

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,689

Florida Bar No: 0361836

SUE A. HIGLEY and THE)
CONTINENTAL INSURANCE CO.,)
)
Petitioners,)
)
vs.)
)
FLORIDA PATIENT'S COMPENSATION)
FUND,)
)
Respondent.)
_____)

ON REVIEW OF A CERTIFIED QUESTION
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND THE FACTS

In 1980, Marian Falk filed a complaint against Holy Cross Hospital, St. Paul Fire Insurance Company, and The Florida Patient's Compensation Fund (R90, A.2). At the time of the action, the hospital had primary liability insurance coverage of \$100,000 with St. Paul and was also a member of the Fund, which provided the hospital with unlimited coverage over and above the \$100,000 provided by St. Paul (R90, 42, A.2). Petitioner herein, Nurse Sue A. Higley, was not named as a defendant in the action; however, the hospital's liability was predicated solely upon her alleged negligence (R90, A.2).

In 1982, the Falk suit was settled with the Fund paying \$425,000 on the hospital's behalf (R41). In return, the Falks released Holy Cross Hospital, The Fund, and Nurse Higley from any further liability in this action (R42). Subsequently, the Fund filed this action, alleging that it was subrogated to the hospital's right of indemnification against Higley, the active tortfeasor, and Continental Insurance Company, with whom Higley had a \$200,000 professional liability insurance policy (R41-43).

Petitioners, Higley and Continental filed a Motion for Summary Judgment asserting that Section 768.54, Florida Statutes (1979), the act creating The Fund, precluded the Fund from recovering from Nurse Higley on the basis that she was a

hospital employee whose acts were covered by the Fund (R50). The trial court denied Summary Judgment and determined as a matter of law that Higley was not an insured under the hospital's agreement with the Fund and that the Fund was not barred from seeking subrogation from Higley and her insurer (R90-91). Thereafter, Petitioners agreed to the entry of a consent final judgment, by which Summary Judgment was entered in favor of the Fund in the amount of the coverage provided by Continental, \$200,000 (R122-124). Petitioners then filed a timely Notice of Appeal to the District Court of Appeal, Fourth District, seeking review of the final judgment.

The District Court of Appeal determined that a hospital's contract with the Fund covers the hospital for vicarious liability of its employees including nurses, but does not provide that nurses are separately covered insureds under the agreement (A.3). The District Court further found that hospital employees such as Nurse Higley are not additional insureds under the hospital's contract with The Fund (A.3).

After considering the alleged public policy reasons for barring The Fund's indemnity claim asserted by Petitioners, the District Court noted that:

Had Nurse Higley been a named party defendant in the main action her insurance coverage with Continental would have to be exhausted before her vicariously liable employer's coverage [from The Fund] would be payable. The fact that she was not a named party should not change this result (A.4).

The District Court then found no legal bar to the Fund's claim for indemnification and analogized the situation to one in which the insurer of a vicariously liable party seeks to follow the insurer of the actively negligent party in its obligation to pay a claim. Because the District court perceived the issues of the instant case to be of great public importance, the following question was certified to this Court:

MAY THE FLORIDA PATIENT'S COMPENSATION FUND MAINTAIN AN ACTION FOR INDEMNITY AGAINST A NEGLIGENT EMPLOYEE OF A HOSPITAL MEMBER OF THE FUND ON WHOSE BEHALF THE FUND HAS PAID A CLAIM PREDICATED SOLELY UPON THE EMPLOYEE'S NEGLIGENCE?

Petitioners timely filed an appropriate notice, this Court accepted jurisdiction, and the Fund now files its Answer Brief on the merits.

