OA 10-02-00

ORIGINAL

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)

REPLY BRIEF OF PETITIONERS
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CERTIFICATE OF TYPE SIZE & STYLE

The type size and style of the Brief is 14 point Times New Roman.

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ISSUE 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?

REPLY ARGUMENT

Respondent argues, with their "slick barrister - Joe Plaintiff' colloquy that the workers' compensation carrier should only pay their pro rata share of "taxable costs." Otherwise, Respondent implies the employee's lawyer will hire lots of experts such as accident reconstructionist, biochemical expert, economist, with a view toward increasing the verdict and seek to shift part of the cost of those experts to Respondent carrier. (Brief of Respondent p. 19, 20). Respondent prefaces their colloquy by acknowledging:

> It is one thing for employers and carriers to share in costs *necessarily* required to effect a third-party recovery. (Brief of Respondent p. 19).

Accordingly, even Respondent acknowledges their obligation to "share in costs necessarily required", to effect a third-party recovery. These, of course, are something more than "taxable costs", but complains that should not include their pro rata share of "unnecessary costs."

Petitioner concurs that neither the employee client nor the carrier client should pay "unnecessary costs." If the carrier objects to any claimed expense as being "unnecessary", then the carrier can challenge that expense - and if correct would have no obligation therefore. Similarly, the employee client could challenge any obligation for an unnecessary expense. Are "unnecessary" expenses in the third party recovery an obligation of the employee, but not the carrier? We think not.

Respondent fails to recognize the nature of the third party proceeding is a joint venture between the employer/carrier and the employee. That is clear from the statutory scheme and specific provision requiring the cooperation of the parties in prosecuting claims against third party tort feasors. §440.39(7) Florida Statutes. In the ad horrendum colloquy between Slick Lawyer and Joe Plaintiff, Respondent suggests there is something wrong when Slick Lawyer states:

> So, the expenses that we incurred will not only mean a bigger verdict for you, but the carrier is going to split those costs with you. (Brief of Respondent p. 20).

Is Respondent suggesting the bigger verdict should redound only to Joe Plaintiff? Hardly. The bigger verdict for "you" is, in fact, for the joint venture between the employer, employee and carrier. §440.39 Florida Statutes.'

'The statute is explicit that the action brought by the employee is also "for the use and benefit of the employer or insurance carrier, as the case may be."

Respondent suggests with some "horror" that the costs in securing that bigger verdict are going to be "split" with the carrier. They do not mention that the "bigger" verdict is also "split" with the carrier. The terminology "split", although technically correct, is not sufficiently precise. The carrier, at most, will pay their pro rata share of recovery costs and similarly receive their pro rata share of the recovery. The bigger the verdict, the bigger the recovery for both the employer and carrier as well as the employee.

Respondent's interpretation is not only inconsistent with the pro rata statutory formula, but detrimental to the employer/carrier, If the employee alone has to bear all necessary expenses in securing the third party recovery, then considering just the interest of the employee, he may be better off not spending the money, cutting corners and just settling for a lot less. Plaintiff might come out as well simply not hiring experts necessary to secure full damages and then just paying the carrier a much smaller percentage of whatever recovery is made as provided by the statute.

Respondent seeks to cast aside what was suggested at the least to be ambiguous amendatory language talking about the carrier's recovery "after costs and attorney's fees incurred by the employee..." (Brief of Respondent p. 7-9). They argue they interpret that language as "cap" language - and in any event, "costs" when used in the legal scenario, are so accepted as being "taxable costs" that no preface is necessary.

(Brief of Respondent p. 12). If so, why would the legislature address reducing the recovery by taxable costs? If the case is settled before suit, then there are no taxable costs. If the case is litigated, then all reasonable taxable costs are the obligation of the defendant. See *McArthur Farms v. Peterson,* 586 So.2d 1273 (Fla. 1 st DCA 199 1). If "costs" in determining the carrier's lien pursuant to 5440.39 are only "taxable costs", then it would seem there would be nothing to address - there are no taxable costs pre-litigation and post-litigation the relatively minor taxable costs would, in any event, be the obligation of the defendant.

