

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

Case No.: 3D2024-1689
LT Case No.: 2021-007895-CA-01 (09)

BAPTIST HOSPITAL OF
MIAMI, INC.,

Petitioner/Defendant,

vs.

GIULIA LLAURO, a minor, by
and through her parents and
naturals guardians, YVONNE
LLAURO, and ARMANDO
LLAURO, and YVONNE
LLAURO, and ARMANDO
LLAURO, individually,

Respondents/Plaintiffs.

From the Circuit Court of the 11th Judicial Circuit in and for
Miami-Dade County, Florida

**PETITIONER'S/DEFENDANT'S REPLY TO
RESPONDENTS'/PLAINTIFFS' RESPONSE TO
PETITIONER'S/DEFENDANT'S PETITION FOR WRIT OF
CERTIORARI**

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ARGUMENT IN REPLY

A. BAPTIST HOSPITAL has established irreparable injury.

In arguing that this Court lacks jurisdiction, Plaintiffs rely upon case law which is patently inapposite. In support of their contention that the challenged order is not reviewable by certiorari, Plaintiffs cite to *Riano v. Heritage Corp.*, 665 So. 2d 1142 (Fla. 3d DCA 1996); *Simpson v. Broward Cty.*, 241 So. 2d 193 (Fla. 4th DCA 1970); *Siegel v. Abramowitz*, 309 So. 2d 234 (Fla. 4th DCA 1975); *Ali Invs., Inc. v. First Am. Title Ins.*, 929 So. 2d 1154 (Fla. 5th DCA 2006); *Patterson v. Whitehead*, 360 So. 2d 1136 (Fla. 1st DCA 1978); *Sardinas v. Lagares*, 805 So. 2d 1024 (Fla. 3d DCA 2001); and *Bill Kasper Constr. Co. v. Morrison*, 93 So. 3d 1061 (Fla. 5th DCA 2012). **None** of the aforementioned cases sought relief from orders improperly applying the doctrine of judicial estoppel. Rather, all the cases cited by Plaintiffs sought relief from **evidentiary** rulings.

For instance, *Riano* involved an order granting a motion in limine to preclude testimony regarding insurance coverage. 665 So. 2d at 1143. *Simpson* involved a pretrial order precluding the admission of certain sound recordings or other evidence concerning

noise from aircraft using an easement. 241 So. 2d at 194. *Siegel* likewise involved an order precluding the admission of certain evidence. 309 So. 2d at 235. *Ali Invs., Inc.* involved a sanctions order limiting who the petitioner could call as a witness at trial. 929 So. 2d at 1154. *Patterson* involved “a pre-trial order forbidding the mention at trial of the taking and testing of blood samples from petitioners’ decedents.” 360 So. 2d at 1136. *Sardinas* involved an order striking an independent medical examiner. 805 So. 2d at 1025. Finally, *Bill Kasper Constr. Co.* involved an order striking an amended witness list. 93 So. 3d at 1062.

The holdings in the cases relied upon by Plaintiffs accord with the principle that certiorari relief generally cannot be afforded from **evidentiary** rulings because a plenary appeal affords an adequate remedy from such orders. Stated differently, the harm caused by the wrongful exclusion of evidence can be cured by affording a new trial. Such is **not** the case with an order wrongfully applying the doctrine of judicial estoppel, as is supported by the ample case law cited by BAPTIST HOSPITAL in the petition for writ of certiorari, to wit: *State, Dep't of Transp. v. Gary*, 513 So. 2d 1338 (Fla. 1st DCA 1987); *Lathan Constr. Corp. v. McDaniel Grading*, 695 So. 2d 354

(Fla. 5th DCA 1996); *Shalimar Pointe Owners Ass'n v. JMJ/Bayclub, Inc.*, 745 So. 2d 1129 (Fla.1st DCA 1999); *Westerbeke Corp. v. Atherton*, 224 So. 3d 816 (Fla. 2d DCA 2017); and *Hernando Cty. Bd. of Cty. Comm'rs v. S.A. Williams Corp.*, 630 So. 2d 1155 (Fla. 5th DCA 1993).

Plaintiffs' efforts to distinguish the foregoing cases miss the mark. The cases relied upon by the Hospital clearly show that appellate courts have routinely afforded certiorari relief where the trial court improperly applies an estoppel doctrine. Plaintiffs have failed to provide this Court with any case law which would warrant arriving at a contrary conclusion. The absence of a basis for arriving at a contrary conclusion is further heightened by the fact that the trial court's order in the underlying proceedings effectively eviscerates one of BAPTIST HOSPITAL's defenses by forcing the Hospital to take the position that Max Llauro's fetal heart monitoring strips were ***not*** "normal." In turn, this has the effect of precluding the Hospital from arguing that the fetal heart monitoring strips did not indicate a need for an earlier Cesarean section or other intervention, yet BAPTIST HOSPITAL's theory of the case revolves around the premise that an earlier Cesarean section or

other intervention was **not** necessary. Such evisceration of a defense is precisely the kind of harm that certiorari relief is intended to address. See, e.g., *Ludeca, Inc. v. Alignment & Condition Monitoring, Inc.*, 276 So. 3d 475 (Fla. 3d DCA 2019); *Marrero v. Rea*, 312 So. 3d 1041 (Fla. 5th DCA 2021).

