IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-331

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 APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
FOR THE FOURTH DISTRICT
CASE NO. 4D03-3873

# PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, STUART HOROWITZ as Personal Representative of the Estate of LENA HOROWITZ, seeks review on the merits of Plantation General Hospital Limited Partnership, etc. v Stuart Horowitz, Personal Representative of the Estate of Lena Horowitz, 895 So.2d 484 (Fla. 4th DCA 2005).

This case has a long history which now dates back more than ten years. In January 1996 LENA HOROWITZ and her husband, MAX H. HOROWITZ, were residents of Broward County, Florida. Mrs. Horowitz received medical treatment from a physician who was (at that time) licensed to practice medicine in the State of Florida, DEREK V. JHAGROO, M.D.

As a result of Doctor Jhagroo's malpractice LENA HOROWITZ'S right thumb was amputated at PLANTATION GENERAL HOSPITAL and a malpractice claim instituted in Circuit Court, in and for Broward County, Florida against Doctor Jhagroo.

On December 17, 1999, after a jury trial, a Final Judgment was entered of LENA HOROWITZ and MAX H. HOROWITZ in the amount of $859,200.73. (R-4)

The judgment was uncollectible and Mr. and Mrs. Horowitz[1] brought suit against PLANTATION GENERAL HOSPITAL LIMITED LIABILITY PARTNERSHIP d/b/a COLUMBIA PLANTATION GENERAL HOSPITAL seeking the sum of $250,000 toward the unsatisfied judgment as provided in § 458.320(2), Fla. Stat., as well as case law interpreting that statute. The theories asserted against PLANTATION GENERAL HOSPITAL sounded both in negligence and strict liability. (R-1-4)

The Plaintiffs and the Defendant entered into a "Joint Stipulation of Facts" which clearly and succinctly set forth the issues to be submitted to the Circuit Court for resolution. The exact text of the Stipulation is as follows:

> 1. In order to clarify the issues now before the Court Plaintiffs and Defendant hereby enter into this Stipulation and stipulate that the facts set forth hereinbelow in Paragraph 2a through 2h are true and require no further proof. The parties enter this Stipulation in good faith and in anticipation that each party will be moving for summary judgment.
>
> 2. The parties hereby agree and stipulate that the following are true and correct:

[1] During the pendency of this protracted litigation both Mr. and Mrs. Horowitz passed away. The claim of Mr. Horowitz was dismissed and the litigation proceeded in the name of STUART HOROWITZ as Personal Representative of the Estate of LENA HOROWITZ.

a. During the month of January 1996 Plaintiffs were husband and wife and residents of Broward County, Florida;

b. On or about January 19, 1996 LENA HOROWITZ came under the care and treatment of DEREK V. JHAGROO, M.D.;

c. DEREK V. JHAGROO, M.D., was a physician licensed to practice medicine in the State of Florida and he maintained staff privileges with the Defendant, PLANTATION GENERAL HOSPITAL LIMITED PARTNERSHIP d/b/a COLUMBIA PLANTATION GENERAL HOSPITAL (hereinafter referred to as "HOSPITAL");

d. The medical treatment rendered by DOCTOR JHAGROO to LENA HOROWITZ in January 1996 was for the purpose of examination and treatment of LENA HOROWITZ'S infected right thumb. This examination and treatment took place in the private medical offices of DEREK V. JHAGROO, M.D., and the medical malpractice judgment obtained against DOCTOR JHAGROO (referred to hereinbelow in "f") was predicated upon theories of medical negligence occurring in DOCTOR JHAGROO'S private office.

e. On January 22, 1996 LENA HOROWITZ was admitted by DOCTOR JHAGROO to HOSPITAL and during that admission her right thumb was surgically removed. Plaintiffs have not alleged any negligent care and treatment by DOCTOR JHAGROO during the admission or asserted any theories of negligence against employees of HOSPITAL;

f. Subsequently, Plaintiffs instituted an action for medical malpractice against DOCTOR JHAGROO in Circuit Court, in and for Broward County, Florida, under Case No. 97-19211 (25). A true and correct copy of the Final Judgment entered in favor of the Plaintiffs and against DOCTOR JHAGROO is attached to Plaintiffs' Complaint as Exhibit "A";

g. No amounts have been paid toward the Final Judgment, the Final Judgment is uncollectible and a Writ of Execution was returned unsatisfied on May 9, 2001;

h. During the month of January 1996 DEREK V. JHAGROO did not maintain medical malpractice insurance or otherwise comply with the requirements of Florida Statute 458.320. (R-44-48)
(Emphasis added)

