IN THE SUPREME COURT OF FLORIDA
CASE NO. 66,291
THIRD DISTRICT COURT OF
APPEAL CASE NO. 84-934

MILDRED IRENE ROBISON,
Incompetent, by and
through her guardian,
ETHEL M. BUGERA,

Petitioner,

vs.

FLORIDA PATIENT'S
COMPENSATION FUND,

Respondent.

_____/

BRIEF OF PETITIONER
ON THE MERITS

BARWICK & DILLIAN, P.A.
The Everett Building, Suite C
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and

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Attorneys for Petitioner

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PREFACE

For the sake of brevity, the petitioner, Mildred Irene Robison, by and through her legal guardian, Ethel M. Bugera, shall be referred to herein as "ROBISON"; the Respondent, Florida Patient's Compensation Fund, shall be referred to as the "FUND." The symbol "R" shall stand for the record on appeal. Unless otherwise indicated, all emphasis appearing in this brief is supplied by counsel.

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TABLE OF CITATIONS

CASE LAW

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STATUTES

OTHER AUTHORITIES

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STATEMENT OF THE CASE AND OF THE FACTS

The District Court of Appeal, Third District, certified the question in this case to be one of great public importance and noted conflict with the Fourth District Court of Appeal in Florida Patient's Compensation Fund v. Tillman, 453 So. 2d 1376 (Fla. 4th DCA 1984) wherein the Court adopted the rationale of Judge Ferguson's dissent in Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3rd DCA 1984) and held that the two year statute of limitations was not applicable to the FUND.

Petitioner was plaintiff in the trial court and appellant in the Third District Court of Appeal. Respondent was defendant and appellee. Robison sought review of a final summary judgment entered by the trial court in favor of the FUND. The original Complaint was filed by Robison on August 26, 1981 (R. 1-3) alleging negligence on the part of North Miami General Hospital in the care and treatment rendered plaintiff. Robison had been admitted to said hospital on August 30, 1979, after being found lying on the floor of the trailer where she lived. She was being treated for physical injuries as well as mental and emotional conditions. On September 3, 1979, the plaintiff left her hospital room and subsequently sustained a fall from the second floor of the hospital suffering injuries.

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Interrogatories were propounded to the defendant, North Miami General Hospital by the plaintiff and the hospital answered these interrogatories on October 13, 1981. (R. 4-7) Questions 4. and 5. specifically addressed the identity of all insurance carriers for the defendant hospital. The specific questions and answers are as follows:

4. State the name and address of any and all insurance carriers for defendant whose policy may cover the injuries here sued upon.

A. 1. Florida Medical Malpractice Joint Underwriting Association (FMMJUA)
325 John Knox Road
Tallahassee, Florida 32303

2. Florida Patient's Compensation Fund (PCF)
325 John Knox Road
Building S - Suite 106
Tallahassee, Florida 32303

5. As to each insurance carrier listed in the answer to question 4. above, please state:

4. 1) (a) policy number - HD509MJ0034
(b) period of coverage - July 1, 1979 to July 1, 1980
(c) amount of coverage - 100,000 each claim 2,500,000 aggregate

4. 2) (a) certificate number - 1363
(b) period of coverage - July 1, 1979 to July 1, 1980
(c) amount of coverage - unlimited

The information provided in these answers to interrogatories was the first instance in which plaintiff became apprised of the FUND's coverage. (R. 4-7) The Complaint was filed August 21, 1981 (R. 1-3) and these interrogatories were propounded September 10, 1981, to the defendant hospital (R. 4-7) The Fund's involvement was not discovered until

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more than two years after the incident occurred while the plaintiff was a patient at North Miami General Hospital.

