IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC., NANCY BAKER and DONALD E. ALLEN

Petitioners,

vs.

SHERONDA A. MEEKS, a minor, and her next friend, EULA ADAMS, as Personal Representative of the Estate of SHERONDA A. MEEKS, deceased,

Respondents.

CASE NO. 74,408
First DCA Nos. 87-1174
87-1175
87-1176

BRIEF OF AMICUS CURIAE FLORIDA PATIENT'S COMPENSATION FUND

MARGUERITE H. DAVIS
Katz, Kutter, Haigler, Alderman, Eaton, Davis and Marks
215 S. Monroe Street
Suite 400
Tallahassee, Florida 32301
(904) 224-9634
Amicus on behalf of Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

PRELIMINARY STATEMENT

This brief is submitted on behalf of the Florida Patient's Compensation Fund (hereinafter the Fund) which has been granted leave by this Court to file a brief as amicus curiae in support of the Petitioners' argument presented in Issue I of their brief. Petitioners/Defendants, Tallahassee Memorial Regional Medical Center, Inc., Nancy Baker, and Donald Allen, will be referred to respectively as TMRMC, Baker, and Allen or collectively as Defendants. Respondents Sheronda Meeks, et al. will be referred to as Meeks or as Plaintiffs.

STATEMENT OF THE CASE AND FACTS

TMRMC and its employee paramedics Allen and Baker were sued by Plaintiff Meeks for the October 5, 1979, death of her daughter who died of congestive heart failure. (R. 78-82, 1346, 1549). At the time of this incident, TMRMC was a member of the Florida Patient's Compensation Fund. The Fund, however, was not joined as a defendant in this lawsuit as is required by law for it to be liable for any portion of the judgment in excess of $100,000. (R.78, 408, 412, 668-69). After the jury entered a verdict in favor of Plaintiffs in excess of $100,000, Defendants moved to limit their liability to the statutory limitation amount of $100,000 because of TMRMC's Fund membership and compliance with section 768.54(2)(b), Florida Statutes (1979). (R. 408-418).

At the hearing on this motion, Defendants argued that TMRMC had complied with all the prerequisites of section 768.54(2)(b), Florida Statutes (1979), so as to entitle them to the statutory limitation of liability. (R. 408-18, 725-29). Sufficient evidence was presented to the trial court to demonstrate Fund membership and statutory compliance. (R. 668-69, 73). Before the trial court, Plaintiffs, in response to this motion, argued that the issue of limitation of liability was irrelevant to this lawsuit, that TMRMC was not in technical compliance with the provisions of the Fund statute, and that TMRMC, Allen, and Burns were liable for the entire amount of the jury verdict. (R. 792-95).

The trial court made no findings regarding TMRMC's compliance with the statutory prerequisites of section

768.54(2)(b), Florida Statutes (1979), which entitle it to the statutory limitation of liability. Rather, the trial court decided that even were these requirements met by TMRMC, it nevertheless had absolute discretion to limit or not to limit the liability of TMRMC as a health care provider member of the Fund. It then denied Defendants' motion to limit liability. (R.796-97, 742). Defendants appealed this denial as well as other issues to the District Court of Appeal, First District.

In addressing the issue of whether the trial court erred in denying Defendants' motion to limit their liability to $100,000, the first district affirmed the denial of the limitation of liability by the trial court, but on an entirely different basis than that asserted by the trial court or than that posited by Plaintiffs in either the trial court or the district court. It did not address whether the trial court erred in ruling that it had absolute discretion to grant or deny TMRMC's motion to limit liability. The district court rather reasoned that the limitation of liability provided by section 768.54 was a limitation afforded by the Fund to a health care provider member of the Fund and was not a limitation of liability provided to the Fund or Fund member vis-a-vis an injured plaintiff. Despite the statutory language requiring that a plaintiff must join the Fund as *a* party to recover an amount in excess of $100,000, the district court held that a plaintiffs' failure to join the Fund as a party defendant would not result in the limitation of liability for the health care provider Fund member, a limitation

established by the legislature by section 768.54, Florida Statutes (1979). It held that the full amount of the judgment could be recovered against the Defendants despite TMRMC's membership in the Fund and despite its compliance with all statutory prerequisites to a Fund member's entitlement to the statutory limitation of liability.

