IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-380

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 ON THE MERITS
OF SOUTHERN BAPTIST HOSPITAL OF FLORIDA, INC.

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PRELIMINARY STATEMENT

In this Brief on the Merits, the Petitioner, Southern Baptist Hospital of Florida, Inc., is referred to as "Baptist". The Respondent, Jeffrey W. Welker, is referred to as "Welker". Baptist's mental health counselor, Ms. Valerie Brink, is referred to as "Brink". References to the record on appeal are designated as (R.___). Citations to the attached Appendix are referred to as (A.____).

STATEMENT OF THE CASE

This is an appeal from the First District's decision in Welker v. Southern Baptist Hosp. of Florida, Inc., 864 So.2d 1178 (Fla. 1st DCA 2004). In Welker, the First District affirmed the trial court's dismissal of Counts I and II of Welker's three count Amended Complaint. However, as to Count III, the First District reversed the trial court's dismissal finding that Welker's claim did not fall within the medical negligence provisions of Chapter 766 of the Florida Statutes. In doing so, the First District noted conflict with the Fifth District's decision in Goldman v. Halifax Medical Center, Inc., 662 So.2d 367 (Fla. 5th DCA 1995). Goldman had previously held that hospitals are entitled to the benefits of Section 766.106 when hospitals are alleged to be vicariously responsible for employees whose actions fall within the parameters of Section 766.106(1), Fla. Stat. (1999).

After finding that Chapter 766 did not apply to Count III of Welker's Amended Complaint, the First District created a special exception for Welker's emotional damages claim under Florida's Impact Rule. In doing so, the First District certified the following question as being a question of great public importance:

> DOES FLORIDA'S IMPACT RULE PRECLUDE THE RECOVERY OF DAMAGES FOR EMOTIONAL INJURIES FOR A NEGLIGENCE CASE ALLEGING THAT DEFENDANT'S ACTIONS WRONGFULLY CAUSED THE PLAINTIFF TO LOSE CUSTODY

OF HIS CHILDREN AND ALL OTHER PARENTAL RIGHTS FOR A SIGNIFICANT PERIOD?

Baptist asks this Court to overturn the First District's reversal of the trial court's dismissal of Count III.

STATEMENT OF FACTS

As set forth above, Welker's Amended Complaint contained three counts against Baptist. (R. 19-28). Because the trial court's dismissal of Count II was conceded by Welker and because the dismissal of Count I was not appealed, Count III is the only count currently before this Court.

Count III asserted a negligence claim against Baptist for the actions of its employee, Valerie Brink. (R. 19-28).[1] The Amended Complaint alleged that Brink was a licensed mental health counselor who was acting within the course and scope of her employment for Baptist. (R. 19-28). The Amended Complaint also alleged that Brink was a licensed mental health counselor. (R. 19-28).

Further, the Amended Complaint alleged that in the Summer of 1999, Welker's children visited Welker's ex-wife, Penelope Donham (hereinafter "Donham"). (R. 19-28). While the children were visiting Donham, Donham engaged Brink's services to evaluate the children. (R. 19-28).

After evaluating the children, Brink set forth her clinical conclusions concerning Welker's children in a "To Whom It May Concern" letter. (R. 19-28).[2] In this letter, Brink referenced her evaluation of the children and summarized her clinical diagnosis

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[1]It is undisputed that no individual claims were ever brought against Brink.

[2]The letter was attached as an exhibit to Welker's Amended Complaint.

by noting that the children met "all DSMIV criteria for Post-Traumatic Stress Disorder". (R. 19-28). In reaching this diagnosis, Brink expressed her "clinical opinion" that contact with Welker was "psychologically harmful" to the children and also posed a serious threat of bodily harm to the children. (R. 19-28).

Additionally, Welker alleged that after the letter was generated by Brink, Donham used the letter to obtain an injunction against domestic violence against Welker. (R. 19-28). Welker claimed that the injunction denied Welker legal custody and access to his children and denied him the parental rights granted in the Final Judgment of Dissolution of Marriage. (R. 19-28).

Ultimately, by consolidating the injunction case with an enforcement proceeding related to the dissolution of marriage judgment, the injunction was dissolved. (R. 19-28). According to the Amended Complaint, the children were then returned to Welker. (R. 19-28).

