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IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. **66,502**

Fourth District Court of Appeal Case No. 84-[illegible]

Florida Patient's Compensation Fund,

Petitioner,

-vs-

Elvera Isabella and Albert Isabella,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

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Petitioner,

-vs-

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TABLE OF CASES AND AUTHORITIES

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Authorities

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Statement of the Case and Facts[1]

In early December of 1978, the Isabellas sued A.F. Petti, M.D., P.A., A.F. Petti, M.D., and Hollywood Medical Center for medical malpractice, claiming compensatory and punitive damages. [R. 1-9] The Complaint was amended twice. [R. 12-13]

On April 15, 1982, at a pretrial conference, the Isabellas for the first time discovered that Dr. Petti was a participant in the Fund. [R. 35] On April 29, they moved for leave to amend to name the Fund as a defendant. [R. 34-35] The trial court granted the motion to amend on May 14, 1982, and the Isabellas filed an amended complaint naming the Fund as a defendant on June 17, 1982. [R. 51-52] In sum, the Isabellas named the Fund as a defendant immediately after discovering that Dr. Petti was a member.

When the Isabellas joined the Fund, this case had just been set for a November 15, 1982, trial. [R. 37-38]

On July 9, 1982, the Fund answered. [R. 53-54] In its answer, the Fund pleaded that it had no duty to defend because the Defendants' carrier would do so. The Fund also claimed that it could not be named as a defendant because the statute of limitations had run.

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[1] Petitioner, Florida Patient's Compensation Fund, will be referred to as the "Fund." Respondents, Albert Isabella and Elvera Isabella, will be referred to as the "Isabellas."

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On September 20, 1982, prior to trial, the Fund filed its first motion for summary judgment on the basis of the statute of limitations. [R. 55-59] The Fund claimed the bar of the two-year and four-year medical malpractice limitations periods in Fla.Stat. §95.11(4)(b). It argued that: (i) the latest date on which Dr. Petti could have committed malpractice was October, 1976, requiring naming of the Fund on or before October, 1980; and (ii) the latest date when the malpractice should have been discovered was November, 1977, requiring naming of the Fund on or before November, 1979. The trial court denied this motion.

On November 19, 1982, after the trial of this case resulted in a mistrial, the Fund filed its second motion for directed verdict and for summary judgment. [R. 66-74] This time, the Fund alleged that the Isabellas' claim was barred not only by §95.11(4)(b), but also by §95.11(3)(f), the four year statute of limitations for actions founded on a statutory liability. The trial court again denied the motion. [R. 11]

Then, on May 6, 1983, following the First District's decision in Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983), the Fund filed its third motion for final summary judgment, again claiming that both §95.11(4)(b) and §95.11(3)(f) barred the Isabellas' claim. [R. 75-80]

The Fund did not dispute the following facts. Dr. Petti's acts of malpractice occurred between March of 1976 and October of 1976. [R. 75, 118] By September of 1977, the Isabellas were on notice of Dr. Petti's malpractice. [R. 77, 118] They timely

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filed an action against the health care providers. [R. 1-113, 119] They first discovered that Dr. Petti was a member of the Fund on April 15, 1982. [R. 35, 126] They immediately moved for leave to name, and actually named, the Fund as a defendant. [R. 35-50] The Fund claimed no prejudice whatever as a result of not having been joined earlier and no denial of an opportunity to defend. In fact, the Fund claimed that it had no duty to defend because a defense was already being provided by insurance carriers. [R. 53-54]

The trial court granted the third motion for summary judgment, holding that Plaintiffs' claim was barred both by §95.11(4)(b) and by §96.11(3)(f). [R. 81-82] The Isabellas' motion for rehearing was denied, and they appealed.

Following briefing and oral argument, the Fourth District Court of Appeal reversed the summary judgment. Isabella v. Florida Patient's Compensation Fund, 465 So.2d 129 (Fla. 4th DCA 1985). The Fourth District followed its decision in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984). In Tillman, the Fourth District had adopted the rationale of Judge Ferguson's dissent in Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984), and held that claims against the Fund, like claims against an insurer, were not barred when brought after the time when the statutes of limitations would bar a claim against the defendant health care provider.

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As it had done in Tillman, the Fourth District here acknowledged that its decision conflicted with Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984); 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 (Fla. 1st DCA 1983); Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979); and Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984).

The Fund petitioned this Court for review. This Court took jurisdiction and ordered briefs on the merits.

