IN THE SUPREME COURT OF FLORIDA

Case No. 81,234

RONDA C. WEINSTOCK, Ph.D.

Petitioner,

v.

SUZANNE GROTH,

Respondent.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL FIFTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER, RONDA C. WEINSTOCK, PH.D.

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STATEMENT OF THE FACTS AND CASE

Sometime in 1985, Respondent, Suzanne Groth, sought psychotherapy and counseling from Dr. Weinstock, a licensed clinical psychologist with a Ph.D. in psychology. Dr. Weinstock treated Ms. Groth for her psychological problems until about May, 1986. Subsequently, Ms. Groth sued Dr. Weinstock for malpractice based upon an alleged relationship that Dr. Weinstock allegedly entered into with Respondent's ex-husband. Respondent's complaint was not filed until February 1991, approximately a year after Ms. Groth had sued her husband for divorce and nearly five years after she had terminated therapy with Dr. Weinstock. Knowing Ms. Groth's complaint to be wholly devoid of any factual or legal merit, Dr. Weinstock moved to dismiss Respondent's complaint, asserting, among other things, that the complaint failed to allege that Ms. Groth had complied with the presuit screening requirements for a malpractice action against a health care provider as required by Florida's Medical Malpractice Act, Chapter 766, Florida Statutes.

The trial court granted Dr. Weinstock's motion to dismiss based upon the Second District Court of Appeal's decision in *Pinellas Emergency Mental Health Services v. Richardson*, 532 So. 2d 60 (Fla. 2d DCA 1988) which applied the presuit requirements to a mental health care provider and Ms. Groth appealed. On appeal, the Fifth District Court of Appeal reversed the trial court holding that Dr. Weinstock was not a health care provider to whom the presuit screening requirements applied. Petitioner timely filed her notice to invoke discretionary jurisdiction and

now seeks review of the Fifth District's decision rendered November 6, 1992. It is contended by Petitioner that the Fifth District's decision in the instant case is in direct conflict with the decisions of the Second District Court of Appeal in *Richardson* and similar cases.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction of this case in order to resolve a conflict between the decision of the Fifth District Court of Appeal in this case and the decision of the Second District Court of Appeal in *Pinellas Emergency Mental Health Services v. Richardson,* 532 So. 2d 60 (Fla. 2d DCA 1988) and similar cases arising out of the Second District. In the instant case, the Fifth District Court of Appeal held that Dr. Weinstock, a Ph.D. clinical psychologist, is not a health care provider for purposes of the presuit screening requirements contained in Chapter 766, Florida Statutes. The Fifth District Court of Appeal noted that psychologists are licensed under Chapters 490 and 491 and observed that Chapter 766, Florida Statutes, does not list health care providers licensed under those Chapters. Instead, the Fifth District concluded that the inclusion of other specifically enumerated health care providers, but not psychologists, meant that the legislature intended not to include psychologists as health care providers to whom the presuit screening requirements applied.

On the other hand, in *Pinellas Emergency Mental Health*

Services v. Richardson, 532 So. 2d 60 (Fla. 2d DCA 1988), the Second District Court of Appeal concluded that the Florida Legislature intended to require mental health care providers to be subject to the provisions of the Act even though those entities are not specifically listed in the statute. The Second District noted in *Richardson* that §768.57(1)(a)(1985) did not limit application of the Act to malpractice claims where there has been a failure to render physical, as opposed to mental, medical care or services. The Court specifically stated, "We believe the Legislature intended 'medical care or services' to include mental, as well as physical, medical care." Id. at p. 62. The Court then held, in direct conflict with the holding in the instant case, that a mental health care provider not specifically identified in the Act was subject to the requirements of the presuit screening process set forth in Chapter 766, Florida Statutes.

Similarly, the Second District Court of Appeal held in *NME Properties, Inc. v. McCullough*, 590 So. 2d 439 (Fla. 2d DCA 1991) that the simplest test to determine whether the presuit notice provisions apply to a particular claim is whether the professional medical negligence standard of care described in §766.102, Fla. Stat. (1989), applies to the active tortfeasor. This rule of law is directly contrary to the decision of the Fifth District Court of Appeal in this case in which the Court simply looked to whether the alleged tortfeasor was one of the enumerated health care providers in the statute.