Based on these allegations, Welker brought three counts against Baptist in his Amended Complaint: a claim for a statutory violation under Section 39.201 of the Florida Statutes (Count I); a claim for Brink's alleged "false and defamatory" statements (Count II); and a negligence claim for Brink's alleged failure to exercise reasonable care (Count III). (R. 19-28). Based on these alleged torts, Welker claimed that he had been "injured and damaged by interference with [his] parental rights,

incurring expenses for attorney's fees, court costs and suit monies and by suffering mental anguish, humiliation, embarrassment and the loss of companionship and society of his children". (R. 19-28).

Baptist moved to dismiss all three counts of Welker's Amended Complaint. As to Count I, Baptist contended that Section 39.201 did not create a civil cause of action against Baptist. (R. 29-32). As to Count II, Baptist contended (among other arguments) that Welker's claim was barred by the applicable Statute of Limitations. (R. 29-32). Finally, as to Count III, Baptist alleged that Welker's negligence claim was barred by Welker's failure to comply with the presuit screening requirements of Sections 766.106 and 766.203 of the Florida Statutes (1999). (R. 29-32). Similarly, Baptist alleged that even if the claim was not barred by the presuit provisions of Chapter 766, Count III was barred by Florida's Impact Rule because Welker did not suffer any physical injuries and had not been involved in a physical impact related to his alleged emotional injuries. (R. 29-32).

After these issues were argued to the trial court, the trial court dismissed all three counts of the Amended Complaint, with prejudice. At the hearing on the Motion to Dismiss, Welker never requested leave to amend the allegations of any of the counts of his Amended Complaint. (Record on Appeal).

Importantly, at all stages of this litigation, Welker has fully admitted that Baptist is a statutory "health care provider" under the provisions of Chapter 766 of the Florida Statutes (1999). Also, at all times material to the Amended Complaint, it is undisputed that Brink was a Baptist employee acting within the course and scope of her employment as a mental health counselor. (R. 19-28). Similarly, if Chapter 766 applies to Welker's claim in Count III, it is undisputed that this claim is barred by the Medical Malpractice Statute of Limitations because Welker never complied with the presuit requirements of Chapter 766. (Record on Appeal).

As to the Impact Rule issues, it is undisputed that Welker did not suffer any bodily impact, physical injury, or physical illness related to any of the alleged actions referenced in Count III of the Amended Complaint. (R. 19-28). Also, it is undisputed that Welker's alleged emotional distress and other intangible damages do not flow from any physical impact to Welker. (R. 19-28).

SUMMARY OF THE ARGUMENT

Because Baptist is a Chapter 766 "health care provider", which was providing mental health services through its employee, Brink, the District Court erred in denying Baptist the protections of Chapter 766 of the Florida Statutes. By concentrating on the fact that Brink's individual occupation is not included in the statutory definitions of a "health care provider", the District Court erroneously denied Baptist its statutory entitlement to the benefits of Chapter 766 as a Chapter 395 hospital. Similarly, because Welker's claim against Baptist is predicated on the alleged inaccuracies of the clinical conclusions in Brink's letter, Welker's claim arises from "the rendering of, or failure to render, medical care or services". Fla. Stat. §766.106(1)(a) (1999).

Additionally, the District Court misinterpreted the decision in J.B. v. Sacred Heart Hosp. of Pensacola, 635 So.2d 945 (Fla. 1994), as prohibiting the application of Chapter 766 to claims where the plaintiff is not a patient of the health care provider. More recent Supreme Court cases, as well as the medical malpractice cases under Florida's Wrongful Death Act, establish that Chapter 766 does apply to cases where the plaintiff was not the patient of the health care provider if those claims otherwise arise from medical care or services.

Further, the District Court erred in creating a special exception to Florida's Impact Rule for the facts alleged in Count III of Welker's Amended Complaint.

Under established Supreme Court precedent, unless a recognized exception exists, a plaintiff must suffer a physical impact before the plaintiff can recover for emotional distress caused by another's negligence. Here, it is undisputed that Welker did not suffer any physical impact or physical injuries related to Brink's alleged negligence in this case.

STANDARD OF REVIEW

Because the determination of whether a complaint sufficiently states a cause of action involves an issue of law, an order granting a motion to dismiss a complaint is reviewable on appeal by the de novo standard of review. Sobi v. Fairfield Resorts, Inc., 846 So.2d 1204 (Fla. 5th DCA 2003).

