IN THE SUPREME COURT OF FLORIDA

| | |
|---|---|
| HUMANA OF FLORIDA, INC., d/b/a SUN BAY COMMUNITY HOSPITAL; SUN BAY COMMUNITY HOSPITAL MEDICAL STAFF, INC., Defendants/Petitioners, vs. SUNCOAST HOMES, INC. and AUTO-OWNERS INSURANCE COMPANY, Respondants. | CASE NO. 83-3621-12<br>Appeal No. 87-1519 |

PETITIONERS' BRIEF

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

By: S. Jane Mitchell
A. Broaddus Livingston
S. Jane Mitchell
Florida Bar No.: 047941

TABLE OF CONTENTS

## TABLE OF CITATIONS

## STATEMENT OF THE CASE AND FACTS

The underlying action involves a suit for alleged medical malpractice brought by plaintiffs, Wayne and Theresa McGhee (not participants in this appeal), against multiple defendants, including Humana of Florida, Inc. and Sun Bay Community Hospital Medical Staff, Inc., the Petitioners in this appeal. The plaintiffs' self-insured employer and the employer's Workers' Compensation insurance carrier, Suncoast Homes, Inc. and Auto-Owners Insurance Co., the Respondents in this appeal, filed a Notice of Payment of Compensation and Medical Benefits (Lien). (R.1-2). The Notice purported to constitute a lien upon any recovery by the plaintiffs for the amount of Workers' Compensation benefits previously paid to plaintiffs by Respondents. (R.1-2). Each of the defendants, including Petitioners Humana of Florida, Inc. and Sun Bay Community Hospital Medical Staff, Inc., subsequently filed Motions to Strike the Notice of Workers' Compensation Lien. (R.3-4).

The defendants' Motions to Strike were heard by Judge Helen S. 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. (R.9). The Respondents appealed this Order. (R.10).

The Second District Court of Appeal reversed the trial court's Order striking the Notice of Lien. The Second District Court of Appeal certified that this decision was directly conflicting with the decision of the Third District Court of Appeal in American

Motorists Ins. Co. v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985), rev. denied, 488 So.2d 829 (Fla. 1986). The petitioners then timely filed the Notice to Invoke Discretionary Jurisdiction.

## SUMMARY OF ARGUMENT

The Second District was wrong in sustaining a workers' compensation lien against health care providers in this malpractice case. The trial court's decision striking the lien was correct because the medical malpractice collateral source statute prohibits the lien. The medical malpractice collateral source statute requires the court in a medical malpractice action to reduce an award against a health care provider by the amount of collateral source benefits received by the claimant. Further, an insurer is prohibited from recovering the benefits from the health care provider. Worker's compensation benefits clearly come within the statutory definition of a collateral source. The only exception to the statute is when a subrogation right has been "expressly provided by law". Therefore, a worker's compensation carrier cannot recover workers compensation benefits from a health care provider in a malpractice case unless a subrogation right is expressly provided by law.

The provision "expressly provided by law" should be construed as requiring an explicit, direct right under the law. Such an interpretation is consistent with the policy concerns expressed by the Legislature in passing medical malpractice legislation. Further, this interpretation is in harmony with the rules of statutory construction and prior court decisions. According to this interpretation, unless there is an explicit, direct right under the law which would give a subrogation right for workers'

compensation benefits in the context of a medical malpractice action, the medical malpractice collateral source statute would prohibit the workers' compensation carrier from recovering those benefits from the health care provider.

The workers' compensation statutes contain a section which is expressly limited to employee and employer/carrier rights for on-the-job injuries caused by a third party tortfeasor. However, 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. This statute does not expressly provide for any subrogation for injuries incurred by a hospital patient in a setting wholly unrelated to the patient's employment. The best that can be said is that a subrogation right is impliedly authorized by this workers' compensation statute because of a legal fiction extending the carrier's obligation to provide benefits for expenses attendant to subsequent medical negligence. However, the medical malpractice collateral source statute requires that the subrogation right be "expressly provided by law" and the implied authorization of the workers' compensation statute is not sufficient.

