

NO. COA12-1176

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2013

BOBBY ANGLIN,
Plaintiff,

v.

Mecklenburg County
No. 12 CVS 1143

DUNBAR ARMORED, INC. AND GALLAGER
BASSETT SERVICES, INC.,
Defendants.

Appeal by plaintiff from order entered 1 August 2012 by
Judge Timothy Kincaid in Superior Court, Mecklenburg County.
Heard in the Court of Appeals 14 February 2013.

*The Sumwalt Law Firm, by Vernon Sumwalt and Mark T.
Sumwalt, for plaintiff-appellant.*

*McAngus, Goudelock & Courie, by Colin E. Scott, for
defendants-appellees.*

STROUD, Judge.

Plaintiff appeals a trial court order which denied
plaintiff's request to reduce or eliminate defendants' lien on
funds plaintiff received from South Carolina underinsured
motorist coverage, contending that because South Carolina law
would not allow a lien on such funds neither should North
Carolina. For the following reasons, we disagree and thus
affirm.

I. Background

Plaintiff filed a complaint on 18 January 2012 seeking "declaratory relief and to eliminate or reduce Defendants' subrogation interest so that Plaintiff can then proceed to the Industrial Commission for proper disbursement of Plaintiff's UIM settlement pursuant to N.C. Gen. Stat. § 97-10.2(f)." On 1 August 2012, after a hearing on "PLAINTIFF'S MOTIONS FOR: (1) JUDGMENT ON THE PLEADINGS PURSUANT TO N.C.R. CIV. P. 12(c) AND (2) ELIMINATION OR REDUCTION OF WORKERS' COMPENSATION LIEN PURSUANT TO N.C. GEN. STAT. § 97-10.2(j)[,]" the trial court made the following uncontested findings of fact:

1. That the Plaintiff was injured while in the course and scope of employment with the Defendant Dunbar in an automobile accident which occurred in South Carolina on May 13, 2009;
2. That the Plaintiff and Defendant driver were both residents of South Carolina;
3. That the Defendant Dunbar did business out of North Carolina;
4. That as a result of the Plaintiff's injuries, the Plaintiff received Worker's [sic] Compensation benefits from the Defendants pursuant to the North Carolina Worker's [sic] Compensation Act;
5. That the Plaintiff was paid a total of \$31,809.48 in Worker's [sic] Compensation benefits by the

Defendants;

6. That the Plaintiff settled the liability claim with the at fault driver for \$92,712.55;
7. That on January 31, 2011, the Defendants agreed to settle its lien on the liability settlement for 1/3 of the lien (\$10,613.16);
8. That on or about April 18, 2011, Plaintiff settled with his Underinsured Motorist Carrier (UIM) for injuries sustained in the 2009 accident for a total of \$30,000.00;
9. That the Defendants were unaware of the UIM funds at the time the lien was settled in January of 2011;
10. That Plaintiff contends that South Carolina law applies because the Plaintiff was entitled to UIM funds pursuant to a South Carolina Policy. Plaintiff further contends that the Defendants cannot subrogate UIM funds under South Carolina law (S.C. Code[]Ann. §38-77-160);
11. That Plaintiff also contends that there was an accord and satisfaction because the Defendants agreed to 1/3 of the lien;
12. That the Defendants contend that they are entitled to the remaining \$21,206.31 of the lien from the UIM funds because North Carolina [law] applies and because they were not aware of the UIM funds at the time of the settlement[.]

Based upon the findings of fact the trial court ordered:

1. That North Carolina law should apply because the Plaintiff is seeking relief pursuant to North Carolina law (NCGS §97-10.2(j));
2. That North Carolina does not have a statute which prevents subrogation of UIM funds;
3. That applying S.C. Code Ann §38-77-160 in this case would be contrary to the policies and procedures set forth in the North Carolina Worker's [sic] Compensation Act.
4. That there is not an accord and satisfaction of the lien as it relates to the UIM funds because the Defendants were not aware of the UIM funds at the time of the settlement of the lien;
5. That after consider[ing] all of the factors in 97-10.2(j), including the anticipated amount of prospective compensation the employer or worker's [sic] compensation carrier is likely to pay to the employee in the future, the net recovery to Plaintiff, the likelihood of the Plaintiff prevailing at trial or on appeal, the need for finality in the litigation and other factors as set forth above, the Defendants are entitled to the remaining \$21,206.31 of the lien from the \$30,000.00 of UIM funds.

