IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,730

DISTRICT COURT OF APPEAL
THIRD DISTRICT

CASE NO. 83-952

CARLYLE S. FABAL and NANCY G. FABAL, his wife,

Petitioners,

vs.

FLORIDA KEYS MEMORIAL HOSPITAL, UNITED STATES FIDELITY AND GUARANTY COMPANY and FLORIDA PATIENT'S COMPENSATION FUND,

Respondents.

_____/

PETITION FOR REVIEW
THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONERS, CARLYLE S. FABAL AND NANCY G. FABAL

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AUTHORITIES

I

Statement of The Case

Petitioners, Carlyle S. Fabal and Nancy G. Fabal, his wife, (hereinafter "Fabal"), filed suit against Respondent, Florida Keys Memorial Hospital (hereinafter "FKMH"), on April 3, 1980 seeking damages for injuries suffered on June 28, 1978 as a result of FKMH's negligent nursing care. (A.1-3). Fabal propounded insurance interrogatories on December 29, 1980 which were answered on June 15, 1981 (A.5-9) and which identified for the first time that FKMH was covered by Respondent, Florida Patient's Compensation Fund (hereinafter "FPCF"). Counsel for Fabal was substituted by Stipulation on December 23, 1981 (A.10-11) and Fabal filed his Motion for Leave to File an Amended Complaint on January 21, 1982 (A.12) which was granted on January 26, 1982. (A.16). FPCF filed its answer on March 25, 1982 (A.17-18). On October 18, 1982, FPCF filed its Motion for Summary Judgment or, in the alternative, Motion for Judgment on the Pleadings. (A.19-20). The Honorable M. Ignatius Lester entered his order of Summary Final Judgment for the FPCF on April 6, 1983 (A.27-28) and Fabal filed his Notice of Appeal on April 22, 1983. On May 29, 1984, the Third District court of Appeals filed its Opinion. (A.29-38). On July 17, 1984, the Third District Court of Appeal denied Fabal's Motion for Rehearing and granted Fabal's Request for Certification. (A.39).

To this Court, the following was certified as a decision that passes upon a question of great public importance:

> "Whether a Plaitiff'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."

II

Statement of The Facts

It is uncontested that there exists not one shred of evidence, that Fabal was placed on notice by anyone, in any way, that FPCF was involded in the instant case until June 15, 1981 when FKMH filed its answers to Fabal's insurance interrogatories. (A.5-9). It is also uncontested that there exists not one shred of evidence that FPCF was involved in any way in the care and treatment of Fabal on June 28, 1978, when he was injured. Yet, the Summary Final Judgment entered by the trial court, and affirmed below, holds that, "Plaintiffs' cause of action, not having been commenced as against FLORIDA PATIENT'S COMPENSATION FUND within two (2) years from June 28, 1978, is barred by Florida Statute 95.11(4)(b)." (A.27). Thus, in order to uphold the Summary Final Judgment and the appellate court below, this Court must hold that (1) a non-tortfeasor, whose liability is solely derived from a financial contract with the tortfeasor, somehow participated in the negligent conduct; and (2) the statute of limitations begins to run, not upon discovery of the fact that FPCF is involved in providing coverage to FKMH, but upon the fact that Fabal has been injured by the negligence of the nursing staff of FKMH. These issues constitute the essence of the Certified Question enunciated by the Third District Court of Appeal.

III

Issues On Appeal

Whether The Appellate Court Erred in Affirming The Lower Court's Final Summary Judgment Which Held That Petitioners' Failure to Join The Florida Patient's Compensation Fund As a Defendant In An Action Against A Health Care Provider Before The 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.

IV

(1) The Appellate Court Erred In Failing To Recognize That Section 95.11(4)(b), Florida Statutes (1983) Does Not Bar A Cause of Action Against A Non-torfeason Insurance Fund Whose Liability Is Solely Derived From The Negligence Of The Health Care Provider.

It is Fabal's position, sub judice, that the trial court committed error in failing to recognize that Section 95.11 (4)(b), Florida Statutes (1983), does not bar Fabal's claim against FPCF when FPCF's liability is purely and solely derived from the negligence of FKMH. The cases of Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983); Burr v. Florida Patient's Compensation Fund, ____So.2d____(Fla. 2nd DCA ____ Case No. 83-1359, opinion filed March 2, 1984)[9 F.L.W. 526]; Taddiken v. Florida Patient's Compensation Fund, ____So.2d____ (Fla. 3rd DCA Case Nos. 83-1478 & 83-1541, opinion filed May 8, 1984) [9 F.L.W. 1074]; and Florida Patient's Compensation Fund v. Tillman, ____So.2d____, (Fla. 4th DCA opinion filed July 13, 1984)[9 F.L.W. 1547] will be discussed in some detail below. Suffice it to say, Fabal was never treated by FPCF and that FPCF was not licensed to practice medicine, nursing, or to operate a hospital in the State of Florida. FPCF is no more than a legislative creation, the exact duplication of which exists nowhere else. However, FPCF more closely resembles an insurance company than a health care provider. And finally, under no stretch of the imagination is FPCF the master/employer/principal of any health care provider in this case.

