O/a 0-4-89

IN THE SUPREME COURT OF FLORIDA

FLORIDA PATIENT'S
COMPENSATION FUND,

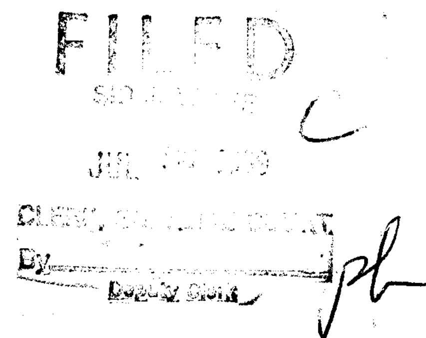
Petitioner,

CASE NO. 73,761

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.



PETITIONER'S REPLY BRIEF ON THE MERITS

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, the Florida Patient's Compensation Fund (hereinafter referred to as the "Fund"), relies on its Statement of the Facts and Case in its Brief On The Merits except that the Petitioner, as part of this Statement, would direct the Court's attention to the original Amended Complaint filed by the initial plaintiffs, the Roberts, (Appendix, Exhibit "B", pages 7 - 14) against the Fund and the Fund member pathologist, Dr. Cox, and against Dr. Ward, his P.A. and St. Paul Fire and Marine Insurance Company (herinafter referred to as "Respondents"), especially pages 10-11 of Appendix, Exhibit "B", wherein the allegations of negligence by the Roberts against Dr. Ward are listed.

SUMMARY OF ARGUMENT

The Fourth District affirmed the dismissal of this law suit based on res judicata, not just because it found that there can be no subrogation between the insurer of one joint tortfeasor and another joint tortfeasor, as maintained by the Respondents. Even if you accept this proposition, the Fund should not be precluded from pursuing its claim for equitable subrogation because it should be given the opportunity to show that its Fund member was not a joint tortfeasor with the Respondent surgeon. Also, there is case authority to support an action for equitable subrogation even if the Respondents could show some active fault on the part of the pathologist who was a member of the Fund.

The doctrine of res judicata does not apply to the circumstances of this case and does not preclude the Fund, as a subrogee of the original plaintiffs, from seeking equitable subrogation from the Respondents. Until the settlement with the Roberts was paid in cash by the Fund, an action for equitable subrogation did not arise. Therefore, at the time of the second law suit the factual basis was different than at the time of the first law suit, and what is being sought in the second law suit, equitable subrogation, is different from an action for statutory contribution pursuant to Section 768.31, Florida Statutes.

Several other District Courts of Appeal have rendered Opinions which conflict with the Fourth District's Opinion below and would permit this action for equitable subrogation under the circumstances of this case.

ARGUMENT

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

Respondents' main argument is that the basis of the Fourth District's Opinion is not res judicata but instead is that if there is no contribution between joint tortfeasors, there can be no subrogation by the insurer of one joint tortfeasor against another joint tortfeasor (Respondents' Brief, page 3). This argument is part of the Fourth District's Opinion, but it is an over simplification and inaccurate summary of the albeit erroneous reasoning of the Fourth District.

In making this argument, the Respondents seemed to ignore the portion of the Fourth District's Opinion which, after a discussion of the elements of res judicata, states:

> 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.

The Fourth District in its Opinion never said that it was not deciding the case on the basis of res judicata. What it said was that its analysis was largely not present in the briefs or in the record, and then said that if it was reversing instead of affirming the trial court, it might be criticized for applying a theory not addressed (Appendix, Exhibit "A", page 5).

If the Fourth District is not basing its Opinion on res judicata, just what theory it is proceeding under is unclear or not expressed. It may be that the Fourth District's Opinion is a stream of consciousness type of thought process arriving at the conclusion that this law suit cannot be brought by the Fund.

If the point of law underlying the Fourth District's Opinion, as suggested by the Respondents, is that the insurer of one tortfeasor cannot sue another tortfeasor for contribution, the Fourth District and the Respondents are assuming that the Fund Member, the pathologist, can be nothing other than a joint tortfeasor with the Respondents. They make this assumption without the Fund ever being entitled to put on any evidence, since both the first law suit and this law suit have been dismissed at the pleading level.

