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Southern Baptist Hospital of Florida v. Jeffrey Welker

I CALL THE LAST CASE O N T HE CALENDAR THIS M ORNING WHICH IS SOUTH ERN BAP TI ST H OS PITA L VERSUS J EF FR EY W ELKE R . THE PARTIES A RE R EA DY . LET'S J UST WAIT U NTIL W E - - P RIOR COUNSEL. MR. JAY?

MAY IT PLEASE THE COURT , I'M H ARVEY JAY O N B EHAL F O F SOUTHERN BAPTIST HOSPITAL OF FLORIDA. THIS S AY I NV OLVES THE DISMISSAL OF A T HREE -C OUNT COMPLAINT THAT AROSE FRO M THE ACTIONS OF A MEN TA L HEALTH COUNSELOR W HO W AS A FULL-TIME EMPLO YE E O F BAPTI ST MEDICAL CENTER. THAT STANDS UNDISPUTE D IN THE RECORD.

NOW, WE'RE H ER E O N T HE CERTIFIED QUESTION BUT I T SEEMS THAT A LOT O F W HAT W AS THE B RIEF I S FOC US IN G O N I S THE I SS UE A BO UT WHE TH ER THE P RESUIT NOTICE REQUI RE ME NT S HAD TO BE COMPLIED W ITH. I WANT TO MAKE SUR E THA T , YOU KNOW, BECAU SE W E H AVEN 'T ACCEPTED JURISDICTION ON THAT BASIS A LT HO UGH T HERE WAS CONFLICT NOT ED W IT H GOLDMAN.ARE YOU GOING TO FOCUS ON BOTH OF THE ISSUES? ARE YOU GOING T O STA RT WITH THE IMPACT RULE I SSUE THAT WE ARE HERE O N O R A RE Y OU GOING TO DO IT AS Y OU A RGUE D IN YOUR BRIEF?

WHATEVER THE P RE FE RE NC E OF THE COURT IS. I'M PREPARED TO A RGUE B OTH. BOTH ISSUES A RE VER Y IMPORTANT TO THE HOSPITAL.

IF YOU COULD ADD RESS FIRST THE I SS UE T HA T W E H AV E ACCEPTED JUR ISDICTION O N S O T HAT THEN WE ARE GOI NG T O HAVE TO DECIDE A FT ER T HAT WHAT OTHER ISSUES , A ND O F COURSE THAT DOESN'T PRE CL UDE YOU FROM ARGUING THAT , B UT IF YOU COULD HELP US FIRST OF ALL WITH T HE I SSUE THA T WE ARE ACTUALL Y HER E O N , THE P RIORITY ISSUE I'LL CAL L I T.

SO WE DON 'T R UN OUT O F TIME, I WOULD LIKE FOR B OTH COUNSEL TO ADDRESS THE C AUSE OF ACTION THAT WE ARE DEALING WITH IN C OUNT 3 .

YES, SIR . AND I WILL BE H AP PY T O ADDRESS T HE IMPACT RULE AND THE CAUSE OF A CTION. BACK TO THE COM PL AINT , INITIALLY INC LU DED A V IOLATION A ND L ES S VIO LA TION O F 3 92 01 W HI CH WAS D IS MI SSED WITH PREJUDICE BY THE T RIAL COURT ON APPEAL. COUNT 2 WAS A L IABL E C OUNT THAT WAS DISMISSED BY THE TRIAL COURT BY C ONCESS IO N O F COUNSEL WAS AGREED T O AS BEI NG DISMISSED AND COUNT THREE IS A FAI LU RE T O U SE REASONABLE I K KA CARE A ND W E WOULD SUBMIT COMING FROM THE ACTIONS, HEALTH CARE A CT IO NS OF THIS MENTAL HEA LT H COUNSELOR WHO WAS A FULL-TIME EMPLOYEE OF T HE HOSPITAL.

THIS IS WHERE THE IMPACT RULE COMES IN ; IS T HA T CORRECT?

YES, SIR.

THAT IS THE RE WAS A CLA IM THAT THE IMPACT R ULE WOULD PRECLUDE THAT CAUSE OF ACTION BECAUSE THERE WAS N O PHYSICAL IMPACT INVOLVED IN THIS CASE ; IS T HA T CORRECT?

YES, SIR.

LET ME JUST, SO YOU DISPUTE THAT THE ATTORNEYS FEES AND COSTS PART ARE NOT PART OF THIS APPEAL? >> I AGREE WITH THAT, YOUR HONOR. ON THE IMPACT PART OF THIS, NOW, THE COURT WAS TO FIND THAT 766 BARRED THE CLAIM THEN THAT WOULD ALSO TAKE AWAY THE ATTORNEYS FEES AND COSTS BUT ABSOLUTELY AS TO THE IMPACT RULE PORTION THE ATTORNEYS FEES AND COSTS WOULD BE SEPARATE AND A PART FROM THE EMOTIONAL INJURY.

SO YOU ARE CONCEDED THAT THERE IS A RECOGNIZED CAUSE OF ACTION PLED?

NO, SIR. AND THAT'S THE INTERESTING, I GUESS, DILEMMA THAT WE ARE IN HERE. THE COURT DISMISSED THIS CLAIM WITH PREJUDICE ON THE COMPLAINT. WE NEVER REACHED THE POINT OF SUMMARY JUDGMENT. WE NEVER REACHED THE POINT EVEN THOUGH BOTH PARTIES WERE DEPOSED IN THE UNDERLYING CASE.

WHERE ARE WE ON THAT? AND THIS REALLY IS COMING BACK TO JUSTICE WELLS' STATEMENT, YOU KNOW, TO YOU, AND THAT IS ORDINARILY WE SEE THE IMPACT OF THE IMPACT RULE AND THAT IS SORT OF SAYING, YOU KNOW, HERE IS A FORMULA AND THERE IS A CAUSE OF ACTION THERE, OKAY? EXCEPT THAT THE RE WAS NO IMPACT, ALL RIGHT? AND SO THERE, THEN, THE DECISION IS MADE. DO YOU HAVE TO HAVE AN IMPACT AND THAT IS SORT OF WHAT OCCURRED HERE, BUT THERE IS SORT OF AN UNKNOWN WITH REFERENCE TO IS THE RE A VALID CAUSE OF ACTION HERE TO BEGIN WITH? THAT IS, DOES A THIRD PARTY HAVE A VALID CAUSE OF ACTION AGAINST A, YOU KNOW, I'LL STATE IT IN THE WAY THAT I HAVE WONDERED ABOUT IT, LOOKING AT THE CASE, YOU KNOW, A GENERAL SOME PROFESSIONAL, YOU KNOW, LIKE A PHYSICIAN OR WHATEVER, BUT AFTER BEING TOLD THESE THINGS BY WHOEVER BRINGS THE CHILD IN AND THE N TALKING TO THE CHILD, YOU KNOW, SAY, WELL, YOU KNOW, I'M ALL KINDS OF BELLS HAVING ONE OFF WITH ME AND I'M VERY CONCERNED AFTER BEING TOLD THAT THE CHILD WOULD BE RETURNED TO THE OTHER PARENT OR AFTER WHAT I HAVE BEEN TOLD AND, THEREFORE, I DON'T THINK THE CHILD OUGHT TO GO BACK UNLESS SOMETHING HAPPENS. IS THERE A RECOGNIZED CAUSE OF ACTION AGAINST A PROFESSIONAL? DID YOU ALL RESEARCH WHETHER OR NOT IN OTHER JURISDICTIONS OR IS THIS AN EXTENSION OF THE INTERFERENCE WITH PARENTAL RIGHTS OR SO AS A PRELIMINARY TO THE IMPACT PART, COULD YOU TELL US WHAT YOUR POSITION IS AS TO WHETHER OR NOT THERE IS A CAUSE OF ACTION RECOGNIZED IN FLORIDA SUCH AS HAS BEEN BROUGHT HERE IN THIS THIRD COUNT?

