

SUPREME COURT OF FLORIDA

**SOUTHERN BAPTIST HOSPITAL
OF FLORIDA, INC.,**

Petitioner,

Case No.: SC04-380

vs.

DCA Case No.: 1D02-4894

JEFFREY W. WELKER,

Respondent.

Amended
ANSWER BRIEF ON MERITS

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STATEMENT OF CASE

Jeffrey W. Welker, Respondent, (“Welker” herein), agrees with the essential aspects of the Statement of the Case in the initial brief of Southern Baptist Hospital of Florida, Inc., (“Baptist” herein). However, additional details of the procedural history are relevant.

Welker was the plaintiff in a three count complaint against Baptist. All three counts were dismissed, with prejudice, by the trial court. In each count of the relevant amended complaint, Welker alleged that the active tortfeasor was a mental health therapist, who was an employee of Baptist. Liability was attributed to Baptist by *respondeat superior*. Count I involved negligence *per se* or negligence for violation of a statutory duty. Count II was based upon defamation. And, Count III alleged simple negligence, which was later characterized by the First District as “negligent interference with parental rights.” The instant discretionary review involves only Count III.

Baptist moved to dismiss the complaint for numerous reasons. At this stage of the appellate proceedings, three grounds are pertinent. First, Baptist argued that Welker was obliged, and failed, to comply with Section 766.106, Florida Statutes (1999), often referenced as the presuit requirements for a medical malpractice action. Second, as a result of Welker’s non-compliance with the Chapter 766 presuit

procedure, the two-year statute of limitations expired. (Welker's complaint was filed well within the four-year limitation period for general negligence actions.) Third, one element of Welker's alleged damages involved psychological or emotional injury, contrary to the impact rule, according to Baptist.

Welker appealed the dismissal of Counts I (negligence *per se*) and III (simple negligence). The First District Court of Appeal affirmed the dismissal of Count I and reversed in regard to Count III in Welker v. Southern Baptist Hospital of Florida, Inc., 864 So.2d 1178 (Fla. 1st DCA January 8, 2004) (rehearing denied February 6, 2004). In addition, also related to Count III, the First District certified a question of great public importance to this Court in relation to the application of the impact rule.

Baptist sought discretionary review based upon the certified question and upon the claim that the First District's opinion "expressly and directly conflicts with the decision of another district court of appeal." Art. V, § 3(b)(4) and (5), Fla. Const. Baptist is supported by three *amicus curiae*. The Florida Hospital Association, ("FHA" herein), and Shands Teaching Hospital and Clinics, Inc., ("Shands" herein), filed briefs relating to the applicability of Chapter 766 (Issue I on review), and the Florida Defense Lawyers Association ("FDLA" herein) filed a brief in regard to Issue II on review, which involves the impact rule.

STATEMENT OF FACTS

In its initial brief, Baptist summarizes facts. However, since the appellate proceedings arise from dismissal of Welker's amended complaint, and the parties agree that the standard of review is *de novo*, the more succinct and accurate statement of the facts are the actual allegations of Count III, which state:

Count III

26. This is an action for damages that exceed \$15,000, exclusive of interest and costs.

27. At all times pertinent hereto, the Defendant operated a business held out to the public under the name of "Psychological Associates" and represented to the public as a provider of mental health services. The business was located in Duval County, Florida.

28. At all times pertinent hereto, Valerie Brink, ("Brink" herein), was an agent or employee of the Defendant, held herself out to be a licensed mental health counselor, and worked at Psychological Associates. Further, at all times pertinent hereto, Brink acted within the scope and course of her employment by the Defendant.

29. The Plaintiff is an individual who was formerly married to Penelope

Donham, (“Donham” herein). They had two (2) minor children, namely Joshua Welker and Jessica Welker.

30. Pursuant to a final judgment dissolving the marriage between the Plaintiff and Donham, the Plaintiff had custody of their minor children. From the time that the Plaintiff and Donham dissolved their marriage until the events described below, the Plaintiff and the children maintained their primary physical residence in Arizona.

31. The children came to visit Donham in Jacksonville during the summer of 1999. While the children were visiting her, Donham engaged the services of Brink.

32. On or about July 20, 1999, Brink made a written statement in the form of a letter addressed “To Whom It May Concern” and gave the opinion that the Plaintiff’s and Donham’s minor children suffered from a mental disorder as a direct result of the Plaintiff’s misconduct. The Plaintiff’s purported misconduct included, but was not limited to, child abuse committed by the Plaintiff against his children. A copy of the letter is attached.

33. Donham used Brink’s letter to obtain an injunction against domestic violence against the Plaintiff, without advance notice to him. Because the

Plaintiff did not have advance notice of the injunction, he did not have an opportunity to defend against the allegations. The injunction denied the Plaintiff legal custody of, visitation with, and access to his children and effectively denied him the parental rights designated in the final judgment of dissolution of marriage relating to Donham and him.

