SUPREME COURT OF FLORIDA

ELMER WILLIAM FAST, JR. and FRANCES B. FAST, Petitioners,	)	
vs.	)	CASE NO. 66,698
FLORIDA PATIENT'S COMPENSATION FUND, Respondent.	)	

RESPONDENT FLORIDA PATIENT'S COMPENSATION FUND'S BRIEF ON JURISDICTION

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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", the Respondent, FLORIDA PATIENT'S COMPENSATION FUND, will be referred to as the "Fund". References to Petitioners Appendix will be designated by the prefix (PR). References to the Appendix of Respondent will be designated by the prefix (RA).

TABLE OF AUTHORITIES

ARGUMENT

Fast seeks to invoke the discretionary jurisdiction of this court under Rule 9.030(a)(2)(iv) Fla.R.App.P. which provides for discretionary jurisdiction to review decisions of District Courts of Appeal that expressly and directly conflict with a decision of another District Court of Appeal. Admittedly the court below in its per curiam decision stated that it was in direct conflict with the Fourth District Court of Appeals decision in Florida Patient's Compensation Fund vs. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984). (PA 11-12). However, it is respectfully submitted that the court below was incorrect in characterizing a conflict between its decision and that of the Fourth District Court of Appeal in Tillman. It has long been the rule that

> "...jurisdiction to review because of an alleged conflict requires a preliminary determination as to whether the court of appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with the prior decision of this court or another court of appeal on the same point, thereby generating confusion and instability among the precedents."

There are two reasons why this courts preliminary determination should lead to the decision that there is no conflict. First, the per curiam decision of the court below does not provide any precedential value to other appellant in courts. Therefore, it does not generate confusion or instability among the

precedents. Second, the grounds of decision of the court below are different from the grounds expressly stated by the Fourth District Court of Appeal in Tillman.

The per curiam decision of the court below merely states that it affirmed on the authority of Burr vs. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA) Pet. for Review Denied, 453 So2d 43 (Fla. 1984). The decision does not provide any of the factual circumstances presented to the trial court and accordingly it has no precedential value. It has long been the rule of Florida that a per curiam affirmance without opinion does not bind an Appellate Court in another case to accept the conclusion of law upon which the decision of lower court was based. State Dept. of Public Welfare vs. Nelser, 69 So.2d 347 (Fla. 1954). This principle was reaffirmed by the First District Court of Appeal more recently in the case of Goldberg vs. Graser, 365 So.2d 770 (Fla. 1st DCA 1978). In Goldberg, an action was brought by an employee to recover for alleged violations of the Fair Labor Standards Act. The Circuit Court entered judgment on the verdict for the plaintiff. On appeal, the employer argued that a prior per curiam decision of the same Appellate Court should be controlling. Moreover, the per curiam decision involved the same employer and the same apartment complex. Despite that fact, the First District citing the previous decision of this court in State Dept. of Public Welfare vs. Nelser, supra, refused to consider the per curiam decision as a precedent.

A decision is not a precedent to a point not mentioned in the opinion. 20 AM Jur 2d Courts §189. An affirmance without a written opinion does not bind a court to accept generally conclusions of law upon which the decisio of the court was based.

It is therefore respectfully submitted that the decision of the court below has no precedential value and accordingly does not conflict with the decision of the Fourth District Court of Appeal in Florida Patient's Compensation Fund vs. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984).

An examination of the issues raised in the court below when compared with the issues raised in Tillman demonstrates that points raised by the parties in each appeal were different. In Tillman, supra, at 1382, Tillman argued that the "insurers exception" to the Statute of Limitation should be applied. The Fourth District agreed with him citing the rational of Judge Ferguson's dissent in Fabal vs. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984). The dissent in Fabal expressed the rational that the Fund was in the nature of an insurer, and therefore the Statute of Limitation would not begin to run against the Fund until after a judgment had been rendered against it's insured member.

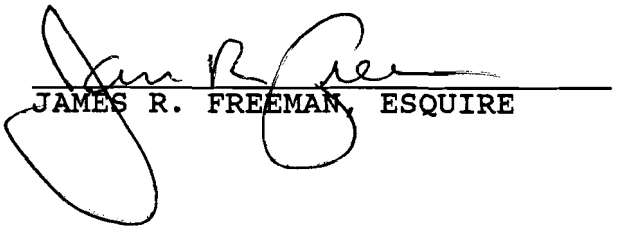
In this case Fast did not argue that the Fund was in the nature of an insurer. Instead Fast made two different arguments. First, that the joinder of the Fund in any suit against the health care provider is merely a condition precedent to a cause of action not yet in existence, and therefore no Statute of Limitations can

apply. Fast also argued that any cause of action against the Fund exists only by virtue of statute and is therefore governed by the four year limitation period of §95.11(3)(f) Florida Statutes. (RA3,8). Fast as appellant in the court below waived the opportunity to present the argument under the "insurers exception" and accordingly no such argument was considered or ruled upon by the court below. It should also be noted that the court below in Burr vs. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA 1984) Pet. for Review Denied, 453 So.2d 483 (Fla. 1984) did not discuss the "insurers exception" to the Statute of Limitations. The court below found that the Fund was in privity with the health care provider, and therefore was entitled to assert 94.11(4)(b) Florida Statutes. The Court also rejected the argument that Fast made in this Appeal, that an action against the Fund is founded on statutory liability and that 95.11(3)(f) Florida Statutes should apply.

It is clear from the above that the points raised on appeal and the grounds of decision were different in Tillman from the points raised and grounds of decision of the court below. Therefore no direct and express conflict has arisen between the two decisions.

CONCLUSION

Based on the foregoing authorities, it is respectfully submitted that no direct and express conflict exists between the decision of the court below and that of the Fourth District Court of Appeal in Florida Patient's Compensation Fund vs. Tillman, supra. Accordingly, the Fund requests this court to dismiss this appeal.



JAMES R. FREEMAN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was furnished by U.S. Mail to John A. Lloyd, Jr., Esquire, 447 Third Avenue North, St. Petersburg, Florida 33701; C. Howard Hunter, Esquire, 220 Madison Street, Suite 1200, Tampa, Florida 33602; and to John W. Williams, Esquire, Post Office Box 12349, St. Petersburg, Florida 33733, this 10th day of April, 1985.

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