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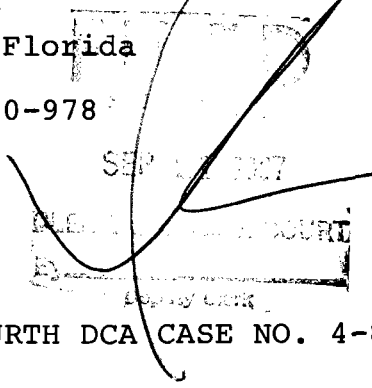
IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 70-978



KARL NIKULA, ETC.,

Petitioner,

vs. FOURTH DCA CASE NO. 4-86-0944

MICHIGAN MUTUAL INSURANCE,

Respondent.

_____/

ON CERTIFIED QUESTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS OF PETITIONER KARL NIKULA, ETC.

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PREFACE

The parties will be referred to as the plaintiff and the insurer.

The following symbol will be used:

R - Record.

STATEMENT OF THE CASE AND FACTS

Plaintiff was severly injured when he was hit on the head by a piece of steel scaffolding which was falling on a construction site. He brought suit against the manufacturer of his hard hat and made a settlement in the amount of $3,600,000. He had received worker's compensation from his employer's carrier of $535,452.84. The workers' compensation insurer (insurer) sought to recover all of the benefits it had paid out and there was a hearing at which evidence was taken before the trial court. The evidence at that hearing was as follows.

Plaintiff was age 26 at the time of the accident. He was a welder earning $8.00 an hour with a potential to earn $15 to $20. In addition to his full-time job in construction he also worked as an Amway distributor (R 29-30).

On the day of the accident the plaintiff was working as a "lookout" on a construction site. His sole responsibility

was to be looking up and watching out for falling scaffolding which was being dismantled on the fifth floor of a building under construction. For some reason he was not looking up when he was supposed to be, and a piece of steel scaffolding fell from the fifth floor and struck him on the head (R 31-32). He was wearing a hard hat and thus sued the manufacturer of the hat for defective design.

Plaintiff is a quadriplegic with severe brain damage, yet he can understand his situation (R 34-35). His trial lawyer testified that if plaintiff had not been guilty of comparative negligence the value of the claim would have been between $15,000,000 to $20,000,000 (R 35). Because of a comparative negligence problem the case was settled for a total payment having a present value of $3,600,000. After deducting attorney's fees and costs plaintiff was left with a structured settlement having a present value of $2,031,000 (R 37). Plaintiff's trial lawyer testified that there was a probability that a jury would have found plaintiff 100% at fault (R 37).

Another trial lawyer, Justus Reid, testified as an expert. It was his opinion the case was worth $15,000,000 without comparative negligence, but plaintiff was at least

75% at fault (R 44-46). He described the situation as follows:

> ... here is a guy that's put in an area to do the very thing that hurts him, because he is just not paying attention. (R 45)

Another trial lawyer, William Pruitt, testified that the damages were in excess of $15,000,000 (R 54). He was involved in a jury trial in which plaintiff was awarded $11,000,000 and the damages in that case were not as great as in the present case (R 54-55). In addition the plaintiff in Pruitt's case did not have a normal life expectancy, while the 26 year old plaintiff in the present case does have a normal life expectancy (R 55).

Insurer presented the testimony, by deposition, of David Goodwin, the trial lawyer who defended the case for the manufacturer of the hard hat. He testified damages were from $7,000,000 to $10,000,000 and the issue of comparative negligence was a factor but he did not testify as to how much of a factor (Dep. Goodwin pgs. 7-9, R 814).

The court found that the full value of plaintiff's damages was $15,000,000, that the amount of the recovery on the tort claim was $3,600,000, and that the plaintiff accepted a reduced amount because he was 90% comparatively

negligent. The court interpreted the statute to mean it should utilize the percentage of comparative negligence in reducing the lien, rather than the actual amount of the settlement, which could be influenced by other factors (R 844). The court thus reduced the amount of the insurer's lien by the percentage of comparative negligence, 90%, and the insurer appealed.

The Fourth District stated the main issue to be:

> Whether the trial court erred in reducing the amount of the workers' compensation carrier's lien by the percent of the claimant's comparative negligence, and not by the ratio borne by the amount of claimant's tort claim settlement to the full value of his tort claim. ...

The Fourth District reversed the reduction of 90% based on the comparative negligence and awarded the insurer 24%, which was the ratio of the actual amount of the settlement, $3.6 million, to the full value of the case, $15 million. On request of the parties on motions for rehearing, the Fourth District certified as a question of great public importance:

> WHERE, IN A WORKERS' COMPENSATION LIENHOLDER'S SUIT FOR A SHARE OF THE INJURED WORKER'S RECOVERY BY SETTLEMENT FROM A THIRD PARTY TORTFEASOR, THE TRIAL COURT HAS DETERMINED A PERCENT OF COMPARATIVE NEGLIGENCE THAT DOES NOT CORRESPOND TO THE RATIO OF THE AMOUNT OF THE SETTLEMENT TO THE TOTAL VALUE OF THE INJURED WORKER'S DAMAGES-- ALSO DETERMINED BY THE COURT -- HOW IS THE LIEN REDUCTION CALCULATED PURSUANT TO SECTION 440.39(3)(A), FLORIDA STATUTES?

