IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC., ET AL.,

Petitioners,

vs.

SHERONDA A. MEEKS, ETC., ET AL.,

Respondents.

CASE NO.: **74,408**

JOINT BRIEF OF FLORIDA HOSPITAL ASSOCIATION AND FLORIDA MEDICAL ASSOCIATION, AMICI CURIAE

On Discretionary Review From The District Court of Appeal, First District

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PRELIMINARY STATEMENT

This joint brief is submitted on behalf of the Florida Hospital Association and the Florida Medical Association, Amici Curiae. Inasmuch as this joint brief must be served by August 7, 1989, under Rule 9.370, Florida Rules of Appellate Procedure, and this Court's Briefing Schedule, we have served the parties and tendered this brief to the Clerk on that date, notwithstanding the absense of any order ruling upon the motions of Florida Hospital Association and of Florida Medical Association for leave to appear as amici curiae. Assuming that the Court grants those motions and permits this brief to be filed, we thank the Court for permitting us the opportunity to express our position in this case, and hope that this brief may be of service to the Court in resolving the issues presented by this case.

In this brief, the parties will be referred to as follows: Tallahassee Memorial Regional Medical Center, Inc., as "TMRMC"; Nancy Baker as "Baker" and Donald E. Allen as "Allen". Sheronda A. Meeks will be referred to as "Meeks". The Florida Patient's Compensation Fund will be referred to as "the Fund".

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The facts stated herein are taken from the decision of the District Court of Appeal, First District, in the instant cause.

On October 4, 1979, Baker and Allen, paramedics employed by TMRMC, were called to the home of Meeks. They determined that no emergency health care was needed and did not transport Meeks to the

hospital, nor did they consult with a physician about her condition. Meeks died during the night of congestive heart failure.

The Florida Patient's Compensation Fund was never made a party to the suit. At trial, the trial court permitted Meeks' counsel to use Baker's medical incident report to TMRMC for impeachment purposes. Baker had testified that no one had informed her of Meeks' heart murmur, and that she had made a misstatement on a "run report" (a separate document) when she wrote "Doctor told them [the family] patient had 'heart murmur and heart beats too fast.'". For the purpose of impeaching hertestimony, Meeks' counsel asked Baker whether she had also written a medical incident report the following day and made the same mistake when she stated therein: "We asked her [Meeks'] mother if the doctor could have said that the patient had a heart murmur, and she replied 'Yes.'". The medical incident report was never introduced into evidence per se.

A jury verdict resulted in a final judgment in the approximate amount of $248,000. After the verdict, TMRMC, Meeks and Allen filed a motion to limit their liability to $100,000, on the ground that they were members of the Fund. The trial court denied that motion.

On appeal, the District Court of Appeal, First District, affirmed on all points, holding that the incident report could be used for purposes of impeachment and further holding that TMRMC, Baker, and Allen were not entitled to the statutory limitation of liability prescribed by Section 768.54(2)(b), Florida Statutes

(1979). The District Court held that the statute was a limitation afforded to a participating hospital, not a limitation of liability vis-a-vis an injured plaintiff. The District Court further reasoned that, notwithstanding the language of Sections 768.54(2)(b) and (3)(e), Florida Statutes (1979), requiring joinder of the Fund as a defendant in order for plaintiff to recover a judgment amount from the Fund in excess of $100,000,' and exonerating the health care provider of liability in excess of that amount, the statutory limitation of a health care provider's liability would not apply if neither party joined the Fund as a party to the suit. Rather, the District Court reasoned, the participating Fund member who desired to limit his individual liability to the statutory amount should join the Fund as a party. Finally, the District Court held, it was the obligation of the defendants, not the plaintiffs, to assert the statutory limitation of liability as an affirmative defense in their answer to the plaintiff's pleading, the District Court holding that failure to timely assert the limitation waived the health care provider's right to raise it following a rendition of the verdict.

The District Court certified that its decision was in conflict with the decision of the Third District Court of Appeal in Mercy Hospital. Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), a m .

'Or the maximum limit of the underlying coverage maintained by the health care provider, if greater. For simplicity, we will refer only to the initial $100,000, recognizing that higher underlying policy limits could increase that amount in particular cases.

dism'd and cert. denied, 383 So.2d 1198 (1980). TMRMC, Baker and Allen filed their Notice invoking this Court's discretionary jurisdiction on July 10, 1989, and this Court, by order dated July 13, 1989, set forth its briefing schedule.

SUMMARY OF ARGUMENT

Section 768.54, Florida Statutes (1979), is a carefully-constructed statutory plan designed to protect health care providers from financial ruin and simultaneously to provide medical negligence plaintiffs with assurance of recovering any judgment amounts to which they are entitled. The method chosen by the Legislature was to establish the Fund, transferring to it (so long as certain prerequisites were met) liability to medical negligence plaintiffs in excess of $100,000. The Fund serves as a method of spreading risks, as well as providing a stable and ongoing source of recovery where large judgments are involved.

