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COURT OF APPEALS
STATE OF NEW YORK

An appeal of the 3rd Dept's affirmance of the Board's ruling that the workers' comp carrier can take credit against claimant's third party settlement recovery.

MATTER OF BETH V.,

Appellant,

-against-

No. 202

NEW YORK STATE OFFICE OF CHILDREN
AND FAMILY SERVICES, and NEW YORK
STATE INSURANCE FUND, ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
October 17, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 202, Matter of Beth
2 V. v. The New York State Office of Children and
3 Family Services.

4 Counselor, would you like any rebuttal
5 time?

6 MR. BUCKLEY: Yes, I would, Your Honor, if
7 I could have two minutes.

8 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
9 Go ahead. You're on.

10 MR. BUCKLEY: This is a claim for Workers
11 Compensation benefits, and Beth V. - - -

12 CHIEF JUDGE LIPPMAN: Counsel, talk to us
13 about punitive damages. Were there any punitive
14 damages at all?

15 MR. BUCKLEY: No, there were no punitive
16 damages, Your Honor, in this case.

17 CHIEF JUDGE LIPPMAN: So how does that
18 affect the issue that we have in front of us?

19 MR. BUCKLEY: I don't believe that it
20 affects it in any way because the damages in this
21 case were set forth in a stipulation that was - - -

22 JUDGE READ: Well, that's stipulations of
23 physical injuries, correct?

24 MR. BUCKLEY: Yes, physical injuries
25 including the loss of enjoyment of life and the

1 emotional response thereto.

2 JUDGE READ: And you did that for tax
3 purposes; is that correct?

4 MR. BUCKLEY: Yes. If you - - - if you do
5 a stipulate - - - or if you settle a claim for
6 physical injuries, it's nontaxable.

7 JUDGE READ: What if you had - - -

8 MR. BUCKLEY: If you settle a claim for
9 loss of wages, punitive damages, it would be taxable.

10 JUDGE READ: Could you have settled the
11 claim and allocated everything to pain and suffering,
12 for example?

13 MR. BUCKLEY: Well, you probably could, but
14 the stipulation was more meticulous and more - - -
15 more specific than that because the attorney general
16 who was representing the State of New York who
17 ultimately paid this settlement set forth a
18 stipulation that required a lien of the Victims
19 Compensation Board to be paid back, and there was no
20 - - - absolutely no mention of the adjustment or
21 resolution of any of the Workers Compensation claims
22 because the case was being settled only for the
23 physical injuries, the emotional reaction thereto,
24 and the loss of enjoyment of life.

25 JUDGE SMITH: But if you - - - you've got a

1 third-party tort award, the lien - - - the comp lien
2 attaches to the whole thing. Certainly it attaches
3 to pain and suffering as well as the medical and the
4 lost wages, doesn't it?

5 MR. BUCKLEY: Yes, Your Honor, but if you
6 follow the true statutory construction of Section 29,
7 subdivision 1 and 6, the lien only attaches when you
8 bring a claim against somebody who is not - - -

9 JUDGE SMITH: Not in the same employ.

10 MR. BUCKLEY: - - - not in the same employ.
11 When you bring a claim against an employer for other
12 actions other than - - -

13 JUDGE SMITH: Haven't we held that we don't
14 take that literally? I mean, the other statute, the
15 statute - - - we have a statute that says you can
16 never bring any cause of action whatever against your
17 employer, but we said there are exceptions to that,
18 and there are also exceptions to the Section 29 lien.

19 MR. BUCKLEY: Yes. But in this case, I
20 don't think the exception should attach because the
21 wrong that was done to Beth V. was a continuing wrong
22 that started months before this lawsuit was commenced
23 and she had the injuries. She was - - - there was a
24 hostile work environment where she complained about
25 the conduct of this inmate, and nothing was done.

1 And that was the basis of the deprivation of her
2 constitutional rights.

3 CHIEF JUDGE LIPPMAN: What makes the offset
4 here unfair? Why is it unfair - - -

5 MR. BUCKLEY: Well, it's unfair because - -
6 -

7 CHIEF JUDGE LIPPMAN: - - - from a policy
8 point of view?

9 MR. BUCKLEY: From a policy point of view,
10 when Mr. Bains, who testified in this case, he's the
11 lawyer that handled the civil rights lawsuit, he had
12 no economic report that would have set up what her
13 economic damages were in the lawsuit. There was no
14 claim in the lawsuit or any projection of future
15 medical losses after the settlement of the lawsuit
16 because in the stipulation that was done before the
17 federal district court, which purports to be the
18 entire agreement of all the parties, and it does say
19 that, there was no mention of limiting or a credit to
20 the State of New York for the Workers Compensation
21 lien.

