Consol. 4-26

IN THE SUPREME COURT OF FLORIDA

WILLIAM P. MAHAN, M.D., and
W. P. MAHAN, M.D., P.A.,

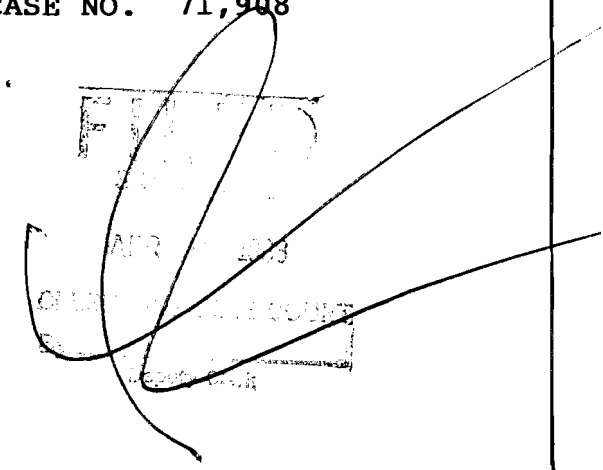
Petitioners,

vs.

VINCO PLASTERING & DRYWALL;
FLORIDA EMPLOYERS INSURANCE
SERVICE CORP. (FEISCO),

Respondents.

CASE NO. 71,908



BRIEF OF RESPONDENTS

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SUMMARY OF ARGUMENT

The lower Court had ordered striken the employer/servicing agent's statutory workers' compensation lien filed in claimant's medical malpractice action. There being no countervailing pronouncement in the Second (or in any other) District, the Judge below felt constrained to rule in such a manner on authority of a comparatively recent Third District Court case, a case of first impression, dealing squarely with the matter now before the Court.

On appeal, your respondents, appellants below, confronted directly their burden of persuasion: They were required to, and did demonstrate to the satisfaction of the Second District Court of Appeal the fact the Third District had plainly erred in its construction of §768.50, Florida Statutes 1981. The decision challenged and that which is now certified by the Second District as the basis of the conflict is American Motorists Insurance Co. v. Coll, 479 So.2d 157 (Fla. 3DCA 1985) rev. den. 488 So.2d 829 (Fla. 1986).

In order for the analysis given §768.50 by the Third District Court of Appeal to prevail, this Honorable Court must determine the express statutory right of subrogation lien set forth under §440.39 Florida Statutes is a subrogation right which does not exist, and, that the employer/servicing agent is not entitled to recover extra amounts paid as a consequence of third-party wrongdoing because no right of lien has been "...expressly provided by law..". This is a

paradox not of the making of either your respondents or of the Second District Court of Appeal. As urged below and as reasserted here the statutory language under scrutiny is not truly capable of disparate interpretation unless violence is done to axiomatic rules of statutory construction. Your respondents hope to persuade this Honorable Court the construction given the statutory measures under consideration by the Third District Court of Appeal Coll, supra, are both facially defective and fundamentally unsound.

The interpretation given §768.50 (4) by the Second District Court in the cause sub judice restores to that section meanings which are reconcilable with the plain language of the statute. Further, as respondents will show, the Second District's interpretation tracks what has always been--and more important--what ought to be--in the context of the measures involved vis-a-vis the legitimate rights and expectations of all parties. They are outlined in the following paragraph.

Your respondents agree with petitioner's opening statement, in his Summary of Argument: The workers' compensation employer/servicing agent must compensate the injured employee for 100% of his work-related injury. Respondents agree with the second statement in petitioner's Summary: If, during treatment for a compensable injury, the employee is harmed further through alleged malpractice of a physician, the employee may sue the physician on the incident of alleged malpractice. However, at this juncture in petitioner's Summary, a crucial step is overlooked and all remaining

statements will be shown to be inaccurate. The omitted step is: When treatment for a compensable injury either prolongs or exacerbates the original injury, such aggravation is compensable under the Workers' Compensation Act and the employer/servicing agent must provide benefits resulting from this magnification of the work connected injury though it is not in any real sense "responsible" for the physician's misdeed. It has long been the law in Florida: Such exacerbations of compensable injuries are constructively deemed to have "arisen out of and in the course of employment" as if part of the original compensable injury, thus compelling increased workers' compensation payments by the employer/servicng agent.