In order to assure that the Fund's interests were amply protected, the Legislature required that the Fund be joined as a defendant in any suit against a health care provider potentially involving exposure of the Fund's assets, and further imposed a fiduciary duty on the health care provider to adequately defend the Fund. Failure to meet this fiduciary responsibility precludes the health care provider from availing himself of the statutory limitation of liability.

By limiting a health care provider's potential judgment liability to $100,000, the legislative plan reduced insurance costs and alleviated problems of insurance availability to health care

providers, in addition to providing a financially stable source of funds to satisfy large judgments. In exchange for the statutory limitation of liability, a health care provider must pay Fund assessments, pay the first $100,000 of any judgment, and provide an adequate defense for the Fund in any suit. All that a plaintiff need do to assure full satisfaction of any judgment is to join the Fund as a defendant.

The lower court's holding that a defendant health care provider, to avail himself of the statutory limitation of liability, must raise it as an affirmative defense and join the Fund as a defendant, is both contrary to the language of the relevant statutes and destructive of the carefully-drafted legislative plan. It engrafts a new requirement, not found in the statute, onto the three statutory prerequisites a health care provider must meet in order to be entitled to the limitation of liability. Moreover, that additional requirement is completely inconsistent with the Legislature's statutory plan. In addition, the new requirements which the lower court's holding imposes on a defendant health care provider simply cannot be complied with: the health care provider must assert as an affirmative defense acts which, in their nature, can only occur in the future, and is required, notwithstanding his own status as a defendant, to join the Fund <u>as a defendant</u> -- a procedural impossibility.

A more fundamental difficulty with the lower court's holding is that it places the health care provider in an insoluble dilemma: he is under a fiduciary duty to protect the interests of the very

party he is required to sue. In order to be entitled to the statutory limitation of liability, the health care provider must comply with his fiduciary duty to protect the Fund's interests by providing the Fund with an adequate defense. Failure to adequately defend the Fund results in a loss of the limitation of liability. The lower court's holding requires the defendant, if he is to protect that limitation of liability, to sue the Fund; if he does not, the lower court held, he loses the statutory limitation. A defendant health care provider cannot both provide the Fund with an adequate defense and sue it in the same case. Yet if he does not do both, the lower court's holding strips him of the statutory protection.

Even if these conflicting requirements could somehow be met in some cases (a dubious proposition at best), there are many situations in which an insoluble express conflict would be presented. In order to timely join the Fund in a suit filed late in the limitations period, for instance, a defendant health care provider might have to forego meritorious legal challenges to a defective complaint -- and thereby risk losing the limitation of liability because, in doing so, he failed to provide the Fund with an adequate defense. Indeed, the problems caused by the lower court's holding are magnified in another way when suit is filed late in the limitations period -- not only can the health care provider face the dilemma of losing his statutory protection by not suing the Fund or losing it because he sued the Fund (thereby eliminating the Fund's potential statute of limitations defense

and, a fortiori, not providing the Fund with an adequate defense), but the plaintiff can wholly eliminate the Fund from the suit by the simple expedient of not filing suit until the last possible day, thus depriving the health care provider of any chance to sue the Fund in an attempt to meet the lower court's requirement.

In addition to erring in regard to the statutory limitation of liability, the lower court erred in permitting a hospital's medical incident report to be used for impeachment. Hospital incident reports form an integral part of a hospital's internal risk management program, and are used, among other things, to identify and analyze types of medical incidents adversely affecting patients, in order to improve the quality of health care. To achieve that purpose, they must be candid and reliable. Confidentiality of such reports, and the knowledge that they will not be used in court, are vital to achieving the statutory objective. For that reason, the Legislature made them inadmissible, with no exception for use in impeachment. In the analogous situation of auto accident reports, this Court has pointed out that there is no logical reason to distinguish between admissibility in the case in chief and use for impeachment. That same rule should be applied in the medical incident report context.

The lower court should be reversed on these two rulings.

ARGUMENT

I. PLAINTIFF HAVING FAILED TO JOIN THE FLORIDA PATIENT'S COMPENSATION FUND AS A PARTY DEFENDANT, AND DEFENDANTS HAVING MET THE STATUTORY PREREQUISITES OF SECTION 768.54 (2) (b), FLORIDA STATUTES (1979), THE TRIAL COURT SHOULD HAVE

LIMITED DEFENDANTS' LIABILITY UNDER THE JUDGMENT TO $100,000.

