OA 8-31-94

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,015

FILED
SID J WHITE
AUG 15 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

Petitioner,

v.

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

Respondents.

_____/

REPLY BRIEF OF PETITIONER

PAUL C. HUCK, ESQ.
2850 First Union Fin. Center
200 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 372-1800

COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
Telephone: (305) 371-1597

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

DISABILITY INCOME BENEFITS DUE UNDER A DISABILITY INSURANCE POLICY DO NOT LOSE THEIR § 222.18 EXEMPTION BECAUSE THEY ARE MADE IN A LUMP SUM PURSUANT TO A SETTLEMENT OF LITIGATION BROUGHT TO ENFORCE THAT DISABILITY INSURANCE POLICY.

Hofrichter tries to make this simple case very complex. The key to this case is the fact that the litigation in the prior action was initiated by Zuckerman to obtain disability benefits under his disability policy. That action resulted in a settlement. Fla.Stat. § 222.18 unambiguously exempts from legal process all disability income benefits "of whatever form" due a debtor under a disability policy. Therefore, Hofrichter simply cannot garnish the funds owed Zuckerman under the settlement.

Hofrichter claims Zuckerman's interpretation of § 222.18 is "tortured" and that Zuckerman cites nothing in support of his construction. That is not so. Zuckerman's construction of that statute is the same as this Court's construction of virtually identical statutory language in Bank of Greenwood v. Rawls, 117 Fla. 381, 158 So. 173 (1934) and In re McCollam, 612 So.2d 572 (Fla. 1993).

It is also the only construction that makes sense. Hofrichter's suggestion that "of whatever form" modifies only the words immediately preceding is absurd. Significantly, Hofrichter does not explain how such a construction would work. The words immediately preceding "of whatever form" are "any policy or contract of life, health, accident, or other insurance." The words "any policy or contract" and "or other insurance" are broad enough

to encompass any type of insurance situation. Therefore, under Hofrichter's construction, the words "of whatever form" are mere surplusage. Statutes should be construed to give effect to all the statutory language. Terrinoni v. Westward Ho!, 418 So.2d 1143, 1146 (Fla. 1st DCA 1982); Pinellas County v. Woolley, 189 So.2d 217, 219 (Fla. 2d DCA 1966).

Furthermore, Hofrichter's attempt to distinguish Bank of Greenwood[1/] and In re McCollam on their facts must fail. The significance of those cases here is not the underlying facts but this Court's interpretation of statutory language virtually identical to the statute at issue in this case.

Moreover, Hofrichter's reading of the facts of Bank of Greenwood is simply incorrect. Quoting from the case, Hofrichter claims that Bank of Greenwood involved "'an agreed payment for total disability payments.'" However, that description was this Court's summary of the appellant's position; it was not a finding of fact. 158 So. at 174. In Bank of Greenwood, the husband held a life insurance policy with his wife as beneficiary. The policy provided that the husband could take disability benefits if he surrendered his entire policy. The husband took out the disability benefits, surrendered the policy, then transferred the check from the insurance company to his wife. The appellant argued that this meant he received disability benefits, which at that time were not exempt under the statute. This Court held the statute

---

1/ Hofrichter clearly understands the significance of Bank of Greenwood because he continues to argue the Third District's decision in this case does not conflict with Bank of Greenwood.

covered "cash surrender values" "of whatever form," and not just "cash surrender values" as that term is used by lawyers and insurance companies. Id. at 174-75.

> We therefore hold that the "cash surrender value" of a life insurance policy, as contemplated by our statute . . . 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 . . . .

Id. at 175. A fund is a "cash surrender value" if it is received in return for surrendering the policy, for whatever reason. Therefore, this Court ruled that the fund at issue was the "cash surrender value" of the policy and exempt from garnishment. See also In re McCollam, 612 So.2d at 573-74 (holding Fla.Stat. § 222.14 which applies same language to annuities, "clearly exempts all annuity contracts," whatever form they might take).

The same reasoning should apply here. Section 222.18 exempts all "disability income benefits" of whatever form. That includes not only benefits paid on uncontested claims under a disability policy, but funds paid in settlement of any contested claims on a disability policy.

