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

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

RESPONDENTS' BRIEF ON THE MERITS

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PREFACE

Respondents, ROBERT B. WARD, M.D. (hereinafter "DR. WARD"), GOLD, VANN, & WHITE, P.A. d/b/a 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

The decision below considers the remedy of the insurer of one joint tortfeasor against the other joint tortfeasor. This point is not specifically acknowledged by Petitioner but is clear from the first sentence of the Fourth District's opinion, and provides the basis for that opinion.

DR. WARD allegedly performed unnecessary surgery because of a faulty pathologists report issued by Respondent's insured. Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 535 So.2d 335, 336 (Fla. 4th DCA 1988). Thus, from Petitioners point of view, the best it can establish is that its insured and DR. WARD were joint tortfeasors.

SUMMARY OF ARGUMENT

The Fourth District below determined that subrogation afforded no relief to the insurer of one joint tortfeasor against the other joint tortfeasor in this particular case. Here, a contribution claim is barred: and, indemnity is simply unavailable to provide relief between joint tortfeasors. Thus, the insured has no right to which the insurer may be subrogated: and, none of the cases cited by Petitioner suggest that subrogation is available between joint tortfeasors or their insurers in this situation.

Further, this claim is barred by res judicata as it is based on the same facts and seeks the same relief, reimbursement, as a prior suit between the parties. Because Petitioner had discharged its obligation to its insured and satisfied the liability of its insured and Respondents to the injured parties, the subrogation claim could have and should have been brought at the time of the initial suit.

Finally, to the extent Petitioner seeks to be subrogated to the claims of the injured parties, its action would be barred by release and res judicata. The injured parties have completely released Respondents and dismissal of their suit with prejudice is res judicata to a suit brought by their subrogor.

ARGUMENT

Point I

THE FOURTH DISTR CT COURT OF APPEAL CORRECTLY HELD THAT, WHERE THERE IS NO RIGHT OF CONTRIBUTION, SUBROGATION AFFORDS NO RELIEF TO THE INSURER OF ONE JOINT TORTFEASOR AGAINST THE OTHER JOINT TORTFEASOR.

Petitioner claims that the Fourth District improperly affirmed dismissal of its subrogation claim, arguing that the District Court of Appeal incorrectly concluded that the claim was barred by res judicata.[1] A review of the opinion below, however, demonstrates that the Fourth District affirmed on other grounds.2

The point of law underlying the Fourth District's decision on Petitioner's subrogation claim is not that the doctrine of res judicata is applicable, but that, where there is no right of contribution, subrogation affords no relief to the insurer of one joint tortfeasor against the other joint tortfeasor. This holding is consistent with the general caselaw on subrogation and remedies between joint tortfeasors, it is supported by 768.31(4)(e), Fla. Stat., it

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[1] Because Petitioner does not claim error as to the rulings on its contribution and equitable assignment claims, Respondents will not address those issues.

[2] That is the reason the district court cited Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979) in its opinion. Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Company, 535 So.2d 335, 338 (Fla. 4th DCA 1988).

also has support in other jurisdictions, and it does not conflict with any of the cases cited by Petitioner.

Under common law, there was generally no relief betw en joint tortfeasors. Certainly, prior to enactment of 5768.31, Fla. Stat., there was no contribution among joint tortfeasors. Otherwise, the legislature would have had no need to enact the statute. Further, there was no right to indemnity between "active" joint tortfeasors. See, Winn Dixie Stores, Inc. v. Fellows, 153 So.2d 45 (Fla. 1st DCA 1963).

In this case, the statutory contribution right is of no avail because Petitioner failed to comply with the payment provision in §768.31(4)(d)(2), 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). Lacking a claim for contribution or indemnity, Petitioner seeks relief by way of subrogation.

Subrogation is a theory which puts the subrogee in the shoes of the subrogor. As a consequence, the subrogee has no greater rights than its subrogor. See, Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116 (Fla. 3rd DCA 1988). Here the subrogor has no right to contribution or indemnity, so there is nothing to which the Petitioner may be subrogated. On this basis, the

Fourth District affirmed dismissal of the claim.