34. Donham's publishing or communication of Brink's letter to third parties was reasonably foreseeable by Brink.

35. Brink made the statements in the letter without knowing whether the purported factual basis of her opinion was true, false, or unable to be validated.

36. Brink had a duty of reasonable care to investigate or validate the factual allegations of the Plaintiff's purported misconduct.

37. Brink breached her duty of reasonable care by not investigating or validating her statements.

38. As (an) approximate (result) of Brink's failure to investigate or validate the claims of the Plaintiff's misconduct, the Plaintiff was injured and damaged by incurring expenses for attorney's fees, court costs, and suit money, and by suffering mental anguish, humiliation, embarrassment, and the loss of companionship and society of his children.

WHEREFORE, the Plaintiff demands judgment for damages and trial by jury. (parenthetical expression added)

The district court of appeal included the following additional facts about the therapist's letter which was attached to the complaint:

As indicated, a copy of Brink's letter was attached to the complaint as an exhibit. Among other things, it stated that appellant's met "All . . . criteria for Post Traumatic Stress Disorder," and that "[t]he traumas which the children have experienced [we]re all directly caused by [appellant]." It also asserted Brink's opinion that "contact with [appellant] [wa]s psychologically harmful, and pose[d] a serious threat of bodily harm."

Welker's custody of his children was restored after approximately a year of post-dissolution proceedings. Welker, 864 at 1181.

Count III was dismissed by the trial court for reasons relating to the impact rule and for the Respondent's lack of compliance with the presuit screening requirements of Section 766.106, Florida Statutes (1999). Before the trial court and on appeal, the parties agreed that the two-year statute of limitations for medical malpractice actions

expired by the time the original complaint was filed. Further, the same complaint was filed well within the four-year limitation period for general negligence claims.

ARGUMENT

SUMMARY OF ARGUMENT

This discretionary review results from dismissal of a three count amended complaint and a corresponding appeal to the First District, which partly reversed the trial court's ruling. The relevant portion of the amended complaint is Count III alleging negligence by a mental health counselor employed by Baptist. The mental health counselor provided psychotherapeutic services to Welker's former wife and wrote a letter addressed to "To Whom It May Concern." The letter stated, among other things, that Welker committed child abuse against his children and that his children should not have contact with him. At the time, Welker had legal custody of his children, and their residence was in Arizona. Also at the time of the letter, the children were visiting Welker's former wife in Jacksonville. Welker's former wife used the letter to obtain an injunction against domestic violence and to deprive Welker of custody and contact with his children for approximately one year. The contents of the

letter, according to the complaint, were neither investigated, validated, nor true. Based upon *respondeat superior*, Welker sued Baptist for its employee's negligence.

In Issue I, Baptist contends that, because it is a "health care provider" under the medical malpractice chapter, Welker was obligated to satisfy statutory presuit requirements for a medical malpractice action. The parties agree that Welker did not attempt to meet the presuit requirements of Chapter 766. If the medical malpractice statutes apply to Count III of the amended complaint, the two-year statute of limitations expired, and Welker's claim is barred. To the contrary, Welker maintains that the allegations of the complaint do not constitute a claim for medical malpractice, and his claim is therefore not subject to Chapter 766, including the presuit requirements.

FHA and Shands submitted *amicus curiae* briefs supporting Baptist on Issue I. Shands's argument is virtually identical to Baptist's argument. Without genuine authority, FHA contends that "medical" is the equivalent of "mental health" in the rendering of care or services and ought to cause Count III to be deemed a medical malpractice action. FHA never offers a legal or logical connection between "medical" and "mental health" services.

The allegations of the Count III state a cause of action for simple or ordinary negligence, not medical malpractice. Section 766.102, Florida Statutes (1999), has two

essential elements. First, the tortfeasor must be a “health care provider” from an enumerated list. Although Welker’s argument differed subtly and slightly, the First District concluded that medical malpractice under the statute can only be committed if the active tortfeasor was a designated health care provider. Since the active tortfeasor was a mental health counselor, Chapter 766 does not apply.

The second element involves the alleged conduct which, under the statute, necessarily must constitute medical malpractice. The statutory definition of medical malpractice states that the wrongful conduct must arise “out of the rendering of, or failure to render, medical care or services.” The letter written by the mental health counselor simply did not involve medical care or services. Thus, regardless of whether a statutorily designated health care provider can be vicariously liable for the medical malpractice of its non-designated employee, Chapter 766 does not apply to claims where the active tortfeasor’s conduct does not constitute medical malpractice. The conduct described in Welker’s complaint does not amount to medical malpractice. Further, since the broader application of Chapter 766 would result in a shorter, and expired, statute of limitations, the statute should be strictly construed, leading to the conclusion that neither the mental health counselor’s lack of status as a health care provider nor her conduct in writing the wrongful letter should be deemed to meet the statutory criteria of Section 766.102, Florida Statutes (1999).

