THE SUPREME COURT
OF THE STATE OF FLORIDA

Case No.: SC03-286

JACKSON COUNTY HOSPITAL CORPORATION d/b/a JACKSON HOSPITAL and BAY ANESTHESIA, INC.

Defendants/Appellants,

vs.

DARLENE ALDRICH AND MICHAEL CONIGLIO AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF WILLIAM E. RODDENBERRY, JR., ON BEHALF OF THE ESTATE AND SURVIVORS,

Plaintiffs/Appellees.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
Lower Tribunal Case Numbers: 1D01-4079, 1D01-4042
Lower Tribunal Filing Date: 2/17/03

APPELLANT BAY ANESTHESIA, INC.'S REPLY BRIEF AND APPENDIX

V. JAMES FACCIOLO
Florida Bar No. 151111
HAYDEN, FACCIOLO & VAUGHN, P.A.
1551 South 14th Street, Suite B
Amelia Island, Florida 32034
(904) 491-7647
Fax (904) 491-7678
Attorneys for Appellant Bay Anesthesia, Inc.

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I. ARGUMENT

A. The Standard of Liability set forth in §768.13(2)(b) Florida Statutes (1988) Should Have Been Applied to This Defendant.

The nurse anesthetist, Teresa Cruce, was an employee of the hospital within the meaning of this statute, given the circumstances of this case. Appellee's argument to the contrary relies upon the contract between Jackson County Hospital Corporation and Bay Anesthesia, Inc. which characterizes their relationship as that of "independent contractor". To that argument Bay Anesthesia makes the following rebuttals.

First, this Court has made it clear that when an issue of employer/employee status arises within the context of entitlement to worker's compensation, a written statement that the claimant's work was "independent of and in no way under the control or direction" of the respondent business owner was not determinative. Instead the Court said "such status depends not on the statements of the parties but upon all of the circumstances of their dealings with each other." Cantor v. Cochran, 184 So.2d 173 (Fla. 1966) at page 174.

In Keith v. News and Sun Sentinal Company, 667 So.2d 167 (Fla. 1995) this Court said:

> "where . . . the actual practice of the parties, belie the creation of the status agreed to by the parties, the actual practice and relationship of the parties should control."
>
> *Id.* at page 171.

In Robinson v. Linzer, 758 So.2d 1163 (Fla. 4th DCA 2000) the Court was asked to address the issue of whether an independent contractor, Coastal Physician Services and their emergency room physician qualified for sovereign immunity based on their contract with the sovereign hospital authority. The contract with the hospital authority provided that the hospital authority would exercise control over the conduct of the physician within the emergency room. The Court looked to the actual facts of the relationship and determined that the emergency room physician and Coastal Physician Services were independent contractors.

Furthermore, that portion of the Jackson Hospital/Bay Anesthesia contract quoted by the appellee overlooks another portion of the contract which is inconsistent with the independent contractor status. That portion of the contract says the following:

> "The corporation employs, or has as shareholders, one or more Certified Registered Nurse Anesthetists (all CRNAs providing services under this Agreement are collectively sometimes referred to hereafter as 'Anesthetists') who are willing to accept the responsibility of providing anesthesia services to Hospital patients in the Department in accordance with recognized medical standards, the by-laws of the medical staff of the Hospital ('medical staff'), the by-laws of the Hospital, and the terms and conditions set forth in this agreement."
>
> (Plaintiff's Exhibit 65 at page 2) (Appendix at Tab 2)

The definition section of the medical staff by-laws identifies the "anesthetist" under the definition of "allied professional personnel". In the medical staff by-laws at paragraph 5.1(k), the by-laws provide:

> "Scope of Activities. The Board shall determine the scope of activities which each Allied Health Professional may undertake. Such determination shall be furnished in writing to the Allied Health Professional and shall be final and non-appealable, except as specifically and especially provided in the by-laws, rules and regulations."
>
> (Appendix to Bay Anesthesia, Inc.'s Reply Brief at page A-7).

That document then leads directly to the Jackson Hospital CRNA protocol which provides that the CRNA "based on history, physical assessment, and supplemental laboratory results, [shall] determine with the consent of the responsible physician, the appropriate type of anesthesia within the framework of the protocol." (Emphasis added.) (Plaintiff's Exhibit 48.) In reading these documents together, it is clear that neither the hospital nor Bay Anesthesia presumed to negate the statutory requirement of physician oversight of the performance of the CRNA.