ARGUMENT

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

A. Introduction

Because Baptist is a Chapter 766 "health care provider" which is alleged to be vicariously liable for a tort arising from Brink's mental health services to Welker's children, the District Court improperly denied Baptist the protections of Chapter 766. By focusing on Brink's exclusion from the list of "health care providers" referenced in Section 768.50(2)(b), the District Court overlooked the benefits afforded Baptist as a health care provider under Sections 766.106 and 766.203 of the Florida Statutes (1999). While Baptist admits that Brink was not personally entitled to **individual** protection under Chapter 766, Welker chose to sue Baptist for damages which emanated from Brink's health care services. Because the services were provided while Brink was within the course and scope of her Baptist employment, Welker was required to follow the presuit provisions of Chapter 766 before filing suit.

B. Established Law Concerning Chapter 766 Requirements

Chapter 766 of the Florida Statutes establishes a complex investigative protocol which must be followed before a plaintiff can sue a "health care provider" for medical negligence. Walker v. Virginia Ins. Reciprocal, 842 So.2d 804 (Fla. 2003). This "pre-trial investigation process is designed to force the claimant and potential defendants to carefully analyze the merits of a particular claim from both a legal and medical perspective before settlement is rejected and suit is filed". Clark v. Sarasota County Public Hosp. Bd., 65 F.Supp.2d 1308 (M.D. Fla. 1998).

When a court finds that a claim against a hospital arising out of the rendering of medical services has not been properly subjected to the presuit requirements of Chapter 766, Chapter 766 requires dismissal of the action. Williams v. Campagnulo, 588 So.2d 982 (Fla. 1991). While the presuit investigation requirements are not jurisdictional, when a plaintiff fails to comply with the presuit procedures before the applicable statute of limitations expires, the court's dismissal should be with prejudice. Torrey v. Leesburg Regional Medical Center, 796 So.2d 544 (Fla. 5th DCA 2001); Shands Teaching Hosp. v. Miller, 642 So.2d 48 (Fla. 1st DCA 1994); Correa v. Robertson, 693 So.2d 619 (Fla. 2d DCA 1997); Royle v. Florida Hospital-East Orlando, 679 So.2d 1209 (Fla. 5th DCA 1996); Central Florida Regional Hosp. v. Hill, 721 So.2d 404 (Fla. 5th DCA 1998).

As set forth above, it is undisputed that Welker failed to comply with the presuit provisions of Chapter 766 prior to filing his Amended Complaint. Also, it is undisputed that the Medical Malpractice Statute of Limitations has run on Welker's claim if Chapter 766 applies to Welker's Amended Complaint. For these reasons, if Welker was required to presuit his claims under Chapter 766, then the trial court was correct in dismissing Count III of Welker's Amended Complaint, with prejudice. Williams v. Campagnulo; Walker v. Virginia Ins. Reciprocal; Clark v. Sarasota County Public Hosp. Bd.; Torrey v. Leesburg Regional Medical Center; Shands Teaching Hosp. v. Miller; Correa v. Robertson; Royle v. Florida Hospital-East Orlando; and Central Florida Regional Hosp. v. Hill.

C. Application of Chapter 766 to Welker's Claims

In the first portion of the District Court's Opinion, the District Court relies on Section 766.102(1) to hold that Section 766.106 does not apply to Welker's claim unless Welker's injuries "resulted from the negligence of a health care provider as defined by Section 768.50(2)(b)". Welker at 1183. Because mental health counselors are not included within the group of "health care providers" under Section 768.50(2)(b), the District Court concluded that Welker's claim for Brink's negligence was not a claim for "medical malpractice" under Section 766.106. *Id*. at 1184.

Respectfully, this analysis overlooks the fact that the **only** defendant in this case is a Chapter 766 health care provider which is being sued for injuries arising from Brink's mental health diagnosis and treatment of Welker's children. Similarly, by excluding Baptist from the protections of Chapter 766 because Brink's occupation is not included in the "health care provider" list of Section 768.50(2)(b), the District Court failed to recognize that a hospital, different from an individual physician, can only provide health care services through its employees and agents. Because these health care services are often provided by individuals who are not "health care providers", the District Court's analysis unfairly strips hospitals of the protections which were intended to protect Chapter 395 hospitals.

Similarly, based on its analysis of these presuit issues, the District Court's decision is inconsistent with the Fifth District's holding in Goldman v. Halifax Medical Center. In fact, the District Court specifically acknowledged conflict with Goldman while disagreeing with the principal holding of Goldman.

