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
3d District Court of Appeal
Case No 83-1478
83-1541

BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

The District Court of Appeal, 3d District, certified the question in this case to be of great public importance.

Appellants were Plaintiffs below. They filed a civil action for medical malpractice against the doctor and hospital defendants within two years after discovering the existence of their cause of action.

They filed Interrogatories asking the Defendants for the names and addresses of their insurors. The Defendant Dr. Garry Wachtel responded that he had two insurors, one of which was the Florida Patient's Compensation Fund.

Plaintiffs then filed an Amended Complaint to add the Fund as a Defendant. The Amended Complaint was filed more than two years after Plaintiffs discovered the existence of their cause of action.

The Fund moved for Judgment on the Pleadings on the grounds that:

1. the Amended Complaint was filed more than two years after Plaintiffs discovered the injury giving rise to the civil action;

2. the limitations period of two years set forth in Section 95.11 (4) (b) Florida Statutes applied to it; and

3. the filing of the Amended Complaint to add the Fund as Defendant did not relate back in time to the filing of the

original Complaint so as to evade the bar of the Statute of Limitations.

The Trial Court granted the Motion, and the District Court of Appeals, Third District, affirmed. However, that Court certified the following Question to the Florida Supreme Court:

> Whether a claim against the Florida Patient's Compensation Fund arises at the time of the alleged medical malpractice, rather than when judgment is entered against the tortfeasor, and is governed by the two year statute of limitations provided by Section 95.11 (4) (b), Florida Statutes (1977), so that the Fund must be made or joined as a party defendant within two years after the malpractice action accrues?

The identical question, on identical fact situations, has been certified to the Supreme Court by the Third District Court of Appeal in the cases of Lugo v. Florida Patients Compensation Fund, 9 FLW 1565 and Fabal v Florida Keys Memorial Hospital, 9 FLW 1210.

An identical case was presented to the Fourth District Court of Appeal in the case of Florida Patients Compensation Fund v. Tillman, 9 FLW 1547. That court held that the two year Statute of Limitations provided by said section did not apply. There is thus a direct conflict between the Tillman case and the case at bar, the Lugo case, and the Fabal case. A petition for Certiorari has been filed in the Tillman case.

STATEMENT OF THE FACTS

Joyce Taddiken underwent an abortion on or about June 16, 1978. In October 1978 she learned certain facts from medical

records which indicated she had a cause of action against her doctors and the hospital in which the abortion was performed. On June 13, 1980, Mrs. Taddiken, joined by her husband, filed this civil action against her doctors and the hospital for medical malpractice.

As part of their discovery Plaintiffs propounded Interrogatories to Defendants asking whether Defendants were insured for the claim that is the subject matter of the litigation and, if so, the name and address of the insurance company and certain information about the policy.

The Defendant Dr. Garry H. Wachtel answered that he was insured and named as one of his two insurors the Florida Patient's Compensation Fund.

Plaintiff filed an Amended Complaint naming the Fund as an additional Defendant and setting forth the necessary allegtions concerning the membership of Defendant Dr. Wachtel in the Fund. The Fund filed a motion for judgment on the pleadings on the grounds that:

1. the Amended Complaint was filed more than two years after Plaintiffs discovered their cause of action;

2. the filing of the Amended Complaint against it as a new Defendant did not relate back in time to the filing of the initial Complaint so as to escape the bar of the Statute of Limitations;

3. therefore, Plaintiffs' claim against the Fund was barred

by the two year Statute of Limitations set forth in Florida Statutes Section 95.11(4)(b).

The trial court entered a judgment on the pleadings in favor of the Fund which was sustained upon appeal by the District Court of Appeal, Third District. That court did, however, certify the following question to the Florida Supreme Court:

QUESTION:

> Whether a claim against the Florida Patient's Compensation Fund arises at the time of the alleged medical malpractice, rather than when judgment is entered against the tortfeasor, and is governed by the two year statute of limitations provided by Section 95.11 (4) (b), Florida Statutes (1977), so that the Fund must be made or joined as a party defendant within two years after the malpractice action accrues?

