6-14

IN THE SUPREME COURT OF THE STATE OF FLORIDA

HUMANA OF FLORIDA, INC., d/b/a SUN BAY COMMUNITY HOSPITAL; SUN BAY COMMUNITY HOSPITAL MEDICAL STAFF, INC.,

Petitioners,

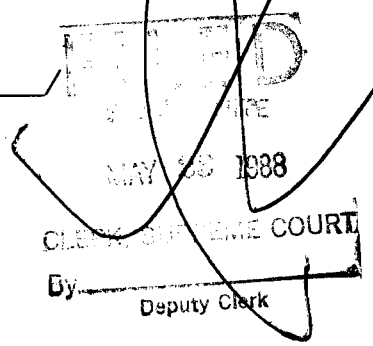
vs.

SUNCOAST HOMES, INC., and AUTO-OWNERS INSURANCE COMPANY,

Respondents.

CASE NO: 72,093

APPEAL NO: 87-1519



RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES:

STATEMENT OF THE CASE AND FACTS

A complaint for alleged medical malpractice was filed by Wayne and Theresa McGhee against several defendants including Humana of Florida, Inc., d/b/a Sun Bay Community Hospital. (R-1, 2). Thereafter, the plaintiffs self-insured employer, Suncoast Homes, Inc., along with its workers' compensation insurance carrier, Auto-Owners Insurance Company, filed a Notice of Payment of Compensation and Medical Benefits (lien). (R-1, 2). The Notice which was amended on two occasions purported to constitued a lien upon any recovery by the plaintiffs for the amount of compensation benefits previously paid to plaintiffs by Auto-Owners. (R-3, 4). Thereafter, petitioners filed a motion to strike the notice of workers' compensation lien. (R-3, 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. (R-9). The respondent timely filed its notice of appeal to the Second District Court of Appeal. (R-10).

The Second District Court of Appeal reversed the trial court's striking the notice of payment of workers' compensation benefits in the above case in a per curiam decision based upon American Mutual Insurance Co. v. Decker, 518 So.2d 315 (Fla. 2d DCA 1987).

Thereafter, the petitioners, pursuant to Rule 9.030(a)(2)(A)(VI) of the Florida Rules of Appellate Procedure filed their notice of invoking the discretionary jurisdiction of this Honorable Court.

SUMMARY OF ARGUMENT

The Second District Court of Appeal correctly held that a self-insured employer or carrier, possessing a statutory subrogation right under Fla. Stat. Section 440.39 may file a lien and recover directly from the tort judgment the workers' compensation benefits paid or payable to the employee resulting from the medical negligence. Such a procedure is "expressly provided by law" and is anticipated by the collateral source statute, Fla. Stat. Section 768.50(4) and that Sections 440.39 and 768.50(4) are functionally "integrated".

To accept the petitioner's interpretation of Florida Statute 768.50(4) as barring all subrogation rights for collateral sources precludes the workers' compensation carrier from seeking redress for its injuries and unconstitutionally discriminates against non medical malpractice insurance companies by, in effect, forcing such carriers to subsidize medical malpractice carriers in the underwriting of their liability risks. Such a statutory distinction between different types of insurance carriers represents an inequitable and arbitrary classification which unconstitutionally discriminates against non-medical malpractice insurance carriers.

ISSUE

The respondent would rephrase the issue as follows:

WHETHER A WORKERS' COMPENSATION CARRIER'S STATUTORY SUBROGATION RIGHTS UNDER FLORIDA STATUTE 440.39 CONSTITUTE A RIGHT OF SUBROGATION "EXPRESSLY PROVIDED BY LAW" UNDER FLORIDA STATUTE 768.50(4) SO AS TO ALLOW A WORKERS' COMPENSATION LIEN IN A MEDICAL MALPRACTICE SUIT WHERE WORKERS' COMPENSATION BENEFITS WERE PAID AS A RESULT OF THE MEDICAL MALPRACTICE.

ARGUMENT - I

FLORIDA STATUTE 440.39 GRANTS EXPRESS SUBROGATION RIGHTS TO SELF-INSURED RIGHTS EMPLOYERS AND WORKERS' COMPENSATION INSURANCE CARRIERS AND SHOULD BE READ IN PARI MATERIA WITH FLORIDA STATUTE 768.50.

The Second District Court of Appeal reversed the trial court's striking of a workers' compensation lien in a subsequent medical malpractice lawsuit where the physician was treating the injury which was the subject of the workers' compensation claim. The court's per curiam decision is based upon American Mutual Consolidated Company v. Decker, 518 So.2d 315 (Fla. 2d DCA 1987).

