IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

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

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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 Petitioners. The Respondents, SHERONDA A. MEEKS and EULA ADAMS, shall be referred to as "Plaintiff" or "Respondents." The amicus curiae, FLORIDA PATIENT'S COMPENSATION FUND, shall be referred to as "the Fund." The amicus curiae, ACADEMY OF FLORIDA TRIAL LAWYERS, shall be referred to as "Academy." The record shall be cited as (R. page number).

ARGUMENT

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

A. The doctrine of joint and several liability is inapposite to the certified question before the Court.

This case is before the Court because the District Court certified its conflict with the third district's Mercy Hospital[1] case. The primary issue to be determined is whether the District Court, in the face of the Plaintiff having failed to join the Fund as a party to the lawsuit, reversibly erred in denying Petitioners the statutorily mandated limitation of liability of Section 768.54, Florida Statutes (1979). There are no joint and several liability implications within this question, and Respondents' lengthy dissertation of that doctrine only clouds the narrow issues before the Court. The entire argument is irrelevant to the present case, because a special exception to the doctrine of joint and several liability has been carved out by the Legislature for judgments covered by the Fund legislation.

Although Respondents label untenable the Petitioners' argument that "the umbrella of Fund coverage available to TMRMC should extend to its employees, Baker and Allen," *so* that they, too, can benefit from the statutory limitation of liability, that is exactly what the statute says: "... the limitation of liability afforded by the Fund for a participating hospital ... shall apply to the ... employees of the hospital." F.S. 768.54(2)(e) (1979).

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[1] Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), app. dism'd and cert. den., 383 So.2d 1198 (Fla. 1980).

The Legislature's intent to remove judgments covered by this legislation from the auspices of joint and several liability has been recognized by this Court on more than one occasion. In dicta in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 786 (Fla. 1985), cited by Respondents, this Court refers to that portion of F.S. 768.54(2)(b) that "modifies the law on joint and several liability and shifts to the Fund the obligation to pay the portion of any judgment that exceeds $100,000,'' and holds that statutory scheme constitutional.

In Higley v. Florida Patient's Compensation Fund, 525 So.2d 865 (Fla. 1988), this Court denied the Fund the right to indemnification against a Fund member's employee for a claim predicated solely on Nurse Higley's negligence. In so ruling, the Court found the meaning of F.S. 768.54(2)(e) "clear and unambiguous," and reflective of "the Legislature's desire for the Fund's coverage to apply to all employees of a participating hospital." Neither Respondents' failure to address the public policy implications of any ruling to the contrary, nor the amicus Academy's denigration of the medical malpractice crisis can obviate this Court's ruling that the Legislature has made a public policy decision that employees of participating Fund members should not be subject to joint and several liability.

Respondents' reliance on the Fleisher decision[2] is misplaced. There clearly is no issue before the Court regarding whether the Petitioners can seek contribution from the Fund, and

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2Fleisher v. Florida Patient's Compensation Fund, 498 So.2d 436 (Fla. 3d DCA 1986), rev. den., 504 So.2d 767 (Fla. 1987).

that question has no bearing on whether the District Court erred in denying the mandated limitation of liability. In fact, in the present case, the District Court expressly determined the necessity of the Fund being joined as a party, contrary to the Fleisher opinion, but then simply misconstrued the party on which the responsibility for joinder lies. Moreover, the majority opinion in Fleisher flies in the face of this Court's Taddiken decision.[3] As noted in the dissent of Judge Baskin, Taddiken did not characterize the Fund as a joint tortfeasor, which is a prerequisite to an action for contribution.

Finally, pursuant to the doctrine of vicarious liability, TMRMC as the Fund member/employer is by law responsible for the entire judgment. Immediately upon the entry of the judgment, TMRMC, having met the prerequisites for a limitation of liability was entitled to that $100,000 limitation. The limitation applies to the total obligation, including any employee liability which may be assumed by TMRMC.

B. The District Court correctly determined that the applicable statute was F.S. 768.54(2)(b) (1979), but erred in construing that statute and applying the erroneous construction to this case.

