OA 11-1-93

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

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

Francis H. Sheppard
Florida Bar No.: 442290
Sharon K. Duncan
Florida Bar No.: 0959774
RUMBERGER, KIRK & CALDWELL
A Professional Association
201 S. Orange Avenue, Ste. 300
Post Office Box 1873
Orlando, Florida 32802
(407) 872-7300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Session Laws

ARGUMENT

I. RESPONDENT'S STATEMENT OF THE FACTS AND OF THE CASE IS IMPROPER.

Florida Rule of Appellate Procedure 9.210(c) states that, "[t]he statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." While Groth asserts at page 4 of her answer brief that she disagrees with Petitioner's statement of facts to the extent Petitioner stated the complaint alleged the relationship between Ms. Groth and Dr. Weinstock terminated in May, 1986, Ms. Groth's statement of the facts and of the case is not limited to that point of contention. Accordingly, Ms. Groth's statement of the facts and of the case is inappropriate under the applicable appellate rules.[1] Instead, Respondent improperly raises new allegations in her statement of the case and of the facts with no specific citation to the record. For example, Ms. Groth states in her answer brief:

> Groth asserted that Weinstock improperly used her knowledge of Groth's emotional state to further Weinstock's relationship with Groth's husband. (*See* Respondent's Answer Brief, p. 4.)

There is no citation to the record to support this allegation. It is either a mischaracterization of allegations in the complaint or the raising of new ones, both of which are improper.

---

[1] ***Nevertheless, petitioner would point out that at paragraph 7 of her complaint Groth alleges that in May 1986 petitioner declared Groth, and her husband, "cured" and thereupon immediately entered into an intensely personal social relationship with each of the parties. (R. 2-3)***

II. PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO FOLLOW THE PRESUIT NOTICE AND SCREENING REQUIREMENTS CONTAINED IN SECTION 766.106

Respondent argues that one of the statutory definitions of "health care provider" contained in Chapter 766, Florida Statutes, is controlling as to whether the presuit screening process set forth in Florida Statutes Section 766.106 must be followed in a given case. However, Respondent does not identify which of the several statutory definitions of health care provider contained in Chapter 766 is controlling and Respondent fails to explain why any particular definition of "health care provider" should determine whether the presuit screening requirements are to be followed prior to commencing litigation. Instead, Respondent simply argues that because none of the statutory definitions of "health care provider" identified by Respondent include psychologists or counselors licensed pursuant to Chapters 490 and 491 of the Florida Statutes, the presuit screening requirements contained in Section 766.106 do not apply to malpractice actions against psychologists. However, Respondent's argument is not supported by the statutory language or the intent of the legislature.

Turning to the statutory definitions cited by Respondent, it is clear that none of the definitions relied upon by Respondent are related to the presuit screening requirements of Section 766.106 in any way. The first definition relied upon by Groth, contained in Section 766.101, pertains to medical review committees, immunity from liability. In fact, the first sentence of this section limits the applicability of the definitions set forth in subsection

766.101(1), including the definition of "health care provider", to Section 766.101. Further, nowhere in Section 766.101, is there any indication that the legislature intended this definition of "health care provider" to have any broader scope than medical review committees and their immunity from liability.

The limited scope of the Section 766.106 definition of health care provider is made quite clear by the fact that the next consecutive section of the statute, Florida Statute Section 766.102, contains a different definition of health care provider. If the legislature had intended the definition contained in Section 766.101 to be controlling, then presumably, it would not have included a different definition for health care provider in the immediately following section of the statute. Of course, Section 766.102 does not expressly relate to the presuit screening requirements either. Instead, Section 766.102 relates to medical negligence; standards of recovery.

The term "health care provider" next appears in Section 766.105 where again another definition of health care provider is used. This section of the statute deals with what is known as the Florida Patient's Compensation Fund and, again, this section of the statute expressly states that the definitions used in this section are only for the purpose of the Florida Patient's Compensation Fund provisions. Nowhere in Section 766.105 does the statute make any reference to the presuit notice and screening requirements, which are the subject of this appeal, and which are contained in Florida Statute Subsection 766.106(2). However, the controlling statute,

Subsection 766.106(2), does not contain a definition for health care provider at all. This is because Subsection 766.106(2) does not limit the application of its notice provisions to only a limited group of health care providers. Rather, Section 766.106 provides that presuit notice is to be provided to each prospective defendant. The statute requires the Department of Professional Regulation also be notified if a defendant is licensed by certain enumerated chapters:

> (2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Professional Regulation by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice. (emphasis added)

Florida Statute Section 766.106 (1991).