In Goldman, the central issue was whether Chapter 766 applied to the plaintiff's negligence claim for the actions of a hospital employee who was not a statutory "health care provider" under Chapter 766. Goldman at 368. Like Welker in this case, Goldman argued that it would be "inherently illogical" to make her comply with the presuit notice requirements of Chapter 766 where the tortfeasor, an equipment

operator, was not a "health care provider" under any of the statutory definitions. *Id*.

Finding that Chapter 766 did apply to the plaintiff's hospital claim, the trial court dismissed the plaintiff's complaint for failure to comply with Chapter 766. This holding was affirmed by the Fifth District.

In upholding the trial court's dismissal of the plaintiff's complaint, the Fifth District pointed out an important infirmity in the plaintiff's argument:

> The weakness in Goldman's example and argument is that, in cases alleging medical negligence, the legislature extended the privileges of chapter 766 to hospitals but not to psychologists or, for that matter, radiologic technologists. The complications that may arise when one defendant is defined in chapter 766 as a health care provider and another is not [footnote omitted] are procedural in nature. The fact that the law may have created procedural difficulties is not justification for attempting to construe the law in a manner which defeats the legislative intent that hospitals should be covered by chapter 766 where the alleged acts of negligence arose out, or in the course of, medical treatment. Id. at 368 - 369.

Further, the Goldman court specifically addressed the argument that when the active tortfeasor is not a Chapter 766 "health care provider", Chapter 766 does not apply to the plaintiff's claim. In language particularly applicable to this case, the Fifth District held as follows:

> Goldman interprets McCullough to urge that the presuit requirements of chapter 766 should only apply where the "active" tortfeasor is a health care provider. Because the radiologic technologist who performed Goldman's mammogram is not defined as a health care provider,

> Goldman argues that, consistent with McCullough, she should not be required to follow the chapter 766 prerequisites.
>
> . . . .
>
> Read in its entirety, McCullough actually runs contrary to Goldman's position. The opinion appears to suggest that the presuit requirements would have been applicable if the nursing home had been a health care provider, or if the employees or agents who allegedly injured the plaintiff had been health care providers. Goldman argues that McCullough stands for the proposition that presuit notice requirements only apply where the individual who **actually** commits the tort is a health care provider. McCullough, however, simply states that even where the employer is not a health care provider, it may still be afforded the protections of the statute if it is vicariously liable for an employee or agent who is a health care provider. Moreover, the court in McCullough seems to suggest that its analysis of vicarious liability would not have been necessary had the nursing home fit the statutory definition of a health care provider.
>
> . . . .
>
> We believe that Goldman's interpretation of McCullough – that the "active" tortfeasor must be a health care provider in order for chapter 766 to apply – is incorrect. Id. at 369 - 370 (emphasis in the original)

Based on this analysis, the Goldman decision establishes that an active tortfeasor's status as a "health care provider" is irrelevant to presuit compliance issues when the plaintiff sues the hospital for actions covered by Chapter 766. Therefore, the question becomes whether a mental health evaluation, made within the course and scope of a hospital employee's employment, falls within the parameters of Chapter 766. Baptist submits that it does.

Here, it is undisputed that Welker's alleged damages arise from the counselor's clinical evaluation and treatment of Welker's children (see the July 20, 1999, letter attached to Welker's Amended Complaint). (R. 19-28). This clinical evaluation was a health care service being provided by a statutory "health care provider", Baptist. Like the radiology technician in Goldman, the counselor's actions fall squarely within the parameters of Chapter 766 and, therefore, presuit compliance was required. Goldman.

For these reasons, Goldman establishes that Baptist's status as a health care provider entitles Baptist to statutory protection if Brink's actions arose from "the rendering of, or failure to render, medical care or services". Fla. Stat. §766.106(1)(a). Because the alleged tort flows directly from Brink's alleged negligence in improperly diagnosing the children or from clinically acquiring facts which should have been objectively verified, Welker's entire claim emanates from the delivery of "medical care or services".[3]

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[3]While not specifically defined in Chapter 766, "medical care" has been defined as "professional treatment for illness or injury". See e.g., WordNet Lexical Database (Princeton University). Under this definition, Brink's evaluation, diagnosis and treatment of Welker's children would fall within the parameters of this definition. As noted by this Court in Nehme v. Smithkline Beecham Clinical Laboratories, Inc., 863 So.2d 201, 204 (Fla. 2003), when a statute does not define a statutory term, the Supreme Court must resort to the principles of statutory construction in deriving a proper meaning. In fact, this Court has repeatedly held

Similarly, because Welker's Amended Complaint is predicated on an improper PTSD diagnosis and an inaccurate analysis of the children's relationship with Welker, if there was no care deficiency in Brink's treatment of the children, then Welker's claim must fail. For this reason, Brink's alleged deficiencies in her clinical judgment are the essence of Welker's claim against Baptist. Without these components, Brink's letter accurately captured the truth of the relationship between Welker and his children and, if so, could not serve as the basis of Welker's claim.

