IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,015

DONALD S. ZUCKERMAN, etc., et al.,

Petitioner,

v.

HOFRICHTER & QUIAT, P.A., et al.,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS[1/]

Zuckerman seeks review of a Third district decision which held that the settlement of a case that sought disability insurance proceeds converted those proceeds from exempt disability payments under the garnishment statute into generic settlement proceeds that were not exempt from garnishment. This decision directly conflicts with this Court's decision in Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934) and misapplies the rule of law announced by the Second District Court in J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249 (Fla. 2d DCA 1989).

Zuckerman had a disability insurance policy with Provident Life and Accident Co. When Provident denied Zuckerman's disability claim, Zuckerman sued Provident for payment under the policy and for bad faith. That action was eventually settled for a lump sum payment of $75,000 by Provident in exchange for a general release and surrender of the policy by Zuckerman.

In the interim, Hofrichter obtained a judgment against Zuckerman in an unrelated case. To collect on that judgment, Hofrichter filed a writ of garnishment against the funds from the

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[1/] Petitioners DONALD S. ZUCKERMAN, P.A. and DONALD S. ZUCKERMAN will be referred to as they stand in this Court, as they stood in the trial court, and as Zuckerman. Respondents HOFRICHTER & QUIAT, P.A., ALEX HOFRICHTER, P.A., and ALEX HOFRICHTER will be referred to and they stand in this Court, as they stood in the trial court, and as Hofrichter. Emphasis is supplied by counsel unless otherwise indicated. Only relevant subsequent history is provided.

disability case which were still in the hands of Provident.[2/] The trial court held an evidentiary hearing and awarded $44,209.50 of the disability settlement to Hofrichter.[3/] Zuckerman appealed.

The Third District Court affirmed. Zuckerman v. Hofrichter & Quiat, P.A., 18 Fla.L.Weekly D2571 (Fla. 3d DCA Dec. 7, 1993)(A. 1). The court held that proceeds of a settlement in an action to obtain payment under a disability insurance policy were not "disability income benefits" exempt from garnishment under Fla.Stat. § 222.18. The Third District reasoned that those funds were paid pursuant to the settlement agreement, not the disability insurance policy. The court cited three cases: J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249, 251 (Fla. 2d DCA 1989); Brinker v. Ludlow, 379 So.2d 999, 1002 (Fla. 3d DCA 1980), approved, 403 So.2d 969 (Fla. 1981); Salling Wiping Cloth Co. v. Sewell, Inc., 419 So.2d 112, 116-17 (La.Ct.App. 1982). These cases merely state the general, and irrelevant, rule that a cause of action merges into a judgment or settlement obtained on that action.

Zuckerman filed a timely notice to invoke the discretionary jurisdiction of this Court under Fla.Const. art. V, § 3(b)(3).

2/ The initial judgment in favor of Hofrichter and against Zuckerman is not the subject of these proceedings. The Third District Court of Appeal affirmed that judgment. Zuckerman v. Hofrichter, 18 Fla.L.Weekly D2579 (Fla. 3d DCA Dec. 10, 1993). It is now pending on rehearing.

3/ The remainder of the settlement was awarded to Zuckerman's attorneys for legal services rendered in the disability insurance action.

SUMMARY OF ARGUMENT

The Third District Court held that proceeds of a settlement in an action for benefits under a disability insurance policy were not "disability income benefits" exempt from garnishment under section 222.18, Florida Statutes. This Court has jurisdiction to review this decision because it directly conflicts with this Court's decision in Bank of Greenwood v. Rawls, which interpreted the predecessor statute to § 222.18 which had language nearly identical to the relevant language in this case. The decision also conflicts with the Second District Court's decision in J. Allen, Inc. v. Castle Floor Covering, Inc., because it misapplies the rule of law stated in that case. J. Allen merely states the unremarkable proposition that a party who enters into a settlement of a disputed claim cannot later attempt to litigate that claim. It does not follow that funds paid pursuant to a settlement of a case to obtain benefits under a disability policy somehow lose their character as disability benefits.

