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IN THE SUPREME COURT OF FLORIDA

MILDRED IRENE ROBISON, Incompetent, by and through her guardian, ETHEL M. BUGERA, Petitioner, v. FLORIDA PATIENT'S COMPENSATION FUND, Respondent.	Case No. 66,291 Third District Court of Appeal Case No. 84-934

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS*

Petitioner filed suit against NORTH MIAMI GENERAL HOSPITAL (NMGH) on August 16, 1981. (R. 1-3). She alleged medical malpractice resulting from the lack of proper diagnosis, treatment or care by NMGH. (Id.). The cause of action accrued on September 3, 1979, the date when Petitioner sustained serious personal injuries when she slipped and fell on NMGH's premises. (Id.).

Almost sixteen (16) months later, and over fifteen (15) months after the two-year limitation period for medical malpractice claims had run, Petitioner filed her Amended Complaint on December 6, 1982, for the first time naming the Florida Patient's Compensation Fund ("Fund") as a party. (R. 8-10). Contrary to her assertion at Page 2 of her brief, Petitioner did not allege that at any time prior to filing this action she made an inquiry of Section 768.54, Florida Statutes (1981). Nor did she allege that the Fund's books and records ". . . open for reasonable inspection to the general public, . . ." had at any time been denied to her or her counsel.

The Fund moved for summary judgment on the grounds this action was time barred by Section 95.11(4)(b), Florida Statutes (1983). (R. 38-39). The trial court entered a final summary judgment in the Fund's favor. (R. 52-53). The judgment was

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* The symbol "R." designates the record. All emphasis is supplied, unless indicated otherwise.

affirmed on appeal and certified to this Curt as passing on a question of great public importance.

CERTIFIED QUESTION

The District Court of Appeal, Third District, certified this case as passing on the same dispositive issue presented in Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984); Lugo v. Florida Patient's Compensation Fund, 452 So.2d 633 (Fla. 3d DCA 1984) and Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984). Each of these holdings is consistent with determinations of the First and Second District Courts of Appeal on the identical question. Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA 1984); Owens v. Florida Patient's Compensation Fund, 428 So.2d 708, 710 (Fla. 1st DCA 1983). Only the Fourth District has conflicted with these holdings. Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984).

ARGUMENT

A.

THE FUND IS ". . . IN PRIVITY WITH THE PROVIDERS OF HEALTH CARE" WITHIN THE PURVIEW OF SECTION 95.11(4)(b).

Before directly addressing Petitioner's contention that the Fund is not in privity with NMGH, it should be observed what Petitioner apparently does not argue in this case. She apparently recognizes that if Section 95.11(4)(b) governs, her claim was

filed over fifteen (15) months late against the Fund, and cannot "relate back". The "relation back" doctrine ordinarily does not apply to a defendant named after the limitations period expires. See, Garrido v. Markus, Winter, et al., 358 So.2d 577 (Fla. 3d DCA 1978) [law partners could not be added in a suit against their firm after the statute ran]. Statutes of limitations are arbitrary periods created by the legislature which are not mere technicalities but are fundamental to a well ordered judicial system. 35 Fla.Jur.2d, Limitations and Laches §3. The statute operates to extinguish the enforcement of legal remedies. Id., §4.

Petitioner takes the position that notwithstanding her lawsuit ineluctably is a "medical malpractice" claim, Section 95.11(4)(b) does not govern the Fund because it is neither a health care provider nor "in privity" with one. Petitioner makes no serious effort to justify application of another general limitations statute in lieu of the more specific enactment (Section 95.11(4)(b)) passed at the same time as Florida's Medical Malpractice Reform Act. See, Ch. 75-9, Laws of Florida, pp. 13-15, 20-21. The Fund was created in the same legislative enactment. Id., p. 27-30. [Relevant portions of Ch. 75-9 are annexed hereto as an appendix].

The court in both Burr and Taddiken rejected arguments that the more general statutes of limitations in Section 95.11(3)(f) [claims founded on a statutory liability]; 95.11(3)(a) [action for negligence]; or 95.11(3)(p) [action not provided for elsewhere] would govern a medical malpractice claim against the Fund.

A specific statute of limitations involving enforcement of specific rights is exclusive of more general provisions. Wetmore v. Brennan, 378 So.2d 79 (Fla. 3d DCA 1979); Hughey v. Stevmier, Inc., 190 So.2d 410, 415 (Fla. 2d DCA 1966).

For the same reason, Petitioner cannot rely on Section 95.11(2)(b) [governing an action on a written contract]. Because the Fund is not a surrogate insurance company, as Petitioner contends (see, Point B, infra.), there is no insurance contract of indemnity. Also, Petitioner's action is founded on medical malpractice, not a contract. Mercy Hospital v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979).

