IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC05-331

STUART HOROWITZ, as Personal Representative of the
ESTATE OF LENA HOROWITZ,

Petitioner,

v.

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

Respondent.

RESPONDENT'S ANSWER BRIEF

ON REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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ABBREVIATIONS USED IN THIS BRIEF

"Horowitz" is used as an abbreviated reference to petitioner Stuart Horowitz.

"Plantation Hospital" is used as an abbreviated reference to respondent Plantation General Hospital Limited, d/b/a Columbia Plantation General Hospital.

"IB" is used as an abbreviated reference to the Initial Brief filed by Horowitz.

"Amicus Brief" is used as an abbreviated reference to the *amicus curiae* brief filed by the Academy of Florida Lawyers in support of Horowitz' position.

INTRODUCTION

This case brings to the Court the question of whether the 1985 Florida Legislature intended to make each hospital in Florida a guarantor or insurer of the first $250,000 of an unsatisfied medical malpractice judgment entered against a physician to whom a hospital has given staff privileges. *Plantation General Hospital Ltd. Partnership v. Horowitz,* 895 So. 2d 484 (Fla. 4th DCA 2005), *review granted*, 924 So. 2d 808 (Fla. 2006). Horowitz, who has an unsatisfied medical malpractice judgment for injuries sustained in Dr. Derek Jhagroo's private office, seeks to recover $250,000 from Plantation Hospital by reason of the fact it had given Dr. Jhagroo staff privileges at the hospital.

The Fourth District held that Horowitz cannot recover on his unsatisfied judgment from Plantation Hospital, on the ground that the statute on which he relies – section 458.320(2), Fla. Stat. – does not create a civil cause of action against hospitals for the failure of a staff-privileged physician to pay a medical malpractice judgment. A different view of the statute has been taken by the Fifth, Second, and Third Districts in *Robert*,[1] *Baker*,[2] and *Mercy Hospital*,[3] respectively, each of which has held that section 458.320(2) *implies* a cause of action for

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1 *Robert v. Paschall*, 767 So. 2d 1227 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1187 (Fla. 2001).

2 *Baker v. Tenet Healthsystem Hospitals, Inc.*, 780 So. 2d 170 (Fla. 2d DCA 2001).

3 *Mercy Hospital, Inc. v. Baumgardner*, 870 So. 2d 130 (Fla. 3d DCA 2003), *review denied*, 879 So. 2d 622 (Fla. 2004). This case, like the other district court decisions, is referenced in this brief by its first name.

negligence (and for strict liability in Third District) for the in-hospital negligence of a staff-privileged physician.

This appeal, which arises from a summary judgment based on stipulated facts, turns solely on the principles of statutory construction which are applicable to section 458.320(2). That statutory provision came into being as part of the Comprehensive Medical Malpractice Reform Act of 1985 ("the 1985 Act"). Thus, the Court's inquiry is directed to the intent of the Florida Legislature when it enacted those medical malpractice reforms.

STATEMENT OF THE CASE AND FACTS

Plantation Hospital accepts Horowitz's Statement of the Case and the Facts.

SUMMARY OF ARGUMENT

The Florida Legislature did not create a private cause of action against hospitals for $250,000 of an unpaid judgment against physicians with staff privileges. It certainly did not intend to authorize lawsuits against hospitals for malpractice committed in a physician's private office.

Section 458.320(2) of the 1985 Act contains no language which creates a private cause of action against hospitals for unsatisfied judgments entered against staff-privileged physicians. Horowitz does not contend that an authorization for a private cause of action appears in the express language of the Act.

The Florida Legislature did not imply that persons injured by physicians could seek to collect on unsatisfied medical malpractice judgments from hospitals. Chapter 458, of which section 458.320(2) is a part, is a regulatory statute. The

courts may not judicially infer a private cause of action from a regulatory statute in the absence of a clear legislative intent for doing so, ascertainable from the context or legislative history of the statute. Nothing in the history or context of the 1985 Act, or its placement of section 458.320(2) in Chapter 458, suggests an intent by the legislature to create a private cause of action against a hospital for $250,000 of an unsatisfied judgment against a physician with hospital staff privileges.

In *Robert, Baker,* and *Mercy Hospital,* the courts held that a cause of action exists against a hospital for up to $250,000 of an unsatisfied judgment against a staff-privileged physician. Those decisions, however, contain no analysis of the 1985 Act, or any legal reasoning as to why the courts inferred a private cause of action from the Act. The Fourth District's decision in *Plantation General Hospital* and the dissent in *Mercy Hospital,* in contrast, present a reasoned analysis for holding that no cause of action can be judicially inferred from the 1985 Act. The *Plantation General Hospital* decision should be approved by the Court.

In *Robert, Baker,* and *Mercy Hospital,* the courts ostensibly limited their decisions to unsatisfied judgments arising from medical malpractice committed in a hospital. The court should hold that under no circumstances does section 458.320(2) apply to an unsatisfied malpractice judgment which arises from acts of a staff-privileged physician in his or her private office.

STANDARD OF REVIEW

The decision of the Fourth District in this case is reviewable *de novo. E.g., State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004).

ARGUMENT

This case, which comes to the court on stipulated facts, involves the single, narrow issue of whether the Florida Legislature intended to create a private cause of action against hospitals when in 1985 it comprehensively revised the statutory scheme embodied in Chapter 458 for the regulation of medical practitioners in Florida.

In this brief, Plantation Hospital will demonstrate that section 458.320(2) is embodied within a regulatory scheme designed to address the competence of physicians and establish risk management mechanisms, and that the 1985 Act did not expressly or by implication create a private cause of action against hospitals for unsatisfied judgments against staff-privileged physicians. The brief will then point out that in Florida there is no common law cause of action against hospitals for unsatisfied judgments against physicians, and that the law restrains courts from inferring a private cause of action from a regulatory scheme in the absence of a clear intention by the legislature to do so.

