IN THE SUPREME COURT OF FLORIDA
APPEAL NO. 71,969

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

Petitioners,

vs.

SUNCOAST HOMES, INC., et al.

Respondents.
_____/

PETITIONERS BRIEF

Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.

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SUMMARY OF ARGUMENT

The Second District Court of Appeal erred in reversing the striking of the worker's compensation lien. The provisions of Section 768.50(4) of the Florida Statutes, unambiguously provides that unless otherwise expressly provided by law, no insurer or any other party providing collateral source benefits is entitled to recover the amounts of any such benefits from the Defendant or any other person or entity, and that no right of subrogation or assignment of rights of recovery shall exist. This section has been construed in Florida to define a worker's compensation carrier as a party providing collateral source benefits as that term is defined in Section 768.50(2). **American Motorist Insurance Company v. Coll, M.D.**, 479 So.2d 156 (Fla. 3rd DCA 1985), review denied 488 So.2d 829 (Fla. 1986), **Rosabal, M.D. v. Arza**, 495 So.2d 846 (Fla. 3rd DCA 1986), **Chambers v. Liberty Mutual Insurance Company**, 511 So.2d 608 (Fla. 3rd DCA 1987).

Section 768.50(2) provides that in any action for damages for personal injury or wrongful death, arising out of the rendition of professional services by health care provider in which liability is admitted or determined, the Court shall reduce the amount of such award from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation right exists.

Therefore, a worker's compensation carrier is a party providing collateral source benefits and is thus legislatively disentitled to any subrogation lien herein.

In addition, the Second District Court of Appeal's Opinion suggests that it has overlooked the effect of their decision on the Medical Malpractice Act of 1985. **Pearlstein v. Malunney**, 500 So.2d 585 (Fla. 2nd DCA 1986). The Medical Malpractice Act of 1985 was enacted by the legislature in response to the perceived medical malpractice crisis and availability of reasonably priced health care services, prompted by escalating medical malpractice insurance premiums. This Court in **Pinellos v. Cedars of Lebanon Hospital**, 403 So.2d 365 (Fla. 1981) recognized the existence of a valid legislative purpose in insuring the protection of public health by assuring the availability of adequate medical care. In permitting the worker's compensation carrier to file a notice of lien in the medical malpractice proceeding will have the effect of discouraging settlement of meritorious claims and will escalate medical malpractice premiums in contravention with the legislative intent apparent in the Medical Malpractice Reform Act.

In light of the foregoing, the trial court was correct in striking the worker's compensation lien and Petitioners would request that the Opinion of the Second District Court of Appeal be quashed and approve the opinions rendered by the Third District Court of Appeal in **Coll**.

ISSUE ON APPEAL

I. WHETHER A WORKER'S COMPENSATION CARRIER IS A PARTY PROVIDING COLLATERAL SOURCE BENEFITS AS DEFINED IN SECTION 768.50(2) FLORIDA STATUTES AND IS, THEREFORE, LEGISLATIVELY DISENTITLED TO RECOVER AMOUNTS OF ANY SUCH BENEFITS FROM PETITIONERS.

STATEMENT OF THE CASE AND FACTS

A complaint for alleged medical malpractice was filed by Wayne and Theresa McGhee against several defendants including Aaron Schneider, M.D. and Aaron Schneider, M.D., P.A. (R1-2) Thereafter, the Plaintiffs self-insured employer, Suncoast Homes, Inc. along with its worker's compensation insurance carrier, Auto-Owners Insurance Company, filed a Notice of Payment of Compensation and Medical Benefits(lien). (R1-2) The Notice which was amended on two occasions, purported to constitute a lien upon any recovery by the Plaintiffs for the amount of compensation benefits previously paid to Plaintiffs by Auto-Owners. (R3-4). Thereafter, Petitioners, Schneider, filed a Motion to Strike the Notice of Worker's Compensation Lien. Humana, Inc. d/b/a Sun Bay Community Hospital and other defendants therein also filed Motions to Strike the Notice of Worker's Compensation Lien. (R3-4)

The Petitioners Motions to Strike were heard by the Honorable Helen Hansel on November 13, 1986. On April 24, 1987, the trial court granted the Motions to Strike and entered the Order granting Motions to Strike the Notice of Lien and Amended Notice of Lien of Auto-Owners. (R9) The Respondent timely filed its Notice of Appeal to the Second District Court of Appeal. (R10)

The Second District Court of Appeal reversed the trial court's striking the Notice of Payment of Worker's Compensation Benefits in the above case. In so doing, the Second District Court of Appeal certified to this Honorable

Court that their decision is in direct conflict with the Third District Court of Appeal in **American Motorist Insurance Company v. Coll, M.D.**, 479 So.2d 156 (Fla. 3rd DCA 1985), review denied 488 So.2d 829 (Fla. 1986).

