

11-17

IN THE SUPREME COURT OF FLORIDA

CASE NO.
(Third District Court No. 86-2405)

LIBERTY MUTUAL INSURANCE
COMPANY,

Petitioner,

vs.

FRANK CHAMBERS and BRUNETTA
CHAMBERS, his wife,

Respondents.

11-337
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TALLAHASSEE, FLORIDA

PETITIONER'S BRIEF IN SUPPORT OF JURISDICTION
(Conflict Certiorari)

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CITATION AND AUTHORITY

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McNEE v. BIZ
473 So. 2d 5
(Fla. App. 4th 1985)

1

I.

INTRODUCTION

The petitioner, Liberty Mutual Insurance Company, was the workers' compensation lien holder in the trial court and it became the appellee in the District Court of Appeal, Third District, after the respondents (Frank Chambers and Brunetta Chambers, his wife) appealed to the District Court of Appeal, Third District, trial court orders enforcing this respondent's lien. In this brief of petitioner on jurisdiction, the parties will be referred to as they appear in this Court and, alternatively, as "LIBERTY" and "CHAMBERS." The symbol "A" will refer to the rule-required appendix which accompanies this brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

JURISDICTIONAL STATEMENT

The instant cause is in direct and irreconcilable conflict with the following decision:

McNEE v. BIZ, 473 So. 2d 5 (Fla. App. 4th 1985) which case holds:

* * *

"Because the appellees did nothing more than defend the judgment on appeal, we hold that the award of attorneys' fees constitutes a departure from the essential requirements of law. Consequently, we grant appellees' petition for certiorari and quash the award.

* * *

"Here, the McNees won a summary final judgment . . . and Biz appealed. . . . In the appellate phase, the McNees did nothing more than defend the judgment entered by the lower court. They did not file a cross-appeal, but simply responded to the appellant's assertions of error. Under these circumstances the

appellate court could not award \$ 57.105 fees to the successful appellant because, AS A MATTER OF LAW, the appellees' position had to embody a justiciable issue of law or fact. The judgment of the trial court carried with it a presumption of correctness. (Citation omitted.) And the defense of that judgment necessarily involved the advancement of justiciable issues. . . ." 473 So. 2d at p. 6.

* * *

III.

STATEMENT OF THE CASE AND FACTS

The pertinent facts of this case may be learned from the opinion herein sought to be reviewed (A. 1, 2):

* * *

"The order below assessing a workers' compensation lien filed under section 440.39, Florida Statutes (1985), against the settlement proceeds of a compensable medical malpractice claim is directly contrary to section 768.50, Florida Statutes (1985), as interpreted in American Motorist Insurance Co. v. Coll, 479 So. 2d 156 (Fla. 3d DCA 1985), review denied 488 So. 2d 829 (Fla. 1986), and is therefore reversed with directions to strike the notice of lien. Accord Rosabal v. Arza, 495 So. 2d 846 (Fla. 3d DCA 1986). The carrier's present contention that the rule in Coll applies only to judgments and not settlements is frivolous. See Coll, 479 So. 2d at 156; Rosabal, 495 So. 2d at 846; § 768.50(4).

"We consider, in the light of the clearly controlling effect of Coll, that the appellee's position in this case appropriately invokes section 57.105, Florida Statutes (1985). Accordingly, by separate order, we have granted the appellants' motion for appellate attorney's fees under this statute and remanded the cause for the trial court to fix the amount. Henning v. Henning, --- So. 2d ---, (Fla. 3d DCA Case No. 86-2146, opinion filed, May 12, 1987) [12 FLW 1239]." (A. 1,2)

* * *

The District Court accompanied its opinion with an order remanding the cause to the trial court for an award of fees (A. 3). Upon District Court denial of LIBERTY'S timely filed motion for rehearing (A. 9) this proceeding was instituted (A. 10).

IV.

SUMMARY OF ARGUMENT

In this action the trial court ruled in favor of LIBERTY and the losing party (CHAMBERS) appealed. LIBERTY did not cross-appeal. The District Court reversed the trial court's order and awarded attorneys' fees against LIBERTY (ostensibly because LIBERTY attempted to defend the trial court's ruling--a ruling which Chief Judge Schwartz obviously did not agree with!).

