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IN THE SUPREME COURT OF FLORIDA

BRIAN JONES, and SUZETTE JONES, his wife,

Petitioners,

vs.

ETS OF NEW ORLEANS, INC.,

Respondent(s),

CASE #: 96,287
(2nd DCA Case #: 98-00625)

INITIAL BRIEF OF PETITIONERS
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DESIGNATION OF PARTIES AND RECORD REFERENCES

Brian Jones and Suzette Jones as Petitioner or Petitioners

E.T.S. of New Orleans, Inc. as Respondent

Employer/Carrier as E/C

Appendix of Petitioner as "Appx."

2nd District Court of Appeal as "DCA"

STATEMENT OF THE CASE AND FACTS

This is a Petition for Writ of Certiorari from an order of the Second District Court of Appeal holding the carrier only pays their pro rata share of "taxable costs" in connection with the third party recovery, thereby leaving the employee bearing all of the other "expenses" also referred to as "costs of recovery".[1]

Petitioner suffered injuries while working for Respondent and was paid workers' compensation benefits. Petitioner then sued a third party and reached a settlement for $50,000.00. In determining Respondent's lien, the trial court deducted from the gross recovery, in addition to attorney's fees, reasonable and necessary "expenses"("costs of recovery") incurred in securing the recovery, most of which never fall in the limited category of "taxable costs".

The District Court reversed that determination, holding the only costs that are permitted to be deducted from the gross recovery to determine the net recovery are "taxable costs", thereby leaving the employee to bear the full extent of the major reasonable necessary costs of recovery. From that decision Petitioners (Appellees below), seeks review by this Court contending said decision is in error and in conflict with decisions of this Court and other District Courts of Appeal.

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[1] In fact, it is unclear when just taxable costs would ever be borne by either the employee or carrier upon a successful recovery in that "taxable costs" would always be reimbursed by the third party tort feasor.

SUMMARY OF ARGUMENT

In more than 50 years of determining these liens involving similar statutory language insofar as the issue herein, no other District Court has interpreted the E/C "participation" in costs in securing the recovery to include only "taxable costs" which would leave solely to the party securing the recovery - generally the employee - responsibility for the bulk, if not all, of the recovery costs. The DCA holding is in conflict with this Court's decisions in Nikula v. Michigan Mutual Insurance Company, 521 So.2d 330 (Fla. 1988) and Manfredo v. Employers Casualty Insurance Company, 560 So.2d 1162 (Fla. 1990). The DCA holding also conflicts with multiple other District Court of Appeal decisions which have similarly interpreted the statutory language that the E/C recovery from the judgment is after attorney's fees and "costs incurred by the employee" which means all reasonable recovery costs (expenses).[2]

Subsequent to multiple judicial decisions, which without exception hold the "costs" in which the E/C participates are not just taxable costs, but all reasonable recovery costs or expenses, the legislature re-enacted the provision on multiple occasions. Where a statute has been construed, subsequent re-enactment is legislative approval of the judicial construction which always was, until the decision here under

[2] The statutory provision dealing with this same aspect uses at times "court costs" or just "costs". See Footnote 3.

review, "costs" is the broader concept of recovery costs (expenses) - not just taxable costs.

"When the meaning of a statute is at all doubtful, the law favors a rational, sensible construction." Wakulla County v. Davis, 395 So.2d 540 (Fla. 198 1) at p.543. The holding of the DCA was directly contrary to the policy established by this Court in Nikula, reiterated by multiple other District Courts of Appeal, and thereafter codified by the legislature holding that the workers' compensation carrier shall receive pro rata recovery from the third party to the same extent as the employee has received same, compared to the full value of the case. That policy compels the carrier to share pro rata in all reasonable and necessary recovery costs, not just taxable costs - which taxable cost, in any event, would not seem to be borne by the carrier or employer since they would be reimbursed by the third party. The DCA decision limiting the E/C "participation" to only "taxable costs" results in a greatly disproportionate obligation by the employee and, in a number of circumstances, could even result in little or no recovery to the employee actively pursuing the recovery, but substantial recovery to the E/C who simply acted as "cheerleader".