In holding that a health care provider defendant, rather than the medical negligence plaintiff, has the burden of raising the statutory limitation of liability as an affirmative defense and joining the Fund as a defendant, the District Court has: (1) rewritten the statute by imposing an additional prerequisite to a health care provider's right to the statutory limitation of liability; (2) required a defendant to do something a defendant cannot do; (3) required a defendant to plead as an affirmative defense something that can only occur in the future; (4) placed the health care provider in a situation in which he must destroy the basis for limiting his liability in order to assert his right to that same limitation of liability; (5) required the health care provider in some situations to forego meritorious challenges to a deficient complaint (and thereby risk losing the benefit of the statutory limitation) in order to assert his right to a limitation of liability; and (6) given the plaintiff unfettered control over whether the Fund or the health care provider will be responsible for judgment amounts in excess of $100,000.

The District Court's holding is not only wholly inconsistent with the statutory plan, but indeed is so inimical to it that the statutory plan, carefully constructed to provide malpractice protection to health care providers and simultaneously provide a method of payment to medical negligence plaintiffs, would be destroyed. To assist the Court in understanding and resolving the

problems presented by the District Court's holding, we will first review the nature of, and the purposes for, the statutory plan, and then address the ways in which the District Court's holding is at war with the statutory provisions.

A. The Statutory Plan's Structure and Purposes

The Fund was created to provide medical malpractice protection to the physicians and hospitals who join it, as well as to provide a method of payment to medical negligence plaintiffs. Higley v. Florida Patient's Compensation Fund, 525 So.2d 865 (Fla. 1988); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). The Fund provides a statutory method of pooling the risks of losses and placing major losses in the entity that can best spread the risk of loss as well as control the conduct of those at fault. Florida Patient's Compensation Fund v. Von Stetina, supra. The Legislature created the Fund in response to the compelling social problems associated with the insurance crisis, including exorbitant prices for professional liability insurance, problems with the availability of insurance, and the resulting threats to the provision of quality health care services in Florida. Higley v. Florida Patient's Compensation Fund, supra.

The statutory plan is one in which the Fund has obligations primarily to the plaintiff in any medical malpractice action, and it is reasonable to require that the Fund be joined in any suit to enforce those obligations. Mercy Hospital, Inc. v. Menendez, supra. See also, to like effect, Owens v. Florida Patient's

Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983), rev. denied, 436 So.2d 100 (Fla. 1983).

Section 768.54(3)(e), Florida Statutes (1979), provides, in pertinent part:

> Any person may file an action against a participating health care provider for damages covered under the fund, except that the person filing the claim shall not recover against the fund unless the fund was named as a defendant in the suit.

The requirement that the Fund be named as a defendant is for the protection of the Fund, to avoid it incurring liability without its knowledge. Lemoine v. Cooney, 514 So.2d 391 (Fla. 4th DCA 1987), rev. denied, 523 So.2d 577 (Fla. 1988).

In addition to the statute, case law provides that a person filing a claim against a health care provider who is a member of the Fund cannot recover against the Fund unless the Fund is named as a defendant in the suit. Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA 1984), rev. denied, 453 So.2d 43 (Fla. 1984).

In Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), this Court specifically observed (478 So.2d at 1060) that the Fund must be joined as a defendant in order for the claimant to recover from it. The Court based that ruling in part on the necessity for prompt joinder of the Fund as a defendant in order to permit the Fund to fulfill its dual purposes of protecting health care providers and compensating medical negligence victims; to fulfill those dual purposes, the Court said, the Fund must be

actuarially sound, and prompt joinder of the Fund furthers that goal. The Court in Taddiken, supra, observed that the Legislature could reasonably have determined that compliance with the statutory risk management requirements, allowing the Fund both to minimize adverse incidents and to estimate upcoming expenses, was facilitated by its joinder in medical negligence suits at the earliest possible date. Continuing, the Taddiken Court said that timely joinder of the Fund was even more significant and critical if the Fund was to protect its own interests, since the liability exposure of the Fund was open-ended and potentially very great. It would be illogical, the Court said, to permit late joinder of the defendant with potentially the greatest stake in the outcome of the litigation after that outcome may have largely been determined.[2]

B. The District Court's Rewriting Of The Statutory Requirements For Limiting Liability

Section 768.54(2)(b), Florida Statutes (1979) provides that a "health care provider shall not be liable for an amount in excess of **$100,000** per claim or $500,000 per occurrence", so long as he meets three statutory prerequisites: that the health care provider (1) be a member of the Fund at the time of the incident, (2) provide an adequate defense to the Fund, and **(3)** pay the first $100,000 of the judgment. The lower court's holding engrafts an additional fourth requirement -- that the health care provider

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[2] See also, to like effect, Florida Patient's Compensation Fund v. Tillman, 487 So.2d **1032** (Fla. 1986).

raise the statutory limitation as an affirmative defense and join the Fund as a defendant in the case[3]. Thus, the lower court has impermissibly rewritten the statute.