The essential problem sub judice, is just what label or tag do you place on FPCF. Is FPCF an insurance company or not? That is the question. The Third District Court of Appeals has unintentionally complicated what should be a very simple situation. The Third District Court of Appeals mandated that a plaintiff in a medical malpractice action, seeking a recovery in excess of $100,000.00, had to make the FPCF a party. Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979). Pregnantly unanswered however, was whether or not the statute of limitations even applied to FPCF. Of interest is the following language from the Menendez opinion which has served as the basis for the alleged application of Section 95.11(4)(b), Florida Statutes (1983):

> ". . . It is apparent from a reading of the Medical Malpractive Reform Act that the legislative did not set up an insurance fund with obligations to the health care provider. The plan is one in which the Fund has obligation primarily to the plaintiff in a medical malpractice action. As such, it is reasonable to require that the Fund be joined in any suit to enforce those obligations.
>
> 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. . . " Id at p. 1079 (Emphasis added).

There is no question that FPCF more resembles an insurance fund than a health care provider. The Menendez court described the obligations of the FPCF as being owed primarily to the Plaintiff in a medical malpractice action. However, the genesis for the creation of the Fund was the alleged malpractice insurance crisis which caused insurance premiums for doctors to skyrocket, thereby rendering such premiums too expensive for medical doctors to afford. The fund certainly was created to alleviate this so-called insurance premium crunch for the direct benefit of Florida's medical doctors.

Rather than question the accuracy or wisdom of the Menendez Court's characterization of the FPCF, it is abundantly clear that FPCF does pay money to plaintiffs injured as a result of the medical negligence of the "health care provider." In other words, without the occurrence of primary medical negligence on the part of the "health care provider," the FPCF pay absolutely nothing. In addition, it is axiomatic that the FPCF does not care, treat, nurse, hospitalize, or commit medical malpractice on any patient. The "health care provider" accomplishes this mission. Thus, whatever label or characterization this Court applies to the FPCF, it simply cannot be a "health care provider." 1 In essence, the FPCF is an insurance fund. The confusion inherent in the Menendez opinion arises from the description of the obligation of the Fund to the Plaintiff as not being "secondary." The Owens opinion has interpreted this description in such a way as to describe the liability of the FPCF as not being "derivative." This interpretation is absolutely wrong and lies at the heart of this certified question.

1. F.S. Section 768.54(1)(b) contains the pertinent definitions of "Health Care Provider." Nowhere is the FPCF defined as a "Health Care Provider," nor could it be.

Section 95.11(4)(b) Florida Statutes (1983), provides 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 2 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 occurrence 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 health 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).

It is obvious that the FPCF is not a "health care provider" and therefore F.S. Section 95.11(4)(b) should have no application. It should also be obvious that the FPCF is not "in privity with the health care provider" in the care and treatment of Fabal. Whether or not FPCF is in privity with FKMH in terms of paying off a judgment in excess of $100,000.00 to Fabal is another question and also irrelevant to the operation of Section 95.11(4)(b), Florida Statutes (1983). It should be obvious that the statute of limitations relates specifically to some "incident" resulting in action for medical malpractice. An "incident" requires, like a play or drama, actors. The FPCF neither acts nor plays any role in the "incident". It merely pays money and defends the "incident" at the time of trial. It may be many things to many people, however, its main function is that of an insurance fund. In essence, its liability is derived solely from the acts of the health care provider.

An "insurer" is one who contracts to indemnify against specific perils. See Black's Law Dictionary 721 (5th ed. 1979). Section 768.54(2), Florida Statutes (1983) requires each private hospital to pay a prorated fee or assessment each year in order to participate in the Fund. This is a yearly insurance premium payment. Section 768.54(2)(b), Florida Statutes (1983) obligates the Fund to pay a claim against the hospital if the hospital has paid its annual fee or assessment. This is an agreement by the Fund to indemnify a hospital against a malpractice settlement or judgment. Section 768.54(2)(e) refers to ". . . coverage afforded by the fund for a pacticipating hospital. . . " This is a declaration that the Fund covers the hospital by way of a contract to indemnify against a malpractice claim. Section 768.54(3)(f) requires the Fund to actively defend the claim once the Fund is named. Clearly, the Fund operates as an "insurer" of the hospital.

Privity is not defined by Section 95.11(4)(b), Florida Statutes (1983). However, its common sense understanding should be self evident. "Privity" is defined as a "derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest" Black's Law Dictionary, Revised 4th ed. P. 1361 (1968). There is no contract, connection, or bond of union between FPCF and FKMH for the care and treatment of Fabal. The only "privity" that exists between FPCF and FKMH occurs in the context of providing an insurance fund to pay off a portion of a claim arising out of the rendering of medical care to the patient by the "health care

provider." Section 768.54(3), Florida Statutes (1983). In this context, the operation of the FPCF is no more and no less than that of an insurance company. Certainly, the "privity" involved between FKMH and FPCF has absolutely nothing to do with the care and treatment of patients and is indistinguishable from any "privity" that may exist between FKMH and its other insurance companies, attorneys, accountants, investigators, etc., who come onto the stage after the "incident" has occurred.

