

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

JUN 10 1985

CLERK, SUPREME COURT

By *pl*  
Chief Deputy Clerk

---

**BRIEF OF PETITIONER**  
**ON THE MERITS**

---

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

I N D E X

	<u>PAGE NO.</u>
TABLE OF CITATIONS AND AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1-3
POINT INVOLVED ON REVIEW	4
Whether the District Court Erred in Reversing Summary Judgment; Whether the Statute of Limi- tations Bars the Plaintiffs' Claim Against the FUND.	
SUMMARY OF ARGUMENT	5
ARGUMENT	6-8
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS AND AUTHORITIES

	<u>PAGE NO.</u>
<u>Burr v. Florida Patient's Compensation Fund,</u> 447 So.2d 349 (Fla. 2d DCA 1984)	6, 7
<u>Clemons v. Flagler Hospital, Inc.,</u> 385 So.2d 1134 (Fla. 5th DCA 1980)	2 n.2, 8
<u>Davis v. Williams,</u> 239 So.2d 593 (Fla. 1st DCA 1970)	2 n.2, 8
<u>Fabal v. Florida Keys Memorial Hospital,</u> 452 So.2d 946 (Fla. 3d DCA 1984)	6
<u>Florida Patient's Compensation Fund v. Tillman,</u> 453 So.2d 1376 (Fla. 4th DCA 1984)	6, n.3
<u>Isabella v. Florida Patient's Compensation Fund,</u> 462 So.2d 129 (Fla. 4th DCA 1985)	6
<u>Mercy Hospital, Inc. v. Menendez,</u> 371 So.2d 1077 (Fla. 3d DCA 1979), <u>cert. denied and appeal dismissed,</u> 383 So.2d 1198 (Fla. 1980)	6, 7, 8
<u>Owens v. Florida Patient's Compensation Fund,</u> 428 So.2d 708 (Fla. 1st DCA 1983), <u>petition for review denied,</u> 436 So.2d 100 (Fla. 1983)	6, 7, 8 n.6
<u>Taddiken v. Florida Patient's Compensation Fund,</u> 449 So.2d 956 (Fla. 3d DCA 1984)	6, 7

OTHER AUTHORITIES:

Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure	1
Florida Statute §95.11(3)(f) (1981)	1, 5, 6 n.5, 8
Florida Statute §95.11(4)(b) (1981)	1, 5, 6 n.4, 8
Florida Statute §768.54(3)(e) (1981)	7

## STATEMENT OF THE CASE AND FACTS

### A. The Introduction

This is a proceeding by petitioner/defendant<sup>1</sup> seeking to invoke this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. This Court has accepted jurisdiction. The Fourth District decision which is the subject of review is now reported at 465 So.2d 129.

The appeal below was taken by plaintiffs ELVERA ISABELLA and ALBERT ISABELLA from a summary final judgment entered in favor of defendant, FLORIDA PATIENT'S COMPENSATION FUND. The trial court held that the two-year statute of limitation, Florida Statute Section 95.11(4)(b), had run, thereby barring plaintiffs' action against the FUND (A. 20-21; R. 81-82). The trial court held, in the alternative, that plaintiffs' cause of action against the FUND was precluded by any four-year statute of limitation, including the limitation of liability for statutory liability, Florida Statute Section 95.11(3)(f). (A. 20-21; A. 81-82).

Plaintiffs appealed to the Fourth District Court of Appeal. The court reversed the trial court and held that neither the two-year nor four-year statutes of limitations are applicable

---

<sup>1</sup>/ Petitioner was the defendant and appellee in the courts below and will be referred to as the FUND or defendant. The respondents were plaintiffs and appellants in the courts below and will be referred to as ISABELLAS or plaintiffs.

to the FUND; rather the Fourth District applied the "insurers' exception" to the FUND.<sup>2</sup>

In this proceeding, petitioner contends that either the two-year or four-year statutes of limitations is applicable to the FUND. Since the cause of action against the FUND accrued four and a half (4 1/2) years before suit was filed against the FUND, the Fourth District erred in reversing the summary judgment granted in favor of the FUND on the statute of limitations issue.

B. The Case and Facts

The ISABELLAS filed the medical malpractice suit in December, 1978 against A.F. Petti, M.D., P.A.; A.F. Petti, M.D. and Hollywood Medical Center (R. 1-9). An amended complaint was filed on June 1, 1982 which named the FUND as a party for the first time (A. 1-12; R. 36, 39-50).

The FUND answered the complaint and affirmatively alleged that the action was barred against the FUND because the statute of limitations had run (A. 13-14; R. 53-54). The FUND also asserted that it was not a liability insurer for the defendants (A. 13-14; R. 53-54).

Viewed in a light most favorable to the plaintiffs who were moved against in the motion for summary judgment, the record

---

<sup>2</sup>/ 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).

shows the following relevant facts: Plaintiff ISABELLA was treated by Dr. Petti between March, 1976 until October, 1976 when she moved outside of the State of Florida (A. 31; R. 75, 118). As page three of the brief filed by ISABELLAS in the Fourth District notes, plaintiffs were on notice of the alleged malpractice of Dr. Petti in September, 1977 when she was treated in Boston by Dr. Scala (A. 33; R. 77, 118).

The alleged malpractice suit was filed against Dr. Petti, the P.A. to which he belonged, as well as the hospital where Dr. Petti practiced in December, 1978 (R. 1-9). However, the FUND was not added as a party to the suit until June 1, 1982 -- long after the two-year statute of limitations had run (T. 36, 39-50). As a result, the trial court entered a summary final judgment in favor of the FUND and against plaintiffs (A. 20-21; R. 81-82).

