**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC04-380

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**SOUTHERN BAPTIST HOSPTIAL OF FLORIDA, INC., a corporation,**

**Petitioner,**

**v.**

**JEFFREY W. WELKER,**

**Respondent.**

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On Review from the First District Court of Appeal
Case No. 1D02-4894

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# BRIEF OF AMICUS CURIAE FLORIDA HOSPTIAL ASSOCIATION IN SUPPORT OF PETITIONER, SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., (Filed with leave of Court)

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## INTRODUCTION

The Florida Hospital Association ("FHA") is the primary organization of hospitals in the state of Florida. Its membership includes approximately 230 hospitals varying in size from thirty-two (32) to over one thousand (1,000) beds. Its members are representative of the various forms of ownership currently existing in the hospital field. The principal corporate objective of the FHA is to promote its members' ability to "provide comprehensive, efficient, high quality health care to the people of Florida." In order to meet this aspiration, the FHA membership necessarily also shares a common need with the Petitioner for financial stability.

FHA believes that this case involves an issue of statewide significance, and that its appearance as amicus curiae will serve as a conduit through which its members will have an opportunity to be heard on the issue concerning the scope of the procedural and substantial protections of chapter 766. This Court's decision could have a significant impact on all hospitals throughout this state. In light of the recent legislative changes to Chapter 766, uniformity of decision and predictability of application of the law in this area will be more important than ever.

All emphasis is supplied by counsel unless otherwise indicated.

## POINT INVOLVED ON REVIEW

## POINT I

**WHETHER A HOSPITAL IS A STATUTORY "HEALTH CARE PROVIDER" FOR PURPOSES OF CHAPTER 766, AND THEREFORE ENTITLED TO PRESUIT NOTICE REGARDLESS OF WHETHER ITS EMPLOYEE IS ALSO A "HEALTH CARE PROVIDER"?**

## SUMMARY OF ARGUMENT

The district court misapplied the law in determining that the claim below was not subject to the notice and investigation requirements of Chapter 766. By focusing upon the fact that individual hospital employee who was involved in the treatment at issue is not separately defined as a "health care provider," the district court failed to employ the proper analysis. The hospital *is* a statutory health care provider for purposes of the notice and investigation provisions of Chapter 766 by virtue of every relevant statutory definition. The fact that an individual employee is not also separately defined as a "health care provider" does not deprive the hospital of *its* entitlement to notice and an opportunity to engage in presuit investigation of the claim.

## ARGUMENT

## POINT I

### A HOSPITAL IS A STATUTORY "HEALTH CARE PROVIDER" FOR PURPOSES OF CHAPTER 766, AND THEREFORE ENTITLED TO PRESUIT NOTICE REGARDLESS OF WHETHER ITS EMPLOYEE IS ALSO A "HEALTH CARE PROVIDER"

A claim against a hospital arising out of the rendering of, or failure to render medical services is properly dismissed when it has not been the subject of the statutorily-required presuit notice and investigation. *See Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991). The plaintiff's claim against the hospital, which arose out of the delivery of out-patient mental health services, is a claim which arises out of the rendering of medical care or services. Under these circumstances, the failure to comply with the presuit screening provisions of Chapter 766 was properly determined by the trial court to be fatal to the plaintiff's claim. *Id.*

In enacting the Medical Malpractice Act, the Legislature established a statutory condition precedent to filing a "claim for medical malpractice," as defined in the statute; i.e., "a claim arising out of the rendering of, or the failure to render, medical care or services." '766.106(1)(a), Fla. Stat. (2001). The purpose of the mandatory presuit notice and investigation requirements was to effectuate the legislative goals of prompt evaluation and settlement of claims, as well as

eliminating non-meritorious claims. '766.201(1)(d), Fla. Stat. (2001). *See also Duffy v. Brooker*, 614 So. 2d 539, 543 (Fla. 1st DCA), *rev. denied*, 624 So. 2d 267 (Fla. 1993) (goal of presuit screening requirements was to "permit early evaluation of the merit of claims and defenses and, thereby, to encourage meaningful presuit negotiations.")