In response to the hospital's answer that the FUND was an insurance carrier, Robison sought leave of court to amend the Complaint and filed an Amended Complaint (R. 8-10) naming the FUND as a party defendant. The Fund filed a Motion for Summary Judgment or Alternatively, Motion For Judgment on the Pleadings, raising the applicability of Florida Statute §95.11(4)(b). (R. 38-39) The Fund's position was that it could not be joined more than two years after the incident giving rise to the claim. After argument of counsel, the trial court ruled in favor of the FUND entering Final Summary Judgment April 5, 1984. (R. 52-53)

Robison took an appeal to the Third District Court of Appeal seeking review of the Final Summary Judgment in favor of the FUND and the District Court per curiam affirmed the trial court on the authority of Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3rd DCA 1984); Lugo v. Florida Patient's Compensation Fund, 452 So.2d 633 (Fla. 3rd DCA 1984); and Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3rd DCA 1984). The Third District has certified Fabal (Supreme Court Case No. 65,730); Lugo (Supreme Court Case No. 65, 765); and Taddiken (Supreme Court Case No. 65,690) to this Court for decision on a single question of great public

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importance. This Court has accepted jurisdiction in all three cases.

In the instant case, the Third District stated that, consistent with their decision in Lugo, they were certifying the issue presented here as one of great public importance and noted conflict with the Fourth District Court of Appeal in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984).

THE CERTIFIED QUESTION

> Whether a claim against the Florida Patient's Compensation Fund arises at the time of the alleged medical malpractice, rather than when judgment is entered against the tortfeasor, and is governed by the two year statute of limitations provided by §95.11(4)(b), Florida Statutes (1977), so that the FUND must be made or joined as a party defendant within two years after the malpractice action accrues?

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ARGUMENT

A. THE FUND IS NOT A HEALTH CARE PROVIDER AS DEFINED BY STATUTE AND CASE LAW.

The Court below relying on Fabal, Lugo and Taddiken, supra, reasoned that the FUND was subject to a two year statute of limitations and, as such, ROBISON's Amended Complaint naming the FUND as a party defendant, which was filed more than two years from the incident in question was barred by the provisions of Florida Statutes §95.11(4)(b), which provides:

> 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 sub-section shall be limited to the health care provider and persons in privity with the provider of health care.** In those actions covered by this paragraph in which it can be shown that fraud, concealment or intentional misrepresentation of fact prevented the discovery of the injury within the 4 year period, the period of limitations is extended for 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date of the incident giving rise to the injury occurred.

The error of the Court below in such reasoning is that

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Florida Statute §95.11(4)(b) applies only to "health care providers" and "persons in privity with the provider of health care." In order to define "health care provider," an examination of Florida Statute §768.54(1)(b) is essential. It states as follows:

. . . .

(b) The term "health care provider" means any:
1. Hospital licensed under chapter 395.
2. Physician licensed, or physician's assistant certified, under chapter 458.
3. Osteopath licensed under chapter 459.
4. Podiatrist licensed under chapter 461.
5. Health maintenance organization certificated under part II of chapter 641.
6. Ambulatory surgical center licensed under chapter 395.
7. "Other medical facility" as defined in paragraph (c).
8. Professional association, partnership, corporation, joint venture, or other association by the individuals set forth in subparagraphs 2., 3., and 4. for professional activity.

(c) "other medical facility" means a facility the primary purpose of which is to provide human medical diagnostic services or a facility providing nonsurgical human medical treatment and in which the patient is admitted to and discharged from such facility within the same working day, and which is not part of a hospital. However, a facility existing for the primary purpose of performing terminations of pregnancy, or an office maintained by a physician or dentist for the practice of medicine, shall not be construed to be an "other medical facility."

. . . .

It is clear that within its own statute, The Florida Patient's Compensation Fund is not a "health care provider." This conclusion is further supported by the case of Florida Medical Center, Inc. v. Von Stetina, 436 So.2d 1022 (Fla.

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4th DCA 1983). After stating the definition of a health care provider as given under Florida Statutes §768.50(2)(b), which constitutes nothing more than an expansion of Florida Statutes §768.54(1), the Court concluded that the FUND is not a health care provider. The Court stated:

> This [F.S. §768.50(2)(b)] rather clearly eliminates the FUND from the benefit of the statute. The Fund's argument on this point is not convincing, especially when one refers to [. . . the cited statutes . . .]. 436 So.2d at 1029.

The statutory language and the Von Stetina case support the common sense conclusion that: the FUND is not a health care provider. It is not a hospital, physician, health maintenance organization or any other entity listed under Florida Statutes §768.54(1)(b).