Acknowledging that its decision was in express and direct conflict with the Third District's decision in Mercy Hospital, Inc. v. Menendez, 371 So. 2d 1077 (Fla. 3d DCA 1979), appeal dismissed and cert. denied, 383 So. 2d 1198 (Fla. 1980), the first district nevertheless decided that, if the health care provider Fund member defendant desired to limit its liability to the statutory amount, the member defendant itself must join the Fund as a defendant in the lawsuit. Further, the first district determined that if section 768.54 had the effect of limiting Defendants' liability to the statutory amount, it was Defendants' obligation to raise this argument as an affirmative defense in their answer and that failure to do so amounted to a waiver of the health care provider member's right to raise it following the verdict's rendition.

Upon rehearing, the first district certified its decision to be in express and direct conflict with Mercy Hospital, Inc. v. Menendez. Notice to invoke this Court's jurisdiction was then filed by Defendants, and this Court established a briefing schedule. Upon motion timely filed, the Florida Patient's Compensation Fund was granted leave of this Court to file a brief

as amicus curiae to address the limitation of liability issue which issue directly affects the Fund's relationship with its health care provider members and the fiduciary duty owed by health care provider Fund members to the Fund.

SUMMARY OF THE ARGUMENT

The District Court of Appeal erred in holding that a defendant health care provider member of the Florida Patient's Compensation Fund must join the Fund as a defendant in a medical malpractice lawsuit in order to be entitled to its statutory limitation of liability where the Fund member, TMRMC, has complied with the express requirements of section 768.54(2)(b), Florida Statutes (1979). Here Plaintiffs failed to join the Fund as a defendant as required by Section 768.54 in order for it to be able to recover against the Fund. In order for there to be recovery against the Fund, section 768.54 requires that the Fund be timely joined as a Defendant in the medical malpractice lawsuit. Plaintiffs then sought to circumvent the requirement that they join the Fund as a Defendant by arguing, in response to Defendants' motion to limit liability, that TMRMC had not complied with a technical requirement extraneous to the provisions of section 768.54, Florida Statutes (1979).

Having demonstrated Fund membership and compliance with the statutory requirements for limitation of its liability, TMRMC sought its statutory limitation of liability, but the trial court erroneously denied this motion on the basis that it had complete

discretion to grant or deny this limitation of liability. The limitation of liability statute, however, is mandatory, and upon a showing of Fund membership and compliance with the three express statutory requirements, the trial court had no discretion to deny this motion.

The district court in requiring that the Fund member join the Fund as a defendant in order to be entitled to its statutory limitation of liability, or that the Fund member must raise its statutory limitation as an affirmative defense in the medical malpractice litigation, has imposed impossible burdens on the Fund member, has rewritten the Fund statute, and has jeopardized every case in which a Fund member is a defendant and where the Fund and Fund member have relied upon established law. Section 768.54(2)(b), Florida Statutes (1979), imposes three requirements that must be met by a Fund member to be entitled to a limitation of liability. The First District has improperly and in violation of the constitutional system of separation of powers written a fourth requirement into the law. Procedurally, the Fund member defendant cannot join the Fund as a defendant. By statute, the Fund member owes the Fund a fiduciary duty and must provide the Fund an adequate defense in order to be entitled to a limitation of liability. By requiring the Fund member to join the Fund, the district court has erroneously required the Fund member to breach its duty to defend the Fund and thereby made impossible compliance with one of the requirements that must be met by the Fund member to limit its liability.

