w/o o/a

SUPREME COURT OF FLORIDA

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

Petitioners,

v.

FLORIDA PATIENT'S
COMPENSATION FUND,

Respondents.
_____/

Case No. 66,698

2d DCA No. 84-370

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE SECOND DISTRICT
COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF PETITIONERS, ELMER WILLIAM FAST, JR. and FRANCES B. FAST

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INTRODUCTION

Except where otherwise specified, the singular "plaintiff" will refer to petitioner Elmer William Fast, Jr. who was the injured patient and plaintiff below, and the word "Fund" will refer to the Florida Patient's Compensation Fund, respondent and successful defendant-appellee below.

STATEMENT OF THE CASE

This is a petition for review of a decision of the District Court of Appeal, Second District, which affirms a final summary judgment entered by the trial court in favor of the Florida Patient's Compensation Fund in which the trial court held that the claim of plaintiff against the Fund was barred by a two-year statute of limitations.

On April 18, 1978, plaintiff underwent a double coronary artery by-pass operation at a special heart surgery facility operated by two hospitals (R-109). 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. On April 12, 1982, plaintiff sought

to amend the complaint to add the Fund as a defendant. Plaintiff's motion to join the Fund came more than two years but less than four years after the date when the infection was discovered, May 2, 1978. The Fund appeared and moved for summary relief claiming that a two year limitation period applied. Final summary judgment was entered for the Fund (R-143) and an appeal was taken resulting in an affirmance by the District Court. *Fast v. Florida Patient's Compensatin Fund,* 462 So.2d 1212 (Fla. 2d DCA 1985). Supreme Court jurisdiction for discretionary review was granted on June 10, 1985.

The issues presented for review are before the Court in a number of other cases in which a district court has certified a question involving the application of Section 95.11(4)(b), Fla. Stat., in claims against the Fund. The Fourth District, *Florida Patient's Compensation Fund v. Tillman,* 453 So.2d 1376 (Fla. 4th DCA 1984), has declined to apply this statute of limitations to Fund claims, while the other three districts - despite well thought out dissents - have held that the statute is applicable, *Burr v. Florida Patient's Compensation Fund,* 447 So.2d 349 (Fla. 2d DCA 1984), *petition for review denied,* 453 So.2d 43 (Fla. 1984); *Fabal v. Florida Keys Memorial Hospital,* 452 So.2d 946 (Fla.3d DCA 1984); *Florida Patient's Compensation Fund v. Miller,* 436 So.2d 932 (Fla. 3d DCA

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In several of these cases, the district court has evidenced doubt as to the correctness of its decision by certifying to the Supreme Court a question raising the issue of the statute of limitations.

SUMMARY OF ARGUMENT

Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), *cert. denied and appeal dismissed,* 383 So.2d 1198 (Fla.1980) erroneously placed the burden of joining the Fund as a party to malpractice litigation upon the injured plaintiff and not upon the physician or hospital paying a premium for coverage by the Fund and to whom the benefit of Fund membership accrued. 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 only to jump out and say "gotcha!" when the litigation is completed.

Even if it is the plaintiff's obligation to join the Fund, the requirement that the Fund be joined is merely a condition precedent to the ultimate liability of the Fund, and does not mean that any cause of action has accrued against the Fund. A cause of action accrues (Section 95.031, Fla. Stat.) when the last element constituting the cause of action occurs. The Fund incurs no liability until a judgment has been entered against its member, the judgment is in excess of health care provider's immunity ceiling, and the administrative requirements to collect from the Fund have been accomplished.

In any event, the Fund is not a party entitled to take advantage of the limitation provided for by Section 95.11(4)(b), Fla. Stat., since it is neither a health care provider nor in privity with a health care provider. A proper limitation to apply, if one should be applied at all, must of necessity be the one applicable to actions created by statute, Section 95.11(3)(f), Fla. Stat.

ARGUMENT

DOES ANY STATUTE OF LIMITATION BAR A CLAIM BROUGHT AGAINST THE FLORIDA PATIENT'S COMPENSATION FUND BEFORE JUDGMENT IS RENDERED AGAINST ITS MEMBER?

It is difficult to add to the arguments presented by Judge Ferguson in his dissent in *Fabal v. Florida Keys Memorial Hospital,* 452 So.2d 946 (Fla. 3d DCA 1984). Plaintiff here adopts all of the arguments and reasoning of that dissent. The Court has by this time received briefs from a number of other parties in the several cases pending before the Court involving the same issue, and petitioners here ask the benefit of all of such arguments favorable to petitioners' petition. Petitioners under the separate subheadings which follow will add to those arguments.