B. THE FUND IS NOT "IN PRIVITY" WITH THE HEALTH CARE PROVIDER.

In addition, the two year statute of limitations listed under Florida Statutes §95.11(4)(b) pertaining to "persons in privity with the providers of health care" does not apply to the FUND. In Gonzales v. Jacksonville General Hospital, Inc., 365 So.2d 800 (Fla. 1st DCA 1978), quashed on other grounds 400 So.2d 965 (Fla. 1981), the patient sustained injury after being given a shot by a hospital nurse. The plaintiff had originally filed suit only against the hospital, but later amended her complaint to include two additional defendants, Homemakers, Inc., and Medical Personnel Pool of Duval County, Inc. The latter two defen-

dants had allegedly provided the hospital with the nurse who negligently administered the shot. The Court held that the two year statute of limitations relating to persons in privity with the health care provider was not applicable to Homemaker and Medical Personnel Pool of Duval County. Instead, the four year statute of limitations given in Florida Statutes §95.11(3)(a) dealing with actions founded on negligence was applicable. The Court, regarding the word "privity" noted as follows:

> We are of the view that the legislature intended by the language employed to limit the application of the two year limitation to actions wherein privity exists between the claimant and the health care provider and any other persons (or corporations) claimed by the claimant to be liable and with whom there exists a privity relationship. Such a construction is in keeping with the verbiage of predecessor statutes and with the logical conclusion that the legislature intended to impose a two year limitation upon claims between parties in privity, one with the other, but to allow additional time for discovery and assertion of claims against persons claimed to be liable but with whom the claimant has no privity relationship. 365 So.2d at 803.

Judge Ferguson in his dissent in the case of Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3rd DCA 1984), points out that the term "privity" in connection with medical malpractice actions refers only to successive proprietors of the health care provider.

> Although the term "privity" has no definition which can be applied uniformly, Tallahassee Variety Works v. Brown, 106 Fla. 599, 610; 144 So. 848, 852 (1932), it is not completely elusive, but denotes a mutual or successive relationship to the same interest in property. Industrial Credit Co. v. Berg 388 F.2d 835, 841 (8th Cir. 1968);

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> Osburn v. Stickel, 187 So.2d 89, 92 n.2 (Fla. 3rd DCA 1966). The relationship between the hospital and the FUND, whereby the FUND agrees to provide "coverage" to the hospital to the extent that a malpractice claim against the hospital exceeds $100,000.00, does not remotely qualify as a privity relationship - else so might any contractual relationship . . . applying the definition of privity to the terms in its statutory context, the logical conclusion is that the two-year time period within which a medical malpractice action must be commenced against a tortfeasor health care provider applies only to any successor in ownership to that health care provider. 452 So.2d at 950.

The Court in Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3rd DCA 1979) described the FUND as being "like an insurance program" and discussed the matter of privity. It stated:

> It is apparent from a reading of the Medical Malpractice Reform Act that the legislature did not set up an insurance fund with obligations to the health care provider. **The plan is one in which the FUND has obligations primarily to the plaintiff in a medical malpractice action.** 371 So.2d at 1079.

A plain reading of Florida Statutes 95.11(4)(b), combined with Gonzales, Menendez and Judge Ferguson's dissent in Fabal, clearly implies that the privity requirement relates to privity between parties to the actual medical treatment involved. It bears no relationship to the FUND and, as such, the FUND cannot be considered "in privity with the provider of health care." In addition, the Medical Malpractice Reform Act statutory obligations run from the FUND "primarily to the plaintiff in a malpractice action." Menendez, supra.

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Since the FUND is not subject to a two year statute of limitations which governs health care providers, it therefore must be subject to a four year statute of limitations as concluded in Gonzales, supra. Therefore, any action against the FUND would come under Florida Statutes §95.11(3), four year statute of limitations as either:

1. An action founded on negligence, 95.11(3)(a);

2. an action founded on statutory liability, 95.11(3)(f) or,

3. any action not specifically provided for in these statutes, 95.11(3)(p).

