

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAR 25 1986

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

CASE NO. 67,742

FLORIDA PATIENT'S)
 COMPENSATION FUND,)
)
 Petitioner,)
)
 vs.)
)
 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
 REPLY 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

TABLE OF CONTENTS

<u>ITEMS:</u>	<u>PAGE(S)</u>
TABLE OF AUTHORITY	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND OF THE FACTS	2
SUMMARY OF ARGUMENT	3
POINTS OF APPEAL	4
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	
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	5
CONCLUSION	9
CERTIFICATE OF SERVICE	10
APPENDIX	

TABLE OF AUTHORITIES

<u>CASE AUTHORITIES:</u>	<u>PAGE(S)</u>
<u>Dober v. Worrell,</u> 401 So.2d 1322 (Fla. 1981)	6
<u>Moore v. Morris,</u> 475 So.2d 666 (Fla. 1985)	7
<u>Nardone v. Reynolds,</u> 333 So.2d 25 (Fla. 1976)	7
<u>Taddiken v. Florida Patient's Comp. Fund,</u> 478 So.2d 1058 (Fla. 1985)	5,7
 <u>STATUTORY AUTHORITY:</u>	
Section 95.11(4)(b), Fla. Stat.	3,5,6 7,9

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

The Petitioner shall rely on its Statement of the Case and of the Facts in its Initial Brief as well as on any further discussion of the case and the facts in the argument portion of this Reply Brief.

SUMMARY OF THE ARGUMENT

The Respondent concedes that the Respondent was required to join the Fund within the 2-year limitations period provided by Section 95.11(4)(b), Florida Statutes.

The Respondent did not sue the Fund within the applicable 2-year statute of limitations period. The discovery portion of Section 95.11.(4)(b), Florida Statutes, was not raised in Respondent's complaint, nor when the Fund was joined as a defendant and was not an issue before the trial court. The Respondent, therefore, should be precluded from raising it in these appellate proceedings.

Even if the discovery portion of Section 95.11(4)(b), Florida Statutes, is applied, the summary judgment at the trial court in favor of the Fund was proper. The Respondent sued the Fund members within the applicable 2-year statute of limitations period and should not be permitted to join the Fund after the expiration of that 2-year limitations period.

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

Respondent has admitted in his Brief that this Court's recent decision in Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), controls and that the District Court erred in concluding that the plaintiff was not required to join the Fund within the 2-year limitations period provided by Section 95.11(4)(b), Florida Statutes (1983) [The Fourth District was erroneous in referring to Section 95.11(4)(b), Florida Statutes (1983), because the version of the statute applicable to this case would be Section 95.11(4)(b), Florida Statutes (1979) (App.1-2).

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

In his complaint dated December 9, 1981, the Respondent sued Dr. Baxt and his P.A. (App.3-8). In that complaint, he

did not make any allegations to bring himself under the "discovery rule" (See Respondent's Brief at page 5). His complaint is controlled by the portion of Section 95.11(4)(b), Florida Statutes (1979), which provides that "An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred" (App.2)

The Respondent, at the trial level, did not raise the discovery portion of Section 95.11(4)(b), Florida Statutes, and should be precluded from doing so during the appellate process. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Just as the respondents in Dober, supra, were not permitted on appeal to assert for the first time that the period of limitations was extended because of the doctors' alleged fraudulent concealment of the facts surrounding an infant's death, the Respondent in this case should not, in these appellate proceedings, be permitted to argue a discovery provision of Section 95.11(4)(b), Florida Statutes, not raised in the Respondent's complaint below, nor before the trial court.

The Respondent sued Dr. Baxt and his P.A. in December of 1981, well within the 2-year statute of limitations period applicable to Respondent's allegations of negligent treatment by Dr. Baxt, and well within the 2-year period subsequent to August 10, 1980, the last possible time,

according to the complaint, that Dr. Baxt could have provided any kind of treatment to the Respondent. (See Respondent's Brief at page 9).

The Respondent relies significantly on the case of Moore v. Morris, 475 So.2d 666 (Fla. 1985) in which this Court relied on Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). In the Nardone case, this Court stated:

... Previously, this Court has held that the statute of limitations in a malpractice suit commences either when the plaintiff has notice of the negligent act giving rise to the cause of action or when the plaintiff has notice of the physical injury which is the consequence of the negligent act. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).

333 So.2d at page 32. Even if the discovery portion of Section 95.11(4)(b), Florida Statutes, would apply, the Respondent should not prevail because the complaint shows that the Respondent had notice of the alleged negligent acts and of physical injury alleged to be a consequence of said negligent acts.

The Respondent had no problem in suing Dr. Baxt and his P.A. within the 2-year statute of limitations period. The Respondent forgot to join the Fund as a defendant until more than nine (9) months later. This Court has not ruled that the Fund is entitled to a longer statute of limitations than its Fund members. However, this Court's ruling in Taddiken

v. Florida Patient's Comp. Fund, 478 So.2d 1058 (Fla. 1985),
dictates that a party suing the Fund is not permitted to
enjoy a longer statute of limitations within which to sue
the Fund than the party has within which to sue the Fund
members.

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 Reply Brief 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 24th day of March, 1986.

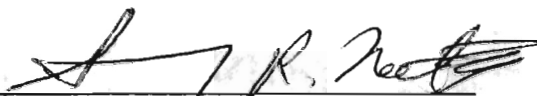
STEVEN BILLING
BILLING, COCHRAN & HEATH
790 East Broward Boulevard
Ft. Lauderdale, FL 33301
(305) 764-7150

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