OA 10-02-00

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

CASE NO. 96,287

BRIAN JONES AND SUZETTE JONES, his wife,

Petitioners,

vs.

ETS OF NEW ORLEANS, INC.,

Respondent.

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF PETITIONERS

Joseph H. Williams, Esquire
Florida Bar No. 166106
TROUTMAN, WILLIAMS, IRVIN,
GREEN & HELMS, P.A.
311 West Fairbanks Avenue
Winter Park, Florida 32789
Telephone: 407/647-2277
Facsimile: 407/628-2986
Attorneys for Amicus Curiae
The Academy of Florida Trial
Lawyers

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PREFACE

In this brief, Petitioners, Brian Jones and Suzette Jones, his wife, will be referred to as "Petitioners". Respondent, ETS of New Orleans, Inc., shall be referred to as "Respondent". Amicus Curiae, The Academy of Florida Trial Lawyers, shall be referred to as "the Academy". References to "the DCA", shall refer to the Second District Court of Appeal, unless the context indicates otherwise. Reference to §440.39, Fla. Stat. shall be to the 1993 edition of that statute, unless otherwise noted. The designation "E/C" shall refer to employers, carriers, self-insureds, and servicing agents concerned with the provision of worker's compensation benefits in the State of Florida. References to the Appendix to this brief shall be by the symbol "A", followed by the page cited to.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The Academy adopts the Petitioners' statement of the facts and statement of the case in this proceeding.

SUMMARY OF THE ARGUMENT

The Academy adopts the argument and citations to authority contained in Petitioners' brief.

The DCA construed the term "costs" contained in the language of the Florida Worker's Compensation Act which ignored decades of a procedure followed by the bench, the Bar and E/C's in this state regarding the pro rata sharing of an injured worker's recovery from a responsible tortfeasor. The ruling ignores the context in which these claims are made prosecuted, litigated and resolved. The interchangeable use of the terms "claims", "judgment", "settlement", *suit", and "action at law" in the controlling legislation renders the language so ambiguous and indefinite in the context of the issue presented in this case as to require judicial construction.

Since the statute is ambiguous, several strong public policy considerations dictate that the DCA's construction be rejected. This remedial legislation, in derogation of the common law must be construed in favor of the class of persons it was intended to benefit - the injured employee. Any interpretation which impinges on the rights of the injured employee which existed at common law must be rejected. This court should formally adopt the rule which has been followed for decades by all parties involved in the distribution of tort

recoveries in this state; i.e. allowing the distribution computation to contain all of the reasonable and necessary costs expended by the employee in making the tort recovery. This will insure fundamental fairness in the process. This will inure to the benefit of injured employees, E/C's and the Florida consumer.

The DCA's "prevailing party" analysis is out of place in the context of a proceeding involving the pro rata sharing of expenses of the claim and/or litigation. Petitioners and Respondent are prevailing parties in the sense that a recovery has been made and will be shared. Since the E/C substitutes for the injured employee in asserting its claims against the recovery, it can stand in no better position in sharing the proceeds of the recovery than the employee. The DCA allows the E/C to stand in a better position vis-a-vis the class of persons the statute was designed to benefit - the injured employee.

The DCA's opinion should be quashed and this court should construe the statute in question to require that the terms "costs", or "all court costs", mean the total of the reasonable and necessary amounts expended by the employee or his representative in securing the recovery which gives rise to the E/C's claim.

ARGUMENT

FACED WITH AMBIGUOUS STATUTORY LANGUAGE, THE DCA'S RULING FAILED TO CONSIDER THE IMPORTANT PUBLIC POLICY REASONS WHICH DICTATE A FINDING THAT THE "COSTS' USED IN THE DETERMINATION OF THE DISTRIBUTION OF THE PROCEEDS OF A TORT RECOVERY ARE ALL OF THE REASONABLE AND NECESSARY COSTS EXPENDED BY THE INJURED EMPLOYEE

A. INTRODUCTION.

The DCA failed to address the many factors which impinge on the assertion of a lien by an E/C which has paid worker's compensation benefits. The DCA engaged in a cursory analysis which ignores the modern realities of settling and litigating these claims. The court's mandate is a result which is a radical departure from the manner in which these liens have been resolved for decades. Allowing this precedent to stand will adversely impact the rights of injured employees, E/C's, and consumers in this state. The Academy requests that this court reverse the DCA's ruling and reinstate the former practice as this court's rule concerning the subject of determining the "costs" incurred by an injured worker in effecting a third party recovery in which the E/C will share.

