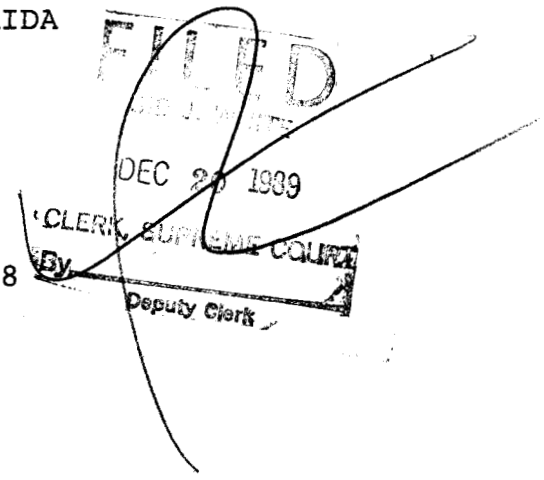
IN THE SUPREME COURT OF FLORIDA



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.

REPLY BRIEF ON THE MERITS OF

PETITIONERS ALEX GUP, M.D., and THE MEDICAL CENTER CLINIC

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PETITIONERS' REPLY BRIEF

ARGUMENT

Issues I, III and IV in the ANSWER BRIEF address the points raised in Issue I of Petitioners' INITIAL BRIEF. Issue II in the ANSWER BRIEF addresses the points raised in Issue II of the INITIAL BRIEF. This REPLY BRIEF will discuss the arguments in Respondents' ANSWER BRIEF, by making reference to Respondents' issues, and pages of the ANSWER BRIEF.

ISSUE I

> A HEALTH CARE PROVIDER WHO IS A MEMBER OF THE FLORIDA PATIENT'S COMPENSATION FUND, AND WHO HAS MET THE STATUTORY REQUIREMENTS FOR THE LIMITATION OF ITS LIABILITY SET FORTH IN §768.54(2)(b), FLORIDA STATUTES (1977), IS ENTITLED TO A LIMITATION OF LIABILITY TO $100,000, WHERE PLAINTIFF FAILED TO JOIN THE FUND AS A PARTY DEFENDANT.

Respondents argued that §768.54, Fla. Stat. (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." (See pp. 18-19 of ANSWER BRIEF, Issue I).

Respondents' argument fails to consider the following language from §768.54(2)(b), Fla. Stat. (1977):

> (b) Each health care provider shall not be liable for an amount in excess of $100,000 per claim for claims covered under sub-section (3) in this statute if, at the time the incident giving rise to the cause of the claim occurred, the health care provider . . . [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. (emphasis added)

The title of that section in the statute is "Limitation of Liability". The statute clearly contemplates a limit on the liability exposure of a health care provider who is a member of the Florida Patients' Compensation Fund.

Respondents' argument also ignores the holdings and the rationale of Taddiken v. Florida Patients' Compensation Fund, 478 So.2d 1058 (Fla. 1985), Florida Patients' Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985), and their progeny. Von Stetina specifically considered and discussed the Legislature's "transfer of responsibility" from the health care provider to the Patients' Compensation Fund. Specifically, the Supreme Court stated in Von Stetina:

> Von Stetina contends that the Legislature cannot constitutionally limit the liability of a health care provider to $100,000 and transfer the responsibility to pay the portion of a judgment which is in excess of $100,000 from the health care provider to the Fund... (474 So.2d at 788) (emphasis added)

The Court stated: "We disagree." (474 So.2d at 788) The Court discussed in detail the concept of transferring the responsibility for the portion of the judgment which is in excess of $100,000 from the health care provider to the Fund. The Court said:

> ...We find nothing in the transfer of liability provision . . . that constitutionally invalidates the statutory scheme. (474 So.2d at 789) (emphasis added)

In Von Stetina, supra, the Supreme Court considered and explained the reasons for the creation of the Fund as follows:

> ...In 1975, the Florida Legislature instituted the Fund as a non-profit entity to provide medical malpractice protection to the physicians and hospitals who join it, as well as a method of payment to medical malpractice

> plaintiffs. . . The Fund provides a statutory scheme of pooling the risk of losses and placing major losses in the entity that can best spread the risk of loss as well as control the conduct of those at fault. (474 So.2d at 788)

This language was quoted with approval in Taddiken.