As described above, the summary judgment was reversed by the Fourth District which applied the "insurers' exception" to the FUND.

POINT INVOLVED ON REVIEW

WHETHER THE DISTRICT COURT ERRED IN REVERSING SUMMARY JUDGMENT; WHETHER STATUTE OF LIMITATIONS BARS THE PLAINTIFFS' CLAIM AGAINST THE FUND.

SUMMARY OF THE ARGUMENT

This Court is requested to quash the decision of the Fourth District and determine that the court erred in reversing the summary judgment entered by the trial court in favor of the FUND. The FUND asserts that either the four-year statute of limitations, Florida Statutes Section 95.11(3)(f)(1981), or two-year statute of limitations, Florida Statutes Section 95.11(4)(b)(1981), should be applied to bar the plaintiffs' action against the FUND. The undisputed evidence shows that four and a half years (4 1/2) passed from the accrual of plaintiffs' cause of action against the FUND before the filing of the action against the FUND.

Plaintiffs ISABELLAS assert that the "insurers' exception" to the statutes of limitations should apply to prohibit the application of the statute of limitations to this case. The FUND asserts that the FUND is not an insurer, and there is no basis for broadening the insurer's exception to include the FUND.



## A R G U M E N T

THE DISTRICT COURT ERRED IN REVERSING SUMMARY JUDGMENT; THE STATUTE OF LIMITATIONS BARS PLAINTIFFS' CLAIM AGAINST THE FUND.

Four district courts of appeal have decided the issue before this Court. Three of the courts have decided the issue in favor of petitioner: Taddiken v. Florida Patient's Compensation Fund, 449 So.2d 956 (Fla. 3d DCA 1984); Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (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). On the other hand, the Fourth District Court of Appeal alone has disagreed with petitioner's position in this case, Isabella v. Florida Patient's Compensation Fund, 462 So.2d 129 (Fla. 4th DCA 1985) and in an earlier decision, Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984).<sup>3</sup>

Either the two-year statute of limitations<sup>4</sup> for medical malpractice actions or the four-year statute of limitations for statutory liability<sup>5</sup> bars recovery by plaintiffs against the FUND

---

<sup>3</sup>/ This Court has also accepted jurisdiction in the Tillman case, Supreme Court Case No. 65,736.

<sup>4</sup>/ §95.11(4)(b), Fla. Stat. (1981).

<sup>5</sup>/ §95.11(3)(f), Fla. Stat. (1981).

in this case. Both plaintiffs and the FUND agree that well over four years passed from the time plaintiffs knew of their cause of action against the health care providers before the filing of the action against the FUND.

The FUND does not act as an insurer which need not be brought in as a party until after judgment against an insured. Taddiken v. Florida Patient's Compensation Fund, supra at 957; Owens v. Florida Patient's Compensation Fund, supra at 710.

There are several requirements and components of the FUND which dictate the conclusion that the FUND does not act as an insurer, contrary to the Fourth District's decision.

First, Florida Statute Section 768.54(3)(e) (1981) provides that a person cannot recover against the FUND unless the FUND was named as a party in the suit. On the other hand, an insurance company need not be joined until after judgment. As the First District's Burr decision notes the requirement that the FUND be named in any action against a health care provider participating in the FUND

alone would make it illogical for the legislature to have intended a longer and different limitations period to apply to the FUND than is applied to the health care provider for whom it may be obligated. - [447 So.2d at 351].

Second, unlike an insurer, the FUND is not obligated to defend unless it is named in a suit and it is determined that the claim may exceed \$10,000. Florida Statutes § 768.54 (3) (e) (1981). Taddiken v. Florida Patient's Compensation Fund, supra at 957; Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1198 (Fla. 1980).

Third, under the medical malpractice statutes, the FUND, unlike an insurance company, has "obligations primarily to the plaintiff in a medical malpractice action" rather than to the health care provider. Mercy Hospital, Inc. v. Menendez, supra at 1079. Accord Owens, supra.

As the Owens decision notes, the FUND's primary obligation to plaintiffs rather than to participants in the FUND is the critical element which precludes the application of decisions that do not allow the tortfeasor's statute of limitations as a defense to insurers. See 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). The only basis for the holding in the two decisions is that the only action a plaintiff has against the insurer is as a third party beneficiary; an action against such a third party beneficiary does not arise until the entry of a judgment. Owens, supra at 710. On the other hand, plaintiffs do not occupy a third party beneficiary relationship to the FUND. An action against the FUND accrues immediately at the time it accrues against a participating health care provider.

The amendment to the complaint to include the FUND, as a new party to the suit, does not relate back to the filing of the original complaint. The "insurers' exception"<sup>6</sup> relied on by the ISABELLAS does not apply to the FUND. Either section 95.11 (4) (b) (1981) or section 95.11(3) (f) (1981) applies to bar the action against the FUND.

---

<sup>6</sup>/ This term was used by the Owens court. 428 So.2d 710.

C O N C L U S I O N

This Court is respectfully requested to quash the opinion of the Fourth District with directions to affirm the summary final judgment entered by the trial court in favor of the FUND.

Respectfully submitted,

BY: Betsy E. Gallagher  
BETSY E. GALLAGHER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Merits was mailed this 7<sup>th</sup> day of June, 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  
BETSY E. GALLAGHER