This brief will then demonstrate that there is nothing in the history or context of the 1985 Act which indicates that the legislature intended to create a private cause of action against hospitals, that the decisions in *Robert*, *Baker*, and *Mercy Hospital* were decided without any attempt to apply governing legal principles to the 1985 Act, and that the Fourth District in this case both identified and applied the correct legal principles in holding that section 458.320(2) does not create the private cause of action which Horowitz seeks to pursue.

I. Section 458.320(2)(b) does not create a private cause of action against hospitals for unsatisfied judgments recovered against staff-privileged physicians.

Legislative intent is considered the "pole star" for interpreting statutes. *E.g.*, *Parker v. State*, 406 So. 2d 1089, 1092 (Fla. 1981). Legislative intent is first determined from the language of the statute being construed. *PNR, Inc. v. Beacon Property Mgmt., Inc.*, 842 So. 2d 773, 775 (Fla. 2003). In *Robert*, *Baker*, and *Mercy Hospital*, the courts did not identify any language in section 458.320(2), or anything in the context or legislative history of the 1985 Act, which created a private cause of action against hospitals for unsatisfied medical malpractice judgments. An analysis of the 1985 Act confirms the absence of any language which creates a private cause of action, and a similar absence of any intent from which one can be inferred.

A. The 1985 Act created a regulatory scheme to address the competence of physicians in the State of Florida.

In 1979, the Florida Legislature enacted Chapter 458, entitled "Medical Practice Act" in Ch. 79-302, § 1, Laws of Florida, for the "sole" purpose of ensuring that every physician practicing in the state meets minimum requirements for safe practice. Section 458.301, Fla. Stat. (1996).[4] Chapter 458 contains

[4] In 1986, the legislature amended section 458.301 to replace the word "sole" with the word "primary." Ch. 86-245, § 1. In that year, the legislature also authorized self-insurance and irrevocable letters of credit as means by which physicians could maintain their required $250,000 of financial responsibility, and specified that the requirements of financial responsibility were to be met "prior to the issuance or renewal" of a license to practice medicine. Ch. 86-160, § 47, Laws of Florida.

administrative remedies for violations of the requirements established in that chapter, but makes no provision for the *private* enforcement of its regulatory requirements.

Six years later, the legislature enacted the "Comprehensive Medical Malpractice Reform Act of 1985." Ch. 85-175, § 1, Laws of Florida. The Act was based on findings by the legislature that high-risk physicians were spending a disproportionate amount of their income for malpractice insurance, that the high cost of liability insurance premiums was passed on to the public through health care costs, that there was a "dire threat" to the continuing availability of health care in Florida, and that there was a need for "fundamental reforms" in the state's tort/liability insurance systems. Ch. 85-175, Whereas clauses. A copy of the 1985 Act is attached as an appendix. To address those concerns, the legislature amended Chapter 458 (and other laws) with a comprehensive array of provisions having one specified objective; namely, the prevention of "medical injuries . . . through comprehensive risk management programs and monitoring of physician quality." *Id*.

The legislature's endeavor to retain high risk physicians in Florida was reflected in a potpourri of provisions dealing with risk management, quality control, and the consequences of non-compliance with the new risk management and quality control requirements. Among the provisions aimed at accomplishing those objectives were those which (i) revised the statutes dealing with medical

malpractice investigations, proceedings, and records,[5] (ii) added responsibilities for investigating possible disciplinary conduct,[6] (iii) required health care facilities to hire risk managers and file annual incident reports with the Department of Health,[7] (iv) required the Department to send its determination of grounds for disciplinary action to the medical board,[8] (v) added penalties for a physician's failure to comply with risk management or quality assurance policies, procedures, or directives,[9] and (vi) gave the Department rule-making authority.[10]

Additionally, the 1985 Act created section 768.60, entitled "Liability of Health Care Facilities," in which it created a duty "to assure comprehensive risk management and the competence of their medical staff" by requiring the adoption of "written procedures" for the selection and review of medical staff, "a comprehensive risk management program," and the "initiation and diligent administration" of the medical review and risk management processes.[11] In conjunction with that duty, the legislature specified that each health care facility would be liable for "a failure to exercise due care" in fulfilling those duties.[12]

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5 Ch. 85-175, § 2.

6 Ch. 85-175, § 3.

7 Ch. 85-175, § 9. At the time of enactment, this agency was known as the Department of Health and Rehabilitative Services.

8 Ch. 85-175, § 9(8).

9 Ch. 85-175, §§ 3, 4, 5.

10 Ch. 85-175, § 9.

11 Ch. 85-175, § 23, creating section 768.60(1).

12 *Id*.

In that same provision, the legislature authorized hospitals (i) to carry liability insurance of not less than $1.5 million to cover the negligence of medical staff members "who elect to be covered thereby," (ii) to assess physicians for their share of that coverage, and (iii) to provide a deductible amount to be applied if a physician is found liable for medical malpractice in order "to instill in each health care provider (*i.e.*, physician[13]) the incentive to avoid the risk of injury to the fullest extent."[14]

Concomitant with those regulatory reforms, the legislature (i) added new responsibilities for insurance companies writing malpractice policies,[15] (ii) required that physicians, surgeons at ambulatory surgical centers, and physicians with hospital staff privileges, "demonstrate to the satisfaction of the [Board of Medicine] and the [Department of Health] financial responsibility to pay claims and costs" of medical malpractice,[16] and (iii) created the "financial responsibility" provision which is the focus of this proceeding – section 458.320.[17]

Section 458.320 has two distinct requirements. As enacted, subsection 458.320(1) required, as a condition of issuing, renewing or reactivating a license for the practice of medicine, that an applicant "demonstrate to the satisfaction of the board and the department," the financial responsibility to pay claims "arising

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13 Section 768.40, Fla. Stat. (1985), unchanged by Ch. 85-175, § 8.

