7-28

IN THE SUPREME COURT OF FLORIDA

MICHAEL MANFREDO,

Petitioner,

v .

EMPLOYER'S CASUALTY INSURANCE: COMPANY WORKERS' COMPENSATION: LIENHOLDER,

Respondent.
_____:

CASE NO. 74,275
THIRD DISTRICT COURT
COURT OF APPEAL NO. 88-01794

APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

LAW OFFICES OF BRUCE S. SCHWARTZ, P.A.
Attorneys for Plaintiff(s)
2750 N.E. 187th Street
North Miami Beach, Florida 33180
Telephone No. 932-5400 (Dade)
763-5044 (Broward)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

INTRODUCTION

Throughout this brief, the parties will be referred to as follows: Michael Manfredo will be referred to as the Petitioner or the Claimant. Employers Casualty Insurance Company will be referred to as Respondent, Lienholder or Carrier. "R" refers to the record on appeal. "A" refers to the appendix. All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND THE FACTS

This is an appeal from a decision of the Third District Court of Appeal, which certified the following question as one of great public importance:

> Has the Supreme Court's Opinion in Nikula v. Michigan Mutual Insurance Co., 531 So.2d 330 (Fla. 1988) implicitly overruled Brandt v. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3d DCA 1987) and the reasoning therein?

In its opinion, (A.1-5) the Third District reversed a trial court order (A.6-7;R.916-917) which determined the extent of the Respondent/Lienholder's right to recover past and future worker's compensation benefits paid, or to be paid, to the Petitioner [F.S. 440.39(3)(a)]. The trial court, relying upon the reasoning set forth in the case of Brandt vs. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3d Dist. 1987) ruled that two separate and distinct computations were required. First the court calculated the pro rata reduction in the compensation carrier's right to reimbursement attributable to the Petitioner's legal costs by comparing the percentage of total recovery with the total legal costs incurred in achieving that recovery. The Petitioner had settled his third-party tortfeasor claim for $900,000, and had paid 45.5 percent of that sum in costs and attorney's fees. The court accordingly reducted the carrier's right to reimbursement by 45.5 percent.

The trial court next considered the comparative negligence factor. Following an evidentiary hearing at which testimony was taken and argument entertained, (R.863-897) the trial court concluded that the full value of the third party claim of the

Petitioner Manfredo was $1,500,000. Neither party has challenged this factual determination. The trial court also found that the failure of the Petitioner to recover the full value of his claim was attributable solely to his own comparative negligence. This finding likewise was not challenged on appeal. The Petitioner had received 60 percent of the full value of his claim. The *40* percent reduction was attributable to comparative negligence. Accordingly, the trial court made a second pro rata reduction in the carrier's right to reimbursement of *40* percent. The two reductions resulted in a total of 85.5 percent reduction in the Respondent carrier's right of reimbursement of past and future worker's compensation benefits paid, or to be paid, to the Petitioner Manfredo.

The Respondent carrier took an appeal from the trial court's order. The Third District Court of Appeal reversed the trial court, but certified the aforementioned question to this Court, as one of great public importance.

ISSUES ON APPEAL

I. WHETHER THE SUPREME COURT'S OPINION IN NIKULA V. MICHIGAN MUTUAL INSURANCE COMPANY, 531 SO.2D 330 (FLA. 1988) IMPLICITLY OVERRULED BRANDT VS. PHILLIPS PETROLEUM CO., 511 SO.2D 1070 (FLA. 3D DIST. 1987) AND THE REASONING THEREIN?

11. WHETHER THE METHOD OF CALCULATING THE PRO RATA REDUCTIONS OF THE COMPENSATION LIEN CARRIER'S RECOVERY UTILIZED BY THE TRIAL COURT WAS CORRECT.

