IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 2004

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

Appellant,

v.

STUART HOROWITZ, as Personal Representative of the Estate of LENA HOROWITZ,[1]

Appellee.

CASE NO. 4D03-3873

Opinion filed December 1, 2004

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona M. Holmes, Judge; L.T. Case No. 01-2154 (18).

Hal B. Anderson and Kevin M. Vannatta of Billing, Cochran, Heath, Lyles, Mauro & Anderson, P.A., Fort Lauderdale, for appellant.

Gail Leverett Parenti of Parenti, Falk, Waas, Hernandez & Cortina, P.A., Coral Gables, and William A. Bell, General Counsel, Tallahassee, for Amicus Curiae Florida Hospital Association.

H. Mark Purdy of Purdy & Flynn, P.A., Fort Lauderdale, for appellee.

Joel S. Perwin of Podhurst Orseck, P.A., Miami, for Amicus Curiae Academy of Florida Trial Lawyers.

[1]We sua sponte change the style of the case since the parties stipulated to the dismissal of the claim of Max Horowitz. Stuart Horowitz, as personal representative of the Estate of Lena Horowitz, was then substituted as the sole party plaintiff in the lower court.

STEVENSON, J.

This is an appeal from a final summary judgment entered in favor of appellee Stuart Horowitz, as personal representative of the Estate of Lena Horowitz, and against appellant Plantation General Hospital in a medical malpractice related action. The deceased, Lena Horowitz, and her husband, Max Horowitz, had earlier obtained a medical malpractice judgment against an uninsured physician with privileges at Plantation General Hospital. When the judgment went unsatisfied, the Horowitzes brought this suit against Plantation General based upon the premise that Florida's physician financial responsibility law, Florida Statutes section 458.320, created a "strict liability" right of action against the hospital for up to $250,000 of the unsatisfied judgment. We reverse because it was error to enter a judgment against the hospital predicated on principles of strict liability.

In the action below, both parties moved for summary judgment and the case was presented to the trial judge on stipulated facts. Dr. Derek Jhagroo was a physician licensed to practice medicine in the State of Florida and he maintained staff privileges at Plantation General. Lena Horowitz went to Dr. Jhagroo's private office on January 19, 1996, for examination and treatment of an infected right thumb. Three days later, on January 22, 1996, Horowitz was admitted by Dr. Jhagroo to Plantation General where her right thumb was surgically removed.

Subsequently, Horowitz obtained a medical malpractice judgment in the amount of $859,200 against Dr. Jhagroo based on medical negligence which occurred while she was treated in Dr. Jhagroo's private office. A writ of execution was returned unsatisfied and the final judgment against Dr. Jhagroo is uncollectible. No amounts have been paid toward the final judgment. During the month of January 1996, while he enjoyed privileges at Plantation General, Dr. Jhagroo did not maintain medical malpractice insurance or otherwise comply with

the requirements of the physician responsibility law. The Horowitzes then brought this suit against Plantation General to collect on the unsatisfied judgment.

The trial court entered summary judgment against Plantation General and ruled as follows:

> [Florida Statute 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 v. Tenet Heathsystem Hospitals, Inc.*, 780 So. 2d 170 (Fla. 2d DCA 2001); *Robert v. Paschall*, 767 So. 2d 1227 (Fla. 5th DCA 2000). However, no cause of action arises against the hospital until the patient and spouse establish liability on the part of the staff physician. Plaintiffs in this case have established liability which is evidenced by the judgment.
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> Defendant distinguishes these cases, and both Plaintiff and Defendant agree, that in both cases, the negligence occurred in the hospital. In the case *sub judice*, the negligence occurred in Jhagroo's office. He merely used the hospital to rectify the negligence. Both parties agree that no negligence occurred during the surgical procedure.
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> As a matter of public policy, the finding is for Plaintiff. The hospital is in the best position to verify that its staff is in compliance with the statute.
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> It's as simple as the legislative requirement that motorists have to carry, along with their driver's licenses and registrations for vehicles, proof of insurance. A simple card, issued by insurance companies to show proof of coverage. The legislature placed this responsibility and duty upon hospitals.
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> In this case, there would have been little inconvenience to Defendant hospital to verify, when he scheduled a room for surgery, or certainly prior to his entry into the surgical area, his current insurance coverage. Defendant hospital assumed the risk of allowing this doctor to operate in their facility, they should share in the responsibility of his negligence.

