O a 10-4-89

IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S
COMPENSATION 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

PETITIONER'S BRIEF ON MERITS

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

Samuel R. Neel, III
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STATEMENT OF THE FACTS AND CASE

The Petitioner, the Florida Patient's Compensation Fund (hereinafter referred to as the "Fund"), and the Respondents were co-defendants in a medical malpractice action brought against a surgeon, his P.A., 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 Fund, which had the role of an excess insurance carrier for the pathologist, settled the entire case with the original plaintiffs by means of a promissory note, release and stipulation for dismissal with prejudice (Appendix, Exhibits "A", "B" and "C" respectively) and then filed suit against the Respondents for contribution.

This first lawsuit was dismissed by the trial court and upheld by the Fourth District, on the basis that the Fund, although it had given a promissory note for the settlement amount, had not paid off the promissory note at the time the first lawsuit was filed against the Respondents and therefore had failed to comply with the payment requirement of Section 768.31(4)(d)(2), Florida Statutes. That section requires the payment of a settlement with the original plaintiff within a year of the settlement with the original plaintiff. 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).

During the pendency of the first appeal to the Fourth District Court of Appeal, the Fund paid the settlement amount in cash and filed a second lawsuit against the Respondents setting forth claims for contribution, equitable subrogation and equitable assignment (Appendix, Exhibit "E"). The trial court again dismissed the Fund's lawsuit, this time based upon the doctrine of res judicata. This second dismissal was appealed to the Fourth District Court of Appeal which upheld the second dismissal in an Opinion dated December 14, 1988 (Appendix, Exhibit "D"). The Fund filed a timely Motion for Rehearing which was denied by the Fourth District on January 20, 1989. The Fund then filed a timely Notice to Invoke Discretionary Jurisdiction requesting that this Court review the decision of the Fourth District Court of Appeal because of conflict between that decision and decisions of other District Courts of Appeal and this Court accepted jurisdiction on May 15, 1989.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal in its Opinion below upheld the dismissal of this second lawsuit by the Florida Patient's Compensation Fund based upon the doctrine of res judicata. That Opinion relies on two basic premises:

1) That the cause of action in the second lawsuit is the same as the cause of action in the first lawsuit, and is the same as an action for indemnity; and

2) That the circumstances underlying the two lawsuits are the same.

Both of these premises are false, the doctrine of res judicata does not apply and the Fund should be entitled to pursue an action for equitable subrogation against the Respondents.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN UPHOLDING THE DISMISSAL OF THIS CAUSE BASED UPON THE DOCTINE OF RES JUDICATA.

The decision of the Fourth District Court of Appeal to uphold the dismissal of the Fund's suit based on the doctrine of res judicata is founded on two major fallacies:

1. That at the time of the second law suit, the circumstances were the same as at the time of the first law suit; and

2. That an action for equitable subrogation is the same as an action for indemnity.

On page 3 of its Opinion (Appendix, Exhibit "D", page 3), the Fourth District Court of Appeal continues its Opinion with the following statement:

> 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.

It is clear that at the time of the second lawsuit which is now before this Court, the circumstances were not the same as at the time of the first lawsuit because payment in cash had been made to the original plaintiffs, whereas at the time of the first lawsuit only a promissory note had been given to the original plaintiffs. In footnote 1. to its Opinion, the Fourth District acknowledged that the note was paid prior to the second lawsuit (Appendix, Exhibit "D", page 2), but then appeared to ignore this fact.

The trial court and the Fourth District ruled as they did in the first law suit because they said this circumstance had not occurred -- the payment of the settlement amount in cash -- and this was the foundation of their rulings.

It is incongruous for the Fourth District in the first lawsuit to rule against the Fund because it said payment in cash had not been made, but then uphold the dismissal of the second lawsuit on the basis that the circumstances were the same -- even though at the time of the second law suit actual payment in cash had been made. The Fourth District is thus saying in its Opinion that the payment in cash of the settlement amount is of no consequence, whereas the absence of this fact or circumstance was the basis for the dismissal of the first suit.

This payment in cash was necessary before the Fund could bring an action for equitable subrogation since the right to subrogation does not arise until the entire obligation is satisfied and paid in full. Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116 (Fla. 3d DCA 1988); Munson & Associates v. Doctors Mercy Hosp., 458 So.2d 789 (Fla. 5th DCA 1984).

Since the circumstances between the two lawsuits were not the same, res judicata would not apply.