The Second District Court of Appeal in Decker held:

> Our analysis has lead us to the conclusion that self-insured employer or carrier, possessing a statutory subrogation right under Section 440.39 may file a lien and recover directly from the tort judgment the workers' compensation benefits paid or payable to the employee resulting from the medical negligence. Such a procedure is "expressly provided by law" and is anticipated by the collateral source statute, Section 768.50(4).

In so holding the Second District Court of Appeal certified that their decision was in direct conflict with the Third District Court of Appeal's decision in American Motorists Insurance Co. v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985). The Court agreed with the Third District Court of Appeal that workers' compensation benefits are a "collateral source" within the meaning of Section 768.50(2)(a)(2), Florida Statute (1983). The Second District Court of Appeal in its opinion points out where the Third District Court of Appeal in Coll omits to give any significance to 768.50(4) prefatory words. The Second District Court of Appeal finds that

phrase "unless otherwise provided by law" is critical and controls the outcome of this issue. The court points out that for more than forty years Florida has permitted an employee injured in the course of his employment to pursue an independent action against a third party tortfeasor. Within that backdrop, the workers' compensation law, specifically Section 440.39, Fla. Stat., expressly encompasses a subrogation right in the provider of workers' compensation benefits.

The Second District Court of Appeal calls this statutory scheme comprehensive and "designed to accomplish an equitable allocation of financial responsibility between and among the plaintiff and defendant in a medical malpractice action and a collateral source".

The Second District Court of Appeal's decision in Decker, discusses the patent unfairness of the consequences should they not be construed together, stating "nothing offered us in either the appellee's briefs or oral arguments detract from our determination that Sections 440.39 and 768.50(4) are "functionally integrated". (Emphasis added).

The statutory interpretation in the functional integration of Section 768.50 and Section 440.39 advanced by the Second District Court of Appeal finds persuasive support, not only in the plain language of the statutes but also the subsequent enactments of the Florida legislature relative to Section 768.50 and Section 440.39. Specifically, sub-section (4) of Section 768.50 has been completely reworded since the Coll decision was rendered. See 768.76, Florida

Stat. (supp. 1986). The Tort Reform and Insurance Act of 1986, 86-106, repeals Section 768.50 of the Florida Statutes altogether and has moved the substance of Section 768.50 to a new statutory section, that being Section 768.76. Section 768.50 had previously been located under Part II of Chapter 768, entitled "Medical Malpractice and Related Matters" and the collateral source provisions set forth in Section 768.50 only applied to actions brought against health care providers. Chapter 86.160, however, repealed Section 768.50, renumbered the body of the statute as Section 768.76 and moved the statute out of the medical malpractice section of the Florida Statutes and into the newly created Part III of Chapter 768 which applies to any action for damages, whether in tort or in contract, and against all types of tortfeasors, not just health care providers. Section 768.76(1), like former Section 768.50(1), provides in pertinent part that "there shall be no reduction for collateral sources for which a right of subrogation exists". Section 768.50(4) the new sub-section 4 to Section 768.76 provides as follows:

> A provider of collateral sources that has a right of subrogation shall have a right of reimbursement from a claimant to whom it has provided collateral sources if such a claimant has recovered all or part of such collateral sources from a tortfeasor. Such provider's right of reimbursement shall be limited to its pro rata share for collateral sources provided, minus its pro rata share of costs and attorney's fees incurred by the claimant in recovering such collateral sources from the tortfeasor. In determining the provider's pro rata share of those costs and attorney's fees, the provider shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees. 768.76(4), Fla. Stat. (supp. 1986). (Emphasis added).

By rewording the language of sub-section (4), the legislature is essentially clarifying the section to clearly indicate that no subrogation rights already in existence are being eliminated by the statute. In this way, there can be no mistake that insurers who have an existing right of subrogation by law continue to have such a right of subrogation, and no collateral source benefits provided by such insurers are to be deducted from the claimant's award. This subsequent legislative enactment should provide the court with ample evidence of the legislature's original intent regarding Section 768.50.

As noted by this court in Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), when a statute is amended soon after a controversy as to the original statute arises, the court may consider the amendment not necessarily as a substantive change but as a legislative interpretation of the original statute. See also Parker v. State, 406 So.2d 1089 (Fla. 1981). (In determining correct meaning of a prior statute, the court has a duty to consider subsequent legislation); Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973) (change in statutory language may simply represent clarification to safeguard against misapprehension as to existing law). In fact, a subsequent change in the statutory language used by the legislature can actually show the legislative disapproval of a prior judicial construction of the statute. Moreover, the fact that Section 440.39 has been in force since 1935 through numerous amendments up to and including the present date, clearly evidences that the

subrogation rights provided by Section 440.39 have continuing vitality and have in no way been repealed or invalidated by Section 768.50 (now 768.76). See State ex Quigley v. Quigley, 463 So.2d 224 (Fla. 1985) (Amendment by implication is not favored and will not be upheld where doubtful). See also Caloosa Property Owners v. Palm Beach County Board, 429 So.2d 1260 (Fla 1st DCA 1983) (Prior statute not repealed by later statute by implication where recent amendments to prior statute give prior statute continued vitality).

