IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs. Case No. 74,408

SHERONDA 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 28 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ANSWER BRIEF OF RESPONDENTS

KNOWLES AND RANDOLPH

ROOSEVELT RANDOLPH, ESQUIRE
FLORIDA BAR NO. 183446
HAROLD M. KNOWLES, ESQUIRE
FLORIDA BAR NO. 174359
528 EAST PARK AVENUE
TALLAHASSEE, FLORIDA 32301
(904) 222-3768

LARRY K. WHITE, ESQUIRE
FLORIDA BAR NO. 195446
1020 LAFAYETTE STREET
SUITE 104
TALLAHASSEE, FLORIDA 32301
(904) 942-7700

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

CONTENTS PAGE(S)

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

I PRELIMINARY STATEMENT 1

II SUMMARY OF ARGUMENT 2

III ARGUMENT 6

ISSUE I

THE DISTRICT COURT DID NOT REVERSIBLY ERR IN REFUSING TO LIMIT APPELLANTS/DEFENDANTS LIABILITY TO $100,000.00. 6

A. Principles of Joint and Several Liability Require Affirmance of Total Damage Award Without Regard to Certified Conflict of District Court Opinion with Mercy Hospital Inc. v. Menendez. 6

B. The District Court Did Not Err In Determining That Menendez Decision Is Erroneous. 18

C. Appellants/Defendants Below Failed To Meet The Requirements of Section 768.54(2) (B (1979). 26

ISSUE II

THE DISTRICT COURT DID NOT REVERSIBLY ERR IN PERMITTING NANCY BAKER TO BE QUESTIONED REGARDING A WRITTEN STATEMENT SHE PROVIDED HER EMPLOYER. 35

IV. CONCLUSION 49

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CITES	PAGE(S)
Brooks v. Herndon Ambulance Service, Inc., 475 So.2d 1319 (Fla. 5th DCA 1985)	31
Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983)	24
Drew v. Knowles, 511 So.2d 393 (Fla. App.2d Dist. 1987)	12
Dulman v. Seaboard Coast Line Railroad Company, 308 So.2d 53 (Fla. 4th DCA 1975)	8
Durden v. American Hospital Supply Corp., 375 So.2d 1096 (Fla. 3rd DCA 1979)	31
Fleisher v. Florida Patient's Compensation Fund, 498 So.2d 436 (Fla. 3rd DCA 1986) (On Motion for Rehearing), rev. den. 504 So.2d 767 (Fla. 1987)	15
Florida Patient's Compensation Fund v. Tillman 478 So.2d 1032 (Fla. 1986)	24
Florida Patient's Compensation Fund v. von Stetina, 474 So.2d 783) (Fla. 1985)	22
Goodies v. Findelstein, 174 So.2d 600 (Fla. 3rd DCA 1965)	41
Hall v. Haldane, 268 So.2d 403 (Fla. 4th DCA 1972)	42
Higley v. Florida Patient's Compensation Fund, 525 So.2d 865 (Fla. 1985)	16
Hinton v. Iowa National Mutual Insurance Company, 317 So.2d 832 (Fla. 2nd DCA 1975)	14
Johnson v. United States, 780 Fed.2d 902 (11th Cir. 1986)	36,40
Licenberg v. Issen, 318 So.2d 386 (Fla. 1975)	9,10,15
McTevia v. Schrag, 446 So.2d 1183 (Fla. 4th DCA 1984)	42
Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979)	3, 6,25

TABLE OF CONTENTS
-Continued-

CITES	PAGE(S)
Mercy Hospital v. Menendez, 400 So.2d 48 (Fla. 3rd DCA 1981)	25,29
Preventive Sec.and Investigor v. Troge, 423 So.2d 931 (Fla. 3rd DCA 1982)	13
Sands v. Wilson, 140 Fla. 18, 191 So. 21 (1939)	8
Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).	24
Soler v. Kukula, 297 So.2d 600 (Fla. 3rd DCA 1974)	47
Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1038 (Fla. 1985)	24
Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987)	8,10
White v. Kaiser, 368 So.2d 952 (Fla. 1st DCA 1979).	42

STATUTES	
Florida Statutes, Section 90.608	37
Florida Statutes, Section 90.608(1)(a)	
Florida Statutes, Section 316.066	36
Florida Statutes, Section 316.066(4)	
Florida Statutes, Section 395.041	35,36,38
Florida Statutes, Section 395.041(2)	
Florida Statutes, Section 395.041(4)	
Florida Statutes, Chapter 401	38
Florida Statutes, Section 401.30(3)	35
Florida Statutes, Section 401.211	39
Florida Statutes, Section 401.33	

TABLE OF CITATIONS
-Continued-

STATUTES	PAGE(S)
Florida Statutes, Section 627.357	27
Florida Statutes, Chapter 768	4
Florida Statutes, Section 768.31	9,15
Florida Statutes, Section 768.31(7)	9
Florida Statutes, Section 768.41(1)(d)	40
Florida Statutes, Section 768.41(b)	29
Florida Statutes, Chapter 768.54	8,16,19,23 30
Florida Statutes, Section 768.54 (1)(b)	30
Florida Statutes, Section 768.54(2)(b)	18,26,27,29
Florida Statutes, Section 768.54(2)(d)	27
Florida Statutes, Section 768.54(2)(e)	
Florida Statutes, Section 768.54(3)(c)	24
Florida Statutes, Section 768.54 (3)(e)	
Florida Statutes, Section 768.81(2)	9
Florida Statutes, section 768.81(3)-(6)	9

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE MEMORIAL HOSPITAL, et al.,

Petitioners,

vs. CASE NO. **74,408**

SHERONDA MEEKS, et al.,

Respondents.

I PRELIMINARY STATEMENT

The Respondent, SHERONDA A. MEEKS, shall be referred to as "Plaintiff/Appellee." The Petitioners, TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC., **("TMRMC")**, DONALD E. ALLEN ("ALLEN") and NANCY BAKER **("Baker")**, shall be referred to by name and as **"Defendants/Appellants."** The record shall be cited by the symbol **"R,"** by the appropriate page number.

II SUMMARY OF ARGUMENT

This is an appeal from an affirmance by the First District of Appeal of judgment for damages in a negligence action.

Appellants maintain the court below committed reversible error in: a) denying their motion to limit liability to $100,000.00 based on Section 768.54(2)(b), Florida Statutes (1979); b) affirming trial court's ruling which permitted impeachment of Appellant paramedic Nancy Baker's testimony through the use of incident reports; c) requiring the health care provider to join the Patient's Compensation Fund if it wished to avail itself of the Fund's limitation of liability.

Appellee/Plaintiff would show that no reversible error was committed at any stage of these proceedings for the reasons set forth below.

First, the principles of joint and several liability require affirmance of the total damage award without regard to the limitation of liability supposedly available to Appellant Tallahassee Memorial Regional Medical Center (TMRMC) under Section 768.54(2)(b), Florida Statutes (1979). Appellant paramedics Baker and Allen are not covered by the limitation of liability because Section 768.54(2)(b) relates only to health care providers. Appellee/Plaintiff sued Appellants Baker and Allen individually for torts committed independent of the negligence of their employer, TMRMC. Therefore, even assuming TMRMC could avail itself of the limitation of liability purportedly afforded it under Section

768.54(2)(b), Florida Statutes (1979), co-defendants Baker and Allen are nonetheless liable for the remainder of the damage award as joint tortfeasors. Under the theory of joint and several liability which applies to this case Appellee/Plaintiff has the clear and unequivocal right to collect from any or all of the Appellants. Thus, this case may be decided on this threshold issue alone, without any need to reach the certified conflict issue of the First District Court's opinion with Mercy Hospital. Inc v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979).

