

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 9 WAP 2006

Debbie Gillette, individually and as Administratrix of the Estate of John Gillette,
Deceased, Appellee

v.

Catherine Wurst, as Parent and Guardian of Andrew Wurst, a minor, Jerome J. Wurst
and Catherine Wurst, and J.J. Wurst Landscape Contractors, Inc., Jacob Tury, a minor,
by and through his Parents and Legal Guardians, Joe Tury and Noreen Tury, and Joe
Tury and Noreen Tury, individually, Appellees

v.

Jerome Wurst and Catherine Wurst, Appellees

v.

Utica National Insurance Group and General McLane School District, Appellants

**AMICUS BRIEF OF NATIONAL ASSOCIATION OF SUBROGATION
PROFESSIONALS**

Upon grant of the Petition for Allowance of Appeal, at PAA Docket No. 194 WAL 2005, on
June 6, 2006, from the Order of the Superior Court of Pennsylvania at No. 355 WDA 2004 of
January 24, 2005, and Petitioners' Application for Reargument en banc having been denied by
Order of March 31, 2005, which affirmed the January 27, 2004 Order of the Court of Common
Pleas of Erie County, per the Honorable John A. Bozza, at Lower Court Docket No. 1999-14030
approving the settlement and distribution of the proceeds of a Wrongful Death action

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77 P.S. § 6719, 10

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I. STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania has jurisdiction to hear this appeal pursuant to the provisions of 42 Pa. Con. Stat. Ann. §724(a) which provides as follows:

(a) General rule -- Except as provided by section 9781(f) (relating to limitation on additional appellate review), final orders of the Superior Court and final orders of the Commonwealth Court not appealable under section 723 (relating to appeals from Commonwealth Court) may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter. If the petition shall be granted, the Supreme Court shall have jurisdiction to review the order in the manner provided by section 5105(d)(1) (relating to scope of appeal).

The Supreme Court of Pennsylvania granted allowance of appeal in this matter by Order dated June 6, 2006.

II. ORDER IN QUESTION

Appellants seek review of the Superior Court Opinion and Order dated January 24, 2005, which affirmed the January 27, 2004 Order of the Court of Common Pleas of Erie County. The decision approved the distribution of a third party settlement to the widow and children of John Gillette, who was shot and killed while performing his duties on behalf his employer, the General McLane School District. His widow, Debbie Gillette, has received and continues to receive fatal claim benefits under the Pennsylvania Workers' Compensation Act. Appellants intervened before the trial court to object to the proposed distribution, claiming that it was structured to avoid Appellants' statutory subrogation lien.

The Panel issued an Opinion and Order, which concluded as follows:

... In this case, given the application of the Wrongful Death Act, which provides for apportionment of an awardee's recovery as "in the case of intestacy," 42 Pa. C.S. §8301(b), Debbie Gillette's disclaimer of her right to her intestate share of the wrongful death recovery must relate back to the date of her husband's death. **See Bute's Estate**, 49 A.2d at 341. Accordingly, she does not have and has not had an interest in a third party recovery against which Utica seeks to assert its lien. **See Id.** Unlike the workers' compensation claimant in **Thompson and Bumbarger**, she never acceded to any compensation for her husband's injury. **See Bute's Estate**, 49 A.2d at 341. Thus, even assuming the lien's existence, the trial court did not err in declining to Order its enforcement over Debbie Gillette's disclaimer.

For the foregoing reasons, we affirm the trial court's Order approving the parties' proposed settlement and distribution.

Order **AFFIRMED**.

The trial court's Order, dated January 27, 2004, which was affirmed by the Superior Court's Order of January 24, 2005 provided as follows:

AND NOW, to-wit, this 27th day of January, 2004, it is hereby **ORDERED, ADJUDGED and DECREED** that the Amended Petition for Approval of Wrongful Death Settlement Distribution is **APPROVED**, consistent with this Court's

Memorandum. Debbie Gillette, as Administratrix of the Estate of John Gillette, is authorized to execute a release and make distribution consistent with the amounts set forth in the Amended Petition.

IT IS FURTHER ORDERED that the Petition to Intervene filed on behalf of Utica National Insurance Group and General McLane School District is **GRANTED**.

By the Court
 /s/ John A. Bozza
John A. Bozza, Judge

A request Reargument *en banc* was denied. A Petition for Allowance of appeal was filed and was granted by Order dated June 6, 2006.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

Scope of Review:

This Court's scope of review refers to the "confines within which the court must conduct its examination." Harman v. Borah, 562 Pa. 455, 467 n.5, 471, 473, 756 A.2d 1116, 1122 n.5, 1124, 1126 (2000); McMillen v. 84 Lumber, Inc., 538 Pa. 567, 572, 649 A.2d 932, 934 (1994). Such review is confined to the issues preserved for appellate review and thereby properly before the Court for consideration. Id. The provisions of 42 Pa. Con. Stat. Ann. §5105(d)(1) provide the following scope of review:

Except as otherwise provided in this subsection an appeal under this section shall extend to the whole record, with like effect as upon an appeal from a judgment entered upon the verdict of a jury in an action at law and the scope of review of the order shall not be limited as on broad or narrow certiorari.

