

FILED

S'D J. WHITE

JUN 12 1985

CLERK, SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

By _____
Chief Deputy Clerk

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

JOSEPH TILLMAN, et al.,

Respondents and
Cross-Petitioners.

CASE NO. 65,736

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

PETITIONER'S REPLY BRIEF ON THE MERITS

SAMUEL R. NEEL, III
PERKINS & COLLINS
Post Office Drawer 5286
Tallahassee, Florida 32314
(904) 224-3511

Counsel for Florida Patient's
Compensation Fund

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Dept. of Insurance v. Southeast Volusia Hospital District,</u> 438 So.2d 815,917 (Fla. 1983), <u>appeal dismissed, 104 S.Ct. 1673 (1984)</u> . . .	3
<u>Florida Medical Center, Inc. v.</u> <u>Von Stetina,</u> 436 So.2d 1022 (Fla. 4th DCA 1983)	2
<u>Florida Patient's Compensation Fund v.</u> <u>Von Stetina,</u> 10 FLW 286 (Fla., May 16, 1985) . . .	1,2,3
<u>Mercy Hospital v. Menendez,</u> 371 So.2d 1077 (Fla. 3d DCA 1979), <u>cert. den. 383 So.2d 1198 (Fla. 1980)</u>	2
 <u>STATUTORY AUTHORITIES</u>	
Section 95.11(4)(b), <u>Florida Statutes</u>	3
Section 768.51, <u>Florida Statutes</u> (1981)	2
Section 768.54, <u>Florida Statutes</u> (1981)	2,3

SUMMARY OF ARGUMENT

All of Respondent Tillman's legal arguments have been negated by the decision of the Florida Supreme Court in Florida Patient's Compensation Fund v. Von Stetina, 10 FLW 286 (Fla., May 16, 1985).

All of Respondent's practical arguments find no support in the statutes or in reality.

ARGUMENT

The crux and essence of the legal argument in Tillman's Brief On The Merits is the decision of the Fourth District in Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (Fla. 4th DCA 1983). That decision was reversed by this Court recently in Florida Patient's Compensation Fund v. Von Stetina, 10 FLW 286 (Fla., May 16, 1985).

In this recent decision, this Court upheld the constitutionality of Sections 768.54(2)(b), 768.54(3)(e)3 and 768.51, Florida Statutes (1981), and thereby upheld the limitation of liability for Fund members which is provided for in Section 768.54(2)(b) of the Florida Statutes and which was confirmed in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. den. 383 So.2d 1198 (Fla. 1980). This Court also acknowledged that the Fund existed both for the benefit of plaintiffs as well as for the benefit of health care providers when it stated:

The Florida Patient's Compensation Fund provides health care providers with medical malpractice liability coverage for the benefit of both the health care providers and those members of the public who become victims of medical malpractice. In Southesat Volusia Hospital District, we upheld the concept of the Fund and its assessment mechanism. We find the statutory scheme does not deny plaintiffs recovery of judgments, but in fact is designed, in part, to ensure that sufficient funds exist to pay substantial judgments to medical malpractice victims.

10 FLW at 288.

This Court further reaffirmed its decision in Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed, 104 S.Ct. 1673 (1984), in which this Court acknowledged the contractual relationship between the Fund and its members. 438 So.2d at p. 817.

This Court, in Von Stetina, therefore overruled or negated all of Respondent's legal arguments in its Brief including the ones that the Fund is just another insurance company and cannot avail itself of the statute of limitations provided for in Section 95.11(4)(b) of the Florida Statutes. As a result, the line of district court decisions relied upon by the Fund in support of its statute of limitations defense have been validated.

In the portion of its Brief which does not rely on the Von Stetina decision reversed by this Court, the Respondent, Tillman, attempts to discuss what he claims are practical problems with joining the Fund within the statute of limitations applicable to the Fund member. However, the Respondent ignores the fact that because the records of the Fund are open to the public, §768.54(3), Fla. Stat., and the Fund has been in existence since 1975, a plaintiff or the plaintiff's attorney could telephone the Fund office and ask if a particular health care provider was a member of the Fund and request a letter to that effect if told the health

care provider was not a Fund member at the time relevant to the lawsuit.

If a plaintiff chooses to join the Fund as a defendant without checking the Fund membership of the other defendants, or even if told that no defendants were members, customarily the Fund would not seek attorney's fees and costs if the plaintiff dismisses the Fund after being told in writing, by letter or affidavit, that a particular health care provider was not a member of the Fund at the time of the alleged malpractice. The problem occurs when the plaintiff's attorney requires the Fund to go through a formal hearing on a Motion to Dismiss or usually on a Motion for Summary Judgment when there is no evidence that a health care provider was a Fund member at the time of the alleged malpractice and the plaintiff's attorney has been informed of this in writing. It is not unfair for the Fund to ask for attorney's fees and costs under these circumstances because the plaintiff is protected by the Fund's statement in writing, usually under oath, that no defendant was a member during the relevant time period. All that is happening is that the plaintiff's attorney is attempting to require the Fund to undergo unnecessary expense in having to explain to a judge at a formal hearing what the Fund has already put in writing.

What the argument of Tillman boils down to is that

plaintiffs' attorneys should not be required to be aware of what is in the Florida Statutes, and that if they tried to protect themselves and their clients by joining the Fund out of precaution, they would suffer unnecessary expense. The first part of this argument is startling, and there is nothing in the record to lend any support to the second part.

CONCLUSION

For all of the above reasons, the decision of the Fourth District Court of Appeal should be reversed.

DATED this 11th day of June, 1985.

Respectfully submitted,

PERKINS & COLLINS




SAMUEL R. NEEL, III
Post Office Drawer 5286
Tallahassee, Florida 32314
(904) 224-3511

Counsel for Florida Patient's
Compensation Fund

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to MICHAEL B. DAVIS, ESQ., WALTON, LANTAFF, SCHROEDER & CARSON, Post Office Box 2966, West Palm Beach, FL 33402; DAVID F. CROW, ESQ., PAXTON, CROW, BRAGG & AUSTIN, Forum III, Suite 600, 1655 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401; EDNA L. CARUSO, EDNA L. CARUSO, P.A., Suite 4-B, Barristers Building, 1615 Forum Place, West Palm Beach, FL 33402; PHILLIP HOUSTON, KOCHA & HOUSTON, P.A., Post Office Box 1427, West Palm Beach, FL 33402; and to ROBERT M. KLEIN, DEBRA LEVY NEIMARK, STEPHENS, LYNN, CHERNAY & KLEIN, One Biscayne Tower, Suite 2400, Miami, FL on this 11th day of June, 1985.



SAMUEL R. NEEL, III