Pursuant to the Stipulation both parties did, in fact, move for Summary Judgment. The hospital had admitted Doctor Jhagroo's non-compliance with § 458.320, Fla. Stat., and offered no proof that the hospital had attempted to secure compliance. The Honorable Ilona M. Holmes entered an "Order Granting Plaintiffs' Motion for Summary Judgment" on August 19, 2003. (R-121-123). In essence, the trial court applied § 458.320(2), Fla. Stat., as that statute was interpreted and applied in Robert v. Paschall, 767 So.2d 1227 (Fla. 5th DCA 2000),

and Baker v. Tenet Healthsystem Hospitals, Inc., 780 So.2d 170 (Fla. 2d DCA 2001), and further held that the rationale of those cases extended to the specific facts of this case, i.e., that the Hospital's liability for uncollectible medical malpractice judgments against their staff-privileged physicians was not limited to acts of malpractice which actually took place within the hospital itself. The trial court followed Robert and Baker in interpreting and applying the statute,

specifically finding that the Hospital is in the best position to verify statutory compliance by their staff-privileged physicians and should share responsibility for damages inflicted upon innocent victims when judgment cannot be collected from the physician.

Final Judgment was eventually entered (R-130-131) and the Hospital appealed to the Fourth District Court of Appeal. Subsequent to the entry of the Final Judgment the Third District Court of Appeal issued its decision in Mercy Hospital, Inc. v. Baumgardner, 870 So.2d 130 (Fla. 3d DCA 2003), which followed the Fifth District's decision in Robert and the Second District's decision in Baker.

The Fourth District Court of Appeal reversed the Circuit Court judgment and noted direct conflict with Robert, Baker and Baumgardner. 895 So.2d 484, 488.

Upon timely Petition this Honorable Court accepted jurisdiction.

## POINTS ON APPEAL

### POINT ONE

§ 458.320, FLA. STAT., CREATES A PRIVATE CIVIL CAUSE OF ACTION AS CORRECTLY FOUND BY THE FIFTH DISTRICT IN ROBERT, THE SECOND DISTRICT IN BAKER AND THE THIRD DISTRICT IN BAUMGARDNER.

### POINT TWO

THE PRIVATE CIVIL CAUSE OF ACTION UNDER § 458.320, FLA. STAT., AS RECOGNIZED IN ROBERT, BAKER AND BAUMGARDNER APPLIES TO ACTS OF MALPRACTICE COMMITTED BY STAFF-PRIVILEGED PHYSICIANS REGARDLESS OF LOCATION.

## STANDARD OF REVIEW

The interpretation of a statute presents an issue of law reviewable *de novo*, State v. Burris, 875 So.2d 408, 410 (Fla. 2004).

## SUMMARY OF ARGUMENT

The Comprehensive Medical Malpractice Reform Act of 1985 was passed by the Florida Legislature as Chap. 85-175, Laws of Florida, and became effective October 1, 1985. The Florida Legislature's preamble itself characterized this broad Act as "drastic legislative action" intended to address a number of issues related to medical malpractice, patient's rights, health care provider's obligations, hospital's obligations, etc.

This Act created § 458.320, Fla. Stat., which deals with financial responsibilities of physicians, including those who have hospital privileges.

The Fifth District in Robert v. Paschall, 767 So.2d 1227 (Fla. 5th DCA 2000), the Second District in Baker v. Tenet Healthsystem Hospitals, Inc., 780 So.2d 170 (Fla. 2d DCA 2001), and the Third District in Mercy Hospital, Inc. v. Baumgardner, 870 So.2d 130 (Fla. 3d DCA 2003), all have held that § 458.320(2), Fla. Stat., creates a private civil cause of action against a hospital who grants staff privileges to a physician when the staff-privileged physician fails to satisfy a judgment for medical malpractice.