In Issue II, Baptist also argues that, to the extent Welker seeks damages for mental anguish, the claim is barred by the impact rule. (By Baptist's phrasing of the issue on review, Baptist appears to pursue a complete bar to the claim even though mental anguish is but one element of the damages alleged in the amended complaint.) According to opinions of this Court, applicability of the impact rule must be decided on a case-by-case basis. The instant case has a number of characteristics supporting inapplicability of the rule. A plaintiff in Welker's position is unlikely to ever suffer a physical impact from the deprivation of parental rights. Emotional injury from such a deprivation of is clearly foreseeable. And, causation is a natural consequence of the deprivation and, consequently, is unlikely to be fraudulent or speculative.

Standard of Review

Welker agrees that the standard of review for the merits of this discretionary appellate review is *de novo*. Martinez v. Florida Power & Light Company, 863 So.2d 1204 (Fla. 2003); Florida Department of Health and Rehabilitative Services v. S.A.P., 835 So.2d 1091 (Fla. 2002).

ISSUE I

THE DISTRICT COURT ERRED IN DENYING BAPTIST THE BENEFIT OF CHAPTER 766 WHEN BAPTIST, A CHAPTER 766 HEALTH CARE PROVIDER, WAS ALLEGED TO BE VICARIOUSLY LIABLE FOR THE HEALTH CARE ACTIONS OF BRINK, A MENTAL HEALTH COUNSELOR EMPLOYED BY BAPTIST

The primary issue is what distinguishes statutory medical malpractice from general negligence. If the allegations of Count III amount to a claim for medical malpractice under Chapter 766, Welker undoubtedly had a duty to comply with the presuit screening requirements. Conversely, since Count III does not allege medical malpractice under Chapter 766, presuit screening was not required. Of course, Welker urges this Court to determine that the allegations of Count III state a claim for a non-medical-malpractice cause of action for negligence, as did the First District, whose

decision should be affirmed.

By the plain language of Chapter 766, two mutually dependent, critical elements constitute a statutory claim for medical malpractice. First, the claim must be made against a statutorily defined “health care provider.” §766.102, Fla. Stat. (1999). Second, the allegations of the complaint must also constitute a claim for “medical malpractice.” According to the plain language of the statute, “medical malpractice” involves “medical care or services.” §766.106(1)(a), Fla. Stat. (1999). The precise language of the 1999 statutes state:

Section 766.102, Medical negligence; standards of recovery

(1) 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 the health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of the evidence that the alleged actions of the healthcare provider represented a breach of the prevailing professional standard of care for that health care provider. . . .

* * * *

766.106. Notice before filing action for medical malpractice; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review

(1) As used in this section:

(a) “Claim for medical malpractice” means a claim arising out of, or the failure to render, medical care or services.

* * * *

The statute does not distinguish between direct or vicarious liability for a health care provider. (To the extent that these statutes were amended since 1999, the language in question is unchanged, and the issues on appeal apply to the current version of the statutes.)

This issue on appeal also bears a significant legal relationship with the statute of limitations. J.B. v. Sacred Heart Hospital of Pensacola, 635 So.2d 945 (Fla. 1994).

Although the First District cited this opinion for other reasons, the implications with regard to the statute of limitations are strikingly similar. This Court’s opinion began:

We have for review two certified questions from the federal circuit court (footnote omitted) that are determinative of a cause pending before that court

and for which there appears to be no controlling precedent:

1. Does a complaint which alleges injuries to the brother of a hospital patient allegedly arising out of the defendant hospital's failure to warn the plaintiff brother of the patient's infectious disease, failure to properly instruct the plaintiff regarding transportation of the patient, and negligently using the non-patient brother as a transporter of the patient fall within Fla. Stat. §95.11(4)(b), the two-year statute of limitations for medical malpractice actions?

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The key inquiry under the statute is whether the action "Aris[es] out of any medical, dental, or surgical diagnosis, treatment, or care." *If there is doubt as to the applicability of such a statute, the question is generally resolved in favor the claimant.* Baskerville-Donovan Eng'rs, Inc. v. Pensacola Executive House Condominium Ass'n, Inc., 581 So.2d 1301, 1303 (Fla. 1991) ["Where a statute of limitations shortens the existing period of time the statute is generally construed strictly, and where there is reasonable doubt as to legislative intent, the preference is to allow the longer period of time."]. *Id.* 947-948 (italics added)

Thus, Chapter 766 should be strictly construed.

