

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-1710

FRANK C. WALKER, JR., M.D.,
WILLIAM P. SIMMONS, M.D., and
NORTH FLORIDA PEDIATRIC
ASSOCIATES, P.A.,

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

**REPLY BRIEF OF PETITIONERS
FRANK C. WALKER, M.D. AND NORTH FLORIDA
PEDIATRIC ASSOCIATES, P.A.**

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ARGUMENT

II. THE FIRST DISTRICT COURT ERRED IN CONCLUDING THAT THE STATUTORY PRESUIT SCREENING REQUIREMENTS OF CHAPTER 766 APPLY TO AN ACTION FOR CONTRIBUTION BASED ON THE ALLEGED MEDICAL NEGLIGENCE OF A JOINT TORTFEASOR, AND IN REJECTING THE FOURTH DISTRICT COURT'S HOLDING IN WENDEL

V.I.R. devotes much of its answer brief to its compliance with the pre-suit notice and investigation requirements of Chapter 766.¹ Dr. Walker does not dispute that Chapter 766 mandates certain presuit screening procedures by both claimants and prospective defendants in medical malpractice claims. Nor does he dispute that V.I.R. served a notice of intent to litigate or that the parties participated in the

¹ V.I.R.'s statement of the case and facts contains argument on this subject based on information outside the record on appeal. For example, there is reference to a letter of June 19, 1999, from Dr. Walker's insurer, Physician's Protective Trust Fund (PPTF), requesting information under the presuit procedures of Chapter 766. Although the letter was attached to V.I.R.'s brief as part of the appendix, it was not part of the record below. Dr. Walker does not dispute that he participated in the presuit discovery process, so it hardly makes sense to move to strike this document from the answer brief. The Court will note by review of the letter that the PPTF here is the same PPTF (the losing party) in the Wendel case. PPTF now has the dubious distinction of being on opposing sides of an issue in two separate appeals and losing both appeals.

presuit investigation process commenced by V.I.R. Dr. Walker does dispute that the parties' participation is relevant to the issue before the Court.

Whether V.I.R., or Dr. Walker for that matter, complied with the intricacies of Chapter 766's notice and investigation requirements is not dispositive of the pure legal issues before the Court. Rather, the core issues are whether V.I.R. complied with section 768.31(4)(d)2, Florida Statutes, by filing its contribution claim within the one year limitations period, and whether V.I.R.'s notice of intent to litigate under Chapter 766 tolled the period for filing such a contribution action.

Perhaps V.I.R.'s focus on its compliance with the presuit process stems from what it believes to be the issue on appeal, namely:

[W]hether 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.

(Answer Brief, p. 13)(emphasis added). As argued in the Initial Brief, V.I.R.'s cause of action is not one for medical negligence, but one for contribution. Despite V.I.R.'s and the First District court's efforts to blur the distinction between the contribution claim brought in this case and a standard medical malpractice claim,

the causes of action remain separate and distinct.

V.I.R.'s "Complaint for Contribution" alleges that it is entitled to damages from Dr. Walker because Dr. Walker was a joint tortfeasor and because it paid more than its pro rata share of the common liability in settling its lawsuit with the Aumans. In a nutshell, V.I.R. claims damages by reason of monetary loss on account of the negligence of an alleged joint tortfeasor. Such is the very description of a contribution claim. See Hyster Co. v. David, 612 So.2d 678, 680 (Fla. 1st DCA 1993) (stating "[A] cause of action for contribution pursuant to the Uniform [Contribution Among Tortfeasors] Act does not accrue until the tortfeasor seeking contribution 'has paid more than his pro rata share of the common liability.'").

V.I.R. quotes Weinstock v. Groth, 629 So.2d 835 (Fla. 1993), in its answer brief and posits that V.I.R. was required to give notice to Dr. Walker under section 766.106 in this suit because he was a "healthcare provider" under Chapter 766. (Answer Brief, p. 15). To bolster this assertion, V.I.R. quotes Weinstock's test to determine whether a prospective defendant is entitled to notice of intent to file suit under Chapter 766, viz.: "[T]he 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 for care set forth in section 766.102(1)." (Answer Brief, p. 15-16). Weinstock's test is of

little value here because, unlike this case, the nature of the action in Weinstock was medical malpractice.