SUMMARY OF ARGUMENT

Section 440.39(3)(a), Florida Statutes (1981), provides that the workers' compensation insurer will recover 100% of its benefits where there is a recovery from a third party tortfeasor,

> ... unless the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility.

The only two factors in the statute which can be considered by the court in reducing the lien are comparative negligence, and insufficient insurance coverage or collectibility. Comparative negligence was the only factor involved in this case and, since the trial court found comparative negligence to be 90%, the trial court properly reduced the lien by that amount.

The Fourth District held that even though the statute only allows reduction because of comparative negligence, the reduction is to be computed by comparing the amount of the actual settlement to the full value of the claim. This is contrary to the language of the statute. The decision of the Fourth District should be reversed and the order of the trial court reinstated.

ARGUMENT

CERTIFIED QUESTION

> WHERE, IN A WORKERS' COMPENSATION LIENHOLDER'S SUIT FOR A SHARE OF THE INJURED WORKER'S RECOVERY BY SETTLEMENT FROM A THIRD PARTY TORTFEASOR, THE TRIAL COURT HAS DETERMINED A PERCENT OF COMPARATIVE NEGLIGENCE THAT DOES NOT CORRESPOND TO THE RATIO OF THE AMOUNT OF THE SETTLEMENT TO THE TOTAL VALUE OF THE INJURED WORKER'S DAMAGES-- ALSO DETERMINED BY THE COURT -- HOW IS THE LIEN REDUCTION CALCULATED PURSUANT TO SECTION 440.39(3)(A), FLORIDA STATUTES?

Section 440.39(3)(a), Florida Statutes (1981), applicable to this 1982 accident, provided in part:

> (3)(a) In all claims or actions at law against a third-party tortfeasor, the employee, or his dependents or those entitled by law to sue in the event he is deceased, shall sue for the employee individually and for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier, in the event compensation benefits are claimed or paid, and such suit may be brought in the name of the employee, or his dependents or those entitled by law to sue in the event he is deceased, as plaintiff, or, at the option of such plaintiff, may be brought in the name of such plaintiff and for the use and benefit of the employer or insurance carrier, as the case may be. Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which said notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law. The employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the

> employee or dependent in that suit have been deducted, 100 percent of what it has paid and future benefits to be paid, unless the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility. ... (Emphasis added)

If the Fourth District is correct in holding that the amount of the lien is computed by comparing the amount of the actual settlement to the full value of the claim, then there is no reason for a court to ever determine the percentage of comparative negligence. Yet the statute only authorizes reduction for comparative negligence (or insurance coverage limits and collectibility). Nowhere does the statute mention reduction in proportion to the amount of the actual settlement. If the legislature had intended the amount the plaintiff actually receives to be the factor, it would have said so.

The Fourth District relied most heavily on Miceli v. Litton Systems, Inc., 566 F.Supp. 875 (S.D. Fla. 1983). The Fourth District mistakenly characterized the Miceli decision as a decision of an appellate court, which it is not. In that case the Federal District Court found the full value of the case to be $1,000,000 and plaintiff's recovery of $50,000 to be 5%. That court held that the percentage of

plaintiff's negligence was irrelevant, and it only considered the ratio between the full value of the claim and the actual recovery. The court cited no authority for that conclusion, and there is nothing in the statute to support it.

Miceli and the present case are the only two cases which have ever determined, where there is a difference between the comparative negligence factor and the actual settlement factor, that the actual settlement factor controls. In all of the other cases the courts have simply determined the comparative negligence factor to be the same as the ratio of the actual settlement to the full value of the case.

The insurer will undoubtedly argue that the plaintiff's construction of the statute results in a windfall to the plaintiff. What the insurer overlooks is that, more often than not, the statute works against the plaintiff. In a case where the only factor causing the plaintiff to receive less than the full value of his damages is that the case against the tortfeasor is difficult liability, the worker's compensation insurer receives 100% of its lien. If a plaintiff has $1,000,000 in damages but settles for $100,000 because the chances are nine out of ten the jury will find

the tortfeasor not liable, the worker's compensation carrier gets 100% of what it paid. This is because there is no reduction in the lien for difficult liability cases. The only time the lien is reduced is because of comparative negligence or low insurance coverage or collectibility. Where the plaintiff settles for less than full value of his damages for any reason other than the two set forth in the statute, the lien is 100%. See Winn-Dixie Stores, Inc. v. Roca, 480 So.2d 171 (Fla. 3d DCA 1985), in which the Third District noted that the statute was neither fair nor equitable. If the facts in the present case were slightly changed, with the plaintiff not being comparatively negligent, and the case being settled for less than full value because liability against the tortfeasor was only 24%, the trial court would have had no alternative but to award the insurer 100% of its lien.