Welker, Baptist, and the First District all have assumed diverse approaches to this issue on appeal. Baptist concentrates on the first element which is its status as a health care provider rather than confronting the conduct of the active tortfeasor, which is the second element. As *amicus curiae*, Shands's argument is identical to that of Baptist. The gravamen of Baptist's position is that, because Baptist is a statutorily defined health care provider, Welker was required to comply with Section 766.106, Florida Statutes (1999). This argument ignores the second element of conduct and would judicially expand Chapter 766 to include all forms of negligence claims against a health care provider. Baptist's argument contradicts the plain language of Section 766.102, Florida Statutes (1999).

Baptist advocates extremely broad application of Chapter 766, Florida Statutes (1999). Essentially, Baptist proposes to expand the clear terms of the statute requiring a Chapter 766 claimant to prove "by the greater weight of the evidence that the alleged actions of the healthcare provider represented a breach of the prevailing professional standard of care for that health care provider." Moreover, and perhaps more importantly, the application of Baptist argument leads to an absurd result. Specifically, any person or entity advancing a negligence claim against a health care provider would be required to submit to the presuit screening process. For example, if a hospital's

motor vehicle were involved in a traffic accident which was the hospital employee's fault, the accident victim would be required to comply with Chapter 766. Or, if a person (not necessarily a patient) slipped and fell due to a hospital's negligence, the same reasoning might apply and be applicable to all negligent torts, an outcome hardly contemplated by the legislature in its attempt to restrict medical malpractice actions.

Welker emphasizes that he did not sue Baptist for medical malpractice. Instead, Welker alleged that Baptist's non-healthcare-provider employee, who was a mental health counselor, negligently issued a letter, addressed a letter "To Whom It May Concern," and proclaimed as a matter of purported fact that Welker engaged in criminal conduct (child abuse) and, consequently, should not have contact with his children. Just as importantly, Welker neither engaged nor received any services from the employee but was injured or damaged as a result of the letter that was used by his former wife to obtain a domestic violence injunction depriving Welker of contact with and custody of his children.

At least on the surface, Baptist is asserting that all claimants who would sue a hospital for negligence should be burdened with the presuit requirements of Sections 766.102, 104, and 106, Florida Statutes (1999), simply because a claim is advanced against a "health care provider," regardless of the alleged conduct. The proposed expansion of the statute would eviscerate reasonable distinctions between medical and

non-medical negligence, not to mention invade the province of the legislature. *See Conner v. Southwest Florida Regional Medical Center, Inc.*, 668 So.2d 175 (Fla. 1996) and *Shands Teaching Hospital and Clinics, Inc. v. Smith*, 497 So.2d 644 (Fla. 1986). Further, expansion of the statute would cause virtually all actions against statutory health care providers, particularly hospitals, to be restricted by the terms of Chapter 766 not only in the burdens of presuit requirements, but also by shortening the statute of limitations for ordinary negligence claims from four years to two years. §95.11(3)(a) and (4)(a), Fla. Stat. (2003).

The First District's approach narrowly construed Section 766.106, Florida Statutes (1999), holding that conduct arising "out of the rendering of, or the failure to render medical care or services" can only be committed by a statutorily defined "health care provider." According to this approach, Chapter 766 does not apply to Baptist because its agent or employee (Brink the mental health counselor) was not a statutorily defined health care provider and, therefore, could not commit medical malpractice.

Before the trial court and the First District, Welker maintained that the determinative issue was not whether Baptist could be vicariously liable for the actions of its non-health-care-provider agents or employees, but rather whether the alleged conduct arose from "the rendering of, or the failure to render medical care or services." The First District's approach was similar yet distinguishable. Welker

argued that the analysis of the health-care-provider element is unnecessary because, by any reasonable assessment of the Count III allegations, the representations of fact and the opinion of the mental health counselor do not involve “medical care or services.” According the First District’s opinion, only a statutory health care provider can render medical care or services. Thus, for Baptist to be vicariously liable for the medical malpractice of its agents or employees, the active tortfeasor must also be a statutory health care provider.

In relation to the briefs of the *amicus curiae*, FHA acknowledges the two-element approach but contends that the representations of fact and the opinion of the mental health counselor equate to medical care or services. This argument lacks statutory or case law authority, much less logic, to demonstrate that the term “medical” means “mental health.”