22 JUDGE GRAFFEO: Counsel, how do you deal
23 our Petterson precedent, because Petterson said if
24 it's the same injury that's the predicate for the
25 Workers Comp award and then a later tort award, that

1 there has to be an offset. And in the subsequent
2 case, I think it's Hanford, we said that that rule
3 applies even if it's a co-employee.

4 MR. BUCKLEY: Yeah. Even if it was a
5 co-employee or the employer himself, if - - - that's
6 why the compensation board, when they first sent this
7 back for development of the record as to whether
8 there was a lien, wanted to know what the damages
9 were for in the lawsuit.

10 JUDGE GRAFFEO: Well, is it the same injury
11 underlying both?

12 MR. BUCKLEY: No. The injury in this case
13 happened when Beth V. was continually being harassed
14 and assaulted at work, not to the extent that
15 ultimately happened when she was raped and assaulted
16 at knifepoint, but she - - - for months before this
17 time, she was being harassed, she had left her
18 employment because she couldn't take it anymore. She
19 would still have had the same civil rights and human
20 rights lawsuit for a hostile work environment had she
21 not even the injuries. So the injuries to her - - -

22 JUDGE GRAFFEO: So that's how you're
23 distinguishing - - -

24 MR. BUCKLEY: Yeah, that he - - -

25 JUDGE GRAFFEO: - - - the Petterson rule?

1 MR. BUCKLEY: That's how Patterson (sic) is
2 distinguished. And Patterson was an impleader case
3 where the employer was - - - that's the accident that
4 happened in Connecticut, and Connecticut law allowed
5 a co - - - a suit against a co-employee, which we
6 don't allow in New York state.

7 JUDGE PIGOTT: Mr. Buckley, with respect to
8 the punitive aspect of this and the testimony of the
9 lawyer that it was for punitive damages, is it your
10 view that simply saying that and saying it to say
11 that it's for purposes of income tax - - - for income
12 tax purposes, does that do it? I mean, because
13 punitive damages is pretty serious, and in any other
14 case, it's not even covered by insurance.

15 MR. BUCKLEY: Right.

16 JUDGE PIGOTT: So did the defendant know
17 that this money was being - - - was being paid out by
18 the State of New York in punitive damages for what
19 occurred there?

20 MR. BUCKLEY: I think probably the reason
21 why the State didn't want to denominate this as
22 punitive damages is they were paying on behalf of the
23 co-employees that were also - - - the three
24 supervisors that were brought into this, and if it
25 was punitive damages at the settlement, the State of

1 New York couldn't indemnify them.

2 JUDGE PIGOTT: Well, that's exactly right.
3 And so I'm wondering why somebody wasn't saying that
4 because if it is punitive damages, State doesn't have
5 to pay, and it's going to come out of the employees,
6 and they're not covered by insurance for punitive
7 damages. So all of that seems to gravitate to the
8 point that it's not punitive damages, and the fact
9 that somebody wants to call it that for purposes of
10 the Internal Revenue Service is a whole separate
11 argument with that part of the government, is it not?

12 MR. BUCKLEY: My understanding of the
13 stipulation was that they said it was not punitive
14 damages; it was for the physical injury, the loss of
15 enjoyment of life, and the emotional upset.

16 JUDGE PIGOTT: Right. So your argument is
17 that conscious pain and suffering - - -

18 MR. BUCKLEY: It's the pain and suffering,
19 the loss of enjoyment of life. There was no dealing
20 with the lost wages or the future lost wages or
21 future medical.

22 JUDGE PIGOTT: So you're saying that if
23 it's for conscious pain and suffering it's not
24 subject to the Workers Compensation liens?

25 MR. BUCKLEY: That's - - - I would say that

1 in this particular case where you're bringing a case
2 against an employer and co-employees, which by the
3 statute says that there's no lien on those salaries.