SUMMARY OF ARGUMENT

The Supreme Court, in its decision of Nikula v. Michigan Mutual Insurance Company, 531 So.2d 330 (Fla.1988), considered the proper method of computing the pro rata reduction of recovery of worker's compensation benefits paid under the 1981 version of F.S. §440.39(3)(a), where the claimant failed to recover the full value of his third-party torfeasor claim due to comparative negligence. In that case, the trial court had attributed to the claimant 90 percent comparative negligence, where, in fact, the claimant had recovered 24 percent of the full value of his claim. The 1981 version of F.S. §440.39(3)(a)(1981) did not provide for a pro rata reduction for costs and attorney's fees. The issue as to how to consider the interplay between those two factors (comparative negligence and attorney's fees) was not before the court.

The only expression of opinion found in Nikula regarding treatment of attorney's fees and costs comes at the end of the decision in a footnote. Inasmuch as the footnote concerned an extraneous matter not presented in the case of appeal, the footnote constitutes obiter dictum, and accordingly, should not be viewed as overruling Brandt v. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3d Dist. 1987).

On the contrary, this Court should now consider the merits of the issue addressed by the Third District Court of Appeal in the case at bar. The Third District opinion should be reversed, and the opinion of the trial court should be reinstated, inasmuch as the approach utilized by the trial court is mandated by the

clear, unambiguous language contained in F.S. §440.39(3)(a)(1983). That statute requires two separate and distinct pro rata reductions, which are to be computed by considering different factors. In regard to attorney's fees and costs, the statute requires the court to compare total costs and attorney's fees with gross recovery. In regard to the comparative negligence factor, the statute requires that a comparison be made between the full value of the claimant's claim and the gross recovery actually achieved.

The approach adopted by the Third District would result in the claimant's bearing a proportionally greater share of the burden of costs and attorney's fees incurred in achieving the recovery than that born by the carrier. The claimant's legal costs are based on a percentage of his actual recovery. The carrier's reduction of reimbursement, under the Third District's approach, would be based on a comparison of actual fees with total value of the claim, notwithstanding the fact that the claimant did not recover, through settlement or verdict, the full value of his claim.

ARGUMENT

I. THE SUPREME COURT OPINION IN NIKULA V. MICHIGAN MUTUAL INSURANCE COMPANY, 531 SO.2D 330 (FLA. 1988) DID NOT OVERRULE BRANDT VS. PHILLIPS PETROLEUM CO., 511 SO.2D 1070 (FLA. 3D DIST. 1987) OR THE REASONING THEREIN.

In the case of Brandt v. Phillips Petroleum Company, 511 So.2d 1070 (Fla. 3d Dist. 1987), the Third District Court of Appeal was confronted with an equitable distribution order entered under the 1983 version of F.S. §440.39(3)(a). That statute, unlike the 1981 version of the statute, requires that the employer's right to reimbursement of past and future benefits paid be reduced by "a percentage amount equal to the percentage of the judgment which is for costs and attorney's fees." Inasmuch as the trial court had ingnored this statutory directive in its order of equitable distribution, the Third District in Brandt reversed.

In its opinion in Brandt, the Third District correctly calculated the second proration mandated by the statute. The trial court had determined that the claimant had been 25 percent comparatively negligent, and, to that extent, had received less than the full value of his claim. The statute provides that a second proration shall be made if the claimant "can demonstrate to the court that he did not recover the full value of his damages sustained because of comparative negligence . . ." F.S. §440.39(3)(a)(1983). In Brandt the attorney's fees and costs totaled 41.64 percent of the gross recovery; the trial court had found that the claimant had recovered 25 percent less than the full value of his claim, due to his own comparative negligence.

Pursuant to the statute, the Third District combined these percentages and ordered a total reduction in the right to reimbursement of 66.64 percent.

The Florida Supreme Court, in its recent decision of Nikula v. Michigan Mutual Insurance Co., 531 So.2d 330 (Fla. 1988) was confronted neither with the 1983 version of F.S. §440.39(3)(a) nor with any issue involving the appropriate calculation of pro rata reductions in a carrier's right to reimbursement for attorney's fees. On the contrary, the court in Nikula was concerned only with the proper method of determining the percentage of the pro rata reduction to be made in a carrier's right to reimbursement for the comparative negligence factor. The Supreme Court, in sustaining the Fourth District's ruling, held that under the 1981 version of the statute, the reduction shall be based upon the ratio of the settlement amount to full value of damages. This ruling was entirely consistent with the Third District ruling in Brandt in regard to comparative negligence.

