IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-331

STUART HOROWITZ, as Personal Representative of the estate of LENA HOROWITZ,

Petitioner,

vs.

PLANTATION GENERAL HOSPITAL LIMITED PARTNERSHIP d/b/a COLUMBIA PLANTATION GENERAL HOSPITAL,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
Lower Tribunal No. 4D03-3873

AMICUS CURIAE BRIEF OF FLORIDA HOSPITAL ASSOCIATION IN SUPPORT OF RESPONDENT

Filed with leave of Court

William A. Bell
General Counsel
Florida Hospital Association
306 East College Ave.
Tallahassee, Florida 32301
Phone (850) 222-9800
Fax (850) 561-6230

Gail Leverett Parenti
Parenti & Parenti, P.A.
9155 S. Dadeland Blvd.,
Suite 1504
Miami, Florida 33156
Phone (305) 539-3800
Fax (305) 539-3801

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INTRODUCTION

The Florida Hospital Association ("FHA") is the primary organization of hospitals in the state of Florida. Its members are representative of the various forms of ownership currently existing in the hospital field. The principal corporate objective of the FHA is to promote its members' ability to "provide comprehensive, efficient, high quality health care to the people of Florida." In order to meet this aspiration, the FHA membership necessarily shares a common interest with the Respondent hospital in the financial stability of Florida's hospitals.

FHA's appearance as amicus curiae will serve as a conduit through which its members will have an opportunity to be heard on this issue which will have dramatic ramifications on all hospitals throughout this state, and consequently, on the cost of health care to Florida's residents.

POINT INVOLVED ON APPEAL

WHETHER SECTION 458.320(2)(B), FLORIDA'S FINANCIAL RESPONSIBILITY STATUTE, WHICH REGULATES PHYSICIAN LICENSING, IMPOSES LIABILITY ON A HOSPITAL WHEN ONE OF ITS STAFF PHYSICIANS FAILS TO SATISFY A JUDGMENT?

SUMMARY OF ARGUMENT

The Fourth District properly rejected the cause of action announced by the Fifth District in Robert v. Paschall, 767 So. 2d 1227 (Fla. 5th DCA 2000), rev. denied, 786 So. 2d 1187 (Fla.

2001). A hospital may not properly be held liable for damages as a result of a staff-privileged physician's failure to comply with the provisions of the financial responsibility statute because the Legislature did not contemplate a private cause of action against hospitals when it enacted the licensing statute in question. Consideration of the financial responsibility statute in its entirety reveals that the enforcement mechanism established by the Legislature involves physician discipline, not liability for hospitals.

Furthermore, the judicially-implied cause of action goes against the grain of existing law, as well as the practical realities of the insurance market in Florida and the relationships between hospitals and staff-privileged physicians. As a practical matter, a hospital would have no way of knowing at the time of granting staff privileges whether a physician might ultimately fail to satisfy a judgment entered against him many years in the future, and furthermore has no realistic ability to prevent such a result.

This Court is urged to approve the decision of the Fourth District holding that the financial responsibility statute does not create a cause of action against hospitals based upon a physician's failure to satisfy the requirements of licensure.

ARGUMENT

SECTION 458.320(2)(B), FLORIDA'S FINANCIAL RESPONSIBILITY STATUTE, WHICH REGULATES PHYSICIAN LICENSING, DOES NOT IMPOSE LIABILITY ON A HOSPITAL WHEN ONE OF ITS STAFF PHYSICIANS FAILS TO SATISFY A JUDGMENT

Standard of Review: The decision of the district court presents purely a question of law which is subject to de novo review. E.g., State v. Burris, 875 So. 2d 408, 410 (Fla. 2004).

Argument: The Fourth District correctly concluded that Robert and its progeny were wrongly decided because there is no evidence that the Legislature intended to create a private cause of action against a hospital for a physician's failure to comply with a condition of licensure, by failing to satisfy the first $250,000 of a medical malpractice judgment entered against him.

The theory of liability upon which the trial court based the final judgment for damages against the hospital derived from the holding of the Fifth District in Robert v. Paschall, supra, which was followed by the Second District in Baker v. Tenet Health System Hospital, Inc., 780 So. 2d 170 (Fla. 2d DCA 2001), and a divided Third District in Mercy Hospital, Inc. v. Baumgardner, 870 So. 2d 130 (Fla. 3d DCA 2003), rev. denied, 879 So. 2d 622 (Fla. 2004). The cause of action recognized by the Robert court -- which in essence makes hospitals guarantors of physicians' financial responsibility -- created a new species of

liability for hospitals, but one which they can neither predict nor control. See Beam v. University Hospital Building, Inc., 486 So. 2d 672 (Fla. 1st DCA 1986)(hospital owes no duty to provide patient with financially competent physician).