Your respondents will show that where the law, either through statute or through the so-called "fiction" of judicial interpretation, construes an injury to have arisen "out of and in the course of employment", what follows is not a fiction: Once an injury arising out of and in the course of employment is identified--the express statutory lien created under §440.39, Florida Statutes 1981, is self-actuated and affixes itself unto such injury accordingly. The petitioner maintains otherwise and your respondents will satisfy the Court his representations in this respect are incorrect.

There is neither statutory authority nor any alleged exigency so compelling as to justify the wrongdoing physician's receipt, in the form of relief from the financial burden of his own negligence of the windfall benefit of having that burden fall instead on the

Florida consumer of the employer's industry. Petitioner's arguments and the Coll Court's construction are not only unsupported in law--they are eminently wrong-headed.

Finally, in his summary, Petitioner Mahan asserts employer/servicing agent's rights against a subsequent treating physician is in "equitable distribution", citing Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980). The aforementioned case treats tort feasors, not employers and as a consequence, it does not involve statutory subrogation. The employer/servicing agent's rights are expressly enumerated by statute.

STATEMENT OF THE CASE

Your respondents accept the statement of the case offered in Petitioner Mahan's brief on the merits except to point out the servicing agent-respondent currently having an interest in the matter, (a successor to Claims Management Systems, Inc., mentioned in petitioner's brief), is Florida Employer Service Corporation (FEISCO) which was primarily responsible for maintaining this action at both the trial and appellate levels.

In this brief, Respondents Vinco Plastering and Feisco will address the arguments of all three petitioners referring to each by name.

STATEMENT OF THE FACTS

To assist this Court in placing the instant controversy in a more complete context, your respondents would supplement Petitioner Mahan's statement, though such facts as are stated by petitioner are not disputed.

Joe Harris received workers' compensation payments and medical treatment for his on-the-job injury of March, 1983 through his employer, Vinco Plastering and Drywall, Inc. and its workers' compensation servicing agent, Florida Employer Service Corporation (FEISCO) your respondents herein.

Dr. William P. Mahan, the petitioner, treated for the compensable wrist injury but in a subsequent suit filed by Harris, it was alleged Dr. Mahan harmed him further through carelessness and negligence (R1-3).

Such "third party" negligence in the form of medical malpractice (if established) has had the effect of increasing your respondents' workers' compensation payments to the employee below, Mr. Harris, considerably (TR4,l. 11). As a consequence, the employer/servicing agent filed a notice of payment of worker' compensation benefits and a claim of lien in the medical malpractice action brought by the employee, Joe Harris, under authority of §440.39, Florida Statutes 1981.

The defendant below, petitioner Dr. Mahan, (and W. P. Mahan, M.D., P.A.) filed a Motion of Defendants to Strike Notice of Workers' Compensation Lien and a hearing was conducted before the Honorable Dennis P. Maloney. On the strength of the recent Third District Court of Appeal's decision cited by the petitioner, American Motorists Insurance Co. v. Coll, 479 So.2d 156 (Fla. 3DCA 1985), rev. den., 488 So.2d 829 (Fla. 1986)--a case of first impression, the trial judge entered an Order striking the Notice of Workers' Compensation Lien on June 9, 1986 (R23).

The Order of June 9, 1986 was a final Order disposing of your respondents' statutory lien on the grounds such rights are purportedly abolished by §768.50, Florida Statutes (1981). From the Order striking the lien, the employer and servicing agent took an

appeal to the Second District Court urging that Court reinstate the lien and in so doing, your respondents expressly requested the District Court below repudiate the interpretation of the involved statutory authorities given by its sister Court, the Third District Court of Appeal in Coll, supra. This is precisely what the Court has done in the four consolidated cases bearing the style American Mutual Insurance Co. v. Decker, 518 So.2d 315 (Fla. 2DCA, 1987).

ARGUMENT

WHETHER A WORKERS' COMPENSATION LIEN MAY BE ASSERTED IN A MEDICAL NEGLIGENCE ACTION NOT-WTIHSTANDING THE PROVISIONS OF SECTION 768.50, FLORIDA STATUTES (1983)

From the opening paragraph of the Petitioner Mahan's argument it can be seen he repeats the error of the Coll Court, ab initio. We can agree with the following statement of petitioner:

> "Workers' compensation benefits have always been considered "collateral sources" and are included in the statutory definition of collateral sources."