This issue is one in serious need of clarification as both the Fifth District and the Second District Courts of Appeal have noted the difficulty in construing Chapter 766 due to the lack of comprehensive definitions and have rendered conflicting opinions concerning the applicability of Chapter 766 to mental health care providers. Accordingly, this Court should accept jurisdiction of this case and resolve the conflict between the two Districts as to whether the presuit screening requirements apply to mental health care providers, such as Dr. Weinstock and other similarly situated mental health care providers, or whether the presuit screening requirements apply only to those health care providers specifically enumerated in the statute.

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION OF THIS CASE BASED UPON DIRECT CONFLICT WITH *PINELLAS EMERGENCY MENTAL HEALTH SERVICES, INC. v. RICHARDSON*, 532 So. 2d 60 (Fla. 2d DCA 1988) AND *NME PROPERTIES, INC. v McCULLOUGH*, 590 So. 2d 439 (Fla. 2D DCA 1991).

This Court has jurisdiction to review the decision of the Fifth District Court of Appeal in the instant case due to a direct conflict between this case and the decision of the Second District Court of Appeal in *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, 532 So. 2d 60 (Fla. 2d DCA 1988). Article 5, §3 (B)(3), Fla. Const. In the instant case, the Fifth District Court of Appeal reversed the trial court's dismissal of respondent's complaint for malpractice against petitioner due to respondent's failure to comply with the presuit screening requirements for medical malpractice actions against "health care

providers". The trial court had expressly relied on the Second District Court of Appeal's decision in *Richardson, supra*, which had held the presuit screening requirements applicable to mental health care providers, as well as physical health care providers. The Fifth District Court of Appeal was not persuaded by the reasoning of the Second District in *Richardson*, and instead concluded that the presuit screening requirements were not applicable to psychologists such as Dr. Weinstock since the Medical Malpractice Act did not specifically list psychologists among the enumerated health care providers.

The Fifth District looked solely to the list of health care providers contained in Fla. Stat. §768.50(2)(b), (1985) which lists various health care providers, but does not include clinical psychologists licensed pursuant to Chapters 490 and 491. The Court concluded that since the Act specifically lists health care providers licensed under other chapters, but not Chapters 490 and 491, the Legislature must have intended to exclude psychologists from the applicability of the presuit screening requirements.

On the other hand, in *Richardson*, the Second District Court of Appeal held that the presuit screening requirements apply to malpractice claims arising out of mental, as well as physical, medical care. The appellant had argued in *Richardson* that it should not be required to comply with the presuit screening procedure since it was not a "health care provider" as defined in the Act. The *Richardson* court disagreed with the appellant and

held the presuit screening requirements applicable to an emergency mental health care services center, finding that plaintiff's claim was a claim arising out of the failure to render mental health care within the purview of the statute.

Importantly, the Second District Court of Appeal noted that the active tortfeasors in the *Richardson* case were "intake specialists" who were trained to perform mental status assessments and determine whether or not to admit the patient. It is not indicated in the *Richardson* opinion, but it is commonly understood that such intake specialists are not normally Ph.D. psychologists, but are lower level mental health care providers who work under the direction and supervision of Ph.D. psychologists and/or psychiatrists.

While the Fifth District Court of Appeal recognized the decision in *Pinellas Emergency Mental Health Services, Inc. v. Richardson*, the Fifth District sought to distinguish *Richardson* from the present case on the grounds that *Pinellas* was a mental health services facility located at a hospital and had authority to admit patients to that hospital, if appropriate. However, that is really a meaningless distinction for purposes of the presuit screening requirements since it makes absolutely no difference whether the alleged malpractice occurs in a health care provider's office or at another facility for purposes of determining whether the Malpractice Act's provisions apply. For example, it would be preposterous to suggest that mental health care providers such as the psychologist and psychiatrist who were

jointly sued in *Kalbach v. Day*, 589 So. 2d 448 (Fla. 4th DCA 1991) should have their liability determined or the plaintiff's rights to sue determined based upon where the asserted act or omission occurred. The correct focus, and the analysis followed by the Second District Court of Appeal in *Richardson* and other cases, is the nature of the health care services rendered and the identity of the health care provider who actually provided the services. In *Richardson*, the services performed were "mental status assessments" which are nothing more than an evaluation by a mental health professional as to the current mental state of the patient at the time the patient is seen. Of course, this is the type of service every psychologist or psychiatrist performs every time such a mental health care provider sees a patient. It is important to note that the "intake specialists" in *Richardson*, were not even shown to be licensed by the State of Florida or insureds under any policy for professional malpractice. This is significant since one of the principal public policy rationales underlying the Medical Malpractice Reform Act was to reduce the cost of professional liability insurance and thus ensure affordable health care for the citizens of the State of Florida.

