IN THE SUPREME COURT OF FLORIDA

ALEX GUP, M.D., and THE MEDICAL CENTER CLINIC,	:	
Petitioners,	:	
vs.	:	**CASE NO. 74,848**
KATHERINE COOK and ERNEST A. COOK, Wife and Husband,	:	
Respondents.	:	

BRIEF OF AMICUS CURIAE FLORIDA PATIENT'S COMPENSATION FUND

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the Florida Patient's Compensation Fund (hereinafter the Fund) which has been granted leave by this Court to file a brief as amicus curiae in support of the Petitioners' argument that it is entitled to the limitation of liability provided by statute.

Petitioners/Defendants, Alex Gup, M.D. and The Medical Center Clinic will be referred as Dr. Gup and The Medical Center Clinic or as Defendants. Respondents Katherine Cook and Ernest Cook will be referred to as Respondents, Mr. or Mrs. Cook or as Plaintiffs.

The record references will be referred to as (R. page number). The hearing on the Motion to Limit Liability is identified as testimony C in the Index prepared by the Clerk of the trial court and will be referred to as (R. Testimony C Page Number). The depositions made a part of the record are enumerated in the index by letter references and will be referred to as (R. deposition letter designation, page number of deposition).

The Depositions referenced are:

P - Hunt Wester
Q - Cathy Sims
R - Charles Portero
T - John Odem
U - Luther Smith

Since there are two Mercy Hospital, Inc. v. Menendez decisions of the third district court, the first one rendered (Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980)) will be referred to as Mercy Hospital I and the second (Mercy Hospital, Inc. v. Menendez, 400 So.2d 48 (Fla. 3d DCA), rev. denied, 411 So.2d 383 (Fla. 1981)) will be referred to as Mercy Hospital II.

STATEMENT OF THE CASE AND FACTS

Katherine Cook and her husband sued Dr. Alex Gup and The Medical Center Clinic (Defendants/Petitioners) alleging negligence in diagnosis and treatment of her cancer. (R. 106). Plaintiffs alleged that Dr. Gup last saw Mrs. Cook in his office in November, 1977 and December 17, 1977. (R. 107). Dr. Martin was later joined in the suit. Although Dr. Gup and The Medical Center Clinic were members of the Fund, Plaintiffs failed to join the Fund as a defendant in the malpractice lawsuit as required by law. (R. 106, 113, 307, 341). The jury returned a special verdict finding negligence on the part of Dr. Gup and employees of The Medical Center Clinic and contributory negligence on the part of Mrs. Cook. (R. 302, 304). The jury found Dr. Gup 15% negligent, The Medical Center Clinic 70% negligent, and Katherine Cook 15% negligent. (R. 302, 304). (The statute of limitations had run on the claim against Dr. Martin.)

Dr. Gup and The Medical Center Clinic, as members of the Fund, moved to limit their liability pursuant to Section 768.54(2)(b), Florida Statutes (1977), the statute in effect when the incident arose and thus the applicable statute by its express terms. (R. 307). Defendants had paid the required fees and assessments for membership in the Fund for the period from July 1, 1977, to June 30, 1978, during which time the incident in question occurred, and certificates of membership had been issued to them. (R. 309-10; Testimony C-12). They alleged that they had done all things necessary to comply with the terms and conditions of Section 768.54(2)(b), and were thus entitled to have the total judgment for damages against them limited to $200,000 ($100,000 against each). (R. 308).

Plaintiffs, although conceding that Defendants had paid the required fees and assessments and were members of the Fund (R. Testimony C-12), argued that Defendants

were not entitled to the statutory limitation of liability provided by Section 768.54, Florida Statutes (1977), because they were not in technical compliance with the requirements of Section 768.54(2)(b), Florida Statutes (1977). (R. 601-605; Testimony C 12-14). Plaintiffs contended that The Medical Center Clinic failed to comply with Section 768.54(2)(b)1.a, because it had not placed $100,000 in escrow per each of three claims which Plaintiffs contended arose during the 1977-78 membership year.

Evidence was introduced in the form of depositions demonstrating that Defendants had complied with the statutory prerequisites for membership in the Fund and limitation of liability provided by Section 768.54(2)(b) to the satisfaction of the Fund and its Board of Governors. (R. Depositions U).

Moreover, The Medical Center Clinic alleged that only one claim against the Clinic was pending when the incident giving rise to the Cooks' action occurred, and therefore sufficient funds had been placed in escrow even if Plaintiffs' reading of the statute were correct and even if they had standing to challenge the Defendants' compliance with the requirements of Section 768.54. (R. 663-667). The only claim against The Medical Center Clinic pending at the time of the incident giving rise to the claim against Dr. Gup was Rotenberry v. Wilhoit and The Medical Center which was filed April 14, 1977. (R. 442-44, 601). This was likewise the only claim pending when the Fund issued its certificates of Fund membership to Defendants for the year July 30, 1977 - June 30, 1978.

After hearing and considering the depositions introduced and the memoranda submitted, the trial court denied Defendants' Motion to Limit Liability on the ground that Defendants had failed satisfy the provisions of Section 768.54(2)(b)1.b, Florida Statutes (1977), requiring proof of financial responsibility in the amount of $100,000 per

claim to the satisfaction of the board of governors of the Fund through the establishment of an appropriate escrow account. (R. 708). No mention was ever made in the trial court by Plaintiffs that it was the obligation of anyone other than the Plaintiffs to timely join the Fund.

Defendants appealed and argued that the award of $500,00 in future medical expenses could not stand and that Defendants were entitled to a limitation of judgment pursuant to statute. The Fund requested and was granted permission to file a brief as amicus curiae directed solely to the erroneous ruling by the trial court in denying Defendants' Motion to Limit Liability. The first district vacated the award of future medical expenses and remanded for remittitur to $57,250 or new trial, but, for a different reason than found by the trial court which reason was not presented to the district court, the district court in a two to one decision affirmed the denial of Defendants' motion to limit judgment in accordance with Section 768.54.