## ARGUMENT

### THE MEDICAL MALPRACTICE COLLATERAL SOURCE STATUTE PROHIBITS A WORKERS' COMPENSATION CARRIER'S LIEN IN A MEDICAL MALPRACTICE ACTION BECAUSE THIS RIGHT IS NOT EXPRESSLY PROVIDED BY LAW

The Second District was wrong in sustaining a workers' compensation lien against healthcare providers in this malpractice case. The trial court's decision striking the lien was in faithful keeping with the fundamental public policy considerations underlying present health care legislation in this state. The Florida legislature has been for many years and by various methods trying to alleviate a perceived crisis in health care services resulting from rising malpractice insurance rates. See 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. In fact, the preamble to the legislation enacting the medical malpractice collateral source statute included the following provisions:

> Whereas, despite the responsive and responsible actions of the 1975 session of the Legislature, professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and
>
> Whereas, insurance companies across America are continuing to withdraw from the medical professional liability insurance market so that such insurance, even at exorbitant rates, is becoming virtually unavailable in the voluntary private sector, and . . .

> Whereas, our present tort law/liability insurance system for medical malpractice will eventually break down and costs will continue to rise above acceptable levels, fundamental reforms of said tort law/liability insurance system must be undertaken . . . .

Medical Malpractice Act of 1976, 76-260, Laws of Florida. Other concerns expressed by the legislature in the enactment of this provision included rising insurance rates for medical specialists, increasing costs of health care as a result of the insurance rates and the practice of "defensive medicine", and decreasing availability of health care in Florida as young physicians leave the state and older physicians retire early to avoid the high premiums. Medical Malpractice Act of 1976, Chapter 76-260, Laws of Florida. The legislature has clearly indicated its concern about the escalating costs of medical malpractice insurance and its willingness to use dramatic methods to decrease the burden of malpractice costs for the healthcare provider. Further, numerous Florida courts have recognized and supported the Florida legislature's concerns and actions regarding the medical malpractice crisis. See Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365 (Fla. 1981); MacDonald v. McGiver, 514 So.2d 1151 (Fla. 2d DCA 1987); Pearlstein v. Malunney, 500 So.2d 585 (Fla. 2d DCA 1986); Lynn v. Miller, 498 So.2d 1011 (Fla. 2d DCA 1986).

As further evidence that the legislature has singled out the area of medical malpractice as one requiring special attention, one must only look to the statutes. The medical malpractice collateral

source statute is part of the section entitled "Medical Malpractice and Related Matters". This section is separate and distinct from all other sections, including the general negligence section. Further, this section contains provisions which are unique and solely applicable to medical malpractice. These provisions include standards of recovery for medical negligence, alternative methods of payment of damage awards, and attorneys' fees. It is clear from the position of the medical malpractice collateral source statute in the overall statutory landscape that the legislature considers this to be an area of particular concern. Therefore, careful consideration of the policy concerns involved in the area of medical malpractice is necessary when construing the provisions of these statutes. The trial court in the instant case recognized the public policy concerns expressed by the Florida legislature and correctly determined that the medical malpractice collateral source statute prohibited the workers' compensation carrier's lien.

The medical malpractice collateral source statute, Fla. Stat. 768.50, requires the court in a medical malpractice action to reduce an award against a health care provider by the amount of collateral source benefits received by the claimant. The statute provides:

> 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.

Fla. Stat. 768.50(2)(1981). Workers' compensation benefits clearly come within the statutory definition of a collateral source. See Rosabal v. Arza, 495 So.2d 846 (Fla. 3d DCA 1986); American Motorists Ins. Co. v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985), rev. denied, 488 So.2d 829 (Fla. 1986). Further, the Second District Court of Appeal in the instant case also concluded that workers' compensation benefits were a collateral source under the statute. American Mutual Ins. Consolidated Co. v. Decker, 518 So.2d 315, 317 (Fla. 2d DCA, 1987). Therefore, unless worker's compensation benefits come within an exception, a successful plaintiff in a medical malpractice action would have his judgment reduced by the amount of the benefits.