C. THE FUND FUNCTIONS AS AN INSURER.

Upon examination of the FUND and the purpose of its creation, only one logical conclusion may be reached: the FUND functions as an insurer and any cause of action against it does not accrue until a judgment has been entered against its insured. Insurance has been defined as "an agreement whereby one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils." 43 Am.Jur.2d Insurance §1; and 30 Fla.Jur.2d Insurance §2. In the case of Professional Lens Plan, Inc. v. Department of Insurance, 387 So.2d 548 (1st DCA 1980) the Court listed five elements that are normally present in insurance contracts. They are: (1) an insurable interest; (2) a risk of loss; (3)

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an assumption of the risk by the insuror; (4) a general scheme to distribute the loss among the larger group of persons bearing similar risks; and (5) the payment of a premium for the assumption of risk. (Citing Guaranteed Warranty Corp. v. Humprhey, 533 P.2d 87 (1975) 387 at 550).

Florida Statute 768.54(3)(a) which describes the FUND's purposes certainly mirrors the purpose and function of an insurance carrier. Although it describes the "insured" as a "member" it is clear that the legislative intent was to treat the FUND as an "insurer." The Statute reads:

> **(3) The fund.-**
>
> (a) Purposes.--There is created a "Florida Patient's Compensation Fund" for the purpose of paying that portion of **any claim arising out of the rendering or failure to render medical care or services, or arising out of activities of committees, for health care providers or any claim for bodily injury or property damage to the person or property of any patient,** including all patient injuries and deaths, **arising out of the members' activities** for those health care providers set forth in subparagraphs (1)(b)1., 5., 6. and 7. . . .

The case of Florida Medical Center, Inc., v. Von Stetina, supra, acknowledges the FUND as an insurer. The Court stated:

> To the extent that the statute creates a trust fund in the nature of liability insurance for the hospital, the Court does not find it constitutionally offensive. To the extent that the statute restricts the plaintiff's right to recover her judgment from the hospital and that fund, however, it violates several fundamental provisions

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> of both the Florida and United States' Constitutions when applied to the facts in this case. 436 So.2d at 1025.

In the case at bar, all of the necessary elements to comprise a contract of insurance are incorporated into the Florida Patient's Compensation Fund. It is interesting to note that in answers to interrogatories, the health care provider, North Miami General Hospital, listed the FUND as its insurance carrier. In spite of the FUND's attempts to convince the Courts that it does not function as an "insurer," no other conclusion is plausible. Its members are required to pay an annual fee (premium) to receive indemnity benefits and upon payment of this premium the FUND become liable for any injuries in excess of $100,000.00 caused by its members (insureds). The Fund is an insurer.

D. A CAUSE OF ACTION AGAINST THE FUND DOES NOT ACCRUE UNTIL THERE HAS BEEN A JUDGMENT AGAINST THE FUND MEMBER.

If indeed the FUND is an insurer, and ROBISON submits that it is, then Florida law holds that the statute of limitations does not begin to run against an insurer upon the ocurrence of the incident giving rise to the cause of action. In Clemons v. Flagler Hospital, Inc., 385 So.2d 1134 (Fla. 3rd DCA 1980), the Court therein stated:

> [T]he only actual or potential ground of the insurers' liability to the plaintiff is the entirely derivative one to indemnify the hospital for any judgment rendered against it. 385 So.2d

at 1135.

In its explanation of why the statute of limitations applied to the insurer should not coincide with the statute as applied against the tortfeasor-insured, the Court quoted from Davis v. Williams, 239 So.2d 593 (Fla. 1st DCA 1970);

> Appellant's cause of action, if any, against appellee insurance company does not arise in tort but arises out of contract, and does not accrue until after the appellant has secured a judgment against the alleged defendant tortfeasor to whom appellee issued its policy of professional liability insurance. It is therefore apparent that appellant's cause of action to impose liability on appellee under the insurance policy issued by it has not yet accrued and, therefore, any statute of limitations which does not commence to run until the accrual of the cause of action has not yet been activated. 385 So.2d at 1136.

An important issue addressed by Judge Ferguson in his dissent in Fabal, supra, was the similarity between the FUND and an insurance program. He correctly noted that there is no obligation on the part of the FUND unless (1) judgment is entered against the health care provider, and (2) the amount of the judgment exceeds $100,000.00. In his historical review of the FUND's creation he noted:

> Senate Bill No. 481 which created the Florida Patient's Compensation Fund was entitled "AN ACT" relating to medical malpractice insurance . . . and referred to participating members, specifically hospitals, "as insureds." SEE Medical Malpractice Reform Act, Ch.78-47, Laws of Florida 49 . . . .
>
> There is not to be found in the original Medical Malpractice Reform Act, or any of its amendments, an intent to give the FUND any substantive rights greater than those enjoyed by insurance companies.