SUMMARY OF ARGUMENT

The express language of the statute creating the Fund makes coverage available to "health care providers." As defined in the statute, health care providers include hospitals but not nurses. Thus, Fund coverage is available to Holy Cross Hospital but not to Nurse Higley. Further, Nurse Higley cannot be considered an insured under the hospital's contract with the Fund since the Fund is liable only for claims against health care providers. In fact, the only relationship between the Fund and Nurse Higley is that the hospital's liability, and therefore, the Fund's coverage, results from its vicarious liability for Nurse Higley's negligent actions as her employer. Thus, the Fund as the insurer of the vicariously liable hospital has the right to seek indemnification from the insurer of the actively negligent party, Nurse Higley. If Nurse Higley had been named in the Falk's initial action, her insurance coverage with Continental would necessarily have been exhausted before her vicariously liable employer's coverage with the Fund would be payable. The same result, through this subrogation/indemnification suit should obtain.

Public policy does not dictate a different result. The Florida Patient's Compensation Fund was instituted to provide a solution to the perceived problem of high malpractice

insurance rates specifically for health care providers as defined by the statute (those persons and corporations looked upon by malpractice litigants as having deep pockets). Nurses were not included in this category. Thus, the Fund was not designed to cover nurses, has no contact with nurses, and should not be barred from seeking indemnification from a nurse's liability insurer. In fact, public policy dictates that Nurse Higley's insurance company meet its obligation to cover her negligent acts and pay to the Fund the insurance monies which the Fund, in essence, paid out to the Falks. By denying its responsibility to the subrogation claim, Continental receives a windfall. Continental contracted with Nurse Higley to insure her for negligent acts committed and accordingly accepted her premium payments. Yet now Continental denies any responsibility or obligation to pay for the negligent act of Nurse Higley. Such an unjust enrichment accruing to Continental is against public policy.

POINT I

WHETHER THE FLORIDA PATIENT'S COMPENSATION FUND, WHICH SETTLED A CLAIM AGAINST A MEMBER HOSPITAL WHOSE LIABILITY WAS VICARIOUS AND BASED SOLELY UPON THE NEGLIGENCE OF ITS EMPLOYEE, NURSE HIGLEY, MAY MAINTAIN A SUBROGATION ACTION AGAINST NURSE HIGLEY AND HER PROFESSIONAL MALPRACTICE INSURANCE CARRIER FOR THE AMOUNT OF HER COVERAGE.

The Fund is liable only for the payment of claims against health care providers who are in compliance with the requirements for Fund membership. Section 768.54(3)(a), Florida Statutes (1985). Nurses, including Nurse Higley, are not health care providers as defined by the statute, Section 768.54(1)(b), Florida Statutes (1985);

Finkelstein v. North Broward Hospital

District, 484 So.2d 1241 (Fla. 1986). Thus, Nurse Higley is not and cannot be directly covered by the Fund. Further, Nurse Higley has never paid any fees to become a member of the Fund and has never been subject to any of the assessments (millions of dollars in amount) paid by hospitals and other Fund members.

Section 768.54(2)(e), Florida Statutes, states that the coverage afforded by the Fund for a participating hospital applies to employees of the hospital other than those that qualify as a health care provider, such as licensed physicians. Contrary to Petitioner's assertion, this statutory provision does not extend coverage to employees like Nurse Higley as additional insureds. Petitioner's interpretation of extended coverage is inconsistent with the

statutory restriction that the Fund shall be responsible only for payment of claims against health care providers and the declared statutory purpose for creation of the Fund to pay

...any claim arising out of the rendering or failure to render medical care or services, or arising out of activities of committees for health care providers or any claim for bodily injury or property damage to the person or property of any patient, including all patient injuries and deaths, arising out of members' activities for those health care providers...(emphasis added)

Section 768.54(3)(a), Florida Statutes (1985). Rather, the coverage provision, Section 768.54(2), entitles the hospital to coverage even though its liability arises, as here, vicariously through the negligence of its employees. See Higley v. Florida Patient's Compensation Fund, 506 So.2d 483 (Fla. 4th DCA 1987) (opinion on review).