The District Court's decision below construed and applied the provisions of F.S. 768.54(2) (1979), entitled "LIMITATION OF LIABILITY." Although the issue was not raised by the Respondent at the trial court level or before the District Court, the Respondents and the Academy now, for the first time in this litigation, contend that the 1982 version of F.S. 768.54(2)

[3]Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985).

should control. For the following reasons, however, this belated argument is erroneous.

The incident of malpractice at issue in this case occurred on October 4, 1979, when the 1979 version of F.S. 768.54(2) was in effect. Therefore, unless subsequent revisions of the statute are given retroactive effect, the 1979 version controls. In this case, the provisions of F.S. 768.54(2) which are at issue are substantive and, therefore, revisions to the 1979 statute may not be given retroactive effect absent clear legislative intent.

A close examination of the relevant portions of the 1979 statute shows that they are substantive rather than procedural. Under that statute, in the subsection titled "Limitation of Liability," the Legislature provided that a health care provider "**shall not be liable** for an amount in excess of $100,000 per claim . . ." if the health care provider satisfied the statutory prerequisites: Payment of the fees required by the Florida Patient's Compensation Fund for the year in which the incident occurred; provision of an adequate defense for the Fund; and payment of at least the first $100,000 (or the maximum limit of its underlying insurance coverage) of any settlement or judgment against the health care provider.

Viewing the legislative mandate that a health care provider "shall not be liable" for payments in excess of $100,000 as anything but a vested, substantive right would render the statutory scheme meaningless. What incentive would there be for compliance with the prerequisites for limited liability if that limitation could be subsequently abolished? What justification

could there be for the mandated participation of hospitals in the Fund scheme, and the thousands of dollars in fees and assessments which hospitals were statutorily required to pay? The only sensible interpretation is that a health care provider who complied with the statutory conditions had a vested right to its limitation of liability which could not be abolished by subsequent enactments.

Respondents argue that the 1982 amendments effect only a procedural change, by affecting only the manner in which the judgment is collected, and not the amount of the judgment. This assertion is inconsistent with Respondents' own position that the statutory amendments were intended to remove the express limitation of liability of the statute and replace it with a coverage provision. If the amendments deleted the limitation, as Respondents urge, that is a substantive change which cannot be applied retroactively.

This Court has long recognized that a statute that interferes with vested rights will not be given retroactive effect. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985), and cases cited therein. Retroactive application of a statute is invalid where "... a new obligation or duty is created or imposed ... in connection with transactions or considerations previously had or expiated." Id. at 1154, quoting McCord v. Smith, 43 So.2d 704 (Fla. 1949). The determination of whether retroactive application of a statute affects vested rights is best determined by looking at the party's respective positions before and after the enactment. Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982); State

Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981). Here, by complying with the requirements of the 1979 statute, TMRMC had a vested right in the limitation of liability afforded by that statute. To retroactively apply provisions of the 1982 statute which are at variance with that limitation of liability would impose a new duty on TMRMC that it did not previously have, i.e., the duty to pay more than $100,000 on claims that were covered by the Fund.

The decision in Altenhaus is instructive. There, this Court examined whether Section 768.56, Florida Statutes (1981), which authorizes the trial court to award a reasonable attorney's fee to the prevailing party in a medical malpractice action, could be retroactively applied to an incident of malpractice occurring in 1979. The Court held that, "... a statutory requirement for the non-prevailing party to pay attorney's fees constitutes 'a new obligation or duty,' and is therefore substantive in nature." Id. at 1154. This Court held that retroactive application would not be appropriate because:

> When appellant's cause of action accrued, she was not burdened with the potential responsibility to pay the successful party's attorney's fees and costs, and appellee was not entitled to that right. Id. at 1154.

Like the situation presented in Altenhaus, when Respondents' cause of action accrued in this case, TMRMC was not burdened with the potential responsibility to pay judgments in excess of $100,000 and Respondents were not entitled to recover more than $100,000 from the hospital. Therefore, the 1982 revision to F.S. 768.54(2)(b) may not be retroactively applied because it creates

rights and responsibilities that were not in existence when the incident of malpractice took place.

