OA 8-31-94

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,015

DONALD S. ZUCKERMAN, P.A. and
DONALD S. ZUCKERMAN, individually,

Petitioners,

vs.

HOFRICHTER & QUIAT, P.A., ALEX
HOFRICHTER, P.A., and ALEX
HOFRICHTER, individually,

Respondents.
_____/

BRIEF OF RESPONDENTS ON THE MERITS

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-and-

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TABLE OF CONTENTS

INDEX OF CITATIONS AND AUTHORITIES

INDEX OF CITATIONS AND AUTHORITIES (Cont'd)

INTRODUCTION

For the Court's convenience, Respondents will adopt the same party and record references used by Petitioners, and reference to the appendix annexed to Respondent's herein brief will be preceded by the designation "A." All emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Alex Hofrichter, P.A.[1] (Hofrichter) obtained a substantial joint and several money judgment against Zuckerman and his law firm entities. Donald S.Zuckerman, P.A. v. Hofrichter & Quiat, P.A., 629 So. 2d 217 (Fla. 3d DCA 1994), rev. denied, ____ So. 2d _____ (1994). The judgment remained unsatisfied. Hofrichter garnished Provident Life & Accident Insurance Company which was believed to be indebted to Zuckerman pursuant to a recently entered contract for settlement. (R. 4415-16)

Provident answered, admitted its indebtedness to Zuckerman in the amount of $75,000.00 pursuant to the parties' compromise and settlement agreement, and further disclosed a potential charging lien by Zuckerman's counsel. (R. 4417-19)

After due notice to Zuckerman and his potentially interested counsel (R. 4411-19), each moved separately to

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[1]Although throughout their brief Petitioners refer collectively to Alex Hofrichter, P.A. (which was formerly known as Hofrichter & Quiat, P.A.) and Alex Hofrichter as "Hofrichter" it should be noted that the money judgment was obtained by Alex Hofrichter, P.A., not Alex Hofrichter, and the garnishment at issue was by Alex Hofrichter, P.A. Notwithstanding this, for convenience of reference only, Alex Hofrichter, P.A. and Alex Hofrichter, individually, will continue to be referred to herein as "Hofrichter."

dissolve the writ. (R. 4423-32) Both Zuckerman and his counsel admitted in their pleadings that Provident's indebtedness to Zuckerman arose out of their contract for settlement, rather than a disability policy. (Id.) Nevertheless, they asserted that the settlement was at once exempt from garnishment pursuant to Section 222.18, Fla. Stats., and that counsel had "an ownership interest in the $75,000.00 held by Provident by virtue of its law firm's lien against those funds for legal services rendered in obtaining the $75,000.00," which alleged liens said parties contended were superior to the claim of Hofrichter. (Id.) The trial court agreed with the latter contention, enforced the attorney's charging liens, the order was affirmed on appeal, and Zuckerman thus successfully reduced the available garnished res by almost half. (R. 4565-71); see Hofrichter & Quiat, P.A. v. Brumer, Cohen, Logan & Kandell & Kaufman, 624 So. 2d 415 (Fla. 3d DCA 1993).

Because Zuckerman admitted that Provident's indebtedness arose out of a contract for settlement, Hofrichter moved for judgment on the pleadings with respect to the remaining res. (R. 4420-22) The trial court conducted an extensive evidentiary hearing on the parties' omnibus pleadings and motions which hearing focused upon the settlement between Provident and Zuckerman. (R. 1296-1498) Zuckerman's present recollection of the record testimony and evidence presented is inaccurate and, not surprisingly incomplete, however, as highlighted below.

Zuckerman sued Provident for breach of contract, statutory insurer bad faith, interest and statutory attorney's fees for failure to pay benefits and cessation of benefits pursuant to a lawyer's disability insurance policy issued by Provident. (R. 1317-18; SR 1-4) Provident counterclaimed against Zuckerman, individually and as soliciting insurance agent of his own disability policy, for fraud, breach of fiduciary duty, indemnity, and unjust enrichment for overpayment of benefits arising out of fraud on the insurance application as to Zuckerman's substantially misstated age and prior medical history. (R. 1320; SR 25-33) Provident also disputed Zuckerman's alleged disability and sought to rescind the policy. (Id.; SR 17-21)

It is true that Provident paid Zuckerman monthly disability payments for a short period of time. Provident's counsel testified, however, that such pre-suit payments were initiated in good faith upon Zuckerman's initial filing of a claim for benefits and were made without prejudice to Provident's right to investigate such claim and, if appropriate, contest fair payment pursuant to law. (R. 1342-43) Indeed, said payments were promptly terminated and reimbursement sought when Provident concluded that Zuckerman had no covered disability.

