CLARK LAW FIRM
A PROFESSIONAL CORPORATION

811 Sixteenth Avenue
Belmar, New Jersey 07719
Tel: 732-443-0333
Fax: 732-894-9647

ClarkLawNJ.com

Gerald H. Clark*
Certified By the Supreme Court of New Jersey as a Civil Trial Attorney

Stephanie Tolnai
Mark W. Morris
Lazaro Berenguer
Janet S. Bayer

**New Jersey and New York Bars*

Of Counsel
John J. Bruno, Jr.
Robert A. Ferraro
Teresa M. Graw

May 31, 2019

VIA ELECTRONIC FILING
Middlesex County, Law Division
56 Paterson Street
New Brunswick, New Jersey 08903-0964
Attn: Honorable Jamie D. Happas, P.J.Cv.

Re: Joao Abilio Silva v. Conti Enterprises, Inc., et als.
Docket No.: MID-L-7167-15
Our File No.: 15-94

Letter Brief in Support of Plaintiffs' Motion to Decide Lien Issue

Dear Judge Happas:

On behalf of Plaintiff Joao Silva, please accept the following letter brief in support of the above motion.

I. Facts and Procedural History

On December 9, 2013, Plaintiff, Joao Silva was caused to suffer severe and permanent injuries when he was struck by a work truck on a construction site. On December 7, 2015, Plaintiff filed a Complaint naming various entities, including Conti Enterprises, Inc; the Conti Group; Contico Corp.; Contico Corporation and Manuel "Manny" Barbosa ("the Conti Defendants"). The Complaint was later amended to add Defendants, Naik Consulting Group, PC; John Waldorf ("the Naik Defendants").

Given the extent of Mr. Silva's injuries, he incurred a substantial workers compensation lien which as of April 22, 2019, totals $659,658.85. Likewise, to date, Plaintiff's counsel has incurred substantial cost prosecuting this matter.[1] This figure is increasing as trial approaches.

On October 22, 2018, Plaintiff was able to reach a resolution with the Naik defendants for a confidential amount that is far below Plaintiff counsel's costs advanced. Thereafter, on February 22, 2019, Plaintiff reached a confidential settlement with the Conti defendants for an amount also less than

[1] Should the Court prefer a breakdown regarding costs expended, counsel will provide same under seal. For purposes of this Motion, counsel can represent the costs far exceed the two settlements discussed herein.

Plaintiff's counsel's costs advanced and well below the workers compensation lien amount. Combined, the settlements with the Naik and Conti Defendants are significantly less than the costs advanced by Plaintiff's counsel. Under *N.J.S.A.* 34:15-40, *et. seq.*, *Rule* 1:21-7, the pertinent case law and public policy in favor of settlements, the workers compensation lien is not triggered if the plaintiff does not net anything from the settlement. Since the costs advanced by the undersigned law firm far exceed the amounts of these two settlements, and the Rule requires the costs come off the top of any settlement, Plaintiff Joao Silva has no net gain from these settlements. Therefore the workers compensation lien is not triggered. Plaintiff's motion to determine this issue should be granted and the Court should determine the lien is not triggered. Instead these settlement monies should go back to the undersigned law firm to reimburse the expenses it has advanced and is entitled to.

II. Legal Discussion

N.J.S.A. § 34:15-40 states:

34:15-40 Liability of third party.

34:15-40. Where a third person is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein. 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.

(a)The obligation of the employer or his insurance carrier under this statute to make compensation payments shall continue until the payment, if any, by such third person or his insurance carrier is made.

(b)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.

(c)If the sum recovered by the employee or his dependents as aforesaid is less than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be liable for the difference, plus the employee's expenses

> of suit and attorney's fee as hereinafter defined, and shall be entitled to be reimbursed, as hereinafter provided for so much of the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents as exceeds the amount of such difference plus such employee's expenses of suit and attorney's fee.
>
> . . . .
>
> (e)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 or his dependents by such third person or his insurance carrier to which the employer or his insurance carrier shall be entitled in reimbursement under the provisions of this section, but on all sums in excess thereof, this percentage shall not be binding.

N.J.S.A. § 34:15-40. An employer who pays workers' compensation benefits is entitled "to be reimbursed for medical expenses incurred and compensation payments made, out of the net proceeds, after deduction of costs and attorneys' fees, of any recovery by the employee from the third person." *Wilson v. Faull*, 45 *N.J. Super.* 555 (App.Div. 1957), *rev'd, o.g.*, 27 *N.J.* 105, 141 (1958) (emphasis added). Indeed, "when an injured employee has received compensation benefits and later recovers a greater sum from a third person liable for those injuries, the employee must reimburse the employer or its compensation carrier to the extent of the benefits paid." *Stabile v. N.J. Mfrs. Ins. Co.*, 263 *N.J. Super.* 434, 439 (App. Div. 1993) (emphasis added) (citing N.J.S.A. 34:15-40(b)); *see also, Owens v. C & R Waste Material,* 76 *N.J.* 584, 588 (1978) (employers benefit for repayment of lien and obligation to share in costs and attorney fee for recovery of benefits paid out arises when employee makes recovery). The central purpose of the workers' compensation lien repayment system is to avoid double recovery to injured plaintiffs. *Midland Ins. Co. v. Colatrella*, 102 *N.J.* 612, 615 (1986). Where an injured plaintiff will make no recovery, such fears simply do not exist. As such, given the focus on the employees' net recovery, workers' compensation liens are not triggered to be reimbursed unless the injured employee actually nets a recovery. Here, since the costs advanced by the law firm exceed the settlement amounts at issue, there is no net recovery to Joao Silva. The monies should be reimbursed back to the law firm.

