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IN THE SUPREME COURT OF FLORIDA

JOYCE M. TADDIKEN and FRANK TADDIKEN, her husband,

Petitioners,

vs.

FLORIDA PATIENT'S COMPENSATION FUND,

Respondent.

CASE NO. 65,690

ON PETITION FOR REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT, FLORIDA PATIENT'S COMPENSATION FUND

PERKINS & COLLINS
Richard B. Collins
Robert W. Goldman
Post Office Drawer 5286
Tallahassee, Florida 32314
(904) 224-3511

Counsel for Respondent

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INTRODUCTION

If due diligence, or just some effort, had been exercised by the Taddikens, this matter would not be before the Court.

Section 768.54, Florida Statutes, establishing the Florida Patient's Compensation Fund ("Fund"), of course, existed prior to and at the time of the incident giving rise to this case. The statute was not hidden, and the Taddikens, and their counsel, were charged with knowledge of its existence and the rights and liabilities created therein.

Charged with that knowledge, at any time prior to, or after, filing their lawsuit, the Taddikens could have determined whether Dr. Wachtel was a member of the Fund by simply making an inquiry of the Fund pursuant to Section 768.54(3)(d)2, Florida Statutes. That statute, in pertinent part, states:

> All books, records, and audits of the fund shall be open for reasonable inspection to the general public,... .[1]

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[1] The Taddikens correctly note that the Fund's records are not covered under Chapter 119, Florida Statutes. But, instead of reviewing the statute, the Taddikens seem to have surmised that since the Fund is not a public entity, they had no informal means of access to the information they needed. See Initial Brief at 22.

Further, formal discovery methods were available to the Taddikens once their lawsuit was filed. Either through deposition or interrogatory, the Fund's relationship with the hospital could easily have been determined well before Section 95.11(4)(b), Florida Statutes, barred the Taddikens' action against the Fund. Yet the Taddikens failed to serve appropriate insurance interrogatories until some eight months after their complaint was filed. (R.206-243); See Statement of Facts, p.3, infra. And, the Taddikens failed to even attempt to amend their complaint until 11½ months after they received the answers to interrogatories confirming Dr. Wachtel's Fund membership. (R.339-369; R.403-406); See Statement of Facts, p.3, infra.

If the Taddikens had employed any one of the discovery procedures discussed above in a timely manner, they then needed only to review Section 768.54, Florida Statutes (Supp. 1978), in order to determine their rights against the Fund, if any.

But the Taddikens did nothing until it was too late. And the law offers no shelter from the consequences of blameful ignorance. The window of time for bringing an action against the Fund, once open, is now closed.

STATEMENT OF FACTS

The Fund accepts the Statement of Facts set forth in the Taddikens' Initial Brief, except that it does not contain certain dates material to the disposition of the case and it does not provide sufficient facts concerning the nature and origin of the Fund. That information is provided below.

A. Relevant Dates and Activities.

DATE	ACTIVITY	RECORD CITATION
6/16/78	Mrs. Taddiken was hospitalized at Plantation General Hospital and her pregnancy	R.2
10/78	Alleged medical malpractice discovered.	R.1-4
6/13/80	Complaint filed.	R.1-4
1/28/81	Taddikens propound interrogatories to defendant Wachtel	R.206-43
5/07/81	Defendant Wachtel filed Answer to Interrogatories. (including information re: Fund membership)	R.339-69
4/22/82	Taddikens file an Amended Complaint	R.403-06
6/04/82	Taddikens filed Motion for Leave to File Second Amended Complaint	R.438-39
9/24/82	Taddikens filed Second Amended Complaint joining the Fund as a party defendant	R.459-63

B. The Origin and Nature of the Fund.

The Fund is a private non-profit entity. Dept. of

Insurance v. Southeast Volusia Hospital District, 438 So.2d 815,817 (Fla. 1983). It was established by the legislature in an effort to arrest the skyrocketing costs of health care in Florida and eliminate the concern that health care providers might be forced into a wholesale curtailment of their health care practices, which in turn would threaten the health and general welfare of all Floridians. Preamble to Ch. 75-9, Laws of Fla.

In addition to isolating those problems and recognizing that they had reached crisis proportions, the Legislature isolated their cause: the excessive cost of medical malpractice insurance. Indeed, by 1975 it was not uncommon for physicians to have to pay $20,000.00, or more, in premiums annually. The physicians could not bear that cost; nor could their patients. Preamble to Ch. 75-9, Laws of Fla.