It was undisputed that, at all times material, Provident denied and contested Zuckerman's right to any recovery under the subject disability policy. (R. 1330, 1335) Both Zuckerman's and Provident's trial counsel testified unequivocally that this was

a disputed claim from beginning to end. (R. 1330, 1335-36) Both trial counsel also testified that the settlement ultimately reached was the settlement of disputed claims. (R. 1333, 1335-36) Had there not been a lawsuit, there would not have been a settlement. (R. 1352) Provident's counsel further suggested that all of Zuckerman's claims, including his claim for disability benefits under the policy, were wholly without merit. (R. 1353) Astonishingly, Zuckerman's own counsel admitted that Zuckerman's statutory bad faith claim was essentially frivolous![2] (R. 1323-24)

The terms of the settlement were also undisputed. There was a global settlement of all claims (and counterclaims/third party claims) which were brought or could have been brought for the generic sum of $75,000.00, the exchange of reciprocal general releases, surrender of the policy and dismissal of the lawsuit. (R. 1325-31, 1336-38; A. 22-23) There were no admissions of liability, the parties did not apportion any part of the agreed upon settlement to disability income benefits or any other items, and the settlement was not structured in any way. (Id.; R. 1357) A global compromise and settlement and extinguishment of all claims was reached for the generic sum of $75,000.00. (Id.)

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[2] Zuckerman made this concession because he hoped to demonstrate that the settlement allegedly only concerned his suit for potentially exempt disability income benefits. (A. 8, 19) This audacious argument was rejected on appeal.

In Zuckerman's brief to the Third District, although omitted from his jurisdictional and merits briefs in this Court, Zuckerman conceded:

> [Provident's counsel] testified that it was supposed to be a very simple settlement--a surrender of the actual disability policy, a delivery of the general release, entry of the stipulation of dismissal, and payment of the money. (R. 1336-37) Provident's counsel testified that there was no way to apportion the settlement amount to the claimed disability benefits or to anything else. (R. 1357-58) (A.8)

Having heard, received and weighed all of the testimony and evidence, the trial court concluded that Provident's indebtedness to Zuckerman pursuant to their compromise and settlement agreement did not constitute disability income benefits pursuant to Section 222.18, Fla. Stats. (R. 4566, 4570) The court rejected Zuckerman's contention that a liberal construction of the statute required a different result:

> That assumes a couple of things and that assumes that because some component of this settlement, which we cannot determine, is disability income benefits, the settlement is the equivalent of disability income benefits and I do not know under these cases if that can be legitimately assumed. (R. 1429)

The District Court of Appeal, Third District, agreed. In its affirmance, the Third District wrote:

> 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); *Sailing Wiping Cloth Co. v. Sewell, Inc.*, 419 So. 2d 112, 116-17 (La. Ct. App. 1982).

629 So. 2d at 219.

In his jurisdictional brief submitted to this Court, Zuckerman represented, inter alia, that the Third District "held that the settlement. . .converted those proceeds from exempt disability payments under the garnishment statute into generic settlement proceeds that were not exempt from garnishment."

SUMMARY OF ARGUMENT

Jurisdiction was improvidently granted in this cause based upon Zuckerman's inaccurate assertions which find no support in the record proper. No disability income benefits were due or payable. None were paid in connection with the settlement. The settlement between Zuckerman and Provident was a global compromise and settlement of all claims and counterclaims for the generic sum of $75,000.00 and the exchange of reciprocal general releases. As the trial court and Third District noted, no portion of the settlement represented, or purported to represent, the payment of disability income benefits. This Court's decision in Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934), is clearly distinguishable on its facts as there it was undisputed that the garnished res "was an agreed payment for total disability benefits. . . ." 158 So. at 174. There is no conflict with Bank of Greenwood, and jurisdiction does not lie.

The district court also did not misapply the settled and controlling rule of law applied in J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So. 2d 249 (Fla. 2d DCA 1989). There, as here, a compromise and settlement agreement extinguished the parties' respective rights and obligations under a prior contract. In the instant case, Zuckerman and Provident conclusively settled and extinguished their respective claims on global terms and without reservation or allocation for the generic sum of $75,000.00. Hofrichter garnished that

substituted, and legally separate and distinct obligation of indebtedness pursuant to a settlement, not the subject disability policy or any purported benefits thereunder to which Zuckerman now claims to have been entitled. The district court correctly applied J. Allen, no conflict exists, and jurisdiction was improvidently granted.

Having prevailed in the argument that his attorneys had a valid charging lien superior to Hofrichter's claim in garnishment, and having thereby reduced the res at issue by almost half, Zuckerman is judicially estopped from now arguing that the res is statutorily exempt. If it were, no charging lien could attach.

This Court should reconsider the exercise of its jurisdiction over this cause or, alternatively, the order appealed should be affirmed in all respects.

ARGUMENT

JURISDICTION WAS IMPROVIDENTLY GRANTED.

To manufacture conflict and entice discretionary review, Zuckerman strayed far beyond the Third District's opinion and, as this Court can now discern, beyond the record proper and realm of actual fact. No disability income benefits were due or payable; Provident was indebted to Zuckerman pursuant to a compromise and settlement which extinguished any purported rights Zuckerman had under the subject insurance policy. There is no express and direct conflict on the same question of law to invoke this Court's jurisdiction.

A.

There Was No Evidence That Statutory Disability Income Benefits Were Due or Payable.

