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 REPLY BRIEF ON THE MERITS

H. MARK PURDY
ROSE-ANN FLYNN
PURDY & FLYNN, P.A.
Attorneys for Petitioner
1848 Southeast First Avenue
Fort Lauderdale, FL 33316-2875
Telephone No. (954) 356-0008
Facsimile No. (954) 356-0017
Florida Bar No. 128960

TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITY

REPLY TO POINT ONE 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.

Petitioner does not deem it necessary to reply point by point to every theory set forth by Respondent in its extensive Answer Brief. Most of Respondent's arguments were adequately address in Petitioner's Main Brief.

However, Petitioner would like to reply to Respondent's framing of the specific issue herein as set forth at Page 1, first paragraph of Respondent's Brief, ("Horowitz, who has an unsatisfied medical malpractice judgment for injuries sustained in Doctor Derek Jhagroo's private office, seeks to recover $250,000 from Plantation General by reason of the fact that it had given Doctor Jhagroo staff privileges at the hospital.") This characterization greatly over simplifies the relationship between a hospital and a staff-privileged physician and also ignores the obligations imposed by the Comprehensive Medical Malpractice Reform Act of 1985.

Hospitals and staff-privileged physicians typically have an on-going, long-term relationship whereby the physicians regularly admit their private practice patients to the hospitals. § 458.301, Fla. Stat., recognizes that members of the

public often have difficult in selecting physicians. Surely, the fact that a practicing physician enjoys staff privileges is of importance to those seeking medical care. The on-going relationships between physician and hospital are mutually advantageous and financially profitable to both. Because of this relationship and following language in Insinga v. LaBella, 543 So.2d 209 (Fla. 1989) the trial court noted that the hospitals are in the best position to determine and monitor physician conduct and performance as well as to determine physician's financial responsibility, which is a continuing obligation for staff privileges.

Hospitals are not uninvolved third-party guarantors or substitute insurers. Respondent attempts to show inequity where there is none. The circumstances of a hospital's exposure are limited to specific situations in which the hospital accords staff privileges to a physician who is not in compliance with state law and their exposure is capped at $250,000 regardless of the amount of the uncollectible judgment[1]. Hospitals can easily avoid such exposure by taking reasonable minimal steps to protect the patients and by properly monitoring and controlling physicians who utilize their facilities.

This position is particularly compelling given the stipulated factual circumstances presented to the trial court. It should be kept in mind that it was

[1] The judgment in favor of Mr. and Mrs. Horowitz was in excess of $800,000.

stipulated that Doctor Jhagroo "did not maintain medical malpractice insurance or otherwise comply with the requirements of Florida Statute 458.320." (See Paragraph h of the Stipulated Facts at R-44-48.) Therefore, Plantation General continued in a relationship with Doctor Jhagroo and continued to profit from his admission of patients (including Mrs. Horowitz) in spite of the fact that he was not in compliance with state law. This is unjust!

Should the hospitals of this state be allowed to operate with impunity under such circumstances? For good reasons, the courts in Robert, Baker and Baumgardner answered this question in the negative. The hospital's liability arises from its own breach of statutory duty under § 458.320(2).

It is appropriate to briefly re-examine the Comprehensive Medical Malpractice Reform Act of 1985, Chapter 85-175, Laws of Florida. This Act as very broad in its scope in that it sought to bring fundamental reforms to Florida tort law and Florida liability insurance law. It described itself as being "drastic legislative action." See Whereas clauses. While it contains regulatory *provisions*, it is not a *mere* regulatory act with no other purposes. Its scope and intent are broader. In fact, the Act is clear and unambiguous in its objective to bring safe medical practice to the citizens of this state.

Obviously, the Florida Legislature had no illusions that it could legislatively abolish acts of malpractice. The legislature was simply trying to protect the

medical patients by enacting 49 pages of new and amended statutory provisions with the ultimate ideal of "safe practice." As part and parcel of this goal, Section 458.320 was enacted making "financial responsibility" part and parcel of "safe practice." As stated in § 458.301, Fla., Stat., the explicit legislative intent was that physicians who fall below minimum competency **or** who **otherwise present a danger to the public** shall be prohibited from practicing in this state.

