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IN THE SUPREME COURT OF FLORIDA

Case No. 81,234

RONDA C. WEINSTOCK, Ph.D.

Petitioner,

v.

SUZANNE GROTH,

Respondent.
_____/

APPEAL FROM A DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, RONDA C. WEINSTOCk, shall be referred to as WEINSTOCK. Respondent, SUZANNE GROTH, shall be referred to as GROTH.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER, RONDA C. WEINSTOCK, PH.D., IS A "HEALTH CARE PROVIDER" AS DEFINED BY CHAPTERS 766 OR 768, FLA. STAT., OR IN LIGHT OF PINELLAS EMERGENCY MENTAL HEALTH SERVICES V. RICHARDSON, 532 SO.2D 60 (FLA. 3D D.C.A. 1980), FOR PURPOSES OF PRE-SUIT REQUIREMENTS PURSUANT TO FLORIDA STATUTE SECTION 766.106?

II. WHETHER COUNT II OF PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION.

STATEMENT OF THE CASE AND OF THE FACTS

In 1985, the respondent, Suzanne Groth, hereinafter referred to as "Groth", sought the aid and assistance of petitioner, Ronda C. Weinstock, Ph.D., hereinafter referred to as "Weinstock". At that time and at all times material to this cause of action Weinstock was and still is a licensed clinical psychologist authorized to do business in the State of Florida. Groth sought professional help from Weinstock in the form of therapy, psychotherapy and marital counseling. She engaged in over 100 psychotherapy sessions with Weinstock.(R-3, ¶4) All of said visits occurred in Weinstock's office and no visits or counseling occurred at an emergency medical health center affiliated with a hospital; or at any medical doctors offices. All treatment was outpatient, fee for service oriented.

Numerous of the aforementioned psychotherapy sessions were joint sessions with Groth and her husband as well as with Groth's children from time to time, which sessions were designed, allegedly, to help resolve marital problems and conflicts which the couple (Groths) had been experiencing and to treat them both from a psychological point of view so that their marriage would be preserved, enriched and fulfilled.(R-2, ¶5)

In February, 1991, Groth filed a two (2) count complaint against Weinstock. Groth asserted in her complaint that Weinstock was guilty of negligence in count I and intentional infliction of mental and emotional distress in count II. (R 1-7) Both assertions

related to defendant Weinstock's alleged romantic and sexual relationship with Groth's husband, unknown to Groth throughout the course of Groth's treatment by Weinstock. Groth asserted that Weinstock improperly used her knowledge of Groth's emotional state to further Weinstock's relationship with Groth's husband.

At no place does Groth's complaint allege that the relationship between Groth and Weinstock terminated in May, 1986, as is suggested by Weinstock's Statement of Facts in Weinstock's Brief. Groth disagrees with the Statement of Facts to this extent.

On March 26, 1991, Weinstock filed a Motion to Dismiss Groth's Complaint and asserted, in part, that Groth's failure to follow pre-suit screening requirements contained in Florida Statutes section 766.106 was fatal.(R 8-10)

On August 1, 1991, the Honorable C. Vernon Mize entered an Order Granting Motion to Dismiss (R 23-24), and on December 12, 1991, Judge Mize entered a Final Judgement (R 29-30) pursuant to Weinstock's Motion to Tax Cost and Motion for Entry of Final Judgement (R 26-28).

In the August 1, 1991, Order Granting Motion to Dismiss Judge Mize is careful to point out that Florida Statutes set forth the definition of a "health care provider" and that the definition does not include psychologists or any other mental heath professional (R 29). Yet the court goes on to cite the Second District Court of Appeal in Pinellas, supra, where the Court held that an emergency mental heath service based out of a hospital was subject to the provision of the act. (R 29-30)

The order of dismissal was predicated solely upon the pleadings filed (more specifically, the Complaint and the Motion to Dismiss) and was not based upon any facts adduced outside of the above referenced pleadings.

The Fifth District Court of Appeal reversed the trial court holding, inter alia, that the Comprehensive Medical Malpractice Reform Act did not apply to Ronda C. Weinstock, Ph.D., a psychologist. Groth v. Weinstock, 610 So.2d 477 (Fla. 5th D.C.A. 1992). Weinstock now petitions this court to reverse the decision of the Fifth District Court of Appeal and to affirm the Final Judgement entered by the trial court.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal properly held that the marriage counseling and therapy performed by Weinstock did not render Weinstock a "health care provider" pursuant to the provisions of Chapter 766, Fla. Stat. (1991). Therefore, the trial court erred in granting Weinstock's Motion to Dismiss Groth's Complaint with prejudice and the Final Judgement entered in favor of Weinstock should be reversed.

