IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-331

Lower Tribunal No. 4D03-3873

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, Fourth District

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE APPELLEES' POSITION

JOEL S. PERWIN, P.A.
169 E. Flagler Street
Suite 1422
Miami, FL 33131
Tel: (305) 779-6090
Fax (305) 779-6095

By: JOEL S. PERWIN
Florida Bar No: 316814

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I.
STATEMENT OF THE CASE AND FACTS

The relevant facts are not disputed, and are stated in the District Court's Opinion. The Academy accepts that Statement, and the Statement of Facts in the Petitioner's brief.

II.
ISSUE ON REVIEW

WHETHER §458.320(2), FLA. STAT. IMPOSES A DUTY UPON HOSPITALS

III.
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).

IV.
SUMMARY OF THE ARGUMENT

In 1986, in *Beam v. University Hospital Building, Inc.*, 486 So. 2d 672 (Fla. 1st DCA 1986), the First District Court held that hospitals had no common-law duty to assure that their staff physicians were financially responsible. No other court has addressed the common-law issue. After the cause of action in *Beam* had arisen, the Florida Legislature enacted §458.320(2)(b), Fla. Stat., conditioning conferral of hospital staff privileges upon physicians' compliance with minimal

financial-responsibility requirements. As a condition of State *licensure*, the Florida Board of Medicine and Department of Health are charged with enforcing §458.320(1), requiring minimum financial responsibility of all doctors licensed in Florida. The minimum security required is an escrow account of not less than $300,000 ($100,000 per claim, up to $300,000 per incident); or liability coverage of $100,000/$300,000; or a letter of credit for the same amount. §458.320(1). As a condition of *hospital staff privileges*, a different provision of the statute creates a higher obligation--$250,000/$750,000 by escrow account, insurance liability coverage or letter of credit. §458.320(2). Under this separate and higher provision, as we will argue, hospitals are charged with a parallel statutory obligation of enforcing subsection (2). In the absence of such enforcement, while doctors might be subject to censure, patients would receive no compensation, which is the purpose of the statute.

This statutory obligation was recognized in *Robert v. Paschall*, 767 So. 2d 1227, 1228 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1187 (Fla. 2001), holding that section "458.320(2)(b) imposes 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." The Second District Court later agreed in *Baker v. Tenet Healthsystem Hospital, Inc.*, 780 So. 2d 170 (Fla. 2d DCA

2001), as did the Third District Court in *Mercy Hospital, Inc. v. Baumgardner*, 870 So. 2d 130 (Fla. 3d DCA 2003), *review denied*, 879 So. 2d 622 (Fla. 2004).

The Fourth District Court created conflict in the instant case by holding that nothing in the plain language of the Statute expressly confers a duty on the part of a hospital to assure the statutory compliance of its staff physicians (*see* Appendix to Petition, hereinafter "Opinion"). The court acknowledged that the "essential aim of section 458.320 is to have physicians furnish a form of financial security to satisfy malpractice judgments against them." Nevertheless, it said, "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" (Opinion at 3). Finding no language in the statute which expressly creates such a cause of action, the Fourth District Court certified conflict.

As *Robert, Baker* and *Baumgardner* recognized, the statutory duty imposed upon hospitals granting staff privileges is supported by the statute's language, its purpose, and common sense. We will examine the established principles of statutory construction which compel this conclusion.

In addition, we will anticipate some of the arguments which the Defendants in these cases have been making, in attempting to interpret the statute. It seems

probable that Respondent Plantation General will advance these contentions in support of the District Court's decision, on a right-for-the-wrong-reason basis.

