IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-1710
Lower Tribunal No: 1D99-2426

FRANK C. WALKER, JR., M.D.
and NORTH FLORIDA PEDIATRIC
ASSOCIATES, INC.,

Petitioners,

vs.

VIRGINIA INSURANCE RECIPROCAL,
as subrogee of SCOTTISH RITE
CHILDREN'S MEDICAL CENTER, INC.,

Respondent.

On Appeal from the District Court of Appeal
First District
State of Florida

ANSWER BRIEF OF RESPONDENT VIRGINIA INSURANCE RECIPROCAL, as subrogee of SCOTTISH RITE CHILDREN'S MEDICAL CENTER, INC.

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PRELIMINARY STATEMENT

In this Answer Brief, the Respondent, Virginia Insurance Reciprocal, Plaintiff in the trial court and Appellant in the First District Court below, is referred to as V.I.R. or Respondent. Petitioners, Frank C. Walker, Jr., M.D., and North Florida Pediatric Associates, P.A., Defendants in the trial court and Appellee in the First District Court below, are referred to as Defendant Doctors or Petitioners, except in the Statement of the Case and of the Facts, wherein the parties are also referred to by name.

References to the Record are to the First District Court Record on Appeal, which consists of volume one, bound separately, and made a part of the Record on Appeal in this

Court. References are made by page number, as the following example illustrates: R.1. The Supreme Court Record also includes the Opinion of the First District Court, pages 1-14, referred to herein as RSC.1-14.

STATEMENT OF THE CASE AND OF THE FACTS

1. Statement of the Case

a. Nature of the Case

This is a contribution action arising from Virginia Insurance Reciprocal's settlement of a medical malpractice suit on behalf of all potential Defendants. The suit resulted from a failure to administer a mandatory and routine metabolic screening test and failure to diagnose congenital hypothyroidism in the plaintiffs' infant, Emily Auman. Respondent, Virginia Insurance Reciprocal, Plaintiff in the trial court and Appellant in the District Court, (hereafter "V.I.R."), is seeking damages from Dr. Frank C. Walker and North Florida Pediatric Associates, P.A., Defendants in the trial court, Appellees in the District Court, and Petitioners here. Respondent sued Petitioners for payment of their pro rata share of damages for the medical negligence claimed. The issue on appeal in the First District Court was whether the presuit requirements for a claim arising out of medical malpractice under Chapter 766, Florida Statutes (1997)(also referred to as "the Medical Malpractice Act"), applied to V.I.R.'s contribution suit for medical negligence, thus tolling the one-year statute of limitations under the Uniform Contribution Among Tort-feasors Act, section 768.31(4)(d)1,

Florida Statutes (1997) (also referred to as "the Contribution Act").

b. Course of Proceedings

After all parties complied with the presuit requirements mandated by Chapter 766, Florida Statutes (1997), V.I.R. filed a medical negligence claim, Circuit Court case number CV98-6347, on November 13, 1998, seeking contribution from the Defendant Doctors for the excess of V.I.R.'s pro rata share of $1.65 million in damages paid to the Aumans to settle the claims of all parties. *See* R.1. The Defendant Doctors filed an Answer on February 12, 1999, and asserted, among other Affirmative Defenses, an alleged expiration of the one-year statue of limitations under the Contribution Act, section 768.31(4)(d)1, Florida Statutes (1997). *See* R.32-35. On April 16, 1999, Defendant Doctors, Walker and Pediatric Associates, filed a Joint Motion for Summary Judgment on the basis of the one-year statute of limitations found in the Contribution Act, section 768.31(4)(d)1, Florida Statutes (1997).

c. Disposition in the Circuit Court

Senior Judge Richard O. Watson, sitting in the Second Judicial Circuit in Leon County, Florida, granted Defendant

Doctors' Motion for Summary Judgment. *See* R.77. A Final Order as to Defendants Frank C. Walker and North Florida Pediatric Associates, P.A. was entered on June 15, 1999. *See* R.96-97. V.I.R. filed its Notice of Appeal in the First District Court of Appeal on June 28, 1999. *See* R.98.

d. Disposition in the First District Court of Appeal

After receiving briefs of the parties and entertaining oral argument on behalf of the parties on May 25, 2000, the First District Court of Appeal filed its written opinion on August 1, 2000, reversing the Final Order in favor of Defendant Doctors and holding that the time for filing a suit for contribution based on a claim of medical malpractice is tolled by compliance with the statutory presuit screening requirements of Chapter 766, Florida Statutes.[1] The First District Court of Appeal certified that its decision was in conflict with the decision of the Fourth District Court of Appeal in *Wendel v. Hauser*, 726 So. 2d 378 (Fla. 4th DCA 1999)[2]. On August 21, 2000, the Defendant Doctors timely filed a Notice to Invoke the Discretionary Jurisdiction of

[1] *See* Appendix 1

[2] *See* Appendix 2

this Court. On August 25, 2000, this Court entered its Order postponing a decision on jurisdiction and determining a schedule for the parties' briefs to be filed.