The statutory language of Chapter 766, Fla. Stat. (1991) and its precursor Chapter 768, Fla. Stat. (1985) identify and make reference in various sections to "health care providers" as being persons licensed and governed by various chapters of Florida Statutes. At all times material to this action the petitioner Weinstock was and is a clinical psychologist and/or counselor licensed under and governed by Chapters 490 and 491, Fla. Stat. (1991). At no place in any of the various and sundry references to "health care providers" contained in Chapters 766 and 768 is any reference made to psychologists or counselors licensed pursuant to or governed by Chapters 490 and 491.

The statutory provisions identifying "health care providers" are clear, unambiguous, and as such, do not lend themselves to any interpretation, amendment, extension or revision by the court. To the contrary, because this statute restricts citizens rights, it must be strictly construed. Any judicial attempt to extend the clear meaning of this statute must be rejected.

Further, because Chapters 766 and 768 make repeated reference to health care professionals governed by certain specific chapters of Florida Statutes and no mention is made of those professionals governed by Chapter 490 and 491, Fla. Stat. (1991), the clear rule that the mention of one topic suggests the exclusion of another acts to show that psychologists and counselors under Chapter 490 and 491, Fla. Stat. (1991) are not included within the purview of this law.

Because Weinstock was not a "health care provider" as enumerated in Chapter 766, Fla. Stat. (1991), the pre-suit screening requirements enumerated in §766.106, Fla. Stat. (1991) were not applicable to this action and the trial court erred in applying the pre-suit screening requirements to this case.

Questions concerning whether or not Groth's action is barred by the Statute of Limitations is a non-issue in this appeal. Any affirmative defense which is presented under Rule 1.140, Fla. R. Civ. P. must appear on the face of a prior pleading. There is no Statute of Limitations defense which appears on the face of Groth's Complaint. Therefore, any such affirmative defense must be raised by answer, not by a Motion to Dismiss under 1.140, Fla. R. Civ. P. Weinstock has raised this defense at the trial court level, at the District Court level and again in the instant appeal. The trial court and the District Courts refused to rule on this non-issue and this court should likewise rule.

Whether or not Count II of Groth's Complaint states a cause of action also is a "non-issue" because this question has not

been ruled upon by the trial court or the District Court of Appeal. It is improper to attempt to raise this issue at this point in time.

Under any circumstances Count II of Groth's complaint does in fact state a cause of action and the facts and matters alleged in the Complaint, if proven, would support a judgement against Weinstock for Intentional Infliction of Emotional Distress.

ARGUMENT

I

THE TRIAL COURT ERRED IN DISMISSING RESPONDENTS COMPLAINT BECAUSE RONDA C. WEINSTOCK, PH.D. IS NOT A "HEALTH CARE PROVIDER" UNDER §766, FLA. STAT. (1991)

The trial court dismissed Groth's Complaint because Groth failed to allege compliance with the pre-suit requirements for Medical Malpractice Actions against "health care providers" and specifically failed to comply with the pre-suit screening requirements set forth in §766.106(2), Fla. Stat. (1991). The trial court noted that the statute did not include psychologists or other mental health professionals within the definition of "health care provider" to whom the act applies. (R 23) The trial court further observed that in Pinellas, supra, the Second District concluded that the legislature intended the statute to include mental as well as physical medical care and held that an emergency mental heath service at a hospital was subject to the provisions of the act. Based on this case the trial court granted Weinstock's Motion to Dismiss.

A cursory reading of §766.101(1)(b), Fla. Stat. (1991), formerly §768.40(1)(b), Fla. Stat. (1985), specifies who was clearly intended to be covered under the "health care provider" section. It speaks of physicians licensed under Chapter 458, osteopaths licensed under Chapter 459, podiatrists licensed under Chapter 461, dentists licensed under Chapter 466, chiropractors licensed under Chapter 460, pharmacists licensed under Chapter 465,

or hospitals or ambulatory surgical centers licensed under Chapter 395. Psychologists and counselors licensed under Chapters 490 and 491 are not mentioned.

This statute was most recently addressed with by the legislature when §766.101(1)(b) was amended so as to add optometrists licensed under Chapter 463 to the definition of "health care providers". Ch 93-155, Laws of Florida, (effective July 1, 1993). With the exception of adding optometrists, the definition of "health care provider" remains unchanged. Psychologists and counselors licensed under Chapters 490 and 491 are not mentioned.