Secondly, the District Court did not err in determining that the Menendez decision was erroneous as it applied to the limitation of liability under Section 768.54(2) (b) (1979). More to the point, Menendez was decided under the old statutory language (of the 1979 law) and has no applicability here. Florida Statute 768.54 (2)(b) is procedural not substantive. The law of the case is the law in effect at the time of the appeal. In the case sub judice that law is the 1982 law. This law sets forth the statutory scheme for paying a judgment and places no cap on the recovery of those damages. Plaintiff has a constitutional right to collect the entire judgment from the health care provider.

Thirdly, even assuming arguendo that the doctrine of joint and several liability has no application herein, or that Appellants are entitled to the limitation of liability, Appellants would not be able to prevail in the instant cause as TMRMC failed to meet the requirements of Section 768.54 (2)(B) (1979), pertaining to qualifying as a member of the Patient's Compensation Fund (thereby

entitling it to $100,000.00 limitation of liability, if applicable). Appellee/Plaintiff has shown through extensive documentation of the record that Appellant TMRMC failed to comply with Fund requirements for membership and, consequently, was entitled to none of the benefits of the limitations of liability if indeed the limitation has any application at all in this case.

Fourth, Appellee/Plaintiff would urge that this case is not and never has been a medical malpractice case, and, as such, Chapter ***768,*** Florida Statutes, relating to the Patient's Compensation Fund, has no application herein. No mention of medical malpractice or the standards of recovery for medical negligence were mentioned by Appellants until the time of trial. Decedent herein was never a **"patient"** of TMRMC and Appellee/Plaintiff's claim for damages does not stem from any medical diagnosis, care or treatment.

Fifth, Appellee/Plaintiff would maintain the Court below in no way erred in permitting the use of an incident report to impeach the testimony of Appellant Nancy Baker. Appellant Baker made certain statements under oath which directly contradicted written statements she made in an incident report completed the day following death of the decedent herein. While the report itself was never introduced into evidence the trial judge permitted its use to impeach Appellant Baker. The trial judge correctly concluded, and the District Court affirmed, the use of these reports to impeach the contradictory testimony of Appellant Baker. Assuming a statutory privilege existed, Appellants waived any

argument herein by their own use of the incident report before and during the trial. Appellants contradicted themselves numerous times, so that the effect of any claimed violation of the privilege was harmless. Further, the information elicited from the incident report was cumulative as it was included in the testimony of Nancy Baker, Sadie Thomas and Plaintiff Eula Thomas.

III ARGUMENT

ISSUE I

THE DISTRICT COURT DID NOT REVERSIBLY ERR IN REFUSING TO LIMIT APPELLANTS/DEFENDANTS LIABILITY TO $100,000.00.

(A) Principles of Joint and Several Liability Require Affirmance of Total Damage Award Without Regard to Certified Conflict of District Court Opinion With Mercy Hospital Inc. v. Menendez.

This Court need not decide the certified conflict of the District Court's opinion with Mercv Hospital Inc. v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979) to affirm the jury's award of damages in this case. The joint and several liability argument urged by plaintiffs herein relieves this court of the need to reach that issue at this time.

Plaintiff sued defendant, TMRMC, and defendants Baker and Allen (paramedics) in their individual capacity. Plaintiff proceeded to trial in a two-count amended complaint. Count I alleged affirmative negligence of the defendants Baker and Allen which included performing an inadequate examination, improperly taking the decedent's patient history, failing to seek the advice of a physician, and refusing to transport the patient to TMRMC (R-79-83). Count II alleged TMRMC was negligent in that it failed to properly instruct, train and supervise defendants Baker and Allen (R-81-83). Baker and Allen were working within the scope of their employment at the time of the incident (R-78-80; 84, 87; 90; 1153-1154; 1469). Thus TMRMC is also vicariously liable for the

acts of defendants Baker and Allen. The court instructed the jury on the doctrine of joint and several liability (R-1691) without objection from the Defendants (R-1695).

The District Court recognized the applicability of the doctrine of joint and several liability to the instant case when it noted:

> Thus, while the appellants Baker and Allen are covered by the fund as employees of the hospital . . . if the hospital is properly a member of the fund - nevertheless, this contractual benefit to them in no way effects the rights of plaintiffs/appellees herein.

Appellants/Defendants refuse to acknowledge the applicability of joint and several liability in this case and indeed distort, merge and otherwise confuse which party (plaintiff or defendants) benefits by this concept.

Defendants urge the following argument in their brief: the jury awarded damages against three (3) individually named defendants, with three different judgments, but that plaintiff has no other choice but to seek all damages from one defendant, TMRMC. In essence, they argue that affirmative negligence was plead and proven against defendant TMRMC. It is further argued by Appellants/Defendants that although separate and distinct affirmative acts by Defendants Baker and Allen were alleged and proven that liability is automatically imputed to defendant TMRMC based on the theory of respondeat superior. Appellants' argument at this point makes several leaps and bounds, reciting numerous insupportable conclusions not based on any known case law.

Appellants then argue that TMRMC was a member in good standing with the Patient's Compensation Fund at the time of this lawsuit and therefore entitled to the $100,000.00 limitation of liability. Consequently, the Appellants reason, the limitation of liability afforded TMRMC as a participating hospital applies to defendants Baker and Allen as employees because defendant TMRMC is vicariously liable for the acts of their employees. They do not argue that Defendants Baker and Allen as paramedics are health care providers under Section 768.54, Florida Statutes, entitled to fund coverage in their own right. That right to limitation of liability , it is contended, springs from the membership of TMRMC. Thus, conclude Appellants in their argument, ". . . the umbrella of fund coverage available to TMRMC should extend to its employees, Baker and Allen. . ."

A brief review of the concepts and relevant case law demonstrate how untenable Defendants' arguments are in the instant case. Joint and several liability is a judicially created doctrine, Walt Disney World Co. v. Wood, 515 So.2d 198 (Fla. 1987), that enables a court to impose a judgment on joint or multiple tortfeasors, binding each to pay the entire amount of the damages assessed against all of them. Sands vs. Wilson, 140 Fla. 18, 191 So. 21 (1939). A plaintiff injured by the tortious actions or omissions of joint or multiple defendants may proceed against any of them and recover the total amount of any judgment imposed. Dulman vs. Seaboard Coast Line Railroad Company, 308 So.2d 53 (Fla. 4th DCA 1975); Sands v. Wilson, supra. The doctrine is still in

effect, notwithstanding the adoption of comparative negligence in Florida. Under the Florida theory of comparative negligence, damages awarded to the plaintiff are reduced by the plaintiff's own degree of negligence. Sec. 768.81(2), Fla. Stat. The jointly liable defendants then have joint and several liability for the remainder of the damages, unless they are subject to the limitations of the Tort Reform Acts of 1986 or 1988. See Sec. 768.81(3)-(6), Fla. Stat. This cause arose prior to July 1, 1986. Thus, it was appropriate for the trial court to give the instruction pertaining to joint and several liability and for Plaintiff to utilize it.

The doctrine of comparative negligence does not alter the doctrine of joint and several liability. It was argued in the Supreme Court case of Licenbers v. Issen, 318 So.2d 386 (Fla. 1975), that as an implied result of the adoption of comparative negligence, the plaintiff was entitled to recover from each defendant only an amount proportionate to that defendant's fault in having caused the plaintiff's injury. However, the Court held that the plaintiff was entitled to recover full damages, reduced only by the plaintiff's own degree of negligence. The defendants were found jointly and severally liable for all damages caused by their combined negligence. The Court further observed that the statutory right of contribution, see, Sec. 768.31, Fla. Stat., granted to jointly liable defendants in actions pending as of June 12, 1975, or filed thereafter, Sec. 768.31(7), Fla. Stat., did not eliminate joint and several liability. Licenbers v. Issen, supra.

