22
16 cpgs

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.
_____/

FILED
SID J. WHITE
OCT 3 1987
CLERK, SUPREME COURT
By _____
Deputy Clerk

ON CERTIFIED QUESTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS OF RESPONDENT MICHIGAN MUTUAL INSURANCE

ALBERT P. MASSEY, III
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TABLE OF CONTENTS

PYSZKA, KESSLER, MASSEY, WELDON, CATRI, HOLTON & DOUBERLEY, P.A.
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FORT LAUDERDALE, FLORIDA 33316

TABLE OF CITATIONS

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INTRODUCTION

The parties will be referred to as the Plaintiff and the Insurer respectively. The symbol "R" will be used to designate references to the record. The symbol "App." will be used to designate references to the appendix.

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INTRODUCTION

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STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Fla. R. App. P. 9.210(c), the Insurer omits the statement of the facts except for the following.

It should be noted that the trial court stated in construing the statute that: "...the statute in effect, directs the court to utilize the percentage comparative negligence in reduction of this lien rather that the amount recovered by the Plaintiff which can be influenced by other factors" (R 844) Emphasis added.

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SUMMARY OF ARGUMENT

The Fourth District Court of Appeal was correct in using the same ratio that the Plaintiff's settlement amount represented to his damages as the ratio used to determine the amount the Insurer is entitled to recovery on its lien. Further, the court was correct in deciding that Section 440.39(3)(a), Florida Statutes, does not require a separate determination of the degree or percentage of the Plaintiff's own negligence in the trial court when determining the Insurer's recovery on its lien. This is because the statute speaks in terms of proration and subrogation. That is, the trial judge is to distribute the Insurer's lien in the same proportion the Plaintiff recovered his damages through settlement. Additionally, because the Insurer is subrogated to the Plaintiff's rights against the third party tortfeasor, a disproportionate ratio of recovery between the Insurer's recovery on its lien, and the Plaintiff's recovery through settlement, cannot be countenanced under the statute.

This Court is requested to exercise its discretion and review the Insurer's contention that it is entitled to a greater recovery on its lien than 24%. The Plaintiff recovered $3,600,000.00 in his settlement. The total damages were determined to be $15,000,000.00. Because the jury would have reduced the future damages verdict to present dollar value, the $3,600,000.00 recovered represents a higher percentage of recovery by the Plaintiff than 24% because periodic payments will far exceed $3,600,000.00 in future payments to the Plaintiff. Moreover,

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because the $15,000,000.00 figure would be reduced, the $3,600,000.00 settlement necessarily represents a greater ratio than the 24% ratio it represented based on the $15,000,000.00 figure. Therefore, this question should be remanded to the trial court to determine what percentage of the $15,000,000.00 damages figure is based on future damages, reduce that percentage to present dollar value, and then determine what percentage the $3,600,000.00 settlement figure represents to the damages as properly reduced to present dollar value.

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ARGUMENT I 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 NELIGENCE 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?

The statute to be construed by this Court in answering this certified question; Section 440.39(3)(a), Fla. Stat. (1981) reads in pertinent part:

> "...In all claims or actions at law against the 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-insured, 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, that 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 judgement or settlement recovered to the extent that the court may determine to be their prorated 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 judgement, after attorney's fees and costs incurred by the employee or dependents in that suit have been deducted, 100% of what it has paid and future benefits to be paid, unless the employee or dependents 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 burden of

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proof will be upon the employee ...".

The Workers Compensation Lienholder's lien should be reduced by the same percentage the injured worker's settlement has been reduced from the full value of his damages that either comparative negligence or insurance limits and collectibility reduced the amount the injured worker collected in his settlement. In this case, the Plaintiff's settlement has been reduced 76% from the full value of what is determined to be his damages. It has been shown that the Plaintiff in this case was comparatively negligent. Therefore, the Insurer is entitled to 24% of its lien and to have future benefits paid to the injured worker reduced by the same 24%.

