

045

IN THE SUPREME COURT OF FLORIDA

JOYCE M. TADDIKEN and  
FRANK TADDIKEN, her hus-  
band,

Petitioners

vs

FLORIDA PATIENT'S COMPEN-  
SATION FUND,

Respondent

Case No 65,690

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

**FILED**

SID J. WHITE

NOV 19 1984

CLERK, SUPREME COURT

By [Signature]  
Chief Deputy Clerk

REPLY BRIEF OF PETITIONERS

ROBERT M. BRAKE  
Attorney for Petitioners  
1830 Ponce De Leon Blvd.  
Coral Gables, Florida 33134  
(305) 444-1694  
Florida Bar No. 008308

The main thrust of the Fund's Brief is an attempt to deny that it is, for all practical purposes, an insurer. Almost in passing, the Fund claims that the question would not have arisen had not the Taddikens "slept on their rights." The Fund also attempts to distinguish McNayr v. Cranbrook Investments, Inc, 158 So 2d 129, by leapfrogging over it instead of analyzing it.

These points are without merit:

1. The characteristics that the Fund claims distinguished it from insurers are also characteristics of some, if not all, insurance companies or are inconsequential.

The Fund claims it is not a chameleon and cannot change its character (Brief Page 13). If this is true, then the Fund must be held to be an insurer.

The Fund admits that it was set up as a result of a protest against high insurance costs and that its function is to reduce insurance costs (Brief Page 4).

The Fund claims that it is a non-profit organization and that its members in a given year share in any refunds if the assessments are greater than losses, or share in additional assessments if the losses are greater than refunds. In this the Fund is little, if any, different from a mutual insurance company which pays dividends to its insureds if losses are less than its expenses, and may assess its insureds for delinquencies if losses are more than its expenses (Florida Statutes Section 628.321).

Similarly, the Fund tries to make much of the fact that it, not the member, is liable for that portion of any judgment over \$100,000.00. This is a distinction without a difference, for an insurance company is liable directly to a claimant as a third party beneficiary on its third party beneficiary contract and can be sued directly by the judgment holder after judgment. As pointed out above, Fund members, like mutual insurance company members can be assessed for any deficiency.

Finally, the Fund itself denotes that its existence was discovered by Plaintiffs through "Insurance Interrogatories".

2. In it's discussion of McNayr v. Cranbrook Investments, Inc 158 So2d 129, on page 8 and 9 of its brief, the Fund completely ignores the identities between the facts and the decision in that case and the case at bar.

There, the Comptroller, like the Fund here, was made a necessary party by Statute.

There, the Comptroller, like the Fund here, was not added as a party defendant until after the Staute of Limitations had expired.

There, the Supreme Court of Florida held that the addition of the statutory party relates back to the filing of the initial complaint. Here, the decision should be the same.

3. The Fund's claim that the Taddikens "slept on their rights" begs the question at issue and is a bold-faced attempt to appeal to what it deems to be an emotionally prejudicial fact.

The question before the Court is whether Plaintiffs had the right to add the Fund as a party defendant at the time they did. If so, and if the delay did not prejudice the Fund, then the delay was not "sleeping".

One could just as easily say that if the Defendants insured by the Fund had not been negligent, then the question would not have arisen because the Plaintiffs would not have been injured.

Therefore this prejudicial comment should be ignored by the Court.

4. In its treatment of the question of privity the Fund ignores the difference between the meaning of the word in contract law and the meaning of the word in tort law.

In contract law, the word refers to anyone having a direct contractual relationship with an individual.


In it's tort sense the word refers to persons in the chain of causation.

Since the Fund is not in any way a tort feasor, the term does not apply to it in this case.

#### CONCLUSION

The arguments of the Fund are without merit. The decision of the District Court of Appeal should be quashed and the cause remanded for trial on the merits.

RESPECTFULLY SUBMITTED



ROBERT M. BRAKE, ESQUIRE  
Attorney for Petitioners  
1830 Ponce De Leon Boulevard  
Coral Gables, Florida 33134  
(305) 444-1694

CERTIFICATE OF MAILING

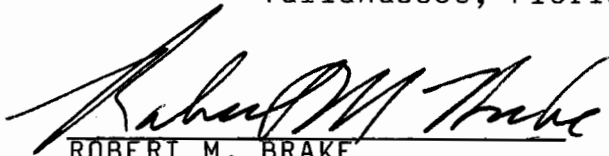
I HEREBY CERTIFY mailing a copy of the above and foregoing  
Brief this 16th day of November, 1984, to

Judith A Bass, Esq  
3300 Ponce de Leon Blvd  
Coral Gables, Florida 33134

Richard S. Powers, Esq  
2400 Amerifirst Building  
1 SE 3d Avenue  
Miami, Florida 33131

Michael J. Murphy, Esq  
City National Bank Bldg, 5th Floor  
25 West Flagler Street  
Miami, Florida 33130

Richard B. Collins, Esquire  
PO Drawer 5286  
Tallahassee, Florida 32314



ROBERT M. BRAKE  
Attorney for Appellants  
1830 Ponce de Leon Blvd  
Coral Gables, Florida 33134  
(305) 444 1694