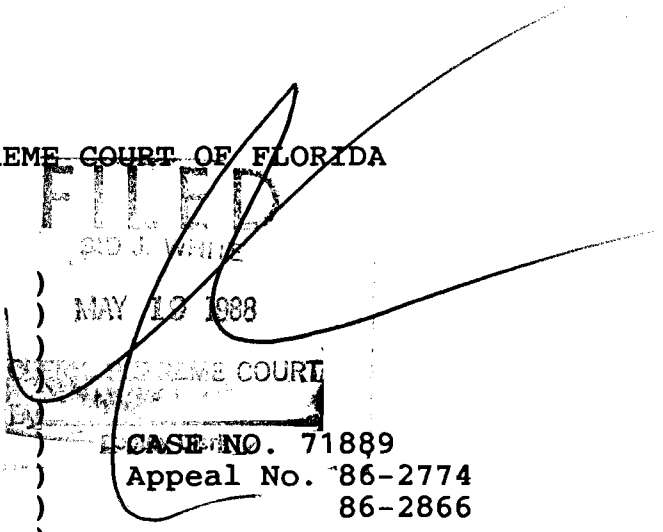
IN THE SUPREME COURT OF FLORIDA



HUMANA OF FLORIDA, INC., et al.,

Petitioners,

vs.

UNDERWRITERS' ADJUSTING COMPANY, et al.,

Respondents.

CASE NO. 71889
Appeal No. 86-2774
86-2866

REPLY BRIEF

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REPLY TO RESPONDENT UNDERWRITERS' ADJUSTING CO.

Respondent, Underwriters' Adjusting Co., fails to address the issue of the requirement under the Collateral Source Statute that a subrogation right must be "expressly provided by law" in order to be preserved. Clearly, the Workers' Compensation Law provides a subrogation right to the employer/carrier for an on-the-job injury caused by a third-party tortfeasor. Fla. Stat. §440.39. Admittedly, this is a subrogation right expressly provided by law. However, the subrogation right provided by this statute exists only when the employee is injured in the course of his employment by the negligence of the third-party tortfeasor. This statute does not "expressly provide" for any subrogation right for injuries incurred by a hospital patient in a setting wholly unrelated to the patient's employment.

In its Answer Brief, Respondent looks to California case law for support of its position that, in preserving subrogation rights that are expressly provided by law, the Florida Legislature intended to enforce an employer/carrier's subrogation rights in a medical malpractice case. However, Respondent's reliance on these decisions is misplaced. In Barme v. Wood, 689 P. 2d 446 (1984), the court considered the constitutionality of the California collateral source statute which eliminates the subrogation right of a collateral source benefit provider.[1/] In a footnote, the court mentions that the legislative history of that collateral source statute indicates an early draft preserved subrogation

[1/] 689 P. 2d at n. 447.

rights when such rights were "expressly provided by statute".[2/] The court determined that the elimination of this provision in the final draft indicated that the collateral source statute was intended to prevail over other statutory subrogation provisions.[3/] Clearly, this analysis is not helpful in determining whether the workers' compensation lien in this case is "expressly provided by law". In fact, the court did not even touch upon the issue of whether the employer/carrier's subrogation right in the context of a claim of subsequent medical negligence was an express right.[4/]

Respondent also asserts that the Florida legislature would have drafted the Collateral Source Statute without the phrase "unless otherwise expressly provided by law" had it sought to eliminate workers' compensation subrogation rights. However, the Respondent fails to cite any legislative history supporting this proposition. It is apparent that the legislature intended to preserve only those subrogation rights which are expressly provided by law. For example, Florida's Department of Health and

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2/ Id. at n. 448.

3/ Id.

4/ Respondent also cites the California case of Miller v. Sciaroni, 218 Cal. Rptr. 219 (Cal. Ct. App., 1985). However, the Miller opinion merely quoted the same footnote in the Barme case in its determination that the collateral source statute was constitutional. Id. at 222.

Rehabilitative Services has an express statutory subrogation right when it pays for medical services for which a third party is liable.[5/]

However, the sketchy legislative history concerning this provision does not provide guidance. Therefore, the language of the Collateral Source Statute must be given its plain and ordinary meaning.[6/] According to that statute, an employer/carrier cannot recover workers' compensation benefits from a health care provider in a malpractice case unless a subrogation right is expressly provided by law. Fla. Stat. §768.50(4). By its terms, Section 440.39 of the workers' compensation statutes does not expressly provide a subrogation right for injuries incurred by a hospital patient in a setting wholly unrelated to the patient's employment. A number of Florida courts, through the creation of a legal fiction, have extended the compensation carriers obligation to include additional expenses attendant to subsequent medical negligence.[7/] However, these courts considered the question for the purpose of determining whether the employee was entitled to benefits under the workers' compensation law. Further, Florida case law has specifically limited the inclusion of subsequent medical negligence in the definition of an 'injury within the scope of employment' to those cases concerning claims for

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[5/] Fla. Stat. 409.266.

[6/] Citizens of the State v. Public Service Commission, 425 So. 2d 534, 542 (Fla 1982).

[7/] Warwick v. Hudson Pulp & Paper Co., Inc., 303 So. 2d 701, 702 (Fla. 1st DCA 1984); Sullivan v. Liberty Mutual Ins. Co., 367 So. 2d 658, 660 (Fla. 4th DCA 1979).

benefits.[8] In fact, the use of this expanded definition in suits for damages caused by the negligence of a third party has been explicitly prohibited.[9] Therefore, the legal fiction extending an employer/carrier's obligation to include additional expenses attendant to subsequent medical negligence should not be used when construing the requirements of the Medical Malpractice Collateral Source Statute.