2. Statement of the Facts

a. The Underlying Lawsuit

Emily Stuart Auman ("Emily") was born on June 3, 1991, at H.C.A. Coliseum Park Hospital, Inc., in Macon, Georgia. *See* R.2. Emily was admitted to Scottish Rite Hospital in Atlanta, Georgia, the next day with birth complications. *See* R.2. On June 15, 1991, care of Emily was assumed by Dr. William P. Simmons, Dr. Frank C. Walker, and North Florida Pediatric Associates, P.A., a corporation in Tallahassee, Leon County, Florida, owned by Dr. Frank C. Walker and Dr. William P. Simmons.[3] *See* R.2. Respondent claims that Defendant Doctors' care of Emily lasted until May 19, 1992. *See* R.2. The Defendant Doctors failed to recognize the child's array of symptoms of hypothyroidism, failed to determine whether Emily had previously received an appropriate metabolic screening test, failed to ensure that the test was completed and appropriate intervention made to prevent long-term mental

[3] Although not a party to this appeal, Dr. Simmons has agreed to be bound by the decision of this Court in the case pending against him in the same lawsuit below.

retardation while the child was under their care, and failed to give notice to Emily's parents, Ann H. Auman and Robert Ray Auman, that there was a need for such testing and early intervention when not previously performed. The Defendant Doctors failure to diagnose the condition and failure to obtain the screening tests and failure to appropriately treat the child is the basis of the Respondent's initial Complaint against them. *See* R.3.

On May 15, 1992, after Emily's symptoms had confounded the Defendant Doctors for several months, she was referred to, and properly diagnosed by, another doctor, Larry Deeb, M.D. Emily had congenital hypothyroidism, a condition which caused permanent physical impairment and mental retardation, and which, in turn, could have been easily prevented through early detection and treatment. *See* R.2, 3.

Robert Ray Auman, Emily's father, and Ann H. Auman, Emily's mother and guardian, filed suit for medical malpractice against Scottish Rite Hospital in Atlanta on May 28, 1993. *See* R.6. On June 11, 1997, in Bibb County, Georgia, V.I.R., the insurance carrier for Scottish Rite Hospital in the underlying suit, settled with the Aumans for $1.65 million on behalf of the hospital, in exchange for a release and dismissal with prejudice of all claims by the

Aumans against Scottish Rite and against all joint tort-feasors. *See* R.4, 20-28.

b. The Contribution Lawsuit for Medical Negligence by the Defendant Doctors.

V.I.R. subsequently determined to file a claim for contribution within the one-year statute of limitations under the Contribution Act, section 768.31(4)(d)1, Florida Statutes (1997), against the Defendant Doctors. It commenced the action by first complying with the compulsory medical malpractice presuit screening procedures of Chapter 766, Florida Statutes (1997), which toll the statute of limitations for a claim arising out of medical negligence. *See* R.2.

V.I.R. properly complied with all of the mandatory presuit investigation requirements under sections 766.104, .203, Florida Statutes (1997). George Sharpe, M.D., an expert qualified under the statute, signed an affidavit providing his expert opinion that the Defendant Doctors were negligent in their care and treatment of Emily, causing her damages. *See* R.4.

Instead of filing suit in Circuit Court, V.I.R. served, on May 14, 1998, pre-suit notice of intent to initiate litigation, which notice tolled the time (twenty-eight days remaining under the Contribution Act) for an additional ninety

days in which V.I.R. and Defendant Doctors were to conduct presuit discovery. *See* R.4; § 766.106(2), Fla. Stat. (1997).

V.I.R. and the Defendant Doctors proceeded under the Medical Malpractice Act, Chapter 766, Florida Statutes (1997). At the request of Defendant Doctors, under authority of section 766.106(4), Florida Statutes (1997), the parties agreed to extend pre-suit discovery through September 14, 1998. *See* R.64.[4] On June 19, 1999, the Defendant Doctors utilized the pre-suit discovery process to request, by certified mail, an exhaustive list of items from V.I.R., including the Aumans' tax returns, itemized expenses of care, medical records, and records available from the lawsuit in Georgia, and reminded the Respondent in the discovery requests of the sanctions under Chapter 766 for its failure to comply. Defendant Doctors did not respond to V.I.R.'s pre-suit notice by the expiration of the extended pre-suit discovery period, effecting a denial of negligence "by silence" on September 15, 1998. *See* R.34; § 766.106(3)(c), (4), Fla. Stat. (1997).

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[4] On June 19, 1999, the Defendant Doctors utilized the pre-suit discovery process to request, by certified mail, an exhaustive list of items from V.I.R., including the Aumans' tax returns, itemized expenses of care, medical records, and records available from the lawsuit in Georgia, and reminded the Respondent in the discovery requests of the sanctions under Chapter 766 for its failure to comply. *See* Appendix 3

V.I.R. then had the greater of 60 days or the remainder of its limitations period within which to file suit under section 766.106(4), Florida Statutes (1997).

The period of pre-suit discovery, from the date of serving pre-suit notice on Defendants and including extensions, lasted 183 days, from May 14, 1998, through November 14, 1998. Under these circumstances, V.I.R. could not have complied with mandatory medical negligence pre-suit procedures and filed a contribution claim under Chapter 766, Florida Statutes (1997), without the benefit of the tolling provisions prescribed by that law.

