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
Appellee

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

CIRCUIT NO. 92-2053

REPLY BRIEF ON BEHALF OF APPELLANTS

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Appellants respectfully reiterate the arguments presented in their original brief that their claim does not lie in medical malpractice and is therefore not controlled by the pre-suit requirements set forth in the Florida Medical Malpractice Act, *Florida Statutes* 766.201 *et seq.*

Throughout their entire answer brief, the appellee constantly argues and implies that the claim of J.B., the non-patient petitioner herein, is inextricably connected to the diagnosis, treatment or care rendered to his brother, L.B., by Sacred Heart Hospital. It is imperative that this Court is not misled by the appellee's contention that the patient, L.B., and his brother, J.B., where involved in the same clinical situation. The action before this Court is not based on any alleged medical malpractice involving the "diagnosis, treatment or care" of the patient, L.B., nor is this action based on the negligent "diagnosis, treatment or care" provided to J.B. as he lacked the hospital-patient, physician-patient relationship with the appellee hospital contemplated in the medical malpractice statutes. Appellee's refusal to distinguish the relationship between the hospital and the two brothers ignores the plain and unambiguous meaning of the Florida statutes that define a "claim for medical malpractice".

The appellee hospital also contends that to accept the appellants' position "would awkwardly and illogically permit two different periods (of limitation) to apply to the same alleged medical malpractice - both the patient and his brother were involved in the same clinical situation." (Appellee's Brief, p.11, emphasis added). Appellants submit that L.B. and J.B. obviously were not in the same clinical situation nor did they enjoy the same type of

relationship with the appellee hospital. Although L.B. or his heirs have no claim pending, any claim they could bring alleging any hospital negligence stemming from his "diagnosis, treatment or care" would obviously fall under the Florida Medical Malpractice Statute; however, J.B.'s claim, as a non-patient, cannot be considered to be brought on the same grounds as L.B., the patient, since it is not based on the appellee's "diagnosis, treatment or care".

Appellants make no contention that the Florida Medical Malpractice Statutes require the patient to have "direct contractual privity" with the hospital in order to be covered under the statute (Appellee's Brief, p.11). Using the Appellee's example, "if an individual received medical treatment in an emergency situation at a health care facility" he would indeed be bound by 95.11(4)(b) since his cause of action would arise out of the diagnosis, treatment or care provided by the health care facility. This is the type of privity envisioned by the enactors of these statutes; however, this is not the facts of the case at bar.

A careful reading of the pertinent Florida Statutes is again required. Section 766.106 of the Florida Statues states that a "claim for medical malpractice" means a "claim arising out of the rendering of, or the failure to render, medical care or services." A similar definition is found in Section 95.11(4)(b) which provides that a "claim in medical malpractice" is:

> "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." (emphasis added).

This exact definition and its meaning has been interpreted by the Florida Supreme Court in the recent case of *Silva v. Southwest Florida Blood Bank,* 601 So. 2d 1184 (Fla. 1992). In the Court's opinion, the malpractice statute of limitations did not apply in that case because the defendant blood bank did not provide "diagnosis, treatment, or care" to the patients as required by the applicable Florida statutory definition. The Court explained that there was no

> "ambiguity to clarify in the words 'diagnosis,' 'treatment,' or 'care,' and we find that these words should be accorded their plain and unambiguous meaning. In ordinary, common parlance, the average person would understand 'diagnosis, treatment or care' to mean ascertaining a patient's medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting the patient's daily needs during the illness." Id. at 1187. (Emphasis added).

This case clearly illustrates that the Florida Supreme Court distinguishes between someone who receives "diagnosis, treatment or care," such as patient L.B., and someone who does not, such as J.B. Employing the definitions set out above, J.B.'s claim is not based on the negligence of the appellee hospital in ascertaining his medical condition through examination and testing, prescribing and administering a course of action to effect a cure, and meeting his daily needs during the illness. In short, J.B.'s cause of action is based on ordinary negligence and is not a "claim for medical malpractice" as defined in the Florida statutes and interpreted by the Florida Supreme Court.

The definition for a "claim for medical malpractice" was again interpreted in *Durden v. American Hospital Supply Corporation*, 375 So. 2d. 1096 (Fla. App. 3rd District 1979), *cert. denied*, 386 So. 2d 633 (Fla. 1980). In *Durden*, the 3rd District cited the same passage of

Section 95.11(4)(b) as cited by the appellants above, and explained that in:

> "construing Section 95.11(4)(b) in its plain and ordinary sense, it is apparent that more than just the fact that a party defendant is a health care provider is required to bring a cause of action within this two year statute of
>
> limitations. In addition, the claim for damages must arise as a result of medical, dental or surgical diagnosis, treatment or care on the part of the health care provider. The relationship contemplated by the subject statute of limitation is in the nature of doctor (dentist) - patient or hospital - patient in contrast to the vendor-vendee relationship in the case at bar. Durden's third amended complaint is grounded upon allegations of ordinary negligence and, therefore, the four year statute of limitations, Section 95.11(3)(a), Florida Statutes (1977), is applicable". *Id.* at 1099. (Emphasis added).

Based on the above, it is obvious that the Florida Courts would disagree with the appellee's assertions that J.B.'s cause of action is based on medical malpractice since he does not enjoy the necessary privity/relationship with the appellee hospital and his cause of action does not involve L.B.'s diagnosis, treatment or care provided by the appellee hospital.