Florida appellate decisions interpreting the scope of the presuit notice and investigation provisions of Chapter 766 have tended to focus upon two distinct inquiries: (1) whether the prospective defendant is a "health care provider," *see, e.g., Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993); and (2) whether the claim is one which "aris[es] out of the rendering of, or the failure to render, medical care or services." ' 766.106(1)(a), Fla. Stat. (1999). *See, e.g., J.B. v. Sacred Heart Hospital of Pensacola*, 635 So. 2d 945 (Fla. 1994). The decisions rendered to date have not always kept these two inquiries separate, resulting in a lack of uniformity and a good deal of confusion.[1] The district court decision in this case created an

[1] For example, in *Community Blood Centers of South Florida, Inc. v. Damiano*, 697 So. 2d 948 (Fla. 4th DCA 1997), the Fourth District held that a blood bank was not entitled to the benefit of presuit screening because it was not a "health care provider," despite the fact that blood banks are expressly included within the section 768.50(2)(b) definition of "health care provider." This decision is more properly viewed as having been decided on the basis that the blood bank did not render medical care or services, as opposed to its status as a "health care provider." Otherwise, the decision cannot be reconciled with *Sova Drugs, Inc. v. Barnes*, 661 So. 2d 393 (Fla. 5th DCA 1995) (pharmacy not entitled to benefit of presuit screening because it was not within section 768.50(2)(b) definition of "health care provider", holding that "section 768.50(2)(b) identifies the only health care providers who are

express and direct conflict with prior district court decisions concerning the scope of Chapter 766, which will only promote further confusion if left uncorrected. *Compare Welker v. Southern Baptist Hospital of Florida, Inc.*, 864 So. 2d 1178, 1183-1185 (Fla. 1st DCA 2004) *with Goldman v. Halifax Medical Center, Inc.*, 662 So. 2d 367, 370 (Fla. 5th DCA 1995), *and Puentes v. Tenet Hialeah Healthsystem*, 843 So. 2d 356 (Fla. 3d DCA 2003).

For purposes of determining the scope of Chapter 766, the operative language is set forth in section 766.106, Florida Statutes (1999)[2]:

> (1) As used in this section:
>
> (a) "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render, medical care or services.
>
> * * *
>
> (2) After completion of presuit investigation pursuant to s. 766.203 and prior to filing a claim for medical malpractice, a claimant shall notify each prospective defendant and, if any prospective defendant is a health care provider licensed under chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466, the Department of Health by certified mail, return receipt requested, of intent to initiate litigation for medical malpractice.

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entitled to presuit investigation and notice. . .")

[2] The treatment which gave rise to the claim occurred in July of 1999. These provisions have since been amended; however, the amendments do not materially alter the analysis.

In *Weinstock v. Groth*, *supra*, this Court interpreted these provisions to require that a "prospective defendant" be a "health care provider" as that term is defined in "various" statutes within Chapter 766. This Court rejected the argument of the defendant, a clinical psychologist, that the literal language of the statute does not limit its applicability to "health care providers." The court reasoned:

> 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):"
>
> > 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 as defined in s. 768.50(2)(b), 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(1) (emphasis added). It is equally clear that under the doctrine of respondeat superior, an employer of a health care provider also may be a "prospective defendant" in a medical negligence action, even if the employer does not fall within the statutory definition of health care provider. . .[W]e agree 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 837-838.

The *Weinstock* decision specifically references three Chapter 766 definitions of "health care provider": sections 768.50(2)(b)[3], 766.101(1)(b)[4], and 766.105(1)(b)[5], Florida Statutes. Each of these statutory definitions includes "hospitals licensed under chapter 395." Thus, it is beyond question that a hospital is a "health care provider" within the meaning of Chapter 766. Hospitals are health care providers by virtue of every relevant statutory definition.

