

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 72,754 SID J. WHITE

SEP 19 1988

CLERK, SUPREME COURT

By _____
Deputy Clerk

SOPHIE GERSHUNY,

Petitioner,

vs.

(FOURTH DCA CASE NO. 87-0918)

MARTIN McFALL MESSENGER
ANESTHESIA PROFESSIONAL
ASSOCIATION,

Respondent.
_____ /

ON CERTIFIED QUESTIONS FROM THE FOURTH DISTRICT
COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

CERTIFIED QUESTIONS

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.

Respondent argues throughout its brief that there is no evidence in the record that the nurse who administered the anesthesia in this case was acting independently and not under the direct supervision of a physician. If there is anything lacking in this record it is because the respondent, which was the appellant in the Fourth District, did not include the trial transcript when it took this appeal to the Fourth District. The lack of supervision of a physician is not being raised for the first time on this appeal. Appellee's brief in the Fourth District included the following in the statement of the case and facts:

There is no transcript of the trial and accordingly no evidence before this court as to what occurred at trial. There is a transcript of the hearing on post trial motions on December 12, 1986, and at that hearing one of the lawyers pointed out to the court that there was no physician anesthesiologist attending this patient. It was a nurse/anesthetist administering the anesthetic who was an employee of defendant Anesthesia Professional Associates. (R 15-16).

Appellee did not take issue with this before the Fourth District.

If a physician had been involved in the negligence in this case, the plaintiff would obviously have sued that physician. This was not some scheme contrived to avoid paying attorney's fees if plaintiff lost the suit. Plaintiff assumed she would prevail on her suit (and she did against another defendant). She would certainly not have sued a nurse alone if a physician had also been responsible for the nurse's negligence.

The other problem with respondent's argument is that it refuses to recognize that respondent is a professional association, which is in fact a corporation. It is not, as respondent says on page 5: "... nothing more than a group of physicians"

Respondent argues on page 5 that where hospitals are sued for the negligence of nurses, attorney's fees are recoverable. What respondent apparently fails to understand is that a hospital is a health care provider specifically named in Section 768.56, Florida Statutes (1983), as being authorized to recover attorney's fees if it is a prevailing party in a malpractice case. A mere corporation clearly is not.

Respondent also argues that the "collective group" of physicians comprising the association is liable for the nurse's negligence, when in fact respondent knows this is not true. It is only the professional association, a corporation, which is liable, and the individual physicians who are shareholders of that corporation are no more liable than the shareholders of Florida Power & Light are liable when Florida Power & Light is negligent. Section 621.07, Florida Statutes (1979).

CONCLUSION

The opinion of the Fourth District should be reversed.

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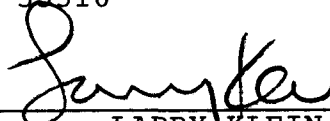
CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing has been furnished, by mail, this 16TH day of September, 1988, to:

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