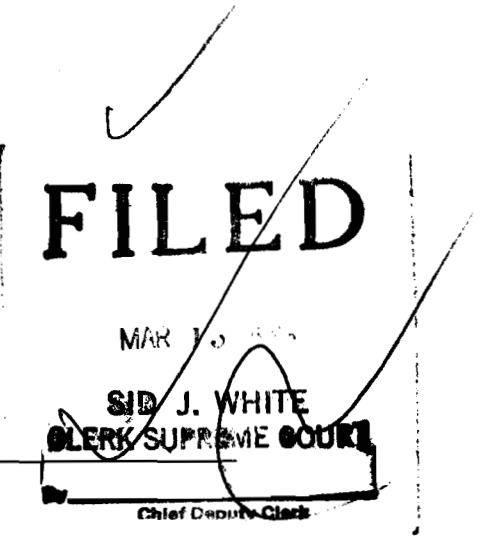
IN THE

SUPREME COURT OF FLORIDA



CASE NO. 63,171

ON REVIEW OF CERTIFIED QUESTIONS OF GREAT PUBLIC IMPORTANCE FROM THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

DORMAN KIMBRELL, JR., et ux,

Appellants, Plaintiffs,

vs.

PHILLIP PAIGE, EUGENE BERRIAN and ALLSTATE INSURANCE COMPANY,

Appellees, Defendants.

BRIEF FOR APPELLEES PAIGE AND BERRIAN

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REQUEST FOR ORAL ARGUMENT

The undersigned counsel of record requests oral argument on all issues of law. This case primarily involves whether the lower courts were correct in finding that only one lawsuit is proper under Florida Statute §440.39. Oral argument on this case would aid the court in focusing upon the complex issues of law being considered.

Respectfully submitted,

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CITATIONS

OTHER AUTHORITY

QUESTION PRESENTED

Does Section 440.39(4), Florida Statutes (1981), bar a separate suit against a third party tort-feasor by an injured employee when such suit is filed more than one year after the cause of action accrued and the compensation carrier, in the second year following the accident, gave the thirty day notice of its intention to seek subrogation and filed an appropriate suit against the third party tort-feasor?

STATEMENT OF THE CASE

i) Course of Proceedings and Disposition of the Case Below.

This case arises in the Circuit Court of Martin County, for the State of Florida wherein the Court entered an order dismissing the Appellant's Complaint with prejudice. (R 204-206). The trial Court found that only one lawsuit was proper under Florida Statute §440.39. The lawsuit was barred by a final judgment which was entered in a prior case brought by Great American Insurance Co., the Appellant's employer's workmen's compensation insurer. (R 235-236). The Court further found that proper notice was given to the Appellant KIMBRELL from Great American, but that he failed to take the necessary steps to prosecute his claim at that time (R 204-206). The decision was affirmed by the Fourth District Court of Appeal of the State of Florida. However, their decision was certified to this Honorable Court as a question of great public importance.

ii) Statement of the Facts

An automobile accident occurred on October 13, 1975, between the Appellant, who was within the course and scope of his employment, and the Appellee, EUGENE BERRIAN, who was operating a motor vehicle owned by the Appellee, PHILLIP PAIGE. Since the Appellant sustained injuries in an "on-the-job" accident, he applied for and was paid compensation disability benefits and medical benefits by his employer's compensation insurer, Great American Insurance Company (R 234-236).

On December 8, 1976, Great American gave the Appellants' attorney notice of their intent to file suit against the alleged tort-feasor in accordance with Florida Statute §440.39. (R 195).