A. FUND COVERAGE IS LIABILITY INSURANCE COVERAGE AND THE INSURED PHYSICIAN OR HOSPITAL HAS THE RESPONSIBILIY FOR JOINDER OF THE FUND.

Mercy Hospital, Inc. v. Menendez, 371 So.2d 1077 (Fla. 3d DCA 1979), *cert. denied and appeal dismissed,* 383 So.2d 1198 (Fla.1980) is a decision which is probably responsible for all of the questions and problems which have arisen concerning the application of the statute of limitations to Fund cases. As pointed out by Judge Ferguson in his dissent in *Fabal v. Florida Keys Memorial Hospital,* 452 So.2d 946 (Fla. 3d

DCA 1984), the *Menendez* court felt it necessary to describe the Fund scheme as being something other than an insurance program because of a misconception that any legislative attempt to require joinder of an insurance company would be unconstitutional as being legislative meddling in court procedure. To buttress its position that the Fund coverage was not insurance, it adopted the requirement that the plaintiff discover and name the Fund as a defendant. The Fund was not a party to *Menendez* or its sequel, *Mercy Hospital, Inc. v. Menendez,* 400 So.2d 48 (Fla. 3d DCA 1981, *petition for rehearing denied,* 411 So.2d 383 (Fla. 1981), in which the court allowed Menendez to avoid its harsh rule.

In all particulars, the Fund meets every definition of an insurance company. When not on guard, the courts refer to the Fund as a "carrier" providing "coverage." See, *Garcia v. Cedars of Lebanon Hospital Corp.,* 444 So.2d 538 (Fla. 3d DCA 1984)

Holding that a cause of action accrues against the Fund at the same time it accrues against the health care provider may yield bizzare results and raise questions of some complexity. Can there be situations where a diligent patient may become aware of the health care provider's negligence, but despite his diligence, not know of the Fund's involvement? Can the patient's

diligence become an issue of fact with regard to his discovery of Fund membership? Who decides that issue, the judge or the jury? Is the Fund an organization guaranteed to be free of the misfilings, misnomers, and clerical mistakes of other organizations? What happens to the patient's claim when, after learning that he has been negligently injured, it takes him nearly all of two years to investigate and sort out the potential tortfeasors so as to identify the one to be sued? Is the patient bound to know that the tortfeasor is a Fund member at the same instant he discovers who *the* tortfeasor is? If the patient has to bring suit by identifying the tortfeasor by description and conduct, but without knowing his identity, does he forfeit a part of his recovery if it turns out the tortfeasor is a member of the Fund? Is it prudent that every plaintiff in every case join the Fund as a defendant?

By requiring the Fund to make a decision as to whether or not it will actively defend, the Legislature has required the Fund to do essentially what an excess or reinsurance carrier is required to do, *i.e.*, determine if there is anything which it can do which will serve to protect the funds available to it from depletion and to avoid doing anything which will promote the depletion of the funds. The health care provider's

personal coverage is treated as what is known in the insurance industry as "underlying coverage" and the Fund is obligated to make a judgment as to whether or not the underlying coverage will be sufficient, and if there is a possibility that an award or settlement will exceed the underlying coverage, to determine if an adequate defense is being provided by the health care provider or his carrier and to act on its determination by abstaining from participation in the defense, by rendering out of court assistance to the underlying carrier's litigator, or by actively intervening - precisely what is required of and what is done by excess insurance carriers. The activity required of it by the statute creating the Fund is the same kind of activity as required by the insurance policy and prudent management of the umbrella carrier protecting the health care provider for liability beyond the basic limits provided by his automobile or homeowners' insurance policy.

B. EVEN IF FUND COVERAGE IS NOT INSURANCE, THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL AFTER JUDGMENT AGAINST ITS MEMBER.

A cause of action has come into existence when it has "accrued." Section 95.031, Fla. Stat., states: "A cause of action accrues when the last element constituting the cause of action occurs." In the

instant case, there remains a number of elements left to occur in the future before plaintiff will have a cause of action against the Fund.

The Fund was created and the procedures to be followed in making claims against the Fund were set out by the Legislature in Section 768.54(3), Fla. Stat. Under Subsection (e) of the cited statute, there is set out "Claims procedures" to be followed in perfecting a claim against the Fund.

The Legislature starts by providing that any person may file an action against a health care provider participating in the Fund, but that if the Fund is not named as a defendant, no recovery can be made against the Fund. By this language, the Legislature has created a condition precedent to the ultimate making of a claim against the Fund after the litigation against the health care provider is concluded.