This assumption is invalid because the evidence may show that Dr. Ward, the surgeon, was solely at fault for any damages suffered by the Roberts. This is also contrary to the results in cases such as West American Insurance Co. v. Yellow Cab Co. of Orlando, Inc., 495 So.2d 204 (Fla. 5th DCA 1986), Kala Investments, Inc. v. Sklar, 538 So.2d 907 (Fla. 3d DCA 1989) and McKenzie Tank Lines, Inc. v. Empire Gas Corp., 538 So.2d 482 (Fla. 1st DCA 1989).

In fact, in the West American case, the original law suit was brought for contribution but on appeal the Appellate Court said subrogation, not contribtion, was the available remedy where the contribution plaintiff was found not to have any fault for the auto accident even though that remedy was not pleaded at the trial court level.

The Respondents also dwell at length on their argument that since a subrogee generally has no greater rights than its subrogor, and that since one joint tortfeasor would generally not have a right of contribution from another joint tortfeasor except pursuant to Section 768.31, Florida Statutes, then the Petitioner, as subrogee of its Fund Member pathologist, the subrogor, cannot seek contribution from the Respondents since the Fund Member could not seek contribution from the Respondents. However, this argument confuses the issue and ignores the fact that the subrogor in this case is the original plaintiff or plaintiffs and not the Fund Member. See Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So.2d 702 (Fla. 1980), at page 704 and Kala Investments, Inc. v. Sklar, 538 So.2d 907 (Fla. 3d DCA 1989), at page 917.

This is one of the main differences between this second law suit and the earlier one for statutory contribution, and this is why the Respondents' argument starting at the bottom of page 4 of their Brief and continuing on through the top of page 6 of their Brief is irrelevant to the issues involved in this Appeal.

The Respondents in point II of their Brief, want to put the Petitioner in a Catch-22 situation where the Petitioner loses the first law suit because payment in cash had not been made and then loses the second law suit because payment in cash had been made. This is just the type of situation to which subrogation, an equitable principle, should apply to prevent unjust enrichment to the Respondents. Contrary to Respondents' assertion on page 8 of their Brief that the case of Munson & Associates v. Doctors Mercy Hosp., 458 So.2d 789 (Fla. 5th DCA 1984) would not require payment of the settlement amount in cash before an action for subrogation would arise, that Opinion does require that the entire obligation be discharged or that the claim or the creditor be paid in full before a claim for subrogation would exist. Under the facts of the case sub judice, the entire obligation was not completely discharged or completely paid in full until the settlement amount was paid in cash because as long as the promissory note was outstanding, there was a chance that the entire obligation or claim would not be paid in full and completely discharged.

Also, the case of Cleary Brothers Construction Co. v. Upper Keys Marine Construction, Inc., 526 So.2d 116 (Fla. 3d DCA 1988) relied on that Fifth District Opinion, as well as other decisions, in finding that the right to subrogation does not arise until the entire obligation is satisfied. 526 So.2d at page 117.

The Respondents next want to claim that since at the time of the settlement with the Roberts, a release was obtained for the Respondents as well as for the Fund, then the Fund is barred from seeking subrogation from the Respondents. The Respondents really do not cite any case for this proposition because they have none to cite. They ignore cases such as McKenzie Tank Lines, Inc. v. Empire Gas Corp., supra, in which one defendant paid off the multiple plaintiffs in exchange for a release of liability for all defendants prior to bringing an action for subrogation, and the defendant who paid off the plaintiffs was found entitled to pursue subrogation even if contribution was not available; and such as Munson & Associates v. Doctors Mercy Hosp., supra, in which the equitable subrogation plaintiff was found not entitled to pursue subrogation because the subrogation plaintiff failed to extinguish the original plaintiffs' right to sue the remaining defendants when the subrogation plaintiff settled with and obtained a release from the original plaintiffs.

Finally, the Fund is not conceding that if the Fund Member pathologist was found partially at fault by a jury, the Fund would be precluded from recovering anything from the Respondents under the doctrine of equitable subrogation. This

is because:

> It [subrogation] is a legal device 'founded on the proposition of doing justice without regard to form, and was designed to afford relief where one is required to pay a legal obligation which ought to have been met, either wholly or partially, by another [cites omitted].'

