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IN THE SUPREME COURT OF FLORIDA

CARLYLE S. FABAL, et al.,

Petitioners,

vs.

FLORIDA PATIENT'S COMPENSATION FUND,

Respondent.

CASE NO. 65,730

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

ANSWER BRIEF OF RESPONDENT, FLORIDA PATIENT'S COMPENSATION FUND

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STATEMENT OF THE FACTS

The Statement of Facts presented in the Initial Brief is both incomplete and argumentative.

Carlyle S. Fabal and his wife, Nancy C. Fabal, instituted a malpractice action for injuries sustained by Carlyle S. Fabal on June 28, 1978. (R.1-3). The initial complaint in the case was filed against Florida Keys Memorial Hospital on April 3, 1980. Some eight months later, the Fabals served "insurance interrogatories" on Florida Keys Memorial Hospital. (R.14). At no time did the Fabals request information about the Hospital's membership in the Florida Patient's Compensation Fund ("Fund") pursuant to the "open records" provision of Section 768.54, Florida Statutes.

The Fund was made a party defendant to this litigation no earlier than the filing of the Fabal's amended complaint on January 20, 1982, several months after the Fabals received answers to their insurance interrogatories. (R.111-115; R.118-120; R.121).

Since the action did not commence against the Fund within two (2) years of June 28, 1978, the Fund moved for summary judgment against the Fabals, arguing that the action against it was barred by Section 95.11(4)(b), Florida Statutes. (R.133-138). The court agreed and granted summary

judgment, leaving Florida Keys Memorial Hospital and its insurance company as the only defendants. The court cited a series of other circuit court decisions from Dade, Leon and Volusia counties that had likewise granted summary judgment under similar circumstances. (R.147-147A).

The summary judgment was appealed to the Florida District Court of Appeal, Third District, which affirmed the decision below. On rehearing, the court decided to certify the following question to this Court:

> Whether a plaintiff's failure to join the Florida Patient's Compensation Fund as a defendant in an action against a health care provider before expiration of the two-year period provided in Section 95.11(4)(b), Florida Statutes (1983), for the commencement of suit against the health care provider, is an absolute bar to the recovery of any part of a judgment which exceeds $100,000.00.

That was the only issue certified.

In order to address the certified question, it is important to provide the Court with some background on the Fund, all of which has been gleaned from Chapter 768, Florida Statutes, the Laws of Florida pertaining to that Chapter, and decisions from this Court.

The Fund is a 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.

THE NATURE OF THE FUND

During the Fund year relevant to this case, [1] the Fund had no underwriting authority. It had to accept all Florida health care providers who elected to join. During the 1978 Fund year, 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. [2] In addition if assessments made by the Fund 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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[1] 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 Carlyle S. Fabal was allegedly injured, June 28, 1978.

[2] 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 DISTRICT COURT OF APPEAL AND CIRCUIT COURT BELOW CORRECTLY HELD THAT SECTION 95.11(4)(b), FLORIDA STATUTES (1983), BARRED THE FABALS' 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 Fabals 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 Fabals, 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 Fabals 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 Fabals correctly point out in their Initial Brief that the Fund is "no more than a legislative creation, the exact duplication of which exists nowhere else." Initial Brief at 4. Indeed, the Fund, as indicated in the Statement of the Facts, was created in an effort to alleviate the rising costs of health care and other effects of the high cost of medical malpractice insurance.

The Fabals are probably correct when they state that the Fund "more closely resembles an insurance company than a health care provider." No doubt the Fund more closely resembles an insurance company than a singer, lawyer or professional football team. But the distinction is meaningless. The issue is whether the Fund is an insurance program, and it is not.

The dissenting judge in the appellate decision below stated matter of factly that "the similarities between the Fund and an insurance program clearly preponderate over the dissimiliarities." Fabal v. Florida Keys Memorial Hospital,

452 So.2d 946,949 (Fla. 3d DCA 1984) (dissenting opinion). A cursory examination of Section 768.54, Florida Statutes (Supp. 1978), [3] 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).

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).

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

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); Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956, (Fla. 3d DCA 1984) and Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979). Owens, Burr and Taddiken involved the same question presented here and on the basis of their conclusions about the nature of the Fund, 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 Fabals and the dissenting judge below 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.

The Fabals and the dissenting judge in the appellate proceeding below attempt to dilute the significance of the other decisions listed above by resorting to the standard definition of an "insurer" found in Black's Law Dictionary. Initial Brief at 8; 452 So.2d at 949. They paraphrase the Black's definition of "insurer" as "One who contracts to indemnify against specific perils." Id. According to the Fabals and the dissenter below, the Fund indemnifies Fund members for their liability to their patients. Id. But that is not so.