In addressing the second issue, the first district held that it need not decide whether the trial court's rationale for its denial of Defendants' motion was correct due to its recent decision in Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989) wherein it held that the limitation provisions of Section 768.54(2)(b), Florida Statutes (1979), were applicable only to the parties to the Fund contract, i.e. the health care provider and the Fund, and did not preclude the plaintiffs from recovering the excess over the $100,000 figure. The first district reiterated its holding in Meeks that the health care provider member, not the plaintiff is required to join the Fund as a party defendant in the malpractice action against the Fund member in order for the health care provider to be eligible for a limitation of judgment. Again acknowledging that its decision was in express and direct conflict with the third district's

decision in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), appeal dismissed and cert. denied, 383 So.2d 1198 (Fla. 1980) (Mercy Hospital I), the first district certified its decision to be in express and direct conflict with Mercy Hospital I. Notice to invoke this Court's jurisdiction was timely filed by Defendants, and this Court established a briefing schedule. Upon motion timely filed, the Fund was granted leave of this Court to file a brief as amicus curiae to address the limitation of liability issue.

SUMMARY OF THE ARGUMENT

The Medical Center Clinic and Dr. Gup were members of the Fund during the year of July 1, 1977 to June 30, 1978, during which the incident giving rise to the present cause of action arose. The record on review supports that Defendants complied with the requirements of Section 768.54(2)(b), Florida Statutes (1977) so as to entitle them to the limitation of their liability pursuant statute as those requirements were reasonably construed and applied by the Fund. Plaintiffs erroneously failed to join the Fund as a party defendant as required by Section 768.54 in order to obtain a judgment of liability against the Fund. The Fund statute (Section 768.54) and decisions of this Court are clear that if the Fund is not timely joined as a defendant in a medical malpractice lawsuit, there can be no recovery against the Fund.

Section 768.54(2)(b), Florida Statutes (1977), is also unambiguous and states absolutely and independently of the joinder provisions that a health care provider shall not be liable for an amount in excess of $100,000, if at the time of the incident giving rise to the claim, the provider has proved financial responsibility in the amount of $100,000 per claim to the satisfaction of the Board of Governors of the Fund through establishment of the appropriate escrow account.

In an attempt to rectify or circumvent their failure to join the Fund, Plaintiffs challenged Defendants' motion to limit judgment pursuant to Section 768.54(2)(b) on the basis that Defendants had failed to technically comply with the provisions of Section 768.54(2)(b) relating to escrow.

The first district erred in holding that a defendant health care provider member of the Fund must join the Fund as a defendant in a medical malpractice lawsuit in order to be entitled to its statutory limitation of liability where the Fund members have

complied with the requirements of Section 768.54(2)(b), Florida Statutes (1977) thereby automatically entitling them to limitation of the liability.

The first district in requiring that defendant health care provider Fund members must join the Fund as a defendant in order to be entitled to its statutory limitation of liability has imposed impossible burdens on the Fund members, has impaled the Fund members on the horns of a dilemma where they must choose between breaching their statutory fiduciary duty to the Fund or lose their limitation of liability, has rewritten the Fund statute, and has jeopardized every case in which a Fund member is a defendant and where the Fund and Fund member have relied upon established law. The first district improperly and in violation of separation of powers has written an additional requirement into the law. Procedurally, the Fund member defendant cannot join the Fund as a defendant. By statute, the Fund member owes the Fund a fiduciary duty and must by statute provide the Fund an adequate defense. By requiring the Fund member to join the Fund as a defendant in the medical malpractice lawsuit, the district court has erroneously required the Fund member to breach its duty to defend the Fund and thereby has made impossible compliance with Section 768.54(3)(e)2., Florida Statutes (1977).

The district court's decision erroneously misconstrues Section 768.54, Florida Statutes (1977), in such a manner as to lead to absurd results and to thwart the legislative intent for enacting this statute and for creating the Fund. Its decision destroys the carefully constructed legislative plan, previously upheld by this Court, to provide medical malpractice protection to health care provider members while at the same time providing a method of payment to plaintiffs.

This Court should adhere to its previous decision in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985) and approve the third district's decision in Mercy Hospital I insofar as it holds that it is the plaintiff's burden to timely join the Fund as a party defendant in any suit where the judgment sought is in excess of $100,000; should achieve the legislature's intent in enacting Section 768.54, Florida Statutes (1977); and should hold that, where a health care provider member has met the expressly enumerated requirements of Section 768.54(2)(b), the Fund member is entitled to a statutory limitation liability. The holding of the First District that Defendants were not entitled to the limitation of liability because they failed to join the Fund as a defendant in the medical malpractice lawsuit should be quashed.

If this Court quashes the district court's erroneous ruling, then this Court should also hold that the trial court erred in finding that Defendants were not in compliance with the technical requirements of Section 768.54(2)(b)1.b. The district court did not address this point due to its disposition of this issue on the basis of Meeks.

The interpretation of the statutory requirement for limitation of liability by the Fund and the Department of Insurance, which provisions they are charged with the responsibility of superintending, are entitled to great weight and should not have been overruled by the trial court. Section 768.54(2)(b), Florida Statutes (1977), required that a health care provider prove financial responsibility in the amount of $100,000 per claim to the satisfaction of the board of governors. This section was not interpreted by the Fund or Department, and did not require that each time a claim is filed during the year of Fund membership that another $100,000 must be placed into an escrow account. Such an interpretation would be inconsistent with legislative intent and lead to absurd results in implementing Section 768.54(2)(b).

The Fund required a showing of financial responsibility as was demonstrated in the present case and did not require the paying of $100,000 into an escrow account any time a "claim" is filed against a health care provider member of the Fund. What was required by the Fund is that when a judgment is obtained or a settlement reached on a claim, then before the Fund would pay, the health care provider member must pay the initial $100,000 per claim of the judgment or settlement.

Defendants furnished the Fund sufficient documentation of financial responsibility to demonstrate ability to pay claims as required by statute. Moreover, at the time the Fund membership certificates were issued for the pertinent year, and at the time of the claimed incident, only one claim was pending.

