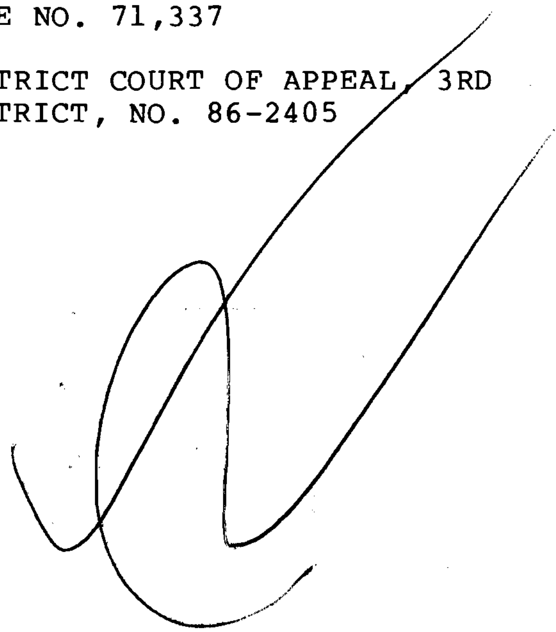
IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,337

DISTRICT COURT OF APPEAL, 3RD DISTRICT, NO. 86-2405



LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

FRANK CHAMBERS, ET UX.,

Respondents.

BRIEF OF PETITIONER ON THE MERITS

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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--plaintiffs in a third party personal injury medical negligence lawsuit] appealed to that court trial court orders enforcing (against the settlement proceeds of that lawsuit) this petitioner's statutory lien.

In this brief of petitioner on the merits the parties will be referred to as they appear in this Court and, alternatively, as "LIBERTY" and "CHAMBERS." The symbols "R" and "A" will refer to the record on appeal and the appendix accompanying this brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

The pertinent facts of this case, being neither complex nor lengthy, may be stated as follows:

A. Liberty (the workers' compensation carrier for Chambers' employer, R. 212) began paying benefits (to Chambers) after

B. Chambers, while on the job, was injured as a consequence of a fall from a ladder (R. 218);

C. Chambers, with all requisite permission and consent, presented himself for treatment at Miami's Jackson Memorial Hospital (R. 1-4);

D. Because the treatment was allegedly negligently performed, Chambers sued said medical facility/health care provider for personal injury damages [R. 1 and R. 2, paragraphs 8 (a)-(e)];

E. On the day of trial Chambers settled that lawsuit for $70,000.00 (R. 212, 215-218);

F. Liberty's statutory lien on the medical negligence settlement proceeds was contested when Chambers filed a motion to have it stricken. After numerous hearings were held the trial court entered an order denying the motion to strike the lien (R. 139, 140) and, after further hearing, entered its "ORDER DETERMINING PRO RATA DISTRIBUTION OF WORKERS' COMPENSATION LIEN" (R. 212-214);

G. Chambers appealed said orders to the Third District Court of Appeal which court, in an opinion now reported, See: CHAMBERS v. LIBERTY MUTUAL INSURANCE COMPANY, 511 So. 2d 608 (Fla.App.3d 1987), reversed the orders appealed:

* * *

> "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 Motorists 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). . ." 511 So. 2d at p. 609

H. Upon District Court denial of Liberty's motion for rehearing, this proceeding was instituted (R. 275; A. 9 and 10);

I. This brief is filed pursuant to this Court's order dated January 15, 1988.

The petitioner reserves the right to argue the significance of the above facts and other relevant record facts in the argument portion of this brief.

III.

QUESTIONS PRESENTED FOR REVIEW

A.

WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THE PLAINTIFFS' MOTION TO STRIKE THE WORKERS' COMPENSATION LIEN.

B.

ASSUMING THE INCORRECTNESS OF TRIAL COURT RULING (IN ENFORCING THE LIEN): DID THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ITSELF ERR IN AWARDING SECTION 57.105, FLORIDA STATUTE ATTORNEY FEES IN FAVOR OF CHAMBERS AND AGAINST LIBERTY?

IV.

SUMMARY OF ARGUMENT

A.

THE TRIAL COURT WAS CORRECT IN DENYING THE PLAINTIFF'S MOTION TO STRIKE THE WORKERS' COMPENSATION LIEN.