Petitioner's argument that the Fund lacks privity with health care providers flies in the face of her assertion that the Fund "functions as an insurer." Courts long have recognized a clear privity relationship between "insurer" and "insured". See, Jones v. Zurich General Accident & Liability Ins. Co., 121 F.2d 761, 763 (2d Cir. 1941). The plain meaning of the language employed in Section 95.11(4)(b) is that it extends to parties in privity "with the provider of health care."

The word "privity" is a more general usage of the term. Often, the more specific phrase "privity of contract" is used with reference to a peculiar mutual relationship subsisting between parties to some particular transaction. See, Words and Phrases, "Privity of Contract", p. 638 (1971).

Petitioner relies on Gonzales v. Jacksonville General Hospital, Inc., 365 So.2d 800 (Fla. 1st DCA 1978) and dictum in the opinion that Section 95.11(4)(b) requires privity between

claimants and health care providers as well as privity between claimants and any other persons the claimants allege to be liable. This dictum is of little consequence because in Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981), this Court quashed the district court's judgment determining only Section 95.11(6), Florida Statutes (1973) applied.

Moreover, the same district court in Owens v. Florida Patient's Compensation Fund, supra, implicitly rejected the Gonzales rationale as applied to the Fund. The Second District Court of Appeal in Burr v. Florida Patient's Compensation Fund, supra, expressly rejected Gonzales, stating:

> . . . It is clear to us that section 95.11(4)(b) applies when there is privity not only between the claimant and the health care provider, but also when anyone connected with the incident against whom the claimant alleges damages is in a privity relationship with the health care provider. (Court's emphasis). (447 So.2d at p. 351).

The Second District's interpretation of the statute in Burr comports with the plain meaning of the statutory language of Section 95.11(4)(b).

In Taddiken v. Florida Patient's Compensation Fund, supra, the Third District echoed the Second District's reasoning in Burr, stating:

> . . . To conclude otherwise and require a two-year statute of limitations for the Fund member but a four-year statute of limitations for the Fund itself would create the possibility that the litigation would be nearly concluded before the statute of limitations would bar the Fund's joinder. (Citing Burr).

> Such a result would seriously impair the Fund's right to defend the case. (449 So.2d at p. 958).

It also might mean that a plaintiff would be time barred from maintaining a malpractice claim against the health care provider, but still could sue the Fund under a longer limitations period. Such a result would be absurd. Fundamental rules of statutory construction require that the courts give effect to the plain legislative intent governing a statute and at the same time avoid absurd results and evil consequences. Foley v. State, 50 So.2d 179 (Fla. 1951); State Dept. of Public Welfare v. Bland, 66 So.2d 59 (Fla. 1953); Pinellas County v. Woolley, 189 So.2d 217 (Fla. 2d DCA 1966).

The court in Taddiken also extensively quoted the language of Section 768.54(3)(e)(1), Florida Statutes (1979) providing in part that ". . . the person filing the claim shall not recover against the fund unless the fund was named as a defendant in the suit. . . ." Arguably, this language creates privity not only between the Fund and the Fund member, but also between claimants and the Fund which the court in Gonzales, supra, articulated as the privity test under Section 95.11(4)(b). The court in Owens and Mercy Hospital v. Menendez, supra, expressly held ". . . the Fund has obligations primarily to the plaintiff in a medical malpractice action. . . ."

In VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983), this Court ruled that the Legislature may create a "substantive right" prohibiting joinder of private

insurance companies. It follows that the Legislature may require joinder of the Fund in Section 768.54(3)(f), Florida Statutes (1983). The Legislature envisioned the claim against the Fund is not "derivative", but that the Fund has a special privity relationship with health care providers, beneficial to the public, and even with the claimants against the Fund.

The court in Taddiken correctly concluded:

> . . . There is no definition of privity which can be applied in all cases, Tallahassee Variety Works v. Brown, 106 Fla. 599, 144 So. 848, 852 (1932), and in fact, the meaning will vary according to the purpose for which the theory is invoked. Generally, however, privity refers to a mutual or successive relationship to the same right. Osburn v. Stickel, 187 So.2d 89 (Fla. 3d DCA 1966). In the present case, there is a mutality of interest which exists between a health care provider and the Fund which extends to the lawsuit itself, the alleged claims of medical malpractice and the damages claimed. The very relationship which exists between the Fund member and the Fund is the underlying reason for the legislature's mandate that the Fund must be joined as a defendant in the lawsuit. . . . (449 So.2d at p. 957-958).

B.

THE SO-CALLED "INSURER'S EXCEPTION" TO THE STATUTE OF LIMITATIONS, PREDICATED ON THIRD PARTY CONTRACT BENEFICIARY RATIONALE, DOES NOT APPLY TO THE FUND.

Petitioner's second line of attack is to argue the claim against the Fund does not accrue until a judgment is entered against the Fund member. She analogizes the Fund to the private

insurance industry, arguing the Fund in essence provides indemnity contracts to its members. Petitioner relies on Clemons v. Flagler Hospital, Inc., 385 So.2d 1134 (Fla. 5th DCA 1980) and Davis v. Williams, 239 So.2d 593 (Fla. 1st DCA 1970). Neither case applies. Petitioner's cause of action for medical malpractice against the Fund is not "derivative"; the Fund does not "indemnify" NMGH; and Petitioner is not a third party beneficiary to an insurance contract.

