IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-685

GUILLERMO TABRAUE, III, ESQ.,
as Personal Representative of the Estate
of SUYIMA TORRES,

Petitioner,

v.

DOCTORS HOSPITAL, INC., ET AL.,

Respondents.
_____/

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF IDENTITY AND INTEREST

This amicus curiae brief is submitted by the Florida Defense Lawyers Association (FDLA) in support of Respondents. The FDLA is a statewide organization of civil defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to "bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort, insurance, or litigation issues.

This case carries statewide importance as it addresses whether this state recognizes a statutory or contractual non-delegable duty that renders a hospital liable for the physician care taking place within its walls. The Third District Court of Appeal held that a hospital does not have such a duty in this instance. As explained below, the Petitioner's proposed non-delegable duty is incompatible with the scope of the hospital's duty as defined by the Legislature and this Court's past holdings and would leave hospitals liable for the clinical decision-making of competent,

properly credentialed physicians when hospitals are bound by laws and regulations prohibiting them from refusing such physicians' medical staff applications.

SUMMARY OF ARGUMENT

This Court should adopt and affirm the well-reasoned opinion of the Third District Court of Appeal. The Petitioner and his amici focus solely on resources for tort recovery and ignore the implications a ruling in their favor would have for hospitals and the healthcare industry as a whole. They similarly ignore that, under Florida's regulatory, administrative, and statutory scheme, hospitals generally cannot freely choose which physicians will practice on their medical staffs. Hospitals are prohibited from arbitrarily and capriciously denying privileges to medical professionals, and generally cannot control which specific medical professionals will provide clinical care even where an exclusive provider agreement is in place. Further, the Petitioner and his amici ignore a remedy already provided by the Legislature and this Court.

ARGUMENT

I. HOSPITALS SHOULD NOT BE HELD LIABLE FOR THE ACTS OF INDEPENDENT PHYSICIAN MEMBERS OF THEIR MEDICAL STAFFS WHEN HOSPITALS GENERALLY CANNOT FREELY CHOOSE WHICH PHYSICIANS WILL COMPRISE THOSE MEDICAL STAFFS

The modern health care system provides patients round-the-clock access to emergency and specialty medical care to a degree unimaginable just decades ago.

This profound change in the health care model substantially changed the nature of the physician-patient relationship. While hospitalized patients are often under the care of a physician with whom they have a long-standing relationship (e.g., obstetricians, gastroenterologists, and orthopedists), patients often require care from physicians in specialties that rarely provide office-based medical care (e.g., emergency physicians, radiologists, anesthesiologists, and pathologists). In exchange for the benefit of access to the kind of medical care they need at whatever time of day they need it, hospital patients sacrifice the opportunity to choose the particular physicians who will provide that care.

Petitioner and his amici contend this Court should recognize that hospital patients are often unable to choose the specific physicians who will provide their care and treatment, and on that basis create a new non-delegable duty under which hospitals will be automatically liable for the way in which physicians exercise their medical judgment within the hospital's walls. Petitioner and his amici fail to acknowledge that, like patients, *hospitals* are generally unable to freely choose the specific physicians who will care for and treat the facility's patients. Recognizing the proposed non-delegable duty would make hospitals liable for acts of physicians they cannot select and would usurp the remedy the Legislature and this Court created to allow patients to hold hospitals accountable for failure to undertake the acts *within the hospital's control*.

A. Hospitals cannot arbitrarily and capriciously deny medical staff privileges to otherwise qualified physicians.

While often described as an independent contractor relationship, the relationship between hospitals and the physicians who care for hospitalized patients is nothing like the typical independent contractor relationship generally involved in non-delegable duty cases. In the classic non-delegable duty fact pattern, a non-delegable duty arises when Entity A contracts to perform some inherently dangerous activity. Entity A could select one of its own employees to perform the activity, but instead selects and contracts with a third-party, Individual B. Entity A is automatically liable if Individual B performs the inherently dangerous activity negligently.