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 (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 1978 Fund year by a 1978 Fund member as a 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 Taddiken and Burr courts 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 courts below 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.

Consistent with Taddiken, the dissenter below recognizes 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 dissenting judge's discussion of privity does not attempt to seriously combat the Fund's contractual privity with its members. Instead, it takes an O. Henrian twist. Indeed it ends 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. 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 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 Fabals go as far afield as the dissenting judge 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 a health care provider's insurance company. That sort of privity, according to the Fabals, is insufficient for purposes of Section 95.11(4)(b), Florida Statutes; otherwise, anyone in privity with a health care provider, e.g. lawyer or accountant, would also be protected by Section 95.11(4)(b), Florida Statutes. Initial Brief at 8-9.

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 its insurance company, 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.

If a health care provider's lawyer is sued by a medical malpractice claimant in order to recover for medical malpractice allegedly caused by the health care provider, and the cause of action is based on direct liabilty of the lawyer to the plaintiff rather than a third-party beneficiary relationship, (e.g. plaintiff and defendant's insurance company) that lawyer, or anyone else under the described circumstances, should have the protection against tardy lawsuits afforded by Section 95.11(4)(b), Florida Statutes. But, such a relationship is unique to the Fund and perhaps certain employees of health care providers.

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 Taddiken, 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 Fabals' and dissenting judge's opposition to those cases evolved no doubt from a frustrated effort to "pigeon hole" the Fund, rather than accepting its peculiar nature. Indeed, the dissenting judge even suggests that the Fabal court should put on a "legislative hat" and rewrite Section 768.54, Florida Statutes, so that the Fund is 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.

Of course, the dissenter's 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.

II. THE APPELLATE COURT PROPERLY REJECTED THE ARGUMENT THAT SECTION 95.11(4)(b) BEGINS TO RUN ONLY UPON DISCOVERY BY THE PLAINTIFF OF THE DEFENDANT/FUND MEMBERS RELATIONSHIP WITH THE FUND. [4]

The Fabals contend that Section 95.11(4)(b), Florida Statutes, should begin to run in this case "only upon Fabal's discovery of the fact that he has a right to file a cause of action against" the Fund. Initial Brief at 12. According to the Fabals, that is only fair, since they could not possibly have known that Florida Keys Memorial Hospital was a member of the Fund or that they had a right of action against the Fund. The Fabals believe that one would have to be not only "prescient but also omniscient" in order to have such information. Id. For those reasons, the Fabals argue that the "blameless ignorance" doctrine, explained in Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1939), should apply here and protect the Fabals from the statutory bar to their suit against the Fund. Initial Brief at 12-13.

Urie involved the issue of whether a statute of limitation barred an action to recover for an injury that was unknown to the plaintiff in the alleged period during

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[4] Of course, the Court need not consider this second issue raised by the Fabals, since it was not certified as a question of great public importance.

which the statute ran, and was "inherently unknownable even in retrospect." Due diligence, required of the plaintiff in Urie, could not have revealed his injury. 93 L.Ed. at 1292.

Such is not the case here. If due diligence, required here as well, or just some effort, had been exercised by the Fabals, this matter would not be before the Court. Indeed, considering the salient facts of this case, it is curious that the circuit court below even heard the Fabals argument on this second issue. For, it was only through their own lack of diligence that they failed to discover the hospital's membership in the Fund.

Section 768.54, Florida Statutes, of course, existed prior to and at the time of the incident giving rise to this case. The statute was not hidden, and the Fabals, 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 Fabals could have determined whether Florida Keys Memorial Hospital 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,... .

Further, formal discovery methods were available to the

Fabals 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 Fabals' action against the Fund. Yet the Fabals failed to serve appropriate insurance interrogatories until some eight months after their complaint was filed. (R.94); See Statement of Facts, p.1, supra. And, the Fabals failed to even attempt to amend their complaint until several months after they received the answers to interrogatories confirming the hospital's Fund membership. (R.111-115; R.121); See Statement of Facts, p.1, supra.

If the Fabals 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 Fabals did nothing until it was too late. And Urie 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.

CONCLUSION

For the reasons presented in this Brief and in the cases cited herein, the question certified to this Court should be answered in the affirmative and the decision below should be upheld.

DATED this 19th day of September, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent, Florida Patient's Compensation Fund has been furnished by U.S. Mail to

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