Pursuant to the so-called "physician financial responsibility law," as a condition of maintaining an active license, a physician must demonstrate to the state Board of Medicine and the Department of Health financial responsibility to pay claims arising out of malpractice. *See* § 458.320(1), Fla. Stat. (1999). This financial responsibility can be demonstrated in a variety of ways, including maintaining an escrow account, professional liability coverage or an unexpired, irrevocable letter of credit, all in an amount sufficient to cover at least $100,000 per claim with an aggregate of not less than $300,000. *See* § 458.320(1)(a)-(c). Additionally, physicians who maintain staff privileges at a hospital must establish financial responsibility with that hospital by maintaining an escrow account, professional liability insurance or an unexpired, irrevocable letter of credit, all in an amount not less than $250,000 per claim, with a minimum aggregate amount of not less than $750,000. *See* § 458.320(2)(a)-(c). A physician who agrees to pay any medical malpractice judgment creditor $250,000 of any judgment, informs patients he or she does not carry medical malpractice insurance, and provides written notification to the Florida Department of Health of compliance with certain statutory requirements, may "go bare" and be exempt from the requirements of section 458.320(2)(b). *See* § 458.320(5)(g).

In *Robert v. Paschall*, 767 So. 2d 1227 (Fla. 5th DCA 2000), the Roberts brought a medical malpractice suit against Dr. Paschall and a negligence action against Putnam Community Medical Center, claiming that the hospital was negligent because it granted staff privileges to Dr. Paschall knowing that he had not complied with Florida's mandatory financial responsibility law. The trial court dismissed the action with prejudice based on common law principles, but the Fifth District reversed, finding that the Roberts could assert a statutory cause of action against Putnam Community Medical Center:

> The obvious intent of the legislature [in enacting section 458.320(2)(b)] 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.
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> This statutory duty is separate and distinct from the common law duty imposed on hospitals to select and retain professionally competent staff physicians. . . .
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> . . . We conclude that the cause of action against the hospital does not arise or accrue until the injured party can establish that the staff-privileged physician is liable to him or her for medical malpractice. After the cause of action accrues, it will then be necessary to establish, by appropriate evidence, what portion of the judgment the doctor cannot satisfy. The limit of the hospital's liability in any event is $250,000.

767 So. 2d at 1228-29 (citations omitted). The court went on to hold that, according to the rationale of its decision, the Roberts' claim against Putnam was premature and the dismissal should have been without prejudice. *Id*. at 1229.

Without much discussion, the court in *Paschall* recognized, apparently for the first time in Florida, a cause of action against a hospital which negligently grants staff privileges to a doctor who has not complied with the physician responsibility law, leaving an unsatisfied and uncollectible judgment in the hands of a medical malpractice claimant. In *Baker v. Tenet Healthsystem Hospitals, Inc.*, 780 So. 2d 170 (Fla. 2d DCA 2001), the Second District recognized and approved a similar cause of action. There, the plaintiffs in a medical malpractice suit alleged that Tenet Healthsystem Hospitals d/b/a Palms of Pasadena Hospital was negligent in failing to assure that the staff-privileged, defendant doctors had complied with financial responsibility law. As in *Paschall*, the lower court dismissed the count on the basis that no common law cause of action in negligence was stated. In reversing the lower court, the Second District stated:

> 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.

780 So. 2d at 171-72 (citing *Paschall*). Like *Paschall*, the court in *Baker* held that the count against the hospital should be dismissed without prejudice since it was premature until the claimants established liability on the part of the defendant doctors. *Id*. at 172.