In addition, Section 440.39 deals specifically with one particular type of collateral source provider, that being a workers' compensation carrier. See Section 440.39, Fla. Stat. (1975). Conversely, Section 768.50 relates to all different types of collateral sources and anticipates that certain types of collateral sources may have subrogation rights created or otherwise reserved by law. See 768.50, Fla. Stat. (1979). Consequently, Section 440.39 is the more specific of the two acts in regard to the collateral sources since it deal with one particular type of collateral course - specifically, workers' compensation carriers. Hence the specific provisions of Section 440.39 are controlling over the more general terms of Section 768.50. See Palm Harbor Special Fire Control District v. Kelly, 500 So.2d 1382 (Fla. 2d DCA 1987). See also Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986) (specific statutes generally control over general statutes).

The appellant would have this court adopt the Third District Court of Appeal's interpretation of Florida Statute 768.50 in American Motorists Insurance Company v. Coll, 479 So.2d 156 (Fla.

3d DCA 1985) and Chambers v. Liberty Mutual Insurance Company, 511 So.2d 608 (Fla. 3d DCA 1987).

The respondents respectfully submit that the Third District Court of Appeal has completely misinterpreted the legal effect of Section 768.50 in light of the express subrogation right granted to workers' compensation carriers by statute. In Coll, rev.den. 488 So.2d 829 (Fla. 1986), the court fails to mention or apply the express qualifying language contained in sub-section (1) of Section 768.50 which language clearly provides that "there shall be no reduction for collateral sources for which a right of subrogation exists". Hence, even if the Third District Court of Appeal was initially correct in characterizing workers' compensation benefits as "collateral sources" under the definitional provisions of Section 768.50(2) it wholly failed to even consider the prefatory language in 768.50(4) which controls how the collateral sources are handled.

The Third District Court of Appeal's interpretation of Section 768.50(4) renders the qualifying provisions in sub-section (1) and sub-section (4) meaningless appendages. If all subrogation rights held by providers of collateral source benefits are indeed barred by the operation of sub-section (4) (as the Third District Court of Appeal's opinion seems to indicate), then the qualifying language used in sub-section (1) regarding the existing subrogation right is unnecessary. Certainly a right of subrogation cannot exist for purposes of the qualifying proviso in sub-section (1), if all subrogation rights are then effectively abrogated by the

operation of sub-section (4). Sub-section (1) and sub-section (4) of Section 768.50 must be read in a manner which gives meaning and harmony to both sub-sections. For example, if sub-section (4) is interpreted in accordance with its obvious intent and plain language, that being sub-section (4) only bars subrogation rights that arise by contract or implication and not those that are specifically created or reserved by statute, then the exclusionary language in sub-section (1) (relative to collateral sources with existing subrogation rights) can be given its intended legal effect.

With all due respect, the Third District Court of Appeals' interpretation of Florida Statute 768.50 ignores all recognized and well established rules of statutory construction. Unfortunately, this erroneous interpretation has been applied by the Third District Court of Appeal in its brief opinion rendered in Coll, supra, and Rosabal, M.D. v. Arza, 495 So.2d 846 (Fla. 3d DCA 1986). In Rosabal, the trial curt had declined to deduct workers' compensation benefits from the amount of the plaintiff's verdict in a medical malpractice case. The defendant physician then appealed and the Third District Court of Appeal citing its contemporaneous decision rendered in Coll (decided during the pendency of the Rosabal appeal), reversed and remanded the cause to the trial court. Id. The Rosabal court directed the trial court to setoff the workers' compensation benefits from the jury verdict in accordance with Section 768.50 and to strike the compensation lien filed under Section 440.39 by the workers' compensation carrier.

Id. No discussion of the interplay between Section 768.50 and Section 440.39 was offered by the Rosabal court. While the Rosabal court concluded that the compensation benefits were a "collateral source" under Section 768.50(2), the court did not proceed further to determine whether, notwithstanding this fact, the carrier had a right of subrogation which would preclude a reduction of damages. The court made no apparent attempt to reconcile the two statutes in question and give both meaning and effect.