V.
ARGUMENT

SECTION 458.320(2) IMPOSED A DUTY ON HOSPITALS

1. The Statutory Framework. Section 458.320(2)(b), Fla. Stat., conditions hospital staff privileges on a physician's compliance with one of three financial-responsibility options amounting to protection of $250,000 per claim, and an annual aggregate of $750,000: an escrow account, professional liability coverage, or a letter of credit.[1] In addition, §458.320(2) provides that the

[1]In the alternative, under §458.320(5)(g), which is not at issue here, a physician is exempt from the requirements of subsection (2)(b) if he "agrees" to pay any medical-malpractice judgment creditor $250,000.00 of the judgment within 60 days of its entry; executes a form supplying information to the Florida Department of Health; posts a sign in his reception area informing patients that he does not carry medical-malpractice insurance; and in fact keeps his promise. If a physician who invokes subsection (5)(g) does not satisfy the judgment up to $250,000.00, the Department of Health must take such "disciplinary action as it deems appropriate." *See* §458.320(5)(g)(4). Under subsection (7) of §458.320, a doctor relying upon the subsection (5)(g) exemption also must notify the Department of Health of any change of circumstance regarding his qualifications for the exemption, and demonstrate that he is in compliance with the statute. In *North Miami Medical Center, Ltd. v. Miller*, 896 So. 2d 886 (Fla. 3d DCA 2005), the court held that a hospital has no duty when the staff physician opts out under sub-section (5)(g), but adhered to its prior ruling in *Baumgardner* that the hospital does have a duty when the staff physician "opts in" (our quotations) under sub-

assurance of financial responsibility, as a condition of hospital staff privileges, is a "continuing responsibility." Therefore, the hospital's statutory duty would require it to insure that its staff doctors are continuously satisfying one of the three alternatives prescribed by §458.320(b).[2]

2. Robert v. Paschall. In *Robert v. Paschall*, 767 So. 2d 1227 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1187 (Fla. 2001), the plaintiffs alleged that the defendant hospital was negligent in granting staff privileges to Dr. Paschall, who had no medical insurance and was not otherwise financially responsible under §458.320(2)(b), Fla. Stat. The trial court dismissed the case on the basis of *Beam v. University Hospital Building, Inc.*, 486 So. 2d 672 (Fla. 1st DCA 1986), which held that a hospital had no common-law duty to assure that "staff physicians are financially responsible." *Robert*, 767 So. 2d at 1228.[3] The district court reversed, holding that regardless of any common-law duty addressed in *Beam*, §458.320

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section (2)(b).

[2]As we will note in a moment, doing so is not difficult.

[3]The court in *Robert* pointed out that *Beam* did not discuss the statute, but only the common-law theory, even though the statute had already been enacted at the time *Beam* was decided. The cause of action in *Beam* had arisen before the statute; no one in *Beam* argued the statute; and *Beam* did not address it. *Robert* correctly noted that *Beam* was based solely on the common law.

necessarily creates a statutory duty, because the

> obvious intent of the Legislature 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.[4]

767 So. 2d at 1228. The Second District Court endorsed this holding in *Baker v. Tenet Healthsystem Hospitals, Inc.*, and the Third District Court agreed in *Mercy Hospital v. Baumgardner*.

3. The Statute Imposes a Duty on Hospitals. As three district courts have held, the hospitals' statutory duty is inherent in the requirements prescribed in Chapter 458. As the district court acknowledged (A. 2), the polestar of statutory construction is legislative intent.[5] A corollary is that a statute should never be

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[4]As noted, the Fourth District Court in the instant case agreed that the statute's purpose "is to have physicians furnish a form of financial security to satisfy malpractice judgments against them" (A. 3). However, in contrast to *Roberts*, the district court in *Horowitz* ruled that the statutory penalties for non-compliance are the only remedy, notwithstanding that penalties imposed on the hospital do nothing to compensate the victim of malpractice, which is the purpose of the statute.

[5]*See St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961, 970 (Fla. 2000); *Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 985 (Fla. 1994); *Department of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976); *Garner v. Ward*, 251 So. 2d 252

construed to achieve an absurd result.[6] In rare cases, therefore, even a court interpreting a statute which seems to be unambiguous may depart from its strict language in order to achieve its legislative purpose.[7] The court should recognize the Legislature's objective in enacting the statute, and interpret it in a manner consistent with that policy and spirit.[8] It should consider both its language *and* its purpose. *Southwest Water Management District v. Charlotte County*, 774 So. 2d 903 (Fla. 2d DCA), *review denied sub nom. Pinellas County v. Southwest Florida Water Management District*, 800 So. 2d 615 (Fla. 2001). It should adopt a construction which is consistent with its legislative purpose. *See Knowles v. Beverly Enterprises-Florida*, 898 So. 2d 1 (Fla. 2004); *Becker v. Amos*, 105 Fla. 231, 141 So. 136 (1932). It should avoid unjust or unreasonable consequences.[9]

(Fla. 1971).

