IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,689

Florida Bar No: 184170

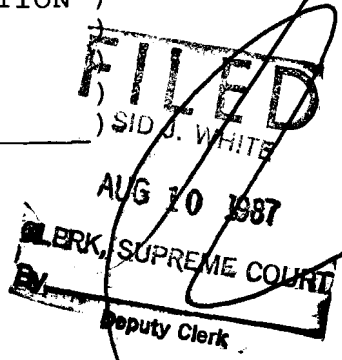
SUE A. HIGLEY and THE CONTINENTAL INSURANCE CO.,

Petitioners,

vs.

FLORIDA PATIENT'S COMPENSATION FUND,

Respondent.



BRIEF OF PETITIONERS ON THE MERITS

BRIEF OF PETITIONERS SUE A. HIGLEY and THE CONTINENTAL INSURANCE COMPANY

(With Appendix)

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

TABLE OF CONTENTS

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

TABLE OF CITATIONS

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

TABLE OF CITATIONS (Continued)

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

POINTS ON APPEAL

I. THE PATIENT'S COMPENSATION FUND CANNOT MAINTAIN A SUBROGATION SUIT AGAINST A NURSE IN THE HOSPITAL.

II. PUBLIC POLICY CONSIDERATIONS PREVENT THE FUND'S ATTEMPT TO SUBROGATE.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

STATEMENT OF THE CASE AND THE FACTS

This is a subrogation action. The Respondent Florida Patient's Compensation Fund (Fund or FPCF) paid a $425,000 settlement on behalf of its insured Holy Cross Hospital. The FPCF sought to subrogate itself to the Hospital's right of indemnity against a nurse and her insurance carrier. The trial court and the Fourth District allowed the indemnification action. However, the Appellate Court agreed that there were strong public policy reasons for barring an indemnification action by the Fund against a hospital employee. The court certified the following question to this Court as one of great public importance:

> 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.

Higley v. Florida Patient's Compensation Fund, 506 So.2d 483, 487 (Fla. 4th DCA 1987).

CRUX OF CASE

The crux of this case is that the Patient's Compensation Fund insured a hospital and settled a case and then filed this action (termed a subrogation action) against Nurse Higley, who worked in the hospital, and her insurance carrier Continental.

The essence of the problem is that if it had been an insurance company which settled the case, the insurance company would not be able to file a subrogation action against the

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

nurse because the nurse would be an additional insured under the hospital's insurance policy. However, the Fund does not issue policies so it contended that the nurses and employees are therefore not additional insureds, so it can sue them. It should be noted that the nurse in the present case has $200,000 of insurance; however this rule of law would apply whether the nurse or doctor or employee had insurance or not, and allow the Fund to receive personal judgments against these employees.

It is submitted that the same public policy which prohibits insurance companies from filing actions against employees of its insured also prohibits the Fund from doing so, and it does not make any public policy difference just because the Fund does not have a written insurance policy. The Fund is a creature of statute and only has the rights given it by statute, and the statute does not give the Fund the right to sue and recover personal judgments against nurses, etc., and therefore it has no right to do so. If anything this is clearly against the intent of the statute since the intent is to shield health care providers where an insurance company could not. This is simply contrary to the intent and policy of the statute, as well as public policy. The statute is in derogation of common law and must be strictly construed, and since the statute does not authorize the Fund to sue nurses etc. and recover personal judgments against them, it can not do so.

Furthermore, the impact of upholding the Fourth District's Decision is that all hospital employees will be forced to buy

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

their own malpractice insurance. This certainly is not what the legislature had in mind. This will only heighten the ever escalating malpractice insurance crisis in Florida.

CONCISE FACTS

In 1980, Marian Falk filed a wrongful death action against Dr. William Joyner, Holy Cross Hospital, the Florida Patient's Compensation Fund and others alleging that hospital personnel negligently caused the death of her new born child. At the time of the alleged negligence, the Hospital had a $100,000 liability insurance policy with St. Paul Fire Insurance Company. The Hospital employees were additional insureds under the St. Paul policy. The Hospital was also a member of the Florida Patient's Compensation Fund. Pursuant to Section 768.54 Florida Statutes, the Fund provided unlimited coverage to the Hospital over and above the $100,000 provided by St. Paul.

