IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-1710

FRANK C. WALKER, JR., M.D.,
WILLIAM P. SIMMONS, M.D., and
NORTH FLORIDA PEDIATRIC
ASSOCIATES, P.A.,

Petitioners,

vs.

VIRGINIA INSURANCE RECIPROCAL,
as subrogee of SCOTTISH RITE
CHILDREN'S MEDICAL CENTER, INC.

Respondent,

On Appeal from the District Court of Appeal
First District
State of Florida

AMENDED INITIAL BRIEF OF
PETITIONERS FRANK C. WALKER, M.D.
AND NORTH FLORIDA PEDIATRIC ASSOCIATES, P.A.

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PRELIMINARY STATEMENT

In this initial brief, the Petitioners, Frank C. Walker, M.D., and North Florida Pediatric Associates, P.A., appellees/defendants below, are referred to collectively as Petitioner or Dr. Walker. Respondent, Virginia Insurance Reciprocal, appellant/plaintiff below is referred to as Respondent or V.I.R. William P. Simmons, M.D., co-defendant below, is referred to as Dr. Simmons.

In addition, use of the phrase “underlying lawsuit,” refers to the suit bought by Ann H. and Robert Ray Auman (hereinafter Aumans) on behalf of their daughter Emily Auman. That lawsuit is styled: Ann H. Auman, individually and as as [sic] guardian of the property of Emily Auman, a minor, and Robert Ray Auman v. Coliseum Park Hospital, Inc., d/b/a HCA Coliseum Medical Centers, Hospital Corporation of America, HCA-Hospital Corporation of America, Ray Farhi, M.D., Ingleside Pediatrics, P.C., Robert I. Schwartz, M.D., Scottish Rite Children's Medical Center, Inc., Civil Action No. 38143, State Court of Bibb County, Georgia.

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STATEMENT OF THE CASE AND OF THE FACTS

Statement of the Case

This case began as a contribution suit brought by V.I.R. against Frank C. Walker, M.D., William P. Simmons, M.D., and North Florida Pediatric Associates, P.A. (R. 1-31). V.I.R.'s suit, filed in the Circuit Court of the Second Judicial Circuit for Leon County, asserted that V.I.R. was entitled to damages because it had paid more than its pro rata share of the common liability in settling a lawsuit brought by Ann and Robert Auman in Bibb Bounty, Georgia in May 1993 (R. 1-31).

Following an answer, and during the discovery phase of the suit, Dr. Walker and Dr. Simmons jointly moved for summary judgment based the Fourth District court's decision in Wendel v. Hauser, 726 So.2d 378 (Fla. 4th DCA) rev. denied 743 So.2d 510 (Fla. 1999). (R. 32-36; 52-59). The circuit court granted Dr. Walker's motion on May 28, 1999, and subsequently entered final judgment in his favor on June 12, 1999[1] (R. 75-78; 96-97). V.I.R. timely appealed the circuit court's order to the Court of Appeal, First District (R. 98).

The First District court reversed the circuit court's order granting summary final judgment in favor of Dr. Walker and

[1] Because of a pleading technicality, Dr. Simmons' motion was not granted at the same time. Following amendment to the pleadings, Dr. Simmons' motion was granted and V.I.R. appealed. That appeal is stayed in the First District court, pending the outcome of this appeal.

certified conflict with the Fourth District court's decision in Wendel. Virginia Insurance Reciprocal v. Frank. C. Walker Jr. M.D., et al., 765 So.2d 229 (Fla. 1st DCA 2000)(J. Padovano).

On August 22, 2000, Petitioner filed a timely notice to invoke the discretionary jurisdiction of the Florida Supreme Court. The Court issued an order postponing the decision on jurisdiction and requiring Petitioner to file an initial brief on the merits.

Statement of the Facts

This case actually began back on June 3, 1991, when Emily Auman was born at HCA Coliseum Park Hospital, Inc., in Macon, Georgia. (R. 2). On June 4, 1991, Emily was transferred to Scottish Rite Children's Medical Center, Inc., in Atlanta, Georgia, because of medical complications. (R. 2, 14). She remained a patient at Scottish Rite until her discharge on or about June 14, 1991. (R. 21). Thereafter, Emily came under the care of Dr. Walker and Dr. Simmons in Tallahassee, Florida. (R. 2).

Approximately 11 months after she came under the care of Dr. Walker, Emily was diagnosed with hypothyroidism by Larry Deeb, M.D. (R. 2-3). On or about May 28, 1993, Emily's parents brought suit against Scottish Rite, HCA Coliseum Hospital, and those physicians who treated Emily in Georgia. (R. 6-19). In their complaint, the Aumans alleged that Emily was injured

because her healthcare providers failed to detect or test her for hypothyroidism as required by Georgia law (R. 6-19). As to Scottish Rite, the Aumans alleged that Scottish Rite failed to perform the metabolic screening test for hypothyroidism within one week after Emily Auman's birth as required by rule 290-5-24-.02(4) of the Georgia Department of Human Resources and Public Health, and failed to determine whether HCA-Coliseum Medical Center had performed the required metabolic screening tests. (R. 15).

