SUPREME COURT OF FLORIDA
Case No.: SC05-1864

BRANDON REGIONAL HOSPITAL,

Petitioner,

vs.

MARIA MURRAY and
DANIEL S. MURRAY, et. al.

Respondents.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NO. 2D05-937

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is the jurisdictional brief of the petitioner, Brandon Regional Hospital (the "Hospital"), co-defendant below, seeking to engage this court's discretionary review of an opinion by the Second District Court of Appeal reported at *Brandon Regional Hospital v. Murray,* 910 So.2d 880 (Fla. 2d DCA 2005) (conformed copy appended). Because the decision in *Murray* expressly and directly conflicts with decisions of other district courts of appeal on a point of law of wide application in Florida, this Court is respectfully requested to accept jurisdiction to resolve the conflict. *See* Art. V, § 3(b)(3), Fla. Const. (1980).

In this case, the plaintiffs, Maria and Daniel Murray, have sued the Hospital and other healthcare providers for medical negligence arising from events alleged to have occurred on or about February 26, 2001. Accordingly, this is a medical malpractice action against a licensed hospital facility under Chapter 766, Florida Statutes (2001).

On January 24, 2005, the trial court denied a motion by the Hospital for entry of a protective order concerning discovery of a Credentials Privilege List prepared by the Hospital's credentials committee[1] that reflects

[1] A hospital credentials review committee is a peer review committee for purpose of the peer review protections of sections 395.0191(8) and 766.101(5). *Cruger v. Love,* 599 So.2d 111, 114 (Fla. 1992).

obstetrical privileges the Hospital granted to Dr. Wayne Blocker, a co-defendant. *Murray*, at 880. To support its motion, the Hospital relied on the privilege against discovery and use in litigation of peer review committee records, which privilege is codified in sections 395.0191(8) and 766.101(5), Florida Statutes (2001). The credentials list identified the surgical privileges requested by Dr. Blocker and those privileges approved or denied by the Hospital's credentials committee. *Id*. at 881. It is signed by Dr. Blocker and members of the Hospital's credentials committee. *Id*. Pursuant to *Bayfront Medical Center, Inc. v. State, Agency for Healthcare Administration*, 741 So.2d 1226 (Fla. 2d DCA 1999), the trial court ruled that a hospital privileges list is not protected from disclosure. *Id*. This ruling prompted the Hospital's pursuit of certiorari relief in the Second District.

On August 17, 2005, the Second District issued the opinion at bar denying the petition for certiorari relief (see attached). Following issuance of the opinion, the Hospital timely filed a motion to certify conflict or, alternatively, to certify the question as one of great public importance, which motion was denied. The Hospital then timely filed the notice to invoke the discretionary review jurisdiction of the Florida Supreme Court, and now seeks resolution of the conflict between *Murray* and decisions of other Florida district courts of appeal on the applicability and reach of the

discovery privilege provided in sections 395.0191(8) and 766.101(5), Florida Statutes, to hospital privilege lists such as the one in question.

SUMMARY OF ARGUMENT

The *Murray* decision creates a conflict among the district courts of this state on the discoverability and use of hospital privileges lists prepared by peer review and credentialing committees. As such, a corporate hospital defendant operating healthcare facilities throughout Florida is now subject to contradictory laws in our state. A hospital extending surgical privileges to physicians holding privileges at separate hospitals in different appellate jurisdictions is now subject to contradictory discovery laws. It is thus respectfully submitted that the legal issue is appropriate for resolution by the Florida Supreme Court in the exercise of its conflict jurisdiction. Accordingly, the Hospital respectfully requests that this Court certify the decision as being in conflict with reported decisions of the Third, Fourth, and Fifth District Courts of Appeal, or any one of them.

