3-28 O/A 4-28-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,337

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

LIBERTY MUTUAL INSURANCE COMPANY,

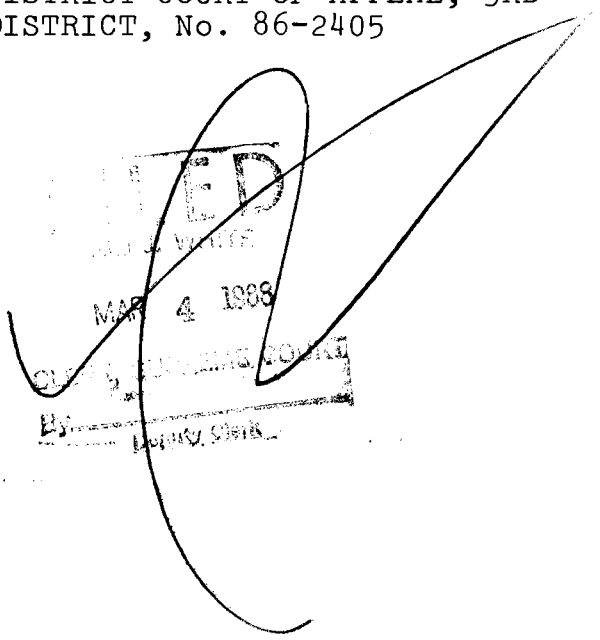
Petitioner,

vs.

FRANK CHAMBERS, ET UX.,

Respondents.

_____/



BRIEF OF RESPONDENTS ON THE MERITS

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INTRODUCTION

The Respondents, FRANK CHAMBERS and BRUNETTA CHAMBERS, his wife, were the Plaintiffs in a medical malpractice action brought in Dade County Circuit Court. By virtue of a lien having been imposed upon the proceeds of their after-the-fact settlement, they became Appellants in the District Court of Appeal, Third District and are now Respondents in this Court. The Petitioner, LIBERTY MUTUAL INSURANCE COMPANY became a workers' compensation lienholder in the trial court and the Appellee in the District Court of Appeal, Third District, after the trial court refused to strike an alleged lien on the proceeds of the Respondents' settlement with the third party tortfeasor. After reversal of the trial court's decision by the Third District Court of appeal, LIBERTY MUTUAL INSURANCE COMPANY has become the Petitioner in these proceedings.

In this Brief, the parties shall be referred to as "CHAMBERS" and "LIBERTY MUTUAL". The symbols "R" and "A" will refer to the record on appeal and appendix accompanying this Brief, respectively.

All emphasis contained in this Brief has been supplied unless otherwise indicated.

II

STATEMENT OF THE CASE AND FACTS

CHAMBERS shall take the liberty of restating the facts of this case as certain salient points have been conveniently discarded by LIBERTY MUTUAL.

The Respondent was injured on July 2, 1982 when he fell off a ladder on a work-related accident. (R-1-4). On July 7, 1982, CHAMBERS went to Jackson Memorial Hospital for treatment of his injuries. (R-1-4). During treatment at Jackson Memorial Hospital, the physicians allegedly committed medical malpractice. (R-1-4). Prior to his treatment, CHAMBERS had revealed in a medical questionnaire to the physicians that he was a diabetic and thus, the physician should have known not to treat in the manner as they did. (R-1-4). CHAMBERS was subsequently sent home from the hospital, however, several days later, and as a result of his diabetic condition, Appellant returned to the hospital where his leg, which had developed inoperable gangrene, required amputation. (R-4). The Carrier had never authorized the claimant to be treated by doctors at Jackson.

A medical malpractice complaint was subsquently filed on behalf of CHAMBERS by the undersigned law office alleging the hospital's negligence in the care and treatment of him while at the emergency room. (R-1-4). While the trial was in progress the claim was settled for $70,000.00 on November 26, 1984. (R-212).