The facts are straightforward. Plaintiff settled with two sets of Defendants for amounts far below counsel's costs and less than the workers' compensation lien. Since the costs exceed the settlement amount and the costs come out of the top of any settlement, there is no net to the client. Indeed, *R.* 1:21-7(d) mandates counsel fees "shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim[.]". To the extent the New Jersey Court Rule stating any net sum "shall be computed" after deducting costs, *R.* 1:21-7(d), conflicts with the subrogation carrier's interpretation of the workers' compensation statute (albeit an incorrect interpretation), the Court Rule controls. *See, N.J. Const. Art. VI, Sec. 2, Para. 3* ("Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."); *Winberry v. Salisbury*, 5 *N.J.* 240

(1950) (Supreme Court's rule-making power is not subordinate to overriding legislation); *see, Borough of Shrewsbury v. Block 115, Lot 4, Assessed to William Hathaway*, 74 *N.J. Super.* 1, 8 (App. Div. 1962) ("[w]hen a statutory provision and a court rule are in conflict in a matter of practice and procedure, the rule prevails."); *Sattelberger v. Telep*, 14 *N.J.* 353, 369 (1954) ("Since third-party practice is procedural and not substantive in nature, it is within the rule-making function vested in the Supreme Court by the Judicial Article of the 1947 Constitution."). Here, because the New Jersey Supreme Court has mandated that costs shall be paid before any disbursement of proceeds, this Rule controls and cannot be trumped by legislation such as the workers compensation statute.

Moreover, our Courts favor settlements and finality. *Pascarella v. Bruck*, 190 *N.J. Super.* 118, 125 (App. Div.1983), *certif. den.* 94 *N.J.* 600 (1983). Indeed, our Courts have actively encouraged litigants to settle their disputes. *See e.g., Morris County Fair Hous. Council v. Boonton Tp.,* 197 N.J. Super. 359, 366 (App. Div.1984). As one court explained:

> The point of this policy is not the salutary effect of settlements on our overtaxed judicial and administrative calendars (although this is an undeniable benefit) but the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced.

Department of Public Advocate, Div. of Rate Counsel v. New Jersey Bd. of Public Utilities, 206 N.J. Super. 523, 528 (App. Div. 1985). In this case we settled with these "non-heavy" defendants with the expectation these monies would go to pay down costs. In fact, our office has had prior settlements with other carriers that have made clear that if the plaintiff does not net anything- the lien is not triggered. As long as the settlement monies go to pay costs, and the client does not net anything in his/her pocket, the lien is not triggered.

It is anticipated counsel for the Insurance Company of the State of Pennsylvania ("ICSP") will again cite to a litany of cases which are entirely distinguishable from the present matter. First, *Pool* involved the succinct legal issue of whether a workers compensation lien was triggered where a jury rendered a verdict of no cause but a client still obtained a net recovery due to a high low agreement. *Pool v. Morristown Mem. Hosp.,* 400 *N.J. Super.* 572, 575-77 (App. Div. 2008). There, in affirming, "the lien will attach to a payment received by an injured employee," the court held, "the [workers compensation] lien attaches regardless of the merit of the third-party claims. As a result, it is of no moment that the jury rendered a verdict favorable to defendant[.]" *Id.* at 577. Defendant also cites to *Marano v. Schob,* 455 *N.J. Super.* 283 (App. Div. 2018) which dealt with a similar legal issue, reached a similar result and is likewise of little bearing regarding the issue of whether the lien is triggered when there is no net recovery to the injured employee. *Id.* at 285-86. The client in *Marano,* netted a recovery following a verdict of no cause featuring a high low agreement and thus the workers compensation lien was appropriately triggered. *Id.* at 287.

Greene is equally inapplicable. *Greene* dealt with the issue of whether payments for an injury ultimately deemed not to be compensable were nonetheless required to be paid back out of a third party settlement. *Greene v. AIG Cas. Co.,* 433 *N.J. Super.* 59, 67 (App. Div. 2013) (workers compensation statute mandates, "the employer or compensation carrier be repaid for benefits paid to the injured worker pursuant to the Act without regard to the compensability of the claim) (emphasis added). Such is not the issue presented here. Likewise, *Liberty Mut. Ins. v. Rodriguez,* 2019 N.J. Super. LEXIS 42 at *1 (App. Div. Apr. 2, 2019), simply examined how the sliding scale provision of *R.* 1:21-7 impacted the workers' compensation repayment calculations and did not address the issue of whether the lien is triggered when there is no net to the client. Indeed, in *Rodriguez* the injured plaintiff netted monies in a recovery. *Id.* at *3-4. As such, this case is of no moment to the issue at hand.