The medical malpractice collateral source statute contains an exception which provides that no reduction of the award is made for a collateral source for which there is a subrogation right. Fla. Stat. 768.50(1)(1981). However, the statute prohibits a party providing collateral source benefits from recovering those benefits from a tortfeasor responsible for the injury and abrogates any subrogation right unless expressly provided by law. The statute 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 . . . .

Fla. Stat. 768.50(4)(1981). Accordingly, a workers' compensation carrier cannot recover workers' compensation benefits from a health care provider in a malpractice case unless a subrogation right is expressly provided by law.

The meaning of the provision "expressly provided by law" is of critical importance in determining whether there is a subrogation right for workers' compensation benefits in the context of a medical malpractice action. In order to determine the meaning of this provision, the legislative intent must be considered. Brown v. Griffin, 229 So.2d 225, 227 (Fla. 1969). Clearly, the legislative intent in the collateral source statute is to reduce the amount that a health care provider must pay a plaintiff. In fact, the legislature hoped that such a reduction in the health care providers' burden would result in decreased malpractice insurance rates. Senate Comm. Report on the Senate Bill No. 586, 1976 Legislative Session, at 5. Obviously, if the statutory exception is broadly construed there will be less of a reduction in the judgment a health care provider pays. The legislative intent would then be thwarted. Therefore, the term "expressly provided by law" should be construed narrowly.

In addition, when statutory language is clear and unambiguous, that language should be given its plain and ordinary meaning. Citizens of the State v. Public Service Commission, 425 So.2d 534,

542 (Fla. 1982). The Florida Supreme Court considered the meaning of the term "expressly" when it construed a section of the Florida Constitution permitting the Court to take jurisdiction of a case when the district court opinion "expressly affects a class of constitutional officers". School Board of Pinellas County v. District Court of Appeal, 467 So.2d 985 ((Fla. 1985). The Court concluded that the term "expressly" could only be construed as requiring the district court opinion to contain in writing the indication that a class of constitutional officers was affected. Id. at 986. In addition, other courts have construed the term "expressly" as requiring a direct and distinct statement and not merely an implication or inference. State ex rel Ashauer v. Hostetter, 127 SW.2d 697, 699 (Mo. 1939) (construing statute providing that joint tenancy in real property must be "expressly declared"); State of Estelle v. Estelle, 593 P.2d 663, 667 (Ariz. 1979) (construing statute providing that future alimony terminates at death or remarriage unless "expressly provided in the decree"). Therefore, the term "expressly provided by law" should be construed as requiring an explicit, direct right under the law, not one that has to be inferred or implied.

Accordingly, unless there is an explicit, distinct right under the law which would give a subrogation right for workers' compensation benefits in the context of a medical malpractice action, the medical malpractice collateral source statute prohibits the workers' compensation carrier from recovering these benefits from the health care provider. The workers' compensation statutes

contain a section which is expressly limited to employee and employer/carrier rights for on-the-job injuries caused by a third-party tortfeasor. That statute provides:

> (1) If an employee, subject to the provision of the workers' compensation law, is injured or killed in the course of his employment by the negligence or wrongful act of a third-party tortfeasor, such injured employee . . . may pursue his remedy by action at law or otherwise against such third party tortfeassor.
>
> (2) If the employee or his dependents shall accept compensation or other benefits under this law or begin proceedings therefore, the employer . . . shall be subrogated to the rights of the employee or his dependents against such third party tortfeasor, to the extent of the amount of compensation benefits paid or to be paid as provided by subsection (3).