14 Ch. 85-175, § 23, creating section 768.60(2).

15 Ch. 85-175, § 6.

16 Ch. 85-175, § 27.

17 *Id*.

out of medical practice" in an amount not less than $100,000, by an escrow, a professional liability insurance policy, or a plan of self-insurance.[18] As enacted, subsection 458.320(2) required as "a continuing condition of hospital staff privileges" a demonstration of financial responsibility through not less than $250,000 in professional liability insurance coverage or an escrow account.[19]

In an effort to reduce large medical malpractice awards and the concomitant high cost of medical malpractice insurance premiums, the 1985 Act also introduced a number of "process" reforms. Among these innovations were (i) a requirement for a pre-suit notice of intent to sue,[20] (ii) an authorization for court-ordered arbitration of medical malpractice lawsuits[21] and for pre-trial settlement conferences,[22] (iii) the requirement of a "reasonable showing" basis for a claim of punitive damages,[23] (iv) the creation of an offer of judgment process in medical malpractice suits,[24] (v) a bar to illegal or excessive attorney's fees in medical

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18 An authorization for an irrevocable letter of credit was added in 1986. Ch. 86-160, § 47, Laws of Florida.

19 *Id*.

20 Ch. 85-175, § 14.

21 Ch. 85-175, § 15.

22 Ch. 85-175, § 19.

23 Ch. 85-175, § 12.

24 Ch. 85-175, § 16.

malpractice actions,[25] and (vi) a directive to the courts to give close scrutiny to medical malpractice awards.[26]

Finally, the 1985 legislature also addressed remedies for violations of this comprehensive set of reforms. The 1985 Act significantly enhanced the disciplinary powers of health care facilities, including hospitals, when a governing board has determined that a physician has committed medical negligence or failed to comply with risk management and quality control policies and procedures.[27] That provision, however, expressly provided that in the absence of intentional fraud, there could be "no monetary liability" or "cause of action for damages" against a licensed facility discharging the responsibilities created by the Act.

The 1985 Act mandated that the Department investigate physician claim notifications from the Department of Insurance,[28] and physician disciplinary reports filed with the Department of Health, to determine if disciplinary action is warranted.[29] The Act did *not*, however, affirmatively create any cause of action for the private enforcement of any of its provisions.

One year after passing the 1985 Act, the Florida Legislature amended section 458.320 to specify that the requirements of financial responsibility were to

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25 Ch. 85-175, § 17.

26 Ch. 85-175, § 18.

27 Ch. 85-175, § 3.

28 Ch. 85-175, §§ 4, 5.

29 *Id*.

be met "at the time of issuance or renewal" of a license to practice medicine – a responsibility of the Department of Health. Ch. 86-160, § 47, Laws of Florida.

The regulatory framework of Chapter 458 into which the legislature placed the financial responsibility provision at issue in this case – section 458.320(2) – was the touchstone for the decision of the district court in this case,[30] and for the dissent of Judge Green in *Mercy Hospital.*[31] The regulatory context of section 458.320(2) was also a predicate for the Third District's recent decision rejecting a private cause of action against a hospital for an unsatisfied judgment against a staff-privileged physician who went "bare" by opting out of the financial responsibility requirements and agreeing to be personally responsible for a malpractice judgment if and when one is entered. *North Miami Medical Center v. Miller*, 896 So. 2d 886, 890 (Fla. 3d DCA 2005), *review denied*, 924 So. 2d 809 (Fla. 2006) ("[T]he statutory consequence contemplated for subsection 5(g) noncompliance [under which physicians can elect to go bare and be personally liable for $250,000] is discipline of the physician by the Department of Health.").[32]

In his initial brief, Horowitz made an unsupported declaration that the 1985 Act is not a regulatory statute. IB 11. In his discussion of the Act, however, he

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30 The physician financial responsibility law "is obviously a regulatory statute." 895 So. 2d at 486.

31 "Chapter 458 is regulatory . . . [and] a licensing statute." 870 So. 2d at 132.

32 The court identified the phrase "go bare" as a colloquialism for a physician's exercise of the privilege made available in section 458.320(5)(g) to forego insurance, an escrow, or a letter of credit of at least $250,000. 896 So. 2d at 888 n.3.

was unable to avoid acknowledging that it is. In the first sentence of the Argument section of his brief, he states that Chapter 458 "sets forth extensive and detailed requirements *for the practice of medicine* in the State of Florida." IB 8 (emphasis added). Later, Horowitz notes that the *Robert* court took note of the fact that section 458.320(2) was enacted as a part of the 1985 Act (IB 10), and in that regard argues that the court was "fully aware" that it was "part and parcel of an act which brought sweeping changes to Florida law *regulating* medical malpractice claims, the rights of victims, obligations of hospitals, and health care providers, etc." IB 11 (emphasis added).[33]

B. Florida has no common law cause of action for the recovery of unsatisfied malpractice judgments against hospitals.

The significance of the foregoing detailed analysis of the 1985 Act lies in the fact that there is no common law cause of action against a hospital for the financial consequences of a physician's failure to pay a medical malpractice judgment. The prospect of any such cause of action was put to rest in *Beam v. University Hosp. Bldg, Inc.*, 486 So. 2d 672 (Fla. 1st DCA 1986), where the court rejected a purported cause of action for the "conceivable risks of financial harm a patient

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[33] His suggestion that the 1985 Act made sweeping changes to "the rights of victims" is an interesting commentary, given that virtually all of the changes *limited* those rights by placing restrictions on and obstacles to the recovery of large medical malpractice awards.

might suffer should he sue a physician financially incapable of paying a malpractice judgment." 486 So. 2d at 673.[34]

The Court has cautioned against inferring the existence of a cause of action in derogation of the common law "unless the legislature expressly indicates an intention to do so," *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1207 (Fla. 1997) (citing *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362 (Fla. 1977), and Horowitz does not assert his claim against Plantation Hospital on the basis of a common law cause of action. He contends only that a private cause of action can be judicially inferred from the history or context of the 1985 Act.

