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.

REPLY BRIEF OF PETITIONERS ON THE MERITS

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

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POINT ON APPEAL

PATIENT'S COMPENSATION FUND CANNOT MAINTAIN A SUBROGATION SUIT AGAINST A NURSE IN A HOSPITAL; ESPECIALLY WHERE PUBLIC POLICY CLEARLY PREVENTS THIS ACTION.

ARGUMENT

The crux of this case is that the Patients' Compensation Fund insured a hospital and settled a case and then filed a subrogation action against the alleged negligent hospital employee and her insurance carrier. It is respectfully submitted that to allow the Fund to proceed in this subrogation action will work an injustice upon hospital employees and is clearly contrary to the public policy expressed in the statute.

The right to subrogation is never absolute; it depends on the equities of the situation involved and on the dictates of good conscience and public policy. Dantzler Lumber & Export Co. v. Columbia Casualty Co., 115 Fla. 541, 156 So. 116 (134). Consequently, relief by way of subrogation will not be granted where it would work an injustice, or innocent third persons would suffer, or where the results would be adverse to sound public policy. 12 Fla. Jur.2d Contributions, Section 19.

The real crux of this case is a public policy question, as to 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 liabilities are limited by the language of the statute. There is absolutely nothing in the statute which would permit the Fund to sue a nurse or employees of a member hospital.

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While a hospital may be liable for improper staffing, using faulty equipment, etc., there is no question that the majority of the hospital's liability can only be derived from its employees, and the Fund collects premiums to cover just this kind of vicarious risk. It is certainly against the intent of the statute to allow the Fund to file a subrogation action against nurses and other employees of the hospital and obtain judgments against them. An insurance company could not do so because the employees are additional insureds. There is certainly 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.

This public policy consideration is certainly not changed by the fact that the Fund asserts that it would be economically ineffective for the Fund to seek these personal judgments. The Fund however does not say that it will not seek personal judgments against hospital employees.

The Fund completely ignores the public policy consideration set out in the Opinion of the Fourth District below. The appellate court has recognized that to allow the Fund's claim against the nurse and her insurer is economically inefficient and probably violative of equal protection rights. The court notes that in viewing the various risks involved, that the Hospital's liability, as asserted by the Appellant, is dependent on that of its employees and in most cases the cost of assuming the risk of liability created by the hospital and its employees, will be the same, whether the hospital alone is the insured or the employees

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are also insured.

The Fund has been paid premiums by assessing member hospitals for assuming these risks of damages that it may have to pay out because of the negligence of an employee. The hospitals will in turn simply pass on the cost of these assessments in the form of lesser salaries for the employees or higher charges to the patients. Higley v. Florida Patients' Compensation Fund, 506 So.2d 483, 486 (Fla. 4th DCA 1987).

The Fund claims that if it is not allowed to proceed with a subrogation action against the nurse and her insurer that this will result in a windfall to the insurance company. The Fund completely ignores the opinion below which states:

> 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 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 the hospital employees. Section 768.54(2)(e). The former pay for this coverage directly; the later 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.
>
> Higley, at 486.

The Fund continues to maintain its chameleon-like status in that it argues that it is an "insurer" for the purposes of being

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allowed to maintain a subrogation action and at the same time claims that it is not an insurer, therefore it is able to seek subrogation against its insured. The Appellants have already discussed in their main Brief, the caselaw and applicable sections of the statute, such as section F.S.A. Section 768.54(2)(e) (1985), which provide coverage through the Fund for hospital employees. Therefore it is clear that if the Fund is an insurer for the purposes of subrogation, than it is barred from seeking subrogation against one of its own insureds, Nurse Higley.

To avoid this clear result the Fund argues that it is simply substituting itself for the Hospital's indemnification action against its employee.

> 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.
>
> Brief of Appellee, page 10.

However the Fourth District acknowledged, in its Opinion below, that the Hospital specifically obtained underlying insurance naming its nurses as additional insureds, which barred it from indemnification. Higley, 486. In addition, the Hospital expressly informed Nurse Higley that she would be covered by the Hospital's insurance. Nurse Higley was never told she would be covered only by the Hospital's primary insurance with St. Paul, but she would be personally liable for any amounts over those limits. In the Affidavit of the risk manager of Holy Cross Hospital, he expressly stated that Nurse Higley was informed that

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she was covered under the Hospital's malpractice insurance policy.

Even if the Fund is eligible to seek indemnification from Nurse Higley, its claim would still fail. No judgment of liability was ever entered against Nurse Higley, as she was not a named Defendant in the original lawsuit. The Hospital's right to indemnity is dependent upon an adjudication that Nurse Higley was negligent and that the Hospital was only vicariously liable. There has never been a judicial determination of these issues. Therefore the Hospital and/or Fund cannot seek indemnity against Nurse Higley.

Upholding the Decision below would impose an obligation on all health care employees to pay private malpractice insurance. The end result would 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. The Fund seeks to carve out an exception to this legislative intent, by asserting that it should be entitled to subrogation even if that is against public policy, for the amount of available insurance coverage. However the end result is exactly the same. If the Fund is permitted to seek subrogation from hospital employees, then these employees will be forced to seek private insurance, which will then be available to the Fund in a subrogation action. Higley, 486. Any attempt by the Fund to recover against Hospital employees, whether this recovery is limited to available insurance or not, is clearly contrary to the legislative intent in passing the statute creating the Fund.

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As previously stated 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 empowers the Fund to seek subrogation/indemnification from an employee of a member hospital. The Fund has collected millions of dollars in premiums to cover this very kind of vicarious risk. The Fund has pointed to no legislative history that indicates that the intent of the statute was to allow the Fund to file subrogation actions against nurses and other employees of health care providers and obtain personal judgments against them. 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.

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CONCLUSION

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of September, 1987 to:

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