A lawsuit was filed in the Nineteenth Judicial Circuit in Martin County, case number 77-816 CA (R 209-211). The following was the style of the case:

> Great American Insurance Company, a foreign corporation, authorized to do business in the State of Florida, individually, and for the use and benefit of Dorman Kimbrell, Jr.,
>
> Plaintiffs,
>
> vs.
>
> Phillip Paige and Eugene Berrian,
>
> Defendants.
>
> (emphasis added)

The Appellees, PAIGE and BERRIAN, did not notify an attorney about this lawsuit, and a default judgment was entered against them. Subsequent to this default judgment, a hearing on the issue of damages was held, resulting in an amended final judgment being entered on November 21, 1980. (R 219-22).

In November of 1978, the Appellant KIMBRELL individually filed another suit against Appellees PAIGE and BERRIAN, and named ALLSTATE INSURANCE COMPANY, who allegedly insured MR.PAIGE and MR. BERRIAN on the day of the accident. A coverage dispute arose between ALLSTATE, PAIGE and BERRIAN, which resulted in separate counsel being retained.

The undersigned attorney, representing Appellees, PHILLIP PAIGE and EUGENE BERRIAN, entered his appearance in the second lawsuit on June 16, 1980. The Appellees, PAIGE and BERRIAN, did not advise their attorney of the default judgment until after it was entered. Therefore, counsel was actively defending the case filed by Appellant KIMBRELL not knowing that Great American had already sued Appellees PAIGE and BERRIAN, and received a judgment against them. After the amended default judgment was entered, counsel became aware of the first lawsuit. As a result of this confusion, a Motion to Dismiss was filed in Appellant KIMBRELL's case (R 191) because Appellees, PAIGE and BERRIAN, should not have had a judgment rendered against them in the name of MR. KIMBRELL in one case, and have a second case from the same accident pending in the same judicial circuit--before the same judge, the Honorable Judge L.B. Vocelle.

The motion was heard before Judge Vocelle at a hearing on March 12, 1981. Having both cases before him, Judge Vocelle found that the judgment against PAIGE and BERRIAN in case 77-816 CA was valid, therefore the court had no recourse but to dismiss the complaint filed by Appellant KIMBRELL with prejudice, since the second lawsuit arose out of the same accident, and claimed the same injuries. An order was signed wherein Judge Vocelle, being fully advised of the premises, found that only one lawsuit was proper under F.S.§440.39, and that the final judgment entered in case 77-816 CA operated as a bar to the pending litigation, thus

the Complaint was dismissed with prejudice. An appeal followed which affirmed the trial court's decision.

I. THE DISTRICT COURT PROPERLY AFFIRMED THE RULING OF THE TRIAL COURT IN DISMISSAL OF THE APPELLANT'S COMPLAINT WITH PREJUDICE SINCE ONLY ONE LAWSUIT IS AVAILABLE UNDER FLORIDA STATUTE §440.39.

The dismissal of the Complaint with prejudice below was both necessary and proper under Florida case law, and the Worker's Compensation Statute, Florida Statute §440.39 "Compensation for Injuries Where Third Persons Are Liable."

When an employee is injured while in the course of his employment, as a result of the wrongful act of a "third party", and he later accepts compensation benefits, the compensation carrier becomes subrogated to the rights of the employee against the tort-feasor to the amount of benefits paid. Florida Statute §440.39(2).

This statute gives the carrier the right to institute an action against the third-party tort-feasor if the employee does not institute an action during the first year after the accrual of the cause of action. Jersey Insurance Company of New York v. Cuttriss, 220 So.2d 15 (Fla. 3DCA 1969). In the second year, the rights of the carrier and employee are concurrent, but once the carrier has filed suit, and given notice to the employee, the employee is required to cooperate with the effort, since the suit is for the employee's ultimate use and benefit, as long as there was no previous suit filed by the employee. Aetna Casualty and Surety Co. v. Bortz, 271 So.2d 108 (Fla. 3 DCA 1969).

In Zurich Insurance Company v. Renton, 189 So.2d 492 (Fla. 2 DCA 1966), the Court stated:

> [i]t is our view that by the only proper construction of §440.39, the right of action is concurrent during the second year after the accrual of the cause of action. To hold otherwise would be to take from the injured employee or his dependents that very right of action, the encouragement toward diligent exercise of which we have previously held was the legislative intent. Id. at 495.