By joining and maintaining their membership in the Fund, health care providers limit their liability for medical malpractice as a matter of law and consequently reduce the cost of their medical malpractice insurance. At the same time, assessments paid to the Fund by its members are used as a source of recovery by those patients who have obtained medical malpractice judgments against member health care providers in excess of the members' limitation of liability. §768.54, Fla. Stat.

During the Fund year relevant to this case, [2] the Fund had no underwriting authority. It had to accept all Florida health care providers who elected to join. During the Fund year beginning July 1, 1977 and ending June 30, 1978, members paid a fee for joining the Fund and promised to pay future assessments if necessary in order to satisfy the Fund's obligation to malpractice victims. §768.54, Fla. Stat. (Supp. 1978).

In return, Fund members were provided with a statutory $100,000.00 limitation of liability. [3] In addition if Fund assessments proved to be excessive, the excess amount would be refunded or credited. Further the Fund was obligated to the patients of Fund members to pay any amount of a medical malpractice judgment against a Fund member in excess of the member's $100,000.00 liability. That obligation was limitless. Id.

Each Fund membership year was separate from all others

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[2] The relevant Fund year is determined by "the date when the incident occurred for which the claim is filed." §768.54(2)(b), Fla. Stat. (Supp. 1978). In this case, the pertinent date is the date that Mrs. Taddiken was allegedly injured, June 16, 1978.

[3] If the health care provider has insurance in excess of $100,000.00 at the time of the incident giving rise to the cause of action, then he is liable to the medical malpractice claimant for the amount of that coverage or $100,000.00, whichever is greater. §768.54(2)(b), Fla. Stat. (Supp. 1978).

and money collected for a particular year could not be used to pay claims attributable to a different Fund year. A claim would not be paid at all, if the health care provider involved did not maintain his membership (in which case he likewise lost his limitation of liability), or if the Fund was not named in the claimant's suit for medical malpractice. Id.

The Fund was managed by a public board of governors, made up of those members of society directly affected by the creation of the Fund; i.e. lay persons, health care providers, insurance industry. Id.

ARGUMENT

I. THE TADDIKENS' JOINDER OF THE FUND AS A DEFENDANT IN THEIR LAWSUIT DOES NOT RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT

The Taddikens' complaint was amended in order to add the Fund as a new party to its medical malpractice action (R.403-406). According to Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983), such an amended complaint does not relate back to the original complaint. Owens is another in the line of statute of limitation cases holding that actions against the Fund are barred if not commenced within the limitation period established in Section 95.11(4)(b), Florida Statutes. Addressing the same "relation back" argument raised by the Taddikens, the Owens Court held:

> It is well established that when a complaint is amended so as to name a new party defendant, such amendment does not relate back, and for limitation purposes the action, as to that defendant, is not commenced until the amended complaint is filed.

428 So.2d at 710 (Emphasis added).

On page 9 of the Initial Brief, the Taddikens correctly point out that "changes in the character and capacity in which Defendants are sued, which do not change the cause of action, relate back to the filing of the original

Complaint." Contrary to the Taddikens' belief, that statement of law is not inconsistent with Owens. Indeed, changing the character in which a defendant is sued is quite different than adding a new defendant as the Taddikens have done in this case. In the latter situation, there is no relation back, Id.; Louis v. South Broward Hospital District, 353 So.2d 562,563 (Fla. 4th DCA 1977)("An amendment which merely corrects a misnomer might well relate back to the date the complaint was originally filed, but this relation back rule is inapplicable where the effect is to bring new parties into the suit.").

The Taddikens cite Florida Jurisprudence, Second, to rebut Owens, Initial Brief at 9. But rather than rebutting it, Florida Jurisprudence, Second, restates the very rule applied in Owens, which is applicable here as well. See, 35 Fla. Jur. 2d, Limitations, §77, et. seq.. Indeed, Owens cites Florida Jurisprudence, Second and the cases cited therein as authority for its holding regarding the relation back of an amended complaint. 428 So.2d at 710.

The Taddikens also cite McNayr v. Cranbrook Investments, 158 So.2d 129 (Fla. 1963) as being on "all fours" with this case and contrary to Owens. Initial Brief at 9-10. That is not so.

According to the Taddikens, the Comptroller in McNayr was simply a nominal party whose presence in that suit was

required "to insure that fraud is not practiced upon the Defendants." Initial Brief at 10. That may be true. But the Taddikens' further contention that the Fund's role in a medical malpractice action is like that of the Comptroller is absurd and points to the Taddikens' inattentiveness to Section 768.54, Florida Statutes (Supp. 1978). The Fund is solely and directly liable to medical malpractice plaintiffs for injuries in excess of the health care providers' limitation of liability. Owens, 428 So.2d at 710; See Statement of Facts, supra., at 5. It is anything but a nominal party.

