IN THE SUPREME COURT OF FLORIDA

CASE NO: 63,171

DORMAN K. KIMBRELL, JR., et ux.,

Petitioners,

v.

PHILLIP PAIGE, EUGENE BERRIAN, and ALLSTATE INSURANCE COMPANY,

Respondents.

BRIEF OF PETITIONERS ON CERTIFIED QUESTION

SCHULER & WILKERSON, P.A.
Suite 4D-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Petitioners

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CITATION OF AUTHORITIES

PREFACE

This case is before this Court on a certified question from the Fourth District Court of Appeal. The following symbol will be used:

(R)-Record-on-Appeal

(A)-Petitioner's Appendix

STATEMENT OF THE CASE AND FACTS

Petitioner, while within the scope and course of his employment, was involved in an automobile accident on October 13, 1975. The tortfeasor, Berrian, negligently operated a motor vehicle owned by Paige so as to cause the accident resulting in serious injuries to Petitioner. Petitioner was required to have a hemi-laminectomy and disc excision(R16). Since Petitioner had been working at the time of his accident, he was paid disability benefits and medical benefits by Great American Insurance Company, his employer's worker's compensation insurer(R235-6).

On December 8, 1976, the claims manager for Great American advised the attorney who was representing Petitioner in the worker's compensation claim that in view of the fact that the case had "entered the second year" Great American was giving notice in accordance with §440.39 F.S. that it intended to file suit against the tortfeasors for Petitioner's injuries(R195). This notice was not sent to Petitioner individually.

Thereafter, in October 1977 the worker's compensation insured filed a lawsuit against Paige and Berrian attempting

to recover the amount that it had paid to Petitioner as worker's compensation benefits(R209-211). Paige's liability insurer, Allstate Insurance Company, was not made a party to the lawsuit. A default was entered against Paige and Berrian(R216).

While Great American's suit was pending, Petitioner filed a common law action, through different attorneys than his worker's compensation attorney, against Paige, Berrian, and Allstate(R11-14). Both suits were litigated concurrently. In November 1980 a trial was had in Great American's case on the issue of damages and the only evidence presented by Great American was on its subrogated claim (i.e.), the testimony of a claims adjuster that Great American had paid disability and medical benefits to Petitioner in the amount of $21,795.82(R234-6). Final Judgment was entered against Paige and Berrian in that amount, minus a $600 reduction due to an error in addition(R219,221-22).

Once that judgment was rendered, in January 1981, the Defendants in Petitioner's common law action filed a Motion to Dismiss alleging that the judgment obtained by Great American barred Petitioner from recovering in this lawsuit pursuant to §440.39 F.S.(R191). They also sought leave to amend their answers to raise the defense of res judicata. At that point the Defendants in Petitioner's common law action had been defending the suit for over two years without raising as a defense Great American's pending lawsuit.

The trial court entered an order dismissing Petitioner's lawsuit with prejudice(R204-06). The trial court found that only one lawsuit was proper under §440.39 F.S. and that the judgment for Great American's subrogated damages entered in

the case brought by Great American operated as a bar to Petitioner's lawsuit in which he sought damages for his personal injuries(R204-06). The court rejected Petitioner's argument that he should be allowed to pursue his claim for pain and suffering and other common law elements of damages that were not sought in the prior litigation. The court ruled that Petitioner had received notice of the worker's compensation insurer's intention to pursue a lawsuit under §440.39 F.S. and that Petitioner had failed to take the necessary steps to prosecute his claim at that time. The court also rejected Petitioner's argument that res judicata did not apply since Allstate had not been a party to the earlier lawsuit(R204-06).

Petitioner appealed to the Fourth District. That court found no specific language in §440.39 which prohibited the filing of a second lawsuit by an injured employer even though the compensation carrier had already done so. However, the court felt that the language of the statute contemplated the filing of only one suit against the third party tortfeasor.

The Fourth District agreed with the Petitioner that the trial court erred in deciding on a Motion to Dismiss a disputed issue of fact in regard to whether 30 days notice had been given to the Petitioner as well as to his lawyer. The court however, held that 30 days notice to Petitioner's lawyer was sufficient under the statute.