As the record proper clearly reflects, no statutory disability income benefits were determined to be due. No such benefits were paid in connection with the settlement. The settlement was a global settlement--requiring the exchange of reciprocal general releases--of sundry claims for disability benefits, statutory insurer bad faith, interest and attorney's fees, and competing counterclaims for fraud, unjust enrichment, indemnity and other relief. As the trial court noted, there wasn't a scintilla of evidence that any portion of the generic settlement represented (or even contemplated) payment of disability income benefits. And, as the Third District observed, Provident simply "bought its

peace", as cost conscious litigants often do, and compromised its claims for restitution, damages, and to rescind the policy.

Zuckerman asks this Court to presume, without any record support, that he was owed contractual disability income benefits. But Zuckerman ignores Provident's contention that he had fraudulently procured the subject policy in the first instance, by lying about his age and his alleged disability. Had there been no fraud, there would have been no policy. Just as Zuckerman chose to forego a judicial determination of his alleged entitlement to disability income benefits, Provident compromised its action for rescission, restitution, and damages.

For the same reason, Zuckerman is incorrect in his suggestion that the Third District narrowly construed Section 222.18, Fla. Stats. Indeed, the court did not construe this exemption statute at all. There was nothing in the record to support Zuckerman's contention that Provident was indebted to him for disability benefits by agreement, by operation of law, or otherwise, and he therefore could not meet his burden to demonstrate error. The court correctly refused Zuckerman's invitation to put the proverbial cart before the horse since there must be a "disability income benefit" due and payable before a debtor can attempt to invoke, and the court will apply, the statutory exemption.

On appeal to this Court, Zuckerman now engages in tortured statutory construction to obtain a reversal. He argues that the

words "of whatever form" in Section 222.18 qualify the words "Disability income benefits" rather than the words "any policy or contract of life, health, accident or other insurance." Tellingly, Zuckerman offers no support for his construction. Moreover, same is negated by the last antecedent doctrine of statutory construction which 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); Rich Electronics v. Southern Bell Telephone & Telegraph Company, 523 So. 2d 670, 672 (Fla. 3d DCA 1988).

As the facts are not as Zuckerman relates them, this Court's decision in Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934), is easily distinguished and the illusion of conflict disappears. In Bank of Greenwood, it was undisputed that the garnished res "was an agreed payment for total disability benefits. . . ." 158 So. at 174. The payment did not emanate from a globally settled lawsuit involving multiple competing claims and counterclaims including a claim that the subject insurance policy was void ab initio. Unlike Bank of Greenwood, there was no evidence here that exempt disability income benefits were due and payable. Bank of Greenwood is clearly distinguishable on its facts and conflict jurisdiction

does not lie. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

B.

Zuckerman's Compromise and Settlement Agreement With Provident Extinguished Any Claims Zuckerman Had Under the Subject Disability Insurance Policy.

It is well settled that:

> A valid compromise and settlement agreement operates as a merger of, and as a bar to, the right to recover on the claim described therein from the party with whom the settlement was reached. In effect, the compromise agreement is substituted for the pre-existing claim, so that the liabilities of the parties are measured by the terms of the agreement.
>
> 10 Fla. Jur. 2d, Compromise, Accord, and Release, Section 10.

Accord, 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 can not 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); McMannis v. Davlin, 222 So. 2d 492 (Fla. 2d DCA 1969), cert. disch., 231 So. 2d 194 (Fla. 1969); Aktieselskabet Dampskibssels-Kabet Svendborg v. U.S., 130 F. Supp. 363, 367 (U.S. Ct. Cl. 1955), cert. den., 350 U.S. 978 (1956) ("Since the contract was entered into in settlement of the controversy and substituted new obligations for the old, we think it was agreed upon in satisfaction of the liability to pay just compensation, and that that liability was extinguished.").

In the opinion at bar, the Third District cited three precedents which applied this firmly established rule of law. In J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So. 2d 249 (Fla. 2d DCA 1989), as in the other cases cited by the Third District, 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 Zuckerman and Provident conclusively settled and extinguished their respective claims on global terms and without allocation or reservation for the generic sum of $75,000.00.

Contrary to his suggestion, Zuckerman was not forced to settle his claims and left without choice. The settlement correspondence of counsel (which agreement was also executed by Zuckerman) belies such assertion by Zuckerman, an educated and seasoned litigation attorney. (See A. 22-3) If anything, as the Third District noted, it was Provident whose back was against the wall because of Zuckerman's litigiousness and who "bought its peace." The district court did not misapply the settled and controlling rule of law applied in J. Allen.

As the foregoing authorities demonstrate, courts will not go behind settlements and resurrect rights and obligations which the parties have themselves compromised and extinguished. Saucer v. Efstathion, 34 So. 2d 435 (Fla. 1948), cited by Zuckerman, does not hold to the contrary. In Saucer, this Court simply noted that judgments and decrees (not settlements) must be construed with reference to the subject matter before the court pronouncing them. This Court held that the plaintiff did not demonstrate error in a chancellor's determination that plaintiff was entitled to rents only for a period commencing after entry of the chancellor's prior decree, despite the fact that the prior decree, since affirmed by this Court on appeal, provided that plaintiff was generally entitled to an accounting from an earlier date.