Surely, when overhauling the state's tort law and liability insurance system the legislature did not forget about the innocent victims of medical malpractice. Holding a defendant liable for violation of a statute is obviously not a new concept. A large body of law deals with violations of statutes, ordinances or regulations as conclusive presumption of liability (strict liability), conclusive presumption of negligence (negligence per se) or evidence of negligence. See for example Florida Standard Jury Instructions 4.9 and 4.11. Medical malpractice victims are a distinct class of persons who often have difficulty protecting themselves from dire consequences and these innocent victims should be accorded some measure of protection. The court in Robert v. Parshall, 767 So.2d 1227, 1228 (Fla. 4th DCA 2000), found that the legislative intent was to make sure that plaintiffs be compensated at least up to $250,000.

It is respectfully submitted that the concepts of protecting the public, safe practice, physician competency and physician's financial responsibility are all

intertwined and integral parts of the Act. The legislative intentions are both clear and obvious. Robert at 1228. More specifically, § 458.320(2), Fla. Stat., provides that financial responsibility, by one of the designated methods, is a continuing condition of hospital-staff privileges. Thus, strong legislative intentions distinguish this situation from the pure administrative remedies in Murthy v. N. Sinha Corp., 644 So.2d 983 (Fla. 1994).

This Court in Murthy examined Fla. Stat. Ch. 489 to determine whether or not a private cause of action arose against a qualifying agent. This Court determined that Chapter 489 was created merely to secure the safety and welfare of the public and found no legislative intent to create a private cause of action for breach. Noting the absence of any express provisions for a civil cause of action the Court addressed whether Murthy's claim should or could be judicially implied. Under the specific facts of Murthy, this Honorable Court found that it could not judicially imply a private cause of action because the legislature had subsequently amended Chapter 489 to include language which specifically precluded judicial implication of a civil cause of action. Murthy at 986.

The facts before this Court are substantially different as is recognized by the fact that three district courts have found that the legislative intent to create a private civil cause of action was "obvious"

Respondent has incorrectly suggested that the granting of immunity in physician disciplinary proceedings implies immunity for all provisions of the 1985 Act. Hospitals, their governing bodies, governing body members, medical staff, disciplinary bodies, agents, investigators, witnesses, employees or any other persons involved in disciplinary proceedings against staff members are immune from monetary liability or damages in the absence of fraud. See Section 3, Comprehensive Medical Malpractice Reform Act of 1985. According this form of immunity conforms with sound public policy and encourages appropriate disciplinary actions without fear of retribution.

On the other hand, Section 23 of the same Act does not accord immunity and makes specific provision for liability of healthcare facilities and provides that they have a duty to assure comprehensive risk management and the competence of their medical staff and personnel, etc. Subsection D, Page 17 of Respondent's Brief seems to confuse Section 3 and Section 23.

Therefore, it is clear that hospitals do not enjoy complete immunity from liability or damages.

In summary, the Fifth District in Robert v. Paschall, 767 So.2d 1227 (Fla. 5th DCA 2000), the Second District in Baker v. Tenet Healthsystem Hospital, Inc., 780 So.2d 170 (Fla. 2nd DCA 2001), and the Third District in Mercy Hospital, Inc. v. Baumgardner, 870 So.2d 130 (Fla. 3rd DCA 2003), have all found that § 458.320,

Fla. Stat., is sufficiently clear and explicit to create a private cause of action for the benefit of innocent injured victims of malpractice. Those three cases should be followed and adopted by this Honorable Court as the law of this state.

REPLY TO POINT TWO ON APPEAL

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.

The Fourth District did not attribute any significance to the fact that the malpractice took place in Doctor Jhagroo's office, because there is no real significance to this point. A reading of Robert, Baker and Mercy Hospital discloses that factually the medical malpractice apparently occurred in the hospital but clearly that was not the basis of the ultimate holdings. In fact, the Second, Third and Fifth Districts placed no significance on this issue in finding the hospital's statutory duty under § 458.320, Fla. Stat.

Likewise, Respondent's reliance on Insinga v. LaBella, 543 So.2d 209 (Fla. 1989), is misplaced. Insinga recognized the corporate negligence doctrine as pre-

dating the Comprehensive Medical Malpractice Act of 1985 which codified that doctrine as § 768.60, Fla. Stat.