The question of *who* is entitled to receive notice should be analyzed separately from the question of *what type of claim* is subject to Chapter 766,

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[3] Section 768.50(2)(b), was repealed except to the extent that it is incorporated by reference into section 766.102(1), Florida Statutes (1991). *See Integrated Health Care Services, Inc. v. Lang-Redway*, 840 So. 2d 974 (Fla. 2002); *Weinstock v. Groth*, *supra* at 836 n.1. Section 766.102, Florida Statutes (1999), requires a plaintiff to prove a breach of the standard of care in any action against a "health care provider" as defined by the now-repealed statute.

Chapter 2003-416, § 58, Laws of Florida, enacted a new, comprehensive definition of "health care provider" for purposes of Chapter 766, which is now found at section 766.202(4), Florida Statutes (2003).

[4] Section 766.101, Florida Statutes (1999), provides a privilege applicable to activities of a medical review committee.

[5] Section 766.105, Florida Statutes (1999), established the Florida Patients Compensation Fund, and authorizes defined health care providers to participate in the fund.

because the tests are different. The analysis to be used in identifying the types of claims to which the presuit notice and investigation requirements apply was outlined by this Court in *J.B. v. Sacred Heart Hospital of Pensacola*, 635 So. 2d 945 (Fla. 1994):

> Chapter 766, Florida Statutes (1989), which governs standards for recovery in medical malpractice cases, imposes certain notice and presuit screening requirements upon a claimant. These provisions must be met in order to maintain a medical malpractice or medical negligence action against a health care provider. *See Weinstock v. Groth*, [*supra*].
>
> In delineating the actions to which it applies, section 766.106, Florida Statutes (1989), defines a "[c]laim for medical malpractice":
>
> > "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render, medical care or services.
>
> ' 766.106(1)(a), Fla. Stat. (1989). And section 766.202, which applies to medical negligence claims, defines "medical negligence," in turn, as medical malpractice:
>
> > "Medical negligence" means medical malpractice, whether grounded in tort or contract.
>
> ' 766.202(6), Fla. Stat. (1989). Reading these two sections in conjunction, we 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." ' 766.106(1)(a), Fla. Stat. (1989).

*Id.* at 948-949. *See also Walker v. Virginia Ins. Reciprocal*, 842 So. 2d 804, 808-809 (Fla. 2003); *O'Shea v. Phillips*, 746 So. 2d 1105 (Fla. 4th DCA 1999), *rev. denied*, 767 So. 2d 459 (Fla. 2000) (presuit notice requirements applied to claim that health care facility negligently retained an employee who sexually assaulted a patient, since duty arose under Chapter 766); *Paulk v. National Medical Enterprises, Inc.*, 679 So. 2d 1289 (Fla. 4th DCA 1996) ("We have no difficulty in deciding that fraudulent rendering of unnecessary medical care and services is encompassed by the term 'arising out of the rendering of . . . medical care or services.'")

Since the term "a claim for medical malpractice" is expressly defined in the legislative scheme, the courts are not free to adopt an *ad hoc* definition in order to relieve a claimant of the effect of the failure to comply with the mandatory condition precedent to bringing the claim. *See Archer v. Maddux*, 645 So. 2d 544 (Fla. 1st DCA 1994); *Maldonado v. EMSA Limited Partnership*, 645 So. 2d 86 (Fla. 3d DCA 1994). *Cf. Sarasota Herald-Tribune Co. v. Sarasota County*, 632 So. 2d 606, 607 (Fla. 2d DCA 1993) ("Courts are not authorized to embellish legislative requirements with their own notions of what might be appropriate.")

The district court in this case improperly engrafted part of the *Weinstock* analysis regarding *who* is entitle to receive notice (i.e., whether the professional

standard of care was applicable) onto the otherwise unambiguous statutory definition of "medical malpractice" to determine whether the *claim* was subject to the Chapter 766 notice and investigation requirements. The court reasoned: "[A] claim is one for medical negligence for purposes of section 766.106 only if it is one as to which, to recover, the plaintiff must establish that the defendant failed to meet the 'medical negligence standard of care as set forth in section 766.102(1).'" *Welker*, *supra* at 1183. The court then carried this reasoning further to conclude that for a claim to be subject to Chapter 766, it was necessary that the allegedly negligent action be committed by a "health care provider" as defined by statute. *Id.* at 1183-1184.