In this case, the trial court actually extended the reach of the Robert cause of action by imposing liability on the hospital even though the treatment which gave rise to the underlying medical malpractice judgment did not occur in the hospital, but in the physician's own private office. Such a radical departure from existing liability principles should not be judicially implied in the absence of clear legislative direction. See Freehauf v. School Board of Seminole County, 623 So. 2d 761, 764 (Fla. 5th DCA), rev. dismissed, 629 So. 2d 132 (Fla. 1993) ("Generally, common law evolves and changes slowly by degrees or inches (as it were) -- not miles.")

In Robert, the Fifth District held that subsection 458.320(2)(b), Florida Statutes, imposed upon hospitals a statutory obligation to ensure that staff physicians comply with the financial responsibility statute. The court held that a cause of action against the hospital for breach of this statutory duty arises when a judgment has been entered against the physician which he or she has failed to satisfy. In inferring a private right of action, the court stated:

> We believe this holding is compatible with the

> legislative intent to make sure that plaintiffs, such as the Roberts, are compensated, assuming they are so entitled, at least up to $250,000.

Id. at 1229.

The Second District followed this holding in Baker and, as did the court in Robert, reversed the dismissal of a complaint asserting a claim against the hospital based upon the alleged failure to ensure that a staff physician had complied with the financial responsibility statute. In both cases, since no judgment had been entered against the physician, the dismissal was without prejudice to re-file a complaint against the hospital if and when the physician failed to satisfy all or a portion of a judgment against him.

Whereas both Robert and Baker involved dismissal of a complaint before a judgment had been entered against an uninsured physician, Mercy Hospital, Inc. v. Baumgardner, supra, arose from the entry of two final judgments against a hospital based upon the Robert cause of action. The majority of Third District agreed with the decisions of the Fifth and Second Districts, and affirmed the judgments which had been entered on a strict liability theory. Judge Green dissented, reasoning that "the legislature has not expressly provided, or evidenced any intent to provide, a private cause of action against a hospital for a staff physician's failure to comply with a licensing statute." Id. at 132.

Indeed, as the Fourth District explained, there is no language in section 458.320(2), Florida Statutes, which can be construed as implying the existence of a cause of action against hospitals, much less clearly expressing the legislature's intent to create one. In finding a "statutory duty" for hospitals in subsection 458.320(2)(b), the Robert court failed to apply the governing test for determining whether a statute creates a private cause of action: whether the Legislature intended to create a private cause of action against hospitals when it enacted the financial responsibility statute, rather than whether the statute imposed a duty to benefit a class of individuals. See Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994); Fischer v. Metcalf, 543 So. 2d 785 (Fla. 3d DCA 1989)(*en banc*). Notably, the court in Robert did not address the ramifications of section 458.320(5)(g), Florida Statutes, which expressly authorizes a physician to elect to be personally responsible for payment of the first $250,000 of a judgment -- i.e., to "go bare" -- or be subject to strict disciplinary sanctions.[1]

Section 458.320(2), Florida Statutes, requires that a physician provide evidence of "financial responsibility" of at

[1] Despite the significance of subsection (5)(g) in the search for "legislative intent," Petitioner and his Amicus relegate any mention of subsection (5)(g) to a single footnote.

least $250,000 for potential malpractice claims as a condition of staff privileges. Under this subsection of the statute, a physician may elect to demonstrate financial responsibility by one of three approved methods: an escrow account, professional liability insurance coverage, or an irrevocable letter of credit. §§458.320(2)(a), (b), (c), Fla. Stat. (1995).[2]

Importantly, however, the financial responsibility statute provides an exception to this requirement, one which is striking for its breadth. Subsection (5) of the statute provides that subsection (2) -- which makes evidence of financial responsibility a condition of staff privileges -- **"shall not apply"** to any physician who "agrees" to certain conditions; i.e., to be personally responsible for paying the first $250,000 of any judgment entered against him in a medical malpractice case, or face prompt disciplinary action. §458.320(5)(g), Fla. Stat. (1995). Specifically, subsection (5)(g) provides, in pertinent part:

> **(5) The requirements of subsections (1), (2), and (3) shall not apply to:**
>
> * * *
>
> **(g) Any person holding an active license under this chapter who agrees to meet all of the following criteria:**

[2] The Robert court focused its analysis on subsection (2)(b), the option to provide proof of professional liability insurance.