The Respondent relies exclusively on the footnote at the end of the Nikula decision, which does refer to the 1983 statute, suggesting that, in considering expenses of recovery, the controlling factor would be the ratio between the full value of the employee's claim, and his net recovery. That issue, however, was not before the Court in the Nikula decision, and, it is respectfully suggested, was based upon an erroneous reading of the 1983 statute.

In regard to the effect of the footnote, the Petitioner would suggest that the footnote was obiter dictum, not binding on the Third District. The highly limited import of statements of obiter dictum, in appellate decisions--even those originating in the Supreme Court of Florida--was acknowledged by this Court in the case of Continental Assurance Co. v. Carroll, 485 So.2d 406 (Fla. 1986). In that decision the Fourth District Court of Appeal relied upon certain language found in the earlier Supreme Court opinion of National Life Insurance Co. v. Permenter, 204 So.2d 206 (Fla. 1967) in concluding that an even earlier Supreme Court opinion had been modified. In reversing the Fourth District opinion, this Court held that the language in the Permenter opinion, relied upon by the Fourth District, was at most obiter dicta. The Court held that such dicta, while perhaps persuasive, could not function as ground-breaking percedent.

This Court has repeatedly noted that obiter dicta pronouncements are non-binding. Costal Petroleum v. American Cynamid, 492 So.2d 339 (Fla. 1986) ~~cert.~~ ~~den.~~ Mobil Oil Corporation v. Board of Trustees of Internal Improvement Trust Fund of State of Florida, 107 S.Ct. 950, 479 US 1065. Indeed, this Court has held that such pronouncemets do not even constitute part of the law of the case in which they are found. Meyers v. Atlantic Coast Line Railroad Company, 112 So.2d 263 (Fla. 1959).

The practice of expressing opinions constituting obiter dicum has even been the subject of rather harsh criticism. For instance, the First District Court of Appeal, in the case of

Dobson v. Crews, 164 So.2d 252 (Fla. 2d Dist. 1964) aff'd 177 So. 2d 202 (Fla. 1965) offered the following comments regarding obiter dictum:

> [A]ny such expression beyond that necessary to decide the narrow issue involved in this appeal would be pure obiter dictum, and of no value to members of the Bar as a guide for future litigation. It is the view of the writer of this opinion that any appellate court should confine its opinion to those statements of legal principles necessary for the solution of the particular quesion or questions involved in the appeal under consideration. Courts of law are established for the sole purpose of deciding issues before them arising from litigated cases and should limit pronouncements of the law to those principles necessary for that purpose. They are not designed to render advisory opinions on abstract questions of law. Judicial pronouncements which are obiter dicta in character more often serve to confound than to clarify the jurisprudence of the State.
>
> 164 So.2d at 255

See also Hayes v. State, 439 So.2d 896 (Fla. 2d Dist. 1983); Ard v. Ard, 395 So. 2d 586 (Fla. 1st Dist. 1981); Bunn v. Bunn, 311 So.2d 387 (Fla. 4th Dist. 1975); and Booth v. Mary Carter Paint Co., 182 So.2d 292 (Fla. 2d Dist. 1966).

In summary, this Court, in the Nikula case, was asked to consider the 1981 version of F.S. §440.39(3)(a) in regard to the proper method of calculating the pro rata reduction in a carrier's right to reimbursement of compensation benefits where the full amount of recovery and the full value of the claim are known. The 1983 version of F.S. §440.39(3)(a), which for the first time required a second pro rata reduction attributable to costs and attorney's fees, was not before the court. Nor was this Court asked to consider the proper method of making the legal cost pro rata reduction mandated by the 1983 version of the

statute. Accordingly, the Nikula footnote addressing that subject is pure obiter dictum, building neither on the lower courts nor on this Court in this case.

II. THE METHOD OF CALCULATING THE PRO RATA REDUCTIONS OF A COMPENSATION CARRIER'S LIEN RECOVERY UTILIZED BY THE TRIAL COURT WAS CORRECT.