The right of contribution permitted damages to be apportioned among the defendants on a pro rata basis without consideration of their relative degrees of fault. See, former Sec. 768.31, Fla. Stat. (subsequently amended to provide contribution on basis of relative fault). However, the multiparty defendants remained jointly and severally liable for the entire amount. Licenberq v. Issen, supra. Courts in subsequent decisions interpreted Licenberq as upholding the doctrine of joint and several liability. See, e.g., Walt Disnev World Co. v. Wood, supra (listing subsequent decisions upholding continuance of joint and several liability doctrine). In Disney, a plaintiff was injured at an attraction in Walt Disney World when her fiancee's vehicle collided with the vehicle she was driving. The jury returned a verdict finding the plaintiff 14 percent at fault, her fiancee 85 percent at fault, and the defendant Disney 1 percent at fault. The court entered a judgment against Disney for 86 percent of the damages. Disney moved to amend the judgment to reflect the finding of the jury that Disney was only 1 percent at fault. The court denied the motion. On appeal, the Fourth District affirmed the judgment on the basis of Licenberq. The issue was certified to the Florida Supreme Court to determine whether Licenberq applied in a fact situation in which the plaintiff was also at fault, since Licenberq involved a blameless plaintiff. The Supreme Court responded to the certified question in the affirmative and approved the decision of the district court.

This Court has also addressed the broader issue of whether the doctrine of joint and several liability should be replaced by one in which the liability of co-defendants to the plaintiff is apportioned according to each defendant's respective fault. The Court reviewed the trend in other states and noted that although some states have passed laws eliminating joint and several liability after the adoption of comparative negligence, the majority of states that have considered the issue have ruled that joint and several liability should be retained. The Court's analysis included citing the Illinois Supreme Court which said:

> (1) The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. In many instances, the negligence of a concurrent tortfeasor may be sufficient by itself to cause the entire loss. The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.

The three Defendants, TMRMC, Baker and Allen are joint tortfeasor, each shown at trial to have committed separate and distinct affirmative acts of negligence. They are, as shown by the above case law, jointly and severally liable for damages flowing from those affirmative acts. Plaintiff has the option - not Defendant - of collecting from any or all of the tortfeasors. Defendants have contended that because defendant TMRMC is also

vicariously liable as an employer of Defendants Baker and Allen, that Plaintiff is somehow precluded from collecting against Defendants Baker and Allen. Imposition of the doctrine of vicarious liability in joint and several liability cases has shown otherwise.

Vicarious liability is the doctrine under which a person who is free from fault must, because of his or her relationship to the tortfeasor, nonetheless bear the legal and financial consequences of the tort. It is true that Defendant TMRMC may be held vicariously liable for the acts of Defendants Baker and Allen. However, the fact that the hospital is vicariously liable for those acts in no way obviates the personal liability of defendants Baker and Allen. This point was illustrated in Drew v. Knowles, 511 So.2d 393 (Fla. App.2d Dist. 1987). In that case the deceased patient's personal representative brought suit against respiratory therapists, registered nurses, doctors and nurses of the admitting hospital. The fact that a hospital is vicariously liable for a nurse's negligence does not relieve the nurse of personal liability for any acts of independent negligence, that is, negligence in the performance of ministerial acts or negligence in situations where the nurse is called on to exercise personal judgment.

> We agree that a nurse acting under the direction and orders of a physician in matters involving medical professional skill and judgment is absolved from liability for the acts so performed, absent independent negligence upon the part of the nurse, and absent a performance of those acts or duties a nurse is called upon to perform at a level of performance below that which is expected of

> a similarly qualified nurse. Similarly, where a nurse is called upon to exercise professional judgment or to perform discretionary ministerial acts and does so negligently, the nurse may be liable. Drew, supra, at p. 396.

A defendant is deemed independently negligent for having a committed the alleged tort or for having contributed to its commission. For example, an employer has a common-law duty to use care in hiring and supervising employees for the protection of third parties. When an employer negligently breaches that duty, and as a result an employee injures a third party, then both the employer and the employee are personally and jointly liable for any award of compensatory and punitive damages assessed against the employee.

An example of joint personal liability on the part of an employer and employee is found in Preventive Sec. and Investisator v. Troge, 423 So.2d 931 (Fla. 3rd DCA 1982). A boatyard owner engaged a security company to protect a marina and the persons who used it. The security company hired a guard, but provided no training. More importantly, the company allowed the guard to remain in his car while on duty rather than requiring him to patrol the area. One night, while the guard was asleep in his car, an intruder slipped into the marina, broke into one of the boats, and severely assaulted the plaintiff, who subsequently brought a negligence action against both the guard and his employer. The jury found for the plaintiff, and awarded him both compensatory and punitive damages against the guard and the company. On appeal by the company, the Third District affirmed. The court found that

there was sufficient evidence in the record to support the jury's finding that the employer was negligent because it had failed to train and supervise the guard, and that the employer's negligence foreseeably contributed to the plaintiff's injury. The court concluded that the employer and the employee were personally liable. Because the employer was personally, and not merely vicariously liable, the plaintiff could recover punitive damages against it, even though such damages were based on the conduct of the guard rather than the mere negligence of the employer.

It is the plaintiff's prerogative to decide which defendant from whom he will seek to collect damages for his injuries or in this case compensation for a death. Moreover, Florida courts have held that a plaintiff could even proceed against the employee or agent alone and then initiate a second action against the employer or principal on the basis of vicarious liability. Hinton v. Iowa National Mutual Insurance Company, 317 So.2d 832 (Fla. 2nd DCA 1975).

An analysis of the concepts and case law above reveals several important points. First of all, the plaintiff makes the decision as to which defendant in a joint and several liability case from whom he will seek to collect his judgment, not the defendant. Further, if the plaintiff cannot satisfy his judgment by collecting monetarily from one defendant he can collect from another defendant until the entire judgment has been satisfied. Finally, the percentages of negligence as they relate to the total of all defendants is only important to the defendants for contribution

and indemnity purposes in joint and several liability cases - not the plaintiff. Licenberg, supra. In essence, if plaintiff sought to collect the entire judgment from Baker and Allen, then Baker and Allen could seek contribution from the hospital, Licenberg, supra.

This situation is particularly well illustrated in the case of Fleisher v. Florida Patient's Compensation Fund, 498 So.2d 436 (Fla. 3rd DCA 1986) (On Motion for Rehearing), rev. den. 504 So.2d 767 (Fla. 1987). In that case the Third District held that a Fund member who claimed that he had paid more than his pro rata share of a final judgment could bring a contribution action against the Florida Patient's Compensation Fund pursuant to Section 768.31, Florida Statutes, even though the original statute of limitations applicable to a claim by the original Plaintiff against the Florida Patient's Compensation Fund had already expired. The Court noted:

> The court's conclusion that Dr. Fleisher's contribution claim is barred because the Fund was not joined at an earlier stage of the litigation is directly contrary to section 768.31(4)(a),(c), Florida Statutes (1983), which unequivocally authorizes just the post-judgment action asserted below.
>
> * * *
>
> 768.31 Contribution among tortfeasors.-
> (4) ENFORCEMENT.-
> (a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.
>
> * * *

> (c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution, must be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

Assuming that Appellants Baker and Allen are "under the umbrella" of the hospital as a Fund member and entitled to the hospital's contractual rights under Section 768.54 (2)(b) (1982), Appellants cite no case in Florida which holds that a Fund member who has paid more than $100,000.00 (<u>or</u> its underlying insurance limits, whichever is greater) cannot then recover the excess over $100,000.00 <u>or</u> its insurance limits from the Florida Patient's Compensation Fund. Thus, any amount of the judgment paid by Appellants Baker and Allen would be subject to an action for contribution against the Fund by them even if a $100,000.00 limitation of liability was upheld as to Appellant TMRMC.

