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

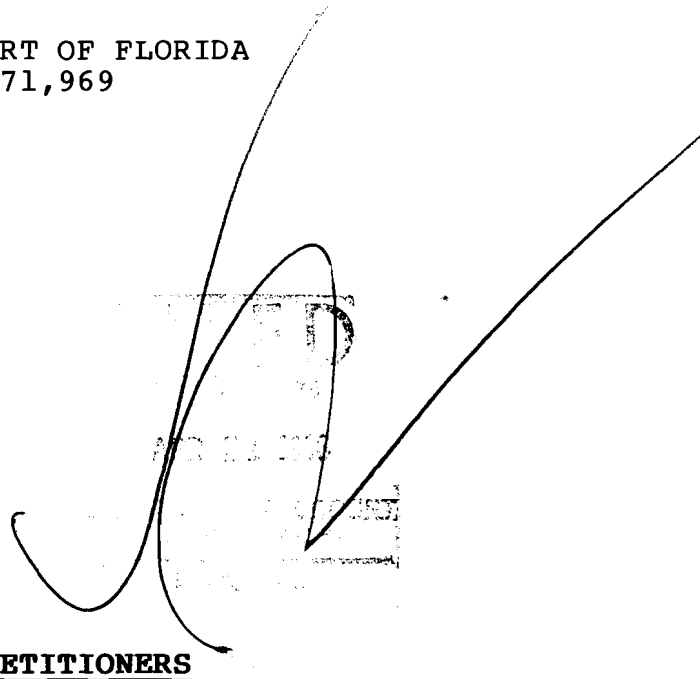
AARON SCHNEIDER, M.D. and
A. SCHNEIDER, M.D., P.A.

Petitioners,

vs.

SUNCOAST HOMES, INC., et al.

Respondents.
_____/



REPLY BRIEF OF PETITIONERS

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SUMMARY OF ARGUMENT

The Petitioners readopt their Summary of Argument as set forth in their Initial Brief and incorporates the same herein by reference.

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

The Petitioners readopt their Statement of the Case and Facts as set forth in their initial brief.

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.

Respondent's argument in its brief seem to ignore the clear and unambiguous language of the worker's compensation statute Section 440.39. This section 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, he 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. The subrogation right provided by the statute is applicable **only** when the employee is injured in the course of his employment by the negligence of the third party tortfeasor. Fla. Stat. 440.39 (1981)

Secondly, this case is not a worker's compensation claim. Rather it is a medical malpractice claim filed against physicians and healthcare providers. The Medical Malpractice Reform Act of 1975, Chapter 75-9, Laws of Florida; Medical Malpractice Act of 1976, 76-260, Laws of Florida; Comprehensive Medical Malpractice Reform Act of 1985, Chapter 85-175, Laws of Florida; Medical Malpractice

Act of 1988, Chapter 88-1, Laws of Florida, have been enacted in response to a perceived crisis in availability of reasonably priced healthcare services, prompted by escalating medical malpractice insurance premiums. The legislature expressed concern about the escalating cost of medical malpractice insurance and its willingness to use drastic methods to decrease the burden of malpractice costs for the healthcare provider.

The medical malpractice crisis has been recognized by the Florida Courts in **Pinillos v. Cedars of Lebanon Hospital**, 403 So.2d 365 (Fla. 1981), **McCarthy v. Mensch**, 412 So.2d 343 (Sup. Ct. Fla. 1982), **Pearlstein v. Malunney**, 500 So.2d 585 (Fla. 2nd DCA 1986), and **Linn v. Miller**, 498 So.2d 1101 (Fla. 2nd DCA 1986).

In permitting the liens to stand in these medical malpractice cases, it will have the effect of undermining the legislative intent behind the enactment of the Medical Malpractice Reform Act. Consequently, the public health will not be protected and availability of adequate medical care will not be ensured for the citizens of this State.

Finally, unless there is an express right under the law which would give a subrogation right for worker's compensation benefits in medical malpractice action, the medical malpractice collateral source statute prohibits the worker's compensation carrier from recovering from these benefits from the healthcare provider. Fla. Stat.§768.50(4) (1981).

Section 768.50(4) provides as follows:

> **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 provision "expressly provided by law" is unambiguous and must be given its plain and ordinary meaning. **Citizens of the State v. Public Service Commission**, 425 So.2d 534 (Fla. 1982). The Legislature did not choose the term "infer" or "imply" but rather the term "expressly". It is uncontroverted that the statute does not "expressly provide" for any subrogation for injury sustained by an individual occurring in a hospital remote from the workplace and clearly outside the scope of the individuals employment. It is clear, therefore, that the Second District Court of Appeal erred in construing the plain and ordinary meaning of the term "expressly provided" as granting to worker's compensation carriers the right of subrogation.

In light of the foregoing, this Honorable Court should reverse the Second District Court of Appeal 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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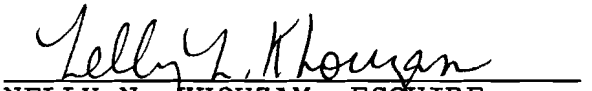
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Reply Brief of Petitioners has been furnished by U.S. Mail this 19th 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.

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



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