B. GENERAL CONSIDERATIONS

For as long as an injured employee's recovery of damages from a third-party tortfeasor have been shared with the E/C providing worker's compensation benefits, the total

reasonable and necessary costs incurred by the employee in pursuit of his/her claim have been used in computing the amount of the recovery going to the E/C. This was sound public policy for several reasons.

First, the injured employee, not the E/C hires the attorney and obligates himself/herself to pay the *total* costs of making the recovery. This includes items which are clearly non-taxable under the guidelines.[1] Any plaintiff bringing an action in this state, especially if it involves a products liability claim or a medical malpractice claim will spend significantly more in investigating and preparing the case for filing suit than is expended in bringing the action. Once involved in litigation, the taxable costs are a small fraction of the total costs expended by the injured employee in getting a case ready to present to a jury. The DCA's holding ignores this reality.

Second, it is the employee, not the E/C who bears the risks of the litigation. If the case is lost, the employee or his/her attorney absorbs the loss of the costs. If the case is lost, it is not the E/C who will have a cost judgment entered against it.

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[1] Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, *Florida Rules of Court (2000* Ed.), p. 1591.

It is the employee, not the E/C who will be penalized for failing to beat an offer of judgment. The DCA's holding ignores this reality.

Third, if the DCA's holding is followed literally, an employee whose attorney expended substantial amounts working up a case and settled it before suit was filed would be solely responsible for all the costs. The E/C's in this setting are cheerleaders. They remain on the sidelines, bearing no risk until the "game" is won and then show up to share in the celebration of the victory procured by the employee through his/her attorney. The DCA's holding fails to address this harsh outcome for the employee.

Fourth, this ruling may have significant impact in the case involving large damages and hotly disputed liability and/or a potential for a jury finding of a high degree of comparative negligence. In the close case involving the projected expenditure of large sums of money on preparation and trial, the DCA's ruling will cause practitioners to weigh more carefully becoming involved. Under the system as it existed before the DCA's ruling, the E/C would share something from a recovery in a case such as this. Now practitioners will more readily reject cases where the injured employee will be required to bear all the risks and a disproportionate share of the costs.

This ruling does a disservice to all concerned. An injured employee may be discouraged from seeking a partial recovery of his damages. E/C's will lose their shares of the potential recoveries from claims which will never be brought. With less money being recovered by way of subrogation, one may project higher premiums for worker's compensation insurance to offset the loss of revenue from this source. The person at the end of this chain of unintended consequences is the Florida consumer, who will see higher prices for goods and services.

Finally, the DCA's holding has an indirect bearing on the application of the distribution of third party recoveries provision of §768.76(4) & (5), Fla. Stat. (1997), since those provisions adopt the pro rata sharing of costs and attorneys fees which is used in §440.39, Fla. Stat. The DCA's failure to consider the broader implications of its holding is additional reason for this court to review and reverse the DCA's action.

We are taught from our earliest exposure to this area of the law that these provisions for liens or subrogation rights allow the insurer to "stand in the shoes" of the injured worker."[2] This means that, while the E/C's proportionate recovery should be no worse than the injured employee's, it certainly should be

[2] "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right." *Russell v. Shelby Mut.* Ins. Co., 128 So.2d 161, 163 (Fla. 3rd DCA 1961).

no better. Otherwise the E/C stands to reap a windfall as a result of the operation of a statute which has already severely impacted on the common law rights enjoyed by the employees of this state prior to the passage of the Worker's Compensation Law. To allow the DCA's holding to stand is to allow the E/C's that windfall. This deprives the person whose figurative blood, sweat and tears won the battle of the just apportionment of the fruits of that victory.

C. THE CONTROLLING STATUTE

The DCA only considered a portion of the provisions of §440.39(3), Fla. Stat., in its analysis of the meaning of the term, "costs", contained in that enactment. The Academy would respectfully show that, in order to discern legislative intent on this question, it is necessary to reference the whole statutory scheme. The pertinent parts of the statute are set forth below:

> (2) ... The employer or...the insurer shall be subrogated to the rights of the employee or his dependants against such third-party tortfeasor to the extent of the amount of compensation benefits paid or to be paid as provided by subsection (3). If the injured employee or his dependants *recovers from a third-party tortfeasor by judgment or settlement, either before or after* the *filing of suit,* before the employee has accepted compensation or other benefits under this chapter or before the employee has filed a written claim for compensation benefits, the amount recovered

from the tortfeasor shall be set off against any compensation benefits other than for remedial care, treatment and attendance as well as rehabilitative services payable under this chapter. *The* amount *of such offset shall be reduced by the amount of all court costs expended in the prosecution of* the *third-party suit or claim...*

