

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.

L.T. Case Nos.:
3D16-1661; 14-002006-CA-24

DOCTORS HOSPITAL, INC., *et al.*,

Respondents.

_____ /

**On Discretionary Review from the District Court of Appeal,
Third District, State of Florida**

**BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans fifty and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. Among other things, AARP and AARP Foundation fight against the abuse and exploitation of older adults in health care settings, through, among other things, participation as amici curiae in state and federal courts. To that end, AARP and AARP Foundation have filed amici curiae briefs concerning access to the civil justice system to address neglectful conditions. AARP Foundation brings litigation to obtain redress for older adults who received substandard and harmful care in health care settings.

SUMMARY OF THE ARGUMENT

The Court's decision in this action will have far-reaching implications for older adults in Florida. Older adults are high utilizers of increasingly outsourced emergency departments and frequently seek urgent care in emergency departments that they are led to believe – often by hospital marketing – are well-integrated into

the hospital. The liability rule urged by Respondent would require vulnerable patients to ascertain the employment status of an emergency department physician when the patient is most vulnerable. Due to the prevalence of using independent contractor physicians, older patients would be hard-pressed to find a hospital emergency department that has employee-physicians instead of independent contractors. Emergency departments are financial drivers for hospitals and are the primary gateway into lucrative inpatient treatment. Because older people come into the emergency department with already compromised health, they have a high risk of suffering adverse outcomes in the chaotic environment of the emergency department. It is essential that older emergency department patients be able to hold a hospital accountable for the care that is provided in the emergency department. The outcome of this litigation will have significant ramifications in the many health care and long-term care settings that rely upon outsourced physician care.

ARGUMENT

I. Emergency Departments Are a Critical Health Care Resource for Older Adults in Florida.

The number of people in Florida aged sixty-five and older is growing rapidly. Between 2010 and 2030, the number of older adults in Florida will increase by seven percent, and will account for nearly forty-eight percent of Florida's population growth. Fla. Legislature Office of Econ. & Demographic Research, *Econographic News: Florida's Population* 3 (vol. 1 2019), <https://bit.ly/2Wx3XyU>. By 2030,

adults aged sixty-five or older will represent 24.3% of Florida's overall population. *Id.*

While Florida's older demographic continues to grow, Florida's emergency departments will provide an increasingly critical care resource to an aging population. Jesse M. Pines et al., *National Trends in Emergency Department Use, Care Patterns, and Quality of Care of Older Adults in the United States*, 61 *J. Am. Geriatrics Soc'y* 12, 12 (2013) (hereinafter Pines et al., *National Trends in Emergency Department Use*). Nationwide, between 2001 and 2009, there was a 24.5% increase in emergency department utilization by older adults. *Id.* at 13. In 2017, 26.4% of all emergency department visits in Florida were adults over the age of sixty-five, accounting for over 2.3 million emergency department visits. Fla. Agency for Health Care Admin., *Emergency Department Utilization Report 16* (2017), <https://bit.ly/2N1Meg6>.

Emergency departments provide a variety of services for older adults, serving as a point of entry for acute care or long-term services, and providing twenty-four hour access to primary care treatment. Pines et al., *National Trends in Emergency Department Use* at 12; Faranak Aminzadeh & William Burd Dalziel, *Older Adults in the Emergency Department: A Systematic Review of Patterns of Use, Adverse Outcomes, and Effectiveness of Interventions*, 39 *Annals Emergency Med.* 238, 239 (2002) (hereinafter Aminzadeh & Dalziel, *A Systematic Review*). The most

common reasons for an emergency department visit include ischemic heart disease, congestive heart failure, syncope, cardiac dysrhythmias, acute cerebrovascular accidents, pneumonia, abdominal disorders, urinary tract infections, and fall-related injuries. Lesley P. Latham, & Stacy Ackroyd-Stolarz, *Emergency Department Utilization by Older Adults: A Descriptive Study*, 17 Can. Geriatrics J. 118, 118 (2014) (hereinafter Lathan & Ackroyd-Stolarz, *Emergency Department Utilization by Older Adults*); Aminzadeh & Dalziel, *A Systematic Review* at 240. These are common ailments seen in the sixty-five and older population. *See generally* Latham & Ackroyd-Stolarz, *Emergency Department Utilization by Older Adults*, 17 Can. Geriatrics J. 118. As such, when older adults visit Florida's emergency departments, they are likely to do so for essential life-saving care.

II. The Implications of Limiting Hospital Liability for Independent Contractor Emergency Department Physicians Are Particularly Significant for Older Adults Who Are at a Greater Risk of Adverse Events Due to Their Unique Care Needs.