§766.102 Fla. Stat. (1991), deals with medical negligence; standards of recovery. §766.102(1) incorporates by reference the definition of "health care provider" as set forth in former §768.50(2)(b) Fla. Stat. (1985), which provides:

> (b) "health care provider" means hospitals licensed under Chapter 395; physicians licensed under Chapter 458; osteopaths licensed under Chapter 459; podiatrists licensed under Chapter 461; dentists licensed under Chapter 466; chiropractors licensed under Chapter 460; naturopaths licensed under Chapter 462; nurses licensed under Chapter 464; clinical laboratories licensed under Chapter 483; physicians assistants certified under Chapter 458; physical therapists and physical therapist assistants licensed under Chapter 486; health maintenance organizations certified under part II of Chapter 641; ambulatory surgical centers as defined in paragraph C; blood banks, plasma centers, industrial clinics and

> renal dialysis facilities; or professional associations, partnerships, corporations, joint ventures or other associations for professional activity by health care providers.

Psychologists and counselors licensed under Chapters 490 and 491 are not mentioned.

§766.103, Fla. Stat. (1991), known as the "Florida Medical Consent Law" deals with certain classes of professions which provide medical care to the general public. While this statute does not use the term "health care provider", specific reference is made to physicians licensed under Chapter 458, osteopaths licensed under Chapter 459, chiropractors licensed under Chapter 460, podiatrists licensed under Chapter 461, and dentists licensed under Chapter 466. Psychologists and marriage counselors licensed under Chapters 490 and 491 are not mentioned.

The Florida legislature again dealt with "health care provider" when it enacted §766.105, Fla. Stat. (1991), known as the Florida Patients Compensation Fund wherein it was provided:

> (b) The term "health care provider" means any Hospital licensed under Chapter 395; Physician licensed, or physician assistant certified, under Chapter 458; Osteopath licensed under Chapter 459; Health maintenance organization certified under part I of Chapter 641; Ambulatory surgical center licensed under Chapter 395; "Other medical facility" as defined in paragraph (c); Professional association, partnership, corporation, joint venture, or other association by the individuals set forth in subparagraphs 2., 3., and 4., for professional activity.

Psychologists and counselors licensed under Chapters 490 and 491 are not mentioned.

In fact, at no point is a psychologist or counselor governed by Chapter 490 and 491 Florida Statutes included within the statutory or legislative definition of "health care provider". The trial judge erroneously ruled that Pinellas, supra, was controlling in the case at bar. The distinctions between the Pinellas, case and the case at bar are clear. At page 62 in the Pinellas, supra, decision the court carefully notes that:

> ...Pinellas Emergency Mental Health is located at Horizon Hospital and regularly provides emergency mental health services through the use of emergency intake specialists.

There is no showing in the case at bar that anything other than outpatient private counseling was occurring about which Groth complained. No hospital was involved and no emergency mental health services were rendered.

The Pinellas, supra, at page 62, decision goes on to state:

> ...these specialists are trained to perform mental status assessments and determine whether or not to admit the patient.

In our case Groth was never seen at any hospital where a mental status assessment was rendered to determine whether or not to admit her as a patient. She merely sought private psychological services from Weinstock. Chapters 490 and 491 Fla. Stat. (1991) are specifically dedicated to psychological services and clinical

counseling thus recognizing their particular status as a group, not as a "health care provider".

Reading further in the Pinellas, supra, at page 62, case the court continues to differentiate its facts and conclusions from our case.

> We believe the Florida Legislature intended to require EMERGENCY MENTAL HEALTH SERVICE PROVIDERS, (emphasis added) such as Pinellas Emergency Mental Health Services, to be subject to the provisions of the Act even though these entities ar not specifically included in Section 769.40(1)(b), Florida Statute (1985).

Again, the Pinellas, supra, court speaks to emergency mental health services, not private practice counselors or psychologists regulated under Chapters 490 and 491, Fla. Stat.

Groth was not attending a hospital based mental health unit nor was this an emergency unit in place at a hospital.

A fair and clear reading of the Statutes tells the reader in unambiguous language what is meant by the term "health care provider" so as to mandate the pre-suit screening procedure. Groth relied in good faith on that definition and further was able to differentiate the requirements carefully set forth in Florida Statutes 490 and 491.