Unlike Entity A, a hospital cannot, itself, perform the function of patient care and generally cannot select the specific third party who will provide that care. Instead, the hospital must function within the universe of complex and detailed Florida laws and regulations, federal regulations, and hospital accreditation standards set forth by the Joint Commission for Accreditation of Hospitals ("the Joint Commission")[1] that prescribe and limit the manner in which a Hospital must

[1] The Joint Commission is an independent, not-for-profit body that promulgates standards and accredits hospitals through a survey process. The Joint Commission accredits and certifies over 22,000 health care facilities and programs nationwide. https://tjc-sc9-cd2-prod.ae-admin.com/about-us/facts-about-the-joint-commission/ (last visited Jan. 26, 2020). The Florida Agency for Healthcare Administration

(i) create and organize a medical staff [2] comprised of health care providers who will provide patient care in its facility; (ii) determine which health care providers may become members of that medical staff; and (iii) oversee the patient safety and quality improvement activities of those health care providers. Hospitals do not practice medicine; hospitals are facilities in which the community's physicians practice medicine.

While Petitioner claims Florida's statutes and regulations establish a non-delegable duty under which hospitals are responsible for hands-on emergency care and other specific types of care, the opposite is true—Florida law *requires* hospitals to create a structure that delegates responsibility for medical care to the physicians on its medical staff. A hospital must have a governing board, which must create an organized medical staff—the constellation of physicians across all specialties (generally independant and not employed by the hospital) who have privileges to take care of their patients in the hospital. See, e.g., Fla. Admin. Code. R. 59A-3.272; Fla. Admin. Code. R. 59A-3.273.

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accepts a Joint Commission accreditation report in lieu of performing its own licensure inspection. Fla. Admin. Code R. 59A-3.253(3).

[2] "Staff" is a term of art in the context of hospital organizations; it does not connote an employment or agency relationship between the hospital and the physician. Members of a hospital's medical staff are generally not hospital employees (if they were, traditional *respondeat superior* vicarious liability would obviate the need for the proposed non-delegable duty).

The hospital's governing board must adopt bylaws outlining the composition and function of the organized medical staff. Fla. Admin. Code. R. 59A-3.272. In turn, the regulations make the medical staff "responsible … for the quality of all health care provided to patients in the facility and for the ethical and professional practices of its members." Fla. Admin. Code. R. 59A-3.275. The medical staff must create committee structures, oversee the activities of those committees, coordinate activities and general policies of the various medical specialty departments, determine the content of medical records, and oversee clinical care issues like medical quality management, peer review, and infection control. Id. Essentially, the hospital typically supplies the facilities, equipment, supplies, nursing, and other support staff while the members of its medical staff provide physician care. A hospital cannot practice medicine—Florida law *requires* the hospital to delegate patient care and related issues to the medical staff.

Rule 59A-3.272(4) requires a hospital's governing board to "approve the by-laws, rules, and regulations of the organized medical staff, provide for appointment, reappointment, or dismissal of members of the organized medical staff, and provide a procedure for hearings and appeals on all actions concerning appointment, reappointment, or dismissal.[3]" Fla. Admin. Code. R. 59A-3.272(4). These bylaws,

[3] The process of applying for and receiving medical staff privileges is known as appointment or reappointment, as applicable. The boundaries of each medical staff member's permitted practice are known as "privileges" (e.g., an obstetrician on the

form a binding contract between the hospital and the members of the medical staff. See, e.g., Naples Cmty. Hosp., Inc. v. Hussey, 918 So. 2d 323, 325 (Fla. 2d DCA 2005) ("Florida has adopted the majority view that hospital bylaws become a binding and enforceable contract between a hospital and its medical staff when adopted by a hospital's governing board.")