Appellants/Defendants can to find no solace in the <u>Hislev</u> decision. <u>Hislev vs. Florida Patient's Compensation Fund</u>, 525 So.2d 865 (Fla. 1985). <u>Hislev</u>, is an indemnification case. Nurse Higley was not sued in her individual capacity as were Defendants Baker and Allen. Although Section 768.54(2)(e) as pointed out by the court below provides that "the <u>limitation</u> of liability afforded by the Fund for a participating hospital . . . shall apply to the . . . employees of the hospital," this court in <u>Hislev</u>, <u>supra</u>, correctly concluded this section merely determines

which parties are afforded coverase, not limitation of liability, by the Fund. Inasmuch as nurse Higley was covered by the Fund, the Fund could not seek indemnity from its own insured.

The indemnity principals enunciated by this Court in no way limit a plaintiff seeking compensation from joint or individual tortfeasors. Perhaps, if the defendant TMRMC had only been sued without naming Baker and Allen in their individual capacities and the affirmative acts of negligence alleged were of those employees only, then a different argument might be maintained by Appellants. Obviously, that scenario then would not encompass multiple joint tortfeasors. Those, of course, are not the facts of the instant case. As shown above, the facts of this case involve joint and individual tortfeasors, from all or any of whom the Plaintiff may collect damages.

B. The District Court Did Not Err In Determining That <u>Menendez</u> Decision Is Erroneous.

Before evaluating the merits of appellants contention that they are entitled to a limitation of liability of $100,000.00, a determination must be made as to whether section 768.54(2)(b) in effect in 1979 or as amended in 1982 is applicable to this case.

The 1979 version of 768.54(2)(b) provides in pertinent part:

768.54 Limitation of Liability and Patient's Compensation Fund

* * * * *

(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) <u>A health care provider shall not be liable for an amount in excess of $100,000.00 per claim</u> 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) if the health care provider had paid the fees required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, and an adequate defense 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). A health care provider may have the necessary funds available for payment when due, or an adequate defense for the fund may be provided by use of the:

* * * * *

(e) The limitation of liability afforded **by** the Fund for a participating hospital or ambulatory surgical center shall apply to the officers, trustees, ... However, the limitation of liability afforded by the Fund for a participating hospital shall apply to house physicians, interns, employed physicians in a resident training program, or physicians performing purely administrative duties for the participating hospitals other than the treatment of patients. This limitation of liability shall apply to the hospital or ambulatory surgical center and those included in this subsection as one health care provider. (Emphasis added.)

Conversely, the **1982** version states:

768.54 Limitation of Liability and Patient's Compensation Fund

* * * * *

(2) LIABILITY.-

(a) All hospitals, unless exempted under this paragraph or paragraph (c), shall, 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 fee or assessment into the fund pursuant to subsection (3). Any hospital operated by an agency of the state shall be exempt from the provisions of this section and shall not be required to participate in the fund.

(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 the fees required pursuant to subsection (3) for the year in which the incident occurred for which the claim is filed, provides an adequate defense for the Fund, and pays the initial amount of the claim up to the applicable amount set forth in paragraph (f) 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. The maximum limit of liability of the fund for each health care provider shall be $1 million per claim, $2 million per claim, **$3** million per claim, $5 million per claim, ***$8*** million per claim, or $10 million per claim, **as** elected by the health care provider. The health care provider who makes such election is liable for any amount in excess of the elected limit. The Fund shall not be responsible for payment of punitive damages awarded for actual or direct negligence of the health care provider member. The health care provider shall have the same responsibility for punitive damages it would have if it were not a member of the fund. A health care provider may have the necessary

funds available for payment when due or may provide underlying financial responsibility by one of the following methods:

* * * * *

(e) The coverage afforded by the Fund for a participating hospital or ambulatory surgical center shall apply to the officers, trustees, volunteer workers, trainees, committee members (including physicians, osteopaths, podiatrist, and dentists), and employees of the hospital or ambulatory surgical center, other than employed physicians licensed under chapter 458, physician's assistants licensed under chapter 458, osteopaths licensed under chapter 459, dentists licensed under chapter 466, and podiatrist licensed under chapter under 461. However, the coverage afforded by the Fund for a participating hospital shall apply to house physicians, interest employed physicians in a resident training program, or physicians performing purely administrative duties for the participating hospitals other than the treatment of patients. This coverage shall apply to the hospital or ambulatory surgical center and those included in this subsection as one health care provider. (Emphasis added.)

Plaintiff/Appellee contends that the applicable statute is the 1982 version. The language in 1982 is instructional as it gives credence to the District Court's view that the limitation of liability provided in subsection 2(b) is one between the parties to the contract --- namely Appellants/Defendants --- and the Fund. Indeed the issue was determined by this Court in <u>Florida Patient's</u>

Compensation Fund vs. Stetina, 474 So.2d 783, 787 (Fla.1985), where the Court stated:

> an appellate court is generally required to apply the law in effect at the time of its decision.

The change in the 1982 Statute neither created new nor took away any vested rights, but instead, as in Von Stetina, was remedial in nature. It does not alter the size of the judgment, but rather changes the form of the remedy or of the enforcement of the judgment and does not substantially impair any existing rights, 474 So.2d at p. 788. One wonders why the Florida Patients' Compensation Fund in filing an amicus brief now argues before this Court that the 1979 statutory language would be applicable to this case but argued the contrary position in Von Stetina.

The legislature in the 1982 statute clarified any confusion that may have existed in the earlier statute by substituting "coverage" for the words "limitation of liability". The purpose of the statute is not to limit the amount of the judgment against the health care provider, as urged by Appellants, but to prescribe the manner of collection of the judgment. Elimination of the 1979 words in 2(b) ". . . A health care provider shall not be liable for an amount in excess of $100,000 per claim. . ." and substituting the 1982 language (2)(b) . . ." whenever a claim covered under subsection (3) results in a settlement or judgment against the health care providers the Fund shall be liable to the extent of the coverage. . ." clearly defines the payment structure

of the health care providers in relationship to the Fund. However, as noted by the District Court, a reading of (2)(e)of Section 768.54 when read in para materia with (2)(b) does not require a limitation of liability to the Fund or the participating hospital vis-a-vis an injured plaintiff.

The 1982 statute has increased the Fund entry level amount for a settlement or judgment to $150,000.00. A logical extension of Plaintiff's argument that the statute in effect at the time of the appeal controls warrants reviewing Section 768.54(2)(f). This statute raises the entry level amount as of January 1, 1987, to $200,000.00. Thus, the only sum in dispute for purposes of this appeal is in reality $47,500, as the total judgment was $247,500.

It is true that Section 768.54(3)(e)1 provides that a plaintiff may not recover against the Fund unless the Fund was named as a defendant in the suit. However, this is not the same as saying that a plaintiff is prohibited from obtaining and enforcing the full amount of a judgment against a health care provider merely because the Fund has not been made a party to the suit. There is no requirement in Section 768.54(3)(e) or any other part of Section 768.54 that the Fund be joined.

The von Stetina decision is not inapposite to this realization. In fact this Court in von Stetina specifically implied that the statutory scheme for paying a judgment is not affected by whether or not the Fund is there to pay a part of the judgment:

> We caution, however, that we do not address in this action the constitutional right of a plaintiff to levy against a health care provider when the Fund is fiscally incapable of or otherwise prohibited from paying valid entered judgments within a reasonable time because of inadequate rates and assessments. 474 So.2d at 789.