Emergency departments present high risk conditions for patient safety. Antonia S. Stang et al., *Adverse Events Related to Emergency Department Care: A Systematic Review* 8 PLOS ONE, Sept. 2013 at 1 (hereinafter Stang et al., *Adverse Events Related to Emergency Department Care*). Emergency departments, especially those in Florida, are chronically overcrowded, and emergency department physicians must work under time constraints, amidst multiple interruptions, and

disrupted sleep cycles. Robert W. Derlet & John R. Richards, *Emergency Department Overcrowding in Florida, New York, and Texas*, 95 S. Med. J. 846, 849 (2002); Stang et al., *Adverse Events Related to Emergency Department Care* at 1. These systemic emergency department issues present particular risks for older adults, who have complex care needs that can overwhelm emergency departments especially if the emergency departments lack the infrastructure to handle the unique care needs of older adults. Andrea Gruneir et al., *Emergency Department Use by Older Adults: A Literature Review on Trends, Appropriateness, and Consequences of Unmet Health Care Needs*, 68 Med. Care Res. & Rev. 131, 132 (2011).

Older adults visit emergency departments under more urgent conditions than younger patients and have longer emergency department stays. Aminzadeh & Dalziel, *A Systematic Review* at 239. Compared to younger patients, older adults present with higher-acuity conditions and multiple comorbidities. Pines et al., *National Trends in Emergency Department Use* at 12. Disease presentation in older adults is frequently atypical and can result in misdiagnosis or under-triage. *Id.* Aminzadeh & Dalziel, *A Systematic Review* at 240. Falls, depression, and sensory impairments are also common among older adults. Ula Hwang et al., *Transforming Emergency Care for Older Adults*, 32 Health Aff. 2116, 2117 (2013). Cognitive impairments such as dementia or delirium are prevalent and present challenges to treatment and diagnoses. *Id.*; see also Nikolas Samaras et al., *Older Patients in the*

Emergency Department: A Review, 56 *Annals Emergency Med.* 261, 261 (2010).

These complex care needs coupled with the stressed resources and hectic emergency department environment place older adults at a particular risk of an adverse event during an emergency department visit. Stang et al., *Adverse Events Related to Emergency Department Care* at 4; Marlene Cimon, *ERs Can Be Loud, Hectic and Even Dangerous for the Elderly. Here's How Hospitals are Trying to Fix That*, *Wash. Post*, Dec. 8, 2018, <https://wapo.st/2PD0v4y>.

Older adults therefore face great risk of harm from any rule limiting a hospital's vicarious liability for independent contracting physicians. Older adults are especially susceptible to adverse events during emergency department treatment because they are so vulnerable at the time they enter an emergency department. They often enter under frenzied circumstances and should not bear the burden of seeking out the employment status of their emergency department physician to ensure that they will have full legal recourse against the hospital if they are neglected or abused.

III. Hospitals Are Increasingly Outsourcing Emergency Department Physicians to Increase Revenue While Simultaneously Marketing Emergency Departments to the Public as an Integrated Part of the Hospital System.

In recent decades, Florida hospitals have become more commercialized. In 2017, over half (51.4%) of Florida hospitals operated on a for-profit basis, which was twice the national average of 25.1%. *See* Kaiser Family Foundation, *Hospitals*

by *Ownership Type: Timeframe 2017*, <https://bit.ly/2WxEupq>. In fact, Florida had the third highest percentage of for-profit hospitals in the country, following only Nevada and Texas. *Id.* The percentage of Florida hospitals operating on a for-profit basis is increasing: between 1999 and 2017, the percentage of for-profit Florida hospitals rose by 5.6%. *See id.* (data available for years 1999 through 2017).

Emergency departments play an important role in this increasingly for-profit model, both by generating a profit themselves and serving as a point of entry for inpatient admissions. Emergency department care generates an estimated 7.8% profit for the hospital for each patient served. *See* Michael Wilson & David Cutler, *Emergency Department Profits are Likely to Continue as Affordable Care Act Expands Coverage*, 33:5 *Health Affairs* 792-799, 796 (May 2014); Zack Cooper, Fiona Scott Morton, and Nathan Shekita, *Surprise! Out-of-Network Billing for Emergency Care in the United States* 8 (National Bureau of Economic Research Working Paper Series) Jan. 2018, <https://bit.ly/334D4oH> (hereinafter Cooper, Morton & Shekita, *Out-of-Network Care in the U.S.*). But, as importantly, emergency department services also generate significant revenue for the hospital by driving usage of hospital inpatient services. Indeed, in recent years, emergency departments have been a principal source of inpatient admissions. “Between 2003 and 2009, inpatient admissions grew at a rate of four percent. Emergency department admissions, which grew at a rate of seventeen percent, accounted for