WE WOULD SUBMIT, JUDGE, THERE IS NOT.

AND BEFORE YOU ANSWER THAT, AND I, YOU KNOW, ON THIS, THIS HAS NOT BEEN AN ISSUE THAT YOU BRIEFED ON APPEAL. I'M NOT SAYING THAT WE CAN'T OURSELVES CONSIDER IT, BUT I WANT TO MAKE SURE THAT TO %% --pp THIS COURT IT IS NOT ONE OF THE ISSUES THAT YOU BRIEFED. %% --pp

IT WAS COLLATERALLY BRIEFED BY THE FLORIDA %% -- pp DEFENSE LAWYERS.

BUT YOU HAVE NOT BRIEFED IT. ALL RIGHT. NOW, PLEASE WITH THAT IN MIND.

YOU BRIEFED THIS IN THE DISTRICT COURT.

NO, WE DID NOT. IT NEVER CAME UP BECAUSE WE WERE CONSTRAINED TO WHAT THE TRIAL COURT DID AS TO THE DISMISSAL OF THE INITIAL COMPLAINT WHICH WAS THE FINDING AS OF COUNT THREE BARRED BY 766 AND OR BARRED BY THE IMPACT RULE AND SO THAT'S WHAT WE ARGUED IN FRONT OF THE FIRST AND WHICH WAS BRIEFED IN FRONT OF THE FIRST. IF WE ARE DEALING WITH THAT ISSUE DENOV, THOUGH, WE WOULD IN LINE WITH THE FLORIDA DEFENSE LAWYERS BRIEF.

IT SEEMS LIKE THE DCA DID SAY THAT THE RE WAS A CAUSE OF ACTION. ISN'T THAT WHAT THE DCA HELD?

IN SPI TE OF U S NOT BRIEFING THAT OR ARGUING THAT TO THE D CA . THE CAUSE OF ACTION THAT HAS BEEN RECOGNIZED IS AN INTENTIONAL INTERFERENCE WITH PARENTAL RIGHTS. THIS HAS BEEN TERMED AS A NEGLIGENT INTERFERENCE. THERE WAS NO CAUSE OF ACTION IN THE STATE THAT WAS RECOGNIZED --

WHY WOULDN'T YOU BE IN A POSITION IF WE HOLD THAT THE IMPACT RULE REALLY DOESN'T AFFECT, I HESITATE TO SAY IMPACT, AFFECT THE RESOLUTION OF THAT , WHY WOULDN'T YOU STILL BE FREE TO ATTACK THIS CLAIM AND THE TRIAL COURT , YOU KNOW , WHEN THESE PROCEEDINGS GO BACK TO THE TRIAL COURT , OR HAS THE RULING OF THE DISTRICT COURT OF APPEAL ALREADY RESOLVED THAT? THAT IS , IS THE LANGUAGE IN THEIR OPINION SUCH THAT THAT WOULD BE CONSTRUED TO SAY , YES, THERE IS A VIABLE CAUSE OF ACTION FOR THE NEGLIGENT INTERFERENCE?

IT WOULD BE OUR INITIAL POSITION, YOUR HONOR, THAT THAT IS NOT ENOUGH IN THE OPINION ITSELF , BECAUSE THE CONTEXT OF THE OPINION OF THE FIRST DISTRICT IF LOOKED AT CAREFULLY , EMANATES AND INVOLVES THE IMPACT RULE AND THIS CAUSE OF ACTION IS SEEN AS PART AND PARCEL AS SOMETHING THAT FALLS BEEN THE EXCEPTION, FOR EXAMPLE , THAT WAS IN RAUEL VERSUS HOLT.

ARE YOU SAYING YOU DIDN'T RAISE THIS BECAUSE YOU DIDN'T SEE THIS AS A CLEAR-CUT RULING THAT THERE IS A CAUSE OF ACTION HERE , REALLY, AN ORDER FOR THE %%--
IMPACT RULE TO BE A PART OF AN INGREDIENT OR NOT AN INGREDIENT?

THE REASON IT WAS NOT RAISED, IT WAS NOT RAISED IN FRONT OF THE TRIAL COURT AND IT WAS NOT RAISED AS A RAL ARGUMENT IN FRONT OF THE FIRST DISTRICT.

WOULD WHY WOULD YOU HAVE HAD TO HAVE RAISED IT IN FRONT OF THE TRIAL COURT IN SAYING THE IMPACT RULE IS REALLY A CONSEQUENCE HERE BECAUSE I DON'T CARE HOW YOU CUT IT, THERE IS NO SUCH CAUSE OF ACTION RECOGNIZED IN THE STATE OF FLORIDA FOR THE NEGLIGENT INTERFERENCE IN PARENTAL RIGHTS OR WHATEVER AND, YOU KNOW , THAT'S SOMETHING THAT IS BASIC AND HAS TO BE RESOLVED EVEN BEFORE YOU GET TO WHETHER OR NOT THERE ALSO HAS TO BE AN IMPACT .

WE DIDN'T RAISE IT AT THE TRIAL LEVEL, YOUR HONOR, BECAUSE THE RE WAS A GREAT MANY THINGS THAT WAS -- THAT WERE YET TO COME AS FAR AS DEPOSITIONS. THE PLAN WAS IF WE WERE NOT SUCCESSFUL ON THE MOTION TO DISMISS AND WE FELT VERY CONFIDENT ON THE 766 ISSUE AS WELL AS THE IMPACT RULE ISSUE, TO RAISE IT , DISPOSITIVELY ON SUMMARY JUDGMENT , UTILIZING THE FACTS FROM MR. WELKER'S DEPOSITION.

IF SOMETHING HAS A STATE D CAUSE OF ACTION YOU DON'T HAVE TO GO TO THE SUMMARY JUDGMENT PHASE AND YOU HAVE ALREADY SAID THERE ARE ATTORNEYS FEES AND COSTS AND YET IF IT DOESN'T STATE A CAUSE OF ACTION WE CAN'T BE UP HERE TALKING ABOUT IMPACT RULE WHEN THE FIRST ISSUE IS WHETHER, AND I PUT IT MORE AS TO WHETHER A DUTY ARISES UNDER THESE CIRCUMSTANCES TO THE FATHER FROM THE WRITING OF THE REPORT WHETHER IF THE MOTHER HAS BROUGHT, YOU KNOW , SO I DON'T KNOW , AND BUT I DO -- I HAVE SIMILAR CONCERNS. I JUST DON'T KNOW HOW WE IN THIS CASE GET AROUND AT LEAST DOING SOMETHING ABOUT THE IMPACT RULE OR AT LEAST DISCUSSING DISCUSSING 766 , WHICH YOU SEEM TO THINK YOU CAN HANG YOUR HAT ON.

I DO , YOUR HONOR , AND BACK TO YOUR QUESTION AS TO WHAT WENT ON AT THE TRIAL LEVEL . A CLARITY WAS FOUND BY JUDGE WEBSTER THAT RESPECTFULLY TO HIM WE DID NOT SEE IN THE COMPLAINT. THERE WAS SOME AMBIGUITY AS TO WHAT THE PLAINTIFF WAS

CLAIMING IN COUNT 3. THAT H AS N OW BEE N REF IN ED B Y JUDGE W EBSTER AND C AL LE D NEGLIGENT INT ERFERENCE WITH PARENTAL RIGHTS.IT WAS NOT THAT CLEAR AT THE TRIAL COURT LEVEL. THAT WAS PART OF T HE R EASON WE WANTED T O GO T HROUGH T HE D EPOSITION PROCESS.