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 this court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

Conflict jurisdiction exists because the decision announced in *Murray*, if permitted to stand, will be out of harmony with decisions in the Third, Fourth, and Fifth District Courts of Appeal, "thereby generating confusion and instability among the precedents." *Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962). The decision in *Murray* that a hospital's credentials privilege list is not protected from disclosure expressly and directly conflicts with the Third District's decision in *Iglesias v. It's a Living, Inc.*, 782 So.2d 963 (Fla. 3d DCA 2001); the Fifth District's decisions in *Columbia Park Medical Center, Inc. v. Gibbs*, 723 So.2d 294 (Fla. 5th DCA 1998) ("*Gibbs I*"), and *Columbia Park Medical Center, Inc. v. Gibbs*, 728 So.2d 373 (Fla. 5th DCA 1999) ("*Gibbs II*"); and the Fourth District's decision in *Boca Raton Community Hospital v. Jones*, 584 So.2d 220 (Fla. 4th DCA 1991). Conflict with the above contrary authority is expressly recognized in *Murray's* use of "but see" citations. 910 So.2d at 881. "But see" signals that cited authority "clearly supports a proposition contrary to the main proposition," according to *The Bluebook – Uniform System of Citation* Rule 1.2 (18th ed. 2005). Although not specifically cited as contrary authority in *Murray*, conflict also exists with the Fourth District's decision in *Love v. Cruger*, 570 So.2d 362 (Fla. 4th DCA 1990).

The *Murray* opinion squarely conflicts with the Fifth District's holdings in the two *Columbia Park Medical Center v. Gibbs* decisions, in which the Fifth District held that delineations of staff privileges are positively privileged and protected from discovery in medical malpractice cases under sections 766.101(5) and 395.0191(8) . *Gibbs I*, 723 So.2d at 295; *Gibbs II*, 728 So.2d at 374. In *Gibbs I*, the Fifth District quashed a discovery order that compelled a member of the defendant hospital's Quality Management Department to produce "[a] copy of any documents provided to [decedent's treating physicians] outlining privileges currently held [by them] at defendant hospital." 723 So.2d at 295. Relying in part on the Second District's decision in *Hillsborough County Hospital Authority v. Lopez*, 678 So.2d 408 (Fla. 2d DCA 1996), *rev. denied*, 689 So.2d 1070 (Fla. 1997), the court held that the discovery privilege was not waived by virtue of the hospital's having distributed copies of the list of approved privileges to the applicant physician, noting that a hospital retains the right to assert the discovery privilege even though a co-defendant physician has provided the confidential documents to an adversary in litigation. *Gibbs I*, at 295. The *Gibbs* court further cited the Fourth District's *Love* and *Jones* decisions for the rule that "committee reports, including documentation that a physician was given staff privileges and delineating the privileges extended, are privileged from discovery." *Id*.

Further into the medical malpractice lawsuit, the plaintiff in *Gibbs* again attempted to secure the hospital privileges lists from the treating physicians directly, rather than from the hospital, and again the hospital objected. The Fifth District, as before, rebuffed the attempt to gain these documents, finding the plaintiff's requests to be "essentially the same" as before. The court thus again sustained the statutory privilege against disclosure of these surgical delineations, citing sections 766.101(5) and 395.0191(8), Florida Statutes. *Gibbs II*, 728 So.2d at 374.

Gibbs provides an exact reflection of the discovery process that unfolded here. As in *Gibbs*, the Murrays sued for medical negligence. Here, too, the Murrays were allowed to discover hospital credentialing committee records outlining hospital privileges extended to a staff physician. Here, too, the Murrays requested the privileges list from the staff physician, and the Hospital objected to disclosure. However, unlike in *Gibbs*, the Second District has allowed medical malpractice claimants to discover credentialing committee records that outline surgical privileges granted to a staff physician, agreeing that such credentials privilege list is "not protected from disclosure." *Murray*, at 881. There is a clear and express conflict on this point of law among the district courts in need of reconciling. *See also, Palms of Pasadena Hosp. v. Rutigliano*, 908 So.2d 594 (Fla. 5th DCA 2005) (sections 766.101(5) and 395.0191(8) create privilege that extends to the

identity of members of hospital credentials committee). The application of the peer review discovery privilege has produced a different result in cases involving substantially similar facts. *See Mancini v. State*, 312 So.2d 732 (Fla. 1975) (discussing contexts in which the Supreme Court's conflict jurisdiction in invoked). This Court's jurisdiction is properly invoked pursuant to Article V, section 3(b)(3) of the Florida Constitution.