We can also agree with the following statement of the petitioner insofar as it goes:

> "Section 768.50 Florida Statutes (1983) is an integral part of the Medical Malpractice Reform Act and requires trial court to reduce medical malpractice awards by the amounts claimants receive from collateral sources."

Where petitioner, and the Coll Court stray is in their respective omissions of either reference to, or consideration of the consequences of the prefatory words to §768.50 (4):

> **"Unless otherwise provided by law**, no insurer or any other party providing collateral source benefits as defined in sub-section (2) shall be entitled to recover the amounts of any such benefits from the defendant or any other person or entity and no right of subrogation or assignment of rights of recovery shall exist." (Emphasis added).

The foregoing language is to be read in pari materia with the earlier sub-section (1) enumerated under §768.50 which reads, in pertinent part:

> "(1) In any action for damages for personal injury or wrongful death, whether in tort or in contract, arising out of the rendition of professional services by a healthcare provider in which liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant for losses sustained, the Court shall reduce the amount of such award by the total of all amounts paid to the claimant from all collateral sources which are available to him; **however, there shall be no reduction for collateral sources for which a subrogation right exists**." (Emphasis added).

The Court will not find within the pages of the petitioner's brief much discussion either buttressing or otherwise taken from the wisdom of the Third District Court's pronouncement in Coll for the Third District's terse rendering in what was then a case of first impression has left petitioner bereft of a guiding hand here--and left to his own devices to explicate what was rather summarily handled by the Third District on this momentous question.

The Coll Court does not express in great detail the reasoning for its summary dispatch of the employer's profound, express, statutory rights, which we will highlight shortly. Instead, the Third District has given us the following paradox: It has deleted, in its quoted excerpt of §768.50, the phrase "....unless otherwise expressly provided by law..." and the phrase "....however, there

shall be no reduction for collateral sources for which a subrogation right exists..." [768.50 (4)and (1), as quoted above] in its effort to determine whether the workers' compensation servicing agent is or is not a "collateral source" for which a subrogation right exists, "...expressly provided by law!" The Second District Court, through Judge Frank, summarized this paradox succinctly:

> "We find nothing in Coll to explicate why §768.50 (4)'s prefatory words are meaningless. In our view those words are critical and control the outcome of the present controversies."

Indeed, glancing at the Petitioner's point on appeal-as phrased, might it not have been more aptly stated as: Whether a Workers' Compensation lien may be disgarded in a medical negligence action notwithstanding the provisions of §768.50, Florida Statutes (1983)?

In attempting to fill the void left by the Coll Court, claimant tries to convey to this Court the notion, [notwithstanding his concession "...a compensation carrier may be responsible for paying enchanced benefits because subsequent medical malpractice enchances the original injury..." (PB6)] that intervening medical malpractice rendered in the treatment of a compensable injury is not suffered "in the course of his employment". (PB6) Your respondents argued to the Court below what they reiterate here: Medical malpractice is one of the limited instances in which subsequent injury is construed to have arisen out of and in the course of employment as if part of the original compensable injury, thus compelling increased workers'

compensation payments by the employer-carrier/servicing agent. Your respondents support this contention with the following discussion.

Most on-the-job injuries are regarded as having arisen out of and in the course employment and as such, the parties' rights are fixed by the now "ancient" remedial social legislation known as the Workers' Compensation Act, §440., Florida Statutes. At the core of this important social compact is a swap: It is designed to provide for employers a liability that is limited and determinative and to afford employees a remedy that is both expeditious and independent of proof of fault. Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1DCA 1981).

Occasionally, a beguiling wrinkle is added to an otherwise typical compensation claim: A subsequent intervening injury occurs which is in some way connected with the original compensable accident and injury. Of course, there have been claims for such intervening accidents ruled too tenuous, too far removed to be regarded as having sufficient connection with the original compensable injury. The rule of law is nicely put in Central Concrete Co., Inc. v. Harris, 475 So.2d 1300 (Fla. 1DCA 1985):

> "When a primary injury is shown to have arisen out of and in the course of employment, every natural consequence of that injury likewise arises out of the employment unless it is the result of an independent, intervening cause which breaks the chain of causation." Harris, supra (Pg. 1301) Emphasis added.