The First District addressed both elements of the statutory cause of action, acknowledged Baptist’s argument, and wrote, “Appellee (Baptist) contends that, because it is a ‘health care provider’ as defined in chapter 766, Florida Statutes (1999), appellant (Welker) was required to comply with the presuit screening requirements of section 766.106 before filing the claim alleged in count III.” Welker, 864 So.2d at 1183. (Parenthetical identifications added.) Following a lengthy analysis which rejected the argument, the lower court concluded, “We can find no language in chapter

766 to suggest that the appellee 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 1184 (italics added)

Writing for the First District, Judge Webster suggests that the statutory definition of medical malpractice limits the cause of action to a “health care provider” who is the active tortfeasor. He explained:

In the first place, a claim is one for medical negligence for purposes of s.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).” Integrated Healthcare Servs., Inc. v. Lang-Redway, 840 So.2d 974, 980 (Fla. 2002). Accord Broadway v. Bay Hosp., Inc., 638 So.2d 176 (Fla. 1st DCA 1994). According to Section 766.102 (1), a plaintiff must carry such a burden to recover only if “death or injury resulted from the negligence of a healthcare provider as defined in s. 768.50(2)(b). §766.102(1), Fla. Stat. (1999). Although Section 768.50(2)(b) was repealed in 1986, our supreme court has held that we must look to the language of that statute at the time of its original enactment in 1977 to

determine what “healthcare providers” are entitled to rely on the provisions of Chapter 766, including Section 766.106. Integrated Health Care Servs., 840 So.2d at 978-79. In Integrated Healthcare Servs., the court said that such “healthcare providers” include only:

hospitals, physicians, podiatrists, dentists, chiropractors, naturopaths, nurses, clinical laboratories, physicians’ assistants, physical therapists and physical therapist’s assistants, health maintenance organizations, and associations for professional activity by healthcare providers, as well as certain ambulatory surgical centers, blood banks, plasma centers, industrial clinics, and renal dialysis facilities.

Id. at 979. Mental health counselors, such as Brink (the active tortfeasor herein), are not included. Therefore, logic dictates that a claim for negligence based on actions or inactions by Brink is not a “[c]laim for medical malpractice” as that term is used in section 766.106. Because such a claim is not one for medical malpractice, by the express language of section 766.106, it is not that section’s presuit screening requirements. See generally Weinstock v. Groth, 629 So.2d 835 (Fla. 1993) (holding that, because psychologists were not included in the list of healthcare providers set forth

in section 768.50(2)(b), the plaintiff did not have to comply with the presuit requirements of section 766.106 before filing an action against a psychologist). Welker, 864 So.2d at 1183-1184.

The First District's reasoning is buttressed by the statutory construction principle of *expressio unius est exclusio alterius*. Young v. Progressive Southeastern Ins. Co., 753 So.2d 80, 85 (Fla. 2000). By exclusion, the legislature did not intend to include a profession or entity which was not enumerated.

Welker recognizes that the First District's logic is compelling. However, analysis of the "medical care or services" element is just as compelling. By the plain language of the statute, when Brink wrote the letter which underlies these proceedings, Brink was not engaged in "the rendering of, or the failure to render medical care or services."

Numerous cases hold, as did the First District in the instant case, that the presuit requirements do not apply to statutory health care providers who engage in negligent conduct other than medical malpractice. J. B. v. Sacred Heart Hospital of Pensacola, 635 So.2d 945 (Fla. 1994) (failure to warn of infectious disease or give proper instructions *to a third party* for transportation of the patient); Lake Shore Hospital, Inc. v. Clarke, 768 So.2d 1251 (Fla. 1st DCA 2000) (slip and fall); Champion v. Cox, 689 So.2d 365 (Fla. 1st DCA 1997) (defamation); Robinson v. West Florida Regional

Medical Center, 675 So.2d 226 (Fla. 1st DCA 1996) (adequate security at psychiatric facility); Broadway v. Bay Hospital, Inc., 638 So.2d 176 (Fla. 1st DCA 1994) (failure to warn of a dangerous condition or properly maintain a piece of equipment); Bell v. Indian River Memorial Hospital, 778 So.2d 103 (Fla. 4th DCA 2001) (improper disposal of infant's remains); Lynn v. Mount Sinai Medical Center, Inc., 692 So.2d 1002 (Fla. 3rd DCA 1997) (collection of urine samples); Forshee v. Health Management Associates, 675 So.2d 957 (Fla. 5th DCA 1996) (civil-rights violation, false imprisonment, and intentional infliction of mental distress); Pfeiffer v. Galen of Florida, Inc., 685 So.2d 882 (Fla. 2nd DCA 1996) (“ordinary or simple negligence rather than claims of medical malpractice”); Lyles v. P.I.A. Medfield, Inc., 681 So.2d 711 (Fla. 2nd DCA 1995) (failure to comply with involuntary commitment provision of the Baker Act); Palm Springs General Hospital, Inc. v. Perez, 661 So.2d 1222 (Fla. 3rd DCA 1995) (homosexual attack).