SUMMARY OF ARGUMENT

The Court below relied on Owens v Florida Patient's Compensation Fund, Fla DCA 1, 419 So 2d 348, and on Mercy Hospital, Inc v Menendez, 371 So 2d 1077, Fla DCA 3, 1979. The court cited Owens as holding that:

1) the two-year Statute of Limitations in Florida Statutes Section 95.11 (4) (b) applies; and

2) joinder of the Fund after the two-year limit does not relate back to the filing of the original Complaint within the two-year period of time;

and cited Menendez as holding that Plaintiff, not the health care provider, has the duty of joining the Fund as a party Defendant.

Appellant argues that:

1) Even if the two-year statute of limitations applies, the joinder of the Fund after two years relates back to the original filing of the Complaint under the doctrine set down by the Florida Supreme Court in the case of McNayr v. Cranbrook Investments, Inc, 1963, 158 So 2d 129; therefore whether the limit is two years or four years is moot in this case and other similar cases;

2) In any event, the two-year Statute of Limitations of 95.11 (4) (b) does not apply, and the applicable Statute of Limitations is four years under Florida Statutes Sections 95.11 (3) (a), (f), or (p) because:

a. The Fund is not a "health care provider" under the

terms of the Statute;

b. The Fund is not "in privity with" the health care provider as the term "privity" is known in tort law; and

c. The Fund functions as an insuror; thus, except for the provisions of Florida Statutes Section 768.54 (3) requiring joinder of the Fund in any civil action, any cause of action against it does not accrue until a judgment has been entered against its insured.

3) The Menendez court was wrong in holding that the Plaintiff must be the one to join the Fund as a Defendant. Since the health care provider is the one who knows whether it is a member of the Fund, the duty should be on the health care provider to make the Fund a third party defendant; and upon failure to do so the health care provider should be responsible for the entire judgment.

ARGUMENT

1. INTRODUCTION - STATUTORY BACKGROUND

Florida Statutes Section 768.54 is a complicated, complex, convoluted attempt by the legislature to provide health care providers with lower claims costs while still providing adequate compensation for those injured by the negligence of health care providers. It has been amended in practically every legislative session since it was first passed in 1975.

At the time of the injury to Mrs. Taddiken, and at the time of the filing of this civil action, the Statute:

A. defined the term "health care provider" (Section 768.54 (1) (b) (the definition did not include the Fund);

B. defined the term "Fund" separately from that of "health care provider" (Section 768.54 (1) (a);

C. limited the amount of liability for negligence of a health care provider who was a member of the Fund to $100,000.00 per claim or $500,000.00 per occurence for claims covered under the act if:

(1) the health care provider was a member of the Fund, and

(2) had paid to the Fund the fees required by it;

D. provided that the Fund would pay that portion of such judgment or settlement which is in excess of either the sum of $100,000.00 or the amount of the health care provider's basic

insurance coverage, whichever was greater; and

E. provided, deep in the bowels of the Statute, that

> 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 unless the Fund was named as a Defendant in the suit. (Emphasis added).

The Statute did not require health care providers to be members of the Fund (Florida Statutes Section 768.54(2)(a).

At the time of the filing of this civil action Florida Statutes Section 95.11(4)(b) provided as follows:

> An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurence out of which the cause of action accrued. An "action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of heatlh care. 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).

Four year limitations were set for actions arising out of negligence (Florida Statutes Section 95.11 (3) (a)); a statutory liability (Florida Statutes Section 95.11 (3) (f)); and not otherwise specifically provided by Statute (Florida Statutes Section 95.11 (3) (p)).

2. APPLICATION OF THE STATUTES TO THE FACTS OF THIS CASE

A. Joinder of the Fund in an Amended Complaint relates back to the filing of the original Complaint. Thus, the question posed by the District Court is, as to this case, moot.