The Green v. Peters case, 140 So.2d 601 (Fla. 2nd DCA 1962), cited in McNayr and by the Taddikens, is likewise consistent with the holding in Owens. In that case, the Comptroller was already a party in the case. The amended complaint simply recognized that the Comptroller was being sued in his official capacity rather than his individual capacity. No new party having been added, the amended complaint in that case related back to the original complaint. Id. at 603.

For these reasons, the general rule regarding the relation back of an amended complaint restated in Owens should be applied here.

II. THE DISTRICT COURT OF APPEAL AND CIRCUIT COURT BELOW CORRECTLY HELD THAT SECTION 95.11(4)(b), FLORIDA STATUTES (1983), BARRED THE TADDIKENS' ACTION AGAINST THE FUND

Section 95.11(4)(b), Florida Statutes (1983), in pertinent part states:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered with the exercise of due diligence;.... The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care.

(Emphasis added).

In an effort to avoid the clear applicability of the above-quoted statute to this case, the Taddikens contend that the Fund is really an insurance program, rather than a unique creature of statute designed to cure a unique problem. And like other insurance programs, according to the Taddikens, the Fund is not protected under Section 95.11(4)(b), Florida Statutes, since a cause of action against an insurer does not even arise until a final judgment against its insured is entered.

Failing on that front, the Taddikens also argue that the Fund is not "in privity with the health care provider" in this case, despite the contractual relationship between them.

Those two arguments, however, are without merit; not simply because of the plethora of cases that contradict them, but because of the nature of the Fund and its relationship to health care providers and their patients.

A. The Fund Is Not An Insurance Program.

The dissenting judge in Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946,949 (Fla. 3d DCA 1984), on whom the Taddikens rely, stated matter of factly that "the similarities between the Fund and an insurance program clearly preponderate over the dissimiliarities." A cursory examination of Section 768.54, Florida Statutes (Supp. 1978), [4] however, indicates that the dissimilarities are predominant. Some of the more significant differences that existed in 1978 are listed below.

1. The Fund is a non-profit association, in contrast to private for-profit insurance companies. Dept. of Insurance v. Southeast Volusia, Id.; See Landis v. Dewitt C. Jones Co., 108 Fla. 613, 147 So. 230, 231 (1933) ("Those who organize or embark in insurance business have profit in view as a recompense for the industry, ability, and capability invested and it would be a strange insurance business that would omit this great incentive from its plans and purposes."). The Fund is managed by a public board of governors, as opposed to a private board of directors obligated to make profits for private investors. See §768.54(3)(a) and (b), Fla. Stat. (Supp. 1978).

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[4] Again, the Court should keep in mind that the 1978 statute controls the Fund's relationship with both the Taddikens and the health care provider in this case. See page 4, n. 1, supra.

2. In return for becoming a member of the Fund, and maintaining the membership, a health care provider's liability for medical malpractice is limited by operation of law to $100,000.00. §768.54(2)(a), Fla. Stat. (Supp. 1978). No such benefit is available anywhere else, and certainly not in any insurance program.

3. Consistent with its non-profit makeup, the Fund does not exact a fixed premium from its members. Instead, it supplements an initial fee with whatever assessments are necessary in order meet the Fund's obligation to medical malpractice victims. See §768.54 (3)(c), Fla. Stat. (Supp. 1978).

4. The Fund does not enjoy the luxury of having underwriting authority. Unlike insurance companies, it had to take all Florida health care providers who elected to join for 1978. See §768.54(2)(a), Fla. Stat. (Supp. 1978).

5. The Fund also lacked the authority to set "policy limits for 1978." It is obligated to pay malpractice victims any amount of a judgment in excess of the $100,000.00 limitation on a health care provider's liability. That liability is actually assumed primarily by the Fund. §768.54(3)(e), Fla. Stat. (Supp. 1978).

6. One of the most significant dissimilarities is that medical malpractice claimants must join the Fund as a defendant in their lawsuit against a Fund member in order to recover against the Fund. Plaintiffs have no such burden against insurance companies because, unlike the relationship between the Fund and its members, an insurance company simply indemnifies its insureds for damages resulting from their negligent acts. See Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1984).