A. Function Integration of Section 768.50 and 440.39.

A further analysis of the operative statutes reinforces the Second District Court of Appeal's well-reasoned opinion in Decker: The two Florida statutes at issue in this appeal, Section 768.50 and Section 440.39, are found within two separate chapters of the Florida Statutes, specifically Chapter 768 entitled "Negligence", and Chapter 440 entitled "Workers' Compensation". See Sec.768.50, 440.39, Fla. Stat. (1979). At the time of Wayne McGhee's injury and during the alleged malpractice in his treatment, the 1979 version of Section 768.50 and Section 440.39 of the Florida Statutes were in effect and hence, are controlling in this action. Section 768.50 entitled "collateral Sources of Indemnity" provides (with certain material exceptions) for the reduction of collateral sources from the damages awarded plaintiffs in medical malpractice actions. Section 440.39 of the Florida Workers' Compensation Act established the subrogation and lien rights for workers' compensation carriers, entitling such carriers to recoup workers' compensation benefits paid to injured employees in suits brought

against third party tortfeasors allegedly responsible for such injuries.

1. SECTION 768.50

Section 768.50(1) found in the medical malpractice provision of Chapter 768 provides in pertinent part as follows:

> 768.50 COLLATERAL SOURCES OF INDEMNITY - (1) In any action for damages for personal injury or wrongful death, whether in tort or in contract, arising out of rendition of professional services by a health care provider in which liability is admitted or 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. (Emphasis added).

The qualifying clause underline in the above statute clearly indicates that in medical malpractice collateral sources are not to be deducted from the plaintiff's damages award where a right of subrogation exists. In order to determine whether benefits provided to an injured claimant in a medical malpractice action are deductible from the damages awarded, the trial court must necessarily apply a two-fold analysis under the express language of sub-section (1) of Section 768.50. The first question is to determine whether the benefits provided to the claimant actually constitute a "collateral source", as that term is legislatively defined in sub-section 2(a) of the same statute. If they are not "collateral sources" then such benefits are obviously not subject to deduction under Section 768.50(1). Any benefit which does fall into one of the four separate "collateral sources" categories delineated in sub-section 2(a) however would be considered a

"collateral source" potentially subject to deduction under Section 768.50(1).

Once the court determines whether the particular benefit received by the injured claimant fits within the statutory categories of "collateral sources" listed in sub-section 2(a), the court must address the second part of the test and determine whether the particular collateral source under consideration has an existing "subrogation right". According to the express qualifying terms of sub-section (1), if the collateral source providing the benefit has a recognized subrogation right, then such benefits are not deducted from the total damages awarded the plaintiff. See Section 768.50(1), Fla. Stat. (1979).

The necessity of the foregoing two-part test is obvious from the plain language of the statute. Sub-section (1) clearly states that no collateral source benefits are to be deducted if a right of subrogation exists. The Third District of Appeal apparently did not consider the second part of this test prior to striking the workers' compensation liens in their decisions in Coll, Chambers and Rosabal. Instead the court simply determined that because the compensation benefits provided by workers' compensation carriers or self-insured employers are considered a "collateral source" under the definitional provision section of 768.50(2)(a), then ipso facto, no subrogation rights exist pursuant to sub-section (4). This conclusion is grounded in circular logic and completely ignores the express qualifying provisos inserted by the legislature in sub-sections (1) and (4) of the statute, which provisos mandate

a contrary result where subrogation rights are otherwise expressly provided by law. See Section 768.50(1) - (4), Fla. Stat. (1979).

To determine what constitutes "unless otherwise expressly provided by law" this court must begin with an analysis of legislative intent. To determine legislative intent one must first look to the plain language used in the statute.

Sub-section 768.50(1) essentially represents a partial abrogation of the common law "collateral source rule", which has historically precluded a reduction in damages for collateral source benefits (such as insurance proceeds) received by an injured plaintiff where the tortfeasor responsible for the plaintiff's injuries did not contribute to the purpose of such benefits. See Florida Physicians' Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984); see also Winston Towers 100 Association, Inc. v. DeCarlo, 481 So.2d 1261 (Fla. 3d DCA 1986). Section 768.50 effectively usurps this long-standing collateral source rule in medical malpractice actions, but only where a recognized right of subrogation does not exist. The policy behind Section 768.50 is to prevent a double recovery by the injured plaintiff and arguably to control the upward spiral of medical malpractice insurance rates. See Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365, 367-368 (Fla. 1981).

As a statute in derogation of the common law collateral source rule, the court should construe Section 768.50 very narrowly, which requires the court to give full operative effect to the express qualifying language used in sub-section (1).

