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IN THE SUPREME COURT OF FLORIDA

CASE NO. 74-408
FIRST DCA NOS.: 87-1174, 87-1175, 87-1176

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.

FILED
SID J. WHITE
AUG 30 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ON PETITION FOR DISCRETIONARY CONFLICT REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE POSITION OF THE RESPONDENTS

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I. STATEMENT OF THE CASE AND OF THE FACTS

The Academy of Florida Trial Lawyers adopts the statement of the case and of the facts of the respondents.

11. ISSUE ADDRESSED BY AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS

Does Section 768.54, Florida Statutes, Impose a $100,000 Cap on the Plaintiff's Damages when the Florida Patient's Compensation Fund is Not Joined as a Defendant in a Medical Malpractice Action Against a Participating Health Care Provider?

111. SUMMARY OF THE ARGUMENT

As amicus curiae, the Academy of Florida Trial Lawyers wishes to make one simple but dispositive point. The version of Section 768.54 that applies to this case is the current version of the statute; the current version of the statute does not make any provision for a limitation on the liability of a participating health care provider; accordingly, there is simply no statutory basis for the petitioners' argument that they are entitled to a $100,000 cap on their liability in the present case.

Petitioners and their amici rest their argument on language in the 1979 statute, which the petitioners interpret as granting a **$100,000** cap on liability. *As* the First District's opinion below forcefully illustrates, the language regarding a "limitation on liability" contained in the 1979 statute is ambiguous at best. However, any ambiguity was removed in 1982, when the Legislature specifically deleted all references to "limitation on liability" and instead defined the participating health care provider's benefit of participation in the Fund as "coverage." Under *Von Stetina*[1], the version of the statute in effect at the time the appellate opinion is decided must be applied to determine the impact of the Fund legislation on the plaintiff's right to recover. Therefore, the old, 1979 version of the statute cannot be applied in this case and the

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[1]*Florida Patient's Cornpensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985).

current version of the statute (which contains no reference to any "limitation on liability") must be applied, so that there can be no argument in this case that participation in the Fund, in and of itself, grants a $100,000 limit on the participating health care provider's liability to an injured plaintiff.

IV. ARGUMENT

The First District's opinion is thorough and well-articulated; we will therefore not belabor the Court with any extended discussion of the opinion itself. Instead, we would like to bring to the Court's attention a 1982 amendment to Section 768.54 which is dispositive of the issue of the hospital's liability for damages in excess of $100,000. Indeed, because the 1982 amendment to the statute necessarily applies to all pending cases, the Court need not even reconcile the conflict between *Meeks*[2] and *Menendez.*[3] Moreover, the 1982 amendment to Section 768.54 obviates a troubling constitutional question presented by petitioners' argument and which was not raised in the Court's prior decisions upholding the Florida Patient's Compensation Fund.

Before addressing the substance of the 1982 amendments, we will explain why, under this Court's decision in ***Florida Patient's Compensation Fund v. Von Stetina,*** 474 So.2d 783 (Fla. 1985), the current version of the statute must be applied in this case.

Under *Von Stetina,* the Current Version of Section 768.54 Must Be Applied to the Present Case

While coverage under the Fund is determined on an "occurrence" basis (according to the year during which the incident of medical malpractice occurred), the plaintiff's right to execute on a judgment against a defendant tortfeasor is governed by the statute currently in effect. *Von Stetina,* 474 So.2d at 787-88. In *Von Stetina,* the Fund was

[2]*Tallahassee Memorial Regional Medical Center v. Meeks,* 543 So.2d 770 (Fla. 1st DCA 1989).

[3]*Mercy Hospital, Inc. v. Menendez,* 371 So.2d 1077 (3d DCA 1979), *appeal dismissed and cert. denied,* 383 So.2d 1198 (Fla. 1980).

