IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,	)	
Petitioner,	)	
vs.	)	CASE NO. 67,742
HERBERT COHEN,	)	
Respondent.	)	

FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
CASE NO. 84-345

PETITIONER FLORIDA PATIENT'S COMPENSATION FUND'S INITIAL BRIEF ON THE MERITS

STEVEN BILLING
BILLING, COCHRAN & HEATH
790 East Broward Boulevard
Ft. Lauderdale, FL 33301
(305) 764-7150

and

SAMUEL R. NEEL, III
PERKINS & COLLINS
Post Office Drawer 5286
Tallahassee, FL 32314
(904) 224-3511

Counsel for Petitioner

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PRELIMINARY STATEMENT

The Petitioner, the Florida Patient's Compensation Fund, will be referred to as the Fund. The Respondent, Herbert Cohen will be referred to as the Respondent. Dr. Baxt, a defendant in the trial court, will be referred to as Dr. Baxt. Reference to the Appendix will be made by the abbreviation "App." in parentheses followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

In a complaint dated December 9, 1981, the Respondent sued Dr. Baxt and his P. A. (App.1-6). In a second amendment to the complaint dated August 30, 1982 and filed on or about that date, the Respondent for the first time joined the Fund as a defendant (App.7-8).

In the complaint, the Respondent alleged that Dr. Baxt treated the Respondent from April 9 thru April 27 of 1980 (App.1-2). The Respondent alleges he was admitted to the hospital again on or about May 10, 1980, with blood clots, but he does not allege that his admission was by Dr. Baxt or that Dr. Baxt treated him during this admission (App.3). The Respondent also alleged that he received some pain medication via a telephone order on August 10, 1980, but it is not alleged that Dr. Baxt prescribed the medication (App.3). However, even if it is assumed for argument's sake that Dr. Baxt did order the medication, the latest date alleged in the complaint that Dr. Baxt may have treated the Respondent was August 10, 1980 (App.3). The Fund was joined as a defendant no earlier than August 30, 1982, which was more than two (2) years after that date (App.7-8).

The Fund answered the second amendment to the complaint (App.9-10) admitting that at all relevant times Dr. Baxt and his P.A. were members of the Fund. The answer also

raised the statute of limitations as a defense and pointed out that the only allegations applicable to the Fund were contained in the second amendment to the complaint (App.9). This second amendment to the complaint does not contain any reference to any of the paragraphs of the original complaint (App.7-8).

A motion for summary judgment was filed by the Fund based on the statute of limitations, Section 95.11(4)(b), Florida Statutes (App.11), which motion was granted by the trial court (App.12). The Fund renewed its motion for summary judgment in a pleading dated May 26, 1983 (App.13), and a final summary judgment was entered in favor of the Fund on August 29, 1983 (App.14-15). The Respondent filed a motion for rehearing which was denied on March 19, 1984 (App.16).

The Respondent appealed this summary judgment and it was reversed by the Court of Appeal for the Fourth District (App. 17-25). A motion for rehearing of the decision of the Fourth District was denied on September 4, 1985 (App.26).

A Notice to Invoke Discretionary Jurisdiction dated October 1, 1985, was filed by the Petitioner (App. 27-37). In a letter dated October 18, 1985, the Respondent conceded to the jurisdiction of this Court (App.38). This Court accepted jurisdiction on December 26, 1985 (App.39).

SUMMARY OF ARGUMENT

The first part of the decision of the Fourth District Court of Appeal is erroneous and should be reversed because it is contrary to the decision of this Court in Joyce M. Taddiken, et ux., v. Florida Patient's Compensation Fund, and Carlisle S. Fabal, et ux., v. Florida Keys Memorial Hospital, et al., 10 FLW 571 (Fla. October 24, 1985).