> Moreover, res judicata extends only to the facts and conditions as they existed at the time the issues in the first action accrued. When other facts or conditions intervene before the second suit, furnishing a new basis for the claims of the respective parties, the issues are no longer the same and the former judgment cannot be asserted to bar the second action. [cite omited] Markel v. Dizney, 534 So.2d 1205, 1207 (Fla. 5th DCA 1988).

Therefore, this second lawsuit is not an attempt to secure relief on the same facts under a different legal theory as maintained by the Fourth District on page 5 of its Opinion. See Faircloth v. Garam, 525 So.2d 474 (Fla. 5th DCA 1988).

Following this first underlying fallacy in its Opinion, the Fourth District on page 3 of its Opinion, and continuing on through page 5 of its Opinion, postulates that since one of two joint tortfeasors cannot have contribution from the other except pursuant to the contribution statute which the Fund failed to satisfy, and that since a joint tortfeasor cannot have indemnity from another joint tortfeasor and that since in its final analysis subrogation is the same as indemnity, then the Fund can neither pursue indemnity nor subrogation.

There are two major things wrong with the Fourth District's analysis. The first is that the Fund is not barred from bringing an action for equitable subrogation

just because an action for contribution or indemnity, or both, is not possible. It is true that if the Fund was a joint tortfeasor with the Respondents, it could not bring an action for contribution under the contribution statute because this was decided in the first law suit, nor an action for indemnity because as an active tortfeasor it could not pursue indemnity.

However, there are many decisions of other District Courts of Appeal and of this Court which support the Fund's position that it can bring an action for equitable subrogation against the Respondents even if the remedy of contribution and the remedy of indemnity are not available to the Fund. Jones v. Williams Steel Industries, Inc., 460 So.2d 1004 (Fla. 5th DCA 1984), rev. denied, 467 So.2d 1000 (Fla. 1985) (remedy of equitable subrogation was available even though an action for contribution was barred under the Uniform Contribution Among Tortfeasor's Act); West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986)(an alleged tortfeasor could recover based on the theory of equitable subrogation even where statutory contribution would not lie); Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3d DCA 1989) (equitable subrogation is available to one defendant against other co-defendants even though contribution and indemnity

were not available); McKenzie Tank Lines, Inc. v. Empire Gas Corp., 538 So.2d 482 (Fla. 1st DCA, 1989) (equitable subrogation was applicable even though remedy of contribution failed); City of Lauderdale Lakes v. Underwriters at Lloyds, 373 So.2d 944 (Fla. 4th DCA 1979) and Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980)(an active tortfeasor could seek recovery for that portion of the plaintiff's injuries directly attributable to the negligence of another by way of subrogation even though the same tortfeasor could not bring an action for indemnity against the other party).

The other major problem with the analysis of the Fourth District is that it equates indemnity and subrogation (Appendix, Exhibit "D", page 4). These are distinctly different concepts, Cleary Brothers Construction Co. v. Upper Keys Marine Construction Co., Inc., supra, as are contribution and subrogation. West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., supra; Jones v. Williams Steel Industries, Inc., supra.

As a result of equating the two concepts, the Fourth District compounds its defective analysis of why the Fund cannot pursue subrogation when contribution and indemnity are not a possibility, i.e. if the concepts are the same and you cannot bring the latter, you also cannot bring the former.

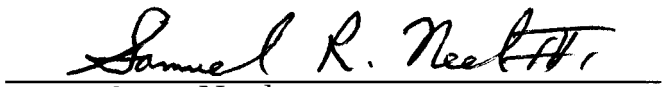
Since this action for equitable subrogation is not the same as the earlier suit for statutory contribution and is based on different facts, res judicata will not apply. Faircloth v. Garam, 525 So.2d at p. 476.

CONCLUSION

In conclusion, this action for equitable subrogation is not the same as the earlier action for contribution and is based on different facts. It is, therefore, not barred by the doctrine of res judicata and is actionable even if contribution and indemnity are not available.

The decision of the Fourth District below is in conflict with decisions of the First, Third and Fifth District Courts of Appeal and should be reversed with the Fund being permitted to pursue equitable subrogation against the Respondents.

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON MERITS has been furnished by U. S. Mail to Richard V. Neill, Jr., Esq., Post Office Box 1270, Fort Pierce, Florida 33454 and Jack Scarola, Esq., Post Office Drawer 3626, West Palm Beach, Florida 33402, this 9th day of June, 1989.



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