nearly all of this growth.” Kristy G. Morganti et al., *The Evolving Role of Emergency Departments in the United States*, Rand Health Research Report, at 24 (2013), <https://bit.ly/2PzVqKg> (hereinafter Morganti et al., *Evolving Role of Emergency Departments*). Between 1993 and 2006, “the share of all inpatient stays in which patients were admitted to the hospital via an e[mergency] d[epartment] increased from 33.5% to 48.3%.” Cooper, Morton, and Shekita, *Out-of-Network Care in the U.S.* at 8 (citing Jeremiah D. Schuur & Arjun K. Venkatesh, *The Growing Role of Emergency Departments in Hospital Admissions*, 367:5 *New England J. of Medicine* 391-393 (2012)). “By 2009, inpatient admissions from emergency departments accounted for roughly half of all inpatient admissions in the United States.” Morganti et al., *Evolving Role of Emergency Departments* at 25.

Given the role of emergency services in generating inpatient admissions, and thereby hospital revenue, many emergency departments undertake public relations and marketing campaigns to increase hospital admissions. See Relias Media, *Emergency Marketing: The ED is best choice for PR Campaign*, Jan. 1, 1997, <https://bit.ly/2PC6F4Q> (quoting the report of Andrew Mills, then media relations manager of Columbia Healthcare Corporation’s Georgia division, that “[w]e look at our ER as a window of opportunity to get people into our hospital and see what quality service we provide”). Hospitals promoting their emergency departments to leverage longer-term or repeat users implicitly convey that the operation of the

emergency department is continuous with and reflective of the operation of other departments to expand their commercial operations. In short, in order for hospital marketing campaigns featuring emergency departments to be successful in revenue generation, they must achieve an association between emergency departments and the larger hospital in the minds of the public.

Yet even as these marketing campaigns lead patients to believe that emergency departments are an integrated part of the overall hospital, hospitals are largely outsourcing their emergency departments in an effort to expand their operations and increase their profitability. “[A]s the use of e[mergency] d[epartments] has gone up, waiting times to be treated in e[mergency] d[epartments] have also increased. . . . [and] e[mergency] d[epartments] increasingly are competing on the length of time patients have to wait before they are treated . . . [a]s a result, there has been a marked increase in the outsourcing of management of hospital e[mergency] d[epartments.]” Cooper, Morton, and Shekita, *Out-of-Network Care in the U.S.* at 8 (citations omitted). In response to increased competition over waiting times, and the heightened role of emergency department services as a patient source for hospitals, “hospitals now want to keep their e[mergency] d[epartments] open at all hours and run them efficiently.” *Id.* “Emergency rooms are [also] costly and difficult to manage as they must be adequately staffed on a 24/7 basis regardless of patient flow, which is unpredictable.” Eileen Appelbaum & Rosemary Batt, *Private*

Equity and Surprise Medical Billing, Institute for New Economic Thinking, Sept. 4, 2019, <https://bit.ly/32171V9> (citation omitted). The pressure to expand emergency department operations leading to increased outsourcing of physician services also corresponds to a consolidation in the physician market, and with it, fewer options for prospective patients who might opt for employee-physicians over independent contractors. Hospitals rely principally on a limited number of publicly-traded staffing companies complemented by a smaller number of management companies.

Id.

Older adults requiring emergency services in Florida are left with few options. They are barraged with hospital marketing touting the services of emergency departments that are, in actuality, heavily outsourced. However, they will struggle to find an emergency department that is not staffed with independent contractor physicians. Crucially, older adults requiring emergency services often must navigate this dilemma precisely when they are most vulnerable. An urgent need for medical care intensifies the logistical demands faced by older adults as they seek that care. The fact that urgent medical care is needed will further complicate the patient's ability to determine whether the emergency department personnel they encounter are employees or not. The liability rule urged by Respondents here fails to meaningfully account for the market conditions and practical circumstances of the older adults in Florida who are the highest users of the emergency department services at issue.

CONCLUSION

This case has far-reaching implications for older residents in Florida because they are high utilizers of emergency departments and particularly vulnerable to adverse events that could require legal recourse for negligent care. Amici AARP and AARP Foundation respectfully urge the Court to consider the sweeping ramifications of its decision for adults who are especially vulnerable as they seek urgent care.

Dated: November 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amici Curiae AARP and AARP Foundation in Support of Petitioner was filed with the Clerk of Court on November 4, 2019, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing has been furnished via email to:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

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