IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-380

SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC., a corporation,

Petitioner,

v.

JEFFREY W. WELKER,

Respondent.

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

BRIEF OF AMICUS CURIAE SHANDS TEACHING HOSPITAL & CLINICS, INC. IN SUPPORT OF PETITIONER, SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC.

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INTRODUCTION

Shands Teaching Hospital and Clinics, Inc. ("Shands") is a not-for-profit corporation which operates a multi-hospital system in North Central Florida. *Shands at UF* and *Shands at AGH* are major teaching hospitals affiliated with the University of Florida. *Shands Jacksonville* is a 696 bed teaching hospital, *Shands at Vista* is an inpatient psychiatric hospital, and *Shands Rehab Hospital* is an inpatient rehabilitation hospital. Shands operates additional acute care community hospitals in Lake City, Starke and Live Oak, Florida.

This case raises issues of vital importance for Shands and other hospitals throughout the State of Florida. By narrowly interpreting Chapter 766, the District Court significantly limits the number of hospital professional liability claims subject to presuit screening. As a result, the Shands hospital system will be deprived the benefits of presuit screening in a manner obviously contrary to the legislature's intent that all professional liability claims against hospitals be subject to presuit screening. Furthermore, the District Court's overly restrictive definition of a "medical negligence" claim, will also lead to confusion regarding application of the newly enacted revisions to Chapter 766, which limit the amount of non-economic damages recoverable in a medical negligence claim. See § 766.118, Fla. Stat. (2003).

ISSUE ON REVIEW

A HOSPITAL IS ENTITLED TO PRESUIT NOTICE OF ALL MEDICAL NEGLIGENCE CLAIMS.

SUMMARY OF ARGUMENT

The District Court erred in determining that a hospital is not entitled to presuit screening of claims based upon the alleged negligence of employees who do not fall within the definition of Chapter 766 "health care providers." As a Chapter 766 "health care provider" hospitals have a right, independent of the status of their employees, to presuit screening of medical negligence claims. Hospitals employ many individuals who provide medical care and services who do not fall within the definition of "health care provider." The effect of the District Court's decision will be to deprive hospitals of the benefits of presuit screening and notice in a substantial number of hospital professional liability cases.

In addition, the District Court erred by adopting a narrow definition of a "medical negligence claim" which is dependent upon the status of the "active" tortfeasor as a statutorily defined "health care provider." By failing to apply the §766.106(1)(a), Fla. Stat. (1999) definition of a medical negligence claim, the District

Court's decision deprives hospitals of rights to which they are clearly entitled as statutory "health care providers".

ARGUMENT

Chapter 766, Fla. Stat. "sets out a complex presuit investigation procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court." *Kukral v. Mekras,* 679 So. 2d 278, 280 (Fla. 1996). As stated in *Williams v. Campagnulo,* 588 So. 2d 982 (Fla. 1991) "the statute was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early state without the necessity of a full adversarial proceeding." *Williams*, 588 So. 2d at 983.

This Court has observed, however, that the construction and interpretation of Chapter 766 has "been plagued by a lack of comprehensive definitions." *Integrated Health Care Services, Inc. v. Lang-Redway,* 840 So. 2d 974, 977 (Fla. 2002). Nevertheless, the overall legislative scheme is clear. Chapter 766 requires presuit screening and presuit notice of medical negligence claims against certain designated health care providers. In *Weinstock v. Groth*, 629 So. 2d 835 (Fla. 1993), this Court held that the presuit notice requirements "only apply in actions against 'health care providers' as defined in chapter 766 . . . and those who are vicariously liable for the acts of a health care provider." *Weinstock*, 629 So. 2d at 835-836.

In *Weinstock* the Court held that a clinical psychologist was not entitled to

presuit notice since psychologists were not included in the Chapter 766 definitions of "health care provider." *Id.* at 836. Since its enactment, however, the Comprehensive Medical Malpractice Reform Act of 1985 has always included hospitals within the definition of "health care providers."[1] Simply stated, the legislature has always manifested an intent to provide hospitals with the benefits of presuit screening and notice.