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attempting to defend the constitutionality of Section 768.54. In order to do so, the Fund took a position diametrically opposed to the position it maintains in the present case, i.e., in *Von Stetina,* the Fund argued that the ***current*** version of the statute was applicable ***(not*** the statute as it existed at the time of the malpractice). The reason the Fund took such a position in *Von Stetina* was because, in 1982, the Legislature made several revisions to Section 768.54 in an effort to remove constitutional infirmities. One such amendment was the deletion of the $100,000 annual cap on payments to an injured plaintiff (the provision before the Court in *Von Stetina);* another *of* the 1982 amendments was the deletion of the purported $100,000 "limitation on liability" for participating health care providers (the provision before the Court in the present case). In *Von Stetina,* this Court agreed with the Fund and applied the 1982 statute (which did not include any annual limitation on the amount an injured plaintiff could receive) -- even though the 1982 amendments took effect after the malpractice occurred and, indeed, after the judgment was entered by the trial court:

> Before evaluating the constitutionality of sections 768.54(2)(b), 768.54(3)(e)3, and 768.51, we must first determine whether section 768.54(3)(e)3 as enacted in 1976, or as amended in 1982, is applicable to this case. The original enactment provides for the Fund to pay, in place of a health care provider, the portion of any judgment which exceeds $100,000, but limits the payment to no more than $100,000 per person per year until the claim has been paid in full. Assuming the 1976 provision is applicable, it is clear that the statute would prohibit the Fund from paying the full amount of the annual medical expenses of Von Stetina, determined by the jury to be $188,400. In 1982, while this cause was pending in the trial court, the "cap" on payments was eliminated by an amendment to section 768.54(3)(e)3. ***The amendment did not become effective until two months after the entry of the trial court's judgment, but it has been in effect while this cause has been pending on appeal.***
>
> The Fund contends that an appellate court must apply the most recent version of the statute when it is the law in effect at the time of the appellate court's final decision. The district court rejected that view, finding that the statutory change affects a substantive matter and that its application to the present case constitutes an impermissible retroactive application.

> We disagree with the district court. The judgment awarded in favor of Von Stetina is not final until the case has been disposed of on appeal. An appellate court is generally required to apply the law in effect at the time of its decision. In *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961), this Court said:
>
> > Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.
>
> *Id.* at 136 (citing *Cunningham v. State Plant Board*, 112 So.2d 905 (Fla. 2d DCA), *cert. denied*, 115 So.2d 701 (Fla. 1959)). ***We accept the Fund's view that the 1982 amendment to section 768.54 is remedial in nature. The amendment does not alter the size of the judgment in favor of Von Stetina; rather, it prescribes the method by which the judgment is to be paid.*** We find that the statute simply changes the form of the enforcement and does not substantially impair any existing rights.

Von Stetina, 474 So.2d at 787-88 (Fla. 1985)(citations omitted; footnotes omitted; emphasis added).

The same year the Legislature removed the $100,000 annual cap on payments (a change which this Court ruled would apply to all pending cases), the Legislature made another significant change in Section 768.54: ***it deleted the $100,000 "limitation on liability" which is relied upon by the Fund and the hospital in this case.*** 1982 Laws of Florida Chs. 82-236 and 82-391. Clearly, these amendments were intended to remove any constitutional infirmities in the statute. Under the reasoning of *Von Stetina*, if the deletion of the cap on annual payments must be applied to pending cases regardless of the date of malpractice, then the deletion of the "limitation of liability" clause must also apply to pending cases regardless of the date of malpractice.[4]

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[4] Indeed, if the purported limitation on liability was ever truly required under the statute (a dubious proposition for the reasons expressed in the First District's opinion in *Meeks*), then it could only be constitutional if it affected the enforcement of the judgment, rather than the amount of the judgment. *See* Von *Stetina*, 474 So.2d at 787-88. Following the reasoning of *Von Stetina*, if the 1982 amendments only affected the manner of enforcement of the judgment, then in the present case the Court must apply the law in effect at the time of its decision, i.e., the current version of the statute which

The **1982** changes to Section **768.54** are completely dispositive of the issue of the hospital's entitlement to a limitation of its liability in the present case. The **former** version of Section **768.54(2)**(b)**(1979),** i.e., the version cited by the hospital and its amici, provided:

> (2) LIMITATION **OF** LIABILITY.
>
> ...
>
> (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 [complied with the conditions necessary for Fund coverage].