In Goldman v. Halifax Medical Center, Inc., 662 So.2d 367 (Fla. 5th DCA 1995), the Fifth District affirmed the trial court's dismissal of Goldman's claim based on the conduct of Halifax's non-health care provider employee “during the course of providing medical treatment.” The Fifth District wrote:

The issue is whether a plaintiff suing a hospital, defined in the chapter as

a health care provider, must comply with the presuit requirements of the chapter when acts of alleged negligence are performed by an employee of the hospital during the course of providing medical treatment but where the employee who provided the care is not defined in the chapter as a “health care provider.” We hold that the notice requirements are applicable and affirm the dismissal.

The gravamen of Goldman’s complaint is that Halifax’s operator of mammagraphic equipment, a radiologic technologist, negligently applied excessive pressure and caused one of her silicone breast implants to rupture. She also alleged that her injury was caused in part by the equipment not having been properly calibrated.

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. . . . [B]ecause the named defendant, Halifax, is a health care provider, *and because it is alleged that Goldman was injured by a Halifax employee during the course of treatment for her health*, there is no question in our minds that the presuit requirements of Chapter 766 had to be met. (italics added)

Essentially, the Fifth District found that the mutually dependent elements were present.

Halifax was a statutorily designated health care provider and subject to vicarious liability through its employee. Distinguished from the instant case, the employee's conduct occurred "during the course of providing medical treatment."

Baptist misplaces reliance on two cases, Pate v. Threlkel, 661 So.2d 278 (Fla. 1995) and Walker v. Virginia Insurance Reciprocal, 842 So.2d 804 (Fla. 2003). Pate is cited for the proposition that ". . . this Court specifically recognized that Chapter 766 applies to non-patient claims against physicians." Initial Brief at 18. Nonetheless, the non-patient claim was by a child of a patient who was not warned about a genetically transferable disease which was treatable if detected early. The distinguishing fact is that Pate sued her mother's doctor for medical malpractice. Thus, whether Pate pled the requisite elements of a statutory medical malpractice action was neither in dispute nor the subject of the appellate opinion. Pate simply does not stand for the proposition cited.

Walker is distinguishable because it was a medical malpractice action brought by an insurance company for contribution. Dr. Walker was one of two alleged tortfeasors in a separate medical malpractice claim. Virginia Insurance Reciprocal, Inc., settled with the other tortfeasor and sued Dr. Walker for contribution. To prove its right to contribution, the insurance company had to prove the underlying medical malpractice claim against Dr. Walker. Apparently, Baptist cites Walker to support applicability of

Chapter 766 to cases where a medical malpractice claimant was not the health care provider's patient. Still, Chapter 766 was applicable since the underlying tort was medical malpractice. Because the underlying tort against Baptist is not medical malpractice, Walker is irrelevant.

In the case *sub judice*, regardless of whether Baptist is a statutorily designated health care provider who can be vicariously liable for the negligence of its agents and employees, Welker's claim "does not arise 'out of rendering of, or the failure to render, medical care or services' to appellant." Welker, 864 So.2d at 1184-1185. Instead, the claim arose from non-medical services, that is a negligent misrepresentation of facts and statement of a psychological opinion. Moreover, the services were not rendered for or on behalf of Welker, but he was a reasonably foreseeable victim of the negligence.

As a matter of statutory construction, Section 766.106(1)(a), Florida Statutes, (1999), is clear and unambiguous. Consequently, the language should be accorded its plain and ordinary meaning. Further, because a broad construction of the statute would adversely affect the statute of limitations, the statute should be strictly construed. Applicability of Chapter 766 should be limited to medical malpractice actions. The allegations of Count III of Welker's amended complaint do not constitute a claim for medical malpractice and, therefore, did not require Welker's

compliance with Section 766.106, Florida Statutes (1999).

ISSUE II

CONTRARY TO THE DISTRICT COURT'S DECISION COUNT III OF WELKER'S AMENDED COMPLAINT IS BARRED BY FLORIDA'S IMPACT RULE

Baptist complains that the First District “created a special exception to the Impact Rule.” Baptist relies primarily on R. J. v. Humana of Florida, Inc., 652 So.2d (Fla. 1995) to support its argument but fails to address the significant body of post-1995 case law from this Court. Those subsequent cases were an important part of Welker’s argument before the lower appellate court and were relied upon by the First District to support its well reasoned opinion.

As an *amicus curiae*, FDLA argues against exception to the impact rule but fails to address the characteristics warranting the exception. Those characteristics were observed and part of the First District’s justification to allow the exception in the instant case. In large part, FDLA claims that an exception to the impact rule should not exist because an underlying cause of action is not cognizable. This argument fails to address myriad points made by all other parties under Issue I, not to mention the First District’s recognition of Count III as stating a cause of action and specifically

one for negligence, albeit not for medical malpractice.