Section 768.54(3)(e), Florida Statutes (1979), governs recovery against the Fund, and provides that no recovery is available against the Fund unless the Fund was named as a "defendant" in the suit. The health care provider's limitation of liability, on the other hand, is provided under Section 768.54(2)(b), Florida Statutes (1979). The only requirements imposed by that section are Fund membership, provision of an adequate defense, and payment of the initial $100,000 of the judgment. Section 768.54(2)(b), Florida Statutes (1979), clearly specifies that the "health care provider shall not be liable for an amount in excess of $100,000 per claim or $500,000 per occurrence" if those three prerequisites are met. Notwithstanding the clear statutory language, the District Court added a fourth requirement not contemplated in the statute -- that the health care provider assert the statutory limitation of liability as an affirmative defense and bring the Fund into the suit as a party.

Section 768.54(2)(b), Florida Statutes (1979), provides that the health care provider "shall not be liable" for more than $100,000 if he meets three requirements, none of which involves bringing the Fund into the suit. Section 768.54(3)(e), Florida

[3]Since two things (asserting an affirmative defense and joining the Fund as a party) are required by the lower court's holding, it could even be considered as adding both a fourth and a fifth requirement.

Statutes (1979), permits holding the Fund liable for those excess amounts, if the Fund is joined as a defendant. Thus, if the Fund is **not** joined as a defendant, the statutes plainly provide that the Fund is not liable and the health care provider's liability is limited to $100,000.

This result, which flows inevitably from the plain statutory language, is required to support the legislative plan of having the Fund serve as a risk-spreading mechanism, to address the problems of professional liability insurance cost and availability, and to assure that medical negligence plaintiffs will have a solvent source of payment of large verdict amounts. By limiting the health care provider's liability to $100,000 (regardless of whether or not the Fund has been joined as a defendant), the legislative plan assures the availability of, and lessens the cost of, professional liability insurance. It also alleviates the potential problem of a health care provider being financially unable to satisfy judgments against him. At the same time, the legislative plan makes the Fund -- and only the Fund -- liable for judgment amounts in excess of $100,000, thereby ensuring that the Fund's risk-spreading function will be fulfilled. Finally, the Fund provides a solvent and financially-responsible party with the resources to assure that judgment amounts due medical negligence plaintiffs will be paid.

Holding the health care provider to an unlimited judgment liability where plaintiff has failed to sue the Fund, on the other hand, is directly contrary to the carefully-considered legislative

goals. The health care provider would be forced, in that situation, to either purchase additional insurance coverage (not only incurring the very cost and availability problems the statute was designed to obviate, but also depriving himself of the protection of the Fund to the extent of that coverage) or to pay the excess judgment amount from his own resources, thereby inevitably increasing health care costs to the public. Moreover, there would be no spreading of the risk in this situation, since the entire risk would be on the health care provider. Finally, the assurance of a solvent entity available to pay medical negligence plaintiffs' claims could be gravely impaired in numerous instances.

Thus, requiring that the plaintiff join the Fund as a defendant or be unable to recover that portion of any judgment in excess of $100,000 is fully compatible with the statutory plan, as well as being compelled by the plain statutory language. The result reached by the lower court, on the other hand, not only contravenes the language of the statute, but in addition is wholly irreconcilable with the legislative goals behind the enactment of the Fund statute.

C. The Limitation Of Liability As An Affirmative Defense

Even if the plain language of Section 768.54(2)(b), Florida Statutes (1979), did not compel the conclusion that the lower court erred in imposing unlimited judgment liability on TMRMC, the lower court's ruling would have to be reversed for other reasons.

The lower court held that the statutory limitation of liability is an affirmative defense which must be plead by the defendant health care provider. The Third District has held directly to the contrary in Mercy Hospital, Inc. V. Menendez, supra. The holding of the Third District in Mercy Hospital, rather than the First District's contrary holding in this cause, fits the statutory plan. The statutory limitation of liability is at best ill-suited to an affirmative defense, since it would require the health care provider to plead that he has performed several statutory prerequisites which cannot, in the nature of things, be performed until after judgment.

As noted above, the three statutory prerequisites to a health care provider's entitlement to the limitation of liability are that the provider must have been a member of the Fund at the time of the incident, must have provided an adequate defense for the Fund, and must pay the initial $100,000 of any judgment at the appropriate time. Section 768.54(2)(b), Florida Statutes. At the time the complaint is filed, a health care provider can meet only one of those three criteria: timely membership in the Fund. Only after the litigation has proceeded to judgment can it be determined whether the health care provider has given the Fund an adequate defense. Likewise, until a judgment in excess of $100,000 is rendered, it cannot be determined whether the health care provider will make appropriate payment of the first $100,000 of any judgment. Thus, a health care provider simply cannot make the necessary averments to sustain the limitation of liability at

the time an answer is due. The decision of the Third District in Mercy Hospital, Inc. v. Menendez, supra, (that the statutory limitation of liability is **not** an affirmative defense) is far more compelling than the First District's contrary holding in this cause.

