IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CASE NO.: **74,275**

MICHAEL MANFREDO,

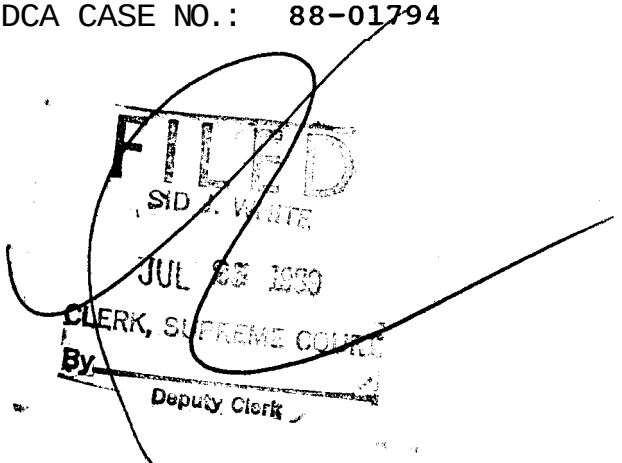
Petitioner,

vs.

THIRD DCA CASE NO.: **88-01794**

EMPLOYER'S CASUALTY
INSURANCE COMPANY
WORKERS' COMPENSATION
LIENHOLDER,

Respondent.



ON CERTIFIED QUESTION FROM THE
THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF RESPONDENT EMPLOYER'S
CASUALTY INSURANCE COMPANY

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INTRODUCTION

Throughout this brief, the parties will be referred to as follows:

Employers Casualty Insurance Company will be referred to as Respondent or Insurer. Michael Manfredo will be referred to as Petitioner or Manfredo. **"R"** refers to the record on appeal. **"A"** refers to the appendix. All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to Fla. R. App. P. 9.210(c), the Insurer omits the statement of the facts.

ISSUE ON APPEAL

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. 3rd DCA 1987) and the reasoning therein?

SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly interpreted and applied Section 440.39(3)(a), Fla. Stat. (1983) when it determined that Respondent/Insurer's lien on Petitioner/Plaintiff's third party settlement was based on the ratio of Plaintiff's net settlement to the judicially determined full value of Plaintiff's third party claim. Accordingly, the insurer recovers the same percentage of its lien that plaintiff recovered in his third party action.

The Third District Court of Appeals' interpretation of Section 440.39(3)(a) Fla. Stat. (1983) was properly based on its reliance of Nikula v. Michigan Mutual Insurance Co., 531 So.2d 330 (Fla. 1988). The Supreme Court in Nikula implicitly overruled Brandt v. Phillips Petroleum Co., 511 So.2d 1070 (Fla. 3rd DCA 1987) and its reasoning therein. Nikula's methodology is consistent with the principle of equitable distribution as delineated in Section 440.39. The methodology enunciated in Brandt is unworkable and untenable. Additionally, the District Court of Appeal in this case which overruled Brandt, was the same District Court of Appeal which originally wrote the Brandt decision.

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY CALCULATED THE WORKER'S COMPENSATION INSURER'S EQUITABLE DISTRIBUTION LIEN PURSUANT TO SECTION 440.39 (3)(a) FLA. STAT. (1983).

The District Court of Appeal correctly interpreted and applied Section 440.39 (3)(a) Fla. Stat. (1983) by granting the Respondent/Insurer a lien of 32.7% for both past and future benefits. In reliance on Nikula v. Michigan Mutual Insurance Co., 531 So.2d 330 (Fla. 1988), the District Court of Appeal based the insurer's lien on the ratio of the Plaintiff's net settlement to the judicially determined full value of Plaintiff's claim against the third party tortfeasor; thereby overruling the process used by the trial court.

Under the Third District's reading of Nikula, the Plaintiff's net settlement ($490,500.00) was compared with the judicially determined full value of the third party claim ($1,500,000.00) leaving 32.7%. Thus, the insurer will receive a lien of 32.7% for past and future worker's compensation benefits.