Further, as an additional basis for the District Court's denial of Baptist's statutory protection under Chapter 766, the District Court found that the claim was not a medical negligence claim because it did not arise "out of the rendering of, or the failure to render medical care or services" **to Welker**. Welker at 1178. This conclusion was based on the District Court's analysis of footnote three in this Court's decision in J.B.. Welker at 1184.

Most respectfully, the District Court's reliance on this footnote is misplaced for the following reasons:

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that statutory language must be given its "plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature." Nehme at 204, 205 (citation omitted). Also, "[w]hen necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary". Nehme at 205 (citation omitted.)

Initially, different from the factual background in J.B., in this case, Welker's claim is dependent on the alleged deficiencies in Brink's diagnosis and evaluation of Welker's children. Conversely, in J.B., there was no legitimate nexus between the hospital's care of the plaintiff's brother and the plaintiff's claim against the hospital.

Second, and perhaps more importantly for purposes of the First District's analysis, after the decision in J.B., this Court rendered two decisions which directly addressed whether the plaintiff must be the provider's patient in order for the provider to enjoy the protections of Chapter 766.

First, in Pate v. Threlkel, 661 So.2d 278 (Fla. 1995), the Supreme Court held that physicians owed a potential duty to the patient's daughter to warn about the genetically transferrable nature of her mother's disease, Medullary Thyroid Carcinoma. Even though the daughter was not the patient of the physicians, the Court found that there was a duty to the plaintiff if the statutory standard of care required a reasonably prudent physician to warn about the transferrable nature of the patient's condition. *Id.* at 280. Importantly, the Court predicated its holding on Chapter 766 and specifically referenced the "statutorily required expert medical authority" of Chapter 766 in supporting its analysis. *Id*. at 281. For these reasons, this Court specifically recognized that Chapter 766 applies to non-patient claims against physicians. *Id*.

More recently, in Walker v. Virginia Ins. Reciprocal, the Supreme Court found that Chapter 766 applied to a non-patient tortfeasor who was bringing a contribution claim under Section 768.31 of the Florida Statutes (1997). In reaching this result, the Court held that "[a] claim for medical malpractice does not change its character merely because it is asserted by another medical provider who is also at fault". *Id.* at 810 (citation omitted). Consistent with the purpose of Chapter 766, the Walker court found that a health care provider "should be entitled to the protection afforded by the presuit screening procedure." Id. (citation omitted).

Also, as recognized by the express provisions of Chapter 766, Chapter 766 applies to wrongful death claims in medical malpractice actions. Section 766.102(1). In medical malpractice wrongful death cases, like the situations in both Pate and Walker, the plaintiff is **never** the patient, even though the claim arises from the "rendering of . . . medical care or services."

Therefore, for all of the above reasons, the J.B. decision does not exempt a claimant from Chapter 766 when the claimant is not the patient of the care provider being sued. Instead, where the plaintiff's claim arises from care provided to others,

this Court has recognized that Chapter 766 can apply if the claim arises from the "rendering of . . . medical care or services."[4]

In summary, the District Court applied an improper analysis in finding that Baptist was not entitled to the protections of Chapter 766 because Brink was not a statutory "health care provider". Also, the District Court misapplied the J.B. decision in finding a Chapter 766 exclusion when a non-patient plaintiff brings claims against a health care provider which arise from the provision of medical care or services. As such, the trial court properly found that Count III was a "claim for medical malpractice" and correctly dismissed Count III.

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

In reversing the trial court's finding that Count III was barred by Florida's Impact Rule, the District Court created a special exception to the Impact Rule in order to accommodate the factual allegations of Welker's claim. In spite of numerous cases upholding the Impact Rule in similar cases involving no physical impact or physical injury, the District Court held that this case merited a separate Impact Rule exception. Welker at 1187. However, this conclusion is misplaced for the following reasons:

[4]*See also*, Kush v. Lloyd, 616 So.2d 415 (Fla. 1992).

