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SUPREME COURT OF FLORIDA

ELMER WILLIAM FAST, JR., and FRANCES B. FAST,

Petitioners,

vs.

FLORIDA PATIENT'S COMPENSATION FUND,

Respondent.

CASE NO.: 66,698

RESPONDENT FLORIDA PATIENT'S COMPENSATION FUND'S ANSWER BRIEF

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INTRODUCTORY STATEMENT

For purposes of brevity and clarity the Petitioners, ELMER WILLIAM FAST, JR., and FRANCES B. FAST, will be referred to in this Brief as "Fast" or as "Plaintiffs", the Respondent, FLORIDA PATIENT'S COMPENSATION FUND, will be referred to as the "Fund" or as "Defendant", the capacity occupied in the trial court. References to the record on appeal will be designated by the prefix (R). References to the Petitioners' Appendix will be designated by the prefix (PR).

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

Respondent, the Fund, agrees with the statement of the case as set forth in the Initial Brief of Petitioners, Fast, with the following exceptions and additions.

Prior to filing their first Complaint in the Circuit Court in and for Pinellas County, Florida, against Defendants, All Children's Hospital and Bayfront Medical Center, Inc., Fast first filed a Medical Liability Mediation Claim on September 28, 1978, (R1-3). The mediation panel rendered its decision on July 13, 1979, (R-25). Thereafter, on August 31, 1979, the Fasts filed their Complaint in Circuit Court alleging medical negligence on behalf of All Children's Hospital and Bayfront Medical Center, Inc. Fast did not choose to join the Fund as a Defendant at that time, (R26-28). More than two years after filing their initial Complaint, on April 12, 1982, Fast sought to amend their Complaint to add the Fund as an additional Defendant, (R62). It should be noted that the case had been set for trial four times prior to Fast moving to amend its Complaint to add the Fund as a Defendant, (R37, 42, 46, 50).

The Fund filed its Motion for Summary Judgment on October 1, 1982, claiming that the claim of Fast against the Fund was barred by F.S. §95.11(4)(b), (R96, 97). On January 30, 1984, Final Summary Judgment was entered for the Fund upon its motion, (R143). The Summary Judgment was affirmed by the Second District Court of Appeal on February 6, 1985.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL DID NOT ERR IN AFFIRMING THE TRIAL COURT'S FINDING THAT SECTION 95.11(4)(b), FLORIDA STATUTES, APPLIED TO PLAINTIFFS' CLAIM FILED AGAINST THE FLORIDA PATIENT'S COMPENSATION FUND AND THAT PLAINTIFFS' CLAIM AGAINST THE FLORIDA PATIENT'S COMPENSATION FUND WAS TIME BARRED.

Prior to receiving Petitioner and Respondent's Briefs in this appeal, this Court has had occasion to review the briefs filed by the parties in at least three other appeals pending before this Court which address the identical issue raised in this appeal. Florida Patient's Compensation Fund v. Isabella, Case No.: 66,502; Fabal v. Florida Keys, Case No.: 65,730; and Florida Patient's Compensation Fund v. Tillman, Case No.: 65,736. This Court in May of 1985 had occasion to hear oral arguments on these same issues and the Fund hereby adopts and incorporates by reference the previous arguments that it has presented to this Court in the above-referenced appeals. Although Fast raises no new arguments that have not been heard by this Court in the other pending appeals, a response is nevertheless warranted.

Fast claims that the Fund is like a liability insurer and from this premise, reasons that no cause of action accrues against the Fund until a Judgment is rendered against the Fund member; and that the Fund member has the responsibility for joining the Fund as a Defendant in the suit. A close examination of Fast's argument demonstrates both the fallacy of Fast's initial premise and the "logical" corollaries of the premise.