4 JUDGE SMITH: You concede that in the
5 typical case, the ordinary garden variety case, the
6 lien does attach to pain and suffering damages?

7 MR. BUCKLEY: Yes, Your Honor, it does
8 attach to pain and suffering in the usual garden
9 variety case where you sue a true third party. The
10 defendants in this case aren't third-party defendants
11 as described by the statute. And I think there
12 should be given some deference to statutory
13 construction because it is pretty clear and
14 unambiguous what's being stated in the statute.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.
16 You'll have your rebuttal time. Thank you.

17 MR. BUCKLEY: Okay. Thank you, Your Honor.

18 MR. PHILLIPS: Good afternoon, Your Honors.
19 Tom Phillips for the State Insurance Fund and the
20 employer.

21 CHIEF JUDGE LIPPMAN: Counselor, does this
22 case turn on whether it's punitive damages or not?

23 MR. PHILLIPS: I don't think it makes any
24 difference, Your Honor. The statute says "all
25 recoveries". And punitive damages essentially are

1 just a finding that there was negligence, but it was
2 so bad that we're going to make an award to punish
3 more than we would in a normal case.

4 JUDGE PIGOTT: Would the argument then
5 follow that because you want to punish the employer -
6 - - I realize there's insurance underneath, but
7 because you want to punish the employer, you're not
8 doing much punishing if you're saying but you're
9 going to get all of this back because you don't have
10 to pay for any medical and you don't have to pay for
11 any lost wages.

12 MR. PHILLIPS: Well, I mean, the Court in
13 Petterson read the - - - read the law to broadly
14 effectuate what the legislature intended, which was
15 to prevent a double recovery by the claimants and to
16 shift the burden to the tortfeasor.

17 JUDGE SMITH: In the ordinary third-party
18 case where there's no employer or co-employee in the
19 picture, does the lien attach to punitive damages?
20 Has that been decided?

21 MR. PHILLIPS: I don't - - - the board, in
22 its infinite wisdom, said in its - - - one of its
23 decisions in this case that punitive damages were not
24 subject to the credit, but they didn't cite any
25 authority for that, and I'm not aware of any. I've

1 never - - - absent when it came up in this case after
2 the settlement, I've never seen - - - I've never
3 personally dealt with a case where there were
4 punitive damages and the issue came up.

5 In the Petterson case, the Court broadened
6 this statute beyond its literal reading, and yet the
7 legislature, since 1966, has actually amended the
8 Workers Compensation Law twice, in the mid 1990s and
9 in 2007, and they took no action to call out the fact
10 that they really meant that it royally should not
11 include actions against the employer and the
12 co-employees.

13 JUDGE PIGOTT: Does it make sense - - -
14 pardon me - - - that if the idea of punitive damages
15 is to punish someone, to allow that someone to then
16 use that money to avoid what it otherwise
17 legitimately owes? You know what I mean?

18 MR. PHILLIPS: You mean included - - - is
19 it right to include the punitive in the credit for
20 the carrier?

21 JUDGE PIGOTT: No. Would the logic be that
22 if the idea of punitive damages is to punish the
23 tortfeasor, in this case it happens to be the
24 employer, does it make sense to say we're punishing
25 you by assessing \$100,000 in punitive damages for him

1 or her to then say, well, I'm going to get that back
2 in the offset anyway, so I don't care what you call
3 it?

4 MR. PHILLIPS: I believe there was a
5 federal court decision that was cited in one of our
6 memos to the board where the federal government, the
7 district court made the distinction between self-
8 insured employers and employers who purchased a
9 policy. And they said in a case where a policy is
10 purchased so that the employer's damages are limited
11 to the premium they paid for the policy, that it was
12 okay to impose the additional penalty, essentially,
13 against the employer, but in a case where the
14 employer was self-insured, essentially they'd be
15 punished twice; they'd be paying twice for the same
16 injuries, and so it wouldn't be proper.

17 JUDGE PIGOTT: Well, punitive is not for
18 injury, right? It's not because she was - - - had
19 all of the damages that she alleged. It's to punish.
20 And if it's to punish, it just seems to me that logic
21 would then say that you can't - - - you can't say
22 you're being fined fifty dollars and say, well,
23 that's okay because I'll use that money - - - it
24 should be offset against my license, or something. I
25 mean, somebody says you can't do that, you can't be

1 punished and say that, because I was punished, I get
2 my money back.