This analysis is consistent with §768.31(2)(e), Fla. Stat., which provides that a liability insurer, upon discharge of the liability of its insured, is subrogated to the insured's right of contribution. If an insurer was already entitled to such relief (at common law) by way of subrogation, there would have been no need for the legislature to enact this provision.

The holding of the Fourth District Court of Appeal is also consistent with "black letter" law as set forth in treatises. As has been noted:

> An insurer paying a judgment against the insured and another joint tortfeasor is not entitled to be subrogated to the rights of the insured against the other joint tortfeasor when there is no right of contribution between the tortfeasors.
>
> Where the right to contribution is not recognized as between joint tortfeasors, it necessarily follows that the surety of one joint tortfeasor does not acquire by subrogation any right to obtain contribution from the other tortfeasor.

Couch on Insurance 2d (Rev. ed.) §61:138.

This proposition is supported by Royal Indemnity Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194 (Ohio 1930), holding that, where a joint tortfeasor has no right of contribution, an insurer, having no greater right than the insured by way of subrogation, is afforded no relief by subrogation. A similar holding was enunciated in Employer's Mutual Liabil-

ity Insurance Company of Wisconsin v. Advance Transformer Company, 15 Ariz. App. 1, 485 P.2d 591 (Ariz. Ct. App. 1971), addressing a situation in which an insurer, standing in the shoes of the insured who had no right to indemnity or contribution, was held to be barred from recovering from a party which was allegedly a joint tortfeasor. See also, Adams v. White Bus Line, 195 P. 389 (Cal. 1921).

Petitioner argues that numerous cases support the position that it can bring an action for subrogation even if contribution and indemnity are not available. None of the cases actually stand for that proposition, however, as none of them deal with joint tortfeasors.

West American Insurance Company v. Yellow Cab Company of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986), Kala Investments, Inc. v. Sklar, 538 So.2d 909 (Fla. 3rd DCA 1989), and McKenzie Tank Lines, Inc. v. Empire Gas, 538 So.2d 482 (Fla. 1st DCA 1989), do all suggest that subrogation may be available where contribution is unavailable; however, they do not consider remedies between joint tortfeasors, which is what is considered in the decision of the Fourth District Court of Appeal below. In those cases, subrogation was or might be available because the parties were not joint tortfeasors or their insurers--it is the lack of common liability which permits or may permit subrogation in those cases.

While Jones v. Williams Steel Industries, Inc. 460 So.2d 1004 (Fla. 5th DCA 1984), does deal with joint judgment debtors, that joint judgment was really not determinative because the parties' liability was based on separate contracts and noted to be "diverse and several, not joint." Id. at 1007, footnote 6.

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) are similarly distinguishable. Rather than dealing with joint tortfeasors, those cases involve successive tortfeasors, who caused injury by successive and distinct tortious actions.

In sum, the cases cited by Petitioner fail to support the proposition that subrogation is even an available remedy: and, the Fourth District's opinion is supported by the decisional law in Florida on subrogation and remedies between joint tortfeasors, the enactment of §768.31(2)(e), Fla. Stat., and decisional law in other states.

Point II

PETITIONER'S SUBROGATION CLAIM IS BARRED BY RES JUDICATA.

In the initial action between these parties, Petitioner sought contribution from Respondents: and, here, Petitioner asserts entitlement to relief by way of subrogation. In both cases, the factual basis for the claims has been the

alleged negligence of DR. WARD; and, both proceedings have sought reimbursement in relation to the settlement. Thus, the cases involve the same cause of action and seek the same thing.

Petitioner may label its claim as one for subrogation but it merely seeks contribution under a different name. The change in legal theories does not avoid the application of the doctrine of res judicata. Quality Type and Graphics v. Guetzloe, 513 So.2d 1110 (Fla. 5th DCA 1987).

