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FILED
SID J. WHITE
JAN 28 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

UNION CENTRAL LIFE INSURANCE COMPANY,

Petitioner,

v.

DANIELLE CARLISLE, etc., et al.,

Respondents.

No. 76,953

* * *

ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE
FROM THE COURT OF APPEAL
FOURTH DISTRICT

* * *

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF ISSUE ON REVIEW
(Restated)

Does Fla.R.Civ.P. 1.230 require a trial judge to grant permission to intervene in a pending action when the putative intervenor shows a right for which intervention may be granted; and, if not, can an appellate court reverse a denial of intervention merely because the asserted right is of the kind for which intervention may be granted?

Subsidiary Issues

1. Does a health insurance carrier claiming subrogation and reimbursement rights have any right to intervene in its insured claimant's action against the tortfeasor?

2. Will any possible dispostion of the insured's tort action prejudice any right of subrogation or reimbursement?

3. Is there any legal basis to grant health insurance carriers, or (for that matter) any other collateral source, extraordinary rights of collection against the victim's inchoate tort/negligence recovery?

SUMMARY OF ARGUMENT

Union has not really shown a right which could be affected, much less prejudiced, by any possible disposition in its insured's negligence action against the tortfeasor. Actually it seeks some extraordinary pre-judgment collection right against its insured's potential recovery in the negligence action. Such a right is so far outside anything given to potential unsecured creditors lacking any judgment against their alleged debtors, as to amount to a preference not even given to secured creditors. It is also contrary to traditional equity jurisprudence, as well as the statutes governing pre-judgment garnishment and attachment.

Rule 1.230 is permissive rather than mandatory. It expressly allows, such was its intent, the trial judge to deny intervention even where the applicant asserts the kind of right for which it may be proper under the rule to allow intervention. There a number of reasons, record and non-record, which might reasonably influence a trial judge's denial of intervention, even assuming a right to intervene had been shown here.

The reasonableness test of Canakaris and Mercer does not allow appellate judges to reverse a denial of intervention simply because they would have granted it in the first instance. It requires a showing, which the Fourth District found lacking here, of an abuse of discretion. The decision of the Fourth District in this case should be approved, and the contrary decision in Southland Life Insurance Co. v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990), should be disapproved.

USAGE NOTE

Amicus Curiae, The Academy of Florida Trial Lawyers, shall be referred to throughout as AFTL.

Petitioner is a health insurance carrier seeking to intervene in its insured's action against a tortfeasor for damages from personal injuries, from which the carrier paid benefits to or on behalf of its insured. Petitioner will be referred to as "Union".

Respondent is referred to as the "insured", or as respondent.

STATEMENT OF CASE AND FACTS

As amicus curiae, AFTL relies on the parties to provide the court with the necessary details of the case below and the facts on which the courts' decisions were based. So far as AFTL is given to understand them, it appears that Union paid out more than $500,000 in health care benefits for respondent, its insured, after she was injured by the malpractice of certain health care providers. Claiming common law subrogation and a right of reimbursement[1] from her, Union sought to intervene in respondent's malpractice lawsuit against the negligent providers, but the trial court denied its request.[2]

In affirming the trial court, the district court held that intervention was an instance of judicial discretion. While the court agreed that petitioner claimed a type of right for which intervention was theoretically proper, it disagreed with its contention that the denial of intervention constituted an abuse of discretion. It saw a substantial effect on trial courts if

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[1] It is unclear whether Union bases its reimbursement claim on its insurance contract, on § 768.76(4), Fla.Stat.(1989), or both. Nor is it clear whether there would be any difference between a purely contractual claim and a purely statutory claim. In this brief, AFTL treats them as if they were identical in their elements. In another case, they may not be.

[2] Since the denial of intervention, respondent has apparently agreed to settle with some of the providers for payment of approximately $900,000. She is said to take the position that the settlement primarily represents damages for pain and suffering and future health care, neither of which are involved in petitioner's subrogation claim. If so, petitioner would be entitled to no part of the settlement proceeds.