(3)(a) In all claims or actions at law against a third-party tortfeasor, the employee, or his dependants or those entitled by law to sue in the event he is deceased, shall sue for the employee individually and for the use and benefit of the employer, if a self-insurer, or employer's insurance carrier, in the event compensation benefits are claimed or paid... Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependants, which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law, *less their pro rata share of all court costs expended by the plaintiff in the prosecution of* the *suit including reasonable attorney's fees for the plaintiff's attorney.* In determining the employer's or carrier's pro rata share of those costs and attorney's fees, *the employer ox carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment ox settlement which is for costs and attorney's fees.* Subject to this deduction, the employer or carrier shall recover from the judgment or settlement after costs and attorney's fees incurred by the employee or dependant in that suit have been deducted, 100% of what it has paid in future benefits to be paid, except, if the employee or dependant can demonstrate to the

court that he did not recover the full value of damages sustained, the employer or carrier *shall recover from the* judgment ox settlement, *after costs and attorney's fees* incurred by the employee *or dependant in that suit have been deducted,* a percentage of what it has paid and future benefits to be paid equal to the percentage that the employee's net recovery is of the full value of the employee's damages...

(b) If the employer or insurance carrier has given written notice of his rights of subrogation to the third-party tortfeasor, and thereafter *settlement of any such claim or action at law is made, either before or after suit is filed,* and the parties fail to agree to the proportion to be paid to each, the circuit court of the county in which the cause of action arose shall determine the amount to be paid to each by such third-party tortfeasor in accordance with the provisions of paragraph (a).

(4)(a) If the injured employee or his dependants, as the case may be, fail to bring suit against such third-party tortfeasor within one year after the cause of action thereof has accrued, the employer...may...institute suit against such third-party tortfeasor...and, in the event suit is so instituted shall be subrogated to and entitled to retain from any judgment recovered against, or settlement made with, such third party the following: All amounts paid as compensation in medical benefits under the provisions of this law and the present value of all future compensation benefits payable... *together* with all court *costs including attorney's fees expended in the prosecution of such suit to be pro rated as* provided by subsection *(3). The remainder of the monies derived from such judgment or settlement shall be paid to the employee or his dependants, as the* **case** *may* be [E.S., A-1].

The first thing that strikes the reader interpreting this statute is the "...recovers...by judgment or settlement, either before or after the filing of suit..." language in 440.39(2), Fla. Stat. This clearly considers a universe in which every claim is not litigated to judgment with a neat determination of taxable costs. The legislature, by use of this language, recognized some claims would be settled before suit was even filed; some would be settled after filing of suit but before trial or final judgment; and, some would go to judgment. In fact, the overwhelming number of such claims are settled before a jury determines the issues.

The legislature mandates that the E/C's recovery shall be offset by an amount including "...all court costs expended in the prosecution of the third party suit or *claim*" (e.s.). This is extremely important language because it refers back to the "...before or after the filing of suit..." language, above. This makes the distinction between "suits" and "claims". Under the DCA's interpretation the injured employee could never pro rate his/her cost where the recovery had been from a "claim" and not from a "suit". Since "court" (taxable) costs cannot be recovered where the result came from making a "claim", the legislature must have meant that "court costs" means something other than taxable costs. Surely the legislature's use of these

two terms and the "before or after" suit language was deliberate recognition that the total reasonable and necessary costs of both types of recoveries were to be pro rated.

If the DCA's opinion is followed literally, an extremely harsh result would occur. An injured employee obligated to reimburse his attorney for hundreds or thousands of dollars in costs would not be able to have these included in the determination of the E/C's pro rata share. Since the claim is settled before suit, by the DCA's definition, none of the costs incurred by the injured employee could be "taxable". Thus, none of the costs could be used to reduce the E/C's pro rata share. The legislature could not have intended such a harsh result. The illogic of this proposition demonstrates the fallacy within the DCA opinion.

The language in §440.39(3), Fla. Stat., "all court costs'", and "costs", refers back to subsection (2)'s, "before or after filing of suit" language. This theme is followed in §440.39(3)(b), Fla. Stat., which also employs the "all court costs" language. It defies logic that a thoughtful reading of all relevant portions of §440.39, Fla. Stat., could yield the result at which the DCA arrived after its cursory discussion of only the language in §440.39(3)(a), Fla. Stat.

Finally, this construction of the statute would also penalize E/C's in those rare instance? where they file suit on behalf of the employee pursuant to §440.39(4) (a), Fla. Stat. This subsection requires that the distribution of the proceeds be as mandated "subsection (3)". Thus where the E/C bears the risks of litigation, it is penalized by only being allowed to use its taxable costs in the distribution equation.

