

IN THE SUPREME COURT OF FLORIDA,

CASE NO. 71,337
DCA-3 No. 86-2405

LIBERY MUTUAL INSURANCE
COMPANY,

Petitioner,

vs.

FRANK CHAMBERS and BRUNETTA
CHAMBERS, his wife,

Respondents.

FILED

SID J. WHITE

NOV 1 8 1987

CLERK, SUPREMS COURT

By _____

Deputy Clerk

RESPONDENT'S BRIEF IN OPPOSITION TO CONFLICT CERTIORARI
JURISDICTION

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INTRODUCTION

RESPONDENT, FRANK CHAMBERS, is an amputee injured in a work related accident, whose injury was aggravated by negligent medical malpractice.

PETITIONER, LIBERTY MUTUAL INSURANCE CO., is a Worker's Compensation carrier which attempted to impose a compensation lien on the proceeds of a settlement obtained in the subsequent medical malpractice suit.

In this brief, the parties shall be referred to as PETITIONER and RESPONDENT. The symbol "A" will refer to the Appendix, which accompanies this Brief.

All emphasis has been supplied unless otherwise noted to the contrary.

STATEMENT OF THE CASE AND THE FACTS

RESPONDENT, FRANK CHAMBERS, was initially injured in a work related accident. An aggravation of that injury occurred while RESPONDENT was being treated at Jackson Memorial Hospital (Dade County operated). A subsequent medical malpractice suit against the hospital staff and Dade County was settled on the eve of trial. Simultaneous with the settlement, PETITIONER, LIBERTY MUTUAL INSURANCE COMPANY, filed a Worker's Compensation lien against the proceeds of the settlement.

Notwithstanding the existence of clear precedent to the contrary in the Third District [American Motorist Insurance Co. v. Coll, 479 So.2d 156 (Fla. 3d DCA 1985), review denied, 488 So.2d 829 (Fla. 1986) and Rosabal v. Arza, 495 So.2d 846 (Fla. 3d DCA 1986)], RESPONDENT asserted the validity of the compensation lien and the trial judge, notwithstanding the above case law, imposed the lien on the proceeds of the settlement.

An appeal was filed by RESPONDENT grounded upon the above cited precedent to the contrary. In addition, a Motion for Attorney's Fees was filed pursuant to Section 57.105, Florida Statutes. The Third District Court of Appeal (Chief Judge Schwartz writing for the Court), reversed the order imposing the lien and granted RESPONDENT'S Motion for Attorney's Fees. The basis for the award of attorney's fees to RESPONDENT was that PETITIONER put forward a frivolous argument to the appellate court, in support of the trial judge's ruling. This frivolous argument was in direct contravention of the established case law of the Third District.

JURISDICTION OF THE SUPREME COURT

Rule 9.030(a)(2)(a)(iv), pertaining to conflict certiorari jurisdiction provides that in order to invoke the conflict jurisdiction of the Supreme Court, an opinion must:

"expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law."

The decision relied upon by PETITIONER, McNee v. Biz, 473 So.2d 5 (Fla. 4th DCA, 1985) in no way either "expressly" or "directly" conflicts with the opinion in this case.

In the instant case, the Court awarded RESPONDENT appellate attorney's fees for both having to prosecute an action on appeal which was clearly controlled by settled precedent and for having to reply to the frivolous arguments asserted by PETITIONER in the appellate court. In the McNee decision, supra, there is no mention of any precedent or controlling principal of law and there is no mention of the fact that PETITIONER urged a frivolous argument upon the Court.

Accordingly, the absence of the above two vital elements from the McNee decision, supra, clearly distinguishes it from the case sub judice. Thus, there is no "express" or "direct" conflict between the two decisions and no jurisdiction to hear this petition.

SUMMARY OF ARGUMENT

Unlike the case of McNee v. Biz, supra, the Third District awarded appellate fees in the case sub judice predicated upon a flagrant disregard of that court's holding on the identical issue (invalidity of worker's compensation lien in a medical malpractice setting) in American Motorist Insurance Co. v. Coll, supra, and Rosabal v. Arza, supra. Further, the award was predicated upon the frivolous argument put forth by PETITIONER in the Court in an anemic attempt to obviate the clear precedent of the above decisions.