Respondent's claim includes a claim by her parents for their own losses, but the greater part of her suit against the doctors and hospital by far involves a minor's claims for damages resulting from catastrophic personal injuries. See fn. 4, below.

intervention of the kind involved here were generally required as a matter of law. It then certified the issue to this court.

ARGUMENT

As a legal proposition, it is difficult to see how a denial of intervention has any effect of Union's "claim" for reimbursement, or subrogation for that matter. As a claim, it remains unaffected by the lack of participation in the malpractice lawsuit. Certainly the final judgment in that case will not dispose of Union's claim.[3] It will still be entitled afterwards to bring its own action against its insured for its share, if any, of any recovery, assuming that its insured does not voluntarily pay Union. Conceptually, then, it is simply

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[3] One should distinguish between Union's claim for reimbursement from its insured and its separate claim to equitable subrogation against the tortfeasor. The claim for reimbursement is obviously not ripe until its insured has effected a recovery in the personal injury action from the tortfeasor. See § 768.76(4), Fla.Stat.(1989) (health insurer's right of reimbursement lies "if such claimant has recovered all or part of such collateral sources from a tortfeasor").

But Union need not abide a judgment in its insured's malpractice case to bring its subrogation claim; without waiting for its insured to bring an action, it could sue the tortfeasor directly on its own account to recover all the money it has paid for the victim's medical care. See Industriales Nicaraguenses Chipirul S.A. v. Switzerland General Ins. Corp. of New York, 443 So.2d 1062 (Fla. 3rd DCA 1984) (insured's failure to sue tortfeasor did not impair subrogation rights of insurer); and Fireman's Fund Ins. Co. v. Rojas, 409 So.2d 1166 (Fla. 3rd DCA 1982) (insurer's indemnity claim against tortfeasor who injured its insured accrued and statute of limitations on indemnity claim began to run when insurer has paid its insured's claim). Cf. Blue Cross and Blue Shield of Florida Inc. v. Matthews, 498 So.2d 421 (Fla.1987) (mere fact that § 627.7372 reduces motor vehicle accident victim's recovery from tortfeasor by amount of collateral source medical payments paid by health insurer does not bar health insurer from subrogation rights to recover from tortfeasor amount of health benefits paid to insured). There is no reason to believe that the Matthews result would be any different under § 768.76.

inaccurate to say that any disposition possible in the malpractice action, including a settlement between the victim and the tortfeasor, will prejudice Union's claim against its own insured for reimbursement.[4]

What Union really appears to be saying as its basis for intervention is that it should be given some extraordinary right -- i.e., by a lien or some form of pre-judgment garnishment -- to control the fund of money, which may result from a successful conclusion of the malpractice action, in such a way that the money goes directly from the source of payment in the malpractice case (a doctor or insurer) straight into the hands of Union; thus by-passing, of course, respondent's hands. So viewed, it is obvious that Union's real dispute has nothing to do with its "claim" for reimbursement, only how it actually collects on that claim.

Union is plainly guilty of confusing the question of its ability to obtain a judgment against its insured for reimbursement of any collateral source medical payments recovered in her malpractice action with the entirely separate question of

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[4] In this case respondent is a minor, and thus Union has unusual protection against any improper or unfair allocation of the settlement so as to defeat its subrogation claim unfairly. Under § 744.387, Fla.Stat.(1989), the court presiding over her personal injury action must approve the settlement (which Union obviously knows about, because it has referred to the settlement in its brief). Surely among the questions which that court will entertain are whether the proposed settlement provides a fair recovery for the minor's pain and suffering and future health care needs, and whether any part of the settlement must be used to reimburse collateral sources. Union has made no contention in this case that it is somehow incapable of using the § 744.387 hearing to raise the questions about which it here prematurely claims so much prejudice.

its ability to satisfy any such judgment. As this court said in an undeniably analogous context:

> "The inadequacy of a remedy at law to produce money is not the test of the applicability of the rule. All remedies, whether at law or in equity, frequently fail to do that; and to make that the test of equity jurisdiction would be substituting the result of a proceeding for the proceeding which is invoked to produce the result. The true test is, could a judgment be obtained in a proceeding at law, and not, would the judgment procure pecuniary compensation."

