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.

CLERK, SUPREME COURT
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Deputy Clerk

REPLY BRIEF OF PETITIONER ON THE MERITS

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I.

INTRODUCTION

In this reply 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 which accompanied Liberty's main brief, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

REPLY TO CHAMBERS' STATEMENT OF THE CASE AND FACTS

Review of Chambers' brief establishes clearly what Liberty has suspected all along, that Chambers' position is without merit! Chambers is now backpedaling in an attempt to find some way to justify the result reached by the Third District Court of Appeal. In so doing Chambers himself exposes the weaknesses in his argument. For example, at page 2 of his brief he states:

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

At the time that Liberty prepared its merits brief, Liberty saw no need to include in its brief mention of every record fact that could bear on every conceivable argument that Chambers would properly (or improperly) raise. In point of fact, many record facts are still irrelevant to the main issue before this Court. However, in light of the argument Chambers

now advances, Liberty will accept Chambers' STATEMENT OF THE CASE AND FACTS as being a substantially correct representation of what positions Chambers asserted below.

At page 2 of his brief Chambers states:

> "The Carrier had never authorized the claimant to be treated by doctors at Jackson."

The statement is without record citation! It would seem (because there can be no record citation to justify such a statement) that same was included in the brief to raise in this Court's mind the inference that the employer/carrier had objected to what Chambers did. This is not so. This Court will please note that at all times pertinent Liberty (the workers' compensation carrier for Chambers' employer, R. 212) paid all benefits to Chambers. The payment extended to all claims made including the claim for amputation of Chambers' leg. This "fact" was considered by the trial court when it ruled on the propriety vel non of Liberty's lien. The record before this Court [See: R. 215-265, Transcript of Hearing held December 1984, at pages 238, 239] establishes that Liberty has all along been paying Chambers for the amputation, that the issue was not even contested and, most importantly of all, at no time during the compensation aspects of this case did Chambers seek to segregate the amputation from the "on-the-job" injury (R. 241). Hence, it may be seen that Chambers, early on, seeks to create the appearance that Liberty is, in this case, the "bad guy" and that Chambers was, at all times pertinent, the victim of

Liberty's actions. As this Court has by now learned from its own independent examination of the record, nothing could be further from the truth. In point of fact, the record demonstrates that Chambers' counsel's strategy early on backfired!

At pages 2 and 3 of his brief Chambers states:

> "A medical malpractice complaint was subsequently 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. . . While the trial was in progress the claim was settled for $70,000.00 on November 26, 1984 (R-212)."

Chambers is correct in stating that a medical malpractice/personal injury complaint was filed against Jackson Memorial Hospital (the alleged third party tortfeasor). Chambers fails to tell this Court that said complaint was not served upon Liberty in derogation of § 440.39, Florida Statutes, which provides that upon the filing of a third party action (by an injured worker who is receiving "comp" benefits):

> ". . .Notice of suit being filed shall be served upon the employer and compensation carrier and upon all parties to the suit of their attorneys of record by the employee. . ."

Liberty was not able to "immediately" serve notice of payment of compensation in the lawsuit because Liberty was never served with notice of the filing of the lawsuit. This fact is not in dispute as Chambers' counsel did, at the hearing held December 4, 1984 (R. 215-265, at pp. 5, 6 and 35 therein), concede same.

The above discussed situation arose as a direct consequence of Chambers' counsel's tactical decision to assert that § 440.39, Florida Statutes, would not come into the scheme of

the third party lawsuit since (allegedly) Jackson Memorial Hospital could not be a "third party tortfeasor" within the meaning of the compensation statute. One needs to look no further than the contents of the pleadings filed by Chambers' counsel to learn why Chambers' counsel did not comply with § 440.39, Florida Statutes. At page 3 of the brief Chambers has filed with this Court, Chambers sets out what it was that he contended for in his motion to strike the workers' compensation lien:

> ". . .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)."

Chambers' counsel contended that Jackson Memorial Hospital was not a "third party tortfeasor" within the meaning of § 440.39 and that, since it was not, he did not have to notify the workers' compensation employer or carrier. Considering the fact that Chambers previously contended for just the opposite in claiming greater worker compensation benefits, it is not surprising that Chambers is now "backpedaling."

Much is made in Chambers' brief of the fact that Liberty did not "timely" file its notice of lien and that Liberty "conceded" this. This is true. However, the reason why Liberty did not "early on" file its lien is because Chambers did not "serve" Liberty when suit was instituted. This issue (concerning the alleged "late filing" of Liberty's lien) was litigated before the trial court, which court determined that under

the circumstances Liberty acted properly (R. 212-214; R. 139, 140). The trial court would not let Chambers "play both ends against the middle." Chambers elected to claim compensation benefits for the amputation. The trial court would not let Chambers then urge (in the third party action) that the amputation was "not work related."

At page 3 of his brief Chambers states:

> ". . .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. . ."

This was the plan! It backfired! Now Chambers blames Liberty, Liberty's counsel, the trial court and everyone else that he can point a finger at. This type of argument should not be allowed.