Even if the **1982** amendments could, consistent with the constitution, be retroactively applied, the Legislature did not provide that they should be. A review of the effective date of each amendment cited by Respondents reveals that none provide for retroactive operation. It is well settled that a statute will not be applied retroactively unless the legislative intent to make it retroactively applicable is clearly expressed in the statute itself.[4]

The impropriety of applying the present version of the statute to a case arising out of an incident which occurred while a prior version was in effect is further evidenced by considering the effect of other changes which have been made in the statute in the interim. Respondents note that the **1982** amendments to the statute increased the Fund "entry level amount" from $100,000 to **$150,000**, and that subsequent amendments further raised the "entry level amount" (as of January 1, **1987)** to $200,000.[5] If the present language of the statute were to govern, rather than the prior language in effect at the time of the incident, an untenable result would occur: TMRMC could, in compliance with the prior terms of the statute, have insured itself for $100,000,

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4State Department of Revenue v. Zuckerman-Vernon Corp., **354** So.2d **353** (Fla. **1977**); Fleeman v. Case, **342** So.2d **815** (Fla. **1976).**

5Section 768.54(2)(f), Florida Statutes **(1988).** As of January **1, 1990,** the entry level amount will be increased to **$250,000.** Under Respondents' argument, this increase will entirely eliminate any Fund liability in this case (since the judgment involved is less than that amount) if the case is still pending on that date.

but then learn that it did not have Fund coverage because -- when the case went to trial years later -- it did not have the then-required $200,000 in underlying coverage applicable to the incident. In that situation, TMRMC would, by purchasing $100,000 of insurance, have complied with the statute in effect at the time of the incident, but because a subsequently-amended version of the statute was applied, would nonetheless not be eligible for Fund coverage because it hadn't purchased the subsequently increased coverage amounts. Certainly, the health care provider could not, each time the statute was amended, retrospectively increase the amount of insurance it previously had in effect -- no insurer would increase policy limits for a policy period which had already been completed and as to which claims had already been made. Thus, retroactive application of subsequent statutory amendments could leave TMRMC insured for only the first $100,000 of liability, and without recourse to the Fund for amounts in excess of that coverage.

The Academy erroneously contends that the Fund argued in Von Stetina that F.S. 768.54(2)(b) was a remedial statute which could be retroactively applied. However, the Fund actually argued that F.S. 768.54 had both remedial and substantive provisions: The provisions regarding periodic payment of damages after entry of judgment, F.S. 768.54(3)(e)3., which were at issue in Von Stetina were remedial because they only affected the method by which a judgment was to be paid, and not the size of the judgment. The comment in Von Stetina that "the Fund contends that an appellate court must apply the most recent version of the statute ..." was

directly related to the Court s discussion of the periodic payout provisions of F.S. 768.54 3)(e)3., not the limitation of liability provisions of F.S. 768.54(2)(b), as evidenced by that comment's appearance in the portion of the Court's opinion which was prefaced: "... we must first determine whether Section 768.54(3)(e)3. as enacted in 1976, or as amended in 1982, is applicable to this case."

Although Respondents argue that the Court in Von Stetina "specifically implied" that a health care provider is ultimately responsible for paying a judgment whether or not the Fund is a party to the suit, the Court's opinion has no such implication. The Court did note that it was not addressing the issue of whether a plaintiff might have a constitutional right to levy against a health care provider "... when the Fund is fiscally incapable or otherwise prohibited from paying validly entered judgments within a reasonable time because of inadequate rates and assessments." Id. at 789. However, the issue in this case is not whether judgment should be entered against the hospital because the Fund is incapable of or prohibited from paying a judgment, but whether judgment can be entered against the hospital in excess of its limitation of liability because of the plaintiff's own failure to join the Fund as a party defendant as required by F S. 768.54. The dicta in Von tetin ■ reflects the Court's concern that a plaintiff might be unconstitutionally foreclosed from collecting on a judgment because the Fund had "inadequate rates and assessments" under the statute; it

expressed no concern about a plaintiff's inability to collect a judgment because it did not name a necessary party defendant.