Zuckerman's reliance upon this Court's decision in In Re McCollam, 612 So. 2d 572 (Fla. 1993), is also misplaced. In McCollam, the seized asset was an annuity structured for the benefit of the debtor as part of a settlement of her father's estate's wrongful death claim. Thus, a non-exempt asset, a tort chose in action, was converted via a settlement into an exempt asset, an annuity.

In the instant case, the very converse is true. A potentially exempt asset, a disability insurance policy (if valid) and any benefits flowing therefrom (if due) were extinguished and compromised for a non-exempt asset, a

separately enforceable contract for settlement. It is that substituted, and legally separate and distinct obligation of indebtedness which was garnished, not the disputed benefits to which Zuckerman claims to have been entitled. McCollam is inapplicable here.

Zuckerman's parting public policy argument that the Third District's decision will discourage settlement of disputes without litigation does not ring true. It is Zuckerman who asks this Court (as he did the district court and trial court before it) to ignore his settlement with Provident and reopen their underlying litigation to determine his entitlement to disability income benefits under the policy. As Zuckerman points out, however, "settlements are highly favored and will be enforced whenever possible." Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985).

C.

Zuckerman is Judicially Estopped From Asserting The Exemption.

Having prevailed in his argument that his attorneys had a charging lien superior to Hofrichter's claim in garnishment and having thereby reduced the res at issue by almost half, See Hofrichter & Quiat, P.A. v. Brumer, Cohen, et al., 624 So. 2d 415 (Fla. 3d DCA 1993), Zuckerman is precluded from now arguing that the garnished res is statutorily exempt. If the settlement proceeds were exempt, no charging lien could attach. See Zimmerman v. Livnat, 507 So. 2d 1205 (Fla. 4th DCA 1987)

(recognizing limitation upon charging lien against entitlement to alimony); Brake v. Sanchez-Lopez, 405 So. 2d 1071 (Fla. 3d DCA 1984) (holding attorney's charging lien unenforceable against child support payments); King v. Pons, 77 Fla. 383, 81 So. 519 (Fla. 1919) (holding charging lien inconsistent with and hence prohibited by federal statute). Zuckerman is judicially estopped from now advancing the statutory exemption. See generally 22 Fla. Jur. 2d, Estoppel & Waiver at 48-53, and cases collected therein.

CONCLUSION

For the foregoing reasons, and upon the authorities cited, Respondents Hofrichter respectfully urge this Court to reconsider the exercise of its jurisdiction over this cause or, alternatively, the order under review should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents on the Merits was served, this 18th day of July, 1994 by U.S. Mail, on the following counsel of record:

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ALEX HOFRICHTER

IN THE DISTRICT COURT OF APPEAL

THIRD DISTRICT OF FLORIDA

CASE NO. 92-02532

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

Appellant,

vs.

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

Appellees.
_____/

AN APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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Table of Contents

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Introduction

The Appellant, Donald S. Zuckerman, individually, was the counter-defendant (sic), judgment debtor below and will be referred to as Appellant. Appellee, Alex Hofrichter, P.A. (formerly known as Hofrichter & Quiat, P.A.), was the Defendant, counter-plaintiff (sic), garnishor below and will be referred to as Appellee.[1] Provident Life and Accident Insurance Company was the garnishee below and will be referred to as PROVIDENT. Reference to the record on appeal, including the transcript of the proceedings will be "R". An appendix containing copies of the exhibits in evidence has been included with this brief.[2] References to those exhibits shall be "EX."

Statement of the Case and of the Facts

This appeal is from a ruling that lump sum settlement funds to be paid to Appellant, the insured, by his insurance company in settlement of a lawsuit brought to enforce his rights to receive disability income benefits under a disability insurance policy were not "disability income benefits" within the meaning of Florida Statutes, Section 222.18 and are therefore not exempt from garnishment.

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[1] The parties, Zuckerman and Hofrichter, are properly third party defendant and third party plaintiff, respectively.

[2] The Clerk of the Court below had been unable to locate the original exhibits in evidence as of the date of the preparation of the record-on-appeal. On January 25, 1993, the Clerk's office advised the undersigned that it had just located the exhibits and will supplement the record-on-appeal accordingly.

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On February 13, 1992, the lower court entered a judgment in favor of Appellee, and against Donald S. Zuckerman, P.A., Zuckerman & Venditti, P.A., and Appellant, Donald S. Zuckerman, individually, in the principal amount of $187,297.00, plus prejudgment interest, for a total of $358,120.12. That judgment is not the subject of this appeal.[3]

Among its efforts to satisfy that judgment, Appellee served a Writ of Garnishment on PROVIDENT. (R. 4411-9) PROVIDENT answered by admitting that it was indebted to Donald Zuckerman in the sum of $75,000.00, which sum it still possessed. PROVIDENT also stated that it believed that two law firms which had represented Appellant had or appeared to have an ownership interest in the $75,000.00.[4] (R. 4408-10)

Appellee traversed PROVIDENT's answer, claiming entitlement to the full $75,000.00 as a matter of law. (R. 4420-2)

Appellant filed his Motion to Dissolve Writ of Garnishment, Reply to Writ of Garnishment Served On Provident, and Answer and Counterclaim. (R.4427-32) In his Motion to Dissolve, Appellant asserted, among other things, that the balance of his $75,000.00 was exempt from garnishment by virtue of §222.18, Florida Statutes. (R. 4427-8) Appellant's position was that because the funds held

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[3] That judgment is presently before this Court as Case No. 92-01716.