Inferring a private cause of action from a regulatory statute, however, creates the possibility that a large and new field of law will develop beyond what existed at common law, without a clear legislative direction for the courts to follow. *Freehauf v. School Bd. of Seminole County*, 623 So. 2d 761, 764 (Fla. 5th DCA), *review dismissed*, 629 So. 2d 132 (Fla. 1993). Plantation Hospital respectfully suggests that a large and new field of law would certainly come into existence, without any legislative guidance as to the purpose for, nature of, or limit on that

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[34] The *Beam* decision was rendered on April 10, 1986. The 1985 Act became law on June 17, 1985. The Academy of Florida Trial Lawyers makes the curious statement that the legislature enacted section 458.302(2)(b) "[a]fter the cause of action in *Beam* had arisen." Amicus Brief at 4. If the Academy intended by that comment to suggest that the Florida Legislature was aware of Dennie Beam's injury at the hands of Dr. Collins on November 29, 1977, and passed the 1985 Act in part as a response to his medical malpractice lawsuit, it cannot support that suggestion. There is nothing in the legislative history of the Act which reveals the legislature's awareness of Mr. Beam's cause of action.

field of law, if every unsatisfied medical malpractice judgment-holder were deemed to have a private cause of action against a hospital (and possibly more than one hospital) which had given staff privileges to a physician who is charged with malpractice. Indeed, it appears that this new field of law has already arrived. *See Robert, Baker*, *Mercy Hospital*, *North Miami Medical Center* and *Plantation General Hospital.*

C. A private cause of action cannot be judicially inferred from a regulatory statute unless the legislature has clearly indicated an intent to supplement administrative remedies with private enforcement.

There are certain legal principles which are fundamental to the interpretation of statutes. The touchstone for all other principles is that laws are to be construed by the courts to reflect the intent of the legislature. *Burris*, 875 So. 2d at 410.

In *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994), the Court held that the existence of a private cause of action may not be judicially inferred from a regulatory statute in the absence of a strong indication of legislative intent. There, the Court addressed a chapter of Florida laws which provided for the regulation and licensing of construction contractors, and imposed a duty on qualifying agents to supervise construction projects. 644 So. 2d at 984.

The Court first noted that the chapter governing construction contractors provided for administrative remedies and did *not* "expressly provide for a civil cause of action." 644 So. 2d at 985. The Court then undertook to determine if a private cause of action should be inferred from the legislative intent. The Court found no evidence of any such intent, but determined rather that "the language of

[the chapter] indicates that it was created merely to secure the safety and welfare of the public by regulating the construction industry." 644 So. 2d at 986. On that basis, the Court declined to infer a private cause of action.

The statutory scheme in *Murthy* and that in Chapter 458 were established for identical purposes. The legislature enacted Chapter 458 with the stated intention of avoiding serious "harm [to] the public health and safety" through measures to ensure the "safe practice" of medicine, by barring from practice those "physicians who fall below minimum competency or who otherwise present a danger to the public." Section 458.301. There is no indication that the legislature enacted Chapter 458 with an intent to assure the financial benefits of medical malpractice judgments to persons who were injured by physicians who have staff privileges at hospitals.

The legal principle announced in *Murthy* has consistently been followed by courts asked to determine whether a regulatory statute creates a private cause of action. The most recent decision on the point is *Florida Physicians Union, Inc. v. United Healthcare of Fla., Inc.*, 837 So. 2d 1133 (Fla. 5th DCA 2003), where the statutory scheme under consideration was the regulation of health management organizations (HMOs) to assure acceptable quality health care to their insureds. The statute created administrative mechanisms to accomplish that objective, including a requirement for a certificate of authority to operate an HMO issued by the Department of Insurance; standards and requirements for the operation of HMOs; the filing of reports with and the submission to examination by the

Department; and a prohibition on specified improper practices. 837 So. 2d at 1135.

After reviewing the statutory structure, the court held that the focus of the statute was to provide protection for HMO subscribers, although providers of medical care such as the physician/group plaintiff in that case played "an essential part in the general overall plan of prepaid medical service." *Id*. On the basis of the regulatory nature of the statute, the court rejected the providers' claim for a private cause of action, and held that the "general scheme of the statute is to empower the Department of Insurance to enforce the statute's requirements." 837 So. 2d at 1135-36. The court's rationale, citing to *Murthy* and five other Florida decisions, was elegantly simple:

> The courts of this state have long been reluctant to find the legislature intended private parties to have causes of action to enforce statutes like [this chapter], without strong indication that was the legislature's intent.

Florida Physicians Union, 837 So. 2d at 1137. The court's analysis and conclusion in *Florida Physicians Union* could have been written for Chapter 458 simply by substituting the Department of Health for the Department of Insurance.

Murthy and *Florida Physicians Union* express the guidelines for courts asked to infer a private cause of action from a regulatory statute. The statutory analysis undertaken in *Murthy* and *Florida Physicians Union* was conducted by the Fourth District in considering whether the 1985 legislature implied a private cause of action, and by Judge Green in her dissent in *Mercy Hospital.* That analysis was *not* undertaken in the three decisions finding a private cause of action, and

Horowitz has not demonstrated to the Court that the 1985 legislature intended to create a private cause of action for the collection of unsatisfied judgments held against staff-privileged physicians.

D. Nothing in the history or context of the 1985 Act indicates that the legislature intended to create a private cause of action against hospitals for unsatisfied medical malpractice judgments against staff-privileged physicians.