On June 11, 1997, V.I.R., the insurer of Scottish Rite, entered into a settlement agreement and release with the Aumans, thereby settling the lawsuit for $1.65 million. (R. 20-31). The settlement agreement and release, released any "entity that may be characterized as a joint tortfeasor with [Scottish Rite]." (R. 22).

On May 14, 1998, V.I.R. served an "intent to litigate" against Dr. Walker pursuant to section 766.203, Florida Statutes. (R. 4, 34). The parties thereafter participated in the pre-suit process. Dr. Walker did not respond to V.I.R.'s intent to litigate during the presuit screening period, thereby denying the claim under section 766.106(3), Florida Statutes. (R. 4).

On November 13, 1998, V.I.R. filed its "Complaint for Contribution" against Dr. Walker and Dr. Simmons. (R. 1-31). V.I.R. alleged that it was entitled to contribution from Dr.

Walker and Dr. Simmons as joint tortfeasors because it had paid more than its pro rata share of the common liability of those persons and entities released in the underlying suit, citing section 768.31, Florida Statutes. (R. 4). V.I.R. also alleged that Dr. Walker was a joint tortfeasor because he negligently failed to determine whether Emily received appropriate metabolic screening, failed to ensure that the screening was completed, and failed to notify the Aumans of the need for such screening. (R. 3). Dr. Walker answered the complaint denying the allegations and asserting various affirmative defenses, including the defense of failing to file within the applicable statute of limitations. (R. 32-36).

During discovery, Dr. Walker and Dr. Simmons filed a joint motion for summary judgment, arguing that V.I.R. had failed to bring its contribution suit within the one-year limitation period imposed by section 768.31(4)(d)2, Florida Statutes. (R. 52-59). Dr. Walker asserted that serving a notice of intent to litigate under section 766.203, did not toll the one year limitation period for filing a contribution claim under section 768.31. (R. 56-57). For support, Dr. Walker cited the then recently decided Wendel case. (R. 56-57).

The circuit court granted Defendants' motion finding, in part:

> There appear to be conflicts in the reasoning of the cases considering actions for contribution in

> medical malpractice litigation. Wendel v. Hauser, 726 So.2d 378 (Fla. 4th DCA 1999) is the only case on all fours. Wendel holds:
>
>> We conclude that the plain language of Section 766.106, Florida Statutes, does not encompass claims for contribution.
>
> Wendel considered Walt Disney World Co. v. Memorial Hospital, 363 So.2d 548 (Fla. 4th DCA 1978) and held that the language in Section 766.105, [sic] Florida Statutes, differs from Section 768.44, Florida Statutes (1975)(the mediation statute) which was at issue in Walt Disney.

(R. 75-78). The circuit court thereafter entered a final order of judgment for Dr. Walker on June 12, 1999. (R. 96-97). V.I.R. appealed to the First District court. That court reversed, disagreeing with the Fourth District court's approach in Wendel. Virginia Insurance Reciprocal, 765 So.2d at 235. Accordingly, the First District court certified conflict with Wendel. This appeal follows.

SUMMARY OF ARGUMENT

The First District court erred in reversing the circuit court's order granting summary judgment in favor of Dr. Walker where V.I.R. failed to bring its action for contribution within the one year limitation period plainly set out in the Uniform Contribution Among Tortfeasors Act, section 768.31(4)(d)2. The undisputed evidence shows that V.I.R. executed a release and paid $1.65 million to the plaintiffs (Aumans) in the underlying lawsuit on June 11, 1997. V.I.R. subsequently commenced its action for contribution against Dr. Walker on November 13, 1998, more than one year after it agreed to settle the action involving the Aumans. Thus, V.I.R.'s action for contribution against Dr. Walker was time-barred.

The First District Court erred in concluding that the statutory presuit screening requirements of Chapter 766 apply to an action for contribution based on the alleged medical negligence of a joint tortfeasor, and in rejecting the Fourth District court's holding in Wendel. The First District court's reasoning and its accordant holding are simply not supported by a plain reading of Chapter 766 (the medical malpractice statutes), the Uniform Contribution Among Tortfeasors Act (section 768.31, Florida Statutes), and Florida case law.

Contrary to the First District court's conclusion about the charater of V.I.R.'s claim, the claim is not one of medical

malpractice under Chapter 766, but one of contribution under section 768.31. The nature of V.I.R.'s claim is plainly evidenced by its own complaint, which is entitled "Complaint for Contribution." Despite the First District court's attempt to blur the distinction between the causes of action at issue, a contribution claim is a separate and distinct cause of action from a medical malpractice claim. A contribution claimant alleges damages by reason of monetary loss on account of the negligence of an alleged joint tortfeasor. In contrast, a medical malpractice claimant alleges damages "arising out of the rendering of, or the failure to render, medical care or services."