Under "claims procedures," the Legislature goes on to provide for the Fund to review the case, and if it so elects, participate in the defense of the claim. Here, the Legislature is talking about defending the claim against the health care provider. The legislation does not contemplate that the Fund will assert at some point prior to judgment or settlement defenses based upon any claimed failure of the health

care provider or the plaintiff to have complied with all of the requirements of the statute which would entitle the health care provider to immunity and the plaintiff to recovery against the Fund.

The statute goes on to provide in Subsection (e)(3) that after the recovery of a judgment or an approved settlement the plaintiff may then file a claim against the Fund for that part of the plaintiff's judgment in excess of $100,000.00 or the health care provider's liability coverage limit, if greater than $100,000.00. It is at this point that the Fund is first required to respond by either accepting or rejecting the claim and it is at this point that the Fund is first required to make any payment.

Should the Fund reject the claim in whole or in part, there then comes into existence a cause of action in favor of the plaintiff and against the Fund. And it is at this point that any limitations which might apply to actions against the Fund would begin to run.

While it is not the usual situation, there are a number of situations recognized where a person or entity may be a party to a lawsuit without having had any cause of action accrue against that person or entity and without there being any limitation of action applicable. One well recognized situation of this sort

is the one that exists when a liability insurance carrier is joined as a party in a negligence suit pursuant to the rules developed in *Shingleton v. Bussey,* 223 So.2d 713 (Fla.1969), and the case that followed it. It is well settled in Florida that when a liability carrier is joined as a defendant in an action against its insured, the statute of limitation does not even begin to run until after the litigation has been concluded by a judgment against the insured. See, *Clemons v. Flagler Hospital, Inc.,* 385 So.2d 1134 (Fla. 5th DCA 1980).

In *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), the argument was made by a plaintiff seeking to avoid a limitations defense by the Fund that the Fund was like a liabiblity insurance carrier and that the plaintiff should have the benefit of what plaintiff styled an "insurer's exception." This led the Distrist Court to limit the scope of its inquiry to a determination of whether or not the Fund was or was not an insurance company. An underlining issue was not brought to its attention as to whether or not a cause of action existed or had accrued against the Fund regardless of whether or not it was an insurer.

If we accept the proposition that the Fund is not an insurance program and that it has a direct liability to the injured plaintiff, we are accepting a proposition which has no bearing whatsoever on the application of the statute of limitations since the statute of limitations depends upon a determination of when the Fund becomes liable. Under very clear statutory language, the Fund incurs no direct liability to the plaintiff until after a judgment or approved settlement has been recovered and a formal claim has aeen made against the Fund by a successful plaintiff. In the instant case, a ruling should have been made below that plaintiff's right to proceed with the Fund as a defendant was not governed by any statute of limitations and that joinder of the Fund was merely a procedural requirement, a condition precedent to a claim against the Fund.

C. IF GOVERNED BY A STATUTE OF LIMITATIONS, THE LIMITATION IS NOT THE ONE CONTAINED IN SECTION 95.11(4)(b), FLA. STAT.

Plaintiff urges that the Court erroneously applied Section 95.11(4)(b), Fla. Stat., in that the Fund is not a "health care provider." Rather, the correct statute of limitations to be applied is the four (4) year statute of limitations under Section 95.11(3), Fla. Stat., with either Subsection (f) dealing with

actions founded on statutory liability, or Subsection (p) dealing with any action not specifically provided for in the statutes. Accordingly, the plaintiff sought to amend the complaint within the four (4) year statute of limitations amd was timely against the Fund.

A health care provider is defined by statute:

Section 768.54(1)(b), 'health care provider' means any:

> 1. Hospital licensed under chapter 395.
> 2. Physician licensed, or physician's assistant certified, under chapter 458.
> 3. Osteopath licensed under chapter 459.
> 4. Podiatrist licensed under chapter 461.
> 5. Health maintenance organization certified under part II of chapter 641.
> 6. Ambulatory surgical center licensed under chapter 395.
> 7. 'Other medical facility' as defined in paragraph (c).
> 8. Professional association, partnership, corporation, joint venture, or other association by the individuals set forth in subparagraphs 2., 3., and 4. for professional activity.
>
> (c) 'Other medical facility' means a facility the primary purpose of which is to provide human medical diagnostic services or a facility providing nonsurgical human medical treatment and which the patient is admitted to and discharged from such facility within the same working day, and which is not part of a hospital. However, a facility existing for the primary purpose of performing terminations of pregnancy, or an office maintained by a physician or dentist for the practice of medicine, shall not be construed to be an 'other

medical facility.'

It is clear that the Fund is not a "health care provider."