Subsequent to his settlement, and after LIBERTY

MUTUAL had had prior notice that a medical malpractice complaint was being filed by CHAMBERS, LIBERTY MUTUAL untimely filed a notice of subrogation lien pursuant to Chapter 440.39, Florida Statutes on November 29, 1984. (R-93; A-1,2). By so filing, LIBERTY MUTUAL sought to attach the proceeds in progress recovered by CHAMBERS after settlement with the tortfeasor (a joint stipulation having been entered into between the original parties, and the jury dismissed).

CHAMBERS therefore timely filed his Motion to Strike Workers' Compensation lien. (R-89-90). In the Motion, it was alleged by CHAMBERS that the only "notice" he received regarding the attempt to impose a workers' compensation lien had been subsequent to the settlement with the tortfeasor and that no such lien had ever been filed appropriately giving him or his attorneys notice so that said lien could be taken into consideration in settling or continuing with the trial to verdict. (R-89-90). Further, it was also alleged in the Motion to Strike the Lien that the tortious act of medical malpractice does not arise in a employer/employee relationship and thus does not arise out of work-related duties. (R-89-90).

After numerous hearings before various Circuit Court Judges, the issue of the propriety of the attempt to enforce a workers' compensation lien on a medical malpractice settlement was heard on December 4, 1984. During the course of the argument, the failure to file the lien was conceded by LIBERTY MUTUAL. (R-222, 228, 250). The Court asked for memoranda to be submitted on a variety of issues, including the issue

of equitable distribution given the fact that the case was settled for far less than its value in light of the sovereign immunity of Jackson Memorial Hospital (i.e. The Public Health Trust of Dade County).

On March 14, 1986, a hearing was held before the trial Judge (Volume III, TR-1). Prior to that hearing, CHAMBERS submitted to the trial Court of the Third District Court of Appeals opinion in American Motorists Insurance Company v. Coll, 479 So.2d 156 (Fla. 3DCA 1985). (R-133). Both the Coll decision was argued at the hearing as well as the fact that LIBERTY MUTUAL had failed to file a lien and had conceded same. (Vol. I, TR-3). While completely disregarding LIBERTY MUTUAL'S failure to file the lien issue, the Court solely addressed the Coll decision before ordering equitable distribution. The Court stated as follows:

> "You see, the problem is that I don't know that anybody can really deal with the effect of the American Motors-we are just better off, you know, probably getting into the special aspect of it." (Vol. III, TR-5).

Accordingly, the court entered its ORDER DETERMINING PRO RATA DISTRIBUTION OF WORKERS' COMPENSATION LIEN BY WHICH THE COURT DENIED THE STRIKING OF THE LIEN AND DETERMINED, PURSUANT TO SECTION 440.39(3)(a), Fla. Statutes, the amount of the lien to be imposed upon the medical malpractice proceeds. (R-212-214).

A timely Notice of Appeal was then filed by CHAMBERS

in which it attacked the trial court's Order on a threefold basis. Firstly, CHAMBERS argued that the American Motorists Insurance Company v. Coll, supra, case was controlling in that the Third District had clearly stated in that decision, as well as several subsequent decisions that had been rendered by the Court, that a workers' compensation lien cannot be imposed upon a medical malpractice settlement pursuant to the dictates of Section 768.50, Florida Statutes. Next CHAMBERS argued that LIBERTY MUTUAL had failed to timely file its lien until subsequent to the actual settlement of the malpractice case even after their workers' compensation attorney received notice from counsel for CHAMBERS that a malpractice complaint had been filed. Finally, CHAMBERS argued that a medical malpractice injury which occurs subsequent to the work-related injury does not arise out of the employment relationship and thus, is not a work-related injury for which a lien attaches in favor of a workers' compensation carrier.

In addition, because of the clear controlling precedent of the Coll decision as well as the admission on the part of LIBERTY MUTUAL that it had not timely filed its lien, CHAMBERS filed a Motion for Attorneys' Fees for Services in the Appellate Court. (A-2-3). CHAMBERS, by and through his counsel, sought attorneys' fees on several grounds:

(1) That given the clear precedent of the Coll decision and that no valid attempt had been made to distinguish the Coll decision at the trial level, he was entitled to

attorneys' fees under Section 57.105, Florida Statutes and

(2) That Section 440.34(5) provides that:

> "5. If any proceedings are had for a review of any claim, award, or compensation order before any Court, the Court may award the injured employee or dependent an attorneys fee to be paid by the employer or carrier, in its discretion, which shall be paid as the Court may direct."