3 MR. PHILLIPS: Well, I think I'd
4 distinguish that, Your Honor. If the punishment was,
5 say, a civil fine then the money goes to the
6 government, that's one thing, but where the money
7 ends up in the pocket of the claimant and that - - -
8 the punitive award is based on the underlying
9 injuries that the claimant sustained - - -

10 JUDGE PIGOTT: Well, it's based on a
11 misbehavior. You can have a dollar damages and a
12 hundred thousand dollars punitive, and I realize it's
13 - - - but you're saying that if you're self-insured
14 you can't - - - you can't recoup through the punitive
15 damages, but if you're insured, your insurance
16 carrier can.

17 JUDGE READ: So I'm confused. Why is it
18 that there would be a double recovery here if you
19 couldn't take the - - - you couldn't take the Workers
20 Comp out of the future, but why would it be a double
21 recovery if what they're recovering damages for are
22 violations of civil rights?

23 MR. PHILLIPS: Well, actually, Your Honor,
24 if you read the federal complaint, after you get by
25 the general language about constitutional

1 deprivations, it's failure to train, failure to fix
2 an alarm, failure to do this, failure to supervise.
3 And the period of time when the claimant was actually
4 subjected to the abuse or language or whatever by the
5 inmate that finally assaulted her was between
6 December 23rd and December 28th when the assault
7 occurred. So, I mean, that's a short period of time
8 and the - - -

9 JUDGE GRAFFEO: So you're claiming there's
10 not two injuries; there's one injury?

11 MR. PHILLIPS: Right, there's one - - -

12 JUDGE GRAFFEO: I'm trying to understand
13 your - - -

14 MR. PHILLIPS: It's one injury and - - -

15 JUDGE GRAFFEO: I'm trying to understand
16 your posture.

17 MR. PHILLIPS: All of this arises from the
18 attack and the abduction, the injuries she suffered
19 then. And those are all the same injuries that are -
20 - -

21 JUDGE SMITH: Well, you say - - -

22 JUDGE GRAFFEO: What about the hostile work
23 environment that your adversary talks about?

24 MR. PHILLIPS: That's part - - - that's one
25 of the many causes of action, but there's no

1 breakdown - - - the money is not broken down per
2 action - - - per cause of action, so we have no way
3 of knowing if it's all related to the hostile work
4 environment except for the fact that the stipulation
5 says it's all allocated to the physical injuries and
6 the pain and suffering.

7 JUDGE SMITH: Well, are we - - - to what
8 extent do we have to decide that or are we bound by
9 the board's decision? The board - - - presumably,
10 the board has said it all - - - it all comes out of
11 the - - - that the - - - it's not a lien, but that
12 the recoupment right attaches to the whole amount.
13 Are we - - - what is our standard review for that?

14 MR. PHILLIPS: Well, you could certainly
15 uphold the board. I can't - - -

16 JUDGE SMITH: Are we bound to uphold the
17 board if there's record support for what they did?

18 MR. PHILLIPS: Absolutely. And it's - - -
19 I believe it would be bad public policy for the Court
20 to overturn Petterson.

21 JUDGE READ: So is it enough that the
22 stipulation says "physical injuries" to uphold the
23 board?

24 MR. PHILLIPS: Well, would the Court allow
25 the parties to go into federal court and stipulate

1 that it's physical injuries so they can avoid tax
2 consequences and then come before the state agency
3 and make an argument that it's something else and we
4 - - -

5 JUDGE READ: So your is yes, it's
6 substantial evidence.

7 MR. PHILLIPS: Yes.

8 JUDGE READ: It's enough that they
9 stipulated to physical injuries.

10 MR. PHILLIPS: Absolutely.

11 JUDGE PIGOTT: But the key - - - to go back
12 to this punitive aspect of this, were it to be
13 punitive damages, and punitive damages are designed
14 to deter future conduct, that would argue in favor of
15 it not being a lien, wouldn't you agree, because you
16 don't want the tortfeasor to benefit from what was
17 designed to deter them from doing this by having it
18 reimbursed to them?

