IN THE SUPREME COURT OF THE STATE OF NEVADA

PUBLIC AGENCY COMPENSATION TRUST, A SELF-INSURED ASSOCIATION OF GOVERNMENT AGENCIES,
Appellant,
vs.
DEBORAH MARTIN,
Respondent.

No. 42144

FILED

MAY 12 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order in a consolidated case adjudicating appellant's workers' compensation subrogation lien and an attorney's lien. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Deborah Martin (Martin) was injured within the scope of her employment as an emergency medical technician when a vehicle driven by Virginia Hannum (Hannum) collided with the ambulance in which Martin was riding. Martin was injured in the collision and required medical attention. Martin filed a workers' compensation claim with the Public Agency Compensation Trust (PACT), a self-insured association of government agencies and her employer's industrial insurance carrier. Martin hired an attorney to handle her workers' compensation claim and any personal injury claims related to the accident.

Martin received $120,000 in combined benefits for her medical needs, lost time, and a 19% award for her permanent partial disability. At the time of the accident, Hannum carried an automobile insurance policy with State Farm Insurance, with policy limits of $100,000 per person/$300,000 per incident. Martin's uncompensated wage loss, pain

and suffering, and other losses not covered by her workers' compensation insurance exceeded Hannum's $100,000 policy limit.

PACT notified Martin's attorney and State Farm that, pursuant to NRS 616C.215, it intended to enforce its workers' compensation subrogation lien against any recovery Martin received from Hannum or State Farm. PACT also notified Martin and State Farm that it would join any action brought by Martin as a co-plaintiff and intended to actively participate in any subsequent litigation and settlement efforts. To that end, PACT conducted informal pre-trial investigation, including an asset investigation that revealed Hannum was without funds to cover any losses beyond the stated policy limits. PACT shared this information with Martin's attorney and filed suit against Hannum to recover on its subrogation lien. After attempts to reach a negotiated settlement that would allow Martin to share in the proceeds of the insurance award failed, Martin filed a separate personal injury action against Hannum and State Farm. Martin's attorney filed a notice of lien for attorney fees and costs in the amount of one-third of any award plus costs.

Hannum did not contest liability in the accident, and interpleaded the $100,000 policy award. The parties stipulated to consolidation of the two cases in the Eighth Judicial District Court. Martin's attorney filed a motion to adjudicate the attorney fees. Based on the contingency fee agreement signed by Martin, her attorney sought one-third of the $100,000 insurance proceeds plus costs, totaling $33,466.33, with the remaining $66,533.67 going to PACT to satisfy part of its workers' compensation subrogation lien. PACT opposed the motion, asserting that its subrogation lien exceeded the $100,000 insurance policy

proceeds at issue, and because PACT fully participated in the litigation it was entitled to the full amount of the insurance proceeds.

Following oral argument on the matter, the district court granted in part Martin's motion and ordered that Martin's attorney was entitled to $16,667.67, or one-sixth of the $100,000 award in satisfaction of the attorney's lien, with the remaining $83,333.33 going to PACT to satisfy its subrogation lien. The district court further ordered that upon payment of the stated amounts, Hannum was dismissed from the case with prejudice. Martin's attorney accepted tender of the one-sixth amount from Hannum and executed a release in her favor. PACT appealed the district court's order to this court.

Subsequently, PACT filed a motion to accept tendered insurance proceeds or in the alternative interplead those proceeds, and a motion to dismiss as to respondent Virginia Hannum. This court granted the motion to dismiss Hannum on appeal, but denied PACT's motion to accept the tendered proceeds or interplead the same. On appeal, PACT argues that the district court erred in awarding attorney fees to Martin's attorney because its subrogation lien takes priority over a competing attorney's lien.