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Point Involved on Review

Whether the Fund can avoid payment of any judgment in excess of $100,000 which may be rendered in a timely-filed malpractice action against a health care provider where the Fund was named as a defendant more than four years after discovery of the health care provider's malpractice.

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Summary of Argument

The Fourth District's decision should be affirmed. The Fund, in every relevant way, resembles an excess insurer. Like an insurer's, its liability to a claimant accrues only when a judgment in excess of $100,000 is entered against a health care provider. Therefore, whatever statute of limitations applies to claims against the Fund does not begin to run until a judgment which the Fund must pay is entered. There is no logical reason or justificaton to support barring collection from the Fund when the Fund is not named as a defendant within the time set by the statute of limitations applicable to actions against the health care provider. Whether the Fund has been timely named as a party should be determined on equitable grounds such as laches or estoppel. Where, as here, no prejudice whatever to the Fund results from its being joined after the litigation is in progress, recovery against it should not be barred.

I. THE FOURTH DISTRICT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS DID NOT BAR THE ISABELLAS' RECOVERY FROM THE FUND.

The Fourth District correctly held here that the Fund could not take advantage of any statute of limitations in this case.

In Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984), the Fourth District upheld the trial court's denial of the Fund's motion for summary judgment. The Fund had claimed that §95.11(4)(b) barred any claim against it

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where it was not named as a defendant until more than two years after discovery of the health care provider's malpractice. As it did here, the Fund claimed in Tillman that it was in privity with the health care provider and was entitled to the benefit of the two year statute.

The Fourth District rejected the Fund's argument and its statute of limitations defense. It expressly adopted the rationale of Judge Ferguson's dissent in Fabal v. Florida Keys Memorial Hosp., 452 So.2d 946 (Fla. 3d DCA 1984), and expressly rejected the majority opinions in Fabal, supra; Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984); 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 (Fla. 1st DCA 1983); and Mercy Hosp., Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCa 1979).

A. The Fund is an insurer.

Judge Ferguson's well-reasoned dissent in Fabal examined the similarities between the Fund and an insurance program. Both the Fund and the insurer contract to indemnify against specific perils. 452 So.2d at 949. Because a plaintiff's cause of action against an insurance company does not arise in tort, but out of contract, it does not accrue until after the plaintiff has a judgment against the defendant tortfeasor. Therefore the statute of limitations does not begin to run on a claim against an insurer upon the occurrence of the incident giving rise to the

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cause of action. Davis v. Williams, 239 So.2d 593 (Fla. 1st DCA 1970); Clemons v. Flagler Hosp., Inc., 385 So.2d 1134 (Fla. 5th DCA 1980). Like an insurer, the Fund has no obligation to a plaintiff unless a judgment in excess of $100,000 is actually entered against a health care provider. Fla.Stat. §768.54(3)(e)3. The claim is then presented to the Fund for payment, as it would be presented to an ordinary carrier. Claims against the Fund, like claims against an insurer, are derivative in nature. They depend not upon any tortious conduct by the Fund but solely upon a contract between the Fund and the health care provider. The Fund agrees to be liable for any damages awarded against the health care provider in an amount in excess of $100,000 in exchange for the health care provider's compliance with certain membership requirements. Also, like an insurer, the Fund is not liable for punitive damages. Florida Patient's Compensation Fund v. Mercy Hosp., Inc., 419 So.2d 348 (Fla. 3d DCA 1982). Like an insurer, the Fund must pay judgments within 90 days of their entry. Fla.Stat. §768.54(3)(e)4.

B. Legislative history supports finding that the Fund is an insurer.

Judge Ferguson also analyzed the events that led to the Fund's establishment. The legislature created the Fund to fill a void when insurance companies were raising rates and withdrawing from the professional liability insurance market, making it difficult for health care providers to obtain insurance. The Senate bill which created the Fund was entitled "an act relating

to medical malpractice insurance..." and referred to participating members, specifically hospitals, as "insureds." 452 So. 2d at 980. The Act also provided that management of the Fund should be vested with the Joint Underwriting Association authorized by the Insurance Code. As Judge Ferguson stated:

> ... There is not to be found in the original Medical Malpractice Reform Act, or any of its amendments, an intent to give to the Fund any substantive rights greater than those enjoyed by insurance companies. 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 a 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 the statute of limitations.
>
> [452 So.2d at 950]