Thereafter, the Petitioners, pursuant to Rule 9.030(a)(2)(A)(VI) of the Florida Rules of Appellate Procedure, timely filed their Notice of Invoking the Discretionary Jurisdiction of this Honorable Court. This Brief on the merits timely follows.

ARGUMENT

THE WORKER'S COMPENSATION CARRIER IS A PARTY PROVIDING COLLATERAL SOURCE BENEFITS IN SECTION 768.50(4) AND, THEREFORE, IS NOT ENTITLED TO A LIEN IN A MEDICAL MALPRACTICE ACTION.

The Second District Court of Appeal erred in reversing the trial court's Order striking the Notice of Worker's Compensation Lien. The trial court properly relied upon **Coll** and ruled that a worker's compensation carrier is a party providing collateral source benefits in Section 768.50(4) and, therefore, is not entitled to a lien in a medical malpractice action.

The pertinent parts of Section 768.50 of the Florida Statutes provides as follows:

> (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 health care 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...

768.50(2) defines collateral source as follows:

> (a) "Collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to:
>
> 1. The United States Social Security Act; any federal, state, or

> local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits.
>
> 2. Any health, sickness, or income disability insurance,; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others.
>
> 3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.
>
> 4. Any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability...

Section 768.50(4) provides:

> (4) 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 clear and unambiguous language of the statute reveal that a worker's compensation carrier is a party providing collateral source benefits as that term is defined by Section 768.50(2), Florida Statutes. **American Motorist Insurance Company v. Coll**, 479, So.2d 156 (Fla. 3rd DCA 1985); **Rosabal, M.D. v. Arza**, 495 So.2d 846 (Fla. 3rd DCA 1986).

In **Coll**, the 3rd District Court of Appeal reviewed an Order striking a Notice of Worker's Compensation Lien filed by a worker's compensation carrier, which notice claimed that the carrier had paid increased worker's compensation benefits because of the alleged negligence of the Appellees. The Third District Court affirmed the Order and held that a worker's compensation carrier is a party providing collateral source benefits as defined in Section 768.50(2) and, therefore, legislatively **disentitled** 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." Section 768.50(4) Florida Statutes.

The facts of the **Coll** are strikingly similar to the facts of the instant case. As in **Coll**, the Respondent herein alleges that it had to provide enhanced worker's compensation to the injured employee as a result of Petitioners' alleged subsequent negligence. Like **Coll**, this Court should follow its well-reasoned decision and affirm the trial court's Order striking the Respondent's Notice of Worker's Compensation Lien.

As further support for affirming the Third District Court of Appeal line of cases, a review of Section 440.39 is necessary.

Section 440.39 expressly provides that if an employee, subject to the provisions of the worker's compensation law, is injured or killed in the course of his employment by the

negligence or wrongful act of a third party tortfeasor, may pursue his remedy against such third party tortfeasor. The statute further entitles the employer once the employee accepts compensation, to be subrogated to the rights of the employee against such third party tortfeasor.

The key language underlying an employer's claim of lien is that the nature of the third party injury must be in the course of the employee's employment. This language has been overlooked by the Second District and is the main crux in this case. The allegation in the Complaint against Dr. Schneider are for alleged medical negligence committed on Wayne McGhee. It is alleged in the Complaints that Dr. Schneider was careless and negligent in his diagnosis and surgery on Wayne McGhee. There are no allegations anywhere in the Complaint to indicate that the alleged medical malpractice was committed during the course of McGhee's employment. The statute mandates that the injury **must** be in the course of the employee's employment before the employer or carrier can file a Notice of Claim of Lien.

The Second District Court of Appeal holding that the language "unless otherwise expressly provided by law" grants worker's compensation carriers the right of subrogation, is ignoring the very part of that statute which requires that the employee be subjected to the provision of the worker's compensation law **and** to be "injured or killed in the course of his employment".