Mrs. Falk did not sue the Defendants in the present case, (Nurse Sue Higley and her professional liability insurer, Continental Insurance Company.) Continental's policy provided $200,000 in coverage to Nurse Higley. The Hospital was not an additional insured on Higley's policy.

The Falk case was eventually settled before trial. The Fund agreed to pay Marian Falk $425,000 on behalf of Fund member Holy Cross Hospital in order to protect the Hospital from possible vicarious liability. In return, the Plaintiff released Defendants/Joyner, Holy Cross Hospital, Florida Medical Malpractice Joint Underwriting Assoc., the Fund, and

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

also Sue Higley, who was not a named Defendant.

The Fund subsequently sued Nurse Higely and Continental, alleging that by payment of the settlement the Fund became subrogated to Holy Cross' rights to a cause of action against Nurse Higley (R 41-43). Therefore, the Fund sought to recover $200,000 under the Continental policy. Defendants answered that the Fund was precluded from bringing such an action by the "limitation of liability" section of the statute. Section 768.54(2)(e) (R 47-49). Defendants' argument essentially was that the Fund insured Nurse Higley as well as the Hospital, and that therefore the Fund could not subrogate against its own insured. Additionally, the argument was that the rights of the Fund were established by the statute and no right was given to the Fund to file actions and obtain judgments against nurses, and other employees that the Hospital covered. Certainly this was never the intent of the statute, and no right of action is given to the Fund to do this.

Both parties moved for Summary Judgment on this issue and submitted memoranda in support (R 50-89). A hearing was held before the trial court on July 10, 1984 (R 1-40). The court subsequently denied Higley/Continental's Motion for Summary Judgment, finding that the Fund did not insure Nurse Higley (R 90-91).

The parties then stipulated to the entry of a Consent Judgment in the case to receive an appellate decision on this point. They agreed that a Summary Judgment would be entered in favor of the Plaintiff Fund in the amount of $200,000, but that

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

the Fund would not attempt to collect the $200,000 until the issue was resolved on appeal. Continental appealed from the Consent Final Judgment in favor of the Florida Patient's Compensation Fund (R 122-125).

The Fourth District held that the Fund was entitled to indemnification from the Hospital's employee as the court could find no legal bar to the claim (A 4). The Opinion found that under the statute nurses were not "additionally insureds" nor were they "directly insured". F.S.A. 768.54(2)(e) (A 3). Factually, the Opinion pointed out that Nurse Higley was an additional insured under the Hospital's primary policy with St. Paul (A 4).

The court reasoned that traditional indemnity principles would permit an action by the Fund against the employer and her insurance carrier (A 3).

Noting that allowing such a claim against a Hospital employee places the employees between a rock and a hard place the court found merit in the Petitioners' position. Holy Cross Hospital had assured Nurse Higley that she was covered by the Hospital for medical malpractice. Fortuitously she purchased her own coverage. Without this coverage Higley could be personally responsible for hundreds of thousands of dollars paid out for settlement with the Plaintiff.

The District Court states that to allow this subrogation suit would upset the delicate economic balance by providing a windfall to the Fund at the expense of Hospital employees and the rest of the public (A 4). The court goes on to say that

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

the Fund had no indemnification rights against the Hospital, as it insured the Hospital, but it can go against the insured's employee (A 4). The result is disparity of treatment between health care providers. Nurses are treated differently than doctors and hospitals, for coverage purposes under the Fund (A 4).

While in sympathy with the nurse's position, the court would not apply overwhelming public policy to bar the indemnification action (A 4). However, finding that the issues involved were of great public importance the panel certified the case to this Court for resolution (A 4-5). It is respectfully suggested that the holding of the District Court is erroneous and that the indemnification action is barred as a matter of law and public policy.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

SUMMARY OF ARGUMENT

This is a subrogation action involving the Florida Patient's Compensation Fund. The Plaintiff Fund paid a $425,000 settlement on behalf of its member, Holy Cross Hospital. The Fund now seeks to subrogate itself to the Hospital's right of indemnity against a Hospital employee, Nurse Sue Higley and her carrier Continental Insurance Company and recover a judgment against them.