Even if the trial court's construction of the subject statute had been correct, Defendants nevertheless are entitled to limitation of liability because there was only one claim pending at the critical time in the present case when the incident giving rise to the Cooks' claim arose, and the Clinic had placed $100,000 in escrow.

The trial court erred in denying Defendants' Motion to Limit Judgment where Defendants had complied with the provisions of Section 768.54, requisite to its entitlement to limitation of its liability as set forth in Section 768.54(2)(b).

The district court's decision should be quashed insofar as it erroneously addresses the issue of limitation of liability, and the cause should be remanded with directions to reverse the order of the trial court denying Defendants' motions to limit liability.

ARGUMENT

I. DEFENDANTS, AS HEALTH CARE PROVIDER MEMBERS OF THE FUND WHO HAVE MET THE STATUTORY REQUIREMENTS FOR THE LIMITATION OF THEIR LIABILITY SET FORTH IN SECTION 768.54(2)(b), FLORIDA STATUTES (1977) ARE ENTITLED TO A LIMITATION OF LIABILITY TO $100,000 WHERE THEY HAVE COMPLIED WITH THE REQUIREMENTS OF SECTION 768.54(2)(b).

The district court erred in holding that Defendants, health care provider fund members had the burden of making the fund a party defendant in a medical malpractice lawsuit where recovery is sought against health care provider in excess of $100,000 in order to be entitled to their statutory limitation of liability.

This issue was not raised by Plaintiffs in either the trial court nor in the District Court of Appeal. Although the district court premised its affirmance on Tallahassee Memorial Hospital v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1980), the language of the 1977 statute which applies in the present case was amended in 1979. The sole basis upon which the trial court based its decision and which was briefed by Plaintiffs as Appellants in the district court is addressed in Issue II of this brief.

Dr. Gup and The Medical Center Clinic were certificated members in good standing of the Fund at the time of the incident involved in this lawsuit. Ample evidence of this fact was presented to the trial court. Here, the controlling Fund statute is Section 768.54(2)(b), Florida Statutes (1977), entitled "Limitation of Liability" which provided in pertinent part that a health care provider member of the Fund shall not be liable for an amount in excess of $100,000 per claim for claims covered by Section 768.54(3), Florida Statutes, if, at the time of the incident giving rise to the cause of the claim occurred, the health care provider member had proved financial responsibility in the amount of $100,000 per claim to the satisfaction of the Board of Governors of the

Fund through the establishment of an appropriate escrow account. This statute is mandatory and expressly states that a health care provider member who complies with this statutory provision shall not be liable for an amount in excess of $100,000. Joinder of the Fund as a defendant by the member is not a prerequisite to this absolute limitation. The courts cannot rewrite this statute to include additional requirements than those enumerated by the Florida Legislature.

The applicable claims procedure for recovery against the Fund is expressly set forth in Section 768.54(3)(e)1., Florida Statutes (1977). This section provides that "[a]ny person may file an action against a participating health care provider member for damages covered under the Fund, except that the person filing the claim shall not recover against the Fund for any portion of the judgment for damages arising out of the rendering of, or failure to render medical care or services against a health care provider member for damages covered by the Fund unless the Fund was named as a defendant in the lawsuit." This is a separate and distinct provision from the statutory provision setting forth the mandatory limitation of liability. Furthermore, in Section 768.54(3)(e)2., Florida Statutes (1977), the legislature imposes the duty on the Fund member to provide an adequate defense and mandates that the member act in a fiduciary relationship to the Fund.

Thus Section 768.54 makes mandatory the health care provider member's limitation of liability in the present case if at the time of the incident giving rise to the cause of action, in this case in 1977, the Fund member has proved financial responsibility in the manner provided by Section 768.54(2)(b). Once Defendants complied with this provision, their liability was limited by virtue of their Fund membership and their compliance with the only requirements for limitation of the members' liability. Thus the maximum

recovery that could be had against the Defendants was $100,000 each. For Plaintiffs to be able to recover in excess of that amount by proceeding against the Fund, Plaintiffs were required by statute to timely join the Fund as a party defendant in their medical malpractice lawsuit. Nowhere in the limitation of liability provisions of Section 768.54, Florida Statutes (1977), which by its express language applies here, does any requirement appear that the Fund member must join the Fund as a party defendant as a prerequisite to its entitlement to limitation of liability.

The Fund consistent with its enacting legislation, interprets the requirement that it be named a defendant in order for there to be recovery against it as an obligation of plaintiffs, not an obligation of its own health care provider members who by express statutory provision owe it a duty to defend it in any suit in which it is properly timely joined as a defendant by plaintiffs.

The issue presented to the trial court in the context of Defendants' Motion to Limit Liability was whether Defendants complied with the requirements for Fund membership and had met the requirements for limitation of its liability created by the Florida Legislature by Section 768.54, Florida Statutes (1977).

Plaintiffs failed to timely join the Fund as a defendant. Therefore, by statute and decisional authority interpreting the Fund statute, the Fund cannot be held liable for any portion of the judgment. The question then became whether Defendants could be held liable for the whole judgment or whether Plaintiffs' failure to join the Fund meant not only that it could not recover from the Fund but also that they could not recover in excess of $200,000 of its judgment against the Fund members who had complied with the enumerated statutory requirements making them eligible for a limitation of liability to $100,000 each.

Contrary to the controlling statute, Section 768.54, Florida Statutes (1977), and the controlling decisional authority of Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), and its progeny, and Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077, (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980) (Mercy Hospital I), the first district erroneously decided that the defendant health care provider member of the Fund rather than the plaintiff in a medical malpractice suit must join the Fund as a defendant and that where the Fund was not joined as a party defendant in a suit against a health care provider member, there could not be a limitation of liability for the health care provider member. The district court did not address the express mandatory limitation of liability language in conjunction with the effect of Defendants' complete compliance with the statutory requirements for limitation of liability. In so ruling, the district court overlooked the explicit statutory language set forth in Section 768.54(2)(b), Florida Statutes (1977), that states that "a health care provider shall not be liable for an amount in excess of $100,000 . . ." if it proved financial responsibility for the amount of $100,000 per claim to the satisfaction of the Board of Governors of the Fund through establishment of an appropriate escrow account, and of Section 768.54(3)(e) that, for plaintiffs to recover from the Fund, the Fund must be joined as a party defendant in the malpractice lawsuit by plaintiffs.

In addressing this issue, it is important to have an understanding of the Fund, its legislatively intended purpose, and the statute which controls its operation, functions, and duties and its relationship with its health care provider members and with plaintiffs in medical malpractice suits brought against its members.

The Fund is a unique entity, initially created by the Florida Legislature in 1975 as a limitation of liability device for its health care provider members. Chapter 75-9,

Laws of Florida (1975). It was created to assist in alleviating a medical malpractice crisis in this state by providing medical malpractice protection to the hospitals required to join it and to the physicians who could join, as well as to provide a method of payment to medical malpractice plaintiffs. Chapter 75-9, Laws of Florida; Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). The Fund acts as a vehicle to pool and spread the risk of loss among member health care providers in Florida for yearly fees and, if necessary, assessments. Florida Patient's Compensation Fund v. Bouchoc, 514 So.2d 52 (Fla. 1987). The Fund's primary purpose is to create a fund designed to compensate medical malpractice plaintiffs, not to set up an insurance fund with obligations to a health care provider, Taddiken v. Florida Patient's Compensation Fund; Mercy Hospital I. It was created as a limitation of liability device for health care provider members where liability otherwise would fully exist; it was not created as an insurance company. Taddiken, supra; Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA), rev. denied 436 So.2d 100 (Fla. 1983).

Contrary to the first district's belief expressed in the present case, the Fund not only establishes a relationship with its members, but also directly affects Plaintiffs' ability to collect judgments in excess of $100,000 from Fund members. Contrary to its ruling in the present case, the first district in its earlier decision of Owens, supra, at 710, correctly acknowledged that the obligation of the Fund is not to the health care provider member, but is a direct obligation to a plaintiff patient and that the Fund has a direct obligation to the plaintiff patient in an action against the health care provider member where it has been timely joined as a defendant in a malpractice action.

The conditions and provisions strictly governing the relationship among the Fund, its health care provider members, and plaintiff patients are specifically and solely established by the Florida Legislature in Section 768.54, Florida Statutes (1977). Florida Patient's Compensation Fund v. Von Stetina, supra. The Fund's liability is enforced only in the manner directed by the Florida Legislature. This statutory scheme has been upheld against constitutional challenges. 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). The limitation of liability provisions fix and declare the primary rights of the Fund members and of plaintiff patients and the duties of the Fund.

Section 768.54(3)(e)1., Florida Statutes (1977), provides that there cannot be recovery against the Fund for any judgment unless it has been named as a defendant in the lawsuit. Taddiken, supra. Failure of plaintiffs to join the Fund is fatal to their recovery of any of their judgment against the Fund. Further, by statute and decisional authority interpreting this statute, failure to join the Fund, where the health care provider member has fully complied with Section 768.54(2)(b), Florida Statutes (1977), does not deprive the health care provider member of its limitation of liability. See e.g. Taddiken; Mercy Hospital I. In fact, in Bouchoc, supra, this Court, in explaining the purpose of establishing the Fund, stated that under the statutory scheme creating the Fund, by paying the requisite fees to the Fund, the health care provider members limit their exposure to $100,000 and, thereby, protect themselves from the consequences of catastrophic verdicts.

In the present case, Plaintiffs who failed to join the Fund as a defendant as required by statute cannot now collect the excess amount above the $100,000 per member

limitation of liability from the health care provider members who, the record demonstrates, were members of the Fund and who were in full compliance with the statutory requirements prerequisite to their statutorily created limitation of liability.

The controlling provisions of Section 768.54, Florida Statutes (1977) provided for an automatic limitation of liability to Defendants once Defendants fulfilled the statutory requirements. The record demonstrates that Defendants met those requirements. This limitation operated as a substitute for liability insurance. Rather than purchase such insurance, Defendants relied upon their fund membership for medical malpractice coverage in excess of underlying primary insurance liability limits of $100,000 each. Plaintiffs, had they acted properly by complying with the statute and timely joining the Fund as a party defendant, would have been able to recover the excess judgment from the Fund for claims for damages arising out of their lawsuit. The Fund, however, is not liable for the excess judgment unless it has been timely joined as a party defendant to the medical malpractice lawsuit.

This Court should adhere to its decision in Taddiken and approve the decision of the third district in Mercy Hospital I, which has been cited as authority even by the First District Court of Appeal in its earlier Owens decision. Those decisions espouse the exact legislative intent contemplated by the enactment of Section 768.54, Florida Statutes (1977). In Mercy Hospital I, the third district held:

> 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.

Id. 1079. In Taddiken, this Court affirmed the third district decision in Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956, 958 (Fla. 3d DCA 1984) wherein the third district noted that failure to join the Fund limits the recovery of a plaintiff from the health care provider member and expressly held: "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." This Court in Taddiken made it clear that it was plaintiffs' affirmative duty to join the Fund as a defendant in a suit against health care provider members if plaintiffs want to recover any portion of its judgment from the Fund or wants to recover more than the $100,000 (for each member) of a judgment in excess of that amount that is due to be paid by the health care provider member as a condition precedent to its limitation of liability.

As explained below, the following reasons, the first district's decision is contrary to what the legislature intended by its enactment of Section 768.54(2)(b), Florida Statutes (1977), and will lead to absurd results in the application of its holding.

(1). By requiring the health care provider member to join the Fund as a party defendant in order to be entitled to its statutory limitation of liability, the first district has rewritten Section 768.54, Florida Statutes (1977), creating the Fund and has restructured the entire concept of the Fund.