> 1. Upon the entry of an adverse final judgment arising from a medical malpractice arbitration award, from a claim of medical malpractice either in contract or tort, or from noncompliance with the terms of a settlement agreement arising from a claim of medical malpractice either in contract or tort, the licensee shall pay the judgment creditor the lesser of the entire amount of the judgment with all accrued interest or . . . $250,000, if the physician is licensed pursuant to this chapter and maintains hospital staff privileges, within 60 days after the date such judgment became final and subject to execution, unless otherwise mutually agreed to in writing by the parties. . .

Subsection (5)(g) further provides that if the physician fails to pay $250,000 toward a judgment entered on a medical malpractice claim within 60 days, he or she will be subject to discipline, including suspension or even revocation of his license. §458.320(5)(g)1., 2., Fla. Stat. (1995).

Reading the financial responsibility statute in its entirety reflects that, although subsection (2) requires a physician to supply evidence of financial responsibility by one of three specified methods as a condition of maintaining staff privileges at a hospital, that requirement **does not apply** to a physician who has indicated his agreement to comply with the provisions of subsection (5)(g), by being personally responsible for the payment of the first $250,000 of a judgment, or face disciplinary action. Thus, by the language chosen by the Legislature, section 458.320(5)(g) -- which expressly permits physicians to be "personally responsible" -- abrogates entirely

the operation of section 458.320(2) for a physician "who agrees to meet" all of the requirements of subsection 458.320(5)(g).

Although the Robert decision recites that the physician was "bare," it failed to address the ramifications of subsection (5)(g) when it recognized a statutory cause of action based upon a purported violation of subsection (2)(b). It is respectfully submitted that this failure to consider the financial responsibility statute in its entirety demonstrates a fundamental and fatal flaw in that decision. Since the Legislature created a remarkably broad exception to the subsection (2) requirement that physicians provide tangible proof of financial responsibility as a condition of staff privileges[3], it is patently unreasonable to conclude that it intended to establish a private cause of action against a hospital when a physician has failed to comply with his financial responsibility obligations, particularly since the hospital has no practical ability to enforce the doctor's promise to be "personally responsible."

As stated by the Third District in Baumstein v. Sunrise Community, Inc., 738 So. 2d 420, 421 (Fla. 3d DCA 1999): "There

[3] While the (5)(g) exception to the financial responsibility statute may be fairly characterized as one which "swallows the rule," the policy decision to authorize physicians to "go bare" under the stated conditions is one which is squarely within the province of the Legislature.

is no question that the primary, perhaps the only, issue pertinent to the question of whether a private cause of action may be based upon the breach of a statute is whether the legislature intended that to be the case." See also Murthy v. N. Sinha Corp., supra at 985. Florida courts have repeatedly declined to imply the existence of a private cause of action in the absence of a strong indication that the Legislature intended to provide for one. See, e.g., Freeman v. First Union National Bank, 865 So. 2d 1272, 1276 (Fla. 2004); Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842, 852 (Fla. 2003); Greene v. Well Care HMO, Inc., 778 So. 2d 1037, 1039-1041 (Fla. 4th DCA 2001); City of Sarasota v. Windom, 736 So. 2d 741, 742 (Fla. 2d DCA 1999); Mora v. South Broward Hospital District, 710 So. 2d 633, 634 (Fla. 4th DCA 1998); Bennis v. State Chemical Manufacturing Co., 682 So. 2d 574, 576-577 (Fla. 4th DCA 1996); Johnson v. Walgreen Co., 675 So. 2d 1036, 1038 (Fla. 1st DCA 1996); Fischer v. Metcalf, supra.

It is simply impossible to reconcile the notion that the Legislature intended to create a cause of action against the hospital for a failure to ensure compliance with subsection (2) with the terms of the extremely broad exception established in subsection (5)(g). Moreover, the financial responsibility statute is contained in the chapter which regulates physicians, not hospitals. It provides for draconian administrative

penalties against a physician for his or her failure to maintain financial responsibility, but makes no reference to a penalty -- civil or otherwise -- against the hospital as a consequence of the physician's noncompliance.