D. Joinder Of The Fund As A Defendant By the original Defendant

In Mercy Hospital, Inc. v. Menendez, supra, the Third District likewise held that it is the plaintiff who has the burden of making the Fund a party in any medical negligence suit in which recovery is sought in excess of $100,000. In that case, the Third District held that if the plaintiff fails to join the Fund as an defendant, and the statutory prerequisites to the limitation of liability have been complied with, the trial court may enter an order limiting the judgment against the health care provider in conformity with the statute. In the instant case, the First District held to the contrary.

Again, the Third District's reasoning is far more compelling and in conformity with the statutory plan. Placing the burden of joining the Fund as a defendant (and the risk of non-recovery if the Fund is not joined) on the plaintiff is in full accord with the statutory scheme; requiring the defendant health care provider to do so, at the risk of losing his limitation of liability if he does not, is directly contrary to the statutory plan.

The statute requires (Section 768.54(3)(e), Florida Statutes (1979)) that the Fund be joined as a "defendant" before any

recovery may be had against the Fund. As a defendant himself, the health care provider cannot do that, but could only join the Fund as a third party defendant. This would not appear to meet the statutory requirement.

Moreover, even if a third party complaint by the health care provider against the Fund were somehow sufficient to meet that requirement, it is difficult to ascertain what possible theory of liability the health care provider could assert in such a third party complaint. Clearly, the Fund is not a joint tortfeasor, and hence a claim for contribution would not be proper. Nor is the Fund vicariously liable for the acts of the health care provider in any sense other than that it provides something akin to insurance coverage to the health care provider.

The only theory of the Fund's liability to the health care provider which we can conceive as being potentially applicable would be that of partial indemnity for judgment amounts in excess of $100,000. In order to be entitled to recover under such a theory, the health care provider would first have to be held liable for more than $100,000 in the underlying suit, and would also have to meet the statutory prerequisites for limitation of liability, one of which is providing the Fund with an adequate defense in the underlying suit. Section 768.54(2)(b), Florida Statutes (1979). Thus, any claim for partial indemnity could not be ripe until after the result in the main action was determined. In short, the third party complaint would be one essentially seeking an advisory opinion as to matters which were still to be

factually developed, and it is doubtful that the health care provider would have standing to assert such a partial indemnity claim prior to entry of judgment.

E. The Health Care Provider's Joining The Fund As A Party and The Fiduciary Duty To Protect The Fund

Apart from the clear language of Section 768.54(2)(b), Florida Statutes (1979), and the procedural obstacles noted above, there is a more fundamental difficulty with requiring the health care provider to bring the Fund into the cause as a third-party defendant. Under the lower court's holding, the defendant health care provider is placed in an intolerable position of conflict: he is required by statute to act in a fiduciary capacity to protect the Fund's interests and provide the Fund with an adequate defense, and is simultaneously required to sue the Fund. Failure to fulfill both of these conflicting requirements, according to the lower court, results in a loss of the statutory limitation of liability. Section 768.54(3)(e)2, Florida Statutes (1979), provides:

> It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a health care provider who is also covered by the fund to provide an adequate defense on any claim filed which potentially affects the fund, with respect to such insurance contract or self-insurance contract. The insurer or self-insurer shall act in a fiduciary relationship toward the fund with respect to any claim affecting the fund. No settlement exceeding $100,000, or any other amount which could require payment by the fund, shall be agreed to unless approved by the fund.

In short, the statute not only imposes a duty to provide an adequate defense to the Fund,[4] but further establishes a fiduciary relationship with the Fund in that regard. A health care provider who fails to fulfill his fiduciary duties in providing a defense to the Fund has not met the statutory prerequisites to limitation of liability. A requirement that the health care provider sue the Fund at the same time will invariably conflict with the fiduciary duty to provide the Fund with an adequate defense.

For example, if suit is brought against the health care provider within the limitations period, but suit is not brought against the Fund within the limitations period, the bar of the statute of limitations is available to the Fund, and limits the amount of recovery which the plaintiff may obtain. Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984), approved, 478 So.2d 1058 (Fla. 1985). See also Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984) (affirming summary judgment in favor of the Fund based on statute of limitations and holding that order limiting health care provider's liability to $100,000 does not constitute a departure from the essential requirements of law). If a health care provider is sued near the end of the statutory limitations period, and is required to join the Fund as a third party defendant in order to

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[4]The fiduciary duty to provide an adequate defense to the Fund, established by Section 768.54(3)(e)2, Florida Statutes (1979), mirrors the requirement of Section 768.54(2)(b), Florida Statutes (1979), that the health care provider must provide an adequate defense to the Fund in order to be entitled to the statutory limitation of liability.