The settlement arose out of a wrongful death suit filed against the Hospital, the Fund and several other Defendants. Nurse Higley was not a named Defendant in that suit and no judgment of liability was entered against her. The case was settled prior to trial, the Defendants were released, and Nurse Higley was released also.

Both the Fund and Higley filed Motions for Summary Judgment, Higley arguing that the Fund covered Hospital employees and that therefore the Fund could not subrogate against its own insured (R 50-83). The court denied Higley's Motion, finding that the Fund covered the Hospital, but not its employees (R 92-93). The parties then stipulated to the entry of a Consent Judgment in favor of the Plaintiff Fund, and the Defendants appealed (R 122-125). The Fourth District found that nurses were not "additional insureds" or "directly insured" under F.S.A. 768.54(2)(e) (A 3). Therefore, there was no legal bar to the Fund seeking indemnification from the Hospital's employee, even though the employee is an additional insured under the Hospital's policy. Noting that strong public

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

policy reasons exist for preventing this type of action by the Fund, the District Court certified the question for resolution by this Court (R 4-5).

Petitioners Higley and Continental argue that the Fund is not allowed to subrogate in this situation. First, Section 768.54(2)(e) Florida Statutes specifically extends its coverage to employees of the health care provider. Recent cases from the Supreme Court and the Fourth District have noted that the Fund is essentially an insurer. It is a basic rule of law that an insurer cannot maintain a subrogation action against its own insured.

Second, no judgment of liability was ever entered against Nurse Higley. Indeed, she was not a named Defendant in the original suit. The Hospital's right to indemnity is dependent upon an adjudication that Nurse Higley was negligent and that the Hospital was merely vicariously liable. There has never been a judicial determination of these issues. Therefore the Hospital cannot seek indemnity against Nurse Higley. Additionally, since a subrogee takes no greater rights than his subrogor, the Fund has no right of indemnity against Nurse Higley either.

Finally and most importantly, sound public policy considerations should prevent the Fund from maintaining this action. The Fund is a statutory creature, and its rights, duties and liabilities are limited by the language of the statute. There is nothing in the statute which would permit the Fund to sue a nurse employed by a member hospital. The Hospital's liability

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

can only derive from its employees, and the Fund collected premiums to cover just this kind of vicarious risk. It is certainly against the intent of the statute to allow the Fund to file subrogation actions against the nurses and other employees of the hospital and obtain judgments against them. An insurance company could not do so because they would be additional insureds. This certainly was not the intent of the statute to allow this, and in fact the intent of the statute is the opposite of this; to protect health care providers from liability.

Upholding the Decision in this case would impose an obligation on all health care employees to pay private malpractice insurance. The end result will be a heightening of the already escalating malpractice insurance crisis, which is directly contrary to the legislative intent in enacting the statute creating the Fund.

For these reasons, the Court should reverse the Opinion affirming the Summary Final Judgment entered in favor of the Fund, and should order that Summary Judgment be entered in favor of the Petitioners and answer the certified question in the negative.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

I. THE PATIENT'S COMPENSATION FUND CANNOT MAINTAIN A SUBROGATION SUIT AGAINST A NURSE IN THE HOSPITAL.

The crux of this case is that the Patient's Compensation Fund insured a hospital and settled a case and then filed this action (termed a subrogation action) against Nurse Higley, who worked in the hospital, and her insurance carrier Continental.

The essence of the problem is that if it had been an insurance company which settled the case, the insurance company would not be able to file a subrogation action against the nurse because the nurse is an additional insured under the hospital's insurance policy. Higley, 486. However, the Fund does not issue policies so it contended that the nurses and employees are not additional insureds, so it can sue them. It should be noted that the nurse in the present case has $200,000 of insurance; however this rule of law would apply whether the nurse or doctor or employee had insurance or not, and allow the Fund to receive personal judgments against these employees.