The Fund was created by the legislature of the State of Florida enacting F.S. §768.54. Its purpose was not to provide indemnity to health care providers, but rather to allow payment to a successful Plaintiff for damages, determined either by Judgment against the Fund or through an approved settlement, resulting from acts of medical negligence by its members. F.S. §768.54 does not provide that the Fund has any obligation to its member health care providers. It has no statutory duty to defend actions brought against them. It has no statutory duty to investigate claims against members for the benefit of the members or to incur any expense on behalf of the member. The clear wording of the statute shows that the obligation of the Fund is primarily to the Patient/ Plaintiff. Mercy Hospital, Inc., v. Menendez, 371 So. 2d 1077, (Fla., 3 DCA, 1979), cert. denied, 383 So. 2d 1198, (Fla., 1980). Unlike a liability insurer, the statute provides that the Fund must be joined in order for there to be a recovery against it. The legislature also gave the Fund the right to actively defend itself. Such a defense may not be beneficial or in the best interests of its members, particularly where a claim exists against the Defendant for multiple acts of negligent treatment over a period of time and the Defendant was only a member of the Fund during a portion of the treatment.

One of Fast's claimed corollaries to his premise that the Fund is a liability insurer is that no cause of action can accrue against the Fund until after a Judgment is entered against a Fund member, the Plaintiff complies with the claims procedure set forth in F.S. §768.54(3)(e), and the Fund refuses to make payment. Breaking down the argument of Fast into its component parts

shows its lack of merit. First, it is clear that F. S. §768.54 requires the Fund to be joined as a Defendant in any lawsuit in which recovery is sought against the Fund. The legislature's requirement of joinder recognizes that there already exists a cause of action against the Fund. Second, it is clear from the wording of sub-section (3)(e) that the claims procedure does not affect a Plaintiff's right to a Judgment against the Fund, it merely details the method that a Plaintiff must follow to collect money after a Judgment has been obtained or an approved settlement reached. The claims procedure constitutes a notice provision which allows the Fund on one hand to approve settlements prior to payment, and on the other to determine which portion of a Judgment or settlement they are required to pay in light of the statutory limitations contained in the statute.

Fast also argues from their basic premise, that the Fund is like an insurer, that logic would require the member health care provider to join the Fund as a party Defendant rather than the Plaintiff. There is no logic to this position. Even if the Fund were considered a liability insurer, a Defendant would have no obligation to join his liability carrier in an action. In fact, the only way that a Plaintiff can obtain a Judgment against a liability insurer is to join the liability insurer as a party Defendant.

To support their argument that the Fund member should be required to join the Fund as a Defendant, Plaintiffs state on Page Four of their Brief that "reason, justice, and the efficient administration of the tort system require that the Fund and its member not be allowed to be hidden in the bushes during the course of litigation". Traditional tort principles require that the Plaintiff determine through investigation who the Plaintiff

wishes to sue for the damages he claims to have suffered. Here, the Plaintiff filed a mediation claim under F. S. §768.44 on September 28, 1978, (R1-3). At that time he named Bayfront Medical Center, Inc., and All Children's Hospital as Defendants. Almost 11 months later Plaintiff filed his Complaint in Circuit Court against All Children's Hospital and Bayfront Medical Center, Inc., (R-26-28). Despite the fact that Fast had full advantage of the discovery process including interrogatories and depositions, Fast did not file a Motion to Amend the Complaint to add the Fund as a Defendant for more than two years after his initial Complaint was filed. In fact, a simple inquiry to the Fund itself would have allowed Fast to determine whether or not All Children's Hospital or Bayfront Medical Center, Inc., were members of the Fund at the time he received medical treatment. It should also be noted that Mercy Hospital, Inc., v. Menendez, 371 So. 2d 1077, (Fla., 3 DCA, 1979) which specifically provided that the Plaintiff has the obligation to name the Fund as a Defendant, was decided more than two months prior to Fast's filing of his initial Complaint in Circuit Court. This is not a case where a statute of limitations has barred a cause of action entirely, prior to its discovery. Cates v. Graham, 451 So. 2d 475, (Fla., 1984).

Fast's second major argument is that even if a cause of action accrues against the Fund prior to entry of a Judgment against a member health care provider and prior to the fulfillment of the claims procedures set forth in F. S. §768.54(3)(e), that the Fund is not entitled to the two year statute of limitations contained in F. S. §95.11(4)(b). Fast argues that the Fund is not a health care provider or a person "in privity with the provider of health care". Admittedly the Fund is not a health care provider. However, it is

submitted that the cases cited by Fast do not support Fast's argument that the Fund is not in a privity relationship with its member hospital.

