IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Johns Hopkins All Childrens Hospital, Inc.,

Appellant,

v.

Maya Kowalski, et al.,

Appellees.
_____/

Case No. 2D2024-0382
L.T. Case No. 2018-CA-005321

AMICUS CURIAE BRIEF ON BEHALF OF THE FLORIDA HOSPITAL ASSOCIATION IN SUPPORT OF APPELLANT

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The FHA is a Florida nonprofit trade association consisting of 342 hospitals and health systems in Florida. Six of Florida's Children's Hospitals are among the FHA membership. The FHA represents its members on matters of common interest before all three branches of government and regularly appears as amicus curiae to address issues affecting its members in the courts of Florida.

FHA respectfully requests leave to file an amicus brief because this appeal implicates the members' vital interest in the statutory immunity afforded to Florida's hospitals and healthcare providers by §39.203(1)(a) Fla. Stat. FHA's members are mandatory reporters in the statutory measure designed to intervene in cases of child abuse under Chapter 39. If insulation from civil liability stemming from good faith participation in that system is removed, Florida's healthcare providers face significant uncertainty when striving to fulfill their obligations under Chapter 39 and advance the cause of detecting and preventing child abuse in this State.

SUMMARY OF THE ARGUMENT

This appeal involves important questions regarding the scope and application of the statutory immunity afforded by § 39.203(1)(a) Fla. Stat. In this case, the trial court found as a matter of law, that John Hopkins All Children's Hospital had a reasonable basis for suspecting that their patient was the subject of child abuse; that the hospital acted in good faith in reporting that suspicion; and that the hospital could not be held liable for any cause of action directly arising from sheltering the child pursuant to a court order. Unfortunately, these findings were rendered meaningless at the trial itself when the court permitted Plaintiff to attack the hospital's basis for suspecting abuse, its motives for reporting that suspicion, and present evidence to the jury of the psychological impact of the court-ordered sheltering period. Despite seemingly agreeing that Chapter 39 prevented such argument, the actions of the hospital with respect to their good faith, mandatory reporting were repeatedly called into question and leveraged by the plaintiffs in their effort to secure a finding of civil liability and an award for damages. Permitting a Plaintiff to argue that otherwise immune actions by the hospital were improper and caused harm to a patient destroys the purpose and function of the immunity granted by § 39.203(1)(a), and leaves Florida's healthcare providers exposed to civil

liability for meeting the statutory obligations imposed upon them by the state.

In resolving this case, the FHA urges this Court to give meaning to the plain language of § 39.203(1)(a), confirming that the scope of immunity is not limited to the discrete act of reporting, but just as the statute states, independently immunizes all good faith "participation" in "any act authorized or required" by Chapter 39.

The FHA also respectfully urges this Court to provide trial courts with two points of guidance to ensure that §39.203(1)(a) immunity is given a practical application consistent with its purpose: First, establishing that the party claiming immunity is entitled to a threshold presumption of good faith, which can be rebutted only by direct evidence and not mere accusations to the contrary. Second, confirming that attempts to weaponize immune conduct against healthcare providers at trial should never be permissible given the danger of unfair prejudice weighed against the limited relevance immune conduct could have in a trial. *See,* Fla. Stat. § 90.403.

ARGUMENT

I. The Scope of Immunity Under § 39.203(1)(a): Protecting Good Faith Efforts in Child Abuse Prevention and Reporting

The plain language of § 39.203(1)(a) must be broadly construed to encourage not only the good faith reporting of suspected child abuse, but also good faith participation in any acts that are authorized or required under Chapter 39.

Any limitations placed on the immunity afforded by § 39.203(1)(a) raises the troubling possibility of the threat of retaliatory litigation posing a chilling effect to the good faith reporting of suspected child abuse and participation in the statutory investigation process. The statute's plain language, the legislative framework within which it appears, and Florida's caselaw on this subject warn against this very danger. The primary purposes of Chapter 39 of the Florida Statutes – which spans twelve sub-chapters – include "prevent[ing] the occurrence of child abuse, neglect, and abandonment." § 39.001(1)(a), Fla. Stat. While the statute enumerates several principles to guide policies for prevention and intervention, the statute unequivocally declares that "[t]he health and safety of the children served shall be of *paramount concern*." § 39.001(1)(b)(1) (emphasis added). See *Dept. of Health & Rehab.*

Servs. v. Dougherty, 700 So.2d 77, 79 (Fla. 2nd DCA 1997) (the statutory scheme "was created for the benefit of child and not for the parents").