It is submitted that a reading of the overall statutory scheme and the expressed purposes of the statute justify the holdings in these cases and the Fourth District's ruling below was incorrect.

## ARGUMENT

## POINT ONE

§ 458.320, FLA. STAT., CREATES A PRIVATE CIVIL CAUSE OF ACTION AS CORRECTLY FOUND BY THE FIFTH DISTRICT IN ROBERT, THE SECOND DISTRICT IN BAKER AND THE THIRD DISTRICT IN BAUMGARDNER.

Chapter 458 of the Florida Statutes sets forth extensive and detailed requirements for the practice of medicine in the State of Florida. The purpose of this chapter as set forth in § 458.301, Fla. Stat., is as follows:

The Legislature recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. The Legislature finds further that it is difficult for the public to make an informed choice when selecting a physician and that the consequences of a wrong decision could seriously harm the public health and safety. The primary legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meets minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state. (Emphasis added)

§ 458.320(2), Fla. Stat., addresses financial responsibility of physicians who perform surgery in an ambulatory surgical center licensed under Chapter 395 as well as physicians who have *hospital staff privileges*. As set forth in the statute, as a continuing condition of hospital staff privileges physicians must either establish and maintain an escrow account, obtain and maintain professional liability coverage or obtain and maintain an unexpired irrevocable letter of credit.[2] This is in conformity with the stated legislative purpose of protecting the public, and recognizes the additional potential harm that could be caused by surgeons and staff-privileged physicians. It also is in conformity with the statutory purpose stated above in that it recognizes that members of the public often find it difficult to make informed decisions when selecting a physician and having staff-privileges at a hospital is often a decisive factor in the selection process.

[2] A physician can "opt out" of these obligations by complying with the requirements of § 458.320(5). Doctor Jhagroo never exercised this option.

The first case to address whether or not § 458.320, Fla. Stat. created a private civil cause of action was Robert v. Paschall, 767 So.2d 1227 (Fla. 5th DCA 2000). In that case Mr. and Mrs. Robert brought a medical malpractice claim against Doctor Paschall and also joined Putnam Community Medical Center which accorded staff privileges to Doctor Paschall. The theory asserted by the Roberts against the hospital was that it was negligent in granting staff privileges to Doctor

Paschall knowing that he had no medical malpractice insurance and was not otherwise financially responsible under § 458.320(2), Fla. Stat.

The Fifth District noted Beam v. University Hospital Bldg., Inc., 486 So.2d 672 (Fla. 1st DCA 1986), which held that hospitals have no common law obligation to assure financial responsibility of their staff physicians. However, in a unanimous decision, the Fifth District held that the "obvious intent of the Legislature was to make sure that a person injured by medical malpractice of a doctor with staff privileges would be able to ultimately recover at least $250,000 in compensable damages." (Emphasis added) The court then noted that it interpreted § 458.320(2)(b), Fla. Stat., "as imposing a statutory duty on the hospital to assure the financial responsibility of its staffed-privileged physicians." (Emphasis added)

The Third District recently noted that Robert's holding of a statutory cause of action under § 458.320, Fla. Stat., was recognized "without much discussion." North Miami Medical Center, Ltd. v. Miller, 896 So.2d 886, 889 (Fla. 3d DCA 2005), Rev. Den. 2006, Fla. Lexis 342, Case No. SC05-581. However, lack of discussion does not equate with lack of careful analysis. The court in Robert recognized that the subject statute was enacted as part of the **Comprehensive Medical Malpractice Reform Act of 1985, Ch. 85-175**, Laws of Florida. In

other words, the Fifth District was fully aware that this statute was not "enacted in a vacuum," but 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.

It is certainly reasonable to assume that the court in Robert was fully aware of all of the provisions of the Comprehensive Medical Malpractice Reform Act of 1985 when it reached the conclusion that the intention of the Florida Legislature in enacting § 458.320, Fla. Stat. was "obvious." The preamble to Chap. 85-175 refers to "fundamental reforms of (this State's) tort law/liability insurance system" and "drastic legislative action" and states that "medical injuries can often be prevented through comprehensive risk management programs and monitoring of physician quality," which were mandated in the Act. (Emphasis added). Chap. 85-175 was no "mere regulatory act." A review of the entire Act readily confirms the Fifth District's conclusion.

