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.

REPLY BRIEF OF PETITIONERS ON CERTIFIED QUESTION

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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

BRIEF OF ALLSTATE

Allstate states that the claims manager for Great American advised Petitioners' attorney that it was going to file an action against the tortfeasor, and Petitioners' attorney took no action. It should be emphasized that the attorney referred to was Petitioners' worker's compensation attorney. Petitioners' common law action was filed by a completely different attorney.

From the chronology set forth in Allstate's brief, it is made to appear that the judgment entered in Great American's lawsuit was prior to Petitioner filing his common law action. In fact, Petitioners' common law action was filed two years prior to the judgment being entered in Great American's case.

Although the judgment entered in Great American's case was in favor of both the carrier and Petitioner, it is undisputed that the judgment was solely for Great American's out-of-pocket expenses for paying medical benefits and worker's compensation to Petitioner. Great American did not otherwise recover any monies for Petitioner's personal injuries.

BRIEF OF PAIGE & BERRIAN

Despite the fact that the lawsuit filed by Great American stated that it was for the use and benefit of Petitioner, as stated supra, Great American recovered no monies other than a recoupment of the monies that it had paid Petitioner as worker's compensation benefits and medical benefits.

ARGUMENT

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

ALLSTATE'S BRIEF

Allstate agrees that the statute does not specifically prohibit the filing of a second suit. However, Allstate argues that the statute "contemplates" the filng of only one lawsuit against the tortfeasor. Petitioners agree that case law has so held. However, certainly it would not be contemplated that only one lawsuit should be brought where the worker's compensation carrier did not protect the claimant's rights by recovering his damages in addition to its outlay.

Allstate relies upon AETNA CASUALTY & SURETY CO. v. BORTZ, 271 So.2d 108(Fla.1972) which holds that the statutory scheme is to avoid double recovery. Allstate argues that if Petitioners' position is adopted a double recovery will result. This is not true. The carrier's recovery for its outlay of medical benefits and loss of wages can be offset from Petitioners' recovery in the second lawsuit.

Allstate argues that where the employee fails to file suit the worker's compensation carrier is allowed to protect "his" interest by filing suit after the first year. Under the statute, the carrier is to protect not only his own interest, but the interest of the claimant by recovering the claimant's damages. The BORTZ case makes reference to the fact that abuses occur where the worker's compensation carrier files suit for the benefit of the claimant "a situation

which often resulted in settlement or recovery being limited to the amount expended in compensation".

If the worker's compensation carrier files suit under §440.39, it is required to recover for the claimant. While the claimant is entitled to have his own counsel monitor the carrier's suit, the ultimate goverance of the cause is within the province of the carrier. AETNA CASUALTY & SURETY COMPANY v. BORTZ, supra.

Allstate argues that there are strong policy reasons for applying ROSENTHAL v. SCOTT, 150 So.2d 433(Fla.1961) to a personal injury action. There are also policy reasons for allowing an injured workman to recover his damages against the tortfeasor where the compensation carrier has merely recovered its out-of-pocket expenses.

PAIGE & BERRIAN'S BRIEF

Defendants argue that notice to an attorney is imputed to his client. This overlooks the fact that the statute specifically requires that notice be given both to the injured employee and his attorney.

Paige and Berrian attempt to distinguish ROSENTHAL v. SCOTT, supra, by arguing that it was based upon a distinction drawn between subrogation agreements and loan receipts. The ROSENTHAL court held that in MIMS v. REID, 98 So.2d 498(Fla.1957) a loan receipt was involved and therefore that case did not actually involve a subrogated claim by an insurer. Rather, Mims sued to recover for personal injuries and later sued to recover for property damage. The second suit was held to be

barred. Unlike MIMS, the Florida Supreme Court held that the ROSENTHAL case involved a subrogated claim by an insurer. The court held that the fact that an insurer brings a subrogated claim to recover against the tortfeasor what it has paid the injured party as property damages does not prohibit the injured party from later seeking recovery for personal injuries against the tortfeasor. The court distinguished cases involving subrogated claims by an insurer stating:

> Understandably, the insurance company's attorney was interested only in securing for his employer the amount of damages it had sustained. There is nothing in the court's opinion in Mims to indicate that the court considered whether an exception to the single cause principle should be drawn in cases involving insurance. . . .
>
> We again recognize the majority rule against the splitting of a single cause of action, but we do not believe that said rule is controlling under the facts of this case. The application of said rule herein without recognizing the insurance exception would in our judgment defeat the ends of justice.

The present case presents the "insurance exception", with the subrogated insurer securing for itself only the amount of damages it has sustained.

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 3967, Lantana, FL 33465, and to SAMUEL TYLER HILL, 400 S.E. 6th Street, Ft. Lauderdale, FL 33402, this 30th day of March, 1983.

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