I'M SURPRISED I T G OES BACK THAT T HI S W AS NOT RAISED BY Y OU AS AN ISS UE O N A PPEAL SO THAT T O OUR C OU RT SO THAT YOU COULD, S INCE I T WASN'T JUST JUDGE W EBST ER'S OPINION BUT BE THA T A S I T MAY, ARE YOU PREPARED T O ARGUE THAT ISSUE? ARE WE GOING TO - - W E'VE PROBABLY TAKEN MOST OF YOUR TIME UP?

I'M PREPARE D T O ARG UE T HE IMPACT ISSUE AND THE 766 ISSUE.

ON T HE IMPACT I SS UE R ULE IT WOULD MAKE A DIFFERE NC E WHETHER THI S W AS A LL EGED T O BE A N I NTE N TI ON AL T OR T O R A N EGLIGENT TORT , I SN 'T THA T CORRECT? IF IT WAS AN I NTE N TI ON AL TORT THEN THE IMPACT RULE WOULD N'T APPLY.

EXACTLY. I D ON'T B ELIEVE THERE IS A NY QUESTION, YOUR HONOR, THAT THIS IS NOT AN INT ENTI ONAL TORT. AS A MATTER OF FACT, IF YOU LOOK CLOSELY AT C OU NT 3 , I T SPEAKS A BO UT NEG LIGE NC E N EGLIGENCE. IT DOESN'T TALK ABOUT INTENTIONALITY. THERE W AS S OM E REFER ENCE I N COUNT TWO, A LIA BL E COU NT , THAT HAS BEEN D IS MI SS ED WIT H PREJUDICE.

THAT'S WHERE I A M HAV IN G THE PROBLEM U NPEE LING T HI S O NION BECAUSE A S SEV ERAL MEMBERS OF THE C OURT HAV E SAID YOU HAVE TO PEE L T HIS. YOU'VE GOT TO GO BACK T O BASICS AND FIGURE OUT B EFOR E YOU CAN FIGURE O UT W HE TH ER T HE I MPACT RULE A PP LI ES WHAT YOU ARE T ALKING ABOUT IN THE FIRST PLACE , BECAU SE O F - - THERE IS A DIF FERE NC E T O THE TYPES O F THING S T HA T THE IMPACT RULE A PP LI ES T O A ND TYPES O F T HI NG S THAT T HE IMPACT RULE DOES NOT APPLY TO, AND I D ON 'T KNO W H OW THAT C OU LD HAV E B EE N FERRE TED OUT IN THE TRIAL COURT.

THE ARGUMENT , YOUR HONOR, TO JUDGE BOW DE N B EL OW , WAS THAT WE KNO W DEF INIT IVEL Y AND IT WAS AGREED T O B Y MR. DATZ THAT THERE W AS NO PHYSICAL INJURY. THERE WAS N O I MPACT. THAT STOOD U NDIS PU TE D I N T HE RECORD. WE KNOW COUNT 3 W AS A NEGLIGENT CLAIM , SO W E KNO W P UTTING THOSE TWO P IECE S TOGETHER THAT NERD O GET - - IN ORDER TO G ET AROU N D THE NEG LIGENCE BAR , THE RE BEI NG NO IMPACT.

DO W E KNO W T HA T F OR CERTAIN? I TAKE IT T HI S WOULD B E A STANDARD PRACTICE WHEN YOU START OUT COU NT 2 , YOU SAY , WE REA LL EGE E EVERYTHING WE ALLEGED IN COUNT ONE A ND I N THREE Y OU S AY W E R EALL EG E EVERYTHING THAT WE ALLEGED IN COU NT S ONE A ND TWO , W HICH INCLUDE S OM E A LL EGAT IONS O F % % --ppINTENTIONAL MISCONDUCT ; IS THAT CORRECT ?

IT DOE S RAI SE % % --ppMALICIOUSNESS , B UT T HE RE I S N O F RANK REI NCOR PO RA TI ON % % --ppCOUNT 2 INT O COU NT 3. COUNT 3 START S O FF DEN OV O , S O A S T O T HE I NT ENTI ON AL IT Y PART OF IT , I W OU LD S UB MI T AND I KNOW IT IS NOT I N FRONT OF THIS COU RT , THE % % --ppIMONY WAS A BS OLUT EL Y C RYSTAL C LEAR FRO M V ALER IE BRINK, THE COU NSELOR , T HA T THERE WAS N O SEN SE O F INT ENTIONALITY, MALICIOUSNESS.SHE WAS SIM PL Y P AS SI NG A LO NG WHAT SHE WAS TOLD.

BUT THIS W AS A D EC IS ION RENDERED BY THE TRIAL COURT JUST ON THE PLE ADINGS ; IS THAT CORRECT?

YES, SIR.

THIS I S A MOTIO N T O DISMISS FOR THESE V ARIOUS REASONS AS OPPOSED T O A SUMMARY J UD GMEN T A S T O DISPOSING OF THAT. WOULD YOU AGREE IF T HERE I S A SUC CE SSFU L A LLEG AT

IO N OF A N I N T E N T I O N A L T O R T H A T U N D E R O U R L A W T H A T ' S O U T T H E R E N O W , R E A L L Y T H A T T H E R E W O U L D B E N O R E Q U I R E M E N T O F P H Y S I C A L I M P A C T ?

YES, SIR. I THINK THAT'S CLEAR.

SO IT ' S W H E R E T H I S C A U S E O F A C T I O N T H E N S I T S A S T O W H E T H E R O R N O T T H E R E W O U L D B E A R E Q U I R E M E N T O R N O T A R E Q U I R E M E N T . I S T H A T --

YES, SIR.

N O W , O N T H E I S S U E , T H E I S S U E I K N O W T H E H A S - - T H E H O S P I T A L S A R E I N T E R E S T E D I N . I S T H E H O S P I T A L V I C A R I O U S L Y % % -- p p L I A B L E , I N R E A D I N G T H E T W O , % % -- p p G O L D M A N I N T H I S C A S E , I T W O U L D S E E M I S N ' T T H E R E A L I S S U E A S T O W H E T H E R T H I S I S -- A S S U M I N G W H E N E V E R W E G E T T O T H E C A U S E O F A C T I O N I M P A C T R U L E I F I T I S B A R R E D B Y T H E N O T I C E R E Q U I R E M E N T S W H E T H E R T H I S I S A M E D I C A L % % -- p p M A L P R A C T I C E C L A I M ? I N O T H E R W O R D S , E V E N I F Y O U A R E A H E A L T H C A R E P R O V I D E R , T H E C L A I M H A S T O B E O N E T H A T I S F O U N D I N M E D I C A L N E G L I G E N C E , C O R R E C T ?

I T H I N K T H E K E Y I S W H E T H E R I T A R I S E S O U T O F T H E R E N D E R I N G O F M E D I C A L C A R E A N D T H E Q U E S T I O N I S : M E D I C A L C A R E , W H I C H I S N O T D E F I N E D B Y T H E S T A T U T E S .

S O A M E N T A L H E A L T H C O U N S E L O R I N V O L V E D I N C O U N S E L I N G , U N D E R W H A T L E A P D O Y O U G E T T O T H A T T H A T ' S M E D I C A L C A R E ?

W E L L , W E K N O W T H I S C O U N S E L O R , B A S E D O N T H E P L E A D I N G S , M A D E A D I A G N O S I S O F P T S D . W E K N O W T H A T T H I S C O U N S E L O R G A V E H E R C L I N I C A L O P I N I O N A N D A S A M A T T E R O F F A C T T H E C L I N I C A L O P I N I O N I S S E R I A L L Y R E F E R E N C E D T H R O U G H O U T T H E C O M P L A I N T . W E K N O W T H A T S H E G A V E T R E A T M E N T R E C O M M E N D A T I O N S B A S E D O N H E R L E T T E R . W E K N O W T H A T O N E O F T H E T H I N G S T H A T M E N T A L H E A L T H C O U N S E L O R S D O I S T H E Y A S S I M I L A T E I N F O R M A T I O N T O D E T E R M I N E T H E C R E D I B I L I T Y .