The subrogation right provided to an employer/carrier under Section 440.39 of the workers' compensation statute in the context of a medical malpractice case is, at best, an implied right. The Medical Malpractice Collateral Source Statute requires that a subrogation right be "expressly provided by law". Under the very terms of the Collateral Source Statute, an implied authorization is not sufficient.

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[8] City of Lakeland v. Burton, 2 So. 2d 731 (Fla. 1941).

[9] Id.

REPLY TO RESPONDENT FLORIDA POWER CORP.

Respondent, Florida Power Corp., fails to address the issue of the requirement under the Collateral Source Statute that a subrogation right must be "expressly provided by law" in order to be preserved. Clearly, the Workers' Compensation Law provides a subrogation right to the employer/carrier for an on-the-job injury caused by a third-party tortfeasor. Fla. Stat. §440.39. Admittedly, this is a subrogation right expressly provided by law. However, the subrogation right provided by this statute exists only when the employee is injured in the course of his employment by the negligence of the third-party tortfeasor. This statute does not "expressly provide" for any subrogation right for injuries incurred by a hospital patient in a setting wholly unrelated to the patient's employment.

In its Answer Brief, Respondent relies primarily on the reasoning set forth in the opinion of American Mutual Ins. Co. v. Decker, 518 So.2d 315 (Fla 2nd DCA 1987). However, the Decker opinion did not clearly address the issue of the requirement under the Collateral Source Statute that a subrogation right must be "expressly provided by law" in order to be preserved. The Decker court, in support of its decision to uphold the liens, quoted a Minnesota case which stated that a majority of courts had determined that a workers' compensation provider has a subrogation right in medical malpractice cases.[10/] However, the Williams

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[10/] Decker, 479 So. 2d at 318 (quoting Williams v. Holm, 181 NW 2d 107, 109 (Minn. 1970)).

court, and the authorities it relied on, did not consider the workers' compensation carrier's subrogation right in a medical malpractice case in relation to a collateral source statute which requires that the subrogation right be express.[11/] The Williams court did not consider whether the workers' compensation statute expressly provided for a subrogation right in a medical malpractice action. Therefore, the Decker court's reliance on these authorities in determining that a workers' compensation carriers' lien should be permitted was misplaced.

The language of the Collateral Source Statute must be given its plain and ordinary meaning.[12/] According to that statute, an employer/carrier cannot recover workers' compensation benefits from a health care provider in a malpractice case unless a subrogation right is expressly provided by law. Fla. Stat. §768.50(4). By its terms, Section 440.39 of the workers' compensation statutes does not expressly provide a subrogation right for injuries incurred by a hospital patient in a setting wholly unrelated to the patient's employment. A number of Florida

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[11/] The Williams case involved the workers' compensation carrier's recovery of benefits from the employee, not the health care provider. Further, there was no collateral source statute involved. The court based its decision on the concern that the employee would have a double recovery if the carrier was denied subrogation. Id. at 109. However, this is not an issue in the application of Florida's Collateral Source Statute. If the workers' compensation carrier is denied its lien under the Collateral Source Statute, the judgment the employee receives will be decreased by the amount of benefits received. Therefore, Respondent's concerns that the employee would receive a double recovery should the liens be denied are not justified.

[12/] Citizens of the State v. Public Service Comm'n, 425 So. 2d 534, 542 (Fla 1982).

courts, through the creation of a legal fiction, have extended the compensation carriers obligation to include additional expenses attendant to subsequent medical negligence.[13/] However, these courts considered the question for the purpose of determining whether the employee was entitled to benefits under the workers' compensation law. Further, Florida case law has specifically limited the inclusion of subsequent medical negligence in the definition of an 'injury within the scope of employment' to those cases concerning claims for benefits.[14/] In fact, the use of this expanded definition in suits for damages caused by the negligence of a third party has been explicitly prohibited.[15/] Therefore, the legal fiction extending an employer/carrier's obligation to include additional expenses attendant to subsequent medical negligence should not be used when construing the requirements of the Medical Malpractice Collateral Source Statute.

The subrogation right provided to an employer/carrier under Section 440.39 of the workers' compensation statute in the context of a medical malpractice case is, at best, an implied right. The Medical Malpractice Collateral Source Statute requires that a subrogation right be "expressly provided by law". Under the very terms of the Collateral Source Statute, an implied authorization is not sufficient.

13/ Warwick v. Hudson Pulp & Paper Co., Inc., 303 So. 2d 701, 702 (Fla. 1st DCA 1984); Sullivan v. Liberty Mutual Ins. Co., 367 So. 2d 658, 660 (Fla. 4th DCA 1979).

14/ City of Lakeland v. Burton, 2 So. 2d 731 (Fla. 1941).

15/ Id.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Reply Brief have been furnished by U.S. Mail on this 17TH day of May, 1988 to the Honorable Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; and a copy of the foregoing has been served by U.S. Mail to Peter H. Dubbeld, Esquire, 696 First Avenue North, St. Petersburg, Florida, 33701; Robert L. Dietz, Esquire, Zimmerman, Shuffield, Kiser & Sutcliffe, P.A., P.O. Box 3000, Orlando, Florida, 32802 this 17TH day of May, 1988.

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