V.I.R. filed suit on November 13, 1998, seeking contribution from the Defendant Doctors for the excess of V.I.R.'s pro rata share of damages previously it paid to the Aumans for the medical negligence of all responsible parties. *See* R.1. Defendant Doctors filed their Answer on February 12, 1999, and raised, among numerous other standard defenses, an expiration of the one-year statute of limitations. See R.32-35. Three months after suit was filed, 0n February 10, 1999, the Fourth District Court of Appeal issued an opinion in *Wendel v. Hauser*, 726 So.2d 378 (Fla. 4th DCA 1999), stating that Section 766.106, Florida Statutes, was not intended to encompass a claim for contribution, and that the pre-suit

screening requirements of that Act do not therefore toll the one year statute of limitations provided by section 768.31(4)(d), Florida Statutes.

On April 16, 1999, Defendant Doctors filed a Motion for Summary Judgment on the basis of the holding in *Wendel v. Hauser*, even thought the Defendant Doctors consented to and participated in the pre-suit screening process, including requesting an extension of time for pre-suit discovery, and despite acknowledging that V.I.R. was required to prove medical negligence by the Defendant Doctors to prevail. *See* R.2, 64; § 768.31(4)(d)1, Fla. Stat. (1997). Senior Judge Richard O. Watson granted the Defendant Doctors' Motion, stating as follows:

> The reasoning of the Florida Supreme Court in [*Musculoskeletal Institute Chartered v. Parham*, 745 So 2d 946 (Fla. 1999)], suggests the Florida Supreme Court may reach a differen[t] result when they consider the issue. This [c]ourt is required to follow the law set forth in [*Wendel v. Hauser*, 726 So. 2d 378 (Fla. 4TH DCA 1999)].

See R.77. "*Wendel* holds: 'We conclude that the plain language of Section 766.106, Florida Statutes [sic] does not encompass claims for contribution.'" *See* R.77. A Final Order in the Defendant Doctors' favor was entered on June 15, 1999. *See* R.96-97.

V.I.R. filed a timely Notice of Appeal in the First District Court of Appeal on June 28, 1999, and based its appeal on the plain language of Chapter 766, Florida Statutes (1997), on the Florida case law which is not in accord with the reasoning in *Wendel v. Hauser*, and on the trial court's error in applying the holding in *Wendel v. Hauser* retroactively. *See* R.98. The parties filed timely briefs and on August 1, 2000, the First District Court of Appeal reversed the Summary Judgment in favor of the Defendant Doctors, holding that the nature of Respondent's claim was medical malpractice regardless of the form of the Complaint filed, entitling V.I.R. to the tolling provision of Chapter 766. *See* RSC. 1-14.

SUMMARY OF ARGUMENT

Respondent is required to prove medical negligence by the Petitioners to prevail in its claim for contribution. A claim based upon medical negligence in Florida must be brought pursuant to the pre-suit litigation requirements of Chapter 766, Florida Statutes. Respondent's claim is a claim for medical negligence not only because of the plain language, numerous definitions contained within Chapter 766, Florida Statutes, but because the courts have reasoned that a contribution claim seeking damages for medical negligence is a claim for medical malpractice. A claim for medical malpractice must be brought pursuant to Chapter 766, Florida Statutes, or be subject to dismissal for failure to follow the pre-suit screening requirements of the Act. Claims which are brought pursuant to Chapter 766, Florida Statutes, benefit from a "time-out," during which the statute of limitations is tolled.

The one-year statute of limitations provided in Florida's Contribution Act, section 768.31(4)(d), Florida Statutes, was tolled during the period of time that Respondent properly engaged in the pre-suit screening process required in this case. Suite was thereafter timely filed by Respondent. The reasoning of the Fourth District Court of Appeal in *Wendel v.*

Hauser, 726 So. 2d 378 (Fla. 4th DCA 1999), that a contribution claim under Chapter 766, Florida Statutes, is a monetary loss not contemplated by the language of the statute, is both erroneous and a deviation from the other cases which have considered the issue. A better view expressed by the First District Court of Appeal in this case is that Chapter 766, Florida Statutes, is sufficiently broad to encompass claims for contribution alleging medical malpractice, which claim necessarily involved a monetary loss.

The public policy reasons behind the pre-suit screening requirements of Chapter 766 would not be fulfilled if contribution claims for medical malpractice were permitted to be brought directly in Circuit Court without compliance with the Medical Malpractice Act. Contribution is not an independent cause of action excluding it from the purview of medical negligence claims brought pursuant to contribution, but rather the remedy available when there is an independent basis under the law to assert a medical malpractice claim.

The First District court of Appeal correctly reasoned in this case that there is no distinction between a malpractice claim asserted directly or one asserted by way of contribution in terms of the requirement to comply with the Medial Malpractice Act, and that dismissal of Respondent’s claim for

contribution asserting the medical malpractice of the Petitioners was erroneous. There are no policy considerations inherent in the pre-suit screening process provided by Chapter 766, Florida Statutes, which would not be fulfilled by requiring contribution claims asserting medical negligence to be included within the purview of the Medical Malpractice Act. The public policy considerations inherent in permitting contribution pursuant to section 768.31, Florida Statutes, are served by requiring contribution claims for medical negligence to be brought pursuant to Chapter 766, Florida Statutes, as potential Defendants benefit equally with settling Defendants from the pre-suit screening process, and Plaintiffs benefit by having their cases resolved, with one of the settling Defendants assuming the burden of recovering the excess of its pro rata share.