The legislative intent is the primary factor of consideration in construing statutes. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). Recognizing the role of the courts in the process of lawmaking we must note that the courts have a limited power to adjust statutory provisions to fit changing concepts, and the court

cannot use the judicial machinery of construction to amend, modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court. So, when the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction. The statute must be given its plain and obvious meaning. Courts are without power to construe an unambiguous statute in a way which would extend, modify or limit its express terms or reasonable and obvious implications. American Bankers Life Assurance Co. v. Williams, 212 So.2d 777 (Fla. 1st D.C.A. 1968). The authority that is cited by the court in Pinellas, supra, at page 62, is McDonald v. McIver, 514 So.2d 1151 (Fla. 2d D.C.A. 1987), and the court said that:

> ...this court held that the legislature intended to include dental services in its conception of `medical care or services' when it drafted Section 768.57(1)(a). Similarly, we believe the legislature intended "medical care or services" to include mental as well as physical medical care.

It is a general rule that the courts may not, in the process of construction, insert words or phrases in a statute, or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted. Brooks v. Anastasia Mosquito Control Dist., 148 So.2d 64 (Fla. 1st D.C.A. 1963); Devin v. Hollywood, 351 So.2d 1022 (Fla. 4th D.C.A. 1976).

Where a statute is clear and unambiguous, the court is not free to add words to steer it to a meaning and a limitation

which its plain wording does not supply. James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 657 (Fla. 3rd D.C.A. 1962).

In the present case, Groth properly relied upon the clear language of the statute that described who shall be considered a health care provider. No ambiguous words were used or omitted.

Pursuant to the clear statutory language, Groth prepared suit and instituted her action; all in good faith reliance upon Florida Statutes that clearly do not include clinical psychologists as health care providers. Obviously, the legislature did not intend to grant psychologists the modality of the pre-screening panel under the Medical Malpractice Relief Legislation. It was held in Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984), that courts cannot amend or complete acts of the legislature intending to supply relief in instances where the legislature has not provided such relief.

Alternatively, notwithstanding Groth's assertion that the statutory language is clear and unambiguous, and, requires no judicial intervention, Groth calls the court's attention to the fact Weinstock is governed by the provisions of Florida Statutes Chapter 490 and 491. Chapter 766 specifically lists health care providers licensed under other chapters of Florida Statutes. It is a well established principle of statutory construction that the mention of one thing implies the exclusion of another. P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Tower Condominium Inc. v. Millman, 475 So.2d 674 (Fla. 1985); Thayer v. State, 335 So.2d 815 (Fla. 1976); Tillman v. Smith, 533 So.2d 928

(Fla. 5th D.C.A. 1988). Since psychologists are not included within the various definitions of health care providers in Chapter 766 the court must conclude that the legislature did not intend to include counseling services under the Comprehensive Medical Malpractice Reform Act. Thus, Groth was not required to meet the statutory notice requirements of the Act and the trial court erred in dismissing her complaint for failure to do so.

Chapter 766 Florida Statutes (1991) was enacted by the legislature in an attempt to deal with either a real or imagined "health care crisis" brought about by the spiraling cost of medical malpractice insurance premiums. The legislature was concerned about the high cost of medical care because the spiraling cost of malpractice insurance was forcing physicians to practice defensive medicine; to restrict, limit or discontinue their practices in certain areas; and all of these expenses were passed on to the patient. At no place in the legislative history of Chapter 766, Fla. Stat. (1991), does this writer decipher or find any reference to a legislative concern over the `spiraling malpractice insurance premium cost for psychologists and marriage counselors governed by Chapters 490 and 491 Florida Statutes' or any concern about the availability of services provided by psychologists or counselors. There are frequent references to the spiraling cost of medical malpractice insurance premiums for medical doctors and "health care providers" defined in various sections of Chapter 766, Fla. Stat. (1991), but no reference whatsoever to psychologists and counselors.

Because Chapter 766 places restraints on a person's access to the courts, and said restraint is in derogation of the common law of Florida and the Constitutional Provisions of Florida which guarantee access to the courts, any such statute must be strictly construed. Kluger v. White, 281 So.2d 1 (Fla. 1973); 49 Fla. Jur. 2d, Statutes, §192; University of Miami v. Patricia Echarte, etc, 18 Fla. Law Weekly s.284 (Fla. 1993); Psychiatric Associates v. Siegel, 610 So.2d 419 (Fla. 1992).