See also Cuttriss (holding that the right to proceed against the tort-feasor is limited to the one who files the cause of action first.)

Florida Statute §440.39 specifically governs in this case, and provides in pertinent part:

> (4)(a) If the injured employee... fail[s] to bring suit against such third-party tortfeasor within 1 year after the cause of action shall have accrued,... the insurance carrier, may, after giving 30 days' notice to the injured employee or his dependents and the injured employee's attorney,... institute a suit against such third-party tortfeasor... and... shall be subrogated to and entitled to retain from any judgment recovered against, or settlement made with, such third party, the following: All amounts paid as compensation and medical benefits under the provisions of this law and the present value of all future compensation benefits payable, to be reduced to its present value, and to be retained as a trust fund from which future payments of compensation are to be made, together with all court costs, including attorney's fees expended in the prosecution of such suit, to be prorated as provided by subsection (3). The remainder of the moneys derived from such judgment or settlement shall be paid to the employee or his dependents, as the case may be.

The statutory language contemplates only one lawsuit during the second year after the accident. In Maryland Casualty Company v.

Simmons, 193 So.2d 446 (1966) the Second District Court of Appeal was called upon to interpret Florida Statute §440.39 specifically in regard to the nature and extent of the compensation carrier's lien upon settlement. The Court stated "We believe... that §440.39 contemplates the filing of one suit only against the third party tort-feasor." Id. at 449. That same year, the same Court discussed the legislative intent in allowing the compensation carrier to file an action during the second year after the accident. Zurich Insurance Company v. Renton, 189 So.2d 492 (1966). The Court stated that "it is to be presumed that this was intended by the legislature as a matter of policy, thus to hasten the disposition of third party litigation." Id. at 494. Thus, it is clear that an injured employee should be prevented from filing a second lawsuit at a later date.

Appellees PAIGE and BERRIAN respectfully submit that the above statutory and case law clearly establish that only one cause of action exists against the alleged tort-feasor. Further, the judgment entered in the first lawsuit in 1980 (R-222) operates as a bar to the present action which was properly dismissed with prejudice in the lower court.

A. Since Appellant's attorney was acting within the scope of his authority, service of process on him was valid and effective notice, and knowledge of its contents was imputed to the Appellant.

Appellants contention that papers showing Great American Insurance Company's intent to file suit against the alleged tort-

feasors in accordance with F.S. §440.39 had no effect because they were served on his attorney rather than on himself is without merit. Under these circumstances, it was perfectly proper for those papers to have been served upon Appellants counsel, especially because the action was not terminated, nor had Appellants counsel terminated his representation; but rather the attorney was actively engaged in this cause on behalf of the Appellant. Nicholson v. Nicholson, 311 So.2d 676 (Fla. 4DCA 1975). Reizen v. Florida National Bank at Gainesville, 237 So.2d 30 (Fla. 1DCA 1970).

Papers may be served on a party's attorney where the cause is pending or not yet concluded. Bussey v. Legislative Auditing Committee of the Legislature, 298 So.2d 219 (Fla 1DCA 1974). Furthermore, notice to an attorney acting within the scope of his authority is imputed to his client. This is especially so since an attorney is generally an agent for his client. In Re Estate of Brugh, 306 So.2d 599 (Fla 2DCA 1975). See also Fl.R.C.P. 1.080(b) (stating that "[w]hen service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the Court.")

As the Fourth District Court of Appeal correctly stated in their decision while passing on this procedural point:

> We do not see why the third party tort-feasor should suffer the consequences of any procedural snafu in which he played no part. The main questions are: "Was due process complied

> with?" and "Was the protection envisaged by the statute afforded to the employee?" We answer both questions in the affirmative. Kimbrell v. Paige, ___ So.2d ___ (September 22, 1982).