Because of those dissimilarities, the First, Second and Third District Courts of Appeal have recognized that the Fund is not an insurance program. Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983); Burr v. Florida Patient's Compensation Fund, 447

So.2d 349 (Fla. 2nd DCA 1984); Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946,949 (Fla. 3d DCA 1984); and Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979). Owens, Burr and Fabal involved the same question presented here and on the basis of their conclusions about the nature of the Fund, each court held that Section 95.11(4)(b), Florida Statutes, applied and barred the proceedings against the Fund below.

Although the Menendez court was not reviewing the applicability of Section 95.11(4)(b), Florida Statutes, to the Fund, it did consider whether the Fund was analogous to an insurance program. The Taddikens and the dissenting judge in Fabal suggest that because the ultimate issue in the case was not the same as here, Menendez is not applicable to this case. Initial Brief at 5; 452 So.2d at 948. The contrary is true. The Fund is not a chameleon that changes its character depending on the issue presented. The Fund is the Fund, incapable of changing, except by legislative edict. So, the Menendez analysis of the Fund is as relevant here as Burr, Fabal and Owens. Note that the Appellant in Lugo admits to the applicability of Menendez to this statute of limitation question. See Initial Brief in Lugo v. Glaser, Case No. 65,765, at 5-6.

The Taddikens and the dissenting judge in Fabal attempt to dilute the significance of the other decisions listed above by ignoring Burr altogether and by arguing that Owens

is bad law.

They attack Owens as being inconsistent with their definition of an "insurer": one who indemnifies another against a particular peril. See Initial Brief at 16. According to the Taddikens and the dissenter in Fabal the Fund indemnifies Fund members for their liability to their patients and consequently are insurers. Id. But the Fund indemnifies no one.

A contract of indemnity is an undertaking by which one party agrees to protect a second party against loss or damage by reason of the second party's liabilty to another person. 12 Fla.Jur. 2d, Contribution, Indemnity and Subrogation, §9 (1979); Royal Indemnity Co. v. Knott, 101 Fla 1495, 136 So. 474 (1931). A Fund member, however, is not liable to its patient who is damaged by malpractice in excess of $100,000.00. The Legislature made clear in Section 768.54, Florida Statutes (Supp. 1978), that it is not the case that the Fund member is actually liable for the damages in excess of $100,000.00, but someone else is going to indemnify it for that portion, as with insurance; nor is it the case that the Fund and its Fund members are jointly liable for that amount. As a matter of law, the Fund member is not liable and the Fund is. As a matter of law the Fund is primarily liable to the patient of a Fund member who is damaged during the 1977-1978 Fund year by a Fund member who

result of malpractice during that year to the extent damages exceed $100,000.00.

In an action against an insured and its insurance company, if the insurance company is for some reason unable to meet its judgment debt at the time or in the manner that the plaintiff might desire, the plaintiff could collect completely against the insured, leaving it to the insured to seek recovery from its insurance company.

That scenario is totally dissimilar to a malpractice action brought against a Fund member and the Fund. The plaintiff in such a case can only look to the Fund member for the first $100,000.00 in damages, regardless of whether the Fund is delayed in meeting its obligation.

Because of the Legislature's redistribution of medical malpractice liability directly to the Fund, it is no wonder that a claimant is required to name the Fund in any action where the claimant seeks to recover against it and it is no wonder that the Fund, for purposes of Section 95.11(4)(b), Florida Statutes, has been treated by the First, Second and Third District Courts of Appeal as any other defendant in a medical malpractice lawsuit that is directly liable to the plaintiff, assuming the alleged malpractice occurred.

B. The Fund Is In Privity With Its Fund Member Health Care Providers

Both the Appellate court below and the Burr court

directly reached the issue of whether the Fund is in privity with its Fund members for purposes of Section 95.11(4)(b), Florida Statutes, and both courts decided that the necessary privity existed. The Fabal court and the Owens court, of course, impliedly reached the same result on the privity issue since they both determined that Section 95.11(4)(b), Florida Statutes, protects the Fund from tardy lawsuits.

The dissenter in Fabal recognized that no definition of privity can be applied uniformly. Id. Indeed, the meaning varies depending on the purpose for which the theory is used. Taddiken, 449 So.2d at 957. The one certainty, however, is that parties who have contracted with one another, like the Fund and its members, are in privity with each other. The dissenter's own example of Strathmore Riverside Villas v. Paver Development Corp., 369 So.2d 971 (Fla. 2nd DCA 1979), emphasizes that point.