B U T W E A L S O K N O W W H E N T H E L E G I S L A T U R E P A S S E D T H E M E D I C A L M A L P R A C T I C E A C T T H A T T H E Y S A I D Y O U ' V E G O T H O S P I T A L S A N D M E D I C A L C A R E , A N D T H E N Y O U ' V E G O T M E N T A L H E A L T H C O U N S E L O R S , A N D I F T H E Y W E R E N ' T T R Y I N G T O A S S I S T O R P R O T E C T M E N T A L H E A L T H C O U N S E L O R S , I T W A S F O R M E D I C A L C A R E , S O I D O N ' T K N O W H O W , B E C A U S E T H E Y B E C A M E E M P L O Y E D B Y T H E H O S P I T A L A L L O F T H E S U D D E N S O M E T H I N G T H A T I S N O T S U B J E C T T O T H E M E D I C A L M A L P R A C T I C E A C T C O M E S W I T H I N I T . I B U Y Y O U R A R G U M E N T T H A T Y O U O B V I O U S L Y A C T A S Y O U R A G E N T % % -- p p S O I F Y O U ' V E G O T S O M E B O D Y W H O I S N E G L I G E N T L Y P E R F O R M I N G M A M M O G R A M S E R V I C E S J U S T B E C A U S E T H E Y A R E N O T H E A L T H C A R E P R O V I D E R D O E S N ' T M E A N I T I S N O T A M A L P R A C T I C E C L A I M , B U T W H E N I T I S T O T A L L Y S O M E T H I N G T H A T % % -- p p I S U N D E R E V E R Y O T H E R C I R C U M S T A N C E W O U L D N ' T B E S U B J E C T T O T H E M A L P R A C T I C E P R E S U I T , I D O N ' T U N D E R S T A N D H O W Y O U G E T I N T O T H E R E J U S T B E C A U S E T H E M E N T A L H E A L T H C O U N S E L O R I S E M P L O Y E D B Y T H E H O S P I T A L .

W E W O U L D S U B M I T , I F Y O U L O O K A T T H E D E F I N I T I O N O F M E D I C A L C A R E A N D I K N O W J U S T I C E C A N T E R A T A L K E D A B O U T D E F I N I N G T E R M S , I F Y O U L O O K A T T H A T T E R M I T T A L K S A B O U T P R O F E S S I O N A L T R E A T M E N T F O R I L L N E S S O R I N J U R Y A N D C E R T A I N L Y H E R E W E H A V E P R O F E S S I O N A L T R E A T M E N T F O R I L L N E S S O R I N J U R Y B Y A F U L L - T I M E E M P L O Y E E O F T H E H O S P I T A L .

Y O U M E A N T H A T ' S L I K E A P L A I N M E A N I N G O R A M B I G U O U S , H O W I S T H A T ? I S I T A N A M B I G U O U S T E R M ?

W E L L , I T P E R H A P S S O M E H A V E S A I D S O , Y O U R H O N O R . W E W O U L D S U B M I T B A S E D O N T H A T D E F I N I T I O N , I A L S O F O U N D A N O T H E R D E F I N I T I O N S A Y I N G T H A T I T R E L A T E S T O T R E A T M E N T O F

ILLNESS OR --ppINJURY, SO, AGAIN, PUTTING THOSE TWO DEFINITIONS TOGETHER, WE HAVE TREATMENT FOR ILLNESS OR INJURY BY THIS MENTAL HEALTH COUNSELOR WHO IS A MASTER LEVEL MENTAL HEALTH COUNSELOR WITH TWO YEARS OF INTERNSHIP DOING WHAT SHE DOES FOR THE HOSPITAL.

SOUALLY WHEN YOU THINK OF MEDICAL CARE, YOU THINK OF PEOPLE WHO HAVE SPECIALIZED TRAINING, HAVE GONE TO MEDICAL SCHOOL OR DENTAL SCHOOL OR, YOU KNOW, SO ANY PERSON THEN WOULD FALL UNDER -- A NY KIND OF --ppSOCIAL SERVICES COUNSELOR, WOULD THAT PERSON THEN FALL UNDER YOUR DEFINITION? >> WELL, WE KNOW --

BECAUSE THEY TALK TO PEOPLE AND TRY TO HELP THEM. SO WE ARE OPENING UP THE DEFINITION HERE OF WHAT WOULD BE THE RENDERING OF MEDICAL CARE AND TREATMENT, AREN'T WE?

JUSTICE QUINCE, I WOULD SUBMIT THAT'S BEYOND WHERE A MENTAL HEALTH COUNSELOR IS. THIS IS MORE A KIND OF ANURSE AND WE KNOW STATUTORY LAW ARE DEEMED TO BE CARRYING OUT MEDICAL CARE BECAUSE THEY ARE INCLUDED SPECIFICALLY AS MENTAL HEALTH CARE PROVIDERS WITHIN THE STATUTE. >> BUT IT WOULD SEEM A S THOUGH HOSPITALS ENGAGE IN SUCH A WIDE VARIETY OF ACTIVITIES THAT WE WOULD JUST BE SPINNING THE WHEEL TO FIND WHERE THIS GOES IF WE DON'T DEFINE IT BY CERTAIN CHAPTERS. FOR EXAMPLE, A DIETICIAN, A NUTRITIONIST WITH ADVANCED DEGREES WHO PROVIDE FOOD FOR --ppTHE CARE, ILLNESS, YOU SEE, I MEAN THIS THING BECOMES, IT JUST SWALLOWSEVERYTHING UNLESS WE HAVE SOME REAL DEFINING LINES OF WHAT THE CONCERN IS, I THINK.

WE WOULD SUBMIT, JUSTICE LEWIS, THAT THE DEFINITION NEEDS TO BE HEALTH CARE PROVIDER, ONE, AND THEN THE SECOND PRONG WHETHER IT ARISES OUT OF THE RENDERING OF MEDICAL CARE. MEDICAL CARE MEANING THAT PROFESSIONAL TREATMENT FOR ILLNESS OR INJURY THAT, DIETICIAN INCLUDES FALLS WITHIN THAT DEFINITION AND THE RADIOLOGY TECHNICIAN IN GOLDMAN FALLS WITHIN THAT DEFINITION.

DOES SHE REALLY -- DID THE PERSON HEREA REALLY RENDER ANY KIND OF MEDICAL CARE AND TREATMENT? SHE RENDERE D AN OPINION AND A LETTER THAT WAS THEN USED FOR SOME OTHER PURPOSE AND IT REALLY WASN'T USED FOR THE TREATMENT OF ANYONE, WAS IT?

WE KNOW AND, AGAIN, NOT IN THE RECORD IN FRONT OF THIS COURT BUT SHE SAW THESE CHILDREN MULTIPLE TIMES. COUNSELED THEM, TREATED THEM --ppOVER SEVERAL DIFFERENT SESSIONS. THIS PARTICULAR LETTER EMANATES FROM THE THIRD SESSION WITH THOSE CHILDREN SO SHE DID PROVIDE TREATMENT.

ANOTHER POINT, THE COMPLAINT DOES NOT ALLEGE THAT THE ACTUAL TREATMENT, IF THAT'S WHAT IT WAS, THAT WAS DONE, WAS DONE IN A NEGLIGENT MANNER. IT IS SIMPLY THAT THE Y DEFAMED NEGLIGENTLY THE FATHER. NOT THAT THEY WERE NEGLIGENT IN THE WAY THEY TREATED THE CHILDREN.