It is submitted that the same public policy which prohibits insurance companies from filing actions against employees of its insured also prohibits the Fund from doing so, and it does not make any public policy difference just because the Fund does not have a written policy. The Fund is a creature of statute and only has the rights given it by statute, and the statute does not give the Fund the right to sue and recover personal judgments against nurses, etc., and therefore it has no right to do so. Higley, 484. If anything

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

this is clearly against the intent of the statute since the intent is to shield health care providers where an insurance company could not. This is simply contrary to the intent and policy of the statute, as well as public policy. The statute is in derogation of common law and must be strictly construed, and since the statute does not authorize the Fund to sue nurses etc. and recover personal judgments against them, it can not do so.

In 1980, Marian Falk filed a wrongful death action against Dr. William Joyner, Holy Cross Hospital, the Florida Patient's Compensation Fund and others alleging that hospital personnel negligently caused the death of her new born child. At the time of the alleged negligence, the Hospital had a $100,000 liability insurance policy with St. Paul Fire Insurance Company. The Hospital employees were additional insureds under the St. Paul policy. The Hospital was also a member of the Florida Patient's Compensation Fund. Pursuant to the Section 768.54 Florida Statutes, the Fund provided unlimited coverage to the Hospital over and above the $100,000 provided by St. Paul.

Mrs. Falk did not sue the Defendants in the present case, (Nurse Sue Higley and her professional liability insurer, Continental Insurance Company.) Continental's policy provided $200,000 in coverage to Nurse Higley. The Hospital was not an additional insured on Higley's policy.

The Falk case was eventually settled before trial. The Fund agreed to pay Marian Falk $425,000 on behalf of Fund

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

member Holy Cross Hospital in order to protect the Hospital from possible vicarious liability. In return, the Plaintiff released Defendants/Joyner, Holy Cross Hospital, Florida Medical Malpractice Joint Underwriting Assoc., the Fund, and also Sue Higley, who was not a named Defendant.

The Fund subsequently sued Nurse Higley and Continental, alleging that by payment of the settlement the Fund became subrogated to Holy Cross' rights to a cause of action against Nurse Higley (R 41-43). Therefore, the Fund sought to recover $200,000 under the Continental policy. Defendants answered that the Fund was precluded from bringing such an action by "limitation of liability" section of the statute. Section 768.54(2)(e) (R 47-49). Defendants' argument essentially was that the Fund insured Nurse Higley as well as the Hospital, and that therefore the Fund could not subrogate against its own insured. Additionally, the argument was that the rights of the Fund were established by the statute and no right was given to the Fund to file actions and obtain judgments against nurses, and other employees in the hospital covered. Certainly this was never the intent of the statute, and no right of action is given to the Fund to do this.

Both parties moved for Summary Judgment on this issue and submitted memoranda in support (R 50-89). A hearing was held before the trial court on July 10, 1984 (R 1-40). The court subsequently denied Hiley/Continental's Motion for Summary Judgment, finding that the Fund did not insure Nurse Higley (R 90-91). This was affirmed on appeal. Higley, supra.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

A. FUND CANNOT SEEK INDEMNIFICATION FOR ITS INSURED.

The Fund was essentially an excess carrier in this situation. The Hospital had a $100,000 underlying policy with St. Paul, and Nurse Higley was an additional insured under this policy. Higley, 486. The Fund provided unlimited coverage over and above the $100,000 limits, and covered hospital employees like Nurse Higley.

The language used by the Supreme Court in Florida Patient's Compensation Fund v. Von Stetina, 474 So.2d 783, 788 (Fla. 1985), indicates that the Fund is essentially an insurer: "The Florida Patient's Compensation fund provides health care providers with medical malpractice liability coverage for the benefit of both the health care providers and those members of the public who become victims of medical malpractice."

In Cohen v. Baxt, 473 So.2d 1340, 1342 (Fla. 4th DCA 1985), this court held the two-year Statute of Limitations, applicable to health care providers and persons in privity with the provider, did not apply to the Patient's Compensation Fund, since the Fund is more analogous to an insurer than to "one in privity with a health care provider." Section 95.11(4)(b) Florida Statutes. The dissenting judges' opinion in Fabal v. Florida Keys Memorial Hospital, 452 So.2d 946 (Fla. 3d DCA 1984), was cited with approval:

> In Fabal the dissenting judge reasoned that "the similarities between the Fund and an insurance program clearly preponderate over the dissimilarities." 452 So.2d at 949.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> Like an insurance company, the Fund has no obligation for payment unless a judgment in excess of $100,000 is entered against the health care provider. The Fund's liability is derivative because it depends not on any tortious conduct which it committed, but arises solely out of a contract with the health care provider.
>
> Cohen, at 1361.