This case conflicts with McNEE v. BIZ, supra.

In McNEE, supra, the trial court ruled for McNEE. On appeal (to the Circuit Court sitting in its appellate capacity) that Court reversed the trial court's order and awarded attorneys' fees against McNEE pursuant to § 57.105, Florida Statutes. However, upon application to the District Court of Appeal, Fourth District, for certiorari review, that Court quashed the award of fees holding, inter alia:

* * *

"Because the appellees did nothing more than defend the judgment on appeal, we hold that the award of attorneys' fees constitutes a departure from the essential requirements of law. Consequently, we grant appellees' petition for certiorari and quash the award." 473 So. 2d at p. 6.

* * *

The conflict is real, the facts are indistinguishable.

V.

QUESTION PRESENTED

WHETHER THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH McNEE v. BIZ, SUPRA.

VI.

ARGUMENT

THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH McNEE v. BIZ, SUPRA.

In this action the trial court ruled for LIBERTY on its entitlement to collect under its workmen's compensation lien. Because the trial court ruled in favor of LIBERTY the losing party (CHAMBERS) appealed. LIBERTY did not cross-appeal. The District Court of Appeal, Third District, reversed the trial court's order on authority of two cases--both from the District Court of Appeal, Third District and neither one delineating in any detail the specific facts and circumstances underlying their holdings--and (then) awarded attorneys' fees against LIBERTY (LIBERTY attempted to defend the trial court's ruling by distinguishing the two Third District cases relied upon). Chief Judge Schwartz obviously did not look with favor upon any attempt to distinguish the two cases cited, apparently believing that any (appellee) litigant faced with prior "precedent" (irrespective of any distinguishing features) must in that District either agree to the correctness of that precedent or suffer the consequences of being deemed "frivolous" in failing to distinguish a particular case.

The instant cause conflicts with McNEE v. BIZ, supra. In McNEE the trial court ruled for McNEE. On appeal

(in that case to the Circuit Court sitting in its appellate capacity--a distinction without the proverbial difference) the appellate court reversed the trial court's order and awarded attorneys' fees against McNEE pursuant to § 57.105, Florida Statutes. However, upon application for certiorari review to the Fourth District Court of Appeal, that Court quashed the award of fees and in so doing held:

* * *

"Because the appellees did nothing more than defend the judgment on appeal, we hold that the award of attorneys' fees constitutes a departure from the essential requirements of law. Consequently, we grant appellees' petition for certiorari and quash the award." 473 So. 2d at p. 6.

* * *

The facts in McNEE v. BIZ are indistinguishable from the instant cause. The McNEES obtained a final judgment in the trial court. The opposition appealed. In the appellate phase the McNEES did nothing more than defend the judgment entered by the lower court. They did not file a cross-appeal, but simply responded to the appellant's assertions of error. The appellate court awarded fees. Upon review to the District Court of Appeal, Fourth District, that Court noted that an appellate court could not award § 57.105 fees to the successful appellant because:

" . . . As a matter of law, the appellees' position had to embody a justiciable issue of law or fact. The judgment of the trial court carried with it a presumption of correctness, Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) and the defense if that judgment necessarily involved the advancement of justiciable issues. (Citation omitted.)" 473 So. 2d at p. 6.

The opinion of the District Court of Appeal, Third District, sets dangerous precedent. The conflict between this

case and McNEE v. BIZ, supra, is real. The holdings of the two cases are at odds legally and the factual circumstances are indistinguishable.

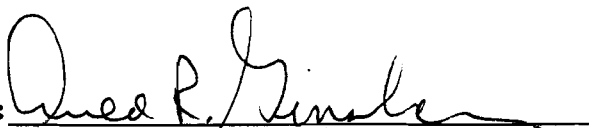
VII.

CONCLUSION

It is respectfully submitted that for the reasons set forth herein, the decision sought to be reviewed is in express and direct conflict with the decision cited. This Court should enter its order accepting jurisdiction and set this cause for consideration on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Jurisdiction and accompanying Appendix was mailed to the following counsel of record this 23rd day of October, 1987.

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