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

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

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PRELIMINARY STATEMENT

In this Reply 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.___).

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

It is undisputed that 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. In his brief, Welker admits that "[i]f the allegations of Count III amount to a claim for medical malpractice ... Welker undoubtedly had a duty to comply with the presuit screening requirements." (Amended Answer Brief on Merits at 11). 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 these health care 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. Welker's Chapter 766 Argument

On page 12 of his Amended Answer Brief on Merits, Welker summarizes his Chapter 766 argument by stating that there are "two mutually dependent" components of a Chapter 766 claim for medical malpractice. Welker synopsizes these elements as follows:

> 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).

Consistent with part one of Welker's definition, here, it is undisputed that Welker's **only** claim is against Baptist, a Chapter 766 "health care provider". (Amended Answer Brief at 8). This important fact has been undisputed since the parties argued Baptist's Motion to Dismiss at the trial court level. No individual claim was ever advanced against Baptist's mental health counselor, Brink. *Id.*

In trying to obscure the clarity of this issue, Welker adopts the First District's judicially created addition of an "active tortfeasor" requirement to the definition of "health care provider". Interestingly, the current definition of "health care provider", which makes no mention of an "active tortfeasor" requirement, is found at §766.202(4), Fla. Stat. (2003).

Unfortunately, adding an "active tortfeasor" prerequisite to the Chapter 766 requirements eviscerates the protection afforded to hospitals by the presuit statutes. Because hospitals are corporations which can only act through their employees or agents and because hospital employees or agents who are "health care providers" are already covered by the protections of Chapter 766, the Legislature's inclusion of Chapter 395 hospitals in the definition of a "health care provider" must have intended protection for hospital employees who are not within the definition of a "health care provider". Stated another way, since hospitals are already covered by Chapter 766 for claims brought against them for the actions of their "health care provider" employees, *Weinstock v. Groth*, 629 So.2d 835 (Fla. 1993), the **separate** inclusion of hospitals as "health care providers" is devoid of a legitimate purpose if hospitals are not protected for the actions of employees who do not fall within the "health care provider" definition.

Similarly, the First District's rewriting of the presuit definitions overlooks the routine presuiting of claims against hospitals for the actions of non-health care employees and disregards the time honored maxim that the Legislature is presumed to know the state of the law when it makes legislative enactments. *Joshua v. City of Gainesville*, 768 So.2d 432 (Fla. 2000), quoting *Collins Inv. Co. v. Metropolitan Dade County*, 164 So.2d 806 (Fla.1964) ("Florida's well-settled rule of statutory

construction [is] that the legislature is presumed to know the existing law where a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute'"). Because the Legislature has not redacted hospitals from the presuit protections of Chapter 766 (even though the Legislature has made periodic changes to the presuit statutes), logically, the Legislature must have intended for hospitals to maintain the presuit protections for their employees who are not "health care providers". Otherwise, there is no reason for the Legislature to have included hospitals as a separate "health care provider" under Chapter 766 and to maintain this designation while changing other parts of Chapter 766.

In addition, as to the second prong of Welker's "medical malpractice" definition, based on Welker's Amended Complaint, Welker claims that all of his alleged damages arise from Brink's actions and occurred "within the course and scope" of Brink's mental health employment. (Amended Answer Brief at 3). Because Brink's mental health evaluation and treatment of Welker's children was a health care service which is the predicate for Welker's claim against Baptist and because "medical care" has been defined as "professional treatment for illness or

injury", [1] Brink's actions fall squarely within the "medical care services" language of Fla. Stat. §766.106(1)(a).

Further, Welker spends much of his argument discussing a fundamental issue: what distinguishes medical negligence from general negligence? In an attempt to avoid the medical malpractice statute of limitations, Welker argues that this lawsuit is a general negligence claim not covered by the provisions of Chapter 766. In doing so, Welker contradicts his own argument that the plain meaning of the statute should apply.

For example, in arguing that Brink's services did not constitute health care services, Welker asks the Court to engage in legal gymnastics. By doing so, Welker overlooks the undisputed facts that Brink was licensed to provide mental health services; that she did so as an employee of Baptist; and that Welker's claim is based upon an allegedly inaccurate diagnosis of Welker's children by Brink. Because Welker's Amended Complaint is predicated on an alleged improper PTSD diagnosis and an inaccurate analysis of the children's relationship with Welker, if there was no care deficiency by Brink, then Welker's claim must fail. For this

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[1] 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).

reason, Brink's alleged clinical deficiencies 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.

