047

SUPREME COURT OF FLORIDA

NO. 82,147

J.B. AND J.W.B. INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, S.B. AND E.B. AND M.B., INDIVIDUALLY

Appellants

VERSUS

SACRED HEART HOSPITAL OF PENSACOLA

Appelee

ON CERTIFICATION FROM THE
UNITED STATES 11TH CIRCUIT COURT OF APPEALS

CIRCUIT NO. 92-2053

ANSWER BRIEF OF APPELLEE, SACRED HEART HOSPITAL OF PENSACOLA

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PRELIMINARY STATEMENT

References to the record herein are to the Record on Appeal to the United States Court of Appeals for the Eleventh Circuit, and will be designated by "R" followed by the appropriate document number and page number.

STATEMENT OF THE FACTS AND THE CASE

Appellee, Sacred Heart Hospital of Pensacola, submits this statement of additional facts to supplement and, in certain cases, correct the statement of facts submitted by Appellants.

Plaintiffs, J.B., J.W.B., E.B. and M.B., filed a Complaint for damages on April 18, 1991 against Sacred Heart Hospital of Pensacola, seeking recovery for damages to the Plaintiffs as a result of the alleged negligence and fraud of the Defendant in breaching its duty to exercise due care toward Plaintiff, J.B. (R1-2).

The only pertinent "facts" to this appeal are those allegations contained in the Complaint, which for purposes of ruling on a Motion to Dismiss, must be taken as true. Appellants, in their Initial Brief, have made certain "factual" statements which are not contained within the Complaint, and accordingly, are not proper for this Court to consider. Specifically, the following statements contained in Appellants' brief are not found within the Complaint: That a hospital social worker discovered she was unable to secure payment of an ambulance from L.B.'s insurance; that no suggestion was made by Sacred Heart regarding the family paying for an ambulance for L.B. or alternative methods of funding the ambulance trip; that a doctor had ordered the I.V. to be removed from L.B.'s arm before discharge; or that Sacred Heart nurses gave J.B. a "five-minute lesson on the care of I.V. sites."

What the Complaint does state which is pertinent to this Court's review is as follows:

V.

That on or about April 17, 1989, Sacred Heart Hospital was requested by their medical staff to arrange transportation for L.B., a diagnosed AIDS patient, to another treatment facility in Alabama.

...

VIII.

The patient, L.B. was released from the Hospital with excessive fever and a Heparin lock in his arm to the Plaintiff, J.B., a layman providing a service without the benefit of training in the field of medical treatment and transport.

IX.

The complainant, J.B., was not nor has he ever been, nor is he now, nor has he ever represented that he was able to do or trained for, the transport or transfer of an individual who was in need of medical care or treatment during the transport or transfer to another hospital or health care facility.

X.

The complainant could not provide adequate care for the transferee in an emergency situation, as he was the operator of the vehicle

...

XII.

The Hospital was negligent in using J.B. as a transporter, in that the Hospital recognized the technical care L.B. would need in the transportation from their hospital to the receiving hospital.

XIII.

The Hospital recognized the foreseeability of the risk, in that they gave J.B. technical instructions on the care of L.B. in the event that the Heparin lock came loose or started to bleed.

XIV.

As a direct result of the foregoing incident, Complainant tested HIV+, therefore sustaining serious, permanent damages, including but not limited to past, present and future loss of earnings and earning potential....(R1-2-2,3,4).

While Appellant's assert that J.B. never received any type of diagnosis, treatment or care from Sacred Heart Hospital, it is the alleged failure by the hospital to "treat" and "care" for him and his brother, the patient, in connection with discharge and transfer, which constitutes the essence of the allegations in the Complaint.

SUMMARY OF THE ARGUMENT

Plaintiffs' Complaint in this proceeding alleges a claim against Sacred Heart Hospital, a health care provider, based on the alleged failure of the Hospital to exercise the degree of care, skill, and diligence required under the prevailing professional standards of care. Accordingly, the Complaint falls within the provisions of Chapter 766, Florida Statutes, as well as the limitations period prescribed in Section 95.11(4)(b), Florida Statutes (1989). The claim as stated in the Complaint alleges an "action for medical malpractice," as that term is defined in §95.11(4)(b), as it is a claim in tort for damages because of the injury to the Plaintiffs arising out of medical diagnosis, treatment or care by Sacred Heart Hospital.