Underwriters at Lloyds v. City of Lauderdale Lakes, supra, at page 704. Also, the Respondents cannot distinguish away that Opinion of this Court on the basis that that case involved successive tortfeasors as opposed to joint tortfeasors (Respondents' Brief, page 7). Not only did the Roberts, the original plaintiffs, make numerous allegations which would support a finding of liability on the part of the Respondents without a finding of liability on the part of the pathologist Fund Member, but also, conceptually, the allegations against the Respondents and against the pathologist Fund Member can be viewed as being in the nature of allegations of successive negligence since the alleged negligence of each occurred at a separate point in time, i.e., the Respondents allegedly did something wrong before or after the pathologist Fund Member allegedly did something wrong.

Finally, the case of Jones v. Williams Steel Industries, Inc., 460 So.2d 1004 (Fla. 5th DCA 1984), rev. denied, 467 So.2d 1000 (Fla. 1985), a case acknowledged by the Fourth District below as possibly being in conflict with its Opinion, is not distinguishable as claimed by the Respondents

(Respondents' Brief, page 7) because it did involve two judgment debtors who were jointly liable to a plaintiff no matter what their status might have been prior to the entry of the judgment against both of them. There the Fifth District held that an equitable subrogation action could be brought even though an earlier action between the same parties was dismissed due to the failure of the subrogation plaintiff to meet the requirements of Section 768.31, Florida Statutes.

Finally, the case of Ulery v. Asphalt Paving, Inc., 119 So.2d 432 (Fla. 1st DCA 1960) does not support Respondents' claim that the action for equitable subrogation could have been brought in the first law suit when such action was not ripe for adjudication at that time. All that case said was that where a court of equity has jurisdiction of the subject matter and of the parties on separate grounds, it may grant supplementary relief by way of subrogation without compelling the plaintff to resort to a separate proceding. 119 So.2d at page 437. It did not say that where a court was going to dismiss a law suit for statutory contribution because it felt a certain requirement of Section 768.31, Florida Statutes, had not been met, the court could at the same time entertain a subrogation action which was not ripe for adjudication; and there is little doubt that the trial judge here would have dismissed any count for equitable subrogation if it had been joined in the first law suit for statutory contribution,

especially where the reason for the dismissal of the equitable subrogation count would be the same reason used by the trial judge to dismiss the statutory contribution claim -- failure to have paid off the settlement in cash when the first law suit was filed.

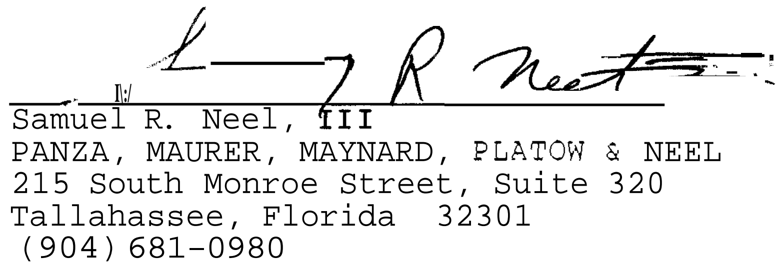
CONCLUSION

In conclusion, the Fund was precluded from bringing a statutory contribution action against the Respondents by a technical application of the provisions of Section 768.31, Florida Statutes. This was done even though the Fund did everything it could to pay off the settlement with the original Plaintiffs as soon as possible.

The Fund has now been barred by the Opinion of the Fourth District below from bringing an action for equitable subrogation against the Respondents. In ruling that the Fund cannot bring this action for equitable subrogation, the Fourth District is in conflict with several other District Courts of Appeal which would permit this action for equitable subrogation even though the statutory contribution action would not be available.

The Fund should be permitted to pursue this form of relief where it has been required to pay a legal obligation which it maintains ought to have been paid, either wholly or partially, by the Respondents, and the Opinion of the Fourth District below should be reversed and the Fund be permitted to pursue this claim against the Respondents.

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE 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 19th day of July, 1989.



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