The "transfer of liability" for the portion of a judgment in excess of $100,000, is the mechanism by which the purpose, as outlined by the Court in Von Stetina, is accomplished. According to the statute, Taddiken and Von Stetina, the event that "transfers the liability" to the Fund is the health care provider becoming a member of the Fund by meeting the requirements of §768.54(2)(b). Respondents' argument would mean that the "transfer of liability" occurs only if and when the Fund is named as a defendant in the suit. That argument is contrary to the statute.

Respondents argued, and the decision of the First District Court of Appeal held, that the defendant, not the plaintiff, has the burden of joining the Fund in the medical malpractice suit. (See pp. 27-30 of ANSWER BRIEF, ISSUE III) This point was not argued by Respondents at the trial level, nor before the First District Court of Appeal. The First District Court of Appeal adopted its holdings, without briefing or argument, from the case of Tallahassee Memorial Regional Medical Center v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989). The First District Court of Appeals held in Meeks that the defendant, not the plaintiff, had the burden of suing the Fund. In Meeks also, as in the case at bar, this particular issue was never briefed nor argued. Both Meeks and the case at bar were two-to-one decisions, with The

Honorable Ann Booth dissenting in both cases. Judge Booth was correct and the majority was in error. The majority certified that their decisions in Meeks and in the case at bar were in conflict with Mercy Hospital, Inc., v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979) (Mercy Hospital I). Mercy Hospital I had specifically held, in 1979, that the plaintiff has the burden of suing the Fund if the plaintiff seeks a recovery against the Fund. This has been the precedent in this State since the creation of the Fund. The First District's opinion is a dramatic change from this precedent.

The Respondents argued (see p. 28 of ANSWER BRIEF, ISSUE III), that the health care provider "has the ability to name the Fund." It is clear, however, that the health care provider will not always have that ability. As discussed in Petitioners' INITIAL BRIEF, if a plaintiff sues a doctor just before the statute of limitations runs, the doctor may not be able to join the Patients' Compensation Fund in time to avoid the statute of limitations. This Court has previously held in Taddiken, supra, that the Patients' Compensation Fund is in privity with the health care provider, and is therefore governed by the same two-year statute of limitations.

To follow the argument of Respondents, and hold that the health care provider must sue the Fund in order to obtain the "limitation of liability" the statute provides, creates the possibility of a doctor or hospital losing its rights, only because the plaintiff sued just before the end of the limitation period. It would not be difficult to imagine a vindictive

plaintiff, or a vindictive plaintiff's attorney, intentionally waiting until just before the statute runs in order to "get his pound of flesh" directly from the doctor and the doctor's assets

It is important to note that Respondents totally ignored this argument (that a health care provider could, unavoidably, lose the protection of the Fund) in their ANSWER BRIEF. This argument was not answered because there is no answer. This point is correct, and it portends disaster for a doctor, if the First District Court of Appeals' opinion is allowed to stand.

> If the court upholds Meeks and the case at bar, holding that the health care provider, not the plaintiffs, must join the Fund in the suit, then the court creates a distinct possibility that a health care provider, who is sued just before the statute of limitations runs against the provider, cannot possibly join the Fund until the statute of limitations has run against the Fund, thereby leaving the Fund without liability, and leaving the health care provider without the "coverage" or protection the provider purchased by becoming a member of the Fund.

The statute should not be given an interpretation that permits such an unintended and unjust result, especially when the statute had previously been construed to the contrary on this exact same point (See Mercy Hospital I).