By the very nature of their work, hospitals and healthcare providers occupy a critical position on the front lines of the fight against child abuse. See *Ellen Wright Clayton, Children's Health Symposium: To Protect Children from Abuse and Neglect*, *Protect Physician Reporters*, 1 Hous. J. Health L. & Pol'y 133, 137 (2001) ("[R]eporting by physicians themselves is different because they can simultaneously report and provide the medical assessment to state child protection and law enforcement officials"); Vincent De Francis, Child Abuse – The Legislative Response, 44 Den. L. Rev. 3, 4 (1967) ("The doctor" is "probably the first responsible contact who has an opportunity to see and examine the child and the first competent person capable of assuming responsibility for positive action on behalf of the child."). However, any intervention – even the act of reporting of suspected abuse, let alone participating in the investigative process – raises the risk of retaliatory legal action by the child's parent or caregiver.

The threat of retaliatory litigation is not simply theoretical for medical providers. To illustrate, in 1998, of 2.8 million reports of suspected abuse, slightly over 10% were made by medical providers, yet "physicians represente[d] the overwhelming majority of lawsuit defendants in cases seeking damages for allegedly inappropriate reports of child abuse or neglect." *Clayton*, *supra*, at 142. Moreover, "[f]ollow-up with CPS and other agencies involved in the child abuse or neglect case is vital, and unfortunately does place professionals at potential risk of facing civil litigation that, regardless of outcome, can have significant costs in time, worry, and legal fees." U.S. Department of Health and Human Services, Report to Congress on Immunity from Prosecution for Professional Consultation in Suspected and Known Instances of Child Abuse and Neglect (June 2013) at 21. These risks of retaliatory litigation are recognized to create a chilling effect that complicates the effective detection and prevention of child abuse. *Id*. at 9-10.

The verdict in this case raised concerns for healthcare providers of the potential risks retaliatory civil litigation poses to themselves and the hospitals where they provide care. Multiple FHA members reported that staff nurses and physicians raised concerns over whether their

roles as mandatory reporters were protected and the risks of exposure to civil judgments. Some providers watched nightly recaps of the trial on social media platforms and forwarded news accounts of testimony and arguments to their supervisors looking for guidance. Placing Florida's healthcare providers in a position of uncertainty over whether their good faith child abuse prevention reports will lead to sizeable civil jury awards jeopardizes the effectiveness of the statutory scheme implemented to protect Florida's most vulnerable residents. No one could suggest that it is useful for hospitals and healthcare providers to first think of a jury award in a civil lawsuit before acting on behalf of a potentially endangered child. While there are no known instances of withholding child abuse reports, it is unfortunately impossible to know how often the legitimate concerns of being unprotected in retaliatory civil litigation may have caused moral stress for the healthcare provider reporting potential abuse. Similarly, we cannot tell whether the threshold for reporting suspected abuse has now been consciously or subconsciously raised in the mind of a mandatory reporter, such that future cases of child abuse may be unintentionally missed.

Florida has fashioned two legislative solutions to address the chilling effect posed by the threat of retaliatory litigation. The first is a

mandatory reporting requirement which dictates that any person who has “reasonable cause to suspect” child abuse is required to report it to the central abuse hotline. § 39.201(1)(a). This provides some degree of indirect protection, insofar as “the absence of discretion on the part of the physician should undoubtedly insulate him from community criticism in the unpopular case[.]” Douglas G. Hendricksen, *The Battered Child: Florida’s Mandatory Reporting Statute*, 18 Fla. L. Rev. 503, 503 (1965).

The second, and more direct legislative solution to the looming threat of retaliatory litigation in the context of preventing child abuse is the immunity guaranteed by § 39.203(1)(a), which provides:

> Any person, official, or institution participating in good faith in any act authorized or required by this chapter *or* reporting in good faith any instance of child abuse, abandonment, or neglect to the department or any law enforcement agency, *shall be immune from any civil or criminal liability* which might otherwise result by reason of such action. (emphasis added).

In the proceedings below, the trial court adopted a narrow construction of § 39.203(1)(a), which limited the statutory immunity to the discrete act of reporting suspected abuse and acts which “flowed” directly from the act of reporting. *Johns Hopkins All Children's Hosp., Inc. v. Kowalski,* 2022 Fla. App. LEXIS 6755. That narrow construction of § 39.203(1)(a) finds no support in the statutory language. Moreover,

it renders an entire clause of the statute meaningless and misapprehends the salient question for determining whether given conduct is entitled to immunity.

"It is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' that guides this Court's interpretation." *State Farm Mut. Auto. Ins. Co. v. Stand Up MRI of Boca Roton, P.A*., 322 So.3d 87, 92 (Fla. 4th DCA 2021) (quoting *Borden v. E-European Ins. Co*., 921 So.2d 587, 595 (Fla. 2006)). "The court must give effect to all parts of the statute and avoid readings that would render a part thereof meaningless, and it must read all parts of the statute together in order to achieve a consistent whole.'" Id. (quoting *Coastal Creek Condo. Ass'n. v. Fla. Tr. Servs. LLC*, 275 So.3d 836, 838-39 (Fla. 1st DCA 2019)).