As stated in the opinion of the Third District (A1,2):

"The carriers present contention that the rule in Coll applies only to judgments and not settlements is frivolous. See Coll, 479 So.2d at 156; Rosabal, 495 So.2d at 846; §768.50(4).

"We consider, in the light of the clearly controlling effect of Coll, that the appellee's position in this case appropriately invokes Section 57.105, Florida Statutes (1985)."

There is absolutely no mention of any disregard for precedent in the written opinion of the McNee Court, nor is there any mention of a frivolous argument in the appellate court. Thus, the basis for the awarding of fees sub judice, a disregard of court precedent and a frivolous argument to circumvent the precedent, is absent from the opinion in McNee. This obvious and patent distinguishing point establishes an absence of any "express" or "direct" conflict between McNee and the instant case.

ISSUE

WHETHER THE OPINION IN McNEE v. BIZ, SUPRA, LACKS AN EXPRESS OR DIRECT CONFLICT WITH THE DECISION SOUGHT TO BE REVIEWED.

ARGUMENT

THE OPINION IN McNEE v. BIZ, SUPRA, LACKS AN EXPRESS OR DIRECT CONFLICT WITH THE DECISION SOUGHT TO BE REVIEWED.

The opinion in McNee v. Biz, supra, is predicated upon the point of law that it is error to award appellate attorney's fees to a losing party who merely defends a judgment rendered by the trial court in the appellate court. There was far more than a mere defense of a judgment by PETITIONERS sub judice.

In the instant case, Chief Judge Schwartz opined that, in light of precedent to the contrary, PETITIONER'S specific argument on appeal was frivolous. Clearly, the instant case lacks either express or direct conflict with McNee, supra, in that it (1) holds that the specific argument espoused by PETITIONER is frivolous (2) in light of two opinions of the Third District Court of Appeal which are squarely contrary to that argument.

Thus, the opinion in the instant case stands for the proposition that an appellate court may award attorney's fees pursuant to Section 57.105, Florida Statutes, when a frivolous argument is put forward in the appellate courts in light of clearly applicable precedent to the contrary.

The McNee, supra, written opinion is completely silent as to whether or not a frivolous argument was put forward by the appellee. Instead, the opinion merely states that the appellee

"defended the judgment". 473 So.2d at page 6. Sub judice, the Third District expressly held that the argument championed by PETITIONER was frivolous and the Court set forth that argument.

Further, the McNee supra, court was completely silent as to the existence vel non of precedent which controlled the decision. Sub judice, the Third District expressly held that the argument was frivolous in light of case law directly to the contrary and the Court set forth the case law.

Contrary to PETITIONER'S assertions, the instant case does not stand for the proposition that a party seeking to affirm a judgment "suffers the consequence" of having fees awarded against him or her for merely defending a trial court judgment. PETITIONER'S Brief at Page 4. Rather, the instant case stands for the proposition that a party seeking to avoid clear precedent to the contrary must put forward an argument that is not frivolous in order to avoid having fees rendered against it pursuant to Section 57.105, Florida Statute.

As an officer of the Court, an attorney must not offer frivolous argument on appeal when he or she realizes that clear precedent is to the contrary. A confession of error is the appropriate and ethical route to take over putting forth frivolous arguments to an appellate court in support of an erroneous decision by the trial court.

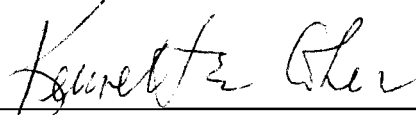
In conclusion, the instant case has several distinct elements that clearly differentiates it from the McNee decision. Those distinguishing features (frivolous argument in light of controlling precedent) renders the instant case conflict free from the McNee decision relied upon in PETITIONER'S Brief.

CONCLUSION

Based upon the foregoing argument and authorities, it is respectfully suggested that this Honorable Court deny the Petition for Certiorari filed herein, as there is neither an "express" or "direct" conflict between the instant case and the case cited by PETITIONERS herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 5th day of November, 1987, to:

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