This Court modified the opinions in Cohen and Fabal, but still stated that the Fund is like an insurance company in some respects. Taddiken v. Florida Patient's Compensation Fund, 478 So.2d 1058, 1060 (Fla. 1985).

Under Section 768.54(2)(e) Florida Statutes (1982), the Fund expressly provided coverage for Nurse Higley as well as for the Hospital:

> The limitation of liability afforded by the Fund for a participating hospital or ambulatory surgical center shall apply to the officers, trustees, voluntary workers, trainees, committee members, and employees of the hospital...This limitation of liability shall apply to the hospital or ambulatory surgical center and those included in this subsection as one health care provider. (emphasis added)

The most recent version of Florida Statute Section 768.54(2)(e) indicates that the legislature looks upon the Fund as an insurer, of health care providers and nurses:

> (e) The coverage afforded by the Fund for a participating hospital or ambulatory surgical center shall apply to the officers, trustees, volunteer workers, trainees, committee members (including physicians, osteopaths, podiatrists, and dentists), and employees of the hospital....
>
> 768.54(2)(e)(1985).

The Fund in the present case seeks to subrogate itself to

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

the Hospital's right of indemnity against Nurse Higley. However, the Fund clearly provides coverage for Nurse Higley as an employee of the Hospital. It is a basic rule of law that an insurer may not maintain a subrogation suit against its own insured. Allstate Ins. Co. v. Fowler, 480 So.2d 1287 (Fla. 1985); Marina Del Americana v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976); Ray v. Earl, 277 So.2d 73 (Fla. 2d DCA 1973).

When the language of a statute specifically extends the benefit of coverage to a person, the insurer cannot go against that person in subrogation.

> It may be required by statute or contract that some person other than the insured shall have the benefit of the insurance procured by the insured. When such is the case, the insurer may not assert any claim by way of subrogation against such person, on the theory that the policy is designed to afford protection to such third person and this purpose would obviously be defeated if the insurer could sue the third person to recover from him the payments made by the insurer to the third person.
>
> Couch on Insurance, 2d Section 62.13.

The clear language of the law mandates that the Fund provides coverage for hospital employees. This unquestionably supports the Petitioners' position that the Fund has no cause of action against Nurse Higley, because she is an insured of the Fund.

This Court has not changed this conclusion by its decision in Finkelstein v. North Broward Hospital District, Inc., 484 So.2d 1241 (Fla. 1986). That case found, that under the express language of Section 768.56, a nurse is not a member of the class of persons subject to having attorneys' fees assessed

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

against them, since a nurse is not a "medical or osteopathic physician, podiatrist, hospital or health maintenance organization." That is not to say that a nurse is not an employee of the hospital covered by the Fund under Section 768.54(2)(e). While the newer version of this law was not in effect in 1979 when the Plaintiff sued the Fund and Hospital, it is instructive as to exactly who is protected by Fund coverage.

The legislature is not concerned that the Fund should cover hospital employees, even though the employee pays no premiums. This is a very reasonable position since many employees are provided insurance coverage by their employers, for which they pay no premium. Hospitals are assessed millions of dollars for coverage by the Fund, and it is clear that the Florida Legislature intended that this coverage extend to hospital employees also. If this were not so then the result is that hospital employees are caught between a rock and a hard place as recognized in the Opinion below:

> The advent of the Patient's Compensation Fund puts employees in a different and difficult position. Employees themselves are not among the health care providers enumerated in section 768.54 (1)(b) and are thereby prevented from taking advantage of the new insurance scheme by becoming Fund members. Simultaneously, they have effectively lost the option of group insurance, except to the limited extent that hospitals are required to carry private insurance, above which they are permitted to rely on the Fund. Consequently, hospital employees appear to be caught between a rock and a hard place. If the Fund is permitted to

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> seek subrogation from hospital employees, these employees will be forced to seek private insurance. Appellants contend this result would directly conflict with the legislative objective to provide an alternative to the health care profession from the spiralling expense of private medical malpractice insurance.
>
> Higley, at 486.