This constructive "arising out of and in the course of" employment analysis is a necessary concomitant to the notion that an employer be responsible for payment of enhanced (or additional) injury benefits because such payments can only be compelled under the sole statutory provision by which the employer may be held liable irrespective of fault, namely: §440.09, Florida Statutes. This parallel cannot be severed for without a basis in §440.09, albeit a constructive one, there can be no basis for enhanced liability on the employer-carrier/servicing agent's part.

Though there are sometimes close questions of "causation" as between original and intervening subsequent injury, intervening medical malpractice has been regarded as a natural consequence of the original injury from the earliest days of the Florida Workers' Compensation Program:

> "It, therefore follows, that the (arguably negligent act of the physician) was not an independent intervening cause but was the result of the original injury, and the employer and insurance carrier are liable under the Workmen's Compensation Act, Acts 1935 c.17481." City of Lakeland v. Burton, 2 So. 2d 731 (Fla. 1941).

Despite successive changes in the workers' compensation statute, the principle set forth above remains in effect. See Royal Palm Market v. Lutz, 126 So.2d 881 (Fla. 1961); Warwick v. Hudson Pulp and Paper, 303 So.2d 701 (Fla. 1DCA 1974); Sullivan v. Liberty Mutual Ins. Co., 367 So.2d 658 (Fla. 1DCA 1979). It has even been reiterated, albeit obliquely, in the Third District Court of Appeal

case your appellants contend has spawned the instant mischief below, American Motorists Ins. Co. v. Coll, supra.[1]

Prior to 1951, in Florida, an employee injured in some way involving a third party could not both collect workers' compensation benefits and also pursue a third party in tort as is now the custom. To the contrary, an election had to be made as between either the workers' compensation or common law remedy.

The above described state of affairs was altered by Operation of Laws, 1951, Ch. 26546, Section 1, which permitted the employee to recover compensation benefits and still maintain a common law action with the employer-carrier allowed a lien on any recovery. Thus, where the workers' compensation carrier, or as here, servicing agent, is required to pay enchanced benefits as a result of third-party's wrongdoing, it is expressly provided by law: A subrogation right exists, §440.39, Florida Statutes.

Indeed, the lien accorded the employer under this remedial social program is so intergral a part of the law, it transcends dramatically, by its workings, the status of mere subrogation right: Under its express provisions, it becomes an independent right of action if the employee fails to pursue the third-party wrongdoer, §440.39 (4)(a), Florida Statutes 1981.

[1]In Coll, the Court observed; "We have for review an Order striking a notice of workers' compensation lien filed by the appellant, American Motorists Insurance Co., a workers' compensation carrier, which notice claimed that the carrier had paid increased workers' compensation benefits because of the alleged negligence of the appellees." Coll, supra (Page 157). (Emphasis added).

Even if the employee does elect to pursue a third-party wrongdoer--such as a negligent healthcare provider, the employee holds a fiduciary responsibility to the employer-carrier/servicing agent for the employee can only bring such action "....for the employee individually and for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier..." §440.39 (3)(a), Florida Statutes 1981, emphasis added.

By its express, unambiguous terms, the employer's prominent statutory right of subrogation described above attaches to all injuries deemed to have arisen "out of and in the course of employment", thus compelling the payment of enchanced workers' compensation benefits. See Winn Dixie Stores v. Roca, 480 So.2d 171 (Fla. 3DCA 1985).

As we develop our argument, let us pause and reflect on one certain thing: The employer-carrier/servicing agent assuredly possess, at the very least, a subrogation right expressly provided by law.

Florida's statutory scheme is exactly as it should be. In his introductory comment to third-party actions, Professor Larson, author of the premier treatise on workers' compensation in the United States, encapsulates the fundamental tenets here involved in the following language:

> "Section 71 Theory of Third-Party Actions.
>
> When compensable injury is the result of a third person's tortious conduct, all statutes preserve a right of action against the

> tort feasor, since the compensation system was not designed to extend immunity to strangers. To avoid a double recovery by the employee, the statutes provide varying systems with the general effect of reimbursing the employer for his compensation outlay and giving the employee the excess of the damaged recovery over the amount of compensation.****" 2A Larson's Workmen's Compensation Law, Section 71, Pg. 14-1.

