

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002601-MR

MIDWESTERN INSURANCE ALLIANCE; AND  
CLARENDON NATIONAL INSURANCE COMPANY

APPELLANTS

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE CHARLES W. BOTELEER, JR., JUDGE  
ACTION NO. 04-CI-00388

LISA K. WATSON

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: DYCHE AND SCHRODER, JUDGES; ROSENBLUM, SENIOR JUDGE.<sup>1</sup>

SCHRODER, JUDGE: An employee injured in an automobile accident in the course of her employment recovered both a personal injury settlement and a workers' compensation settlement. The workers' compensation carrier appeals the trial court's determination of its subrogation lien. We believe the trial court erred in its interpretation of AIK Selective Self Insurance Fund v. Bush.<sup>2</sup>

Therefore, we vacate and remand.

---

<sup>1</sup> Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> 74 S.W.3d 251 (Ky. 2002).

Lisa K. Watson was injured in a motor vehicle accident while working on September 11, 2000. The other driver was James Rorer who was working on business for the City of Madisonville. Watson filed a negligence suit against Rorer and the City of Madisonville. The parties settled the claim for \$47,500.00 to Watson, with Watson signing a full release. Watson also reached a settlement with her employer's workers' compensation carrier, Clarendon National Insurance Company with claims administered by Midwestern Insurance Alliance (collectively referred to as the "Comp Carrier") for \$18,327.78. The settlement of the compensation claim did not include past or future medicals. Watson claimed her attorney's fee was \$15,833.33 with \$314.04 in expenses (total \$16,147.37).

Watson filed a declaratory judgment action to determine the amount of the workers' compensation carrier's subrogation lien. Watson claimed the lien should be \$2,180.41 (\$18,327.78 minus \$16,147.37), plus attorney fees and the cost of the current action for failing to act promptly in settling the matter. The Comp Carrier filed a timely answer but did not disclose the amount it claimed for the lien. In response to Watson's motion for summary judgment on the amount of the lien, the Comp Carrier asserts that because the workers' compensation settlement left future medicals open, its lien would be more than \$2,180.41; that since the settlement, an additional

\$1,565.03 had been paid out in medicals; and that the court had to properly allocate future medicals out of the \$47,500.00 personal injury settlement. The trial court granted summary judgment, determining the lien should be for \$2,180.41 plus \$752.86 (additional medicals paid) for a total of \$2,933.27. However, the court subsequently awarded Watson costs (\$159.72) and attorney fees (\$3,300.00) for a total of \$3,459.72 for bringing this action.

On appeal to this Court, the Comp Carrier contends the trial court erred in granting summary judgment to Watson in ruling the subrogation lien to be \$2,933.27, because there are issues of fact in that under AIK Selective Self Insurance Fund v. Bush, 74 S.W.3d 251 (Ky. 2002), the trial court had to make a determination of what portion of the personal injury settlement (\$47,500.00) represents future medicals, and then determine the Comp Carrier's credit out of the funds paid to Watson. We agree. Under Bush, our Supreme Court recognized an award is equal to the sum of its parts (or elements). When the damage issue is presented to a jury, the jury breaks down its award of damages into: lost wages; past medical expenses; future lost wages; future medical expenses; and pain and suffering. The Bush Court recognized that the part representing pain and suffering had to be deducted from the personal injury award because the Comp Carrier can only recover "those elements of

damages awarded in the judgment that correspond to the workers' compensation benefits that it paid . . . ." Id. at 255. A trial before the bench would have the same elements which, added up, would produce the total award. When a court is presented with a proposed settlement, it has to reverse engineer the sum into its elements. Then, the Comp Carrier's right to subrogation exists only as to the elements or parts recovered. Id.<sup>3</sup>

Bush requires that the trial court (in our case) take the personal injury settlement (\$47,500.00) and deduct that amount, if any, that represents pain and suffering.<sup>4</sup> Bush then allows a subrogation lien on the balance of the award for sums paid out by the Comp Carrier, subject to deductions for legal fees and expenses paid by the injured employee. Id. at 258.

In our case, the workers' compensation settlement left the Comp Carrier liable for future medicals. If, after the above deductions, there is any money left from the personal injury award, then the trial court will need to determine how much of that sum represents future medicals, and the Comp Carrier receives a credit against future payments until the actual medicals equal the credit. Id. at 258. If the actual

---

<sup>3</sup> Bush involved a personal injury judgment adjusted for comparative negligence. We have no such adjustments in our case.

<sup>4</sup> Neither the Comp Carrier nor the employer has legal liability for pain and suffering and none of the benefits paid included this element of damages.

medicals exceed the credit, the Comp Carrier starts paying again. If the actual medicals never reach the credit, the injured employee gets to keep the windfall.

Because the circuit court did not deduct the pain and suffering element from the personal injury settlement, it will be necessary to vacate the judgment and remand for a determination of what part of the settlement represents future medicals, etc.

The Comp Carrier's second argument is that the trial court erred in granting Watson attorney fees and costs for the declaratory judgment action. Again, we agree. KRS 342.310 allows costs, attorney fees etc. where a party defends "without reasonable ground[s]". Our decision above to vacate and remand establishes that the appellants cannot be said to have defended the declaratory judgment action without reasonable grounds. Therefore, this part of the judgment must also be vacated.

For the foregoing reasons, the judgment of the Hopkins Circuit Court is vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

R. Christion Hutson  
Joe H. Kimmel, III  
Paducah, Kentucky

BRIEF FOR APPELLEE:

Jerry P. Rhoads  
Madisonville, Kentucky