FILED
FEB 28 1989
CLERK, SUPREME COURT
By ________ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S COMPENSATION FUND,

Petitioner,

vs.

CASE NO. 73,761

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a foreign corporation; ROBERT B. WARD, M.D.; and GOLD, VANN & WHITE, P.A., d/b/a DOCTORS' CLINIC,

Respondents.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Fourth District
State of Florida

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STATEMENT OF THE FACTS AND CASE

The Petitioner and the Respondents were co-defendants in a medical malpractice action brought against a surgeon, his P.A. and a pathologist and their insurers alleging unnecessary surgery on account of a misdiagnosis of tissue obtained from a patient's pancreas. The insurers for the pathologist, including the Petitioner, who had the role of an excess insurance carrier, settled the entire case with the original plaintiffs and then filed suit against the Respondents for contribution. This first lawsuit was dismissed because the Petitioner had given a promissory note for the settlement amount, but it had not paid off the promissory note at the time it filed the first suit against the Respondents. The trial court dismissed the first lawsuit for failure to comply with Section 768.31(4)(d)(2), Florida Statutes, because the promissory note had not yet been paid. The Fourth District Court of Appeal upheld that dismissal in Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 483 So.2d 770 (Fla. 4th DCA 1986), pet. for rev. denied, 483 So.2d 1150 (Fla. 1986), ruling that giving a promissory note was not payment to satisfy the requirement of Section 768.31(4)(d)(2) of payment within a year of settlement with a plaintiff.

During the pendency of the first appeal to the Fourth District Court of Appeal, the Petitioner paid the settlement in cash and filed a second lawsuit against the Respondents setting forth claims for contribution, equitable subrogation and equitable assignment. The trial court again dismissed this

action based upon the doctrine of res judicata. This dismissal was appealed to the Fourth District Court of Appeal which upheld this dismissal in an Opinion dated December 14, 1988. The Petitioner filed a timely Motion for Rehearing which was denied on January 20, 1989. The Petitioner then filed a timely Notice to Invoke Discretionary Jurisdiction seeking to have this Court review the decision of the Fourth District Court of Appeal by means of its conflict jurisdiction.

SUMMARY OF THE ARGUMENT

In the Opinion of the Fourth District Court of Appeal which the Petitioner seeks to have reveiwed by this Court, the Fourth District held that since the Petitioner was barred from bringing an action for statutory contribution against the Respondents on account of the provisions of Section 768.31(4)(d)(2), the Petitioner could not bring an action for equitable subrogation (or for contribution or equitable assignment) against the Respondents. The Opinion is in direct and express conflict with the decision in Jones v. Williams Steel Industries, Inc., 460 So.2d 1004 (Fla. 5th DCA 1984) as well as in direct and express conflict with several other decisions of the First, Third and Fifth District Courts of Appeal. Those decisions hold that an action for equitable subrogation can be brought even though an action for statutory contribution is barred or otherwise fails to be an available remedy.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of this Court or of another District Court of Appeal on the same question of law. Art. V Section 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court has jurisdiction to review the Opinion of the Fourth District Court of Appeal below because that Opinion conflicts with decisions of the First, Third and Fifth District Courts of Appeal.

ARGUMENT

The Fourth District Court of Appeal acknowledged in its Opinion (Appendix, Exhibit "A") that its Opinion conflicted with Jones v. Williams Steel Industries, Inc., 460 So.2d 1004 (Fla. 5th DCA 1984) and Clearly [sic] Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116 (Fla. 3d DCA 1988). Although the Fourth District used the language "might possibly be in conflict," this Court clearly has conflict jurisdiction because this Court has and can exercise such jurisdiction if the Fourth District's Opinion establishes a point of law in conflict with another decision of this Court or of another Court of Appeal. Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988).

In Jones v. Williams Steel Industries, Inc., supra, the Fifth District found that one jointly liable debtor could recover against the other jointly liable judgment debtor pursuant to the theory of equitable subrogation even though an action for contribution was barred under the Uniform Contribution Among Tortfeasors Act, specifically Section 768.31(4)(c), Florida Statutes. The Fourth District here is in conflict with that Opinion when it held that Petitioner, who had settled and paid the claim brought by the parties who originally sued the Petitioner and the Respondents as joint tortfeasors, could not pursue equitable subrogation against the Respondents because the Fourth District had held in the first appeal that an action for contribution was barred for failure to comply with Section **768.31(4)(d)(2),** Florida Statutes, a provision quite similar to the one involved in Jones.