The district court has further erroneously held that the Fund member must raise its limitation of liability as an affirmative defense when, until the conclusion of the malpractice action and return of the verdict, the Fund member cannot allege compliance with the requirements of section 768.54(2)(b). The district court in contravention of the legislature's intent in creating the Fund as a limitation of liability device has erroneously given Plaintiffs control over the decision of whether the health care provider member will be responsible for the entire judgment with no limit on its liability.

The district court's decision erroneously construes section 768.54, Florida Statutes (1979), in such a manner as to lead to absurd results and to thwart the legislative intent for enacting this statute and for creating the Fund. Its decision destroys the carefully constructed legislative plan, previously upheld by this Court, to provide medical malpractice protection to health care provider members while at the same time providing a method of payment to Plaintiffs.

This Court should adhere to its previous decision in Taddiken v. Florida Patient's Compensation Fund, 478 So. 2d 1058 (Fla. 1985) and approve the third district's decision in Menendez, should achieve the legislature's intent in enacting section 768.54, Florida Statutes (1979), should hold that it is the Plaintiff who must join the Fund as a defendant, and should hold that, where a health care provider member has met the requirements of Section 768.54(2)(b), it is entitled to a

statutory limitation liability. This Court should further hold that the district court erred in holding that TMRMC waived its right to raise its statutory limitation of liability because it did not raise it as an affirmative defense.

The holding of the District Court of Appeal, First District, that TMRMC was not entitled to the limitation provided this statute should be reversed.

ARGUMENT

I. DEFENDANT, AS A HEALTH CARE PROVIDER MEMBER OF THE FUND WHO HAS MET THE STATUTORY REQUIREMENTS FOR THE LIMITATION OF ITS LIABILITY SET FORTH IN SECTION 768.54(2)(b), FLORIDA STATUTES (1979) IS ENTITLED TO A LIMITATION OF LIABILITY TO $100,000 WHERE PLAINTIFFS FAILED TO JOIN THE FUND AS A PARTY DEFENDANT.

TMRMC was a member in good standing of the Florida Patient's Compensation Fund at the time of the incident involved in this lawsuit. Ample evidence of this fact was presented to the trial court. The controlling Fund statute at that time was section 768.54(2)(b), Florida Statutes (1979), which expressly provided in pertinent part:

> (2) LIMITATION OF LIABILITY.
> (a) All hospitals shall, unless exempted under paragraph(c), and all health care providers other than hospitals may pay the yearly fee and assessment or, in cases in which such hospital or health care provider, joined the fund after the fiscal year had begun, a prorated assessment into the fund pursuant to subsection (3).
>
> (b) A health care provider shall not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence for claims covered under subsection (3) if the health care provider had paid the fees required pursuant to subsection (3) or the year in which the incident occurred for which the claim is filed, and an adequate defense for the fund is provided, and pays at least the initial $100,000 or the maximum limit of the underlying coverage maintained by the health care provider on the date when the incident occurred for which the claim is filed, whichever is greater, of any settlement or judgment against the health care provider for the claim in accordance with paragraph (3)(e).

TMRMC, as all hospitals in 1979, were required to participate in the Fund unless they chose to "opt out" by meeting stringent financial responsibility requirements. Once a hospital participated and met the statutory requirements, it was entitled to a statutory limitation of liability. To be entitled to this

limitation of liability, the health care provider member by statute must (1) have paid the fees for the year in which the incident occurred (TMRMC did so here): (2) have provided an adequate defense for the Fund (Where Plaintiffs did not join the Fund as a defendant, had TMRMC joined the Fund when Plaintiffs had not timely done so, it would have violated its statutory and fiduciary duty to defend the Fund.) and (3) pay the greater amount of either the first $100,000 or the maximum limit of any underlying coverage maintained by the member.

The testimony presented post-trial in support of Petitioners' motion to limit liability by Fund personnel, and otherwise, demonstrated TMRMC's compliance with the statutory requirements requisite to its right to limitation of liability. The Fund considered TMRMC to be in compliance with the section 768.54(2)(b). The Fund, consistent with its enacting legislation, interprets the requirement that it be named a defendant in order for there to be recovery against it as an obligation of Plaintiffs, not an obligation of its own health care provider member who owes the Fund a duty to defend it in any suit in which the Fund is properly timely joined as a defendant by Plaintiffs.