The Supreme Court, in Nikula, held that the ratio of settlement to full value was controlling, and that the percentage of comparative negligence was not controlling. Id. at 330. The Nikula court opined that the District Court had correctly applied the 1981 version of Section 440.39 (3)(a). The Court noted that Section 440.39 was amended in 1983 to take into consideration

the worker's costs and attorney's fees in pursuing the third party claim, and thus explicitly held that the controlling factor under the amended statute was the ratio of net recovery to the full value of damages. Id. at 332. Accordingly, under the amended statute, the ratio was now plaintiff's net recovery (1983 version) instead of plaintiff's gross recovery (1981 version) to the full value of damages.

The 1983 amendment did not change the process that a court was to use in computing the lien, only that now the insurer would have to pay a pro rata share of the employee's fees and costs incurred in the third party action. The amendment also did not change the language concerning the role of comparative negligence in the process. Once it is determined that the employee's negligence played a role in the settlement, a further determination of an actual comparative negligence percentage is not necessary to compute the insurer's lien because the actual impact of the employee's negligence has already been considered when determining that settlement amount. Miceli v. Litton Systems, Inc., 566 F. Supp. 875, 878 (S.D. Fla. 1983). The court need only determine the full value of the employee's claim and allow the insurer to recover the same percentage of its lien that the employee recovered (settlement amount/full value of claim). Id.

Petitioner supports the position promulgated by the Third District Court of Appeal in Brandt. Under the reasoning of

Brandt, two quantifications were required to determine the worker's compensation lienholder's equitable distribution lien. First, a percentage would be taken from the ratio of plaintiff's total recovery to that constituting plaintiff's costs and fees. This percentage would be added to a percentage representing the degree of comparative negligence charged by the court to the plaintiff. This approach is hopelessly problematic. Applied to this case, plaintiff would have the court take a percentage from the ratio of plaintiff's total recovery ($900,000.00) to that constituting plaintiff's costs and fees ($409,500.00) which was 45.5%. Next, the court had to determine plaintiff's degree of comparative negligence by looking at a ratio of the full value of plaintiff's claim ($1,500,000.00) to plaintiff's gross recovery ($900,000.00). Plaintiff received 60% of the full value of his claim ($900,000.00/$1,500,000.00); with 40% comparative negligence attributed to plaintiff. The addition of the 40%, representing the degree of comparative negligence charged by the court to the plaintiff, and the 45.5% (representing costs) results in a figure of 85.5%. Therefore, respondent/insurer's lien would be reduced by 85.5% for all past and future worker's compensation benefits.

The Third District Court of Appeal in this case found that plaintiff's approach would lead to absurd results. A-5. It should be noted that it was the same Third District Court of Appeal that promulgated the Brandt decision. The Supreme Court

in Nikula found that "any other rule (than that proclaimed by Nikula) would produce irrational results . . ." Nikula at 331. Clearly, plaintiff's methodology is too complicated and not consistent with principles of equitable distribution. As the District Court of Appeal found, in some cases plaintiff's methodology would yield a percentage amount greater than 100%, which would suggest that the insurer would owe money to a plaintiff. Such a result is ludicrous. An insurer could be penalized in situations where a plaintiff is charged with a high degree of comparative negligence. The statute, Section 440.39, directs that "such pro ration be made by the trial judge . . ." Section 440.39 (3)(a). The term pro rate means: "To divide, share, distribute or distribute proportionately . . ." Black's Law Dictionary, 1385 (rev. 4th ed. 1978). The trial judge is to distribute the insurer's lien in the same proportion as the plaintiff recovered his damages through settlement. To require a trial court to make a separate finding regarding an injured worker's comparative negligence, where the separate finding regarding the degree of comparative negligence may result in a disproportionate recovery against the insurer in favor of the plaintiff is not consistent with the statutory direction that the judge pro rate or "distribute proportionately".