The First District court's rationale for holding that the statutory presuit screening requirements of Chapter 766 apply to an action for contribution based on a claim of medical malpractice is not well-founded in light of the plain language of Chapter 766 and section 768.31. First and foremost, V.I.R.'s claim is not one for medical malpractice, but one for contribution. Second, under section 766.203(1), the Florida Legislature specifically mandates that other rights of actions be included within the term "medical negligence" for purposes of the presuit screening process. The legislature chose not include those rights of action under section 768.31, the contribution statute. Obviously, if the legislature wished to include

contribution actions as an action subject to the Chapter 766 presuit screening process, it would have done so under section 766.203(1). Third, section 766.106(1)(a) need not distinguish between a medical malpractice claim asserted directly by an injured party and a medical malpractice claim asserted by a joint tortfeasor seeking to recover a share of the loss because that distinction has already been established by Chapter 766 and section 768.31, respectively. Finally, the public policy purposes of Chapter 766's presuit screening process and section 768.31 are very different. In blurring the distinction between a medical malpractice claim and a contribution claim with an underlying medical malpractice suit, the First District court fails to acknowledge the policy considerations of the Uniform Contribution Among Tortfeasors Act.

Also, the First District court erred in rejecting the well-reasoned opinion of the Fourth District court in Wendel. The Wendel decision is the better approach because it follows the Florida Legislature’s mandate as reflected in the plain language of both Chapter 766 and section 768.31.

The First District court’s proposition that substantive law governing the limitation period of an underlying cause of action may take precedence over the limitation period of the contribution statute is not applicable to this case. Notwithstanding, if one applied the case law cited by the First

District court, V.I.R.'s "medical malpractice claim" would be barred by the statute of limitations of section 95.11.

Finally, the First District court erred in adopting the view expressed in Walt Disney, a case specifically rejected and distinguished by the Fourth District court in Wendel. Walt Disney was based on section 768.44, which was in effect in 1978 and more broadly defined the kinds of claims subject to the presuit mediation process. Accordingly, its holding is of little precedential value and limited to situations involving that earlier version of the statute.

ARGUMENT

I. THE FIRST DISTRICT COURT ERRED IN REVERSING THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DR. WALKER WHERE V.I.R. FAILED TO BRING ITS ACTION FOR CONTRIBUTION WITHIN THE LIMITATION PERIOD PLAINLY SET OUT IN THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, SECTION 768.31(4)(d)2, FLORIDA STATUTES.

Under the Uniform Contribution Among Tortfeasors Act, "when two or more persons become jointly or severally liable in tort for the same injury to person or property, . . . there is a right of contribution among them even though judgment has not been recovered against all or any of them." §768.31(2)(a), Fla. Stat. Where there is no judgment for the injury against the tortfeasor seeking contribution, the tortfeasor's right of contribution is barred unless the tortfeasor has:

> 2. Agreed, while action is pending against her or him, to discharge the common liability and has within 1 year after the agreement paid the liability and commenced her or his action for contribution.

§768.31(4)(d)2., Fla. Stat. Thus, under this section, the tortfeasor seeking contribution must pay the liability it agrees to pay and commence its action for contribution within one year of the agreement.

Here, the undisputed evidence shows that V.I.R., on behalf of Scottish Rite, executed a release and paid $1.65 million to the Aumans in the underlying lawsuit on June 11, 1997. V.I.R. subsequently filed a complaint for contribution, i.e., commenced the action, against Dr. Walker on November 13, 1998, more than

one year after it agreed to settle the action involving the Aumans. Under the plain language of section 768.31(4)(d)2. V.I.R.'s action for contribution was time-barred and the circuit court properly granted summary judgment for Dr. Walker.

II. THE FIRST DISTRICT COURT ERRED IN CONCLUDING THAT THE STATUTORY PRESUIT SCREENING REQUIREMENTS OF CHAPTER 766 APPLY TO AN ACTION FOR CONTRIBUTION BASED ON THE ALLEGED MEDICAL NEGLIGENCE OF A JOINT TORTFEASOR, AND IN REJECTING THE FOURTH DISTRICT COURT'S HOLDING IN WENDEL.

