

IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CASE NO.: 70-978

KARL NIKULA, etc.,

Petitioner,

vs.

FOURTH DCA CASE NO. 4-86-0944

MICHIGAN MUTUAL INSURANCE,

Respondent.

FILED

SID J. WHITE

NOV 17 1987

CLERK, SUPREME COURT

By

Deputy Clerk

ON CERTIFIED QUESTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS OF RESPONDENT
MICHIGAN MUTUAL INSURANCE

ALBERT P. MASSEY, III
PYSZKA, KESSLER, MASSEY, WELDON,
CATRI, HOLTON & DOUBERLEY, P.A.
707 Southeast Third Avenue
100 Blackstone Building
Fort Lauderdale, Florida 33316
(305) 463-8593

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INTRODUCTION

Pursuant to this Honorable Court's Order dated August 26, 1987, directing the Respondent/Petitioner to file a reply brief twenty (20) days after Petitioner/Respondent files his Reply Brief on the Merits, MICHIGAN MUTUAL INSURANCE COMPANY files this, its Reply Brief on the Merits.

ARGUMENT

CERTIFIED QUESTION

WHERE, IN A WORKERS COMPENSATION LIENHOLDER'S SUIT FOR A SHARE OF THE INJURED WORKER'S RECOVERY BY SETTLEMENT FROM A THIRD PARTY TORTFEASOR, THE TRIAL COURT HAS DETERMINED A PERCENT OF COMPARATIVE NEGLIGENCE THAT DOES NOT CORRESPOND TO THE RATIO OF THE AMOUNT OF THE SETTLEMENT TO THE TOTAL VALUE OF THE INJURED WORKER'S DAMAGES-ALSO DETERMINED BY THE COURT-HOW IS THE LIEN REDUCTION CALCULATED PURSUANT TO SECTION 440.39(3)(a), FLORIDA STATUTES?

The Plaintiff states at Page 1 of the Reply Brief that the Insurer's interpretation of the Statute is "grossly unfair" because it recognized that in cases of doubtful liability on the part of the tort feasor, which may reduce the settlement amount, the Insurer still may receive 100% of its lien. This statement fails to recognize that it is not only the Insurer's interpretation of the Statute, but the interpretation of the Statute by appellate courts of this State. United Parcel Services v. Carmadella, 432 So.2d 702, 704 (Fla. 3rd DCA 1983).

The Plaintiff further argues that it may be unfair for a claimant who settles for less than full value of his tort claim to be required to pay an insurer 100% of its lien, while the claimant who receives 10% of the value of his claim due to comparative negligence, is only required to pay back 10% of his benefits. This argument fails to take cognizance of the fact that the Statute clearly does not provide for the ephemeral and virtually unquantifiable factor of "doubtful liability". Carmadella, supra. Further, in this case, the trial court

determined that the factor reducing the Plaintiff's recovery (contended by the Plaintiff below to be as high as 100%) is comparative negligence and not "doubtful liability". Thus, this argument is not applicable to the facts of this case. Moreover, the Plaintiff fails to explain the propriety of the disparity that actually exists in this case. That is, the Plaintiff surely cannot say that he has met his burden of proving that he had received only 10% of the full value of his claim due to comparative negligence when, in fact, he has received 24% of the full value of his claim.

At Page 2 of his Brief, the Plaintiff finds it difficult to understand how the amount of the settlement is relevant where there is comparative negligence reducing the amount of a claimant's recovery but irrelevant in cases of difficult liability. Notwithstanding the fact that the argument again is not factually relevant to this case as the Plaintiff below did not collect the full value of his claim due to comparative negligence; Plaintiff's difficulty stems from his failure to recognize that "difficult liability", is not a factor that may reduce an insurer's lien pursuant to Section 440.39(3)(a) Fla. Stat. Thus, the settlement amount in a case where "doubtful liability" exists is irrelevant for purposes of determining what extent the insurer's lien may be reduced under the Statute. Additionally, the amount of settlement is relevant where comparative negligence is the reducing factor as the Legislature directed that the Court determine the Insurer's pro

rata share of recovery on its lien. Thus, the proportion the settlement amount represents to the full value of the Plaintiff's claim must necessarily be considered.

