

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0900-11T4

GREATER NEW YORK MUTUAL
INSURANCE COMPANY,

Plaintiff-Respondent,

v.

CALCAGNO & ASSOCIATES, LLC,
and JOHN PHILLIPS,

Defendants-Appellants.

Argued September 12, 2012 - Decided September 20, 2012

Before Judges Simonelli and Koblitz.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-3696-10.

Andrew J. Calcagno argued the cause for appellants (Calcagno & Associates, LLC, attorneys; Craig A. Borgen, on the briefs).

David D. Hess, Assistant General Counsel, argued the cause for respondent.

PER CURIAM

Defendants Calcagno & Associates, LLC (C&A) and John Phillips (Phillips)¹ appeal from the September 30, 2011 Law Division order, which granted summary judgment to plaintiff Greater New York Mutual Insurance Company, and required defendants to pay plaintiff the sum of \$19,073.55 to satisfy plaintiff's workers' compensation lien pursuant to N.J.S.A. 34:15-40. We affirm.

Phillips suffered a work-related injury and filed a workers' compensation claim under a workers' compensation policy issued by plaintiff to Phillips' employer. Plaintiff paid Phillips \$29,733.84 in workers' compensation benefits, which created a statutory lien pursuant to N.J.S.A. 34:15-40. The parties have stipulated that after statutory reductions for a one-third percent attorney's fee and \$750 for expenses of suit, the amount of plaintiff's lien is \$19,073.55.

Phillips retained C&A to represent him in connection with the workers' compensation claim and a negligence lawsuit against the tortfeasor. Phillips signed a retainer agreement with C&A, which required him to pay all costs and expenses incurred in the representation. Prior to settling the negligence lawsuit, C&A

¹ We shall sometimes refer to C&A and Phillips collectively as defendants.

asked plaintiff to reduce its lien. Plaintiff refused to do so, and demanded full payment.

C&A settled the negligence action for \$35,000, and sent plaintiff a check for \$14,821.85 after deducting \$7,410.92 for attorney's fees and \$12,767.23 for "disbursements of suit." Plaintiff demanded payment of the \$4,251.70 balance, stating that N.J.S.A. 34:15-40 only permits a deduction of \$750 for expenses of suit. C&A refused to pay the balance. As a result, plaintiff filed a complaint, seeking full payment of its lien.

Defendants filed a motion to dismiss with prejudice pursuant to Rule 4:6-2(e), arguing that Rule 1:21-7(d) permitted C&A to deduct disbursements, and plaintiff was only entitled to a lien on the net settlement proceeds after deducting attorney's fees and all litigation costs. In a December 3, 2010 order and written opinion, Judge Wertheimer denied the motion, holding that N.J.S.A. 34:15-40 was "clear on its face" and limited the amount of expenses of suit to \$750, and Rule 1:21-7(d) "play[ed] no role in the computation of attorney's fees involving a worker[s'] compensation claim which is clearly covered by statute."

Defendants filed a motion for reconsideration, arguing that N.J.S.A. 34:15-40 does not prohibit a deduction for actual costs of suit, N.J.S.A. 2A:13-5 permits such a deduction, an

attorney's lien has priority over a workers' compensation lien, and it was patently unreasonable to only permit a deduction of \$750 as such a deduction would prevent attorneys from zealously protecting their clients' rights. In a January 7, 2011 order and written opinion, Judge Wertheimer denied the motion, holding that N.J.S.A. 34:15-40, not N.J.S.A. 2A:13-5, applies, and the statute clearly states that "expenses of suit" as "such expenses, not in excess of \$750."

Plaintiff subsequently filed a summary judgment motion, arguing that N.J.S.A. 34:15-40 entitled it to the full amount of its lien minus a one-third percent attorney's fee and \$750 for expenses of suit. Defendants filed a summary judgment motion as well, arguing that the workers' compensation lien attaches solely to the net settlement proceeds to be paid to the injured employee to prevent that person from receiving a double recovery.

In a September 30, 2011 order and written decision, Judge Wertheimer granted summary judgment to plaintiff and denied it to defendants. The judge again held that N.J.S.A. 34:15-40 governed, and the statute was "clear on its face" and defined "expenses of suit" as expenses not in excess of \$750. This appeal followed.

Defendants contend for the first time on appeal that Judge Wertheimer's decision requires them to share an attorney's fee with a non-attorney in violation of DR 3-102.² We "'will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available' unless the matter involves the trial court's jurisdiction or is of public importance." Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 643 (1997) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)); see also State v. Robinson, 200 N.J. 1, 20 (2009) (reiterating the principle of not considering an issue raised for the first time on appeal absent an exception). No exception applies here.

Defendants contend that Judge Wertheimer erred in granting summary judgment to plaintiff and denying summary judgment to them. They argue, in part, that because an attorney's lien pursuant to N.J.S.A. 2A:13-5 takes priority over a workers' compensation lien pursuant to N.J.S.A. 34:15-40, they can deduct all expenses incurred in a third-party negligence action plus attorney's fees before satisfying the workers' compensation lien. Citing Wilson v. Faull, 45 N.J. Super. 55 (App. Div.

² Defendants incorrectly cite to the former Disciplinary Rule 3-102, which has been superseded by Rules of Professional Conduct 5.4. Pressler & Verniero, Current N.J. Court Rules, Appendix to Part I at 503 (2012).

1957), defendants again argue that the workers' compensation lien attaches solely to the net settlement proceeds.

N.J.S.A. 2A:13-5 is irrelevant to this matter, and defendants cite no authority for the proposition that this statute has priority over a workers' compensation lien pursuant to N.J.S.A. 34:15-40. In addition, Wilson does not apply here because it involved a choice of law issue and the interpretation and application of Pennsylvania's workers' compensation law, and our Supreme Court reversed the Appellate Court's application of New Jersey law and did not adopt the court's dicta regarding N.J.S.A. 34:15-40. Wilson v. Faull, 27 N.J. 105, 112-25 (1958).

N.J.S.A. 34:15-40 governs third-party liability in workers' compensation matters, and provides as follows:

In the event that the employee or his dependents shall recover and be paid from the said third person or his insurance carrier, any sum in release or in judgment on account of his or its liability to the injured employee or his dependents, the liability of the employer under this statute thereupon shall be only such as is hereinafter in this section provided.

N.J.S.A. 34:15-40(b) provides as follows:

If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter

provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined.

N.J.S.A. 34:15-40(e) provides as follows:

As used in this section, "expenses of suit" shall mean such expenses, but not in excess of \$750 and "attorney's fee" shall mean such fee, but not in excess of 33 1/3% of that part of the sum paid in release or in judgment to the injured employee . . . by such third person or his insurance carrier to which the employer or his insurance carrier shall be entitled to reimbursement under the provisions of this section[.]

Here, the third-party tortfeasor or his insurance carrier paid Phillips \$35,000 to settle the negligence lawsuit. The employer's liability, therefore, was based on that sum, not the net sum. N.J.S.A. 34:15-40. Because the settlement amount was greater than plaintiff's liability under the statute, plaintiff is entitled to reimbursement for the medical expenses incurred and compensation payments paid to Phillips, less \$750 for expenses of suit and a one-third attorney's fee. N.J.S.A. 34:15-40(b), (e). Accordingly, plaintiff is entitled to \$19,073.55, and defendants must pay plaintiff the \$4,251.70 balance. C&A may seek reimbursement of the litigation costs in excess of \$750 from Phillips pursuant to their retainer agreement.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION