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.

ANSWER BRIEF ON THE MERITS OF

RESPONDENTS KATHERINE COOK and ERNEST A. COOK

WILLIAM C. BAKER, JR.
Florida Bar No. 393479
300 East Government Street
Pensacola, Florida 32501
(904) 433-0888
Attorney for Respondents

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LIST OF CITATIONS

I. INTRODUCTION

Respondents, Katherine Cook and Ernest Cook, Wife and Husband, were plaintiffs at the trial level and appelles before the First District Court of Appeal. They will be referred to as "Mr. and Mrs. Cook", or the plaintiff.

Petitioners, The Medical Center Clinic and Dr. Alex Gup, were defendants at the trial level and appellants before the First District Court of Appeal. They will be referred to in this brief by name, "Dr. Gup" and "the Clinic", or the defendants.

References to the Record on Appeal will be in the form of (R. Page Number). References to the Transcript will be in the form of (T. Page Number).

The depositions are indexed in the record on appeal. Each deposition is assigned a letter designation A through U. References to those depositions will be in the form of (R. deposition, letter, page). For example, if reference is made to what Cathy Sims said on Page 26 of her deposition, then it will be as follows; (R. deposition, Q, 26).

Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979) will be referred to as (Mercy Hospital I).

Mercy Hospital, Inc. v. Menendez, 400 So.2d 48 (Fla. 3d DCA 1981) will be referred to as (Mercy Hospital II).

II. STATEMENT OF THE CASE

This is an appeal from a decision of the First District Court of Appeal in a medical malpractice case, certified to be in conflict with Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979) (Mercy Hospital I).

This case arises out of a medical malpractice action tried before a jury on June 9-16, 1986, resulting in an itemized verdict totalling $850,000.00 in favor of Mrs. Cook. On March 5, 1987 a Final Judgment was entered in favor of Mrs. Cook for $850,000.00. On March 30, 1987 after extensive post-trial discovery and an evidentiary hearing, the trial court entered an Order denying the defendants' Motion to Limit Judgment. The defendants, Dr. Gup and The Medical Center Clinic, appealed on two issues to the First District Court of Appeal. On the first issue, the First District Court of Appeal held that the amount of future medical expense damages awarded by the jury was excessive in light of the evidence, therefore, the Court partially reversed the Final Judgment solely as it related to that itemized portion of the verdict relating to future medical expenses. On the second issue, the First District Court of Appeal affirmed the trial court's ruling denying the defendants' Motion to Limit Judgment. On this second issue, the First District Court of Appeal certified that

its decision was in conflict with Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979) (Mercy Hospital I).

On October 5, 1989, Dr. Gup and the Medical Center Clinic filed their Notice to Invoke Discretionary Jurisdiction of the Supreme Court pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi). The only portion of the case now before the Supreme Court is that portion relating to the First District Court of Appeals' affirmance of the trial court's Order denying defendants' Motion to Limit Judgment.

III. STATEMENT OF FACTS

During 1977 and 1978 Mrs. Cook was a patient of the Medical Center Clinic where she was seen by Clinic doctors, including her obstetrician, Dr. Thomas Wyatt, and her urologist, Dr. Alex Gup. On October 20, 1977, Dr. Wyatt diagnosed Mrs. Cook as having a low grade urinary tract infection and prescribed medication for this condition. (T. 654-655). On November 8, 1977, Mrs. Cook noticed blood in her urine. She called Dr. Wyatt who told her to see his partner, the urologist, Dr. Gup. (T. 386). Dr. Gup examined her that same day, diagnosed her as having an infection and did not cystoscope Mrs. Cook at that time. (T. 388). On December 10, 1987, Mrs. Cook called Dr. Wyatt and told him that the bleeding, which had stopped, had begun again. She also complained of burning when she urinated. (T. 389, 540-541). Dr. Wyatt referred her to another Clinic urologist, Dr. Lataurette, who diagnosed Mrs. Cook as having acute cystitis. He gave her medication and set her up to see Dr. Gup in a week. (T. 541).

On December 17, 1987, when Dr. Gup examined Mrs. Cook, she reported that the bleeding continued. (T. 391). Dr. Gup diagnosed her as having cystitis and changed her medication. He took a urine sample to have culture sensitivity studies and colony counts performed. (T. 541) Dr. Gup noted in his chart: "Return in a week. Needs cystoscopy. Postpartum, will need

infusion pyelogram". (T. 542). Mrs. Cook testified that she was not told she needed any tests and that she could not recall if she was told to return in one week. (T. 412, 414).

Mrs. Cook continued to see Dr. Wyatt January 30, 1978, February 13, 1978, February 29, 1978, March 27, 1978, April 3 through April 5, 1978 while she was in the hospital giving birth to her third child, and May 15, 1978 for her postpartum examination. (T. 391-395). Dr. Wyatt told her that her examination was normal. He did not tell her to go back to Dr. Gup for a cystoscopy nor did he tell her that she needed any further examinations relative to the problem of blood having been in her urine. (T. 394, 682, 724). After May 15, 1978, Mrs. Cook moved to Iowa and shortly thereafter again began having symptoms of blood in her urine. A doctor in Iowa performed a cystoscope examination and diagnosed cancerous tumors. (T. 395-397). Mrs. Cook then went to see a second urologist, Dr. Howell Martin, in Pensacola, Florida, who confirmed this diagnosis. Dr. Martin performed a transurethral resection and removed all of the tumor, including removal of all of Mrs. Cook's bladder to keep the cancer from recurring. (T. 994, 1038, 1039).

Mr. and Mrs. Cook sued Dr. Gup and the Medical Center Clinic for continuing negligence in failing to perform diagnostic tests from 1977 throughout the last time Mrs. Cook

was examined by Dr. Wyatt on May 15, 1978, and thereafter. (R. 106). The lawsuit was based not only upon Dr. Gup's initial failure to diagnose the cancer, but also Dr. Gup's and Dr. Wyatt's and other Medical Center Clinic agents' negligent failure to promptly diagnose the cancerous tumors through proper diagnostic procedures from 1977 and continuing throughout 1978 after Mrs. Cook had delivered her third child. Later, the Cook's joined Dr. Martin as a defendant and asserted that he was negligent in unnecessarily removing her bladder and failing to secure her informed consent to that operation. (R. 3034). The jury found that Dr. Gup, the Medical Center Clinic by its agents and employees other than Dr. Gup and Mrs. Cook were negligent, and assessed the comparative negligence as follows:

Alex Gup, M.D.	15%
Medical Center Clinic by its agents and employees other than Alex Gup, M.D.	70%
Katherine Cook	15%
TOTAL	100%

(R. 302-303). The jury found that the claim against Dr. Martin had not been filed within the two year statute of limitations. (R. 304-305).

On the verdict form the jury assessed damages as follows:

	Past	Future	Future award Reduced to Present Value
KATHERINE COOK			
For Medical Expenses	$0	$500,000	
For pain and suffering	$200,000	$300,000	
ERNEST A. COOK			
For loss of companionship and services	$0	$0	

Please set forth the period of years over which the amounts awarded for future damages are intended to provide compensation.

45 years

(R. 303).

Among other post-trial motions, Dr. Gup and the Clinic moved to limit their liability to $100,000.00 each in accordance with §768.54(2)(b) Florida Statutes (1977). (R. 307, 332-339). The trial court denied all of the motions including the subject motion to limit liability to $100,000.00 each in accordance with §768.54(2)(b). (R. 437,708-709). A Final Judgment was entered in favor of Mrs. Cook against Dr. Gup and the Clinic for $850,000.00. (R. 698). The trial court ruled on the motion to limit liability only after extensive discovery was had between the parties and an evidentiary hearing resulted in the following findings of fact incorporated into the trial court's Order:

1. That Plaintiff, Katherine Cook, was under the care and treatment of Dr. Gup and other agents and employees of The Medical Center Clinic from September 28, 1977, through May 15, 1978.

2. That a jury verdict was rendered in this cause on June 16, 1986, finding that the negligence of the parties which was a legal cause of the damages sustained by Plaintiff, Katherine Cook, was apportionable as follows:

Alex Gup, M.D.	15%
The Medical Center Clinic, by its agents and employees other than Alex Gup, M.D.	70%
Katherine Cook	15%
TOTAL	100%

3. That The Medical Center Clinic established an escrow account in the amount of $100,000.00 at the Barnett Bank of Pensacola in February, 1976, pursuant to Florida Statutes, § 768.54(2)(b). Said escrow account was maintained at $100,000.00 during the period of time the incidents giving rise to the subject cause of action occurred. This escrow account was established for the benefit of The Medical Center Clinic and all doctors who were members of The Medical Center Clinic.

4. Defendants, The Medical Center Clinic and Alex Gup, M.D., did not establish any other escrow accounts pursuant to Florida Statutes, §768.54(2)(b)(1)b; did not post bonds in the amount of $100,000.00 per claim pursuant to Florida Statutes, Florida Statutes, §768.54(2)(b)(1)a; did not purchase medical malpractice insurance in the amount of $100,000.00 per claim pursuant to Florida Statutes, §768.54(2)(b)(1)c; and did not make application nor qualify as a self-insured pursuant to Florida Statutes, §768.54(2)(b)(1)d.

5. During the period of time the incidents occurred giving rise to the subject cause of action against Defendants, Alex Gup, M.D. and The

Medical Center Clinic, there were three other medical malpractice claims pending with Florida Patients' Compensation Fund coverage.

6. Defendants, Alex Gup, M.D. and The Medical Center Clinic, failed to comply with the $100,000.00 per claim requirement of Florida Statutes, §768.54(2)(b).

(R. 708).

Dr. Gup joined the Florida Patients' Compensation Fund on February 4, 1976, and the Medical Center Clinic joined the Florida Patients' Compensation Fund on May 3, 1977. (R. deposition, R. 14). According to Cathy Sims, the Florida Patients' Compensation Fund administrative manager, there was no evidence that Dr. Gup had ever set aside any money in escrow individually. She further testified that The Medical Center Clinic initially set up an escrow account at Barnett Bank in the amount of $100,000.00 at the time it initially joined the fund, however, for the period July 1, 1977 through June 30, 1978, there were no additional deposits into the escrow account, and no other escrow accounts existed separate and apart from the $100,000.00 escrow account at Barnett Bank. (R. deposition Q. 26-28). Mr. Hunt Wester, who was General Manager of the Florida Patients' Compensation Fund at the time his deposition was taken November 18, 1986, testified that no other assets were specifically set aside in escrow by either Dr. Gup or the Clinic to pay claims, aside from the initial $100,000.00 deposit at Barnett Bank in June 1977. (R. deposition T. 29).

Mr. Luther Smith, General Manager of the Clinic, testified that the Clinic had not specifically escrowed any assets other than the initial $100,000.00 at Barnett Bank to pay claims (R. deposition N 43-45).

The following is a chronology of claims filed against the Clinic covering the period April 14, 1977 through the last date Mrs. Cook was examined by Clinic physicians on May 15, 1978;

1. Rotenberry v. Wilhoit, M.D. and Medical Center Clinic, filed April 14, 1977.
2. Coburger v. Wilhoit, M.D. and Medical Center Clinic, filed December 27, 1977.
3. Gay v. Wilhoit, M.D. and Medical Center Clinic, filed April 19, 1978.

(R. 575-583; 601-607)

The trial court construed the evidence and the applicable statute, §768.54(2)(b)(1), Florida Statutes (1977) in denying defendants' motions to limit judgment to $200,000.00. (R. 708-709).

The trial court also considered the authority of Mercy Hospital, Inc. v. Menendez, 400 So.2d 48 (Fla. 3d DCA 1981), (Mercy Hospital II), holding that in order to be in full compliance with the statute, the Clinic needed to have $100,000.00 in escrow per claim at the time the incident occurred which gave rise to the cause of the subject claim.

The First District Court of Appeal affirmed the trial court's decision without deciding whether the trial court's rationale was correct, because the court's denial of the

limitation motion was affirmable for another, more basic, reason under the holding in Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989). After all briefs were filed with the First District Court of Appeal in this case, the appellee filed the Meeks decision as supplemental authority. Specifically the First District Court of Appeal stated:

> We need not decide whether the trial court's above rationale was correct because the court's denial of the limitation motion is affirmable for another, more basic, reason under the recent holding of this court in Tallahassee Memorial Regional Medical Center, Inc., v. Meeks, 543 So.2d 770, (Fla. 1st DCA 1989).

Meeks held that §764.54 (2)(b), Florida Statutes (1977), describes only the relationship between the Fund and its members, which in no way affects the plaintiff's right to recover a judgment directly against a member health care provider in excess of the proposed $100,000.00 per member limitation of liability. Meeks also held that it is the health care provider's obligation to join the Fund as a party as opposed to that being the injured plaintiff's obligation. In addition, Meeks held that it was the health care provider's obligation to raise the limitation of liability argument as an affirmative defense, and failure to do so timely waived the health care provider's right to argue limitation of liability following the rendition of the verdict.

In Meeks, the First District Court of Appeal certified conflict with Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), (Mercy Hospital I), which held that the plaintiffs have the burden of making the Fund a party in any suit where the recovery is sought against a health care provider in excess of $100,000.00, and that upon the plaintiff's failure to make the Fund a party, the trial Court may enter an Order for limitation of the judgment in accordance with §768.54(2)(b), Florida Statutes (1977). Likewise, in the instant case, the First District Court of Appeal certified conflict with Mercy Hospital I.

IV. ISSUES

ISSUE I.

WHETHER §768.54, FLORIDA STATUTES (1977), SHOULD BE CONSTRUED AS A LIMITATION OF LIABILITY WITH RESPECT TO THE FISCAL RELATIONSHIP BETWEEN THE FUND AND ITS MEMBERS, INSTEAD OF A LIMITATION OF LIABILITY PROVIDED TO A FUND MEMBER VIS-A-VIS AN INJURED PLAINTIFF?

ISSUE II.

WHETHER A PLAINTIFF IN A MEDICAL MALPRACTICE CASE WHO IS AWARDED A VERDICT TOTALLING IN EXCESS OF $200,000.00 AGAINST TWO DEFENDANT HEALTH CARE PROVIDERS, IS ENTITLED TO AN ENFORCEABLE FINAL JUDGMENT FOR THE FULL VERDICT AMOUNT AGAINST THOSE DEFENDANTS, WHEN THOSE DEFENDANTS ARE MEMBERS OF THE FLORIDA PATIENTS' COMPENSATION FUND, BUT HAVE FAILED PURSUANT TO §768.54(2)(b)1b, FLORIDA STATUTES (1977), TO PUT MORE THAN $100,000.00 PER CLAIM IN ESCROW WHILE THREE OTHER MEDICAL MALPRACTICE CLAIMS WERE SIMULTANEOUSLY PENDING AGAINST THOSE SAME DEFENDANTS?

ISSUE III.

WHETHER A DEFENDANT IN A MEDICAL MALPRACTICE CASE IS REQUIRED TO JOIN THE FUND AS A PARTY TO THE CASE IN ORDER TO INVOKE THE POTENTIAL LIMITATION OF LIABILITY PROVISIONS SET FORTH IN §768.54, Florida Statutes (1977)?

ISSUE IV.

WHETHER A DEFENDANT IN A MEDICAL MALPRACTICE CASE WHO FAILS TO PLEAD THE POTENTIAL LIMITATION OF LIABILITY PROVISIONS SET FORTH IN §768.54, Florida Statutes (1977) AS AN AFFIRMATIVE DEFENSE, THEREBY WAIVES ANY POTENTIAL LIMITATION OF LIABILITY AND EXCLUDES SUCH FROM CONSIDERATION IN THE CASE?

V. SUMMARY OF THE ARGUMENT

ISSUE I.

Section 768.54, Florida Statutes (1977), should be construed only as a limitation of liability with respect to the fiscal relationship between the Fund and its members, and not as a limitation of liability provided to the Fund members vis-a-vis an injured plaintiff. In Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989), the First District Court of Appeal held that this is the proper interpretation of the 1979 version of that statute, which in all respects is the same as the 1977 version applicable to this case. By its express terms, the statute makes joinder of the Fund permissive. Joinder of the Fund invokes potential Fund coverage for the defendants. Failure to join the Fund may prevent Fund coverage, but it does not operate to thereby limit how much a plaintiff may collect from the defendants' personal assets.

ISSUE II.

The plaintiff in a medical malpractice case who is awarded a verdict totalling in excess of $200,000.00 against two defendant health care providers, is entitled to an enforceable Final Judgment for the full verdict amount against those two defendants when those defendants are member of the Fund, but

have failed pursuant to §768.54, Florida Statutes (1977), to put more than $100,000.00 in escrow while three other malpractice claims are pending against those same defendants.

The claims against Dr. Gup and the Clinic arose as a result of a continuing negligent failure to diagnose cancer in Mrs. Cook from 1977 throughout her last visit to Clinic physician, Dr. Wyatt, on May 15, 1978. The trial judge found as a matter of fact that during that same time frame, at least three other malpractice claims were pending against the Clinic, yet the Clinic only maintained its original deposit of $100,000.00 in escrow. Any potential limitation of liability that might have been afforded to the defendants under §768.54(2)(b), Florida Statutes (1977), was conditioned upon the defendants having escrowed at least $100,000.00 per claim pending at the time the incidents occurred which gave rise to Mrs. Cook's causes of action. The trial court's findings of fact now become the law of the case. The trial court properly applied §768.54, Florida Statutes (1977), and Mercy Hospital, Inc., v. Menendez, 400 So.2d 48 (Fla. 3d DCA 1981), in denying the defendants' Motion to Limit Liability. The plaintiff is entitled to an enforceable Final Judgment against both defendants for the full verdict amount.

ISSUE III.

The defendant, and not the plaintiff, in a medical malpractice case is required to join the Fund as a party to the case, in order to invoke the potential limitation of liability provisions set forth in §768.54, Florida Statutes (1977). In Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989), the First District Court of Appeal supported that view, but certified conflict with Mercy Hospital, Inc., v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), thereby leaving it up to this Court to ultimately decide that issue. Joinder of the Fund would have made no difference in this case anyway since the trial court found as a matter of fact that the defendants had failed to properly fund their escrow account pursuant to §768.54(2)(b), Florida Statutes (1977). Pursuant to §768.54(3)(a), Florida Statutes (1977), the Fund shall be liable only for payment of claims against health care providers who are in compliance with the provisions of subsection (2)(b).

There is no conflict of interest created by placing on the defendants the burden of naming the Fund as a party. The fiduciary relationship to which the defendants allude, exists only between the defendants' insurer or self-insurer and the Fund. See §768.54(3)(e)2, Florida Statutes (1977). Here the defendants are not insurers and did not have insurance. Here

the defendant specifically chose not to qualify as a self-insurer under §768.54(2)(b)1d, Florida Statutes (1977). Section 768.54(3)(e)1, provides that the Fund shall retain its own counsel and actively defend itself. The Supreme Court noted in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1078 (Fla. 1985), that the Fund and health care providers have a mutuality of interest in defending the suit, but it is also true that their interests are not congruent, and only the Fund can best decide how to protect itself.

ISSUE IV.

A defendant in a medical malpractice case who fails to plead the potential limitation of liability provisions set forth in §768.54, Florida Statutes (1977), as an affirmative defense, thereby waives any potential limitations of liability and excludes such from consideration in the case. See Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989) which refers to Jakobsen v. Massachusetts Port Authority, 520 F.2d 810 (1st Cir. 1975). Here, the defendants never pled limitation of liability as an affirmative defense, thereby waiving any potential limitation to which they might have otherwise been entitled.

VI. ARGUMENT

ARGUMENT--ISSUE I

SECTION 768.54, FLORIDA STATUTES (1977), SHOULD BE CONSTRUED ONLY AS A LIMITATION OF LIABILITY WITH RESPECT TO THE FISCAL RELATIONSHIP BETWEEN THE FUND AND ITS MEMBERS, AND NOT AS A LIMITATION OF LIABILITY PROVIDED TO THE FUND MEMBERS VIS-A-VIS AN INJURED PLAINTIFF.

In Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989), the court held that this is the proper interpretation of the 1979 version of that statute, which in all respects is the same as the 1977 version applicable to this case. The Meeks court held that the statute makes joinder of the Fund permissive.

> §768.54(3)(e), Florida Statutes (1977), Claims procedures:
>
> Any person may file an action against a participating health care provider for damages covered under the fund, except that the person filing the claim shall not recover against the fund for any portion of a judgment for damages arising out of the rendering of, or failure to render, medical care or services against a health care provider for damages covered under the fund unless the fund was named as a defendant in the suit. id. at 775 (Emphasis added.)

The statute does not contain any language to the effect that a negligent health care provider does not have to pay the full extent of a Final Judgment against said health care provider when the Fund is not named as a party to the lawsuit. If the legislature had intended for the doctors and the Clinic to get

away without having to pay valid judgments against them then the legislature would have written the statute so stating exactly that. No matter what the legislature's intent was at the time this statute was framed, the plain meaning of this statute does not give it the interpretation that the defendants desire.

When a statute is enacted in derogation of common law, it must be strictly construed. Carlisle v. Game and Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1978). Inference and implication cannot be substituted for clear expression. id. at 364.

If this Court accepts the rationale of the First District Court of Appeal in Meeks, then the First District Court of Appeal decision in the instance case should be affirmed.

ARGUMENT--ISSUE II

THE PLAINTIFF IN A MEDICAL MALPRACTICE CASE WHO IS AWARDED A VERDICT TOTALLING IN EXCESS OF $200,000.00 AGAINST TWO HEALTH CARE PROVIDERS, IS ENTITLED TO AN ENFORCEABLE FINAL JUDGMENT FOR THE FULL VERDICT AMOUNT AGAINST THOSE TWO DEFENDANTS, WHEN THOSE DEFENDANTS ARE MEMBERS OF THE FUND, BUT HAVE FAILED PURSUANT TO §768.54(2)(b), Florida Statutes (1977), TO PUT MORE THAN $100,000.00 IN ESCROW, WHILE THREE OTHER MEDICAL MALPRACTICE CLAIMS ARE PENDING AGAINST THOSE SAME DEFENDANTS.

The defendants here did not comply with the $100,000.00 per claim escrow requirements mandated by §768.54(2)(b)1b, Florida Statutes (1977), which states:

> (b) A health care provider shall not be liable for an amount in excess of $100,000.00 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:
>
> (a) Posted bond in the amount of $100,000.00 per claim;
> (b) Provided financial responsibility in the amount of $100,000.00 per claim to the satisfaction of the board of governors of the fund through the establishment of an appropriate escrow account.
> (c) Obtained medical malpractice insurance in the amount of $100,000.00 or more per claim from private insurers or the Joint Underwriting Association established under subsection 627.351(7); or
> (d) Obtained self-insurance as provided in s.726.357, providing coverage in an amount of $100,000.00 or more per claim, and...(Emphasis added.)

Although the defendants could have chosen to potentially limit their liability by complying with any one of four

subsections of this statute, only subsection 1b is at issue. The defendants admit that subsections 1a, 1c and 1d were not complied with at the times material to this case. (R. deposition, P, 19-22); (R. deposition, Q, 19-22); (R. deposition, T, 22-23).

The former statute on this subject was §627.353(1)1b, Florida Statutes (1975), which stated:

> (b) Each such licensed hospital, physician, physician's assistant, osteopath or podiatrist shall not be liable for an amount in excess of $100,000.00 for claims arising out of the rendering of medical care or services in this state, if, at the time of the incident giving rise to the cause of the claim occurred, the hospital, physician, physician's assistant, osteopath or podiatrist:
>
> 1. Had:
>
> (a) Posted bond in the amount of $100,000;
> (b) Proved financial responsibility in the amount of $100,000 to the satisfaction of the Insurance Commissioner through the establishment of an appropriate escrow account.
> (c) Obtained medical insurance in the amount of $100,000.00 or more from private insurers or the joint underwriting association established under Subsection 627.351(a);
> (d) Obtained self-insurance as provided in s. 627.355, providing coverage in an amount of $100,000.00 or more, and...
> (Emphasis added.) (R. deposition P 4).

The statute was amended effectively October 1976, to include the phrase "per claim" in subsection (2)(b)1b. See CH 76-260, Section 6, Laws of Florida. Here, the defendants cannot escape, or circumvent, the factual finding that their original escrow deposit of $100,000.00 was never supplemented

with additional $100,000.00 deposits, even though three other malpractice claims were simultaneously pending against the Clinic. (R. 708). The trial Judge in this case made the following findings of fact in his order denying defendant's Motion to Limit Judgment:

1. That Plaintiff, Katherine Cook, was under the care and treatment of Dr. Gup and other agents and employees of The Medical Center Clinic from September 28, 1977, through May 15, 1978.

2. That a jury verdict was rendered in this cause on June 16, 1986, finding that the negligence of the parties which was a legal cause of the damages sustained by Plaintiff, Katherine Cook, was apportionable as follows:

Alex Gup, M.D.	15%
The Medical Center Clinic, by its agents and employees other than Alex Gup, M.D.	70%
Katherine Cook	15%
TOTAL	100%

3. That The Medical Center Clinic established an escrow account in the amount of $100,000.00 at the Barnett Bank of Pensacola in February, 1976, pursuant to Florida Statutes, § 768.54(2)(b). Said escrow account was maintained at $100,000.00 during the period of time the incidents giving rise to the subject cause of action occurred. This escrow account was established for the benefit of The Medical Center Clinic and all doctors who were members of The Medical Center Clinic.

4. Defendants, The Medical Center Clinic and Alex Gup, M.D., did not establish any other escrow accounts pursuant to Florida Statutes, §768.54(2)(b)(1)b; did not post bonds in the amount of $100,000.00 per claim pursuant to Florida Statutes, Florida Statutes, §768.54(2)(b)(1)a; did not purchase medical malpractice insurance in the amount of $100,000.00 per claim pursuant to Florida Statutes, §768.54(2)(b)(1)c; and did not make

application nor qualify as a self-insured pursuant to Florida Statutes, §768.54(2)(b)(1)d.

5. During the period of time the incidents occurred giving rise to the subject cause of action against Defendants, Alex Gup, M.D. and The Medical Center Clinic, there were three other medical malpractice claims pending with Florida Patients' Compensation Fund coverage.

6. Defendants, Alex Gup, M.D. and The Medical Center Clinic, failed to comply with the $100,000.00 per claim requirement of Florida Statutes, §768.54(2)(b).

(R. 708).

Those findings of fact are supported by competent substantial evidence.

Findings of fact by a trial judge come to the Supreme Court clothed with the presumption of correctness. Those fact findings should not be disturbed unless there is a lack of substantial competent evidence to support the trial court's conclusion. The standard of review is to determine whether the trial judge abused his discretion in the fact finding process. Strawgate v. Turner, 339 So.2d 1112 (Fla. 1976), Delgado v. Strong, 360 So.2d 73 (Fla.1978), Shapiro v. State, 390 So.2d 344 (Fla. 1980), Marsh v. Marsh, 419 So.2d 629 (Fla. 1982)

Here, the defendants have not alleged abuse of discretion, nor could the defendants show an abuse of discretion. Therefore, the fact of their noncompliance with the mandatory statutory escrow requirement is conclusive as a matter of law at this stage of the proceeding.

This Court should not accept the manner in which the defendants have framed their first issue because it presumes

compliance with §768.54(2)(b), Florida Statutes (1977), when the trial court has already conclusively found noncompliance as a matter of fact.

In Mercy Hospital, Inc., v. Menendez, 400 So.2d 48 (Fla. 3d DCA 1981), the court found as fact that the defendant hospital had only $100,000.00 maintained in escrow, yet eight malpractice claims were pending against that hospital. The Mercy II court affirmed the trial court's ruling that the hospital's failure to properly fund the escrow account on a "per claim" basis, prevented the hospital from asserting any limitation of liability it might have otherwise been afforded under §768.54(2)(b)1, Florida Statutes (1976 Supp.). The 1977 version of that statute, which applies in this case, is the same as the 1976 supplement version in the Mercy Hospital II case. The court in Mercy Hospital II noted the following with respect to subparagraphs a through d of the 1976 and 1977 versions of the subject statute:

> Reading subparagraphs a-d together, see 30 Fla.Jur.Statutes §91 (1974), it is plain that the legislature sought to precondition the right to limit liability upon the provision, through one of four alternative means, of security for the payment of every claim up to $100,000.00. This conclusion is strengthened by the fact that sub-paragraphs a-d then contained in Section 627.353 Fla.Stat. (1976), were each specifically amended by inserting the words "per claim" after "$100,000.00." Ch. 76-260, §6, Laws of Fla. See 30 Fla.Jur.Statutes §97 (1974). There is thus no basis for Mercy's contention that any escrowed amount whatever would comply with

> paragraph "b" so long as the board of governors approved. The "satisfaction" of the board provided in the statute obviously refers only to its satisfaction that the escrow account actually exists or is properly secured, rather than to its approval of the amount. That issue is (or was) mandated by statute. id. at 49,50,n2

Here, the application of Mercy II would require a legal ruling that the defendants are not entitled to any limitation of liability to which they might have otherwise been entitled, had they properly funded their escrow account on a per claim basis in compliance with §768.54(2)(b)1b, Florida Statutes (1977).

Since the defendants were not in compliance with subsection (2)(b)1b, then the Fund would not have been liable to pay this verdict even if the Fund had been named as a party to this lawsuit. See §768.54(3)(a), Florida Statutes (1977), which states in part:

> The fund shall be liable only for payment of claims against health care providers who are in compliance with the provisions of paragraph (2)(b),...

The financial strength of the Medical Center Clinic, aside from the $100,000.00 maintained in escrow, is of no significance. Nevertheless, the defendants and the Fund relied upon the post-trial testimony of various fund employees and ex-employees and testimony from Luther Smith, manager of the Clinic, to establish that the Clinic allegedly is rich enough to pay the first $100,000.00 of all their malpractice claims, even though only one lump sum of $100,000.00 has been

maintained in escrow. The defendants call this "financial responsibility" and intend to have this Court construe "financial responsibility" as a substitute for what the legislature has mandated by statute. That mandate is an escrow account. See §768.54(2)(b)1b, Florida Statutes (1977), and Mercy II at 49,50,n2.

Mr. Hunt Wester, who was working for the Department of Insurance until 1975, testified that aside from the initial escrow deposit of $100,000.00, no assets were set aside by either defendant specifically to pay claims. (R. deposition, P, 29). The Clinic manager, Mr. Luther Smith, testified that the Clinic had a large line of credit, but none of it was set aside in escrow, nor was it earmarked specifically to pay claims in medical malpractice cases. In fact that line of credit was available to borrow money to pay for everything from the employee payroll to office equipment bills. (R. deposition N, 43-45). The subject statute specifically requires an escrow account. That requirement is not met with accounts receivable and a revocable line of credit available to pay everything from the employee payroll to office equipment bills.

This Court should affirm the trial court's denial of the defendant's Motion to Limit Liability and affirm a Final Judgment enforceable against the negligent defendants.

ARGUMENT--ISSUE III.

THE DEFENDANT, AND NOT THE PLAINTIFF, IN A MEDICAL MALPRACTICE CASE IS REQUIRED TO JOIN THE FUND AS A PARTY TO THE CASE IN ORDER TO INVOKE THE POTENTIAL LIMITATION OF LIABILITY PROVISIONS SET FORTH IN §768.54, Florida Statutes (1977).

In Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989), the First District Court of Appeal supported that view, and certified conflict with Mercy Hospital, Inc., v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979). In Mercy I, the Third District Court of Appeal, held that the plaintiffs have the burden of making the Fund a party in any suit where recovery is sought against a health care provider in excess of $100,000.00. id. at 1079.

The First District Court of Appeal's holding in Meeks takes the more logical approach. The plaintiff has the option of either naming the fund as a party or not naming the fund as a party. This is so because the claims procedure set forth in §768.54(3)(e) uses the word "may", and because the language of that subsection only limits recovery "against the fund". If the plaintiff does not seek recovery "against the fund", then the plaintiff can seek recovery against the health care provider.

> §768.54(3)(e), Florida Statutes (1977), Claims procedures:
>
> Any person may file an action against a participating health care provider for damages covered under the fund, except that the person filing the claim shall not recover against the fund for any portion of a judgment for damages arising out of the

> rendering of, or failure to render, medical care or services against a health care provider for damages covered under the fund unless the fund was named as a defendant in the suit. id. at 775 (Emphasis added.)

If the health care provider believes that the claim will have a damages value in excess of $100,000.00 per claim, then the health care provider has the ability to name the fund as a third party in the lawsuit and potentially invoke limitation of liability and fund coverage. At that point, the Fund member and the Fund would have to either agree to the rights and obligations existing between each other pursuant to §768.54(2)(b) and §768.54(3)(a), or they could litigate those issues. If it was determined in a declaratory action that the doctor or clinic had not complied with the provisions of subsection (2)(b), then the Fund could file a motion for summary judgment, get out of the lawsuit, and leave it in the hands of the negligent health care providers and their lawyers.

The defendants argue that the Meeks court's interpretation of the statute, placing the burden on the defendant to name the fund as a party, puts the defendant in a conflict of interest situation. There is no conflict of interest by placing the burden on the defendants to name the Fund as a party. A third party defendant is a defendant for the purpose of §768.543(e)1, Florida Statutes (1977). The fiduciary relationship to which the defendants allude, exists only between the defendants' insurer or self-insurer, and the Fund. Section 768.54(3)(e)2, provides:

> It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a health care provider who is also covered by the fund to provide an adequate defense on any claim filed which potentially affects the fund, with respect to such insurance contract or self-insurance contract. The insurer or self-insurer shall act in a fiduciary relationship toward the fund with respect to any claim effecting the fund... id. (Emphasis added.)