Respondents argued, based on the Meeks decision, that the defendants had a duty to plead "limitation of liability" as an affirmative defense, failing which it was waived. (See p. 31 of ANSWER BRIEF, ISSUE IV) This argument also was not made by Respondents at the trial level, nor was it argued or briefed before the First District Court of Appeal. This issue had previously been considered by the Third District Court of Appeals of Florida, in Mercy Hospital I, and defense attorneys in Florida

had been told that "limitation of liability" based on Fund membership was not an affirmative defense, and need not be pled. The court stated in Mercy Hospital I:

> The plaintiffs' suggestion that the limitation provided should be treated as a 'set-off' that must be pled by the defendant simply is not supported by the language of the statute. The provision in the statute is one of limitation of judgment upon the performance of conditions specified.
>
> * * *
>
> Because the obligation of the Fund is not secondary and is not a set-off, it must be joined and have a 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 cannot be gathered from the statute. Perhaps that would have been a better way to have written the limitation but the wisdom of legislation is not within our province... (371 So.2d at 1079) (emphasis added)

The rationale for stare decisis is well illustrated by this case. A health care provider's right to a limitation of liability should not be taken away because his lawyers followed the law which had been interpreted and applied for several years before the case at bar arose, only to be told years later that the game must be played under different rules.

Furthermore, the rationale of Mercy Hospital I on this point is sound. The statute sets forth the conditions that must be met for a health care provider to "transfer the responsibility" for a verdict in excess of $100,000 to the Fund, and sets forth the conditions that must be met by a plaintiff before he or she can collect the judgment from the Fund. Those provisions of the statute are abrogated if the Court holds that those conditions do

not suffice unless additional conditions, not in the statute, are met; namely, that the defendant doctor must raise the issue as an affirmative defense and that the defendant doctor, not the plaintiff, must join the Fund in the suit. For the reasons set forth above, the arguments of Respondents in Issues I, III and IV of the Respondents' ANSWER BRIEF should be rejected.

ISSUE II

THE TRIAL COURT ERRED IN CONSTRUING §768.54(2)(b), FLORIDA STATUTES (1977), TO REQUIRE A $100,000 ESCROW ACCOUNT PER CLAIM, WHERE THE HEALTH CARE PROVIDER HAD PROVED FINANCIAL RESPONSIBILITY IN THE AMOUNT OF $100,000 PER CLAIM TO THE SATISFACTION OF THE BOARD OF GOVERNORS OF THE FUND.

Respondents argued that a health care provider has to put $100,000 per claim in escrow, regardless of whether it has proved its financial responsibility of $100,000 per claim to the satisfaction of the Board of Governors of the Fund. (See pp. 20-26 of ANSWER BRIEF, ISSUE II) That argument by the Respondents is contrary to the wording of §768.54(2)(b) Fla. Stat. (1977). If the establishment of an escrow account of $100,000 per claim was essential, notwithstanding other proof of financial responsibility, then the statute could have stated that condition in briefer and clearer language. Further, if the Legislature intended to require a $100,000 escrow per claim, there would have been no reason or purpose for saying in the statute that a health care provider:

> "...[S]hall not be liable for an amount in excess of $100,000 per claim . . . if . . . the health care provider . . . had . . . <u>proved</u> <u>financial</u>

> 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." (§768.54(2)(b) Fla. Stat. (1977)) (emphasis added)

Respondents make the point, as did the Court in Mercy Hospital, Inc., v. Menendez, 400 So.2d 48 (Fla. 3d DCA 1981) (Mercy Hospital II), that between 1975 and 1977 the Legislature changed the statute to add the words "per claim". This created a new requirement that the health care provider had to show financial responsibility of $100,000 per claim to the satisfaction of the Board of Governors. Previously, the requirement was that the health care provider had to show financial responsibility of $100,000, without regard to the number of claims pending. It does not follow, however, that this new requirement of financial responsibility of $100,000 per claim means there must be an additional sum of $100,000 per claim placed in escrow. Obviously, a health care provider could show financial responsibility of $100,000 (as required by the 1975 act), but not be able to show financial responsibility of $100,000 per claim, if there were several claims pending. The 1977 statute made it clear that the Legislature wanted proof by the health care provider of financial responsibility of $100,000 per claim. Thus, the purpose of the statute was to require an additional showing of financial responsibility, not an additional sum to be placed in escrow.

