RVNjr/mkl 3/10/89

IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S
COMPSNSATION FUND,

Petitioner,

vs.

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.

CASE NO: 73,761

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT, STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENTS

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PREFACE

Respondents, ROBERT B. WARD, M.D. (hereinafter "DR. WARD"), GOLD, VANN, & WHITE, P.A. d/b/ DOCTORS' CLINIC, his employer, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, their insurer, will be referred to collectively as "Respondents".

Petitioner, FLORIDA PATIENT'S COMPENSATION FUND, will simply be referred to as "Petitioner".

STATEMENT OF FACTS AND CASE

One aspect of the case which is not completely clear from Petitioner's Statement of the Facts and Case is that, at best (from Petitioner's point of view), Petitioner's insured and DR. WARD are joint tortfeasors.

As noted in the first sentence of the subject opinion, "this controversy stems from a malpractice claim involving an unnecessary surgical operation performed because ~~of a~~ faulty pathologist's report." Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 535 So.2d 335, 336 (Fla. 4th DCA 1988) (emphasis added). Of course, Petitioner's insured was the pathologist; and, DR. WARD was the surgeon.

This Court should decline to accept jurisdiction because the cases cited by Petitioner do not expressly and directly conflict with any point of law on which the decision below rests.

The Fourth District's decision is based on a unique situation in which the Petitioner, the insurer for a joint tortfeasor, is barred by statute and res judicata from recovery under the contribution statute. Petitioner here seeks to recover on the theory of subrogation.

Petitioner cites cases for the proposition that subrogation is available as an avenue of relief where contribution is unavailable. None of these cases, however, deal with joint tortfeasors or their insurers. For that reason, there can be no direct and express conflict between those cases and the holding of the Fourth District Court of Appeal below.

ARGUMENT

Petitioner seeks to establish jurisdiction based on conflict. In order to do so, Petitioner must establish that an expressed "point of law on which the decision rests" conflicts with a similar point established by this Court or another district court of appeal. The Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988).

In this case, the decision of the Fourth District Court of Appeal rests on three points of law:

> 1. Dismissal with prejudice of a contribution claim for failure to comply with 5768.31, Fla. Stat., is res judicata as to a second contribution claim.
>
> 2. Personal injury and malpractice claims are not assignable.
>
> 3. Where a contribution claim is barred by statute and res judicata, the theory of subrogation provides no remedy to a joint tortfeasor's insurer in a claim against another joint tortfeasor.

Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 535 So.2d 335 (Fla. 4th DCA 1988). As is obvious from Petitioner's brief, it does not assert jurisdiction based on the first two points.

Petitioner does, however, argue that the opinion of the Fourth District Court of Appeal conflicts with decisions holding that an action for subrogation can be brought where the remedy of contribution is not available. Because none of the decisions cited deal with joint tortfeasors, those cases are easily distinguishable and do not provide a basis

for conflict jurisdiction.

Jones v. Williams Steel Industries, Inc., 460 So.2d 1004 (Fla. 5th DCA 1984), deals with a confused situation in which the parties were designated as joint judgment debtors without any legal basis for the same. Noting that the parties' liability to the judgment creditor was based on separate contracts, the court pointed out that "their liability was diverse and several, not joint." Id. at 1007, footnote 6.

Munson & Associates v. Doctors Mercy Hospital, 458 So.2d 789 (Fla. 5th DCA 1984), discusses a situation involving a claim against a subsequent tortfeasor, not a joint tortfeasor. In that case, an auto accident defendant sought relief by way of subrogation against subsequent treating physicians who exacerbated the injuries.

While West American Insurance Company v. Yellow Cab Company of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986), does hold that subrogation may be an available remedy where contribution is unavailable, it does not deal with a situation involving joint tortfeasors. In that case, the defendant who settled was found not to be at fault and, thus, not entitled to contribution because he was not a joint tortfeasor, i.e., "common liability was lacking". Id. at 206.

Kala Investments, Inc. v. Sklar, 14 FLW 330 (3rd DCA January 31, 1989) and McKenzie Tank Lines, Inc. v. Empire

Gas Corporation, 14 FLW 282 (Fla. 1st DCA January 27, 1989), are similarly distinguishable. Both note that subrogation was or might be available where the lack of common liability precluded a contribution claim. Neither, therefore, deals with a situation involving joint tortfeasors.

In this case, contribution was initially unavailable to Petitioner because of failure to comply with §768.31, Fla. Stat. Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 483 So.2d 770 (Fla. 4th DCA), pet. rev. den., 494 So.2d 1150 (Fla. 1986). In the instant lawsuit, the contribution claim was barred by res judicata. Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 535 So.2d 335, 337 (Fla. 4th DCA 1988). Thus, this case involves a situation in which the joint tortfeasor was unable to take advantage of its statutory remedy, not one in which the remedy was never available because common liability was lacking.

Petitioner cites Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116 (Fla. 3rd DCA 1988)[1] for the proposition that subrogation was not available to it until after the first lawsuit between the parties was decided. That point goes to the merits of the

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[1] In Cleary, the Third District held that indemnity was available, so it also does not consider joint tortfeasors.

trial court's determination, rather than the holding of the Fourth District. In holding that subrogation was simply not available as a method for a joint tortfeasor's insurer to seek contribution (when recovery under §768.31, Fla. Stat., was barred), the Fourth District did not need to reach this point and did not do so.

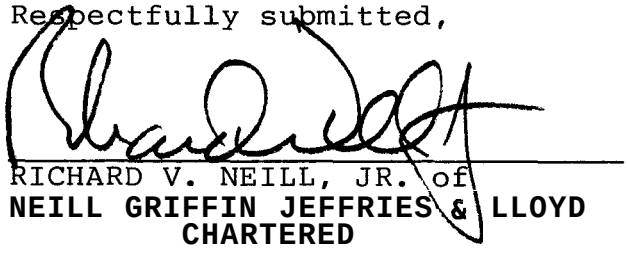
It should also be noted that the Fourth District's general discussion of subrogation is merely dicta and is clearly noted to be in the specific context of this case. The point of law announced by the court below deals with the availability of subrogation to a joint tortfeasor's insurer; and, none of the cases cited by Petitioner address that issue.

In sum, the holding of the Fourth District Court of Appeal does not directly and expressly conflict with any of the cases cited by Petitioner. Thus, the cited cases fail to demonstrate the existence of conflict jurisdiction.

CONCLUSION

Based on the foregoing arguments and authorities, Respondents respectfully submit that this Court should deny Petitioner's application for review because of lack of jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished to SAMUEL R. NEEL, III, ESQUIRE, Post Office Drawer 10509, Tallahassee, Florida 32302 and JACK SCAROLA, Post Office Drawer 3626, West Palm Beach, Florida 33402, by mail this 13th day of March, 1989.

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