CORRECT. --pp

EVEN ASSUMING THAT THIS FALLS WITHIN THE PENUMBR OF A MEDICAL SERVICE, HOW IS THE RESULT OF THE ACTION AS A RESULT OF THE MEDICAL SERVICE ITSELF?

THE BASIS OF THIS CLAIM IS PASSING ALONG THIS INFORMATION THAT IT IS UNDISPUTED THESE CHILDREN ARE RELATED TO THIS COUNSELOR, PART OF WHAT COUNSELORS DO IS DETERMINE HOW VALID THAT INFORMATION IS WITHIN THEIR PROFESSIONAL TRAINING. DETERMINING WHETHER SOMETHING HAS CREDIBILITY. IN A HEALTH CARE SETTING, SO IN

ESSENCE B Y S AY ING T HA T SHE I MPROPERLY PASSED T HA T INFORMATION ALONG THEY ARE SAYING THAT SHE FELL B ELOW HER STANDARD OF C AR E I N PROVIDING THAT.

YOU KNOW , IRO NI CALL Y B Y YOUR MAKING SUCH A F OR CE FU L ARGUMENT THAT THIS IS A MEDICAL PRACTICE CAUSE OF ACTION, YOU END U P A NS WERING THE QUESTION THAT WE F IRST STARTED O UT WITH THA T T HERE IS A CAUSE O F ACT IO N , S O YOUR E XC EL LE NT A DV OC AC Y MAY CAUSE SOME C ON CERN S B EC AUSE D O YOU UNDERSTAND WHAT I AM SAYING? IF YOU ARE SAYING THIS COU LD BE NEGLI GENCE I N THE TREATMENT IF THEY SHOULD HAVE VERIFIED THI S BEFOR E AND THEN THIS CAUSED HAR M ? %% --pp

WE WOU LD SUB MI T NOT , GIVEN WHAT WE KNOW TO B E T HE F ACT OF THIS C AS E F IR ST SIMPLY P ASSING A LONG T HE %% --ppINFORMATION IT HAS BEEN PLED AS SUCH , YOUR HONOR, AND ALSO I'M NOT P AI NTIN G O N A CLE AN LAN DSCAPE. WE KNOW F RO M P AT E VERSU S THRELKEL THAT N ONPA TIEN T PLA INTIFFS CAN BRI NG C LAIM S SO THAT CASE CRE ATED A DUT Y IN THAT SETTING.

WE HAVE WIT H O UR QUESTIONS GOING F ROM WHETHER THERE IS A CAUSE O F ACTIO N TO WHETHER THERE IS A MEDICAL MALPRAC TI CE C AUSE O F ACTION, WE' VE USED UP YOU R TIME. THANK YOU VERY MUCH .

THANK Y OU . > > MAY I T P LEASE THE C OURT , I'M LAW RE NC E DAT Z , I %% --ppREPRESENTED THE PLAINTIFF BEFORE THE TRIAL COURT.

IT SEEMS T O M E W HA T W E HAVE HERE IS A L ITTL E L IK E DEBATING WHETHER TO HAVE A NINE HOL E G OL F COU RS E O R A 18-HOLE GOLF COURSE WIT HO UT HAVING DECIDED YOU ARE G OING TO BUILD A GOLF COU RS E. DON'T WE HAVE TO G O T HROUGH STEP 1 BEFORE W E REACH S TE P 3, WHICH IS DON'T WE HAV E TO DEFINE THE CAUSE O F A CT IO N BEFORE WE DEFINE WHAT T HE DAMAGES FOR THE C AUSE OF ACTION ARE?

YES, SIR. I AGREE. IN FACT , I ANS WE R THAT Q UESTION HEAD ON , S O T O SPEAK , C OU NT 3 W AS P LE D AS ORDIN ARY NEGLIGENCE, AND JUST, YOU KNO W , SIM PL E L AW SCHOOL IS H T YP E S TUFF A BO UT DUT Y , BRE AC H OF DUTY , CAUSATION AND DAMAGE. WHAT HAPPENED W AS I S T HA T THE HOSPITAL FILED A M OTIO N TO DISMISS , A ND I N THE %% --ppGROUNDS IN A MOTION T O DISMISS, THE O NE S THA T THE %% --ppTRIAL JUDGE RULED O N , WER E THAT, O NE, H E D IS MISSED B ASED ON THE I MPAC T R UL E , AND , TWO , T HA T I T WAS A MEDICAL MALPR AC TICE CAUSE OF ACTION AND, THEREFORE, THE STATUTE OF LIMITATIONS HAD EXP IRED. THE N A S P LAIN TIFF W E APPEALED TO T HE F IR ST DISTRICT.

WHEN YOU S AY T HEY R AISE D OTH ER POINTS, DID THE Y R AI SE ALTERNATIVELY THAT THE RE WAS NO RECOGNIZE D C AUSE O F ACTION?

FRANKLY, I DON 'T REM EMBE R THE E XACT WORDING OF T HE MOTION TO D ISMISS. I D O KNO W T HA T, YOU K NO W , I THINK T HEY GEN ER ALLY PLE D FAILURE TO STATE A CAUSE O F ACTION, BUT I DON'T KNO W WHETHER THEY I NC LU DE D SPECIFIC GROUNDS. I THINK THEY RELIED M OR E O N THE 7 66 D OCTR INE.

BUT WAS YOUR A LL EG ATION THAT THERE WAS N EGLIGE NC E I N TREATING THE CHILDREN? JUST GOING BACK TO T HAT.

NO , YOUR HON OR .

I N F AC T , T HIS I S A CTUALLY ONE OF THE MAIN POI NTS I WANTED TO M AKE. T HE COMPLAINED O F A CT O F NEGLIGENCE OR T HE F OC AL A CT W AS THE ISSUA NCE O F T HI S LETTER TO WHOM I T M AY CONCERN, AND FRO M THA T WELKER WAS A R EASO NABL Y FOR ESEEABLE VICTIM , I F Y OU WILL, OF T HE C ONTE NT S O F T HAT LETTER.

BUT IF EVERYTHING THE PERSON DID WAS PROPER OR NOT - - YOU ARE NOT ALLEGEDLY THERE WAS ANYTHING IMPROPER IN TERMS OF THE DIAGNOSIS AND THIS WAS JUST A REPORT, WHY WOULD THERE BE ANY DUTY TO SOMEONE OUTSIDE OF THE CHILDREN? THAT'S WHERE I AM HAVING THE PROBLEM IN TERMS OF EITHER THIS WAS A NEGLIGENT WAY TO APPROACH THE DIAGNOSIS AND TREATMENT, BUT IF IT WASN'T THEN WHERE WOULD THE DUTY ARISE NOT TO WRITE A LETTER SAYING WHAT SHE FOUND TO BE HER DIAGNOSIS?

THAT LETTER WAS, I GUESS, A COUPLE OF POINTS. ONE HAS TO DO WITH FORESEEABILITY.

DUTY, DUTY. WHERE IS THE DUTY? WHAT IS IT THAT WAS NEGLIGENT IF IT WASN'T TREATING THE CHILDREN?

THE NEGLIGENCE WAS THAT SHE RENDERE D THE OPINION THAT THE CHILDREN SUFFERED FROM POSTTRAUMATIC STRESS DISORDER WITHOUT INVESTIGATING THE CLAIM, LET ME BACK UP FOR A SECOND. SHE REACHED THAT OPINION AND INCLUDED IN HER LETTER NOT ONLY THE OPINION BUT THE FACTUAL STATEMENT THAT THE CHILDREN SUFFERED FROM THE PTSD AS A RESULT OF ABUSE BY THE FATHER AND THE ABUSE COMMITTED IN THE PRESENCE OF THE CHILDREN.