Judge Hersey dissented : relying upon this Court's decision in ROSENTHAL v. SCOTT, 150 So.2d 433(Fla.1963) which sets forth an exception to the prohibition against splitting a cause of action. That exception provides that

where an insurance carrier obtains rights against the tortfeasor by subrogation, the insured and the insurer may bring separate actions against the tortfeasor.

On rehearing the Fourth District certified the following question to this Court as one of great public interest(A5):

> 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?

ARGUMENT

SEPARATE SUIT IS NOT BARRED WHERE THE WORKER'S COMPENSATION CARRIER ONLY RECOVERED ITS SUBROGATED CLAIM.

§440.39 F.S. Does Not Bar A Second Suit Under These Circumstances

§440.39(4)(a) F.S. provides:

> If the injured employee or his dependents, as the case may be, fail to bring suit against such third-party tortfeasor within 1 year after the cause of action thereof shall have accrued, the employer, if a self-insurer, and if not, the insurance carrier, may, after giving 30 days' notice to the injured employee or his dependents and the injured employee's attorney, if represented by counsel, institute suit against such third-party tortfeasor, either in his own name or as provided by subsection (3), and, in the event suit is so instituted, 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.

§440.39 provides for subrogation of the worker's compensation insurer to the rights of the employee against a third-party tortfeasor to the extent of the amount of the compensation paid or to be paid. PURSELL v. SUMTER ELEC. COOP. INC., 169 So.2d 515(Fla.2d DCA 1964). True, the statute anticipates only one lawsuit against the tortfeasor, either brought by the claimant, or the carrier for recovery of the claimant's entire damages. If the claimant brings the suit under §440.39(3)(a) the carrier receives 100% reimbursement from the judgment or settlement unless the claimant can demonstrate that he did not

recover the full value of his damages. If so, equitable distribution applies. If the carrier brings suit, he is to recover plaintiff's full damages from which the carrier is subrogated to and is entitled to retain 100% reimbursement of the medical and disability benefits paid the claimant by the carrier. The problem is that in the present case the carrier simply proved up its own damages, making no attempt to recover Petitioner's damages. Great American's actions should not be utilized to preclude Petitioner from recovering from the tortfeasor, and Allstate, for his damages. The amount recovered by the worker's compensation carrier should simply be a setoff from the damages Petitioner recovers so that there is no double recovery against the tortfeasors and their insurer.

There is no language in §440.39(4)(a) that prevents a separate lawsuit by Petitioner under the circumstances of this case where the worker's compensation insurer did not attempt to recover Petitioner's damages.

The right of employers to subrogation for compensation benefits is a statutory and not an inherent right. MARYLAND CASUALTY CO. v. SMITH, 272 So.2d 517(Fla.1973). The carrier is entitled to limited subrogation rights according to the terms and conditions set forth in the statute.

§440.39(4)(a) requires that notice be given to the "injured

employee. . .and the injured employee's attorney". In the present case, only Petitioner's worker's compensation attorney was given notice by Great American(R195). Notice was never given by Great American to Petitioner(R195). The trial court incorrectly found that Petitioner had been given notice. Only Petitioner's worker's compensation attorney was advised of the "intent" to file an action. Petitioner's attorney was not served with a copy of the complaint of the lawsuit when it was filed by Great American. Thus, even Petitioner's attorney was not apprised of the fact that the lawsuit was in fact ever filed(R209.228). The pleadings and orders subsequently entered in Great American's case were never provided to Petitioner or his worker's compensation attorney, as evidenced by their certificate of service(R209-228). Only the tortfeasors were served(R209-228). The Final Judgment in Great American's favor was not even served on Petitioner(R221-22).

For this reason, the Final Judgment obtained by Great American in the prior case cannot be utilized to preclude Petitioner from recovery for his own damages. §440.39(4)(a) was not complied with by Great American.