Contrary to the statement in Owens v Florida Patient's Compensation Fund, DCA 1, 1983, 425 So 2d 708, that

> "...when a complaint is amended as to name a new party Defendant, such amendment does not relate back, and for limitations purposes the action, as to that defendant, is not commenced until the amended complaint is filed" (428 So 2d at 710)

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. (35 Fla Jur. 2d Section 77, page 92 at 95 and cases cited).

The case most analogous to the case at bar is that of McNayr v. Cranbrook Investments, Inc., 1963, Fla 158 So 2d 129. In that case a taxpayer sued to reduce an annual ad valoreum tax assessment.

- There, like here, the statute required an addition of another party, in that case the State Comptroller.

- There, like here, the Plaintiff failed to join the required party in its initial Complaint.

- There, like here, the Plaintiff was given leave to amend its Complaint to name the omitted party after the Statute of Limitations period had expired.

- There, like here, the new party moved to dismiss on the

grounds that the Statute of Limitations had expired.

There, the Florida Supreme Court held that

> "... the court has the discretionary power to allow an amendment to add the Comptroller as a party Defendant under the Rules of Civil Procedure Rule 1.15, 30 FSA, and the amendment then relates back to the time of the original pleading. Thus in the instant case the suit was properly instituted within the time limitation of Section 192.21 because the amendment to add the Comptroller related back to the date of the institution of the suit. The result of the judgment in Green v. Peters, 140 So 2d 601, 605, is the same" 158 So 2d 131 (Emphasis added).

The purpose of the statutes in requiring joinder of the Comptroller in tax assessment actions and requiring joinder of the Fund in medical malpractice actions is the same, namely, to insure that fraud is not practiced upon the Defendants. If the addition of the Comptroller relates back to the time of filing the Complaint against the tax assessor, then the addition of the Fund ought to relate back to the filing of the initial Complaint against the health care provider. The decisions of the District Courts of appeal in the case at bar and in similar cases, including Owens, are thus contrary to the decision of the Florida Supreme Court in McNayr and should be reversed.

B. The Fund is not a health care provider as defined by Statute and case law.

Florida Statutes Section 768.54 (1) (a) defines the Fund. Florida Statutes Section 768.54 (1) (b) separately defines health

care provider.

In addition to being separately defined in the statute, the definition of "health care provider" in the latter subsection does not include any description remotely recognizable as the Fund.

Finally, Florida Medical Center Inc. v. Von Stetina, 1983, DCA 4, 436 So 2d 1022, specifically held that "the Fund is not a 'health care provider'" under the Statute (436 So 2d at 1028, 1029).

Therefore, Florida Statutes Section 95.11 (4) (b) does not aply to the Fund as a "health care provider"

C. The Fund is not "in privity" with the health care provider as that term is used in Florida Statutes Section 95.11 (4) (b).

(1). As pointed out by Judge Ferguson in his dissent in the case of Fabal v. Florida Keys Memorial Hospital, 9 FLW 1210, the term "privity" in connection with the medical malpractice actions refers only to successive proprietors of the health care provider.

> "Although the term "privity" has no definition which can be applied uniformly, Tallahassee Variety Works v. Brown, 106 Fla 599, 610, 144 So 848, 852 (1932), it is not completely elusive, but denotes a mutual or successive relationship to the same interest in property. Industrial Credit Co. v. Berg, 388 F. 2d. 835, 841 (8th Cir. 1968); Osburn v. Stickel, 187 So 2d 89, 92, n.2 (Fla. 3d DCA 1966). The relationship between the hospital and the Fund, whereby the Fund agrees to provide "coverage" to the hospital to the extent that a malpractice claim against the hospital exceeds $100,000, does not remotely qualify as a privity relationship - else so might any contractual relationship. A good example of

> privity is set out in Strathmore Riverside Villas Condominium Association, Inc., v. Paver Development Corp, 369 So 2d 971 (Fla 2d DCA), cert. denied, 379 So 2d 210, (Fla 1979) where it was said that the original purchaser of a newly constructed condominium home was in privity with the developer but a subsequent purchaser of the home was not. Applying the definition of privity to the term in its statutory context, the logical conclusion is that the two year time period within which a medical malpractice action must be commenced against the tortfeasor health care provider applies only to any successor in ownership to that health care provider."