That hospitals fall within the Chapter 766 definition of "health care providers" is beyond dispute. Equally beyond dispute is the fact that hospitals employ many individuals who are not statutory "health care providers." Hospitals employ a wide variety of allied health professionals, technicians and other support staff, who all play an integral part in patient care. Hospitals employ radiology technicians, respiratory therapists, nuclear medicine technicians, operating room technicians, phlebotomists, lab technicians, dieticians, pharmacy workers, patient care assistants, social workers, mental health professionals, transportion aids, records clerks, and clerical staff, all of

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[1]In *Weinstock* the Court referenced three definitions of "health care providers": §§ 768.50(b), 766.101(1)(b) and 766.105(1)(b), Fla. Stat. *Id.* at 836. At the time this cause of action arose in 1999, the definition of "health care providers" found in § 768.50(2)(b) had been repealed but is nevertheless applicable since it is incorporated by reference into § 766.102(1), Fla. Stat. (1991). *See Integrated Health care Services, Inc. v. Lang-Redway*, 840 So. 2d 974, 978 (Fla. 2002). The current definition of "health care providers", which, of course, includes hospitals, if found in § 766.202(4), Fla. Stat. (2003).

whom are involved in serving the medical and health care needs of the patient. Yet, none of these individuals fall within the statutory definition of "health care providers." In fact, most hospital employees *do not* fall within the definition of "health care providers".[2]

Hospitals are corporate entities which can only act through their agents and employees. *Barry Cook Ford, Inc. v. Ford Motor Company*, 616 So. 2d 512, 519 (Fla. 1st. DCA 1993) ("It is axiomatic that a corporation acts only through its officers, agents and employees.") Hospitals are liable for the negligent acts or omissions of their employees under the common-law doctrine of *respondeat superior*. *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965). By including hospitals within the Chapter 766 definition of "health care providers", the legislature must have intended to confer the benefits of presuit screening to hospitals as corporate entities separate and distinct from their agents or employees. By including "hospitals" within the statutory definition, the legislature must have intended to expand the scope of presuit notice and screening to include claims against hospitals based on the negligent acts or omission of employees who do fall within the statutory definition of "health care

[2]Under § 768.50(2)(b), incorporated by reference into § 766.102(1) (1991), the only hospital employees that fall withing the definition of "health care providers" are licenced nurses, physicians' assistants, physical therapists and physical therapy assistants.

providers. Otherwise, there would have been no need to include "hospitals" as a separate entity entitled to presuit screening.

The District Court below, however, reached the opposite conclusion. The District Court held that a hospital has no right to presuit screening if it is vicariously liable for the negligence of an "active" tortfeasor who, in turn, has no right to presuit screening. The District Court stated: "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." *Welker v. Southern Baptist Hospital of Florida, Inc.*, 864 So. 2d 1178, 1185 (Fla. 1st DCA 2004). The result of the District Court's decision is to effectively eliminate "hospitals" from the definition of "health care provider" and strip hospitals of the benefits of presuit screening in a substantial number of cases.

For example, under the District Court's decision, a hospital would be entitled to presuit screening only for claims based on the negligence of employees who fall within the statutory definition of a "health care provider." However, this Court has previously held in *Weinstock,* supra, that presuit screening applies to those who are vicariously liable for the acts of a statutory "health care provider." 629 So. 2d at 835-836. Under *Weinstock*, by virtue of their status as *employers,* hospitals are *already*

entitled to presuit claims based on the negligent acts of employed "health care providers." Including hospitals within the definition of "health care providers" is meaningless unless hospitals are also entitled to presuit claims based on the negligent acts of *non*-health care providers. The net result of the District Court decision is not simply to ignore, but to nullify, legislative intent.