Specifically, the language which states that no collateral source is to be deducted from the plaintiff's award where a right of subrogation exists. See State v. Egan, 287 So.2d 1, 6 (Fla. 1973) (Narrow construction required where statute is in derogation or common law); Sand Key Association v. Board of Trustees, etc., 458 So.2d 369, 371 (Fla. 2d DCA 1984) (Statute must explicitly state in clear terms that it is altering common law). A narrow construction of the statute would arguably require the court to strictly construe the abrogating provisions and to broadly construe the excepting provisions. Consequently, the legislature's use of the phrase "however there shall be no reduction for collateral sources for which a subrogation right exists" in sub-section (1) must be afforded the broadest possible interpretation since this proviso represents an existing common law with regard to collateral sources. See State v. State Racing Commission, 112 So.2d 825, 829 (Fla. 1959).

Sub-section (4) of the same statute provides additional insight into the meaning and scope of the qualifying phrase used in sub-section (1). Sub-section (4) basically provides that there are no rights of subrogation or assignment rights in medical malpractice actions unless otherwise expressly provided by law in that all policies of insurance are to be construed accordingly. See Section 768.50(4), Fla. Stat. (1979). Specifically, sub-section (4) provides as follows:

> Unless otherwise expressly provided by law, no insurer or other party providing collateral source benefits as defined in sub-section (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. All policies of insurance providing benefits described in this section shall be construed in accordance with this section after the effective date of this act. Section 768.50(4), Fla.Stat. (1979). (Emphasis added).

Sub-section (4) when read in pari materia with sub-section (1), and against the backdrop of existing subrogation law, clearly reveals that only certain types of subrogation rights are meant to be eliminated by Section 768.50(4). Specific types of subrogation rights are intended to be barred by Section 768.50. It is important to briefly discuss the origin of rights of subrogation, especially since the legislature is presumed to have knowledge of existing case and statutory law when it enacts new law on the subject. See Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986).

2. Section 440.39

Under Florida law, rights of subrogation can arise in a variety of ways. As noted by this court in Goodwin v. Schmidt, 5 So.2d 64 (Fla. 1941), there are two basic types of subrogation rights. The first type is what has come to be known as "legal" or "equitable" subrogation in which a right of subrogation arises by operation of law whenever a person having a liability, a right or a fiduciary relationship in the premises pays a debt actually due by another person under the circumstances that the payor is equitably entitled to the security or obligation held by the creditor whom he has paid. Id. at 66-67. In such event the paying party is substituted, or stands in the shores of the subrogor, with reference to the claim or right. Id. at 66. See also Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980).

This particular type of subrogation right is purely a creature of equity and is enforceable as an equitable right of action.

The second type of subrogation right is commonly known as "conventional" or "contractual" subrogation, which arises where a person who has no interest in or relation to the matter pays another's debt and by a contractual agreement with that person is entitled to the securities and rights of the creditor who has been paid. Id. at 67. This type of subrogation right is a creature of contract and is enforceable as any other valid contractual right. See Schwab v. Town of Davie, 492 So.2d 708 (Fla. 4th DCA 1986); see also Allstate Insurance Company v. Metropolitan Dade County, 436 So.2d 976, 978 (Fla. 3d DCA 1983). "Equitable" subrogation and "contractual" subrogation are subrogation rights arising out of or recognized by Florida case law. As will be discussed, however, there are actually three different types of subrogation rights, the third type being those rights of subrogation which are expressly created by statute.

The historical common law right of insurance carriers who have either equitable or conventional subrogation rights to recover payments made to an injured insured is well established in Florida law. See Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1932). See also Blue Cross & Blue Shield of Fla. Inc., v. Matthews, 498 So.2d 421 (Fla. 1986).

Right of subrogation for workers' compensation carriers in particular, however, is not grounded in equity or in contract but in expressed statutory law, specifically, Section 440.39 of the

Workers' Compensation Act. See Section 440.39, Fla.Stat. (1979). Section 440.39 of the Workers' Compensation Act grants subrogation rights to employers and their workers' compensation carriers by providing that if an employee has accepted workers' compensation and benefits relative to a compensable injury, and has brought suit for such injury against a third party tortfeasor, the employer or the employer's insurance carrier is subrogated to the rights of the employee to the extent of the compensation benefits paid or to be paid. Section 440.39(2), Fla. Stat. (1979). Moreover, Section 440.39(3)(a) in pertinent part provides that the workers' compensation carrier may file in the employee's suit against a third party tortfeasor:

> . . . a notice of payment of compensation and medical benefits to the employee or his dependent which said notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law. The employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted 100% of what it has paid and future benefits to be paid, unless the employer dependent can demonstrate to the court that he did not recover the full value of damages sustained because of the comparative negligence or because of limits of insurance coverage and collectability . . . Section 440.39(3)(a), Fla.Stat. (1979). (Emphasis added).