Stewart v. Manget, 132 Fla. 498, 181 So. 370, 374 (1938). As the trial court undoubtedly reasoned in dismissing its intervention complaint[5], no agreement or statute gives Union any lien rights on its insured's tort recovery. Without a lien, there is no basis in equity to reach a putative debtor's assets before a judgment is entered against him, and Union can thus hardly claim any right to an injunction controlling the incipient tort recovery by the victim. See Oxford Int'l Bank and Trust Ltd. v. Merrill Lynch Pierce Fenner & Smith Inc., 374 So.2d 54 (Fla. 3rd DCA 1979) (contingent, disputed and unliquidated claim for damages does not provide any basis for injunctive relief).

Moreover, while Union's claim for reimbursement from its insured may arise from its contract with its insured, its attempt to control the proceeds of its insured's potential recovery from the tortfeasor obviously comes in an action "sounding in tort".

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[5] The district court plainly saw Union's claim to intervention as based in equity. Union Central Life Ins. Co. v. Carlisle, 566 So.2d 1335, 1337 (Fla.4th DCA 1990) ("As to the case at bar * * * the insurer would clearly be entitled to equitable subrogation").

The right to intervene in a pending lawsuit originated in equity. Miracle House Corporation v. Haige, 96 So.2d 417 (Fla.1957). When the intervention claim is thus based on equity, it is indeed appropriate that the court recur to traditional equitable principles to decide the intervention question.

There is no doubt that garnishment is a creature of statute, unknown to the common law, and must be strictly construed only as the statute allows. Robinson v. Robinson, 154 Fla. 464, 18 So.2d 29 (1944). Yet § 77.02, Fla.Stat.(1989), expressly excludes pre-judgment garnishment in an action "sounding in tort".[6]

The slope created by a rule requiring intervention in the circumstances involved here would be as slippery as a handful of eels. What is the functional difference between the insurer who has paid the doctor and a doctor who has not been paid? In fact, one could hardly avoid turning the victim's negligence case into an omnibus action encompassing all claims which anybody in the world may have for payment on account of the event.

All unpaid landlords, doctors, grocers, nurses, babysitters, therapists, taxidrivers, hospitals, tax collectors -- indeed every creditor who the victim has asked to wait until there is a recovery -- can then intervene in the action, and the clerk of court can write the checks when the case is finally over. It will make our trial courts collection agencies or quasi-bankruptcy courts who must marshal the tort-recovery asset and then pay the creditors. All this simply because the insurance carrier wants some sort of preternatural collection rights, not given to any other contingent and unliquidated creditor under any other circumstances.

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[6] Union makes no claim that its insured is preparing to flee the jurisdiction, or is disposing of or hiding assets to avoid paying its claim. Such a showing is indispensable to any right of pre-judgment attachment, even assuming that attachment could be used to reach an inchoate fund of money. See § 76.04, Fla.Stat. (1989); and Cerna v. Swiss Bank Corp. (Overseas) S.A., 503 So.2d 1297 (Fla. 3rd DCA 1987), rev. den. 513 So.2d 1060 and 1063.

The resulting delay in disposing of negligence cases could lead to a backlog in our courts that would then become a true crisis whose proportions we cannot even begin to imagine. The rights of tort victims would be inevitably lost in the long, long time that it will then take to get one of these cases to judgment. It is impossible to understand how anyone, not even insurance companies, could benefit from this needless additional complication of ordinary tort cases.

There are at least two formidable legal obstacles to a decision in favor of Union. The first is the rule itself. As the district court pointedly observed, rule 1.230 is cast in permissive terms, not mandatory requirements. Discretion is given to the trial judge to allow or deny intervention. The rule does not, for example, itemize the occasions when intervention is proper and then simply require it when the claim fits within one of the listed occasions.

Instead the drafters of rule 1.230 said the following:

> "Under this rule, the court has full control over intervention, including the extent thereof; although intervention under the rule is classified as of right, there must be an application made to the court, and the court in its discretion, considering the time of application as well as other factors, may deny the intervention or allow it upon conditions." [e.s.]