The Second District in its opinion categorically state that the medical malpractice occurred in the course of each claimant's employment and in support thereof state that their reasoning is founded upon "longstanding doctrine" citing to **City of Lakeland v. Burton**, 2 So.2d 731 (Fla. 1941) and **Hudson Polk and Paper Company, Inc.**, 303 So.2d 701 (Fla. 1st DCA 1974). Petitioners submit that because these cases are distinguishable, they are not applicable herein.

Both of these cases dealt with suits against employers. In **Burton**, the Florida Supreme Court held that the death of the employee suffering an accidental injury causing pain in the abdominal region was compensible even if the death was the immediate result of taking narcotics prescribed by a physician. However, in so ruling the Supreme Court unequivocally stated:

> Let it be understood that the Rule as above stated is one which applies to claims arising under what we know as worker's compensation statutes and not two **suits for damages caused by negligence of another.** [Emphasis supplied]

The instant case is not an action invoking worker's compensation, rather it is a suit for damages allegedly caused by the negligence of Dr. Schneider. The caveat of **Burton** makes it clear that its holding should not be applied to the instant case. **Hudson Polk** likewise dealt with an action involving a worker's compensation. It was not a suit for damages caused by the negligence of another.

In light of the above, the reliance on **Burton** and **Hudson Polk** is misplaced.

Finally, it should be stated that the Florida Worker's Compensation Act is a no-fault concept of social legislation. By voluntarily electing to accept the provisions of the Worker's Compensation Law, the employee relinquishes his right to sue his employer regardless of whether or not the employer has directly caused the injury. When the employer secures payment of compensation required by law, he obligates himself to pay compensation benefits irrespective of the negligence of the injured employee. The employer is allowed to treat worker's compensation as a routine cost of doing business which can be budgeted without fear of any substantial adverse tort judgment, in return for accepting vicarious liability for all work related injuries regardless of fault. Florida Worker's Compensation Law, Florida Statutes.

If the worker's compensation liens are permitted to stand, this will have the effect of increasing the tort judgment against the physician who does not have the benefit of treating it as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments. It will further undermine the legislative intent behind the Medical Malpractice Reform Act of 1985.

The Comprehensive Medical Malpractice Reform Act of 1985, Chapter 85-175, Laws of Florida, was enacted in response to a perceived crisis in availability of reasonably

priced health care services, prompted by escalating medical malpractice insurance premiums. This Court recognized in **Pinellos v. Cedars of Lebanon Hospital Corp.**, 403 So.2d 365 (Fla. 1981), that there exists a valid legislative purpose in insuring the protection of public health by assuring the availability of adequate medical care. **McCarthy v. Mensch**, 412 So. 2d 343 (Fla. 1982)), **Pearlstein v. Malunney**, 500 So.2d 585, (Fla. 2d DCA 1986). In permitting the liens to stand it will have the effect of not protecting public health by insuring availability of adequate medical care for citizens of the State.

This is not a case in which a worker suffered an on the job injury at the hands of a third party tortfeasor. Rather, it involves an injury alleged to have occurred in a hospital remote from the workplace.

Accordingly, this Honorable Court should reverse the Second District Court of Appeal's Opinion and affirm the trial court's striking of the Notice of Worker's Compensation Lien.

CONCLUSION

The trial court properly granted Petitioners' Motion to Dismiss on the basis that a worker's compensation carrier is a party providing collateral source benefits as defined in Section 768.50(2) Florida Statutes and, therefore, is not entitled to recover the amount of any such benefit from the Petitioners or any other person or entity and no right of subrogation or assignment of rights of recovery shall exist. Section 768.50(4) Florida Statutes. This Court should quash the Second District Court of Appeal's Opinion and affirm the trial court's decision herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Petitioners Brief has been furnished by U.S. Mail this 21st day of March, 1988, to The Honorable Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building Tallahassee, Florida, 32301; and a copy to KURT PRESTON HAMPP, ESQUIRE, Attorney for Appellants, P.O. Box 12809, St. Petersburg, Florida 33733; RODNEY W. MORGAN, ESQUIRE, P.O. Box 2378, Tampa, Florida 33601; and to A. BROADDUS LIVINGSTON, ESQUIRE, P.O. Box 3239, Tampa, Florida 33601.

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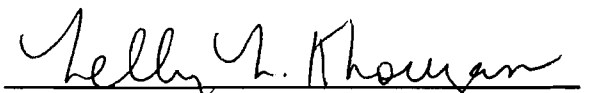

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