The issue presented to the trial court in the context of Defendants' motion to limit liability was whether TMRMC had complied with the requirements for Fund membership and had met the requirements for limitation of its liability created by the Florida Legislature by Section 768.54, Florida Statutes (1979),

Plaintiffs failed to timely join the Fund as a defendant. Therefore, by statute and decisional authority interpreting the Fund statute, which will be explained below, the Fund could not be held liable for any portion of the judgment. The question then became whether TMRMC could be held liable for the whole judgment or whether Plaintiffs' failure to join the Fund meant not only that it could not recover from the Fund but also that they could not recover in excess of $100,000 of its judgment against a Fund member who has complied with the expressly enumerated statutory requirements making it eligible for a limitation of liability to $100,000. The trial court did not make any findings as to compliance with the statutory requirements but instead incorrectly determined that it had the absolute discretion whether or not to limit liability regardless of Fund membership and compliance with the statute. It thereupon exercised its nonexistent "discretion" and denied the motion.

Defendants, on appeal, asked the District Court of Appeal, First District, to address the issue of whether the trial court reversibly erred in holding that it had the absolute discretion to grant or deny a limitation of liability for Defendants. Before the district court, Plaintiffs argued that Defendants were not in technical compliance with the provisions of section 768.54. Rather than addressing the question raised by Defendants and the response made by Plaintiffs, the first district decided this case and the propriety of the trial court's denial of

Defendants' motion to limit liability on an entirely different basis.

Contrary to the controlling statute, section 768.54, Florida Statutes (1979), and the controlling decisional authority of Taddiken v. Florida Patient's Compensation Fund, 478 So. 2d 1058 (Fla. 1985), and its progeny, and Mercy Hospital v. Menendez, supra., the first district erroneously decided that the defendant health care provider member of the Fund rather than the plaintiff in a medical malpractice suit must join the Fund as a defendant and that plaintiffs' failure to join the Fund as a party defendant in a suit against a health care provider member would not result in a limitation of liability for the health care provider member. The district court did not address the express mandatory limitation of liability language in conjunction with the effect of Defendants' complete compliance with the statutory requirements for limitation of liability. Rather, that court based its decision on its erroneous determination that defendant health care provider member, not plaintiffs, must raise this limitation of liability as an affirmative defense. In so ruling, the district court overlooked the explicit statutory language set forth in section 768.54(2)(b), Florida Statutes (1979), that states that "a health care provider shall not be liable for an amount in excess of $100,000 . . . ." if it complies with three specified requirements, and of section 768.54(3)(e) that, for plaintiff to recover from the Fund, the Fund must be joined as a party defendant.

In addressing this issue, it is important to have an understanding of the Fund, its legislatively intended purpose, and the statute which controls its operation, functions, and duties and its relationship with its health care provider members and with plaintiffs in medical malpractice suits brought against its members.

The Fund is a unique entity, created by the Florida Legislature in 1975 as a limitation of liability device for its health care provider members. Chapter 75-9, Laws of Florida (1975). It was created to assist in alleviating a medical malpractice crisis in this state by providing medical malpractice protection to the hospitals required to join it and to the physicians who could join, as well as to provide a method of payment to medical malpractice plaintiffs. Chapter 75-9, Laws of Florida; Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985). The Fund acts as a vehicle to pool and spread the risk of loss among member health care providers in Florida for yearly fees and, if necessary, assessments. Florida Patient's Compensation Fund v. Bouchoc, 514 So. 2d 52 (Fla. 1987). The Fund's primary purpose is to create a fund designed to compensate medical malpractice plaintiffs, not to set up an insurance fund with obligations to a health care provider, Taddiken v. Florida Patient's Compensation Fund, supra.; Mercy Hospital, Inc. v. Menendez, supra. It was created as a limitation of liability device for health care provider members where liability otherwise would fully exist; it was not created

as an insurance company. Taddiken, supra.: Owens v. Florida Patient's Compensation Fund, 428 So. 2d 708 (Fla. 1st DCA), rev. denied 436 So. 2d 100 (Fla. 1983).