(2) Furthermore, it is clear from the history of privity in tort law that the term deals only with the duties of care of a principal actor in the event, and does not include a mere insuror.

An insuror or other source of funds for payment of a judgment has never been held to be in privity with the principal under such circumstances. It is not jointly liable with the insured for the total amount of the judgment regardless of the limits of the insurance policy, since such collateral sources are not involved in the tortious event and have no duty of care to the injured party.

The application of the privity doctrine to the medical care tort field is aptly illustrated by the case of Wilhelm v. Traynor, DCA 5, 1983, 434 So 2d 1011. There, the doctor obtained an biopsy of diseased flesh and sent it to a pathologist for examination. The pathologist made an incorrect diagnosis. As a result the patient was advised that he did not have cancer. When the cancer was later discovered the patient sued both doctors.

Although the question of privity was not discussed as such, it is obvious that the pathologist did not have any direct contact with the patient and his liability resulted solely because he was in privity with the treating doctor.

This difference is present in the case at bar.

- The Fund had no duty of care to the patient at the time of the medical treatment.

- The Fund was not present at the diagnosis.

- The Fund was not present in the operating room.

- The Fund was not present in the recovery room.

- The Fund did not have then, and does not have now a duty to give good medical care to the patient. The only duty the Fund has is to pay money if a judgment is entered against the Fund and the health care provider.

In the light of the above, and in the absence of any contrary evidence, the term "privity" when used by the legislature in Florida Statutes Section 95.11(4)(b) does not include the insuror of a health care provider or other sources of reimbursment such as the Fund. It includes only those persons who have a duty of care to the patient, such as a contractor's services like a pathologist.

Therefore the doctrine of "privity" in tort law does not apply to the Fund. If the doctrine does not apply to the Fund then the statutory time limitation which applies only to those covered by

the doctrine of privity does not apply to the Fund either. Only the four-year limitations of Florida Statutes Section 95.11 (3) (a), (f) or (p) applies to the Fund.

D. The Fund functions as an insuror and, except for the provisions of Florida Statutes Section 768.54 (3) any cause of action against it does not accrue until a judgment has been entered against its insured.

Carl Sandberg, in his biography of Abraham Lincoln, tells how the Great Emanciptor answered a similar attempt to cause fuzzy thinking through the use of euphemisms.

"If you call the tail of a sheep a leg, how many legs will the sheep have?", asked Lincoln.

His questioners answered, "Five".

"No", said Lincoln, "it will have only four. Calling the tail of a sheep a leg does not make it a leg."

Calling the Fund anything but an insuror does not make it anything other than what it is - an insuror.

Consider the facts:

1. The Fund is a pool of money for the payment of claims. So is insurance.

2. The Fund pool is made up of contributions from those who are protected by the Fund. So is an insurance pool.

3. The Fund must accept all applicants. Insurors must accept risks from the assigned risk pool.

4. The Fund obligation is written in a statute passed by the Legislature. Insurance contracts are governed by statute and written on forms approved by the Insurance Commissioner under delegated authority from the Legislature.

5. The Fund must be made a party to the suit and given the opportunity to defend. An insurer must be notified of the suit and given an opportunity to defend (and, until prohibited by statute, was properly named as a party defendant to any suit against an insured).

6. The obligation of the Fund, once a judgment is rendered, is to pay the injured party the sum which it is obligated to pay under the Statute. The obligation of an insuror, once a judgment is rendered, is to pay the injured party the sum which it is obligated to pay under its contract.

7. The Fund is obliged to pay only those sums above the "deductible" amount of $100,000. An insuror is obliged to pay only sums above the contract deductible amount.

8. The Fund is not responsible for punitive damages. An insuror is not responsible for punitive damages.

9. The Fund was created to indemnify doctors against specific perils. An insuror indemnifies its insureds against specific perils.