It is important for this Court to exercise its jurisdiction because the Third District's decision is contrary to the plain language of the statute, contravenes the policy behind the disability benefits exemption, contravenes the policy that favors settlement and unfairly places those insureds who must go to court to obtain their disability benefits in a significantly worse position than those whose insurance carriers do not deny their claims.

ARGUMENT

I. THIS COURT HAS JURISDICTION BECAUSE THE THIRD DISTRICT'S DECISION CONFLICTS WITH A DECISION OF THIS COURT AND A DECISION OF THE SECOND DISTRICT.

The Third District held that funds paid pursuant to settlement of a lawsuit for disability insurance benefits were not "disability income benefits" exempt from garnishment under Fla.Stat. § 222.18.[4/] Donald S. Zuckerman, P.A. v. Hofrichter & Quiat, P.A., 18 Fla.L.Weekly D2571 (Fla. 3d DCA Dec. 7, 1993). The court reasoned that the settlement agreement "extinguished Zuckerman's claim under the disability policy" and therefore those funds were paid "pursuant to the agreement of settlement and compromise, not the disability insurance policy." Id.

The Third District's decision conflicts with this Court's decision in Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934) and with the Second District Court's decision in J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249 (Fla. 2d DCA 1989). This Court therefore has jurisdiction to review this case.

4/ Section 222.18 provides:

> Disability income benefits under any policy or contract of life, health, accident, or other insurance of whatever form, shall not in any case be liable to attachment, garnishment, or legal process in the state, in favor of any creditor or creditors of the recipient of such disability income benefits, unless such policy or contract of insurance was effected for the benefit of such creditor or creditors.

A. The Third District Court's decision directly conflicts with this Court's decision in Bank of Greenwood v. Rawls.

In Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934), a man received funds in settlement of a disability provision in his life insurance policy in return for surrender of that policy. The man's creditors sought to garnish those funds, arguing that they did not constitute "cash surrender values" of a life insurance policy because they were in settlement of the disability provision of the policy.

This Court disagreed. It interpreted language in the then existing exemption statute which stated that the cash surrender value of life insurance policies "upon whatever form" shall not in "any" case be liable for garnishment.[5/] Id. at 174-75. This Court held that cash surrender value included funds obtained by a negotiated settlement which included surrendering the policy. "Cash surrender value" was not limited to "cash surrender value" as that term is ordinary used in insurance law. Id. at 175.

The statutory language interpreted in Bank of Greenwood is virtually identical to the relevant statutory language in this case. Section 222.18 states that benefits of a disability insurance policy "of whatever form, shall not in any case be liable" to garnishment. Thus, as in Bank of Greenwood, the exempted policy benefits in this case should include monies obtained in a negotiated settlement for payment under the policy. The Third District

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[5/] Prior to the passage of § 222.18 in 1941, disability income benefits were not exempt from garnishment, but cash surrender values of life insurance policies were.

held otherwise. Therefore, this case directly conflicts with Bank of Greenwood and this Court has jurisdiction.

B. The Third District Court's decision misapplied the rule of law stated in J. Allen, Inc. v. Castle Floor Covering, Inc.

The Third District Court's decision conflicts with the Second District Court's decision in J. Allen, Inc. v. Castle Floor Covering, Inc. because it misapplies the rule of law stated in that case. See Mancini v. State, 312 So.2d 732, 733 (Fla. 1975). In J. Allen, a conflict arose over whether a subcontractor's work was acceptable. The contractor and subcontractor settled this conflict by entering into an agreement that the contractor would pay the subcontractor for the labor and materials necessary to rework the job. The subcontract redid the job according to the job specifications but the contractor refused to pay the subcontractor for the additional work. The subcontractor sued and the contractor counterclaimed that the subcontractor had initially performed the work in an unworkmanlike manner. The Second District Court rejected the contractor's counterclaim because any rights and duties the parties had at the time they entered into the settlement agreement were merged into that settlement agreement. 543 So.2d at 251.