Owens v. Florida Patient's Compensation Fund, supra, is simply a judicial aberration. There may be a direct obligation to the plaintiff patient by the FPCF in an action against a participating "health care provider" but such an obligation only occurs after the act of malpractice occurs and after plaintiff patient has obtained a verdict in excess of $100,000.00 against that "participating health care provider."

The FPCF, like any insurance company involved in any litigation, attempts to eliminate any direct obligation it may have to the plaintiff patient by obtaining a verdict for the defendant "health care provider." The only difference between the FPCF and an insurance company is that the plaintiff patient is required to include the FPCF in the lawsuit prior to the occurrence of the trial. This requirement does not raise the status of the FPCF to that of a "joint-tortfeasor", "employer/employee", "master/servant", or "principal/agent." In addition, whether one describes the obligation owed by the FPCF to the patient as "direct" or "indirect", it cannot be denied that the liability of FPCF is

derived solely from the conduct of the "participating health care provider." Thus, the stare decisis embodied in Clemons v. Flagler Hospital, Inc., 385 So.2d 1134 (Florida 5th DCA 1980) and Davis v. Wilham's, 239 So.2d 593 (Florida 1st DCA 1970) should control the application of Section 95.11(4)(b), Florida Statutes (1983).

If the Fund more closely resembles an insurer, why then should the Fund be afforded the same treatment as the tortfeasor for purposes of the operation of Section 95.11(4)(b), Florida Statutes (1983)? Taddiken v. Florida Patient's Compensation Fund, supra; Burr v. Florida Patient's Compensation Fund, supra; and Fabal v. Florida Patient's Compensation Fund, (Fla. 3rd DCA May 29, 1984)[9 F.L.W. 1210], provide no answer.

Taddiken weakly argues that because the Fund must be made a party to the lawsuit, it cannot, therefore, be an insurer for purposes of the statute of limitations. One can only wonder why not? Taddiken further argues that a statute of limitations longer than two years cannot be applied to the Fund because such a result would seriously impair the Fund's right to defend the case. This position is certainly not based on any recorded precedent and is cured by a simple motion for continuance. This position is doubly difficult to accept when one considers the requirement of the insurer or self-insurer providing insurance or self-insurance to the health care provider to provide an adequate defense on any claim filed which potentially affects the Fund. Section 768.54(3)(f)2.

Burr anticipates Taddiken and argues that because the Fund must be named as a defendant in a suit against the health care provider, it is illogical to conclude that the legislature intended a longer and different limitations provision to apply to the Fund than is applied to the health care provider. The truth of the matter is that the legislature never intended the statute of limitations to apply to the Fund in the first place. If it wanted it to apply, the legislature should have said so.

(2) The Appellate Court Erred In Failing To Recognize That Section 95.11(4)(b), Florida Statutes (1983) Begins To Run Only Upon Discovery That The Florida Patient's Compensation Fund Extended Coverage To The Health Care Provider.

It would be surprising indeed that any patient, not to mention Fabal, would know that he was being treated by a health care provider who was "in privity" with FPCF. Indeed, such knowledge would not only be prescient but also omniscient. This being the case, it is necessary that Fabal be granted the opportunity to discover that FPCF has a role to play in the case and that Fabal has a cause of action against FPCF. To apply the statute of limitations to FPCF in the same manner as it is applied to the "health care provider" would be patently unfair. Any application of the statute of limitations should be in accordance with the "blameless ignorance" doctrine. Thus, the statute of limitations should begin to run, if it applies at all, only upon Fabal's discovery of the fact that he has a right to file a cause of action against FPCF. Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969); Miami Beach First National Bank v. Edgerly, 121 So.2d 417 (Fla. 1960); City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).

In Brooks this Court was concerned with a cause of action based on negligence in the use of an x-ray machine, where the injurious effects of such negligence did not appear until after the running of the applicable statute of limitations. In holding that the action was not barred, the Florida Supreme Court cited with approval the United States Supreme Court Case of Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1939) and said:

> In other words, the statute attaches when there has been notice of an invasion of the legal right of the Plaintiff or he has been put on notice of his right to a cause of action... to hold otherwise under circumstances of this kind, would indeed be a harsh rule and prevent relief to an injured party who was without notice during the statutory period of any negligent act that might cause injury.

In Urie the United States Supreme Court held that an employee's claim for injuries in the nature of the occupational disease of silicosis was not barred by the applicable statute of limitations because the statute did not begin to run until the disease had been diagnosed. The Court said in that case, as against the contention that the statute began to run when the plaintiff contracted the disease:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at an earlier date.

Fabal only became aware of an invasion of his right or of his right to a cause of action against FPCF on June 15, 1981. It was at this time that Fabal discovered that FPCF was involved with FKMH. Therefore, it was on June 15, 1981 that the statute of limitations should begin to run. The operation of Section 95.11(4)(b) Florida Statutes (1983) should not be viewed in a vaccum, unrelated to the concept of fair play. To do so would make a mockery of the law.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellants was mailed this 31 day of August, 1984 to counsel of record.

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