Mercy Hospital, Inc. v. Baumgardner, 870 So. 2d 130 (Fla. 3d DCA 2003), *review denied*, 879 So. 2d 622 (Fla. 2004), followed on the heels of *Paschall* and *Baker*. In *Mercy*, the plaintiffs had obtained a medical malpractice judgment against an uninsured doctor who had staff privileges at Mercy Hospital. The defendant physician filed for bankruptcy and the plaintiffs were unable to recover their judgments. The plaintiffs then brought an action against Mercy Hospital, alleging strict liability under Florida's physician financial responsibility law and negligence for failure to ensure that the defendant, staff-privileged physician complied with the statute. The trial court dismissed the negligence claims but granted summary judgment for the plaintiffs on the strict liability claims. The hospital appealed the summary judgment on the strict liability claims and the plaintiffs cross-appealed the dismissal of the negligence claims. On appeal, the Third District affirmed and stated:

> Mercy Hospital argues the trial court erred in granting summary judgment for the plaintiffs, contending Section 458.320(2) does not impose liability upon a hospital to ensure a

> physician's compliance. We disagree for the reasons expressed by our sister districts in *Robert v. Paschall*, 767 So. 2d 1227 (Fla. 5th DCA 2000), *review denied*, 786 So. 2d 1187 (Fla. 2001), and *Baker v. Tenet Healthsystem Hosp., Inc.*, 780 So. 2d 170 (Fla. 2d DCA 2001).

870 So. 2d at 131. In approving the summary judgment entered in favor of the plaintiffs, the court in *Mercy* went beyond the holdings in *Paschall* and *Baker* and recognized yet another cause of action against a hospital that fails to assure that a staff-privileged physician complies with the financial responsibility law -- one sounding in strict liability.

We cannot agree with *Mercy's* holding that there is a cause of action under these circumstances against a hospital on a strict liability theory. Strict liability is an extraordinary theory of tort recovery which relieves the plaintiff from the traditional burden of proving lack of due care, and is not casually embraced in Florida law. *See generally West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). Nothing in Florida Statutes chapter 458 supports the notion that the legislature intended that a hospital should be strictly liable for failure to correctly determine whether a staff-privileged physician has "established" compliance with the financial responsibility law.[2] The legislative intent that a statutory-based private cause of action should proceed as a strict liability claim must be clearly and plainly expressed. *See Easton v. Aramark Unif. & Career*, 825 So. 2d 996 (Fla. 1st DCA 2002), *approved*, No. SC02-2190, 2004 WL 2251847 (Fla. Oct. 7, 2004); *see also deJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198, 201 (Fla. 1973)(noting that strict liability is generally applied to violations of statutes of "the type designed to protect a particular class of persons from their inability to protect themselves, such as one prohibiting the sale of firearms to minors").

In the instant case, the Horowitzes proceeded only on a claim of strict liability against the hospital.[3] The trial court erred in entering summary judgment in their favor and should have entered summary judgment for Plantation General. Plantation General also argued that it could not be responsible under the statute since the parties stipulated that the malpractice occurred in the physician's private office and had no connection with any of the physician's activities at the hospital. We need not reach that issue.

Accordingly, the summary judgment entered in favor of the Horowitzes is reversed, and we remand for entry of summary judgment for Plantation General.[4]

REVERSED and REMANDED.

GROSS, J., concurs.
FARMER, C.J., concurs specially with opinion.

FARMER, C.J., concurring specially.

I like the reversal, but not because of strict liability. The majority's refusal to disavow negligence suggests there might eventually be something to it, that the outcome is just the result of bad pleading. The problem is not the wrong cause of action but that there is no cause of action. I don't think plaintiff is entitled, no

[2]The holding in *Mercy Hospital* seems to imply a type of "strict vicarious liability" standard akin to the "dangerous instrumentality doctrine" in Florida. *See Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000)(noting that "Florida's dangerous instrumentality doctrine imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another")(citing *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 637 (Fla. 1920)).

[3]Appellee brought no cause of action for negligence in this case. Therefore, we do not reach the question of whether a cause of action for negligence could arise as in *Baker v. Tenet Healthsystem Hospitals* and *Robert v. Paschall*.

[4]We certify conflict with *Mercy Hospital, Inc. v. Baumgardner*, 870 So. 2d 130 (Fla. 3d DCA 2003), *review denied*, 879 So. 2d 622 (Fla. 2004).

matter what theory is used, to have a hospital pay any of its doctor's malpractice judgment.