No response to CHAMBERS' Motion for Attorney's Fees was filed by LIBERTY MUTUAL in the Appellate Court.

Subsequently, on June 23rd, 1987, the Appellate Court, per Chief Judge Schwartz, entered an Order Striking the workers' compensation lien against the medical malpractice setlement proceeds as being contrary to Section 768.50 as interpreted in the Coll decision. Further, the Third District also opined that the argument put forth by LIBERTY MUTUAL to the effect that the Coll case applies only to judgments and not settlements was a frivolous argument. (A-4-6). While not addressing the other grounds for which CHAMBERS moved for attorneys' fees, the Court ruled that in light of the frivolous argument put forth by LIBERTY MUTUAL, the attorneys' fees motion should be granted pursuant to Section 57.105, Florida Statutes.

After LIBERTY MUTUAL'S Motion for Rehearing en banc was denied by the Third District, the discretionary jurisdiction of this Court was invoked. The invocation of jurisdiction was premised upon LIBERTY MUTUAL'S argument that the mere

defense of a trial Court's judgment in an Appellate Court cannot invoke the attorneys' fees sanction of Section 57.105 (relying upon the decision of the Fourth District in McNee v. Biz, 473 So.2d 5 (Fla. 4th DCA 1985).

This Court accepted conflict jurisdiction and hence, this current proceeding.

III

QUESTIONS PRESENTED FOR REVIEW

A.

WHETHER THE TRIAL COURT ERRED IN FAILING TO STRIKE A WORKERS' COMPENSATION LIEN IMPOSED UPON A MEDICAL MALPRACTICE RECOVERY AGAINST A THIRD PARTY TORTFEASOR.

B.

ASSUMING THE INCORRECTNESS OF THE TRIAL COURT'S RULING (IN FAILING TO STRIKE THE LIEN); WHETHER THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, WAS CORRECT IN AWARDING ATTORNEYS' FEES IN FAVOR OF RESPONDENT, A WORKERS' COMPENSATION CLAIMANT, AND AGAINST PETITIONER, A WORKERS' COMPENSATION CARRIER/INSURER PURSUANT TO SECTION 57.105 AND/OR section 440.34(5), FLORIDA STATUTES.

IV

SUMMARY OF ARGUMENT

A

THE TRIAL COURT ERRED IN FAILING TO STRIKE A WORKERS' COMPENSATION LIEN IMPOSED UPON A MEDICAL MALPRACTICE RECOVERY AGAINST A THIRD PARTY TORTFEASOR.

It is obvious that the trial court erred in failing to strike the workers' compensation lien in that the compensation carrier, LIBERTY MUTUAL, failed to file its Notice of Lien pursuant to Section 440.39(3)(a) notwithstanding the fact that it had been placed on notice that a Complaint for Medical Malpractice had been filed by counsel for CHAMBERS. (A-7-9).

Finally, the Court erred in failing to strike the workers' compensation lien by refusing to recognize the clear precedent and correctness of the Coll decision and Section 768.50, Florida Statutes, which clearly provides that workers' compensation benefits constitute a collateral source benefit as defined by subsection (2) of said Statute and thus there is no right of subrogation in a medical malpractice setting.

B

THE DISTRICT COURT WAS CORRECT IN AWARDING ATTORNEYS' FEES IN FAVOR OF RESPONDENT, A WORKERS' COMPENSATION CLAIMANT, AND AGAINST PETITIONER, A WORKERS' COMPENSATION CARRIER/INSURER PURSUANT TO SECTION 57.105 AND/OR SECTION 440.34(5), FLORIDA STATUTES.