B. The Appellant cannot now sue for further damages arising out of this accident since the doctrine of res judicata is an absolute bar to a subsequent suit on the same cause of action.

Under the doctrine of res judicata, a final judgment or decree on the merits, by a court of competent jurisdiction, constitutes an absolute bar to a subsequent suit on the same cause of action, and concludes all issues which were raised or could have been raised in that action. Wise v. Tucker, 399 So.2d 500 (Fla. 4DCA 1981). Therefore, the Appellant was properly estopped from bringing a second suit for pain and suffering and other common law elements of damage which could have been raised in the earlier suit.

To bring the doctrine of res judicata into play, four elements must exist. They are:

1) identity in the thing sued for
2) identity of cause of action
3) identity of persons and parties to the action
4) identity of quality or capacity of the person for or against whom claim is made.

In this case, both Complaints sue for money damages arising out of an automobile accident which occurred on October 13, 1975. Both Complaints state the same cause of action, namely personal

injury damages caused by the negligence of the Appellees. The term parties as used in this doctrine include parties and their privies, such as an insurance carrier. Privies in this context means those identifed with a litigant in interest. Jones f/u/b State Farm v. Bradley, 366 So.2d 1266 (Fla. 4 DCA 1979). ALLSTATE INSURANCE COMPANY is certainly in privity with Appellees PAIGE and BERRIAN in this case. Under no circumstances could there be a recovery by the Appellant against the Appellee, ALLSTATE INSURANCE COMPANY without a recovery against the Appellees PAIGE and BERRIAN. The lower court properly recognized this in their final judgment. Finally, the fourth element of res judicata has been fullfilled. (R 1-3; 209-211).

Parties should not be vexed more than once for the same cause, yet this is precisely what the Appellants are seeking to do. Here, the Appellant's individual damages were claimed in the pleadings filed for the first lawsuit which was in fact brought for Appellees' use and benefit! (R 209-211). The trial court properly found, (and the District Court Affirmed) that as a matter of fact, the Appellant failed to join in and participate in the prosecution of his claim at that time. The Appellant cannot now capitalize on his lack of diligence in the past.

C. All damages accruing to a party as a result of a single wrongful act must be claimed and recovered in one action or not at all, therefore, the Appellant was properly estopped from splitting his cause of action.

The rule against splitting causes of action is closely related to the doctrine of res judicata. Florida courts have held that all damages accruing to a party as a result of a wrongful act must be claimed and recovered in one action or not at all. Georgia-Pacific Corporation v. Squires Development, 387 So.2d 986 (Fla. 4DCA 1980). Stated another way, only one cause of action arises out of a single tort committed on an individual even though that tort results in damage to both person and physical property. Edelman v. Kokler, 194 So.2d 683 (Fla. 3DCA 1967).

An illustration of this rule which is closely analogous to the case at bar is Mims v. Reid, 98 So.2d 498 (Fla. 1957). Mims sued Reid for personal injuries and damage to his auto. At a pre-trial conference, Mims, with the consent of Reid, dismissed his claim for personal injury, whereupon the case was settled and judgment satisfied. Prior to entry of judgment, Mims, through his insurance company, sued Reid for damages to his auto. The Supreme Court, in holding that the insurer's suit fell within the prohibition of splitting causes of action adopted the forgoing rule. In the instant case, since Great American Insurance Company has previously sued the Appellees PAIGE and BERRIAN for the use and benefit of Appellant, KIMBRELL, and received a judgment, the present suit for damages is properly barred since it is in direct violation of the rule against splitting causes of action and res judicata.