In providing care to Mr. Roddenberry, the emergency room physician (a hospital employee) did more than exercise general oversight over the CRNA. He summoned the CRNA and directed her to intubate the patient. He chose the anesthetic to be used in preparing the patient. The critical choice to paralyze the patient as part of the intubation process was his. He directed her to use the oral airway routing,

though she would have preferred the nasal route. He independently confirmed that the patient's lungs were being ventilated, in addition to confirmation by the CRNA, Ms. Cruce, and others. He did everything but place his hands on the tube as Ms. Cruce was passing it down the airway.

The Appellee discusses both Fortson v. McNamara, 508 So.2d 35 (Fla. 2nd DCA 1987) (where a surgeon was determined not to be vicariously liable for a CRNA) and Vargas v. Dulzaides, 520 So.2d 306 (Fla. 3rd DCA 1988) (where a heart surgeon was vicariously liable for the negligence of the heart pump operator). Appellee attempts to distinguish these cases based upon the fact that the CRNA was "certified" and the profusionist was not. But that was not the determinative distinction. What was determinative was that the court in Fortson found that the duties of the surgeon and CRNA were not "inextricably bound". *Id*. at 37. The court in Vargas noted that the "profusionist's responsibilities were 'inextricably bound' to Dr. Vargas". *Id*. at 308. Furthermore, in Fortson, the Court relied upon Hughes v. St. Paul Fire and Marine Insurance Company, 401 So.2d 448 (La. Ct. App. 1981) where it was noted that "the court found that because the surgeon did not actually supervise or control the acts of the nurse anesthetist, the captain of the ship doctrine was inapplicable." Fortson at 37. In the instant case, the act of intubating Mr. Roddenberry was an essential element of the emergency room physician's planned resuscitation and

stabilization. Ms. Cruce was, in fact, an extension of the emergency room physician, acting upon his order to intubate the patient, and using his methods. He did indeed exercise both supervision and control. Since Dr. Griffin was an extension of the hospital, Ms. Cruce should be regarded as an employee of the hospital when acting for Dr. Griffin and under his direction. At the very least Teresa Cruce was a borrowed servant as that term is commonly defined. In Burton v. Diamond Sand and Stone Company, 327 So.2d 95 (Fla. 1976) this Court quoted with approval 21 Fla. Jurisprudence 2d, Master and Servant, as follows:

> "It is competent for an employer to loan out one of his servants to a third party. If that third party has complete control over the servant and directs his conduct at all times, he will be responsible for the servant's derelictions even though the original employer is still paying his salary."
>
> *Id*. at 96.

Bay Anesthesia submits that Teresa Cruce, being at least a borrowed servant, was an employee within the meaning of the statute.

In the worker's compensation context, the question frequently arises as to whether an employee of an independent contractor is a "statutory employee" for purposes of either entitlement to compensation or limitation upon right to pursue a common law remedy. In that same context the question sometimes arises as to whether an individual is an employee or an independent contractor. In those cases the

courts have held that the test for what constitutes independent service lies in the control exercised, the decisive question being who has the right to direct what shall be done and when, where and how it shall be done. *See* Roberts v. Gator Freightways, Inc., 538 So.2d 55 (Fla. 1st DCA 1989).

B. CRNA Cruce was a "Person Licensed to Practice Medicine"

The Appellee argues for a restrictive interpretation of the phrase, person licensed to practice medicine. Not only is the appellee's interpretation contrary to the "ordinary meaning" of those words in common parlance; the interpretation is at odds with other legislative language that recognizes that licensed health care workers, other than physicians, provide "medical care". For instance, Florida Statutes §458.347(2)(e) defines a "physician assistant" as "a person . . . licensed to perform medical services . . . " In Florida Statutes §768.135 the legislature used the term to apply to chiropractors, podiatrists and dentists. Florida Statutes §381.008(6)(b) refers to visitors authorized to visit migrant labor camps as persons including "a physician or other health care provider whose sole purpose is to provide medical care or medical information." Clearly the legislature recognizes that persons other than physicians provide medical care. Florida Statute §467.016 recognizes that a certified nurse midwife is a person licensed to provide medical care.