At page 4 of his brief Chambers states:

> "On March 14, 1986, a hearing was held before the trial Judge (citations omitted). 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). . . 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. . .While completely disregarding LIBERTY MUTUAL'S failure to file the lien issue, the Court solely addressed the Coll decision before ordering equitable distribution. . ."

The record demonstrates that the trial court did not "disregard" the fact that Liberty "had failed to file a lien." To the contrary, the trial court considered all of the circumstances surrounding why Liberty's lien was not "timely" filed (assuming

there is some time requirement for the filing of said lien). Because Chambers did not comply with the law, and because the court saw through Chambers' contentions, the trial court did not let Chambers gain an unfair advantage or assert inconsistent positions.

Further, in light of the recent decision in AMERICAN MUTUAL INSURANCE COMPANY v. DECKER, 518 So. 2d 315 (Fla.App.2d 1987), it can be noted that the trial court (in this case) was correct in its observation:

> "You see, the problem is that I don't know that anybody can really deal with the effect of the American Motors (vs. COLL opinion). . . We are just better off, you know, probably getting into the special aspect of." (See: Brief of Chambers at page 4, citing to Volume III, TR. 5).

At pages 4, 5, 6 and 7 of his brief Chambers relates to this Court what he argued to the District Court of Appeal, Third District, pertaining to the merits of this case and, further, what he argued to that court to obtain an award of attorney's fees. In this light it must be emphasized that Chambers made no challenge to the quantum of the lien and made no independent challenge to the formula utilized by the trial court in its computation of the lien. As far as Chambers was concerned, because of the existence of AMERICAN MOTORISTS INSURANCE COMPANY v. COLL, 479 So. 2d 156 (Fla.App.3d 1985), it was "all or nothing."

Liberty 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 PLAINTIFF'S 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 § 57.105, FLORIDA STATUTE ATTORNEY FEES IN FAVOR OF CHAMBERS AND AGAINST LIBERTY?

IV.

ARGUMENT

A.

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

Chambers' argument is twofold:

1. The District Court was correct in reversing this case upon authority of AMERICAN MOTORISTS INSURANCE COMPANY v. COLL, supra, because that case was correctly decided but, assuming it was incorrectly decided:

2. Reversal was still required because the trial court was incorrect in not striking Liberty's lien.

Liberty would respectfully suggest to this Court Chambers' argument is without merit.

AMERICAN MOTORISTS INSURANCE COMPANY v. COLL, supra, was wrongly decided for all of the reasons previously advanced by

Liberty in its main brief. The opinion cannot and should not stand. This Court should approve as controlling law for the State of Florida (the analysis made by the District Court of Appeal, Second District, in) AMERICAN MUTUAL INSURANCE COMPANY v. DECKER.

The argument Chambers' advances [to "explain" why COLL "makes good sense"] (itself) makes no sense! As noted by the District Court of Appeal, Second District, in DECKER, supra:

> "We find nothing in COLL to explicate why Sec. 768.50(4)'s prefatory words are meaningless. In our view, those words are critical and control the outcome of the present controversies." 518 So. 2d at p. 317.

Because the District Court of Appeal, Third District, ignored, in deciding COLL and its progeny, pertinent portions of §768.50. COLL should be disapproved by this Court and the opinion herein sought to be reviewed should be quashed.

What must now be considered in detail is the alleged "fall-back" argument advanced by Chambers. At page 17 of his brief he alleges:

> "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. . ."

Chambers next argues:

> "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. . .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."

The problem that Chambers has in advancing the above thoughts is that the facts of this case do not apply to the arguments Chambers advances. Liberty asks: What result should obtain when a settlement is negotiated but it does not take into consideration collateral source benefits? In the abstract Chambers' thoughts make good sense. However, when a settlement does not take into account collateral source benefits or when (as here) counsel is mistaken as to the applicable law, it should not be the lienholder who suffers. When one settles a case, one is supposed to take into account the existence of all liens. But when counsel for the settling party thinks he can "beat the lien" and is wrong. . .! Such is the instant cause.

The above explains why Chambers never served Liberty pursuant to the appropriate statute. The above provides the reason why Chambers argued that there existed no relationship between the on-the-job injury and the alleged malpractice. The above clarifies and underscores why "the plan" took a back seat when the District Court of Appeal, Third District, decided COLL, supra, and the above crystallizes why Chambers' counsel is so adamant in stressing that Liberty's position is frivolous. Chambers' counsel sought to beat the lien and it did not work. This case is that simple.