This conclusion has the direct support of two courts who have been called on to interpret this statute and the inferential support of other courts which will be demonstrated below. In Miceli v. Litton Systems, 566 F. Supp. 875 (S.D. Fla. 1983); the Federal District Court construed Section 440.39(3)(a) Fla. Stat. determining that:

> "... The statute does not require the court to consider the degree or percentage of plaintiff's own negligence. It simply requires a finding that the doctrine of comparative negligence is applicable in the present case. Comparative negligence being present, the carrier may then recover the same percentage of the settlement the plaintiff recovered of the full value of his claim". Miceli, id. at 877.

The Fourth District Court of Appeal in this case has also determined that where the trial court properly finds that comparative negligence is present in a given case, the present value of the settlement divided by the total damages equals the proration percentage of the insurer's lien.

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Moreover, this Court in Aetna Insurance Company v. Norman, 468 So.2d 226 (Fla. 1985) stated:

> "The case cited for conflict, Risk Management Services, Inc. v. McCraney, correctly applied the statutory compensation lien on future benefits. McCraney held that the workers compensation carrier had a present lien on the net tort recovery for the benefits it had paid, reduced to the extent that the claimant failed to recover the full value of damages from the third party tort feasor. Id at 228, emphasis added.

Thus in this case, the Fourth District Court of Appeal correctly applied the statutory compensation lien as set forth in Section 440.39(3)(a), Florida Statutes, reducing the insurer's lien to the extent the Plaintiff herein failed to recover the full value of damages.

The flaw at the trial court level in this case, and concededly, the flaw contained in the certified question, is that it is presumed the trial court must make a separate finding regarding the degree or percentage of the Plaintiff's comparative negligence in order to determine the amount of the Insurer's lien. Nowhere in the statute is it stated that the trial court must make a separate finding regarding the degree of the Plaintiff's comparative negligence in situations where the injured worker settles with a third party tortfeasor. Simply, the statute does not direct the trial court to reduce the Insurer's lien by the percentage of the injured worker's comparative negligence separately determined by the trial court.

The statutes does state that the Insurer is entitled to 100% of its lien unless the injured worker demonstrates to the court that the settlement amount recovered does not represent the full

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amount of the claim because of the presence of the injured worker's own negligence or problems with insurance limits and collectibility. The statute directs that "such proration be made by the trial judge...", Section 440.39(3)(a). The term prorate means: "to divide, share, or distribute proportionately...", Black's Law Dictionary, 1385 (rev. 4th ed. 1968). The trial judge is to distribute the Insurer's lien in the same proportion the Plaintiff recovered his damages through settlement. Clearly, to require the trial court to make a separate finding regarding the injured worker's comparative negligence in this case, where the separate finding regarding the degree of comparative negligence results in a disproportionate recovery against the Insurer in favor of the Plaintiff, is not consistent with the statutory direction that the judge prorate or "distribute proportionately".

The Plaintiff contends that the statute does not explicitly provide for a reduction of the Insurer's lien in the same proportion the actual amount of the Plaintiff's settlement represents for the full value of his damages. The statute does state that the burden of proof regarding the reduction is on the employee. It is difficult to see how in this case the Plaintiff has met his burden of proving that he did not recover 90% of the full value of his claim due to his comparative negligence; where he has recovered 24% of the full value of his damages. The result contended for by the Plaintiff; that the Insurer's lien be reduced by 90% notwithstanding the fact that he has recovered 24% of his damages, serves to illustrate why requiring a separate finding of

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the percentage of an injured worker's comparative negligence was not intended by the legislature and, as in this case, can bring about erroneous results at the trial level.

The Plaintiff's reading of the statute forces the injured worker into taking contradictory stances. In the first instance, when negotiating a settlement with the third party tortfeasor or at trial, arguing that the Plaintiff's contributory negligence was minimal or non-existant. In the second instance, at the determination of the Insurer's lien, arguing that the Plaintiff is guilty of a high degree of comparative negligence or, at least, a higher degree of comparative negligence than was represented by the settlement value. The legislature must not have intended that the injured worker be placed in such contradictory positions. Nor must the legislature have intended that the Insurer's lien be determined by a battle of expert witnesses, testifying to the relative degrees of comparative fault which, as in this case, bears no relationship to the actual percentage of fault and the recovery actually obtained by the injured worker.