protect his right to the statutory limitation of liability, the health care provider would be required to file that third party action against the Fund prior to expiration of the statute of limitations. Under his fiduciary duty to protect the interests of the Fund, however, that same health care provider would be required to take no action which would jeopardize the Fund's statute of limitations defense. If the health care provider were to choose not to join the Fund as a third-party defendant, under the lower court's ruling, he would fulfill his statutory duty of protecting the interests of the Fund, but would lose his right to a limitation of liability. If, on the other hand, the health care provider were to join the Fund as a third party defendant in this situation, he would fail in his fiduciary duty to protect the interests of the Fund, and hence would not be entitled to a limitation of liability under Section 768.54(2)(b), Florida Statutes (1979). In short, no matter what the health care provider did in this situation, his limitation of liability would be lost under the lower court's ruling.

F. Required Waiver of Meritous Challenges To A Deficient Complaint And The Health Care Provider's Fiduciary Duty

A health care provider sued near the end of the statutory limitations period would, even if he could bring the Fund in as a third party defendant without **per se** violating his fiduciary duty to the Fund, face other improper obstacles.

For instance, if a medical negligence complaint filed near the end of the statutory period were deficient and hence subject

to a motion to dismiss, the health care provider would be placed on the horns of an intolerable dilemma under the lower court's ruling: He could either pursue a meritorious motion to dismiss, thereby allowing the limitations period to elapse before the health care provider was required to file an answer and third party complaint, or he could ignore the deficiencies in the complaint and file an answer and third party complaint, abandoning a meritorious legal attack on a deficient complaint[5].

If the health care provider in that situation were to exercise his undoubted right to challenge the legal sufficiency of a deficient complaint, and were unable to obtain a ruling on his motion prior to expiration of the limitations period, he would be unable to thereafter join the Fund as a third party defendant and hence, under the lower court's holding, would not be entitled to the limitation of liability provided by the statute. If, on the other hand, the health care provider were to abandon a meritorious grounds for dismissal of a deficient complaint, a substantial possibility would exist that, by doing so, he failed in his duty to provide an adequate defense to the Fund, and hence would not be entitled to limit his liability, since he would not have complied with the statutory prerequisites of Section 768.54(2)(b), Florida Statutes (1979). In either event, the statutory limitation of liability would be lost simply because -- through no fault of the health care provider -- the complaint was filed late in the

[5]Similar examples could be provided as to improper service of process and the like, but the essential point remains the same.

limitations period and did not properly state a cause of action against the health care provider.

G. Plaintiff's Control Over Whether The Fund Or The Health Care Provider Would Be Liable For Judgments In Excess of $100,000

If a complaint were filed sufficiently late in the limitations period, a health care provider could be deprived of the statutory limitation of liability, under the lower court's holding, without ever having a chance to protect that limitation of liability. For instance, if a medical negligence suit were filed against a health care provider on the last day of the limitations period (a not uncommon event), the health care provider would be totally unable to file a third party complaint against the Fund before the expiration of the limitations period. In that situation, the health care provider would be deprived of the statutory limitation of liability solely because the plaintiff exercised his undoubted right to wait until the last possible moment to file the complaint. The health care provider would be wholly without recourse, since under existing case law the Fund is separately entitled to claim the benefits of the statute of limitations. Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984), approved, 478 So.2d 1058 (Fla. 1985); Neilinger v. Baptist Hospital of Miami, Inc., supra.

In short, the lower court's ruling gives a medical negligence plaintiff the unchecked ability to remove the Fund from the case entirely, simply by waiting until the last moment to file a

complaint against the health care provider and electing not to join the Fund as a defendant, safe in the knowledge that, under the lower court's holding, plaintiff can collect the full amount of damages from the health care provider.

Under the result reached by the lower court, medical negligence plaintiffs would have absolutely no incentive whatsoever to join the Fund as a defendant, since the plaintiff would be entitled to recover an unlimited judgment against the health care provider if the health care provider did not sue the Fund. Plaintiffs would understandably be reluctant to incur the added burdens of bring in an additional defendant, perhaps with separate counsel, if they had no reason to do so, and would presumably only join the Fund as a defendant if there was a substantial possibility that the health care provider would be unable to satisfy a judgment. Yet, the statute and case law plainly require the plaintiff to promptly join the Fund in order to permit the Fund, as the party having potentially the greatest stake in the matter, to properly defend itself.

More significantly from the overall perspective of the statutory plan, the Fund could be wholly removed from numerous suits, destroying the Fund's ability to ease the insurance crisis, spread risks, protect health care providers against enormous liabilities, and promote the quality of health care by providing risk management services. A carefully-crafted legislative plan to achieve important social goals would thus be gravely impaired, if not nullified, by the lower court's holding.

The lower court's holding is contrary to both the letter and the purpose of the relevant statutes, creates a situation in which the health care provider cannot possibly avail itself of the statutory protection to which it is entitled, and permits -- even encourages -- a medical negligence plaintiff to avoid its statutory responsibility of suing the Fund if it wishes to recover more than **$100,000**. That holding must not be permitted to stand.

II. THE LOWER COURT ERRED IN PERMITTING MEDICAL INCIDENT REPORTS TO BE USED FOR IMPEACHMENT PURPOSES.

The lower court held that the contents of a hospital medical incident reports were admissible for impeachment purposes. It was in error in so holding.

A hospital's incident reports are an integral part of its internal risk management program, mandated by Section **395.041**, Florida Statutes **(1985)**. As set forth in that statute, the purposes of the internal risk management program include identifying and analyzing types of medical incidents adversely affecting patients and developing measures to minimize the risks to patients. Medical incident reports are used to identify problem areas. Section **395.041(4)**, Florida Statutes **(1985)**. Additionally, hospitals must submit annual reports to the Department of Health and Rehabilitative Services summarizing the incident reports. Section **395.041(5)** (a), Florida Statutes **(1985)**. If, as a result of such reports, the Department has a reasonable belief that grounds for disciplinary action exist as to any hospital staff member or employee, the Department must report that

fact to the appropriate regulatory board. Section 395.041(8), Florida Statutes (1985). The Department is also required to promulgate information bulletins as necessary to all hospitals in order to disseminate trends and preventive data derived from its actions under the statute. Section 395.041(9), Florida Statutes (1985).

Together with the meetings and reports of medical review committees, as set forth in Section 768.40, Florida Statutes (1985), such incident reports play a crucial role not only in a hospital's risk management and in promoting quality health care services, but also in providing clinical training (in the form of critical case analyses) to physicians and in the self-policing of the health care field.

In order for medical incident reports to fulfill their critical role in internal risk management, in providing a basis for Departmental action, and in promoting quality health care services, it is crucial that they be accurate, candid, and reliable. The statutory prohibition against admission in evidence of such reports is essential to that goal.

Confidentiality of such reports, and the knowledge that they will not be used in open court, are vital to achieving these salutary statutory objectives. As the Third District observed in Dade County Medical Association v. Hlis, 372 So.2d 117, 119 (Fla. 3d DCA 1979):

> More to the point as to the issues presented here, we also agree with petitioner that it is important, perhaps indispensable, to the achievement of the committee's purposes that

> its proceedings remain confidential. It is obvious that both complaints and free discussion about the activities of physicians would be markedly discouraged if the contents were to be held open to public perusal.

To assure that confidentiality for incident reports and medical review committee reports, the Legislature imposed restrictions on both the discoverability and admissibility of such reports. In the case of medical review committee reports, Section 768.40(5), Florida Statutes (1985), provides that they "shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee . . . ." Due to the slightly different purpose served by incident reports, however, discovery is permitted in some situations,[6] but admissibility remains precluded. Section 395.041(4), Florida Statutes (1985), provides, in pertinent part:

> The incident reports shall be considered to be a part of the work papers of the attorney defending the establishment in litigation relating thereto and shall be subject to discovery, but shall not be admissible as evidence in court, nor shall any person filing an incident report be subject to civil suit by virtue of such incident report.

Significantly, the statute does not contain any exception for use of such reports to impeach -- it simply makes them inadmissible.

The statutory restrictions on discoverability and admissibility of medical review committee reports and incident reports were added because the Legislature believed that the

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[6]Discoverability apparently is not in issue in this cause.

medical community would not enthusiastically engage in self-policing as a means to improve health care if those self-policing efforts could later be used in medical malpractice cases. See, Holly v. Auld, 450 So.2d 217 (Fla. 1984). As the Eleventh Circuit observed in Johnson v. United States, 780 F.2d 902, 909 (11th Cir. 1986), Florida has made a legislative judgment that, in order to ensure the reliability and efficacy of such reports, they should not be subject to use in litigation.

In Holly v. Auld, supra, this Court pointed out that there are substantial legislative policy reasons for the limitations on discovery and admissibility of these types of reports, and further observed that it is not the duty or prerogative of the courts to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the courts. Rather, the courts must assume that, in enacting the privilege, the Legislature balanced the potential detriment to litigants deprived of access to helpful, or even crucial, information against the benefits to health care quality and cost containment, and found the latter to be of greater weight. Holly v. Auld, supra.

There is an overwhelming public interest in maintaining the confidentiality of records within the purview of these statutes. Dade County Medical Assn. v. Hlis, supra. That necessary assurance of confidentiality is destroyed by permitting the use of incident reports for impeachment purposes, just as surely as it would be destroyed by permitting the document itself to be placed in evidence. In either case, its contents are revealed to the jury,

to spectators in the courtroom, and, if a transcript is prepared, to anyone else who wishes to review the typed transcript. It does not matter whether the public disclosure of the report's contents is visual (physically placing it in evidence) or oral (using it for impeachment purposes in cross-examination); in either case, the seal of confidentiality is broken. Use of an incident report for impeachment amounts to nothing more than doing by the back door what plainly cannot be done by the front door -- admitting the contents of the incident report into evidence.