In reversing the circuit court, the First District court held that the statutory presuit screening requirements of Chapter 766 apply to an action for contribution based on an underlying claim of medical malpractice. Virginia Insurance Reciprocal, 765 So.2d at 232. Boiled down to its essence, the First District court concluded that although such an action is brought by a health care provider rather than an injured party, the claim is, nonetheless, an action arising out of the rendering or failure to render medical care. Id. at 231. The court went on to hold that "[b]ecause V.I.R.'s complaint was filed within the applicable time limit as tolled," the complaint was timely. Id. at 231. The First District court's reasoning and its accordant holding are simply not supported by a plain reading of Chapter 766 (the medical malpractice statutes), the Uniform Contribution Among Tortfeasors Act (section 768.31, Florida Statutes), and Florida case law.

A. The First District Court Erred in Concluding That

the Statutory Presuit Screening Requirements of Chapter 766 Apply to an Action for Contribution Based on the Alleged Medical Negligence of a Joint Tortfeasor.

Petitioner does not dispute that Chapter 766, mandates compliance with the presuit screening procedures set out in that chapter. See §§766.106, 766.203 - 766.206, Fla. Stat. Compliance, however, only pertains to "claim[s] for medical malpractice" as defined under section 766.106(1)(a). That section defines a "claim for medical malpractice" as "a claim arising out of the rendering of, or the failure to render, medical care or services." §766.106(1)(a), Fla. Stat.

Contrary to the First District court's conclusion about the character of V.I.R.'s claim, the claim is not one of medical malpractice under Chapter 766, but one of contribution under section 768.31. The nature of V.I.R.'s claim is plainly evidenced by its own complaint, which is entitled "Complaint for Contribution," and contains the following allegation:

> Scottish Rite (V.I.R.), Dr. Walker, Dr. Simmons and Pediatric Associates are joint tortfeasors, and Scottish Rite (V.I.R.) has paid more than its pro rata share of the common liability of those persons and entities released. Therefore, V.I.R. is entitled to contribution from the other joint tortfeasors. Fla. Stat §768.31(1989) and Ga. Stat. §51-12-32 (1987).

(R. 1, 4).

Despite the First District court's attempt to blur the distinction between the causes of action at issue, a contribution claim is a separate and distinct cause of action from a medical

malpractice claim. A contribution claimant alleges damages by reason of monetary loss on account of the negligence of an alleged joint tortfeasor. §768.31(2), Fla. Stat.; see Wendel, 726 So.2d at 380; see generally, Lincenberg v. Issen, 318 So.2d 386 (Fla.1975)(elucidating on the question of continued viability of the principle of no contribution among joint tortfeasors in Florida and on the enactment of the Uniform Contribution Among Tortfeasor Act); see also Rowland v. Skaggs Companies, Inc., 666 S.W.2d 770, 773 (Mo. 1984)(en banc)(holding that contribution accrues from the existence of a joint obligation on a liability shared by tortfeasors, and that "[t]he right of contribution serves to rectify the unjust enrichment that occurs when one tortfeasor 'discharge[s] a burden which both in law and conscience was equally the liability of another.'"). In contrast, a medical malpractice claimant alleges damages "arising out of the rendering of, or the failure to render, medical care or services." §766.106(1)(a), Fla. Stat.

The Uniform Contribution Among Tortfeasors Act, as described by the First District court in this case, provides that "[t]he right of contribution exists only in favor of a tortfeasor who has paid more than his or her pro rata share of the common liability." Virginia Insurance Reciprocal, 765 So.2d at 231 (quoting section 768.31(2)(b)). Section 768.31 creates a remedy; a remedy that is only available if there is an independent basis to assert a claim that the joint tortfeasor is liable for a share

of the loss. Virginia Insurance Reciprocal, 765 So.2d at 232. Contrary to the First District court's opinion, the obvious conclusion to be drawn is that a claim for contribution is not dependent on the nature of the underlying claim.[2] Rather, a contribution claim is dependent on the payment of one joint tortfeasor who shares a common liability with another. Because a contribution claim is a separate and distinct cause of action based on different legal principles of recovery, it is by its very nature, not a claim for medical malpractice as defined under section 766.106(1)(a). Accordingly, a contribution claim is not subject to the presuit screening process of Chapter 766.

B. The First District Court's Rationale for Holding That the Statutory Presuit Screening Requirements of Chapter 766 Apply to an Action for Contribution Based on a Claim of Medical Malpractice Is Not Well-founded in Light of the Plain Language of Chapter 766 and Section 768.31.

In holding that the time for filing a suit for contribution was tolled by V.I.R.'s compliance with Chapter 766's presuit screening requirements, the First District court stated, *inter alia*:

> We conclude that the statutory presuit screening requirements apply to an action for contribution that is based on a claim of medical malpractice. By the terms of section 766.203(1), all claims of medical malpractice are subject to the mandatory presuit screening procedure. Section 766.106(1)(a) defines a

[2] The underlying claim can be any tort other than one that is reckless, willful, wanton, or intentional. See §768.31 (2)(c), Fla. Stat.

