IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

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

Respondents.

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

INITIAL BRIEF OF PETITIONERS, TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC., NANCY BAKER AND DONALD E. ALLEN

Respectfully submitted,

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PRELIMINARY STATEMENT

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." The Respondent, SHERONDA A. MEEKS, shall be referred to as "Plaintiff." The record shall be cited as (R. page number).

For ease of reference to the decision of the First District Court of Appeal, cited statutory and decisional law, and portions of the record, a separately bound Appendix has been filed simultaneously herewith.

STATEMENT OF FACTS AND CASE

Eula Adams, as Personal Representative of the Estate of Sheronda Meeks, and in her individual capacity, sued Tallahassee Memorial Regional Medical Center, Inc., ("TMRMC"), Donald E. Allen, ("Allen"), and Nancy Baker, ("Baker"), for the October 5, 1979, death of her daughter, Sheronda A. Meeks. (R, 78-82). The child died at home of congestive heart failure (R. 1346; 1549) several hours after being examined by TMRMC paramedics Baker and Allen, on the evening of October 4, 1979. (R. 1169-1170; 1469; 343).

The allegations of negligence in the Plaintiff's Second Amended Complaint were set forth in two separate counts, with the first alleging various acts of negligence on the part of Baker and Allen, including performing an inadequate examination, improperly taking the child's history, failing to seek the advice of a physician, and refusing to transport the patient to TMRMC. Count II alleged affirmative negligence on the part of TMRMC for failing to properly supervise, train, and instruct the paramedics. (R. 79-82). Although named individually as Defendants in the lawsuit, the complaint alleged, the Defendants acknowledged, and the evidence at trial proved that at all times pertinent to the lawsuit, Allen and Baker were acting as agents and employees

of TMRMC, within the scope of their employment duties as TMRMC paramedics. (R. 78-80; 84; 87; 90; 1153-1154; 1469).

During the trial, over Defendants' objection, the Plaintiff was allowed to impeach Baker with a statement made in a risk management incident report written by Baker the day after the paramedics examined Sheronda Meeks. The defense argued that the incident report was made pursuant to Section 395.041, Florida Statutes (1985), thereby making it inadmissible as a matter of law, either as substantive evidence or for impeachment. (R. 1183; 1185; 1195). Plaintiff argued that Chapter 401, Florida Statutes, was the controlling statutory provision, and that neither it nor Chapter 395 prohibited the use of incident reports for impeachment purposes. (R. 1184; 1186; 1188; 1192-1193). The trial judge ruled that although the incident report could not be admitted as substantive evidence, it could be used to impeach Baker. (R. 1194-1196).

The question precipitating the Defendants' objection to Plaintiff's use of the report was, "The next day, after you got back to the hospital, your supervisors told you to write down what happened, didn't they?" (R. 1182). Plaintiff's counsel followed up with a similar question after the trial court overruled the objection. (R. 1198). Counsel then elicited testimony from Baker that, contrary to her

testimony at trial, she had stated in her incident report that Sheronda Meeks' mother told the paramedics the child had a heart murmur. (R. 1198). Later in the trial, Plaintiff's expert witness stated he reviewed the incident reports in preparation for trial (R. 1327), and Plaintiff's counsel again referenced the impeachment in his closing argument. (R. 1639). The Defendants renewed their argument on this issue in their Motion for New Trial (R. 405), but the trial court again rejected the Defendants' argument. (R. 777; 742).

At the close of the trial, the jury returned a verdict apportioning individual liability to the hospital in the amount of 50%. Each of TMRMC'S agents and employees, Baker and Allen, were found 20% negligent. The mother, Eula Adams, was found to be 10% negligent. The total amount of the verdict was $275,290. (R. 419-420).

The Final Judgment granted the Estate of Sheronda Meeks $290. Eula Adams, individually, received a judgment for $137,500 against. the hospital for its separate and distinct liability, plus $55,000 against each of the paramedics. Therefore, the total award to Eula Adams and the corresponding total liability to TMRMC, calculated by adding its distinct liability to its vicarious liability for the acts of Baker and Allen, was $247,500. (R. 743).

Although TMRMC was a member of the Florida Patient's Compensation Fund ("Fund") in 1979, Plaintiff failed to join the Fund as a defendant in the action as required by law. (R. 78; 408; 412; 668-669). After the verdict the Defendants moved to limit their total liability to $100,000, pursuant to Section 768.54(2)(b), Florida Statutes (1979). (R. 408-418). At the hearing on their motion, Defendants argued that TMRMC had complied with all of the requirements of Section 768.54(2)(b), Florida Statutes (1979), in order to be entitled to such a limitation. (R. 408-418; 725-729; 786). Mr. Charles Portero, Claims Manager for the Fund, testified to that effect. (R. 668-669; 673). The Defendants further argued that, pursuant to Section 768.54(2)(e), Florida Statutes (1979), it was appropriate to limit the liability attributed to Baker and Allen, employees of TMRMC. (R. 408-411; 781). The Plaintiff argued that the issue of limitation of liability was irrelevant to this lawsuit (R. 718); that TMRMC was not in technical compliance with the provisions of Section 768.54(2)(b), Florida Statutes (1979) (R. 792-795); and that Baker and Allen were not individually entitled to any limitation. (R. 787-791).

The trial court failed to make any findings of fact as to TMRMC'S compliance or non-compliance with the statutory requirements for Fund membership, the threshold question

before the court. Instead, as clearly appears from the record, the court decided that it had the absolute discretion to impose or not to impose a limitation of liability, and ruled for the Plaintiff, denying the Defendants' motion. (R. 796-797; 742).

The Defendants appealed the order denying their Motion for New Trial and the Final Judgment for Plaintiff. The First District Court of Appeal affirmed the lower court on all points. The Defendants then filed a Motion for Rehearing, or in the Alternative, for Certification to the Supreme Court of Direct Conflict. The district court denied the Motion for Rehearing, issued a revised opinion, and certified a direct conflict with the Third District Court of Appeal on the issue of limitation of liability for the Defendants.

In reaching its decision, however, the district court failed to address the narrow issue before it regarding the question of limitation: whether the trial court reversibly erred in holding that it had absolute discretion to order a limitation of liability for the Defendants. Instead of speaking to this limited question, the district court rendered a broader opinion, in conflict with its sister court, holding that the Plaintiff did not have a duty to

join the Fund as a party defendant to the lawsuit. Rather, the court held it was the duty of the Defendants to "join" the Fund as a defendant, or, in the alternative, to raise lack of joinder as an affirmative defense.