The **1982** amendments to Section **768.54(2)** changed the title of this subsection from "Limitation of Liability" to **"Liability";** and amended the text of subsection (b) as follows:

> (b) Whenever a claim covered under subsection (3) results in a settlement or judgment against a health care provider, the fund shall be liable to the extent of the coverage if the health care provider has [paid its assessments and performed the other conditions necessary for coverage].

In **1983,** the title of the subsection was again revised and was changed from **"Liability"** to "Coverage." **1983** Laws **of** Florida Ch. **83-206.** Subsection **768.54(2)(b)** has remained the same, in pertinent part, to the current time, and is now found at Section **766.105(2)(b ,** Florida Statutes (Supp. **1988).**[5]

Thus, the only portion of the statute which could have ever arguably been interpreted as a "limitation on liability" was deleted from the law and no longer exists. Significantly, this change in the law occurred after ***Menendez*** was decided, suggesting that the amendment was a clarification of legislative intent ***not*** to limit a tortfeasor's liability -- or that the amendment was specifically intended to overrule ***Menendez.*** A

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does not include any reference to a "limitation on liability." **474 So.2d** at **787-88.**

[5]Copies of Chapters **82-236, 82-391** and **83-205,** Florida Laws, are included in the Appendix to this brief.

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review of the law as it currently exists makes it abundantly clear that the Fund scheme cannot serve as a limit on the amount of a judgment against a tortfeasor (unless, of course, the plaintiff brings a direct action against the Fund and establishes his right to recover from the Fund). The following provisions of the statute make this point rather clear:

1. Section 766.105(2) is now entitled "Coverage," indicating that the Legislature intended that participation in the Fund grants a provider protection in the nature of liability insurance; and that such coverage is ***not*** tantamount to a "Limitation on Liability" (the former title of the subsection).

2. Section 766.105(2)(b) now provides that, "Whenever a claim covered under subsection (3) results in a settlement or ***judgment against a health care provider,*** the fund shall pay to the extent of its coverage...." (Emphasis added.) If, as petitioners suggest, this statute imposed a limitation on liability, the Fund would never have to pay unless there was a judgment against a health care provider ***and the Fund.*** The fact that the statute contemplates a judgment against a health care provider alone as a predicate for coverage necessarily implies that a plaintiff can proceed against the tortfeasor, without joining the Fund, and still recover the full measure of damages.

3. Indeed, this interpretation of the statute is borne out by the continuation of subsection 766.105(2)(b), which provides:

> (b) Whenever a claim covered under subsection (3) results in a settlement or judgment against a health care provider, the fund shall pay to the extent of its coverage if the health care provider ... provides an adequate defense for the Fund....

(Emphasis added.) The statute provides elsewhere (in subsection (3)(f)) that if the plaintiff is to recover directly from the Fund, he or she must join the Fund as a defendant. The Fund must then "appear and actively defend itself when named as a defendant in the suit. In so defending, the fund shall retain counsel...." Section

766.105(3)(f)1. What does the statute mean, then, when it says that if a covered claim results in a judgment against a health care provider (not the Fund), there will be coverage if, among other things, the tortfeasor provided an adequate defense for the Fund? We respectfully submit that it can only mean that, in those cases where the plaintiff does not bring a direct action against the Fund and instead proceeds solely against the tortfeasor, then the defendant may establish Fund coverage after a judgment is entered by showing, among other things, that it provided an adequate defense for the Fund. Otherwise, one must torture subsection (2)(b) to give it any meaning.