The plaintiff's reading of the statute compels an injured worker into taking contradictory stances. In the first instance, when negotiating a settlement with the third party tortfeasor or

at trial, arguing that the plaintiff's degree of negligence was minimal or non-existing. In the second instance, at the hearing on the insurer's lien, arguing that the plaintiff is liable for a high degree of comparative negligence or at least, a higher degree of comparative negligence than was represented by the settlement value. The Legislature could not have intended that the worker be placed in such contradictory positions. Nor could the Legislature have desired that the insurer's lien be determined by a battle of expert witnesses, testifying to the relative degrees of comparative fault with the plaintiff being rewarded for having a low degree of comparative negligence during his settlement negotiations or at trial with the third party tortfeasor, and having a high degree of comparative negligence at the hearing on the insurer's lien.

As was stated supra, the Supreme Court in Nikula impliedly reversed the Third District Court of Appeal decision in Brandt. The Third District Court of Appeal below, and the Supreme Court in Nikula renounced the methodology promulgated in Brandt. Nikula clearly sets out in the footnote that the controlling factor under the 1983 version of the statute is the ratio of the net recovery to the full value of the plaintiff's claim, and not the degree of comparative negligence. Nikula, at 332. Nikula's approach to lien reduction in a settlement situation is certainly an equitable one, consistent with the statute. Petitioner/plaintiff's approach is impractical nor is it

supportable in light of current case law. Thus, there should be no question that since plaintiff recovered 32.7% of the full value of his claim ($490,500.00/$1,500,000.00), the worker's compensation lienholder should also recover 32.7% of its lien and in addition, a 32.7% reduction in all future benefits to be paid.

Petitioner/plaintiff suggests that the footnote toward the end of the Nikula decision was obiter dictum and therefore not binding on the Third District. Petitioner/plaintiff cites numerous cases as support for plaintiff's ostensible position that the Nikula holding in the footnote should not be viewed as overruling Brandt.

Petitioner/plaintiff, however, misses the point. Technically, the footnote in Nikula may in fact be dictum. However, it is dictum from the highest court in the state of Florida. Dicta from the Supreme Court of Florida, in the absence of a contrary decision by the Supreme Court, must be given persuasive weight because of its source. Horton v. Unigard Insurance Co. 355 So.2d 154 (Fla. 4th DCA 1978), O'Sullivan v. Citv of Deerfield Beach, 232 So.2d 33 (Fla. 4th DCA 1970), and Milligan v. State, 177 So.2d 75 (Fla. 2nd DCA 1965). Accordingly, in this matter, the Third District Court of Appeal below properly applied the holding and reasoning contained in Nikula to this case.

CONCLUSION

The respondent/insurer respectfully requests that this Honorable Court affirm the decision of the Third District Court of Appeal, and answer the certified question that the Supreme Court's opinion in Nikula has implicitly overruled Brandt and the reasoning therein. Nikula's methodology is consistent with the principle of equitable distribution as delineated in Section 440.39, Fla. Stat. (1983); the process enunciated in Brandt is unreasonable and untenable. Additionally, the 1983 amendment to Section 440.39 did not change the process that a court was to use in computing the worker's compensation insurer's lien; under the amended statute the insurer would now have to pay a pro rata share of the employee's fees and costs incurred in the third party action. Therefore, under the amended statute, the ratio to be computed by the court was now plaintiff's net recovery (1983 version) instead of plaintiff's gross recovery (1981 version) to the full value of damages. When viewed in light of current case law and principles of equitable distribution, the process enunciated in Nikula is both reasonable and consistent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing, together with copy of appendix attached hereto, has been furnished, by regular mail, this 24th day of July, 1989 to THEODORE R. DEMPSTER, ESQUIRE, Law Offices of Bruce S. Schwartz, P.A., 2750 N.E. 187th Street, North Miami Beach, Florida 33180.

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