Florida tightly regulates the way a hospital's medical staff bylaws must conduct medical staff credentialing:

> (a) The governing board **shall provide that no qualified applicant is denied organized medical staff privileges or clinical privileges** solely because the applicant is licensed as a physician, dentist or podiatrist, psychologist, advanced practice registered nurse, or physician assistant.
>
> (b) The governing board **shall set standards and procedures to be applied** by the hospital and the organized medical staff **in considering and acting upon applications for staff membership or professional privileges**, including delineation of privileges. Such standards or procedures shall be available for public inspection, and **shall not operate to deny staff privileges or clinical privileges in an arbitrary, unreasonable or capricious manner**, or on the basis of sex, race, creed, or national origin.
>
> * * *
>
> (e) The governing board **shall require that eligibility for privileges**, delineation of privileges, and reappointments, **be based on the applicant's background, experience, health, training, demonstrated current competence, adherence to applicable professional ethics, reputation, ability to work with others**, ability

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medical staff has privileges to deliver babies but does not have privileges to perform neurosurgery). The terms are often used interchangeably and are colloquially referred to as "credentialing."

> of the hospital to provide adequate facilities and supportive services for the applicant and his patients, and such other elements as the governing board determines that are not inconsistent with this part.
>
> (f) The governing board shall establish a procedure, within a time-limited period, for approving, approving in part, or denying an applicant's request for privileges.
>
> (g) The governing board s**hall establish a procedure for an applicant for privileges to appeal an adverse decision,** and shall establish a time-limited period for rendering a final decision after the appeal.

Id. (emphasis added).

Florida law circumscribes the process by which a hospital builds the medical staff of physicians who will care for its patients. Florida law requires hospitals to create, publish, and apply uniform credentialing standards. Florida law details the particular factors hospitals must include in their credentialing standards. Florida law prohibits hospitals from (i) refusing to grant appropriately tailored privileges to otherwise qualified health care providers; and (ii) denying an applicant's request for privileges in an arbitrary and capricious manner. An applicant has a right of appeal if he or she is denied or loses privileges despite being appropriately qualified. See generally Bolt v. Halifax Hosp. Med. Ctr., 851 F.2d 1273, 1283 (11th Cir. 1988) ("Florida courts have recognized that a physician whose staff privileges at a hospital have been revoked has a cause of action for injunctive relief."); Lawler v. Eugene Wuesthoff Mem. Hosp. Ass'n., 497 So. 2d 1261, 1264 (Fla. 5th DCA 1986) (Physician who alleged his medical staff privileges were improperly revoked could

state a claim for injunctive and compensatory relief because "the loss of staff privileges equates to loss of patients and the ability to practice in this doctor's specialty. . . ."); Carida v. Holy Cross Hosp., Inc., 427 So. 2d 803, 805 (Fla. 4th DCA 1983); Dance v. N. Broward Hosp. Dist., 420 So. 2d 315, 316 (Fla. 4th DCA 1982); Margolin v. Morton F. Plant Hosp. Ass'n, 348 So. 2d 57 (Fla. 2d DCA 1977).

Hospitals do not have the luxury afforded to most Florida employers. Hospitals cannot grant, refuse, or revoke medical staff privileges at will. Regardless of the feelings and preferences of its administration and medical staff, the law ***requires*** the hospital to confer the requested privileges unless the hospital identifies some specific defect in a physician's training or competence that justifies denial.[4] Absent an exclusive provider agreement, discussed below, the hospital must allow properly qualified community physicians to care for the hospital's patients within the scope of the physicians' expertise. Nevertheless, Petitioners ask this Court to open the floodgates of liability by focusing on the *patient's inability to choose* a particular physician while ignoring the *hospital's inability to refuse* that same physician.

[4] The FDLA is not suggesting or implying the physician at issue lacked competence; it is merely explaining that the hospital's right and duty is limited to investigating his professional qualifications and, failing to identify any defects, granting him medical staff privileges.

B. Even where Hospitals enter into exclusive provider agreements for certain services, Hospitals generally cannot regulate which specific physicians will perform those services.

Petitioner and his amici note, correctly, that many hospitals enter into exclusive provider agreements to ensure comprehensive access to physician services in areas like emergency medicine, radiology, and anesthesiology.[5] An exclusive provider agreement is a contract by which a hospital designates a physician group to ensure physician care will be available on-site whenever patients need it.