> claim for medical malpractice as "a claim arising out of the rendering of, or the failure to render, medical care or services." This definition makes no distinction between a medical malpractice claim that is asserted directly by the injured party and a medical malpractice claim that is asserted by a joint tortfeasor seeking to recover a share of the loss. Nor would there be any good reason to make such a distinction. The policy considerations underlying the presuit screening procedure are the same in either case.

Virginia Insurance Reciprocal, 765 So.2d at 232.

In a nutshell, the First District court asserts that because the theory of V.I.R.'s claim is that Dr. Walker was negligent in the care of Emily Auman and he should share in the loss paid to the Aumans, V.I.R.'s claim, although asserted in a suit for contribution, is a claim falling under section 766.106(1)(a). The court also asserts that because section 766.106(1)(a) does not distinguish between a medical malpractice claim and a medical malpractice claim asserted by a joint tortfeasor seeking to recover a share of the loss, then the latter claim falls within that subsection. The court then concludes, by virtue of the terms of section 766.203(1), that "all claims of medical malpractice" are subject to the mandatory presuit screening procedure. Virginia Insurance Reciprocal, 765 So.2d at 232. There are several problems with this analysis.

First and foremost, V.I.R.'s claim is not one for medical malpractice, but one for contribution. Accordingly, it does not, by a plain reading of section 766.106(1)(a), fall within the

mandate of section 766.203(1). Again, contribution claims allege damages by reason of monetary loss on account of the negligence of a joint tortfeasor, irrespective of the nature of the underlying tort. §768.31(2), Fla. Stat.; see generally, Kendall B. Coffey, Contribution Among Joint Tortfeasors: A Florida Case Law Survey and Analysis, 25 U. Miami L. Rev. 971 (1981).

Second, by citing section 766.203(1) for the proposition that the presuit screening process is mandatory for medical malpractice claims, the First District court overlooks the real significance of that statute to contribution claims vis-a-vis claims under Chapter 766. Section 766.203(1) states: [3]

> (1) Presuit investigation of medical negligence claims and defenses pursuant to this section and ss. 766.204-766.206 shall apply to all medical negligence, including dental negligence, claims and defenses. This shall include:
>
> (a) Rights of action under s. 768.19 and defenses thereto.
>
> (b) Rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28 and defenses thereto.

Under this section, the Florida Legislature specifically mandates that other rights of actions, specifically, actions brought pursuant to section 768.19 and section 768.28, be included within the term "medical negligence" for purposes of the presuit

[3] Section 766.203(1), uses the phrase "medical negligence." "Medical negligence" is defined as "medical malpractice, whether grounded in tort or in contract." §766.202(6), Fla. Stat.

screening process. The legislature chose *not* to include those rights of action under section 768.31, the contribution statute. Obviously, if the legislature wished to include contribution actions as an action subject to the Chapter 766 presuit screening process, it would have done so under section 766.203(1). See PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988)(the express mention of one thing implies the exclusion of another). The general rule of *expressio unius est exclusio alterius,* means "where a statute enumerates the things on which it is to operate, . . . it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

Third, in support of its holding, the First District court asserts that section 766.106(1)(a) makes no distinction between a medical malpractice claim that is asserted directly by the injured party and a medical malpractice claim that is asserted by a joint tortfeasor seeking to recover a share of the loss. The court then posits that the policy considerations underlying the presuit screening procedure are the same in either case. Petitioner respectfully disagrees.

Simply put, section 766.106(1)(a) does not distinguish between a medical malpractice claim asserted directly by the injured party and a medical malpractice claim asserted by a joint tortfeasor seeking to recover a share of the loss because that

distinction has already been established by Chapter 766 and section 768.31, respectively. By virtue of a plain reading of the statutes, a claim for contribution is not a claim for medical malpractice, no matter how the contribution claim is described by the First District court.

Finally, the First District court asserts that policy considerations underlying the presuit screening procedure are the same in a medical malpractice claim asserted directly by an injured party and a medical malpractice claim asserted by a joint tortfeasor seeking to recover a share of the loss. Such is true as long as one assumes, as postulated by the First District court, that the described claims are indeed "medical malpractice claims." If both claims are of "medical malpractice," the policy considerations underlying the presuit screening procedure will always be the same.

However, the First District court's assertion fails because of its first assumption, that is, equating a claim described as a "medical malpractice claim asserted by a joint tortfeasor seeking to recover a share of the loss" with a claim of medical malpractice under Section 766.106(1)(a). As argued earlier, they are not the same claim. The distinction becomes obvious when one contemplates the differing policy considerations of each claim.

The objective of the presuit screening procedure of Chapter 766 is to reduce medical costs by eliminating frivolous

malpractice claims and affording a prompt and efficient resolution of claims with merit. §766.201, Fla. Stat.; see also, Muscoskeletal Institute Chartered v. Parham, 745 So.2d 946, 950 (Fla. 1999); Virginia Insurance Reciprocal, 765 So.2d at 232. Stated succinctly by this Court in Parham, sections 766.104 and 766.106 serve to prevent the misuse and abuse of the civil justice system while simultaneously encouraging expedited relief for those wronged by medical practitioners. 745 So.2d at 950.