Thus, the health care provider has the ultimate responsibility for satisfying a judgment of the Plaintiff. To the extent that Appellants/Defendants argue that Florida Statute 768.54 places a cap on damages recoverable from a health care provider, the same would be unconstitutional and contrary to Article 1, Section 21 of the Florida Constitution (access to court and redress of injury). Smith v. Department of Insurance 507 So.2d 1080, 1087 (Fla. 1987).

Reliance by Appellants on Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1038 (Fla. 1985) is misplaced as this case stands only for the proposition that the same two-year statute of limitations for filing an action applies to the Fund as it does the health care providers. The issue of limiting the recovery of the judgment to no more than $100,000.00 is not addressed. Likewise the Court in Florida Patient's Compensation Fund v. Tillman, 487 So.2d 10323 (Fla. 1986) followed von Stetina without addressing the $100,000.00 limitation argument as it applies to a plaintiff's action against a health care provider. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983)

held that Section 768.54(3)(c) providing for financing of

Patient's Compensation Fund, (which was established to pay medical malpractice claims against participating health care providers over and above cost limits) is not constitutionally infirm as not providing sufficient guidelines for establishment of fees and assessments. This case never addressed the $100,000.00 limitation argument as it applies to a plaintiff's action against a health care provider, nor did it address any requirement of the Plaintiff to name the Defendant in the suit in order to recover in excess of $100,000.00. Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979) and Mercv Hospital v. Menendez, 400 So.2d 48 (Fla. 3rd DCA 1981) were decided under the old statutory language and thus provide little enlightenment in determining whether the 1982 version of 768.54 is a statute permitting the recovery of more than $100,000.00 from Appellants.

For the reasons cited above and those in the District Court's opinion, it is urged that 768.54 (1982), as amended, is the statute which sets forth the formula for payment of the judgment herein and in no way alters a plaintiff's rights against any health care provider to payment in full.

C. Appellants/Defendants Below Failed To Meet The Requirements of Section 768.54(2)(B) (1979)

As shown by the discovery obtained after the Appellants filed the motion for limitation of liability following the trial in this case, TMRMC did not meet and has not met the requirements of Section 768.54 (2)(b) (1979). Plaintiff/Appellee does not concede any argument made in Section B, supra, concerning the applicability of the 1982 version of 768.54(2)(b). The primary difference is that in the 1982 version the amount for which a Fund member remains liable was increased from $100.000.00 to $150.000.00 per claim, effective July 1, 1983. For purposes of this analysis, however, Plaintiff/Appellee will make reference to the 1979 statute.

Section 768.54(2)(b) (1979) does provides that a health care provider should not be liable for an amount in excess of $100,000.00 per claim if the health care provider has paid the required fees, provides an adequate defense for the Fund and pays at least the initial $100,000.00 of the maximum limit of the underlying coverage maintained by the health care provider, whichever is greater, of any settlement or judgment against the health care provider. That subsection provides, further, the health care provider may have the necessary funds available for payment when due, or an adequate defense for the Fund may be provided by means of a bond in the amount of $100,000.00 per claim, an adequate escrow account in the amount of $100,000.00 per claim, medical malpractice insurance in the amount of $100,000.00

or more per claim or self-insurance provided for in Section 627.357 in an amoun of $100,000.00 or more per claim. TMRMC's failure to meet any of these requirements is amply demonstrated by the deposition taken on August 7, 1987, of William Anthony Giudice, Senior-Vice President and Chief Financial Officer of TMRMC, in which it was revealed that TMRMC had neither a bond nor an adequate escrow account nor medical malpractice insurance nor self-insurance as provided in Section 627.357 (R-1341-1342, 1363, 1365-1371), and, therefore, did not satisfy the requirements of Section 768.54 (2)(b), Florida Statutes (1979).

Appellants maintain that they are in compliance with those provisions as long as they pay the first $100,000.00 of any settlement or judgment when it becomes due. However, the legislative history of Section 768.54 when the 1979 version was passed (as analyzed by the Senate Commerce Committee which formulated the amendments to that section) demonstrates that the intent of the 1979 law was not to change the requirements as to the four alternative methods which must be used by a health care provider to comply with Section 768.54 (2)(b). Senate Staff Analysis and Economic Statement for Senate Bill 481 (May 31, 1978) (R- 1652-1653).

The Appellant TMRMC claims that it is entitled to the limitation of liability even though TMRMC did not comply with Section 768.54(2)(d) which provides as follows:

> 1. Any health care provider who does not participate in the fund, or participates and does not meet the

> provisions of paragraph (b), shall be subject to liability under law without regard to the provisions of this section.
>
> 2. Annually, the Department of Health and Rehabilitative Services shall require documentation by each hospital that said hospital is in compliance, and shall remain in compliance, with the provisions of this section. . . . The license of any hospital fails to remain in compliance or fails to provide such documentation shall be revoked or suspended by the department.

TMRMC's lack of statutory compliance for the Fund year applicable to the date of the incident involved in this casemay be found on HRS Form 1028 which is entitled "Statutory Compliance Florida Patient's Compensation Fund" (R-1647-1648).

This form specifically states that all hospitals claiming the limitation of liability pursuant to Section 768.54 must submit this form to HRS. Form 1028 also requires that each hospital claiming compliance circle on the form the appropriate method for providing underlying financial responsibility to the Fund. TMRMC circled Section (d) as its method for providing such underlying financial responsibility (R-1648). That section reads in pertinent part:

> Self-insurance as provided in Section 627.357, Florida Statutes providing coverage in the amount of $100,000.00 or more per claim and three times the per claim limit in the aggregate per year, plus an additional fifteen percent (15%) to meet claim defense and expenses.

> Self insurance is provided through a trust fund and is approved by the Department of Insurance as evidenced by the attached.

As noted earlier, TMRMC had no such self-insurance (R-1341-1342), Form 1028 signed by the Chief Executive Officer of the Hospital (R-1648). It thus appears that the TMRMC's position in this case is that even though it would not qualify to be licensed as a Fund participating hospital at the time of the incident in question, it should be entitled to the limitation of liability provided for in the same statute containing the requirement the hospital has failed to meet. TMRMC's position is contrary to the holding in Mercy Hospital vs. Mendez, 400 So.2d 48 (Fla. 3d DCA 1981), cert. den., 411 So.2d 383 (Fla. 1981), in which the Third District Court of Appeal denied limitation of liability to a hospital for failure to comply with the conditions of Section 768.54(2)(b).

This case is not and has never been a medical malpractice case, nor a case coming under the provisions of Section 768.54, Florida Statutes, relating to the Florida Patient's Compensation Fund. Section 768.40(1)(b) defines those "health care providers" who are the medical professionals subject to medical malpractice actions. A hospital licensed under Chapter 395 would fall under such definition, but paramedics Nancy Baker and Donald Allen would not. Emergency medical personnel licensed under Chapter 401, Florida Statutes, are not specifically mentioned in such definition or anywhere else in the statutes

relating to medical malpractice actions. Appellants acknowledge that Appellants Allen and Baker are not included within the definition of "health care providers" under Section 768.54(1)(b), which sets forth the definitions to be applied in the interpretation and enforcement of Section 768.54.

This case was brought by the Plaintiff as a wrongful death action occasioned by the death of a child and arising out of the negligence of the Appellants. The Appellants never mentioned anything about medical malpractice or the standards of recovery for medical negligence until the time of trial. It should be noted that when the court ruled that the standard of care to be applied was the one used in medical malpractice cases, Plaintiff/Appellee prevailed under an arguably more stringent standard. The case was handled through all of the pleading stages as a negligence case. The limitation of liability which Appellants now argue was not asserted in any way in the Answer and Defenses which they filed to the Second Amended Complaint (R-84-92). It was only after Appellants received an adverse verdict that this issue was raised.