An excellent example of that situation is found in City of Tallahassee v. Chambliss, 470 So.2d 43 (Fla. 1st DCA 1985), in which the plaintiff was left a quadriplegic as the result of a compensable accident when he was a passenger in a garbage truck operated by a city employee. Past worker's compensation benefits were $230,000 and even more would be payable in the future. There was a partial settlement the amount of which hinged on a jury verdict. The jury found

the defendants not liable, but the plaintiff still received $290,000 from the settlement. The trial court awarded the insurer nothing on the lien and the appellate court reversed and held, since there was no contention that comparative negligence or limits of insurance coverage and collectibility were issues, insurer was entitled to 100% of past and future benefits.

A similar situation was presented in United Parcel Services v. Carmadella, 432 So.2d 702 (Fla. 3d DCA 1983), in which the plaintiff became a quadriplegic but settled for the policy limits of $350,000. The lien was over $400,000 for past benefits. The trial court awarded nothing on the lien citing factors other than policy limits and comparative negligence, including the factor of no liability against the defendant. The Third District held that since this was not a factor in the statute, it could not be the basis for reducing the lien and reversed. The court stated that it was sympathetic to the position of the plaintiff but that the statute is "conspicuously void of equitable notions". 432 So.2d at 704.

The Fourth District discussed Aetna Insurance Company v. Norman, 468 So.2d 226 (Fla. 1985), as if it supported its reversal. It does not. In that case the trial court made a

finding that the plaintiff was 50% at fault, that the claim was worth $150,000, and that the plaintiff settled for $75,000. The clear distinction between that case and the present case is that in Aetna the percentage of comparative negligence found by the trial court was 50% and the settlement was exactly 50% of the full value. In Aetna this Court approved the manner in which the Third District had determined the lien on past benefits. In that opinion, Aetna Insurance Company v. Norman, 444 So.2d 1124 (Fla. 3d DCA 1984), the Third District stated on page 1125:

> Applying the above emphasized statutory formula to the instant case, it is plain that the defendant Aetna Insurance Company is entitled to recover from the judgment obtained by the plaintiff James Norman from the third-party tortfeasor [after attorney's fees and costs incurred by the plaintiffs in said lawsuit have been deducted], to wit: $38,732.53, 100% of what it has paid ($26,795.17) and future benefits to be paid, reduced by the plaintiff James Norman's 50% comparative negligence, to wit: $26,795.17 X 50% = $13,397.59, plus 50% of any future workers' compensation benefits, until the full lien of $19,366.26 (50% of the net tort recovery) has been satisfied. (Emphasis added)

That is precisely what the trial court did in the present case. It reduced the lien by the plaintiff's 90% comparative negligence.

The Fourth District also felt that American States Insurance v. See-wai, 472 So.2d 838 (Fla. 5th DCA 1985), was supportive of its conclusion, but in that case the Fifth

District simply assumed that the percentage of comparative negligence was determined by the relationship between the settlement and the full damages. Again there was no specific finding of comparative negligence which differed from the relationship of the settlement to the full damages.

There are many factors which can influence a settlement besides comparative negligence and the limits of insurance or collectibility, which are the only factors provided in the statute. There are numerous reasons why a defendant might pay more to settle a case than it is worth. A defendant might wish to avoid the precedent of a jury verdict or an appellate court decision. A defendant may be afraid of a punitive damage award. It might be cheaper for the defendant to pay than litigate and win. Some defendants are simply more litigious than others.

There are also reasons why a plaintiff might settle for less than a claim is worth. The plaintiff may need the money desperately, or cannot go through a trial for emotional reasons. The statute does not authorize reduction of a lien because of any of the above factors.

The only factor in the statute applicable to this case is comparative negligence. If the legislature had intended

that the actual amount of the settlement would be the controlling factor, it would have said so. In Lee v. Gulf Oil Corporation, 4 So.2d 868 (Fla. 1941), this Court stated on page 870:

> ... If it was not the intention of the legislature to make the Act apply to filling stations where any merchandise except gasoline and petroleum products were sold, then the learned members of that august body would certainly have used some other language, or would have left out the word "exclusively" in the passage of the Act. See Smith v. State, 80 Fla. 315, 85 So. 911; State v. Tunnicliffe, 98 Fla. 731, 124 So. 279. If the language of the statute is plain and clear, and free of ambiguity so as to be susceptible of but one meaning, then it becomes the duty of the courts to follow the plain meaning of the statute and not to depart therefrom....

The comparative negligence factor in this case was found by the trial court to be 90% and that finding is based on competent substantial evidence. Since comparative negligence is the only reason why the trial court reduced the lien, the utilization of 90% was the only proper interpretation of the statute.

CONCLUSION

The opinion of the Fourth District should be reversed and the judgment of the trial court reinstated.

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By 
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing, together with copy of appendix attached hereto, has been furnished, by mail, this 17th day of September, 1987, to:

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