The District Court's conclusion that Southern Baptist's employee, Valerie Brink, is not a statutory "health care provider" is not, and should not, be dispositive of Petitioner's entitlement to presuit screening. The dispositive issue is not whether Brink is a statutory "health care provider", but whether Welker's cause of action arises out of "the rendering of, or failure to render, medical care or services." §766.106(1)(a), Fla. Stat. (1999).

In a line of circular reasoning found at pages 1183-1184 of its decision, the District Court concludes that the claim against Brink is not a " medical malpractice" claim. The syllogism advanced is that since Brink is not a statutory "health care provider", the medical negligence standard of care found in §766.102(1) does not apply to her; ergo, the claim against her cannot be, by definition, a claim for "medical malpractice."

The reasoning of the District Court is wrong for two salient reasons. First, the Court overlooks the definition of a medical negligence claim found in §766.106(1)(a),

Fla. Stat.(1999), which simply defines a claim from medical malpractice as "a claim arising out of the rendering of, or the failure to render, medical care or services." Second, the District Court overlooks the fact that, as a mental health care counselor, Brink owed Welker a *professional* standard of care, regardless of the application of §766.102(1), Fla. Stat. As a professional, Brink had a duty to perform services in accordance with the standard of care owed by similar professionals in the community under similar circumstances. *Moransis v. Heathman*, 744 So. 2d 973, 975 (Fla. 1999). Under Chapter 766, medical negligence claims should not be limited to claims against statutorily defined "health care providers" but should include all claims which arise "out of the rendering of, or failure to render, medical care or services." §766.106(1)(a), Fla. Stat.

The District Court restrictive definition of malpractice claims has profound implications for the construction and interpretation of the newly enacted limitations on non-economic damages found in §766.118, Fla. Stat. (2003). Section 766.118 limits the recovery of non-economic damages against both "practitioners" and "non-practitioners" in "medical negligence" claims, without an independent definition of what is a "medical negligence" claim." Future litigants may very well attempt to apply the District Court's restrictive definition of "medical negligence" claims to avoid the limitation on noneconomic damages for "non-practitioner" (i.e. hospital) defendants.

Shands submits that the District Court's decision is in conflict with both the decision of the Florida Fifth District Court of Appeal in *Goldman v. Halifax Medical Center, Inc.*, 662 So. 2d 367 (Fla. 5th DCA 1995) and the decision of the Third District Court of Appeal in *Puentes v. Tenent Hialeah Healthcare Systems*, 843 So. 2d 356 (Fla. 3d DCA 2003). In both these cases, the Courts held that hospitals are not deprived of the benefits of presuit screening when sued for the alleged negligence of a non health care provider. *Goldman* and *Puentes* provide the correct rule of decision.

CONCLUSION

For the foregoing reasons Amicus Curiae Shands Teaching Hospital & Clinics, Inc. respectfully requests that this Court accept jurisdiction of this Petition, quash the decision of the First District Court of Appeal below, and approve the decisions of the Fifth District Court of Appeal in *Goldman v. Halifax Medical Center, Inc.*, and the Third District Court of Appel in *Puentes v. Tenent Hialeah Healthcare Systems.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail, this _____ day of June, 2004 to: Harvey L. Jay, III, Esq., Saalfield, Coulson, Shad & Jay, P.A., Attorneys for Petitioner, Southern Baptist Hospital of Florida, Inc., 225 Water Street, Suite 1000, Jacksonville, FL 32202 Lawrence C. Datz, Esquire, Datz & Datz, P.A., Attorneys for Respondent, 4348 Southpoint Boulevard, Suite 330, Jacksonville, FL 32116 and to Gail Leverett Parenti, Esq., Parenti, Falk, Waas, Hernandez & Cortina, P.A., Attorneys for the Florida Hospital Association, 113 Almeria Avenue, Coral Gables, FL 33134.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

_____
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