The Plaintiff argues that this statute works against the Plaintiff, because factors other than comparative negligence and insurance limits and collectibility can reduce the settlement amount. For example, where doubtful liability on the part of the third party tortfeasor reduces the amount of settlement, the insurer nevertheless receives 100% of its lien. It should be noted that numerous decisions of the appellate courts of this state have held that the statute does not provide for reductions

of an insurer's lien due to questionable liability or "other factors". United Parcel Services v. Carmadella, 432 So.2d 702 (Fla. 3rd DCA 1983) rev. den. 441 So.2d 831 (Fla. 1983); City of Tallahassee v. Chambliss, 470 So.2d 43 (Fla. 1st DCA 1985) and cases cited therein.

Further, if as the Plaintiff contends, the trial court is required to make a separate determination of the degree of an injured worker's comparative negligence, the statute works against the Insurer. For example, an injured worker could receive 90% of the value of his damages, the amount of settlement being reduced by the plaintiff's 10% comparative negligence. At the hearing to determine the insurer's lien, as a result of the injured worker's expert witness' testimony, the court determines that the claimant was 90% comparatively negligent thus affording the insurer only a 10% recovery on its lien. This example is concededly a more drastic example of what happened in the case sub judice, where it was a recovery by the Plaintiff of 24% and an award of 10% to the Insurer on its lien; a 14% disparity. However, this example and the instant case serves to illustrate the point that a separate determination of the percent of comparative negligence by the trial court will bear little if no relationship to the Plaintiff's actual comparative negligence and the extent to which it reduced the Plaintiff's settlement.

A separate finding of the percentage of an injured worker's comparative negligence could also work against the injured worker. If the insurer is successful in persuading the trial court through expert testimony that the injured worker's comparative negligence

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is less than the percentage his actual settlement amount was reduced from the full value of his damages, the injured worker could be harmed as well. Clearly, the best reducing factor involving little or no speculation is the percentage the plaintiff's settlement amount represents to the full value of the plaintiff's damages in the third party suit.

Additional evidence that the legislature could not have intended that there be a disparity between the ratio of the amount recovered by the injured worker in the settlement, and the ratio to which the Insurer is entitled to recover its lien, is the statement that the Insurer is subrogated to the rights of the employee against the third party tortfeasor. Section 440.39(2), Florida Statutes (1981). Thus, the Insurer is entitled to recover from the tortfeasor to the extent of its lien, having paid part of the tortfeasor's obligation to the injured worker. See e.g. Goodwin v. Schmidt, 149 Fla. 85, 5 So.2d 64 (1941) (defining subrogation). Because the legislature intended that the insurer's recovery be based on a theory of subrogation, any reading of the statute that would approve a disparity in the ratio of recovery between the injured worker and the Insurer should not be approved by this Honorable Court.

The Plaintiff argues that Aetna Insurance Company v. Norman, 468 So.2d 226 (Fla. 3rd DCA 1985) reversing in part; Aetna Insurance Company v. Norman, 444 So.2d 1124 (Fla. 3rd DCA 1984) is not supportive of the Fourth District Court's conclusion because the trial court reduced the amount of the insurer's lien by 50%;

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the same percentage of comparative negligence for which the trial court in Aetna found the injured worker responsible. The Plaintiff contends that this is what the trial court did in the instant case.