In defining words, the Court is allowed to use its collective common sense. Absent a legislative definition to the contrary, common usage or a dictionary definition should control the interpretation of word meaning. Because mental health counseling includes diagnosis and treatment, and is covered by most health insurance plans, common understanding would place it in the ambit of medical care or services. Similarly, 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 to derive a proper meaning of the term. Consistent with this, 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.)

Because the legislature did not define "medicine" in Chapter 766, the plain meaning of the term "medicine" should apply. The American Heritage Dictionary defines "medicine" as "[t]he science of diagnosing, treating, or preventing disease and other damage to the body **or mind**." *The American Heritage Dictionary of the English Language, Fourth Edition (2004)*, emphasis added. This definition reflects the progress society has made in recognizing mental health issues as legitimate medical concerns – no longer is mental health stigmatized as "soft science" or the province of untrained "paraprofessionals". To be sure, most health care plans cover mental health evaluation, diagnosis and treatment in a manner similar to other medical conditions. Unfortunately, both Welker and the First District overlooked the plain meaning of this important term.

C. Welker Unfairly Characterizes Baptist as Arguing That All Hospital Claims Should Be Presuited

Painting with an extremely broad brush, Welker accuses Baptist of arguing that all hospital claims, regardless of their basis, must be presuited under Chapter 766. This charge is advanced on page 16 of Welker's Amended Answer Brief on Merits:

> 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. (emphasis added)

Prior to making this unsubstantiated accusation, Welker unfairly suggests that Baptist would require personal injury plaintiffs to presuit all slip and fall and automobile negligence claims. Respectfully, Baptist has never argued that non-health care torts should be presuited and recognizes that cases have held that general negligence claims are not actions arising from "medical care or services".

However, Baptist does take the exception with Welker's attempt to force his claim into the broad category of automobile negligence actions involving hospital vehicles and slip and fall claims which occur in or around hospital property. As established by the record, the basis of Welker's claim against Baptist is **professional** care, in a **professional** setting, rendered by a licensed mental health counselor. (Amended Answer Brief at 16). Without this professional treatment of Welker's children, Welker would not have been allegedly damaged. Thus, the alleged conduct of Brink falls squarely within the term "medical care or services".

According to the Amended Complaint, Brink interviewed Welker's children, spoke with Welker's ex-wife, compiled information, and made a *clinical diagnosis* that the children met the diagnostic criteria for post-traumatic stress disorder set out in the DSMIV. (see the July 20, 1999, letter attached to Welker's Amended

Complaint). (R. 19-28). Thus Baptist's argument that it is entitled to presuit protection does not lead to the absurd result Welker anticipates: for this Court to hold that Brink's mental health care, diagnosis and treatment falls within the statutory scheme will not bring ordinary negligence claims or intentional torts within the presuit protection umbrella, nor will it somehow shorten the statute of limitations as to such claims.

D. Welker's Failed Attempt to Distinguish Goldman

Welker attempts to distinguish the Fifth District's decision in *Goldman v. Halifax Medical Center, Inc.*, 662 So.2d 367 (Fla. 5th DCA 1995), by only quoting a select portion of the opinion. Even though Welker has attempted to carve out a favorable part of the case, it is interesting that Welker puts particular emphasis on this sentence from *Goldman*:

> [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. (emphasis added by Welker)

Based on this sentence, Welker emphasizes the *Goldman* court's finding that Ms. Goldman's injuries arose from the actions of a hospital employee, an employee who provided healthcare services to Ms. Goldman.[2]

In evaluating this focus, it is important to analyze the allegations in Welker's Amended Complaint. In particular, Welker makes the following allegations against Baptist:

> **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. (emphasis added)

Because these allegations are a predicate for Welker's other claims, it is undisputed that "at all times pertinent" to this lawsuit, Brink was working as a licensed mental health counselor, for a statutory "health care provider", Baptist. For this reason, Welker cannot credibly argue that Brink's actions were ever outside of her health care functions as a licensed mental health counselor. Because health care services are at the center of Welker's lawsuit against Baptist, the *Goldman* decision establishes that presuit notice was required in this case. In fact, borrowing language from the *Goldman* decision, "there is no question" that Welker

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[2]The employee was not a Chapter 766 "health care provider".

