IN THE SUPREME COURT OF FLORIDA

CASE NO.: 83,015

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

Petitioners,

vs.

ALEX HOFRICHTER, P.A., f/k/a
HOFRICHTER & QUIAT, P.A., and
ALEX HOFRICHTER, individually,

Respondents.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner invites the invocation of this Court's discretionary jurisdiction pursuant to Fla. Const. Art. V, Sec. 3(b)(3), because of an alleged "express and direct conflict" with this Court's decision in Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934) and the Second District's decision in J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249 (Fla. 2d DCA 1989). No other jurisdictional basis is alleged; none is presented.

Contrary to Petitioner's factual statement, as the opinion under consideration makes clear, the Third District Court of Appeal did not hold that the subject settlement "converted these proceeds from exempt disability payments into generic settlement proceeds but were not exempt from garnishment." (Petitioner's Brief, at 1). Rather, the district court expressly held that the subject lawsuit settlement proceeds never possessed the character of disability benefits in the first instance:

> 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 piece 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. [citations omitted].
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> 18 FLW D2571 (Fla. 3d DCA Dec. 7, 1993).

As the district court noted, while Petitioner sued for disability benefits and for statutory bad faith, his insurer, Provident, counterclaimed for fraud, unjust enrichment and related claims because of Petitioner's fraudulent misrepresentation on the insurance application. Id. The lawsuit (and, necessarily, all claims asserted or which could have been asserted therein) was settled for an agreed upon general payment of $75,000.00 by Provident. Id.

Respondent respectfully suggests that no conflict exists and, thus, jurisdiction does not lie.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the Third District's decision here and this Court's decision in Rawls or the Second District's decision in J. Allen. In Rawls, the garnished res "was an agreed payment for total disability benefits...." Here, Respondent garnished an indebtedness under a general litigation settlement. The res never possessed the character of disability income benefits, nor did it purport to. Rawls is distinguishable on its facts and no conflict is presented.

In J. Allen, as in this case, the parties entered into a compromise and settlement agreement and expressly extinguished their respective rights and obligations under the original contract. The district court here properly relied upon J. Allen and the controlling rule of law applied therein in deciding this case. The compromise and settlement agreement here did not provide for the payment of disability benefits, but instead represented the global settlement of various disputed claims and counterclaims of the parties.

ARGUMENT

I. THERE IS NO EXPRESS AND DIRECT CONFLICT ON THE SAME QUESTION OF LAW TO INVOKE THIS COURT'S JURISDICTION.

Neither precedent relied upon by Petitioner is in conflict with the Third District's decision in this case. In Bank of Greenwood v. Rawls, this Court expressly recognized that the garnished res "was an agreed payment for total disability benefits...." 158 So. at 174. Here, respondent indisputably garnished the proceeds of a general litigation settlement following the compromise of various disputed claims and counterclaims. Petitioner's reliance upon this Court's use of the word "settlement" in Rawls as meaning something more than the direct exercise and discharge of the parties' respective rights and obligations pursuant to the terms of an insurance policy, is clearly misplaced and an attempt to manufacture conflict where none exists. See Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983) (where case is distinguishable on its facts from cases allegedly in conflict, jurisdiction does not lie).

The same reasoning negates Petitioner's suggestion of jurisdiction based upon an alleged misapplication of the rule of law followed in J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249 (Fla. 2d DCA 1989). In J. Allen, as in the other

cases cited in the opinion at bar, the court held, inter alia, that a compromise and settlement agreement memorialized in addenda to the parties' contract extinguished the parties' rights and obligations under the original contract: "By entering into the addenda, any rights and duties the parties had at that moment were merged into their settlement agreement, unless stated otherwise." 543 So.2d at 251.

Precisely the same factual scenario was presented in the instant case, as Petitioner and his insurer conclusively settled and extinguished their respective claims on global terms and without reservation for the sum of $75,000.00. The district court did not misapply the settled and controlling rule of law applied in J. Allen.

II. THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY AUTHORITY TO REVIEW THIS CASE.

The controlling rule of law properly applied by the district court in this case is also entirely consistent with this Court's own prior precedents. See National Surety Co. v. Willys-Overland, Inc., 103 Fla. 738, 138 So. 24, 26 (Fla. 1931) ("It is also well settled that the parties and those who claim under them with notice cannot go behind a compromise made in good faith as a settlement of prior disputes."); Munilla v.

Perez-Cobo, 335 So.2d 584 (Fla. 3d DCA 1976), cert. den. 344 So.2d 325 (Fla. 1977).

To entice discretionary review, Petitioner cites noble legislative concerns, misguided principles of statutory construction,[1] and the public policy favoring settlements over litigation. Bad facts make bad law, however. In this case, the record, as noted by the District Court of Appeal, reflects that the compromise and settlement agreement did not provide for payment of disability benefits pursuant to the policy but rather expressly extinguished Petitioner's claim under the policy. As the trial court found, and as confirmed by the district court, the settlement funds were not, as Petitioner contends, disability benefits,[2] nor did the parties intend

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[1]Petitioner's generous liberties concerning the plain language of the statute at issue merits brief mention. Contrary to Petitioner's suggestion at pages 5 and 7, as well as by the supplied emphasis in footnote 4 at page 4, the words "of whatever form" in Section 222.18 do not qualify the words "Disability income benefits" but, rather, the words "any policy or contract of life, health, accident, or other insurance." The last antecedent doctrine of statutory construction requires that "relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." Kirksey v. State, 433 So.2d 1236, 1241 (Fla. 1st DCA 1983 (the court citing McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1179-1180 (Fla. 1st DCA 1982); Rich Electronics v. Southern Bell Telephone & Telegraph Company, 523 So.2d 670, 672 (Fla. 3d DCA 1988). See also Rawls, 158 So. at 174-75.

[2]Petitioner's Brief, at p.9.

them to be as reflected in the settlement documents.

Petitioner's expressed fear that insureds in litigation with their disability carriers will lose the statutory protections ignores the plain fact that with the exception of those few highly tenuous claims which can only be resolved through litigation, the overwhelming majority of claims are resolved and benefits paid without litigation. Furthermore, as with all settlement agreements, all the insured or its counsel need do to preserve the statutory exemption is simply require the due payment of disability benefits and identify same in the settlement (if that is in fact the case). See J. Allen, 543 So.2d at 251-52 ("By entering into the addenda, any rights and duties the parties at that moment were merged into their settlement agreement, unless stated otherwise. [citation by the court omitted.] The addenda and their attachments conclusively show that there was no statement or reservation to the contrary." [emphasis supplied]).

CONCLUSION

For the foregoing reasons, Respondent respectfully suggests that there is no express and direct conflict on the same question of law authorizing this Court's discretionary review of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of February, 1994 to all counsel on the attached Service List.

Respectfully submitted,

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