The Legislature has balanced the competing policy interests involved, and has concluded that the benefits of maintaining the confidentiality of incident reports require that their contents not be admissible. In allowing an incident report to be used for impeachment, the lower court has impermissibly rejected that legislative determination, despite this Court's admonition in Holly v. Auld, supra.

The prohibition against admission of incident reports is comparable to the prohibition against admission of auto accident reports[7]. The intent of the statute making auto accident reports privileged is, in part, to ascertain and correct the causes of accidents, and the privilege is afforded to encourage the giving of information freely and honestly without fear of self-

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[7]The statutory language establishing the auto accident report privilege, found in Section 316.066(4), Florida Statutes (1985), provides, in pertinent part: "No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident . . . ."

incrimination. State v. Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984); Wiggen v. Bethel Apostolic Temple, 192 So.2d 796 (Fla. 3d DCA 1966), quashed on other srounds, 200 So.2d 797 (Fla. 1967). The medical incident report privilege serves an analogous function and has analogous purposes, being intended to assist in ascertaining and correcting the causes of medical incidents, and the privilege being affordedto encourage the giving of information freely and honestly to assist in that purpose. Dade County Medical Association v. Hlis, supra.

The statutory provisions establishing the auto accident report privilege have been given a liberal interpretation in favor of the privilege of confidence. White v. Kiser, 368 So.2d 952 (Fla. 1st DCA 1979) (rejecting a contention that the accident report privilege statute should be strictly construed, and observing that a liberal construction in favor of confidentiality was warranted in order to facilitate the statutory goal of ascertaining the causes of accidents). The similar purposes of the medical incident report statute -- ascertaining the causes of medical incidents -- require that a similar construction should be afforded the medical incident report privilege statute.

The accident report privilege applies when the statements are offered for impeachment, as well as when they are offered in the case in chief. Ippolito v. Brener, 89 So.2d 650 (Fla. 1956); Wiggen v. Bethel Apostolic Temple, supra (holding that the lower court erred in permitting impeachment of a witness by use of prior inconsistent statements made to the investigating police officer,

the court emphasizing that the privilege was for the benefit of the public, to facilitate ascertaining the causes of accidents and aiding in the solution of traffic problems). See also, to like effect, Hall v. Haldane, 268 So.2d 403 (Fla. 4th DCA 1972) (holding that the lower court erred in permitting plaintiff's counsel to impeach defendant with a prior inconsistent statement to an investigating police officer shortly after the accident occurred).

As this Court observed in Ippolito v. Brener, 89 So.2d 650, 652 (Fla. 1956), in rejecting a claim that materials privileged under the auto accident report statute could properly be used to impeach the driver's testimony:

> The rule should be applied where the statements made to the police officer are offered for impeachment, as well as where offered as evidence in the case in chief. No logical reason exists to distinguish the situation.

This same rule should be applied to the incident report privilege. Such a holding is consistent with, and in fact compelled by, the plain language of the statute. It is also consistent with, and compelled by, the purposes of the statute--maintaining an inviolable confidentiality in order to assure effective risk management policies by the medical community and to promote quality health care services. Opening the door of admissibility requires that the seal of confidence be broken.

The Legislature has made a public policy determination that, to assure effective risk management by the medical community and to promote quality health care, these reports must be inadmissible

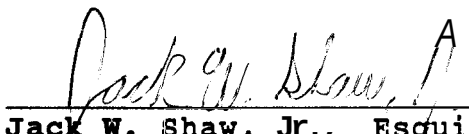
in court. If that policy is to be changed, it must be done by the Legislature. The lower court erred in holding to the contrary, and should be reversed.

CONCLUSION

For the reasons set forth above, the lower court's ruling that TMRMC was not entitled to avail itself of the statutory limitation of liability, and its ruling that the contents of medical incident reports can properly be used for impeachment, are erroneous, and should be reversed.

Respectfully submitted,

MATHEWS, OSBORNE, McNATT & COBB, Professional Association



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by United States Mail to Laura Beth Faragasso, Post Office Drawer **1049**, Tallahassee, Florida **32302**, Roosevelt Randolph, **528** East Park Avenue, Tallahassee, Florida **32301**, Larry K. White, **528** East Park Avenue, Tallahassee, Florida **32301**, and Marguerite Davis, Esquire, **215** South Monroe, Suite 400 First Florida Bldg., Tallahassee, Florida **32301**, this 7th day of August, **1989**.

Attorney