Contrary to the first district's belief expressed in the present case, the Fund not only establishes a relationship with its members but also directly affects plaintiffs' ability to collect judgments in excess of $100,000 (or the maximum limit of underlying primary insurance coverage) from Fund members. Contrary to its ruling in the present case, the first district in its earlier decision of Owens, supra. at 710, correctly acknowledged that the obligation of the Fund is not to the health care provider, but is a direct obligation to a plaintiff patient and that the Fund has a direct obligation to the plaintiff patient in an action against the health care provider member.

The conditions and provisions strictly governing the relationship among the Fund, its health care provider members, TMRMC, and plaintiff patients are specifically and solely established by the Florida Legislature in Section 768.54, Florida Statutes (1979). Florida Patient's Compensation Fund v. Von Stetina, supra. The Fund's liability is enforced only in the manner directed by the Florida Legislature. This statutory scheme has been upheld against constitutional challenges. Department of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983); Florida Patient's Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985). The limitation of liability provisions fix and declare the primary rights of the

Fund members and of Plaintiff patients and the duties of the Fund.

Section 768.54(e)(1), Florida Statutes (1979) provides that there cannot be recovery against the Fund for any judgment unless it has been named as a defendant in the lawsuit. Taddiken, supra. Failure of Plaintiffs to join the Fund is fatal to their recovery of any of their judgment against the Fund. Further, by statute and decisional authority interpreting this statute, failure to join the Fund, where the health care provider member has fully complied with section 768.54(2)(b), Florida Statutes (1979), does not deprive the health care provider member of its limitation of liability. See e.g. Taddiken; Mercy Hospital, Inc. In fact, in Bouchoc, supra., this Court, in explaining the purpose of establishing the Fund, stated that under the statutory scheme creating the Fund, by paying the requisite fees to the Fund, the health care provider members limit their exposure to $100,000 and, thereby, protect themselves from the consequences of catastrophic verdicts.

In the present case, Plaintiffs who failed to join the Fund as a defendant as required by statute cannot now collect the excess amount above the $100,000 limitation of liability from the health care provider member who, the record demonstrates, was a member of the Fund and who was in full compliance with the three statutory requirements prerequisite to its statutorily created limitation of liability.

The controlling provisions of section 768.54, Florida Statutes (1979) provided for a limitation of liability to its member TMRMC, once TMRMC fulfilled the statutory requirements. The record demonstrates that TMRMC fully met those requirements. This limitation operated as a substitute for liability insurance. Rather than purchase such insurance, this TMRMC relied upon its fund membership for medical malpractice coverage in excess of its underlying primary insurance liability limits of $100,000. Plaintiffs, had they acted properly by complying with the statute and timely joining the Fund as a party defendant, would have been able to recover the excess judgment from the Fund for claims for damages arising out of their lawsuit. The Fund, however, is not liable for the excess judgment unless it has been timely joined as a party defendant to the medical malpractice lawsuit.

Here, Plaintiffs failed to join the Fund. Because the Defendants liability would be limited with or without the joinder of the Fund, Plaintiffs were allowed by the district court and the trial court to circumvent their mistake in failing to timely join the Fund, thereby barring any action or recovery against the Fund, by attacking the sufficiency of Defendants' technical compliance with a requirement of the Department of Health and Rehabilitative Services extraneous to the statutory requirements that must be met for limitation of liability.

This Court should adhere to its decision in Taddiken and approve the decision of the Third District in Menendez, which has been cited as authority even by the first district court of

appeal in its earlier Owens decision. Those decisions espouse the exact legislative intent contemplated by the enactment of section 768.54, Florida Statutes (1979). In Menendez, the third district held:

> Because the obligation of the Fund is secondary and not a set-off, it must be joined and have the right to defend. Nor do we think that the obligation of the Fund may be said to be an affirmative defense of the health care provider. To be such a defense the limitation of liability would need to be conditioned on a notice or pleading. Such an intention can not be gathered from the statute. Perhaps that would have been a better way to have written the limitation, but the wisdom of the legislation is not within our province.