For example, Sec. 23 of Ch. 85-175 created § 768.60, Fla. Stat., titled "Liability of Health Care Facilities." Subsection 1 thereof provides:

(1) All health care facilities, including hospitals and ambulatory surgical centers, as defined in chapter 395, have a duty to assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review, and are liable for a failure to exercise due care in fulfilling these duties. These duties shall include, but not be limited to:

(a) The adoption of written procedures for the selection of staff members and a periodic review of the medical care and treatment rendered to patients by each member of the medical staff;

(b) The adoption of a comprehensive risk management program which fully complies with the substantive requirements of section 395.041 as appropriate to such hospital's size, location, scope of services, physical configuration, and similar relevant factors;

(c) The initiation and diligent administration of the medical review and risk management processes established in paragraphs (a) and (b) including the supervision of the medical staff and hospital personnel to the extent necessary to ensure that such medical review and risk management processes are being diligently carried out.

Each such facility shall be liable for a failure to exercise due care in fulfilling one or more of these duties when such failure is a proximate cause of injury to a patient.
(Emphasis added)

Two points: Subsection 1 uses the term "assure" and Subsection 1(c) uses the term "ensure." "Assure" means "to make safe (as from risks . . .). "Assure," "insure," "ensure," and "guarantee" are used interchangeably. Miriam-Webster On-line Dictionary. Secondly, and even of greater importance, is the fact that a

hospital could **not possibly** discharge its obligations under 768.60(1) without insuring compliance of their staff-privileged physicians with the obligations imposed by § 458.320, Fla. Stat. Clearly hospitals are under a statutory duty to protect the public.

This compelling point is further re-enforced by Section 2 which provides as follows:

(2) Every hospital licensed under chapter 395, Florida Statutes, may carry liability insurance or adequately insure itself in an amount of not less than $1.5 million per claim, $5 million annual aggregate to cover all medical injuries to patients resulting from negligent acts or omissions on the part of those members of its medical staff who elect to be covered thereby in furtherance of the requirements of sections **458.320** and 459.0085, Florida Statutes. Any insurer authorized to write casualty insurance may make available, but shall not be required to write, such coverage. The hospital may assess on an equitable and pro rate basis the following professional health care providers for a portion of the total hospital insurance cost for this coverage: physicians licensed under chapter 458, osteopaths licensed under chapter 459, podiatrists licensed under chapter 461, dentists licensed under chapter 466, and nurses licensed under chapter 464. The hospital may provide for a deductible amount to be applied against any individual health care provider found liable in a law suit in tort or for breach of contract. The **legislative intent** in providing for the deductible to be applied to individual health care providers found negligent or in breach of contract is to instill in each individual health care provider the incentive to avoid the risk of injury to the fullest extent and ensure that the citizens of the State of Florida receive the highest quality health care obtainable.
(Emphasis added)

Now it is readily apparent why the Robert court discerned the clear and "obvious" legislative intent in enacting the Comprehensive Medical Malpractice Reform Act of 1985. It is simply beyond logic to argue that the Legislature provided that a hospital can carry insurance to protect itself from a liability that it does not have! This section provides a mechanism for hospitals to protect itself from liability that arises when a staff-privileged physician fails to comply with § 458.320, Fla. Stat.

Obviously the Legislature imposed a duty on hospitals to protect the public and these statutorily imposed obligations would become meaningless unless injured members of the public having access to the courts to enforce these rights.

Baker v. Tenet Healthsystem Hospitals, Inc., 780 So.2d 170 (Fla. 2d DCA 2001) was decided by the Second District the year after Robert. Here again, victims of medical malpractice sought recovery from the hospital pursuant to 458.320(2), Fla. Stat. The Second District concurred with the Fifth District's analysis in Robert and stated as follows:

Section 458.320(2)(b), Florida Statutes (1997), mandates financial responsibility as a condition of a physician's ability to maintain staff privileges at a hospital. This section likewise 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.

As in Robert, this decision was unanimous.