In reality, this is not a well drafted statute with reference to this question. The interchangeable uses of the terms "all court costs" and "costs" when referring to the differing contexts in which these claims may be concluded' is confusing. At best, the statutory language on this issue is ambiguous.

D. THE AMBIGUOUS STATUTE AND PUBLIC POLICY.

When faced with an ambiguous statutory provision, as here, it is appropriate for the court to consider the legislature's intent. This must begin with the proposition that this enactment is designed to protect employees against hardship arising from on-the-job injury. The law is remedial in nature.

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[3] The writer, in 35 years as an insurance claims representative and attorney has never seen an E/C file suit under §440.39(4) (a), Fla. Stat.

[4] "Claims", "judgment", "settlement", "third party suit", "third party claim", "suit", "action at law" [§440.39, Fla. Stat.].

Any doubt as to statutory construction must be resolved in favor of providing benefits to injured workers. *Broward v. Jacksonville Medical Center,* 690 So.2d. 589, 591 (Fla. 1997). Where a provision is susceptible of disparate interpretations, the court will adopt the construction which is more favorable to the employee. *Henderson v. Saul, Walker & Co., 138* So.2d 323, 327 (Fla. 1962).

The purpose of 5440.39, Fla. Stat. is to preserve an injured employee's cause of action against third-party tortfeasors. *General Cinema Beverages of Miami, Inc. v. Mortimer, 689* So.2d 276, 279 (Fla. 3rd DCA 1995). That provision has been determined to be in derogation of the common law. *Weathers v. Cauthen,* 152 Fla. 420, 19 So.2d 294, 295 (1943). When construction of such a provision leads to a conclusion which is in derogation of the employee's common law rights, that construction should be avoided where possible. *Haxquist v. Tamiami Trail Tours, Inc.,* 139 Fla. 328, 199 so. 533, 539 (1939). This means the provisions of the law must be liberally construed in relationship to those whom it is designed to reach - the injured employee. *Leon County v. Sauls,* 151 Fla. 171, 9 So.2d 461 (1942).

Applying these principals to this controversy makes evident the resolution of the issue. As much as possible of the

injured employee's common law rights are to be preserved, This means that the employee's third party recovery, including recovery of all reasonable and necessary costs expended, should be kept as intact as possible, consistent with the pro rata sharing provision of §440.39, Fla. Stat. Since the respondent is only "in the place of" the employee *[Russell, 128* So.2d at 1631, its position cannot be any more favorable than his.

The DCA's construction is in derogation of Petitioners' common law rights, since it would mandate that the employee be in a proportionately worse position than he would have been at common law. The DCA, faced with a statutory provision which was susceptible of disparate interpretations chose the interpretation which was in derogation of Petitioners' common law rights. This in contravention of this court's mandate in *Henderson.* The E/C's recovery is specifically conditioned on the employee's comparative negligence and his full attorney's fees.[5] There is no logical reason to use a different manner of pro rating costs.

[5] Should the DCA's construction of the term prevail, the Academy can envision the day when E/C's are claiming that only the portion of attorney's fees related to work performed "in the prosecution of the suit" [440.39(3), Fla. Stat.] should be allowed in the equitable distribution equation. This is the time to nip that illogic in the bud.

There is another public policy on which the DCA's holding impinges: The policy which favors settlement of disputes. In *Russell,* the DCA cited this as a reason for denying relief to an E/C where the injured employee settled his third party claim with the tortfeasor before the E/C had paid any worker's compensation benefits [128 So.2d at 164].[6] Generally settlement of disputed issues is highly favored by the legal system. *Robbie v. City of Miami,* 469 So.2d 1384, 1385 (Fla. 1985). Settlement is highly favored because it reduces congestion in the legal system and reduces the cost of the administration of the system to Florida's taxpayers. Certainly, telling injured employees that if they settle their cases without filing suit they can recover no costs, has the potential to create more litigation in the court system.

Finally, the DCA's holding denies fundamental fairness to Florida's workers, an issue on which Justice Anstead touched in his dissent in *Wal-Mart Stores v. Campbell, 714* So.2d 436, 439 (Fla. 1998). Creation of a different standard governing the resolution of the distribution of worker's compensation liens depending on whether the case is settled or litigated is both illogical and fundamentally unfair.

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[6] This case was decided under a predecessor version of §440.39(2), which did not specifically allow subrogation in this setting.