ISSUE ON APPEAL

The issue before this Court is whether the medical malpractice pre-suit screening requirements of sections 766.104 and 766.203, Florida Statutes, apply to a medical negligence action brought by way of a contribution claim under section 768.31, Florida Statutes, after payment discharging the common liability of all tort-feasors.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE FIRST DISTRICT COURT OF APPEAL WAS CORRECT IN CONCLUDING THAT THE MEDICAL MALPRACTICE PRE-SUIT SCREENING REQUIREMENTS APPLY TO AN ACTION FOR CONTRIBUTION BASED ON THE ALLEGED MEDICAL NEGLIGENCE OF A JOINT TORTFEASOR.

A. The Respondent, V.I.R., fully complied with existing law in commencing its claim for medical negligence.

At the time the Respondent, V.I.R., brought its claim against the Defendant Doctors, it had no alternative to filing a notice of intent to initiate litigation pursuant to Chapter 766, Florida Statutes, initiating the medical malpractice pre-suit screening procedures of that Act and tolling the one-year statute of limitations for its claim. V.I.R.'s contribution action is based upon medical negligence. Both the plain language of the statute, and the case law interpreting section 768.44, Florida Statutes, (1975) (the predecessor to today's medical malpractice law, Chapter 766, Florida Statutes),

mandated compliance with the Medical Malpractice Act for claims based upon medical negligence and brought by way of contribution.

Before a suit based upon medical negligence may be filed, *a* claimant must consult with a medical expert and obtain his or her expert, written opinion, must serve a notice of intent to initiate litigation, and commence a required pre-suit investigation process, which allows a 90-day "time-out" period for the statute of limitations. *See* §§ 766.104(1), 766.106(2),(4), Fla. Stat. (1997). Within the ensuing 90-day period, a claimant alleging medical negligence and the potential Defendant must conduct a pre-suit investigation which requires exchange of discovery information and provides an opportunity to resolve the case. *See* § 766.106, Fla. Stat. (1997).

In *Walt Disney World Co. v. Memorial Hosp.*, 363 So. 2d 598, 599 (Fla. 4th DCA 1978)[5], Disney, as the original defendant and the third-party plaintiff, sought contribution from Memorial Hospital. At the time the claim was brought, medical malpractice was governed by mediation requirements, *see* section 768.44, Florida Statues (1975), which were the

[5]*See* Appendix 4

predecessor to today's pre-suit screening procedures and shared a common purpose. *See Walt Disney World Co.*, 363 So. 2d at 599. The court held that, "we cannot accept appellant's argument that because the claim is based on a contribution statute, it does not fit within the medical malpractice mediation requirements. The claim is clearly one for medical malpractice." *Id*. The Fourth District Court of Appeal stated further:

> We stress that the mediation required here is not the mediation of the contribution claim but is instead the mediation required of the issue of actionable negligence. Therefore, under the statute, a mediation panel must first answer the question of whether the hospital was actually actionably negligent in the care or treatment of the patient.

Id.

The holding and the court's reasoning certainly appeared to apply to V.I.R.'s situation and led V.I.R. to the conclusion that there cannot be a suit for contribution based on medical negligence without first determining the liability of the Defendant Doctors for their failure to render medical care, for which pre-suit screening is required under Chapter 766, Florida Statutes, as well.

Further, the Florida Supreme Court had stated in *Weinstock v. Groth*, 629 So. 2d 835, 836 (Fla. 1993), that,

"[i]t is clear that the provisions of the Medical Malpractice Reform Act must be met in order to maintain an action against a health care provider." The Defendant Doctors are health care providers, and it seemed clear that Chapter 766, Florida Statutes, must be followed before V.I.R. could proceed with a suit for contribution. The Court in *Weinstock* added that, "the proper test for determining whether a defendant is entitled to notice under Section 766.106(2) is whether the defendant is directly or vicariously liable under the medical negligence standard of care set forth in Section 766.102(1)." Id. at 838.

Considerable peril awaits any attorney who ignores the pre-suit requirements of Chapter 766 when medical negligence must be proven, whether in filing his or her claim on behalf of a client or in defending one. Had V.I.R. simply filed a suit for contribution in Circuit Court, without supplying a verified written medical expert opinion to support its claim for medical negligence, and without participating in the pre-suit screening process as required by sections 766.106 and 766.203 Florida Statutes, it certainly would have faced a motion for dismissal of its claim for contribution and for sanctions.

Counsel for V.I.R. operated under the constraints

mandated by section 766.104(1), Florida Statutes, which provides:

> no action shall be filed for personal injury ... arising out of medical negligence ... unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care and treatment of the claimant.