On the other hand, the public policy objective of the Uniform Contribution Among Tortfeasors Act is to establish a statutory right of contribution among joint tortfeasors, even if a judgment has not been entered. See §768.31, Fla. Stat.; Lincenberg, 318 So.2d at 389-394. As stated in the staff analysis for the bill which eventually became section 768.31:

> The traditional policy of Anglo-American common law has been to deny assistance to tortfeasors on the understanding that they are wrongdoers and hence not deserving of the aid of courts in achieving equal or proportionate distribution of the common burden. This bill, however, expresses a desire for equal or proportionate distribution of a common burden among those upon whom it rests. The bill recognizes that an injury resulting from the joint tort of two or more persons involves each of them, jointly and severably, in liability for the entire damage.

Staff of Senate Judiciary - Civil Committee, Analysis, CS/SB-98 (Fla. 1975).

The public policy purposes of Chapter 766's presuit screening process and section 768.31 are very different. In

blurring the distinction between a medical malpractice claim and a contribution claim with an underlying medical malpractice suit, the First District court fails to acknowledge the policy considerations of the Uniform Contribution Among Tortfeasors Act.

For example, when the legal process proceeds to the stage of a contribution action with an underlying claim involving medical malpractice, the goals and purposes of Chapter 766's presuit screening process have already been satisfied. That is, by the time a contribution plaintiff files his claim, the culling of meritless medical malpractice claims and frivolous filings has already been accomplished, as evidenced by that party's payment of a judgment in the underlying medical malpractice suit or by the party's discharge of the common liability through settlement. What better indication of the merit of a medical malpractice claim than a judgment in the law suit or a settlement of the claim? Further, in order for the contribution plaintiff to file his suit, there must be a judgment or a discharge of common liability. Obviously, the judgment or discharge of common liability is proof that the person injured by the medical malpractice has been fairly compensated for his or her injury.

Further, if the First District court's holding is applied to reality, one wonders how the parties to the contribution claim could practically and effectively participate in the presuit screening process of Chapter 766. For example, under sections

766.106(6) - (9), parties to a medical malpractice claim may engage in informal presuit discovery. Such discovery includes the production of documents and things, the taking of unsworn statements of the parties, and the physical and mental examination of the parties. The contribution defendant, under the circumstances sub judice, would obviously want to examine and or take the unsworn statement of the medical malpractice claimant. Unfortunately, that claimant is no longer a party to any action and no longer subject to section 766.106's informal discovery requirements.[4] Without access to the claimant injured by the medical malpractice, the presuit screening process at the contribution stage would be quite ineffective in terms of gathering information and encouraging settlement.

Petitioner does not dispute that the intent and goal of the presuit screening process applicable to Chapter 766 claims are noble in nature and that he, as a physician, was intended to benefit from its implementation. Petitioner also acknowledges, however, that the legislature chose not to provide that benefit in contribution claims.[5] As argued above, the legislature had

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[4] It is highly unlikely that a medical malpractice claimant who has settled or who has prevailed at trial will be willing to voluntarily subject themselves and their medical records to further scrutiny by a contribution defendant.

[5] The legislature did decide, however, that all contribution defendants would benefit from a one year limitation period. §768.31(4)(c), (d), Fla. Stat.

the opportunity to include contribution actions in the category of claims subject to the presuit screening process when it enacted section 766.203(1), but chose not to. See Aetna Casualty & Surety Co. v. Huntington Nat'l Bank, 609 So.2d 1315, 1317 (Fla. 1992)(holding, statutes must be given their plain and obvious meaning and courts should assume that the legislature knew the plain and ordinary meaning of words when it chose to include them in the statute.). The legislature's decision not to include contribution claims under section 766.203(1), is exactly the type of policy judgment that rests exclusively within the province of the legislature rather than the courts. See, Art. II, § 3, Fla. Const.; Holly v. Auld, 450 So.2d 217, 219 (Fla.1984); Delgado v. J.W. Courtesy Pontiac GMC -Truck, Inc., 693 So.2d 602, 608-609 (Fla. 2d DCA 1997). Any change in that policy must come from the legislature.

C. The First District Court Erred in Rejecting the Well-Reasoned Opinion of the Fourth District Court in Wendel.

The First District court erred in rejecting the well-reasoned opinion of the Fourth District court in Wendel. The Wendel decision is the better approach because it follows the Florida Legislature's mandate as reflected in the plain language of both Chapter 766 and section 768.31.