WHERE IS THE DUTY, BECAUSE IT SEEMS TO ME WHAT YOU ARE SUGGESTING IS NOW THAT ANY PHYSICIAN OR PSYCHIATRISTS OR WHATEVER THAT HAS THESE THINGS, FOR INSTANCE, A DOCTOR THAT IS PRESENTED, YOU KNOW, WITH PHYSICAL TRAUMA, YOU KNOW, THAT THE BABY FELL OUT OF BED AND SAID, HO, HO, HO, I DON'T BELIEVE THE BABY FELL OUT OF BED AT ALL AND I'M GOING TO CALL THE TEAM TO GET OVER HERE, THE CHILD PROTECTION TEAM AND BEFORE YOU KNOW IT, THE STATE ATTORNEY HAS FILED AN INFORMATION AND WE'VE GOT SOMEBODY HAULED OFF AND, YOU KNOW, NOW MAYBE I'M PAINTING A GREATER PICTURE, BUT WHAT I AM SAYING IS YOU REALLY ARE SUGGESTING IF THERE IS A CAUSE OF ACTION HERE THAT THE BOY, YOU TALKED ABOUT THE FLOODGATES, THAT EVERY TIME SOMEBODY COULD HAVE DONE SOMETHING MORE, BUT WHERE IS THERE ANY DUTY TO THIS ABSENT PARENT TO DO EVERYTHING TO GET IT RIGHT? THAT IS, IF THE CHILDREN HAVE SAID SOMETHING OR IF THE MOTHER SAYS SOMETHING, A PHYSICIAN CAN SAY, WELL, IF THAT'S ALL TRUE, THEN I DON'T THINK THESE CHILDREN OUGHT TO GO BACK TO THAT ENVIRONMENT, AND YOU ARE SAYING EVERY TIME THAT HAPPENS THAT THEY GOT IT WRONG, THAT THERE IS GOING TO BE A CAUSE OF ACTION AGAINST THE PARENT THAT DIDN'T GET THE KIDS BACK, AND I'M HAVING TROUBLE.

LET ME RECONCILE THAT FOR YOU, JUSTICE INSTEAD. THE DIFFERENCE IS THIS: FIRST OF ALL, WHERE THE COMPLAINT AND THE THEORY OF THE COMPLAINT IS NOT THAT THIS PERSON SHOULD HAVE DONE EVERYTHING THEY COULD DO. THE THEORY OF THE COMPLAINT, AND FRANKLY IT IS A PROFESSIONAL LIABILITY TYPE OF THEORY. IT IS NOT MEDICAL MALPRACTICE, BUT STILL PROFESSIONAL LIABILITY TYPE OF THEORY, THAT IT FELL BELOW THE STANDARD OF CARE OF A PERSON IN HER POSITION.

WHERE HAVE WE EVER RECOGNIZED THIS DUTY NOW TO THE ABSENT PARENT, YOU KNOW, ON A NEGLIGENCE COUNT? IN OTHER WORDS, WHAT WOULD YOU EITHER NATURAL SIZE THIS TO OR - - AN ALIEN HISTORICAL? >> LET ME EXPLAIN THIS FURTHER. WHAT HAPPENED WAS THE ORIGINAL COMPLAINT JUST VOLED THE INVOLVED THE COUNT OF NEGLIGENCE WHICH HAS BECOME COUNT 3 BEFORE YOU NOW. IT WAS REFINED WHEN IT GOT AMENDED BUT IN THE AMENDED COMPLAINT, COUNT ONE WAS ABOUT NEGLIGENCE PER SE, - - PERSE, FAULT OR REPORT TO DC.

BECAUSE YOUR TIME IS LIMITED, COUNT ONE, THE DISTRICT COURT, HELD AS A MATTER OF LAW WAS NOT - - DIDN'T STATE A CAUSE OF ACTION. COUNT TWO, YOUR OPPONENT SAYS YOU

S TI PULA TE D THA T I T %% --ppW AS DISMISSED.

YES, SIR.

SO WE'RE D OW N T O C OU NT THREE AND THE S PE CI FI C LANGUAGE IN C OU NT THR EE T HA T I 'M S EEING IS T HA T B RI NK M ADE STATEMENTS IN THE LETTER WITHOUT KNOWINGWHETHER THE PUR PO RTED FACTUAL BASIS OF HER OPINI ON WAS TRUE, F ALSE OR UNABL E T O BE V AL IDAT ED , BRINK HAD A DUTY O F R EA SO NABLE CARE T O I NVESTIGATE O R V AL IDAT E THE A CTUAL A LLEGAT IONS O F T HE PLAINTIFF'S PURPORT ED M ISS DEDUCT. THOSE WERE YOU R A CT UAL ALLEGATIONS, CORRECT?

YES, SIR.

AND IT IS ON T HE BASIS O F T HOSE A LLEGATIONS , NOT S OM E ALLEGATION THAT T HE RE W AS A BREACH O F P RO FE SS IONA L CONDUCT OR ANYTHING E LS E , THAT OTHER THA N WHA T I S IN YOUR COMPLAINT , T HA T T HE QUESTION HAS TO B E A NS WE RE D AS T O W HERE H AV E W E EVE R S AID THAT T HE RE W AS A DUT Y %% --ppTO THE THI RD PAR TY P AR ENT U NDER WHICH YOU ALL EG ED I N T HIS COMPLAINT?

A ND C AN DI D LY I A M N OT %% -- ppAWARE OF ANYWHERE W HERE Y OU HAVE SAID IT AND A S JUS TI CE PARIENTE POINTED OUT THAT' S NOT R EALLY SOMETHING W E H AV E BRIEFED. OFF THE TOP OF MY HEAD I A M NOT A WARE OF IT.

I SAID T HA T , THAT YOU DIDN'T BRIEF IT , BUT THE A MICAS HAVE BRIEF ED I T A ND THE PROBLEM IS IT SOUNDS LIKE WHAT THE F IR ST DIS TR IC T D ID WAS TAK E T HI S V AGUE CAUSE OF ACTI O N I N C OU NT T HREE A ND CON VE RT IT AND SAID, WELL , T HI S I S NEGLIGENT I NTER FERENCE WITH PARENTAL RIGHTS.

YES.

AND MY RES EA RC H D IDN' T REVEAL A NY S TATE I N T HE COU NTRY THA T HAS E VE N %%-- ppDISCUSSED THAT TYPE OF CAUSE OF A CT IO N , A ND S O , A ND Y OU , I 'M SURE , B EI NG T HE G OOD , %% --ppDILIGENT LAWYER YOU ARE, I F YOU HAD SOMET HI NG W HE RE I T WAS ESTABLISHED YOU W OULD HAVE PERHAPS POINTED IT OUT, SO I FEE L LIK E FIRST O F A LL , WE J UF ERNE D ONE STE P F UR TH ER TO SAY - - JUM PED O NE S TE P F UR TH ER TO SAY T HI S CAUSE O F ACTION ISN'T W HETHER WE A RE GOING TO R ECOGNI ZE N EG LIGENT %%-- ppINTERFERENCE WITH PARENT A T RIGHTS BUT W HE TH ER I N T HIS C ASE ASS UMING THERE I S N O NEGLIGENT DIAGNOSIS , T HE RE IS N O D UT Y T HAT ARISE S , S O I DON'T KNOW HOW YOU S EPARATE IT. IF YOU WANT TO SAY SHE WAS NEGLIGENT IN H ER EVA LU ATIO N AND TREATMENT OF T HE CHILDREN AND IT WAS FOR ESEEABLE BECAUSE OF THA T , BUT YOU ARE SEP AR AT IN G T HOSE TWO TH I NGS .