DISCUSSION

This court reviews questions of law de novo,[1] whereas an award for attorney fees and costs is reviewed for an abuse of discretion.[2]

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[1]SIIS v. United Exposition Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

[2]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 251, 955 P.2d 661, 672 (1998), but see Nyberg v. Nev. Indus. Comm'n, 100 Nev. 322, 324, 683 P.2d 3, 4 (1984) (noting that the proper construction of a statute is a legal

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PACT argues that the district court erred in awarding Martin's attorney one-sixth of the $100,000 insurance award because PACT is entitled to the full amount of the insurance proceeds from Hannum's State Farm insurance policy. According to PACT, it is not obligated to bear any portion of Martin's attorney fees and costs because it actively participated in the litigation, placed both Martin's attorney and State Farm on notice that it intended to enforce the subrogation lien by participating in any litigation involving Hannum's liability, provided Martin's attorney with pre-trial discovery, and filed suit against Hannum to collect on its subrogation lien.

The issue presented here was largely resolved by this court in Breen v. Caesars Palace[3] and its progeny. In Breen, this court adopted the majority rule that when a self-insured employer asserts a workers' compensation lien against a tort recovery obtained by an injured employee who files a claim against a third-party tortfeasor, the employer must reduce the amount of its lien recovery by a proportionate share of the litigation expenses.[4] This court reasoned that if an employer were permitted to assess the full amount of the lien against the total proceeds of the settlement without the employer bearing its fair share of the litigation expenses, the employer would be unjustly enriched to the detriment of the

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rather than factual question and accordingly de novo review applies as opposed to a more deferential standard).

[3]102 Nev. 79, 715 P.2d 1070 (1986).

[4]Id. at 84-85, 715 P.2d at 1073-74.

injured worker who would then be forced to bear the total expense.[5] "In other words, the employer could not obtain a windfall by sitting on the sidelines and relying upon the independent collection efforts of the injured worker. Where the injured worker pursues an independent cause of action against a negligent third party, the employer/lienholder must share in the litigation expenses."[6] After Breen, when an injured employee brings a negligence action against a third-party tortfeasor, an employer or other workers' compensation carrier holding a subrogation lien who is not a participant in the litigation, must pay a proportionate share of the litigation expenses based on the amount of the insurer's lien recovery as compared to the net proceeds of the litigation.[7]

In SIIS v. District Court,[8] this court held that a workers' compensation carrier may, as a matter of right, intervene in a case brought by an injured employee against a third-party tortfeasor in order to preserve the amount of its lien recovery.[9] The court went on to note that when an insurer intervenes and expends its own monies and effort to obtain an adequate settlement or judgment, the Breen formula is inapplicable.[10] As a result, when an insurer with a subrogation lien

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[5]Id.

[6]SIIS v. District Court, 111 Nev. 28, 33, 888 P.2d 911, 914 (1995) (citing Breen, 102 Nev. at 85, 715 P.2d at 1074)).

[7]See Nevada Bell v. Hurn, 105 Nev. 211, 212-13, 774 P.2d 1002, 1003 (1989).

[8]111 Nev. 28, 888 P.2d 911.

[9]Id. at 32-33, 888 P.2d at 913-14.

[10]Id. at 33, 888 P.2d at 914.

intervenes, it may avoid the proportionate reduction of its lien recovery as required by Breen if it actively participates in the litigation. It may not, however, as PACT argues, avoid all reduction in the total award to account for an injured employee's attorney fees and costs.[11]

PACT's reading of SIIS v. District Court is too broad. The public policy expressed in Breen, that the legislative intent of Nevada's workers' compensation statutes is to compensate injured employees, was not abrogated by this court's decision in SIIS v. District Court. Moreover, as footnote 3 in Breen implies, when the amount of an insurer's subrogation lien exceeds the amount of the total award less the applicable attorney fees and costs, then the insurer should bear the total cost of litigation.[12] We conclude that because PACT actively participated in this case by conducting pre-trial discovery and providing the results of that investigation to Martin's attorney, the Breen formula is inapplicable.

PACT argues that under Nevada law, and the case law of this court, a workers' compensation subrogation lien established pursuant to NRS 616C.215 takes priority over an attorney's lien pursuant to NRS 18.015. PACT notes that the plain language of NRS 616C.215(5) provides a subrogated insurer with "a lien upon the total proceeds of any recovery from some person other than the employer, whether the proceeds of such

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[11]Id.