Later in his text, Professor Larson summarizes the sound principles behind, and the interplay of the various statutory schemes (similar to Florida's as your Respondents and the Second District Court portray it) in the following excerpts:

> Section 71.10 Reaching the Ultimate Wrongdoer.
>
> The concept underlying third-party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer.[2]
>
> As mentioned at the close of the preceding chapter, every mature loss-adjusting mechanism must look in two directions: It must make the injured person whole, and it must also seek out the true wrongdoer whenever possible. While compensation law, in its social legislation aspect, is almost entirely preoccupied with the former function, it is not so devoid of moral content as to overlook the latter. It should never be forgotten that the distortions of our

[2]So that the Court may know it at the outset, in a subsequent chapter, Professor Larson includes, expressly, a physician whose negligent act subsequent to the original accident and injury brings further (or new) harm to the employee, as a qualifying wrongdoer. See 2A Larson's Workmen's Compensation Law, Section 72.64, (Pages 14-216).

> old-fashioned fault concepts that have been thought advisable for reasons of social policy are exclusively limited to providing an assured recovery for the injured person; they have never gone on--once the injured person was made whole--to change the rules on how the ultimate burden was borne.****
>
> Similarly, in compensation law, social policy has dispensed with fault concepts to the extent necessary to insure an automatic recovery by the injured workman; but the disregard of fault goes no further than to accomplish that object, and, with payment of the workman assured, the quest of the law for the actual wrongdoer may proceed in the usual way.
>
> So, it is elementary that if a stranger's negligence was the cause of injury to claimant in the course of employment, the stranger should not be in any degree absolved of his normal obligation to pay damages for such an injury.
>
> Section 71.20 Avoiding Double Recovery
>
> It is equally elementary that the claimant should not be allowed to keep the entire amount both of his compensation award and of his commonlaw damage recovery. The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse him for his compensation outlay, and to give the employee the excess. This is fair to everyone concerned: The employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he would normally pay, which is correct, since to reduce his burden because of the relation between the employer and the employee would be a windfall to him which he has done nothing to deserve; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone." 2A Larson's Section 71.10, 71.20 (Pgs. 14-1 through 14-7). Emphasis added.

The underscored passages represent, precisely, the operation of the Florida process under study, at least as it is portrayed by your respondents and the Second District Court of Appeal, but not the Coll

Court. This is, your respondents reiterate, as it should be.

Petitioner's arguments notwithstanding, neither the text of the Coll, supra, opinion nor the operative language of §768.50, Florida Statutes supports the Coll holding.

Our two state programs, The Workers' Compensation Act and The Medical Malpractice Reform Act travel on lines almost parallel with one another, but they do converge. They do so at the junction of §440.39, Florida Statutes and §768.50, Florida Statutes.

Is there anything on the face of §768.50, Florida Statutes that might upset the harmonious concordance of wrongdoing, responsibilities, rights and recoveries as set forth in the preceding quoted language from Larson's which tracks--your Respondents contend, Florida's statutory scheme? There is not. The holding in Coll, supra, is even facially defective.

In construing §768.50 in Coll, supra, the Third District Court has determined workers' compensation payments are made by a collateral source for which no express right of subrogation has been provided by law, and, having thus become "legislatively disentitled" to subrogation, no such right exists and none would be allowed. Coll, supra, (Pg. 157). At this juncture respondents ask: What is §440.39, Florida Statutes if it is not a "subrogation right...expressly provided by law?" The petitioner's speculation at what might underly the Coll Court's analysis proceeds in the face of basic rules statutory construction. As Justice Atkins stated:

> "Where the words of statute are clear and unambiguous, judicial interpretation is not appropriate to displace the expressed intent (citation omitted). Therefore, we do not feel that this statute, which is clear on its face, presents an occasion to permit interpretative principles governing different types of proceedings. Citizens v. Public Service Com'n, 435 So.2d 784 (Fla. 1983).