The issue raised by Horowitz, and considered by *Robert*, *Baker*, *Mercy Hospital* and *Plantation General Hospital,* is whether, when the legislature made "fundamental reforms" to the state's tort and medical malpractice liability systems through the 1985 Act,[35] it impliedly intended to make hospitals liable for the first $250,000 of every unsatisfied judgment obtained against a staff-privileged physician. As noted above, there is nothing in the history or context of the 1985 Act to indicate that the legislature was concerned with the collectability of medical malpractice judgments, and the Act expressly barred any cause of action or monetary liability, in the absence of fraud, for a hospital's failure to discharge its newly-imposed duty "to assure comprehensive risk management and the competence of their medical staff."[36]

Nonetheless, Horowitz asserts that a private cause of action for judgment collections can be judicially inferred from section 458.320(2)(b). Not surprisingly,

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35 Ch. 85-175, Whereas clauses.

36 Ch. 85-175, § 23.

he relies almost exclusively on the decisions in *Robert*, *Baker*, and *Mercy Hospital.* As will be shown, these are weak reeds which do not support his position.

Robert was the first decision to declare that hospitals are responsible for the first $250,000 of an unsatisfied judgment against a physician who holds staff privileges. The sole reason offered by the court for reaching that conclusion was the "obvious intent" of the legislature "to make sure that a person injured by the medical malpractice of a doctor with staff privileges would be able to ultimately recover at least $250,000 of compensable damages." 767 So. 2d at 1228.[37] On that rationale alone, the court "read section 458.320(2)(b) as imposing a statutory duty on the hospital to assure the financial responsibility of its staff-privileged physicians who use the hospital for medical treatment and procedures." *Id*. (emphasis added).[38]

The court's un-elaborated belief that the legislature *intended* to insure that patients recover damages for medical injuries from hospital staff physicians is reflected in its determination that a cause of action against a hospital does not arise until a judgment is obtained. The court held that this timing is "compatible with the legislative intent to make sure that plaintiffs . . . are compensated . . . ." 767 So. 2d at 1229.

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37 The Third District recently noted that *Robert* was a decision "without much discussion." *North Miami Medical Center*, 896 So. 2d at 889.

38 The importance of the emphasized words is discussed in the last section of this brief, which addresses the important factual distinction between *Robert* and its progeny which involved plaintiffs injured in a hospital, and this case where the injury to Horowitz took place in the doctor's private office.

These naked declarations by the court, and its finding of an "obvious intent" to compensate unsatisfied judgment holders, are not derived from any words in section 458.320 which express any such intent. Nor did the court indicate in what way or where any such intent is signified by anything in the legislative history of the 1985 Act, or in the statutory scheme in Chapter 458 into which it was placed. The court's conclusion is written on a blank slate, and Plantation General Hospital respectfully suggests is incorrect.

The *Robert* decision was followed by *Baker*, in which the court uncritically cited to and parroted the *Robert* court's determination that section 458.320(2)(b) "imposes a statutory duty on a hospital to assure the financial responsibility of its staff-privileged physicians who use the hospital for medical treatment and procedures." *Baker*, 780 So. 2d at 171. Similarly, in *Mercy Hospital* a majority of the court did nothing more than "agree" with what it considered the "well-reasoned decisions" in *Robert* and *Baker*. 870 So. 2d at 131. Neither of those cases offered any legal analysis on the issue whatsoever.

Being utterly devoid of any statutory analysis or legal reasoning, the *Robert*, *Baker*, and *Mercy Hospital* decisions are unreliable authorities for the proposition that the legislature implied a cause of action against hospitals, or wrote section 458.320(2)(b) to benefit unsatisfied judgment holders. The opinions of the courts evince no attempt to discern from the legislature's complex and comprehensive statutory scheme a basis to imply that the legislature either was concerned with the collectability of judgments for injured patients of staff-privileged physicians, or

contemplated that hospitals would be insurers or guarantors for creditors who hold unsatisfied malpractice judgments against staff-privileged physicians.[39]

There is a huge chasm between the expressed legislative requirement in the state's physician licensure statute that physicians with hospital staff privileges must establish financial responsibilities to the satisfaction of the Board of Medicine and the Department of Health in order to enjoy the privilege of practicing medicine in Florida or maintain hospital staff privileges, and court-imposed liability for hospitals to compensate injured persons who hold an unsatisfied judgment against a staff-privileged physician. Not only did the *Robert*, *Baker*, and *Mercy Hospital* decisions omit any reasoned analysis as to how that chasm can be bridged, but none of the three even purported to apply the *Murthy* legal principle for construing a regulatory statute.

In each of those cases, the court's decision to hold a hospital liable rests solely on a declaration that the legislature's intent is "obvious." The earlier close inspection of the 1985 Act has demonstrated, however, that the liability of hospitals is anything *but* obvious, and in fact could not have been intended.

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[39] The terms "insurers" and "guarantors" were used in *North Miami Medical Center*, where the court held that section 458.320 does not require hospitals "to insure or guarantee" an unsatisfied judgment recovered against a staff-privileged physician who elected to go bare. 896 So. 2d at 890. Those terms are used here to reflect the notion that hospitals are being asked to guarantee the financial competence of staff physicians – the common law proposition rejected in *Beam* – or to insure that injured persons receive a financial recovery on their judgments.

In contrast to *Robert*, *Baker*, and *Mercy Hospital*, the dissenting opinion authored by Judge Green in *Mercy Hospital* contains a thorough and unchallenged discussion of the entire statutory scheme of which section 458.320(2)(b) is a part, the nature of Chapter 458 itself, and the *Murthy* legal principle by which the courts are to ascertain legislative intent when no private cause of action has been stated expressly. Judge Green's analysis led her to conclude that the *Robert* and *Baker* decisions were "wrongly decided" (*Mercy Hospital*, 870 So. 2d at 134), and that in those cases "the Second and Fifth Districts overstepped their authority in creating a private cause of action." 870 So. 2d at 135. Like Judge Green, the Fourth District in this case paid studious attention to the statutory scheme for the regulation of the practice of medicine of which section 458.320(2)(b) is a part, and came to the conclusion that the *Robert*, *Baker*, and *Mercy Hospital* decisions had "flaws in the logic." *Plantation General Hospital*, 895 So. 2d at 487.