How else is a hospital liable except through its employees? The Hospital paid premiums to the Fund to cover the Hospital's exposure which could only derive from the negligence of its employees, including the nurses. Once again, the unequivocal language of the statute states:

> The limitation of liability afforded by the Fund to a participating hospital... shall apply...to employees of the hospital ....

Since Holy Cross Hospital is a corporation, claims against it necessarily are vicarious for acts of its employees in the course and scope of their employment. The Fund's action against Nurse Higley then is an attempt to subrogate against its own insured, which is prohibited by law and on grounds of public policy.

The Fund characterized itself, in the Complaint, as an insurer, to take advantage of the insurance laws on subrogation:

> 3. The FUND, while not strictly speaking as an excess insuror, is entitled to equitable subrogation to the rights of its member HOLY CROSS HOSPITAL under applicable general rules of insurance law.
>
> (R 41)

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Then it repeatedly claimed in its Brief below that it is not an insurer, because if it were it could not file suit against Higley. The Fund advocated using the most recent version of the malpractice statute, which now explicitly states the Fund must provide "coverage" for hospital employees. If the Fund is an insurer it cannot seek subrogation against its own insured, a hospital employee. If it is not an insurer then there are no subrogation rights. In either case the result is the same, there is no cause of action against Higley and Summary Judgment must be entered for the Petitioners and the certified question answered in the negative.

B. HOSPITAL CANNOT RECOVER AGAINST ITS INSURED; NEITHER CAN ITS SUBROGEE.

Since the Fund merely stands in the Hospital's shoes for subrogation purposes, the Fund cannot seek indemnification from Nurse Higley. An insurer can take nothing by subrogation but the rights of the insured, and is subrogated to only such rights as the insured possessed. DeCespedes v. Prudence Mutual Cas. Co., 193 So.2d 224 (Fla. 3d DCA 1966), affirmed 202 So.2d 561 (Fla. 1966); 31 Fla.Jur.2d, Insurance Section 950. The Hospital cannot seek indemnification from Nurse Higley.

The Fourth District acknowledged that the Hospital specifically obtained underlying insurance naming its nurses as additional insureds, which barred it from indemnification. Higley, 486. Moreover, the Hospital told Nurse Higley that she would be covered by the Hospital's insurance. The following is taken from the affidavit of Frank Milanesi:

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> I am Frank Milanesi, and I was the risk manager at Holy Cross Hospital prior to, during, and at all times subsequently to the conclusion of the Falk litigation.
>
> I have personal knowledge of the facts recited in this affidavit.
>
> I inform the nurses at Holy Cross Hospital that they are covered under the Hospital's medical malpractice insurance policy.
>
> It is my policy to inform the nurses of their coverage under the Hospital's policy, not only during orientation lectures, but whenever and if ever the subject comes up during normal conversations, or during other organized programs or activities.
>
> To the best of my knowledge Nurse Higley was informed that she was covered under the Hospital's medical malpractice insurance policy.
>
> (R 50-83)

These representations made by the Hospital bar it from seeking indemnity from Nurse Higley. Having undertaken to insure its nurses, the Hospital cannot now seek indemnity from one of them, and neither can the Fund as the Hospital's subrogee, since the subrogee stands in the shoes of the subrogor.

Where two parties agree that one will purchase insurance for the mutual benefit of both, the carrier is barred from subrogating to the rights of either party to seek indemnity from the other. U.S. Fire Insurance Co. v. Norlin Industries, 428 So.2d 325 (Fla. 1st DCA 1983). In that case, the court held that a lessee was an intended beneficiary under the lessors insurance contract, and it dismissed the carrier's

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

subrogation suit against the lessee.

Summary Judgment should have been entered for the Petitioners as the Fund, as subrogee, cannot seek indemnification against its own insured, or the additional insured of the subrogor Hospital.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

II. PUBLIC POLICY CONSIDERATIONS PREVENT THE FUND'S ATTEMPT TO SUBROGATE.

The Fund for public policy reasons is not entitled to bring the present subrogation action. The Fund is a statutory creature, and its rights, duties and liabilities are limited by the language of its enabling statute. There is nothing in the statute that would authorize the Fund to sue a nurse employed by a covered Hospital. Higley, 484. The primary basis of the Hospital's liability is the actions of its nurses and other employees. It is fundamentally unfair to permit the Fund to collect premiums for this kind of vicarious risk, and then turn around and sue the very people it is covering.