The defendants here are not insurers. The defendants here are not self-insurers, and in fact chose specifically not to qualify themselves as self-insurers under §768.54(2)(b)1d, Florida Statutes (1977). (R. deposition, T, 23).

Section 768.54(3)(e)1 provides in part that:

> ...The fund is not required to actively defend a claim until the provisions of §768.54 are completed or waived, suit instituted, and the fund is named therein. If, after the facts upon which the claim is based are reviewed, it appears that the claim will exceed $100,000.00, or, if greater, the amount of the health care providers basic coverage, the fund shall appear and actively defend itself when named as a defendant in the suit. In so defending, the fund shall retain counsel and pay out of the account for the appropriate year attorney's fees and expenses, including court costs incurred in defending the fund.

This court noted in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1078 (Fla. 1985), that the Fund and health care providers have a mutuality of interest in defending the suit, but it is also true that their interests are not congruent, and only the Fund can best decide how to protect itself. id. at 1061.

Joinder of the fund by the defendant, or the plaintiff, in this case would have made no difference anyway, since the trial court found as a matter of fact that the defendants had failed to properly fund their escrow account pursuant to §768.54(2)(b), Florida Statutes (1977). Since the trial court factually found that the defendants were not in compliance with subsection (2)(b), then §768.54(3)(a) would have prevented the plaintiff from recovering against the fund even if the fund had been named as a party by either side. Section 768.54(3)(a), mandates that:

> ...The fund shall be liable only for payment of claims for health care providers who are in compliance with the provisions of subsection (2)(b)...

In Florida Patients' Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), this court left open the issue of what would occur in the event the fund was prohibited from paying out a portion of the verdict against a health care provider.

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

Here the fund would be legally prohibited from paying any judgment against these defendants. Thus the plaintiff has a constitutional right to fully collect her judgment against the defendants.

Therefore, the defendants, and not the plaintiffs, should shoulder the burden of naming the fund as a party in any medical malpractice suit against the defendant health care provider. The failure of the defendant to name the fund as a party now prevents the defendant from gaining any potential benefits of §768.54, Florida Statutes (1977), and exposes the defendants' personal assets to satisfy this judgment.

ARGUMENT--ISSUE IV.

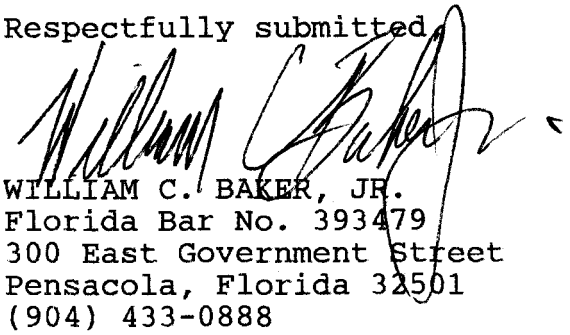
A DEFENDANT IN A MEDICAL MALPRACTICE CASE WHO FAILS TO PLEAD THE POTENTIAL LIMITATION OF LIABILITY PROVISIONS SET FORTH IN §768.54, Florida Statutes (1977), AS AN AFFIRMATIVE DEFENSE, THEREBY WAIVES ANY POTENTIAL LIMITATIONS OF LIABILITY AND EXCLUDES SUCH FROM CONSIDERATION IN THE CASE.

See Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989), which refers to Jakobsen v. Massachusetts Port Authority, 520 F.2d 810 (1st Cir. 1975). Here, the defendants never pled limitation of liability as an affirmative defense, thereby waiving any potential limitation to which they might have otherwise been entitled. Therefore, the defendants cannot claim a limitation of liability at this late stage of the proceeding. The enforceable Final Judgment against these two defendants should be affirmed.

VII. CONCLUSION

The First District Court of Appeal's decision in this case should be affirmed. First, it should be affirmed on the basis of Meeks, id. Secondly, even if this Court does not adopt the Meeks rationale, then this case should be affirmed on the basis of Mercy Hospital II, id., because the defendants failed to comply with the escrow requirements of §768.54(2)(b)1b, Florida Statutes (1977).

Respectfully submitted,



WILLIAM C. BAKER, JR.
Florida Bar No. 393479
300 East Government Street
Pensacola, Florida 32501
(904) 433-0888
Attorney for Respondents

VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Hand Delivery to James M. Wilson, Esquire, 201 E. Government Street, Pensacola, FL and by U.S. Mail to Marguerite H. Davis, 215 South Monroe Street, First Florida Bank Building, Suite 400, Tallahassee, FL 32301, this 28th day of November, 1989.

WILLIAM C. BAKER, JR.
Florida Bar No. 393479
300 East Government Street
Pensacola, Florida 32501
(904) 433-0888
Attorney for Respondents