IN THE SUPREME COURT OF FLORIDA

Case No. 71,908

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

Petitioners,

vs.

VINCO PLASTERING & DRYWALL; FLORIDA EMPLOYERS INSURANCE SERVICE CORP.; and JOE HARRIS and LINDA HARRIS,

Respondents.

DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

PETITIONERS' MAIN BRIEF ON THE MERITS

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INTRODUCTION

This main brief is filed on behalf of William P. Mahan, M.D. and W. P. Mahan, M.D., P.A. defendants in this medical negligence case. The certified conflict is in the treatment of workers' compensation liens in medical negligence cases.

STATEMENT OF THE CASE AND FACTS

Joe Harris injured his wrist while working for Vinco Plastering & Drywall, Inc. Dr. Mahan treated Harris for the injury (R. 1-3). Alleging negligent treatment, Harris and his wife filed the underlying medical malpractice action against Dr. Mahan and his professional association (R. 1-3).

Claims Management Systems, Inc., the workers' compensation servicing agent for Harris's employer, filed a notice of payment of workers' compensation benefits and claim of lien (R.

14). Dr. Mahan moved to strike the notice upon the authority of American Motorists Insurance Company v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985), rev. den., 488 So.2d 829 (Fla. 1986) (R. 16-22). The trial court granted the motion and discharged the lien (R. 25). The workers' compensation carrier appealed and the Second District reversed in a consolidated decision, certifying conflict with American Motorists Insurance Company v. Coll. The Second District decision is reported, American Mutual Insurance Company v. Decker, 518 So.2d 315 (Fla. 2d DCA 1987), a copy of which is appended.

ISSUE PRESENTED FOR REVIEW

WHETHER A WORKERS' COMPENSATION LIEN MAY BE ASSERTED IN A MEDICAL NEGLIGENCE ACTION NOTWITHSTANDING THE PROVISIONS OF SECTION 768.50, FLORIDA STATUTES (1983).

SUMMARY OF ARGUMENT

Under statutory workers' compensation, the employer/carrier must compensate the injured employee for one hundred percent of his work related injury. If, during subsequent treatment, the employee is further injured through the alleged malpractice of a physician treating the primary work related injury, the employee may sue the physician upon the incident of alleged malpractice arising out of the physician/patient relationship. It is not a claim for injury sustained in the course of employment and therefore does not give rise to a statutory right of subrogation. The employer/carrier's rights against a subsequent treating physician are for equitable subrogation.

Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980). Under section 768.50, Florida Statutes (1983) the employee's recovery is reduced by the measure of collateral source benefits, including workers' compensation benefits. Those who provide the collateral source benefits have no right of recovery by way of subrogation, assignment, or otherwise. Section 768.50(4), Florida Statutes (1983).

ARGUMENT

The trial court properly discharged the workers' compensation lien under American Motorists Insurance Company v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985), rev. den., 488 So.2d 829 (Fla. 1986) and its Third District progeny. Section 768.50, Florida Statutes (1983), is an integral part of the Medical Malpractice Reform Act, and requires trial courts to reduce medical malpractice awards by the amounts claimants receive from collateral sources. Workers' compensation benefits have always been considered "collateral sources" and are included in the statutory definition of collateral sources.

Section 768.50(4) provides in part, "Unless otherwise expressly provided by law, no insurer or any other party providing collateral source benefits as defined in subsection (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." The Third District has correctly concluded this section bars reimbursement for workers' compensation benefits.

Section 768.50 was enacted to reduce medical malpractice awards - a response to the professional liability insurance crisis. Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981). It has withstood constitutional challenge. Id. The medical negligence collateral source statute is materially different from its automobile negligence counterpart, section 627.7372, Florida Statutes (1983). In automobile negligence actions, workers' compensation benefits are specifically excluded from collateral source benefits otherwise subject to the statute, section 627.7372(3), although the general definition of "collateral sources" is the same as in section 768.50(2)(a) involved here. The legislature expressly protected workers' compensation carriers from the effect of section 627.7372. The legislature made no similar exception in the medical negligence collateral source statute.