Nonetheless, the Third District held that because the funds at issue were paid in settlement of a lawsuit, they were not "disability income benefits" under the statute, even though that lawsuit was instituted by Zuckerman to obtain benefits under a disability policy which the insurer had denied. Donald S. Zuckerman, P.A. v. Hofrichter & Quiat, P.A., 629 So.2d 218 (Fla. 3d DCA

1993).[2/] That decision is contrary to this Court's decisions in Bank of Greenwood and In re McCollam and the plain language of the statute.

The essence of Hofrichter's argument is that this fund is somehow not disability income benefits because the insurance company contested the claim. This makes no sense. The mere fact that someone may raise a standard affirmative defense does not change the nature of the basic claim. Hofrichter asks this Court to assume that because the insurance company alleged in defense that the policy was fraudulently procured and that Zuckerman was not disabled that Zuckerman was not entitled to disability benefits. But it was never agreed, nor did a court rule, that the policy was void.[3/]

Thus, it is Hofrichter, not Zuckerman, who seeks to go behind the settlement to try the underlying claims by relying on testimony about the merits of the underlying claims. Why the insurance company chose to settle this claim is irrelevant. What is relevant is that Zuckerman had a claim for benefits under his disability policy, sued the insurance company to obtain those benefits and was to be paid money for disability benefits by the insurance

---

[2/] At 10, Hofrichter inexplicably argues that the Third District did not construe this statute in its opinion. The Third District stated: "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." 629 So.2d at 219. Hofrichter is wrong again.

[3/] The first doctor Provident sent Zuckerman to found he had a low back problem and was disabled. Provident was dissatisfied with this report and sent Zuckerman to someone else. (T. 48-52).

company in return for surrendering the disability policy. Without the disability policy there would have been no litigation. All of Zuckerman's claims against Provident arose out of that policy. If the funds in this case are not disability benefits, no funds received in settlement of a disputed claim for benefits under a disability policy are ever disability benefits.

Under Hofrichter's theory, whenever a disability insurance carrier contests a claim, for whatever reason, and that claim is settled, for whatever reason, the funds received by the insured lose their exempt character. This places an unfair burden on insureds whose disability carriers dispute their claims and contravenes the policy of protecting debtors and their families from becoming destitute and public charges.

Further, under the Third District's and Hofrichter's reasoning, the result would be no different if the case proceeded to judgment and the insured prevailed. The Third District and Hofrichter rely on the rule that a cause of action merges into a judgment or settlement obtained on that action. 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 apply the same rule to settlements and judgments. Under this reasoning, funds received pursuant to a final judgment in the insured's favor would not be disability benefits because the insured would be receiving funds pursuant to the judgment, not the

policy. If, however, the Third District's decision applies only to settlements, it contravenes the public policy that favors settlement of disputes without litigation. See Robbie v. City of Miami, 469 So.2d 1384 (Fla. 1985). Insureds are much less likely to settle if by doing so they make it possible for creditors to reach the money recovered from the insurance company.

Lastly, Hofrichter argues that Zuckerman is estopped from claiming the exemption under § 222.18 because his attorneys succeeded in attaching a charging lien to the funds. Nonsense. Estoppel only prevents a party from arguing a position contrary to a position that party took previously. See 22 Fla.Jur.2d Estoppel & Waiver §§ 48-53. A charging lien is filed by an attorney to enforce his right to fees out of funds he recovered for the client. See Sinclair, Lewis, Siegel, Heath, Nussbaum & Zavertnik v. Baucom, 428 So.2d 1383, 1384 (Fla. 1983). Indeed, "the remedy is available where there has been an attempt to avoid payment of fees, or a dispute as to the amount involved." Id. at 1385 (citations omitted). Thus, the attorney and the client may be in an adversarial position. Where, as here, there has been a settlement and the case closed before the attorney files the lien, that right can be asserted in an independent action by the attorney. See Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, 517 So.2d 88, 92 n.4 (Fla. 3d DCA 1987)(cited by Third District in affirming charging lien in Alex Hofrichter, P.A. v. Brumer, Cohen, Logan, Kandell & Kaufman, 624 So.2d 415, 416 (Fla. 3d DCA 1993)). Thus, it was his attorney acting on his own behalf, not Zuckerman,

that took the position the funds could be subject to an attorney's charging lien. See Alex Hofrichter, P.A. v. Brumer, Cohen, Logan, Kandell & Kaufman, 624 So.2d 415 (affirming attachment of charging lien by Zuckerman's attorney; note Zuckerman was not a party). Zuckerman cannot be estopped because of a position taken by a third party acting for his own behalf.