Since the Plaintiffs' claim in this case is controlled by Chapter 766, Florida Statutes, the Plaintiffs are required to comply with the pre-suit screening procedures set forth in Chapter 766. Such compliance is a prerequisite to filing suit. Inasmuch as the Plaintiffs failed to do so, the District Court's dismissal of the Complaint, without prejudice, in order that the Plaintiffs might comply with the filing prerequisites of Chapter 766, Florida Statutes, was proper.

Based on the foregoing, this Court should respond affirmatively to both questions certified by the Eleventh Circuit Court of Appeals, since Section 95.11(4)(b) and Chapter 766 are both applicable to Plaintiffs' cause of action.

ARGUMENT

I. THE COMPLAINT HEREIN, WHICH ALLEGES INJURIES TO THE BROTHER OF A HOSPITAL PATIENT ALLEGEDLY ARISING OUT OF THE DEFENDANT HOSPITAL'S FAILURE TO WARN THE PLAINTIFF BROTHER OF THE PATIENT'S INFECTIOUS DISEASE, FAILURE TO PROPERLY INSTRUCT THE PLAINTIFF REGARDING TRANSPORTATION OF THE PATIENT, AND NEGLIGENTLY USING THE NON-PATIENT BROTHER AS A TRANSPORTER FOR THE PATIENT FALLS WITHIN §95.11(4)(b), FLORIDA STATUTES, THE TWO YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE ACTIONS.

A review of the Complaint in this proceeding can leave no doubt that Plaintiffs' claim is an "action for medical malpractice," as that term is defined in §95.11(4)(b), Florida Statutes. That Section, which sets forth the statute of limitations period for medical malpractice actions, contains the following definition:

> An "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. §95.11(4)(b), Fla. Stat. (1989).

Appellee makes no contention herein that §95.11(4)(b), Florida Statutes, is intended to apply to anyone asserting any type of claim against a health care provider, and recognizes that there are instances in which a claim may be asserted against a health care provider, but still remain outside the medical malpractice statutes. For example, Buchanan v. Lieberman, 526 So.2d 969 (Fla. 5th DCA 1988) involved a physician who allegedly committed an intentional battery in his office on a patient by fondling the patient and forcibly kissing her. The Court in Buchanan found that the complaint did not involve medical malpractice, for purposes of applying the medical malpractice statute of limitations. Likewise,

in the case of Zobac v. Southeastern Hospital District, 382 So.2d 829 (Fla. 4th DCA 1980), the court stated that medical malpractice means a "dereliction from professional duty or a failure of professional skill or learning that results in injury, loss or damage... and does not include janitorial negligence, for example, or a breach of duty in maintaining the hospital grounds generally required of possessors of land." 382. So.2d at 830-831. The court went on to equate malpractice to "the departure from a standard of care required of professionals." 382 So.2d at 831.

However, in the instant case, the Plaintiffs are clearly alleging in their Complaint that Sacred Heart Hospital departed from the prevailing standard of care in connection with the discharge and transport of the patient, L.B. The Complaint alleges that the Plaintiff, J.B., was not trained nor able to transport an individual in need of medical care and treatment, but that the Hospital "recognized the technical care L.B. would need in the transportation..." and "recognized the foreseeability of the risk...". R1-2-3. The Complaint also states that the Hospital gave the Plaintiff, J.B., technical instructions in the care of L.B. in the event the Heparin lock came loose or started to bleed. Id. These allegations can only be interpreted as charging the Defendant with a failure of professional skill or learning that has allegedly resulted in injury to the Plaintiff, a departure from the prevailing standard of care required by the Hospital, as a health care provider. The Plaintiffs have in essence charged the Hospital with a breach of its duty as a Hospital. Clearly, such charges of

breach of this type of alleged duty could not be made against a non-health care provider, since there would exist no duty in such case. In effect, Plaintiffs are attempting to charge a breach of professional duty (i.e., medical malpractice), but seek the benefit of the statutory provisions governing common negligence. Such a result cannot be permitted under applicable law.

While not specifically addressing the issues raised herein, the Florida case of Hofmann v. Blackmon, 241 So.2d 752 (Fla. 4th DCA 1970) is instructive. In that case, the court held that a physician owes a duty to use reasonable care to advise and warn members of a patient's immediate family of the existence and dangers of a contagious disease. No such duty would arise but for the physician's status as a medical professional, with the skill and training to diagnose the disease and to instruct the family regarding precautionary measures to be taken. Clearly, a lay person would not have such a duty inasmuch as he would not have the professional skill and training to create such a duty. Consequently, allegations of breach of such professional duty necessarily fall within the definition of professional (medical) malpractice.