Assuming that the Third District was correct in

striking the workers' compensation lien (either because it felt that 768.50 was controlling or for the reason that the compensation carrier failed to timely perfect its lien) it is eminently clear that appellate attorneys' fees were appropriate. The Appellate Court, per Chief Judge Schwartz, found that LIBERTY MUTUAL'S attempt to distinguish the Coll decision was nothing more than a frivolous and thinly veiled attempt to have another panel of the Third District review its decision in the Coll case. Having found that the argument put forth by LIBERTY MUTUAL was frivolous (i.e. that 768.50 only dealt with judgments and not malpractice settlements), the Court appropriately awarded appellate attorneys' fees pursuant to Section 57.105.

Even assuming arguendo that 57.105 might not be appropriate in this scenario, it is respectfully suggested that the Court was nevertheless correct in entering attorneys' fees in favor of CHAMBERS, a workers' compensation claimant, pursuant to the clear dictates of Section 440.34(5) for the successful thwarting of an attempt to wrongfully impose a lien on this settlement by LIBERTY MUTUAL. Based upon either of the above statutes, attorneys' fees were appropriate in this action as the imposition of a lien, given the facts of this case, were clearly improper.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO STRIKE A WORKERS' COMPENSATION LIEN IMPOSED UPON A MEDICAL MALPRACTICE RECOVERY AGAINST A THIRD PARTY TORTFEASOR.

Though this Court granted certiorari jurisdiction to hear this matter predicated upon the attorneys' fees issue, it is clear that the underlying cause of action, to wit; the propriety vel non of the trial court's failing to strike the workers' compensation lien, is, in many respects determinative of the attorneys' fees issue. Accordingly, in keeping with LIBERTY MUTUAL'S format in its brief, CHAMBERS will initially address this issue.

The Third District Court of Appeal, in American Motorists Insurance Company v. Coll, 479 So.2d 156 (Fla. 3 DCA 1985), review denied, 488 So.2d 829 (Fla. 1986) clearly and plainly held that workers' compensation benefits are a collateral source pursuant to Section 768.50 and thus cannot be the subject of a lien filed in an action whereby a claimant recovers against a health care provider for medical malpractice, see also Rosabal v. Arza, 995 So.2d 846 (Fla. 3 DCA 1986).

Section 768.50, Florida Statutes provides, in pertinent part that:

> "In any action for damages for personal injury or wrongful death, whether in tort or in contact, arising out of the rendition of professional services by a health care provider in which liability is admitted or is determined by the trial of fact and damages are awarded to compensation the claimant for losses

> sustained, the court shall reduce the amount of such award by the total of all amounts paid to the claimant from all collateral sources which are available to him; however, there shall be no reduction for collateral sources for which a subrogation right exists. 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 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 restrictions in the award by such amounts."

Collateral sources are defined within Section 768.50, Florida Statutes as follows:

> "(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 effect date of this act."

It is the position of LIBERTY MUTUAL that the above statutory sections, when read in conjunction with Section 440.39, Florida Statutes does provide the right of a compensation lien in a subsequent medical malpractice action.

This position was adhered to in a recent decision of the Second District Court of Appeal in American Mutual Insurance Company v. Decker, ____ So.2d _____ (2nd DCA 1988), Case Nos. 86-851. 86-1717, 86-2774, 86-2866, opinion filed December 4, 1987. In pertinent part, said section provides that:

> "(3)(a) In all claims or action 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, which 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 error in relying upon Section 440.39 as somehow providing for the workers' compensation lien in a medical malpractice scenario is that Section 768.50 expressly deals with medical malpractice and thus, a general statute such as Section 440.39 cannot override the specific dictates of Section 768.50[1]. It goes without saying that Section 768.50 clearly defines workers' compensation benefits as a collateral

1. See State v. Young, 357 So.2d 416, 417 (Fla. 2 DCA 1978)(stating that a statute dealing specifically with a subject takes precedent over another statute covering the same subject in general terms), citing Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959).

source for which there is no right to impose a lien.

To illustrate the above point, one need only turn to Florida's NO FAULT AUTOMOBILE LAW. Section 627.7372, Florida Statutes controls the issue of whether workers' compensation benefits can constitute a collateral source in automobile accident recoveries. Said statutory section clearly provides that workers' compensation benefits are not a collateral source and thus, a lien can be imposed upon the proceeds of any recovery, be it via a settlement or verdict[2].