Murray also conflicts with the Fourth District's *Love* and *Jones* decisions, which involved discovery orders arising in medical malpractice cases. In those cases, the Fourth District held that documents reflecting or delineating hospital privileges granted to a physician are encompassed by the discovery privilege and thus protected from disclosure in view of the confidentiality of investigations, proceedings and records of medical review committees and boards arising from public policy considerations and from sections 766.101 and 395.011, Florida Statutes. *Love*, 570 So.2d at 362-63; *Jones*, 584 So.2d at 221.

Similarly, in *Iglesias*, a premises liability case, the Third District quashed a discovery order requiring the hospitals where the defendant physician held staff privileges to produce the documents reflecting the status of those privileges. 782 So.2d at 963-64. The *Iglesias* court held that documents "created or considered" by a hospital peer review or credentialing committee, including documents reflecting the status of a

physician's hospital privileges, are protected from disclosure. According to the court, any document reflecting the status of a physician's hospital privileges "falls within the purview of this privilege as a matter of public policy." *Id*. at 964 (citing *Cruger v. Love*, 599 So.2d 111 (Fla. 1992); *Dade County Med. Ass'n. v. Hlis*, 372 So.2d 117 (Fla. 3d DCA 1979)). As in *Iglesias*, the Credentials Privilege List at bar is a document *created by* the Hospital's credentialing committee that reflects the status of Dr. Blocker's hospital privileges. In the Third District, under *Iglesias*, the Credentials Privilege List would fall within the discovery privilege. *Murray* would overrule *Iglesias* in the Third; *Love*, *Jones*, and *Cruger* in the Fourth; and *Gibbs I* and *II* in the Fifth if it were issued by those courts. *See Kyle*, at 887 (conflict jurisdiction arises if the challenged decision would have the effect of overruling an earlier decision, were the two cases decided by the same appellate court) (citing *Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958)).

The Court has made it clear in *Holly v. Auld*, 450 So.2d 217 (Fla. 1984), and *Cruger v. Love*, 599 So.2d 111 (Fla. 1992), that the discovery privilege extending to medical review committee records is to be broadly construed to encourage full candor in the review process. Courts do not create exemptions or exceptions to statutes when the Legislature has not seen fit to include them. *See Morgan v. State ex rel. Shevin*, 383 So.2d 744 (Fla. 4th DCA 1980). "In construing or interpreting the words of a statute it

should be borne in mind that the courts have no function of legislation, and seek only to ascertain the will of the Legislature. The courts may not imagine an intent and bend the letter of the act to that intent, much less . . . can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence." *Fine v. Moran*, 74 Fla. 417, 428, 77 So. 533, 536 (1917). Given the broad scope of the discovery privilege embodied in sections 766.101(5) and 395.0191(8) under *Cruger* and *Holly*, the Second District's *Murray* decision conflicts with and departs from decisional law and public policy.

The conflict has broad ramifications in medical malpractice cases. If, for example, an orthopaedic surgeon having surgical privileges at Lakeland Regional Hospital in Polk County and Florida Hospital-Celebration Health in Osceola County is sued for medical malpractice, then under *Murray*, a plaintiff suing in Lakeland, Florida is permitted to discover and use in litigation the surgeon's hospital privilege lists at both hospitals. A plaintiff suing the same orthopaedic surgeon in Kissimmee, Florida would have no such right of access under *Gibbs I* and *II*. Depending on where suit was filed, the physician and each of the hospitals extending surgical privileges to him are subject to inconsistent and discordant rules of law concerning

disclosure of this information. This is precisely the sort of scenario that this Court's conflict jurisdiction is intended to address.

CONCLUSION

For the foregoing reasons, the *Murray* decision conflicts with decisions of the Third, Fourth, and Fifth District Courts of Appeal, and this Court's conflict jurisdiction is properly engaged for further briefing on the merits.

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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