PRESENTED

WHETHER THE EMPLOYER/CARRIER PAYS THEIR SHARE OF ATTORNEY'S FEES AND "RECOVERY" COSTS (EXPENSES) IN MAKING THE THIRD PARTY RECOVERY OR ONLY PAYS THEIR SHARE OF "TAXABLE" COSTS, LEAVING IT TO THE INJURED WORKER TO PAY ALL THE OTHER REASONABLE COSTS NECESSARILY EXPENDED TO SECURE THE THIRD PARTY PROCEEDS?

ARGUMENT

Historically, it appears the terminology "court costs" was used in the more general sense of "expenses" or "recovery costs". $440.39 Florida Statutes (1947).[3]

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[3] The initial terminology prior to amendment in 1947 used "expenses incurred by him in respect of such proceeding or compromise" with that terminology intended to encompass both costs and attorney's fees. In 1947, the provision was amended separating out attorney's fees and costs utilizing terminology "court costs".(Appx.4-5) In 1977 the terminology "court costs" continued to be utilized in one part, but language was amended to provide employer or carrier shall recover "from the judgment after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted, 1 00%..." 440.39(3)(a) Florida Statutes (1977)(Appx.6,7). In 1983 the second sentence was re-written and states the e/c"shall have deducted from its recovery a percentage amount equal to the percentage of the judgement which are costs and attorneys fees." 440.39(3)(a) Florida Statutes (1983)(Appx.8). Since that time, there have been numerous re-enactments and revisions with the language, however, continuing to utilize terminology of "court costs", but specifically providing, as noted in the provision under consideration the following:

> "Subject to this deduction, the employer or carrier shall recover from the judgment or settlement, after and attorney's fees incurred bv the emulovee or dependent in that suit have been deducted, 100% of what he has paid and future benefits to be paid, except, if the employee or dependent 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 or settlement after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted..." [§440.39 (3)(a) Florida Statutes (Supp. 1994)] (Emphasis supplied).

That provision required the employee to elect whether to accept compensation or pursue a third party claim. If the employee elected to pursue a third party claim, then the employer/carrier was given the right to pursue the third party claim. The E/C is then permitted to retain from the third party proceeds all compensation paid or to be paid, costs of medical benefits paid or to be paid, reasonable attorney's fees and "court costs". The balance after the foregoing was to be paid to the employee.

Although the statutory terminology initially utilized was "court costs", Petitioner is unaware of any decision by any District Court of Appeal or this Court ever holding only "taxable" costs may be recovered by the party pursuing the third party action - until the Second District so held in this case. Such a restrictive interpretation would be inconsistent with the intended purpose of the provision. Why would the legislature permit the E/C even under the 1947 provision to recover everything from the third party proceeds they secured (past and future compensation, past and future medical, reasonable attorney's fees), but then only a small part of the necessary costs - only "taxable costs" with all the other costs non-recoverable and having, in effect, to be paid as a part of the balance to the claimant.

It is suggested the legislature never intended such an irrational interpretation

whether it be the injured worker or the E/C[4] who has been called upon to expend reasonable costs to secure the recovery. Rather, the legislature has repeatedly amended and m-enacted the provision with the only judicial interpretation of "court costs" used in this section and "costs" as being the more general "expenses" or "recovery" costs.

In any event, as noted in footnote 3, the provision was amended in 1977 and again in 1983 allowing the E/C to recover from the judgment after attorney's fees and "costs" incurred by the employee.(Appx.6-8). Although continuing to utilize "court costs" in other parts, this new language uses the unqualified terminology "costs". Both in the 1977 provision, and all subsequent provisions, including the current provision, where the E/C is permitted to bring the action, the terminology utilized as to what the employer may retain continues to utilize the 1947 terminology "court costs".'