First, the Impact Rule requires that a plaintiff suffer a physical impact before the plaintiff can recover for emotional distress caused by another's negligence. Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So.2d 1294 (Fla. 4th DCA 1992); R. J. v. Humana of Florida, Inc., 652 So.2d 360 (Fla. 1995); Ruttger Hotel Corp. v. Wagner, 691 So.2d 1177 (Fla. 3d DCA 1997). This means that before a plaintiff can recover for emotional distress caused by another's negligence, "the emotional distress ... must flow from physical injuries the plaintiff sustained in an impact". Reynolds, 611 So.2d at 1296. Therefore, the Impact Rule bars a claim for negligent infliction of emotional distress unless the plaintiff's distress directly arises from physical injuries sustained by the plaintiff in an impact. Id.

The Impact Rule is based on the belief "that allowing recovery for injuries resulting from purely emotional distress would open the floodgates for fictitious or speculative claims". R. J., 652 So.2d at 362 [citation omitted]. This is because "compensatory damages for emotional distress are spiritually intangible, are beyond the limits of judicial action, and should be dealt with through legislative action rather than judicial decisions". Id. [citation omitted]. Similarly, "the requirement of a physical impact gives courts a guarantee that an injury to a plaintiff is genuine". Id. [citation omitted].

In this case, it is undisputed that Welker did **not** suffer any bodily impact or physical injury as a result of any alleged actions or inactions in this case (R. 19-28). In fact, it is undisputed that any alleged emotional injuries suffered by Welker did **not** flow from any impact related injuries (R. 19-28). Therefore, without the creation of a special exception, Welker's claim is barred by the Impact Rule. Ruttger; R.J.; Reynolds; Vivona v. Colony Point 5 Condominium Ass'n, Inc., 706 So.2d 391 (Fla. 4th DCA 1998); and, Jordan v. Equity Properties and Development Co., 661 So.2d 1307 (Fla. 3d DCA 1995).

Additionally, based on the facts of this case, Welker's claim falls within the parameters of this Court's decision in R.J. For this reason, R.J.'s analysis of the dangers of allowing claims for emotional damages in medical care situations is especially applicable to this Court's review of Welker's claim:

> Without question, allowing compensation for emotional distress in the absence of a physical injury under the circumstances of this case would have a substantial impact on many aspects of medical care, including the cost of providing that care to the public. Were we to create such a exception, we would, of necessity, also be allowing a claim for emotional distress for *any* misdiagnosis made from negligent medical testing. We could not limit an exception for negligent misdiagnosis to cases specifically involving the HIV virus while excluding other terminal illnesses. Moreover, it would be exceedingly difficult to limit speculative claims for damages in litigation under such an exception. Given that the underlying policy reasons for the impact rule still exist, we find that no special exception is justified under the circumstances of this case.

R.J. at 363, 364.

Consistent with this analysis, creating a special Impact Rule exception will have a substantial impact on "many aspects of medical care, including the cost of providing that care to the public". *Id*. Therefore, the District Court improperly created a special exception to the Impact Rule in a situation where the Impact Rule prohibited Welker from claiming emotional injuries against Baptist. For this reason, the trial court was correct in dismissing Count III of Welker's Amended Complaint.[5]

[5]See also, Kennedy v. Byas, 867 So.2d 1195 (Fla. 1st DCA 2004); Gonzalez-Jimenez de Ruiz v. U.S., 231 F.Supp.2d 1187 (M.D. Fla. 2002); Brown v. Cadillac Motor Car Div., 468 So.2d 903 (Fla. 1985); Crenshaw v. Sarasota County Public Hosp. Bd., 466 So.2d 427 (Fla. 2d DCA 1985); Nadeau v. Costley, 634 So.2d 649 (Fla. 4th DCA 1994); Jackson v. Sweat, 855 So.2d 1151 (Fla. 1st DCA 2003); and Rivers v. Grimsley Oil Co., Inc., 842 So.2d 975 (Fla. 2d DCA 2003).

CONCLUSION

For all of the above reasons, Baptist requests this Court to reverse the District Court's decision overturning the trial court's dismissal of Count III of Welker's Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Lawrence C. Datz, Esquire, 4348 Southpoint Blvd., Suite 330, Jacksonville, Florida 32216, by U. S. mail this 11th day of May, 2004.

/s/ Harvey L. Jay, III

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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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ATTORNEY