The Defendants filed their Notice of Invoking Discretionary Jurisdiction and now appeal the order rendered by the First District Court of Appeal.

SUMMARY OF ARGUMENT

The trial court committed reversible error in denying the Defendants' Motion to Limit Liability to $100,000, based upon the trial judge's stated perception of absolute discretion in making that decision, and the district court likewise erred in affirming the lower court's ruling on this point. Section 768.54(2)(b), Florida Statutes (1979), clearly states that if a health care provider is a member in good standing of the Fund and meets the three prerequisites for limitation of liability (i.e., pay the membership fees, provide an adequate defense of the Fund, and pay the first $100,000), the limitation of liability is mandatory. The evidence presented to the trial court established that TMRMC was entitled to the limitation, but the trial judge refused to hear the evidence or the arguments of counsel and summarily denied the motion, without making the findings of fact necessary for a proper determination as to the hospital. Furthermore, because TMRMC is vicariously liable for the acts of its employees, Baker and Allen, and because the mandatory limitation of liability extends to the acts of a Fund member's employees, the trial court should have ordered that the total liability of the Defendants is limited to $100,000.

The district court compounded the error of the trial court on this issue in two fashions. First, it failed to rule on the point of appeal before it, i.e., whether the trial judged erred in ruling he had absolute authority to grant or deny the limitation of liability. Then, in opining the respective duties of parties to a lawsuit with respect to the joinder of the Fund, the court disregarded the unambiguous language of statutory and case law on this issue, placing a non-existent and illogical burden upon the Defendants, and ignoring the unacceptable legal and public policy implications of its decision.

By statute and decisional authority, the Plaintiff had an unequivocal duty to join the Fund as a party defendant in this lawsuit, if the Plaintiff wished to recover more than $100,000 on her judgment. The limitation of the health care provider Fund member's liability was mandatory once TMRMC's Fund membership was established. The failure of the Plaintiff to join the Fund is fatal to her ability to recover more than the statutorily limited amount of $100,000.

To require TMRMC to join the Fund as a defendant or to raise non-joinder as an affirmative defense is to require the hospital to violate its statutory duty of providing an adequate defense for the Fund, and, in fact, to jeopardize

the ultimate possibility of receiving a limitation by virtue of failing to meet one of the three prerequisites, an adequate defense of the Fund. Such an action would also cause TMRMC to breach its statutorily mandated fiduciary duty to the Fund.

Moreover, the decision imposes a procedurally impossible burden upon the hospital, for only plaintiffs can "join" defendants in a lawsuit. Nor can non-joinder be raised as an affirmative defense along with the defendant's answer, because it is not a factor until a verdict is rendered in excess of $100,000 and a determination has been made that the Fund member has met the three prerequisites for limitation. The district court's ruling on this issue contradicts the controlling statute and defies both common sense and the established decisional law regarding limitation of liability as it has existed since the Fund was created. It jeopardizes every case in which a Fund member is a defendant and has relied in good faith on the established law. The decision of the First District Court of Appeal must therefore be reversed.

The district court also reversibly erred in affirming the trial court's ruling which permitted the impeachment of Defendant Baker with a risk management incident report written by her pursuant to Section 395.041, Florida Statutes

(1985). The impeachment evidence was extremely prejudicial to Defendants, in that it contradicted Baker's testimony regarding whether the child's mother had advised the paramedics that Sheronda had a heart murmur.

The statutory privilege accorded such incident reports by Section 395.041 precludes their use at trial as substantive evidence or for impeachment purposes. The prejudice resulting to the Defendants from the trial court's erroneous ruling was compounded by reference to the incident report by Plaintiff's counsel and expert witness. In allowing the initial impeachment and the comments which followed, the trial judge violated both the intent and the letter of the incident report privilege. By analogy, Section 316.066, Florida Statutes (1985), the accident report privilege, and Section 90.410, Florida Statutes (1978), the criminal plea privilege, provide guidance as to the impropriety of using privileged information for impeachment. The district court's affirmance of the trial court's ruling on this issue contravenes the clear language of the applicable statute, as well as the legislative intent of the incident report privilege, and must be reversed.

ARGUMENT

I. THE DISTRICT COURT REVERSIBLY ERRED IN REFUSING TO LIMIT DEFENDANTS' LIABILITY TO $100,000,

This case is before the Court for review pursuant to the certification of the First District Court of Appeal that its decision directly and expressly conflicts with the decision of the Third District Court of Appeal in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), app. dism'd and cert. denied, 383 So.2d 1198 (Fla. 1980). In addition to conflicting with its sister court, the district court's opinion is contrary to the holding of the Supreme Court in Taddiken v. Florida Patient's ompensa io nd, 478 So.2d 1058 (Fla. 1985), wherein the affirmative duty of a plaintiff to join the Fund as a defendant in the lawsuit, and the limited liability of a health care provider Fund member were espoused. For the reasons stated below, it is apparent that the Mercy Hospital and Taddiken cases resolve these issues correctly and in a manner which is consistent with the language and legislative intent of the governing statute, and the district court's opinion to the contrary must therefore be reversed.

Following the trial, the Defendants moved to limit their liability to $100,000, pursuant to Section 768.54, Florida Statutes (1979), which clearly provides for that limitation, as follows:

> A health care provider shall not ha liable for an amount in excess of $100,000 per claim...if the health care provider had paid the fees required...for the year in which the incident occurred for which the claim is filed, and an adequate defense of the Fund is provided, and pays at least the initial $100,000 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...

Although TMRMC was a member in good standing of the Fund in 1979, the Plaintiff failed to join the Fund as a defendant in the lawsuit, and is therefore prohibited by law from recovering the excess amount of the judgment from the Fund or the Defendants. Section 768.54(3)(e)(1), Florida Statutes (1979); Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985).

The Defendants asserted that the Plaintiff's failure to meet her statutory obligation in joining the Fund rendered her incapable of collecting from the Defendants an amount greater than $100,000, since it has been uniformly held, and Section 768.54, Florida Statutes (1979), clearly states, that a member in good standing, such as TMRMC, is entitled to a mandatory limitation of liability for its own

negligence and its vicarious liability for the acts of its employees. At the hearing on this motion, the trial court never reached the issue raised by the Plaintiff, of whether TMRMC had met the prerequisites for membership in the Fund and the accompanying limitation of liability, although the evidence before the Court revealed that TMRMC had met its statutory obligations. Instead, the trial judge erroneously decided that he had absolute discretion to determine whether or not he should allow a limitation, and he denied the motion on that basis, without making any findings of fact. (R. 795-798; 742).