Because it is without dispute [1] that workers' compensation benefits constitute a "collateral source" within the purview of § 768.50(2), Florida Statutes (1983); and [2] that § 440.39, Florida Statutes (1983) does (by law) provide a right of subrogation [thereby fulfilling the criteria of § 768.50(4)]. It may be concluded that the trial court was correct in enforcing the subject lien. As a consequence, it may be concluded that the District Court of Appeal, Third District, was legally incorrect in reversing the trial court.

B.

THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ERRED IN AWARDING § 57.105, FLORIDA STATUTE ATTORNEY FEES IN FAVOR OF CHAMBERS AND AGAINST LIBERTY.

Liberty would respectfully suggest to this Court that it was never the intent of § 57.105, Florida Statutes, to operate under the facts and circumstances as presented herein, to-wit: Where the recipient of a favorable ruling by a trial court judge seeks to sustain that judgment on appeal. The purpose of § 57.105 is to discourage baseless claims, stonewall defenses and "sham appeals" in civil litigation by placing a price tag

through attorney's fee awards on losing parties who engage in these activities. In the instant cause the trial court ruled and Liberty was the recipient of a favorable ruling. Chambers took an appeal from the orders entered. Liberty neither cross-appealed nor found any reason to "confess error." The District Court of Appeal, Third District, found Liberty's attempts to sustain the trial court's rulings "frivolous." However, the District Court of Appeal, Fourth District, has deemed attempted defense of trial court judgment not frivolous as a matter of law. Because the Fourth District Court of Appeals's reasoning is sound, that holding should be approved by this Court as controlling law in this state.

The opinion of the District Court of Appeal, Third District, herein being reviewed, should be quashed.

V.

ARGUMENT

A.

THE TRIAL COURT WAS CORRECT IN DENYING THE PLAINTIFFS' MOTION TO STRIKE THE WORKERS' COMPENSATION LIEN.

The petitioner would suggest to this Court that the trial court was correct in denying Chambers' motion to strike the subject lien. Because the trial court's ruling was correct, Liberty urges this Court (1) to quash the opinion of the District Court of Appeal, Third District; (2) to affirm the ruling of the trial court; (3) to deny Chambers' motion(s) for attorneys' fees; (4) to disapprove the opinions rendered by the Third District Court of Appeal in AMERICAN MOTORISTS INSURANCE CO. v. COLL, 479 So. 2d 156 (Fla.App.3d 1985) and ROSABAL v. ARZA, 495 So. 2d 846 (Fla.App.3d 1986); and, (5) to approve the decision of the Second District Court of Appeal rendered recently in the case of AMERICAN MUTUAL INSURANCE COMPANY v. DECKER, ETC., ET AL., District Court of Appeal, Second District, Consolidated Case Numbers 86-851, 86-1717, 86-2774, 86-2866, Opinion filed December 4, 1987 (A. 11-20), specifically that portion of the opinion holding (that):

> ". . .the collateral source provider, statutorily endowed with a right of subrogation, may file its notice of lien in the medical malpractice proceeding and recover its payments originating in the workers' compensation claim which were enlarged by reason of the medical negligence; the medical malpractice defendant pays the entire judgment attributable to the post-industrial accident negligence; and the claimant retains only that portion of the

> negligence judgment for which he has not received the benefits under the workers' compensation statute . . ." (A. 17).

The genesis of the subject issue is § 768.50, Florida Statutes (1983) which statute, at all times pertinent herein, provided in essence and pertinent part:

* * *

> "In any action for damages for personal injury or wrongful death, whether in tort or in contract, arising out of the rendition of professional services by a health care provider in which liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the claimant <u>from all collateral sources</u> which are available to him; <u>however, there shall be no reduction for collateral sources for which a subrogation right exists</u>. Upon a finding of liability and an awarding of damages by the trier of fact, the court shall receive evidence from the claimant and other appropriate persons concerning the total amounts of collateral sources which have been paid for the benefit of the claimant or are otherwise available to him. The court shall also take testimony of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury, and shall offset any restriction in the award by such amounts.