The Third District Court of Appeal in *Durden v. American Hospital Supply Corporation*, 375 So.2d 1096 (Fla. 3d DCA 1979), discussed the factors which must be present before Section 95.11(4)(b), Fla. Stat., is applicable to an action. Two factors must concur: (1) the party defendant must be a health care provider and, (2) the claim must arise as a result of medical, dental or surgical diagnosis, treatment or care on the part of the health care provider. Obviously, the Fund rendered no medical, dental or surgical diagnosis, treatment or care.

In claiming the benefit of Section 95.11(4)(b), Fla. Stat., to the action in the case at bar, the Fund must concede that it is not a "health care provider," and its sole argument has been that it comes with the statute as a person "in privity with the provider of health care."

The only Florida case discussing what the language in the statute means is *Gonzales v. Jacksonville General Hospital, Inc.*, 365 So.2d 800 (Fla. 1st DCA 1978) in which the court says:

> The limitation of actions within this subsection shall be limited to the

> health care provider and persons in privity with the provider of health care."
>
> Recognizing, as we do, that the above quoted sentence is subject to differing interpretations, we are of the view that the Legislature intended by the language employed to limit application of the two year limitation period to actions wherein privity exists between the claimant and the health care provider and any other persons (or corporations) claimed by the claimant to be liable and with whom there exists a privity relationship. Such a construction is in keeping with the verbiage of predecessor statutes and with the logical conclusion that the Legislature intended to impose a two year limitation upon claims between parties in privity, one with the other, but to allow additional time for discovery and assertion of claims against persons claimed to be liable but with whom the claimant has no privity relationship.
>
> So construing the limiting sentence, the amendatory provision of Chapter 75-9 has no application here since the plaintiff specifically alleged in her second amended complaint the absence of any privity relationship between herself and appellees (or the allegedly offending nurse) and there is nothing in the record before us (nor before the learned trial judge) to establish the contrary.

The *Gonzales* court held that coporations which furnished nurses to Jacksonville General Hospital were not entitled to the provisions of the medical malpractice statute of limitations as they were not in "privity" with the claimant.

To give the Fund the advantage of the health

care provider's limitation, one must completely ignore the factors which must be present before anyone can claim it. As held in *Durden v. American Hospital Supply Corporation,* 375 So.2d 1096 (Fla. 3d DCA 1979), those factors are: (1) the party defendant must be a health care provider, and (2) the claim must arise as a result of medical, dental or surgical diagnosis, treatment or care on the part of *the* health care provider. Obviously, the Fund, even if it can successfully argue that the *Gonzales* court is erroneous in their analysis of the privity portion of the statute, still fails to present any evidence that they fulfill the second element of the statute, that is, that they rendered medical, dental, or surgical diagnosis, treatment or care. A variety of entities have "privity" relationships with a hospital, from roofers, security firms, food suppliers, janitors, etc., but it cannot be argued that claims against those entities would be limited by Section 95.11(4)(b), Fla. Stat., for non-medical related claims. Obviously, the Fund alleged privity with hospital does not comply with *Gonzales, and even if Gonzales* is disregarded, the second element as required by *Durden* is missing.

The above is not to say that *Gonzales* is incorrectly decided. On the contrary, there is an

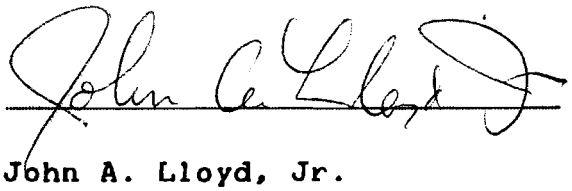
excellent analysis to support the court's position. The reasoning of the court was that:

> The legislature intended to impose a two year limitation upon claims between parties in privity, one with the other, but to allow additional time for discovery and assertion of claims against persons claimed to be liable but with whom the claimant has no privity relationship.

CONCLUSION

Petitioners, Elmer William Fast, Jr. and Francis B. Fast, request that the Court reverse the decision of the District Court of Appeal and order that this case be remanded to the Circuit Court for further proceedings on its merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Initial Brief of Petitioners has been served by U. S. Mail this 1st day of July, 1985, to C. Howard Hunter, Esquire, 201 East Kennedy Boulevard, Suite 700, Tampa, Florida 33602; to James R. Freeman, Esquire, Post Office Box 2378, Tampa, Florida 33601; and to John W. Williams, Esquire, Post Office Box 12349, St. Petersburg, Florida 33733.

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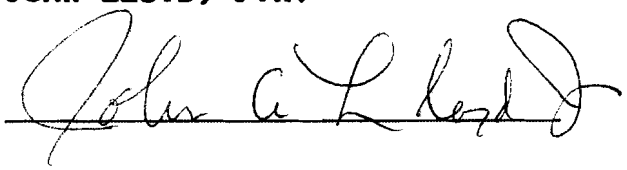

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