SUPREME COURT OF FLORIDA
CASE NO. SC05-331

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

Petitioner,

vs.

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

Respondent.
_____/

AMENDED JURISDICTIONAL BRIEF OF RESPONDENT PLANTATION GENERAL HOSPITAL LIMITED PARTNERSHIP d/b/a COLUMBIA PLANTATION GENERAL HOSPITAL

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STATEMENT OF THE CASE AND THE FACTS

This case is the fourth in a string of published appellate cases arising in four different districts that create a patchwork of liability and non-liability for hospitals. All cases addressed whether various causes of action for money damages can be implied from a statute, section 458.320, Florida Statutes, that sets statewide standards of physician financial responsibility for purposes of licensing. In the present case, the Petitioner is correct that Respondent, Plantation General, was held liable on summary judgment in the trial court under section 458.320 for part of an unsatisfied judgement against Dr. Derek V. Jhagroo for medical negligence that had occurred in the doctor's office and not even through use of the hospital's facilities.

The trial court's ruling was based upon precedent from the Second District and the Fifth District holding that, although the physician financial responsibility statute was silent as to any private remedies, one could state an implied cause of action in negligence for money damages against a hospital if it had granted privileges to a physician, but the physician later failed to satisfy a judgment for medical malpractice as required by the financial responsibility statute. As explained in the opinion of the Fourth District, these courts imposed a continuing statutory duty upon hospitals to ensure the physicians's compliance with the financial responsibility law regarding medical malpractice judgments. (2005 WL 293031, at *1). The decision of the Fourth District also notes that Petitioner maintains that he went further in the

trial court, holding the hospital liable for an implied cause of action in strict liability, as well as in negligence, under this statute.

Shortly after the hospital appealed the trial court's ruling to the Fourth District Court of Appeal, the Third District issued an opinion joining the two earlier districts in finding an implied cause of action against hospitals under this same physician financial responsibility law for unsatisfied medical malpractice judgments and also appearing to allow strict liability claims under it. Thus, before the Fourth District Court of Appeal had ruled, some jurisdictions -- the Seventeenth Circuit and the Third District -- allowed both negligence and strict liability theories of liability to be implied from this silent statute, and at least two other jurisdictions -- the Second District and the Fifth District -- allowed at least an implied cause of action for negligence.

When it ultimately ruled, the Fourth District Court of Appeal reversed the summary judgment, rejecting any private remedy for money damages implied from the statute -- whether sounding in negligence, strict liability, or any other tort theory -- because the statute set standards for physician financial responsibility as a condition of licensure and nothing more. In so doing, the Fourth District noted that "[i]t follows that our decision today is in direct conflict with *Baker*, *Baumgardner* and *Robert*." (2005 WL 293031, at *4). Based upon this express and direct conflict, the present appeal to this Court ensues.

POINT ON APPEAL

This court should set a consistent, statewide standard that resolves the express and direct conflict between the district courts concerning any implied cause of action against hospitals under the physician financial responsibility law, section 458.320, Florida Statutes, and the deeper, inherent conflict between the districts about when *any* statute properly gives rise to such implied rights.

SUMMARY OF ARGUMENT

The Fourth District's decision below rejects any implied cause of action under section 458.320, Florida Statutes. This statute establishes standards for physician responsibility as a condition of licensing but states nothing about imposing any statutory duty on hospitals that would give rise to any private remedy. In so ruling, the Fourth District expressly and directly parted ways with its sister districts in the Second, Third, and Fifth Districts which had previously allowed a negligence cause of action under this physician financial responsibility statute by implication. Moreover, in the case of the Third District, it would apparently also allow a strict liability cause of action to be implied; whereas, the other two districts addressed only implied causes of action in negligence. Thus, hospitals in Florida face not only a patchwork of liability and non-liability under the very same statute, but even where they face liability, the nature and extent of it are uncertain. Even more portentously, the fact that such a conflict exists reveals a deeper,

inherent conflict between the districts regarding when *any* statute properly gives rise to a private, implied cause of action under this Court's own precedent.

