA. 2nd DCA 1990), the Second District Court of Appeals quashed the trial court's order for production of the doctor's application for staff privileges and any renewal applications. In so doing, the court held that the privileges granted by Florida Statutes Section 395.011, and 766.101, applied, and that a Petition for Certiorari was appropriate in order to remedy situations in which hospitals have been wrongly ordered to disclose statutorily privileged documents.

These facts are substantially similar to the case at bar, hence, the Fourth District Court of Appeals was correct in choosing to follow the policy behind confidentiality of records and deliberations of medical review committees, and the construction of the Statutes in Tarpon Springs General Hospital v. Hudak.

In Burton v. Becker, 516 So.2d 283 (FLA. 2nd DCA 1987), the court held that records of a medical peer review committee were confidential and exempt from discovery, even if records which were otherwise not privileged had been relied upon by the committee. In so reasoning, the court stated that "[o]ur Supreme

Court has stated that the confidentiality of medical peer review committees outweighs the need of civil litigants to discovery even when the information is essential to their causes." Id at 285.

Therefore, while Petitioner asserts that the Second and Fourth District Courts of Appeal are in conflict with a decision of the First District Court of Appeals, there is not an actual conflict at all. The Fourth and Second Districts uphold, in a consistent manner, the confidentiality of medical peer review committee records. The First District in Jacksonville Medical Center found that the information requested there was not privileged, due to circumstances different to the cases in the Fourth and Second Districts. Thus, since the cases are factually distinguishable, there is not conflict for the purpose of jurisdiction.

JURISDICTIONAL POINT III

PUBLIC POLICY MANDATES THAT JURISDICTION BE DENIED SINCE THE DISTRICT COURTS WERE DESIGNED TO HAVE FINAL APPELLATE JURISDICTION.

The seminal Supreme Court decision of Ansin v. Thurston, 101 So.2d 808 (FLA. 1958), has held that the district courts of appeal were never intended to be intermediate courts. In the often quoted words of Justice Drew,

> "[t]o fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Id. at 810. See also Sanchez v. Wimpey, 409 So.2d 20 (FLA. 1982); Jenkins v. State, 385 So.2d 1356 (FLA. 1980).

Therefore to hold otherwise, simply because Petitioner would prefer a decision similar to one previously given under an entirely different set of circumstances, would be an abuse of discretion. The Fourth District Court of Appeals chose to follow the construction placed upon Florida Statute Section 766.101, and 395.011 in Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (FLA. 2nd DCA 1980), since the circumstances were substantially similar. Petitioner should not be permitted to challenge this reasoning, in accordance with the policy enunciated in Ansin v. Thurston, and all the cases that follow.

CONCLUSION

Jurisdiction must be denied. There is no direct and express conflict on the same point of law between the First District and the Fourth District. Further, public policy and established case law require that, in instances such as this, the district courts have final appellate jurisdiction.

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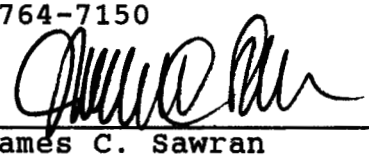
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Richard Roselli, Esquire, Attorney for Petitioner, KRUPNICK, CAMPBELL, MALONE AND ROSELLI, P.A., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, Florida 33316 this 15th day of February, 1991.

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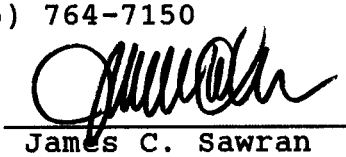
By: 

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