Petitioner urges that payment of the settlement in cash was a prerequisite to maintaining a subrogation action and that the actual payment constituted a change in the factual basis of its claim. Neither Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116 (Fla. 3rd DCA 1988) nor Munson and Associates, Inc. v. Doctors Mercy Hospital, 458 So.2d 789 (Fla. 5th DCA 1984), cited by Petitioner, holds that actual payment in cash is a prerequisite to a subrogation action. In fact, both cases discuss satisfaction or discharge of the obligation or liability. Both of Petitioner's cases against Respondents have alleged payment in the form of a promissory note. That payment discharged the obligation of its insured and Respondents to the injured parties, and discharged Petitioner's obligation to its insured as well.

Florida courts encourage bringing all claims, including subrogation claims, in a single action: and, it has been held that a subrogation claim may be brought, even where not ripe, if the court otherwise has jurisdiction. Ulery v. Asphalt Paving, Inc. 119 So.2d 432 (Fla. 1st DCA 1960). Here, Petitioner never tried to assert a subrogation claim in the prior action, despite repeated opportunities to amend: and, the trial court dismissed the first case with prejudice only after Petitioner declined to amend further.

At the time it first sued Respondents, Petitioner had made payment in the form of a promissory note and obtained the complete release of its insured and Respondents. It had thereby discharged its obligation to the insured and satisfied Respondents' liability to the injured parties. A subrogation claim could have been then alleged, so such a claim is now barred because "the doctrine of res judicata precludes litigation of issues tried in a prior suit and those issues which could have been there litigated." Signo v. Florida Farm Bureau Casualty Insurance Company, 454 So.2d 3, 6 (Fla. 4th DCA 1984).

Point III

TO THE EXTENT PETITIONER CLAIMS TO BE SUBROGATED TO THE RIGHTS OF THE INJURED PARTIES, ITS CLAIM IS BARRED BY RELEASE AND RES JUDICATA.

A review of the Complaint in the instant action demonstrates that, in addition to claiming rights through its in-

sured, Petitioner claims to be subrogated to the rights of the Roberts (the medical malpractice plaintiffs with whom the settlement was made) against Respondents. Even if such a claim could be maintained, Petitioner would still be subject to any impediments to the claims of the subrogors.

The release obtained at the conclusion of the original medical malpractice action clearly extinguishes any and all claims which the Roberts may have had against Respondents. The reservation of a potential contribution action in that release does not affect the Roberts' rights vis-a-vis Respondents.

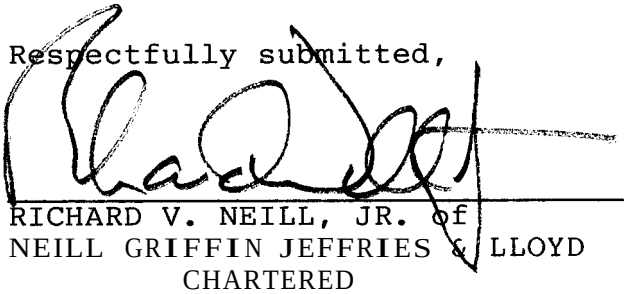
Furthermore, it should be noted that the original medical malpractice action was dismissed, by stipulation, with prejudice. Such a dismissal extinguishes any and all claims which the Roberts could have brought against either Petitioner or Respondents. That Order was a determination on the merits and is res judicata to any claim which Petitioner might assert as a subrogee of the Roberts. See, Jones v. Bradley, 366 So.2d 1266 (Fla. 4th DCA 1979).

Thus, Petitioner gains no more by possibly being subrogated to the injured parties than it does by being subrogated to its insured.

CONCLUSION

Based on the foregoing arguments and authorities, Respondents respectfully submit that the theory of subrogation affords no relief to Petitioner and such a claim is barred anyway, so this Court should refuse to reverse the decision below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits 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 29th day of June, 1989.

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