Accordingly, it is suggested the omission of the pre-fix "court" costs reflects the legislature's intent that the E/C have deducted from its percentage the broader concept of "costs" and shall recover "after costs and attorney's fees incurred by the employee..." In the alternative, at the least, the provision is ambiguous and has been

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[4]Where the injured employee fails to pursue a third party claim, then the E/C may do so retaining from the recovery attorney's fees and "court costs". [e.g. §440.39(4) Florida Statutes (Supp.1994).

[5]The accident occurred January 25, 1994. Accordingly, the controlling statute is 440.39(3)(a) Florida Statutes (Supp. 1994). The statutory language of this provision has remained unchanged, but is identical to §440.39(3)(a) Florida Statutes (1997) referred to in the DCA opinion,

interpreted by this Court and other District Courts of Appeal consistent with the realities of litigation. Those realities are taxable costs are only a very small part of the costs expended in securing the third party recovery. On occasion, the non-taxable costs may even exceed the attorney's fees. Further, recouping "taxable costs" is rarely a problem. If no suit is instituted, then there are no "taxable costs." If suit is instituted and proceeds to judgment, then taxable costs would be the obligation of defendant in addition to any judgment.

The 1983 version of the statute , as does the current statute, utilizes terminology "court costs" in several references, but also states:

> . ..the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgement which are costs and attorney's fees. Subject to this deduction, the employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the employee...s.440.39(3)(a) Florida Statutes (1983) (emphasis supplied).

This Court in Nikula v. Michigan Mutual Insurance Company, 531 So.2d 330 (Fla. 1988) stated at the conclusion of the opinion in a footnote:

> The statute was amended in 1983 to take into consideration the worker's exsenses in pursuing the third-party claim. Nikula v. Michigan Mutual Insurance Company, supra p.332, emphasis supplied.

Again, in Manfi-edo v. Employer's Casualty Insurance Company, 560 So.2d 1162 (Fla. 1990) this Court referred to Nikula v. Michigan Mutual Insurance Company, 531

So.2d 330 (Fla. 1988) holding:

> Although Nikula concerned the 198 1 version of the statute, in a footnote to that opinion, we stated:
>
> > The statute was amended in 1983 to take into consideration the worker's expenses in pursuing the third party claim. The controlling factor for settlements involving comparative negligence under the amended version is the ratio of net recovery to full damages. Manfredo v. Employer's Cas. Ins. Co., supra, p. 1165, (emphasis supplied).

Subsequently, the legislature codified this Court's pro rata formula announced in the Nikula case, but dispensing with the need for an initial showing of comparative negligence to trigger the pro rata determination. §440.39(3)(a) Florida Statutes (1991).

Brandt v. Phillips Petroleum Company, 5 11 So.2d 1070 (Fla. 3rd DCA 1987)[6] utilizes the terminology "recovery costs". The opinion refers with approval to Annot., Workman's Compensation: Attorney's Fee or Other Expenses of Litigation Incurred by Employee in Action Against Third Party Tort Feasor as Charge Against Employer's Distributive Share, 74 A.L.R. 3d 854 (1976).

In Williams Heating and Air Conditioning Company v. Williams, 55 1 So.2d 559 (Fla. 5th DCA 1989) the Fifth District also refers to "costs of recovery" including attorney's fees. Both opinions in allowing deduction of "costs of recovery", as

[6] Manfredo disapproved of the portion of the Brandt opinion pertaining to when the comparative negligence reduction comes into the formula, but adopts the "expenses" or "recovery costs" terminology.

distinguished from taxable costs, discuss the intent of the statute that the "employee's gross recovery is proportional to the total value of the injured employee's claim." Also see similar rationale expressed in City of Hollywood v. Lombardi, 738 So.2d 49 1 (Fla. 1 st DCA 1999), at p. 1850, pending before this Court on certified question.

The rationale of the foregoing opinions and the total pro rata formula codified by the legislature following Nikula could not occur if the injured employee is called upon to pay all of the other reasonable and necessary "expenses" (cost of recovery) - except taxable costs.[7]

The legislature not only codified this Court's pro rata formula in Nikula dispensing with the need for any comparative negligence, but subsequently repeatedly re-enacted the provision. They did so continuing to use the above referred to terminology "court costs" in a number of references but as well reference to recovery after attorney's fees '"and costs incurred by the employee,." This language had been interpreted by this court and other District Courts of Appeal, without exception, to include costs in the broader sense of recovery costs or expenses.