Further, Chambers (still) does not address the glaring discrepancy between the language of § 440.39 and § 768.50, to-wit: settlements are not mentioned in § 768.50, Florida Statutes! Chambers harps upon the fact that it was precisely "this type of argument" that the District Court of Appeal, Third District, found "frivolous." Be that as it may, the discrepancy has not (yet) been reconciled. Liberty still asks: (1) Why does § 768.50, by its express terms, apply (only) to judgments? (2) Did the legislature intend to exclude "settlements" from its terms? ASSUMING THIS COURT WERE TO REJECT THE RATIONALE OF DECKER, SUPRA. and assuming that § 768.50, Florida Statutes, is to be construed as Chambers desires, Chambers still cannot get over the hurdle that this case did not go to judgment! Hence, once again Chambers' counsel is impaled upon the horns of his own dilemma. This case was settled without resolution or negotiation of the lien. The answer to the question of "why" (it was not so negotiated) lies not in the existence of Section 440.39 or in the language of Section 768.50 but, rather, is found in the motion to strike the lien:

> ". . .The tortious act of medical malpractice does not arise in an employer/employee relationship and thus does not arise out of work-related duties." (Brief of Chambers at page 3).

That the tortious act of medical malpractice does arise in an employer/employee relationship and that it does arise out of "work-related duties" is too well settled to need detailed

citation of authority. See: DECKER, supra, and cases cited therein. That Liberty did not "waive" any rights as a consequence of the alleged "late filing" of its lien is clear. See: AETNA INSURANCE COMPANY v. HARTER, 379 So. 2d 1019 (Fla.App.2d 1980) and cases cited therein. (See also: R. 215-265, 212-214, 139, 140). Liberty's position has never been frivolous. Liberty's analysis is correct. Irrespective of whether or not this Court accepts the holding in DECKER, supra, as the law for this State, the trial court's ruling in this case must still be affirmed. Chambers' arguments concerning the ultimate correctness of District Court result is a red herring! This is so because when this Court takes jurisdiction of a case, this Court reviews the case as if it were on direct appeal. See: BOULD v. TOUCHETTE, 349 So. 2d 1181 (Fla. 1977) and LAWRENCE v. FLORIDA EAST COAST RAILWAY COMPANY, 346 So. 2d 1012 (Fla. 1977). What the District Court of Appeal, Third District, could have decided is irrelevant to any consideration herein. The trial court found good reason not to strike Liberty's lien. The Court's order is supported by competent, substantial evidence and is legally sound. The trial court's ruling should be affirmed.

B.

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

At page 19 of his brief Chambers, in attempting to distinguish the case of McNEE v. BIZ, 473 So. 2d 5 (Fla. 4DCA 1985), states:

". . .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. . ."

Once again there is disagreement between Liberty and Chambers. Liberty disagress with Chambers' assertion that Liberty made a "veiled attempt" to have a different panel of the Third District overrule its prior decision in COLL. Liberty's effort was not veiled, it was direct! Liberty did not beat around the bush. Liberty told the District Court of Appeal, Third District, that it believed that COLL was wrongly decided. Liberty argued to the Court that it should recede from COLL. After that, in the alternative, Liberty attempted to distinguish the instant cause from COLL and its progeny. Liberty will not backpedal as does Chambers. COLL was decided wrongly and Liberty's argument was not then frivolous nor is it now frivolous. See: DECKER, supra, and cases cited therein.

Regarding Chambers' attempts to justify an award of attorney's fees under either one of two statutes, it should be noted that the District Court of Appeal, Third District, went out of its way to award fees pursuant to § 57.105, Florida Statutes. That court made no mention of § 440.34(5), Florida Statutes, which itself provides:

". . .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."

In this case the District Court of Appeal, Third District, in the exercise of its discretion chose not to award fees pursuant to § 440.34(5), Florida Statutes. This is not surprising. But for the existence of COLL, Chambers' contentions would have been rejected out of hand! This Court will please remember how this case developed:

1. Chambers claimed workers' compensation benefits for all injuries including amputation of his leg;

2. Liberty paid the claimed benefits without controversy;

3. Chambers instituted a third party lawsuit but did not (as required by law) serve the compensation carrier/lien holder;

4. Chambers settled with the third party tortfeasor;

5. Liberty found out about the settlement from the third party tortfeasor and filed its lien;

6. Chambers, in an attempt to "beat the lien", argued that the malpractice tortfeasor was not a third party under the law.

Under the circumstances presented, the trial court would not allow Chambers to advance inconsistent positions! However, when COLL was decided, Chambers "seized" upon the decision (and all of the above took a back seat). Simply stated, Chambers "got lucky" when the Third District--not satisfied with simply reversing the judgment appealed--concluded Liberty's defense of the trial court's order was frivolous. But for COLL Chambers

would have had "nothing." In point of fact, the remaining portions of Chambers' argument to the District Court of Appeal, Third District, were ignored.

It is Liberty's contention that the award of fees cannot be sustained on alternative grounds where the award was premised on a specific finding under a specific statute. In any event, unless this Court were to decide that the trial court's ruling was legally erroneous, and that the lien is to be cancelled, modified or altered in some way, Chambers' counsel is entitled to no fee from Liberty. See: BOULD, supra, and LAWRENCE, supra.

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.

VII.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits was served, by U.S. mail, this 23rd day of March, 1988, on opposing counsel:

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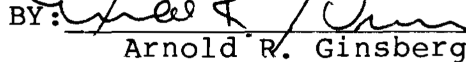
BY: 
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