[6]*See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *Johnson v. Presbyterian Homes of Synod of Florida, Inc.*, 239 So. 2d 256 (Fla. 1970); *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598, 599 (Fla. 4th DCA 1977).

[7]*See State v. Webb*, 398 So. 2d 820 (Fla. 1981); *Wakulla County v. Davis*, 395 So. 2d 540 (Fla. 1981); *DR Inc. v. Brandsmart U.S.A. of West Palm Beach*, 819 So. 2d 971, 974 (Fla. 4th DCA 2002).

[8]*See Florida Industrial Comm'n v. Manpower, Inc. of Miami*, 91 So. 2d 197, 198 (Fla. 1956); *Weiss v. Leonardy*, 160 Fla. 570, 573-74, 36 So. 2d 184 (1948).

[9]*See In re Watkins' Estate*, 75 So. 2d 194 (Fla. 1954); *Foley v. State ex rel.*

Moreover, remedial statutes should be "liberally construed in favor of granting access to the remedy provided by the Legislature."[10] The Florida Legislature has recognized that it is the hospitals which grant staff privileges to doctors, which work with staff-privileged physicians on a daily basis, and which derive substantial income from their services; and most important, that hospitals are the *only* entities in a position to monitor compliance with the financial-responsibility laws upon which hospital staff privileges are conditioned. The State of Florida controls licensure--not hospital staff privileges. It has no capacity to monitor the conferral of staff privileges at every hospital in Florida. Under different provisions of the statute, physician licensing requires proof of financial responsibility every two years (*see* §§458.310, 458.319). The licensing mechanism provides no means to determine that a doctor has satisfied the requirements for hospital staff privileges under §458.320(2). Only the hospitals can assure such compliance. And without such a requirement, in relation to its

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Gordon, 50 So. 2d 179 (Fla. 1951).

[10]*Golf Channel v. Jenkins*, 752 So. 2d 561, 565-66 (Fla. 2000). *Accord, Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992); *Smiley v. Nelson*, 805 So. 2d 870, 872 (Fla. 2d DCA 2001).

fundamental purpose--to assure minimal financial recovery to those who are victimized by malpractice--subsection (2) would be totally meaningless.[11]

4. No Statutory Language or Rule of Construction Forecloses the Robert Holding.

a. The Statutory Obligations of Hospitals Regarding Staff Physicians' Financial Responsibility Are Not Inconsistent With the Conditions of Licensure by the State- -and Specifically, With the Disciplinary Procedures Available if a Doctor Fails to Comply With the Conditions of Licensure. The hospitals have argued that there is some inconsistency between the statutory right of the State of Florida to discipline a doctor who fails to comply with the conditions of licensure, and the statutory obligations of hospitals to assure compliance with the conditions of hospital staff privileges. They contend that recognition of the hospitals' duty somehow would interfere with the efficacy of the disciplinary process. We respectfully disagree.

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[11]Contrary to the hospitals' protest in these cases, it would not be very difficult for the hospitals to fulfill this responsibility. They can certainly require proof of compliance when they grant and when they renew staff privileges. They can also require continuing compliance in the intake sheets which every doctor fills out when he admits a new patient. All he has to do is put a check mark on the intake sheet verifying compliance with the statute. That is not too much ask in order to fulfill the statutory purpose of protecting the patient--the only way to protect the patient.

The disciplinary procedures outlined in §458.320 (as well as the profile maintained by the Department of Health under §456.041) derive from the Department's control over licensure. The conditions of licensure are not the same as the conditions for conferring hospital staff privileges. As the court noted in *Paige v. State Board of Medical Examiners of Florida*, 141, Fla. 294, 193 So. 82, 83 (Fla. 1941), the Board of Medical Examiners is authorized "to cancel or annul the licensure or registration of practitioners of medicine" in order to "control the practice of medicine," and has the right to prescribe "reasonable rules and regulations that shall control the practice of medicine." All of this concerns the "practice of medicine"--not the conferral of hospital staff privileges.