By doing so in the context of the present case, it has effectively abrogated a precise statutory scheme intended to provide malpractice protection to the health care provider members and to provide a method of payment to malpractice plaintiffs.

To be entitled to the statutory limitation of liability, by the express language of the controlling statute, Defendants must meet the above-described statutory requirements. These requirements were met. The district court, however, has taken it upon itself to

write in an additional requirement that the Fund must be joined as a party defendant by the defendant health care provider member. Section 768.54 does not require that the defendant health care provider member join the Fund as a defendant in the lawsuit in order to limit its liability. In fact, such a holding is inimical to the statutory scheme of Section 768.54 as a whole. The portion of Section 768.54 alluded to by the first district court in support of its ruling merely states that the Fund cannot be recovered against unless it is joined as a defendant in the malpractice suit. This statute does not say that the Fund must be joined as a third party defendant which is the only way that a health care provider member defendant could even conceivably join the Fund.

It is axiomatic that courts cannot rewrite the law; they may not invade the province of the legislature and add words to a statute which change its meaning; they cannot amend or complete statutes to supply relief where the legislature has not supplied it; and they cannot judge the wisdom of legislation. Dade County v. National Bulk Carriers, 450 So.2d 213 (Fla. 1984); Holly v. Auld, 450 So.2d 217 (Fla. 1984). This is exactly what the first district court has done. Courts must give effect to the legislation as written despite any personal opinions as to its wisdom or efficacy. This is the most firmly imbedded principle in the constitutional system of separation of powers and check and balances. Moore v. State, 343 So.2d 601 (Fla. 1977). The first district cannot rewrite this law to achieve a result which it believes to be more suitable.

Consistent with the express language of the subject statute and prior controlling precedent, this Court should quash the holding of the first district that the health care provider member rather than the plaintiff must join the Fund as a defendant in order for the member to be entitled to its statutory limitation of liability.

(2). The district court is requiring a procedural impossibility by requiring that defendant health care provider members join the Fund as a defendant in the lawsuit brought by plaintiff claiming medical malpractice.

A defendant health care provider member cannot join the Fund as a defendant in the medical malpractice lawsuit. Only the plaintiff can do so. The third district in Mercy Hospital I and this Court in Taddiken correctly decided consistent with the language of the statute and Florida Rules of Civil Procedure that it is the plaintiff who must join the Fund as a defendant. Even were it possible for the defendant member to join the Fund as a defendant, which it is not, no theory of liability exists which can be asserted by the member against the Fund. The Fund is not a joint tortfeasor. It is not an insurer. Taddiken. It is not liable vicariously for the acts of its members.

Requiring that plaintiff, not defendant members, join the Fund as a defendant is consistent with the statutory scheme adopted by the legislature. The legislature placed the burden on plaintiffs to join the Fund and, if they did not do so, they risked nonrecovery of the excess over $100,000. Taddiken; Mercy Hospital I; Owens.

Had the Fund been timely joined by Plaintiffs, Plaintiffs would have been able to recover the excess of their judgment from the Fund. The legislature certainly could not have contemplated nor could it have intended that Section 768.54(2)(b), Florida Statutes (1977), be used as a sword by a plaintiff, who through lack of diligence or understanding, or for whatever reason, did not join the Fund or timely join the Fund (allowing the statute of limitations to run thereby barring any claim against the Fund, Taddiken) and who thereby forfeited any right to recover against the Fund.

(3). The first district court's ruling adding an additional requirement to the statute that the defendant member must join the Fund as a defendant before it can be

eligible for the statutory limitation of liability has impaled the petitioners on the horns of a serious dilemma.

To require the health care provider members to join the Fund as a defendant is to require them to violate their statutory duty to provide the Fund with an adequate defense. If the Fund is not timely joined by the plaintiff and the statute of limitations would otherwise run as to the Fund, and, if the Fund must be joined as a defendant in order for it to be liable for any portion of the judgment, the Fund member will be violating its duty to provide the Fund an adequate defense by joining the Fund as a party defendant where the Fund would otherwise not be liable due to its non-joinder. The first district's decision presently before this Court for review requires Defendants, in blatant violation of their fiduciary obligations bind their duty to defend, to abrogate the Fund's best defense.

Section 768.54(3)(e)2., Florida Statutes (1977), expressly states that the health care provider members owe a fiduciary duty to the Fund. The district court's decision requires Defendants to breach their fiduciary duty to the Fund by requiring that they join the Fund as a defendant in the lawsuit where were the Fund not joined it would not be liable for any damages. Requiring the health care provider members to sue the Fund at the same time that they are required to provide a full and adequate defense for the Fund is in direct contradiction to the intent of the legislature in enacting the subject statute. This is an absurd construction of the statute. It is a fundamental rule of statutory construction that statutes not be construed in such a way as to lead to absurd results, and, in fact, they must be construed in such a way as to avoid absurd or unreasonable results. Drury v. Harding, 461 So.2d 104 (Fla. 1984).

It is possible that a medical malpractice lawsuit could be filed by the plaintiff against only the health care provider member within the period of the applicable statute of limitations while the Fund is not joined within the limitations period. In this instance, the statute of limitations bar would be available to the Fund but would not be available to the health care provider member. Taddiken; Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984). Due to their fiduciary duty owed to the Fund, the health care provider members could not jeopardize the Fund's statute of limitations defense by joining it as a party defendant. Again under the district court's ruling, the Fund member is being told that he must breach his fiduciary duty to be eligible for its limitation of liability, but if it breaches its duty it would likely be liable for bad faith.

The district court's interpretation thus leads to absurd results and should be rejected. Its decision is incongruous with the statutory language and decisional authority, thwarts the statute's intent and purpose, and should be reversed. Instead a holding by this Court that it is Plaintiffs' responsibility to join the Fund as a party defendant would be entirely consistent with the statutory scheme established by Section 768.54, would give effect to the legislature's clear intent in promulgating the statute, and would be consistent with prior precedent of this Court, the third district, and even the first district court prior to its ruling rendered in the present decision.