One should also take note of the language of §95.11(4)(b), which defines a medical malpractice action as one "arising out of any medical... diagnosis, treatment or care...." In the instant case, the claim arises out of the alleged failure to properly "care" for or "treat" the patient L.B. in connection with his discharge and transfer to another facility, as well as the alleged

failure to "care" for the plaintiff J.B., by failing to warn him about his brother's condition, to instruct him as to proper transport and proper care for the patient, and by using his as a transporter.

Appellants argue that J.B. did not have the necessary "privity" with Sacred Heart Hospital for his claim to be considered one for professional malpractice. However, it should first be noted that there is no requirement of privity, nor of a physician-patient relationship, found in the definition of an "action for medical malpractice" in Section 95.11(4)(b), Florida Statutes. Further, Plaintiff misconstrues the provision regarding privity found in §95.11(4)(b). The applicable provision therein states as follows:

> The limitation of action within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. §95.11(4)(b), Fla. Stat. (1989).

Clearly, the definition of an action for medical malpractice does not contain a requirement of privity. The statute merely states that the two-year limitations period only applies to those in privity.

The section was interpreted in the case of Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3rd DCA 1984). In that case, the court held that the two-year statute of limitations for medical malpractice applies to a lawsuit brought against the Florida Patient's Compensation Fund. The plaintiff argued that the two-year statute of limitations provision did not apply, but that the claim was one for negligence, governed by a four-year

limitation period. The Fund argued that the two-year limitation provision under §95.11(4)(b), Florida Statutes, was applicable, since the Fund was in privity with the health care provider alleged to have committed malpractice on the plaintiff. In its ruling, the court stated as follows:

> There is no definition of privity which can be applied in all cases, ... and in fact, the meaning will vary according to the purpose for which the theory is invoked. Generally, however, privity refers to a mutual or successive relationship to the same right. Osborn v. Strickel, 187 So.2d 89 (Fla. 3d DCA 1966). In the instant case, there is a mutuality of interest which exists between a health care provider and the Fund which extends to the lawsuit itself, the alleged claims of medical malpractice and the damages claimed. ... Thus, we hold that the Florida Patient's Compensations Fund is in privity with the health care provider so that the two-year statute of limitations provision is applicable. Accord Owens; Burr. 449 So.2d at 957-958.

Thus in Taddiken, the court made no finding that the plaintiff was in privity with the Fund; yet, the court found the two-year medical malpractice statute of limitations applied to the Fund.

In the instant case, the Plaintiff, J.B., dealt face to face with the defendant health care providers. Indeed, Plaintiffs allege that due to this relationship, Plaintiff, J.B., was owed a duty of care by Defendant Sacred Heart Hospital. There is no requirement that the plaintiff must be a patient to be in privity with the health care provider, within the meaning of privity found in §95.11(4)(b), Florida Statutes.

While Plaintiffs place much reliance on the case of Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, 581 So.2d 1301 (Fla. 1991), that case was not one involving medical malpractice, nor the construction of

§95.11(4)(b), but rather was a case involving alleged professional malpractice against an engineering corporation. In that case, the plaintiff condominium association had no communication or contact whatsoever with the defendant engineers, but rather based its claim on an allegedly negligent report prepared by the defendant for a third party, and later supplied by this third party to the plaintiff association. In that case, the court construed the meaning of §95.11(4)(a), Florida Statutes, the limitations period for bringing professional malpractice actions other than medical malpractice. For purposes of that section, the court held that privity referred only to direct contractual privity.

However, the provisions regarding privity in §95.11(4)(a), Florida Statutes, and §95.11(4)(b) are not identical, nor have they been interpreted by the courts in the same manner. The provision of medical diagnosis, treatment, or care is often rendered to patients and non-patients who have no direct contractual privity with the health care provider. Accepting the Plaintiff's arguments as correct, an individual who receives medical treatment in an emergency situation at a health care facility with no prior contractual arrangement with the health care provider would not be bound by the statute of limitations contained in §95.11(4)(b). Further, to accept the Appellant's argument would awkwardly and illogically permit two different periods to apply to the same alleged underlying medical malpractice - both the patient and his brother were involved in the same clinical situation.