In doing *so*, what the Fourth District has done is establish a principle of law that equitable subrogation is not available to one alleged tortfeasor against another alleged joint tortfeasor if statutory contribution is unavailable. This is in direct and express conflict not only with the Jones decision but also with the decision in West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986) and the much more recent opinions of the Third District in Kala Investments Inc., et al. v. Sklar, et al., 14 FLW 330 (Fla. 3d DCA, January 31, 1989) and of the First District in McKenzie Tank Lines, Inc., v. Empire Gas Corp., et al., 14 FLW 282 (Fla. 1st DCA, January 27, 1989).

In the West American decision, the Fifth District held that a joint tortfeasor could recover based on equitable subrogation where statutory contribution would not lie and where the contribution Plaintiff had not even pleaded equitable subrogation. In Kala Investments, Inc., et al. v. Sklar, et al., supra, the Third District in a thorough Opinion followed West American and found that equitable subrogation was the remedy available to one defendant against other co-defendants in a personal injury suit even though contribution and indemnity were not available and even though the co-defendant/plaintiff Kala only raised the doctrine of equitable subrogation for the first time in its reply brief. See Kala, footnote *8.*

In McKenzie Tank Lines, Inc. v. Empire Gas Corp., et al., supra, the court also followed West American and held that the remedy of equitable subrogation was applicable even though the remedy of contribution failed.

It should be noted at this point that the apparent underlying premise of the Fourth District for discussing and equating contribution, indemnity and subrogation and in finding that Petitioner could not pursue equitable subrogation was that the second suit by Petitioner involved the same circumstances as the first suit. The Fourth District, on page **3** of its Opinion, explained this premise as follows:

> There remains for discussion the question of whether a suit predicated on contribution would bar a subsequent suit between the same parties, involving the same circumstances based on either subrogation, equitable assignment or both.

This premise is faulty because at the time of the second suit, the promissory note had been paid by the Petitioner (the Fourth District even acknowledges this in footnote 1. on page 2 of the Opinion), and it had been this lack of payment which was the underlying foundation for the dismissal by the trial court of the first lawsuit for contribution under Section **768.31(4)(d)(2)** and that affirmance of the dismissal by the Fourth District in Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Co., 483 So.2d 770 (Fla. 4th DCA), pet. for rev. denied, 483 So.2d 1150 (Fla. 1986). Therefore, when the second lawsuit was filed, the circumstances were different and the case for the first time was ripe for equitable subrogation relief because application of that doctrine does require actual payment of the entire obligation. Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116, 117 (Fla. 3d DCA 1988) and Munson & Associates v. Doctors Mercy Hosp., 458 So.2d 789, 791 (Fla. 5th DCA 1984).

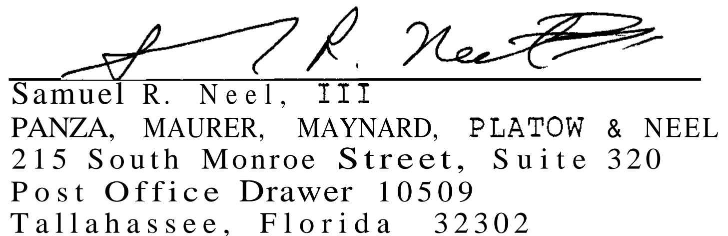
Finally, the Opinion of the Fourth District in finding that subrogation is equatable with indemnity conflicts with the Cleary Brothers Construction Co. case. That finding is part of the Fourth District's holding that no subrogation is available if statutory contribution is barred because it leads to its reasoning that since there is no common law right to contribution or indemnity, there can be right to subrogation because it is the same as indemnity (See page 4. of the Opinion).

CONCLUSION

For all of these reasons, this Court should accept jurisdiction based on conflict because the Fourth District's Opinion in this case expressly and directly conflicts with the decisions from the First, Third and Fifth District Courts of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing jurisdictional brief has been furnished to JACK SCAROLA, Post Office Drawer 3626, West Palm Beach, FL 33402, RICHARD V. NEILL, JR. ESQ., NEILL, GRIFFIN, JEFFRIES & LLOYD, Post Office Box 1270, Fort Pierce, Florida 33454, by United States Mail, this 27th day of February, 1989.



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