Section 766.104(1), Florida Statutes, requires counsel to acquire an expert medical opinion to be able to certify that medical negligence has occurred. Counsel is subject to an award of attorney's fees and taxable costs against him or her, and a referral to the Florida Bar for disciplinary review, if he or she fails to meet the obligation. V.I.R. simply followed the law under Chapter 766, Florida Statutes (1997), and supporting Florida case law by initiating pre-suit screening and by exchanging discovery and entering into discussions or negotiations with the Defendant Doctors during an extension of time they requested under pre-suit discovery rules. The Defendant Doctors freely acknowledged that they participated in the pre-suit process mandated by Chapter 766, and stated in their Answer Brief in the First District Court that they were "obligated to comply with the process, or risk dismissal of its defenses under [s]ection 766.106(6) and

[s]ection 766.205(2), Florida Statutes."

When V.I.R. complied with the pre-suit screening procedures of the Medical Malpractice Act, it had no way of knowing that the court in ***Wendel v. Hauser***, 726 So. 2d 378 (Fla. 4th DCA 1999), would, after suit was filed, contradict its prior holding in ***Walt Disney World Co. v. Memorial Hospital***, 363 So. 2d 598 (Fla. 4th DCA 1978), and hold that pre-suit requirements did not apply to contribution claims, even when based on medical negligence, under the revised Medical Malpractice Act.

At the time it commenced this action with a Notice of Intent, V.I.R. was aware that section 766.106(1)(a), Florida Statutes (1997), plainly and broadly states that a "claim for medical malpractice" is defined as "a claim arising out of the rendering of, or the failure to render, medical care or services." Section 95.11(4)(b), Florida Statutes (1997), which defines limitations of actions not involving real property, states that, "[a]n 'action for medical negligence' 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." It would have taken a bold claimant to conclude that a claim for

contribution based on medical negligence was not a "claim for medical malpractice" under Chapter 766, Florida Statutes.

Chapter 766, Florida Statutes (1997), is replete with other language indicating the applicability of medical malpractice pre-suit requirements to V.I.R.'s medical negligence claim for contribution.

> *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... that the alleged actions...represented a breach of the prevailing professional standard of care for that health care provider.

§ 766.102(1), Fla. Stat. (1997)(emphasis added).

Section 766.104(1), Florida Statutes (1997), states: "*No action shall be filed* for personal injury or wrongful death *arising out of medical negligence*, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances . . . ." (emphasis added). "*Pre-suit investigation shall be mandatory and shall apply to all medical negligence claims and defenses*." § 766.201(2), Fla. Stat. (1997) (emphasis added). Section 766.203(1), Florida Statutes (1997), further states that "*pre-suit investigation of medical negligence claims and*

defenses pursuant to this section and sections 766.204-766.206 [sic] *shall apply to* ***all*** *medical negligence*, . . . claims and defenses." (emphasis added).

V.I.R. quite reasonably assumed from the foregoing language in Chapter 766, Florida Statutes, that it was statutorily required to conduct a pre-suit investigation of the Defendant Doctors' alleged medical negligence.

B. The First District Court of Appeal correctly stated the law in reversing summary judgment in favor of the Defendant Doctors.

The Fourth District Court of Appeal had concluded in *Walt Disney World v. Memorial Hospital* that the scheme devised by the Legislature for screening medical malpractice claims, Section 768.44, Florida Statutes (1975), was clearly meant to include contribution claims based on medical malpractice, reasoning that the subject matter to be mediated was the issue of actionable medical negligence not the right to contribution. *See id.* at 599.

The Fourth District later deviated from this holding in *Wendel v. Hauser,* 726 So. 2d 378 (Fla. 4th DCA 1999) reasoning narrowly that a contribution claim was a claim for "monetary loss," earlier contemplated by the language of section 768.44, Florida Statutes (1975), but not specifically included within the definition of malpractice contained within the modern

section 766.106, Florida Statutes, which defines a claim for medical malpractice as one arising out of the rendering of or the failure to render medical care or services. The court in *Wendel v. Hauser* apparently did not consider whether a claim for medical malpractice is inherently a claim for monetary loss as well. In both *Walt Disney World v. Memorial Hospital* and in *Wendel v. Hauser,* as in the case before this Court, the parties bringing claims for medical negligence by way of contribution complied with the requirements of the Medical Malpractice Act, at the time believing that the statute of limitations would be tolled while the mandatory pre-suit requirements were met. The holding of the Fourth District Court in *Wendel v. Hauser* is a deviation from that court's other holdings and is inconsistent with the reasoning in cases from other District Courts and from this Court as well.

In rendering its opinion reversing summary judgment in favor of the Defendant Doctors and reinstating Respondent's claim for medical negligence, the First District Court of Appeal in *V.I.R. v. Walker* correctly concluded that the medical malpractice screening requirements apply to an action for contribution based on the medical negligence of a joint tortfeasor, because such an action is both a contribution action and an action arising out of the rendering of or

failure to render medical care. *See* RSC. 1,2. The First District noted that substantive laws governing the underlying cause of action may take precedence over laws that apply to contribution actions, characterizing contribution as a remedy available only if there is an independent basis to assert the claim. *See* RSC. 5,6. The independent basis, of course, is "medical malpractice," for which the pre-suit screening process is required under Chapter 766 and under which the statute of limitations is tolled.

The very terms of the Medical Malpractice Act, section 766.203 (1), Florida Statutes, require all claims for medical malpractice to be subject to the pre-suit screening procedure. Section 766.106(1)(a), Florida Statutes, plainly defines a claim for medical malpractice as "a claim arising out of the rendering of or the failure to render medical care or services." The First District Court correctly concluded that these definitions make no distinction between a medical malpractice claim asserted directly or asserted by way of contribution. *See* RSC. 7,8.