While Section 627.7372(3) clearly provides that workers' compensation benefits are not to be considered a collateral source (thus allowing a lien to be filed against proceeds recovered) there is no such limitation in the medical negligence collateral source rule of Section 768.50 where it is eminently clear that workers' compensation benefits are considered a collateral source for which a claimant's recovery is subject to reduction by the court to avoid a double recovery and for which the compensation carrier is not entitled to a compensation lien.

It is interesting to note that Subsection 3 of Section 628.7372 was enacted by the Legislature in 1979 as part of an omnibus revision of the Workers' Compensation Law. See

2. There are two areas of personal injury tort litigation where a claimant's recovery is reduced to the extent of collateral source benefits received. Workers' compensation pursuant to Section 768.50 is one area while automobile negligence pursuant to Section 627.7372 is the other. See Pinillos v. Cedars of Lebanon Hos. Corp., 403 So.2d 365 (Fla 1981) regarding the constitutionality of Section 768.50, Fla. Statutes and Purdy v. Gulf Breeze Ent., Inc., 403 So.2d 1335 (Fla. 1981) for the constitutionality of Section 627.7372.

Ch. 79-40, Laws of Florida at pg. 301. This was three years after Section 768.50 had been enacted. See, Ch. 76-26, Law of Florida, pg. 691-692. Consequently, the Legislature must be presumed to have been mindful of the medical malpractice exception of the collateral source rule in Section 768.50, supra. The use of differing terms in separate statutes indicate differing results were contended, and the courts have so presumed. See, generally, 49 Fla.Jur.2d Statutes, Section 133; 73 Am.Jur.2d Statutes, Section 235.

If, as the Second District opined in the Decker case and as LIBERTY MUTUAL is arguing sub judice that Section 440.39 permits the filing of a lien in all recoveries against a third party tortfeasor, then the specific language of Sections 627.7372 and 768.50, providing for the filing of a lien in automobile accident recoveries against a third party tortfeasor in the former and denying the filing of a lien against a health care provider in the latter would be completely superfluous and of no meaning.

It is quite clear from a review of these specific statutes in both automobile negligence and medical malpractice negligence that workers' compensation benefits may be the subject of a lien in the former (not a collateral source by definition) and may not be a lien in the latter (defined as a collateral source). This is the specific intent of the Legislature regarding the above two areas of litigation.

Certainly, the plain specifics of medical malpractice

recovery and automobile tort recovery as spelled out in their specific controlling statutes must clearly be applied over the more general statute of Section 440.39 which merely allows workers' compensation liens to be filed against third party tortfeasors. To state otherwise would be to obviate the specific language of both of the statutes referred to above and impliedly repeal them.

Next, even assuming that, for the sake of argument, this Court should find that a workers' compensation lien may be filed in a subsequent medical malpractice recovery, it is respectfully submitted that the Third District Court of Appeal was eminently correct in its ultimate ruling of striking the lien in that no lien was timely perfected. There is no question but that LIBERTY MUTUAL failed to timely file a lien in accordance with the dictates of Section 440.39 until after the settlement had been effected[3]. Further, there is no question but that LIBERTY MUTUAL'S counsel clearly had knowledge of the fact that CHAMBERS had filed a medical malpractice cause of action against Jackson Memorial Hospital (The Public Health Trust) because it requested a copy of the Complaint and thus, with the complaint in their possession, no legimate argument can be made that LIBERTY MUTUAL was not placed on notice. Accordingly, as no lien had been filed pursuant to the dictates of the aforementioned statute, the Third District

3. A copy of said lien is attached in the Appendix on page 1. Said lien shows a certificate of service dated November 29, 1984, (after the settlement) and a filing of same on November 30, 1984. (R-93).

Court of Appeal could easily have struck the lien on that basis, had it chosen to address that issue[4].