B. The trial court departed from the essential requirements of the law in applying the doctrine of judicial estoppel.

In their response to BAPTIST HOSPITAL's petition, Plaintiffs implicitly acknowledge that intentional inconsistency and issue congruity are essential elements of judicial estoppel. However, rather than arguing that these elements are satisfied, Plaintiffs rely upon *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061 (Fla. 2001) in submitting that said decision mandates denial of the Hospital's petition. In fact, the stark contrast between the instant matter and *Blumberg* serves to underscore just how improper it was for the lower tribunal to apply the doctrine of judicial estoppel.

In *Blumberg*, after the plaintiff prevailed in a lawsuit in which he contended that insurance coverage existed to compensate him for the theft of sports cards, he subsequently contended in a second lawsuit that insurance coverage did not exist. 790 So. 2d at 1066.

The plaintiff in *Blumberg* changed his position regarding coverage in furtherance of arguing (in the second lawsuit) that his agent for the procurement of insurance was negligent in failing to obtain same. The Florida Supreme Court opined that the second lawsuit was barred by the doctrine of judicial estoppel.

Blumberg is distinguishable for two reasons. First, in *Blumberg* there could be no dispute that the inconsistency between the position taken in the two lawsuits was intentional. The plaintiff changed his position regarding coverage for one purpose: to obtain a more favorable result in the second proceeding. Here, although BAPTIST HOSPITAL's position regarding Dr. Jose Bello's involvement is different from its position in the NICA proceedings, the change was not borne of efforts to obtain a more favorable result in the civil action. Rather, the record makes clear that new evidence became available in the civil action.

There is no dispute that Dr. Bello, a neonatologist, was present at delivery. In the NICA proceedings, there was no evidence to refute Dr. Bello's narrative regarding the extent of his involvement that he actively participated in delivery. However, in the civil action, testimony was obtained for the first time that Dr.

Bello, although present during the delivery, did not actively participate in the delivery of the infant. The Hospital further notes that the extent of Dr. Bello's involvement in Max Llauro's delivery was ***not*** germane to the administrative law judge's determination in the NICA proceedings. It had no bearing on the timing or nature of Max Llauro's injury.

Second, in *Blumberg* the issues underlying the two lawsuits were identical—i.e., whether coverage existed to compensate the plaintiff for the theft of the sports cards. Here, the issues are not identical. Notwithstanding Plaintiffs' urging to the contrary, the fetal heart monitoring strips cannot be read in a void. Their import must be measured and considered in the context of the issues presented in each proceeding. In the NICA proceedings, the strips were examined in support of determining (i) when Max Llauro was injured, and (ii) what was the nature of the injury. The issue as to whether the abnormalities on the fetal monitor strips required the healthcare providers to take actions to deliver Max Llauro earlier was not an issue. In contrast, the fetal monitor strips are being relied upon in the civil action to determine whether an earlier Cesarean section or other interventions should have been

undertaken by the healthcare providers. Stated simply, there is no dispute that there are “abnormalities” on the fetal monitor strips, but the issue in the civil action is whether these “abnormalities” required additional interventions by the healthcare providers or whether these abnormalities are something that are typically encountered by healthcare providers during a mother’s labor and do not require further intervention.

By way of illustration, it would have been proper for the trial court to apply the doctrine of judicial estoppel if (i) BAPTIST HOSPITAL had argued in the NICA proceedings that the fetal heart monitoring strips indicated a need for earlier Cesarean section or other interventions and (ii) BAPTIST HOSPITAL had subsequently sought to argue in the civil action that the fetal heart monitoring strips did not indicate a need for earlier Cesarean section or other intervention. **This is not what occurred because the NICA and civil proceedings involve different issues.**

Ultimately, there is a complete lack of issue congruity between the NICA proceedings and the civil action. It is not inherently inconsistent for fetal heart monitoring strips to be considered “abnormal” in the context of determining whether Max Llauro

showed signs of having a cord susceptible to compression yet to be considered “normal” or typical in the context of determining that these are findings which routinely occur during the course of labor, and thus, are not an indication that YVONNE LLAURO should have undergone an earlier Cesarean section.

The trial court’s improper application of the doctrine of judicial estoppel constitutes a departure from the essential requirements of the law. This conclusion is supported by the ample decisions granting certiorari relief where judicial estoppel was improperly invoked. *See, e.g., Gary, supra; Lathan Constr. Corp., supra; Shalimar Pointe Owners Ass'n, supra; Westerbeke Corp., supra; Hernando Cty. Bd. of Cty. Comm'rs, supra.*

CONCLUSION

As further elaborated upon in BAPTIST HOSPITAL’s petition, it is manifestly unjust to eviscerate any of the Hospital’s defenses by relying on proceedings which contemplated completely different issues from those in the underlying civil action. The trial court’s order works irreparable harm upon BAPTIST HOSPITAL and constitutes a departure from the essential requirements of the law. Hence, for the reasons stated herein, and for the reasons more fully

set forth in the Hospital's petition, BAPTIST HOSPITAL respectfully requests that this Court grant certiorari and quash the trial court's order granting Plaintiffs' *Motion to Strike and Exclude Evidence that Max Llauro's Fetal Heart Monitoring Strips Were Normal and that Dr. Jose Bello Did Not Help Deliver Max.*

BAPTIST HOSPITAL further requests that this Court remand the present matter with instructions that the trial court enter an order denying Plaintiffs' motion.

RESPECTFULLY SUBMITTED this 21st day of October, 2024.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was served to all parties on the attached Service List via email on October 21, 2024.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Reply complies with the font and word count requirements of Fla. R. App. P. 9.045. This Reply contains 1,676 words.

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