was required to meet the presuit requirements of Chapter 766 in this lawsuit. *Goldman* at 369. As such, the First District's decision in this case directly conflicts with the Fifth District's decision in *Goldman*.[3]

E. Welker's Attempts at Distinguishing *Pate* And *Walker* Are Not Persuasive

Welker attempts to distinguish this Court's decision in *Pate v. Threlkel* by arguing that *Pate* does not stand for the proposition cited by Baptist (i.e. that the Florida Supreme Court has applied the protections of Chapter 766 to cases where the plaintiff is not the patient). Contrary to Welker's argument against *Pate*, the essence of the *Pate* decision was this Court's holding that a claim could be brought by a **non-patient** plaintiff against a health care provider. While the First District also overlooked this important portion of the *Pate* decision, the uniqueness of *Pate* is predicated on its allowance of a medical malpractice lawsuit by a non-patient plaintiff.

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[3] As more fully set forth in Baptist's Brief on the Merits, this Court's decisions in *Pate v. Threlkel*, 661 So.2d 278 (Fla. 1995) and *Walker v. Virginia Ins. Reciprocal*, 842 So.2d 804 (Fla. 2003), establish that the patient does **not** have to be the plaintiff in order for a health care provider to receive the protections of Chapter 766. See also, *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992). Welker's reliance on *Goldman* for a contrary conclusion is misplaced.

Second, Welker dismisses the *Walker* decision by claiming that the underlying action in *Walker* was a medical negligence claim. Of course, as more fully set forth above, because it is undisputed that Brink was providing health care services to Welker's children and because Brink's actions emanated from those health care services, the essence of Welker's claim against Baptist, like this Court's decision in *Walker*, arises from health care services covered by Chapter 766. The *Walker* decision is important because it nullifies the superficial argument that a non-patient's claim against a healthcare provider, based on the provision of allegedly negligent health care services, will never be covered by the presuit provisions of Chapter 766.

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

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 by Brink. (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 Florida's Impact Rule. *Ruttger Hotel Corp. v. Wagner*, 691 So.2d 1177 (Fla. 3rd DCA 1997)*; R.J. v. Humana of Florida, Inc.*, 652 So.2d 360 (Fla. 1995)*; Reynolds v. State Farm*

Mut. Auto. Ins. Co., 611 So.2d 1294 (Fla. 4th DCA 1992)*; 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).

In response, Welker argues that "the idea that [he] was harmed by the domestic violence laws instead of [Brink's] negligence... is mere obfuscation." This generalization fails to address the essential underpinning of the FDLA's amicus argument: that the damages Welker asserts are the byproducts of litigation. In fact, a court of competent jurisdiction followed legislatively mandated criteria and issued an *ex parte* injunction for protection; Welker was not deprived of his right to contest the issuance of the injunction or the consolidation of the proceedings with the domestication of his dissolution of marriage/child custody action. On the contrary, the parties conducted litigation for a year. Welker does not allege that he was deprived of his right of access to the judicial system, his right to be heard, his right to present evidence, his right to counsel, or his right to appeal.

Instead, Welker's complaint is that the court ruled against him during the intermittent period and he was damaged. Unfortunately, this is the outcome of *every* litigated issue: the court rules in favor of one party and against another.

Further, if the effect of litigation on a party's mental status is allowed to give rise to damages for "mental anguish" because of allegedly incorrect interim rulings, every custody dispute would give rise to such a claim. It is an unfortunate fact that child custody disputes are often heated, emotionally taxing and prolonged. Baptist submits that the legislature has spoken in regard to this issue in the juvenile dependency, delinquency and Family Court contexts.

Consistent with this analysis, creating a special Impact Rule exception will not only have a substantial impact on many aspects of medical care, including the cost of providing that care to the public, as argued in Baptist's Initial Brief, but it will open the floodgates to claims of "mental anguish" damages as a result of unappealed judicial rulings and adverse child custody or visitation decisions. 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 based on the Impact Rule.[4]

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[4]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

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 of Datz & Datz, P.A., 4348 Southpoint Blvd., Suite 330, Jacksonville, Florida 32216, William A. Bell, General Counsel of Florida Hospital Association, 306 East College Avenue, Tallahassee, Florida 32301, Gail Leverett Parenti of 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 _____ day of July, 2004.

2003).

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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.

_____

ATTORNEY