The Fourth District held that 30 days notice to Petitioner's attorney was notice to Petitioner. On the one hand the Fourth District holds that under §440.39 an employee's separate cause of action is taken away from him, and on the other hand does not require §440.39 to be strictly adhered to. Having been deprived of his common law action by §440.39, that statute must be strictly construed. In NELL v. STATE, 277 So.2d 1(Fla.1973) this Court held that statutes in derogation of the common law should be strictly construed and if there is any doubt as to their meaning, the court should resolve that doubt in favor of the citizen.

In the present case, the statute is in derogation of the common law. Accordingly, the requirement in the statute that notice be given to both the injured employee and his attorney must be strictly enforced. Since this provision was not complied with, Kimbrell is not prevented by §440.39 from bringing a separate action against the tortfeasor.

No Common Law Rule Prohibits Petitioner From Bringing The Second Lawsuit.

Estoppel by judgment precludes the parties from litigating in a second suit only those issues that were actually decided in a previous suit, even though the causes of action are different. HOHWEILER v. HOHWEILER, 167 So.2d 73(Fla.2d DCA 1964). In the present case only Great American's reimbursement for payment of disability and medical bills was determined. Petitioner's damages were not determined.

Collateral estoppel does not apply to a case in which the parties are different. PENNSYLVANIA INS. CO. v. MIAMI NATIONAL BANK, 241 So.2d 861(Fla.3d DCA 1970). In the present case the parties are different from those in the prior suit. In the prior suit, Great American, individually, and for the use and benefit of Kimbrell, sued Paige and Berrian, but not Allstate. In the present suit, Kimbrell is suing Paige, Berrian and Allstate.

Res judicata is also not applicable. A case dealing with res judicata and which is analogous to the present case is SCOTT v. ROSENTHAL, 118 So.2d 555(Fla.3d DCA 1960). In that case Scott was involved in an automobile accident with Rosenthal resulting in injuries to Scott's automobile and personal injuries to Scott. Scott was covered by an insurance policy issued him

by Mid State. The insurer in its own name brought suit against Rosenthal for injury to Scott's automobile, and Scott subsequently commenced a lawsuit against Rosenthal for personal injuries. The insurer's suit was settled and thereafter in Scott's suit for personal injuries the defendant set up as a defense the settlement on the claim for damages to the automobile. The lower court granted the defendant's motion for summary judgment and Scott appealed.

The question on appeal was whether the judgment on the claim for damages to the automobile was res judicata of Scott's claim for personal injuries. The court reversed the lower court's ruling and held that an exception to the rule that a single tort causing injury to a person and his property constitutes one cause of action which cannot be split arises when rights to subrogation under an insurance policy accrue. The court stated that where, before any cause of action arises for injury to person or property, the owner of the property by contract invests another with certain subrogation rights, there is no basis for the denial of the right of the insured to prosecute a separate action for damages. The court cited out-of-state cases which hold that an insurer has an equitable interest by reason of having written the policy of insurance. When the automobile is damaged, by virtue of the contract of insurance and the article of subrogation, the insurer has an interest in the claim for damages. This interest becomes a right to sue atlaw when the insurer pays to the insured the amount owing for loss under the policy and becomes subrogated to the insured's right to recover for damages. Therefore, when suit is filed

by the insured for recovery for injuries sustained to his person, that cause of action is in the insured and the cause of action to recover for damages to the automobile is in the insurer. These are two separate distinct causes of action in two different persons. The cause of action brought by the insurer to recover through subrogation the amount that it has paid to an insured is not the same, or even substantially the same, cause of action of the plaintiff in seeking his own damages. The court pointed out that the insurer alone could maintain an action to recover the sum that it had paid to its insured under the policy. The insurance company was subrogated "in a corresponding amount to the assured's right of action against any other person responsible for the loss".