[12]102 Nev. at 85 n. 3, 715 P.2d at 1074 n. 3 (noting that if the insurer's lien equals or exceeds the insured's excess recovery (i.e., the total award minus attorney fees, costs, and the subrogation lien), then the insurer "will obviously bear the total litigation expense," meaning that insurer will receive the amount remaining after the total award is reduced by any attorney fees and costs).

recovery are by way of judgment, settlement or otherwise." Pact argues that the term "total proceeds" applies to the entire insurance award and not to the amount of the award less attorney fees and costs.

We conclude that PACT's argument lacks merit. The language of NRS 616C.215(5) is nearly identical to the previous version of the statute that was at issue in Breen.[13] In that case, we held that the term "total proceeds" extends only to that portion of an award remaining after taking into account the parties' litigation expenses.[14] Moreover, because PACT's lien exceeds the total amount of the $100,000 award in this case, PACT would bear 100% of the costs of litigation. However, the district court appears to have taken a compromise position when it reduced the amount of the attorney's lien from one-third to one-sixth of the total award.

PACT, however, argues that SIIS v. District Court is controlling and mandates a different result. According to PACT, the fact that it filed suit before Martin entitles it to priority. However, PACT fails to cite any rule of law supporting a "first-in-time, first-in-right" rule for competing statutory liens, and we decline to adopt such a rule in this case. Adopting a first-in-time, first-in-right rule as suggested would run counter to this court's stated policy of encouraging injured workers to seek remedial recovery from third parties for the benefit of the employee and

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[13]Compare NRS 616.560(2) (amended in 1993 by Nev. Stat., ch. 265, § 188 at 742-45) ("the insurer has a lien upon the total proceeds of any recovery from some person other than the employer"), with NRS 616C.215(5) ("the insurer or the Administrator has a lien upon the total proceeds of any recovery from some person other than the employer").

[14]Id.

their family.[15] As a by-product of upholding this sound public policy, workers' compensation insurers are encouraged to work with injured employees to obtain adequate compensation for their injuries, and by doing so spread the cost of recovering on its workers' compensation subrogation liens more effectively.

PACT argues that because it expended its own attorney fees to collect and protect the size of its workers' compensation lien this obviates the need for the injured worker's attorney to be paid from the proceeds of any recovery. We conclude that this contention also lacks merit. As we observed in Nevada Bell v. Hurn, it is sound public policy to encourage injured workers to seek remedial recovery from third-party tortfeasors.[16] Moreover, adhering to this public policy reduces the burden placed on workers' compensation insurers, who would be forced to bear the total cost of litigating employees' claims more often in the hopes of recovering on their subrogation liens if we were to adopt the proposed rule. A rule of law providing that an insurer's subrogation lien takes priority over a competing attorney's lien would discourage attorneys from accepting cases on a contingency fee basis, which is often the only means for an injured employee to obtain legal aid and finance litigation on his or her behalf.

PACT also argues that it maintained a separate right of action and that it agreed to consolidate the cases only for the sake of judicial economy. In this instance, the two separate cases would have been combined on Hannum's motion to interplead the $100,000 award from the State Farm insurance policy. Combining the cases would have been

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[15]Nevada Bell, 105 Nev. at 213, 774 P.2d at 1003.

[16]105 Nev. at 213, 774 P.2d at 1003.

necessary to prevent Hannum or State Farm's liability exposure to multiple, duplicative, or inconsistent judgments.[17]

PACT argues that the 1929 case of Dunseath v. Industrial Commission[18] stands for the proposition that compensation payable under the NIIA, the precursor to Nevada's current workers' compensation statutes, is not subject to an attorney's lien. PACT cites to NRS 616.205, arguing that "any compensation due and payable under NRS chapters 616A to 616D is not 'assignable [and] is exempt from attachment, garnishment and execution, and does not pass to any person by operation of law."