The rule announced in J. Allen has no relevance to this case. It does not address the nature of funds received in settlement of a claim. Instead, the rule merely states the unremarkable proposition that a party who enters into a settlement of a disputed

claim cannot later attempt to litigate that claim.[6/] It does not follow that funds paid pursuant to a settlement of a case to obtain benefits under a disability policy somehow lose their character as disability benefits.

Thus, the Third District Court's decision in this case conflicts with the Second District Court's decision in J. Allen and this Court has jurisdiction to review this case.

II. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THE QUESTION OF WHETHER MONIES OBTAINED IN A SETTLEMENT ON A DISABILITY POLICY ARE DISABILITY INCOME BENEFITS EXEMPTED FROM GARNISHMENT.

The Third District Court's decision in this case has broad and disturbing ramifications. First, the Third District Court's decision is contrary to the plain language of the exemption statute. Section 222.18 unambiguously exempts from legal process all disability income benefits, "of whatever form" due a debtor under any disability policy.[7/] The statute could not be more broadly worded. The court should not graft onto a statute limitations not mandated by the legislature. Chaffee v. Miami Transfer Co., 288 So.2d 209, 215 (Fla. 1974). Therefore, the fact that these payments were made pursuant to a settlement agreement on a claim for these benefits should be irrelevant.

[6/] The other two cases cited by the Third District Court in this case apply the same rule in the context of a judgment on a disputed claim. Brinker v. Ludlow, 379 So.2d 999 (Fla. 3d DCA 1980), approved, 403 So.2d 969 (Fla. 1981); Salling Wiping Cloth Co. v. Sewell, Inc., 419 So.2d 112 (La.Ct.App. 1982).

[7/] The only exception to this broad exemption from legal process is where the insurance policy "was effected for the benefit of such creditor or creditors." § 222.18.

Second, the Third District Court's decision contravenes the policy behind the exemption statute. Statutes should be construed to give effect to the policy behind their enactment. White v. Pepsico, 568 So.2d 886, 889 (Fla. 1990). The purpose of such exemptions is to prevent debtors and their families from being deprived of the necessities of life and becoming public charges. Patten Package Co. v. Houser, 102 Fla. 603, 136 So. 353, 355 (1931). See also Elvin v. Public Finance Co., 196 So.2d 25 (Fla. 3d DCA 1967). For this reason, such exemptions should be liberally construed in favor of the debtor to accomplish the policy of preserving a living for the debtor and his family. Killian v. Lawson, 387 So.2d 960, 962 (Fla. 1980); Patten Package, 136 So. at 355.

Instead, the Third District Court strictly construed the exemption. The implication of the court's holding is that only disability benefits paid pursuant to uncontested claims are exempt from garnishment. If the carrier contests the claim, and the insured is forced to litigate the claim, any funds received whether by settlement or judgment are subject to garnishment by creditors.[8/] That places an unfair burden on insureds whose disability carriers dispute their claims and contravenes the policy of

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8/ Two of the three cases cited by the Third District Court dealt with the merger of claims into a judgment, Brinker v. Ludlow, 379 So.2d at 1002; Salling Wiping Cloth Co. v. Sewell, Inc., 419 So.2d at 116-17. Thus, apparently the court did not distinguish between settlements and judgments in this context. To the extent the court's decision can be seen as only applying to payments made pursuant to a settlement, it also contravenes the public policy favoring settlement of disputes without litigation. See Robbie v. City of Miami, 469 So.2d 1384 (Fla. 1985).

protecting debtors and their families from becoming destitute and public charges.

Moreover, settlements and judgments do not exist in a vacuum. They must be construed with reference to the subject matter before the court at the time they were made. See Saucer v. Efstathion, 34 So.2d 435, 436 (Fla. 1948). The settlement in this case requires payment of disability benefits to Zuckerman because the original insurance policy so required. The settlement merely changed the method of payment. Those funds were disability benefits as surely as if they had been paid when Zuckerman first made his claim. The character and purpose of the payments never changed, and neither should their exempt status.