In Wendel, Mr. Willie Fencher brought a medical malpractice action against Paul Wendel, M.D., and other care providers who

treated him. On June 11, 1993, Mr. Fencher entered into an agreement with Dr. Wendel's insurer, Physicians Protective Trust Fund (PPTF), whereby PPTF paid $1,000,000 to settle the claim on Dr. Wendel's behalf and on behalf of all other alleged tortfeasors. Thereafter, PPTF participated in the presuit screening process of Chapter 766, received an automatic 90-day extension under section 766.104(2), Florida Statutes, and eventually served notices of intent to other alleged tortfeasors (appellees) on June 13, 1994. PPTF filed its complaint for contribution against appellees on December 2, 1994. Appellees moved for summary judgment, arguing that the one-year limitation period contained in section 768.31(4)(d), barred PPTF's claim for contribution. The circuit court agreed and granted summary judgment in favor of appellees. Wendel, 726 So.2d at 379.

On appeal, PPTF argued that it had timely filed its complaint against appellees because it followed the medical negligence presuit screening process set out in Chapter 766. PPTF further argued that section 766.106, tolled the one-year limitation period for filing a contribution claim under Chapter 768, citing Walt Disney World Co. v. Memorial Hospital, 363 So.2d 598 (Fla. 4th DCA 1978). Id. The Fourth District court rejected PPTF's arguments, stating:

> Appellant argues that Walt Disney World Co. v. Memorial Hospital, 363 So.2d 598 (Fla. 4th DCA 1978), applies to the presuit process in chapter 766, Florida Statutes. We disagree. The language in section 766.106, Florida

> Statutes, differs from section 768.44, Florida Statutes (1975), which was at issue in Walt Disney. Section 768.44 provided that "[a]ny person or his representative claiming damages by reason of injury, death, or monetary loss, on account of alleged malpractice . . . shall submit a claim . . . " Contribution claimants allege damages by *reason of monetary loss* on account of the malpractice of an alleged joint tortfeasor.
>
> Section 766.106, Florida Statutes (1993), more narrowly defines those claims subject to presuit screening procedures than did its predecessor, section 768.44, Florida Statutes (1975).
>
> > "Claim for medical malpractice" means a claim arising out of the rendering of, or the failure to render, medical care or services.
>
> § 766.106(1)(a), Fla. Stat. (1993).
>
> > Presuit investigation of medical negligence claims and defenses pursuant to this section and ss. 766.204-766.206 shall apply to all medical negligence, including dental negligence, claims and defenses....
>
> § 766.203, Fla. Stat.
>
> We conclude that the *plain language of section 766.106*, Florida Statutes, does not encompass claims for contribution. Accordingly, we hold that the presuit screening procedures initiated by appellant did not toll the time for filing this action for contribution. We affirm the trial court's order granting summary judgment in favor of appellees.

Wendel, 726 So.2d at 380. (Emphasis added).

In a nutshell, contribution claims like PPTF's in Wendel and V.I.R.'s in this case, arise by "reason of monetary loss" on account of the negligence of a joint tortfeasor. See Wendel, 726 So.2d at 380. On the other hand, a medical malpractice claim, which is narrowly defined by section 766.106(1)(a), arises out of

the "rendering of, or the failure to render, medical care or services." Id. As correctly held in Wendel, a contribution claim involving medical malpractice issues is not a claim falling under Chapter 766 and, therefore, participation in the presuit screening procedures of Chapter 766 does not toll the time for filing an action for contribution under section 768.31. 726 So.2d at 380.

D. Section 768.31, Florida Statutes, Controls the Timeliness of this Contribution Action, Notwithstanding the Cases Cited by the First District Court.

In reversing the circuit court, the First District court states that courts have recognized that the substantive law governing the limitation period of an underlying cause of action may take precedence over the limitation period of the contribution statute, citing Showell Industries, Inc. v. Holmes County, 409 So.2d 78 (Fla. 1st DCA 1982) and State, Dep't. of Transportation v. Echeverri, 736 So.2d 791 (Fla. 3d DCA 1999). Virginia Insurance Reciprocal, 765 So.2d at 232. Neither of the cases cited are applicable to this case.

In Showell Industries, the First District court was asked to determine whether the three-year limitation period of section 768.28(6),Florida Statutes, concerning suits against the State, or the one-year limitation period of section 768.31(4)(c), concerning contribution claims, applied to a contribution suit brought against Holmes County. Showell Industries, 409 So.2d at

79. The court held that the three-year limitation period applicable to suits against the State would govern, citing Beard v. Hambrick, 396 So.2d 708 (Fla. 1981)(holding that the legislature intended that there be one limitation period for all actions brought against the State or its subdivisions under section 768.28). Id. Showell is inapposite here because the issue in this case does not involve a direct conflict between two statute of limitation periods. The only issue in this case is whether the presuit screening process applies to and tolls a contribution claim under section 768.31.[6]