We conclude that PACT's arguments here lack merit. As this court has noted, Dunseath merely stood for the proposition that while an attorney and his or her client are free to contract for attorney fees, they are prohibited from agreeing that such fees should be paid directly out of the award.[19] Furthermore, the broad application of NRS 616.205 sought by PACT would discourage contingency fee agreements. Such a reading of the statute does not comport with the sound public policy of workers' compensation statutes, which is to aid injured workers in obtaining compensation for their injuries.[20]

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[17]NRCP 24(a); see also SIIS v. District Court, 111 Nev. at 33-34, 888 P.2d at 914-15 (Rose, J. concurring) (noting that NRCP 24(a)(2) provides an adequate mechanism for a subrogated insurer to intervene in a lawsuit when the facts so warrant).

[18]52 Nev. 104, 282 P. 879 (1929).

[19]Hardy & Hardy v. Wills, 114 Nev. 585, 958 P.2d 78 (1998).

[20]E.g., Breen, 102 Nev. at 84, 715 P.2d at 1073; Nevada Bell, 105 Nev. at 213, 774 P.2d at 1003.

In response to PACT's arguments, Martin argues that NRS 108.600(2) ensures that an attorney's lien takes priority over other competing liens including a healthcare provider's lien, and by analogy a workers' compensation subrogation lien.[21] NRS 108.600(2) provides, "No [hospital] lien shall apply or be allowed against any sum incurred by the injured party for necessary attorney fees, costs and expenses incurred by the injured party in securing a settlement, compromise or recovering damages by an action at law." In Michel v. District Court, this court noted that NRS 106.600(2) embodies the general public policy that attorney liens take priority over a competing lien of a hospital or other medical service providers.[22]

The same sound policy that supports the contention that an attorney's lien takes priority over a competing medical service provider's lien also holds true for a workers' compensation insurer's subrogation lien. As noted above, the purpose of workers' compensation statutes is to aid injured workers in obtaining compensation, which is supported by this court's policy of encouraging that injured workers seek compensation from negligent third parties.[23] As such, we conclude that an attorney's lien should maintain priority over a competing workers' compensation lien. If the insurer does not participate in the litigation effort, the Breen formula applies. In that situation, the subrogation lien is reduced by the

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[21]See Michel v. Dist. Ct., 117 Nev. 145, 17 P.3d 1003 (2001).

[22]117 Nev. at 150, 17 P.3d at 1007 (noting that the difference between a hospital lien and those of other medical service providers is de minimis).

[23]E.g., Nevada Bell, 105 Nev. at 213, 774 P.2d at 1003.

proportionate amount of the litigation expense attributable to the insurer's award as compared to its subrogation lien. On the other hand, when, as here, an insurer actively participates in the litigation, then it can avoid that proportionate reduction. However, the total award is still reduced by the cost of attorney fees and costs due to the injured employee, thereby encouraging injured workers to be able to seek compensation while preventing the injured worker from absorbing the full cost of litigation.

As this court has observed, attorney fees are recoverable only when authorized by agreement, statute, or rule.[24] When authorized, the award of attorney fees and costs will not be disturbed on appeal absent a manifest abuse of discretion.[25] When attorney fees are requested, the district court must examine the reasonableness of the fees based upon its examination of the record,[26] and on rare occasions based upon its observations of the quality and quantity of the work performed and the time expended on the client's behalf.[27] Here, neither party challenged the

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[24]Young v. Nevada Title Co., 103 Nev. 436, 442, 744 P.2d 902, 905 (1987).

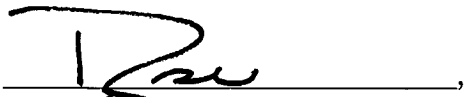
[25]E.g., Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001) (citing Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994)).

[26]Id. (citing James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 929 P.2d 903 (1996)).

[27]Id. (citing Artistic Hairdressers, Inc. v. Levy, 87 Nev. 313, 316, 486 P.2d 482, 484 (1971)).

district court's reduction of the attorney's lien on appeal. Given the fact that there was no litigation of Hannum's liability in this case, we cannot say that the district court abused its discretion in deciding to reduce the award of attorney fees in this case. Accordingly we,

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Sally L. Loehrer, District Judge
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Clark County Clerk