As for the application of the Florida Patient's Compensation Fund statute to this case, the name "Florida Patient's Compensation Fund" militates against applying any of the provisions relating to limitation of liability to this case since the decedent was not a "patient" of any health care provider.

Sheronda A. Meeks was not, and the Appellants have never claimed that she was, a patient of TMRMC at any time.

This situation is best illustrated by the case of Brooks v. Herndon Ambulance Service, Inc., 475 So.2d 1319 (Fla. 5th DCA 1985), that case involved a wrongful death action brought against an ambulance service alleging negligence resulting in or contributing to the death of a minor. Included among the allegations of negligence were allegations that employees of ambulance service were improperly trained, negligently failed to comprehend the severity of the emergency situation and negligently performed their duties when they arrived on the scene. There were also allegations that the ambulance service failed to have the proper equipment to meet the emergency needs of the decedent, and that the ambulance service violated its own operating procedures manual by the choice it made when it dispatched an ambulance to the scene. 475 So.2d at page 1321. The negligence standard applied in that case was a general negligence standard not a medical negligence standard. The same standard should apply in the case sub judice. The mere fact that the ambulance service was provided by TMRMC, a health care provider, does not make the allegations of Appellee's Complaint a medical negligence case. An analogous situation arises in Durden v. American Hospital Supply Corp., 375 So.2d 1096 (Fla. 3rd DCA 1979). In that case defendant operated a laboratory which was a blood donor center and plaintiff

sold his blood to the laboratory on several occasions. Plaintiff was subsequently notified that a hepatitis antigen was present in his blood and several weeks later he contracted infectious hepatitis. Thereafter he sued the defendant for negligence in the extraction of his blood and alleged that defendant was negligent in using a dirty needle which had not been inspected properly for cleanliness prior to its use. Defendant moved to dismiss the plaintiff's complaint as being barred by the two year medical malpractice statute of limitations and the trial court agreed with defendant. The issue to be determined by the appellate court was whether the two year medical malpractice statute of limitations applied or the four year general negligence statute of limitations. Defendant contended that since it met the definition of a health care provider under one of the malpractice statutes, the two year statute should apply. The appellate court disagreed. The Third District held that before the medical malpractice statute of limitations would apply, the claim for damages must arise as a result of medical, dental or surgical diagnosis, treatment or care on the part of the health care provider. Since the plaintiff sold his blood to the defendant, the court found there was no such medical, dental or surgical diagnosis, treatment or care rendered by the defendant to the plaintiff. Instead, the relationship between the plaintiff and the defendant was one of vendor-vendee rather than that of hospital-patient contemplated by the medical malpractice statute of limitations. Thus, Plaintiff's

complaint was grounded upon allegations of ordinary negligence and the court found the four year statute of limitations applied.

Likewise, if there was a relationship established between this decedent and any of the Appellants it would have been one founded on a contractual basis rather than any hospital-patient basis. In other words, if the paramedics had done what they were supposed to do -- transport the decedent to the hospital -- the decedent's family would have paid TMRMC for performing a contractual service and not for providing medical diagnosis, care or treatment. This is probably why the portion of Chapter 401 dealing with paramedics is entitled "Medical Transportation Services" and why Appellants own expert (Dr. Lee) testified at trial that the national standards for paramedics were set by the U.S. Department of Transportation.

Appellants/Defendants would also have this Court believe they were not permitted to fully expound to the trial judge on their theory that TMRMC was a Fund member in good standing at the time of the incident in question: arguing that if the trial court found TMRMC to be a Fund member in good standing that the court had no discretion on the issue of limitation of liability. Appellants/Defendants further suggest that the trial judge ". . . cut off the argument . . . stating that he had complete discretion in this matter . . ."

Predictably, Appellants/Defendants have taken substantial editorial license with the record and the facts. While the full

text of the record does not bear recitation herein, it is replete with extensive discussion by defense counsel on the issue of whether TMRMC was a Fund member in good standing as it related to the limitation of liability question. (R-780-786). The record simply does not support Appellants' contention that they were prevented from fully setting forth their position. And indeed, this is further confirmed by the fact that the trial judge, in addition to permitting comprehensive argument of counsel, authorized the parties to submit supplemental memoranda in support of their respective positions. Each of the parties argued from these memoranda and were permitted to append them to the trial record (R-718-724 and 725-729) at the conclusion of the post-trial hearing (R-767-830). While Appellants' counsel might feel that they should have been granted unlimited latitude in presenting their arguments, the trial judge correctly concluded otherwise and foreclosed further argument of counsel after a thorough and comprehensive airing of their respective positions.

In view of the foregoing, the district court's denial of Appellants' application for a limitation of liability should be upheld. The decision by the trial judge and the district court is fully supported by the record in this case and by the applicable statutory provisions.

ISSUE II

THE DISTRICT COURT DID NOT REVERSIBLY ERR IN PERMITTING NANCY BAKER TO BE QUESTIONED REGARDING A WRITTEN STATEMENT SHE PROVIDED HER EMPLOYER.

Appellants argue that the trial court erred in permitting the use of appellant Baker's incident report for impeachment purposes. Paramedic Baker testified at trial that no one had informed her of decedent's heart murmur. She further testified that she had made a misstatement on the "run report" when she wrote, ". . . Doctor told them [the family] patient has 'heart murmur' and heart beats too fast'. . ." For the purpose of impeaching her testimony, Plaintiff/Appellee asked defendant Baker whether she had written an incident report the following day and made the same mistake when she stated therein: "We asked her [Sheronda's] mother if the doctor could have said that the patient had a heart murmur, and she replied 'Yes'." The incident report itself was never introduced into evidence.

Appellant argues that admissibility of the incident report is controlled by Section 395.041(4), Florida Statutes, governing internal risk management programs, which provides that incident reports are discoverable, but not admissible. Appellee, on the other hand, argues that the controlling statute is Section 401.30(3), Florida Statutes, dealing specifically with emergency medical services, which provides that records of emergency calls

may be disclosed in civil or criminal actions, unless otherwise prohibited by law. Both statutes are silent regarding the use of the report for impeachment purposes. Appellants rely on Johnson v. United States, 780 F.2d 902 (11th Cir. 1986), where the trial court properly excluded from evidence an incident report prepared pursuant to the predecessor statute of Section 395.041, Florida Statutes. Although Johnson states in dictum that it is against the legislative intent to use incident reports in litigation, the case does not discuss the use of reports for impeachment purposes, and is therefore not helpful as to the point raised.

Appellants also argue that Section 395.041, Florida Statutes, is analogous to Section 316.066, Florida Statutes, involving automobile accident reports, which states that "[n]o such report shall be used as evidence in any trial, civil or criminal, arising out of an accident. . . ." Although Section 316.066, Florida Statutes, provides for very limited disclosure of some information, it does not provide that an automobile accident report is discoverable; thus, the plain language of this statute is essentially different from Section 395.041. It would, therefore, appear intuitively obvious that the incident report may be used for the purpose of impeachment.

At trial, Plaintiff/Appellee's attorney asked Defendant Nancy Baker, ". . . The next day, after you got back to the hospital, your superiors told you to write down what happen didn't they? . . ." The Appellants/Defendants' attorney objected and the jury was excused (R-1181).