Fla. Stat. 440.39 (1981) (emphasis added). The subrogation right provided by this statute is applicable 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 for injuries incurred by a hospital patient in a setting wholly unrelated to the patient's employment. Instead, the statute is expressly restricted to injury incurred "in the course of . . . employment". A number of Florida courts, through the creation of a legal fiction, have extended the compensation carrier's obligation to include additional expenses attendant to subsequent medical negligence. Warwick v. Hudson Pulp & Paper Company, 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). However, these courts considered this question for the purpose of determining whether the employee was entitled to benefits under the workers' compensation law. Further, Florida's Supreme Court in City of Lakeland v. Burton, 2 So.2d 731 (Fla. 1941) explicitly limited the inclusion of subsequent medical negligence in the definition of an injury within the scope of employment to workers' compensation claims. In this case, a worker was injured on the job and the injury caused intense pain for which a narcotic was prescribed by the treating physician. The employee died and the employee's wife made a claim for worker's compensation benefits. The wife was awarded benefits and the employer and insurance carrier appealed the decision, claiming that death was caused by an overdose of narcotic which was due to the negligence of the deceased or the physician. The court found that the taking of the narcotic was not an independent intervening cause, but was the result of the original work-related injury. However, the court stated,

> Let it be understood that the rule as above stated is one which applies to claims arising under what we know as Workman's Compensation Statutes and not to suits for damages caused by negligence of another.

Id. (emphasis added). Clearly, the court intended to restrict including subsequent medical negligence in the definition of on-the-job injury to claims for workers' compensation benefits. In fact, the court explicitly prohibited the use of this expanded definition in suits for damages caused by the negligence of a third

party. Therefore, this 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 best that can be said is that a subrogation right is impliedly authorized by the workers' compensation statute because of the legal fiction extending the carrier's obligation to provide benefits for expenses attendant to subsequent medical negligence. However, an implied authorization is a far cry from "expressly provided by law" as is required under the medical malpractice collateral source statute.

## CONCLUSION

The Petitioners request that this honorable Court quash the decision of the Second District Court of Appeal and affirm the trial court's decision.

Respectfully submitted,

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioners

By: S. Jane Mitchell
A. Broaddus Livingston
S. Jane Mitchell
Florida Bar No.: 047941

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Petitioners' Brief has been furnished by United States Mail on this 11th 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.

S. Jane Mitchell

A. Broaddus Livingston
S. Jane Mitchell

## LIST OF COUNSEL

Kenneth L. Olsen, Esquire
MILLER & OLSEN
711 N. Florida Avenue
Suite 310
Tampa, Florida 33602

Jonathan L. Alpert, Esquire
Peter J. Grilli, Esquire
ALPERT, JOSEY, FREEMON & GRILLI
Ashley Tower, Suite 2000
100 S. Ashley Drive
Tampa, Florida 33602

H. George Kagan, Esquire
MILLER, HODGES, KAGAN & CHAIT, P.A.
445 Fairway Drive, Suite 101
Deerfield Beach, Florida 33441

G. W. Jacobs, Esquire
HARKAVY, MOXLEY, MITCHELL,
STEWART & JACOBS, P.A.
219 S. Orange Street
Sarasota, Florida 33577

James C. Blecke, Esquire
Susan S. Lerner, Esquire
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130

Peter H. Dubbeld, Esquire
6500 First Avenue North
St. Petersburg, Florida 33710

Rodney Morgan, Esquire
SHEAR, NEWMAN, HAHN & ROSENKRANZ, P.A.
Suite 1000, 201 E. Kennedy Blvd.
Tampa, Florida 33601

Robert L. Dietz, Esquire
Kevin S. Cannon, Esquire
ZIMMERMAN, SHUFFIELD, KISER
& SUTCLIFFE, P.A.
P. O. Box 3000
Orlando, Florida 32802

Gary D. Fox, Esquire
STEWART TILGHMAN, P.A.
44 West Flagler Street
Suite 1900
Miami, Florida 33130

Arnold R. Ginsberg, Esquire
HORTON, PERSE & GINSBERG
410 Concord Building
66 W. Flagler Street
Miami, Florida 33130

Gene Flinn, Esquire
201 McCormick Building
111 S.W. Third Street
Miami, Florida 33130

Kenneth E. Cohen, Esquire
KROLL & TRACT
3250 Mary Street
Suite 301
Miami, Florida 33133

Nelly N. Khouzam, Esquire
FOWLER, WHITE, et al.
P. O. Box 210
St. Petersburg, Florida 33731

Tim Ellis, Esquire
804 Blackstone Building
233 East Bay Drive
Jacksonville, Florida 32202