While the case now before this Court was pending before the Fourth District, the Third District issued its opinion in Mercy Hospital, Inc., v. Baumgardner, 870 So.2d 130 (Fla. 3d DCA 2003), which presented a similar fact pattern. The Third District specifically approved Robert and Baker and quoted from Robert as follows:

> The obvious intent of the legislature [in enacting Section 458.320(2)] was to make sure that a person injured by the medical malpractice of a doctor with staff privileges would be able to ultimately recover at lest $250,000 of compensable damages. We 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. 767 So.2d 1227, 1228.

The Third District majority then concluded by praising the Robert and Baker decision as "**well-reasoned decisions**" and concurred in their finding that the subject statute mandates not only financial responsibility as a condition to maintaining staff privileges but also imposes a duty on the hospital to ensure compliance. 870 So.2d 130, 131.

Baumgardner was a 2-1 decision. Judge Green dissented opining that there was no private cause of action created under the subject statute because the

Legislature " . . . has not expressly provided, or evidenced any intent to provide, a private cause of action . . ." 870 So.2d at 132. The dissent did not find a private cause of action because the dissent did not see "clear legislative intent" and would not "assume that the Legislature intended to create a cause of action and abrogate the common law without clear, unambiguous and affirmative language to that effect." 870 So.2d at 135.

This case then came before the Fourth District Court of Appeal which essentially adopted Judge Green's dissent in Baumgardner. The Fourth District took the position that the Fifth, Second and Third Districts had wrongfully interpreted the subject statute predicated primarily upon Murthy v. Sinha Corporation, 644 So.2d 983 (Fla. 1994), opining that the other Districts had "misunderstood" Murthy. In curious terminology, the court stated that "the creative minds of lawyers" could not open the "money door" through § 458.320(2), Fla. Stat., and that the statute is not sufficiently specific to create a civil remedy against hospitals.

In Murthy this Honorable Court answered a certified question holding that Chap. 489, Fla. Stat. (1991), does not create a private cause of action against an individual qualifier for a corporation acting as a general contractor. This Court

looked to the language of the statute as well as subsequent legislative history which specifically disavowed an intent to create a civil cause of action. It is submitted that the language in the statute before this Court, for the reasons specified herein, is sufficiently specific to find a legislative intent for a private civil cause of action.

Thus, we have the Fifth District, Second District and Third District holding that the intent of § 458.320(2), Fla. Stat., is "obvious" and the Fourth District reaching the exact opposite conclusion. It is submitted that the approach and analysis taken in Robert, Baker and by the majority in Baumgardner is correct based upon clear expression of legislative intent and a reading of the full purpose and text of the statute as originally passed.

As this Honorable Court is well aware, a large body of case law discusses principles of statutory interpretation and it has been repeatedly stated that a fundamental principle of statutory interpretation is that legislative intent is the "polestar" that guides the courts. See State v. J. M., 824 So.2d 105, 109 (Fla. 2002), and Reynolds v. State, 842 So.2d 46, 49 (Fla. 2002). Likewise, it is axiomatic that statutes are construed so as to effectuate the intent of the Legislature.

The Fourth District looked at the subject statute and quite simply found that the "polestar" was not bright enough.

On the other hand the courts in Robert, Baker and Baumgardner found that the legislative intent was "obvious." Certainly the legislative intent was, in fact, obvious and that intent was to protect the public from incompetent and financially irresponsible doctors. Requiring staff-privileged physicians to carry malpractice insurance certainly was not for the benefit of doctors or hospitals. As stated in § 458.301, Fla. Stat. (quoted at Page 7 hereof) the purpose was to protect the public.

This Honorable Court has held that "any ambiguity or uncertainty regarding legislative intent should receive the interpretation that best accords with benefit to the public." In Re: Estate of Ruff v. Ruff, 159 Fla. 777; 32 So.2d 840 (1947). This principle was followed by the Second District in Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989), which relied on Sunshine State News Company v. State, 121 So.2d 705, 708 (Fla. 3rd DCA 1960), and stated:

Any uncertainty as to legislative intent should be resolved by an interpretation that best accords with the public interest.