The conclusion that the Legislature did not intend to establish a cause of action against a hospital based upon a breach of a duty to ensure a staff physician's compliance with the financial responsibility statute is further supported by reference to section 766.110(1), Florida Statutes (1999). That statute, which creates a cause of action against hospitals for so-called "corporate negligence" in, inter alia, "selection of staff members," makes no reference to a hospital's duty to ensure that staff physicians comply with the financial responsibility statute. The fact that the Legislature did not reference such a statutory duty in the civil remedy statute applicable to hospitals provides yet another compelling indication that it did not intend for a private right of action against the hospital to attach as a result of the physician's failure to comply with the financial responsibility statute.

Similarly, the recognition of a cause of action against the hospital in these circumstances hopelessly conflicts with the policy embodied in section 395.0191, Florida Statutes (1999), which governs the granting of staff membership and clinical privileges by a hospital. Section 395.0191(7), Florida Statutes

(1999), provides immunity from liability to hospitals "for any action taken in good faith and without intentional fraud" in acting upon applications for staff membership and clinical privileges. Furthermore, section 395.0191(8), Florida Statutes (1999), provides that information regarding the proceedings undertaken pursuant to that statute "shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of matters which are the subject of evaluation and review by such board."

None of the district courts which have considered the issue to date has addressed the fact that the very process which governs the granting of staff privileges is cloaked with a statutory immunity, and concomitant evidentiary privilege. To judicially infer a cause of action arising from one component of the process -- proof of financial responsibility -- would necessarily undermine both the immunity from liability and the evidentiary privilege the credentialing process has heretofore been afforded in accordance with the policy of encouraging candor in the medical review committee setting. See generally Cruger v. Love, 599 So. 2d 111 (Fla. 1992) (holding that physician's application for hospital staff membership is privileged).

As a practical matter, the cause of action recognized by the

Robert court imposes an impossible burden upon hospitals; to wit, a continuing duty to investigate the financial affairs of its staff physicians. A hospital is ill-situated to determine whether a physician can or will ultimately pay a judgment, nor should hospitals be placed in the position of having to constantly monitor pending claims against their physicians to ensure that the physicians maintain assets sufficient to meet their financial responsibility requirements as to all outstanding claims.

The suggestion by the Academy of Florida Trial Lawyers that "it would not be very difficult" for hospitals to continuously monitor staff-privileged physicians' financial responsibility, by the expediency of check marks on a form, is simply absurd. Brief of Amicus, pp.8-9 n.11. What may seem easy or practical from an attorney's perspective makes utterly no sense in the real world. The argument that the hospital can protect itself from liability by requiring the physician to do more paperwork – i.e., by repeatedly noting his financial responsibility status on intake sheets -- mirrors a similarly fallacious suggestion posited by the trial court below:

> It's as simple as the legislative requirement that motorists have to carry, along with their driver's licenses and registrations for vehicles, proof of insurance. A simple card, issued by insurance companies to show proof of coverage. The legislature placed this responsibility and duty upon hospitals.

> In this case, there would have been little inconvenience to Defendant hospital to verify, when he scheduled a room for surgery, or certainly prior to his entry into the surgical area, his current insurance coverage.

Plantation General Hospital, Ltd. v. Horowitz, 29 Fla. L. Weekly D2690a (Fla. 4th DCA 2004).

What the trial court failed to take into account is that the insurance policy in effect at the time a physician enters the surgical area will, in all likelihood, have no relationship to the insurance coverage available at the time a claim is made, one, two or more years later. Even if the "insurance card" theory did not suffer from the fatal flaw of ignoring the statutorily-authorized option to be personally responsible pursuant to the terms of subsection (5)(g), or maintain a letter of credit or escrow account, it also ignores a more basic reality; i.e., the difference between "claims made" and "occurrence-based" insurance coverage.

Had the Legislature chosen to make hospitals liable for physicians' failure to provide proof of insurance, such a policy decision might have made sense in an "occurrence-based" universe, where an insurance card constitutes proof of insurance to respond to an incident occurring within the stated policy period. But the fact of the matter is that we live in a "claims-made" universe, at least where professional liability

insurance is concerned. As a result of this reality, the assumption underpinning the entire Robert cause of action -- that proof of insurance at the time of granting staff privileges is in any way related to the availability of such insurance to respond to a claim -- is fundamentally flawed.

Ultimately, whether a physician satisfies the proof of financial responsibility requirement by providing a letter of credit, an escrow agreement, a policy of insurance or an agreement to be personally responsible, a hospital has no way of knowing at the time of granting staff privileges what the physician's financial status will be at the time a judgment is entered many years in the future. And the hospital has no practical means to ensure that, even if he or she has the financial wherewithal, the physician will actually pay the judgment, especially if the threat of losing his or her license is not sufficient incentive to do so.