Thus, it is important that this Court exercise its jurisdiction to review this case and resolve the conflict created by the Third District Court's decision.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to exercise its jurisdiction and resolve the conflict presented by the Third District Court's decision in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was ~~mailed~~ hand delivered this 19th day of January, 1994 to: all counsel on the attached list.

Respectfully submitted,

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Garnishment—Proceeds from disability insurer's settlement of lawsuit in which its insured sought payment under policy and damages for bad faith practices did not constitute "disability income benefits" exempt from garnishment

DONALD S. ZUCKERMAN, P.A., and DONALD S. ZUCKERMAN, individually, Appellants, vs. HOFRICHTER & QUIAT, P.A.; ALEX HOFRICHTER, P.A., and ALEX HOFRICHTER, individually, Appellees. 3rd District. Case No. 92-2532. Opinion filed December 7, 1993. An appeal from the Circuit Court of Dade County, Ursula Ungaro, Judge. Proenza White Huck & Roberts and Paul C. Huck, for appellants. Wolpe Leibowitz Berger & Brotman and Todd Schwartz; Alex Hofrichter, for appellees.

(Before BARKDULL and HUBBART and LEVY, JJ.)

(PER CURIAM.) This is an appeal by the judgment debtors [Donald S. Zuckerman and Donald S. Zuckerman, P.A.] from an adverse judgment entered in a garnishment proceeding awarding certain lawsuit settlement proceeds to the judgment creditors [Hofrichter & Quiat, P.A., et al.]. It is urged that the settlement proceeds were exempt from garnishment by Section 222.18, Florida Statutes (1991) which provides that "[d]isability income benefits under any policy or contract of life, health, accident, or other insurance of whatever form, shall not in any case be liable to ... garnishment ... in the state, in favor of any creditor or creditors of the recipient of such disability income benefits," subject to an exception not applicable here. We disagree and affirm.

It appears that the judgment debtor Donald S. Zuckerman had a disability insurance policy with Provident Life and Accident Company. Zuckerman made a claim under the policy which Provident eventually denied. A lawsuit resulted in which Zuckerman sued for payment under the policy, and sought damages, as well, for bad faith settlement practices; Provident filed an answer contesting Zuckerman's disability and counterclaimed for fraud, unjust enrichment and related claims, asserting fraudulent misrepresentations by Zuckerman on the insurance application. Eventually, the suit was settled for an agreed-upon lump sum payment of $75,000 by Provident in exchange for Zuckerman's general release and surrender of the disability policy. The judgment creditors herein then filed a writ of garnishment against these proceeds. After an evidentiary hearing, the trial court awarded $44,209.50 of the settlement proceeds to the judgment creditors; the remaining portion of the $75,000 was awarded to Zuckerman's attorneys in the insurance suit for legal services rendered in that suit.

We conclude that the lawsuit settlement proceeds in the hands of Provident did not, as urged, constitute "disability income benefits" exempt from garnishment under Section 222.18. The compromise and settlement agreement between the parties extinguished Zuckerman's claim under the disability policy, as well as Provident's counterclaim for fraud, and in no way constituted an admission by Provident or Zuckerman that each other's claims were valid; Provident, in particular, simply bought its peace at a price considerably lower than Zuckerman claimed. Stated differently, Provident paid Zuckerman pursuant to the agreement of settlement and compromise, not the disability insurance policy. This being so, the subject settlement proceeds cannot constitute "disability income benefits" under the above statute. *See J. Allen, Inc. v. Castle Floor Covering, Inc.*, 543 So. 2d 249, 251 (Fla. 2d DCA 1989); *Brinker v. Ludlow*, 379 So. 2d 999, 1002 (Fla. 3d DCA 1980), *approved*, 403 So. 2d 969 (Fla. 1981); *Salling Wiping Cloth Co. v. Sewell, Inc.*, 419 So. 2d 112, 116-17 (La. Ct. App. 1982).

Affirmed.