The legislature created the Fund in 1975 in order to establish a mechanism and source of funds for compensating medical malpractice plaintiffs. The statute is, in effect, a contract among the affected parties (the Fund, the health care provider member, and the claimant), and the terms of this contract have been amended from time to time since the Fund's creation. Chapter 78-47, Laws of Florida (1978), amended Section 768.54(3)(a), Florida Statutes (1977), by broadening the purpose of the Fund from paying a portion of "any medical malpractice claim for health care providers" in excess of the established limits, to paying the excess portion of:

> ...any claim arising out of the rendering of or failure to render medical care or services for health care providers or any claim for bodily injury or property damage to the person or property of any patient arising out of the insured's activities...

A further expansion was accomplished with the passage of Chapter 79-178, Laws of Florida (1979), effective July 1, 1979, and thus controlling law at the time of the subject incident on October 4-5, 1979. Chapter 79-178 specifically included "all patient injuries and deaths" in the types of claims to be covered by the Fund. The claim resulting from the death of Sheronda Meeks was therefore eligible for coverage from the Fund, had the Plaintiff joined the Fund as a Defendant as required by Section 768.54(3)(e)(1), Florida Statutes (1979).

However, as in this case, failure to join the Fund is fatal. A Plaintiff cannot recover against the Fund unless it has been named as a Defendant in the suit. Section 768.54(3)(e)(1), Florida Statutes (1979); Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985). This statutory scheme has repeatedly been upheld as constitutional. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983); Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985).

Nor may a plaintiff who neglects his duty to join the Fund remedy his failure by collecting the excess amounts from the health care provider defendant or its employees, as long as the health care provider has met the prerequisites for limitation of liability. Contrary to the trial court's assumption, there is no judicial discretion involved once it has been determined that the provider is entitled to limitation, for the statutory mandate is clear: "A health care provider shall not be liable for an amount in excess of $100,000 per claim..." Section 768.54(2)(b), Florida Statutes (1979). (emphasis added)

The Defendants presented the trial court with ample evidence to enable it to determine that TMRMC was a Fund member in good standing at the time of the incident. The judge failed to make that determination. When counsel for the Defendants attempted to advise the trial judge that, if he found TMRMC had complied with the requirements of Section 768.54(2)(b), Florida Statutes (1979), he would have no discretion on the issue of limitation, the judge cut off the argument and, stating that he had complete discretion in this matter, denied the motion without making any findings of fact. (R. 795-798; 742). The following dialogue demonstrates the lower court's blatant abuse of discretion:

MR. SUBER: Judge, may I respond to those?

THE COURT: You may, but I am not going to grant the $100,000 limitation.

* * *

THE COURT: I think it is within the sound discretion of the Court to make that liability.

MR. BUCHANAN: Could I make a comment on that Judge?

THE COURT: I am not going to change my ruling on the matter, but if you want to do it for the purposes of the record, that is fine.

MR. BUCHANAN: I don't think it is discretionary with the Court--under the Owens case, it is mandatory that the limitation--1 don't think if they failed to join the Fund that it is discretionary, and if the Court is doing it on a discretionary basis, I would like to get that in the record that it is mandatory. If the limitation is there, I don't think the Court has any choice.

THE COURT: I am not going to do it, however.

MR. SUBER: For the record, Judge, may I continue?

THE COURT: No, I have heard all I need to hear on that issue.

MR. SUBER: How about if I just get in a couple of exhibits?

* * *

MR. SUBER: First, I would cite a case in support of what Mr. Buchanan just said, Tadicar [Taddiken] versus Florida Patient's Compensation Fund, at 478 So.2d 1058...

* * *

MR. SUBER: I have several other points, but am I to infer that you don't want to hear them?

THE COURT: I am not going to change my mind, I am going to decline to limit the liability of the hospital.

(R. 795-798).

Thus, the court refused to consider the applicable law, disregarded the evidence before it, and ruled on the motion without having resolved the underlying facts necessary to that determination.

As a result of the trial court's refusal to address the matter fully, the district court had no factual basis for ruling on this issue. However, the reversible error of the trial judge's ruling was his misapprehension that he had absolute discretion to refuse to limit liability, regardless of what the facts showed. The district court should therefore have reversed the ruling and remanded the issue to the trial court for a factual determination of the nature of TMRMC'S relationship with the Fund in 1979.

In the alternative, the appellate record sufficiently showed that TMRMC had fully met its statutory obligations as

a Fund member in 1979. The district court could have, on the face of the record, ordered the appropriate limited award, even without findings of fact from the trial court. The three requirements for limitation of liability are straightforward. A member must:

1. Have paid the fees for the year in which the incident occurred;

2. Have provided an adequate defense for the Fund; and

3. Pay the greater amount of either the first $100,000 or the maximum limit of any underlying coverage maintained by the member, of any settlement or judgment for a claim as discussed above. Payment of this amount may be made when due; i.e., at the time of the settlement or judgment. Section 768.54(2)(b), Florida Statutes (1979).

C. Hunt Wester, who was closely associated with the drafting of the Fund statute (R. 646) and currently serves as General Manager of the Fund (R. 645); Charles Portero, Claims Manager for the Fund (R. 668); and Clay McGonagill, General Counsel for the Fund (R. 697), all testified in post-trial depositions that the three enumerated requirements were the only prerequisites for limitation of liability. (R. 647; 671; 698; 706). The Fund considered TMRMC to have met these

prerequisites and to have been a member in good standing in the subject year. Thus, the district court had before it ample evidence to support a holding that the hospital and its employees, Baker and Allen, were entitled to the limitation by virtue of TMRMC's Fund membership, but the court failed to make the appropriate ruling. (R. 668; 669; 673).

In affirming the trial court's ruling on this issue, the district court disregarded the plain language of the governing statute, the holdings of this Court and other district courts of appeal, and earlier rulings from the first district itself. The opinion ignores not only the language of the controlling statute itself, but also the many statements of legislative intent within Chapter 768. Finally, the district court's ruling fails to recognize the far reaching and adverse legal and public policy effects of its holding.