The second part of the Fourth District Court of Appeal's opinion should be reversed because it clearly appears on the face of the complaint filed against Dr. Baxt and his P.A. that any suit against the Fund was barred by Section 95.11(4)(b), Florida Statutes, because it was not brought within two (2) years of the time the Respondent knew or should have discovered by due diligence the incident giving rise to his suit against Dr. Baxt and the Fund. The Respondent was aware of the alleged malpractice against Dr. Baxt well before August of 1980, even though he may not have been aware of the full extent of his injuries, and he did not sue the Fund until August 31, 1982.

POINTS ON APPEAL

POINT I

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT SECTION 95.11(4)(b), FLORIDA STATUTES (1983), WAS NOT APPLICABLE TO THE FLORIDA PATIENT'S COMPENSATION FUND

POINT II

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT IF SAID STATUTE WAS APPLICABLE, THE RESPONDENT'S CLAIM WAS NOT BARRED BY THAT STATUTE OF LIMITATIONS

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT SECTION 95.11(4)(b), FLORIDA STATUTES (1983), WAS NOT APPLICABLE TO THE FLORIDA PATIENT'S COMPENSATION FUND

The Fourth District Court of Appeal's finding that Section 95.11(4)(b), Florida Statutes (1983), was not applicable to the Fund is contrary to and controlled by the decision of this Court in Joyce M. Taddiken, et ux., v. Florida Patient's Compensation Fund, and Carlisle S. Fabal, et ux., v. Florida Keys Memorial Hospital, et al., 10 FLW 571 (Fla. October 24, 1985). In that decision, this Court held that the Fund was in privity with its participating health care providers and was subject to the same two-year statute of limitations as the participating health care providers. Therefore, the first portion of the Fourth District Court of Appeal's decision should be reversed.

POINT II

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT IF SAID STATUTE WAS APPLICABLE, THE RESPONDENT'S CLAIM WAS NOT BARRED BY THAT STATUTE OF LIMITATIONS

Respondent alleged that Dr. Baxt, an orthopedic surgeon, diagnosed a left knee injury and operated on him on April 11, 1980, to repair an injury to the cartilage by way of arthroscopy (App.2), that thereafter he suffered excrutiating pain; that five (5) days later the cast was removed and it was discovered that a large lump had appeared in Respondent's left calf; and that the cast was negligently removed leaving permanent burn marks (which, of course, Respondent was aware of at the time). Two days later, the Respondent alleges he was readmitted to the hospital and it was discovered that he had deep vein thrombophlebitis which required him to undergo anti-coagulate therapy from April 18, 1980 to April 27, 1980 (App.3). There was no allegations that the thrombophlebitis was a result of any of the acts of Dr. Baxt, but, of course, the Respondent would have been aware of the complication of thrombophlebitis when it arose. The Respondent further alleges that about two (2) weeks later, on May 16, 1980, he was admitted to an osteopathic hospital, apparently not by Dr. Baxt, with blood clots in his kidneys caused by improper anit-coagulation therapy (App.3), which, of course, he would also have been

aware of at that time. Even if it is assumed that Respondent was under Dr. Baxt's care in the osteopathic hospital, which is not alleged, the last time that the Respondent was under Dr. Baxt's treatment was May 14, 1980. Therefore, Dr. Baxt treated the Respondent from April 11, 1980 to May 14, 1980, at the latest. The Respondent did not file his second amendment to the complaint joining the Fund as a party defendant until over two (2) years later on August 31, 1982 (App.7-8).

It is clear that the Respondent added the Fund as a defendant over two (2) years after Dr. Baxt last treated the Respondent. However, the Respondent argues that simply by alleging in his complaint that on September 24, 1980, he discovered he had sustained an "O'Donahue triad" knee injury which was not diagnosed by Dr. Baxt, he has created a factual issue as to whether he should have discovered his cause of action sooner. The Respondent claims he had no "actual knowledge" that would have caused the statute to begin running prior to September 24, 1980. This is clearly not so based upon the Respondent's own allegations. He alleged that on May 10, 1980, he sustained blood clots in his kidneys "caused by improper anti-coagulation therapy as performed at the Hollywood Memorial Hospital from April 18 thru April 27 by the Defendants," which required him to be re-hospitalized. Thus, the Respondent was aware as of May

10, 1980 of some of his injury even if he was not aware of the full extent of his injury.