IT S EE MS LIK E C OUNT T HREE IS A DEF AM AT IO N CLA IM WITHOUT THE INTENT REQ UIREMENT

I GUESS THE ONL Y T HING I CAN S AY IS THA T W HE N I DRAFTED IT, I I NT ENDE D T O %% -- ppPLEAD NEGLIGENCE.

NEGLIGENCE WHAT ?

WELL --

BECAUSE THE B ES T A RG UMENT COULD BE THAT THERE IS , YOU KNOW, D EF AMAT IO N HER E BECAUSE SHE'S ACTUALLY S PENT MORE TIME. SHE D IAGNOS ED THEM BUT S HE %% --ppDOESN'T TALK ABOUT THE DIAGNOSIS BUT THEN SAYS T HE CHILDREN REPORTED THE FOLLOWING INC ID

ENTS A ND REPORT FOUR OF THESE THING S AND BUT Y OU ARE N OT A LL EG IN G DEFAMATION, S O I S I T % % --ppNEGLIGENT PUBLICATION O F THE LET TER ?

THE ISSUANCE OF T HE LETTER, YES. IN OTHER WORDS, SHE MADE STATEMENTS THAT SHE JUS T % % --ppWERE UNS UB ST AN TIATE T D A ND UNFOUNDED.

SHE REPORTED IT.

SHE DIDN'T C AL L A ND REPORT IT. SHE DID NOT REPORT I T. % % --pp

THE CHILDREN H AD REP OR TED THE FOLLOWING INCIDENTS. THAT'S WHAT THE LET TE R SAY S. % % --pp

O. THE CHILD RE N HAD REPORTED IT.I'M SORRY. I M IS UNDERSTOOD YOU .

WE SEE DIAGN OS IS B Y DOC TORS R EP OR TI NG O F W HA T THEY SAY IS P ART O F W HA T' S IN THEIR REP OR T . T HE CHILD R EP OR TE D THIS , T HE MOTHER REPORTED THA T. THE HISTORY I S T HIS. I MEAN , T HAT' S WHA T -- > > I N T HO SE TYPES O F CAS ES , JUS TICE PARIENTE, YOU A T LEAST HAVE A QUESTION O F % % --ppFACT. I C OULD IMA GI NE ANY T IME O F % %-- ppPROFESSIONAL LIABI LITY C AS E , YOU KNOW, SHOULD T HE PROFESSIONAL HAVE RELIED O N WHAT THE PERSO N TOLD T HE M?

BUT THAT'S WHERE I COM E BACK TO. I F T HIS WAS PLE D , AS A P ROFESSIONAL LIABILITY CASE, THEN WE W OULD HAVE T O T HI NK THROUGH THAT PROBLEM BUT THAT'S NOT WHAT THIS IS PLE D AS. THIS IS P LED AS SOMET HING THAT I R EALL Y T HI NK I S J US T A C OMMO N N EGLI GENC E ALLEGATION THAT R EA LL Y T HE N W E'VE GOT T O F IG UR E O UT , W ELL , W HERE D OES THI S KIND OF SIT IN O UR LAW O F TOR TS IN FLORIDA, AND THE ONL Y TIME I CAN S EE T HA T W E'VE HAD A CAS E ON INT ER FE RE NC E WITH PARENTAL R IGH T S , W HICH KIND O F I S W HA T J UD GE WEBSTER WAS TALKING ABOUT, WAS WHEN WE ANSWERED THE QUESTION DOWN IN THE 1 1T H CIRCUIT WHICH SAYS IT WAS AN % % -- ppINTENTIONAL I NT ERFERENC E , AND S O WE'VE GOT T O A NSWER THAT QUESTION AS TO WHETHER WE'VE GOT A NEG LI GENT I NTERFERENCE BEFOR E WE C AN EVEN GET TO T HI S QUE ST IO N % % --ppTHA T T ROUBLED THE F IR ST ABOUT WHETHER THERE WAS T HE IMPACT RULE HAD ANY PLA Y .

I G UESS FOR , Y OU K NOW , LACK OF ALT ER NA TI VES A ND T HEN MAYBE THE T HI NG T O D O IS TO REC OGNIZE T HI S A S A VALID CAUSE OF ACT IO N. THE PROBLEM I N T HI S --

THE PRO BL EM W IT H T HA T I S THEN YOU G ET INT O A LL O F THESE O THER KINDS O F SERVICES THAT ARE R ENDE RE D AND OTHER PEOP L E WHO R ENDER OPI NIONS AND S O I N ALL O F T HOSE SITUATIONS ARE W E GOING TO HAVE A CAUSE OF ACT IO N WHEN THE SE PROFESSIONALS RENDER OPINIONS ? A NEG LI GENT C AUSE O F A CT ION. THERE MAY BE S OMET HING ELSE THAT YOU CAN P LE AD A S A V ALID CAUSE OF A CT ION , S O NOW WE'RE GOING TO GIV E THEM A NEG LI GE NC E CAU SE O F A CT IO N , % % --ppA ND WHAT WOULD B E A G OO D % % --ppPUBLIC POLICY FOR DOI NG S O ?

F IRST , T HE B ASIC ANS WE R TO YOUR QUESTION IS YES , Y OU DO DO THAT , A ND I G UESS T HE M ORE C OMPLEX P ART OF THE ANSWER IS THA T I T W OULD H AV E TO BE BASED O N THE STA NDAR D OF CARE BY P EO PL E , L IK E PEOPLE IN T HA T P ROFESSION.

YOU KNOW , THE PROBL EM THAT I HAVE IN ADDITION, AND THIS IS R EA LLY M AY BE G OE S T O THE IMPACT RULE , YOU KNOW , WE'RE TALKING A BOUT A ND AGAIN THE STO NE C AS E WHE RE S OMEONE KID NA P PE D T HE CHI LD. H ERE, AS I U ND ERSTAND IT , THIS LETTER W AS TAKEN A ND THERE W AS A DOM ESTIC VIOLENCE I NJUN CT ION O BT AI NED , A TEMPORARY ONE. TEN DAY S A FT ER WARDS , T HE RE IS AN O PP OR TU NITY AND WE KNOW THIS THROUGH THE STATUTES, T O C ON AN E X SPAS PAR TE I N J UN CT IO N. THE RE IS NO A LL EG ATION THAT SHE

CAME INTO COURT AND TRIED TO THE VERACITY OF THESE ALLEGATIONS SO THERE IS A PRIMA FACIE CASE THAT THESE CHILDREN HAVE REPORTED THESE INCIDENTS. THAT SHOULD BE A CONCERN TO THE COURT AND THEN HAVE THE -- ppADVERSARIAL SYSTEM TO DETERMINE IF THEY ARE TRUE OR NOT. HOW DOES HE GET CAUGHT WITH WHAT WOULD FLOW FROM IF IT TOOK THE COURT FOR WHATEVER REASON, YOU KNOW, MONTHS TO COME TO THE DECISION AS TO WHETHER THIS WAS -- THE SEVERE VALID ALLEGATIONS AGAINST MR. WELKER?

THAT IS AN ANSWER FAIRLY REDUCED. IT WAS CONSOLIDATED WITH THE POST-DISPOSITION CASE AND FRANKLY IN DUVAL COUNTY THIS PROBABLY WAS VERY MUCH THE EXCEPTION RATHER THAN THE RULE THAT THE FAMILY LAW JUDGE PERMITTED IT TO BE -- ppCONSOLIDATED. EFFECTIVELY, THAT WAS A TEMPORARY INJUNCTION THAT STAYED IN EFFECT FOR ALL THAT TIME.