10. The statute setting up the Fund, and cases under it, have defined the Fund in insurance terms.

a. As it existed at the time of the filing of this civil action, Florida Statutes Section 768,54 (3)(a) which created the Fund, provided that its purpose was to pay

> "...that portion of any claim arising out of the rendering of or failure to render medical care or services for health care providers... for bodily injury or property damage to the person or property of any patient arising out of the insured's activities..." (Emphasis added)

Thus the legislature itself acknowledged that the Fund operated in the nature of an insurance fund.

b. In the case of Florida Medical Center Inc., v. Von Stetina, 1983 DCA 436 So 2d 1022 at 1025, the Fourth District Court of Appeals characterized the Fund as a "trust fund in the nature of liability insurance"

11. Statutory and judicial definitions of insurance describe factual situations identical to the Fund's situation. For example,

a. Florida Statutes Section 624.02 defines insurance as

> "...a contract where one undertakes to indemnify another or pay or allow a specified amount or a determinable benifit upon a determinable contingency."

This is exactly what the Fund does.

b. In Professional Lens Plan Inc., v. Department of Insurance, 387 So 2d 548, DCA 1, 1980, the court listed five

elements which are normally present in insurance contracts as being

1. An insurable interest

2. A risk of loss

3. An assumption of risk by the insuror

4. A general scheme to distribute the loss among the larger group of persons bearing similar risks

5. The payment of a premium for the assumption of risk (387 So 2d at 550) See also Financial Indemnity v. Steele and Sons, Inc. v. Safeco Insurance Co., 403 So 2d 600 , DCA 4 1981, and Farley v. Gateway Insurance Co., 302 So 2d 177, DCA 2, 1974.

The Fund and its member health care providers fit all aspects of this definition. The Statute recognizes the insurable interest and risk of loss of the health care providers. The Statute provided for an assumption of the risk of loss by the Fund and a general scheme to distribute the loss amoung all health care providers through the payment of premiums.

11. Finally, even the Defendant Wechtel and his lawyers believed that the Fund was an insuror. In the Answers to Interrogatories asking if he were insured, and the name and address of his insurors, he replied that he was insured and listed the Fund as one of his insurors.

A century after Lincoln, Americans noted that, "If it looks like a duck, walks like a duck, swims like a duck, and quacks like

a duck, it is a duck." The imagery is different, but the principle is the same: changing the name does not change the reality.

If the Fund functions as an insuror, is described by Statutes in insurance terms, and is thought of by insurance members as an insuror, then it is, as a matter of law, an insuror, regardless of the euphemisims used by its attorneys.

If the Fund is not a "health care provider", and is not "in privity" with the health care provider because of statutory definitions, the judicial history of the word "privity" in tort actions, and because it functions as an insuror, then the two-year limitation of Florida Statutes Section 95.11 (4) (b) does not apply to it.

3. OWENS v. FLORIDA PATIENT'S COMPENSATION FUND, DECIDED BY THE FIRST DISTRICT COURT OF APPEAL, AND RELIED ON BY THE COURT BELOW, WAS INCORRECTLY DECIDED.

The primary argument made below by the Fund attorneys was that Summary Judgment was mandated by the decision in Owens v. Florida Patient's Compensation Fund, DCA 1, 1983, 428 So 2d 708 rehearing denied 436 So 2d 100. In that case the Court recognized a traditional rule of law that an action against a tortfeasor's insurance company does not accrue until the entry of a judgment against the tortfeasor, which triggers the third party beneficiary contract right of the injured person to be reimbursed for the judgment amount by the tortfeasor's insurance company (428 So 2d at 710,

citing Clemens v. Flagler Hospital Inc. So 2d 1134, DCA 5 1980 and Davis v. Williams, 239 So 2d 593 DCA 1 1970).