* * *

The statute, in §§ (2)(a)-(c), identifies what constitutes "collateral sources" and then provides, at § 4:

* * *

> "UNLESS OTHERWISE EXPRESSLY PROVIDED BY LAW, no insurer or any other party providing collateral source benefits as defined in subsection (2) shall be entitled to recover the amounts of any such

> benefits from the defendant or any other person or entity, and no right of subrogation or assignment of rights of recovery shall exist. All policies of insurance providing benefits described in this section shall be construed in accordance with this section after the effective date of this Act."

Also highly pertinent to the issues before this Court is § 440.39, Florida Statutes (1983), which at all times relevant provided:

* * *

> "(3)(a) In all claims or actions at law against a third party tort feasor, 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... 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, <u>which notice shall constitute a lien</u> <u>UPON ANY JUDGMENT OR SETTLEMENT RECOVERED TO THE EXTENT THAT THE COURT MAY DETERMINE TO BE THEIR</u> PRO RATA SHARE FOR COMPENSATION AND MEDICAL BENEFITS PAID OR TO BE PAID under the provisions of this law..."

* * *

Because it is without dispute (1) that workers' compensation benefits constitute a "collateral source" within the purview of § 768.50(2), Florida Statutes (1983) and (2) that § 440.39, Florida Statutes (1983) DOES (by law) provide a right of subrogation (thereby fulfilling the criteria of § 768.50(4) "UNLESS OTHERWISE EXPRESSLY PROVIDED BY LAW. . .", it may be concluded that (in the instant cause) <u>the trial court was correct in enforcing the subject lien</u>! It may also then be concluded that the District Court of Appeal, Third District, <u>was incorrect</u> in reversing the trial court for enforcing the lien.

In rendering the opinion herein being reviewed the District Court relied upon:

> ". . .section 768.50, Florida Statutes (1985) as interpreted in American Motorists Insurance Company v. Coll, 479 So. 2d 156 (Fla. 3d DCA 1985), review denied, 488 So. 2d 829 (Fla. 1986). . ." 511 So. 2d at p. 609.

Liberty would respectfully suggest to this Court that when one turns to COLL, supra, to ascertain just how it "interprets" § 768.50, Florida Statutes, one finds not interpretation but, rather, "conclusion." In its entirety COLL, supra, provides:

* * *

> "We have for review an order striking a notice of workers' compensation lien filed by the appellants, American Motorists Insurance Company, a workers' compensation carrier, which notice claims that the carrier had paid increased workers' compensation benefits because of the alleged negligence of the appellees. We affirm the order upon a holding that a workers' compensation carrier is a party providing 'collateral source benefits' as that term is defined in section 768.50(2), Florida Statutes (1983), and is therefore legislatively disentitled to recover 'the amounts of any such benefits from the defendants or any other person or entity, and no right of subrogation or assignment of rights of recovery shall exist. § 768.50(4), Fla.Stat. (1983). Affirmed." 479 So. 2d at p. 157.

With all due respect to the District Court, the only "interpretation" one can glean from within the four corners of the COLL decision is "interpretation by omission", to-wit: The District Court ignored not only the significance of the first four words provided in section (4) of 768.50, Florida Statutes, but it also ignored their existence! Since, in Florida, a court may not invoke a limitation, ignore or add words to a statute not placed there by the legislature, See: CHAFFEE v.

MIAMI TRANSFER COMPANY, INC., 288 So. 2d 209 (Fla. 1974) and cases cited therein, it is clear the District Court of Appeal, Third District, erred.

Recently, the Second District Court of Appeal had occasion to comment on the Third District's decision in COLL, supra. In the case of AMERICAN MUTUAL INSURANCE COMPANY v. DECKER, ETC., ET AL., supra, the Court addressed the subject issue and in disagreeing with the Third District's "holding" in COLL, stated:

> "We find nothing in Coll to explicate why section 768.50(4) prefatory words are meaningless. In our view those words are critical and control the outcome of the present controversy. . ." (A. 15).