Judge Ferguson's description of the origin and purpose of the Fund parallels this Court's own recent discussion in Florida Patient's Compensation Fund v. Von Stetina, ___ So.2d ___ (case nos. 64,237, 64,251, and 64,252, op. filed, May 16, 1985) [10 F.L.W. 286]. In Von Stetina, this Court said:

> In 1975, the Florida Legislature instituted the Fund as a non-profit entity to provide medical malpractice protection to the physicians and hospitals who join it, as well as a method of payment to medical malpractice plaintiffs....
>
> * * *
>
> ... the Florida Patient's Compensation Fund provides health care providers with medical malpractice liability coverage for the

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> benefit of both the health care providers and those members of the public who become victims of medical malpractice.... The scheme that makes the Fund party to a medical malpractice action and responsible for portions of awards in excess of $100,000 does not substantially ... change any of the plaintiff's vested rights.
>
> * * *
>
> .... [T]he subject measures were designed to reform the medical malpractice insurance system. The legislature has designated a source to pay medical malpractice judgments ... It has not modified the dollar amount of malpractice judgments that can be rendered. [10 F.L.W. at 288] [emphasis added]

C. Fund not a "person in privity" within the meaning of §95.11(4)(b)

Judge Ferguson also rejected the Fund's claim that it was a "person in privity" with the health care provider under the terms of §95.11(4)(b). Citing Indus. Credit Co. v. Berg, 388 F.2d 835, 841 (8th Cir. 1968); Osburn v. Stickel, 187 So.2d 89, 92 n.2 (Fla. 3d DCA 1966); and Strathmore Riverside Villas Condominium Ass'n v. Paver Dev. Corp., 369 So.2d 971 (Fla. 2d DCA 1979), Judge Ferguson pointed out that the relationship between a health care provider and the Fund, whereby the Fund agrees to provide coverage to the health care provider to the extent that a malpractice claim against the health care provider exceeds $100,000, does not remotely qualify as a privity relationship. If it did, any contractual relationship would. The Fund is no more a "person in privity" than any other insurer would be. Instead, as Judge Ferguson wrote:

> Applying the definition of privity to the term 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]

D. Fund's arguments incorrect.

The Fund makes three arguments before this Court in support of its contention that it should be treated as a health care provider for purposes of the statute of limitations. None of these arguments is valid.

First, the Fund argues that, because it must be named as a defendant, it is not like an insurer. This is a distinction without a difference. Requiring that the Fund be named as a defendant serves the same purpose as requiring that the insurer by notified of claims for which it may have to pay. Like an insurer, the Fund could, if prejudiced by late notice, claim laches or equitable estoppel as a reason to deny coverage. But, if its insured were timely sued, no insurer could claim the statute of limitations as a defense for the mere reason that it had received notice of the claim after the statute of limitations had run. It makes no more sense for the Fund to make this claim than for an insurer to make it.

In relation to this argument, the Taddiken and Burr courts felt that delay in making the Fund a party would impair its right to defend. But, in fact, the health care provider is statutorily obligated to provide an adequate defense of the Fund as a

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condition precedent to any obligation of the Fund to pay a claim. Fla.Stat. §768.54(3)(e)2. And because the Fund is not involved in the conduct which gives rise to the cause of action, its defense must be dependent upon and directly tied to the defense of the health care provider. Once again, equitable principles, such as laches or estoppel, should govern whether the plaintiff should be permitted to join the Fund as a defendant long after the action is commenced. This amply protects the Fund against any prejudice, without unnecessarily penalizing the victim of medical malpractice.

Secondly, the Fund argues that it is not like an insurer because it is not obligated to defend unless named as a defendant in a claim determined to exceed $100,000. This distinction is also invalid. An excess insurer ordinarily has no duty to defend unless the claim exceeds the underlying coverage and, like the Fund, can rely on the primary insurer to defend.

Finally, the Fund argues, relying on Owens and Menendez, that it is not like an insurer because its obligation is "primarily to the plaintiff in a medical malpractice action." This proposition simply will not withstand analysis. The Fund has no more obligation to a plaintiff than an excess insurer has. Judge Ferguson correctly analyzes this in his Fabal dissent, where he explains the reasons that led the Third District to this erroneous conclusion in Menendez. 452 So.2d at 951. And in Von Stetina, this Court continuously refers to the Fund as an

entity created to benefit both the health care provider and the claimant.

