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.	)	CASE NO. 72,093 Appeal No. 871519
SUNCOAST HOMES, INC. and AUTO-OWNERS INSURANCE COMPANY,	)	
Respondents.	)	

REPLY BRIEF

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REPLY

Respondent fails to adequately 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.[1/] However, the Williams court, and the authorities it relied on, did not consider the

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

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.[2/] 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.[3/] 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

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[2/] 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.

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

compensation carriers obligation to include additional expenses attendant to subsequent medical negligence.[4/] 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.[5/] In fact, the use of this expanded definition in suits for damages caused by the negligence of a third party has been explicitly prohibited.[6/] 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.

[4/] 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).

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

[6/] 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 13TH day of June, 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 A. Wade James, Esquire, Hampp & Schneikart, P.A., Post Office Box 12809, St. Petersburg, Florida 33733 and to H. George Kagan, Esquire, 455 Fairway Drive, Suite 101, Deerfield Beach, Florida 33441 this 13TH day of June, 1988.

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