The issue in Weinstock was whether a licensed clinical psychologist sued for negligence was a "health care provider" as defined by Chapter 766 for purposes of the chapter's presuit notice requirements. 629 So.2d at 835-836. In addressing the issue, the Weinstock court stated:

Section 766.106(2) does not define the "prospective defendants" to whom notice must be given. However, it is only logical that the term refers to defendants *in a medical malpractice action* who are health care providers as defined in chapter 766 or who, although not expressly included within that class, are vicariously liable for the acts of a health care provider. It is clear that under section 766.102(1) "prospective defendants" *in medical negligence actions* are "health care providers as defined in [section] 768.50(2)(b):"

Id. at 837 (emphasis added). As shown by the quoted passage, the Court determined the issue before it within the context of a medical malpractice action under Chapter 766. Again, V.I.R.'s suit is not one for medical malpractice, but one for contribution. Thus, the Weinstock test for identifying prospective defendants under Chapter 766 is not applicable in this case.

Determination of those claims subject to Chapter 766's presuit notice and screening provisions does not depend solely on whether the prospective defendant fits within the definition of "health care provider." Rather, the Court must examine the context of the claim

brought by the plaintiff. This Court did just that in J.B. v. Sacred Heart Hosp. of Pensacola, 635 So.2d 945 (Fla. 1994). In J.B., J.B. filed a negligence action in federal district court against Sacred Heart, claiming that he contracted HIV from his brother L.B., a patient at Sacred Heart, while transporting his brother to another hospital at Sacred Heart's request, and because Sacred Heart failed to fully inform him of his brother's condition. 635 So.2d at 946-947. The district court ruled that J.B.'s claim was one for medical malpractice and subject to the presuit notice and screening procedures of Chapter 766. Id. The district court then dismissed the action because J.B. failed to follow the presuit procedures of Chapter 766. Id.

On appeal, the federal circuit court asked the Florida Supreme Court to answer two questions: whether the two-year limitations period relating to medical malpractice suits applied to J.B.'s claim; and whether Chapter 766's presuit screening procedures applied to J.B.'s claim. J.B., 635 So.2d at 946. In addressing the first question the Court stated:

According to the allegations in J.B.'s complaint, at the time the Hospital contacted him to drive his brother to Alabama, J.B. had no medical condition for which he sought medical services at the Hospital. His injury arose solely through the Hospital's use of him as a transporter. The simple question we must decide is whether this injury arose from the Hospital's medical diagnosis, treatment, or care of J.B. [FN3] Applying the law as set forth in Silva [v. Southwest Florida Blood Bank, Inc.], 601 So.2d 1184 (Fla. 1992) we conclude that it did not. Accordingly,

this suit is not a medical malpractice action for chapter 95 purposes and the two-year statute of limitations is inapplicable.

FN3. The Hospital's claim that this action arose from the medical diagnosis, treatment, or care of L.B. is without merit. J.B., not L.B., is the party allegedly injured by the Hospital's negligence.

Id. at 948.

As to the second question, the Court applied definition sections 766.106(1)(a) and 766.202(6) to conclude that Chapter 766's notice and presuit screening requirements apply to claims that "aris[e] out of the rendering of, or the failure to render, medical care or services." Id. at 949. The Court then held that because J.B.'s complaint did not "allege that [Sacred Heart] was negligent in any way in the rendering of, or the failure to render, medical care or services to J.B.", the complaint did not state a medical malpractice claim for Chapter 766 purposes, and the notice and presuit screening requirements were inapplicable. Id.