The reasoning of the Fifth District in the instant case is not only in conflict with the Second District's decision in *Richardson*, but is also in conflict with the rule of law announced by the Second District in *NME Properties, Inc. v. McCullough*, 590 So. 2d 439 (Fla. 2d DCA 1991). In *NME Properties, Inc.*, the Court was confronted with a complaint

against a nursing home, which did not seek recovery based on either direct or vicarious liability under the professional standard of care for medical negligence. The Second District Court of Appeal noted that it may be that the agents who allegedly injured the plaintiff were orderlies or other employees without professional status. Accordingly, the Court declined to apply the presuit screening requirements to the nursing home in that case. However, the Court agreed that the notice provisions may occasionally apply to a defendant who is not a health care provider as defined in §768.50(2)(B)(1985). The Court ruled that "[t]he simplest test to determine whether the notice provisions apply to a claim is whether the professional medical negligence standard of care described in §766.102, Fla. Stat. (1989), applies to the active tortfeasor. *NME* at 441. Accordingly, the Second District Court of Appeal has expressly held that whether a prospective defendant is one of the enumerated health care providers is not determinative for purposes of the applicability of the presuit screening requirements contained in Chapter 766. This rule of law is directly and expressly in conflict with the rule followed by the Fifth District Court of Appeal in this case.

Similarly, in *Silva v. Southwest Florida Blood Bank*, 578 So. 2d 503 (Fla. 2d DCA 1991), the Second DCA again looked to the qualifications of the laboratory personnel as one of the factors to be considered in determining whether a blood bank would be subject to the medical malpractice statute of limitations. It is significant to note that the medical malpractice statute of

limitations defines an action for medical malpractice "as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment or care by any provider of health care." Fla. Stat. §95.11(4)(B). This definition is very similar to the statutory definition for medical malpractice contained in Fla. Stat. §766.106 and both provisions are broad enough to include the instant claim for malpractice against Dr. Weinstock.

It is not surprising, however, that the Fifth District Court of Appeal and the Second District Court of Appeal have reached conflicting decisions on this issue. After all, both Courts have lamented the difficulty of interpreting Chapter 766 because of the lack of comprehensive definitions. Nonetheless, the Second District Court of Appeal has announced a rule of law or test for determining whether the presuit screening requirements apply which conflicts with the rule followed by the Fifth District Court of Appeal in this case. Further, the Fifth District applied a different rule of law to produce a different result in this case which is not factually distinguishable from the pertinent facts in the *Richardson* case. Accordingly, conflict jurisdiction is appropriate under both basic types of "direct conflict" articulated in *Neilson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

It is not necessary that the District Court explicitly recognize the conflict with the decision of another district

court or the Supreme Court in its opinion in order to create an "express" conflict under Article V, Section 3 (B)(3). *Ford Motor Company v. Kikis*, 401 So. 2d 1341 (Fla. 1981). Further, under this jurisdictional principle a district court's ineffective attempt to distinguish the decision of a sister court does not operate to preclude review by this Court pursuant to its conflict jurisdiction. Rather, this Court should independently review the decisions of the two District Courts and recognize the existence of the conflict between the reasoning and the results in the decisions of the two intermediate appellate courts and exercise its constitutional authority accordingly.

CONCLUSION

Based upon the above cited legal authorities and argument, it is respectfully requested that this Court accept jurisdiction of this case to resolve the conflict between the two District Courts as to whether the presuit screening requirements apply to mental health care providers, such as Dr. Weinstock, or whether the presuit screening requirements only will apply to those health care providers specifically enumerated in the statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Facsimile to the Supreme Court of Florida, and by United States mail this 19th day of February, 1993, to **Robert S. Sigman, Esquire,** 540 East Horatio Avenue, Suite 200, Maitland, Florida 32751 and **TANYA M. PLAUT, ESQUIRE**, 506 Mariposa Street, Orlando, Florida 32801.

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