Notwithstanding the fact that the statute does not command the trial court to make a separate determination of the percentage of the injured worker's comparative negligence; what was done by the trial court in Aetna, supra, was not done by the trial court in this case. Here, the trial court created a disparity of 14% between the ratio of the Plaintiff's recovery by settlement for the ratio of the Insurer's entitlement to its lien to the detriment of the Insurer of $74,963.28. In Aetna, supra, there was no disparity between the ratio of the injured worker's recovery and the ratio of the Insurer's entitlement to its lien. Thus, Aetna, supra, is not supportive of the Plaintiff's position. The fact the trial court in Aetna, supra, found the injured worker to be 50% comparatively negligent was not merely fortuitous, but could have been reasonably inferred by the trial court drawn from the ratio the actual amount of the settlement represented to the full value of the injured worker's damages which was 50%.

The Plaintiff further contends that the Fourth District Court of Appeal erroneously felt that American States Insurance v. See-Wai, 472 So.2d 838 (Fla. 5th DCA 1985) was supportive of its decision to reverse the trial court in this case. According to the plaintiff, the Fifth District Court of Appeal in American States, supra, assumed that the percentage of the injured worker's

comparative negligence correspondended to the ratio between the settlement amount and the full value of his damages. The plaintiff further points out the court did not make a separate finding regarding the degree of the injured worker's comparative negligence which differed from the ratio the injured worker's settlement to the full damages. This was exactly the Insurer's position in the Fourth District Court of Appeal. There is no need to make a separate finding of the percentage of comparative negligence in settlement situations. It is certainly reasonable for the trial court to conclude that the settlement amount reflects the percentage of the injured worker's comparative negligence. It is unreasonable for a trial court to conclude, as in this case, that the settlement amount bears no relationship to the percentage of the injured worker's comparative negligence. Thus, American States, supra, is supportive of reversing the trial court's decision in this case which allowed a disparate ratio of recovery between that of the injured worker's settlement and the Insurer's entitlement to its lien. American States, supra, is further supportive of the conclusion that a separate finding of the percentage of the injured worker's comparative negligence by the trial court is inappropriate and unnecessary.

Lastly on this issue, the Plaintiff argues that if the legislature had wanted the actual amount of the settlement to determine the amount of the ratio of recovery of the Insurer's lien, it would have said so. However, it is equally true that this Court may not add terms to the statute that would require a

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court to make a separate finding of the degree or percentage of the injured worker's comparative negligence. In Chaffee v. Miami Transfer Company, Inc., 288 So.2d 209 (Fla. 1974), this Court refused to apply the reading of the workers compensation statute contended for by the employer stating:

> "To say, as the employer would have us do, that in merger cases the true meaning of Section 440.15(3)(u) is that disability for purposes of that section is the greater of physical impairment where the loss of earning capacity only if there is a loss of earning capacity is to invoke a limitation or to add words to the statute not placed there by the legislature. This we may not do. Id at 215. Emphasis in the original, footnotes omitted.

In sum, the legislature never intended that the trial court make a separate finding as to the degree or percentage of the Plaintiff's comparative negligence where the Plaintiff's recovery is by settlement, in order to determine the extent to which the Insurer's entitlement to a workers compensation lien is correspondingly reduced. Neither did the legislature intend that there be a disparity between the extent the Plaintiff recovers the full value of his claim through settlement, and the extent to which the Insurer is entitled to recovery of its lien. The Plaintiff cites no authority in support of the reading of the statute for which he contends. However, the courts of this state either directly or tangentially uniformly support the Insurer's position. Therefore, the Fourth District Court of Appeal's decision should be affirmed.

The Insurer takes note that this Court has stated that it may

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exercise its prerogative to examine any asserted error in the record, and is not limited to only considering the certified question. Lawrence v. Florida East Coast Railway, 346 So.2d 1012 (Fla. 1977); Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976); Rupp v. Jackson, 238 So.2d 86 (Fla. 1970); Confederation of Canada Life Insurance Company v. Vega Y Arminan, 144 So.2d 805 (Fla. 1962). Therefore, the Insurer respectfully requests that this Court address the second issue contained in this brief.