4. The current statute consistently employs the term "coverage" to describe the effect of participation in the Fund. *See, e.g.,* Section 766.105(2)(e), Florida Statutes (Supp. 1988). Nowhere in the current statute does the term "limitation of liability" appear. In another context, this Court has recently recognized the significance of this choice of words. *Higley v. Florida Patient's Compensation Fund,* 525 So.2d 865, 867 (Fla. 1988).

5. The current version of the subsection entitled "Claims Procedures" also leads to the inevitable conclusion that the statute does not create a $100,000 limitation on liability. This subsection begins by stating:

> 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 may not recover against the fund unless the fund was named as a defendant in the suit.

Section 766.105(3)(f)1, Florida Statutes (Supp. 1988). A careful reading of this sentence indicates that a plaintiff may bring an action against a participating health care provider, but there is no indication of any limitation on the amount of recovery by the plaintiff in that action. However, if the plaintiff wishes to "***recover against the fund,***" then he or she must name the Fund as a defendant. In other words, unlike a private liability insurer,

the Fund may be the object of a direct **action.**[6] Moreover, if the plaintiff intends to seek a recovery **from *the Fund itself,*** then he must join the Fund as a defendant in the underlying litigation. However, the statute provides no suggestion that if the plaintiff fails to pursue a direct action against the Fund, then he is limited to a recovery of **$100,000** from ***the tortfeasor.*** Nor does the statute suggest that, if the plaintiff elects to proceed solely against the health care provider, the provider is thereby divested of coverage with the Fund. Indeed, as noted above, the totality of the statute clearly suggests that a health care provider may establish Fund coverage after **"a** claim covered under subsection **(3)** results in a **...** judgment against a health care provider," if the defendant can show that it "provide[d] an adequate defense for the fund." Section **766.105**(2)(b).

6. Section **766.105(3)(f)1,** Florida Statutes (Supp. **1988**) ("Claims Procedures") continues by stating:

> The fund is not required to actively defend a claim until the fund is named therein.

Under the petitioners' theory, this sentence would read, "The Fund is not required to pay any claim unless the Fund was joined as a defendant in the suit." Of course, the statute does not so provide, but only requires that if the plaintiff is to recover directly from the Fund, then he or she must join the Fund as a defendant. The fact that the Fund is not required to actively defend until named as a defendant is consistent with the provision of subsection (2)(b) which allows a participating health care provider to establish Fund coverage after a judgment for a covered claim is entered against the provider by showing that it provided an adequate defense for the Fund.

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[6] *Cf.* Fla. Stat. §627.7262 (Fla. **1987**); *Van Bibber v. Hartford Accident and Indemnity Insurance* Co., **439** So.2d **880** (Fla. **1983**).

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7. Fundamentally, if it was the intent of the Legislature to accomplish such a profound departure from the common law as a $100,000 cap on damages that could be recovered directly from a participating health care provider, then the Legislature should have, and presumably would have, clearly so specified. Indeed, the fact that the Legislature deleted the term "limitation of liability" and specifically removed all such references from the statute in 1982 can only be interpreted as a clear indication of legislative intent that no such restriction on the plaintiff's right to recovery be effected.

The First District's Interpretation of Section 768.54, Which is Borne Out by the 1982 Amendments to that Statute, Is Supported by Sound Policy Considerations

Given the Legislature's decision to remove any references to "Limitation on Liability" from Section 768.54, this Court need not consider the policy implications militating for or against a cap on liability. However, in light of the shrill *in terroram* arguments of the petitioners and their amici, we think it appropriate to comment briefly on the wisdom of the current version of the statute.

This Court has often recognized that the Fund has two aspects: in one respect it serves as a compensation fund, against which the plaintiff may make a direct claim; in another respect, it operates much as a liability insurer, providing coverage to participating health care providers. ***See, e.g., Von Stetina; Taddiken v. Florida Patient's Compensation Fund,*** 478 So.2d 1058 (Fla. 1985). These two aspects or facets of the Fund are not inconsistent or mutually exclusive. The Fund simply partakes of features of both types of entities. A careful reading of the statute reveals that it operates in the following fashion:

> 1. If a plaintiff intends to make a direct claim against the Fund, then he must join the Fund as a party defendant in the litigation against the participating health care provider. This Court has held that the two-year medical malpractice statute of limitations applies to such a direct claim against the Fund.

