

IN THE SUPREME COURT OF THE  
STATE OF FLORIDA

AARON SCHNEIDER, M.D. and  
A. SCHNEIDER, M.D., P.A.

Petitioner,

vs.

Case No. 71,969

SUNCOAST HOMES, INC., et al

Respondents.

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**FILED**

SID J. WHITE

APR 12 1988

CLERK, SUPREME COURT

By

RESPONDENTS' BRIEF Deputy Clerk

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STATEMENT OF THE CASE AND FACTS

The Respondents accept the Petitioner's Statement of the Facts with the following addition:

(1) The decision by the Second District Court of Appeal was a per curiam reversal based upon the authority of American Mutual Insurance Company v. Decker, No. 86-851 (Fla. 2nd DCA December 4, 1987) [12 FLW 2773].

## SUMMARY OF ARGUMENT

The Second District Court of Appeal correctly held that a self-insured employer or carrier, possessing a statutory subrogation right under Fla. Stat. Section 440.39, may file a lien and recover directly from the tort judgment the workers' compensation benefits paid or payable to the employee resulting from the medical negligence. Such a procedure is "expressly provided by law" and is anticipated by the collateral source statute, Fla. Stat. Section 768.50(4) and that Sections 440.39 and 768.50(4) are functionally "integrated".

To accept the Third DCA's interpretation of Florida Statute 768.50(4) as barring all subrogation rights for collateral sources precludes the workers' compensation carrier from seeking redress for its injuries and unconstitutionally discriminates against non-medical malpractice insurance companies by, in effect, forcing such carriers to subsidize medical malpractice carriers in the underwriting of their liability risks. Such a statutory distinction between different types of insurance carriers represents an inequitable and arbitrary classification which unconstitutionally discriminates against non-medical malpractice insurance carriers.

ISSUE

The Respondent would rephrase the issue as follows:

WHETHER A WORKERS' COMPENSATION CARRIER'S STATUTORY SUBROGATION RIGHTS UNDER FLORIDA STATUTE 440.39 CONSTITUTE A RIGHT OF SUBROGATION "EXPRESSLY PROVIDED BY LAW" UNDER FLORIDA STATUTE 768.50(4) SO AS TO ALLOW A WORKERS' COMPENSATION LIEN IN A MEDICAL MALPRACTICE SUIT WHERE WORKERS' COMPENSATION BENEFITS WERE PAID AS A RESULT OF THE MEDICAL MALPRACTICE.

ARGUMENT - I

FLORIDA STATUTE 440.39 GRANTS EXPRESS SUBROGATION RIGHTS TO SELF-INSURED RIGHTS TO SELF-INSURED EMPLOYERS AND WORKERS' COMPENSATION INSURANCE CARRIERS AND SHOULD BE READ IN PARI MATERIA WITH FLORIDA STATUTE 768.50.

The Second District Court of Appeal has reversed the Trial Court's striking of a workers' compensation lien in a subsequent medical malpractice lawsuit where the physician was treating the injury which was the subject of the workers' compensation claim. The Court's per curiam decision is based upon American Mutual Consolidated Company v. Decker, 12 FLW 2773 (Fla. 2nd DCA, December 18, 1987). The Second District Court of Appeal in Decker, held:

Our analysis has led us to the conclusion that self-insured employer or carrier, possession a statutory subrogation right under Section 440.39, may file a lien and recover directly from the tort judgment the workers' compensation benefits paid or payable to the employee resulting from the medical negligence. Such a procedure is "expressly provided by law" and is anticipated by the collateral source statute, Section 768.50(4).

