IN THE SUPREME COURT OF FLORIDA
APPEAL NO. 71,853

Amended:

AARON SCHNEIDER, M.D. and
A. SCHNEIDER, M.D., P.A.

Petitioners,

vs.

UNDERWRITERS' ADJUSTING CO./
THE FAMILY MART,

Respondents.

_____/

RESPONDENTS' BRIEF

PETER H. DUBBELD, P.A.
6500 FIRST AVENUE NORTH
ST. PETERSBURG, FL 33710
(813) 347-8877

By: _____
PETER H. DUBBELD, ESQUIRE
DONALD D. KAELBER, ESQUIRE

TABLE OF CONTENTS

LIST OF AUTHORITIES

FLORIDA STATUTES:

STATEMENT OF THE CASE AND FACTS

The respondent, Underwriters' Adjusting Company/The Family Mart, accepts the petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Section 440.39, Florida Statutes (1983) does expressly provide a right of subrogation and if the legislature sought to deny workers' compensation liens, in medical malpractice actions, the legislature would have drafted the medical malpractice statute without the phrase "...unless otherwise expressly provided by law".

Further, the practical operation of striking a workers' compensation lien in medical malpractice cases acts to unjustly require a workers' compensation carrier to provide enhanced medical benefits to an employee for injuries suffered at the hands of third party. This is fundamentally wrong.

ISSUE

(Re-worded by the Respondent)

WHETHER A WORKERS' COMPENSATION CARRIER WHO PROVIDES ENHANCED WORKERS' COMPENSATION BENEFITS TO AN INJURED EMPLOYEE AS A RESULT OF A PHYSICIAN'S SUBSEQUENT NEGLIGENCE IS ENTITLED TO A LIEN ON THE ENSUING MEDICAL MALPRACTICE ACTION.

Petitioner, Humana of Florida, Inc., et al, argues that the Florida legislature is concerned about the escalating costs of medical malpractice insurance, increasing costs of health care, the practice of "defensive medicine", and the decreasing availability of health care in Florida. Petitioner argues further that the medical malpractice collateral source statute shows that the legislature considers this area to be of particular concern.

Respondent does not contend this. In fact, Respondent agrees with this general proposition, however, the fact remains that the medical malpractice statute does provide for exceptions to the collateral source rule. The statute provides for a party providing collateral source benefits to recover those benefits when such subrogation right is expressly provided by law. Florida Statute, Section 768.50(4) (1981). Workers' compensation benefits are collateral source benefits for which a subrogation right is expressly provided. Florida Statutes, Section 440.39(2) (1977)

Petitioner argues that the workers' compensation statute does not contain the explicit language granting a subrogation right in the context of a medical malpractice action, and

therefore such subrogation right is not "expressly provided by law". It is true that although there is a general subrogation right in the workers' compensation statute there is no explicit language giving a subrogation right in the context of medical malpractice. However, it must be remembered that the workers' compensation statute was drafted before the medical malpractice statute and if the legislature sought to deny liens in matters such as workers' compensation benefits, the legislature would have drafted the medical malpractice statute without the phrase "...unless otherwise expressly provided by law".

As Respondent has already pointed out in their brief to Petitioner, Schneider, other jurisdictions have struggled with medical malpractice reform, notably California. In the California Supreme Court case of Barme v. Wood, 689 P.2d 446 (1984), the court held that no collateral source subrogation right exists. It was pointed out that the California legislature had removed the subrogation right in cases involving medical malpractice claims, however, it was also pointed out that the legislature had initially considered leaving such a subrogation right intact in a medical malpractice claim when it was "...expressly provided by law", but instead specifically rejected that consideration. In a later California case, Miller v. Sciaroni, 218 Cal.Rptr. 219 (Cal. 1st DCA 1985) the court pointed out that the California workers' compensation statutes permits employers to subrogate Plaintiff's claims against the tortfeasor, however, under the California Medical Malpractice Act collateral sources are barred from subrogation. This court also pointed out

that an earlier draft of the medical malpractice act would have preserved a collateral sources subrogation rights when such rights were "expressly provided by statute", but that exception was eliminated before the statute's enactment. Miller at 222.

Florida on the other hand, has decided to leave the workers' compensation carriers' subrogation rights intact in medical malpractice claims as that subrogation right is "otherwise expressly provided by law", as required by Section 768.50(4).

