IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

JOSEPH TILLMAN, et al.,

Respondents.

CASE NO. 65,736

ON PETITION TO INVOKE DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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INTRODUCTION

The issue raised below was whether Section 95.11(4)(b), Florida Statutes, barred recovery from the Florida Patient's Compensation Fund ("Fund") in medical malpractice actions brought against the Fund after the limitation period provided in that statute expired. The Florida District Court of Appeal for the Fourth District decided that Section 95.11(4)(b), Florida Statutes, was not a bar to recovery against the Fund. Following the dissent in another case, the Court opined that the Fund is an insurance program and is not in privity with the Fund member/health care providers, and, therefore, the statute does not apply to the Fund. Florida Patient's Compensation Fund v. Tillman, ____So.2d____, 9 Fla. L. Weekly 1547,1550 (Fla. 4th DCA, July 13, 1984).

The Tillman decision has disrupted a line of cases from the First, Second and Third Districts which determined that the Fund is not an insurance program and that Section 95.11(4)(b), Florida Statutes, does apply to the Fund. Those cases, which are cited below, along with the Tillman decision, are provided in the Appendix to the Brief.

The Fund requests that this Court invoke its discretionary jurisdiction under Article V, Section 3(b)(3), Florida Constitution, in order to cure the direct and

express conflict between the decision below and the decisions of all other district courts of appeal that have addressed the same issue.

STATEMENT OF THE FACTS

The Fund was not made a party to Tillman's lawsuit until after the two year statute of limitations in Section 95.11(4)(b), Florida Statutes, expired. 9 Fla. L. Weekly at 1549. On the basis of that statute, and the multitude of decisions that determined its applicability under these circumstances, the Fund moved for summary judgment. It was denied. After a final judgment was rendered in the case, several defendants, including the Fund, appealed. The sole issue raised by the Fund was whether Section 95.11(4)(b), Florida Statutes, barred Tillman's recovery against it. id. at 1549.

As already indicated, the appellate court decided that Section 95.11(4)(b), Florida Statutes, did not bar Tillman's recovery against the Fund.

ARGUMENT

The appellate court below grounded its decision regarding the Fund solely on the dissenting opinion in Fabal v. Florida Keys Memorial Hospital, ____So.2d____, 9 Fla. L. Weekly 1210 (Fla. 3d DCA, May 29, 1984). In so doing, the court emphasized that its decision was in:

> direct and express conflict with the following cases: Taddiken v. Florida Patient's Compensation Fund, ___So.2d ___ (Fla. 3d DCA, Case Nos. 83-1478 & 83-1541, opinion filed May 8, 1984) [9 FLW 1074]; Burr v. Florida Patient's Compensation Fund, ___So.2d___ (Fla. 2nd DCA, Case No. 83-1359, opinion filed March 2, 1984) [9 FLW 526]; Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA), pet. for review denied, 436 So.2d 100 (Fla. 1983); Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied and appeal dismissed, 383 So.2d 1198 (Fla. 1980); and Fabal v. Florida Keys Memorial Hospital, supra.

id. at 1550.*

The conflict between Tillman and the cases cited above was patently obvious to the court below and, or course, its recognition of that fact is entitled to great weight. Nevertheless, each of the cases cited in the quote above are

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* It shall be emphasized to the Court that both Taddiken (Case no. 65,690) and Fabal (Case no. 65,730) have been certified to this court by the Third District Court of Appeal. Those cases, as indicated herein, decide the exact same legal issue decided in this case, but the Tillman court decides the issue contrary to the Fabal and Taddiken courts. The cases should clearly be heard together.

analyzed below in order to further demonstrate the direct and express conflict between them and the Tillman decision.

A. FABAL V. FLORIDA KEYS MEMORIAL HOSPITAL 9 FLA. L. WEEKLY 1210 (FLA. 3D DCA, MAY 29, 1984)

A dissenting opinion is, of course, grounded on a view of how a case should be decided that is contrary to the majority opinion. Black's Law Dictionary (4th ed. 1968), p. 559. Thus, by its very nature, the dissenting opinion in Fabal directly and expressly conflicts with the majority decision in the same case. And, since the Tillman court relied solely on the Fabal dissent for support of its interpretation of Section 95.11(4)(b), Florida Statutes, the Fabal majority decision provides the most obvious ground for this Court's jurisdiction under Article V, Section 3(b)(3), Florida Constitution.

In Fabal, as in Tillman, the central issue was whether Section 95.11(4)(b), Florida Statutes, protected the Fund from a medical malpractice action brought against it after the two year limitation period expired. Unlike Tillman, however, the circuit court granted the Fund's motion for summary judgment and that judgment was affirmed by the appellate court citing Owens, Burr, Taddiken and Menendez. 9 Fla. L. Weekly at 1210.