In so holding the Second District court of Appeal certified that their decision was in direct conflict with the Third District Court of Appeal's decision in American Motorists Insurance Co. v. Coll, 479 So.2d 156 (Fla. 3rd DCA 1985). The Court agreed with the Third District Court of Appeal that workers' compensation benefits are a "collateral source" within the meaning of Section 768.50(2)(a)(2), Florida Statute (1983). The Second District Court of Appeal in its opinion points out where the Third District Court of Appeal in Coll omits to give any significance to 768.50(4) prefatory words. The Second District Court of Appeal finds that phrase "unless otherwise provided by law" is critical and controls

the outcome of this issue. The Court points out that for more than forty years Florida has permitted an employee injured in the course of his employment to pursue an independent action against a third party tortfeasor. Within that backdrop, the Workers' Compensation law, specifically Section 440.39, Fla. Stat., expressly encompasses a subrogation right in the provider of workers' compensation benefits.

The Second District Court of Appeal calls this statutory scheme comprehensive and "designed to accomplish an equitable allocation of financial responsibility between and among the plaintiff and defendant in a medical malpractice action and a collateral source".

The Second District Court of Appeal's decision in Decker, discusses the patent unfairness of the consequences should they not be construed together, stating "nothing offered us in either the appellee's briefs or oral arguments detract from our determination that Sections 440.39 and 768.50(4) are "functionally integrated". (Emphasis added).

The statutory interpretation in the functional integration of Section 768.50 and Section 440.39 advanced by the Second District Court of Appeal finds persuasive support, not only in the plain language of the statutes but also the subsequent enactments of the Florida legislature relative to Section 768.50 and Section 440.39. Specifically, sub-section (4) of Section 768.50 has been completely reworded since the Coll decision was rendered. See 768.76, Fla. Stat. (supp. 1986). The Tort Reform and Insurance Act of 1986, 86-

106, repeals Section 768.50 of the Florida Statutes altogether, and has moved the substance of Section 768.50 to a new statutory section, that being Section 768.76. Section 768.50 had previously been located under Part II of Chapter 768, entitled "Medical Malpractice and Related Matters" and the collateral source provisions set forth in Section 768.50 only applied to actions brought against health care providers. Chapter 86-160, however, repealed Section 768.50, renumbered the body of the statute as Section 768.76 and moved the statute out of the medical malpractice section of the Florida Statutes and into the newly created Part III of Chapter 768 which applies to any action for damages, whether in tort or in contract, and against all types of tortfeasors, not just health care providers. Section 768.76(1), like former Section 768.50(1), provides in pertinent part, that "there shall be no reduction for collateral sources for which a right of subrogation exists". Section 768.50(4), the new sub-section 4 to Section 768.76 provides as follows:

A provider of collateral sources that has a right of subrogation shall have a right of reimbursement from a claimant to whom it has provided collateral sources if such a claimant has recovered all or part of such collateral sources from a tortfeasor. Such provider's right of reimbursement shall be limited to its pro rata share for collateral sources provided, minus its pro rata share of costs and attorneys fees incurred by the claimant in recovering such collateral sources from the tortfeasor. In determining the provider's pro rata share of those costs and attorneys fees, the provider shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorneys fees. 768.76(4), Fla. Stat. (supp. 1986) (Emphasis added).

By rewording the language of sub-section (4), the legislature

is essentially clarifying the section to clearly indicate that no subrogation rights already in existence are being eliminated by the statute. In this way, there can be no mistake that insurers who have an existing right of subrogation by law continue to have such a right of subrogation, and no collateral source benefits provided by such insurers are to be deducted from the claimant's award. This subsequent legislative enactment should provide the Court with ample evidence of the legislature's original intent regarding Section 768.50.

As noted by this Court in Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), when a statute is amended soon after a controversy as to the original statute arises, the Court may consider the amendment, not necessarily as a substantive change but as a legislative interpretation of the original statute. See also Parker v. State, 406 So.2d 1089 (Fla. 1981). (In determining correct meaning of a prior statute, the Court has a duty to consider subsequent legislation); Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973) (change in statutory language may simply represent clarification to safeguard against misapprehension as to existing law). In fact, a subsequent change in the statutory language used by the legislature can actually show the legislative disapproval of a prior judicial construction of the statute. Moreover, the fact that Section 440.39 has been in force since 1935 through numerous amendments up to and including the present date, clearly evidences that the subrogation rights provided by Section 440.39 have continuing









