When this Courts reviews questions of law, the scope of review is plenary. Com. v. Gilmour Mfg. Co., 573 Pa. 143, 822 A.2d 676 (2003); Phillips v. A Best Products Co., 542 Pa. 124, 665 A.2d 1167 (1995).

Standard of Review:

The Court's standard of review refers to the manner or "degree of scrutiny" it employs to conduct its examination of the appellate claims. See Harmon, 562 Pa. at 467 n. 5, 756 A.2d at 1122 n.5. When this Court reviews only questions of law, the standard of review is *de novo*. Kopko v. Miller, 892 A.2d 766 (Pa. 2006); Scalice v. Pennsylvania Employees Benefit Trust Fund, 584 Pa. 161, 883 A.2d 429 (2005); Southeastern Pennsylvania Transportation Authority v. Board of Revision of Taxes, 574 Pa. 707, 833 A.2d 710 (2003).

IV. STATEMENT OF QUESTIONS INVOLVED

- A. WHETHER THIS COURT SHOULD REVERSE THE ERRONEOUS RULING APPROVING A WRONGFUL DEATH SETTLEMENT ALLOCATION WHICH DENIED THE ABSOLUTE, MANDATORY RIGHT OF SUBROGATION PURSUANT TO THE WORKERS' COMPENSATION ACT?

Suggested answer in the positive. Answer of the Pennsylvania Superior Court in the negative.

- B. WHETHER THIS COURT SHOULD REVERSE THE ERRONEOUS RULING WHICH PERMITTED A WIDOW TO DISCLAIM, WITHOUT THE CONSENT OF THE WORKERS' COMPENSATION INSURANCE CARRIER, ALMOST ALL OF THE PROCEEDS OF A WRONGFUL DEATH SETTLEMENT SO AS TO ALLOCATE THE PROCEEDS TO HER CHILDREN AND AVOID A SUBROGATION LIEN?

Suggested answer in the positive. Answer of the Pennsylvania Superior Court in the negative.

V. STATEMENT OF THE CASE

Appellant Utica National Insurance Group (hereinafter “Utica”) paid \$167,934 (through the time of settlement) in workers’ compensation fatal claim benefits to Debbie Gillette as a result of the death of her husband, John Gillette. [R.R. 43a-44a]. Ms. Gillette will receive benefits at the rate of \$561 per week for the rest of her life. Appellants were denied their statutory right to recover their workers’ compensation lien as a result of the trial court’s approval of Ms. Gillette’s allocation of 95% of the settlement proceeds to her children. [R.R. 8a].

On April 24, 1998, John Gillette, a teacher at James Parker Middle School in the General McLane School District, was shot and killed by a student while chaperoning a dinner dance. The Gillette plaintiffs and Jacob Tury, a minor who was also injured during the shooting, brought a third-party action against various defendants. The plaintiffs reached a settlement agreement for the policy limits of \$300,000, with the proceeds to be divided with \$288,000 to the Gillette plaintiffs and \$12,000 for the Tury plaintiffs. [R.R. 9a].

Plaintiffs petitioned the Court for approval of the wrongful death settlement requesting that \$276,000 be disclaimed by Debbie Gillette and allocated to her three adult children. Ms. Gillette was to receive only \$12,000 for funeral expenses. The allocation would effectively eliminate the workers’ compensation subrogation lien because the lien must be asserted against Debbie Gillette as the beneficiary of the fatal claim benefits.

In order to protect their statutory lien, Appellants filed a Petition to Intervene pursuant to Pa. R.C.P., No. 2327(2) and (4), 42 Pa. Con. Stat. Ann. [R.R. 36a-38a], and Objections to the Petition for Approval of Wrongful Death Settlement and Distribution. [R.R. 43a-44a]. Appellants contended that they had an absolute right of subrogation, which the proposed distribution failed to recognize. Appellants further argued that they would recover a portion of the lien if the settlement proceeds were properly distributed as if it was a case of intestacy in

accordance with the Wrongful Death Act. Under the Wrongful Death Act, Ms. Gillette would be entitled to the first \$30,000 plus ½ of the balance of the Estate or, in this case, \$109,493.77 of the net settlement proceeds.