The Owens court distinguished those cases by relying on Mercy Hospital Inc. v. Menendez, 371 So 2d 1077 DCA 3, 1979 cert denied 383 So 2d 1198. The Owens court pointed out language in Menendez which stated that the

> "legislature did not set up an insurance fund with obligations to the health care provider. The plan is one in which the Fund has obligations primarly to the plaintiff in a medical malpractice action... The obligation of the Fund is not secondary and is not a set off..."

Therefore, the Owens court reasoned, since the obligation of the Fund is an independent obligation to the Plaintiff, the same statute of limititions should apply to the Fund as to the health care provider. Furthermore, since there are two separate obligations to the patient (that of the health care provider and that of the Fund), filing an Amended Complaint to add the Fund as a party Defendant would not cause the addition of the Fund to relate back in time to the filing of the original Complaint against the health care provider, so as to satisfy the statute of limitations.

As pointed out by Judge Ferguson in his dissent in Fabal v. Florida Keys Memorial Hospital, 9 FLW 1210, Owens was incorrectly decided because it incorrectly read Menendez.

In Menendez, Plaintiff did not name the Fund as Defendant, and the health care provider did not file a third party complaint

against the Fund as its insuror. The case proceeded to trial before a jury which returned a verdict in excess of the maximum liability of a member of the Fund. The health care provider moved to limit the judgment to its maximum liability as a Fund member based upon such membership. The Fund moved for relief from the judgment because it had not been made a party to the civil action before judgment, as provided by statute.

The Appellate Court held that it was the duty of the Plaintiff to name the Fund as a party Defendant. As Judge Ferguson pointed out in Fabel, the language of the Statute does not require this and the Court could just as easily have said that it was the duty of the health care provider, which had direct knowledge of whether it was or was not a member of the Fund, to make the Fund a third party Defendant in the action.

The Plaintiff in Menendez raised the constitutionality of the statute requiring joinder of the Fund as a party Defendant on the ground that the Statute amounted simply to a rule of procedure, thus invading the right of the Florida Supreme Court as the sole authority to make rules of procedure (Markert v. Johnson, Fla 1978, 367 So 2d 1003). As pointed out by Judge Ferguson,

> "Solely for the purpose of hurdling the constitutional obstacle, the Menendez court distinguished the Fund from an insurance program. Subsequent decisions, however, render unnecessary such a forced distinction in order to preserve the constitutionality of the Medical Malpractice Reform Act's joinder provision." 9 FLW at 1211.

Even if the Fund has a direct obligation to the Plaintiff to pay its statutory share of any judgment, that duty arises only after a judgment is entered. It is no different from the obligation of any other insuror. The ultimate basis of its liability is the tortious act of the health care provider.

The Menendez court had two simple questions before it.

1. When must the Fund be joined as a party defendant? As pointed out by Judge Ferguson in his dissent in Fabal v Florida Keys Memorial Hospital, 9 FLW at 1211, that question should be decided on the question of laches. It is apparent from a reading of Menendez that laches should have been applied to prevent a late joinder there. That should have ended the Menendez case. The Court did not need to reach the Constitutional question it discsussed.

2. Who should be required to join the Fund as a party Defendant - the Plaintiff or the health care provider? As pointed out by Judge Ferguson in his dissent in Fabal v Florida Keys Memorial Hospital, 9 FLW at 1211, the answer to that question as given by the Menendez court (ie, the Plaintiff) does not appear in the language of the Statute.

It can, with even more forceful logic, be argued that the health care provider, who knows whether or not he is a member of the Fund, should bear the responsibility of bringing in the Fund as

a third-party defendant. Just as an insured must notify his insurance company of the existence of a civil action covered by his policy if he wishes to shift payment of any judgment from himself to his insurance company, so also a health care provider should be required to bring in the Fund as a third party Defendant if he wishes to shift payment of any judgment from himself to the Fund.