The gist of subrogation is that someone pays off a debt owed to a creditor, and then stands in the creditor's shoes to collect from the debtor. In the present case, the Fund merely paid off its own debt to Mrs. Falk, based upon its independent "contract" of insurance with the Hospital.

Moreover, to allow subrogation would be to penalize Nurse Higley for being responsible enough to carry her own coverage. The court's holding that the Fund does not cover employees (even when the Hospital assures them that they are covered) would require all nurses to obtain professional liability insurance. This is directly contrary to the intent of the malpractice legislation and would only add fuel to the fire of the ever escalating malpractice insurance crisis.

The statute does not state that the Fund can sue nurses and recover judgments against them, and therefore it can not do

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

so. The Fund statute is in derogation of common law and therefore must be strictly construed. Randolph v. Unger, 417 So.2d 1095 (Fla. 3d DCA 1982); Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1978).

The real public policy question here is whether the Fund should be allowed to get personal judgments against hospital employees. Sound public policy considerations should prevent the Fund from maintaining this action. The Fund is a statutory creature, and its rights, duties and liability are limited by the language of the statute. There is nothing in the statute which would permit the Fund to sue a nurse employed by a member hospital. The Hospital's liability can only derive from its employees, and the Fund collected premiums to cover just this kind of vicarious risk. It is certainly against the intent of the statute to allow the Fund to file subrogation actions against the nurses and other employees of the hospital and obtain judgments against them. An insurance company could not do so because they would be additional insureds. There certainly is no intent of the statute to allow this, and in fact the intent of the statute is the opposite of this; to protect health care providers from liability.

The Appellate Court also recognized that to allow the Fund's claim against the nurse and her insurer is economically inefficient and would probably be violative of equal protection rights:

> Since the hospital's liability is dependent upon that of its employees, in most instances the cost of assuming the risk of

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> liability created by the hospital and its employees will be the same whether the hospital alone is the insured or the employees are also insureds. The Fund is directly compensated, through assessments paid by member hospitals, for assuming the risk of damages it might have to pay out because of the negligence of an employee. Presumably, the hospitals will in turn pass these costs on in some manner to employees and patients in the form of lesser salaries and higher charges. To permit a suit for subrogation is to upset this delicate economic balance by providing a windfall to the Fund at the expense of hospital employees and the rest of the public. This is in addition to the waste and expense of yet another stage of litigation. There can be no question that the Act was designed to compensate patients for damages caused by the negligent acts of both health care providers and hospital employees. Section 768.54(2)(e). The former pay for this coverage directly; the latter are protected through the hospital's policy with the Fund. It is equally clear that the Fund has no right of indemnification or subrogation against a health care provider, since the health care provider is an insured. There appears to be little rational basis for treating hospital employees differently; indeed, such a result seems to discriminate unfairly between different classes of health care professionals, in this case, nurses as opposed to health care providers eligible for coverage under the Fund. (emphasis added)
>
> Higley, at 486.

For these policy reasons, the Court should not permit the Fund to subrogate in this case and the certified question should be answered in the negative.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

CONCLUSION

The Court should answer the certified question in the negative, reverse the Summary Final Judgment entered in favor of the Florida Patient's Compensation Fund, and order that a Summary Judgment be entered in favor of Petitioners Higley and Continental Insurance Company.

Law Offices of
RICHARD A. SHERMAN, P.A.
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: Richard A. Sherman
Richard A. Sherman

CERTIFICATE OF SERVCIE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of August, 1987 to:

Craig A. Dennis, Esquire
Collins, Dennis & Williams
Post Office Drawer 550
Tallahassee, Florida 32302

Law Offices of
RICHARD A. SHERMAN, P.A.
Suite 102 N Justice Building
524 South Andrews Avenue
Fort Lauderdale, FL 33301
(305) 525-5885 - Broward
(305) 940-7557 - Dade

By: Richard A. Sherman
Richard A. Sherman