

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 66,502
Fourth District Court of Appeal Case No. 84-747

FLORIDA PATIENT'S COMPENSATION FUND,
Petitioner,
-vs-
ELVERA ISABELLA and ALBERT ISABELLA,
Respondents.

FILED

SID J. WHITE

FEB 27 1985

CLERK, SUPREME COURT

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Chief Deputy Clerk

**BRIEF OF PETITIONER
ON JURISDICTION**

TALBURT, KUBICKI, BRADLEY & DRAPER
BY: BETSY E. GALLAGHER
Attorneys for Petitioner
701 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Telephone: 305/374-1212

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STATEMENT OF THE CASE AND FACTS¹

This is a proceeding to invoke this Court's discretionary jurisdiction to review a decision of the Fourth District Court of Appeal (A. 1-2). Art. V, §3(b)(3), Fla. Const. (1980). The decision expressly and directly conflicts with decisions of other District Courts of Appeal on the same question of law. The conflict is a serious one which should be remedied by this Court.

The issue before the Fourth District was whether the two-year statute of limitations contained in Florida Statute 95.11(4)(b) or the four-year statute of limitations in Florida Statute 95.11(3)(f) is applicable to claims against the FUND. The Fourth District opinion states that "[m]ore than four and a half years after accrual of the claim for medical malpractice," the ISABELLAS amended their complaint to add the FUND. As reflected in the opinion, the trial court granted summary judgment in favor of the FUND on the ground that the two statutes of limitations cited above had expired. The Fourth District reversed the summary based on its decision in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984). The Fourth District decision and its earlier Tillman decision reflect that the Fourth District is applying the statute

¹/ Petitioner will be referred to as the FUND, and respondents will be referred to as ISABELLAS. The parties will alternately be referred to as they stand before this Court. "A" refers to the appendix attached to this brief.

of limitations "insurers exception" to the FUND.² Earlier decisions from the First, Second and Third District Courts of Appeal, set forth below, are directly in conflict with the Fourth District decisions.

The Fourth District decision shows on its face a conflict between the Fourth District decision and decisions of other district courts of appeal. In this regard, the opinion states, in part:

We again acknowledge that this court's decision is in direct and express conflict with the following cases: 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), petition 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, 452 So.2d 946 (Fla. 3d DCA 1984).

Petitioner presently seeks to invoke the certiorari jurisdiction of this Court by demonstrating a conflict between the decision of the Fourth District Court of Appeal and five prior cases of the First, Second and Third District Courts of Appeal.

²/ The statute of limitations against liability insurers does not begin to run until after the plaintiff secures a judgment against the insured. Davis v. Williams, 239 So.2d 593 (Fla. 1st DCA 1970); Clemons v. Flagler Hospital, Inc., 385 So.2d 1134 (Fla. 5th DCA 1980).

POINT INVOLVED ON APPEAL

WHETHER THE FOURTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOLLOWING DISTRICT COURT DECISIONS: 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), petition 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, 452 So.2d 946 (Fla. 3d DCA 1984).

SUMMARY OF ARGUMENT

Petitioner argues that the Fourth District Court of Appeal's decision expressly conflicts with five earlier decisions from the First, Second and Third District Courts of Appeal: 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), petition 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, 452 So.2d 946 (Fla. 3d DCA 1984). The Fourth District opinion expressly acknowledges conflicts with the five earlier decisions relied on to create the direct conflict in this proceeding.

The Fourth District's opinion in this medical malpractice case determined that the two-year statute of limitations for health care providers, etc. contained in Florida Statute 95.11(4)(b) is not applicable to the Florida Patient's Compensation Fund. The earlier decisions in Taddiken, Fabal, Owens and Burr directly and expressly conflict with the Fourth District decision because they hold that Florida Statute 95.11(4)(b) is applicable to the joinder of the FUND in a medical malpractice case. All five decisions are in conflict with the present

decision because they hold that the FUND is not an insurer or insurance fund, and the instant decision reflects that the Fourth District is applying the statute of limitation's "insurer's exception" to the FUND.

A R G U M E N T

THE FOURTH DISTRICT DECISION EXPRESLLY AND DIRECTLY CONFLICTS WITH THE FOLLOWING COURT DECISIONS: 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), petition 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, 452 So.2d 946 (Fla. 3d DCA 1984).

The Fourth District decision on its face acknowledges the express and direct conflict between its decision and the five earlier decisions of the First, Second and Third District Courts of Appeal.

The Taddiken, Fabal, Owens and Burr decisions directly and expressly conflict with the instant decision because the four decisions hold that Florida Statute §95.11(4) (b) (two year statute of limitations) is applicable to the joinder of the FUND in a medical malpractice suit. The four decisions hold that the FUND is not an insurer and does not fall within the "insurer's exception" to the statute of limitations. In this case, the Fourth District held the two-year statute of limmitation inapplicable even though four and one half years had expired since the accrual of the cause of action against the FUND. A direct and express conflict exists.

The Menendez case also conflicts with this case. In Menendez, the court held that the FUND is not an insurance fund with obligations to a healthcare provider; rather, the court

construed the FUND as having its primary obligations to the plaintiff in a malpractice suit.

The Menendez decision is in conflict with the instant decision which determined that the FUND falls within the "insurer's exception" to the statute of limitations.

The conflict in the present case is a serious one especially due to the spiraling amount of medical malpractice litigation involving the FUND. This Court's jurisdiction should be exercised to resolve the conflict between the Fourth District and the First, Second and Third District Courts of Appeal and make the law uniform throughout the state. See Ansin v. Thurston, 101 So.2d 808 (Fla. 1958).

C O N C L U S I O N

Based on the foregoing, the Fourth District's decision directly and expressly conflicts with the five earlier decisions of the First, Second and Third District Courts of Appeal. The conflict is a serious one.

This Court is respectfully requested to exercise its jurisdiction to address the merits of the decision.

Respectfully submitted,

BY: 
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction and Appendix was mailed this 21st day of February, 1985 to: SARA SOTO, ESQ., BAILEY & DAWES, P.A., Penthouse Two, 1390 Brickell Avenue, Miami, Florida 33131-3313; MARTIN DAVIS, ESQ., 3300 Ponce de Leon Boulevard, Coral Gables, Florida 33134; and to NORMAN KLEIN, ESQ., 2750 Northeast 187th Street, North Miami Beach, Florida 33180.

TALBURT, KUBICKI, BRADLEY & DRAPER
Attorneys for PETITIONER
701 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Telephone: 305/374-1212

BY: 
BETSY E. GALLAGHER