In point of fact, the term has no precise meaning, nor did the legislature choose to define it or to limit its breadth by qualifying references in §768.13. Consequently, if it has an acceptable meaning consistent with the legislative intent, that is the meaning that it should be given. Where the legislative intent was to extend the protection of the statute to all health care providers engaged in the emergency room in an effort to stabilize a critically ill, unstable patient, then the term is certainly broad enough to include a certified nurse anesthetist. Appellant argues that there is no ambiguity in the meaning of "employee" or the term "licensed to practice medicine." Neither term is precise and both require reference to the legislatures intent. Furthermore, the meanings or definitions argued by the Appellees are not only inconsistent with the legislative intent, they raise the specter of unconstitutionality which, if at all possible, should be avoided.

C. The Constitutional Infirmity of the Statute as Interpreted by the Lower Court

In arguing that the statute does not violate the equal protection clause of the Florida or the Federal Constitution the appellee sites Hechtman v. Nations Title Insurance Company of New York, 840 So.2d 993 (Fla. 2003). That case in fact supports Bay Anesthesia's position. There the court, in order to support the statute against an equal protection challenge, articulated a rational reason upon which the

legislature could have supported its distinction. In the instant case, the First District Court of Appeals never did that. Furthermore, it is irrational to distinguish between a contract nurse and one paid directly by the hospital, or a contract physician assistant and one paid directly by the hospital. The staffing of emergency rooms, including the provision of physicians, physician assistants and nurse practitioners to hospitals, especially rural hospitals, through intermediate contracting companies is not peculiar to Jackson County Hospital. *See* Robinson v. Linzer, *supra*.

D. Apportionment of Fault

Pursuant to Florida Statute §768.81 the instant case does not represent an instance where a medical provider aggravates an injury inflicted by an original tortfeasor. *See* Stuart v. Hertz Corp., 351 So.2d 703 (Fla. 1977). Instead it is an instance where the claim of negligence against the health care provider is that they failed to save a patient with an injury almost certain to cause death absent successful medical intervention. That is a very different case than the cases relied upon by the Appellee.

The Appellee cites Association for Retarded Citizens – Volusia, 741 So.2d 520 (Fla. 5th DCA 1999), but that case is distinguishable because the record contained no evidence that the failure to bring the decedent to a medical care facility would have

altered the outcome. The court specifically reviewed the proffer and said: "This testimony does not establish that negligent medical care contributed to Nathan's death." Consequently the court determined that the initial tortfeasor was not entitled to raise the subsequent medical care as a defense under Florida Statute §768.81. The facts of this case are much closer to those in Washewich v. LeFave, 248 So.2d 670 (Fla. 4th DCA 1971). In that automobile case, the plaintiff was thrown from her car in an initial motor vehicle accident. Subsequently the defendant there ran into the plaintiff's body. The court found that the two independent negligent events had merged to produce one indivisible injury and that the subsequent tortfeasor (defendant) would be responsible for the entire injury. The court treated the two tortfeasors as jointly and severally liable. The traditional notions of joint and several liability do apply to situations of successive torts where they merge to form a single injury.

Albertsons, Inc. v. Adams, 473 So.2d 231 (Fla. 2nd DCA 1985), *rev. denied*, 482 So.2d 347 (Fla. 1986) is also inapposite. In that case, a pharmacist attempted to bring an action for contribution by way of a third party complaint alleging in the alternative that the prescribing physician prescribed the improper medication or that the prescribing physician failed to timely discover that the patient was taking the wrong prescription. The court disallowed the contribution action holding that if the prescription was wrong because of the physician then the pharmacist had an absolute

defense to the plaintiff's claim. If on the other hand the physician was late in discovering the wrong prescription that would at most have been an enhancement of the initial injury. Under the doctrine of Stuart v. Hertz, *supra*, the pharmacist would be liable for having provided the opportunity for the malpractice. The court in Albertson did however say:

> "Joint and several liability exists where two or more wrongdoers negligently contribute to the injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable."

The court found that that situation did not apply in the Albertson case. It does apply in the instant case.

Similarly the case of Touche Ross & Company v. Sun Bank of Riverside, 366 So.2d 465 (Fla. 3rd DCA) *cert. denied*, 376 So.2d 350 (Fla. 1979) is distinguishable. Again, that case was an attempt to claim contribution by the accounting firm which was sued for failing to detect fraudulent transfers by the hospital's (plaintiff) chief executive officer. The accounting firm then sought to bring a third party complaint for contribution against the bank on an allegation that the bank was an intentional participant in the fraud. In this commercial setting the Supreme Court held that the claim for contribution could not be maintained because it did not "arise out of the same transaction or series of transactions. The court explained:

> "it is readily apparent that Touche Ross contends that the banks are responsible for having permitted the dollar lost through negotiation in honoring of the involved checks, while it patently appears that Touche Ross is exposed to responsibility not as a result of permitting the aforesaid loss and/or even causing the aforesaid loss but in failing to discover the aforesaid loss."