Petitioner, Humana, argues, as did Petitioner, Schneider, that the Florida Supreme Court in the case of City of Clearwater v. Burton, 2 So.2d 731 (Fla. 1941), intended to restrain the definition of "on the job injuries" to claims for workers' compensation benefits. This is simply not true. The rule that the court intended to restrict was the causal connection between the aggravated medical condition, as a result of the medical negligence, and the original injury. This court's dicta did not restrain the definition of "on the job injuries", it simply meant that the casual connection would not necessarily be found if the original injury was not a result of an employment situation. Clearly, in the case at bar, Billy Joe Hicks' original injury was employment related and Burton is squarely on point for holding that the medical malpractice occurred in the course of his employment.

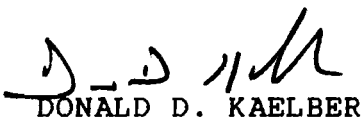
Petitioner cites Brown v. Griffith, 229 So.2d 225 (Fla. 1969), for the proposition that the legislative intent must be considered in order to determine the meaning of the provision "...expressly provided by law", however, Petitioner fails to

point out that Brown states further that the practical operation of that statute before and after the amendment must also be considered. Brown at 228.The practical operation of striking a workers' compensation lien in medical malpractice cases acts to unjustly require a workers' compensation carrier to provide enhanced medical benefits to an employee for injuries suffered at the hands of a third party. This is fundamentally wrong.

CONCLUSION

Based on the foregoing reasons and citations of authority, Respondents would suggest to this Court that the District Court of Appeal, Second District, was correct in reversing the trial court's orders striking the notices of payment of workers' compensation benefits. Because the District Court's ruling was correct, Respondents urge this Court to approve that opinion.

Respectfully submitted,



DONALD D. KAELBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Respondents' Brief have been furnished by Federal Express this ____ day of April, 1988 to the Honorable Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; along with a copy each to the attached List of Counsel by U.S. Mail.

DONALD D. KAELBER, ESQUIRE
PETER H. DUBBELD, P.A.
6500 FIRST AVENUE NORTH
ST. PETERSBURG, FL 33710
(813) 347-8877
ATTORNEY FOR RESPONDENTS

LIST OF COUNSEL

Kenneth L. Olsen, Esquire
MILLER & OLSEN
711 N. Florida Avenue, Ste. 310
Tampa, FL 33602

Jonathan L. Alpert, Esquire
Peter J. Grilli, Esquire
ALPERT, JOSEY, FREEMON & FRILLI
Ashley Tower, Suite 2000
100 S. Ashley Drive
Tampa, FL 33602

H. George Kagan, Esquire
MILLER, HODGES, KAGAN & CHAIT, P.A.
445 Fairway Drive, Suite 101
Deerfield Beach, FL 33441

G.W. Jacobs, Esquire
HARKAVY, MOSLEY, MITCHELL,
STEWART & JACOBS, P.A.
219 S. Orange Street
Sarasota, FL 33577

James C. Blecke, Esquire
Susan S. Lerner, Esquire
Biscayne Building, Suite 705
19 West Flagler Street
Miami, FL 33130

Rodney Morgan, Esquire
SHEAR, NEWMAN, HAHN & ROSENKRANZ, P.A.
201 E. Kennedy Boulevard, Suite 1000
Tampa, FL 33601

Robert L. Dietz, Esquire
Kevin S. Cannon, Esquire
ZIMMERMAN, SHUFFIELD, KISER &
SUTCLIFFE, P.A.
P.O. Box 3000
Orlando, FL 32802

Gary D. Fox, Esquire
STEWART TILGHMAN, P.A.
44 West Flagler Street
Suite 1900
Miami, FL 33130

Arnold R. Ginsberg, Esquire
HORTON, PERSE & GINSBERG
410 Concord Building
66 W. Flagler Street
Miami, FL 33130

Gene Finn, Esquire
201 McCormick Building
111 S.W. Third Street
Miami, FL 33130

Kenneth E. Cohen, Esquire
KROLL & TRACT
3250 Mary Street, Suite 301
Miami, FL 33133

Nelly N. Khouzam, Esquire
FOWLER, WHITE, et al
P.O. Box 210
St. Petersburg, FL 33731

A. Broaddus Livingston, Esquire
S. Jane Mitchell, Esquire
CARLTON, FIELDS, WARD et al
P.O. Box 3239
Tampa, FL 33601