[4] The lower court found that $30,790.50 was due to Appellant's counsel for legal fees and costs in the federal action against PROVIDENT. Thus, it is actually only the balance of $44,209.50 which is in contention in this appeal.

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by PROVIDENT represented undisbursed settlement proceeds in Appellant's federal lawsuit against PROVIDENT to recover disability income benefits due him under PROVIDENT's disability policy, such proceeds were exempt under §222.18, Florida Statutes. The statute provides:

> 222.18 **Exempting disability income benefits from legal processes.**-- 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.

On October 8, 1992, the trial court held an evidentiary hearing to determine whether the Writ of Garnishment should be dissolved on the basis that the funds held by PROVIDENT were exempt. At the hearing, the following copies of documents from Appellant's federal action against PROVIDENT were admitted into evidence:

Appellant's Complaint against PROVIDENT (Ex. 1)

Appellant's disability insurance policy with PROVIDENT (Ex. 2)

PROVIDENT's Answer, Affirmative Defenses and Counterclaim (Composite Ex. 3)

PROVIDENT's Counterclaim, or in the Alternative, Third Party Complaint (Composite Ex. 3)

Appellant's Answer to PROVIDENT's Counterclaim (Composite Ex. 3)

Omnibus Order (Ex. 4)

Stipulation of Dismissal with Prejudice of federal action and correspondence between counsel relating to the settlement (Composite Ex. A)

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General Release submitted by PROVIDENT to Appellant, but unsigned. (Ex. B)

Appellant's Complaint alleged a breach of contract for failure to pay disability income benefits under his disability policy with PROVIDENT. (R. 1318-19, 1326, Ex. 1) Appellant's complaint alleged:

> Provident issued a basic disability insurance policy to ZUCKERMAN on May 4, 1981 which provided, inter alia, the monthly payment of $2,025.00 upon total disability. A copy of the contract is attached to this Complaint as Exhibit A... (Ex. 1)

The Complaint also contained a bad faith settlement practices claim against PROVIDENT for its refusal to continue to pay the monthly disability income benefits under the policy as it had done for two years. That claim had been severed and stayed pending resolution of the breach of contract claim. (R. 1322, Ex. 4) PROVIDENT acknowledged making monthly disability income benefit payments under its policy, but denied any further obligation to pay Appellant such benefits. (Composite Ex. 3)

The evidence in the hearing below established that prior to trial of the federal action, Appellant and PROVIDENT settled their lawsuit for $75,000.00. (R. 1324-25) This settlement was reached at the insistence of the presiding federal judge and settled all claims against PROVIDENT arising out of the disability policy. (R. 1327, 1329-30) Appellant had to surrender all of his rights under the disability policy, including surrendering the policy itself. (R. 1332) Appellant also proffered, and the court below rejected, evidence that the amount of disability benefits to which Appellant

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would have been entitled was approximately $125,000.00. (R. 1332-3) The settlement included Appellant's right to receive future disability benefits. (R. 1359) Appellant's federal court counsel testified that, in his opinion, the bad faith claim had no value and that if he obtained a verdict in the trial on the breach of contract claim, there was no way he would have proceeded with the bad faith claim. (R. 1327)

PROVIDENT's counsel testified on behalf of Appellee that Appellant's claims, which were disputed, included his claim to enforce his right to continue receiving monthly payments under the disability policy, which monthly payments had been stopped by PROVIDENT, a bad faith claim, plus claims for attorneys fees and interest. (R. 1335-6, 1341-43) The underlying basis for Appellant's claim, as PROVIDENT's counsel understood it, was that Appellant claimed he had suffered a herniated disc in his lower back (R. 1343). PROVIDENT's counsel also agreed that there was no merit in the bad faith claim. (R. 1353-54) He testified that it was supposed to be a very simple settlement--a surrender of the actual disability policy, a delivery of the general release, entry of the stipulation of dismissal, and payment of the money. (R. 1336-37) PROVIDENT's counsel testified that there was no way to apportion the settlement amount to the claimed disability benefits or to anything else. (R. 1357-58) He had not yet obtained Appellant's release and still held the $75,000.00 settlement check. (R. 1349, 1359)