While Bay Anesthesia is precluded from seeking a reversal on the basis of the insufficiency of the evidence to establish causation, it is not precluded from bringing to this court's attention the severity of the injury to William Roddenberry, or the testimony in the record concerning that severity or the finding of the First District Court of Appeals that the injury was sufficiently severe that it found that the acts or omissions charged against Dr. Griffin could not be deemed a legal cause of Mr. Roddenberry's death. For purposes of determining whether or not Florida Statute §768.81 should have been available to evaluate Mr. Roddenberry's negligence in causing his burn injuries, the severity of his injuries and the likelihood to produce death is a salient fact.

E. The Exclusion of the Testimony of Dr. David Mozingo

But for the fact that the trial court provided no forewarning that it would impose a limitation on Bay Anesthesia's properly disclosed experts, the appellee's arguments in this instance are well taken. However, relying on the pretrial rulings, Bay Anesthesia structured the presentation of its case. That structure included having Dr. David Mozingo, chief of the burn section of the Shands Hospital, Gainesville, Florida, testify concerning the survivability of Mr. Roddenberry's burns were he transported to the University of Florida for treatment. The issue of whether this patient was savable even with the superior resources and facilities of the University of Florida burn center is not the same as the issue of what caused his death at Jackson County Hospital. Nor was that testimony of *deminimus* value to Bay Anesthesia's defense. Dr. Mozingo was the only witness offered by Bay Anesthesia to provide such testimony. While it is true that Dr. Tompkins provided similar testimony for Jackson County Hospital, Bay Anesthesia should have been permitted to put on a full defense to the claims against it.

CONCLUSION

The Court should reverse the lower court, answer the certified question in the affirmative, order a new trial and hold that the negligence of the decedent can be raised as an affirmative defense under §768.81, Florida Statutes.

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V. JAMES FACCIOLO
Florida Bar No. 151111
HAYDEN, FACCIOLO & VAUGHN, P.A.
1551 South 14th Street, Suite B
Amelia Island, Florida 32034
(904) 491-7647
Fax (904) 491-7678
Attorneys for Appellant Bay Anesthesia, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant Bay Anesthesia, Inc,'s Reply Brief has been furnished, by U.S. Mail, to DONALD M. HINKLE, Esq., Fonvielle & Foran, Co-Counsel for Plaintiff's, 1545 Raymond Diehl Road, Suite 150, Tallahassee, Florida 32308, LOUIS K. ROSENBLOUM, Esq., Law Offices of Louis K. Rosenbloum , P.A., Co-Counsel for Plaintiffs, 4300 Bayou Boulevard, Suite 36, Pensacola, Florida 32503; and G. BRUCE HILL, Esq., Hill, Adams, Hall & Schieffelin, Post Office Box 1090, Winter Park, Florida 32790-1090, attorney for Jackson County Hospital Corporation, by U.S. Mail, this _____ of May, 2003.

_____

V. JAMES FACCIOLO
Florida Bar No. 151111
HAYDEN, FACCIOLO & VAUGHN, P.A.
1551 South 14th Street, Suite B
Amelia Island, Florida 32034
(904) 491-7647
Fax (904) 491-7678
Attorneys for Appellant Bay Anesthesia, Inc.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a Times New Roman 14-point font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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V. JAMES FACCIOLO
Florida Bar No. 151111
HAYDEN, FACCIOLO & VAUGHN, P.A.
1551 South 14th Street, Suite B
Amelia Island, Florida 32034
(904) 491-7647
Fax (904) 491-7678
Attorneys for Appellant Bay Anesthesia, Inc.

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_____

V. JAMES FACCIOLO
Florida Bar No. 151111
HAYDEN, FACCIOLO & VAUGHN, P.A.
1551 South 14th Street, Suite B
Amelia Island, Florida 32034
(904) 491-7647
Fax (904) 491-7678
Attorneys for Appellant Bay Anesthesia, Inc.