Obviously, the attorneys for CHAMBERS would not have settled a medical malpractice action worth far in excess of the statutory limit of $100,000.00 for some $70,000.00 had it realized that LIBERTY MUTUAL would attempt to impose a lien amounting to some $25,000.00 on the proceeds of recovery.

Finally, LIBERTY MUTUAL has argued that Section 768.50 only controls when a trier of fact has rendered a decision [verdict] leading to a judgment. It is LIBERTY MUTUAL'S position that settlements are excluded from the lien prohibition of said Statute. It is precisely this argument that the Third District found frivolous. One must only keep in mind that to force a trial to the end in all medical malpractice cases in order to avoid the imposition of a lien would lead to the most foolish of results, including a waste of judicial labor. Obviously, as long as a settlement is negotiated which takes into consideration collateral source benefits (such as workers' compensation in a medical malpractice scenario) there will be no double recovery inuring to the benefit of a claimant and a medical/health care provider will not bear the full burden of its negligence.

Sub judice, this case was settled for far less than

4. It is also interesting to note that LIBERTY MUTUAL, having been put on notice, failed to file a medical malpractice complaint on behalf of CHAMBERS within the time frame of Section 440.39, as it has the right to do.

its value as specifically determined by Judge Esquiroz upon testimony in her Order on Pro Rata Distribution under appeal. Accordingly, to require a jury trial in all medical malpractice cases in order to obviate the imposition of the lien which in any event is not permisible under Section 768.50, would be to require needless and time consuming litigation to no one's benefit. Moreover, it would be contrary to a sound public policy.

In sum, the specific definition of Section 768.50 which includes workers' compensation benefits as a collateral source is far more persuasive where legislative intent is concerned than a general statute found within Chapter 440, which provides for the filing of workers' compensation liens against third party tortfeasors. To hold otherwise would be to render meaningless the specifics of Section 768.50 and Section 627.7372(3) relating to collateral sources.

Finally, as LIBERTY MUTUAL, by its own admission failed to timely file its lien in this proceeding it should not be entitled to enforce a lien upon the proceeds in this matter under any set of circumstances.

II

THE DISTRICT COURT WAS CORRECT IN AWARDING ATTORNEYS' FEES IN FAVOR OF RESPONDENT, A WORKERS' COMPENSATION CLAIMANT, AND AGAINST PETITIONER, A WORKERS' COMPENSATION CARRIER/ INSURER PURSUANT TO SECTION 57.105 AND/OR SECTION 440.34(5), FLORIDA STATUTES.

This Honorable Court accepted jurisdiction on this

case predicated upon an alleged conflict between this matter and the case of McNee v. Biz, 473 So.2d 5 (Fla. 4 DCA 1985). It is again respectfully suggested that there is no conflict in that the McNee case merely holds that the defense of a trial court order in the Appellate Court cannot give rise to an award pursuant to Section 57.105, Florida Statutes, pertaining to non-justiciable issues. In actuality, however, what the instant case contains that the McNee court did not have is the fact that Chief Judge Schwartz specifically found that the argument put forward by counsel for LIBERTY MUTUAL in the Appellate Court was, in fact, frivolous and a veiled attempt to have a different panel of the Third District overrule its prior decision in Coll which is, by all accounts, controlling. Further, LIBERTY MUTUAL'S counsel during the trial and post settlement proceedings was aware of the Coll decision but refused to acknowledge it before the trial Judge, necessitating this appeal to the Third District. Accordingly, the McNee case had neither precedent setting case law nor a finding of a "frivolous argument" before the appellate court as was found in this instant case in the Third District decision sub judice.

Nevertheless, it is clear that attorneys' fees were properly awarded to counsel for CHAMBERS on either one of two theories. Firstly, Section 57.105 was correctly invoked by the Court in that counsel for LIBERTY MUTUAL merely attempted to re-argue the incorrectness of the Coll decision. In an

attempt to persuade the Court that Coll did not apply to the instant case, counsel for LIBERTY MUTUAL argued that Section 768.50, Florida Statutes, only applied to judgments and not settlements. The Court, finding that argument frivolous, ordered attorneys' fees. As stated in Galbraith v. Inglese, 402 So.2d 574 (Fla. 4 DCA 1981), the purpose behind Section 57.105 is to discourage baseless claims and sham appeals. See also Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982).