After argument of counsel, the trial judge ruled that the Plaintiff could use what Defendant's labeled an "incident report" for purpose of impeaching Nancy Baker by inquiring if she made a certain statement in writing the day following the decedent's death (R-1194). In ruling, the trial judge indicated he would have difficulty accepting Appellants/Defendants' contention that the law had declined to such a point where a witness could testify to a particular set of facts under oath and then not be questioned for impeachment purposes concerning an earlier written statement which was contrary to the facts earlier testified to under oath (R-1184-1185, 1194). The trial judge correctly ruled that the statement itself could not be admitted into evidence (R-1195), and indeed, the statement was never admitted into evidence.

The jury returned and defendant Baker was then asked if the next day (October 5, 1979) she wrote a statement about the incident and she answered "Yes." She was next asked if she made the statement the next day that "We asked the mother if the doctor could have said that the patient had a heart murmur, and she replied 'yes?', and Nancy Baker answered "Yes" to that question (R-1197).

Since the defendant admitted making the statement and it was not introduced into evidence, it cannot be accurately said she was impeached. Section 90.608, Florida Statutes, provides in pertinent part:

> (1) Any party, . . ., may attack the credibility of a witness by:

(a) Introducing statements of a witness which are inconsistent with his present testimony.

Clearly to impeach would require admission of the written statement into evidence. Since the Defendant admitted making the statement the most that may be said about it is it refreshed her recollection. Moreover, the Defendant was permitted to explain that the statements were a misquote (R-1197).

The Appellant objected to the use of the "incident reporot" based on Section 395.041, Florida Statutes (1985). Appellee agrees that Section 395.041 relates to the internal risk management program of a hospital licensed under Chapter 395, Florida Statutes, but would disagree that this section applies to the facts of this case. The Chapter which applies is Chapter 401 where Part III entitled "Medical Transportation Services" deals specifically with emergency medical services and with paramedics. Appellant TMRMC in providing ambulance service is not exempt under Section 401.33 of that Chapter since TMRMC does charge a fee for transporeting persons to the hospital.

Chapter 401 of the Florida Statutes was enacted in 1973. Ppursuant to that Chapter, Chapter 10D-66 of the Florida Administrative Code titled "Emergency Medical Services," wasa enacted. That Chapter in no way lists Chapter 395 or any other chapter other than Chapter 401 as the authority for that poritonb of the administrative code. Chapter 10D-66 deals with subjects such as the keeping of records by an ambulance service owner or

its designated representative, (10-D-66.33). The information required to be kept pursuant to 10D-66.33 is the same information contained in the run reports and the so-called incident reports.

Also of relevance to this case is Section 401.30(3), Florida Statutes, which provides that records of emergency calls that contain examination or treatment information shall not be disclosed without the consent of the person to whom they pertain, but also provides in subparagraph (d) that they may be disclosed without such consent of the person to whom they pertain "In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice by the party seeking such records, to the patient or his legal representative".

Defendants in their Brief acknowledged that Section 395.041 relates to reporting adverse incidents causing injury to patients, but they never claimed at trial that the decedent was ever a patient of TMRMC. Section 401.211, Florida Statutes, which sets forth the legislative intent of Part III of Chapter 401 speaks of the health and well-being of citizens of the State of Florida. The purpose of the act is to protect and enhance the public health, welfare and safety by providing for and overseeing emergency and non-emergency medical transportation services to citizens of this State. Nothing in Chapter 401 requires that the provider of medical transportation services be a hospital although hospitals are permitted to do so. For example, Section 401.265, relating to with medical directors, provides that a medical

director could a licensed physician, a group of physicians or a physician provided by a hospital for that purpose.

The District Court agreed with the trial judge that the two statutes must be read together. And like the trial court found that the statutes were silent as to use of the report for impeachment purposes.

The Appellants/Defendants cite the case of Johnson v. United States, 780 Fed.2d 902 (11th Cir. 1986), for the proposition that the statement given by Nancy Baker could not be used for impeachment purposes. In that case, the trial court had excluded from evidence a "risk management" report prepared by an insurance adjuster on behalf of Jackson Memorial Hospital under its duty to maintain that report pursuant to Section 768.41(1)(d), Florida Statutes. It was prepared 18 days after the decedent's death and contained, inter alia, informal physicians' opinions. The Plaintiff in that case was attempting to introduce a report into evidence prepared by an insurance adjuster for a hospital. The court there did quote from the provision to the statute which provides that incident reports shall be subject to discovery but not admissible as evidence in court. The court found that 768.41(4) was a legislative judgment that these reports should not be subject to use in litigation in order to ensure their reliability. Johnson v. United States, supra, at pages 908-909. This dictum by that court, which acknowledged that a state statute was not controlling in federal litigation where federal rules of evidence apply, does not stand for the proposition that a statute

such as Section 395.041(2) (whose purpose is to ensure reliability of incident reports) would prohibit their use for impeachment purposes when a party under oath has contradicted a written statement previously given to the party's employer.

The District Court in the case sub judice dismissed consideration of the Johnson decision, as not being helpful because it did not discuss use of the report for impeachment purposes. We agree.

The Appellants/Defendants then attempt to analogize incident reports under Section 395.041 to accident reports filed by drivers of motor vehicles pursuant to Section 316.066, Florida Statutes. Separate and apart from the obvious differences in language between the two statutes -- Section 395.041(4) provides that the incident reports shall be subject to discovery but not admissible as evidence in court, whereas Section 316.066(4) provides that an accident report made by a person involved in an accident shall be without prejudice to the person making the report -- there are cases dealing with 316.066 which would suggest that the report compiled by appellant Nancy Baker could likewise be used for impeachment purposes even if it was an incident report protected by 395.041(4).

In Goodies v. Finkelstein, 174 So.2d 600 (Fla. 3rd DCA 1965), the defendant sought to introduce against the plaintiff a statement she had made shortly after an accident to a police officer. That Court, in indicating that the statute would not apply, concluded that the significant part of the statement of the

plaintiff which the defendant sought to introduce had no relevance as to how the accident happened. 174 So.2d at p. 603.

Determining the causes of accidents is one of the primary purposes of Section 316.066, Florida Statutes. White vs. Kaiser, 368 So.2d 952 (Fla. 1st DCA 1979), at p. 953. Similarly, since one of the purposes of Section 395.041(4) is to generate incident reports so that problem areas may be identified, 395.041 should not be applied to exclude the information which counsel for Plaintiff/Appellee sought to elicit from Nancy Baker about the written report made to her employer the day after the incident.

In Hall vs. Haldane, 268 So.2d 403 (Fla. 4th DCA 1972, the Court found that although it was error to use for impeachment purposes a prior inconsistent statement made to a police officer investigating an accident because it violated the privilege afforded accident reports by the predecessor to Section 316.066, any such error was harmless because the evidence of the statement given by the Defendant in that case to a highway patrolman was cumulative. This conclusion was reached because a similar written statement which was properly admitted into evidence had been given by Defendant Hall to his own employer shortly after the accident. 268 So.2d at p. 405.

Similarly, in McTevia v. Schrag, 446 So.2d 1183 (Fla. 4th DCA 1984) the Court determined that a testimony of motorist not involved in accident was not subject to the statutory privilege stated:

> However, even if . . . statement
> had not been admissible, its

> admission would not be reversible error here because it was clearly cumulative of other testimony regarding that statement. . .

Prior to asking Nancy Baker about the statement she made to her employer the day after the incident, counsel for the Plaintiff/Appellee inquired about Plaintiff's Exhibit #2, (the Run Report), which is required by law (Section 401.30, Florida Statutes) and which defendant Baker testified was filled out solely by herself (R-1171, 1173). In response to one of counsel's questions, defendant Baker testified that they tried to find out from the decedent's mother what it meant when the mother said that the Health Department told her that the child's heart ". . . beat too loud and too fast . . ." [the mother had taken the child to the Health Department three (3) days before the incident]. She then she stated she asked the mother if the Health Department could have told her that the child had a heart murmur, and the mother indicated she did not know (R-1178). Counsel then pointed out to defendant Baker that on the Run Report, which is to be filled out and turned in on the same day that each run is made by the paramedic (R-1170-1171), Appellant Baker quoted the mother as saying that ". . . Doctor told them patient had 'heart murmur and heart beats too fast . . .'" Defendant Baker then said that this was a misquote on her part (R-1178-1179). This is the identical information which counsel for the Appellee elicited from defendant Baker when he asked her questions about what she said in a statement to her employer the next day (R-1197). Further Mrs.