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At the conclusion of the hearing, the trial court candidly commented that there was no law on point, that the issue was "iffy" and "a big toss-up" and "I have no idea whether I'm right or wrong to tell the truth." (R. 1427, 1429, 1437) Nevertheless, the trial court ruled that the balance of the $75,000.00 due to Appellant and still held by PROVIDENT was not exempt under §222.18, Florida Statutes, and that Appellee was entitled to receive it. (R. 1425-27) The Court's rationale was that, in the absence of more pertinent authority, it would construe §222.18 consistently with the Federal District Court's construction in a bankruptcy case, In Re: Prestien, 427 F.Supp. 1003 (S.D. Fla. 1977), that is, the §222.18 exemption for disability benefits applies only

> to future periodic payment of disability benefits and does not apply to lump sum settlement or lump sum [disability] benefits. (R. 1426)

On October 19, 1992, the trial court entered its Order Denying Motions to Dissolve Writ of Garnishment, Determining Other Pending Matters and Final Judgment of Garnishment, and on October 23, 1992 entered its Amended Order Denying Motions to Dissolve Writ of Garnishment, Determining Other Pending Matters And Final Judgment of Garnishment, both of which are the subject of this appeal. (R. 4565-71) Both Orders denied the Appellant's Motion to Dissolve the Writ of Garnishment and entered judgment that Appellee shall recover from PROVIDENT the sum of $44,209.50. In so ruling, the court declared:

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442-1700

The Court has concluded that the funds paid in settlement of Zuckerman v. Provident Life and Accident Insurance Company are not "disability" benefits within the meaning of F.S. §222.18. (R.4566, 4570)

Summary of Argument

Section 222.18, Florida Statutes, exempts all disability income benefits incident to an insurance policy from garnishment. The statute's exemption is without limitation or restriction on the extent, form, timing or method of payment of such benefits. Appellant's disability benefits--in the form of undisbursed proceeds resulting from the settlement of a lawsuit brought against his disability insurer, PROVIDENT, because of PROVIDENT's refusal to pay monthly disability benefits and from Appellant's surrender of his disability policy--are therefore exempt from garnishment by Appellee.

The lower court's reliance on Prestien in reaching its determination that the settlement proceeds were not exempt was inappropriate. The facts in Prestien are dramatically different from those below, including, but not limited to, the pivotal dividing line drawn by the Prestien court between lump sum disability income benefits already in the hands of the insured-debtor and those benefits not yet received. It is undisputed, and the trial court acknowledged, that Appellant had not received the lump sum payment of his benefits. In fact, the factual background on which the Prestien Court rationalized its judicial exception to the broad legislative exemption of disability income benefits, that

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442-1700

is, a fraudulent debtor squirreling away his benefits in a savings account while incurring debts at the expense of his creditors, is completely absent here.

Furthermore, the Prestien decision ignores the clear legislative mandate to exempt all disability income benefits by judicially adding an exception. Thus, Prestien violates two well established principles of judicial application of exemption statues: 1) such statutes should be liberally construed in favor of the exemption in order to effectuate the public policy of protecting the debtor and his family, and 2) such statutes must be literally read by the courts, which may not add limiting language effectively changing the breadth of the exemption.

That the settlement included all claims which Appellant may have had under his disability income benefits policy does not disqualify the settlement proceeds from the statutory exemption. All such claims are incident to Appellant's rights arising out of his policy and therefore also subject to the exemption.

Issue

WHETHER DISABILITY INCOME BENEFIT PAYMENTS DUE UNDER A DISABILITY INSURANCE POLICY LOSE THEIR SECTION 222.18 EXEMPTION BECAUSE THE PAYMENTS ARE MADE TO THE INSURED IN A LUMP SUM PURSUANT TO A SETTLEMENT OF INSURED'S LAWSUIT BROUGHT AGAINST THE INSURER TO ENFORCE HIS RIGHTS UNDER THE DISABILITY POLICY.

Argument

It appears that the issue before this Court has never been directly addressed by a Florida appellate court. However, for the

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442-1700

compelling reasons discussed below, the denial of exemption should be reversed.

First, and foremost, §222.18, Florida Statutes, without ambiguity and without limitation, exempts from legal process all disability income benefits due a debtor under any disability insurance policy. There is no restriction on the amount, the form, the timing, or any other aspect of payment of such benefits. The Florida legislature has clearly declared that it is this State's public policy to protect a debtor's disability payments, like the wages of a head of household, from creditors. Statutes which grant such exemptions should be liberally construed in favor of the debtor so that the laudable legislative aim--preserving to the debtor and his family a means of living so as not to become public charges--can best be achieved. Killian v. Lawson, 387 So.2d 960 (Fla. 1980); Patton Package Co. v. Houser, 136 So. 353 (Fla. 1931). See, In Re: Glickman, 126 B.R. 124 (M.D. Fla. 1991). Given this rule of liberal construction in favor of exemption, the unambiguous and unlimited exemption for disability income benefits due Appellant, and the fact that the funds in question are due in settlement of Appellant's lawsuit brought to enforce his rights to benefits under his disability policy with PROVIDENT, it appears that those funds are exempt from garnishment.