Finally, the trial court's application of the Robert theory to impose liability on the hospital in this case highlights the fundamental unsoundness of the judicially-inferred cause of action. Although Dr. Jhagroo maintained staff privileges at the defendant hospital, the medical injury which gave rise to the cause of action was unrelated to the exercise of such privileges. Under these circumstances, the connection between the hospital's alleged actions and the injury to the patient is

so attenuated that imposing liability on the hospital violates the most basic principles of fundamental fairness. Under the trial court's logic, a hospital is liable under a Robert theory any time a staff physician fails to pay the first $250,000 of a judgment, regardless whether the hospital had anything whatsoever to do with the patient or the subject treatment.

To impose liability, essentially as a guarantor, in circumstances where (1) the hospital bears no culpability in the physician's failure to satisfy the first $250,000 of any judgment, (2) the hospital has no opportunity to predict, control, or protect itself against significant financial exposure, and (3) the hospital's alleged violation of the financial responsibility statute had no relation to the underlying injury giving rise to the judgment, would be so manifestly unjust as to constitute a deprivation of the fundamental fairness guaranteed by the U.S. and Florida Constitutions, particularly where, as here, the hospital was not a party to the underlying action. See Richards v. Jefferson County, 517 U.S. 793, 804 (1996) (a state may not deprive a person of property rights unless it affords some real opportunity to protect those rights); Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1254-1254 (Fla. 1996)(statute which did not permit defendant to respond to a claim in a fair manner violated due

process guarantees of article I, section 9 of the Florida Constitution); Alger v. Peters, 88 So. 2d 903, 906 (Fla. 1956) ("It is so fundamental to our concept of justice that a citation of supporting authorities is unnecessary to hold that the rights of an individual cannot be adjudicated in a judicial proceeding to which he has not been made a party. . ."); Lollie v. General American Tank Storage Terminals, 34 So. 2d 306, 308 (Fla. 1948)("Peremptorily to impose a penalty. . . on one and not permit him to open his mouth in his defense is contrary to every element of due process.").

In the final analysis, implication of a cause of action against hospitals based upon a staff physician's violation of the financial responsibility statute is fundamentally unsound, legally, logically and practically. Read as a whole, the financial responsibility statute reflects that the Legislature was fully cognizant of the possibility that a physician might fail to pay a medical malpractice judgment, notwithstanding the requirement of proof of financial responsibility. The enforcement mechanism established by the statute contemplates physician discipline, not a cause of action against the hospital (or hospitals) which granted the physician staff privileges. The intent of the Legislature with respect to non-payment is manifest, and excludes the imposition of liability on hospitals. The Legislature did not make Florida's hospitals guarantors of

physicians' agreements to pay medical malpractice judgments. This Court should not impose on hospitals a punishment which the Legislature chose not to impose.

Stated plainly, the Robert decision is wrong. This Court should approve the decision of the Fourth District and correct the miscarriage of justice which has resulted from the attempt to shift the financial burden rightly borne by negligent physicians to faultless hospitals.

CONCLUSION

This Court is respectfully requested to approve the decision of the Fourth District finding that the financial responsibility statute does not create a cause of action against hospitals.

Respectfully submitted,

Gail Leverett Parenti

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Hal B. Anderson, Esquire** and **Kevin M. Vannatta, Esq.,** Billing, Cochran, Heath, Lyles & Mauro, P.A., 888 Southeast Third Avenue, Suite 301, Ft. Lauderdale, FL 33316; **H. Mark Purdy, Esquire**, Purdy & Flynn, P.A., Attorneys for Plaintiff/Appellee, 1848 S.E. 1st Avenue, Ft. Lauderdale, FL 33316; **Arthur J. England, Esquire** and **Edward G. Guedes, Esq.**, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131 and **Joel S. Perwin, P.A.**, Alfred I. DuPont Building, 169 E. Flagler Street, Suite 1422, Miami, FL 33131 by mail on May 30, 2006.

Gail Leverett Parenti
Parenti & Parenti, P.A.
9155 S. Dadeland Blvd.,
Suite 1504
Miami, Florida 33156
Phone (305) 539-3800
Fax (305) 539-3801

By:_____
Gail Leverett Parenti
Florida Bar No. 380164

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Courier New 12-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Gail Leverett Parenti
Parenti & Parenti, P.A.
9155 S. Dadeland Blvd.,
Suite 1504
Miami, Florida 33156
Phone (305) 539-3800
Fax (305) 539-3801

By: _____
Gail Leverett Parenti
Florida Bar No. 380164