Clearly, the legislature intended to make a distinction between the two groups of potential medical malpractice defendants. If the legislature had intended the notice provisions to apply only to professionals licensed pursuant to certain enumerated chapters, it would have so stated just as it stated the specialties for which notice must also be sent to the Department of Professional Regulation. However, the statute makes it clear that notice is to be provided to each prospective defendant, regardless of whether the defendant is licensed pursuant to any of the enumerated chapters of the Florida Statutes. Accordingly, the definitions of "health care provider" contained in other statutory provisions are

irrelevant for determining whether the presuit notice and screening requirements must be complied with.

Nonetheless, Respondent repeatedly argues that psychologists and counselors licensed under Chapters 490 and 491 are not included in the various definitions of health care provider contained in unrelated sections of Chapter 766 and therefore the Act's presuit screening requirements do not apply to mental health care providers. However, a significant factor that Respondent does not mention is that Chapters 490 and 491 were promulgated after the medical malpractice act was created in 1972.[2] Chapter 490, governing psychological services, and Chapter 491, governing clinical, counseling, and psychotherapy services, were both enacted after 1972. When enacting Chapters 490 and 491 the legislature found that:

> As society becomes increasingly complex, emotional survival is equal in importance to physical survival. Therefore, in order to preserve the health, safety, and welfare of the public, the legislature must provide privileged communication for members of the public or those acting on their behalf to encourage needed or desired psychological services to be sought out. The legislature further finds that, since such psychological services assist the public primarily with emotional survival, which in turn affects physical and psychophysical survival, the practice of psychology and school psychology by unqualified persons presents a danger to public health, safety, and welfare.

As time progressed, the legislature realized the importance of mental health and acted on society's need for regulation of mental

---

[2]The presuit notice and screening requirements were created as a part of the 1985 Amendments to the Act.

health care providers by enacting these chapters. As the legislature explained, emotional health impacts physical health. Clearly, the legislature intended "medical care or services" to include mental, as well as physical, medical care.

This evolution in the legal recognition of the importance of mental health care in society is emphasized by the psychotherapist/patient privilege created by the legislature and contained in Florida Statute Section 90.503. That statute defines psychotherapist as either a person authorized to practice medicine or a person licensed as a psychologist engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction. Plainly, the legislature does not draw a distinction between Ph.D. psychologists and medical doctors for purposes of the psychotherapy/patient privilege and it would be incongruous to treat claims for violation of the privilege differently based upon whether the psychotherapist was a Ph.D. psychologist or a medical doctor. Further, the legislature clearly understands the importance of mental health care as demonstrated by the creation of the privilege and disparate treatment of claims for malpractice in the provision of mental health care, as opposed to physical health care, would not further the legislative intent.

More recently, in Chapter 92-33, Laws of Fla., the legislature created the "Agency for Health Care Administration" within the Department of Professional Regulation. The Agency for Health Care Administration is organized to include health care professionals licensed pursuant to various chapters of the Florida Statutes,

including Chapters 490 and 491. The Agency for Health Care Administration has responsibility for the regulation of both mental and physical health care providers. The new law also provides for the appointment of a deputy director for health quality assurance who is to be responsible for regulating the quality of physical, as well as mental, health care. In fact, throughout the extensive Health Care Reform Act of 1992, the legislature has treated physical and mental health care providers similarly and has made no distinction between mental as opposed to physical health care. In addition, in Chapter 92-149, Section 4, Laws of Fla., the legislature amended the statutes providing for the regulation of professionals and rewrote Florida Statute Section 455.01 to include a definition of "health care practitioner" which includes psychologists and counselors licensed under Chapter 490 or Chapter 491. These two laws are a clear indication of the legislature's recognition of our current health care crisis and its intent that mental, as well as physical, health care providers should be treated similarly in our efforts to come to grips with this crisis.