The First District Court of Appeal essentially concluded that the Fourth District should not have altered its course (in *Wendel v. Hauser)* from its earlier opinion in *Walt Disney World Co. v. Memorial Hospital.* The sole basis for the Fourth

District Court's decision in *Wendel v. Hauser* was the phrase "monetary loss," a phrase not carried forward in the later version of the Medical Malpractice Act. Noting that every complaint for medical malpractice will necessarily involve a "monetary loss," the First District Court found the re-wording of the statute to be of no consequence to the issue, and concluded that for whatever comfort it may bring to the Fourth District Court, the phrase "monetary loss" is still contained within section 95.11, Florida Statutes, governing medical malpractice actions. Section 95.11(4)(b), Florida Statutes, states: "[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." The First District Court concluded that reading section 95.11 and section 766.106 together provides a more broad, *not more narrow,* definition of claims for medical malpractice than the former statute, section 768.44(1)(a), Florida Statutes (1975), and that the better approach is to determine the applicable limitations based on the nature of the underlying cause of action, here medical malpractice, and not the form of the complaint in which the cause of action is permitted to be asserted

(Contribution). *See* RSC. 10,11. The First District Court stated further that it would be illogical to conclude that the pre-suit requirements initially apply in a direct suit, but not in a suit for contribution, even though the Defendant Doctors would be facing the same charge of medical malpractice in both actions and although they should be entitled to the protections afforded by the pre-suit screening procedure in both actions. *See* RSC. 12,13.

The court in *Wendel v. Hauser* could have reasoned that complaints for contribution based on medical negligence are not subject to statutory requirements that would otherwise apply to medical negligence, on the theory that "contribution is an independent cause of action," as have some other jurisdictions in the United States noted by the First District Court in its opinion. *See* RSC. 11. This is perhaps because the Fourth District Court had earlier ruled in *Walt Disney World v. Memorial Hospital* that a contribution claim "is clearly one for medical malpractice." *See id.,* 363 So.2d at 599.

Citing the prior opinions in *Hayes v. Mercy Hosp. & Med. Ctr.,* 557 N.E. 2d 873 (Ill. 1990), from the Illinois Supreme Court, and *Krasaeath v. Parker*, 441 S.E. 2d 868 (Ga. Ct. App.

1994),from the Georgia Court of Appeals, the First District Court of Appeal concluded that substance must be followed over form, and that the nature of the contribution action asserted remains medical malpractice when brought by way of contribution. *See* RSC. 11,12. The Fourth District Court of Appeal does not apparently disagree. In ***Paulk v. National Medical Enterprises Inc.***, 679 So. 2d 1289 (Fla. 4th DCA 1996), involving claims for damages on the theory that hospitals had operated their facilities as a criminal enterprise by extending patients' hospitalization beyond that needed medically, the Fourth District Court extended the pre-suit screening requirements of Chapter 766 to cases involving intentional torts. The court reasoned that from the language of the Statute: "it seems to us that the intent expressed in the text [of Chapter 766] is to extend the statute whenever the medical judgment of the provider is being challenged." *See id*. at 1290. The court further reasoned that the pre-suit requirements applied because plaintiffs could not prove their cause of action without adducing evidence as to the "medical necessity for the hospitalization periods," *See id*. Additionally, the Fourth District noted that in light of th[e] allegations [in the pleadings, which directly referred to medical treatment], the conclusion that the cause of action

sounds in medical malpractice is inescapable." *See Paulk*, 679 So. 2d at 1291. Somehow the same inescapable conclusion escaped the Fourth District Court panel considering the contribution claim in *Wendel v. Hauser* three years later.

In *O'Shea v. Phillips*, 746 So.2d 1105 (Fla.4th DCA 1999), Appellants who asserted that the pre-suit requirements did not apply, had brought a claim for negligent supervision and negligent retention of an employed neurologist against a clinic. They relied upon cases holding that not every wrongful act by a health care provider amounts to medical malpractice subject to the Chapter 766 notice and screening requirements. The Fourth District Court distinguished these cases, reasoning that the pre-suit requirements were in fact required because, in the cases appellants relied upon, liability was based on a theory of negligence apart from medical malpractice in the facility, (third party acts) and not by an employee of the health care facility, whereas the liability in *O'Shea* was based on a type of medical malpractice described by Chapter 766. *See O'Shea*, 746 So.2d at 1108. The Third District Court of Appeal has agreed with the Fourth District's holding in *O'Shea* in *Morales v. Moss*, 750 So.2d 156 (Fla. 3d DCA 2000).