In Strathmore, the court determined that the original purchaser of a newly constructed condominium home was in privity with the developer, but a subsequent purchaser was not. The reason for that result is simple and is expressed in the opinion; the original purchaser enjoyed a contractual relationship (purchase contract and deed) with the developer, while subsequent purchasers contracted with the preceeding purchaser, not the developer. Absent such a contractual relationship, there was no privity between

subsequent purchasers and the developer. Id.

The Fabal dissenting judge's discussion of privity and the Taddikens' discussion of privity do not attempt to seriously combat the Fund's contractual privity with its members. Instead, they take an O. Henrian twist. Indeed they end abruptly with the incongruous and unsupported conclusion that the "privity provision" in Section 95.11(4)(b), Florida Statutes, applies only to a successor to a health care provider. Id. at 950; Initial Brief at 11-12. According to the dissenter, such a successor is one who "becomes invested with rights and assumes burdens of a health care provider." Id. at 950, n. 6. For instance, if a hospital corporation was directly liable for an act of malpractice and another corporation became associated with it, and thereby became directly liable for the same malpractice, then that second corporation would have the benefit of Section 95.11(4)(b), Florida Statutes, in like manner as the first corporation.

Assuming, arguendo, that the dissenting judge's and the Taddikens' interpretation is correct, the Fund squarely satisfies the successor definition to the extent that a malpractice judgment of a Fund member exceeds $100,000.00. It is no different than that "second corporation" described in the preceeding paragraph.

The Taddikens go somewhat further afield in their

effort to remove the Fund from the purview of Section 95.11(4)(b), Florida Statutes. They contend that the Fund's relationship to a malpractice action is one of an indemnifier, nothing more, and consequently, its privity relationship with the health care provider is no different than that of health care providers' insurance companies, which do not enjoy the protection of Section 95.11(4)(b), Florida Statutes.

Again, the Appellants blind themselves to the uniqueness of the relationship between the Fund and its health care providers. Unlike the health care providers' privity relationship with their insurance companies, here, by operation of law, the Fund is solely and directly liable to the medical malpractice claimant for damages sustained in excess of $100,000.00.

For those reasons, the Burr court held that because of the Fund's special direct liability, to the malpractice claimant, it is "connected with the incident" giving rise to the action, it must be sued directly, and it must be sued within the limitation period established in Section 95.11(4)(b), Florida Statutes. 447 So.2d at 351.

The appellate court below, and the Fabal, Owens and Menendez courts, all concur with the Burr decision and recognize the unique nature of the Fund and the legislative goals embodied therein.

The Taddikens' and Fabal dissenter's opposition to those cases evolved no doubt from a frustrated effort to "pigeon hole" the Fund, rather than accepting its peculiar nature. Indeed, both the dissenting judge and the Taddikens go so far as to suggest that this Court should put on a "legislative hat" and rewrite Section 768.54, Florida Statutes, so that the Fund would be like an insurance company; so that the square pegged Fund fits in the round hole of insurance jurisprudence:

> That the liability of the actual tortfeasor is limited because he has contracted with a third party for excess damages should not preclude a plaintiff from obtaining a judgment against the tortfeasor for the full amount of his damages. It should be the health care provider's obligation to limit its liability by bringing the Fund into the action by way of a third-party complaint.

452 So.2d at 951; See Initial Brief at 21-22.

Of course, their suggestions are precisely what the legislature intended to avoid, believing that therein was a cause of the excessive medical malpractice rates that were present in 1975, which increased the cost of medical care and generally threatened the health and welfare of Floridians. Ch. 75-9, Laws of Fla.; See Statement of Facts, p.2, supra. And, if the Legislature was wrong, it is within their province to correct the error.

CONCLUSION

For the reasons provided herein, this Court should answer the certified question in the affirmative and uphold the decision of the appellate court below.

DATED this 26th day of October, 1984.

Respectfully submitted,

PERKINS & COLLINS
RICHARD B. COLLINS
ROBERT W. GOLDMAN
Post Office Drawer 5286
Tallahassee, Florida 32314
(904) 224-3511

Robert W. Goldman for
RICHARD B. COLLINS

Counsel for Respondent,
Florida Patient's Compensation
Fund

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent, Florida Patient's Compensation Fund has been furnished by U.S. Mail to Judith A. Bass, 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; Richard S. Powers, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131; Michael J. Murphy, 5th Floor, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 and to Robert M. Brake, 1830 Ponce de Leon Boulevard, Coral Gables, Florida 33134 on this 26th day of October, 1984.

RICHARD B. COLLINS