The Second District Court of Appeal reached this same conclusion and ruled that the Act's notice and presuit screening requirements applied to mental, as well as physical health care. *Pinellas Emergency Mental Health Services v. Richardson,* 532 So. 2d 60 (Fla. 2d DCA 1988). However, Respondent misreads and misapplies the ruling and rationale of the Second District Court of Appeal in *Pinellas*. Respondent focuses on the location at which the mental health services were provided and not on the nature of those

services. The *Pinellas* court included the mental health intake specialist in the scope of health care providers to whom notice must be provided and stated its "conclusion is supported by Subsection 768.57(1)(a) which defines a medical malpractice claim as one 'arising out of the rendering of, or the failure to render, medical care or services.' That subsection does 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."

Respondent argues that a distinction can be drawn between *Pinellas* and the instant case in that no hospital was involved and no emergency mental health services were rendered in this case. However, this is a meaningless distinction. Directing the court's attention to the specialties that are enumerated throughout different sections of the medical malpractice act, no distinction is made between hospital-based practices and private office practices. For example, the chapter governing chiropractors has been included in a definition for health care providers and most chiropractors do not have hospital admitting privileges. There is no reason why this distinction should be drawn only in regard to psychologists. In fact, most hospitals grant hospital privileges to psychologists. Therefore, a distinction based on the location where services are provided is meaningless and irrelevant.

Respondent also argues that the statute of limitations defense asserted by Petitioner in her motion to dismiss and addressed in her initial brief is a non-issue. This is peculiar in light of

Respondent's having taken issue with the timing of the alleged relationship in her statement of the case and of the facts in her answer brief. In the complaint, Ms. Groth alleges that in May 1986 Dr. Weinstock declared Ms. Groth and her husband "cured" and thereupon entered into a social relationship with both of the parties. It has been understood all along, particularly in light of the nearly five year delay in bringing suit, that Ms. Groth was alleging that the relationship did not commence until after termination of the therapy. If that is the case then the statute of limitations defense most likely <u>is</u> a non-issue since no cause of action exists. However, if Ms. Groth now wishes to assert that the relationship was ongoing prior to the termination of her doctor/patient relationship with Dr. Weinstock, then her claim clearly will be time-barred.

Florida Statute Section 95.11(b) states that "[a]n action for medical malpractice shall be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued." The statute further provides that "[a]n action for medical malpractice is defined 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." Interestingly

enough, Subsection 95.11(4)(b) does not limit its application to physical, as opposed to mental, health care and does not contain any specific definition of "health care provider". There is no reason why the presuit notice and screening requirements contained in Section 766.106 should be treated any differently.

III. COUNT II OF RESPONDENT'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS A MATTER OF LAW

Ms. Groth argues that the dismissal of her claim for intentional infliction of emotional distress for failure to state a cause of action is improper. She argues that this claim must be decided after evidentiary proof has been offered. (*See* Respondent's Answer Brief, pp. 22 and 23.) This is not correct. As the Fifth District Court of Appeal has stated, "whether the conduct is outrageous enough to state a cause of action must be decided as a question of law when the alleged facts can under no conceivable interpretation support the tort." *Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th DCA 1991). Therefore, the final judgment entered on this claim is proper. Of course, to the extent which Respondent wishes to call this point a non-issue, Respondent would be satisfied to allow the trial court's judgment on this claim to stand. However, Respondent having appealed that judgment, Petitioner deemed it necessary before the Fifth District Court of Appeal to address all claims upon which judgment was entered and has likewise argued both claims before this court.

To overturn that judgment, Respondent relies upon *Ford Motor Credit Co. v. Sheehan,* 373 So. 2d 956 (Fla. 1979), and argues that

the behavior alleged falls short of the outrageous behavior alleged by Ms. Groth in the case at bar. However, in *Sheehan,* a debt collector for Ford Motor Credit Company contacted Sheehan's mother in an attempt to locate Sheehan. This representative lied to Sheehan's mother and told her she was employed by Mercy Hospital in San Francisco, California. She advised Sheehan's mother that one or both of Sheehan's children had been involved in a serious automobile accident. In fear, Sheehan's mother supplied information to the representative regarding his home and business addresses and phone numbers. Sheehan was then contacted by his sister and told that his children had been involved in a serious automobile accident. The First District Court of Appeal found that Ford Motor Credit Company would be liable to Sheehan for the severe mental distress and suffering it had caused him until he discovered the information was false. Causing a parent overwhelming distress and fear by falsely alleging severe injuries to his children is an intolerable tactic to collect money. It is clear the conduct of Ford Motor Company's representative can be characterized as being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to regard it as atrocious, and utterly intolerable in the civilized community" when asserted for the mere purpose of collecting an overdue debt.