Moreover, the positions must be clearly inconsistent. "[T]he positions must be not merely different but so inconsistent that one necessarily excludes the other." 22 Fla.Jur.2d Estoppel & Waiver § 50 at 480. The position that a charging lien for services performed by the attorney who recovered the disability benefits in question may be attached does not necessarily lead to the conclusion that any judgment creditor can access those funds. For example, a charging lien has priority over judgments obtained against the client after commencement of the attorney's services. Miles v. Katz, 405 So.2d 750, 752 (Fla. 4th DCA 1981)(cited by the Third District in affirming the charging lien in Alex Hofrichter, P.A. v. Brumer, Cohen, Logan, Kandell & Kaufman, 624 So.2d at 416). Thus, even if it were Zuckerman who had maintained that position, it is not inconsistent with the position presented in this case. Hofrichter's claim of estoppel must fail.

In sum, the funds Hofrichter sought to garnish were disability benefits exempt under § 222.18. Zuckerman had a disability policy and sued to obtain benefits under that policy. He was awarded funds in settlement of that litigation. The settlement in this case merely changed the method of payment, not the character

and purpose of the payments. What the insurer claimed in defense is irrelevant, as it was never conceded or proved in court. Any other ruling would mean that any time a disability insurer contests a claim, and the insured is required to litigate, the funds received as a result are not exempt from garnishment. The Third District's ruling places an unfair burden on insureds whose disability carriers dispute their claims. It also contravenes the policy of protecting debtors and their families from becoming destitute and the policy that favors settlement of disputes without litigation. Thus, the Third District's decision contravenes both the plain language and the public policy behind that statute. This Court should quash that decision.

CONCLUSION

For the foregoing reasons and the reasons stated in the initial brief, Petitioner Zuckerman respectfully requests this Court to quash the decision of the Third District Court of Appeal.

Respectfully submitted,

PAUL C. HUCK, ESQ.
2850 First Union Fin. Center
200 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 372-1800

COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
Telephone: (305) 371-1597

By: _____
SHARON L. WOLFE
Fla. Bar No. 222291

By: _____
CHRISTINE M. NG
Fla. Bar No. 0776180

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 10th day of August, 1994 to: All counsel on the attached list.

Respectfully submitted,

PAUL C. HUCK, ESQ.
2850 First Union Fin. Center
200 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 372-1800

COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Fl 33130
Telephone: (305) 371-1597

By: _____
SHARON L. WOLFE
Fla. Bar No. 222291

CERTIFICATE OF SERVICE
Zuckerman v. Hofrichter
Case No. 83,015

Ronald P. Ponzoli, Esq.
Ponzoli & Wassenberg, P.A.
3250 Mary Street
Suite 302
Miami, FL 33133

Steven R. Berger, Esq.
Berger & Chafetz
9350 South Dixie Highway
Suite 1500
Miami, FL 33156

Alex Hofrichter, Esq.
9350 S. Dixie Highway
Suite 1500
Miami, FL 33156

Donald Zuckerman, Esq.
16399 Fern Drive
Ft. Lauderdale, FL 33326

Joel D. Adler, Esq.
MARLOW, CONNELL, VALERIUS,
ABRAMS, LOWE & ADLER
Grove Professional Building
Suite 200
Miami, FL 33133

Brian J. Stack, Esq.
STEEL, HECTOR & DAVIS
4000 First Union Fin. Center
200 South Biscayne Blvd.
Miami, FL 33131-2398

Paul C. Huck, Esq.
2850 First Union Fin. Center
200 South Biscayne Boulevard
Miami, FL 33131

COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130