While the appellee hospital places much emphasis on *Martinez v. Lifemark Hospital of Florida*, 608 So.2d 855 (Fla. App 3rd Dist. 1992), that case can be easily distinguished from the instant matter. In *Martinez*, a patient and his wife filed a medical malpractice suit against a doctor for negligence involving an unsuccessful knee surgery. More than two years after the surgery, he amended his suit to include an ordinary negligence claim against the hospital based on its negligent hiring of these doctors. The trial court subsequently granted the hospital's Motion to Dismiss. The Appellate Court recognized that the plaintiffs' allegations were specifically covered under Florida Statute 766.110 regarding the liability of

health care facilities. After enumerating the specific duties, the statute states that

> "each such facility shall be liable for a failure to exercise due care in fulfilling one or more of these duties when such failure is a proximate cause of injury to a patient" (emphasis added). Id. at p. 856.

The Court concluded that the appellants' entire case arises out of negligent medical treatment (to the patient-plaintiff) and such medical treatment is both necessary to the claims against the hospital and inextricably connected to them. Therefore, the cause of action was covered by the medical malpractice statute of limitations.

As set out above, J.B. was not a patient of the hospital and his cause of action does not arise out of "negligent medical treatment" to L.B. or himself.

Appellee also places much emphasis on *Merchants National Bank v. Morriss*, 269 F.2d 363 (1st Cir. 1959) and *Hedlund v. Superior Court of Orange County*, 669 P.2D 41 (Cal. 1983). As explained in the Initial Brief, *Merchants* is a 33 year old case from the U.S. First Circuit which does not interpret Florida law. In addition, the numerous legal developments which have occurred in the past decade alone regarding medical malpractice claims reflect that the *Merchants* case carries little authoritative weight in the case before this Honorable Court. *In Hedlund*, a California case interpreting California law, the plaintiffs alleged that the health care providers, psychotherapists, failed to diagnose or predict dangerous behavior in a patient which could have resulted in injury to a third party. This duty of care was first recognized in California with the benchmark case of *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976). Florida courts have specifically rejected the theory cited in *Tarasoff* that psychiatrists have a duty to warn potential victims of danger

posed by a patient; and therefore, is inapplicable to the case at bar. *Boyton v. Burglass*, 590 So. 2d 446 (Fla. App. 3rd Dist. 1991).

Lastly, appellants wish to address the improper conclusion made by both the District Court and the appellee that the "failure to render medical care or services" must be interpreted to mean "negligence of a health care provider" in order to qualify under the Medical Malpractice Act. All parties in this action recognize that Chapter 766 is not intended to apply to everyone asserting any type of claim against a health care provider and there are instances in which a claim may be asserted against a health care provider but remain outside the medical malpractice statutes. For example, a claim arising from a physician who commits an intentional battery on a patient does not involve medical malpractice although it does involve the "negligence of a health care provider." (See *Buchanan v. Lieberman*, 526 So. 2d 969 (Fla. Dist. Ct. App. 1988). This principle is also illustrated when claims arise due to injuries caused by a breach of duty to maintain hospital grounds or caused by the collapse of a hospital bed. (See *Zobach v. Southeastern Hospital*, 382 So. 2d 829 (Fla. App. 4th Dist. 1980) and *Sewell v. Doctors Hospital*, 600 So. 2d. 577 (La. 1992), respectively). Appellants submit that the case at bar presents another situation where the application of the Florida Medical Malpractice Statutes are in question. For example, what if medical waste is improperly disposed of and consequently results in injury to an individual or contamination of a lake? According to the appellee's argument, this situation may also be considered medical malpractice since the hospital's actions may constitute "negligence of a health care provider" even though the negligent actions do not arise from the "failure to render medical care or services".

In the case at bar, the appellee hospital's negligence did not arise from its failure to render medical care or services to J.B. because, as a non-patient, he did not need medical care. Appellee cleverly attempts to disguise this fact by arguing that J.B.'s cause of action is inextricably connected with the "diagnosis, treatment and care" that the appellee hospital provided to L.B. by allowing him to be transported by his brother. J.B.'s cause of action has no connection to any claim L.B. may have for improper diagnosis, treatment or care. Therefore, it is not awkward or illogical as the appellee has contended for J.B.'s claim to have a different statute of limitation since it is based on ordinary negligence than a claim by L.B. based on medical malpractice. As such, J.B.'s cause of action should not have been dismissed by the U.S. District Court for its failure to adhere to the pre-trial requirements of the Florida Medical Malpractice Statute since it is not based on the appellee's "failure to render medical care or services" or connected with the "diagnosis, treatment and care" provided by the appellee hospital.

CONCLUSION

As set out in the clear and unambiguous language defining a "claim for medical malpractice" and the subsequent Florida jurisprudence interpreting those medical malpractice statutes, J.B.'s complaint does not allege any type of professional negligence arising from the diagnosis, treatment or care provided by the appellee hospital. Nor is his cause of action based on the diagnosis, treatment or care provided to L.B. by the appellee hospital. His claim is based on the hospital's failure to warn him of the dangerous condition which his brother was afflicted. This warning did not require any special medical knowledge nor the professional expert judgment that distinguishes a cause of action based on simple/ordinary negligence from the more particularized theory of medical malpractice. As J.B. was a third party, non-patient having no connection whatsoever to the appellee hospital, their failure to warn him must be viewed as ordinary negligence and not a "claim for medical malpractice." Therefore, appellants respectfully request that this Honorable Court respond to the two questions certified by the 11th Circuit in the negative and allow their claim to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the I have on this 16th day of September, 1993, served a copy of the above and foregoing pleading to the attorneys for defendant-appellee, by mailing a copy of same in the the United States Mail postage prepaid.

Adrian A. Colon, Jr.