Murthy teaches that legislative intent to create a private cause of action cannot merely be assumed from the enactment of a regulatory statute. 644 So. 2d at 986-87. Statutory analysis can be difficult, and determining legislative intent can be challenging. When the legislature has not expressed its intent in the language of a statute and a court is called upon to ascertain intent from context and legislative history, however, the analytical effort must be made.

The eight district court judges in *Robert*, *Baker*, and *Mercy Hospital* made no ostensible effort to ascertain legislative intent with respect to section

458.320(2). Seven district court judges have: the three in this case, Judge Green in *Mercy Hospital*, and three judges in *North Miami Medical Center*.[40] The value of precedent rests on the legal reasoning applied by judges who have made the effort to apply governing legal principles to the statutory scheme under consideration and not, as Horowitz implies, by a headcount of the number of judges or courts which have reached a particular result.

E. No argument put forth by Horowitz supports a private cause of action against hospitals for an unsatisfied judgment against a staff-privileged physician.

Horowitz rests his claim to a private cause of action against hospitals almost entirely on the *Robert*, *Baker*, and *Mercy Hospital* decisions,[41] but he also makes

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40 In *North Miami Medical Center*, the court held there is no private cause of action against a hospital for an unsatisfied judgment against a staff-privileged physician who elects to privately assume the liability of financial responsibility set out in section 458.320(2). The court held that a hospital "is entitled to rely on a staff-privileged physician's exercise of a statutory right . . . to be personally liable for any judgments up to $250,000," and that the financial responsibility requirements of subsection 458.320(2)(b) "shall not apply" to a physician who assumes personal responsibility to pay up to $250,000 for any medical malpractice judgment. 896 So. 2d at 888 n.2, 889, citing to section 458.320(5)(g). The court distanced itself from *Robert*, *Baker*, and *Mercy Hospital* on the basis of the statutorily-authorized privilege of a physician to go bare which had been exercised by the staff-privileged physician in that case.

41 He asserts that the "approach and analysis" taken in those cases is correct "based upon clear expression of legislative intent and a reading of the full purpose and text of the statute as originally passed." IB 17. As noted, there is no approach *or* analysis in those cases, and as will be shown Horowitz fails to identify *any* expression of legislative intent from the statute.

other arguments to suggest that the Florida Legislature intended to insure the recovery of at least $250,000 from a hospital staff-privileged physician. These arguments are unpersuasive, however.

(1) Hospitals are not insurers or guarantors.

Hypothesizing what the *Robert*, *Baker*, and *Mercy Hospital* courts must have known and intended but did not say, Horowitz suggests it is "certainly reasonable to assume" that the court in *Robert* was aware of all of the provisions of the 1985 Act. IB 11. He then quotes the Act's provision entitled "Liability of Health Care Facilities" – section 768.60 – which created a duty for health care facilities to "assure" and "ensure" comprehensive risk management and the competence of their medical staff.

Horowitz points out that those two words are defined in Miriam-Webster's online dictionary as being interchangeable with the words "insure" and "guarantee," and on that basis suggests that the legislature intended to make hospitals the *insurers* of physicians who do not pay their medical malpractice judgments, or the *guarantors* of medical malpractice judgments. IB 11-12.[42] The legislature could not have used the words "assure" and "ensure" to mean "insure" and "guarantee," however. For one thing, those words are used in a provision which imposes a duty on *all* health care facilities; not just on hospitals. As there is

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[42] Webster's dictionary also defines the word "assure" to mean "convince" or "inform positively," and the word "ensure" to mean "make sure or certain." WEBSTER'S NEW COLLEGIATE DICTIONARY (1976).

nothing in the 1985 Act that sets a dollar level of financial responsibility for **non**-hospital health care facilities, Horowitz's attempt to import into section 768.60 one of the many dictionary synonyms for "assure" and "ensure" is untenable as a matter of statutory construction.

For another thing, the very sentence and context of the legislature's use of those words belie any notion of an implied intent to make hospitals insurers or guarantors of unsatisfied judgments. When the legislature specified that all health care facilities will be liable for a failure to exercise due care in fulfilling their new risk management and competence duties, it simultaneously created a set of administrative consequences for a failure to comply and actually *forbade private causes of action*. That is, the legislature directed that hospitals "shall suspend, deny, revoke, or curtail the staff privileges," or impose other types of penalties, on a physician found liable for medical negligence (Ch. 85-175, § 3), but in doing so specifically immunized hospitals from any monetary consequences, and from being subject to any "cause of action," for a failure to discharge these statutory responsibilities unless there was intentional fraud. *Id*. These provisions quite clearly demonstrate that disciplinary, rather than monetary consequences, were the sole focus of the 1985 Act. When the legislature prescribes an administrative remedy for a statutorily-imposed duty, no private cause of action can be inferred. *Murthy*; *Florida Physicians Union*.

Further refutation of an implied private cause of action is found in the legislature's designation of the manner and means by which the new statutory duty could be discharged. Hospitals were given an *option* to purchase insurance with

respect to medical malpractice of physicians, along with the right to pass along the cost of that insurance to its physicians so as to instill in them an incentive not to injure patients. This legislatively-prescribed remediation mechanism conforms to the legislature's intent to require *physicians* alone to be responsible to maintain their competence.

(2) Hospitals do not have a duty to monitor financial responsibility.

A second reason offered by Horowitz for suggesting that the 1985 Act created a private cause of action is that hospitals "could not possibly" discharge their risk management obligations without "insuring" compliance of the staff-privileged physicians with their financial obligations to maintain certain levels of malpractice liability protection in the form of insurance, escrow, or letter of credit. IB 12-14. Ensuring the financial responsibility of physicians is not one of the duties established for hospitals under section 395.0197, however. Moreover, any such notion is at odds with the array of *administrative* penalties and consequences which the legislature set out for non-compliance with the financial responsibility requirements of section 458.320.