Through its bylaws, a hospital may limit its grant of privileges in a particular medical specialty to the universe of physicians associated with the exclusive group. However, a hospital generally has no right or ability to control which physicians will associate with the exclusive group. As in the absence of an exclusive provider agreement, a hospital may only act independently to terminate or refuse a physician's medical staff privileges when it has identified a specific, permissible reason to do so. Absent a legitimate reason to terminate a physician's privileges, a hospital may violate its medical staff bylaws and expose itself to liability if it interferes in the relationship between an exclusive provider group and the particular physicians with whom the group chooses to contract . See generally Palm Springs General Hospital, Inc. v. Valdes, 784 So 2d 1151, 1153-1154 (Fla. 3d DCA 2001)

[5] The FDLA has no knowledge of or position regarding the terms of Respondent's exclusive provider agreement, if one exists.

(finding radiologist could recover damages from hospital where jury concluded hospital persuaded radiologist's partners to create a new exclusive provider group excluding radiologist because hospital administrator believed radiologist made a medical error); Lawler v. Eugene Wuesthoff Mem'l Hosp., 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986); James Hutchinson, *Tortious Interference and Physician Credentialing Decisions*, Am. Health Lawyers Ass'n., Feb. 2011.

With or without an exclusive provider agreement, the only way a hospital can control which physicians will practice within its walls is to deny or revoke privileges in the limited situations where physicians fall short of the regulatory standard for competence.

II. THE FLORIDA LEGISLATURE AND THIS COURT ALREADY CREATED A CAUSE OF ACTION PROVIDING A REMEDY WHEN HOSPITALS FAIL TO PROTECT PATIENTS THROUGH APPROPRIATE MEDICAL STAFF CREDENTIALING PROCESSES

Petitioner and his amici suggest that, unless this Court recognizes the proposed non-delegable duty, patients will be left without recourse if they are malpracticed upon in a hospital. The proposed non-delegable duty is a solution in search of a problem, as Florida already provides patients relief under such circumstances. A patient injured through physician error has a cause of action for medical malpractice directly against the physician. If the physician lacked appropriate education, training, and experience such that a reasonable hospital would

have denied or revoked his medical staff privileges, the patient has a second claim for negligent credentialing against the hospital.

In 1985, the Florida Legislature enacted section 768.60 (now section 766.110). § 768.60. Fla. Stat. (1985). Section 766.110 defines the hospital's duty with respect to physician care, "[a]ll health care facilities, including hospitals and ambulatory surgical centers, as defined in chapter 395, have a duty to ensure 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 those duties." Id.; § 766.110, Fla. Stat.

In 1989, in Insinga v. LaBella, 543 So. 2d 209 (Fla. 1989), this Court recognized and adopted the hospital "corporate negligence doctrine." The Court held, "as a matter of public policy, that hospitals are in the best position to protect their patients and, consequently, have an independent duty to select and retain competent independent physicians seeking staff privileges." Id. at 214. The Court defined the boundaries of the new cause of action by explaining, "the hospital will **only** be responsible for the negligence of an independent contractor physician when it has failed to exercise due care in the selection and retention of that physician on its staff." Id. (emphasis added). The Court noted that the above-referenced statute expressly codified this doctrine, often informally called "negligent credentialing." Id.

Thus, the Legislature and this Court created a remedy to address the precise situation about which Petitioner expresses alarm. If a hospital fails to perform an appropriate credentialing investigation and fails to discover some defect in a physician's education, training, or experience that renders him unfit for clinical privileges, a patient injured by that physician has a cause of action against the hospital in addition to his cause of action against the physician.

The Petitioner asks this Court to transform the hospital into a guarantor. The remedy the Petitioner urges—that a hospital bear responsibility for every medical judgment made by every physician within its walls, regardless of the adequacy of that physician's training and general competence—is incompatible with this Court's directive that a hospital is *only* responsible when it fails to exercise due care in credentialing its medical staff. Such a judicially created non-delegable duty would expose hospitals to boundless liability.