Petitioner suggests the legislature intended to adopt not only this Court's formula in Nikula, but the judicial interpretations already placed thereon - that it was intended

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[7]A number of cases, such as Risk Management Services. Inc. v. Scott, 414 So.2d 220 (Fla. 1st DCA 1982) simply refer to "costs" with the factual scenario reported neither saying nor seeming to involve just the limited category of "taxable" costs.

the parties bear their pro rata share of all reasonable "expenses" or "recovery costs" necessarily incurred in connection with the third party recovery. This Court and District Court decisions have repeatedly held where a statute has been construed, subsequent re-enactment is legislative approval of the judicial construction. White v. Johnson, 59 So.2d 532 (Fla. 1952); Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964).

This Court did not, through inadvertence or inability to utilize correct terminology, use the terminology "expenses", nor did the other District Courts act inadvertently in also using "expenses" or "cost of recovery" rather than the terminology "taxable costs". Rather, as announced by this Court and the other District Courts of Appeal, it was intended that the E/C receive reimbursement on a pro rata basis exactly proportional to what the claimant receives compared to his overall recovery.

The third party suit is, in effect, a joint venture between the E/C and the employee, with both intended to pro rata share in all reasonable and necessary attorney's fees, and all reasonable and necessary costs of the recovery. The DCA prevailing party analysis is accordingly inapplicable.

The District Court interpretation, herein under consideration by this Court, defeats the pro rata intent of the statute. Further, the interpretation placed upon the statute by the lower court produces an unreasonable consequence - the major "cost" in

securing a third party recovery - costs that are not taxable which on many occasions may be more than the attorney's fees - are not borne pro rata, but solely by one party. As this Court pointed out in Wakulla Countv v. Davis, 395 So.2d 540 (Fla. 1981), at p. 543:

> when the meaning of a statute is at all doubtful, the law favors a rational, sensible construction." Realtv Bond & Share Co. v. Englar, 104 Fla. 329, 143 So.2d 152 (1932).

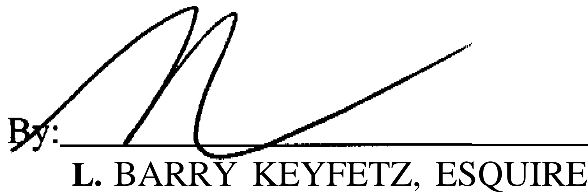
The opinion goes on to point out that, if at all possible, the Court must avoid an interpretation that produces an unreasonable consequence.

The novel interpretation by the DCA here in issue is in conflict with other decisions by this Court and its sister jurisdictions. It is not compelled by the statutory language. Specific amendments in 1977 and 1983, omit the pre-fix "court" and uses just the terminology "costs" in discussing deduction from gross recovery before reaching the E/C workers compensation lien. At the least, the statutory language is ambiguous and thus the rational, sensible construction previously adopted by this Court and effectuating the pro rata policy expressed by the legislature should continue to be adhered to by this Court.

CONCLUSION

For the foregoing reasons, it is requested this Court grant Petition for Writ of Certiorari, quash the DCA opinion herein and reinstate the opinion of the trial judge allowing deduction from the third party recovery in determining E/C workers compensation lien all reasonable recovery costs (expenses) in securing said recovery - not just "taxable costs".

Respectfully submitted,



By:______________________________
L. BARRY KEYFETZ, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of April, 2000 to: M. MITCHELL NEWMAN, ESQUIRE, ROBERT A. LeVINE, ESQUIRE, Newman, Levine, Metzler & Shankman, P.A., Attorneys for Appellants/Respondents, 400 N. Tampa Street, Suite 2900, Tampa, Florida 33602; GERALD R. HERMS, ESQUIRE, Attorney (co-counsel) for Appellees/Petitioners, Suite 3-A, 200 Pierce Street, Tampa, Florida 33602.

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