A secondary argument, raised now by Respondents for the first time, is that the mandated limitation of liability due to Petitioners is an unconstitutional cap on damages which denies access to Court. The assertion of unconstitutionality is absurd. The only step a plaintiff need take in order to assure unlimited recovery of any medical negligence judgment is the simple expedient of joining the Fund as a party defendant when suit is filed. The plaintiff's burden of proof is in no way affected, nor is he burdened with additional, stringent procedural requirements. Many similar procedural requirements have been reviewed by the courts and found not to impinge upon the constitutional right to access to court.[6] Here, Respondents' limited recovery is not the result of an unconstitutional restriction, but rather results from her own negligence in failing to join the Fund in the lawsuit as required by law.

C. Petitioners did not fail to meet the requirements of F.S. 768.54(2)(b) (1979).

6. See, e.g., Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986), rev. den., 511 So.2d 299 (Fla. 1987) (malpractice presuit notification requirement does not deny access to courts); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) (upholding statutory notice requirements concerning suits against governmental bodies); White v. Hillsborough County Hospital Authority, 448 So.2d 2 (Fla. 2d DCA 1983), appeal dismissed, 443 So.2d 981 (Fla. 1983) (statute barring suits against state employees acting within scope of duties not an unconstitutional bar to access to courts, since state could be substituted as defendant and legislative claims bill could be submitted for portion of judgment in excess of state's statutory limitation of liability).

By law, there are three and only three prerequisites for a health care provider's limitation of liability:

1. Pay the fees and assessments for the year in which the incident took place;
2. Provide an adequate defense for the Fund;
3. Pay the first $100,000 (or the limit of underlying coverage) of any judgment or settlement, when the money is due.

TMRMC absolutely met each and every one of the prerequisites, and is entitled to a limitation of liability.[7] The HRS Form 1028 has nothing to do with the limitation of liability; rather, as is clear from the statute, it is an informational form which assists HRS in monitoring the appropriate licensure of a hospital: "The license of any hospital which fails to remain in compliance ... shall be revoked or suspended by the department." Not a word of this provision implicates the limitation of liability.

Respondents' reliance on Mercy Hospital v. Menendez, 400 So.2d 48 (Fla. 3d DCA 1981), cert. denied, 411 So.2d 383 (Fla. 1981), is blatantly insupportable. That decision construed the 1976 version of F.S. 768.54(2)(b) and specifically required the health care provider to participate in one of four specified mechanisms of financial responsibility. As noted in footnote (1) of the opinion, that provision was "drastically revised by Ch. 78-47, Laws of Florida, on the point in issue here." A part of the amendment was the provision that the Fund member could pay the money when the funds were due, or participate in one of the four methods of fiscal responsibility.

7See deposition of Charles Portero, Claims Manager for the Fund (R 668-669; 673).

The argument that the limitation of liability cannot apply in this case because it is not a medical malpractice case is obviated by the first sentence of the District Court's opinion: "This is an appeal from a judgment for damages entered against the defendants/appellants in a medical malpractice action." Respondents did not seek review of this ruling and cannot be heard now to complain about it. Furthermore, the expansive array of claims covered by the Fund legislation, as previously discussed in Petitioner's Initial Brief, pages 14-15, dispels any argument that this must be a malpractice case, or that Meeks must have been registered at TMRMC as a "patient" in order for the limitation of liability to be awarded.

In summary, Respondents have confused the issues before this Court by raising two inaccurate and meritless arguments: the applicability of joint and several liability, and the applicability of the 1982 version of F.S. 768.54(2). Most instructive, however, is the failure of Respondents to address major points regarding the District Court's error which were raised in the Initial Brief. Neither the Respondents nor the Academy made any meaningful response to the following arguments, so one must assume that no tenable response was possible: (1) the limitation of liability could not be asserted as an affirmative defense because the requisite facts did not exist at the time an affirmative defense would have to be asserted; (2) the Fund cannot be joined as a defendant by TMRMC; (3) TMRMC cannot both implead the Fund as a party and fulfill its fiduciary duty to protect the Fund's interests; (4) requiring TMRMC to join the

Fund as a third-party defendant could well require the waiver of meritorious challenges to a deficient complaint; and (5) Respondents' theory would give a medical negligence plaintiff unbridled discretion to control whether the Fund or TMRMC would be liable for judgments in excess of $100,000.

