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

RESPONDENTS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondents, MARIA MURRAY and DANIEL S. MURRAY[1] adopt the facts stated in the decision of the Second District Court of Appeal as its Statement of the Case and Facts.[2]

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL ANNOUNCES A JURISDICTIONAL RULE OF LAW THAT EXPRESSLY AND DIRECTLY CONFLICTS WITH ANY OTHER REPORTED DECISION OF THIS COURT OR THE DISTRICT COURTS OF APPEAL SO AS TO AUTHORIZE EXERCISING THIS COURT'S DISCRETIONARY CONFLICT JURISDICTION?

SUMMARY OF THE ARGUMENT

In order for this Court to exercise the jurisdiction conferred pursuant to Art. V. Section 3(b)(3), Fla. Const., the decision under review must announce a rule of law which expressly and directly conflicts with the decision of another district court of appeal or this Court on the same question of law. See e.g., Jenkins v. State, 385 So.2d 1356 (Fla. 1980). This Court has subject matter jurisdiction to hear any petition arising from an opinion that establishes a point of law. The

[1] The Respondents, MARIA MURRAY and DANIEL S. MURRAY, will be referred to by name or as Plaintiffs. The Petitioner, BRANDON REGIONAL HOSPITAL, will be referred to as the Hospital or by name.

[2] In conformity with Florida Rule of Appellate Procedure 9.129(d), the decision of the Second District Court of Appeal is attached as an Appendix.

Florida Star v. B. J. F., 539 So.2d 286, 288 (Fla. 1988). However, the mere fact that the Court has subject matter jurisdiction to hear such a petition does not mean that the Court automatically has constitutional conflict jurisdiction to review a case. This Court refuses to exercise its discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court of appeal. Id. at 288, 289.

In this case, although there might be inconsistency, on a superficial level, between the result here and the cases cited to support conflict, the present decision did not announce any rule of law; it simply cited prior precedent which had done so. Moreover, when those other cases are analyzed closely, the documents which the respective courts found to be privileged clearly included those which were or might have been considered by a peer review committee during the course of its investigation. That simply is not the case here. In fact, the two Gibbs decisions from the Fifth District cited to support conflict, actually dealt with waiver of the statutory privilege, an issue not present in the present case. This Court should decline to exercise its discretionary constitutional jurisdiction.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL DID NOT ANNOUNCE A RULE OF LAW THAT EXPRESSLY AND DIRECTLY CONFLICTS WITH ANY OTHER REPORTED DECISION OF THIS COURT OR THE OTHER DISTRICT COURTS OF APPEAL SO AS TO AUTHORIZE EXERCISING THIS COURT'S DISCRETIONARY CONFLICT JURISDICTION.

Pursuant to Art. V, Sec. 3(b)(3), Fla. Const. (1980), this Court may only exercise its discretionary "conflict" jurisdiction when an appellate decision expressly and directly conflicts with the decision of another district court of appeal, or this Court, on the same question of law. That conflict must be expressed and contained within the written rule announced by the Court. See, Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Reaves v. State, 485 So.2d 829 (Fla. 1986); Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 880 (Fla. 1986). These cases all stand for the proposition that an express and direct conflict on the same point of law must exist before this Court may exercise its discretion to accept jurisdiction. The only facts that are relevant to this Court's decision to accept or reject a petition based upon decisional conflict are the facts within the four corners of the decisions allegedly in conflict. See, Reaves v. State, 485 So.2d 829, 830, n.3 (Fla. 1986); Hardee v. State, 534 So.2d 706, 707 (Fla. 1988).

From a subject matter jurisdiction standpoint, this Court has subject matter jurisdiction to hear any petition arising from an opinion that establishes a point of law. The Florida Star v. B. J. F, 539 So.2d 286, 288 (Fla. 1988). However, the analysis does not end with that broad statement of this Court's subject matter jurisdiction. Rather, this Court has recognized that it operates within the intent of the Constitution's framers, and, in doing so, refuses to exercise its discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court of appeal. Id. at 288, 289. In short, while this Court's subject matter jurisdiction in conflict cases is necessarily very broad, its discretion to exercise it is more narrowly circumscribed by what the voters of the State have commanded through the amendment to Article V of the Florida Constitution. Id. at 288.

In the present case, the Second District determined that the list which reflected Dr. Blocker's obstetrical privileges granted him by the hospital is not protected from disclosure, citing its decision in Bayfront Medical Center, Inc. v. State Agency for Health Care Administration, 741 So.2d 1226 (Fla. 2nd DCA 1999). The court's opinion in this case did not announce any rule of law. It simply cited to its decision in Bayfront, as the authority for the present decision.