Finally, the present case adds the further element of potentially holding Plantation General liable for the unsatisfied judgment of a physician whose medical negligence occurred in a private office and had no nexus to the hospital itself. Such facts illustrate the dramatic reach and the significant financial impact of allowing an implied cause of action that effectively makes hospitals the insurer of any physician who commits medical malpractice and then fails to satisfy the judgment, even months or years after being granted the privilege of using the hospital's facilities -- and regardless of whether the hospital's facilities had any relationship to the physician-induced injury.

Such a contradictory interpretation of a statute of general application produces inconsistent liability for hospitals and only exacerbates the financial pressures these institutions already face in providing care to the state's citizens. If not addressed now, the precedential effect of this conflict threatens both unnecessary and inconsistent burdens upon hospitals, but also augurs a schism among the districts in future cases that require the analysis of implied causes of action and will look back to the analysis of section 458.320. The chaotic patchwork of liability derived today from section 458.320 cries out for the exercise of this Court's conflict jurisdiction to impose uniformity and predictability -- both for the application of this particular statute to a vitally important sector of the state

and for the recurring question of the proper analysis of implied an remedies and rights of action from statutes in other contexts.

ARGUMENT

> This court should set a consistent, statewide standard that resolves the express and direct conflict between the district courts concerning any implied cause of action against hospitals under the physician financial responsibility law, section 458.320, Florida Statutes, and the deeper, inherent conflict between the districts about when *any* statute properly gives rise to such implied rights.

As matters stand today across the state for Florida's approximately 275 hospitals, those hospitals in the Second District, the Third District, and the Fifth District, face some form of implied cause of action in negligence for the first $250,000 of an unsatisfied medical malpractice judgment against any physician who happens to hold staff privileges at the particular hospital. Hospitals in the Third District might also face strict liability, as Petitioner attempted to pursue here by implication from this same statute. Hospitals in the Fourth District, however, face no liability. And what hospitals face in the First District is unknown. This patchwork of differing liability and non-liability is exactly the kind of situation that this Court's conflict jurisdiction is designed to address. Moreover, given the importance of uniform regulation of the healthcare sector and given the many other statutes to which the

district courts will likely extend this conflict about implied rights, the present case merits consideration and a uniform, statewide standard.

That the conflict is express and direct cannot be denied. The case below concerned the existence of an implied cause of action, if any, against hospitals under section 458.320, Florida Statutes, for the first $250,000 of an unsatisfied medical malpractice judgment against a physician with hospital privileges.[1] The Fourth District here rejected any such implied cause of action against hospitals in such a physician licensing statute. By contrast, the Third District's decision in Mercy Hosp. Inc. v. Baumgartner, 29 Fla. L. Weekly D56 (Fla. 3d DCA Dec. 24, 2003); the Second District's decision in Baker v. Tenet Health System Hosp., Inc., 780 So. 2d 170 (Fla. 2d DCA 2001), and the Fifth District's decision in Robert

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[1] Subsection (2) of Section 458.320 sets the standards of financial responsibility for physicians who have staff privileges of any nature at a hospital, and provides in pertinent part as follows:

> (2) Physicians who perform surgery in an ambulatory surgical center licensed under chapter 395 and, as a continuing condition of hospital staff privileges, physicians who have staff privileges must also establish financial responsibility by one of the following methods: (a) Establishing and maintaining an escrow account consisting of cash or assets eligible for deposit in accordance with s. 625.52 in the per claim amounts specified in paragraph (b).... (b) Obtaining and maintaining professional liability coverage in an amount not less than $250,000 per claim, with a minimum annual aggregate of not less than $750,000 from an authorized insurer.... (c) Obtaining and maintaining an unexpired irrevocable letter of credit, established pursuant to chapter 675, in an amount not less than $250,000 per claim, with a minimum aggregate availability of credit of not less than $750,000....
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> This subsection shall be inclusive of the coverage in subsection (1).(3)(a) Meeting tl

