

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN

OF COUNSEL

LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
DAVID S. FOODEN
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JILLIAN A. SMITH

Court of Appeals of New York.

ACE FIRE UNDERWRITERS INSURANCE COMPANY, & c., Appellant,
v.
SPECIAL FUNDS CONSERVATION COMMITTEE, Respondent.

Nov. 22, 2016.

Facts: Leave to appeal granted to the Carrier on the question of whether the Carrier had the right to pursue a *nunc pro tunc* consent order where a third-party action associated with an underlying Workers' Compensation claim was settled by the claimant with the consent of the carrier, but not with the consent of the Special Funds Conservation Committee when Section 15-8 of the WCL had previously been found to apply.

The claimant, as required by Section 29 of the WCL, sought and obtained Ace Fire's approval prior to entering the settlement of the third-party action. Ace Fire, however, did not seek the Special Disability Fund's written approval prior to settlement. When Ace Fire sought the Special Disability Fund's retroactive consent, the Fund refused, asserting that Ace Fire had forfeited its right to reimbursement. Ace Fire then commenced an action asking the Supreme Court to compel the Special Disability Fund's consent *nunc pro tunc* under Section 29(5).

Holding: *Reversed and Remanded* to the Supreme Court, with costs.

Discussion: The claimant was classified as having a permanent partial disability and Section 15(8) of the WCL was found to apply. Accordingly, the Special Disability Fund is responsible for reimbursing the workers' compensation carrier for all medical and compensation benefits payable after the first 260 weeks of disability. In addition to receiving workers' compensation benefits, the claimant commenced a third-party personal injury action in Supreme Court.

The Court noted that Section 29(1) of the WCL states in pertinent part that if the injured employee elects to bring a third-party action, "the person, association, corporation or

insurance carrier” that is liable for workers' compensation and medical expenses is entitled to “a lien on the proceeds of any recovery” in the third-party action, less reasonable and necessary expenses. The “recovery shall be deemed for the benefit of such ... person, association, corporation or carrier,” to the extent of the amount payable by the lienor.

The also noted that the same statute further provides in subdivision (5) that, when the third-party settlement is in an amount less than the benefits payable to the injured employee, it “shall be made only ... with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. However, such written approval “need not be obtained if the employee ... obtain[s] a compromise order from a justice of the court in which the third-party action was pending”

In other words, although the employee must obtain the written approval of the workers' compensation carrier prior to entering a settlement, the failure to do so can be cured by the court ordering the carrier's consent to the personal injury settlement, *nunc pro tunc*. The Court further observed that neither Section 29(5) nor Section 15(8) specifically requires the carrier to obtain the Special Disability Fund's approval prior to agreeing to a third-party settlement.

The Court explained “that a statute ... must be construed as a whole and that its various sections must be considered together and with reference to each other”. It went on to further note that the language in Section 29(1) establishing what entities may be deemed lienors is essentially identical to the language in Section 29(5) referring to the entities whose consent to settlement is required and, if not obtained, can be compelled upon application to the court. The parties did not dispute that the consent of the Special Disability Fund to settlement of the employee's third party action was required. The Court reasoned that the Special Disability Fund is a lienor whose consent to settlement is required under Workers' Compensation Law § 29(1), and therefore concluded that the carrier may seek to obtain the Fund's consent from Supreme Court *nunc pro tunc* under Section 29(5).

In so doing the Court explained that there is no principled basis for concluding that the Special Disability Fund's consent is required as a lienor under one portion of the statute, but that the failure to obtain it cannot be cured, as it can for other lienors, under the same statute.