The plain language of § 39.203(1)(a) describes two distinct categories of conduct that are entitled to immunity under the statute: (1) "*participating in good faith* in any act authorized or required by this chapter [i.e., Chapter 39]" (2) "*or reporting in good faith* any instance of abuse, abandonment, or neglect[.]" (Emphasis added). See *Fettig's Constr., Inc. v. Paradise Props. & Interiors LLC*, 305 So.3d 555, 560 (Fla. 4th DCA 2020) (reiterating that use of the disjunctive term "or" in a

statute “normally indicates that alternatives were intended”). As to both categories of conduct, the statute declares that the party “shall be immune from any civil or criminal liability which might otherwise result by reason of such action.” 39.203(1)(a).

The conclusion that § 39.203(1)(a) immunity protects good faith conduct at other stages of the intervention and prevention process is not only apparent from the statute’s plain language but is consistent with Florida’s caselaw on this subject. See *Dougherty*, 700 So.2d at 79 (holding, in reference to claim of negligent investigation, that “the Department, as an ‘*institution participating in good faith’ in acts ‘authorized or required by* [statutory predecessor to Chapter 39],’ was ‘immune from any civil . . . liability which might otherwise result by reason of its action’”) (emphasis added).

Broad construction of § 39.203(1)(a) immunity such that it protects good faith conduct at other stages of the intervention process, irrespective of any cognizable relationship to the initial act of reporting, is also consistent with the Chapter’s stated purpose. See § 39.001(12) (“It is the intent of the Legislature that this chapter be liberally interpreted and construed in conformity with its declared purposes.”).

Effectively combating child abuse and neglect is not something that can be accomplished by any one entity alone; it depends on the coordinated efforts of public and private entities, individuals, and the community at large. The threat of retaliatory litigation, and its attendant chilling effect, is not unique to the threshold act of reporting – that threat is just as real with respect to the prospect of participating in other stages of the intervention and prevention process contemplated by Chapter 39. See DHS, Report to Congress on Immunity from Prosecution for Professional Consultation in Suspected and Known Instances of Child Abuse and Neglect (June 2013) at 21. ("A review of civil actions filed against professionals for involvement in the child protection process suggests good reason for fearing lawsuits based on acts that go beyond 'making' a report").

Just as it is necessary to assure community partners that they will not be subject to any liability for making good faith reports of suspected child abuse, so too is it necessary to assure community partners that they will not be exposed to civil liability for their good faith participation in "any act authorized or required" by Chapter 39. A broad construction of the immunity guaranteed by § 39.203(1)(a) is critical to provide such assurance.

II. Ensuring Effective Application of Immunity Under § 39.203(1)(a): Presumptions of Good Faith and Improper Uses of Evidence

The statutory immunity afforded by § 39.203(1)(a) must be given a practical application by trial courts in the form of a rebuttable presumption of good faith and a highly critical approach of the use of evidence regarding immunized conduct against mandatory reporters in any civil. To say that certain conduct is "immune" provides little protection unless that finding is given a practical application by trial courts, to ensure that the immunized party actually receives the benefit of that status. The FHA urges this Court to provide trial courts with two points of guidance in this regard.

First, this Court should confirm that the party claiming immunity for conduct within the scope of § 39.203(1)(a) is entitled to a threshold presumption of good faith, that can only be rebutted by the proffer of direct evidence, and not mere accusations to the contrary. To be clear, the FHA is not asking this Court to make new law, but merely to confirm a point that prior decisions have left implicit. In *Dougherty* for example, this Court held that a claim of negligent investigation by the Department of Health and Rehabilitative Services should have been resolved by a

directed verdict on the basis of statutory immunity where "nothing reveals that the investigation was not instituted and conducted in good faith after a legitimate report of abuse that the Department was required to take seriously." *Id*. at 79. The import of that reasoning is that the plaintiffs in *Dougherty* had an affirmative burden to adduce evidence of bad faith in order to overcome the claim of immunity but failed to give rise to a genuine dispute on that point.

In *Urquhart v. Helmich*, 947 So.2d 539 (Fla. 1st DCA 2006), the plaintiffs alleged that the doctor-defendant had "reported the injury to the state child abuse hotline out of a sense of spite because she was angry about the arguments [the family of the child] had with [the physician] in the hospital." *Id*. at 541. The Court held that it was not even necessary to consider the question of "good faith" where the doctor-defendant had reasonable cause to suspect child abuse and was therefore legally required to report her suspicion. *Id*. at 542.

