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In Donegal Mutual Insurance Group v. Jarrett, 2022 Ga. Appl LEXIS 331 (June 27, 2022), the claimant, Jeffrey Jarrett, sustained a compensable on-the-job accident caused by the negligence of a third party tortfeasor. His employer's insurer, Donegal, paid him $130,359.02 in workers' compensation benefits. Jarrett brought an action against the third party tortfeasor, and Donegal placed Jarrett's counsel on notice of their subrogation lien but did not seek to intervene in the action brought by Jarrett against the tortfeasor.

Jarrett and his wife entered into a settlement agreement with the tortfeasor; they were paid $520,000 and signed a release stating that "the consideration paid hereunder does not fully compensate [Jarrett] and/or make him whole for the injuries and damages that he sustained or incurred as a consequence of the incident." Donegal then sought to enforce their subrogation lien against Jarrett's settlement, but Jarrett moved for summary judgment on the ground that he had not been fully and completely compensated by the settlement. Donegal argued that there was a genuine issue of material fact and "pointed to evidentiary disputes about Jarrett's current physical condition, the effects of his injury on his day-to-day living and activities, and his future prognosis." The trial court granted the motion for summary judgment, finding that there was no genuine issue of material fact.

The Court of Appeals began their analysis by noting that a workers' compensation employer or insurer, after paying any benefits under a workers' compensation claim, has a right of subrogation against any recovery by a claimant against a third party tortfeasor and "may intervene in any action to protect and enforce such lien." However, the employer/insurer may only recover under that subrogation lien "if the injured employee has been fully and completely compensated, taking into account both the benefits received under this chapter and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury."

The Court cited a prior decision, Georgia Electric Membership Corporation v. Hi-Ranger, 275 Ga. 197 (2002), in which the Supreme Court of Georgia stated, "In practice, this rule requires the [insurer] to assert its lien against the employee after the employee has recovered a judgment or settled his claim. The burden is then on the [insurer] to establish that the employee has been fully and completely compensated."

The Court further noted that a workers' compensation subrogation lien can only be recoverable against economic losses and cannot be enforced against noneconomic losses such as pain and suffering. Therefore, in order to recover, the employer/insurer "must show that the employee has

been fully and completely compensated as to each category of noneconomic loss for which the insurer seeks subrogation and that no portion of the lien is taken against recovery for noneconomic losses." If the trial court cannot determine what portion of the recovery was meant to compensate the claimant for economic losses and what portion was meant to compensate him for noneconomic losses, the trial court cannot enforce the subrogation lien, and the employer/insurer cannot recover anything.

Furthermore, the Court of Appeals noted that a lump-sum settlement typically "prevents a court from determining 'what portion of the settlement was allocated to economic losses and what portion was meant to compensate for noneconomic losses.'" While the Court had, in a previous case, allowed the parties to go to trial after the employee made an admission as to the amount that would fully compensate him, there was no evidence in this case "that would help the trial court determine the amount that would constitute a full and complete recovery." As the Court found, the questions of fact regarding Jarrett's current condition and need for future medical treatment "are simply not material to the allocation of the lump-sum settlement payment between Jarrett's economic and noneconomic losses."

Additionally, the Court noted that they could not presume that Jarrett was fully compensated simply because the amount of his settlement exceeded the amount of workers' compensation benefits he received. After all, a claimant could decide to settle his claim for less than its full value in order to minimize the risk of going to trial.

Finally, Donegal argued that it was error for the trial court judge to base her ruling on Jarrett's release, which specifically stated that the settlement was a compromise that did not fully compensate him. Donegal was not a party to that release, so they argued that they should not be bound by it. The Court of Appeals agreed that the release did not bind Donegal, but concluded that the release language was relevant "because it shows that Jarrett denied that the settlement fully compensated him" and that "release documents generally are relevant because they reflect the terms of the settlement, showing that the settlement was a lump sum that was not allocated either between economic and noneconomic losses or between losses sustained by Jarrett and those sustained by his wife."

The Court of Appeals therefore concluded,

> By pointing to the release, other record evidence, and legal tenets concerning the nature of lump sum settlements to show the terms of the settlement, Jarrett met his burden on summary judgment of 'establishing from the record an absence of evidence to support [Donegal's] claim' that Jarrett had been fully and completely compensated. So the burden shifted to Donegal to point to specific evidence creating a genuine issue of fact on that issue. Because Donegal failed to do so, we affirm the trial court's grant of summary judgment to Jarrett.

(citations removed).

Unfortunately, it has long been apparent that the employer/insurer's right to workers' compensation subrogation is not particularly valuable. The requirement that the employer/insurer prove that the claimant was fully and completely compensated for economic and noneconomic damages is a difficult, if not impossible, one to meet. Even worse, claimants are permitted to settle with third party tortfeasors without the employer/insurer's involvement or even their knowledge, and when that happens, the settlement documents will certainly be worded in such a fashion as to undermine any effort by the employer/insurer to pursue a recovery against the settlement sum. The Georgia courts have consistently deferred to the language of settlement releases in concluding that a claimant has not been fully and completely compensated, despite the self-serving nature of those releases and the fact that employers/insurers are not parties to those releases.

It is at least possible for the employer/insurer to recover under a subrogation lien if all of the following conditions take place: the employer/insurer intervene in the claimant's lawsuit against the third party tortfeasor, the case does not settle, the case goes to a jury verdict, the jury awards damages against the third party tortfeasor, the jury utilizes a special verdict form which specifically delineates the economic and noneconomic damages, and the award of damages is great enough that there is a viable argument that the claimant was fully and completely compensated for all economic and noneconomic damages. However, this is quite obviously an expensive, time consuming process, and the likelihood of recovery at the end of the process is vanishingly small since proving that the claimant was fully compensated is still extraordinarily difficult even in these circumstances.

One other possibility that is somewhat more likely to lead to a recovery would be if the claimant does not exercise his exclusive right to file suit against the tortfeasor within the first year after the accident and does not reach a settlement agreement with the tortfeasor. If the employer/insurer pursue a recovery against the third party tortfeasor (which they have the right to do after a year has elapsed since the accident but before two years have elapsed) and the claimant does not participate and assert his right to full and complete compensation, the employer/insurer can recover up to the amount of their lien, and they would have to pay any amount they recover in excess of the lien amount to the claimant. On the other hand, if the employee intervenes in the employer/insurer's action against the third party tortfeasor, then the employer/insurer would still have to prove full and complete compensation in order to recover under their lien.

In the author's experience, the workers' compensation subrogation lien is most valuable when used as leverage while negotiating settlement of the workers' compensation claim. That is, even though claimants who are represented surely know that they can likely settle with the third party and pay the employer/insurer nothing, they would presumably prefer to avoid the time and hassle of having to defend that position in court (and avoid the delay in being able to spend their settlement money). If the employer/insurer can convince the claimant to reduce his settlement demand in his workers' compensation claim in return for a waiver of the subrogation lien, then at least the lien has had

some value, and the employer/insurer do not incur any additional legal expenses in the (likely fruitless) pursuit of the subrogation lien.

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