(4). The legislature in creating the Fund to alleviate the medical malpractice crisis in this state could not have contemplated a decision such as the present one by the district court that would permit plaintiffs to manipulate the statute in such a manner as to control whether the entire judgment will have to be paid by the health care provider member or whether the Fund will pay a portion of a judgment in excess of the statutory limitation amount.

Even were it properly the burden of a Fund member to join the Fund as a defendant, which it is not, plaintiffs who desire to ensure that the health care provider

member will have to pay the entire judgment rather than only the first $100,000, could easily file their lawsuit on the last day before the statute of limitations runs, thus depriving the health care provider member any opportunity to timely join the Fund as a defendant. The same statute of limitations that applies to the Fund member also applies to the Fund. Taddiken. The statute of limitation will, therefore, have run against the Fund, and no recovery against the Fund will be possible and thus, pursuant to the rationale of the first district, no limitation of liability would be available to the Fund member.

The first district's decision relating to the limitation of liability issue is antithetical to the legislature's express purpose in enacting Section 768.54, Florida Statutes (1977). The district court's holding has the effect of creating unlimited liability for the health care provider members of the Fund, making the Fund an illusory creature, and accelerating a medical malpractice insurance crisis.

The district court's decision should be quashed in part and this Court should hold that, pursuant to Section 768.54, Florida Statutes (1977) if a health care provider member defendant meets the requirements specifically enumerated in Section 768.54(2)(b), Florida Statutes (1977), which does not include the requirement that the Fund member defendant join the Fund as a defendant, it is entitled to the mandatory statutory limitation of liability. In that event, if the Fund is not joined as a defendant by plaintiff, the Fund is not liable for any portion of the judgment, and the health care provider members' liability is limited to $100,000 each.

II. THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS HAD FAILED TO SATISFY THE PROVISIONS OF SECTION 768.54(2)(b), FLORIDA STATUTES (1977).

Dr. Gup and The Medical Center Clinic have complied with the requirements of Section 768.54(2)(b), Florida Statutes (1977)[1], so as to entitle them to membership in the Fund during the year of July 1, 1977 to June 30, 1978, and so as to entitle them to the limitation of liability provided by Section 768.54(2)(b), and the trial court erred in denying their motion to limit judgment on the basis of non-compliance.

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[1] Section 768.54 has been continuously amended and refined. In 1978 it was amended to provide that to limit liability of the health care provider member it must have met the following three prerequisites:

1. payment of the fees and any assessments required by statute for the year in which the incident occurred for which the claim is filed;

2. providing an adequate defense for the Fund; and

3. payment of 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.

Section 768.54, Florida Statutes (1979).

Therefore, the legislature amended this statute consistent with the Fund's interpretation regarding the prerequisite for limitation of liability, i.e., that the provider pay a specific amount of the settlement or judgment, which until 1983 was $100,000, or the maximum of underlying liability coverage. Chapter 75-9, Laws of Florida (1975); Chapters 76-168, 76-260, Laws of Florida (1976); Chapters 77-64, 77-174, 77-457, Laws of Florida (1977); Chapter 78-47, Laws of Florida (1978); Chapter 79-178, Laws of Florida (1978); Chapter 80-91, Laws of Florida (1980); Chapter 83-206, Laws of Florida (1983).

It has always been the Fund's policy that the health care provider's responsibility did not occur until they were called upon to pay the first $100,000 or their primary limits to any settlement or judgment.

The controlling statutory provision in the present case is Section 768.54(2)(b)1.b, Florida Statutes (1977), which provided:

> A health care provider shall not be liable for an amount in excess of $100,000 per claim for claims covered under subsection (3) in this state if, at the time the incident giving rise to the cause of the claim occurred, the health care provider:
>
> 1. Had:
>
> b. Proved financial responsibility in the amount of $100,000 per claim to the satisfaction of the board of governors of the fund through the establishment of an appropriate escrow account.

The two key phrases of this section for purposes of the present case are "at the time of the incident giving rise to the cause of claim" and "proved financial responsibility in the amount of $100,000 per claim to the satisfaction of the board of governors."

For two distinct reasons, Defendants have complied with Section 768.54(2)(b) and are entitled to a limitation of judgment. First, the trial court under the particular circumstances of the present case erred in determining that The Medical Center Clinic and Dr. Gup are not entitled to the Section 768.54 limitation of liability because they had not met the statutory escrow requirements. The Fund and its Board of Governors and management determined that The Medical Center Clinic had met the financial responsibility requirements for membership in the Fund and for eligibility for limitation of liability. Secondly, even if Section 768.54(2)(b) required the placing of $100,000 per claim into an escrow account, there was only one claim pending when the incident giving rise to the Cooks' claim occurred.

Because the Defendants' liability would be limited with or without joinder of the Fund, but the Plaintiffs could not recover the excess over $200,000 from the Fund due

to its failure of joinder, Plaintiffs circumvented their failure to join the Fund by attacking the Defendants' technical compliance with the escrow provisions of Section 768.54(2)(b).

The purpose of the escrow fund or the showing of financial responsibility in the amount of $100,000 per claim is to ensure the ability of the health care provider member to pay the first $100,000 in those claims where damages exceed $100,000. Section 768.54(2)(b)1.b, Florida Statutes (1977) states that financial responsibility for this amount must be demonstrated to the satisfaction of the Board of Governors of the Fund. In the present case, such satisfaction as to financial responsibility has been clearly demonstrated by Defendants.

The Fund operates and is administered subject to the supervision and approval of its Board of Governors. Through its Board of Governors and operating manager, the Fund is charged with the responsibility of determining compliance with Section 768.54. Section 768.54(3)(b), Florida Statutes (1977).

The Florida Supreme Court, in upholding the constitutionality of Section 768.54 against challenge of unlawful delegation of legislative authority in Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), held that the legislature may delegate to authorized officials and agencies the authority to determine facts to which established policies of the legislature are to apply. The Court held that allowing the Fund to determine whether monies collected in a given fund year are in excess or insufficient to satisfy claims made against the fund year without supplying guidance to the Fund was not an unlawful delegation because the question of whether a deficit exists is a technical issue of implementation to be determined by the Fund.