Other Florida courts have rendered decisions consistent

with the principle that it is the substantive allegation of the medical negligence of a health care provider covered in the statute which controls the application of Chapter 766. The Third District Court earlier reached a similar conclusion in *Davis v. Acton*, 373 So.2d 952 (Fla. 3d DCA 1979), under the earlier version of the Medical Malpractice Act. *Davis* remains good law in that District, and is consistent with relevant holding outside of the decision of *Wendel v. Hauser*. In *Davis*, one doctor sued another for contribution based upon an underlying suit for wrongful death and damages which, in turn, stemmed from alleged medical malpractice. *See Davis*, 373 So.2d at 952. The court held that:

> By the language of the statute [Florida Medical Malpractice Reform Act of 1975, section 768.44(1)(a)], the instant claim against Dr. Acton by the appellant must be submitted to a medical liability mediation panel. It is to be emphasized that the gravamen of the third-party action is predicated upon the allegation of professional negligence by a practicing physician, and appellant's claims for indemnity and contribution arise out of that underlying claim of professional negligence.

Id. at 953. The doctor's complaint for contribution was dismissed as he failed to submit his claim to a medical liability mediation panel before filing the Complaint.

The common thread of reasoning throughout these cases is that allegations against a health care provider covered by Chapter 766 which require proof of medical negligence constitute claims arising out of or the rendering of or the failure to render medical care or services. It is the substance of the claim which triggers the protections afforded by, and the requirements of, the pre-suit screening process contained within Chapter 766.

As noted earlier, the sole reason seized upon by the Fourth District Court of Appeal in *Wendel v. Hauser* for not including a contribution claim is the conclusion that a contribution claim is a "monetary loss," formerly referred to in the Medical Malpractice Act, but not carried forward to Chapter 766, Florida Statutes. The First District Court reasoned in its opinion in this case that the phrase could not have been meant "in exclusive reference to contribution" in the earlier version of the statute, and that the phrase is not exclusive, as every complaint for medical malpractice necessarily involves a monetary loss. The First District Court then simply concluded that the statute is currently broadly and sufficiently worded to cover contribution claims. *See* RSC. 10.

The First District Court chose to harmonize the

application of the Contribution Act to claims for medical malpractice by recognizing that the statute of limitations controlling the timeliness of a contribution action has not been applied in other cases by courts which recognized in other circumstances that substantive laws governing the underlying cause may take precedence over the statute that applies the contribution action. *See* RSC. 6. Citing ***Showell Industries v. Holmes County***, 409 So.2d 78 (Fla. 1st DCA 1982) and ***State Department of Transportation v. Echeverri***, 736 So.2d 791 (Fla. 3rd DCA 1999), the First District Court in this case chose substance over form in applying the tolling provisions of the substantive law (Chapter 766) to be applied, the Contribution claim for medical malpractice. In each of these cases, the appellate courts applied another governing substantive law rather than the one year statute of limitations for contribution.

When two statutes are originally relevant, justice is not furthered by considering one statute in isolation, as the Fourth District Court of Appeal did with Contribution Act in ***Wendel v. Hauser.*** This Court has held that a medical malpractice action is commenced for purposes of the statute of repose when the prospective claimant filed for a ninety-day extension pursuant to the pre-suit requirements of Chapter

766, Florida Statutes (1997). In *Musculoskeletal Institute Chartered v. Parham*, 745 So.2d 946, 951-52 (Fla. 1999), this Court stated: "the case before us does not concern the efficacy of the medical malpractice statute of repose per se nor our construction of that statute in isolation. Rather, we are obligated to construe the statute of repose in conjunction with the statutory pre-suit requirements of chapter 766." In referring to the Florida Constitution, article I, § 21, which states that, "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay," the Florida Supreme Court held:

> We conclude that these statutes must be brought into symmetry so that the mandatory pre-suit screening and investigation requirements do not impede a claimant's access to the courts during the four years in which an action may be commenced in accord with the statute of repose. Otherwise, the pre-suit screening and investigation requirements would be in conflict with article I, section 21 of the Florida Constitution, [quoting that section of Florida's Constitution] and thus be unconstitutional.

See Musculoskeletal Institute Chartered, 745 So.2d at 952.

Likewise, this Court reiterated the danger of adhering to form over substance, which occurs when a court allows a suit to be time-barred under a statute of limitations because a

party complied "with a procedural or statutory predicate." *See Totura & Co. v. Williams*, 754 So. 2d 671 (Fla. 2000).

The First District Court reasoned correctly when it concluded that Chapter 766, Florida Statutes, can be read broadly to include a contribution claim as a claim for medical negligence, allowing the one-year statute of limitations for contribution claims to be tolled while the pre-suit process proceeds. Respondent urges this Court to reject the narrow view put forth by Petitioners that Respondent's claim must either be interpreted as a claim for Contribution to be filed in Circuit Court within the one-year statute of limitations provided by section 768.31(4)(d), Florida Statutes, or as a claim for medical malpractice, in which event the statute of limitations applicable to medical malpractice claims would have barred his claim two years from the time of the incident, under section 95.11(4)(d), Florida Statutes. Respondent's claim is obviously a claim for both. A substantive claim for medical negligence against the Defendant Doctors has been alleged, and must be proven, yet brought procedurally pursuant to section 768.31, Florida Statutes, after Respondent discharged the common liability of all defendants, the procedure which permits suit against the remaining tort-feasors for their share of the common liability.

II. THE PUBLIC POLICY GOALS OF CHAPTER 766 AND OF SECTION 768.31, FLORIDA STATUTES, ARE BOTH MET BY REQUIRING A CONTRIBUTION CLAIM FOR MEDICAL NEGLIGENCE TO BE COMMENCED PURSUANT TO CHAPTER 766.