The trial court relied heavily upon the holding in In Re: Prestien, supra., in construing §222.18 and in deciding that Appellant's disability insurance coverage lawsuit settlement proceeds are not exempt under §222.18. At issue in Prestien, a

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442-1700

bankruptcy case, was whether the §222.18 exemption applied to a debtor's disability income benefits which had previously been received by debtor in two lump sum payments in lieu of his right to periodic payments in the future, and been deposited in debtor's savings accounts. The debtor contended that the funds in his savings account remained exempt as disability income benefits under §222.18. The bankruptcy trustee countered that once the disability benefits were paid to debtor and deposited into a savings account, the previously exempt benefits lost their exempt character. The bankruptcy judge denied the exemption, but for a different reason--that the bankrupt was a "dishonest debtor." The debtor had set aside his disability benefits while at the same time living off of the credit of others, thereby accumulating substantial debts before declaring bankruptcy. The bankruptcy judge determined that this deliberate squirreling away of "exempt" funds at the expense of his creditors constituted "a fraudulent scheme to defeat his creditors." 427 F.Supp. at 1008. On appeal, the district court affirmed the denial of the exemption for the disability benefits, drawing a distinction between those disability income benefits not "already paid," which were exempt under §222.18, and those benefits "already paid" and accumulated by the bankrupt, which lost their exemption. 427 F.Supp. at 1005. The district court rationalized this admittedly unwritten distinction with the observation that a disabled bankrupt should not be permitted to accumulate

> his disability payments, refusing to apply them toward his normal expenses, and thereafter expecting them to be exempt.

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442-1700

427 F. Supp at 1005-06.

It further rationalized that:

> Lump-sum beneficiaries enjoy the immediate benefit of disposition of their lump sum [receipt of disability payments]. In return for this benefit, they risk losing their lump-sum if they choose to segregate it from their creditors and thereby precipitate bankruptcy.

Id. at 1006. Emphasis added.

The trial court's reliance on Prestien--an admitted reluctant reliance--was misplaced for the following reasons. First, the district court in Prestien judicially created a bright line distinction between those disability benefits not yet paid to the insured, which it held were meant to be exempt by §222.18, and those disability benefits "already paid," which it held were not meant to be exempt. 427 F.Supp. at 1005. As applied to the instant case, the record is absolutely clear that the $75,000.00 has not yet been paid, but rather, is still held by PROVIDENT's counsel. The court below acknowledged this distinction, from the Prestien, which distinction rightfully troubled the court. (R. 1431)

Second, though the Prestien court drew a distinction between disability benefits already paid and not already paid to the debtor, the Florida legislature drew no such distinction. In fact, §222.18 places no restriction on how or when benefits are received. Exemption statutes should be construed both liberally and literally as drafted to accomplish the obvious aims of the legislature. Exemption statutes must be accepted as written. The courts have no right, by judicial fiat, to add qualifying words or limitations not clearly mandated by the legislature. White v. Johnson, 59 So.2d

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442-1700

532 (Fla. 1952); In Re: Glickman, supra. Contrary to these well-established principles, the Prestien decision represents both a very restrictive construction as well as a judicial grafting of an exception to the §222.18 exemption not written by the legislature.

Third, the factual background which provided the rationale for the Prestien decision is completely at variance with the facts of this case. Here, there was no squirreling away of disability benefits in a bank account while Appellant lived off the credit of others before seeking the protection of bankruptcy. Here, the disability benefits due Appellant were and still are withheld from him by PROVIDENT. Here, there was no initiation and choice by Appellant to elect to receive an early lump sum payment in lieu of continuing periodic benefits payments, nor an intent to gain early and sole control and disposition of the disability benefits. To the contrary, here, PROVIDENT, not Appellant, chose to discontinue the periodic disability payments to which Appellant was entitled and willing to accept in the normal course. As a result, Appellant was forced to sue PROVIDENT for his benefits. Furthermore, in having to prosecute his lawsuit, Appellant incurred substantial legal fees and expenses. Thus, the present situation bears no resemblance to the "fraudulent scheme" devised by the debtor in Prestien which justified, at least in the mind of the district court, the denial of a legislatively mandated exemption. Thus, Prestien is of no precedential value for the present case.

Fourth, if the proposition to be gleaned from Prestien is simply and absolutely that once disability income benefits are paid

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442-1700

to the beneficiary they automatically become non-exempt, as the trial court seemed to accept, then Prestien is a classic example of bad facts making bad law. Appellant respectfully submits that the proposition should be rejected as the law of this State. Instead, this Court should embrace those cases, rejected or distinguished in the Prestien opinion, which are consistent with the well-established rule of liberally construing exemption statutes in favor of exemption. Orange Brevard Plumbing and Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962); Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934); First Nat'l. Bank v. How, 65 Minn. 1987, 67 N.W. 994 (1896); State ex. rel. Lankford v. Collins, 70 Okl. 323, 174 P. 568 (1918). Appellant suggests the better view is expressed by the court in First Nat'l. Bank v. How, supra.:

> To interpret the statute so as to exempt the fund only while it is in the hands of the association would defeat the purpose of the law, and justly expose the legislature to the charge of paltering with the beneficiary in a double sense. What benefit is it to an unfortunate widow to be mockingly told that the money provided by her husband for her support is exempt from execution so long as it remains in the hands of the insurance company, where it can do her no possible good, but, when she reaches out her hand to take the money, her creditors may wrest it from her grasp. Such is not the meaning of the statute. It exempts the money from execution in the hands of the beneficiary.