Great weight should be given to the construction of Section 768.54 by the Fund and its governing Board, the agency charged with administering that statutory creature. The Florida courts have oftentimes reiterated the long recognized rule that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. Pan Am World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973); Troup v. Bird, 53 So.2d 717 (Fla. 1951). If an interpretation by the agency or body charged with the responsibility of a statute's administration chooses one of several reasonable alternative interpretations, its interpretation stands even though another alternative interpretation may appear more reasonable.

In the present case, the evidence is clear that the reasonable interpretation of Section 768.54(2)(b) adopted by the Fund and its governing Board is that demonstration of financial responsibility for $100,000 per claim does not require that the actual amount of $100,000 per any claim be placed in escrow when any claim is made, and that The Medical Center Clinic demonstrated the requisite financial responsibility to the satisfaction of the Fund.

In an affidavit by Charles Portero, Claims Manager for the Fund, filed by Defendants (R. 341), Mr. Portero attested that he has researched the records of the Fund and knows of his own knowledge that Dr. Gup and The Medical Center Clinic paid the fee and any assessments required by the Fund for the year commencing July 1, 1976 and ending July 1, 1977, that certificates reflecting their Fund membership were issued to them, that Dr. Gup and The Medical Center Clinic did all things necessary to comply with Section 768.54(2)(b), and that upon payment of their maximum liability, the

Fund would have been liable for any judgment in excess of $200,000 of damages had it been timely joined as a defendant. (See, also, R. Deposition R11-15, Deposition of Charles Portero).

The Medical Center Clinic was the first partnership to become a member of the Fund. To demonstrate financial responsibility in addition to the $100,000 plus interest which it placed in an escrow account, The Medical Center Clinic furnished the Department of Insurance, pursuant to its request, a financial statement evidencing $6,896,265.98 as accounts receivable for 1975 and $9,167,689.20 for 1976. (R. Deposition P7-8). Further, The Medical Center Clinic furnished additional proof of its financial responsibility, including a $1,000,000 line of credit, which was available to pay the initial $100,000 per claim prerequisite to the liability limitation for The Medical Center Clinic and Dr. Gup. (R. 342). The Florida Department of Insurance acknowledged that Defendants had complied with the statute. (R. 342, Deposition P 21-26).

Hunt Wester, who was head of the Risk Management Section of the Florida Department of Insurance, was instrumental in drafting the statute creating the Fund, served on the Board and became General Manager of the Fund, and personally handled the details of assuring compliance by The Medical Center Clinic and its physicians with the requirements of Section 768.54 (R. Deposition P3-5). In evaluating financial responsibility, Wester testified that the financial stability of the partnership was strong, with each partner being liable for the actions of the partnership and the pledging of over $7,000,000 in accounts receivables. (R. Deposition P 9). These were pledged against claims that may arise in case there were multiple claims arising during a period of time so that their escrow would never reduce below $100,000. (R. Deposition P 28). He testified that claims which were properly presented involving The Medical Center

Clinic or its physicians in which the Fund was made a party which arose during the membership year in question have been paid by the Fund where The Medical Center Clinic and its physicians met their underlying responsibility on those claims. (R. Deposition P 10). If the Fund had been joined as a party to the Cooks' suit, he testified, the Fund would have paid the judgment. (R. Deposition P 10).

John Odem who was Claims Manager and Assistant General Manager in 1977 and later became General Manager, testified that The Medical Center Clinic and Dr. Gup were in compliance with the requirements of the Fund during the fiscal year July 1, 1977 to July 30, 1978, that the Fund had paid claims arising during that period where the Fund was timely joined as a party, (R. Deposition T9-10), and that, prior to payment by the Fund of a claim, it required that its member pay the initial $100,000 of the proven specific claim when a judgment is rendered or a settlement reached and provide a defense for the Fund. (R. Deposition T13-16). Odem testified that the financial responsibility required by Section 768.54(2)(b) was demonstrated through escrow as well as the statements regarding the assets of the partnership and the assets of the individual partners at the time. (R. Deposition T17). The total assets on the balance sheet for 1976 was $9,801,170.41. (R. Deposition T22, Deposition T Exhibit 2).

Charles Portero, present Claims Manager, testified that to demonstrate financial responsibility to the satisfaction of the Board of Governors of the Fund, the Fund was furnished documents showing that The Medical Center Clinic was a partnership with seventy partners who would be personally liable for any claims, that total assets for 1976 were $9,801,170.41 and that accounts receivable were $9,167,689.20. (R. Deposition R13).

Cathy Sims, administrative manager for the Fund from 1979 to 1985, testified from a review of the files The Medical Center Clinic had demonstrated the requisite financial responsibility to the Fund. (R. Deposition Q36).

Luther Smith, who has been the General Manager of The Medical Center Clinic for thirty-five years, testified that in addition to the $100,000 in escrow that the assets and receivables of the partnership were available to prove financial responsibility, (R. Deposition U28), that The Medical Center Clinic also had a $100,000 open line of credit that was a source available to meet claims, (R. Deposition U44), that the Insurance Commissioner and, later, the Board of Governors of the Fund accepted the $100,000 as adequate escrow, and that The Medical Center Clinic did everything requested of it by the Department of Insurance to ensure compliance with the statute including furnishing documentation of their accounts receivables and other assets. (R. Deposition U19-22).

The Medical Center Clinic, from the inception of its membership with the Fund, did everything necessary to ensure its compliance with the requirements of the statute. The interpretation by the Department of Insurance and the Board of Governors of the Fund regarding the application of Section 768.54, Florida Statutes (1977), is entitled to great weight. This interpretation requires a showing of financial responsibility as was demonstrated in the present case and does not require the paying of $100,000 into an escrow account anytime a "claim" is filed against a health care provider member of the Fund. What was required by the Fund is that when a judgment is obtained or a settlement reached on a claim, then before the Fund would pay, the health care provider member must pay the initial $100,000 of the judgment or settlement. The construction urged by Plaintiffs below and adopted by the trial court would require a member to post $100,000 in escrow every time a claim is filed. Such a requirement would lead to an

absurd result in implementing Section 768.54. This construction allows for no review to determine the validity of a claim or the likelihood that it would be paid. It bears no relationship to the legislative goal of reducing malpractice insurance cost. To the contrary, it turns those provisions into an expensive harassment tool for claimants.