The financial responsibilities imposed by the legislature in section 458.320 also extend to physicians who have no hospital staff privileges, albeit for a lesser dollar amount, so that the legislature could not have used the terms "assure" and "ensure" to mean "insure." Additionally, in section 768.60(2) the legislature authorized (but did not *require*) the purchase of insurance by hospitals, with a further authorization to transfer the costs of coverage (by using the term "may") to

staff physicians. This formulation and the administrative consequences for malpractice are at odds with any notion that the legislature intended an unspoken judgment-collection mechanism for judgment-holders.[43]

Thus, Horowitz exaggerates when he suggests that the risk management duties imposed by the 1985 Act "would become meaningless" unless judgment creditors of staff-privileged physicians had "access to the courts" to enforce these new statutory duties. IB 14. A suspension from the practice of medicine brought about by disciplinary proceedings initiated by a statutorily-required reference from the Department of Health to the Board of Medicine,[44] and the suspension or loss of hospital staff privileges,[45] are hardly meaningless to a physician who relies on a hospital for the practice of his profession.

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[43] The suggestion that hospitals are positioned to monitor the financial responsibility requirements of section 458.320(2) is fallacious. A malpractice judgment creditor's cause of action against a hospital accrues when a malpractice judgment has been returned unsatisfied. *Robert*, 767 So. 2d at 1228-29; *Baker*, 780 So. 2d at 172. Invariably, that occurs many years after the medical incident which gave rise to the judgment. A physician who, has complied with the financial responsibility requirements at the time of the incident may no longer be in compliance when the cause of action accrues, for a host of reasons over which the hospital has no control and as to which it may have no knowledge. The physician may have ceased practicing medicine, terminated his staff privileges, cancelled his insurance, escrow, or letter of credit, or filed for bankruptcy (*see North Miami Medical Center*). A hospital cannot forever monitor the personal choices and financial condition of physicians who are or were once on its staff.

[44] Ch. 85-175, § 9(8).

[45] Ch. 85-175, § 3(1).

(3) Hospitals are not the only entities that can enforce financial responsibility.

Horowitz suggests that the hospitals alone can enforce the $250,000 financial responsibility requirement of section 458.320(2)(b). He is mistaken.

Section 458.320(1) specifies that a physician must demonstrate compliance with the financial responsibility requirements of that section to the Department of Health and the Board of Medicine. In a Rule promulgated pursuant to that authority, the Department requires every physician to give the medical board 10 days' advance notice in writing of "any change in status relating to financial responsibility compliance." Rule 64B8-12.005(3), Fla. Admin. Code.[46]

Additionally, section 458.320(1) specifies that the requirements of financial responsibility are to be met "prior to the issuance or renewal" of a license to practice medicine by the Department. In this way, the legislature manifested an intent that *the Department*, not hospitals, monitor the financial responsibility compliance of physicians, and put the Department in the best position to assure compliance.

A second and even more efficacious enforcement mechanism for assuring the financial responsibility of physicians is the patient population. Patients have an opportunity to know of a physician's compliance with financial responsibilities, or not, simply by asking at the time medical services are sought. There is nothing burdensome or unfair in giving patients the responsibility to assure the financial

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[46] Horowitz has not suggested that this rule is invalid.

integrity of the person to whom they entrust their health. In fact, the legislature put that burden squarely on patients when it allowed physicians to go bare and offer a naked promise to pay future judgments. Just as there is no guarantee of a recovery in that situation, so too there is no assurance that the insurance policy, escrow, or letter of credit in place when medical care is delivered will be available when a judgment is entered and becomes final many years after the services have been delivered.

(4) General principles of statutory construction do not override *Murthy*.

Horowitz also supports the notion of an implied cause of action by reference to generic statutory construction principles which are sometimes applied by the courts: that laws are to be interpreted to benefit the public; and that courts are to avoid a literal interpretation of a statute which does not reflect legislative intent. IB 18-19. Horowitz offers no relationship of these general concepts to the 1985 Act, however. There is no decision in Florida which has held that they trump the statutory construction principles laid out in *Murthy*.[47]

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[47] Horowitz references *Murthy* for the sole purpose of asserting that statutory language was important to the Court, and that his arguments to the Court in this case provide the reasons for it to hold that the language of the 1985 Act "is sufficiently specific to find a legislative intent for a private cause of action." IB 17.

F. No argument put forth by the Academy of Florida Trial Lawyers supports a private cause of action against hospitals for an unsatisfied judgment against a staff-privileged physician.

In its *amicus* brief, the Academy also relies predominantly on the *Robert*, *Baker*, and *Mercy Hospital* trilogy, and the same general principles of statutory construction offered by Horowitz. Amicus Brief at 5-8. The Academy's arguments, like those of Horowitz, are untethered from any language, history, and context of the 1985 Act. The Academy does not even acknowledge the Supreme Court's restriction on implying a private cause of action from a regulatory statute.

The Academy devotes the bulk of its brief (Amicus Brief at 9-16) to a rebuttal of arguments apparently made in other lawsuits – consistency with licensure laws; Chapter 458's non-regulation of hospitals; consistency with the corporate negligence statute and Chapter 395; difficulty of enforcement; inducement to collusion; and due process. These arguments are not framed by the pleadings in this case and warrant no comment from Plantation Hospital.

G. The Fourth District in this case correctly applied the legal principle of *Murthy* to hold that there is no statutory cause of action against hospitals, and that *Robert, Baker*, and *Mercy Hospital* were decided incorrectly.