Id. 1079. In Taddiken, this Court affirmed the Third District decision in Taddiken v. Florida Patient's Compensation Fund, 449 So. 2d 956, 958 (Fla. 3rd DCA 1984) wherein the third district noted that failure to join the Fund limits the recovery of a plaintiff from the health care provider member and expressly held: "To preclude her at this point from joining the Fund does not bar her claim, it merely limits the amount of recovery which may be obtained." This Court in Taddiken made it clear that it was plaintiff's affirmative duty to join the Fund as a defendant in a suit against a health care provider member if the plaintiff wants to recover any portion of its judgment from the Fund or wants to recover more than the $100,000 of a judgment in excess of that amount that is due to be paid by the health care provider member as a condition precedent to its limitation of liability.

For the following reasons, the first district's decision is completely contrary to what the legislature intended by its

enactment of section 768.54(2)(b) Florida Statutes (1979) and will lead to absurd results in the application of its holding.

(1). By requiring the health care provider member to join the Fund as a party defendant in order to be entitled to its statutory limitation of liability, the first district has rewritten section 768.54, Florida Statutes (1979) creating the Fund and has restructured the entire concept of the Fund. By doing **so** in the context of the present case, it has effectively abrogated a precise statutory scheme intended to provide malpractice protection to the health care provider members and to provide a method of payment to malpractice plaintiffs.

To be entitled to the statutory limitation of liability, by the express language of the controlling statute, TMRMC must meet three requirements enumerated above. These requirements were met. The District Court, however, has taken it upon itself to require a fourth requirement that the Fund must be joined as a party defendant by the defendant health care provider member. Section 768.54 does not require that the Defendant health care provider member join the Fund as a Defendant in the lawsuit in order to limit its liability. In fact, as will be explained below, such a holding would be inimical to the statutory scheme of section 768.54 as a whole. The portion of section 768.54 alluded to by the first district court in support of its ruling merely states that the Fund cannot be recovered against unless it is joined as a defendant in the suit. This statute does not say

that the Fund must be joined as a third party defendant which is the only way that a health care provider member defendant could even conceivably join the Fund.

It is axiomatic that courts cannot rewrite the law; they may not invade the province of the legislature and add words to a statute which change its meaning; they cannot amend or complete statutes to supply relief where the legislature has not supplied it; and they cannot judge the wisdom of legislation. Dade County v. National Bulk Carriers, 450 So. 2d 213 (Fla. 1984); Holly v. Auld, 450 So. 2d 217 (Fla. 1984); Metropolitan Dade County v. Bridges, 402 So. 2d 411 (Fla. 1981). This is exactly what the first district court has done in the present case. Courts must give effect to the legislation as written despite any personal opinions as to its wisdom or efficacy. This is the most firmly imbedded principle in the constitutional system of separation of powers and check and balances. Moore v. State, 343 So. 2d 601 (Fla. 1977). The first district cannot rewrite this law to achieve a result which it believes to be more suitable.

Consistent with the express language of the subject statute and prior controlling precedect, as well as the principles above-recited, this Court should reverse the holding of the first district that the health care provider member rather than the plaintiff must join the Fund as a defendant in order for the member to be entitled to its statutory limitation of liability.

(2). The district court is requiring a procedural impossibility by requiring that Defendant health care provider member join the Fund as a defendant in the lawsuit brought by Plaintiff claiming medical malpractice. A defendant health care provider member cannot join the Fund as a defendant in the medical malpractice lawsuit. Only the plaintiff can do *so.* The Third District in Menendez and this Court in Taddiken correctly decided consistent with the language of the statute and Florida Rules of Civil Procedure that it is the plaintiff who must join the Fund as a defendant. Even were it possible for the defendant member to join the Fund as a defendant, which it is not, no theory of liability exists which can be asserted by the member against the Fund. The Fund is not a joint tortfeasor. It is not an insurer. Taddiken. It is not liable vicariously for the acts of its members.