Author's Comment -- 1967, 30 Fla. Stat. Ann. 352 (1985). It was obviously their intent not to let the right to intervene control the trial judge's handling of the case; rather they gave the court the power to deny participation even where the right to intervene was shown.[7] For this court to disapprove the district

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[7] The common understanding of the decisions is that the granting

court's decision here would be an effectual rewriting of the rule.

AFTL opposes any change in this rule. Our members believe that trial judges are in the best position to decide which claimants should be allowed to participate in a pending action which the intervenors did not initiate. Any other rule would give peripheral claimants too much control over the timing and course of lawsuits, which have already become too complex.

The second obstacle arises from the first. Over the last decade this court has carefully reaffirmed the rule of reasonableness in matters of judicial discretion. Perhaps the clearest expression of this policy is contained in the following (admittedly lengthy) quotation:

> "In Farish [v. Lum's Inc., 267 So.2d 325 (Fla.1972)], this Court stated:
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> > The exercise of discretion by a trial judge who sees the parties first-hand and is more fully informed of the situation, is essential to the just and proper application of procedural rules. In the absence of facts showing an abuse of that discretion, the trial court's decision excusing, or refusing to excuse, non-compliance with rules * * * must be affirmed * * * . It is the duty of the trial court, and not the appellate courts, to make that determination.
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> Id. at 327-28. This same rule of law has been stated and followed by the United States Supreme Court. [Citation omitted.] Thus, to justify reversal, it would have to be shown on appeal that the trial court clearly erred in its interpretation of the facts and not merely that the court, or another fact-finder,

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or denying of intervention is within the discretion of the trial court, as to which an abuse must be shown to disturb the order. Wogisch v. Tiger, 193 So.2d 187 (Fla. 4th DCA 1966); Coral Bay Property Owners Assoc. v. City of Coral Gables, 305 So.2d 853 (Fla. 3rd DCA 1975); Wong v. Von Wersebe, 365 So.2d 429 (Fla. 3rd DCA 1978); Hamel v. Seekell, 404 So.2d 1144 (Fla. 5th DCA 1981); and Idacon Inc. v. Hawes, 432 So.2d 759 (Fla. 1st DCA 1983).

might have made a different factual determination.

> This Court has spoken of the scope of this discretionary power granted to the trial court. In Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980), we stated:
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> > In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.
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> Id. at 1203. * * * As we noted in Baptist Memorial Hospital Inc. v. Bell, 384 So.2d 145 (Fla.1980), which dealt with discretionary power to grant or deny a new trial, the trial judge is granted this discretionary power because it is impossible to establish a rule of law for every conceivable situation which could arise in the course of a trial. * * * " [e.o.]

Mercer v. Raine, 443 So.2d 944, 946 (Fla.1984).

The foregoing has especial application to intervention orders. As the rule itself suggests, it is simply impossible to draft an intervention rule that would cover every conceivable kind of attempted intervention. Some kinds should be almost always granted -- e.g., in an in rem action, anyone claiming title should be allowed in the case -- while in others, as here, it should be left to the trial judge to sort out.

The AFTL opposes any abandonment of this court's rule of reasonableness for discretionary acts of trial judges. Our members do not always prevail in matters of discretion before trial judges, not even always when they should. But on the whole, we believe that our clients and the system are best served

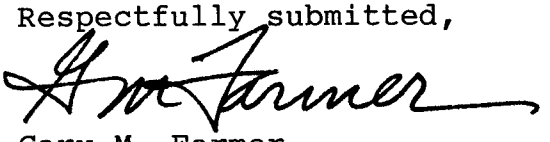
by a rule which limits the power of appellate judges to decide procedural matters on a cold record and without personally seeing the players or knowing all of the considerations (record and non-record) affecting the decision.

We believe that the Fourth District has correctly applied the reasonableness test in this case to the intervention decision here. It follows that the Fifth District has gotten it all wrong in Southland Life Insurance Co. v. Abelove, 556 So.2d 805 (Fla. 5th DCA 1990).

CONCLUSION

The certified question should be answered in the negative, and the decision of the Fourth District approved.

Respectfully submitted,



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