In AMERICAN MUTUAL INSURANCE COMPANY v. DECKER, supra, the Second District--on facts similar (if not virtually identical) to the facts of this case--had occasion to address the subject issue and in language highly pertinent herein noted:

> "Thus, the collateral source provider, statutorily endowed with a right of subrogation, may file its notice of lien in the medical malpractice proceeding and recover its payments originating in the workers' compensation claim which were enlarged by reason of the medical negligence; the medical malpractice defendant pays the entire judgment attributable to the post-industrial accident negligence; and the claimant retains only that portion of the negligence judgment for which he has not received benefits under the workers' compensation statute. Coll cannot be squared with the foregoing analysis; if it were followed, the unfairness of consequences (2) and (3) would be assured. . ." (A. 17).

Lastly, at the risk of injecting into this case a factor which all cases seem to accept as true [perhaps because during any litigation process abstractions of law do not always meld

with "real world" considerations, hence some necessary glossing of distinctions need be made and "common sense" considerations by necessity are "read into" any given set of circumstances], the issue posited herein [whether or not the trial court erred in denying Chambers' motion to strike Liberty's lien] can be resolved (whether or not it should be resolved with marked simplicity remains to be seen) with an affirmative answer to the following question:

> DOES § 768.50, FLORIDA STATUTES (1983) EXCLUDE A SETTLEMENT?

If it does (and by its express language it would seem to so do --§ 768.50 makes no utilization, mention or reference to the word "settlement"), the trial court must still be affirmed and the opinion herein being reviewed must still be quashed. This is so because of the existence of § 440.39, Florida Statutes (1983) which itself recognizes that the notice of lien:

> ". . .shall constitute a lien upon any judgment OR SETTLEMENT recovered . . ." See § 440.39(3)(a), Florida Statutes.

In PINILLOS v. CEDARS OF LEBANON HOSPITAL CORPORATION, 403 So. 2d 365 (Fla. 1981), this Court upheld the constitutionality of § 768.50, Florida Statutes (1979) and, in so doing, directly discussed its applicability to a medical malpractice action. This Court stated:

> "This section requires that any judgment in a medical malpractice action be reduced by any amount which the plaintiff has received from collateral sources." 403 So. 2d at p. 366.

It may thus be concluded that the District Court of Appeal, Third District, was incorrect in faulting the trial court for not following COLL, supra, in that the trial court was correct in not deciding this case upon its authority. Irrespective of what the District Court of Appeal, Third District, held in COLL, it may be argued that the trial court's ruling was bottomed upon an entirely different factual situation than was found in COLL. Since, under § 440.39, Florida Statutes (1983), a workers' compensation carrier has a lien upon "any judgment or settlement recovered", and since by its own terms § 768.50, Florida Statutes (1983) applies only to actions for damages in which ". . .liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant for losses sustained. . .", it is clear Liberty is not (and has never been) "legislatively disentitled" to recover. In point of fact, it should be noted that if § 768.50 needed to be interpreted, such interpretation should have centered on whether or not the above quoted language was broad enough to include "settlement."

Liberty recognizes that the issues addressed above need not herein be reached if this Court agrees that COLL (and its Third District progeny) was wrongly decided and that the Second District Court of Appeal was correct when it concluded:

> ". . .We find nothing in Coll to explicate why Section 768.50(4)'s prefatory words are meaningless. In our view those words are critical and control the outcome of the present controversies. . ." (A. 15).

However, since § 768.50 makes no specific mention of the word "settlement" and appears to apply to all circumstances other than settlement, Liberty advances its inquiry in an abundance of appellate caution.

While on the subject of "appellate caution", Liberty would additionally argue the following.

B.

ASSUMING THE INCORRECTNESS OF TRIAL COURT RULING (IN ENFORCING THE LIEN), THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ITSELF ERRED IN AWARDING § 57.105, FLORIDA STATUTE ATTORNEY FEES IN FAVOR OF CHAMBERS AND AGAINST LIBERTY.

This issue has been addressed by the District Court of Appeal, Fourth District, in the case of McNEE v. BIZ, 473 So. 2d 5 (Fla.App.4th 1985), which case holds:

* * *

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

* * *

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 attorney's 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 attorney's fees constitutes a departure from the essential requirements of law. . ." 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 appellee's 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 of that judgment necessarily involved the advancement of justiciable issues. (Citation omitted)." 473 So. 2d at p. 6.