11. THE DISTRICT COURT REVERSIBLY ERRED IN PERMITTING THE USE OF BAKER'S INCIDENT REPORT FOR IMPEACHMENT PURPOSES.

The majority of the Respondents' argument regarding this issue deals with one of two assertions: (1) Chapter 401, rather than Chapter 395, Florida Statutes, governs the use of Nancy Baker's risk management incident report; and (2) the accident report privilege, although similar in purpose to the incident report privilege (see Answer Brief, p. 42), cannot be analogized to the incident report privilege. These two arguments were anticipated and addressed explored in Petitioner's Initial Brief, and Respondents have raised little which requires further reply.

One misstatement regarding the applicability of Chapter 401 and the administrative rules promulgated there under Chapter 10D-66, Florida Administrative Code, should, however, be clarified. Respondents state: "The information required to be kept pursuant to 10D-66.33 [sic] is the same information contained in the run reports and the so-called incident reports." (Answer Brief, p. 39). Quite to the contrary, however, Section 10D-66.060, the provision governing records and reports, calls only for routine, ministerial information such as patient identification, vital signs, destination of run, use and malfunction of certain equipment, and signature of the author of the report. The incident report required by Chapter 395 is a risk management

tool, is completed only after injuries or adverse incidents, and is intended to be a complete expose' of the exact details of the particular adverse incident. The two documents clearly require different content by the very nature of their diverse purposes.

In addition to the two primary arguments made, Respondents once again raise for the first time a new and unique argument. They assert that although Baker's incident report directly contradicted her testimony at trial, she was not "impeached." The Evidence Code, as quoted by Respondents, directly contradicts their argument:

> (1) Any party ... may attack the credibility of a witness by:
>
> (a) Introducing statements of a witness which are inconsistent with his present testimony. Section 90.608, Florida Statutes.

Throughout the trial, Baker denied that Sheronda Meeks' mother explained the child had a heart murmur. Upon interrogation by Respondents' counsel, Baker was forced to admit that her incident report stated, "We asked her mother if the doctor could have said that the patient had a heart murmur, and she replied, 'yes.'" This impeachment evidence not only directly contradicted Baker's in court testimony, but also reversibly prejudiced the Petitioners. It was not harmlessly cumulative, because it was the only time when either of the two paramedics testified that the mother had advised them of a heart murmur. Other "mistakes" referenced by Respondents cannot lessen the impact of the prejudicial impeachment. The child died of

congestive heart failure, and the impeachment dealt with the paramedics' direct knowledge of some type of cardiac malfunction.

Finally, Petitioners cannot be said to have waived the incident report privilege by fully apprising their expert of all the available information. If that were the case, Petitioners would have waived the privilege upon disclosing the incident report to Respondents, as required by law. The privilege is against use in court - as impeachment or substantive evidence - not against disclosure during the discovery stage of litigation, and upholding that privilege is the only way to ensure that the risk managment goals of Section 395.041, Florida Statutes, are met.

CONCLUSION

For the reasons stated above, the holding of the District Court of Appeal, First District, that Petitioners were not entitled to the limitation of liability provided by Section 768.54(2)(b), Florida Statutes (1979), and that the use of the incident report governed by Chapter 395, Florida Statutes, for impeachment purposes is permissible, should be quashed or reversed. The decision of Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), app. dism'd and cert. den., 383 So.2d 1198 (Fla. 1980), should be approved and adopted by this Court, to the extent that it upholds the mandated limitation of liability when a plaintiff fails to join the Fund as a party to the lawsuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Roosevelt Randolph and Harold M. Knowles, 528 E. Park Avenue, Tallahassee, Florida 32301; Larry K. White, 1020 E. Lafayette Street, Suite 104, Tallahassee, Florida 32301; C. Rufus Pennington, III, American Heritage Tower, Suite 1702, 76 South Laura Street, Jacksonville, Florida 32202; Marguerite H. Davis, 215 South Monroe, Suite 400 First Florida Bank Building, Tallahassee, Florida 32301; and Jack W. Shaw, Jr., 11 East Forsyth Street, Suite 1500, Jacksonville, Florida 32202-3385, on this 18th day of September, 1989.

Laura Beth Faragasso

LAURA BETH FARAGASSO