The Appellants also cite the case of Silva v. Southwest Florida Blood Bank, Inc., 601 So.2d 1184 (Fla. 1992). However, the Silva case is not dispositive of the issues raised in this case. The Supreme Court in Silva found the four-year statute of limitations for negligence to apply, rather than the two-year medical malpractice statute, on the basis that the blood bank was not a "provider of health care" as that term is used in §95.11(4)(b), and that further the blood bank did not render "diagnosis, treatment, or care" to the plaintiff.

In its decision, the court in Silva provided definitions of the words "diagnosis," "treatment," and "care," and stated that "care" means "provide for or attend to needs or perform necessary personal services (as for a patient or a child)." The court noted an additional definition of "care" to be "the application of knowledge to the benefit of...[an] individual." 601 So.2d at 1184. In the instant case, taking the allegations of the Complaint on their face, Plaintiffs have alleged a breach by the Hospital in its "care" of J.B., and the allegations clearly state that the Hospital negligently provided for or attended to the needs of J.B. in connection with the transport of his brother. The complaint further alleges a breach of the Hospital's duty of care to L.B., in that the Hospital allegedly provided an inappropriate mode of transport and transferred the patient with a Heparin lock in his arm. The essence of Plaintiffs' complaint is that the Hospital negligently applied or failed to apply its professional knowledge for the benefit of L.B. and J.B. Accordingly, Plaintiffs must be

bound by the two-year statute of limitations governing medical malpractice actions.

The Appellants also rely on the case of Durden v. American Hospital Supply Corporation, 375 So.2d 1096 (Fla. 3rd DCA 1979). However, again, the distinguishing factor in that case is that the court found that the claim did not arise as a result of any medical, dental or surgical diagnosis, treatment or care on the part of the health care provider. The court found that the plaintiff sold his blood to the defendant blood donor center, and that there was no medical, dental or surgical diagnosis, treatment or care rendered by the blood donor center to the plaintiff.

Other cases cited by the Appellants are inapposite to the case at hand. For example, in Johnson v. West Virginia University Hospitals, 413 S.E.2d 889 (W.Va. 1991), the court entered a very narrow ruling holding that damages for emotional distress may be recovered by a plaintiff against a hospital based upon a plaintiff's fear of contracting AIDS, if the plaintiff is not an employee of the hospital but has a duty to assist hospital personnel in dealing with a patient affected with AIDS; the patient's fear is reasonable; the AIDS-infected patient physically injures the plaintiff and such physical injury causes the plaintiff to be exposed to AIDS; and the hospital has failed to follow a regulation which requires it to warn the plaintiff of the facts that the patient has AIDS, despite the elapse of sufficient time to warn. 413 S.E.2d at 894. The court specifically limited its holding to the facts before it. Clearly, the facts in this case

present a completely different scenario than those in the Johnson case. Further, that case specifically interpreted the law of West Virginia regarding a cause of action for negligent infliction of emotional stress, which is not before the court here.

In Heigert v. Reidel, 565 N.E.2d 60 (Ill. App. 5. Dist. 1990), the court applied Illinois law regarding the scope of a physician's duty in medical malpractice actions. The court found that, based upon its prior holdings and applicable Illinois statutes, a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship ... between the patient and the plaintiff." 565 N.E.2d at 64-65. Of course, Florida's medical malpractice legislation is not identical to that of Illinois, and there are no provisions in Florida law which require a direct physician-patient relationship in order to bring a medical malpractice action. Arguably, however, the Illinois provision which permits a claim by non-patients who have a "special relationship" with the patient could apply in this instance, in that the Plaintiffs have alleged a relationship between the patient and his brother, J.B., which allegedly gave rise to a duty by the Hospital which extended to the non-patient brother.

