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CLERK, SUPREME COURT

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Chief Deputy Clerk

SUPREME COURT OF FLORIDA

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

Petitioners,

v.

Case No. 66,698

FLORIDA PATIENT'S
COMPENSATION FUND,

Respondent.

PETITIONERS' BRIEF

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SUMMARY OF ARGUMENT

This case involves a determination of whether a statute of limitations is to be applied to claims against the Florida Patient's Compensation Fund when it is joined in an action against one of its members. This question has been answered in the negative by the Fourth District Court of Appeal in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984) and in the affirmative by the Second District Court of Appeal in the present case.

Since there is a conflict which is both direct and express, the Supreme Court has jurisdiction and by accepting this case for review it can make the law on this issue uniform throughout Florida.

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 "plaintiff." The respondent, Florida Patient's Compensation Fund, will be referred to as the "Fund" or as "defendant." References to the Appendix will be designated by the prefix (A).

STATEMENT OF THE CASE

On April 18, 1978, plaintiff, William E. Fast, Jr., underwent a double coronary artery by-pass operation at a special heart surgery facility operated by the two defendant-hospitals. Because plaintiff failed to recover additional surgery was performed on him on May 2, 1978 which revealed internal infection at the site of the by-pass.

Claiming negligence in the operation of the special heart surgery facility, plaintiff and his wife sued the hospitals, and after suit was begun, a motion was served on April 12, 1982 asking leave to amend the complaint to add as a defendant the Florida Patient's Compensation Fund (A-1).

On April 30, 1982, plaintiffs served their requested amended complaint (A 2-6), and on May 5, 1982 an order was entered allowing the requested amendment (A-7). Plaintiffs alleged:

At all times material of this complaint, the defendant Bayfront Medical Center Inc. was a member of and subscribed to the Florida Patient's Compensation Fund, thus requiring the joinder of the Florida Compensation Fund as a defendant herein.

Plaintiffs' motion to join the Fund came more than two years but less than four years after the infection was discovered. The Fund appeared and moved for summary relief claiming that a two-year limitation period applied. On January 30, 1984, final summary judgment was entered for the Fund (A-10). An appeal from that judgment yielded the decision of the District Court of Appeal for the Second District on February 6, 1985 (A 11-12) of which review is sought.

Before its consideration of the instant case the District Court had held in Burr v. Florida Patient's Compensation Fund, 447 So.2d 349 (Fla. 2d DCA), pet. for review denied, 453 So.2d 43 (Fla. 1984) that the same period of limitations applied to the Fund as applied to its health care provider-member, and that therefore no liability could be imposed upon the Fund unless it had been joined as a defendant in the suit against the health care provider within two years of the occurrence or discovery of the malpractice. In the Burr decision, the District Court rejected arguments that the limitations period which applied to the Fund should be determined in the same way as if the Fund were a liability insurance carrier and arguments that actions involving the Fund should be governed by the limitations period applying to liabilities created by statute. Section 95.11(3)(f), Florida Statutes.

When the Burr decision was entered no other district court had rendered an opinion in conflict with it and the Supreme Court declined to accept jurisdiction of a petition for review. Thereafter, in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984), the Fourth District Court of Appeal expressly rejected the holding in Burr and the cases relied upon by the Second District in Burr. Later in Neilinger v. Baptist Hospital of Miami, Inc., 460 So.2d 564 (Fla. 3d DCA 1984), the Third District agreed with Burr and acknowledged that both Burr and its own decision were in direct conflict with Florida Patient's Compensation Fund v. Tillman, supra.

In the present case, the District Court in its decision stated,

...We acknowledge that we are in direct conflict with Florida Patient's Compensation Fund v. Tillman, 453 So. 2d 1376 (Fla. 4th DCA 1984).

It is from this decision that plaintiffs here seek relief by their petition.

ARGUMENT

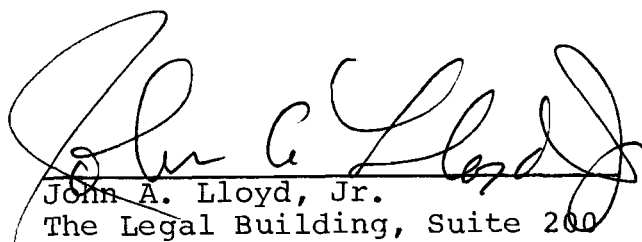
Article V, Section 3(b)(3) of the Constitution of the State of Florida vests jurisdiction in the Supreme Court to review decisions of district courts which expressly and directly conflict with a decision of another district court or the Supreme Court on the same question of law. An identical question of law was presented to the Second District here as was presented to the Fourth District in Florida Patient's Compensation Fund v. Tillman, 453 So.2d 1376 (Fla. 4th DCA 1984). In Tillman, the Fourth District Court of Appeal acknowledges that its decision is in direct conflict with the decisions in other districts and refers to the case of Burr v. Florida Patient's Compensation Fund, 447 So. 2d 349 (Fla. 2d DCA), pet. for review denied, 453 So.2d 43 (Fla. 1984), relied on by the Second District in the instance case.

This Court will perform a service to all those dependent on the Fund, i.e., its members and those with claims against its members, by accepting this case for review so that the statutes of limitations may be applied uniformly.

CONCLUSION

Since there is an express and direct conflict in the decisions, the Supreme Court has jurisdiction and review should be granted.

Respectfully submitted,



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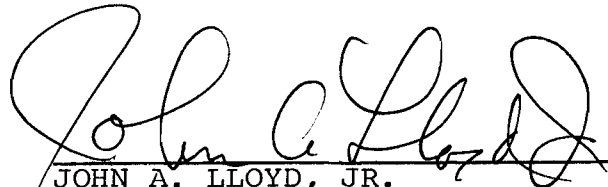
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Initial Brief
of Appellants has been served by U. S. Mail this 18th
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