DJW/smt

IN THE SUPREME COURT OF FLORIDA.

CASE NO. 65,730

DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA.

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 REVHEW
THIRD DISTRICT COURT OF APPEAL

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

PROENZA AND WHITE, P.A.,
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BY: DAVID J. WHITE.

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I. STATEMENT OF THE FACTS.

FABAL can only wonder how THE FUND can insert the alleged "background of the Fund," in its rendition of the Statement Of The Facts filed in its Answer Brief, and still comply with Rule 9.210(b)(3), Florida Rules of Appellate Procedure. Suffice it to say, such historical assertions more properly belong under the heading, "Argument." Rule 9.210(b)(4), supra.

ARGUMENT

I. THE APPELLATE COURT ERRED IN FAILING TO RECOGNIZE THAT §95.11(4)(b), FLORIDA STATUTES (1983) DOES NOT BAR A CAUSE OF ACTION AGAINST A NON-TORTFEASOR INSURANCE FUND WHOSE LIABILITY IS SOLELY DERIVED FROM THE NEGLIGENCE OF THE HEALTH CARE PROVIDER.

II. THE APPELLATE COURT ERRED IN FAILING TO RECOGNIZE THAT §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 is respectfully submitted that the only real difference between the Fund and an insurance company is that the Plaintiff is required to join the Fund as a Defendant in the lawsuit against the Fund member. If this requirement transforms the Fund into something other than an insurance program, no rational, coherent and reasonable explanation has been and ever can be given. The assertion that the Fund is not an insurance company because the member of the Fund is relieved of any monetary liability by the Fund for judgments in excess of One Hundred Thousand Dollars ($100,000.00), that the Fund is non-profit, that it does not exact a fixed premium, that it does not have underwriting authority, and that it lacks authority to set policy limits for the year 1978 does nothing but avoid the issue sub judice. The issue is this: Liability of the Fund is derivative; it is derived from the negligent action of the health care provider with whom the Fund is not in

privity in the treatment of the patient. The Fund is only in privity with its member after the negligent action has occurred and a lawsuit filed. Since liability of the Fund is derivative, the stare decisis established in Clemons v Flagler Hospital, Inc., 385 So.2d 1134 (Fla. 5th DCA 1980) and Davis v Wilham's, 239 So.2d 593 (Fla. 1st DCA 1970) should control the application of Section 95.11(4)(b), Florida Statutes (1983).

CONCLUSION

It is respectfully requested that the question certified to this Court should be answered in the negative and the decision below should be reversed.

CERTIFICATE OF SERVICE.

IT IS HEREBY CERTIFIED that a true copy hereof has been mailed this 27th day of September, 1984, to:

Richard B. Collins, Esquire,
Perkins and Collins,
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Tallahassee, Florida 32314.

Rosalind Herschtal, Esquire,
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Respectfully submitted.

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