The basis for the district court's decision on this point was its opinion that the statutory scheme established by Section 768.54, Florida Statutes (1979), simply creates a relationship between the Fund and health care provider members of the Fund, which has no effect on a plaintiff's right to recover from the health care provider a judgment in excess of the threshold limitation amount, $100,000. The

district court ruled that, although TMRMC was a member in good standing of the Fund at the time of the incident, Plaintiff's failure to join the Fund as a party defendant does not bar her right to collect the entire amount of the judgment, $248,000, directly from the appellants. The court further ruled that in order for the appellants to claim the limitation of liability as provided by Section 768.54, the defendants, not the plaintiff, had an affirmative duty to join the Fund as a defendant in the lawsuit. In the alternative, the court ruled that, in order to invoke the limitation of liability of $100,000, the defendants had the duty to raise the limitation as an affirmative defense, and that in failing to do so, the defendants waived their ability to seek a limitation.

The ruling judicially creates an extra requirement for Fund members to meet in order to be eligible for the non-discretionary, statutorily mandated limitation of liability for health care providers and their employees. The only statutory prerequisites are those three previously enumerated, and members and their employees who meet these limited requirements shall not be liable for an amount in excess of $100,000 per claim. Section 768.54(2)(b). There simply is no additional requirement that the member join the Fund as a party defendant or that the member raise its

limitation of liability as an affirmative defense. Thus, the court's holding to the contrary constitutes a re-writing of the law, a legislative function which is not within the province of the district court. The result is an undermining of the purpose for creating the Fund: the stemming of the spiralling medical malpractice crisis.

The district court's decision quotes the statutory requirement of Section 768.54(3)(e)(1), regarding the duty of a plaintiff who files a claim against a participating Fund member for damages to join the Fund as a party defendant in the suit, but espouses that this is a permissive action on the part of the claimant. This opinion directly conflicts with the holding of Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979), app. dism'd and cert. denied, 383 So.2d 2d 1198 (Fla. 1980), and the repeated statement of the Florida Supreme Court in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), that it is the affirmative duty of the plaintiff to join the Fund as a defendant in a suit against a health care provider member of the Fund, if the plaintiff wants to recover anything from the Fund or more than $100,000 from the member. The district court's admonition that all of the pertinent provisions be read in pari materia does not negate

this absolute duty on the part of the plaintiff, nor does it alter the unequivocal statement of Section 768.54(2)(b) that a health care provider shall not be liable in excess of $100,000.

Further evidence of the legislature's intent that a plaintiff cannot recover more than $100,000 from a qualified Fund member is found in the paragraphs immediately following Section 768.54(3)(e)(1). Section 768.54(3)(e)(2) provides the following: "No settlement exceeding $100,000, or any other amount which could require payment by the fund, shall be agreed to unless approved by the fund." The only possible reason for requiring the Fund's consent is that the Fund, not the health care provider member, will pay amounts in excess of $100,000, assuming the Fund has been joined as a defendant. If the Plaintiff chooses not to join the Fund, or negligently fails to do so, the maximum recovery is $100,000, or the amount of the provider's separate insurance coverage, a factor which is not an issue in this case. Additional, similar language is found in the succeeding paragraph:

> A person who has recovered a final judgment or a settlement approved by the fund against a health care provider who is covered by the fund may file a claim with the fund to recover that portion of such judgment or settlement which is in excess of

$100,000 or the amount of the health care provider's basic coverage, if greater, as set forth in paragraph (2)(b)...
Section 768.54(3)(e)(3), Florida Statutes (1979).

Again, the only logical explanation for having a plaintiff file a claim with the Fund for amounts exceeding $100,000, is that only the Fund, and not the qualified Fund member, can be required to pay the excess amounts. Indeed, this paragraph specifically refers back to Section 768.54(2)(b), which unequivocally states that the member shall not be liable for more than $100,000.

Supporting the unambiguous mandate of Section 768.54 and the case law regarding the plaintiff's duty is a statutory provision enacted in 1979, which provides an excellent indication of the general legislative intent at that time. Section 768.44, Florida Statutes (1979), was part of the medical malpractice legislation of the day, promulgated in response to the malpractice crisis. It established medical liability mediation panels and imposed the burden on potential plaintiffs to file a claim with a mediation panel prior to suit being brought in court.

The constitutionality of the mediation panel legislation was initially upheld by the Supreme Court in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), wherein the Court noted that it was the legislature's prerogative to

enact legislation which places a burden on plaintiffs and which results in undesirable consequences to the plaintiff for noncompliance. Section 768.44 was subsequently held unconstitutional due to its practical operation and effect. Aldana v. Holub, 381 So.2d 231 (Fla. 1980).

Notwithstanding the latter ruling, the enactment of Section 768.44, which required a potential plaintiff to give notice of intent to file suit and participate in mediation, is indicative of the intent of the legislature to require certain affirmative steps of medical malpractice claimants. So, too, did the legislature impose the burden on the plaintiff of joining the Fund in a lawsuit, with noncompliance resulting in a limitation on the plaintiff's right to recover more than $100,000.

The district court also apparently failed to consider the fact that its holding, compelling the health care provider, rather than the plaintiff, to join the Fund, requires the Fund member to do that which is pracedurally impossible under the Florida Rules of Civil Procedure. A defendant in a lawsuit cannot "join" another party into the lawsuit as a defendant; only a plaintiff may join more than one defendant in an action. At best, a Fund member defendant could file a third party complaint against the Fund, but this is an entirely different procedural mechanism

than "joining" the Fund, and is not a procedure contemplated by the statute. Any interpretation of the cited case law other than that it is the burden of the plaintiff to "join" the Fund as a defendant is entirely inconsistent with the remainder of the statute and leads to an absurd result, thus violating the basic rules of statutory construction.

The holding also disregards the incongruous, practical result of the decision, with regard to one of the three statutory requirements for benefitting from the limitation of liability. The health care provider must provide "an adequate defense for the Fund". Section 768.54(2)(b). The absurdity, on the one hand, of requiring TMRMC to defend the Fund, and on the other hand, requiring TMRMC to "ambush" its own defense of the Fund by joining the Fund as a party defendant, is self-evident and would defeat the purpose of this statutory provision. The best possible defense, of course, would be to avoid the joinder of the Fund. The district court's decision thus places TMRMC and all health care provider Fund members in the untenable "no win" position of losing the limitation by failing to join the Fund, or losing the limitation by joining the Fund and thereby failing to provide an adequate defense.