Petitioners argue that a hospital can only be liable through its employees, that the hospital here has paid the Fund to cover exposure which could only derive from vicarious liability, and therefore, the Fund must cover employee negligence such as that of Nurse Higley. This entire argument is predicated on an erroneous assumption; the hospital has many areas of liability exposure not based upon employee negligence. The adequacy and maintenance of equipment could expose the hospital to liability. Staffing decisions as the amount and hours of staff is an area in which the hospital has

potential liability. See Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 790 (Fla. 1985) in which every staff member available at the time of injury due to respirator malfunction or disconnection was actively involved in delivery of necessary care to other patients. A hospital's liability may be based upon its policies as to the treatment and care of patients or the training required or given in house to its staff. Thus, a hospital is potentially liable for much more than only the negligent acts of its employees. It is significant in the instant case that the hospital's liability is based solely on Nurse Higley's negligence and therefore is exclusively vicarious. There are no hospital policies, equipment or staffing problems involved.

Since the Fund in fulfilling its duty paid monies on behalf of the hospital which was only vicariously liable for Nurse Higley's negligence, the Fund now properly seeks subrogation of the hospital's claim for indemnification from Nurse Higley.

Subrogation is available only to one who has a duty to pay and usually involves an insurer who, by operation of law, is substituted to the rights of an insured. DeCespedes v. Prudence Mutual Casualty Co., 193 So.2d 224 (Fla. 3rd DCA 1967). Although the Fund is not an insurer, Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985), it owes a duty to pay claims against member health care

providers and, in the present case, did in fact settle the Falk's claim against Holy Cross Hospital. Thus, under the doctrine of subrogation, the Fund is substituted to the right of the hospital to indemnity from Nurse Higley.

Indemnity shifts the loss from one who, although without active negligence, has been obligated to pay because of some vicarious, constructive, derivative or technical liability, to another for whose wrongdoing the former was held liable. Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979). Here, the hospital as Nurse Higley's employer was vicariously liable for her negligent act, and accordingly, discharged its duty, through the Fund, to pay the Falk's claim. Since indemnity is a right which inures to one who discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other, the hospital is entitled to seek indemnity from Continental Insurance, Nurse Higley's insurer. In turn, the Fund, having settled the claim on behalf of the hospital, may be subrogated to the hospital's right of indemnity.

Petitioners argue that the Fund is an insurer and that an insurer cannot maintain a subrogation action against its own insured citing, inter alia, Allstate Insurance Co. v. Fowler, 480 So.2d 1287 (Fla. 1985); Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058 (Fla. 1985); and Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d

783 (1985). However, this Court has clearly indicated that the Fund is not an insurer. As stated in Taddiken at 1060, 1061

Indeed, the legislature treats the Fund differently from the way it treats a private insurance company in a most important respect: a private insurance company may not be joined in an action against its insured..., while the Fund must be joined in order for a claimant to recover from it...

In view of the above considerations, it is apparent that the Fund is a unique entity created by statute that is not treated as an insurance company by the legislature.

Further, the Fund does not seek subrogation against nor indemnification from its own insured. Rather, the Fund seeks to be subrogated or substituted to the hospital's claim for indemnification against Nurse Higley, who, as has been demonstrated, is not covered by the Fund. The Fund's right of subrogation exists not because it is an insurer of the hospital, but because it fulfilled its statutory obligation to pay the claim against the hospital, a member of the Fund.

Petitioners also assert that because the hospital's underlying insurance names its nurses as additional insureds, the hospital cannot seek indemnification from Nurse Higley and therefore, the Fund cannot seek indemnification through subrogation. On its face, this argument has a certain logic; however, it is applicable only to actions involving the underlying insurer, St. Paul. Thus, St. Paul could not seek

indemnification from Nurse Higley, but this does not affect or bar the present action by the Fund.

It is significant that the Fund would have incurred no obligation had Nurse Higley, not the hospital, been sued. In that instance, Continental would have been obligated for the amount of its coverage for Nurse Higley's negligence. Or, had Nurse Higley been named as a defendant in the main action, her insurance coverage with Continental would have to be exhausted before the hospital's coverage would be payable. In either case, Continental would have to fulfill its obligation in the amount of Nurse Higley's coverage. This result should not be different because the Falks chose to sue only the hospital.