Weinstock's attempt to bring herself under the canopy of Chapter 766, Fla. Stat. (1991) by vague references to other professions such as dental hygienists, nurses, and specifically a reference to a psychologist in Kalbach v. Day, 589 So.2d 448 (Fla. 4th D.C.A. 1991) and attempts to equate herself with these other professions. It is respectfully submitted that in each of these instances, the person involved was associated with a party who is specifically covered by Chapter 766, for example a dentist under Chapter 466 ; a nurse under Chapter 464 ; and in Kalbach, supra, the licensed clinical psychologist is not a party to that appeal. It appears that Dennis A. Day, Ph.D., licensed clinical psychologist, did not make an appearance in this appeal as the only appellee listed is Rudolf J. Frei, who is a licensed medical doctor according to the appellate record. The absurdity of Weinstock's contentions is amply exemplified by Weinstock's attempt to identify herself with psychiatry by alleging inter alia that the services performed by Weinstock are comparable to the service being performed by a psychiatrist who is the successor counselor for

Groth. (Weinstock's Brief pages 9 and 10). Any such comparison is ridiculous. A psychiatrist is a medical doctor; medical doctors are licensed under Chapter 459, Fla. Stat.; a medical doctor is a "health care provider" as defined by Chapter 766, Fla. Stat. Weinstock is not a medical doctor and no such claim is supported by the record. Therefore, Groth respectfully asserts that any such reference or claim by Weinstock is ill founded and inappropriate.

Nowhere in the present case is there any allegation or contention that Weinstock was at any time material to this cause associated with a medical doctor, associated with a hospital, or associated with an emergency room in the care, treatment or services provided by Weinstock to Groth.

Weinstock also urges this court to look to the ruling of NME Properties, Inc. v. McCullough, 590 So.2d 439 (Fla. 2d D.C.A. 1991) and find that the true criteria for determining whether or not the pre-suit screening requirements apply should be governed by the nature of the proof required to be adduced in order to prove a claim. The proof required to prosecute a medical malpractice claim is set forth in §766.102, Fla. Stat. (1991). Groth respectfully shows that §766.102, which is titled Medical Negligence; Standards of Recovery, specifically provides:

> (1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in §768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of

> the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.(emphasis added)

Thus, Weinstock requests this court to follow a definition which omits any reference to a psychologist or mental health counselor governed by Chapters 490 and 491. To this extent Groth concurs with Weinstock's request.

Further, Groth shows that the NME, supra, ruling was dicta and only suggested a means of determining when and under what circumstances a non-health care provider might be vicariously liable and /or jointly liable. There is no vicarious liability or joint liability issue in the instant case.

II

THE STATUTE OF LIMITATIONS AND/OR WHETHER COUNT II STATES A CAUSE OF ACTION ARE NOT JUSTICIABLE ISSUES BEFORE THIS COURT

Groth does not concede that the issue of whether or not count II of Groth's complaint states a cause of action is before this court. To the contrary, Groth would submit that this issue is not properly before the court. A very brief history of this case reflects that a complaint was filed by Groth (R 1-7); a Motion to Dismiss was filed pursuant to Rule 1.140, Fla. R. Civ. P. by Weinstock (R 8-10); the trial court entered an Order Granting

Motion to Dismiss (R 23-24) and the ensuing Final Judgement (R 29-30) was entered pursuant to the Order without any further evidence or proof being presented or introduced.

Weinstock's Motion to Dismiss alleged as an affirmative defense that Groth had not complied with the pre-suit screening requirements of §766.106 Fla. Stat. (1991). Rule 1.110(d), Fla. R. Civ. P. provides:

> (d) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and <u>any other matter constituting an avoidance or affirmative defense</u>. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleading as if there had been a proper designation. <u>Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under Rule 1.140(b)</u>; provided this shall not limit amendments under Rule 1.190 even if such ground is sustained. (emphasis added)

Thus, it was not improper to raise the defense of failure to comply with pre-suit screening via this vehicle.

Weinstock now is attempting to raise at this juncture a Statute of Limitations issue before the appellate court. This is an impermissible and improper attempt to assert an affirmative

defense pursuant to Rule 1.110(d) as the Statute of Limitations defense does not appear "on the face of a prior pleading" (complaint) as is required by Rule 1.110(d) as a condition precedent to asserting an affirmative defense under Rule 1.140(b).