As for the idea that Welker was harmed by the domestic violence laws instead of the counselor's negligence, FDLA's reasoning is mere obfuscation. FDLA fails to address the fact that the counselor's letter was the evidence used to obtain the injunction against domestic violence, without notice. Further, the notion that the injunction was readily dissolvable is false since the domestic violence action was joined with the post-dissolution proceedings. As alleged in the amended complaint, however, the post-dissolution proceedings eventually resulted in the children being returned to Welker.

Finally, with regard to FDLA's arguments, the *amicus curiae* raises the purported flood of litigation as a reason to deny an exception to the impact rule. As will be explained in the following paragraphs, a flood of litigation doubtful.

This issue on appeal arises from Welker's claim, among other elements of damages, for "mental anguish." By judicially fashioned exceptions, the impact rule is eroding. One common theme, perhaps, among cases constituting exceptions to the impact rule are actions in which a plaintiff is unlikely to ever suffer a physical impact. Finding other common characteristics among the exceptions, the First District observed:

There exist common threads in all of the foregoing cases in which the court established exceptions to the impact rule. In all, the likelihood of emotional injury was clearly foreseeable; the emotional injury was likely to be significant; the issue of causation was relatively straightforward; and it was unlikely that creating an exception to the rule would result in a flood of fictitious or speculative claims. We believe that count III of appellant's amended complaint likewise meets all of these criteria. Welker, 864 So.2d at 1187.

In the case on review, Welker alleged that Baptist's negligence proximately caused a foreseeable interference with Welker's parental rights. The interference with parental rights, specifically the deprivation of child custody and contact for approximately one year, is the type of tort unlikely to involve a physical impact.

This Court recently explained the concept, derivation, and erosion of Florida's impact rule in Hagan v. Coca-Cola Bottling Co., 804 So. 2d 1234, 1236-1239 (Fla. 2001). The Court offered the following analysis:

We begin by acknowledging that although many states have abolished the "impact rule," several states, including Florida, still adhere to the rule. (footnote omitted) This Court, while acknowledging exceptions, has

accepted the impact rule as a limitation on certain claims as a means for “assuring the validity of claims for emotional or psychic damages.” *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360, 363 (Fla. 1995); *Accord Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995); *Gonzalez v. Metropolitan Dade County Public Health Trust*, 651 So. 2d 673, 674 (Fla. 1995); *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974). Generally stated, the impact rule requires that before a plaintiff may recover damages for emotional distress, she must demonstrate that the emotional stress suffered flowed from injuries sustained in an impact. *See R.J.*, 652 So. 2d at 362. Notwithstanding our adherence to the rule, this Court has noted several instances where the impact rule should not preclude an otherwise viable claim. For example, this Court modified the impact rule in bystander cases by excusing the lack of a physical impact. In such cases, recovery for emotional distress would be permitted where one person suffers “death or significant discernable physical injury when caused by psychological trauma resulting from a negative injury imposed on a close family member within the sensory perception of the physically injured person. *Champion v. Gray*, 478 So. 2d 17, 18 (Fla. 1985); *see also Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995); (reaffirming rule in bystander cases but rejecting temporal proximity

requirement) We also have held that the impact rule does not apply for claims of intentional infliction of emotional distress, *see Eastern Airlines v. King*, 557 So. 2d 574 (Fla. 1990), wrongful birth, *see Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992), negligence claims involving still birth, *see Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997), and bad faith claims against an insurance carrier, *see Times Ins. Co. v. Burger*, 712 So. 2d 389 (Fla. 1988).

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On review (of a stillbirth case,) , this Court recognized that “the primary obstacle in Florida to a cause of action for ‘negligent still birth’ is the application of the impact rule.” *Id.* at 707. In our analysis, however, we compared the case to a case involving wrongful birth wherein we had held that the impact rule does not apply. *See id.* at 708. (citing *Kush v. Lloyd*, 616 So. 2d 414 (Fla. 1992)). In *Kush v. Lloyd*, we explained:

However, we are not certain that the impact doctrine ever was intended to be applied to a tort such as wrongful birth. Prosser and Keeton state that the impact doctrine should not be applied where emotional damages are an additional “parasitic” consequence of conduct that itself is a freestanding tort apart from any emotional injury. W. Page Keeton et al., *Prosser and Keeton on the Law of*

Torts. § 54, at 361-65 (5th ed. 1984). The American Law Institute is in general accord. Restatement (Second) of Torts §47 & §47 cmt. b (1965). Obviously, the Lloyds have a claim for wrongful birth even if no emotional injuries had been alleged.