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> By requiring that the FUND be named as a defendant, the statute insures that the FUND is given notice of the suit and an opportunity to evaluate its rights and liabilities, to make timely investigation, to negotiate with claimants, and to prevent fraud and collusion upon it . . . . **The insurer's right to notice and an opportunity to defend a claim is a common feature in a contract of insurance, from which does not necessarily follow a right to be insulated from judgment by virtue of a statute of limitations.** 452 So.2d at 950.

Since the Florida Patient's Compensation Fund is in essence an insurer, as both legislative history and the recent Von Stetina case imply, the holding in Clemons applies. Therefore, ROBISON's cause of action against the FUND would not accrue until Final Judgment has been entered against the insured, North Miami General Hospital.

As indicated earlier, ROBISON learned of The Fund's existence and the afforded coverage in October of 1981, when the defendant, North Miami General Hospital, answered interrogatories. It was in 1983 when the FUND was added but it makes no difference because as of October, 1981, more than two years had elapsed from the date of the incident (September, 1979) or from the date that ROBISON became aware that she had a potential claim.

This timetable supports the premise that the adding of the FUND should relate back to the original Complaint because the FUND's involvement was derivative (like an insurer) and a determination should be made that the filing against the FUND either relates back to the original filing of the Complaint or, alternatively, that any cause of action

against the FUND does not exist until there has been a judgment against the Fund member.

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CONCLUSION

It is respectfully submitted that for each and every separate and distinct reason stated herein, the decision sought to be reviewed should be reversed.

Respectfully submitted,

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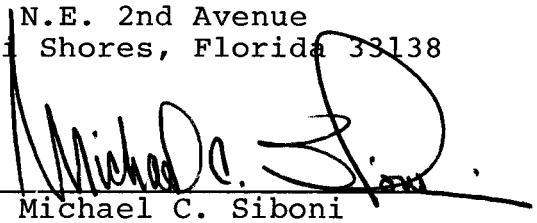
By: 
Michael C. Siboni
Attorneys for Petitioner

PETITIONER'S NOTE

Subsequent to the rendering of the opinion in the instant case (November 20, 1984), the Third District Court of Appeal has decided the case of Neilinger v. Baptist Hospital of Miami, Inc., 10 FLW 22 (Fla. 3rd DCA December 18, 1984), wherein the Florida Patient's Compensation Fund was a party defendant. The issue on appeal regarding the Fund was the same as in the instant case; whether the plaintiff's cause of action against the Fund was time barred by the two year statute of limitations for medical malpractice actions [§95.11(4)(b), Fla. Stat. (1979)]. The Court affirmed the final summary judgment entered by the trial court in favor of the Fund. In so deciding, the Court cited the following cases as authority: Robison v. Florida Patient's Compensation Fund, 9 FLW 2456 (Fla. 3rd DCA November 20, 1984); Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3rd DCA 1984); Lugo v. Florida Patient's Compensation Fund, 452 So.2d 633 (Fla. 3rd DCA 1984); Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3rd DCA 1984); Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 3rd DCA), pet. for review denied, 453 So.2d 43 (Fla. 1984); contra Florida Patient's Compensation Fund v. Tillman, 453 So. 2d 1376 (Fla. 4th DCA 1984).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, this 14th day of January, 1985, to: William F. Fann, Esq., Yates & Fann, 9999 N.E. 2nd Avenue, Suite 301, Miami Shores, Florida 33138; Thomas R. Post, Esq., 2000 Harbor Place, 901 N.E. 2nd Avenue, Miami, FL 33132; Miles A. McGrane, III, Esq., Talburt, Kubicki, Bradley & Draper, 701 City National Bank Building, 25 West Flagler Street, Miami, FL 33130; Karen A. Brimmer, Esq., Stephens, Lynn, Chernay, Klein & Zuckerman, 2400 One Biscayne Tower, Two South Biscayne Boulevard, Miami, FL 33131; Harvey D. Rogers, Esq., 1401 N.W. 17th Avenue, Miami, FL 33125; and Evan J. Langbein, of Counsel, 25 West Flagler Street, Suite 908, Miami, FL 33130.

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