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ARGUMENT II

THE DISTRICT COURT OF APPEAL ERRED BY DETERMINING THAT THE INSURER IS NOT ENTITLED TO MORE THAN 24% REIMBURSEMENT OF ITS OUTSTANDING LIEN WHEN THE PLAINTIFF, BY VIRTUE OF THE $3,600,000.00 SETTLEMENT, WILL RECEIVE THE FULL VALUE OF HIS TORT CLAIM THROUGH PERIODIC PAYMENTS WHICH WILL TOTAL AT LEAST THE $15,000,000.00 FOUND TO BE THE FULL VALUE OF HIS TORT CLAIM

If the Plaintiff's case had been tried, and the jury found no negligence on the part of the Plaintiff and awarded him $15,000,000.00, the jury would have had to reduce the future damage figures to present dollar value. Standard jury instruction 6.10 provides that:

> "Any amounts which you allow in damages for future medical expenses or loss of ability to earn money in the future should be reduced to the present money value and only the present money value of such amount should be included in your verdict".

This jury instruction was adopted by this Court in Florida Bar Standard Jury Instructions, 475 So.2d 682, 685 (Fla. 1985).

Before the above charge was officially adopted, it has been held that failure to give charge 6.10 is reversable error. Sea-Board Coastline Railroad Company v. Garrison, 336 So.2d 423 (Fla. 2nd DCA 1976); Seaboard Coastline Railroad Company v. Burdi, 427 So.2d 1048 (Fla. 3rd DCA 1983), Rev. Dism. 431 So.2d 988 (Fla. 1983).

The Second District Court of Appeal explained the rationale for jury instruction 6.10 as follows:

> "This instruction is based on the concept that the plaintiff will be able to profitably invest his award, so that less money is required now to compensate him for the money,

> which, absent defendant's negligence, he would not have received until some future time. Garrison, supra, at 425.

Here, the trial court determined the full value of the Plaintiff's damages to be $15,000,000.00 and that the amount of the Plaintiff's settlement is $3,600,000.00 (R at 844). However, it is likely the Plaintiff will receive more than $15,000,000.00 in periodic payments. Testimony of Mr. Reid (R at 52):

> Q. He will receive far in excess of $3,600,000.00, will he not?
> A. Yes. I calculated that up. He sure will. But he won't get it-
> Q. In fact, probably come out to around $18,000,000.00?
> A. I don't know. If you add it up, it may. But, of course, that's all in the future.

Thus, both the Fourth District Court and the trial court erred by determining that the Insurer is not entitled to more than 24% of its lien. This is due to the fact that the majority of the Plaintiff's damages are future damages, e.g. lack of ability to earn money and medical expenses. Because the jury would have had to reduce these future damages to present money value, the Plaintiff received substantially more than 24% of the full value of his claim, especially where it relates to future damages reduced to present dollar value. If this Court decides that there is insufficient evidence in the record regarding the exact extent of the Plaintiff's future damages and the extent to which they would have been reduced by a jury, it is respectfully requested that this Court remand this case to the trial court in order to receive evidence on this issue, in order to make the proper determination.

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CONCLUSION

The Insurer respectfully requests that this Court affirm the decision of the Fourth District Court of Appeal, and answer the certified question that the ratio the amount of an injured worker's settlement represents to the full value of his damages is the ratio to be used to calculate the amount the Insurer's lien is reduced pursuant to Section 440.39(3)(a), Florida Statutes. The Insurer further requests that this Court reverse the District Court's finding as to Issue II herein and remand the case to the trial court to determine the reduction of the $15,000,000.00 damage amount to present dollar value, and to determine the corresponding increase the percentage the Insurer is entitled to recover on its lien.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, together with copy of appendix attached hereto, has been furnished, by regular mail, this 7th day of October, 1987 to LARRY KLEIN, ESQUIRE, 501 South Flagler Drive, Suite 503, West Palm Beach, FL 33401; to BABBIT & HAZOURI, P.A., P.O. Box 024426, West Palm Beach, FL 33402; and to DAVID GOODWIN, ESQUIRE, 100 Chopin Plaza, Miami, FL 33131.

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