Curiously, the First District court overlooks the fact that its proposition, as supported by Showell, may actually benefit Dr. Walker. If V.I.R.'s claim is indeed a "medical malpractice claim" as characterized by the First District court, the claim would be subject to the statute of limitations period applicable to claims of medical malpractice under section 95.11, Florida Statutes. See §766.104, Fla. Stat. Under section 95.11(4)(b), a claimant must commence his suit for medical malpractice within

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[6] Beard is persuasive in one respect, however, as the Courts' rationale seems to be in line with the result of Wendel. Specifically, in rejecting the Sheriff Beard's appeal for application of the two-year statute of limitations, the Court stated, "We believe that the legislature intended that there be one limitation period for all actions brought under section 768.28." Beard, 396 So.2d at 712. Likewise, the plain language of the contribution statute shows that the legislature intended there to be a one-year limitation period for all claims under section 768.31, with no regard to the presuit screening process of Chapter 766.

two years from the time of the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with due diligence. V.I.R. was certainly aware, more than two years prior to filing its notice of intent, that Dr. Walker had, perhaps, negligently treated Emily. Accordingly, V.I.R.'s "medical malpractice claim" would be time barred under section 95.11(4)(b).

Echeverri is also distinguishable from this case and, thus, not applicable. In Echeverri, the State, Department of Transportation (DOT) was sued for an alleged wrongful death sustained in a 1995 automobile accident. Eheverri, 736 So.2d at 791-792. Plaintiff's suit alleged negligent maintenance of a road that had been originally built in 1966. DOT, in turn, asserted "cross claims for indemnity" and "joint-tortfeasor-type contribution" claims against the original contractor and architect, claiming they had negligently performed work on the original project. Id. Those contractors moved for dismissal claiming that the 15 year statute of repose applied to DOT's third party complaint. Id. The lower court agreed and dismissed DOT's third party complaint. Id. DOT appealed. The Third District affirmed, holding that the plain language of the statute of repose applied to all actions founded on the design, planning or construction of an improvement to real property. Id.

Contrary to the First District court's description of

Echeverri, the Echeverri court does not specify the exact third party claim DOT filed, i.e., whether it was a contribution claim under section 768.31 or an indemnity claim.[7] Accordingly, the court did not hold that a contribution plaintiff need not comply with the one-year limitation period of section 768.31 or that the limitation period was tolled for some particular purpose. At most, Echeverri should be read as requiring third party plaintiffs to file suit within the applicable statute of repose of the underlying tort. Again, that is not an issue in this case.

E. The First District Court Erred in Adopting the View Expressed in Walt Disney, a Case Specifically Rejected and Distinguished by the Fourth District Court in Wendel.

In reversing the circuit court, the First District court adopts the view of the Fourth District court in Walt Disney World Co. v. Memorial Hospital, 363 So.2d 598 (Fla. 4th DCA 1978). This adoption is somewhat curious considering that the Fourth District court determined in Wendel, that Walt Disney involved a different statute and was not applicable to the facts. See Wendel, 726 So.2d at 380.

The Fourth District court in Walt Disney held that the mediation requirement for medical negligence claims under section

[7] Indemnity is quite different from contribution. See Firestone Tire and Rubber Co. v. Thompson Aircraft Tire Corp., 353 So.2d 137 (Fla. 3d DCA 1977).

768.44, Florida Statutes (1977), applied to Walt Disney's claim for contribution against a hospital that negligently treated a person who fell on Walt Disney property. 363 So.2d. 599-600. Walt Disney, as distinguished in Wendel, was based on section 768.44, which was in effect in 1978 and more broadly defined the kinds of claims subject to the presuit mediation process.[8] Walt Disney, 363 So.2d at 599. Further, Walt Disney does not address the correlative issue of whether the limitation period for contribution claims would have been tolled by participation in mediation process. Accordingly, its holding is of little precedential value and limited to situations involving that earlier version of the statute.

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[8] Section 768.44 was subsequently repealed in 1983, in response to this Court's decision in Aldana v. Holub, 381 So.2d 231(Fla. 1980)(holding section 768.44 unconstitutional). See 1983 Fla. Laws ch. 83-214, s. 15.

CONCLUSION

The First District court erred in concluding that the statutory presuit screening requirements of Chapter 766 apply to an action for contribution based on the alleged medical negligence of a joint tortfeasor and in rejecting the Fourth District court's holding in Wendel. Wherefore, Defendants respectfully request the Court reverse the First District court's holding, adopt the opinion of the Fourth District court in Wendel, and reinstate the judgment of the circuit court, which determined that Petitioner was entitled to summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Hand Delivery to Michael T. Callahan, Esq., 2151 Delta Boulevard, Suite 101, Tallahassee, Florida 32303; on this 19th day of October, 2000.

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