Plaintiff appeals.

II. N.C. Gen. Stat. § 97-10.2(j)

Plaintiff contends that the trial court erred by applying North Carolina law because this issue is controlled by South

Carolina law as the funds subject to subrogation were paid under a South Carolina UIM policy. Plaintiff asserts that

in allowing defendants to recoup their workers' compensation lien under N.C. Gen. Stat. § 97-10.2(j), the superior court judge misapprehended the law by engrafting the substantive law of North Carolina upon an insurance contract between a South Carolina resident and his UIM carrier, which the substantive law of South Carolina governed.

(Original in all caps.) Essentially, plaintiff contends that because the funds at issue were paid to plaintiff from a South Carolina contract -- his UIM insurance policy -- South Carolina law controls. However, the terms of the insurance contract are not at issue in this case, and defendant was not even a party to the South Carolina contract; the issue here is actually what law applies to the trial court's authority to adjust the North Carolina lien on plaintiff's UIM funds, despite their origin.

Whether North Carolina law or South Carolina law governs is a question of law which we review *de novo*. See *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). Under N.C. Gen. Stat. § 97-10.2, a subrogation lien for the benefit of the workers' compensation carrier automatically attaches to the third party proceeds received by a plaintiff for whom the carrier has paid medical expenses arising from the injury by accident. See *Cook v. Lowe's Home Centers*,

Inc., 209 N.C. App. 364, 367, 704 S.E.2d 567, 570 (2011) ("Under North Carolina law an employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature." (citation, quotation marks, ellipses, and brackets omitted)). This lien may be reduced or eliminated by the trial court in certain circumstances, under N.C. Gen. Stat. § 97-10.2(j), which provides as follows:

Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and

reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

N.C. Gen. Stat. § 97-10.2(j) (2009).

Plaintiff recognizes that N.C. Gen. Stat. § 97-10.2 provides a "procedural remedy" and not a substantive claim, but still argues that the substantive law of South Carolina should be applied in this case, relying upon *Cook*. *Cook*, 209 N.C. App. 364, 704 S.E.2d 567. In *Cook*, this Court determined that N.C. Gen. Stat. § 97-10.2(j) "is remedial in nature" and that "remedial rights are determined by the law of the forum." 209 N.C. App. 364, 367-68, 704 S.E.2d 570-71.

Cook, an employee of the Oryan Group, a Tennessee corporation, sustained an injury in the course of performing the duties of his employment on the premises of Lowe's Home Improvement in Greensboro, North Carolina. Before a Chancery Court of Tennessee, *Cook* and the Oryan Group acknowledged Tennessee Workers' Compensation Law applied to them at the time of his injury. *Cook* and the Oryan Group petitioned the Chancery Court pursuant to Tennessee Workers' Compensation Statutes for, and thereafter received, a lump sum settlement wherein *Cook* recovered from his employer and Hartford Insurance \$97,397.00 for permanent-partial disability of 75% to the body as a whole and ongoing medical treatment of his injury by authorized, pre-approved panel physicians. Subsequently, *Cook* filed a

negligence action against defendants in Superior Court in Guilford County, North Carolina. Hartford Insurance intervened to enforce a subrogation lien against any recovery. Cook and defendants settled the North Carolina negligence claim for \$220,000.00. Cook filed a motion in the Superior Court to reduce or extinguish the lien pursuant to N.C. Gen. Stat. § 97-10.2(j), which Hartford Insurance opposed by asserting that Tennessee law applied. However, after a hearing, the trial court entered an order reducing the amount of the lien to \$30,000.00 pursuant to N.C.G.S § 97-10.2(j).