Indeed, this is the only fair way to interpret the statute. Florida has ensconsed a right of privacy in its Constitution (Article I, Section 23), and statutes. Since the legislature has said that the Fund is not a state agency (Florida Statutes Section 768.54 (1) (a)) the records of the Fund are not public records under Florida Statutes Section 119.011, and not necessarily available to patients. Therefore, the only way that a patient can determine with any accuracy that the health care provider is covered by the Fund is to file suit and ask the health care provider that question either through written interrogatories or by deposition.

Under the Fund's interpretation of the Statute of Limitations, if the interrogatory or deposition is not anwered by the health care provider until more than two years after the accrual of the cause of action against the health care provider, then that part of the remedy of the patient which exists against the Fund would be taken away by causes beyond the patient's control.

(At present it is not unusual for defendants to be rather

dilatory about providing answers to questions. A rule such as suggested by the Fund would give an added incentive to such defendants to be dilatory.)

To argue that the patient can file suit against both the health care provider and the Fund, and thereafter let the Fund move for dismissal if the health care provider is not a member, is, on the one hand, to subject the Fund to the harrassment and annoyance of unfounded civil actions; and, on the other hand, to subject the patient to the dangers of facing an action for malicious prosecution by the Fund, or, at least, for attorney fees under Florida Statutes Sections 57.105 or 768.56.

To argue that the patient, to be on the safe side, should file suit long before the expiration of the time limitation, so as to get the information in time for use before the Statute expires, is to wreak a judicial abridgment of a statutory right, contrary to the plain words of the statute, and to ignore the practical realities of litigation. The Legislature has given an injured patient a full two years to prepare and to file suit. The patient should not have to rush to court in advance of that time in order to overcome delaying tactics by the health care provider.

Both the Owens case and the Menendez case were incorrectly decided and should be overruled. The burden of joining the Fund as a party defendant should be placed on the health care provider. The joinder of the Fund in an Amended Complaint should relate back to

the filing of the original Complaint, subject to the defense of laches. Absent that, the Court should hold that the 4 year Statutes of Limitations, rather than the two-year Statute, apply to the Fund because the Fund is not a health care provider and is not in privity with the health care provider as that term is used in tort law.

CONCLUSION

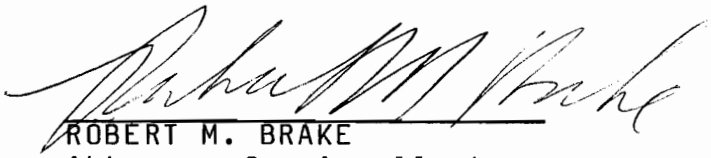
In no other area of the law does a Statute of Limitations begin to run against a hidden collateral source of payment from the time of the primary injury. Instead, limitations run from the time of discovery of the collateral source, or from the time of the entry of a judgment against the tortfeasor.

The words of the statutes involved do not mandate the results adopted by the Court below. The health care provider should have the responsibility to join the Fund as a third-party Defendant, since it is to relieve him of the burden of payment that the Fund was set up. If the Plaintiff is to continue to bear that burden, then the filing of an Amended Complaint to bring in the Fund as a defendant should relate back to the time of filing the original Complaint.

The Fund is not a "health care provider" nor is it "in privity" with the health care provider as that term is used in tort law. Therefore, the two year limitations of Florida Statutes Section 95.11 (4) (b) does not apply.

The decision of the Courts below should be overruled and this cause returned to the trial court for further proceedings.

RESPECTFULLY SUBMITTED



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CERTIFICATE OF MAILING

I HEREBY CERTIFY mailing a copy of the above and foregoing Brief this 8th day of October, 1984, to

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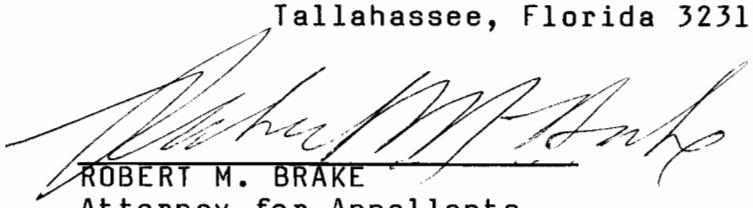

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