Furthermore, such a requirement would directly contravene the fiduciary relationship imposed by statute on

the hospitals and their insurers with the Fund. Section 768.54(3)(e)(2) requires the insurer or self-insurer for a health care provider to act in a fiduciary capacity toward the Fund with respect to any claim affecting the Fund. Any act by a hospital to join the Fund in a lawsuit would constitute a gross breach of its fiduciary duty to the Fund, and the court's ruling on this issue overlooked this insupportable result.

In ruling that, in the alternative, the appellants had the duty to assert their limitation of liability as an affirmative defense, the district court again overlooked the fact that there are only three requirements for the limitation of liability, as enumerated more fully above, and that raising the limitation as an affirmative defense is simply not one of the requirements.

Furthermore, the imposition of the limitation cannot come into play until after a judgment in excess of $100,000 is entered. Requiring the health care provider to assert the limitation as an affirmative defense, before the issue is ripe for determination, requires the provider to plead facts which cannot be determined until the trial or settlement negotiations are concluded. Two of the three requirements for benefitting from the limitation are the provision of an adequate defense of the Fund and payment of

the first $100,000 by the member. At the time an affirmative defense would have to be raised, i.e., twenty days after service of the complaint, it is impossible to know whether an adequate defense will be provided, or whether the provider will pay the first $100,000, assuming a judgment is entered against it at all.

The district court's reliance on Jakobsen v. Massachusetts Port Authority, 520 F.2d 810 (1st Cir. 1975), to support its affirmative defense theory is untenable. This federal Massachusetts case is not controlling authority in Florida, particularly in light of the existence of a Florida case, Mercy Hospital, supra, which is expressly on point:

> Because the obligation of the Fund is secondary and not a set-off, it must be joined and have the right to defend. Nor do we think that the obligation of the Fund may be said to be an affirmative defense of the health care provider. To be such a defense the limitation of liability would need to be conditioned on a notice or pleading. Such an intention can not be gathered from the statute. Perhaps that would have been a better way to have written the limitation but the wisdom of the legislation is not within our province. Mercy Hospital, at 1079.

The unacceptable and detrimental public policy consequences of the district court's opinion are readily apparent. Since the inception of the Fund legislation, the statute and the case law regarding the limitation of

liability have uniformly placed the responsibility of joining the Fund in a lawsuit on the plaintiff. Health care providers have, in good faith, participated in the Fund and have followed the law as written. Indeed, hospitals were required to participate in the Fund, unless they chose to "opt out" by meeting extremely stringent financial responsibililty requirements. Section 768.54(2)(a), Florida Statutes (1979). The Fund has, in effect, been a substitute for liability insurance for these providers, upon which the providers have reasonably relied.

The district court's decision abrogates the existing statute and case law upon which Fund members have relied, and places them in jeopardy in every case in which a plaintiff has failed in his duty to join the Fund. This decision has the effect of creating unlimited liability for those health care providers and their employees, while at the same time rendering the Fund an illusory mechanism. Rather than supporting the Fund's purpose of curbing the malpractice crisis, the decision opens the door for an extraordinary acceleration of that crisis.

In holding that the statutory scheme which created the Fund simply establishes a relationship between the Fund and its health care provider members, and does not affect a plaintiff's ability to collect judgments in excess of

$100,000 from Fund members, the court's ruling directly contradicts the first district's own opinion in Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983), Wentworth, J., wherein the district court cited Mercy Hospital, with approval, and espoused:

> ...Menendez, indicates that the obligation of the Patient's Compensation Fund is not to the health care provider, but rather is a direct obligation to a plaintiff patient...Section 768.54(3)(e), and Menendez, indicate that the Fund has a direct obligation to the plaintiff-patient in the action against the participating health care provider. Owens at 710.

Thus, the first district had previously established that the relationship created by the statutory scheme of Section 768.54, is not exclusively one between the Fund and its members, but constitutes a direct relationship between the Fund and the plaintiff-patient. Furthermore, in addition to overlooking a contrary holding within its own district, the lower court also disregarded the fact that the purpose of the Fund, as expressly stated within the statute and the preamble to the statutory scheme in Chapters 75-9 and 76-260, Laws of Florida, is in part to create a relationship between the Fund and injured plaintiffs. The Fund was created in an effort to relieve the rising medical malpractice insurance crisis by limiting the liability of a health care provider to $100,000, by transferring the

responsibility of paying any portion of a judgment in excess of $100,000 from the provider to the Fund.

In establishing this payment mechanism, the legislature did not limit the size of the judgment the plaintiff could recover, but rather, simply prescribed the method by which the judgment was to be paid (that is, by the Fund, not by the health care provider or its covered employees).

Inherent in the Florida Supreme Court cases upholding the constitutionality of this statutory scheme is a reaffirmation of the concrete limitation of liability afforded to members of the Fund. As stated by the Supreme Court in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985),

> Florida Patient's Compensation Fund provides health care providers with medical malpractice liability coverage for the benefit of both the health care providers and those members of the public who become victims of medical malpractice...we find the statutory scheme does not deny plaintiffs recovery of judgments, but in fact is designed, in part, to insure that sufficient funds exist to pay substantial judgments to medical malpractice victims.

Likewise, in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), the Supreme Court emphasized both the necessity of the plaintiff joining the Fund and the limited exposure to health care providers who are members of the Fund: "Under the legislative plan the

liability exposure of the Fund is open ended and potentially very great, whereas that of the health care providers is relatively small." Taddiken at 1061. In Taddiken, the Supreme Court affirmed the Third District Court of Appeal's opinion wherein the District Court also noted that failure to join the Fund limits the recovery of a plaintiff from the health care provider: "To preclude her at this point from joining the Fund does not bar her claim, it merely limits the amount of recovery which may be obtained." Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956, 958 (Fla. 3d DCA 1984). Thus, the district court ignored the indisputable point of law that failure of the plaintiff to join the Fund means not only a bar to recovery from the Fund, but also a bar to collecting any more than $100,000 from the Fund member, regardless of the amount of the judgment.