Having thus revamped the statutory definition of "a claim for medical malpractice," the court concluded: "We can find no language in chapter 766 to suggest that [the hospital] should be entitled to the benefit of the section 766.106 presuit screening requirements when it is alleged to be only vicariously liable for the negligence of an agent, and the negligence alleged does not constitute medical malpractice." *Id*. at 1185. The court further explained: "It would make little sense to require a plaintiff to comply with the presuit screening requirements as to a defendant alleged to be only vicariously liable in a situation where the active tortfeasor would not be entitled to the benefit of those provisions." *Id.*

The court acknowledged that this conclusion was in conflict with the decision of the Fifth District in *Goldman v. Halifax Medical Center, Inc., supra.*. In *Goldman,* the Fifth District expressly held that it was not necessary for the active tortfeasor to be a "health care provider" in order for the provisions of Chapter 766 to apply to a claim against a hospital. The Fifth District reasoned that a hospital, unlike a physician, can only provide medical care through its agents and employees, and explained:

> We conclude that the legislature, in enacting section 766.102, and the Medical Malpractice Reform Act in general, intended that the negligence of the hospital's agents acting in the course of their employment should be treated as the negligence of the hospital, and that the chapter's presuit requirements should be complied with where an agent of the hospital provides negligent medical care. To conclude otherwise would lead to the irrational result that a hospital or other health care providing employer not directly negligent is subject to chapter 766 conditions only when it employs another health care provider who causes the injury while performing health care. Just as non-health care employers are entitled to the presuit conditions where their health care employees have allegedly provided negligent medical care while in the course of their employment, *McCulloch*,[6] so too are health care providing employers entitled to these provisions when their health care or non-health care employees commit such acts or omissions.

Id. at 370. [emphasis in original]

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[6] *NME Properties, Inc. v. McCullough,* 590 So. 2d 439, 440 (Fla. 2d DCA 1991).

The *Goldman* decision gives appropriate recognition to the fact that many individuals are necessarily involved in the delivery of medical care and services in the hospital setting, not all of whom are "health care providers," such as the radiologic technologist in *Goldman.* The language used by the Legislature in defining a "claim for medical malpractice" is sufficiently broad to encompass negligent acts committed by hospital employees who are not themselves "health care providers," but who are nonetheless necessarily involved in the delivery of medical services in the hospital or out-patient setting. *See, e.g., Puentes v. Tenet Hialeah Healthsystem*, *supra* (presuit screening requirements applied to claim against hospital arising out of kitchen employee's failure to follow physician's order). In order to effectuate the legislative intent behind Chapter 766, the hospital's entitlement to the substantive defenses and protections afforded by Chapter 766 should not be determined by the status of the negligent employee, but

rather by whether the claim "*arises out of*[7] the rendering of, or failure to render, medical care or services."

Under the facts of this case, since the hospital was plainly a health care provider, the only question is whether WELKER alleged a cause of action for "ordinary negligence" independent of the "rendering of, or the failure to render, medical care or services." The harm alleged in the complaint flows from the hospital employee's clinical evaluation of WELKER's children, which plainly arose in the context of the delivery of medical care and services. The duty (if any) owed to WELKER flowed from the hospital employee's clinical treatment relationship with his children, *cf. Pate v. Threlkel*, 661 So. 2d 278 (Fla. 1995), and not from another source; e.g., the hospital's status as a premises owner.

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[7] Although arising in the automobile insurance context, the Fifth District's explanation of the term "arising out of" is instructive here:

> The term "arising out of" is broader in meaning than the term "caused by" and means "originating from," "having its origin in," "growing out of," "flowing from," "incident to" or "having a connection with" the use of the vehicle.

*Hagen v. Aetna Casualty & Surety Co.*, 675 So. 2d 963 (Fla. 5th DCA) (*en banc*), *rev. denied*, 683 So. 2d 483 (Fla. 1996), *citing National Indemnity Co. v. Corbo*, 248 So. 2d 238 (Fla. 3d DCA 1971).