* * *

Trusts—Underproductive property—Trial court departed from essential requirements of law by entering discovery order which compelled production of numerous documents dealing with management and operation of trust and other assets—Suit alleging violation of underproductive property statute is narrow in scope and cannot be used to obtain de facto accounting or the kind of discovery permitted only after right to an accounting has been established—Discovery order duplicative in view of fact that beneficiaries have available to them pertinent financial statements containing information sought—Access to many relevant documents already provided to beneficiaries by trustees

TIMOTHY J. ROBBIE; JANET L. ROBBIE; DANIEL T. ROBBIE, as Trustee of the Joseph Robbie Trust and as Trustees of the Insurance Trust, Petitioners, vs. JOSEPH MICHAEL ROBBIE; DIANE E. TRULY; DEBORAH R. OLSON; and KEVIN P. ROBBIE, Respondents. 3rd District. Case No. 93-765. Opinion filed December 7, 1993. On Petition for a Writ of Certiorari to the Circuit Court for Dade County, Ronald M. Friedman, Judge. Stroock & Stroock & Lavan and Robert L. Shevin and Richard B. Simring, for petitioners. Warwick & Reynolds and Alice Elizabeth Warwick, for respondents.

(Before HUBBART, NESBITT, and LEVY, JJ.)

(PER CURIAM.) The Petitioners are the Trustees for two trusts of which they, along with the Respondents, are also beneficiaries. The Respondents have brought suit against the Trustees pursuant to Section 738.12, Florida Statutes (1991), claiming the Trustees have violated the underproductive trust property statute. The Trustees petition this Court for a Writ of Certiorari to quash portions of a discovery order entered by the trial court which compelled the production of numerous documents dealing with the management and operation of trust and other assets.

We are persuaded to grant certiorari for three reasons. First, a suit under Section 738.12 is by nature narrow in scope, and cannot be used to obtain a *de facto* accounting, or to obtain the kind of discovery permitted only after the right to an accounting has been established. *See generally Charles Sales Corp. v. Rovenger*, 88 So. 2d 551 (Fla. 1956); *Bouis v. Warren*, 112 So. 2d 283 (Fla. 2d DCA 1959). Second, the Respondents have available to them pertinent financial statements, including certified public audits, which contain the relevant sought after information, rendering the current discovery order duplicative. Third, the Trustees have already provided the Respondents with access to many relevant documents regarding both the administration of the trusts and the Robbie estates.

Consequently, we find that the trial court departed from the essential requirements of the law. *See Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987); *American Southern Co. v. Tinter, Inc.*, 565 So. 2d 891 (Fla. 3d DCA 1990). We therefore quash the trial court's discovery order to the extent it granted Respondent's requests for production numbered 6, 7, 8, 12, 13, 14, 15, 16, 17, and 25.

Certiorari granted.

* * *

Contracts—Attorney's fees—Trial court did not err in enforcing fee-sharing agreement between two law firms which required that firms share any contingency fees on 50-50 basis—Fee amounting to 25% of settlement obtained in class action was contingent upon plaintiffs prevailing in action and was therefore a "contingency fee" within meaning of fee-sharing agreement

BAILEY HUNT JONES & BUSTO, P.A., a professional association, Appellant, vs. ROLAND LANGEN, P.A., Appellee. 3rd District. Case No. 93-1268. Opinion filed December 7, 1993. An appeal of a non-final order from the Circuit Court of Dade County, S. Peter Capua, Judge. Bailey Hunt Jones & Busto and James C. Cunningham, Jr., and Mercedes C. Busto, for appellant. Christopher Langen; Concepcion, Sexton & Stiphany and Francis X. Sexton, Jr., for appellee.

(Before HUBBART and COPE and LEVY, JJ.)

(PER CURIAM.) Because (a) the attorney's fee, which was previously awarded by the trial court to the two law firms representing the plaintiffs in the underlying class action amounting to 25% of the $9,200,000 settlement obtained, was contingent upon the plaintiffs prevailing in the action and was therefore a "contingency fee," within the meaning of the fee-sharing agreement between the two law firms, and (b) there was substantial, competent evidence adduced below that Hilary Langen, as required by the above fee-sharing agreement, worked on the underlying class action as an associate with the Bailey Hunt law firm, assisting in