Fast's reliance on Durden v. American Hospital Supply Corporation, 375 So. 2d 1096, (Fla., 3 DCA, 1979), cert. denied, 386 So. 2d 633, (Fla., 1980) is misplaced. In Durden, the Court found that F. S. §95.11(4)(b) did not apply to Durden's claim because Durden's claim arose from an injury he allegedly received when he sold blood to a blood donor center. The Court found that his injury did not result from a relationship arising out of medical, dental, or surgical diagnosis, treatment, or care as defined in F. S. §95.11(4)(b). The Court specifically found that the injury arose from a sales relationship. Here, Fast cannot be heard to argue that his claim did not arise from medical or surgical diagnosis, treatment, or care on the part of Bayfront Medical Center, Inc., and All Children's Hospital.

Fast also states that the only Florida case discussing what "privity" means in the context of F. S. §95.11(4)(b) is Gonzalez v. Jacksonville General Hospital, Inc., 365 So. 2d 800, (Fla., 1 DCA, 1978), quashed, 400 So. 2d 965, (Fla., 1981). The Gonzalez case has absolutely no precedential value on the issue of privity since the decision was quashed by this Court on other grounds, and this Court specifically refused to consider the privity issue.

Contrary to the assertion of Fast, both the Second District Court of Appeal and the Third District Court of Appeal have specifically addressed the issue of whether or not the Fund is a "person in privity with the provider of health care" under F. S. §95.11(4)(b). In Burr v. Florida Patient's Compensation Fund, 447 So. 2d 349, (Fla., 2 DCA, 1984), petition

for review denied, 453 So. 2d 43, (Fla., 1984), the Second District Court of Appeal found that the Fund was in privity with its member health care provider. The Third District Court of Appeal also finding privity looked at the mutuality of interest which exists between a health care provider and the Fund and the relationship existing between the Fund and the member. Taddiken v. Florida Patient's Compensation Fund, 449 So. 2d 956, (Fla., 3 DCA, 1984). All other decisions of the District Courts of Appeal in the State of Florida other than those of the Fourth District have implicitly found that privity existed between the Fund and its member, that the Fund did have the ability to assert F. S. §95.11(4)(b), and rejected arguments that a four year statute should apply. Fabal v. Florida Keys Memorial Hospital, 452 So. 2d 946, (Fla., 3 DCA, 1984); Florida Patient's Compensation Fund v. Miller, 436 So. 2d 932, (Fla., 3 DCA, 1983); Garcia v. Cedars of Lebanon Hospital Corporation, 444 So. 2d 538, (Fla., 3 DCA, 1984); Lugo v. Florida Patient's Compensation Fund, 452 So. 2d 633, (Fla., 3 DCA, 1984); Neilinger v. Baptists Hospital of Miami, Inc., 460 So. 2d 564, (Fla., 3 DCA, 1984); Owens v. Florida Patient's Compensation Fund, 428 So. 2d 100, (Fla., 1 DCA, 1983), petition for review denied, 436 So. 2d 100, (Fla., 1983); and Robinson v. Florida Patient's Compensation Fund, 458 So. 2d 1225, (Fla., 3 DCA, 1984).

CONCLUSION

Based upon the foregoing authorities, it is respectfully submitted that the Second District Court of Appeal was correct in affirming the Summary Judgment entered by the trial court in favor of Respondent, FLORIDA PATIENT'S COMPENSATION FUND, and Respondent respectfully requests that this Court affirm the decision of the District Court of Appeal and order that this case be remanded to the Circuit Court for taxation of costs and attorney's fees in favor of Respondent and against Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 22nd day of July, 1985, to: JOHN A. LLOYD, JR., ESQUIRE, The Legal Building, Suite 200, 447 Third Avenue North, St. Petersburg, Florida 33701, EDGAR A. NEELY, ESQUIRE, 75 Poplar Street, Atlanta, Georgia 30303, C. HOWARD HUNTER, ESQUIRE, 201 East Kennedy Boulevard, Suite 700, Tampa, Florida 33602, and JOHN W. WILLIAMS, ESQUIRE, Post Office Box 12349, St. Petersburg, Florida 33733.

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