The Third District Court of Appeal, in both the earlier Brandt decision and in the case at bar, interpreted the right of the parties as those rights have been delineated in the 1983 version of F.S. §440.39(3)(a). That statute, as amended in 1983, deals with the right to reimbursement of compensation and medical benefits paid to a claimant by a worker's compensation benefit provider. The statutory scheme contemplates that the provider will recover all benefits provided up to and out of the amount of the claimant's net third-party recovery. However, the statute specifically reduces the right to reimbursement in three important respects, two of which are relevant in the case at bar and in the Brandt decision. The carrier's right to reimbursement shall be reduced by:

> [T]heir pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney. In determining the employer's or carrier's pro rata share of those costs and attorney's fees, the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment which is for costs and attorney's fees.

and

> [I]f the employee . . . can demonstrate that he did not recover the full value of damages sustained because of comparative negligence . . . proration shall be made by the trial court . . .

F.S. §440.39(3)(a)(1983)

The 1981 version of the statute makes no provision for a pro rata reduction based on costs of recovery.

The parties to this action agree that the proper method of computing the pro rata reduction attributable to the comparative negligence factor is by comparing the full value of the Plaintiff's claim with the gross amount of the recovery. The Brandt decision and the Nikula decision mandate this approach, as does the language in the statute itself, which, in regard to the comparative negligence reduction, makes reference to "full value of the claim."

The difficulty arises in the proper treatment of the pro rata reduction for costs and attorney's fees. The Respondent argues, and the Third District in the case at bar ruled, that the pro rata reduction for legal costs should be computed by comparing the total of those costs with the full value of the Plaintiff's claim. This approach is fatally flawed for a variety of reasons. To begin with, the statute, by its clear language, requires that the carrier have deducted from its recovery "a percentage amount equal to the percentage of the judgment which is for costs and attorney's fees." [Emphasis added] It is clear that the word "judgment" as used in the statute refers to the claimant's gross third-party recovery, whether achieved through settlement or through verdict. Had the Florida legislature intended the reduction to be computed by comparing the amount of the legal costs with the full value of the Plaintiff's claim, regardless of the amount of actual recovery, presumptively it

would have said so, as it did in regard to the comparative negligence factor, a few sentences later.

Additionally, the statute itself requires the carrier to bear its "pro rata share of all court costs expended by the Plaintiff in the prosectuion of the suit." F.S. §440.39(3)(a)(1983). In the case at bar, the Plaintiff incurred attorney's fees and costs equaling 45.5 percent of his total recovery. It is axiomatic in Florida that personal injury cases are handled on contingency fee arrangements with the amount of the fee being expressed in terms of a percentage of the total recovery. The approach urged by the Respondent permits the carrier to evade a portion of this burden. In the case at bar, the Petitioner Manfredo expended roughly 45.5 percent of his total recovery of $900,000 in prosecuting his case. However, should the Respondent's approach prevail, the carrier's right to reimbursement shall be reduced by only 27.3 percent, by virtue of the attorney's fees and costs factor. This computation is arrived at by comparing the total fees and costs with the full value of the claim: $\frac{\$409,500}{1,500,000} = 27.3\%$. When added to the 40 percent comparative negligence factor, as to which there is no dispute, the right to reimbursement is reduced by 67.3 percent, leaving a right to reimbursement of 32.7 percent.

This result directly violates the statute's directive that the carrier bear its pro rata share of the Plaintiff's court costs and fees, measured by the percentage of the judgment expended on costs and fees.

The Third District Court of Appeal in the case at bar reached its result partly in misplaced reliance upon the footnote found in the Nikula decision. In part, however, the Court in effect engaged in statutory construciton seeking to avoid what it characterized as certain "absurd results" which would obtain in the hypothetical situation posed in its opinion. The court noted that if the degree of comparative negligence were high enough, the right to any reimbursement, under the Petitioner's approach (for that matter, the Brandt approach) would be destroyed.