E. THE DCA'S "PREVAILING PARTY" RATIONALE IS FLAWED

The DCA reasons that, "a prevailing party may generally recover only taxable costs", *ETS of New Orleans, Inc. v. Jones*, *738* So.2d 958, 959 (Fla. 2nd DCA 1999). The DCA then implies, without articulation, that, as a "prevailing party" an injured worker should be held to that standard in distributing the proceeds of the recovery. With due respect to the DCA, this misapplies the "prevailing party standard", a rule developed for a setting completely removed from the issue in this case.

The prevailing party rationale is used where two or more adversaries involved in head-to-head litigation have submitted their dispute to a jury and received a verdict. There, the courts over hundreds of years developed the concept of taxable costs. The idea was to have a uniform system that would insure that losing defendants would not be subject to pay oppressive costs marginally related to the litigation,?

The considerations in the statutory distribution formula are completely different. There, during the pendency of the claim or litigation, the interest of the injured employee and of the E/C are identical – to obtain and collect as large a

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[7] In the distribution of tort recoveries in the worker's compensation setting, the E/C has always been able to challenge the reasonableness or necessity of the cost claimed by the injured employee to be a part of the statutory distribution formula.

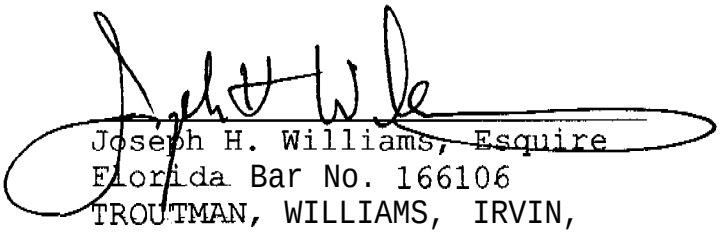
settlement or judgment as possible. In this setting, the "prevailing party" analysis makes no sense, since both the injured employee and the E/C *prevail" when the settlement or judgment is collected. Here the E/C is not a losing party whose interests are protected by the taxable cost guidelines. The E/C is an entity who has received a risk free ride to the recovery. Discussion of the "prevailing party standard" in this context misapplies that concept.

The DCA's reliance [738 So.2d at 959] on *McArthur Farms v. Peterson, 586* So.2d 1273 (Fla. 1st DCA 1991) is also misplaced, *Peterson* dealt with the costs of an adversarial worker's compensation proceeding litigated before a judge of compensation claims on an issue of compensability. This has nothing to do with how costs are to be pro rated in a proceeding involving distribution of the proceeds of a tort recovery under §440.39, Fla. Stat. The "prevailing party" analysis has no place in this context. This rationale should be rejected.

CONCLUSION

The opinion of the District Court of Appeal should be quashed. This court should construe the statute in question to read that the terms "costs" and "court costs" include all reasonable and necessary amounts expended by an injured employee, or his/her counsel in making a recovery from a responsible tortfeasor, regardless of the point at which that recovery was made, before or after filing suit.

Respectfully submitted,



Joseph H. Williams, Esquire
Florida Bar No. 166106
TROUTMAN, WILLIAMS, IRVIN,
GREEN & HELMS, P.A.
311 West Fairbanks Avenue
Winter Park, Florida 32789
Telephone: 407/647-2277
Facsimile: 407/628-2986
Attorneys for Amicus Curiae
The Academy of Florida Trial
Lawyers

CERTIFICATE OF FONT SIZE

The Academy of Florida Trial Lawyers, Amicus Curiae herein, files this, its certificate that the size and style of type used in this brief is: 12 point Courier New, a font that is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. Mail to: **L.** BARRY **KEYFETZ,** Esquire, Keyfetz, Asnis & Srebnick, P.A., 44 West Flagler Street, Suite 2400, Miami, Florida 33130; **GERALD R. HERMS,** Esquire, 200 Pierce Street, Suite 3A, Tampa, Florida 33602; **M. MITCHELL NEWMAN,** Esquire, Newman, Levine, Metzler & Shankman, P.A., 400 North Tampa Street, Suite 2900, Tampa, Florida 33602; and **ROBERT A. LEVINE,** Esquire, 400 North Tampa Street, Suite 2900, Tampa, Florida 33602, this 1st day of May, 2000.

Joseph H. Williams, Esquire
Florida Bar No. 166106
TROUTMAN, WILLIAMS, IRVIN, GREEN & HELMS, P.A.
311 West Fairbanks Avenue
Winter Park, Florida 32789
Telephone: 407/647-2277
Facsimile: 407/628-2986
Attorneys for Amicus Curiae
The Academy of Florida Trial Lawyers