Also worth mentioning is another application of the same basic principle in Holmes v. Blazer Financial Services, Inc., 369 So.2d 987 (Fla. 4DCA 1979):

> "Similarly, the conflict that is posed by petitioners is between the specific language of the statute and the alleged underlying legislative intent in enacting the law. In this case, we believe that the clear language must prevail over the petitioner's intent.**** Our examination of those words reveals no ambiguity. The ambiguity, if any, is only present in the attempts to identify the legislature's specific purpose in enacting the law." Holmes, supra (Pgs. 988,989).

Thus, we need not be diverted to, or better yet, distracted by "other" measures--contrary to petitioner's suggestion at Page 4, to compare their language with the plain statutory language under review for our measure is plain upon its face. The fact there is different wording, designed to achieve the same effect, in the automobile negligence statute §627.7387 (2), Florida Statutes 1983 is beside the point. Likewise, your respondents submit, in the newly enacted Tort Reform Insurance Act of 1986, (as the Second District seems to acknowledge in its FN #2, Page 319), there is a

improved" language in subsection (4) -- a more clear legislative expression of what was obviously originally intended. Instead of opening with the words "unless otherwise expressly provided by law..." and concluding with the negative admonition, "...no such amounts expended by any carrier shall be recoverable" -- the new subsection (4) is entirely permissive in its directory advices on how to deal with an express right of subrogation where one (such as our workers' compensation measure) does exist. Obviously, the old subsection (4) of §768.50 and the new subsection (4) of Chapter 85-160, Section 55 are to be read in pari materia with the otherwise undisturbed language of Section (1) in both measures.

Your respondents submit the law of Florida in this area is clear and unequivocal:

1. When an employee suffers an injury arising out of and in the course of employment and later sustains further injury as a result of medical malpractice, the employee is entitled to such additional workers' compensation payments and medical treatment as may be attributable to the subsequent intervening injury.

2. Notwithstanding receipt of increased workers' compensation benefits, the employee may yet pursue the wrongdoing medical provider. Section 440.39, Florida Statutes.

3. In that medical malpractice action, the employee may not recover amounts paid from other collateral sources, "...however, there shall be no reduction for collateral sources for which a subrogation right exists." Section 768.50 (1), Florida Statutes.

Likewise, no insurer or other party providing collateral source benefits shall be entitled to recover the amounts of any such benefits from the employee "unless otherwise expressly provided by law..." Section 786.50 (4), Florida Statutes.

Because amounts paid to the claimant from a workers' compensation carrier or servicing agent represent collateral sources for which a subrogation right exists [§440.39, Florida Statutes (1981)] the trial Court cannot reduce the amount of an award to the claimant by the total of such a collateral source [§768.50 (1), Florida Statutes (1981)].

4. American Motorists Ins. Co. v. Coll, supra, notwithstanding. The honorable Second District Court of Appeal, in Decker, supra, has it right.

So well does the construction urged by your respondents, and adopted by the Decker Court meld all important social purposes advanced by the respective acts--the feeling in arriving at the conclusion urged is not unlike that felt by the devotee of jigsaw puzzles who, after a search, finds that odd shaped bit and experiences the satisfaction of sliding the piece smoothly, flush into the gap (as if the two were made for one another--which of course they were--that is the whole point). In contrast, the Third District Court's handling in Coll, supra, (to continue the metaphor) resembles nothing so much as an attempt at forcing the proverbial round piece into the square hole: the fit is obviously wrong, and the playing table abandoned--with no meaningful explanation of how

the player could have considered the puzzle complete.

Respondents will now turn their attention to such additional arguments as are raised in briefs of the other petitioners presently before the Court.

Petitioner, Humana Florida, Inc. advances two principal points either in addition to or somewhat at variance with those raised by the petitioners confronting your respondents directly. (Mahan).

First, the vehicle by which Petitioner Humana would do violence to the plain measure under scrutiny is the tried and true; "EMERGENCY"!! We are told of a special crisis in medical malpractice which, impliedly, does not apply to workers' compensation. However, as stated in oral argument before the Second District, below: We'll see their crisis and raise them one!