In reality, the Petitioner in this case is simply unhappy about the amount of money available to pay his claims. See § 458.320, Fla. Stat. The Petitioner's concerns about the adequacy of Florida's minimum physician malpractice insurance requirement should not prompt this Court to create another cause of action to expand the pool of available funds. Instead, it seems the Petitioner's underlying issue (limited availability of physician malpractice insurance funds) is a matter for the Legislature to address.

III. A DECISION IN FAVOR OF THE PETITIONERS WOULD NEGATIVELY AFFECT OUR HEALTHCARE SYSTEM

If this Court follows the Petitioner down this rabbit hole, the effects on the healthcare system will be tremendous. Creating this cause of action would increase hospital liability, raise the cost of hospital professional liability insurance and thus lower the insurance limits hospitals can afford, impair our state's ability to attract top notch health care providers, and deplete funds Florida's many not-for-profit hospitals use to provide charitable and indigent medical care. Forcing hospitals to act as guarantors for the medical care provided by properly-credentialed physicians will hurt patients as it drives up medical costs and decreases access to medical care. More lawsuits will be filed, depleting already scarce judicial resources and increasing cost of litigation. Ultimately, as is often the case, only the lawyers will profit.

Additionally, application of the nondelegable duty doctrine in these circumstances would be fundamentally unjust. It would treat independent contractor physicians as if they were employees of the hospital when the hospital lacks the right of control that might justify such treatment.

Historically, it was fair and just to make the principal legally responsible for the agent through *respondeat superior* and other agency theories of liability because the principal could control the agent's actions and the agent was working to achieve the principal's goals. See Vasquez v. United Enters. of Sw. Fla., 811 So. 2d 759, 760

(Fla. 3d DCA 2002) ("It is a fundamental rule that the *respondeat superior* doctrine applies only when the alleged master has the ability and authority to direct and control the pertinent acts of the employee."); Mumby v. Bowden, 6 So. 453, 454 (Fla. 1889). Here, the physician is working to achieve the patient's goals and is simply using the hospital as a resource or location to do so—an important distinction the Petitioner and his amici disregard.

The fundamental element of *respondeat superior* is missing in the hospital-physician context because the hospital has no right to control the physician. The doctor's ethical and legal duties undeniably require him or her to make independent, professional medical judgments in the patient's best interests. The hospital cannot control the physician's decision-making or force the physician to practice medicine a certain way.

Although the Petitioners claim this would be a narrow ruling, the proposed statutory and regulatory non-delegable duty would swallow the traditionally narrow non-delegable duty exception. As explained above, under the current Florida and federal regulatory and administrative structure, hospitals generally cannot freely choose the specific physicians who will make up their medical staffs and thus care for the facility's patients. While patients likewise often cannot choose the particular physician who will care for them in a hospital setting like the Emergency Department, patients get to make a more fundamental choice. Hospitals make sure

properly-credentialed physicians are available to provide care whenever the patient needs it. The patient may choose to seek out that care with the understanding it will come from whichever properly-credentialed physician is available. If the patient is unwilling to compromise on physician choice, the patient may elect to forego immediately accessible care available at the hospital. This question, like many in life, requires an individual to balance the trade-offs. Only the patient can decide whether to compromise choice in favor of accessibility and convenience. This Court should decline the Petitioner's invitation to alleviate the patient's trade-offs altogether by exponentially expanding the hospital's duty such that the hospital becomes a guarantor of all physician care.

CONCLUSION

This Court should affirm the Third District Court of Appeal's well-reasoned opinion. This Court should not create a non-delegable duty in these circumstances.

WHEREFORE, FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to affirm the Third District Court of Appeal's decision.

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CERTIFICATE OF SERVICE

We HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-PORTAL on this 5th day of February 2020, to the following:

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CERTIFICATION OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Times New Roman font as required by Rule 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Kansas R. Gooden