Moreover, there is no inconsistency between the disciplinary procedures prescribed for non-compliance under §458.320(2), and the hospital's accountability to patients for the first $250,000 of any judgment. The Florida Statutes contain many disciplinary options regarding doctors for the unlawful or improper practice of medicine. None of them are inconsistent with a patient's rights to seek redress from a doctor or a hospital in addition to such discipline. One remedy is available to the State; the other is available to the patient. There is no inconsistency.

b. Section 458.320 Is Not Confined to the Regulation of Physicians; It Regulates Physicians, Hospitals and the State. The hospitals have argued that §458.320 does not impose liability on hospitals because Chapter 458 of the Florida Statutes regulates only physicians. That is impossible. This statute regulates the conditions attached to the conferral of hospital staff privileges; obviously it regulates the relationship between hospitals and doctors. It also implicates the relationship between doctors and the State. For example, subsection (8) of §458.320 says that the State's "board [of medicine] shall adopt rules to implement the provisions of this section." Thus, §458.320 is not confined to doctors alone.

c. The Duty Imposed by §458.320 Is Not Inconsistent With Any Other Florida Statute.

1). Section 766.110(1), Fla. Stat., Governing (Among Other Things) Hospitals' Potential Liability for Negligently Selecting Staff Physicians (Corporate Negligence), Is Not Inconsistent With the Duty Recognized in Robert. The hospitals have argued that because §766.110(1) deals with hospitals' risk management–that is, their responsibility for the *competence* of staff doctors (*not* their financial responsibility), but makes no mention of §458.320, and by omission

pre-empts any imposition of liability under §458.320.[12] But the obligations

[12]Section 766.110(1) 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 s. 395.0197 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.

imposed on hospitals by §766.110(1) are limited to risk management--to assuring the "competence" of the medical staff through "careful selection and review." Section 766.110(1) concerns financial responsibility. The two statutes are not inconsistent, and do not overlap.

2). Chapter 395, Fla. Stat., Is Not Inconsistent With the Duty Recognized in Robert. The hospitals have argued that Chapter 495, which governs hospital licensing, trauma centers, rural hospitals, and the public medical-assistance trust fund, forecloses the duty recognized in *Robert*, because Chapter 395 assertedly prescribes all standards regarding the licensing and operation of hospitals.[13] But Chapter 395 has nothing to do with *financial* responsibility, which is the subject of §458.320. Chapter 395 does not regulate every facet of hospital operation, or every facet of a hospital's relationship with doctors. For example, §766.110 imposes a duty on hospitals to use due care in the selection of medical staff. Section §395.0191 is concerned in part with hospital staff privileges, but it does

[13]Section 395.0191(7) precludes liability for selecting staff doctors or allowing clinical privileges if the hospital acted in good faith and without fraud. Section 395.0191(4)--"Staff membership and clinical privileges"--bars discrimination in granting staff membership or clinical privileges, and requires that eligibility be based on background, experience and other factors. Section 395.0193 makes the proceedings and records of hospital review boards privileged, and provides that a hospital may revoke or suspend a physician's privileges for various enumerated reasons, after a peer-review board determines that such grounds exist.

not concern the financial-responsibility aspects of staff privileges; it does not mention §458.320; and it does not address any sanctions for a doctor's failure to comply with §458.320. There is no inconsistency.

d. Policy Arguments.

1). No Difficulty of Enforcement. As noted earlier, compliance with the statute--both at the time of licensing or license renewal, and at the time of patient admission--would require a check mark on a form.

2). No Inducement to Collude. The hospitals have argued that recognition of their statutory duty would induce a plaintiff to collude with a defendant physician: in exchange for the doctor's promise not to contest the entry of judgment, the plaintiff would promise to look only to the hospital for $250,000, and not to invoke disciplinary measures. To begin with, the plaintiff has an obvious incentive to pursue the physician for the entire judgment. And even in those cases in which the value of the lawsuit, and thus of any judgment, is less than $250,000, given that the medical-malpractice action and any ensuring "*Robert*" lawsuit against the hospital are public, the defendant doctor is always at risk that the State will investigate. And the hospital itself could defeat any collusion both by seeking indemnification from the doctor, and by blowing the whistle on any collusive practices. The asserted threat is fantasy.

e. No Due Process Violation. The hospitals have argued that the statute presents due-process issues because it would hold the hospital liable for the first $250,000 in damages assessed against a doctor upon a finding of negligence which the hospital had no opportunity to litigate. We disagree with this argument, *see infra*; but the short answer is that it is not preserved for appellate review, and therefore is not ripe for consideration. Plantation General never challenged below the finding of negligence against Dr. Jhagroo, or asked to relitigate it. There will be time enough in the next case for the next hospital to assert a right to relitigate the doctor's underlying negligence.