THAT'S NOT A FORESEEABLE TYPE OF DAMAGE. IN OTHER WORDS, YOU ARE SAYING HERE THIS IS MY BEST JUDGMENT. HERE'S THE LETTER. NOBODY THEN USES A LETTER TO DEPRIVE SOMEBODY OF THE CHILD FOR CLOSE TO A YEAR. I MEAN, IF THE COURT PROCEEDINGS ACTUALLY THEN THAT'S A DIFFERENT ISSUE AND I DON'T KNOW, I THINK THAT FURTHER COMPLICES THE IMPACT RULE PART OF THIS ANALYSIS, THAT IS THAT THAT'S NOT REALLY A -- ppFORESEEABLE TYPE OF DAMAGE EVEN THAT THIS WOULD, YOU KNOW, JUST LIKE SOMEBODY REPORTING THAT THEY ARE CONCERNED THAT THE CHILD HAS BEEN ABUSED BECAUSE THEY SEE SOME, YOU KNOW, BROKEN ARM. IF IT TAKES THE SYSTEM A YEAR TO GET IT FURTHERED OUT IS THAT THE PROBLEM OF THE PROFESSIONAL OR THE PROBLEM OF THE SYSTEM?

IN THIS CASE, I HAVE TWO POINTS. ONE IS THAT, AND FRANKLY I -- ppDON'T REMEMBER THE DETAILS OF THE PROCEDURE AT THE TIME, BUT MY RECOLLECTION IS THAT WE, YOU KNOW, WENEEDED ENOUGH TIME TO FIND OUT WHAT BRINK, THE THERAPIST, WOULDIFY TO BEFORE WE HAD A FULL-BLOWN HEARING. I DO REMEMBER THAT THE FORMER WIFE HAD PROBLEMS WITH REPRESENTATION AND THAT THERE WERE LOTS OF TRIALS AND TRIBULATIONS.

BUT YOU AGREE THAT NO COURT IN THE COMPANY HAS RECOGNIZED A CAUSE OF ACTION LIKE THIS?

FRANKLY I DON'T KNOW. IN ALL CANDOR I HAVEN'T RESEARCHED IT, BECAUSE WHAT HAPPENED WAS, AND I GETS BACK TO THE GROUNDS THAT WERE RAISED BY THE MOTION TO DISMISS. THE GROUNDS IT WAS DISMISSED FOR AND THE ISSUES WE RAISED BEFORE THE FIRST DISTRICT COURT OF APPEALS.

YOU ARE NOT AWARE OF ANY AUTHORITY FOR RECOGNIZING A CAUSE OF ACTION?

I'M NOT AND I DON'T MEAN THAT IN ANY KIND OF -- ppAUTHORITATIVE WAY.

THERE USED TO BE THE OLD PHRASE PUTTING THE HORSE BEFORE THE CART, SO WE WILL NOW HAVE PUTTING THE -- ppBUILDING OF THE GOLF COURSE BEFORE THE DECISION. HERE YOU WOULD AGREE FOR US TO PUT A DECISION TOGETHER, WE'VE GOT TO COME TO AT LEAST SAY IF WE ARE NOT GOING TO SAY THERE IS ONE, THAT THAT HAS TO BE LITIGATED, THAT WE CAN'T ASSUME THERE IS A CAUSE OF ACTION AND RECOGNIZE ONE WHICH THE RE -- WHEN THERE HAS BEEN NO BRIEFING ON THIS ISSUE.

FRANKLY THE DIFFICULTY I HAVE WITH THAT REASONING IS TO SAY THAT EVERY CAUSE OF ACTION HAS TO HAVE A LABEL AND HAVE A NAME BEFORE -- ppSOMEBODY FILES A COMPLAINT AND IF THAT WERE THE CASE WE PROBABLY WOULD BE STUCK WITH, YOU KNOW, THE HANDFUL --

IT ISN'T A LABEL. IT IS AN ANALYSIS OF WHETHER OR NOT POLICY REALLY WOULD FAVOR THE RECOGNITION OF A DUTY IN THIS PARTICULAR CIRCUMSTANCE AND ALL OF THE QUESTIONS WE'VE ASKED YOU HAVE INVOLVED, YOU KNOW, OTHER SITUATIONS AND JUST HOW EXPANSIVE, YOU KNOW, THIS RULE WOULD BE. YOU HAVE SOMETHING HERE THAT APPEARS THAT IF THE CHILDREN WERE VISITING A NEIGHBOR OF THE MOTHER AND THE CHILDREN RELATED THAT DADDY DID THIS OR DADDY DID THAT IN TEXAS OR SOMETHING AND A NEIGHBOR GOES OVER TO THE MOTHER AND SAYS YOU CAN'T LET THE SE CHILDREN GO BACK TO THE %-- ppHUSBAND BECAUSE OF WHAT THEY'VE TOLD ME, AND THE %% --ppMOTHER GOES AHEAD AND GETS A DOMESTIC VIOLENCE INJUNCTION OR WHATEVER. NOW APPARENTLY YOU WOULD SAY, WELL, WE HAVE A CAUSE OF ACTION AGAINST THAT NEIGHBOR. IN OTHER WORDS, THIS IS NOT JUST PROFESSIONALS OR OTHER COUNSELORS BUT ANYBODY THAT WOULD ACCEPT THE STATEMENTS OF THE CHILD AND THEN REPORT THEM, YOU KNOW, TO THE AUTHORITIES OR SOMETHING LIKE THAT, BUT IF THEY WERE, QUOTE, NEGLIGENT AND NOT DOING A FULL-SCALE, YOU KNOW, %% --ppVERACITY EXAMINATION.

ACTUALLY I DISAGREE AND THE FACT IS IN THE COMPLAINT I ALLEGE THAT SHE WAS A LICENSED POLICEMAN TALL HEALTH THERAPIST, THAT SHE WAS ACTING IN A PROFESSIONAL CAPACITY WHEN SHE RENDERED THIS OPINION SO THAT ISOLATES IT FROM LAY PEOPLE. SECONDLY YOU GET TO THE FORESEEABILITY ISSUE THAT, AND I THINK YOU ALL HAD ASKED ME BEFORE AND I MIGHT HAVE MISSTATED ABOUT WHETHER NEGLIGENCE CLAIMS OR EVEN PROFESSIONAL LIABILITY CLAIMS WHETHER THERE ARE ANY THIRD PARTY AND FORESEEABILITY TYPE ISSUES OR CASES, AND I HAD FORGOTTEN UNTIL JUST NOW BUT WHEN I ORIGINALLY RESEARCHED THIS WE LOOKED INTO THE WHOLE FIELD OF CASES INVOLVING ACCOUNTANT PROFESSIONAL LIABILITY AND THE FORESEEABILITY OF CONSEQUENCES IN FINANCIAL REPORTS ON THE FACT THAT THIRD PARTY INVESTORS WOULD RELY ON THOSE.

SO YOU HAVE RESEARCHED IT BUT YOU HAVE RESEARCHED IT IN SOME OTHER AREA?

ACTUALLY NOW IT IS COMING BACK TO ME. YES, I DID RESEARCH IT IN SOME OTHER AREA BUT IT WAS FOR THIS CASE AND, NO, I AM NOT AWARE OF A CASE IN WHICH A COURT HAS RECOGNIZED AN INTERFERENCE WITH PARENTAL RIGHTS ALTHOUGH I'M NOT SO SURE I HAVE RESEARCHED THIS NARROW, NARROW SUBJECT.

JUSTICE BELL, DID YOU HAVE A CLOSING QUESTION? OKAY. WITH OUR HELP, YOU HAVE USED UP YOUR TIME AND YOUR %% --ppREBUTTAL TIME, SO WITH THAT WE'LL BE IN RECESS UNTIL 9:00 TOMORROW MORNING.

PLEASE RISE.