Should Weinstock desire to present a defense based upon the Statute of Limitations, it is apparent that this is an affirmative defense which should be set forth in an answer. Alexander Hamilton Corp. v. Leeson, 508 So.2d 513 (Fla. 4th D.C.A. 1987); Cook v. Central and Southern Florida Flood Control District, 114 So.2d 691 (Fla. 2d D.C.A. 1959); Parkway General Hospital, Inc. v. Allstate Insurance Company, 393 So.2d 1171 (Fla. 3d D.C.A. 1981); Toledo Park Homes v. Grant, 447 So.2d 343 (Fla. 4th D.C.A. 1984); Evans v. Parka, 440 So.2d 640 (Fla. 1st D.C.A. 1983); Government Employees Insurance Company v. Wheelus, 319 So.2d 181 (Fla. 4th D.C.A. 1975); Malunney v. Pearlstein, 539 So.2d 493 (Fla. 2d D.C.A. 1989); and BBS v. RCB, 252 So.2d 837 (Fla. 2d D.C.A. 1971)

The complaint merely states that Weinstock's behavior which gave rise to this claim was discovered by Groth. (R-6 ¶15) It does not state when the acts were discovered.

The complaint also alleges acts which could be governed by a four year statute of limitations. The exact nature of any issues concerned with a Statute of Limitations defense must be determined by subsequent discovery. Thus, the trial court correctly refused to rule on this issue.

Notwithstanding the absence of a ruling on this issue by the trial court, Weinstock improperly attempted to raise this issue before the Fifth District Court of appeal. The District Court properly did not address this non-issue in its decision reversing the trial court.

Notwithstanding the absence of a ruling by both the trial court and the District Court, Weinstock, once again, attempts to improperly raise this question which should be ignored by this court.

Similarly, the question as to whether or not count II of Groth's complaint states a cause of action is not properly before this court. While it is conceded that Weinstock attempted to raise such an issue in her Motion to Dismiss (R 8-10) such motion has never been ruled upon and has never been addressed by any court. This court should follow the approach of the trial court and the District Court of Appeals and ignore this non-justiciable issue.

III

COUNT II OF RESPONDENT'S COMPLAINT STATES A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

While Groth maintains that this issue is not before the court, she is compelled to refer the court to the fact that the cases cited by Weinstock as support for her contention that the complaint fails to state a cause of action are cases where the court found that the proof adduced in a particular circumstance did not satisfy the burden of proof in that particular case. In each of these cases, the trial court dismissed the case via summary

judgement and/or by judgement after trial because the proof adduced did not meet the requirement set forth by this court. Such a standard is an evidentiary standard and is not properly considered via a motion to dismiss filed pursuant to Rule 1.140, Fla. R. Civ. P.

Groth respectfully suggests that the matters plead fall within the purview of Ford Motor Credit Company v. Sheehan, 373 So.2d 956 (Fla. 1st D.C.A. 1979)(cert. dism. 379 So.2d 204 (Fla. 1979) ; Habelow v. Travelers Insurance Company, 389 So.2d 218 (Fla. 5th D.C.A.1980). In Sheehan, supra, it was alleged that a representative of Ford Motor Credit Company, in an attempt to locate Sheehan, a debtor to Ford Motor Credit Company, called Sheehan's mother and asked for Sheehan's address because allegedly Sheehan's children had been involved in a serious accident and were hospitalized. Sheehan brought an action for intentional infliction of emotional distress, similar to the claim brought by Groth.

The behavior alleged in Sheehan, supra, falls short of the outrageous behavior alleged by Groth in the case at bar in that Groth has alleged the existence of a confidential relationship; the confidential communications between the parties; the breach of this confidentiality; the violation by Weinstock of her position of trust; violation of Weinstock's professional obligations to Groth; and the calculated entry into a clandestine and illicit affair with Groth's husband under the guise of providing psychological counseling to Groth.

While there is no proof yet adduced, Groth certainly suggests that if the facts alleged were related to the average person on the street, they would certainly cry "that is an outrage". The pleadings set forth a basis for maintaining this claim.

CONCLUSION

This court should affirm the decision of the Fifth District Court of Appeals which held that Ronda C. Weinstock, Ph.D. wa not a "health care provider" under the Comprehensive Medical Malpractice Reform Act and that therefor, Groth was not required to meet the statutory notice requirements of the Act and the trial court erred in dismissing her complaint for failure to do so.

This case should be remanded to the trial court for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Filing has been furnished by U.S. Mail to: Tanya M. Plaut, Esquire, Post Office Box 3708, Orlando, Florida 32802-3708 and Francis H. Sheppard, Esquire, Post Office Box 1873, Orlando, Florida 32802 this 16th day of July, 1993.

JOHN E. MAYNARD, ESQUIRE