The issue was briefed and argued before the Honorable Judge John A. Bozza. Judge Bozza granted Appellants' Petition to Intervene, however, Appellees' Amended Petition for Approval of the Wrongful Death Settlement and Distribution was also approved. [R.R. 85a-89a].

The trial court's decision was affirmed by the Superior Court, and a request for reargument *en banc* was denied. Thereafter, a Petition for Allowance of Appeal with this Court was filed and granted.

VI. SUMMARY OF ARGUMENT

The court below erred in approving a wrongful death settlement arrangement which failed to acknowledge Appellants' workers' compensation lien. Courts in this Commonwealth have uniformly held that the statutory right to recover a workers' compensation subrogation lien is absolute. Furthermore, the mandatory subrogation right can only be waived by the employer or insurance carrier. Accordingly, this Court has held that a plaintiff may not avoid a workers' compensation lien by apportioning the proceeds of a third-party settlement. Thompson v. Workers Compensation Appeal Board, 566 Pa. 420, 781 A.2d 1146 (Pa. 2001). A settlement allocation that is obviously set up to avoid reimbursement of a workers' compensation lien should not be approved. Id. Otherwise, the right of subrogation will not be absolute – it will be completely nullified by a wrongful death claimant as a matter of right.

The lower court also incorrectly held that Pennsylvania's Decedents, Estates and Fiduciaries Code allows a plaintiff to disclaim third-party settlement proceeds, which are subject to a workers' compensation lien, without the consent of the workers' compensation insurance carrier. The interest in property that would have "devolved" by way of settlement was at all times subject to the automatic workers' compensation subrogation lien. Thus, Ms. Gillette should not have been permitted to disclaim the settlement funds and effectively eliminate the lien. When this Court construes the statutes together to give them all affect pursuant to 1 Pa. Con. Stat. Ann. § 1921, it is clear that the legislature did not intend a workers' compensation beneficiary to "disclaim" third-party settlement proceeds without the consent of the employer and its insurance carrier.

VII. ARGUMENT

A. **The Right of Subrogation Pursuant to the Workers' Compensation Act is Absolute, and Only the Employer Can Waive this Right in a Third-Party Settlement.**

The Court below erroneously approved a settlement distribution which precluded Appellants' absolute right to a workers' compensation subrogation recovery without their consent. The following unambiguous and unmistakable language in Section 319 of the Pennsylvania Workers' Compensation Act makes this right absolute:

Where the compensable injury is caused in whole or in part by the act or omission of a third-party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such third-party to the extent of the compensation payable under this Article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employee, his personal representative, his estate or his dependents...

77 P.S. § 671. (emphasis added). The purpose in enacting the above provision is to protect the right to the workers' compensation subrogation lien and, equally important, to prevent a double recovery for the same injury. Thompson v. Workers' Compensation Appeal Board, 566 Pa. 420, 431, 781 A.2d 1146, 1153 (Pa. 2001) (citing Dale Manufacturing Co. v. Bressi, 491 Pa. 493, 496, 421 A.2d 653, 654 (1980)).

With these goals in mind, this Court in Thompson held that a plaintiff is not permitted to apportion a settlement distribution so that the right of a workers' compensation subrogation recovery is denied. Id. In Thompson, plaintiff John Thompson suffered a work-related injury while in the employ of Craig Welding and Equipment Rental. Id. at 1147. Plaintiff received workers' compensation benefits through his employer's carrier, USF&G Company. Id. Mr. Thompson also filed a third-party product liability action as a result of the accident. Id. The third-party action was settled for \$300,000. Id. at 1149. "The settlement was structured in a way

that was obviously intended to defeat the employer's subrogation right" by apportioning \$200,000 to John Thompson for pain and suffering and \$100,000 to his wife for loss of consortium. Id.

The Thompson Court rejected the settlement allocation since the employer's subrogation rights are statutorily absolute and can only be abrogated by the employer (or insurance carrier). Id. at 1152. Indeed, the "right of subrogation is not conferred upon the employer, rather, subrogation is automatic." Id. at 1151. (citing 77 P.S. § 671). The statute is clear, unambiguous and written in mandatory terms with no exceptions. Id. "The legislator could not have manifested more clearly its intent that the subrogation rights of the employer are absolute." Id. See also City of Pittsburgh v. Workers Compensation Appeal Board, 810 A.2d 760, 764 (Pa. Cmwlth. 2002); Winfrey v. Philadelphia Electric Co., 520 Pa. 392, 554 A.2d 484 (1989); Reliance Co. v. Richmond Machine Co., 309 Pa. Super. 430, 455 A.2d 686 (1983); Edder v. W.C.A.B. Glenshaw Glass Co., 767 A.2d 617 (Pa. Cmwlth. 2001).