Also cited by the Appellants is the Louisiana case of Guidry v. Garrett, 591 So.2d 806 (La. Ct. App. 1991), which construed a Louisiana statute defining medical malpractice as "... any unintentional tort...based on health care or professional services rendered...by a health care provider, to a patient. ..." Again,

the Florida statute has no such requirement that a plaintiff in a medical malpractice action be himself a "patient." Likewise, in the case of Sweeney v. Presbyterian/Columbia Presbyterian Medical Center, 763 F.Supp. 50 (S.D.N.Y. 1991), the court found that a complaint alleging that a hospital was negligent in obtaining safe blood for transfusions was not a claim for medical malpractice, explaining its ruling as follows:

> The nature of this claim is not such that it calls into question the competency of the medical decisions made regarding Sweeney's treatment; the complaint does not allege that the decision to give Sweeney a transfusion was wrongful, nor does it -...- charge that the hospital was negligent in the manner in which it administered the transfusion. 763 F.Supp. at 52.

On the other hand, in this case Plaintiffs have certainly called into question the care provided to the patient, L.B., instructions provided by the Hospital to the Plaintiff in connection with the transport, as well as the mode and manner of medical transportation provided to the patient. The Plaintiffs have in essence alleged the Hospital was negligent in failing to ensure that the proper care would be given to L.B. consequently, J.B., in the transport.

Nor is the case of Sewell v. Doctors Hospital, 600 So.2d 577 (La. 1992), at all analogous to the case at bar. That case involved a claim by a patient brought against a hospital to recover injuries sustained when a hospital bed collapsed, and alleged that the bed was defective and unreasonably dangerous. In finding that a claim for strict liability for defects in hospital furniture was not included within the Louisiana medical malpractice act, the

court construed the specific language of the statute, which is unsimilar in many respects to the Florida legislation.

Likewise, the holding in Hutchinson v. Patel, 1993 WL 255484 (La. App. 1st Cir. July 8, 1993) was based upon the wording of a Louisiana statute which defined malpractice as a tort based upon health care services rendered, or which should have been rendered, to a patient. This statutory language contrasts sharply with the language in §95.11(4)(b) which is not limited to claims by a patient, but rather defines medical malpractice as "a claim... arising out of any medical...treatment or care..." In a similar vein, the case of Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993), construed Tennessee law defining medical malpractice, not Florida statutory and case law.

In its order, the District Court in this case noted that, while there are no reported Florida cases that address the specific issue as to whether or not Florida's medical malpractice statutes relate to claims brought by non-patients, there are cases from other jurisdictions which have held that claims by non-patients stemming from negligent clinical conduct by health care providers are controlled by the applicable medical malpractice statutes (R1-18-1,2). The court noted the case of Hedlund v. Superior Court of Orange County, 34 Cal. 3d 695, 194 Cal. Rptr. 805, 669 P. 2d 41 (Cal. 1983), which held that allegations of negligent failure to warn of danger posed by an identifiable victim constitutes professional negligence within the meaning of the statute which provided a three-year statute of limitations for actions for injury

or death against a health care provider, based upon such person's alleged professional negligence. The court in that case declared that when a health care professional's negligence results in harm to parties other than a patient, the legislative purpose of the comprehensive health care statute in which the malpractice statute of limitations appeared - that of reducing health care costs by reducing the dollar amount of judgments in actions for failure to warn - would be frustrated if the act's own restrictions were not applicable to actions essentially within the act's ambit. The court also noted that it would be anomalous if a third party's cause of action based on the same negligent act were treated differently than an action by the patient. See also, Wilschinsky v. Medina, 108 N.M. 511, 775 P.2d 713 (N.M. 1989); Hewett v. Kennebec Valley Mental Health Association, 557 A.2d 622 (Me. 1989). The same analysis can be applied to the proceeding brought by the Plaintiffs herein.

Pertinent to this discussion is a recent case of Martinez v. Lifemark Hospital of Florida, Inc., 17 Fla. L. Weekly D2336 (Fla. 3rd DCA Oct. 13, 1992), a medical malpractice action against two physicians which also included claims against a hospital based upon negligent hiring and retaining of the doctors. In that case, the court dismissed the action against the hospital because it was brought after the two-year medical malpractice statute of limitations. The court ruled that an action brought against a hospital for the negligent retention of its medical staff should be brought under the medical malpractice laws, and not the general

tort law. Thus, in that case, while there was no allegation that the hospital engaged in the negligent care, treatment or diagnosis of the patient, the claim against the hospital was found to fall under Florida's Medical Malpractice Act, since the selection and review of health care personnel is a duty of hospitals under Florida's medical malpractice statute. The court determined that since the case arose out of a breach of that duty, the medical malpractice statute applied. The court found that the entire case arose out of negligent medical treatment, which treatment was both necessary to the claims against the hospital and inextricably connected to them. Thus, the entire case should be handled under the medical malpractice statute.