E. Statutory construction and policy considerations contradict the Fund's position.

The medical malpractice act sets no time limit for naming the Fund as a defendant. Where there is reasonable doubt concerning a legislative intention to provide for a shortened limitations period, the benefit of the doubt should be given to the plaintiff. Haney v. Holmes, 364 So.2d 81 (Fla. 2d DCA 1978). The appellate decisions which for the first time engrafted the two-year and four-year limitations periods onto the medical malpractice act have operated to deny recovery to deserving plaintiffs. Before those decisions were rendered, those plaintiffs truly had no reason to believe that they had an obligation to look for the Fund and name it as a defendant immediately upon filing of their claims. Those decisions ignore the similarities between the Fund and insurance carriers, the language and purpose of the statute, the unfairness to the claimant, and the lack of any prejudice to the Fund. Furthermore, the net result of these decisions would be the naming of the Fund as a defendant in every medical malpractice action. No claimant can afford to wait to determine if his claim exceeds $100,000, or if the Fund insures the defendant, in view

of the risk of losing coverage altogther. The Fourth District correctly declined to follow this unwise trend.[2]

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[2] The statute of limitations begins to run when a party knew or should have known of his cause of action. Creviston v. Gen. Motors Corp., 225 So.2d 331 (Fla. 1969); Miami Beach First Nat'l Bank v. Edgerly, 121 So.2d 417 (Fla. 1960); City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); Senfeld v. The Bank of Nova Scotia Trust Co. (Cayman), Ltd., Case No. 83-854, 9 F.L.W. 1007 (Fla. 3d DCA May 1, 1984); First Fed. Sav. & Loan Ass'n of Wisconsin v. Dade Fed. Sav. & Loan Ass'n, 403 So.2d 97 (Fla. 5th DCA 1981); Green v. Bartel, 365 So.2d 785 (Fla. 3d DCA 1978); Lund v. Cook, 354 So.2d 940 (Fla. 1st DCA 1978); Tullo v. Horner, 296 So.2d 502 (Fla. 3d DCA 1974). Absent a showing of actual knowledge, the question of when a cause of action should have been discovered is a factual one, not appropriately passed upon at the pleadings stage or on summary judgment. Rosen v. Sparber, 369 So.2d 960, 961-62 (Fla. 3d DCA 1979)(where record does not show actual knowledge, issue of whether plaintiff should have known by the exercise of reasonable diligence that he had a cause of action is for the jury to determine and cannot be resolved on a motion for summary judgment); State ex rel Div. of Administration v. Oliff, 350 So.2d 484 (Fla. 1st DCA 1977)(question of when cause of action should have been discovered is a factual one, not appropriately passed upon at the pleadings stage); Schetter v. Jordan, 194 So.2d 130 (Fla. 4th DCA 1974)(issue of when cause of action became known to plaintiff is a question of fact to be determined by the trier of fact and not by the court in a summary proceeding).

Here, there was no actual knowledge until April, 1982, and the Fund was joined immediately. There was no evidence conclusively establishing that the Isabellas would have known about the Fund before. Therefore, the issue was for the jury.

F. Fund's argument that §95.11(3)(f) bars this action also incorrect.

No appellate decision supports the Fund's alternative argument that Fla.Stat. §95.11(3)(f), which bars actions to recover on a statutory liability, bars the Isabellas' claim against the Fund here. Even cases applying §95.11(4)(b) to the Fund have rejected the application of §95.11(3)(f) to bar claims against the Fund. See Burr v. Florida Patient's Compensation Fund, supra; Taddiken v. Florida Patient's Compensation Fund, supra.

And, even if §95.11(3)(f) applied to actions against the Fund, it would not bar the Isabellas' claim here. The Fund has no liability whatever to the Isabellas until a judgment exceeding $100,000 is entered against the Defendant health care providers or a settlement exceeding $100,000 is negotiated with the Fund's approval. Neither event has occurred here. Until either event occurs, the Isabellas have no claim against the Fund, no statutory liability they can enforce, and no statute of limitations running against them.

Conclusion

The Fourth District correctly reversed the trial court's summary judgment. The statute of limitations does not bar the Isabellas' joinder of the Fund here. The Fourth District's decision should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed/~~hand-delivered~~, this 2nd day of July, 1985, to: Betsy E. Gallagher, Esq., Talburt, Kubicki, Bradley & Draper, Suite 701, 25 West Flagler Street, Miami, Florida 33130; Martin Davis, Esq., 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; and to Norman Klein, Esq., 2750 N.E. 187th Street, North Miami Beach, Florida 33180.

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