Plaintiff bases his claim for money damages on that darling of the statutory intent crowd, whether a private cause of action can be inferred from what is obviously a regulatory statute. In *Murthy v. N. Sinha Corp.*, 644 So.2d 983, 986 (Fla.1994), there is a germ of an opening to the money door stating:

> "we agree that *legislative intent*, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one." [e.s.]

644 So.2d at 985 (holding that regulatory statutes governing construction industry did not create private cause of action in the absence of evidence in text or legislative history of intent to create private cause of action). In isolation, I suppose, that single sentence could be read to authorize judges to add private causes of action for damages to regulatory statutes whose text fails to provide for them. Later in the same opinion, however, the court made clear:

> "we decline to infer any civil liability as there is no evidence *in the language* or the legislative history *of chapter 489* of a legislative intent to create a private remedy against a qualifying agent." [e.s.]

644 So.2d at 986.

This actual holding follows the supreme court's previous admonition that judges lack the power

> "to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power."

Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). From the court's own application of its suggestion implying the legitimacy of implied private rights of action, therefore, *Murthy* really stands for the proposition that the text of the statutory scheme itself must betray a legislative purpose to authorize civil damages actions to redress violations of regulatory law.

The term *legislative intent* in *Murthy* is thus better comprehended as a shorthand reference to the ordinary tools for discerning statutory meaning: text, context, and purpose. Given the holding in *Holly v. Auld*, it is very unlikely[5] that the court conceived of *Murthy* as an invitation to judges to comb through committee hearings, staff commentaries or floor debates for isolated comments favoring an implication of a right of private parties to sue for damages from violations of regulatory law when the actual statutory text lacks such authority.

Yes, *Murthy* has been misunderstood. Two courts have justified finding a private right of damages actions in section 458.320 by the following reasoning:

> "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."

Mercy Hosp. Inc. v. Baumgardner, 870 So.2d 130, 131 (Fla. 3d DCA 2003) (quoting *Robert v. Paschall*, 767 So.2d 1227, 1228 (Fla. 5th DCA 2000)). But as (then) Professor Easterbrook has explained regarding this same thinking:

> "A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to

[5] *See Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002) ("this Court does not intentionally overrule itself sub silentio.").

> achieve X, and of where to stop in pursuit of X. Like any other rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X displaces and directly overrides the legislative selection of ways to obtain X. It denies to legislatures the choice of creating or withholding gapfilling authority. The way to preserve the initial choice is for judges to put the statute down once it becomes clear that the legislature has selected rules as well as identified goals."

Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535 (1983).

From this forceful clarification of the boundary between legislative and judicial powers, the flaws in the logic of *Baumgardner* and *Paschall* become apparent. The aim of section 458.320 is obviously to have staff physicians furnish a form of financial security to satisfy malpractice judgments against them. But the Legislature plainly laid out its intended remedies in the statute when physicians fail to provide the required security. None of the statute's remedies include sanctions against a hospital. Nothing in any part of the statute — or for that matter the entire chapter — suggests a purpose to make hospitals responsible to pay staff physicians' malpractice judgments.

Accepting that plain specification of the remedies for complying with the goal of the statute, under what theory of language (or law, or even politics) would one reasonably infer a purpose to have money judgments against a hospital for a doctor's unsatisfied judgment? Indeed, if one were inclined to infer a remedy not specified in the text, why wouldn't that remedy more plausibly be something like injunctive relief against the hospital to enforce the statutory duty of policing compliance with section 458.320? What *is* the legal justification for any kind of money damages remedy against the hospital under any theory?

The answer is that the Legislature itself did not deem the goal of security for malpractice judgments so critical that it should make hospitals become virtual insurers for a doctor's security obligation. I am unable to find any indication anywhere in the entire statutory scheme that a money damages remedy against a hospital is within any legislative purpose discernible from the text adopted.

I would therefore make explicit what the majority elides. The Legislature has implied no damages remedy of any kind under section 458.320, whether it be based on strict liability, negligence, suretyship, contract, contribution, indemnification, criminal punishment, or any other legal theory the creative minds of lawyers can discern.

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.