The court stated that the rule against splitting a single cause of action should not be applied to frustrate the purpose of the laws or to thwart public policy. An owner of an automobile who has sustained both property damage and personal injury may accept payment from his insurer in regard to the property damage, and maintain an action against the tortfeasor for personal injury. The court specifically stated:

> . . .He does not lose his right of action to recover for the injuries to his person, by accepting from the insurance company the amount for which it is liable to him, under its policy, because the insurance company thereafter, upon the cause of action which has accrued to it, recovers of the wrongdoer the amount which it has paid the owner of the automobile in discharge of its liability under the policy. This is not unjust to the wrongdoer, who is thereby required to pay only the full amount for which he is liable because of his wrong or tort.

In the present case, the insurer, by way of statute rather than insurance policy, had a subrogated right to retain from the judgment recovered on behalf of Petitioner the amount that it had paid in disability and medical benefits. The fact that the insurance company did not attempt to seek damages other than the amount it had paid Petitioner, does not now preclude Petitioner from recovering for his own damages. This is not an improper splitting of the cause of action and does not constitute res judicata, since the insured's action for subrogation is an exception to the general rules in that regard.

The Third District's decision in SCOTT v. ROSENTHAL, supra, was reversed by this Court in ROSENTHAL v. SCOTT, 150 So.2d 433 (Fla.1961). However, this Court reversed itself on rehearing at 150 So.2d 436. This Court stated that to require an injured person to go to trial at the same time the insurance company sought to recover its subrogated interests might result in the injured party going to trial before sufficient time had passed to determine the extent of his injuries, was impractical and would work an undue hardship on him not commensurate with the justice and reason for the rule against splitting a cause of action. This Court found that the rule against splitting a cause of action should not be declared rigid, inflexible and inexorable when it would, for the sake only of convenience to the putitive wrongdoer, defeat the ends of justice", and further stated:

> . . .Were we to adhere to said rule and declare it to be unyielding in this case, or in any other case with a similar factual situation, we would, in our judgment, be guilty of making a mockery of the fundamental purpose of all courts in this county--administration of simple, "even-handed" justice.

> Every court in this land in spirit if not in fact has emblazoned over its portal in box-car letters: "fiat justicia". We pray it may ever remain so.

Defendants will undoubtedly argue that the present case is distinguishable from the SCOTT case because SCOTT solely concerned the insured's subrogated right as to property damage. That distinction is invalid. The question is whether the relief sought by Petitioner and Great American were the same. Clearly they were not in the present case.

One of the conditions necessary to an application of the doctrine of res judicata is that there must be an identity of the thing sued for. 19 Fla.Jur. Judgments & Decrees, §114. That is, where the thing sued for in an later action is not identical with the thing sued for in the previous action, the prior action is not res judicata even though there may be an identity of causes of action and parties. SMITH v. PATTISHALL, 129 Fla.498, 176 So.568(1937). In such cases, the causes of action are not considered to be the same. DONAHUE v. DAVIS, 68 So.2d.163(Fla.1953). In the present case, the relief sought (the thing sued for) differed from that sought in the prior case brought by Great American. Accordingly, there was no identity in the same thing sued for or identity of the cause of action. There was also no identity of the parties to the lawsuit.

Finally, estoppel by judgment and res judicata are required to be raised as affirmative defenses rather than by a motion to dismiss. SPROUL v. McDONALD SYSTEMS, INC., 397 So.2d 462(Fla.4th DCA 1981); MOSKOVITS v. MOSKOVITS, 112 So.2d 875(Fla.1st DCA 1959). Therefore, those common law

defenses cannot support dismissal of Petitioner's lawsuit.

CONCLUSION

§440.39 F.S. does not prohibit Petitioner from bringing a second lawsuit against the tortfeasors where the worker's compensation carrier recovered only its subrogated claim against the tortfeasor in the first lawsuit. There are also no common law theories that require dismissal of Petitioner's lawsuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: STANLEY NARKIER, P. O. Box 3225, WPB, FL 33402, and to SAMUEL TYLER HILL, 400 S.E. 6th Street, Ft. Lauderdale, FL 33301, this 22nd day of FEBRUARY, 1983.

SCHULER & WILKERSON, P.A.
Suite 4D-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Petitioner

BY Edna L Caruso
EDNA L. CARUSO