In summary, Section 440.39 creates an express statutory right of subrogation to the compensation carrier; authorizes the carrier to file a notice of payment of compensation and benefits in the suit which then operates as a lien on any judgment or settlement proceeds; and entitles the carrier to recover from the judgment (after deduction of attorney's fees and costs) 100% of the benefits

paid or to be paid. This court in Aetna Casualty & Surety v. Bortz, 271 So.2d 108 (Fla. 1973) stated that the legislative intent behind this statutory right of subrogation for workers' compensation carriers is to provide a balance between the policy of preventing the injured employee from receiving a double recovery and the countervailing policy of not extending tort immunity to persons not outside the immediate employer-employee relationship. Id. at 113.

There is no clearer, or more compelling, evidence of an "existing right of subrogation" than when expressly granted by specific legislative enactment. In fact, the right of subrogation for workers' compensation carriers is wholly a "creature of statute" and the court should look to the statute to determine the nature and the scope of this right. See Alfar Creamery Company v. Williams, 366 So.2d 458 (Fla. 4th DCA 1978). See also General Guaranty Insurance Company v. Moore, 143 So.2d 541, 544 (Fla. 2d DCA 1962). (Determination of workers' compensation subrogation claim is controlled by statute in Florida). National Emblem Insurance Company v. Gillingham, 241 So.2d 707 (Fla. 4th DCA 1970) (Compensation carrier must file notice of payment of compensation and medical benefits and sue to protect statutory lien rights). It is important to note that the statutory right of subrogation has survived ever since 1935, when Section 440.39 of the Workers' Compensation Act was first enacted up to and including the present date with latest amendment to the statute being effective July 1, 1986. See Section 440.39, Fla. Stat. (supp. 1986).

The petitioner's proposed construction of the statutory language "in the course of his employment" to extend only to on-the-job injuries has absolutely no support in law. In fact it is contrary to the holdings of this court as well as all Florida appellate courts which have ruled on this issue.

In City of Lakeland v. Burton, 2 So.2d 731 (Fla. 1941) this court addressed the issue of whether subsequent medical negligence for an injury suffered in the course of employment was covered by workers' compensation:

> [1] The record is clear that the injury caused the injured man to suffer great pain in the abdominal region and the suffering of such pain by the deceased caused the physician to prescribe, and the deceased to take, the narcotic. So, it is clear that there was direct causal connection between the injury and the death, even if death followed as the immediate result of taking the narcotic. It, therefore, follows that the taking of the narcotic was not an independent intervening cause but was the result of the original injury, and the employer and insurance carrier are liable under the Workmen's Compensation Act.

It is difficult to imagine how the term "course of employment" in Section 440.09 could require workers' compensation coverage for subsequent medical negligence which either exacerbates or prolongs the original injury, and then interpret the same term under 440.39 to require on-the-site injury for subrogation purposes. If the petitioner's interpretation of "course of employment" as meaning "on-site-injury" is adopted it should apply to both Section 440.09 and 440.39. If the court adopts the petitioner's interpretation of "course of employment" there will be no workers' compensation coverage for subsequent negligence which exacerbates the injury, medical or otherwise. This is obviously

contrary to the existing law in Florida. Warwick v. Hudson Pulp & Paper Co., 303 So.2d 701 (Fla 1st DCA 1974) cert. denied 314 So.2d 776 (Fla. 1975); Sullivan v. Liberty Mutual Ins. Co., 367 So.2d 658 (Fla. 4th DCA 1979); Southern Bell Telephone & Telegraph Co. v. Poole, 388 So.2d 330 (Fla. 1st DCA 1980).

ARGUMENT - II

DENIAL OF SUBROGATION RIGHTS OF A WORKERS' COMPENSATION CARRIER OR SELF-INSURED EMPLOYER IN MEDICAL MALPRACTICE ACTION UNFAIRLY SHIFTS ECONOMIC BURDENS FROM THE TORTFEASOR TO A THIRD PARTY AND DENIES WORKERS' COMPENSATION CARRIERS AND SELF-INSURED EMPLOYERS ACCESS TO COURTS AND EQUAL PROTECTION UNDER THE LAW.

The petitioner in this case is asking the court to eliminate the existing express statutory subrogation rights of the respondent. If the court adopts the petitioner's position, it will unconstitutionally deprive the workers' compensation carriers access to the courts in violation of Article I, Section 21 of the Florida Constitution.