The "crisis" in workers' compensation in the state of Florida is an older and it is submitted, a more far-reaching one. Inspection of the inside cover page to Florida Statutes Annotated, Volume 14C contains the preamble to the 1978 partial reform which states in part:

> "In recognition of the seriousness of the problem in the existing system and the urgent need for major reform, Chapter 440, Florida Statutes, is repealed as of July 1, 1979."

The law superseding the 1978 partial reforms was described by noted Florida Workers' Compensation commentator and author, Jonathan Alpert, in the preface of his 1980 supplement as having "demolished" the settled workers' compensation law because costs in the form of

insurance premiums were too high. Alpert, Florida Workers' Compensation Law, 1980 Supplement. The product of that urgency was described, in the 1979 supplement to Alpert's, as "wicked and depraved"! In very recent developments, the 1979 Reforms are now being cited by some commentators and in university sponsored studies as having failed and as being prohibitively expensive.[3] The Workers' Compensation Laws are enacted because they deal with a matter of great public interest. Fidelity & Casualty of New York v. Beddingfield, 60 So.2d 489, at 495 (Fla. 1952). We really needn't bicker over who is more important or which crisis is more profound--even legitimate, for it may suffice to say the importance of a sound, permanent industrial base in Florida and an adequate method for the treatment and recompense of virtually all Florida workers facing injury is at least on par, and certainly not less compelling, than the concerns of individuals wronged through the healthcare system in Florida and practitioners in that system.

[3]See Florida 1988 Claim Study, Analysis of the Florida Workers' Compensation System, February, 1988 by the National Council on Compensation Insurance.

An Analysis of Legal Costs In Florida's Workers' Compensation System, A Report Prepared by David J. Nye, Ph.D., February 8, 1988.

Workers' Compensation In Florida Post-Wage Loss: An Update by Fred B. Power and E. Warren Shows, Professors, Departments of Finance and Economics, Respectively, College of Business Administration, University of South Florida, Tampa.

[Respondents are unsure of the propriety of attaching these studies as an appendix to their brief. They will be made available to this Court or to either party on request.]

From setting the "crisis" tone at the outset of its argument, Humana moves toward the importance, separateness and uniqueness of the malpractice statute as indicative of its prominence in this matter and in the "overall statutory landscape" (Humana's Brief,P. 8). The "drift" of this is that careful consideration of the policy concerns in this area is warranted. Not wishing to compete, tit for tat on this level we, nevertheless, remind Petitioner Humana that the Workers' Compensation Chapter, independent and free-standing, not only entails its own proverbial "world" of substantive law, superseding the common law, but its own judicial system, rules of procedure approved by this Honorable Court, and an appellate structure and so too must we sit up and take careful notice, so to speak, of the expressly enumerated statutory measures thereby entailed.

Petitioner Humana addresses our point directly in the second significant addition to the arguments already advanced. Humana argues, after having established workers' compensation payments as a "collateral source"--that workers' compensation benefits are not "...collateral sources for which a subrogation right exists" because, though our §440.39 is undeniably "express" and certainly "provided by law", to give these words literal effect, we are not, according to Petitioner Humana's admonition, construing them "narrowly" enough (Humana's Brief, P. 11). The Petitioner Humana's argument is innovative, however, it is also an attempt to ride upon a horse having a head at both ends. It cannot be done without

destruction of the animal. Petitioner Humana reasons: notwithstanding the fact the Courts have created a "legal fiction extending the carrier's obligation to provide benefits for expenses attendant to subsequent medical malpractice"--because there is no corresponding fiction carrying forward the otherwise express statutory lien, liability without fault (on the employer/servicing agent's part) may travel but the lien does not follow. This specious reasoning represents an imperfect understanding of the basis upon which the employer/servicing agent's additional or enhanced liability has been founded via the medium of the so-called "fiction". What's legal fiction for the goose is also legal fiction for the gander.

As argued earlier, there is no basis to foundation the employer's liability for payment of workers' compensation benefits, without fault on its part, absent a foundation in the enabling language of §440, i.e., that such benefits be paid as a result of injury arising out and in the course of employment. That is the only conceptual basis upon which to foundation payment of enhanced benefits through the intercession of negligence on the part of a treating physician. See Central Concrete Co., Inc. v. Harris, supra. Without a basis in §440.09, albeit a constructive one, there can be no basis for enhanced liability on the employer/servicing agent's part. This parallel cannot be severed.