In addition to erroneously holding that Plaintiff's failure to join the Fund as a defendant does not preclude full recovery of her judgment from TMRMC, the district court held that the hospital employees, Baker and Allen, were not entitled to benefit from the limitation afforded to Fund members. It is undisputed that 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). The

language of Section 768.54(2)(e) is abundantly clear that "the limitation of liability afforded by the Fund for a participating hospital... shall apply to the...employees of the hospital." Thus, the umbrella of fund coverage available to TMRMC should extend to its employees, Baker and Allen.

This Court has recently espoused the following with regard to the cited language:

> We find the meaning of the statute is clear and unambiguous and that the emphasized portion reflects the legislature's desire for the Fund's coverage to apply to all employees of the participating hospital or ambulatory surgical center. Furthermore, this interpretation is thoroughly consistent with the legislature's intent to tailor the statute to offset the spiraling malpractice crisis. Higley v. Florida Patient's Compensation Fund, 525 So.2d 865, 866 (Fla. 1988).

In Higley, the Court, relying on the unambiguous language of 768.54(2)(e) and the purpose of the Fund legislation, refused to allow the Fund to pursue an indemnity action against Nurse Higley, because she was an employee of a participating hospital. Just as the purpose of the Fund would be defeated if the Fund was permitted to sue a covered employee, so will the purpose be defeated if Plaintiff is permitted to recover against Baker and Allen individually. The Higley opinion anticipates the adverse impact of any holding to the contrary:

> If employees such as Nurse Higley, volunteer workers, trainees and others routinely in direct contact with patients are subject to indemnification action by the Fund, they would be required to obtain liability insurance to protect themselves. Moreover, in light of the recent trend in the insurance industry, the premiums could impose an economic burden on these workers who are typically either uncompensated or paid at a modest level for their efforts. This burden would then be placed on the hospital by requests for paid liability insurance coverage or higher salaries for the workers in order for them to continue serving the hospital. This result would only add to the vicious circle that already plagues the professional liability insurance crisis. Higley at 867.

The district court's insistence that the right of the Plaintiff to recover her judgment from Baker and Allen individually is unaffected by their coverage by the Fund, as hospital employees, flies in the face of the public policy pronouncements of Higley. By virtue of their being covered by the Fund, the mandatory limitation of liability comes into play. The total award recoverable by the Plaintiff is therefore $100,000, because the negligence of Baker and Allen is imputed to TMRMC pursuant to the doctrine of respondeat superior, Sanders v. Putnam Community Hospital, 395 So.2d 571 (Fla. 5th DCA 1981), and the hospital, including its employees, is only obligated pursuant to the statute to pay $100,000.

Finally, in addition to misapprehending the unambiguous substantive law on the limitation of liability issue, the

district court either completely misunderstood or simply ignored the arguments made by both appellants and appellee. The issue before the court for appellate review was whether it was error on the part of the trial judge to deny the appellants' Motion for Limitation of Liability, based upon the trial judge's perception that he had absolute discretion in that matter, without making findings of fact with regard to whether TMRMC was a member in good standing of the Fund at the time of the incident. The Plaintiff/Respondent never argued that the limitation would be unavailable to TMRMC if it was shown to be a member in good standing. The district court has therefore misapprehended the scope of the argument before it and has inappropriately based its holding on argument which was not made.

II. THE DISTRICT COURT REVERSIBLY ERRED IN AFFIRMING THE TRIAL COURT'S RULING, WHICH PERMITTED THE USE OF BAKER'S INCIDENT REPORT FOR IMPEACHMENT PURPOSES.

In erroneously affirming the trial court's ruling which permitted the use of an internal, risk management incident report to impeach Baker's testimony, the district court disregarded the sole decisional authority speaking to the use of such reports at trial, Johnson v. United States, 780 F.2d 902 (11th Cir. 1986), which states that incident

reports should not be subject to use in litigation. Based upon the cursory treatment given this issue by the court, and the absence of any discussion regarding the legislative purpose of the incident report privilege, it is apparent that the court did not pause to consider the adverse public policy ramifications of its ruling. The district court's decision not only reversibly prejudices the Defendants in this case, but also has the far reaching effect of violating the legislature's intent of encouraging effective risk management amid the growing malpractice crisis.

Defendant Baker, at the request of her TMRMC supervisors, prepared a risk management incident report concerning the contact the paramedics had with Sheronda Meeks prior to her death. (R. 1182; 1198). During the trial, Plaintiff's counsel impeached Baker's testimony with an inconsistent statement made in her incident report. The report indicated that, contrary to Baker's testimony, Sheronda's mother had told the paramedics that the child had been diagnosed as having a heart murmur.

Upon Defendants' objection, a great deal of argument ensued over whether the controlling statutory provision was Chapter 401 or Chapter 395, Florida Statutes. Plaintiff contended that Chapter 401 was the appropriate statute, but that neither statute prohibited the use of the report for

impeachment purposes. The Defendants argued that the incident report was privileged under the provisions of Chapter 395. (R. 1183-1195). Although the trial court did not rule as to the governing statutory provision, it did rule that. Baker's incident report could be used for impeachment purposes. (R. 1194-1196).

Section 395.041, Florida Statutes (1985), governs the internal risk management programs for hospitals licensed under Chapter 395, Florida Statutes. Section 395.041(4), Florida Statutes (1985), provides the following with respect to reporting adverse incidents causing injury to patients:

> Each internal risk management program shall include the use of incident reports to be filed with an individual of responsibility who is competent in risk management techniques in the employ of each establishment, such as an insurance coordinator, or who is retained by said establishment as a consultant...The incident reports shall. be considered to be a part of the work papers of the attorney defending the establishment in litigation relating thereto and shall be subject to discovery, but <u>shall not be admissible as evidence in court, nor shall any person filing an incident report be subject to civil suit by virtue of such incident report</u>. As a part of each internal risk management program, the incident reports shall be utilized to develop categories in incidents which identify problem areas. Once identified, procedures shall be adjusted to correct said problem areas. (emphasis added).

The Department of Health and Rehabilitative Services has promulgated administrative rules regarding the risk

management program and the writing of incident reports. Section 10D-75.001, et seq., Florida Administrative Code.

TMRMC is a hospital licensed under Chapter 395, Florida Statutes, and its emergency medical services department is an integral part of the total services provided by TMRMC to the community. The statutorily mandated incident reports are therefore required of TMRMC and each of its departments. It logically follows, then, that Baker, who was not only a paramedic, but also a hospital employee, and who wrote her report pursuant to this statute, was both bound and protected by the Statutory privilege to the same extent as any other health care professionals at TMRMC.