Lastly, the Plaintiff contends that if the Legislature had intended the amount of the actual settlement to control where comparative negligence has limited a claimant's recovery, it would have said so. However, it is equally true that had the Legislature wanted the percentage of comparative negligence, that is determined at a separate hearing, to control in such situations it would have said so. Surely, the Legislature did not intend the result that occurred in the trial court in this case. That is, the Plaintiff arguing that his recovery through settlement was reduced by his 90% to 100% comparative negligence when, in fact, he had actually received 24% of the full value of his claim. The Legislature did direct that the Court determine the Insurer's pro rata share. The Legislature clearly did not intend to create a disparity in either the Plaintiff's, or the Insurer's, favor in situations where comparative negligence has reduced a claimant's recovery through settlement.

ARGUMENT II

THE DISTRICT COURT OF APPEAL ERRED BY DETERMINING THAT THE INSURER IS NOT ENTITLED TO MORE THAN 24% REIMBURSEMENT OF ITS OUTSTANDING LIEN WHEN THE PLAINTIFF, BY VIRTUE OF THE \$3,600,000.00 SETTLEMENT, WILL RECEIVE THE FULL VALUE OF HIS TORT CLAIM THROUGH PERIODIC PAYMENTS WHICH WILL TOTAL AT LEAST THE \$15,000,000.00 FOUND TO BE THE FULL VALUE OF HIS TORT CLAIM.

The Plaintiff makes the argument that the Insurer's premise is incorrect in that the \$15,000,000.00 figure found to be the full value of this case had been reduced to the present value by the jury prior to rendering a verdict. At Page 4 in his Brief, the Plaintiff points out that David Goodwin obviously based his opinion that the jury was properly instructed and properly arrived at a verdict and thus, any damages would have already been reduced to present dollar value. This statement fails to take into account Mr. Goodwin's testimony. The records reveals that this figure was a figure Mr. Goodwin arrived at before reductions.

"But the probability is that you would have felt the verdict, a proper value of the case, would have been \$7,000,000.00 to \$10,000,000.00 in terms of the man's damages.

Answer: Without anything else reducing for anything, yes." (Deposition of David Goodwin, R-831). Emphasis added.

Thus, the Plaintiff's assumption that the full value of the Plaintiff's claim as determined by the trial court had already been reduced to present value is without merit.

Simply, the Insurer's position is that if, in fact, the \$15,000,000.00 figure is the raw figure arrived at by the trial

court in this case, absent comparative negligence, a jury would have had to reduce that portion of the \$15,000,000.00 attributable to future damages to present dollar value. Thus, if properly reduced, the present dollar value of a \$3,600,000.00 structured settlement represents a higher percentage of recovery of the full value of his claim. Thus, this Court should remand this case for a factual determination regarding the issue of whether the \$15,000,000.00 figure represents a jury verdict properly instructed and reduced to present dollar value or, alternatively, the full value of the Plaintiff's damages, including future damages, not reduced to present dollar value.

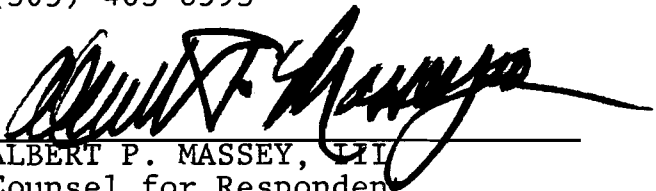
CONCLUSION

The Insurer respectfully requests that this Court affirm the decision of the Fourth District Court of Appeal, and answer the certified question that the ratio the amount of an injured worker's settlement represents to the full value of his damages is the ratio to be used to calculate the amount the Insurer's lien is reduced pursuant to Section 440.39(3)(a), Florida Statutes. The Insurer further requests that this Court reverse the District Court's finding as to Issue II herein and remand the case to the trial court to determine the reduction of the \$15,000,000.00 damage amount to present dollar value, and to determine the corresponding increase in the percentage the Insurer is entitled to recover on its lien.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by regular mail, this 16th day of November, 1987 to LARRY KLEIN, ESQUIRE, 501 South Flagler Drive, Suite 503, West Palm Beach, FL 33401; to BABBIT & HAZOURI, P.A., Post Office Box 024426, West Palm Beach, FL 33402; to DAVID GOODWIN, ESQUIRE, 5300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131-2339; and to MR. CHARLES J. MAGALIAN, Chief of Records, Workers Compensation Division, Department of Labor & Employment Security, 1321 Executive Center Drive, Tallahassee, FL.

PYSZKA, KESSLER, MASSEY, WELDON,
CATRI, HOLTON & DOUBERLEY, P.A.
707 Southeast Third Avenue
100 Blackstone Building
Fort Lauderdale, Florida 33316
(305) 463-8593


ALBERT P. MASSEY, III
Counsel for Respondent