19 MR. PHILLIPS: Well, that would apply in
20 the case where this - - - where the employer is self-
21 insured. I think you could distinguish it that way.
22 In that type of a case, maybe punitives wouldn't be
23 included.

24 JUDGE PIGOTT: Yeah, but the fact that you
25 got insurance, I mean, I don't want to get into

1 fights over premiums or lost histories or things like
2 that, but I would think - - - and I know you're the
3 insurer of last resort, but it would have an effect,
4 I would think, if you were able to get your money
5 back that you're paying for the Workers Comp if you
6 can get credit for the punitives, when the whole idea
7 of the punitives is to punish the tortfeasor.

8 MR. PHILLIPS: Yes, I agree.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 Thanks.

11 MR. PHILLIPS: Thank you.

12 CHIEF JUDGE LIPPMAN: Counselor.

13 MS. SINGER: Good afternoon.

14 CHIEF JUDGE LIPPMAN: Good afternoon.

15 MS. SINGER: I'm Jill Singer for the
16 Special Funds. The appellant here argues for too
17 narrow of an interpretation of Section 29, and it
18 undermines and defeats the whole purpose of Section
19 29, which is to allow the Workers Compensation
20 claimant to sue the actual wrongdoer in addition to
21 collecting Workers Compensation benefits while giving
22 the carrier their lien and credit rights to avoid the
23 double recovery. It doesn't matter how the recovery
24 is characterized or what you call it.

25 CHIEF JUDGE LIPPMAN: What does matter?

1 MS. SINGER: It matters that it's a
2 recovery for a wrong, and this Court focused on that
3 in the Ryan case.

4 JUDGE PIGOTT: So if this was an auto
5 accident case and part of the recovery was for the
6 value of the automobile so that they get 5,000
7 dollars for the damage to the automobile, you're
8 saying that the Workers Compensation - - - that the
9 carrier would have a lien on the property damage?

10 MS. SINGER: Well, I guess it depends on
11 the recovery, if it was - - - the breakdown and well
12 - - -

13 JUDGE PIGOTT: No, you said for the wrong.

14 MS. SINGER: Right. Negligence - - -

15 JUDGE PIGOTT: Any money - - -

16 MS. SINGER: It's a negligence - - - you're
17 talking about a negligence action, so it would be the
18 - - -

19 JUDGE PIGOTT: Well, you said - - - well,
20 okay. What I'm saying is you said, no matter what,
21 if they get money for the wrong, you have a lien on
22 it.

23 MS. SINGER: That's what - - -

24 JUDGE PIGOTT: And I think you'd agree with
25 me that property damage would be separate.

1 MS. SINGER: That's what the court - - -
2 the cases especially - - - in particular, the Ryan
3 case points out that if it's a wrong, if that's what
4 the action - - -

5 JUDGE PIGOTT: So you would say yes, you
6 get - - -

7 MS. SINGER: Yes, I would - - -

8 JUDGE PIGOTT: - - - credit for the
9 property damage as well?

10 MS. SINGER: I guess that's what I'm
11 saying, Your Honor. I don't know of any breakdown to
12 that extent, the extent that you're implicating. And
13 certainly in the cases of Shutter and Hiser where
14 there was no wrong, the Section 29 rights did not
15 come into play. So you have to look at whether there
16 was a wrong in terms of the nature of the recovery
17 and not look at the actual law that it came from.
18 Section 29 does not limit or mention any particular
19 laws. Its applicability is not limited to a
20 particular law.

21 CHIEF JUDGE LIPPMAN: That makes sense from
22 a policy perspective?

23 MS. SINGER: Again, it's to avoid the
24 double recovery.

25 CHIEF JUDGE LIPPMAN: Yeah, yeah, but

1 depending on the nature of what's involved, it in
2 reality may not be double recovery. You follow what
3 I'm saying? From a policy perspective, yours is an
4 awful broad - - -

5 MS. SINGER: But Section - - -

6 CHIEF JUDGE LIPPMAN: - - - rule that you
7 are contending is the case here.

8 MS. SINGER: Section 29 says "any
9 recovery". The legislature did not limit that
10 language, and the language - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but again, that
12 seems very unfair if you're saying any recovery
13 literally meaning any recovery.