2. If the plaintiff does not make a direct claim against the Fund, then the participating health care provider may avail itself of the coverage provided by the Fund if it establishes that the claim was covered; that it resulted in a judgment; that the provider paid its assessments and is otherwise in compliance with the requirements of the statute; and that it provided an adequate defense for the Fund.

3. The statute does not prohibit (and no policy or rule would prohibit) the defendant from joining the Fund as a third-party defendant in the underlying litigation in order to establish entitlement to coverage under the Fund.

4. Likewise, the defendant may establish Fund coverage in a separate action after judgment is entered against the provider. The limitations period for such an action should be the same as for any other action for contribution, i.e., one year from the entry of judgment. *See* Section 768.31(4)(c), Florida Statutes (1987).

The petitioners suggest that permitting the provider to join the Fund in the underlying litigation or in a subsequent action to establish coverage would be inconsistent with the provider's fiduciary obligation to provide an adequate defense for the Fund. However, the Legislature specifically recognized that the interests of the Fund and the provider will not always be identical and accordingly mandated that if the Fund is joined as a defendant (and it appears that the damages will exceed $100,000 or the applicable threshold amount), then the Fund will appear, will retain counsel and will actively defend itself. As this Court stated in ***Taddiken:***

> It is true ... that the Fund and health care providers have a mutuality of interest in defending the suit, but it is also true that their interests are not necessarily congruent and only the Fund can in the final analysis determine how best to protect itself.

478 So.2d at 1061.[7] Thus, the Fund and a participating provider stand in essentially the same relationship as a primary and an excess liability insurer: the primary insurer may have a contractual (or even fiduciary) duty to defend the interests of the excess insurer;

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[7] In ***Taddiken,*** the Court held that the two-year medical malpractice statute of limitations applied to a direct action by a plaintiff against the Fund. In so holding, the Court did not reach the issue of the statute of limitations which governs a participating health care provider's suit against the Fund to establish coverage.

but that does not preclude the primary insurer from bringing a later action against the excess insurer to establish the excess insurer's liability.

Contrary to the petitioners' argument, the Florida Patient's Compensation Fund was not created to provide a windfall to defendants in the form of a **$100,000** limit on liability for health care providers who participate in the Fund. It was created in order to ease a perceived liability insurance crisis by establishing a mandatory statewide pool that provided liability coverage for the health care industry; and by providing a compensation fund against which victims of malpractice could maintain direct claims.' Contrary to the petitioners' arguments, the First District's opinion in the present case does not ***create*** any liability on the part of health care providers. Instead, it only holds that a health care provider is not entitled to an arbitrary cap on its liability for damages caused by its tortious conduct; and that, if a claim which is covered by the Fund results in a judgment against a health care provider, then the provider may bring a subsequent claim against the Fund to establish its entitlement to coverage. Thus, the District Court's opinion does not require a health care provider to pay more than it is obligated to under the law (although the provider may be required to pursue post-trial relief

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The cry of "medical malpractice crisis" hardly gives the petitioners carte blanche to read into the current statute a limitation on their liability for damages caused by their tortious conduct. To the extent that a legitimate "crisis" ever required the creation of the Florida Patient's Compensation Fund, that "crisis" has been sufficiently ameliorated that the Fund does not have, and for many years has not had, any participating health care providers. Indeed, the Fund has provided no coverage for any hospitals since June **30, 1982;** and it has provided no coverage for any physicians since June **30, 1983.**