Article I, Section 21 of the Constitution states:

> [t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

In Klugan v. White, 281 So.2d 1 (Fla. 1973) this court held that the legislature could not abolish the right of access to court without providing a reasonable alternative to the injured party. See also Laskey v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974) (No-Fault Law provision upheld because statute provided reasonable alternative to the injured party). In the case of Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987) this court held that to deny access to courts by placing a cap on non-economic damages violated Article I, Section 21 of the Florida Constitution. This court held that the legislature must provide a reasonable alternative to access to the courts unless an over-powering public

necessity is shown and no alternative method of meeting the public necessity exists. This court avoided the constitutional problems of Florida Statute 627.7372 in Blue Cross & Blue Shield v. Matthews, 498 So.2d 421 (Fla. 1986) by allowing the workers' compensation carriers to exercise their subrogation rights against the tortfeasor.

The workers' compensation carrier's subrogation rights are statutory under Florida Statute 440.39. As the petitioner points out, a self-insured employer or workers' compensation carrier will be precluded from court or recovery of benefits which have been paid as a result of medical malpractice if the petitioner's position is adopted. This clearly infringes upon the self-insured insurers and workers' compensation carriers constitutional rights under Article I, Section 21 of the Florida Constitution.

This court has previously recognized that subrogation is a legal remedy that may be invoked by an initial tortfeasor to recoup losses caused by a physician, which losses, in all fairness ought to be shared by the physician, whose subsequent negligence has aggravated the patient's initial injury. See Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980). Moreover, this court has long recognized that insurers have a right of subrogation to recover payments made to an insured who has been injured by the negligence of a tortfeasor and this right is well established in Florida law. See Blue Cross & Blue Shield of Fla. Inc. v. Matthews, 498 So.2d 421 (Fla. 1986). See also Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1932).

In addition as fully discussed under the prior argument, workers' compensation carriers in particular have an express right of subrogation against a negligent third party tortfeasor to recover benefits paid to an injured employee. See 440.39, Fla. Stat. (1979). The policy rationale behind this right of subrogation against a negligent physician is to prevent a physician from escaping all liability for his negligence which, in all fairness, ought to be shared by the doctor or his malpractice carrier. See Underwriters at Lloyds, 382 So.2d at 704.

If Section 768.50, as interpreted by the petitioner, eliminates all recognized subrogation rights historically held by insurers, including express subrogation rights granted to workers' compensation carriers by statute, the negligent doctors and medical malpractice carriers that insure them will escape all economic liability for the physician's negligence at the expense of the non-medical malpractice insurance industry. The petitioner's interpretation of Section 768.50 would essentially mean that workers' compensation insurance industry would be forced to subsidize the malpractice of the physicians who treat injured workers without any right of recovery from any source whatsoever. For example, if an employee is injured on the job and the physician who treats him commits malpractice resulting in additional or aggravated injuries to the employee, workers' compensation carrier will generally be required to provide compensation and medical benefits to the injured employee in connection with his aggravated injuries and subsequent medical treatment. City of Lakeland v.

Burton, 2 So.2d 731 (Fla. 1941); Warwick v. Hudson Pulp & Paper Co., Inc., 303 So.2d 701 (Fla. 1st DCA 1974). Under the Third District Court of Appeal's application of Section 768.50, however, the workers' compensation carrier then has no subrogation rights against the negligent physician and all workers' compensation and medical benefits paid to the injured employee as a result of the physician's negligence would be deducted from the employee's damage award. Consequently, the negligent physician (or his malpractice carrier) pays a significantly reduced damages award at the expense of the workers' compensation carrier who is burdened with the lion's share of the damage award. This results in an inequitable and unconstitutional shifting of economic burden of the doctor's malpractice to the non-medical malpractice insurance carriers.

The fact that one segment of Florida's insurance industry may be forced to substantially underwrite the liability risk incurred by another segment of the insurance industry through the abrogation of existing subrogation rights, has already given this court cause for concern. In Blue Cross & Blue Shield of Fla. Inc. v. Matthews, supra, this court was asked to consider the constitutionality of Section 627.7372 of the Florida Motor Vehicle No-Fault Law, which provision had been interpreted by both the trial court and the First District Court of Appeal as barring subrogation rights previously enjoyed by health insurers who have provided benefits to an injured plaintiff. 498 So.2d at 421, 422. Section 627.7372 provides for the deduction of collateral sources from the damages awarded an injured plaintiff. Specifically, Section 627.7372

provides that:

> In any action for personal injury or wrongful death arising out of the ownership, operation, use or maintenance of a motor vehicle, the court shall admit into evidence the total amounts of all collateral sources paid to the claimant and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source. Section 627.7372, Fla. Stat. (1985).