Petitioner argued that the ruling of the trial court, that the Clinic and Dr. Gup must have $100,000 per claim in escrow,

was based on a "finding of fact", and that such ruling therefore comes before the appellate court "clothed in a presumption of correctness". (See pp. 22, 23 of ANSWER BRIEF, ISSUE II) However, Dr. Gup and The Medical Center Clinic contend the ruling of the court was erroneous not because of an incorrect "finding of fact", but rather because the court misinterpreted and misapplied the statute. Dr. Gup and the Clinic never claimed that they had placed in escrow $300,000, representing $100,000 for each of the three claims which Cook argued were pending. They acknowledged that they had only $100,000, plus approximately $6,000 in accumulated interest, in escrow, but they contended the statute did not require an escrow account of $100,000 per claim. They contended that if the health care provider had shown financial responsibility of $100,000 per claim to the satisfaction on the Board of Governors of the Fund, the provider had fully complied with the statute. The trial court interpreted the statute differently, and that was the basis for the appeal. The appeal is based on an erroneous legal interpretation, rather than a "finding of fact". There is, therefore, no "presumption of correctness" of the judge's ruling. The appellate court is in as good a position as the trial court to interpret the law.

Respondents do not contend that Dr. Gup and the Medical Center Clinic are not financially able to pay their portion of the judgment -- $200,000. Nor do they argue that the "proof of financial responsibility" submitted by the Medical Center Clinic

and Dr. Gup to the Fund did not "prove financial responsibility to the satisfaction of the Board of Governors". Respondents only argue that submitting such proof, and getting the approval of the Fund, was not sufficient even though the statute clearly states it was sufficient.

For the reasons stated, the Respondents' arguments set forth under its ISSUE II should be rejected.

All other points made and argued by Respondents have been thoroughly briefed and rebutted in Petitioners' INITIAL BRIEF.

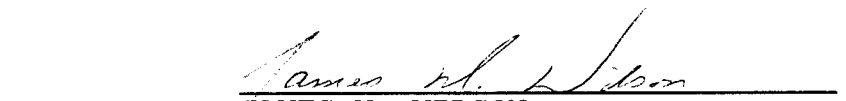
CONCLUSION

On Issue I, the Court should reverse the First District Court of Appeal's holding that if the health care provider desires to limit its liability as a member of the Florida Patient's Compensation Fund, it must join the Fund as a party to the medical malpractice action if the plaintiff fails to do so, and must raise the limitation of liability issue as an affirmative defense.

On the second issue, the court should reverse the trial court's holding that the Medical Center Clinic and Dr. Gup were not in compliance with the statute. They were in compliance because they were not required to have a $100,000 escrow account per claim, and they had proved financial responsibility to the Fund as the statute required.

For the reasons set forth in petitioners' briefs, the Court should reverse the First District Court of Appeal on these issues and hold that Dr. Gup and the Medical Center Clinic are entitled to a limitation of their liability to $100,000 each ($200,000 total) as the statute provides.

Respectfully submitted,



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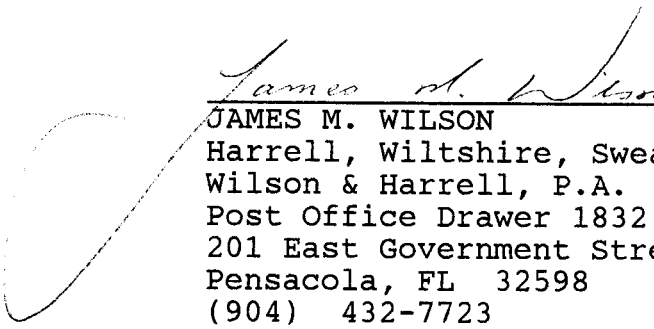
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Robert J. Mayes, Esquire, 226 South Palafox Street, Pensacola, FL and William C. Baker, Jr., Esquire, 300 East Government Street, Pensacola, FL, and to Marguerite H. Davis, Esquire, 215 South Monroe Street, First Florida Bank Building, Suite 400, Tallahassee, FL 32301, this 18th day of December, 1989.



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