427 F. Supp. at 1007 (citing from How).

The Prestien court found the reasoning in How, though "superficially appealing," inapplicable simply because the case before it was a bankruptcy case. The court pointed out that once disability funds are ruled exempt as not yet paid at the time of bankruptcy, the trustee in bankruptcy has no claim to the disputed

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MIAMI, FLORIDA 33133
442-1700

funds. 427 F.Supp. at 1007. It should be noted that this distinction drawn by the Prestien court is another reason not to apply the Prestien rationale to the present case, which is not a bankruptcy case.

While the Prestien court chose to reject the Florida Supreme Court's decision in Bank of Greenwood v. Rawls, supra., Appellant respectfully submits it is yet another clear precedent for the proposition that exemption statute must be liberally construed. Furthermore, the analogous factual situation in Rawls is quite instructive to the instant case. In Rawls, the debtor husband gave his wife settlement proceeds paid by his insurer for disability benefits accruing under the debtor's life insurance policy in exchange for surrendering the policy. The creditors claimed that the proceeds were not in settlement of the life policy, but rather, an agreed payment of disability benefits not entitled to exempt status.[5] In ruling in favor of exemption, the Florida Supreme Court held that:

> "cash surrender value" of a life insurance policy, as contemplated by our statute above referred to, includes any cash value that may be obtained either by means of negotiation or pursuant to an agreement for surrendering the policy in consideration of a sum of money to be paid in whole or in part conditioned upon a surrender of the life insurance feature of the policy, and is not limited to such a cash surrender value as can be demanded and legally enforced against an unwilling insurance company according to the usual significance of the term "cash surrender value" of life insurance as that term is ordinarily used in the law of insurance strictissimis verbis.

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[5] At the time, before the passage of Section 222.18, the cash surrender value of life policy was exempt from creditors, but disability benefit payments were not.

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158 So. at 175. Thus, the Rawls court, like other Florida courts, liberally construed the exemption statute in favor of exemption and chose substance over form in reaching an equitable result within the constraints of the legislative mandate.

Even the Prestien court acknowledged that Rawls appeared to hold that payments made under the life policy retained their exempt status after payment. However, the Prestien court rejected that position with the admonition that such an interpretation would make "unclear precedent into bad law." 427 F.Supp. 1007. Appellant would respectfully suggests that Rawls is not only good and equitable law, consistent with other Florida decisions, but persuasive precedent for reversing the decision below.

Appellee's assertion below that the settlement proceeds are not exempt because the federal lawsuit and the general release settling the lawsuit included all of Appellant's claims against Provident, including not only breach of contract for unilaterally discontinuing benefit payments, but also unfair settlement practices in the handling of that discontinuance, and attorneys fees, is without merit. It is clear that any and all claims involved in the federal lawsuit arose out of and were confined to Appellant's rights under the disability policy. Any and all of the rights which Appellant could possibly have or release against PROVIDENT were "incident to this disability insurance policy" and therefore exempt. In Re: Dennison, 84 B.R. 846 (S.D. Fla. 1988).

In Dennison, the bankruptcy trustee sought to require debtor to cancel his prepaid disability policy in order to recover his

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prepaid premium as property of the bankrupt estate. The court denied the request on the basis that the policy was exempt under Section 222.18. The Court reasoned that:

> The disability insurance policy which is the source of benefits should be subject to the same claim of exemption as the benefits. 84 B.R. at 847.

Even assuming arguendo that the bad faith settlement and attorneys fees claim were not exempt under §222.18 as incident to the disability policy, the result should be the same. The claim based on PROVIDENT's alleged bad faith settlement practices in not paying the disability benefits had no value based on the undisputed testimony of both Appellant and PROVIDENT's counsel in the federal lawsuit. That portion of the PROVIDENT settlement representing attorneys fees was awarded directly to Appellant's federal case counsel and is not a part of the $44,209.50 involved in this appeal.

The fact that the release required of Appellant was a general release is of no significance whatsoever. The obvious reality of litigation is that defendants do not settle without obtaining a general release of any and all matters which may arise out of the subject matter of the litigation. To attach any importance to the existence of a general release is to naively ignore that reality and to raise form over the substance of what the PROVIDENT settlement was all about.

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Conclusion

Section 222.18 exempts benefits under a disability insurance policy without limitation. The lower court's reliance on Prestien was ill-advised and not consistent with the settled liberal interpretation of exemption statutes, which liberality does not afford an avenue for judicially imposed conditions or restrictions on the breadth of exemption statutes such as §222.18. The denial of exemption to the net proceeds of the PROVIDENT settlement of Appellant's claims under his disability benefits insurance policy should be reversed.

Respectfully submitted,

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Certificate of Service

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