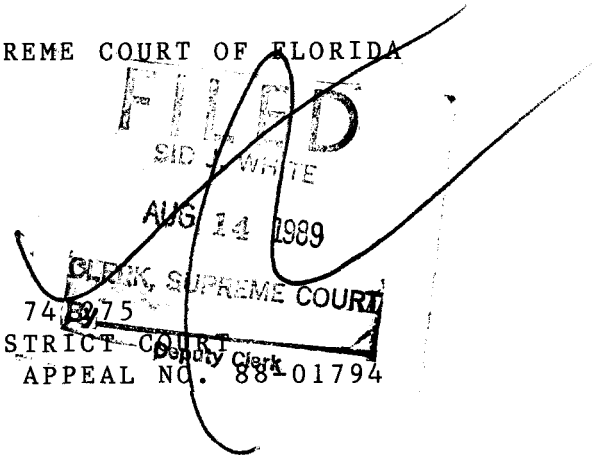
IN THE SUPREME COURT OF FLORIDA



MICHAEL MANFREDO,

Petitioner,

vs. :

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

Respondent.

CASE NO. 74,975
THIRD DISTRICT COURT
COURT OF APPEAL NO. 88-01794

APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The Petitioner, MICHAEL MANFREDO, files this, his Reply Brief, in response to the Brief filed on behalf of the Respondent, EMPLOYER'S CASUALTY INSURANCE COMPANY.

SUMMARY OF ARGUMENT

In its Brief, the Respondent fails to acknowledge the clear dictates of Florida Statute §440.39(3)(a), which requires that the pro rata reduction, in the right to reimbursement due to legal costs, be calculated by comparing the amount of the judgment with the total costs of recovery. This statutory approach is appropriate inasmuch as the amount of attorney's fees and costs paid by the claimant is based upon a percentage of the gross judgment or settlement actually recovered--not upon some percentage relating to the full value of the claimant's third-party claim.

ARGUMENT

The Respondent, Casualty Insurance Company, in its Brief, argues that the Third District Court of Appeal was correct in overruling the method of calculating the reduction in the right to reimbursement set forth in Brandt v. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3d Dist. 1987). The Respondent argues that the method utilized by the trial court is too complicated, and, in certain extreme instances, might result in the total destruction of the carrier's right to reimbursement.

The Respondent also includes in its Brief a discussion of the proper manner of considering the comparative negligence factor. That, however, is not an issue before this Court, nor was it an issue before the Third District Court of Appeal. The parties to this appeal agree that statutorily required pro rata reduction in the right to reimbursement attributable to comparative negligence shall be calculated by comparing the gross recovery to the full value of the claim. That approach is mandated by Florida Statute §440.39(3)(a), which required a pro rata reduction in those instances where an employee can show that he did not recover the full value of his claim due to his own comparative negligence. Although the Respondent, in his Brief, seemed to challenge the reasonableness of allowing a claimant to benefit, vis-a-vis reimbursement of compensation benefits, from his own comparative negligence, that clearly is a subject as to which the legislature has spoken, and neither party has challenged Florida Statute §440.39(3)(a) in that regard.

The only issue before this Court is the proper method of computing the pro rata reduction for costs and attorney's fees. The Respondent argues that one should compare the total recovery costs (costs and attorney's fees) with the full value of the claimant's claim, and reduce the carrier's right to reimbursement by a similar percentage. By way of illustration, consider the following hypothetical example. Assume a claimant recovered $50,000 in a personal injury action. Assume also that the full value of the claim determined by verdict or by the court in a subsequent hearing was $100,000, the difference attributable to comparative negligence. Assume also that the claimant paid *40* percent of his gross recovery ($20,000) in attorney's fees. The claimant under this hypothetical would net $30,000. Respondent would argue that the carrier's right to reimbursement should be reduced by 70 percent--50 percent for comparative negligence plus an additional 20 percent for attorney's fees.

The Respondent argues that this approach is consistent with the "principles of equitable distribution" and is "less complicated" than Petitioner's approach. However, the Respondent fails to cite any legally recognized principle to which its method conforms. Furthermore, it certainly isn't apparant why its approach is less complicated than simply comparing the cost of recovery (attorney's fees and costs) with the actual gross recovery (settlement or judgment) instead of comparing the cost of recovery with the full value of the claim.

Under our hypothetical, the claimant's actual recovery is reduced by *40* percent due to attorney's fees. Under the

Respondent's approach, the carrier's right to reimbursement, due to attorney's fees, is reduced by 20 percent ($20,000 compared to $100,000 full value). The statute mandates that a carrier's right to reimbursement shall be reduced by a "percentage amount equal to the percentage of the judgment which is for costs and attorney's fees." Florida Statute §440.39(3)(a). How then can the carrier argue that its approach is consistent with "principles of equitable distribution?" Furthermore, why is it more just that a claimant spend 40 percent of his actual recovery in achieving the recovery and that the carrier's right to reimbursement be reduced only by 20 percent for attorney's fees and costs?

The legislature, in wording the statute as it did, clearly intended that the carrier's right to reimbursement be reduced by a percentage equal to the actual percentage of the recovery expended by the claimant in achieving the recovery. If the carrier is to benefit from the actions of the claimant in seeking recovery from a third-party, it is appropriate that the carrier share equally in the burden of achieving that recovery.

In any event, the approach advanced by the Petitioner is mandated by Florida Statute §440.39(3)(a) cited above. The statute is clear and unambiguous. It is not the perogative of the courts to disregard a statutory enactment, even if the court concludes that an alternative approach is more reasonable. (See Petitioner's Original Brief and authorities cited therin.) The approach advanced by the Respondent finds no statutory support, and, indeed, is contradicted by Florida Statute §440.39(3)(a).

While the Court's footnote at the end of the Nikula v. Michigan Mutual Insurance Co., 531 So.2d 330 (Fla 1988), opinion would seem to endorse the Respondent's approach, that footnote is pure dictum. The issue addressed in the footnote was not then before the court and presumptively was not briefed. Dictum, even when issued by the Florida Supreme Court, is not binding, especially when it would otherwise establish new precedent. (See Original Brief and authorities cited therin.)

CONCLUSION

The trial court was correct, as was the Third District in Brandt, supra, in computing the reduction in the carrier's right to reimbursement by comparing the legal recovery costs with the gross amount of settlement actually achieved. Accordingly, the Third District, in the case at bar, should be reversed, and the order of the trial court should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply 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 10th day of August, 1989.

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