14 MS. SINGER: Well, the cases, the Parmelee
15 case and the Simmons case - - -

16 CHIEF JUDGE LIPPMAN: So it's always double
17 recovery? Under those cases, it's always double
18 recovery?

19 MS. SINGER: Well, it says it even covers
20 damages that are not compensated for in Workers
21 Compensation. Workers Compensation - - -

22 JUDGE SMITH: Even property damage - - -
23 aren't you stretching your point by trying to get in
24 the property? Suppose the guy owns a Rembrandt, it's
25 destroyed in the accident. The - - -

1 MS. SINGER: Well, we're talking about
2 personal injury.

3 JUDGE SMITH: - - - comp carrier gets to
4 take the price of the Rembrandt back?

5 MS. SINGER: We're talking about injuries
6 here. We're talking about Workers Compensation
7 injuries predicated upon - - -

8 JUDGE SMITH: You have to limit it to
9 personal injuries, don't you?

10 MS. SINGER: Well, it's predicated upon the
11 injuries in the Workers Comp claim, so to that
12 extent, we were talking about - - -

13 JUDGE SMITH: Well, but they - - - but the
14 Workers Comp doesn't compensate for pain and
15 suffering.

16 MS. SINGER: Right, and they don't - - -

17 JUDGE SMITH: But nevertheless the comp
18 lien does attach to pain and suffering recovery,
19 doesn't it?

20 MS. SINGER: Yes, because it's any - - -
21 like I said, Section 29 is very broadly stated, it
22 applies to any recovery, and even those damages that
23 are not compensated for in Workers Comp.

24 JUDGE PIGOTT: So if an injured worker
25 says, I had to borrow 10,000 dollars from my brother

1 so I could get through this whole thing and I'm going
2 to pay him back with the recovery, you would say we
3 come first, you can't pay your brother back because
4 we have a lien on that.

5 MS. SINGER: Well, the lien is in
6 volleyball. I mean, the Workers Compensation lien -
7 - - I'm not sure I follow where - - -

8 JUDGE PIGOTT: Part of the 10 - - - 100,000
9 dollar settlement is 10,000 dollars to pay back the
10 brother for the money that he loaned him. You'd say
11 even though that money is going to the brother, you
12 have a lien on it.

13 MS. SINGER: It's an absolute right. It's
14 - - - the lien right is absolute. I don't know in
15 terms of priority - - - I don't know of any case law
16 that - - -

17 JUDGE SMITH: You wouldn't have the lien if
18 you hadn't already given the guy 10,000 dollars,
19 right? The reason the lien exists is that the
20 carrier has paid out 10,000.

21 MS. SINGER: Right, we pay it like - - -

22 JUDGE SMITH: So he could have paid his
23 brother - - -

24 MS. SINGER: - - - for benefits paid.

25 JUDGE SMITH: - - - with that money.

1 MS. SINGER: The lien is - - -

2 JUDGE PIGOTT: But except you're talking
3 about the future. I mean, you've already been
4 reimbursed for everything you paid to date. This is
5 the credit for future.

6 MS. SINGER: Right. In order to prevent a
7 double recovery, we - - -

8 JUDGE PIGOTT: So you're saying - - -

9 MS. SINGER: - - - to right the deficiency
10 between the amount of the settlement and the amount
11 owed is in the future Workers Compensation. That's
12 what Section 29 gives that right to the carrier for -
13 - -

14 JUDGE PIGOTT: So if he netted out 10,000
15 dollars and he says, thank God I can at least pay my
16 brother back, you say no, you can't because that
17 belongs to us - - -

18 MS. SINGER: Well, that's what the statute
19 - - -

20 JUDGE PIGOTT: - - - because we're going to
21 get credit for that going forward, so you can pay him
22 back if you want, but we're not paying you your wages
23 and we're not paying you for your medical until that
24 10,000 is accounted for.

25 MS. SINGER: That's right, because that's -

1 - - the Workers Comp carrier has the right to that
2 lien and the credit in order to prevent the double
3 recovery.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 Thanks.