The trial court and the District Court had interpreted Section 627.7372 as not only preventing plaintiffs from recovery of collateral source benefits but also precluding all insurance carriers, including health insurance carriers, from exercising these subrogation rights. 498 So.2d at 422. This court, in declining to expressly address the constitutional issues presented, concluded that Section 627.7372(1) is constitutional as written (but not as applied), and that the statute does not bar long standing subrogation rights held by all insurers. Id. at 422-423. According to this court, Section 627.7372 simply prevents an injured claimant from receiving a double recovery and prevents motor vehicle insurers from suing each other to recover benefits paid to an insured. Id. In other words, while Section 627.7372(1) prevents the injured claimant and his automobile insurance carrier from recovering collateral source payments from the negligent tortfeasor, it does not prevent a health insurer such as Blue Cross and Blue Shield from recovering by subrogating such collateral source benefits previously paid to its insured. Id. Justice Shaw observed in his opinion that if Section 627.7372 were interpreted as barring subrogation rights of all insurers (not just vehicle

insurers) the, in effect, the motor vehicle insurance industry would be subsidized by the transfer of the economic burden to the health care industry. Id at 423. In other words, the motor vehicle insurance industry would receive all the benefit of the no-fault law and all other types of insurance carriers would unfairly receive the detriment of the law with none of the corresponding benefits. The court notes, "the arrangement becomes a one-way transaction with the health insurers always transferring money to the vehicle insurers". Id. The court intimated that this interpretation of Section 627.7372 could present some serious constitutional problems.

The inequitable result observed by the Supreme Court in Blue Cross & Blue Shield relative to Section 627.7372 is analogous to what would happen in the case sub judice if the Third District Court of Appeal's erroneous interpretation of Section 768.50 is upheld. Specifically, workers' compensation carriers who have provided benefits to employees whose injuries have been aggravated by the negligence of their treating physicians would be foolish to "foot the bill" for such negligence rightfully owed by the negligent physicians or their malpractice insurance carriers. Malpractice insurance industry would then wholly benefit at the expense of the workers' compensation insurance industry, whose express subrogation rights have been unfairly denied. Such a result would violate the equal protection rights of workers' compensation carriers and unduly deny them access to the courts to seek redress for their injuries.

While the constitutionality of Section 768.50 has previously been upheld by this court in Pinillos, the court was primarily concerned with the constitutionality with Section 768.50 as it applied to injured plaintiffs in medical malpractice suit. 403 So.2d at 366-368. In Pinillos, the plaintiffs have argued that the distinctions drawn by Section 768.50 between plaintiffs who have been injured by medical practitioners and plaintiffs who have been injured by non-medical members of the public is arbitrary, unreasonable and a denial of their equal protection under the law. Id. at 367. In upholding the constitutionality of Section 768.50 the court notes that the "rational basis test" was applicable since no suspect, class or constitutional right was implicated by Section 768.50. Id. The court then discussed the public policy behind 768.50 and concluded the "rational basis test" had been met. Id. at 367, 368.

In the case sub judice, the constitutional challenge is not that the statute unfairly discriminates against certain types of plaintiffs (i.e., plaintiffs in a medical malpractice action) but that the statute unfairly discriminates against non-medical malpractice insurance carriers to the sole benefit of the malpractice insurance carriers by eliminating all rights of subrogation traditionally held. If all subrogation rights, even those expressly granted by statute, are barred by the operation of Section 768.50(4), then the medical malpractice industry will be subsidized by all other types of insurance carriers such as workers' compensation carriers who have paid benefits to the

injured claimant as a result of the medical malpractice. This unjust subsidization of medical malpractice carriers can hardly be the intent of the legislature in enacting Section 768.50, particularly in light of the statutes qualifying provisos regarding the non-elimination of existing subrogation rights. In addition, there is no "rational basis" to support the shifting of economic burdens from the medical malpractice insurance carriers to the workers' compensation insurance carriers.

The constitutional infirmities of Section 768.50 (as applied) can be eliminated, however, if the statute is given the statutory construction set forth by the Second District Court of Appeal in this case and Decker. As this court noted in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976):

> It is incumbent on this court when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of the statute in favor of its constitutional validity and if possible the statute should be construed in such a manner as would be consistent with the constitution, that is, in such a way as to remove it farthest from constitutional infirmity. Id. at 805. (Emphasis added).

The respondents respectfully submit that the statutory interpretation of Section 768.50 advanced by the respondents and so held by the Second District Court of Appeal is the only interpretation which is both consistent with the express language used in the statute and non-violative of the constitutional

guarantees of access to the courts and equal protection under the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief has been furnished by U.S. Mail to: A. BROADDUS LIVINGSTON, ESQ., and S. JANE MITCHELL, ESQ., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P. O. Box 3239, Tampa, Florida 33601, this 20th day of May, 1988.

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