The opinion rendered herein by the District Court of Appeal, Third District, sets dangerous precedent because it requires a litigant faced with prior "precedent" (irrespective of any distinguishing features) to either agree to the correctness of that precedent or suffer the consequences of being deemed "frivolous" in failing (in good faith) to distinguish that particular (single) precedent. The Third District's holding

is particularly troublesome in light of the constitutional makeup of our appellate court system. We have, at the present time, five District Courts of Appeal. Each District Court of Appeal has the capacity for rendering opinions not necessarily representative of the majority opinion of the entire court. This is precisely why "rehearings en banc" have recently become more prevalent.

Liberty would respectfully suggest to this Court that it was never the intent of § 57.105, Florida Statutes, to operate under the facts and circumstances as presented herein, to-wit: Where the recipient of a favorable ruling by a trial court judge seeks to sustain that judgment on appeal. See: WHITTEN v. PROGRESSIVE CASUALTY INSURANCE CO., 410 So. 2d 501 (Fla. 1982) and cases cited therein. As this Court noted in WHITTEN, supra, as it cited to its prior opinion in TREAT v. STATE ex rel MITTON, 163 So. 883 (Fla. 1935):

> "An appeal is not frivolous where a substantial, justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it. . ." 163 So. at pp. 883 and 884.

The purpose of § 57.105 is to discourage baseless claims, stonewall defenses, and "sham appeals" in civil litigation by placing a price tag through attorney's fee awards on losing parties who engage in these activities. In the instant cause the trial court ruled (rightly or wrongly) which ruling necessitated Chambers taking an appeal from the orders entered. The District Court of Appeal, Fourth District, has deemed the

attempted defense of trial court judgment not frivolous as a matter of law. That holding should be approved by this Court as controlling law in this state.

Finally, Liberty would emphasize that the "challenge to COLL", found frivolous by the Third District Court of Appeal, was deemed meritorious by the Second District in AMERICAN MUTUAL INSURANCE COMPANY v. DECKER, supra, when that Court itself observed:

> "We decline to embrace the result in Coll, however, because we are persuaded that the Third District failed to accord section 768.50 its full significance." (A. 15).

Liberty would argue to this Court that COLL was wrongly decided and it should be disapproved. HOWEVER, even assuming this Court were to find (1) COLL meritorious; (2) the trial court's ruling in this case to be erroneous; and (3) that the Third District's opinion reached a legally correct result (albeit for the wrong reasons), that portion of the opinion herein being reviewed which found "frivolity" to Liberty's contentions should still be quashed for any and all of the reasons found and advanced in this portion of this brief. In point of fact, irrespective of the ultimate outcome of this case--recognition by this Court of conflict between this case and McNEE, supra, should itself require a quashing of at least a part of the Third District's opinion. See: WHITTEN, supra; TREAT, supra; and McNEE v. BIZ, supra.

The trial court's rulings should be affirmed.

VI.

CONCLUSION

Based upon the foregoing reasons and citations of authority, Liberty would suggest to this Court that the trial court was correct in denying Chambers' motion to strike the subject lien. Because the trial court's ruling was correct, Liberty urges this Court (A) to quash the opinion of the Third District herein being reviewed; (B) to affirm the rulings of the trial court; (C) to deny Chambers' motions for attorney's fees; (D) to disapprove the opinions rendered by the Third District Court of Appeal in COLL and its Third District progeny; and (E) to approve the opinion recently rendered by the Second District Court of Appeal in AMERICAN MUTUAL INSURANCE COMPANY v. DECKER, supra.

Respectfully submitted,

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VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on the Merits was served, by U.S. mail, this 9th day of February, 1988 on opposing counsel:

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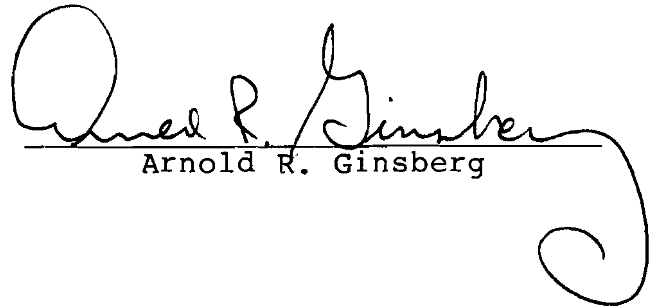

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