In Bayfront, the Second District, citing to this Court's decisions in Holly v. Auld, 457 So.2d 217 (Fla. 1984) and Cruger v. Love, 599 So.2d 111 (Fla. 1992),

stated that the records of the investigative portion of a peer review panel are privileged from disclosure by virtue of Fla. Stat. §395.0193(7) and §766.101(5). The court noted that the courts of the State had consistently construed the privilege and confidentiality of "peer review" records in the broadest manner to protect the integrity of the "peer review" process. The court contrasted the documents considered during the course of such an investigation which were absolutely privileged, to a report of the results of such an investigation. The court explained that, as contrasted to the actual records of the investigative procedures of the "peer review" panel, such a report was not clothed with the same privilege.

Bayfront is consistent with this Court's decision in Cruger v. Love, 599 So.2d 111 (Fla. 1992). Construing the statutory privileges outlined in Fla. Stat. §766.101(5) and §395.011(9), this Court stated:

> We hold that the privilege provided by §766.101(5) and §395.011(9), Fla. Stat., protects any document considered by the committee or board as part of its decision-making process. The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee or board during peer review or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee. Physicians who fear that information provided in an application might some day be used against them by a third party will be reluctant to fully detail matters that the committee should consider. Accordingly, we find that a physician's application for

> staff privileges is a record of the committee or board for purposes of the statutory privilege. (Emphasis supplied) Id. at 114

In the present case, the Respondents concede that upon first glance, the results in the present case and Bayfront on the one hand and the decisions in Iglesias v. It's A Living, Inc., 782 So.2d 983 (Fla. 3d DCA 2001); Columbia Park Medical Center, Inc. v. Gibbs, 723 So.2d 294 (Fla. 5th DCA 1998); Columbia Park Medical Center, Inc. v. Gibbs, 728 So.2d 373 (Fla. 5th DCA 1999); and Boca Raton Community Hospital v. Jones, 584 So.2d 220 (Fla. 4th DCA 1991) on the other, have produced apparently inconsistent results. Most respectfully, we believe that such apparent inconsistency is the result of imprecise language and not as a result of a true Constitutional conflict which announces diametrically opposed rules of law.

For instance, in Iglesias, the decision merely states that during discovery, the defendant served subpoenas duces tecum on every hospital where Iglesias then had, or had in the past, staff privileges. The decision does not identify exactly what documents were requested, nor does it clarify whether such documents were of the type considered by the committee or board as part of its decision-making process. Similarly, in Boca Raton Community Hospital v. Jones, supra, the Fourth District identified a variety of documents to which it concluded that a blanket privilege applied. Many of those documents, at least on their face, would seem to

be of the type that would be considered by a peer review committee when making its determination. The court did not discuss the other documentation referred to which indicated that the doctor had been given staff privileges and one can only assume that the court there determined that such documents contained evidence which was part of the decision-making process of the hospital.

In Columbia Park Medical Center, Inc. v. Gibbs, 723 So.2d 294 (Fla. 5th DCA 1998), the issue addressed in the case was waiver. The plaintiff requested a copy of any documents provided to Drs. Arnold Einhorn and Lewis Kantounis outlining privileges then currently held at the hospital. The hospital objected, raising the peer review privilege, and the trial court had overruled the objection on the ground that the materials requested were no longer privileged when they were given to doctors who were not on the committee. The plaintiff further contended that the documents lost their privileged status because they were intended to be made public and were made available to the individuals who were not members of the peer review committee. Citing to the Second District's decision in Hillsborough County Hospital Authority v. Lopez, 678 So.2d 408 (Fla. 2nd DCA 1996), rev. den. 689 So.2d 1070 (Fla. 1997), the court determined that the hospital's disclosure of medical review committee documents to physicians not on the committee did not waive the limited immunity of that record from discovery or introduction into evidence in a civil case. The Fifth District determined that there

had been no such waiver. In the second Gibbs, decision, Columbia Park Medical Center, Inc. v. Gibbs, 728 So.2d 373 (Fla. 5th DCA 1999), the documents requested were essentially the same as the court had considered in Gibbs I. The court stated that for that reason, if not for any other, the trial court had erred in ordering the production of those documents.

In short, the Gibbs decisions address waiver, an issue not present in the present case and certainly not present in the decision of the Second District Court of Appeal. While there may be an apparent inconsistency on the surface, when the issues that were addressed in the case are actually analyzed, the present decision of the Second District and those cited in support of exercising this Court's discretionary conflict jurisdiction do not disclose an express and direct conflict on the same question of law. Most respectfully, this Court should decline to exercise its discretion and review should be denied.

CONCLUSION

The decision of the Second District Court of Appeal does not announce a rule of law that expressly and directly conflict with any other existing decision from any other district court of appeal or this Court. As such, there is no basis for this Court to exercise its constitutional discretion, and the Petition for Review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to Wm. Jere Tolton, III, Esq., 113 S. Armenia Ave., Tampa, FL 33609; Louis LaCava, Esq., 101 E. Kennedy Blvd., #2500, Tampa, FL 33602; and Christopher Schulte, Esq., 100 S. Ashley Dr., #600, Tampa, FL 33602, on _____.

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CERTIFICATE OF COMPLIANCE

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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