Resort to statutory construction, however, is only appropriate where legislative intent cannot be discerned from the clear language of the statute itself. As this Court said in the case of Holly v. Auld, 450 So.2d 217 (Fla. 1984):

> [W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be given its plain and obvious meaning. [Citing numerous authorities.]
>
> 450 So.2d at 219

The Court in Holly held that the courts of this state are without power to construe an unambiguous statue in a way which would modify its express terms or its reasonable or obvious implications. To do *so*, said the Court, would be an "abrogation of legislative power." Finally, the court held that while in certain situations literal interpretation of the language of a statute need not always be given effect, departures from the letter of the law are sanctioned "only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent." 450 So.2d at 219.

[Citing American Bankers Life Assurance Company of Florida v. Willisams, 212 So.2d 777 (Fla. 1st Dist. 1968); Johnson v. Presbyterian HOmes of Sunod of Florida, Inc., 239 So. 2d 256 (Fla. 1970); and Stateuz rel. Hanburey v. Tunnicliff, 124 So.2d 279 (Fla. 1929). See also Barruzza v. Suddath Van Lines, Inc., 474 So.2d 861 (Fla. 1st Dist. 1985) and Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979).

It is suggested that the manner of computing the pro rata reduction for legal expenses of the carrier's percent of lien recovery is clearly delineated in F.S. §440.39(3)(a)(1983). The legislature obviously intended that the carrier's lien recovery be reduced by a percentage equal to the percentage of the claimant's recovery consumed by legal costs and attorney's fees. The carrier was not to receive a free--or patially free--ride.

The fact that, in certain rare instances, not before the court in this case, the carrier's right to any recovery could be destroyed is a matter which should be addressed to the Florida legislature. Statutory amendments are a function of the legislature--not the judiciary.

Furthermore, it is not conceded that the hypothetical result posed by the Third District is truely unreasonable. At the outset, it should be noted that the suggestion that a negative percentage could result in an increase in the carrier's duty to pay benefits to the claimant finds no support in the statute itself or in the case law. [The statute under review does not define the carrier's obligations regarding payment of benefits]. The possibility that the carrier might not share in the

claimant's recovery is a policy question for the Florida legislature to decide. As the Third District Court of Appeal noted in Brandt, the purposes underlying the Worker's Compensation laws differ greatly from policy considerations underlying personal injury tort recovery. There is no dollar for dollar correlation between benefits received under the two systems of compensation. The Third District Court of Appeal acknowledged that truth in Brandt, citing numerous authorities.

In summary, the Petitioner would suggest that F.S. §440.39(3)(a) is clear in dictating how the pro rata reduction for costs and attorney's fees in the carrier's right to reimbursement is to be calculated. In view of that fact, the courts of this state are compelled to refrain from modifying or amending the statute, to achieve some different result. The carrier's right to reimbursement is to be reduced by a percentage equal to the percentage of the claimant's recovery consumed by costs and attorney's fees. Florida Statute 440.39(3)(a)(1983) will permit no other result.

CONCLUSION

In conclusion, the Petitioner would argue that the Supreme Court in Nikula supra clearly did not overrule Brandt supra or the reasoning found therein. Accordingly, the certified question posed by the Third District Court of Appeal should be answered in the negative.

Furthermore, inasmuch as the trial court order of equitable distribution reducing the Respondent's right to reimbursement by 85.5 percent, leaving the Respondent with the right of reimbursement of 14.5 percent of past and future compensation benefits paid to the Petitioner is imminently correct and is in full compliance with the intent of the Florida legislature as expressed in Florida Statute 440.39(3)(a)(1983), the decision of the Third District Court of Appeal should be quashed and the order of the trial court reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief of the Petitioner, Michael Manfredo, was mailed to Phillip d. Blackmon, Esquire, PYSZKA, KESSLER, et al., 2665 South Bayshore Drive, Miami, Florida 33133, this 3rd day of July, 1989.

LAW OFFICES OF BRUCE S. SCHWARTZ, P.A.
2750 N.E. 187th Street
North Miami Beach, Florida 33180
Telephone No. 932-5400 (Dade)
763-5044 (Broward)

By: Theodore R. Dempster
THEODORE R. DEMPSTER