In contrast to the unique, risk management purpose of an incident report, Chapter 401 governs the day-to-day operation of the TMRMC emergency medical transportation service. Section 401.30 mandates the keeping of certain records, which are more fully described in Section 10D-66.061, Florida Administrative Code. This administrative section contains an exhaustive list of the documentation to be maintained by medical transport services and makes no mention of any document similar to an incident report. Therefore, the well established principal of statutory construction, expressio unius est exclusio alterius, precludes a presumption that incident reports are impliedly

covered or required by this section. See, i.e., Thayer v. State, 335 So.2d 815 (Fla. 1976); Gershuny v. Martin McFall Messenger Anesthesia Professional Association, 14 FLW 90 (Fla., March 9, 1989).

Thus, although Chapter 401, Florida Statutes, and Chapter 10D-66, Florida Administrative Code, do apply to the TMRMC ambulance service and its general record keeping obligations, these provisions are inapposite to the issue before the Court. Even assuming arguendo that the risk management incident report is a document governed by Chapter 401, nothing in Chapter 401 would permit its use for impeachment purposes in contravention of the express prohibition of Section 395.041. Section 401.30(3)(d) speaks solely to the means of obtaining disclosure of certain records which contain privileged patient information. Disclosure of Baker's incident report is not at issue here; its improper use for impeachment purposes is. Chapter 401 provides no direction for the use of the enumerated records once disclosure has been made, and it certainly does not give the Court any guidance regarding the appropriate determination of the impeachment issue.

The necessary guidance is provided by Section 395.041, Florida Statutes, which speaks directly to incident reports and their use in litigation. When examined in light of the

express legislative intent of encouraging increasingly effective risk management within health care facilities, it is apparent that breaching the intended confidentiality of the report, either by introduction as substantive evidence or by publishing its contents during impeachment, directly contravenes the purpose and the letter of the statutory privilege.

Evidence of the purpose and legislative intent of the incident report requirement, and its corresponding privilege, is found throughout Section 395.041. For instance, the legislature's concern for the public's health and welfare is clear from the mandated components of an internal risk management program, which include the following:

> (a) The investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients;
>
> (b) The development of appropriate measures to minimize the risk of injuries and adverse incidents to patients, including at least annual risk management and risk prevention education and training of all personnel;
>
> (c) The analysis of patient grievances which relate to patient. care and the quality of medical services; and
>
> (d) The development and implementation of an incident reporting system based upon the affirmative duty of all health care providers and

> all agents and employees of the health care facility to report injuries and adverse incidents to the hospital risk manager. Section 395.041(1)(a)-(d).

The legislature also encourages risk management innovations "to reduce the frequency and severity of medical malpractice and patient injury claims." Section 395.041(3).

In Johnson v. United States, 780 F.2d 902 (11th Cir. 1986), the court recognized the public policy concerns of the legislature and the fact that use of an incident report at trial would adversely affect the candor, and consequently, the effectiveness of these risk management tools. The court upheld the exclusion from evidence of an incident report prepared pursuant to Section 768.41(1)(d), Florida Statutes (1977), the identically worded predecessor of Section 395.041. The court made the following observation about the legislative intent of according such risk management reports a privileged status:

> Florida has thus made a legislative judgment that in order to ensure reliability and efficacy of the required reports, they should not be subject to use in litigation. 780 F.2d at 909.

The federal court's analysis logically follows from the language of the statute, which provides a blanket prohibition against the admissibility of incident reports in court, without exception for impeachment. The district court's summary dismissal of this authority simply because

the opinion does not use the word "impeachment" is unwarranted.

The evidentiary restrictions attaching to accident reports required by Section 316.066, Florida Statutes (1985), are analogous to the restrictions which should apply to incident reports. The trial court recognized the validity of this analogy (R. 1193), but the district court discounted the comparison. Notwithstanding the district court's skepticism, however, the following judicial statements concerning the purpose of the accident report privilege show the strong similarity between its legislative intent and that of the incident report privilege:

> Section 316.066, Florida Statutes (1977), prohibits the introduction of an accident report in any civil trial...[T]he statute being in part at least designed...to facilitate the ascertainment of the cause of accidents, it should not be so strictly construed as to defeat the legislative purpose. The sections according privilege have been given a liberal interpretation in favor of the privilege of confidence. White v. Kiser, 368 So.2d 952, 953 (Fla. 1st DCA 1979).

> Section 316.066(4) allows persons making such reports to enjoy the privilege of confidentiality in their reports. The clear purpose of these statutory sections is to create a mandatory accident reporting system, while at the same time to promote candor in the making of such reports. To gain this candor, the legislature has expressed an intent to free the reporting person from having his own version of an accident used against him in a civil or criminal trial. State v. Ferguson, 405 So.2d 294, 296 (Fla. 4th DCA 1981).

> The purpose of the accident report privilege contained in section 316.066(4) is to encourage people to make a true report of the accident in order to facilitate the ascertainment of the cause of accidents, thus furthering the state's ultimate goal of making the highways safer for all of society...By extending the privilege to civil trials, the legislature has manifested its choice between two competing goals--on the one hand, safer highways for society, and on the other, unrestricted availability of the product of the state's investigative processes by litigants, for example, automobile accident victims seeking recovery of tort damages. Department of Highway Safety and Motor Vehicles v. Corbin, 527 So.2d 868 (Fla. 1st DCA 1988).

Thus, a review of the statutory language and judicial interpretations of the accident report and incident report reveal the following common factors:

1. Both reporting requirements are mandatory;

2. Both have the public policy purpose of promoting candor in reporting so as to accurately ascertain the cause of events which affect. the public's general welfare: accidents and medical malpractice/adverse medical incidents;

3. Accordingly, there has been a determination that the public policy of candor outweighs an adverse party's right to full disclosure or use of the reports at trial;

4. Both statutes contain blanket statements of inadmissibility of the reports at trial;

5. Both have very limited disclosure provisions (the accident report statute specifies the limited information

which can be disclosed, and the incident report statute accords the reports the work product privilege); and

6. Both provide that one complying with the reporting requirement cannot be subject to civil penalty for doing so.

Given these strong comparisons, it is appropriate that the Court be guided by case law construing Section 316.066, especially in light of the absence of case law directly on point. The district court's dismissal of the analogy simply because the accident report privilege calls for limited "disclosure" of information while the incident report privilege provides for limited "discovery" of the reports defies logic. Surely an opposing party seeking to obtain the information which may be disclosed pursuant to Section 316.066 must make some type of discovery request in order to receive it. Furthermore, the privilege is not abrogated even when the entire contents of the accident report are "disclosed," as when a third party by-stander overhears the oral report being given to an investigating officer. Herbert v. Garner, 78 So.2d 727 (Fla. 1955). The semantic distinction made by the district court is insufficient to preclude reference to accident report cases for guidance in determining the propriety of impeaching Baker with her incident report.