Petitioner relies on Professional Lens Plan, Inc. v. Department of Insurance, 387 So.2d 548 (Fla. 1st DCA 1980). She argues the Fund "mirrors" an insurance carrier and its characteristics are the same. She ignores the result in the case upon which she relies. The court held that an annual "fee" paid by participating optometrists to furnish replacement contact lenses to their patients was not a "premium" of insurance. It also found the contract was "not one of indemnity." Finally, the court found appellant was not engaged in the insurance business. The court relied on this Court's decision in Landis v. DeWitt C. Jones Co., 108 Fla. 613, 147 So. 230, 231-232 (1933) wherein this Court said, "A contract of insurance is purely a business adventure, . . ."

Even if it be assumed for argument's sake that the Fund's privity relationship with its member is "contractual", rather than more appropriately characterized as statutory, the Fund is not engaged in a "business adventure". It "purely" is a creature

of statute. It is non-profit. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815, 817 (Fla. 1983). The Fund is ". . . responsible to the legislature, which determines the amount of fees it may receive . . .", and it ". . . exercises no choice in the acceptance of a risk or of a member. . . ." Florida Patient's Compensation Fund v. Mercy Hospital, 419 So.2d 348, 350 (Fla. 3d DCA 1982).

The Fund, like the appellant in Professional Lens Plan, supra, does not provide a contract of indemnity. Its liability is not co-extensive with the health care provider. The latter's liability was limited in 1979 (the date Petitioner's claim arose) to $100,000.00; after that, the Fund assumed direct and complete responsibility to the Petitioner. That is why the courts have concluded the Fund "primarily" is obligated to plaintiffs in medical malpractice cases, and its obligation is "not secondary." Mercy Hospital, Inc. v. Menendez, supra; Owens v. Florida Patient's Compensation Fund, supra.

Another significant difference between the Fund and an insurer is the joinder requirement. The Legislature obviously believed the Fund's direct responsibility to claimants required its joinder to recover against the Fund. There is no such requirement against private insurance carriers. Once a plaintiff effectuates his recovery against an insured, he or she is free to institute an independent cause of action against the insurer as a third party beneficiary to the indemnity contract.

C.

PETITIONER CANNOT RELY ON "BLAMELESS IGNORANCE" TO ESCAPE THE BAR OF SECTION 95.11(4)(b).

Petitioner contends she only "learned of the Fund's existence . . ." and the coverage afforded NMGH during pre-trial discovery. The Fund was created in 1975, four (4) years before Petitioner suffered an injury. See, Ch. 75-9, Laws of Florida p. 13. No pre-trial discovery was required to learn of its existence. The Legislature's requirement that the Fund be named a party to medical malpractice suits against health care providers certainly created no onerous requirement. Prudence would dictate that the Fund always should be contacted in a medical malpractice case before the action is commenced to ascertain if a particular health care provider is a Fund member. Such a requirement would satisfy the legislative concern that the Fund be named as a party and given a meaningful opportunity to defend the litigation. See, Mercy Hospital v. Menendez, supra.

Nothing precluded Petitioner from ascertaining that NMGH was a Fund member before her lawsuit was instituted. Section 768.54(3)(e)(2), Florida Statutes (1983) provides:

> All books, records, and audits of the fund shall be open for reasonable inspection to the general public, . . .

"Blameless ignorance" ordinarily applies in products liability or fraud cases where facts may be difficult to uncover, even

if due diligence is exercised. See, Section 95.031(2), Florida Statutes (1983). It should not apply when a party created by Florida Statutes easily may be discovered by the exercise of due diligence.

In summary, the Fund is a party ". . . in privity with the health care provider" envisioned by the two-year statute of limitations (Section 95.11(4)(b), supra), applicable to medical malpractice cases. The Fund is not a private "insurer"; rather it is a publicly created non-profit fund designed to ensure the system protects claimants who suffer death, injury or monetary loss resulting from medical malpractice.

CONCLUSION

For the reasons stated, the judgment of the trial court and the district court of appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits, has been provided by United States mail to William F. Fann, Esquire, Yates & Fann, 9999 N.E. Second Avenue, Suite 301, Miami Shores, Florida 33138; Michael C. Siboni, Esquire, Barwick & Dillian, P.A., The Everett Building, Suite C, 9636 N.E. Second Avenue, Miami Shores, Florida 33138; Miles A. McGrane, III, Esquire, Talburt, Kubicki, Bradley & Draper, 701 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; Karen A. Brimmer, Esquire, Stephens, Lynn, Chernay, Klein & Zuckerman, 2400 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131 and Harvey D. Rogers, Esquire, 1401 N.W. 17th Avenue, Miami, florida 33125 this 8th day of February, 1985.