Despite the periodic occurrence (some cynics would say, creation) of "medical malpractice crises," the fact remains that the private insurance industry provides available liability insurance coverage for the health care industry in Florida. Moreover, the citizens of Florida recently had an opportunity to decide for themselves whether "limitations on liability" were the correct response to any perceived "medical malpractice crisis" when proposed Amendment **10** was placed on the ballot. The voters overwhelmingly rejected this proposed cap on damages, which was styled by its primary proponent, amicus curiae The Florida Medical Association, as a battle of "doctors vs. lawyers" and the "final solution to the medical malpractice problem." Clearly, the cry of "crisis" is not a blank check that can be used to pay for any damage to citizens' legal rights.

against the Fund); it does not require the Fund to pay more than it is obligated to pay under the law (the Fund may always raise the participating health care provider's alleged failure to provide an adequate defense); and it does not penalize the plaintiff by imposing the severe (and probably unconstitutional) sanction of a **$100,000** limitation on liability if the plaintiff does not bring a direct claim against the Fund.

The Petitioners' Interpretation of Section **768.54** Would Subject the Statute To Attack as an Unconstitutional Denial of the Plaintiffs' Right of Access to the Courts

We respectfully observe that the clear change in the statute which deleted the "limitation on liability" language relied upon by petitioners is dispositive of this case. The application of the current version of the statute is supported by the proposition that the courts must interpret the statutory law in a manner that renders it constitutional. *Miami Dolphins, Ltd. v. Metropolitan Dade County,* **394** So.2d **981** (Fla. **1981**); *Aldana v. Holub*, **381** So.2d **231** (Fla. **1980**). Should the Court *not* apply the current version of the statute, and should the Court reject the First District's interpretation of the **1979** statute, then the Court would be presented with a constitutional issue which was not addressed in the earlier decisions upholding the Florida Patient's Compensation Fund, i.e., would a cap on liability of **$100,000** violate the guarantee of access to courts of the Florida Constitution?

Under *Smith v. Department of Insurance,* **507** So.2d **1080** (Fla. **1987**), it is now settled that a cap on damages violates article I, section **21** of the Florida Constitution as interpreted in *Kluger v. White,* **281** So.2d *1* (Fla. 1973). While the **$450,000** cap struck down in *Smith* did not contain any provision analogous to the Fund's liability for excess damages and so presented a clearer case of a denial of access to the courts, the limitation advocated by petitioners in the present case is nevertheless a cap on damages and is therefore pernicious. However, the Court need not trouble itself with this issue,

as the Legislature properly exercised its authority to remove the suspect language from the statute in 1982.

VI. CONCLUSION

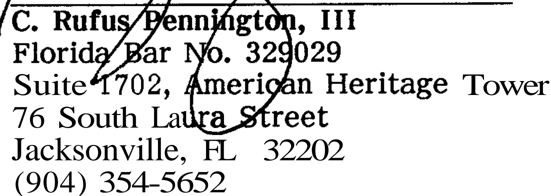
For the foregoing reasons, amicus curiae The Academy of Florida Trial Lawyers respectfully submits that the opinion of the District Court of Appeal, First District, should be approved, and that the judgment of the trial court be affirmed.

VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of August, 1989, to: Laura Beth Faragasso, Esq., Henry, Buchanan, Mick & English, P.A., Post Office Drawer 1049, Tallahassee, Florida 32302, Attorneys for Petitioners Tallahassee Memorial Regional Medical Center, Inc., Nancy Baker and Donald E. Allen; Roosevelt Randolph, Esq. and Harold M. Knowles, Esq. of Knowles & Randolph, 528 East Park Avenue, Tallahassee, Florida 32301, Attorneys for Respondents; Marguerite Davis, Esq., 215 South Monroe, Suite 400, First Florida Building, Tallahassee, Florida 32301, Attorney for Florida Patient's Compensation Fund; and Jack W. Shaw, Jr., Esq., Mathews, Osborne, McNatt & Cobb, 11 East Forsyth Street, Suite 1500, Jacksonville, Florida 32202-3385, Attorneys for Florida Hospital Association and Florida Medical Association.

Respectfully submitted,

MARGOL & PENNINGTON, P.A.



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