The holding and reasoning in Thompson applies with equal force in this case, where an even larger share of the settlement proceeds was allocated to avoid a lien. The obvious effect of the distribution here was to transfer settlement proceeds to family members that are not required to reimburse the lien amount. Thus, the effect – avoidance of a lien - is the same as distributing settlement funds to a loss of consortium claim. Further, Ms. Gillette will enjoy a double recovery through her receipt of fatal claim benefits without having to reimburse Utica. As a result, the approval of Ms. Gillette's settlement allocation completely undermines two main goals of the Workers' Compensation Act – protection of subrogation rights and the prevention of double recoveries.

The Superior Court was wrong to altogether dismiss the holding and reasoning in Thompson based solely on the fact that the apportionment here was made by a purported

disclaimer of settlement funds as opposed to a distribution between claims. Gillette v. Wurst, 869 A.2d 488, 496 (Pa. Super 2005). While this Commonwealth has not decided this precise issue when a settlement is disclaimed, the goal in Thompson to protect a lien must be applied in this case. Regardless of how the apportionment appears on its face, the automatic right to subrogation still exists and must be enforced.

B. A Plaintiff Should Not Be Permitted to Disclaim Proceeds of a Wrongful Death Settlement Under the Decedents, Estates and Fiduciaries Code Without the Workers' Compensation Insurance Carrier's Consent.

The court below incorrectly held that Ms. Gillette may “disclaim” a large share of third-party settlement proceeds under the Decedents, Estates and Fiduciaries Code without Utica’s approval. The disclaimer provision in the Pennsylvania Decedents, Estates and Fiduciaries Code states the following:

A person to whom an *interest in property* would have devolved by whatever means, including a beneficiary under a will, an appointee under the exercise of a power of appointment, a person *entitled* to take by intestacy, a joint tenant with right of survivorship, a donee of an *inter vivos* transfer, the donee under a third-party beneficiary contract (including beneficiaries of life insurance and annuity policies and pension, profit-sharing and other employee benefit plans), and a person entitled to a disclaimed interest, may disclaim it in whole or in part by written disclaimer which shall:

- (1) Describe the interest disclaimed;
- (2) Declare the disclaimer and extent thereof;
and
- (3) Be signed by the disclaimant.

The right to disclaim shall exist notwithstanding any limitation on the interest in the nature of a spendthrift provision or similar restriction.

20 Pa. Con. Stat. Ann. § 6201. (emphasis added).

The Superior Court concluded that the Wrongful Death Act necessarily vests “beneficiaries” of the right to disclaim an interest in property. Gillette v. Wurst, 869 A.2d at

494. However, the interest in property that would have “devolved” by way of settlement was automatically encumbered by the workers’ compensation subrogation lien. Ms. Gillette never really had an “interest in the property” – the entire net settlement proceeds – to disclaim without Appellants’ consent. Further, Debbie Gillette should not be “entitled to take by intestacy” – and then unilaterally disclaim – a greater interest in property than Mr. Gillette would have received had he only suffered injuries and owed a lien amount.

The Superior Court incorrectly examined the disclaimer provision in a vacuum without giving any effect to the Workers’ Compensation Act. In contrast, this Court should construe all three of the statutes together so as to give effect to all of them. 1 Pa. Con. Stat. Ann. § 1921. This can be accomplished simply by requiring a wrongful death claimant obtain the consent of the workers’ compensation insurance carrier before disclaiming monies from a third-party settlement.

Finally, the rules of statutory construction provide that the General Assembly did not intend a result that is absurd or impossible of execution or is unreasonable. 1 Pa. Con. Stat. Ann. § 1922(1). The interpretation of the statutes in this appeal implicate broad policy concerns that extend far beyond a party’s interest in a particular litigation. Affirming the decision below will invite claimants to freely apportion wrongful death settlements in order to avoid subrogation liens. Consequently, the right to subrogation – which is an inducement for an insurance carrier’s participation in the no-fault payment system - will be nullified. Such an unintended result will have a profound negative impact on this Commonwealth’s workers’ compensation insurance system as a whole.

VIII. CONCLUSION

National Association of Subrogation Professionals respectfully request that this Court reverse the holding of the Superior Court and find that the trial court's Order of January 27, 2004 approving Plaintiffs' Amended Petition for Approval of Wrongful Death Settlement and Distribution should be reversed, and that this matter should be remanded to the trial court with directions to order distribution of the settlement proceeds in compliance with the Wrongful Death and Intestacy statutes.

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CERTIFICATE OF SERVICE

Appellants hereby certify that a true and correct copy of the foregoing Amicus Brief of National Association of Subrogation Professionals was served on all parties by Federal Express overnight mail on this 17th day of August, 2006, addressed as follows:

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