Two decisions which reviewed the restricted use of accident reports under Section 317.17, Florida Statutes

(1941), the predecessor to Section 316.066, Florida Statutes, and which interpreted the identical "privilege" language which exists in the pertinent part of the current statute, have held that accident reports may not be used for impeachment purposes. Ippolito v. Brener, 89 So.2d 650 (Fla. 1956); Wiggen v. Bethel Apostolic Temple, 192 So.2d 796 (Fla. 3d DCA 1966); quashed on other grounds, 200 So.2d 797 (Fla. 1967), conformed to 201 So.2d 911 (Fla. 3d DCA 1967), vacated 201 So.2d 911 (Fla. 3d DCA 1967). A more recent decision interprets the current statute in the same way: "The [accident report] statutory privilege applies *to* the use of statements for impeachment as well as for substantive evidence." Thomas v. Gottlieb, 520 So.2d 622, 623 (Fla. 4th DCA 1988). Baker's incident report should have been accorded the same immunity from use for impeachment.

Further guidance for the Court may be found by analogy to an entirely different sort of privilege. Section 90.410, Florida Statutes, provides the following with regard to certain pleas given by criminal defendants:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or

criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

Prior to the current statutory language of blanket inadmissability, this section of the evidence code specifically included an exception for impeachment purposes. The significance of the deletion of this language is explained in the well reasoned opinion of Landrum v. State, 430 So.2d 549 (Fla. 2d DCA 1983), wherein a conviction was reversed, and the case remanded for new trial, based upon improper impeachment by the prosecution:

> The foregoing version of section 90.410 resulted from the amendment of that statute in 1978. Before its amendment, the statute, in pertinent part, provided:
>
> > Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered for impeachment or in a prosecution under chapter 837. (emphasis added)
>
> Section 90.410, Florida Statutes (1977). The amendment, by omitting the words "for impeachment," showed the clear legislative intent that such inconsistent statements would no longer be permitted for impeachment purposes. Thus, the legislature clearly intended that section 90.410 be an exception to section 90.608. The ommission of any reference to the use of such statements for impeachment purposes was intentional. See Yetter, The Florida Rules of Criminal Procedure; 1977 Amendments, 5 Fla. State U.L.Rev. 268 (1977). Landrum at 550.

Accord, Cruz v. State, 437 So.2d 692 (Fla. 1st DCA 1983) and Strickland v. State, 498 So.2d 1350 (Fla. 1st DCA 1986),

which both confirm a party's protection from use of a plea for impeachment, but refuse to extend the privilege to a non-party witness.

It is clear from this case law and the language of Section 90.410 that the legislature specifically intended to delete the impeachment exception when it promulgated the blanket inadmissibility privilege for statements made in connection with criminal pleas or offers. Likewise, in making a blanket statement of inadmissibility in Section 395.041(4), the legislature intended the incident reports to be privileged from all use at trial, including impeachment. Had it intended otherwise, the legislature would have drafted a specific exception.

Thus, the language of the incident report privilege itself, the case law concerning Section 395.041, Florida Statutes (1985), and the analogous bodies of case law construing the accident report and criminal plea privileges dictate that the trial court erred in permitting Plaintiff's counsel to impeach Baker with her incident report and effectively defeated the purpose of the legislation. The prejudicial error was compounded when the Plaintiff's expert listed the incident reports as documentation he relied upon in formulating his opinion (R. 1327) and again when

Plaintiff's counsel referred to the impeachment in the following inflammatory manner:

> Tell you something else real telling. As I said, yu can't change what happened back in '79. She puts it here in quotation marks. Today she came in and said the mother couldn't--yesterday, that they couldn't confirm one way or the other whether there was a heart murmur. You remember when I asked her what did she tell her employer the next day? She had to admit to me, after looking at the documents, that, yes, she did tell me there was a heart murmur. But yet when she came to court, the testimony is different. You know why? Because if they put it all in this area, this gray area, that you can't tell what's going on, then it's difficult to pin them down to the negligent acts that they have performed. That's the problem here. So if you can't believe--and I say to you, you can't believe what Ms. Baker, who was the primary person here, said. (R. 1639-1640).

The Defendants' objection was well founded and should have been sustained. Far from being harmless error, the ruling of the trial court resulted in reversible prejudice to the Defendants. Section 395.041(4), Florida Statutes, in furtherance of the legislative intent behind the use of incident reports within risk management programs, prohibits the imposition of civil. liability upon any person due to the filing of an incident report. Contrary to the intent and the letter of the law, civil liability has indeed been the result of the trial court permitting the use of Baker's incident report for impeachment.

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the First District Court of Appeal. The case should be remanded for a new trial, based upon the improper and reversibly prejudicial misuse of the risk management incident report. The Court should also determine, from the face of the record, that TMRMC had met the prerequisites for a limitation of liability as a Fund member, and that Plaintiff's failure to join the Fund as a defendant limits the total liability of the Defendants to $100,000. In the alternative, the Court should remand the case to the trial court for a determination of whether TMRMC was a member of the Fund in good standing at the time of the incident, with instructions to the trial court that the limitation is mandatory upon a determination that the prerequisites for limitation of liability have been met.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document and the separately bound Appendix to the foregoing, filed simultaneously herewith, has been furnished by hand delivery to Roosevelt Randolph and Harold M. Knowles, 528 E. Park Avenue, Tallahassee, Florida 32301; Larry K. White, 528 E. Park Avenue, Tallahassee, Florida 32301; Marguerite H. Davis, 215 South Monroe, Suite 400 First Florida Bank Building, Tallahassee, Florida 32301 and by U.S. Mail to Jack W. Shaw, Jr., 11 East Forsyth Street, Suite 1500, Jacksonville, Florida 32202-3385, on this 7th day of August, 1989.

LAURA BETH FARAGASSO