The second significant difference between the collateral source statutes in automobile negligence and medical negligence is in their respective effect upon the providers' right of subrogation. In automobile negligence cases, the provider does not lose its subrogation rights. Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 498 So.2d 421 (Fla. 1986). The medical negligence collateral source statute eliminates the provider's right of subrogation. Section 768.50(4), Florida Statutes (1983).

Section 440.39, Florida Statutes (1983) addresses the situation where an employee "is injured or killed in the course

of his employment by the negligence or wrongful act of a third-party tortfeasor." If the employee brings an action against such third-party tortfeasor, the compensation carrier may file a lien and recover "100 percent of what it has paid and future benefits to be paid," subject to reduction for a proportionate share of costs and attorney's fees incurred in obtaining the recovery from such third-party tortfeasor.

There is a very simple and practical reason why the later enacted medical negligence collateral source statute did not preserve or protect a compensation carrier's claim against a subsequent treating physician. A subsequent treating physician does not cause the industrial accident and is not responsible for one hundred per cent of the resulting injury. The employer is responsible for the employee's original injury. The employer fulfills that responsibility through the provision of workers' compensation benefits. A subsequent treating physician who is negligent is responsible to the employee only for the aggravation or enhancement of the injury caused by the malpractice - and the employee's measure of damage is limited accordingly.

As section 768.50(4) provides, "Unless <u>expressly</u> provided by law, no insurer or any other party providing collateral source benefits ... shall be entitled to recover the amounts of any such benefits from the defendant ..., and no right of subrogation or assignment of rights of recovery shall exist." (e.s.). This section simply does not contemplate a workers' compensation carrier's 100 per cent recovery from a subsequent

treating physician for all benefits paid to an employee injured on the job.

Section 440.39 grants to the compensation carrier a statutory right of subrogation only where the employee is injured "in the course of his employment" by the negligence of a third party tortfeasor. Here, Joe Harris was not injured in the course of his employment by Dr. Mahan.

There is a split in authority across the country on whether a compensation carrier is subrogated to the rights of the employee whose injury is aggravated by a subsequent treating physician. Those jurisdictions which permit subrogation, do so to avoid the potential for a "double recovery" by the injured employee. Although no Florida appellate court has expressly decided the issue, reason suggests an equitable apportionment among the responsible parties. The rationale of equitable subrogation adopted by this court in Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980) should afford the employer/carrier similar relief. But for section 768.50, a carrier should be entitled to recover that portion of the benefits paid which are directly attributable to the physician's negligence.

Although a compensation carrier may be responsible for paying enhanced benefits because subsequent medical malpractice enhances the original injury, neither equity nor logic should require the physician to reimburse the carrier for "100 percent of what it has paid and future benefits to be paid" for the

injury received on the job. Section 440.39 should not be construed as giving to the employer/carrier an express statutory right of subrogation against a subsequent treating physician under the section 768.50(4) exception to the medical negligence collateral source rule.

CONCLUSION

The certified conflict should be resolved in favor of the Third District decision in Coll and the Second District decision in this case should be quashed.

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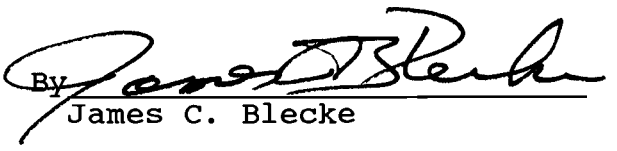
By 
James C. Blecke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on: ROBERT J. ASTI, ESQ., Lau, Lane, Pieper & Asti, Post Office Box 838, Tampa, Florida 33601-0838; DAVID M. MITCHELL, ESQ., Harkavy, Moxley, Mitchell, Stewart & Jacobs, 219 South Orange Avenue, Sarasota, Florida 33577; RICHARD M. MITZEL, ESQ., 701 East Washington Street, Tampa, Florida 33606, and H. GEORGE KAGAN, ESQ., Miller, Hodges, Kagan & Chait, 455 Fairway

Drive, Suite 101, Deerfield Beach, Florida 33441, this 14th day of March, 1988.

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