In comparison, the conduct alleged in the case at bar does not reach the level of outrageousness required to sustain a cause of action for intentional infliction of emotional distress. Ms. Groth alleges a relationship took place between Ms. Groth's husband and

Dr. Weinstock after the commencement of a social relationship between the two couples and after the termination of the patient relationship. (See complaint at ¶ 7.) However, no cause of action exists, even were such allegations susceptible of proof, and Ms. Groth is in reality struggling to convert a dead cause of action for alienation of affections into some viable cause of action recognized under Florida law. In any event, the conduct alleged does not fulfill the requirements necessary to state a claim for intentional infliction of emotional distress.

This Court also refused to find a cause of action for intentional infliction of emotional distress in *Eastern Airlines, Inc. v. King,* 557 So. 2d 574 (Fla. 1990). In *King*, a passenger on an Eastern Airlines flight sued the airline when all three engines failed. The crew and passengers prepared for an emergency landing; however, the pilots were able to restart one engine and land the plane. The plaintiff alleged that Eastern failed to properly inspect, maintain, and operate its aircraft and that "Eastern's records reveal at least one dozen prior instances of engine failures due to missing oil rings [oil seals], and yet, Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." *King* at 575. This Court ruled that *King* failed to state a claim for intentional infliction of emotional distress because the allegations rose no higher than negligence. The prior instances of missing o-rings causing engine failure did not amount to extreme and outrageous conduct intentionally causing emotional distress. *Id.* at 576.

Another instructive case is *Food Fair, Inc. v. Anderson,* 382 So. 2d 150 (Fla. 5th DCA 1980). In *Food Fair,* an employee alleged she was requested to submit to a polygraph test upon threat of termination for untrustworthiness. Despite her protestations of innocence, the plaintiff was persuaded to sign a statement admitting to the theft of $150.00 and later, because of unfavorable polygraph results, was required to sign a new statement admitting to stealing $500.00. The plaintiff was then terminated because of her admission that she stole $500.00. The court found that the employer's conduct was not so outrageous as to constitute a prima facie case of intentional infliction of emotional distress, and the defendant's motion for directed verdict should have been granted.

The instant case may also be decided as a matter of law. The allegations that Dr. Weinstock allegedly entered into a relationship with Ms. Groth's husband after having a social relationship with Ms. Groth and her husband and terminating the doctor/patient relationship, is certainly not as egregious or outrageous as the conduct of the defendants in *Food Fair* or *King*. This is particularly true when it is considered that the allegedly outrageous conduct did not occur during the course of the doctor/patient relationship which was terminated nearly five years before suit was filed and nearly four years after Ms. Groth sued her ex-husband for divorce. The alleged facts regarding the conduct of Dr. Weinstock are not sufficiently outrageous to sustain a claim for intentional infliction of emotional distress and was properly dismissed.

CONCLUSION

Based on the foregoing authorities and legal argument, Petitioner, Ronda C. Weinstock, Ph.D., respectfully requests this Honorable Court to reverse the decision of the Florida Fifth District Court of Appeal rendered November 6, 1992, and affirm the final judgment of the trial court in her favor.

Francis H. Sheppard
Florida Bar No.: 442290
Sharon K. Duncan
Florida Bar No.: 0959774
RUMBERGER, KIRK & CALDWELL
A Professional Association
201 S. Orange Ave., Suite 300
Post Office Box 1873
Orlando, Florida 32802
(407) 872-7300
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this 10th day of August, 1993, to **John L. Maynard, Esquire**, 191 Circle Drive, Post Office Drawer 1960, Maitland, Florida 32751-1960, **L. DANNER HEIRS, ESQUIRE**, 1222 Burning Tree Lane, Winter Park, Florida 32792, and **TANYA M. PLAUT, ESQUIRE**, 506 Mariposa Street, Orlando, Florida 32801.

Francis H. Sheppard, Esquire
Florida Bar No.: 442290
Sharon K. Duncan
Florida Bar No.: 0959774
RUMBERGER, KIRK & CALDWELL
A Professional Association
201 S. Orange Ave., Suite 500
Post Office Box 1873
Orlando, Florida 32802
(407) 872-7300
Attorneys for Petitioner

Groth\Supreme\Brief.rep