Petitioners argue that the policy considerations inherent in the pre-suit screening process provided by Chapter 766, Florida Statutes, do not apply to Contribution claims, as the goals and purposes of the Medical Malpractice Act were "previously fulfilled" during the process in which the Plaintiffs' sued the other joint tortfeasor. (Petitioners' Amended Initial Brief page 20). The circumstances of this particular case point to the fallacy of that argument. The Defendant hospital is a Georgia facility, in this case, and the allegations of medical negligence against it and distinct from the allegations, which have been made against the Defendant Doctors in this proceeding. V.I.R. certainly believed that the Defendant Doctors were negligent in their follow-up care and treatment of Emily Auman when it paid for the common liability of both parties and sought Contribution from the Defendant Doctors in this proceeding. And the Defendant Doctors would certainly not agree to be bound by the private opinions of the merits of the claim, held by V.I.R. in making its settlement. The Defendant Doctors would clearly still insist upon the benefit of the pre-suit screening process as to their claims and not be satisfied as to the

proceedings, which occurred in Georgia between the Defendant hospital and the Plaintiffs, the Aumans. Each covered health care provider is so entitled under Chapter 766.

The Defendant Doctors argue in their brief that they could not effectively participate in pre-suit screening without the presence of the original plaintiffs, the parents of the injured child, as parties to the ongoing litigation. (Petitioners' Amended Initial Brief page 21). This ignores the fact that the Defendant Doctors participated in the pre-suit process in this proceeding, seeking directly and through cooperative releases from the Aumans, extensive discovery materials from the Respondent, V.I.R., involving the care, treatment, education, and ongoing health of Emily Auman, and seeking the records from the prior litigation, and such would be the right of any prospective Defendant under section 766.106, Florida Statutes. The extent to which a Defendant could require a Contribution claimant to produce the injured party for examination or an unsworn statement is not in issue here. These issues would remain no less problematic in a direct suit for Contribution where the original Plaintiffs are not longer present as parties. Had the Respondent to this appeal not chosen to proceed earlier by way of settlement and Contribution, the Defendant Doctors would have been subjected

to simultaneous litigation against them in Florida, while the case proceeded against the Scottish Rite Hospital in Georgia, or they would have been subjected to litigation in an appropriate Federal District Court with jurisdiction over parties from different states. V.I.R. chose to discharge the common liability in Georgia and proceed with proof of the Defendant Doctors' medical negligence pursuant to a contribution claim in Florida after resolution of the Georgia suit. The public policy goals of both the Medical Malpractice and Contribution Acts were fulfilled with this proceeding.

Both of these statutes serve sound public policy goals. The Medical Malpractice Act provides the Defendant Doctors a method by which medical malpractice claims can be screened within the scheme provided by Chapter 766, Florida Statutes, regardless of their source. The Contribution Act provides a method by which one tortfeasor may choose to discharge the common liability of all the defendants, greatly benefitting the injured plaintiffs, and thereafter allow that defendant to recoup the excess of its pro rata share from the other tort-feasors who may be guilty of medical negligence. The Acts should be interpreted to fulfill both goals. The First District Court of Appeal did so in its holding in this case and its decision should be upheld.

CONCLUSION

The First District Court of Appeal ruled correctly when it determined that a contribution claim for medical negligence is a claim for medical malpractice which is covered by the broad language of Chapter 766, Florida Statutes, entitling Petitioners to the benefits of the presuit screening process provided in the Medical Malpractice Act and tolling the statute of limitations applicable to Respondent's claim. This Court should adopt the First District Court's holding in *Virginia Insurance Reciprocal v. Walker* that a contribution claim asserted before a determination of joint liability for medical malpractice is subject to the pre-suit screening requirements of the Medical Malpractice Act. This Court should overrule the holding of the Fourth District Court of Appeal in *Wendel v. Hauser* that Chapter 766, Florida Statutes, does not encompass claims for contribution.

CERTIFICATE OF SIZE AND STYLE OF TYPE

Pursuant to Fla. R. App. P. 9.210(a)(2) and the Administrative Order of this Court dated July 13, 1998, Counsel for Respondent certifies that the Answer Brief of Respondent is reproduced in Courier New 12 point type, a font that is not proportionately spaced and does not exceed ten characters per inch.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Craig Dennis, Esquire, and to William T. Jackson, Esquire, Dennis & Bowman, P.A., Post Office Box 15589, Tallahassee, FL 32317-5589, attorneys for Petitioners/Appellees/Defendants, this 7th day of November, 2000.

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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-1710
Lower Tribunal No: 1D99-2426

FRANK C. WALKER, JR., M.D.
and NORTH FLORIDA PEDIATRIC
ASSOCIATES, INC.,

Petitioners,

vs.

VIRGINIA INSURANCE RECIPROCAL,
as subrogee of SCOTTISH RITE
CHILDREN'S MEDICAL CENTER, INC.,

Respondent.

On Appeal from the District Court of Appeal
First District
State of Florida

APPENDIX TO ANSWER BRIEF OF RESPONDENT VIRGINIA INSURANCE RECIPROCAL, as subrogee of SCOTTISH RITE CHILDREN'S MEDICAL CENTER, INC.

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