The Appellants rely heavily on Scott v. Rosenthal, 150 So.2d 433 (Fla. 1963), however, the Scott decision is clearly distinguish-

able. It discusses in detail certain distinctions between subrogation agreements and loan receipts and allows a subrogated insurance carrier a separate and distinct cause of action against the tortfeasor for property damage if a proper assignment and subrogation agreement is prepared. It is material that Scott deals with property damage because that is an element of damage that is completely foreign to elements of damages for personal injuries. Scott cannot be argued as governing the case for serveral reasons. First, the subrogation rights in question are a creature of statute and, as such, are determined only by a reading of the statute. Maryland Casualty Company v. Smith, 272 So.2d 517 (Fla. 1953); Security Mutual Casualty Company v. Grice, 172 So.2d 834 (Fla. 2DCA 1965). Second, the separate cause of action recognized in Scott is by use of a subrogation agreement which simply does not exist in this cause. Furthermore, the elements of damage in Appellant's personal injury claim significantly overlap the compensation carrier's claim for damages, i.e., medical bills and lost wages (or a portion thereof). The public policy argument used to justify the holding in Scott simply does not apply sub judice. Finally, and most importantly, as noted by the Fourth District Court of Appeal, the Scott decision does not involve workman's compensation, nor does it mention F.S. §440.39 which is at the center of this case.

II. THE PUBLIC INTEREST WOULD BEST BE SERVED BY AFFIRMING THE DISMISSAL OF THIS COMPLAINT WITH PREJUDICE AS THE UNLAWFULLNESS OF THE APPELLANT'S CONDUCT RUNS COUNTER TO NUMEROUS PUBLIC POLICY CONCERNS.

The public interest would best be served by affirming the District Court's decision to dismiss the Appellant's case with prejudice. Appellant seeks to recover the same damages against the same defendants as were recovered by Great American Insurance Company in a previous suit which was brought for the Appellants use and benefit. Unless the Motion to Dismiss is upheld, a precedent would be set in this state which would not only uphold the splitting of a cause of action, but it would also do away with the doctrine of res judicata both of which are contra to public policy. These doctrines are firmly established in the Florida Court System. Georgia-Pacific Corp. v. Squires Development, 387 So.2d 986 (Fla. 4 DCA 1980). These rules were founded on the plainest and most substantial justice, namely that litigation should have an end, and no person should be unnecessarily harassed by multiplicity of suits. Dismissal of the second cause of action therefore was only proper.

The Appellants' actions also threaten the viability and integrity of Florida statutory and case law. Florida Statute §440.39 clearly indicates that the workers compensation carrier becomes subrogated to the rights of the employee against the tort-feasor, and that during the second year after the accident, both the injured employee and the compensation carrier have concurrent rights against the tort-feasor. Furthermore, case law directly holds that

F.S. §440.39 contemplates the filing of only one suit against the third party tort-feasor. Maryland Casualty Company v. Simmons, 193 So.2d 446 (Fla 2DCA 1966).

The laws of this State cannot and should not be used to place Appellees PAIGE and BERRIAN in the position of being sued twice under the same cause of action. Should this Court allow the present suit to be maintained, they would effectively be opening a "Pandora's Box" not only under the facts of this case, but in every other field of the law.

In effect, Appellants are asking this Honorable Court to do the very thing which courts have refused to do for centuries, and that is to split a cause of action. Allowing the Appellant to bring a second suit against the same third party tort-feasor for his own benefit produces an unconscionable result which is contrary to public policy.

CONCLUSION

Because there is only one cause of action which can exist under Florida Statute §440.39, the District Court's decision to affirm the dismissal of the Appellant's Complaint with prejudice was only proper. Accordingly, both equity and esteem for the rules of law dictates that under the facts of this case, the decision of the lower court must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to:

SCHULER & WILKERSON, P.A., Suite 4D, Baristers Building, 1615 Forum Place, West Palm Beach, Florida 33401, Attorneys for Petitioners

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STANLEY NARKIER, ESQ., P.O. Box 3225, West Palm Beach, Florida 33402, Attorney for Appellee, Allstate

this 14 day of March, 1983.

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