Like the plaintiff in J.B., V.I.R.'s injury does not arise from Dr. Walker's medical diagnosis, treatment, or care of V.I.R. Rather, it arises from the payment of more than V.I.R.'s pro rata share of liability in settling the Auman suit on behalf of alleged joint tortfeasors. V.I.R.'s complaint was not one for medical malpractice, subject to Chapter 766's presuit screening procedures. See e.g. Pavolini v. Bird, 25 Fla. L. Weekly D2085, 2000 WL 1228010 (Fla. 5th

DCA, Aug. 30, 2000) (nonfinal opinion)(holding that spouse and minor child of injured patient suing under Chapter 766 did not have to comply with Chapter 766's presuit process, stating, "If the person making the claim did not receive negligent medical care or treatment, the person does not qualify as a claimant under the [Medical Malpractice] Act by definition and hence cannot be required to comply with the presuit notice and investigation requirements of the Act.").

In arguing that the First District court properly adopted Walt Disney World Co. v. Memorial Hosp., 363 So.2d 598 (Fla. 4th DCA 1978), rather than Wendel v. Hauser, 726 So.2d 378 (Fla. 4th DCA 1999), V.I.R. asserts that "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." (Answer Brief, p. 22). V.I.R.'s argument presumably comes from the First District court's assertion that the absence of "monetary loss" in 766.106, "the current version of the statute", prompted the Wendel court to conclude that the presuit screening requirements are "no longer applicable to contribution claims." See Virginia Insurance Reciprocal, 765 So.2d 229, 233 (Fla. 1st DCA 2000). Both assertions are incorrect.

A plain reading of Wendel shows that the court did not focus its opinion on the absence of the term "monetary loss." Nor was the absence of the term the rationale for its holding. The Fourth

District court stated in response to the appellant's claim that Walt Disney applied to the case, that section 766.106, Florida Statutes (1993), differed and more narrowly defined those claims subject to presuit screening procedures than did "its predecessor," section 768.44, Florida Statutes (1975) [sic]². Wendel, 726 So.2d at 380.

The two statutes compared in Wendel were:

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

Section 766.106(1)(a), Florida Statutes (1993).

Any person or his representative claiming damages by reason of injury, death or monetary loss on account of medical malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization against whom he believes there is a reasonable basis for a claim shall submit such claim to an appropriate medical liability mediation panel before that claim may be filed in any court of this state.

Section 768.44(1)(a), Florida Statutes (1977). Notwithstanding the noted absence of the term "monetary loss," section 766.106, indeed, more narrowly defines those actions subject to its presuit screening procedures than does section 768.44 for actions subject to its mediation procedure. The Wendel court then examined sections 766.106(1)(a) and 766.203 and ultimately held that "The plain language of section 766.106, Florida Statutes, does not encompass

² In 1975, medical liability mediation statute was under section 768.133(1)(a), Florida Statutes. The statute was renumbered in 1977 as section 768.44(1)(a).

claims for contribution." Wendel, 726 So.2d at 380. The First District court failed to specifically address this holding.

In reference to Wendel, the First District court also states that "the scope of section 766.106(1)(a) does not appear to have been changed by the deletion of the phrase monetary loss" and then concludes that the "statute was simply reworded." Virginia Insurance Reciprocal, 765 So.2d at 233. The court's statement and conclusion are incorrect. Section 766.106(1)(a) is not a later version of section 768.44(1)(a), Florida Statutes (1977). Although section 768.44(1)(a) does precede 766.106(1)(a), it is a completely different statute.³ A review of section 768.44(1)(a)'s legislative history reveals that it was only in effect from 1977 to 1983. The subsection was repealed in 1983 after the Florida Supreme Court found it unconstitutional in Aldana v. Holub, 381 So.2d 231 (Fla. 1980). See 1983 Fla. Laws ch. 83-214, s.15.

