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

REPLY BRIEF ON THE MERITS OF PETITIONER KARL NIKULA, ETC.

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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?

Insurer's interpretation of the statute is grossly unfair to the plaintiff. Insurer recognizes at the bottom of page 9 of its brief that where "doubtful liability" on the part of the tortfeasor reduces the amount of the settlement, the insurer still receives 100% of its lien. Thus a plaintiff who settles a million dollar case for 10% of its value because of difficult liability must still pay back 100% of the worker's compensation benefits, while a plaintiff who settles a million dollar case for 10% of its value because of his comparative negligence must only pay back 10% of the worker's compensation benefits. Under the insurer's position, and the interpretation of the statute by the Fourth District in the present case, the insurer always gets 100% of benefits paid, regardless of the amount of the settlement, except where there is comparative negligence or limited financial responsibility. Where there is

comparative negligence, however, the insurer takes the totally inconsistent position that the amount of comparative negligence is irrelevant. Insurer then only wants the courts to consider the amount of the settlement itself. If comparative negligence did not exist in this case, and the case had been settled for 24% of its full value because of difficult liability, the insurer would take the position that the actual amount of the settlement is irrelevant and it is entitled to 100%. If the actual amount of the settlement is irrelevant under those circumstances, it is difficult to understand how it becomes relevant and is controlling where there is comparative negligence.

The legislature stated in Section 440.39(3)(a) that the insurer will recover 100% of its benefits unless the employee can demonstrate " ... that he did not recover the full value of damages sustained because of comparative negligence". If the legislature had intended the amount of the actual settlement to control it would have said so. When it limited the reasons for reducing a lien it obviously intended that those reasons (comparative negligence or limited financial responsibility) were to determine the amount of the lien.

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.

Insurer's entire argument under this issue is based on the incorrect premise that the value of this case, $15,000,000, as found by the trial court, was future value, not present value. On the contrary the trial court found the present value of the case to be worth $15,000,000 based on testimony that the jury verdict would have been $15,000,000 or more (R 44, 50, 54). Jury verdict means jury verdict. Trial courts do not reduce jury verdicts to present value, juries do that prior to rendering a verdict.

As the Fourth District recognized, this was a structured settlement, the present value of which was $3,600,000. Plaintiff did not receive $3,600,000 in cash. That was the present value of what he will receive in the future. Insurer's argument is that all of the payments plaintiff may receive in the future should be added up and not reduced to present value. Insurer argues that if there is a possibility plaintiff will receive $15,000,000 over the

remainder of his life then the settlement is really more than 24% of the lien. Insurer wants this court to ignore the difference between a plaintiff receiving $3,600,000 in cash at the present time or a plaintiff receiving future payments having a present value of $3,600,000. Insurer wants the plaintiff who elects to receive a structured settlement to have to pay back a higher amount than the plaintiff who receives all cash, even though the present value of the structured settlement is identical to the amount of the cash settlement.

On page 17 insurer states that the majority of plaintiff's damages are future damages, loss of income and medical expenses, which a jury would have had to reduce to present value. There is nothing in this record to support that statement. Insurer's own expert, defense trial counsel David Goodwin, testified that in his opinion the jury verdict on damages would have been from $7,000,000 to $10,000,000 (Dep. Goodwin pg. 7, R 814). Obviously this opinion was based on an assumption that the jury was properly instructed and properly arrived at a verdict, and that any damages which should have been reduced to present value would have been reduced to present value. Insurer's argument, therefore, is without merit. If insurer thought this argument had any merit it would most certainly have put

the numbers of the structured settlement into the record. This it did not even bother to do.

The essence of the insurer's argument is that plaintiff A who settled for $1,000,000 in cash has made a settlement of exactly the same value as plaintiff B, who receives no immediate payment, but receives $20,000 a year for the next 50 years.

The Fourth District correctly rejected this argument and held that present value, not the total amount of payments in the future, is the proper method to determine the value of a settlement.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 26th day of October, 1987, to:

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