Id. at 367-68, 704 S.E.2d at 570. "On appeal, Hartford Insurance challenge[ed] the trial court's ruling that North Carolina law applied to the issue of reduction or elimination of the workers' compensation subrogation lien. Hartford argue[ed] that Tennessee law would not permit reduction of the subrogation lien and that Tennessee law should be applied here." *Id.* at 366, 704 S.E.2d at 569. This Court disagreed stating,

As to substantive laws, or laws affecting the cause of action, the *lex loci*-or law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based-will govern; as to the law merely going to the remedy, or procedural in its nature, the *lex fori*-or law of the forum in which the remedy is sought-will control.

Where a lien is intended to protect the interests of those who supply the benefit of

assurance that any work-related injury will be compensated, it is remedial in nature. A statute that provides a remedial benefit must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

Under North Carolina law an employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature. However, after notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien.

There is no mathematical formula or set list of factors for the trial court to consider in making its determination; the statute plainly affords the trial court discretion to determine the appropriate amount of defendant's lien. The exercise of discretion requires that the court make a reasoned choice, a judicial value judgment, which is factually supported.

Id. at 366-67, 704 S.E.2d at 569-70 (citations, quotation marks, ellipses, and brackets omitted). The Cook Court thus determined that rights arising from the subrogation lien under N.C. Gen. Stat. § 97-10.2(j) are remedial or procedural, not substantive. *Id.* at 367-68, 704 S.E.2d at 570-71.

[A]s stated earlier, remedial rights are determined by the law of the forum. In this case the forum is North Carolina.

The North Carolina subrogation statute

at issue here gives the court discretion to consider many factors, including any other factors the court deems just and reasonable, in determining the amount of the employer's lien. In his motion to reduce or extinguish the lien, Cook set forth the significant injuries he suffered, including impairment of his ability to earn wages. He also emphasized to the court that his worker's [sic] compensation award was grossly insufficient and inadequate to compensate him for his disability. After a hearing on the motion the trial court entered its ruling reducing Hartford's lien to \$30,000. We hold the trial court acted within, and did not abuse, its discretion in applying North Carolina law and reducing the amount of Hartford Insurance's subrogation lien pursuant to N.C.G.S. § 97-10.2(j).

Id. at 368, 704 S.E.2d at 571 (citation and quotation marks omitted).

Plaintiff argues that under *Cook*, the procedural remedy of adjustment of the subrogation lien by the court was available only because the substantive law of Tennessee did not differ from North Carolina's law as to the availability of subrogation liens. After a thorough analysis of *Cook*, we disagree with plaintiff's interpretation. In *Cook*, this Court determined that North Carolina law, N.C. Gen. Stat. § 97-10.2(j), was applicable not because "the substantive law of Tennessee did not differ from the substantive law of North Carolina" but because N.C. Gen. Stat. § 97-10.2(j) "is remedial in nature" and "remedial

rights are determined by the law of the forum" which in *Cook* was North Carolina. 209 N.C. App. at 367-68, 704 S.E.2d at 570-71; see *Robinson v. Leach*, 133 N.C. App. 436, 514 S.E.2d 567 (determining that subrogation on UIM funds is procedural in nature and thus controlled by North Carolina law, the law of the forum state), *disc. review denied*, 350 N.C. 835, 539 S.E.2d 293 (1999). As plaintiff sought reduction or elimination of the subrogation lien pursuant to N.C. Gen. Stat. § 97-10.2(j), and as this Court has previously determined that N.C. Gen. Stat. § 97-10.2(j) "is remedial in nature" and "remedial rights are determined by the law of the forum[,]" *Cook* at 367-68, 704 S.E.2d at 570-71, the trial court did not err in applying N.C. Gen. Stat. § 97-10.2(j) to plaintiff's UIM funds received under a South Carolina insurance policy.¹

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

¹ Of course, had the trial court in its discretion decided to reduce or eliminate the subrogation lien, plaintiff would be in the same position as the plaintiff in *Cook*; the only difference here is that the trial court in *Cook* decided to reduce the lien, while the trial court here decided not to reduce or eliminate the lien. See *Cook*, 209 N.C. App. at 366, 704 S.E.2d at 569. But as to the applicable law or the trial court's authority, there is no difference between this case and *Cook*, only the result, and thus the party appealing is different. See *id.*

Judges STEPHENS and DILLON concur.