POINT II

WHETHER PUBLIC POLICY CONSIDERATIONS PREVENT
THE FLORIDA PATIENT'S COMPENSATION FUND FROM
MAINTAINING A SUBROGATION ACTION.

Public policy considerations change neither the legal propriety nor the fairness of the Fund seeking indemnification from Nurse Higley and her insurer, Continental.

Public policy favors placing the ultimate responsibility for negligent actions on the active tortfeasor rather than a vicariously liable party. See Houdaille Industries, Inc. v. Edwards, 374 So.2d 490 (Fla. 1979). Here, Nurse Higley was the active tortfeasor and was the holder of an insurance policy providing professional malpractice coverage in just such an event. If Continental as Nurse Higley's carrier cannot be held liable in a situation such as this, for what was Nurse Higley paying insurance premiums? Barring the Fund from maintaining the subrogation/indemnification action would only result in a windfall to Continental. Surely, this is not a result dictated by public policy.

In 1975, The Florida legislature created the Fund because

The cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed...and...it is not uncommon to find physicians in high risk categories paying premiums in excess of \$20,000 annually and...without some legislative relief doctors

will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida...(emphasis added)

Chapter 75-9, Laws of Florida; however, despite the 1975 legislative response, in 1976 the Florida legislature determined that

professional liability insurance premiums for Florida physicians have continued to rise and...will continue to rise at a dramatic rate, and...the maximum rates for essential medical specialists such as cardio-vascular surgeons, neurosurgeons, orthopaedic surgeons, and anesthesiologists range from \$8,200 in physician-owned trusts to \$24,000 through the JUA, and...premium costs are passed on to the consuming public through higher costs for health care services in addition to the heavy and costly burden of "defensive medicine" as physicians are forced to practice with an overabundance of caution to avoid potential litigation, and...this crisis also poses a dire threat to the continuing availability of health care in our state as new young physicians decide to practice elsewhere because they cannot afford high insurance premiums and as older physicians choose premature retirement in lieu of a continuing diminution of their assets by spiraling insurance rates... (emphasis added)

Chapter 76-260, Laws of Florida. In view of these public policy findings, the act creating the Fund was amended. See Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783 (Fla. 1985). Clearly the legislature perceived the insurance crises primarily in terms of physicians. Hospitals and other potential defendants traditionally seen as having "deep pockets" are included in the definition of health care

providers from whom Fund coverage is available. Nurses are mentioned neither as insurance crises victims nor as health care providers covered by the Fund.

Thus, the Fund was not designed or intended to provide coverage to nurses. Rather, the Fund owes a duty to the hospital which is vicariously liable for Nurse Higley's negligence and therefore the Fund's subrogation claim is not only within public policy but is fair.

Petitioners express great concern that the Fund should not be allowed to obtain personal judgments against hospital employees whose negligence results in vicarious liability for the hospital. The Fund does not perceive this as a great problem; it would surely not be economically effective for the Fund to seek personal judgments. However, should the Court determine that public policy discourages subrogation suits by the Fund against negligent hospital employees not named in the underlying action, it could carve an exception for those situations when insurance coverage is available. See Ard v. Ard, 414 So.2d 1066 (Fla. 1982) upholding an exception to the Interspousal Immunity Doctrine to the extent the defendant is covered by insurance.

CONCLUSION

The Fund is legally entitled to maintain a subrogation action for indemnification from Nurse Higley's insurer on the basis that the underlying action was predicated on her negligence. This result is supported by legal principles, by public policy and by fairness. Accordingly, this Court should answer the certified questions positively and affirm the Summary Final Judgment in favor of the Florida Patient's Compensation Fund.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U. S. Mail this 26th day of August, 1987 to RICHARD A. SHERMAN, Suite 102 N. Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301.

A handwritten signature in cursive script that reads "Craig A. Dennis". The signature is written in black ink and is positioned above a horizontal line.

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