In 1985, the legislature passed the Comprehensive Medical Malpractice Reform Act (the "Act") that sets out the presuit procedures used today. See 1985 Fla. Laws ch. 85-175, s. 14. The

³ Dr. Walker acknowledges that the Wendel court used the term "predecessor" when referring to section 768.44(1)(c), which, of course, could be interpreted to mean that it was an earlier version of section 766.106(1)(a). This word choice is unfortunate; however, the Court can clear up any confusion on this issue by virtue of its conflict jurisdiction. See PK Ventures, Inc. v. Raymond James & Associates, Inc., 690 So.2d 1296, 1297 n. 2 (Fla. 1997)(Once a court obtains jurisdiction, it has the discretion to consider any issue affecting the case.)

Act included section 768.57, Florida Statutes, the true precursor to section 766.106(1)(a), which established the definition of "claim for medical malpractice." Contrary to the First District court's opinion, section 766.106(1)(a) is not section 768.44(1)(a), modified by the absence of the phrase "monetary loss." Thus, the rationale used by the First District court to bolster its holding is questionable.

V.I.R. cites Paulk v. National Medical Enterprises Inc., 679 So.2d 1289 (Fla. 4th DCA 1996), for the proposition that the allegations of V.I.R.'s complaint lead to the inescapable conclusion that its cause of action sounds in medical malpractice. (Answer Brief, p. 24). The issue in Paulk was whether plaintiff's intentional tort claim against several hospitals, based on fraud through the provision of medical services, fell within Chapter 766's presuit screening procedures. 679 So.2d at 1289. The Fourth District court held that the claim did, based on sections 766.203(1), and 766.102(1), and on the definition of the term "medical negligence" in section 766.202(6), Florida Statutes. Id. at 1290-1291. Section 766.202(6) defines "medical negligence" as "medical malpractice, whether grounded in *tort* or *contract*." (Emphasis added). The Paulk court stated, "we don't think it much matters whether the plaintiffs' claim is framed as an intentional tort or instead as negligence", and concluded that plaintiffs' cause of

action sounded in medical malpractice. Id. Here, V.I.R.'s claim is one for contribution which is neither a tort, nor a contract claim. It is a statutorily created cause of action based on equitable principles. See Lincenberg v. Issen, 318 So.2d 386 (Fla.1975); Hyster Co., 612 so.2d at 680. Thus, Paulk's holding is inapposite.

V.I.R. also cites O'Shea v. Phillips, 746 So.2d 1105 (Fla. 4th DCA 1999), for support. In O'Shea, the Fourth District court held that the presuit screening requirements applied to a claim for negligent supervision and retention of an employee neurologist who sexually assaulted the plaintiff. 746 So.2d at 1105. O'Shea is easily distinguishable from the case at bar because Chapter 766 specifically establishes a duty on health care facilities to assure the competence of medical staff and personnel through careful selection and review. Id. at 1106 -1107 (citing section 766.110, Florida Statutes). Chapter 766 does not establish such a duty on defendants in contribution claims.

Finally V.I.R. rejects Dr. Walker's argument that contribution defendants may not be able to effectively participate in the presuit process in a contribution claim, arguing that Dr. Walker, in fact, participated in the presuit process and sought extensive discovery materials from V.I.R. As acknowledged by Dr. Walker, supra, V.I.R.'s counter argument is true; however, there is a sharp difference between participation in the presuit process and **effective**

participation. Perhaps the legislature realized this difference when it chose not to include contribution claims among those claims falling under Chapter 766. See §766.203(1), Fla. Stat.

CONCLUSION

The First District court erred in concluding that the statutory presuit screening requirements of Chapter 766 apply to an action for contribution based on the alleged medical negligence of a joint tortfeasor and in rejecting the Fourth District court's holding in Wendel. Wherefore, Defendants respectfully request the Court reverse the First District court's holding, adopt the opinion of the Fourth District court in Wendel, and reinstate the judgment of the circuit court, which determined that Petitioner was entitled to summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Hand Delivery to Michael T. Callahan, Esq., 2151 Delta Boulevard, Suite 101, Tallahassee, Florida 32303; on this 4th day of December, 2000.

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