As in the Martinez case, the claims of J.B. herein are inextricably connected to the care and treatment rendered to his brother, L.B., by Sacred Heart Hospital, as well as the care and medical advice given to J.B. in connection with the medical transport of his brother. Accordingly, the case falls within the medical malpractice statutes, and is governed by the provisions of §95.11(4)(b), Florida Statutes.

II. THE PROVISIONS OF CHAPTER 766, FLORIDA STATUTES, WHICH CONTAIN PRE-SUIT SCREENING AND NOTICE REQUIREMENTS, ARE APPLICABLE TO PLAINTIFFS' CAUSE OF ACTION.

In the instant case, the Plaintiffs failed to serve on the Defendant a Notice of Intent to Initiate Litigation, and failed to comply with the other pre-suit screening requirements of Chapter 766, Florida Statutes. The Plaintiffs contend that Chapter 766 is not applicable to this proceeding.

A "claim for medical malpractice" is defined in §766.106, Florida Statutes, as follows:

> A "claim for medical malpractice" means a "claim arising out of the rendering of, or the failure to render, medical care or services."

This definition is very much like the definition of an "action for medical malpractice" as set forth in §95.11(4)(b), Florida Statutes, discussed above.

In analyzing the applicability of §766.106, one should note that, throughout Chapter 766, the term "claimant" is used, and not "patient." Section 766.202 defines "claimant" as "any person who has a cause of action arising from medical negligence" (emphasis added). It should also be noted that §766.102, Florida Statutes, states as follows:

> 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... 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. §766.102, Fla. Stat. (1989).

In fact, the word "claimant" is used consistently throughout the Medical Malpractice Act, including the legislative findings and intent contained in the Act. §766.201, Fla. Stat. (1989). In §766.101, "claim for medical malpractice" is defined to mean "a claim arising out of the rendering of, or failure to render, medical care or services." There is no condition attached that the claim must be brought by the patient. Finally, §766.202(6) defines

"medical negligence" as "medical malpractice, whether grounded in tort or in contract."

From the above, it is clear that the purpose of the legislation was to reduce the increasing cost of medical care, including reducing the cost of all claims stemming from medical negligence, whether or not the claimant was a patient, so long as the claim arose out of the rendering of, or failure to render, medical care or services. As the District Court properly noted, the "failure to render medical care or services" must be interpreted as "negligence of a health care provider," which is addressed in §766.102, Florida Statutes:

> In any action for the 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 or a health care provider...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. §766.102, Fla. Stat. (1989).

Chapter 766 is intended to apply to all such claims against health care providers, and there can be no doubt that the allegations in the Complaint filed by the Plaintiff herein charge that the acts or omissions by Sacred Heart Hospital represented a breach of the prevailing professional standards of care for Sacred Heart, as a health care provider. In fact, the alleged breach of duty could only arise, if at all, by virtue of the Hospital's status as a health care provider.

CONCLUSION

Contrary to appellants' contentions, the alleged failures of the hospital - to select an appropriate mode of transport, to instruct the plaintiff J.B. regarding proper care of the I.V. site, to utilize the brother, untrained in medical treatment, as a transporter, and to warn J.B. of L.B.'s contagious disease and appropriate precautions - all require professional medical skill and judgment. They create a duty which the law does not foist on an ordinary layman, but rather only upon a professional with special skill, training and expertise - hence the duty arises.

In the instant case, the claim of J.B. clearly arises out of the events surrounding the discharge and transfer of the patient L.B. - events constituting medical care and treatment. The complaint alleges a departure from the prevailing standard of care required of hospitals, as health care providers. As such, Plaintiffs' claim is an action for medical malpractice, as that term is used in both §95.11(4)(b), Florida Statutes, and Chapter 766, Florida Statutes.

Accordingly, Appellee respectfully requests this Court to respond in the affirmative to both certified questions, and to hold the complaint in this case falls within the purview of §95.11(4)(b), Florida Statutes, as well as the pre-suit screening and notice requirements of Chapter 766, Florida Statutes.

Respectfully submitted this 27th day of August, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of August, 1993 caused a copy of the foregoing ANSWER BRIEF OF APPELLEE, SACRED HEART HOSPITAL, to be served upon the following individual by depositing the same in the United States Mail, first class postage prepaid:

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