In *Ross v. Blank*, 958 So.2d 437 (Fla. 4th DCA 2007), the plaintiff alleged that the doctor-defendant "did not in fact suspect [plaintiff] had committed child abuse," and made the report "maliciously for the purpose of hurting him[.]" Id. at 439. The Court affirmed the grant of summary judgment for the doctor-defendant because, as in *Urquhart*,

the doctor had a reasonable basis for suspecting child abuse and was thus required to report it. *Id*. at 441. As such, "[the physicians' motives in doing so were irrelevant[.]" *Id*. These decisions are fairly understood as standing for the proposition that conduct otherwise within the scope of § 39.203(a)(1) is entitled to a threshold presumption of good faith, especially where the party was under a legal obligation to engage in the conduct.

A threshold presumption of good faith also comports with the overarching purpose of immunity, which is to encourage reports of child abuse and participation in the various intervention and prevention measures contemplated under Chapter 39, by removing the concerning uncertainty created by the threat of retaliatory litigation for engaging in such conduct. Requiring the party claiming immunity to affirmatively prove good faith for immunity to attach, and the corresponding risk of failing to meet that burden, robs the statutory immunity of its purpose, to offset the chilling effect of retaliatory litigation. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (observing that qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation"). Conversely, requiring a plaintiff to rebut a threshold presumption of good faith, by adducing evidence to the contrary, respects the interests

of both parties by ensuring that a defendant can still stand trial, but only for conduct that is the subject of a genuine dispute of fact on the question of good faith.

Finally, the trial in this case vividly illustrates the need for guidance on a second point related to the application of § 39.203(1)(a) in practice – namely, attempts to leverage evidence of immune conduct against healthcare providers at trial. For instance, prior to trial, the trial court determined that the hospital-defendant in this case had a reasonable basis for suspecting child abuse, and that its act of reporting the abuse was entitled to immunity under § 39.203(1)(a). Nevertheless, in opening statement the plaintiffs declared to the jury that, "[w]e will prove that [the hospital] . . . wrongfully accus[ed] [parents] of child abuse[.]" (Tr. 9/21/23 at 1556). This sort of maneuvering utterly defeats the function and purpose of immunity.

With respect to conduct within the scope of § 39.203(1)(a), the statute declares that the person or institution engaging in the conduct "shall be immune from *any civil or criminal liability which might otherwise result by reason of such action.*" (Emphasis added). Considering that declaration, it is not clear what legitimate relevancy immune conduct could have when offered against a mandatory

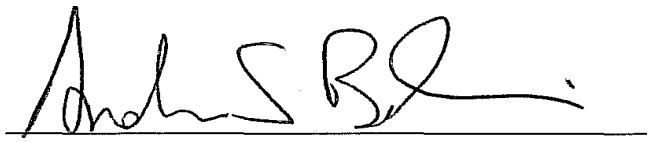
reporter. If a party is immune from any civil liability that might otherwise result by reason of certain conduct, then evidence of such conduct should not be offered as part of an effort to support a finding of any form of civil liability.

What is clear, is that attempting to leverage evidence regarding immune conduct against Florida's hospitals and healthcare providers creates an obvious and significant danger of "unfair prejudice, confusion of issues, [and] misleading the jury[.]" § 90.403, Fla. Stat. Essentially, the jury in such circumstances is being told two inherently contradictory things: (1) this conduct supports the plaintiff's theory, but (2) the defendants are immune from any liability that would otherwise result from this conduct. It is unfeasible to suggest that any jury could set aside allegations and arguments that insinuate impropriety in the reporting of, and participation in, the detection and prevention of child abuse, when deciding their verdict. Accordingly, this Court should warn that trial courts should not allow evidence of immune conduct against Florida's mandatory reporters unless it can be definitively shown that some legitimate relevance outweighs the devastating nature such evidence can have in the form of unfair prejudice and confusion of the issues against the immune party.

CONCLUSION

For the foregoing reasons, the Florida Hospital Association respectfully request that this court reverse the final judgment and to the trial court with guidance, confirming the broad scope of immunity offered under chapter 39, establishing a presumption of good faith for mandatory reporters, and with instructions to exclude evidence regarding immune conduct by healthcare providers in any future trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a true and accurate copy of the above and foregoing was this date filed and served by using the Florida Courts e-Filing Portal on this 12th day of August 2024 to:

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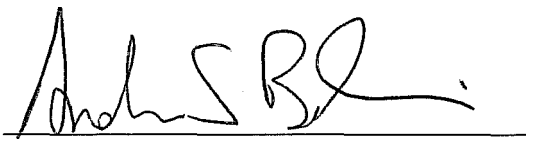

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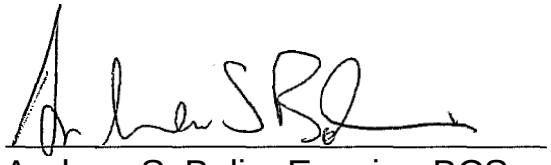

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