' 458.320, Fla. Stat.

v. Paschall, 767 So. 2d 1227 (Fla. 5th DCA 2000), all concerned the same issue under the same statute. Moreover, on the face of its opinion, the Fourth District recognized that it was parting ways with the other three districts, stating "[i]t follows that our decision today is in direct conflict with *Baker, Baumgardner* and *Robert*." Plantation General Hospital v. Horowitz, 2005 WL 293031, at *4 (Fla. 4th DCA Feb. 9, 2005).

With conflict jurisdiction clearly present, it falls to this Court's discretion to grant review so as to give some measure of uniformity and predictability to the reach of section 458.320 for the Florida's approximately 275 hospitals and 48,491 physicians. If the effect of such uncertain exposure on the state's financially pressured healthcare sector were not enough by itself, then the facts of the present case also show the far-reaching import of this issue. In this case, Plantation General was held liable in the trial court for an unsatisfied judgment arising from medical malpractice that occurred in a private office without any nexus to the hospital itself. The only link between this judgment and Plantation General, a tenuous one at best, is that at some time in the months or years before, the hospital had granted the Dr. Jhagroo the privilege of using its facilities for some of his patients. Since these privileges were never part of the malpractice at issue, the import of Petitioner's case is to make hospitals the virtual insurer of at least a portion of a physician's medical malpractice liability without even being accorded the notice, the opportunity to defend, and the due process protections that a conventional insurer would receive.

In Respondent's view, as well as that of the Fourth District, all this occurs based upon a departure from this Court's precedent by those other district courts that would find that a private remedy for money damages in negligence, or even strict liability, can be implied from a statute that is silent about anything other than its limited purpose of setting standards for physician financial responsibility for purposes of state licensing. As noted by the decision below of the Fourth District, to reach the results that they did, the other district courts necessarily had to misapply this Court's precedent in Murthy v. N. Sikha Corp., 644 So. 2d 983, 985 (Fla. 1994), and Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1981), which set limitations on when a private cause of action may be implied from an otherwise silent statute. Therefore, this case holds precedential value far beyond a statute that is significant to Florida's important healthcare sector.

Beyond the statute at issue here, the conflict among the districts about whether section 458.320 gives rise to an implied private cause of action, and if so what kind, reveals divergent approaches as to when *any* statute gives rise to an implied private cause of action. Regardless of how this Court might decide this particular case on the merits, and even setting aside how important it is to the healthcare sector, the statutory and precedential import of the conflict revealed in this case holds great significance for future cases involving analysis of statutorily implied causes of action. If not resolved now, the effect of *starre decisis* will likely perpetuate the present conflict as the divergent analyses of the district courts are extended to other statutes that come before them for a determination of whether those other

statutes accord an implied right to money damages. The precedential import of this conflict calls out for this Court to exercise its discretion now both to ensure the uniform interpretation of an important statute for an industry that is important to Florida's economy and its citizens' well-being and to protect the uniform application of this Court's own precedent for implying causes of action for money damages from myriad other statutes.

CONCLUSION

Based upon the foregoing argument and legal authorities, and the express and direct statement of conflict by the Fourth District Court of Appeal relative to its three sister courts, this Court has conflict jurisdiction. Because the existing patchwork of inconsistent liability and non-liability creates great uncertainty and exposure for the vital healthcare sector of this state, this Court should exercise its discretion to accept this cause and impose a uniform standard statewide concerning the reach and the limitations on section 458.320, Florida Statutes, as well as the implication of private rights of action for money damages from statutes in general.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 18th day of May, 2005, to:

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CERTIFICATION OF TYPESIZE

Undersigned counsel certifies that this brief employs proportionately spaced Times New Roman type in fourteen (14) points which typesize meets or exceeds the legibility standards set by Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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