Therefore, under the rationale of City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954), the statute of limitations had run when the Fund was joined on August 31, 1982. In City of Miami v. Brooks, supra, this Court enunciated a general rule concerning whether or not a party needs to know the full nature of his damages before a statute of limitations will attach to the claim.

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute of limitations is not postponed by the fact that the actual or substantial damages do not occur until a later date.

70 So.2d at page 308.

The Brooks decision was cited with approval by the First District Court of Appeal in Kellermeyer v. Miller, 427 So.2d 343 (Fla. 1st DCA 1983), and has been followed by a number of courts, including the courts in Seaboard Airline R. Co. v. Ford, 92 So.2d 160 (Fla. 1955) and Carter v. Cross, 373 So.2d 81 (Fla. 3rd DCA 1979).

In Howard v. Minnesota Muskies, 420 So.2d 652 (Fla. 3rd

DCA 1982), the Third District Court of Appeal affirmed a summary judgment in a legal malpractice action where the plaintiff was on notice that a judgment had been entered against him, but took no action whatsoever against his attorneys until "serious collection efforts were made by the judgment creditor to collect on the judgment." This decision by the Third District is to the same import as Brooks and Kellermeyer, ie., all three decisions essentially hold that a statute of limitations begins to run once a plaintiff is on notice of his potential cause of action, although the plaintiff may not yet be apprised of the full extent of his injuries. These opinions stand in sharp contrast to the Fourth District's decision in this matter that even though the Respondent had blood clots in his kidneys, he would not have necessarily known that Dr. Baxt had been negligent, and that it was not until September that the Respondent received a different diagnosis from a different doctor, which might for the first time put him on notice that Dr. Baxt had been negligent and that he had a cause of action.

It should be noted that the text of Section 95.11(4)(b) of the Florida Statutes in effect at the times relevant to this case provided that an action for medical malpractice should be commenced within two (2) years from the time the incident giving rise to the action occurred or within two (2) years from the time the incident was discovered or

should have been discovered with the exercise of due diligence and does not refer to when the cause of action was discovered or should have been discovered with the exercise of due diligence. The cause of action language was from an earlier statute of limitations which was not in effect on April 9, 1980 or any subsequent date. Also, the Respondent did not allege in his complaint that he did not discover or could not have discovered the incident which gave rise to this lawsuit within two (2) years of August 31, 1982, because he sued Dr. Baxt and his P.A. well within two (2) years of April 9, 1980, nor did he do so when he joined the Fund in August of 1982.

CONCLUSION

For all of the reasons cited above, the Petitioner would respectfully request that this Court enter an order reversing the decision of the Fourth District Court of Appeal below and affirming the summary judgment entered on behalf of the Petitioner based on the applicable statute of limitations, Section 94.11(4)(b), Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTTIFY that a true and correct copy of Petitioner's Brief on the Merits has been furnished by U.S. Mail to JOEL D. EATON, Suite 1201, 15 West Flagler Street, Miami, Florida 33130; STUART Z. GROSSMAN, 801 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; and to NORMAN KLEIN, 2750 N.E. 187th Street, North Miami Beach, Florida 33180 on this 15th day of January, 1986.

Respectfully submitted,

STEVEN BILLING
BILLING, COCHRAN & HEATH
790 East Broward Boulevard
Ft. Lauderdale, FL 33301
(305) 764-7150

and

SAMUEL R. NEEL, III
PERKINS & COLLINS
Post Office Drawer 5286
Tallahassee, FL 32314
(904) 224-3511

Counsel for Petitioner

BY: 
SAMUEL R. NEEL, III