This circumstance serves to distinguish WELKER's claim from cases involving other bases of civil liability, including premises liability-type claims,[8] false imprisonment,[9] and other torts[10] where the thrust of the claim is unrelated to the delivery of medical care or services. The rule which emerges from these cases is succinct: where the plaintiff's claim arises out of the rendering or failure to render medical care or services, the provisions of Chapter 766 apply; however, where the claim is based upon a theory of liability apart from the rendering or failure to render medical care or services, the presuit screening requirements do not apply.

"It is up to the court to decide from the allegations in the complaint whether the claim arises 'out of the rendering of, or the failure to render, medical care or services.'" *Foshee v. Health Management Associates, Inc., supra* at 959. It must be

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[8] *See, e.g., Lake Shore Hospital, Inc. v. Clarke*, 768 So. 2d 1251 (Fla. 1st DCA 2000)(slip and fall); *Feifer v. Galen of Florida, Inc.*, 685 So. 2d 882 (Fla. 2d DCA 1996)(slip and fall); *Palm Springs General Hospital, Inc. v. Perez*, 661 So. 2d 1222 (Fla. 3d DCA 1995), *rev. denied*, 670 So. 2d 939 (Fla. 1996)(assault on patient).

[9] *See, e.g., Garcia v. Psychiatric Institutes of America, Inc.*, 693 So. 2d 66 (Fla. 5th DCA), *rev. denied*, 700 So. 2d 687 (Fla. 1997); *Foshee v. Health Management Associates*, 675 So. 2d 957 (Fla. 5th DCA), *rev. denied*, 686 So. 2d 578 (Fla. 1996).

[10] *See Robbins v. Orlando H.M.A., Inc.*, 683 So. 2d 664 (Fla. 5th DCA 1996) (alleging breach of contract, fraud, false imprisonment, intentional infliction of emotional distress, defamation and conspiracy to defraud).

highlighted, however, that the analysis of the scope of Chapter 766 issue does not necessarily end with the pleadings. If a determination is made on the basis of a motion to dismiss that the pleadings to not allege a "claim for medical malpractice" as that term is defined by section 766.106(1)(a), the defendant is nonetheless entitled to plead and prove the substantive protections of Chapter 766 as an affirmative defense. *See, e.g., Feifer v. Galen of Florida, Inc.*, 685 So. 2d 882 (Fla. 2d DCA 1996); *Stackhouse v. Emerson*, 611 So. 2d 1365 (Fla. 5th DCA 1993). Otherwise, the applicability of the procedural and substantive protections afforded to hospitals and other health care providers could be determined on the basis of artful pleading, rather than on the merits. As explained by this Court in *Ingersoll v. Hoffman*, 589 So. 2d 223, 224 (Fla. 1991):

> The legislature has established a comprehensive procedure designed to facilitate the amicable resolution of medical malpractice claims. To suggest that the requirements of the statute may be easily circumvented would be to thwart the legislative will.

The district court applied the wrong legal analysis in concluding that the hospital was not entitled to the benefit of the presuit notice and investigation procedures set forth in Chapter 766 because the employee involved in the subject treatment did not fall within one of the definitions of a "health care provider." Because the hospital is a "health care provider" by virtue of every relevant

definition, it was entitled to presuit notice of a claim "arising out of the rendering of, or failure to render, medical care or services." The trial court properly determined that Count III of WELKER's complaint falls within the statutory definition of a "claim for medical malpractice," irrespective of whether the hospital's employee was also a "health care provider."

## CONCLUSION

Based upon the foregoing arguments and authorities, Amicus Curiae, Florida Hospital Association, respectfully requests this Court to resolve the embarrassing conflict of decisions which has arisen among the district courts by quashing the decision of the First District Court of Appeal, and approving the decision of the Fifth District in *Goldman v. Halifax Medical Center, Inc., supra*.

Respectfully submitted,

Gail Leverett Parenti

## CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Lawrence C. Datz, Esquire**, Attorneys for Respondent, Datz & Datz, P.A., 4348 Southpoint Boulevard, Suite 330, Jacksonville, FL 32216 and **Harvey L. Jay, III,** Attorney

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## CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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