It is acknowledge by Respondent that the determination by the District Court of Appeal herein as to what is encompassed in recovery "costs" to be shared in by the carrier "presents an issue of first impression." (Brief of Respondent p. 10). There accordingly is no dispute for in excess of 50 years of workers' compensation lien determinations at both the trial and appellate levels for the first time a court is holding the carrier need not participate - even after the successful recovery - in the recovery costs.[2]

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[2]The Academy Brief points out Petitioners had to advance all the expenses to secure recovery "for the use and benefit of the employer or insurance carrier;" and that if Petitioner lost, in addition to being out of pocket those amounts, Petitioner would be subject to an adverse cost judgment. When Respondent suggests, even after a successful recovery, as far as they are concerned the reasonable expenses in securing the recovery should not be considered in determining their lien, the Academy refers to that role as "cheerleader". However, although a cheerleader may walk away without obligation after a loss, after a victory, even a cheerleader will participate (e.g. victory rally). In this scenario, all Petitioner is suggesting is that the carrier also

Petitioner suggested Respondent's interpretation that the employee bears all the expenses of recovery (except taxable costs which, in any event, are paid by the defendant) is seemingly inconsistent with the legislature codifying this Court's complete pro rata formula announced in *Nikula*, which was triggered upon showing any comparative negligence.[3] Respondent does not discuss that matter, except in the context of contending "costs" always means taxable costs and if it does not make sense, the Court nevertheless need not examine the legislative intent.

It is conceded by Respondent "costs" as used in retainer contracts includes all reasonable costs. (Brief of Respondent p. 11 referring to a retainer contract utilized in workers' compensation matters). They specifically refer to "the general rule that a client pays his non-taxable expenses pursuant to his contract for legal representation."Brief of Respondent p. 18. However, Respondent ignores they are as well the the client in this action brought as well "for the use and benefit of the employer or insurance carrier." Can Respondent contend they should pay a lesser attorney fee than that for which the plaintiff is obligated - and that plaintiff would then be obligated for the differential? We think not. Respondent seemingly concurs, since

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participate in the successful recovery and just pay their prorata share of the expenses incurred to secure that recovery which is for their use and benefit as well.

[3]The legislature dispensed with requirement there being some comparative negligence to trigger complete pro rata formula. §440.39(3)(a) Florida Statutes (199 1).

they do not argue their percentage fee obligation should be less than that of the employee plaintiff. Why, following this Court's decision in *Nikula*[4], would the legislature amend the statute adopting this Court's pro rata formula and further dispensing with the need for any comparative negligence as a trigger - but not want the carrier to pro rata participate in the reasonable expenses in securing the recovery? The interpretation espoused by Respondents is not rational in light of the legislature's amendment adopting a complete pro rata formula. In fact, even Respondents seem to acknowledge that to be the case implying employers and carriers should share in costs "*necessarily* required to effect a third-party recovery." (Brief of Respondent p. 19).

For the foregoing reasons, it is submitted this Court should grant Petition for Certiorari quashing the DCA opinion herein and reinstating the judgment of the trial court.

CONCLUSION

For the foregoing reasons, and those set forth in Initial Brief of Petitioners, it is requested this Court grant Petition for Writ of Certiorari quashing the DCA opinion herein and reinstating the judgment of the trial court.

Respectfully submitted,

By: _____
L. BARRY KEYFETZ, ESQUIRE

[4] *Nikula* **v.** *Michigan Mutual* ***Insurance Company,*** 53 1 So.2d 330 (Fla. 1988).

CERTIFICATE OF SERVICE

I-HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14 day of June, 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; JOSEPH H. WILLIAMS, ESQUIRE, Troutman, Williams, Irvin, Green & Helms, P.A., Attorneys for Amicus Curiae The Academy of Florida Trial Lawyers, 3 11 W. Fairbanks Avenue, Winter Park, FL 32789.

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