The trial court's interpretation subverts the declared legislative intent as expressed in Chapter 75-9, Laws of Florida (1975), to hold down the costs of medical professional liability insurance for health care providers and the passing on of those costs to health care consumers. The escrow account alternative for demonstrating financial responsibility rewards the careful health care provider. In lieu of paying an insurance premium each year, the provider may simply reserve $100,000 of his capital in an interest bearing account. If no claims are paid from the escrowed funds, the same corpus can be reserved from year to year, all the while producing interest income for the health care provider thereby even further reducing health care costs to consumers. The alternative suggested by the trial court is to pay out new dollars each year in insurance premiums, or to remove hundreds of thousands of dollars from the capital or operating funds of the health care provider for each incident which may or may not result in a valid judgment.

If the two Fund members in the present case cannot rely upon the steps they took to assure compliance with Section 768.54, then no member of the Fund can be assured of having procured insurance coverage. Through absolutely no fault of their own, Dr. Gup and The Medical Center Clinic have, under the decision below, been left without insurance coverage for the period of time at issue. This cannot be the result intended by the legislature.

The trial court erroneously based its ruling denying the Defendants' Motion to Limit Liability on the authority of Mercy Hospital, Inc. v. Menendez, 400 So.2d 48 (Fla. 3d DCA), rev. denied, 411 So.2d 383 (Fla. 1981) (Mercy Hospital II). The present case, however, is not analogous. In the present case, The Medical Center Clinic proved its financial responsibility to the satisfaction of the Board of the Fund as previously explained in detail. In Mercy Hospital II, there apparently was no other evidence of financial responsibility other than the $100,000 placed in escrow by Mercy Hospital. The eight claims referred to by the third district in a footnote to its opinion as requiring the placing of $100,000 in escrow, were claims which arose in 1976 and existed on July 1, 1976 when the Florida Patient's Compensation Fund evaluated the financial responsibility of Mercy Hospital and granted a membership certificate to Mercy Hospital for the year July 1, 1976 to June 30, 1977.

In the present case, only one of the three claims alleged by Plaintiffs to require additional escrow amounts existed at the time that the Fund determined compliance with statutory requirements and issued the certificates of Fund membership to Defendants for the year of July 1, 1977 to June 30, 1978. That was the Rotenberry claim which was filed in April, 1977.

Additionally, if Mercy Hospital II were applicable here, then the third district misconstrued Section 768.54(2)(b)1. Its construction would be contrary to the construction by the agency or body charged with the responsibility of administering Section 768.54. This Court, therefore, should not follow that decision if it is found applicable.

To require that $100,000 per each and any claim defined by Section 768.54(3)(a) which was filed against a health care provider be paid into escrow as suggested by the

trial court as a prerequisite to eligibility for limitation of liability would have required that the health care provider member wishing to avail itself of the escrow fund provisions place $100,000 in escrow every time any claim was filed whether such claim has no likelihood whatsoever of success of resulting in actual liability. This is not what is required by Section 768.54(2)(b).

Defendants complied with Section 768.54(2)(b) as construed by the Department of Insurance and the Fund and they expressly relied upon this construction. The Fund, in fact, has stated that had it been timely joined as a defendant in the present case, it would be liable for any excess of a judgment properly entered over $200,000 for damages upon the payment by The Medical Center Clinic or Dr. Gup of their maximum liability for damages of $200,000.

Plaintiffs should not be permitted to argue non-compliance with the statutory requirements where the Fund has determined otherwise, where The Medical Center Clinic and Dr. Gup have relied on this determination of compliance, and where Plaintiffs would not be detrimentally affected by this determination albeit for their failure to properly and timely join the Fund as a party defendant as required by law.

Secondly, the Fund would point out that even if the trial court's construction of the subject statute were correct, which it is not, Defendants are nevertheless entitled to limitation of liability pursuant to Section 768.54 because there was only one claim, to-wit: Rotenberry v. Wilhoit and Medical Center Clinic, pending at the critical time in the present case when the incident giving rise to the Cooks' claim arose. In the complaint filed against Defendants, it is alleged that Dr. Gup saw Katherine Cook in November, 1977 and December 17, 1977. At that time, the only claim pending against the Medical Clinic was the Rotenberry claim, which was filed in April, 1977. There was

no claim pending against Dr. Gup. No other claims were filed until after the incident giving rise to the Cooks' claim arose.

The trial court erred in denying Defendants' Motion to Limit Liability. Defendants had complied with Section 768.54, and are entitled to have their liability limited pursuant to the provisions of that statute. Plaintiffs should not be able to rectify their failure to join the Fund as a party by attacking the administrative decision of the Fund determining that Defendants had complied with the requirements of Section 768.54.

This Court should quash the decision of the first district on the issue of limitation of liability and should remand with directions to the trial court to reverse its order denying the Motion to Limit Liability.

CONCLUSION

For the reasons set forth in this brief, the holding of the District Court of Appeal, First District, that Defendants were not entitled to the limitation of liability provided by Section 768.54(2)(b), Florida Statutes (1977), should be quashed.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE FLORIDA PATIENT'S COMPENSATION FUND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to JAMES M. WILSON, 201 East Government Street, P.O. Drawer 1832, Pensacola, Florida 32598; WILLIAM C. BAKER, JR., 300 East Government Street, Pensacola, Florida 32501; and ROBERT J. MAYES, 226 S. Palafox Street, Seville Tower, Pensacola, Florida 32501, this 6th day of November, 1989.

MARGUERITE H. DAVIS