In Patry v. Capps, 633 So.2d 9 (Fla. 1994), this Honorable Court held that a literal interpretation of a statute is not required when the letter of the law does not accurately reflect the legislative intent.

More recently in Hillsborough County Hospital Authority v. Coffaro, 829 So.2d 862 (Fla. 2002), this Honorable Court reiterated this principle and liberally construed a provision of the Florida Medical Malpractice Act to accord injured parties access to the courts.

Petitioner as well as the growing number of injured innocent citizens of this state who have been injured by the medical malpractice of uninsured doctors simply seek a liberal but reasonable interpretation and application of the subject statute, based upon the fact that the legislative intent was obvious, especially when the full text of the Medical Malpractice Reform Act of 1985 is taken into consideration. Mrs. Horowitz' estate should be entitled to recover $250,000 from PLANTATION GENERAL HOSPITAL pursuant to the provisions of § 458.320(2), Fla. Stat. There is certainly no language within the statute as originally enacted which would preclude the results reached by the courts in Robert, Baker and Baumgardner. These holdings are all consistent with the stated legislative intent.

## ARGUMENT ON POINT TWO

THE PRIVATE CIVIL CAUSE OF ACTION UNDER § 458.320, FLA. STAT., AS RECOGNIZED IN ROBERT, BAKER AND BAUMGARDNER APPLIES TO ACTS OF MALPRACTICE COMMITTED BY STAFF-PRIVILEGED PHYSICIANS REGARDLESS OF LOCATION.

Petitioner will now address an issue submitted to the trial court for resolution that was never ruled on by the Fourth District. Petitioner concedes that under the facts of Robert, Baker and Baumgardner the medical malpractice occurred within the hospital setting. However, the trial court in this case correctly ruled that the statutory scheme does not require that the malpractice occur in the hospital.

On the contrary, the intent of the Legislature in enacting § 458.320(2)(b), Fla. Stat., was to ensure that persons injured as a result of medical malpractice by a physician with staff privileges "ultimately recover at least $250,000." Robert, 767 So.2d at 1228. Although the malpractice in both Robert, Baker and Baumgardner, supra, occurred in the hospital, the statutory purpose, not the physical location, was the basis of these rulings. The Baumgardner court clearly and succinctly summed up this issue as follows:

> As noted in *Robert v. Paschall,* 767 So.2d 1227, 1228 (Fla. 5th DCA 2000): 'The obvious intent of the legislature [in enacting Section 458.320(2)] was 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. We 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.' See also *Baker v. Tenet Healthsystem Hosp., Inc.*, 780 So.2d 170 (Fla. 2d DCA 2001) (hospital has a statutory duty to assure staff-privileged physicians are financially responsible).
>
> (2) We agree with the well-reasoned decisions of the Fifth and Second Districts. The statute mandates financial responsibility as a condition to maintaining staff privileges and imposes a duty on the hospital to ensure compliance.

As the lower court pointed out (R-122) the Hospital is in the best position to assure financial responsibility of physicians who have been accorded staff privileges. This obviously correct observation is in accord with the principal recognized by the court in Robert in reliance upon Insinga v. LaBella, 543 So.2d 209 (Fla. 1989). Those decisions recognized that a hospital is the "only entity that can realistically provide quality control" and is "in a superior position to supervise and monitor physician performance." Insinga at 212.

The statute contains no restriction and does not limit the hospital's liability to acts actually committed within the hospital itself. Certainly, when a hospital accords staff privileges to physicians who are engaged in private practice, it is reasonably foreseeable that the citizens of this state can be injured by acts of medical malpractice within the physician's office. Additionally the lower court correctly pointed out there is "little inconvenience" for the hospital to verify compliance. (R-123)

The inescapable conclusion is that had the hospital fulfilled its obligation to require its staff-privileged physicians to be financially responsible, the malpractice policy (or letter of credit or escrow account) would certainly have covered all acts of malpractice committed by the staff-privileged physician. including the one committed on LENA HOROWITZ.

## CONCLUSION

This Honorable Court should quash the decision of the Fourth District below and affirm Robert, Baker and Baumgardner.

## CERTIFICATE OF COMPLIANCE

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

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 29th day of March, 2006 to the persons on the attached Mailing List.

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