Further, Section 57.105 would have been properly invoked in any event by virtue of the fact that LIBERTY MUTUAL had never filed its lien in this matter and thus attempted to impose a lien on settlement without having first complied with Section 440.39 pertaining to the necessity of the filing of same in a civil action for damages. Thus, as previously stated and argued in this brief, there was no factual issue presented on the record to the effect that LIBERTY MUTUAL had ever complied with the prerequisites for establishing its lien, and thus, an award for attorneys' fees pursuant to Section 57.105 is clearly appropriate.

The Motion for Attorneys' Fees filed in the Appellate Court by CHAMBERS (A-2-3) sought attorneys' fees on another basis besides Section 57.105. Specifically, CHAMBERS sought attorneys' fees pursuant to Section 440.34(5), Florida Statutes, which provide that:

> "If any proceedings are had for review of any claim, award, or compensation order before any court, the court may award the injured employee or dependent an attorney's fee to be paid by the employer or carrier, in its discretion which will be paid as the court may direct."

Accordingly, even if this Court finds that the Third District should not have awarded attorneys' fees pursuant to Section 57.105, an award of fees was nevertheless correct under the facts of this case given Section 440.34(5) and its clear dictates.

Obviously, this was a matter by which CHAMBERS sought to remove the imposition of the lien placed upon malpractice settlement proceedings by LIBERTY MUTUAL. The Third District compiled by striking said lien, which motion had been timely filed to avoid the waste of judicial labor in this case.

Thus, the criteria set forth in the above statute was met by the Third District's reviewing of a claim, award, or compensation order which was before it by virtue of an appeal by the injured employee against a compensation carrier, which was a party of interest in the original proceedings.

In Caravasios v. M. W. Spartes Construction Company, 441 So.2d 1070 (Fla. 1983), this Court opined that though attorneys' fees are not appropriate under Section 440.39 for a proceeding such as a carrier's petition for equitable distribution of a third party recovery, nevertheless, a claimant is entitled to attorneys' fees for services rendered him on appeal in which the award is somehow modified. Sub judice,

the Third District Court of Appeal did, in fact, award attorneys' fees for overturning the trial court's ruling 'viz a viz' the imposition of the lien. The merits of the equitable distribution issue were never addressed in or raised before the Appellate Court. Thus, the Third District was eminently correct in awarding attorneys' fees under the authority of Section 440.34(5).

It is an obvious appellate rule that as long as the lower tribunal can be affirmed on any ground, an appellate court will not disturb the results of an order, even if the order was entered on erroneous premises.

In sum, an award of attorneys' fees can be premised on either of two grounds raised in CHAMBERS' Motion for Attorneys' Fees filed in the Third District Court of Appeal.

Firstly, Section 57.105 can be utilized as a basis for the award because of LIBERTY MUTUAL'S reliance upon frivolous arguments before the Third District in an attempt to have the Coll decision reversed. Further, Section 57.105 is clearly appropriate in that LIBERTY MUTUAL never timely filed a lien in this case and thus, had no grounds upon which to impose same either in the trial court or on appeal.

Secondly, even assuming that Section 57.105 was inappropriately invoked by the Third District, attorneys' fees were appropriate under Section 440.34(5) in that this action in the Appellate Court was for review of a claim or award in favor of a compensation carrier and against an injured employee or claimant as specified by the dictates of the

Statute.

Accordingly, under either theory, the Third District Court of Appeal was eminently corrct in awarding attorneys' fees and as such, the Order awarding same should be affirmed by this Court.

CONCLUSION

Based upon the foregoing authorities of law and arguments set forth in this brief it is respectfully requested that this Honorable Court affirm the decision of the Third District Court of Appeal in Chambers v. Liberty Mutual, remand the cause for further proceedings and render such other and further relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief of the Respondents on the Merits was served by U.S. Mail, this 3rd day of March, 1988 upon opposing counsel:

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