Sadie Thomas told the paramedics the child had been diagnosed as having a heart murmur (R-1014) as did the Plaintiff Eula Adams (R-1439). Therefore, any information elicited from her in regard to the "incident report" was cumulative to evidence already brought out during the questioning of Defendant Baker in reference to the Run Report.

The Appellants/Defendants would have the Court believe that but for the questioning regarding the "heart murmur" on the so-cal ed incident report the jury would have believed the Defendant's version of events. A cursory review of the admitted mistakes and omissions by Defendants more than likely lead the jury to conclude either that the Defendants were incompetent or that their testimony lacked truth and veracity, apart from any mention of the statement from the incident report.

The alleged "mistake" which defendant Baker made on the Run Report concerning the heart murmur was not the only mistake she claimed to have made. She also made a mistake in putting on the Run Report that the mother had told her that she took the child to the Health Clinic the day before, October 4, 1979 (R-1198). The mother testified, further, that the decedent told her [the mother] that her stomach hurt, but defendant Baker neglected to write this down on the Run Report (R-1201). She also testified that co-defendant Donald Allen listened to the decedent's lung sound and checked her pupils, but the negative results of the pupil examination and the fact that Donald Allen did part of the

examination are not listed on the Run Report (R-1206). On the key issue of whether or not the mother of the decedent told the paramedics that she did not want them to transport the decedent to the hospital, defendant Baker again admitted that she had omitted some key information from the Run Report. Defendant Baker testified at trial that even though the mother of the decedent told the paramedics that she did not want them to take the decedent to the hospital, she failed to check the appropriate box on the release form (R-441) beside the words "Patient refused service," and instead checked the box indicating "No emergency health care need." (R-1223-1226)

Defendant Baker was not the only defendant questioned about the "mistakes" on the Run Report. Defendant Allen, the paramedic who had charge status on the day decedent was seen by him and Nancy Baker (R-1494), acknowledged that "charge status" means he was in charge of the ambulance and the scene that day (R-1491). On direct and cross-examination, defendant Allen stated that everything which was written down on the Run Report by Nancy Baker came from a note pad he had provided to her with his notes on it (R-18-484, 1497). He also testified that the notation on the Run Report that: ". . . Doctor told them that patient had 'heart murmur and heart beats too fast. . .'" was inaccurate. Defendant Allen stated he did not know why there was a mistake on the Run Report since he did not write out the report and that counsel for the Appellee would have to inquire of defendant Baker regarding it

(R-1501). When asked if he had not told the jury that everything on the run report came from his note paid, he said, "No," he just gave her information like vital signs, family doctor and medications (R-101-1502). However, when he was next asked about why the word "unable" appeared in the space allocated for reporting the blood pressure vital signs, he said he did not know where defendant Baker got the word "unable" even though he had testified that he recorded the vital signs on the note pad and then gave them to defendant Baker. He repeated that he did not tell Nancy Baker to put down "unable," but instead his note pad was blank as to the blood pressure vital sign (R-1503-1504). It is noteworthy that at no time before his trial testimony did Donald Allen ever mention this note pad (See his deposition at R-187-249).

After recitation of this extensive litany of mistakes, misquotes, errors and omissions it is certainly not surprising that the jury disbelieved both of them on the key issues in this case.

The Appellants/Defendants also complain on pages 4 and 47 of their Brief that Dr. Tabb, the Plaintiff's expert, listed the incident reports as something he reviewed in preparation for trial. More accurately, what occurred was that on direct examination, counsel for Appellee asked Dr. Tabb what documents he reviewed in preparation for his testimony at trial and one of the things he listed was the incident report prepared by paramedics

Baker and Allen (R-1326). Several questions later, after counsel for Appellants objected to the introduction of the administrative code for emergency medical services, the attorney for the Appellants, during the bench conference on admissibility of such code, objected to Dr. Tabb's testimony indicating he had reviewed the incident reports. The Court then directed counsel for the Appellee that any opinion obtained from Dr. Tabb was to exclude these incident reports. Following this instruction, counsel for the Appellee admonished to Dr. Tabb and he did not mention the incident reports again (R-1326-1328).

The Appellants on pages 4 and 48 of their Brief mentioned that Appellee's counsel referred to the incident reports in his final argument. What he referred to in the closing argument was Nancy Baker's statement about the heart murmur. As noted earlier, this same information was elicited during questioning of defendants Baker and Allen about the Run Report, thus cumulative and harmless. Further, Defendants failed to object to a statement at trial, thus waiving it. Soler vs. Kukula, 297 So.2d 600 (Fla. 3rd DCA 1974).

Even assuming, a statutory privilege attached to the so-called incident report and that references to it were impermissible, it would not be reversible error. The Defendants waived any statutory confidentiality they had by the testimony of their own expert, Dr. Lee. Dr. Lee indicated during his testimony

that he had reviewed the depositions of the paramedics as well as the incident reports (R-1532). In these depositions, the incident reports were discussed. Donald Allen testified at his deposition that the facts that were in the incident report were the same facts that he was articulating from memory at his deposition (R-238-239, 241).

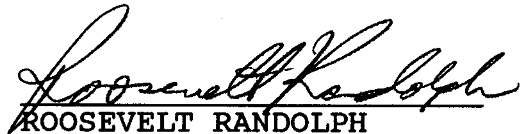
It is also interesting to note that Dr. Lee, when questioned by Appellee's counsel, stated that he assumed that the information about the heart murmur contained in the Leon County Health Department report of October 1, 1979, was also information to which the paramedics were already privy when they saw the decedent. He also assumed the movement of the decedent's chest observed by the paramedics was the same movement of the chest seen at the Leon County Health Department (R-1613-1614). Dr. Lee made the above assumptions because he had read the incident reports (R-280, 1577-78). Dr. Lee furthertestified that he developed his opinions about this case on all the information he read (R-1587). Thus the Defendants waived any statutory privilege they may have had once Dr. Lee reviewed the incidents reports and then utilized them to arrive at his opinions.

V CONCLUSION

Based upon the foregoing argument Respondents request this Court to uphold the District Court's decision in this case.

Respectfully submitted,

KNOWLES & RANDOLPH



ROOSEVELT RANDOLPH
HAROLD M. KNOWLES
528 East Park Avenue
Tallahassee, Florida 32301
(904) 222-3768

LARRY K. WHITE
1020 East Lafayette Street
Suite 104
Tallahassee, Florida 32301
(904) 942-7700

ATTORNEYS FOR RESPONDENTS

:ERTI OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been been furnished by hand-delivery Laura Beth Faragasso, Esquire, HENRY, BUCHANAN, MICK, ENGLISH, P.A., Post Office Drawer 1049, Tallahassee, Florida, and by U.S. mail to Jack W. Shaw, Jr., Esquire, MATHEWS, OSBORNE, McNATT & COBB, P.A., 11 East Forsyth Street, Suite 1500, Jacksonville, Florida 32202-3385 and Marguerite Davis, Esquire, 215 South Monroe, Suite 400, First Florida Bank Building, Tallahassee, Florida 323012, on this 28th day of August, 1989.

ROOSEVELT RANDOLPH