Counsel for ICSP will also likely cite to *Cabrera v. Cousins Supermarket,* 2016 N.J. Super. Unpub. LEXIS 392 at *1 (App. Div. Feb. 23, 2016) which is an unpublished decision and thus of no precedential value. There are many unpublished opinions which say many things. As such, the Court Rules provide that no unpublished opinion shall constitute precedent or be binding upon any court. *R.* 1:36-3; *see, e.g., Trinity Cemetery v. Wall Twp.,* 170 *N.J.* 39, 48 (2001) (Verniero, J., concurring)("an unreported decision 'serve[s] no precedential value and cannot reliably be considered part of our common law'"). Indeed, the facts of *Cabrera* are not even entirely clear from the court's opinion. Plaintiff in *Cabrera* recovered via a high low agreement following a no cause, but the amount of recovery was subsumed by "litigation costs and attorney's fees." *Id.* at *2. There is no analysis of how much of the recovery went to costs and how much went to attorney fees and if there was any amount left for the plaintiff. Moreover, the case is distinguishable from the facts at hand given the attorneys in *Cabrera* sought to collect their fee. Here, Plaintiff's counsel is not seeking any fee from either of the two settlements, simply to cover the costs which pursuant to *R.* 1:21-7(d) come off the top before either net proceeds or attorney fees are distributed. Lastly, counsel in *Cabrera* did not set forth the arguments Plaintiff sets forth here regarding *R.* 1:21-7(d) and the public policy concerns with adopting ICSP's arguments. As such, it is respectfully requested the Court not base its decision on this distinguishable and unpublished case of no precedential value.

Next, ICSP's citation to *McMullen v. Maryland Cas. Co.,* 127 *N.J. Super.* 231 (App. Div. 1974) does nothing but reaffirm the idea that the workers compensation statue is designed to prevent double recoveries to workers who both receive compensation benefits and net a recovery in a third party action. *Id.* at 235. Indeed, there is no question:

> Section 40 prevents the worker from retaining any workers' compensation benefits that have been supplemented by a recovery against the liable third party, even if the two combined would leave the worker less than fully compensated. Under section 40, the workers' compensation carrier is entitled to reimbursement whether or not the employee is fully compensated. We concluded that the "no double recovery" rule should not be different when the third-party recovery is against a party other than the tortfeasor.

Utica Mut. Ins. Co. v. Maran, 142 *N.J.* 609, 613 (1995); *see also, Frazier v. N.J. Mfrs. Ins. Co.*, 142 *N.J.* 590, 597-98 (1995) ("for every dollar of the employee's recovery from the third party, the carrier's lien under section 40 (section 40 lien) entitles it to reimbursement of one dollar (less legal

cost) of workers' compensation benefits. Otherwise, the tort recovery would be duplicating the workers' compensation benefits."). Here, again, there is no fear of double recovery because there is no employee recovery, every penny of the two settlements referenced herein goes to costs pursuant to *R.* 1:21-7(d).

Counsel for ICSP's reliance on *Greater New York Mutual Ins. Co. v. Calcagno & Assoc., LLC,* 2012 N.J. Super. Unpub. LEXIS 2147 at *1 (App. Div. Sep. 20, 2012) is likewise unavailing. First, that case is an unpublished decision and is of no precedential value. *R.* 1:36-3; *see also, Trinity Cemetery, supra,* 170 *N.J.* at 48. Moreover, the injured employee netted a recovery in their third party case in *Calcagno*. The settlement there was for $35,000, with purportedly $12,767.23 in costs and a net to the client of $14,821.85. The workers' compensation lien in that case was for $19,073.55. Since the client in the aforementioned case stood to net proceeds, the compensation lien was appropriately triggered. Such is not the case here. Again, the costs to prosecute this case far exceed the settlement amount and as such, the client has no net gain from the two settlements at issue.

If a new rule were to be established that says the law firm does not gets its costs back like *Rule* 1:21-7 mandates and instead the monies go directly to an enormous workers compensation lien, then there would be little incentive to enter into these settlements with minor player defendants like occurred here. Thus, instead of the Court having to deal with two defendants in the litigation and at trial, there would have been potentially four and all the attendant work that goes with that. Indeed, lower end settlements in these multi-party cases help narrow the issues at the time of trial and unburden the Court from having to address unnecessarily complex legal disputes involving multiple entities with relatively small shares of liability. If these "nuisance value" type settlements only go to pay back the workers' compensation lien and the attorney prosecuting the case is not reimbursed the costs they have advanced, there is likewise little incentive to settle out with these less liable defendants.

III. Conclusion

Since there is no net to the client and no concern for double recovery to the injured plaintiff, it is respectfully submitted the workers' compensation lien is not triggered. Any other conclusion would have a potential chilling effect on settlements of this type.

Thank you for your time and attention to this matter.

Respectfully,

MARK W. MORRIS
For the firm

MWM:bhs
Enclosures

cc: All counsel (Via Electronic Filing)
Steven G. Kraus, Esq. (Via Electronic and Regular Mail)

Ltr Brief2.wpd