Your respondents reiterate: the deliberative judicial processes by which subsequent medical negligence is construed,

through the convention of "legal fiction", to constitute injury arising "out of and in the course of employment" is just as real and tangible a determination as is the statutory one--with real consequences: for all intents and purposes, injury arises out of and in the course of employment. What follows then is not fiction. Once injury arising out of and in the course of employment is identified, either through black letter law, case law interpretation, legal fiction, or call it what you will: the lien is self-actuated and affixes itself accordingly. Put another way, when either the legislature or the Court attaches the "injury arising out of and in the course of" designation to a vehicle of any description, the lien, a heat-seeking missile follows it. It follows the claimant anywhere claimant travels so long as claimant's destination does not have an express statutory insulating feature. The subsection under study expressly invites, it does not bar, the express statutory right of subrogation extant in §440.39.

Petitioner Schneider's most novel contribution to this controversy is a further refinement of the severed "course and scope" analysis given by Petitioner Humana. He attempts to distinguish the controlling influence of this Court's early pronouncement in City of Lakeland v. Burton, 2 So.2d 731 (Fla. 1941). The attempt is not persuasive. At Page 7 in Petitioner Schneider's brief, a "caveat" to a rule not quoted within Petitioner Schneider's brief is set forth. When the rule is read in pari materia with the caveat, it is plain to see what this Court meant

was that the discussion, or "rule" on causation just announced applied, under the limited holding there announced, to the workers' compensation setting and it was not intended to restate a broad-based rule of causation for all negligence actions.

Your respondents would close by pointing out for the benefit of the Court that a Circuit Court Judge in Palm Beach County (Fourth District) has ruled precisely in accordance with your respondents' arguments in the matter of Rash v. Quinn, Raney, Dalbey and Walliwick, P.A., et. al., Case No. 83-4607 CA (L) B, not appealed. (Appendix 1). More surprising is the fact a Circuit Court Judge in Dade County has ruled as much even after, and notwithstanding her own controlling District Court's pronouncements in Coll, supra and this matter, producing a sharply worded reversal by the Third District, Chambers v. Liberty Mutual Insurance Co., 511 So.2d 608 (Fla. 3DCA 1987) is currently lodged before this Honorable Court with oral argument set to be heard April 28, 1988. Case No. 71,337. We bring these matters to the attention of the Court to underscore the fact the cause is an important one, with much attention being paid to it (evidenced the four combined cases leading to the Decker decision below) and with most commentators (apart from the Coll Court) seemingly favoring the interpretation given by the Decker Court. Your respondents respectfully request the Court adopt the rationale of the Second District Court of Appeal over that adopted by the Third and affirm.

CONCLUSION

Based on the foregoing reasons and authorities, your respondents respectfully request this Honorable Court adopt, in this matter of conflict, the interpretation of the statutory measures under scrutiny given by the Second District Court of Appeal in the cause sub judice and repudiate the interpretation rendered by the Third District Court of Appeal in Coll, supra, affirming the holding of the Appellate Court in the instant cause.

Respectfully submitted,

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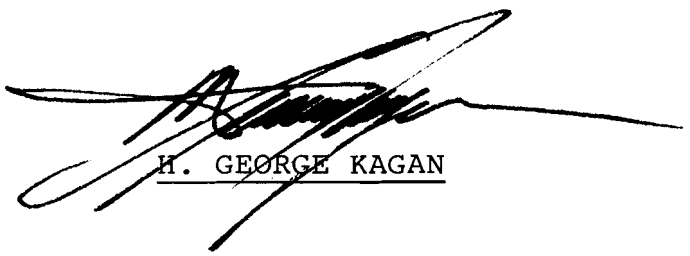
H. GEORGE KAGAN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief was sent this 1st day of April, 1988 by regular mail to: RICHARD M. MITZEL, ESQUIRE, 701 E. Washington Street, Tampa, Florida 33606; JAMES C. BLECKE, ESQUIRE, Biscayne Building, Suite 705, 19 W. Flagler Street, Miami, Florida 33130 and ROBERT J. ASTI, ESQUIRE, c/o LAU, LANE, PIPER & ASTI, P.A., P.O. Box 838, Tampa, Florida 33601-0838.



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