The district court's decision in this case provides a thoughtful analysis of the complex statutory scheme reflected in the 1985 Act – namely, that the Act was both written and intended by the legislature as a regulation of the practice of medicine. Just as physicians were found to be an essential part of the overall plan for prepaid medical services when HBO legislation was enacted, but nonetheless

not given a private cause of action (*see Florida Physicians Union*), so too it does not detract from the regulatory nature of section 458.320 or the 1985 Act to recognize that the legislature imposed on physicians financial burdens which can benefit the victims of medical malpractice as a part of the overall plan for tightening risk management and competence levels in order to keep physicians from fleeing Florida.

The *Plantation General Hospital* decision emphatically holds that there is no plausible basis for holding that the 1985 Act is directed at the collectability of medical malpractice judgments, or that the legislature implied a private cause of action for the benefit of unsatisfied medical malpractice judgment-holders. The court undertook the careful statutory analysis which the Court in *Murthy* directed be conducted when addressing statutes such as the 1985 Act, just as Judge Green had done in *Mercy Hospital.*

The reasoning of the Fourth District and Judge Green is unchallenged by anything found in *Robert*, *Baker*, or *Mercy Hospital*, or in Horowitz's brief. His reliance on those decisions offers the Court nothing more than a statistical headcount of decisions. He never comes to grips with the district court's or Judge Green's reasoning. The Court should reject *Robert*, *Baker*, and *Mercy Hospital*, and approve the Fourth District's conclusion that

> the Legislature has plainly laid out in the statute the only remedies it conceived for those occasions when physicians fail to provide the required security. None of the statute's remedies include sanctions against a privileges-granting hospital. Nothing in any part of the statute . . . suggests a purpose to make hospitals liable to pay staff physicians' malpractice judgments.

895 So. 2d at 487.[48]

II. Nothing in the history or context of the 1985 Act indicates that the legislature intended to create a private cause of action against hospitals for unsatisfied medical malpractice judgments against staff-privileged physicians who injure patients in their private offices.

Dr. Jhagroo had staff privileges at Plantation Hospital when Horowitz was injured in Dr. Jhagroo's private office. The Fourth District did not attribute any significance to the fact he was injured there rather than in the hospital, but the distinction in the *situs* of the injury cannot be overlooked here and provides an alternative basis for the Court to affirm the district court's decision in *Plantation General Hospital.*

In reliance on *Robert, Baker*, and *Mercy Hospital*, Horowitz argues that the place of injury makes no difference. IB 20-22. Those cases in fact contradict his position. The language used by the court in *Robert*, which was quoted verbatim with approval in *Baker*, quite clearly suggests that the place of injury has legal significance.

In approving an ultimate recovery of at least $250,000 for persons injured by staff-privileged physicians, *Robert* held that the legislature had imposed a statutory duty on hospitals to assure the financial responsibility of physicians "who use the

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[48] *Cf., Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000) ("Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.").

hospital for medical treatment and procedures." 767 So. 2d at 1228. There is no "use" test in the statute, however. Yet the court wrote one into its decision. Horowitz argues to the Court that the *Robert* court made a "careful analysis" (IB 10), "discerned the clear and 'obvious' legislative intent" (IB 14), gave an "approach and analysis" that "is correct" (IB 17), and based its ruling on "the statutory purpose." IB 20. Horowitz cannot on the one hand laud the *Robert* decision for its unstated legislative analysis, and at the same time ignore the only non-conclusory, substantive point actually articulated by the court.

If the legislature had created a private cause of action against hospitals (which Plantation Hospital repeats was not the case), a private cause of action would certainly be limited to malpractice judgments arising from in-hospital injuries. In subsections 458.320, the legislature set a higher dollar level of financial responsibility for physicians with hospital staff privileges than it set for those with only an office practice – $250,000, as opposed to $100,000. The Court can judicially infer that the difference reflects the higher cost of patient care provided by physicians engaged in the high risk areas, for which hospital facilities are essential, which most concerned the legislature in 1985 – obstetricians, cardio-vascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologists.[49] An office practitioner may have staff privileges, but employ less intrusive (and consequently less costly) medical services in his or her office setting.

[49] Ch. 85-175, Whereas clauses.

This Court has had prior occasion to limit the liability of hospitals for the negligence of physicians occurring outside the hospital. In *Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989), the Court adopted the corporate negligence doctrine for Florida, in the context of hospital responsibility for the competence of physicians to whom it grants staff privileges, but stated:

> We note the hospital's liability extends only to the physician's conduct while rendering treatment to patients in the hospital *and does not extend to his conduct beyond the hospital premises*.

543 So. 2d at 214 (emphasis added). That spatial limitation was also reflected in *CAC-Ramsay, Inc. v. Mull*, 706 So. 2d 928 (Fla. 3d DCA 1998), where malpractice was committed by a physician being seen by the plaintiff on a private basis during and after a procedure at a non-CAC hospital. The court held there was no basis to hold CAC vicariously liable for her injuries, as "CAC did not authorize the surgery, did not bill and did not receive any compensation for the surgery or care." 706 So. 2d at 929-30.

As in *Insinga* and *CAC-Ramsey*, there is ample reason for the court to hold that a hospital's liability for staff physician competence, if any exists, should extend to acts or omissions only on the hospital's premises.[50] Were the Court to hold that hospitals are liable for unsatisfied malpractice judgments arising from an office injury, it would be tantamount to imposing a financial obligation for conferring an unexercised privilege or pedigree, where not even peer evaluation comes into play.

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[50] *Robert* in fact noted the relevance of *Insinga* in terms of addressing the obligations of a hospital to "supervise and monitor physician performance," which can only be done in the hospital. 767 So. 2d at 1228 (citing *Insinga*, 543 So. 2d at 214).

CONCLUSION

The decision of the Fourth District, holding that section 458.320(2)(b) does not create a private cause of action against hospitals for $250,000 of unsatisfied judgments against staff-privileged physicians, should be affirmed.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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