This Honorable Court in Insinga traced the development of the corporate negligence doctrine by examining multiple out-of-state decisions and comparing their holdings to earlier Florida decisions generally holding that no duty exists on the part of a hospital with regard to independently retained services of a private physician who has hospital-staff privileges. This Court stated as follows:

> Previously, the substantial weight of authority supported the view that a private physician with hospital privileges was not considered the hospital's servant because the hospital had no right to control the acts of a physician who is an independent contractor, and, consequently, the hospital would not be liable for the independent physician's negligence, nor was it a guarantor of the physician's competence. Insinga at 212.

In the following paragaraph this Honorable Court noted that there was a strongly believed legal principle as reflected by a decision of the Hawaii Supreme Court which stated:

> Since the hospital is not liable for the independent physician's negligence, it has no duty to guarantee that he is competent. Id.

However, this Court went on to adopt the corporate negligence doctrine as a matter of public policy and impose on a hospital an independent duty to its patients to assure the competence of its medical staff. This Court stressed that this was a

new and independent duty and noted, following Pedroza v. Bryant, 101 Wash. 2d 226, 677 P.2d 166 (1984), that the application of the doctrine only applies to acts committed within the hospital setting. Also following Pedroza this Court noted that the hospital is the only entity that can realistically provide quality control of physician conduct.

However, the theories asserted by Petitioner against Respondent are not grounded upon the corporate negligence doctrine but on the statutory duty under § 458.320, Fla. Stat., which statutory duty is separate and distinct from the duty found in Insinga. Robert at 1228.

Had Respondent honored its statutory obligation to insure Doctor Jhagroo's financial responsibility under § 458.320, Fla., Stat., his malpractice policy (or other provision for financial responsibility) would unquestionably have covered this incident. Stated another way, had the hospital discharged its statutory duties, Doctor Jhagroo would have financial responsibility for the first $250,000 of the judgment and no action against Respondent would have been brought.

Keep in mind that the Respondent stipulated that Doctor Jhagroo had not in any way complied with his obligations of financial responsibility and that Mrs. Horowitz was admitted to Plantation General Hospital for amputation of her thumb. This is part and parcel of a causation analysis and it is not a quantum leap

as Respondent suggests. The factual nexus between the injuries sustained and Plantation General Hospital is clear.

CONCLUSION

This Court should affirm decision of the Fifth District in Robert, the Second District in Baker and the Third District in Baumgardner and likewise affirm Summary Judgment of the trial court.

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.

PURDY & FLYNN, P.A.
Attorneys for Petitioner
1848 Southeast First Avenue
Fort Lauderdale, FL 33316-2875
Telephone No. (954) 356-0008
Facsimile No. (954) 356-0017
Florida Bar No. 128960

By_____
H. MARK PURDY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 6th day of July, 2006 to the persons on the attached Mailing List.

PURDY & FLYNN, P.A.
Attorneys for Petitioner
1848 Southeast First Avenue
Fort Lauderdale, FL 33316-2875
Telephone No. (954) 356-0008
Facsimile No. (954) 356-0017
Florida Bar No. 128960

By_____
H. MARK PURDY

HOROWITZ v. PLANTATION GENERAL HOSPITAL
MAILING LIST

Hal B. Anderson, Esq.
Billing, Cochran, Heath, et al.
888 Southeast Third Avenue
Suite 301
Fort Lauderdale, FL 33316
Attorneys for Appellee
(954) 764-7150
Fax: (954) 764-7279

Joel S. Perwin, Esq.
Alfred I. DuPont Building
169 East Flagler Street
Suite 1422
Miami, FL 33131-1212
Attorney for Academy of Florida Trial Lawyers
(305) 779-6090
(305) 779-6095 (Fax)

Arthur J. England, Jr., Esq.
Edward G. Guedes, Esq
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0500
(305) 579-0717 (Fax)

Gail Leverett Parenti, Esq.
Parenti & Parenti, P.A.
9155 South Dadeland Boulevard
Suite 1504
Miami, FL 33156
(305) 539-3800
(305) 539-3801 (Fax
Attorneys for FHA

William A. Bell, Esq.
120 South Monroe Street
Post Office Box 469
Tallahassee, FL 32301
Co-Counsel for Florida Hospital Association