Similarly, the impact doctrine also generally is inapplicable to recognized torts in which damages often are predominately emotional, such as defamation or invasion of privacy. Restatement (Second) of Torts §§ 569, 570, 652H cmt. b (1977). This conclusion is entirely consistent with existing Florida law. For example, it is well settled that mental suffering constitutes recoverable damages in cases of negligent defamation, *e.g.*, *Miami Herald Publishing Company v. Brown*, 66 So. 2d 679, 681 (Fla. 1953), or invasion of privacy. *See Cason v. Baskin*, 155 Fla. 198, 20 So. 2nd 243 (1944). *Accord* Restatement (Second) of Torts §§ 569, 570, 652 H, cmt. b (1977). If emotional damages are ascertainable in these contexts, then they are also ascertainable here.

619 So. 2d at 422, *quoted in Tanner*, 696 So. 2d at 708. In keeping with this reasoning and logic, we held in *Tanner*:

We recognize that there is a legitimate legal argument which can be directed against any particular theory upon which a recovery in the instant case might be predicated and that the law does not provide a remedy for every wrong. Yet, it is difficult to justify the outright denial of a claim for mental pain and anguish which is so likely to be experienced by parents as a result of the birth of a stillborn child caused by the negligence of another. As a natural evolution of the common law, we conclude, as in *Kush*, that public policy dictates that an action by the parents for negligent stillbirth be recognized in Florida.

696 So. 2d at 708. To further explain our holding we also noted Justice Alderman's comment in *Champion v. Gray*, on the need for flexibility in the application of the impact rule:

We today modify to a limited extent our previous holdings on the impact doctrine. In doing so, however, we are unable to establish a rigid hard and fast rule that would set the parameters for recovery for psychic trauma in every case that may arise. The outer limits of this cause of action will be established by the courts of this state in the traditional manner of the common law on a case-by-case basis.

Tanner, 696 So. 2d at 708 n. 5 (quoting *Champion v. Gray*, 478 So. 2d 17, 21-22 (Fla. 1985) (Alderman, J., concurring specially)).

More recently, this Court further receded from the impact rule in *Gracey v. Eaker*, 837 So.2d 348 (Fla. 2002), which involved a breach of confidentiality by a mental health professional. Reversing a dismissal by the trial court, this Court held that breach of the fiduciary relationship of confidentiality with a psychotherapist was an actionable exception to the impact rule.

In the instant appeal, Baptist employed a licensed mental health counselor who provided services to Welker's former wife. The mental health counselor wrote a letter "To Whom It May Concern" affirmatively stating that Welker abused his children and should not have contact with them. By way of Count III, Welker alleged that dissemination of the letter was a reasonably foreseeable consequence which enabled Welker's former wife to procure an injunction against domestic violence depriving Welker of the previously ordered custody of his children. Undoubtedly, these events are highly unlikely to involve a physical impact because the wrong involves an interference of rights rather than physical injury.

The history of the impact rule indicates that its original purpose was to prevent fraudulent claims of emotional distress. Thus, the claimant was required to prove the

physical impact or a physically measurable manifestation of an emotional injury. These principles are hardly applicable to torts involving a negligent interference with rights. Consistent with this Court's opinions of the last several years, deprivation of physical presence, communication, all other attributes of child custodial rights and benefits with one's children is virtually necessary consequence of the depriving act and, consequently, unlikely to be based upon fraudulent or speculative claims. Thus, the impact rule should not apply to Count III to the extent that Welker seeks compensatory damages for "mental anguish." In relation to the First District's opinion on appeal herein, and consistent with the case law of this Court, the lower court merely established an "outer limit . . . in the traditional manner of the common law on a case-by-case basis."

CONCLUSION

Respondent, Jeffrey W. Welker, respectfully requests the court either to decline to exercise its discretionary review or to approve the decision of the First District Court of Appeal herein.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was computer-generated and conforms to the requirements for computer-generated briefs, in accordance with Rule 9.210, Florida Rules of Appellate procedure.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was furnished to Harvey L. Jay, III,

Esquire, of Saalfield, Coulson, Shad & Jay, P.A. 225 Water Street, Suite 1000, Jacksonville, Florida 32202-4458, William A. Bell, General Counsel of Florida Hospital Association, 306 East College Avenue, Tallahassee, Florida 32301, Gail Leverett Parenti of Parenti, Falk, Waas, Hernandez & Cortina, P.A., 113 Almeria Avenue, Coral Gables, Florida 33134, Ronald L. Harrop, of Gurney & Handley, P.A., Post Office Box 1273, Orlando, Florida 32802-1273, and Rebecca O'Dell Townsend, of Haas, Dutton, Blackburn, Lewis & Longley, P.L., 1901 North 13th Street, Suite 300, Tampa, Florida 33605, by United States First Class Mail, this 7th day of July, 2004.

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