In any event, the argument is wrong. Under §458.320(2), the hospital's liability is based on the fact of a judgment against the doctor, and on the hospital's conferral of staff privileges without assuring the doctor's compliance with his statutory obligations of financial responsibility. The hospital's liability does not arise until a judgment is entered against a doctor, and the doctor is unable to satisfy it. The statute is analogous to a duty to indemnify, which arises as a result of the underlying judgment, and which is not subject to collateral attack when the right of indemnification is asserted.[14]

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[14]*See, e.g., Hoskins v. Midland Ins. Co.*, 395 So. 2d 1159 (Fla. 3d DCA), *review denied*, 407 So. 2d 1104 (Fla. 1981); *Olin's Rent-A-Car System, Inc. v.*

There are numerous contexts in which a defendant's liability may depend upon some underlying claim which has been established in a prior action, but is not subject to relitigation. Section 458.320(2) imposes liability on the hospital for failing to police its staff physician's compliance with statutory requirements. The hospital's liability properly derives from that failure.

None of these arguments forestall the appropriate interpretation of §458.320(2). At bottom, there is one overriding issue which compels that conclusion. This statute is designed to provide compensation of a minimal amount of money to patients who are victimized by medical malpractice, and who have secured a judgment. That is its purpose. If the only remedy available for the violation of this statute is discipline of the physician, that purpose will not be achieved. The patient will get nothing. There are statutory duties governing licensure; and there are different statutory duties governing conferral and

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Royal Continental Hotels, Inc., 187 So. 2d 349 (Fla. 4th DCA), *cert. denied*, 194 So. 2d 621 (Fla. 1966). A second example would be an action by a judgment debtor against a joint tortfeasor for contribution. The contribution defendant can litigate his own fault or the apportionment of fault, but the contribution plaintiff's fault was determined in the underlying action, and is not a subject of the second litigation. A third example would be a *Coblentz* agreement--*Coblentz v. American Surety Co. of New York*, 416 F.2d 1059 (5th Cir. 1969)--permitting the insured to make a settlement with the tortfeasor when the insurer denies coverage, leaving at issue only the good faith of the settlement and the coverage questions--not any direct re-litigation of the underlying claim.

maintenance of staff privileges. The State monitors licensing. Only hospitals can monitor the provision of staff privileges. If this Statute does not require them to do so, then it is meaningless, and statutes should not be construed to be meaningless. Three district courts have come to that conclusion. This Court should as well.

VI.
CONCLUSION

It is respectfully submitted that the decision of the District Court should be reversed, and the cause remanded with instructions to reinstate the Plaintiffs' judgment.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail on this 24th day of March, 2006 upon all counsel on the attached Service List.

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building
169 E. Flagler Street
Suite 1422
Miami, FL 33131
Tel: (305) 779-6090
Fax: (305) 779-6095

By:_____
Joel S. Perwin
Florida Bar No: 316814

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this computer-generated brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

_____
JOEL S. PERWIN
Florida Bar No. 316814

SERVICE LIST

H. Mark Purdy, Esq.
Purdy & Flynn, P.A.
1848 Southeast First Avenue
Fort Lauderdale, FL 33316-2875

Hal B. Anderson, Esq.
Kevin M. Vannatta, Esq.
Billing, Cochran, Heath, Lyles
& Mauro, P.A.
888 S.E. Third Avenue
Suite 301
Fort Lauderdale, FL 33316

Gail L. Parenti, Esq.
Parenti & Parenti, P.A.
9155 South Dadeland Blvd.
Suite 1504
Miami, FL 33156

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this computer-generated brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

_____

JOEL S. PERWIN
Florida Bar No. 316814