B. MERCY HOSPITAL V. MENENDEZ, 371 SO.2D 1077 (FLA. 3RD DCA 1979)

The conflict between Menendez and Tillman is almost as striking as the Fabal/Tillman conflict. The dissenter in Fabal, and the Tillman majority, opined that Section 95.11(4)(b), Florida Statutes, could never bar recovery against the Fund, based, in part, on the inaccurate premise that the Fund was intended to be an insurance program, and, therefore, was expressly excepted from the purview of that statute of limitation. Fabal, 9 Fla. L. Weekly 1210, dissenting opinion; Tillman, 9 Fla. L. Weekly 1550.

Contrary to the Fabal dissenter's position, the dissimilarities between the Fund and an insurance program preponderate over the similarities. For example, certainly no insurance program provides the limitation of liability afforded under Section 768.54, Florida Statutes; nor was any insurance company designed to benefit all health care consumers by arresting the skyrocketting costs of malpractice insurance that are ultimately paid by them. See Preamble to Ch. 75-9, Laws of Fla., establising the Fund. Indeed, insurance companies are designed to make money for their investors.

The Menendez court recognized the dissimilarities and determined that the Fund was not established by the legislature as an insurance program. 371 So.2d at 1079.

C. OWENS V. FLORIDA PATIENT'S COMPENSATION FUND, 428 SO.2D 708 (FLA. 1ST DCA 1983)

As in Tillman, the plaintiff in Owens neglected to join the Fund as a party until after the limitation period in Section 95.11(4)(b), Florida Statutes, had run. 428 So.2d at 709. The circuit court granted summary judgment in favor of the Fund, based on the statute of limitations defense. id.

The appellate court in Owens affirmed the decision below, recognizing that, as indicated in Menendez, the Fund is not an insurance program and, consequently, the "insurers exception" to Section 95.11(4)(b), Florida Statutes, did not apply. 428 So.2d at 710.

Interestingly, the Appellant in Owens petitioned for review by this Court, but was denied relief. Owens v. Florida Patient's Compensation Fund, 436 So.2d 100 (Fla. 1983).

D. BURR V. FLORIDA PATIENT'S COMPENSATION FUND, 447 SO.2D 349, 9 FLA. L. WEEKLY 526 (FLA. 3D DCA, MARCH 2, 1984)

In Burr, as in Tillman, Fabal and Owens, the plaintiff failed to join the Fund until after the limitation period in Section 95.11(4)(b), Florida Statutes, expired. The Fund was granted summary judgment based on the statute of limitation defense. 9 Fla. L. Weekly at 526. Once again

the applicability of Section 95.11(4)(b), Florida Statutes, was raised on appeal and, once again, the appellate court determined that the limitation period under that statute barred recovery against the Fund.

This time, however, the appellant argued that the Fund was not protected by Section 95.11(4)(b), Florida Statutes, because that section is "limited to the health care provider and persons in privity with the provider of health care." §95.11(4)(b), Fla. Stat. (emphasis added). According to the appellant, that language in the statute somehow required the Fund to be in privity with the claimant in the medical malpractice action. id. at 527. The court rejected that reading and determined that the Fund was in privity with its Fund member/health care providers. id. at 527.

The Fabal dissenter completely ignored Burr in its argument that the Fund was not in privity with its Fund member/health care providers. See 9 Fla. L. Weekly at 1211. Although relying on that dissent, the Tillman court at least recognized that the Fabal dissenter's, and consequently, its own position on privity, directly and expressly conflicted with Burr. 9 Fla. L. Weekly at 1550.

E. TADDIKEN V. FLORIDA PATIENT'S COMPENSATION FUND, ___SO.2D___, 9 FLA. L. WEEKLY 1074 (FLA. 3RD DCA 1984)

At this point, the fact pattern and issue are no doubt

familiar; the plaintiff failed to join the Fund within the limitation period established in Section 95.11(4)(b), Florida Statutes, judgment was entered in favor of the Fund based on the statute of limitation defense, and an appeal was taken on the issue of the applicability of Section 95.11(4)(b), Florida Statutes, to the Fund.

The result is likewise familiar. Contrary to Tillman, the Taddiken court determined that the Fund was not an insurer and was in privity with its Fund member/health care providers. 9 Fla. L. Weekly at 1074. Consequently, summary judgment in favor of the Fund was affirmed. id.

CONCLUSION

The Fund recognizes that in most instances, decisions of the district courts of appeal should be final. But even under the more rigorous requirements of Article V, Section 3(b)(3), as recently amended, the Tillman case is ripe for this Court's review. The Supreme Court, acting in its supervisory capacity, ought to interject in this dispute and preserve the uniformity of legal principle and practice in this state that was previously established in the First, Second and Third Districts by Owens, Burr, Fabal, Menendez and Taddiken. See Jenkins v. State, 385 So.2d 1356, 1358 (Fla. 1980).

DATED this 20th day of August, 1984.

Respectfully submitted,

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