6 MS. SINGER: Okay. Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you, counselor.

8 Counselor, rebuttal.

9 MR. BUCKLEY: Yes, Your Honor. Your Honor,
10 if this - - -

11 CHIEF JUDGE LIPPMAN: Where's she reading
12 this wrong? She says any recovery for the wrong.

13 MR. BUCKLEY: Well, Your Honor, I've been
14 doing this Workers Compensation for a long time. And
15 the compensation board, if you have a settlement of a
16 lawsuit for punitive damages only, they don't assert
17 any lien against the punitive damages. I didn't
18 brief that - - -

19 CHIEF JUDGE LIPPMAN: That's so clear cut,
20 you don't, yeah.

21 MR. BUCKLEY: That's clear, that's clear if
22 it was punitive damages. Now - - -

23 CHIEF JUDGE LIPPMAN: And if it's not
24 punitive damages, what's the - - -

25 MR. BUCKLEY: If it's not - - -

1 CHIEF JUDGE LIPPMAN: - - - what's the
2 rule?

3 MR. BUCKLEY: - - - punitive damages - - -

4 CHIEF JUDGE LIPPMAN: What's the rule?

5 MR. BUCKLEY: There really is no rule other
6 than you have to figure out what the settlement is
7 for, and that's why the Workers Compensation board -
8 - -

9 CHIEF JUDGE LIPPMAN: You just have to
10 match it up each time.

11 MR. BUCKLEY: Yeah. In their first
12 decision, sent us back to have Mr. Bains come in and
13 testify what this settlement included.

14 JUDGE PIGOTT: The better practice then
15 would have been at the time you settled your federal
16 court case you would have had everyone there and said
17 this is the breakdown, this is the lost wages, this
18 is the pain and suffering, this is the medical, and
19 this part is punitive. And then the defendant would
20 say, yeah, this is punitive because - - - well,
21 because right now it looks like you were fashioning
22 the settlement for income tax purposes, and it really
23 wasn't a punitive aspect of the settlement. And if
24 they're right, then they get a lien on the entire
25 thing.

1 MR. BUCKLEY: And if we had gone - - - if
2 Mr. Bains had taken this to trial, and when he put in
3 his damages against the State of New York for the
4 lost wages, there - - - when the verdict came in,
5 there would have been - - - because of the collateral
6 source rule, the lost wages would have been something
7 that it already paid by the defendant - - -

8 JUDGE PIGOTT: But prior to that - - -

9 MR. BUCKLEY: - - - and would have been
10 reduced by the verdict.

11 JUDGE PIGOTT: That's right, but the
12 verdict sheet would have said that, what - - -

13 MR. BUCKLEY: The verdict sheet would have
14 said it, but the - - -

15 JUDGE PIGOTT: - - - how much for punitives
16 right down at the bottom.

17 MR. BUCKLEY: But what the - - - what
18 happened in this case, they entered into a
19 stipulation where they said what the injuries were
20 for, the emotional injuries and the injury itself,
21 but they didn't go the step further to say there's no
22 lost wage component or no medical benefit component.

23 JUDGE SMITH: If there had been punitive
24 damages in there, you would have had to pay - - -
25 your client would have had to pay - - - they would

1 have had to pay tax on it, right?

2 MR. BUCKLEY: Well, he would have had to
3 pay - - - she would have had to pay a tax on it, and
4 also - - -

5 JUDGE SMITH: Is it really fair for her not
6 to pay the tax and also to - - - for the carrier not
7 to get the offset because it's punitives?

8 MR. BUCKLEY: Well, here's - - - here's - -
9 - the other thing is the three supervisors who were
10 working up at Camp Cass with her, supervising her, if
11 it was denominated punitive damages, it wouldn't have
12 been paid by the State of New York or any
13 municipality.

14 JUDGE SMITH: Doesn't that show that it's
15 not punitives? If the State paid it, then maybe it
16 wasn't punitives.

17 MR. BUCKLEY: Well, I - - - it may have
18 been punitives; it may not have been punitives. But
19 the - - - whatever - - - we're concentrating on the
20 lost wage component and the future medical. Right
21 now, she has no medical coverage through the Workers
22 Compensation system, and she has no medical coverage
23 under Medicare or a private insurance policy.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 Thanks.

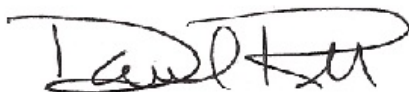
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Thank you all. Appreciate it.

(Court is adjourned)

C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Beth V. v. New York State Office of Children and Family Services and State Insurance Fund, No. 202, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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