Requiring that plaintiff, not defendant member, join the Fund as a Defendant is entirely consistent with the statutory scheme adopted by the legislature. The legislature placed the burden on the plaintiff to join the Fund and, if he did not do *so,* he risked nonrecovery of the excess over $100,000 or the underlying primary coverage if greater. Taddiken; Menendez; Owens.

Had the Fund been timely joined by Plaintiffs, Plaintiffs would have been able to recover the excess of their judgment from the Fund. The legislature certainly could not have contemplated nor could it have intended that section 768.54(2)(b), Florida

Statutes (1979) be used as a sword by a plaintiff, who through lack of diligence or understanding, or for whatever reason, did not join the Fund or timely join the Fund (allowing the statute of limitations to run thereby barring any claim against the Fund, Taddiken) and who thereby forfeited any right **to** recover against the Fund.

(3). The first district court's ruling adding an additional requirement to the statute that the Defendant member must join the Fund as a defendant before it can be eligible for the statutory limitation of liability has impaled the petitioners on the horns of a serious dilemma. To require the health care provider member to join the Fund as a defendant is to require the Fund member to violate one of the three express statutory prerequisites to its limitation of liability guaranteed it by section 768.54(2)(b). Requirement number two of this statute is that the Fund member provide the Fund with an adequate defense. If the Fund is not timely joined by the Plaintiff and the statute of limitations would otherwise run as to the Fund and if the Fund must be joined as a defendant in order for it to be liable for any portion of the judgment, the Fund member will be violating its duty to provide the Fund an adequate defense by joining the Fund as a party defendant where the Fund would otherwise not be liable due to its non-joinder. The first district's decision presently before this Court for review requires TMRMC to abrogate the Fund's best defense. By requiring the Fund member to join

the Fund as a defendant, the district court has required the Fund member to abandon the fulfillment of requirement number 2 of section 768.54(2)(b). Thus, under the ruling of the first district, the member loses its statutory protection if he does not join the Fund and he loses if he does. This is not what was intended by the legislature.

Moreover, section 768.54(3)(e)(2), Florida Statutes (1979), expressly states that the health care provider member owes a fiduciary duty to the Fund. The district court's decision requires TMRMC to breach its fiduciary duty to the Fund by requiring that it join the Fund as a defendant in the lawsuit where were the Fund not joined it would not be liable for any damages. Requiring the health care provider member to sue the Fund at the same time that it is required to be providing a full and adequate defense for the Fund is in direct contradiction to the intent of the legislature in enacting the subject statute. This is an absurd construction of the statute. It is a fundamental rule of statutory construction that statutes not be construed in such a way as to lead to absurd results, and, in fact, they must be construed in such a way as to avoid absurd or unreasonable results. Carawan v. State, 515 So. 2d 161 (Fla. 1987); Drury v. Harding, 461 So. 2d 104 (Fla. 1984).

It is possible that a medical malpractice lawsuit could be filed by the plaintiff against only the health care provider member within the period of the applicable statute of limitations while the Fund is not joined within the limitations period. In

this instance, the statute of limitations bar would be available to the Fund but would not be available to the health care provider member. Taddiken; Neilinger v. Baptist Hospital of Miami, Inc., 460 So. 2d 564 (Fla. 3d DCA 1984). Due to its fiduciary duty owed to the Fund, the health care provider could not jeopardize the Fund's statute of limitations defense by joining it as a party defendant. Again under the district court's ruling, the Fund member is being told that he must breach his fiduciary duty to be eligible for its limitation of liability, but if it breaches its duty it could be liable for bad faith and could also lose its limitation of liability.

The district court's interpretation thus leads to absurd results and should be rejected. Its decision is incongruous with the statutory language and decisional authority, thwarts the statute's intent and purpose, and should be reversed. Instead a holding by this Court that it is Plaintiff's responsibility to join the Fund as a party defendant would be entirely consistent with the statutory scheme established by section 768.54, would give effect to the legislature's clear intent in promulgating the statute, and would be consistent with prior precedent of this Court, the third district, and even the first district court prior to its ruling rendered in the present decision.

(4) Requiring the Fund to plead a limitation of liability as an affirmative defense at the outset of the case is also inconsistent with the statute and prior precedent as well as

impossible in fact. Until the case has been tried and concluded, the health care provider cannot truthfully allege as an affirmative defense at the outset of the case that it has provided an adequate defense for the Fund. Nor before a verdict on liability has been returned against it, can it allege that it has paid the initial $100,000. Thus, compliance with Section 768.54(2)(b), Florida Statutes (1979) would not be possible until after return of a jury verdict finding the health care provider member liable for damages where the verdict is in excess of $100,000. Since the creation of the Fund, the procedural vehicle of a motion to limit liability after return of the verdict has been employed by health care provider members of the Fund who have fulfilled the statutory requirements making them eligible for this limitation of liability.

(5) The legislature in creating the Fund to alleviate the medical malpractice crisis in this state could not have contemplated a decision such as the present one by the district court that would permit plaintiffs to manipulate the statute in such a manner as to control whether the entire judgment will have to be paid by the health care provider member or whether the Fund will pay a portion of a judgment in excess of the statutory limitation amount. Even were it properly the burden of a Fund member to join the Fund as a defendant, which it is not, plaintiffs who desire to ensure that the health care provider member will have to pay the entire judgment rather than only the

first $100,000, could easily file their lawsuit on the last day before the statute of limitations runs, thus depriving the health care provider member any opportunity to timely join the Fund as a defendant. The same statute of limitations that applies to the Fund member also applies to the Fund. Taddiken. The statute of limitation will, therefore, have run against the Fund, and no recovery against the Fund will be possible and thus, pursuant to the rationale of the first district, no limitation of liability would be available to the Fund member.

The first district's decision relating to the limitation of liability issue is antithetical to the legislature's express purpose in enacting section 768.54, Florida Statutes (1979). The district court's holding has the effect of creating unlimited liability for the health care provider members of the Fund, making the Fund an illusory creature, and accelerating a medical malpractice insurance crisis.

The district court's decision should be reversed and this Court should hold that, pursuant to section 768.54, Florida Statutes (1979) if a health care provider member defendant meets the requirements specifically enumerated in section 768.54(2)(b), Florida Statutes (1979), which does not include the requirement that the Fund member defendant join the Fund as a defendant or that it allege its limitation of liability as an affirmative defense, it is entitled to the statutory limitation of liability provided in that statute. In that event, if the Fund is not

joined as a defendant by plaintiff, the Fund is not liable for any portion of the judgment, and the health care provider member's liability is limited to $100,000.

CONCLUSION

For the reasons set forth in this brief, the holding of the District Court of Appeal, First District that TMRMC was not entitled to the limitation of liability provided by section 768.54(2)(b), Florida Statutes (1979), should be reversed.

Respectfully submitted,

MARGUERITE H. DAVIS, Bar.No.136563
Katz, Kutter, Haigler, Alderman,
Eaton, Davis & Marks, P.A.
215 S. Monroe Street, Suite 400
First Florida Bank Building
Tallahassee, Florida 32301
(904) 224-9634

ATTORNEYS FOR AMICUS CURIAE
FLORIDA PATIENT'S COMPENSATION FUND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to LAURA BETH FARAGASSO, Post Office Drawer 1049, Tallahassee, Florida 32302; and HAROLD M. KNOWLES and ROOSEVELT RANDOLPH, Knowles & Randolph, 528 E. Park Avenue, Tallahassee, Florida 32301, this 7th day of August, 1989.

Marguerite H. Davis

MARGUERITE H. DAVIS