

**SHARYN SCHEELER,
APPEARING HEREIN
INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE
ESTATE OF HER MINOR SON,
ALFRED SCHEELER**

*** NO. 2000-CA-2066
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

VERSUS

**WALLACE C. COUTURE, SR.,
ST. BERNARD PARISH
POLICE JURY, DEPARTMENT
OF TRANSPORTATION AND
DEVELOPMENT, ST.
BERNARD WATER AND
SEWERAGE DISTRICT,
CHAMPION INSURANCE
COMPANY AND DEF
INSURANCE COMPANY**

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**APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 58-389, DIVISION "A"
HONORABLE ROBERT A. BUCKLEY, JUDGE**

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**JAMES F. MC KAY, III
JUDGE**

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(Court composed of Chief Judge William H. Byrnes, III, Judge Miriam G. Waltzer, Judge James F. McKay, III)

WALTZER, J., DISSENTS, IN PART AND CONCURS, IN PART.

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LAW OFFICE OF TONRY & GINART
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Attorneys for Plaintiff/Appellee

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New Orleans, Louisiana

Attorney for Defendant/Appellant, St. Bernard Parish Police Jury

AFFIRMED

The defendant, St. Bernard Parish Police Jury, appeals the trial court's awarding of attorney's fees to the plaintiff's attorney. The plaintiff, Alfred Scheeler, appeals the trial court's enjoining him from collecting anything from the judgment in his favor against the St. Bernard Parish Police Jury. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 6, 1987, Alfred Scheeler, a minor at the time, was driving a pickup truck on East Judge Perez Drive. Matthew Shephard, also a minor, was a passenger in the pickup truck. Mr. Scheeler lost control of the pickup truck as it rounded a curb and struck a garbage truck owned by St. Bernard Parish and which was stopped along the shoulder of the road. As a result of the collision, Matthew Shephard was killed and Alfred Scheeler was seriously injured.

Matthew Shephard's parents filed a petition for wrongful death on

May 17, 1988. Several other claims, including a cross-claim filed by Alfred Scheeler against St. Bernard Parish, were filed in connection with the accident and consolidated with the Shephards' case. The liability and damage portions of the trial were bifurcated. The liability portion was tried first, and judgment was rendered on March 20, 1995, apportioning fault among Alfred Scheeler, St. Bernard Parish, and the State of Louisiana. Ultimately, the trial court's decision was amended by the Louisiana Supreme Court, which held that Alfred Scheeler was 80% at fault while the St. Bernard Parish Police Jury was 20% at fault. On January 15, 1999, judgment was rendered in the damages portion of the trial. The trial court cast Alfred Scheeler and the St. Bernard Parish Police Jury in judgment jointly, severally and in solido in the amount of \$513,083.76 together with legal interest and costs. The judgment also provided that the St. Bernard Parish Police Jury was liable to Alfred Scheeler in the sum of \$418,765.10; however, the judgment in favor of Alfred Scheeler was reduced by his fault of 80% so that the judgment actually rendered against the St. Bernard Parish Police Jury and in favor of Alfred Scheeler was \$83,753.02 with interest and costs.

The Shephards elected to collect their entire judgment from the St. Bernard Parish Police Jury pursuant to the version of Louisiana Civil Code Article 2324 that was in effect at the time of the accident. In response to the Shephards' demand and pursuant to La. R.S. 22:1375, *et seq.*, the Louisiana Insurance Guaranty Association (LIGA), on behalf of the St. Bernard Parish Police Jury, paid the Shephards \$610,889.99. On August 5, 1999, Alfred Scheeler filed a pleading entitled "Motion to Make Executory and Enforce Judgment and Motion for Attorney's Fees", which sought to make executory the judgment in his favor against the St. Bernard Parish Police Jury. Thereupon, the St. Bernard Parish Police Jury filed a petition for a permanent injunction and/or preliminary injunction, including a temporary restraining order. Also, on that same day, the St. Bernard Parish Police Jury filed a petition to enforce contribution against Alfred Scheeler.

On January 21, 2000, the trial court held a hearing on the St. Bernard Parish Police Jury's motion for injunctive relief as well as on Mr. Scheeler's motion to enforce. The trial court rendered its judgment on June 21, 2000. The judgment enjoined Mr. Scheeler from collecting anything from the St. Bernard Parish Police Jury but allowed his attorneys to recover their fees

and expenses from the St. Bernard Parish Police Jury. The St. Bernard Parish Police Jury appeals the trial court judgment and Mr. Scheeler has answered the appeal.

DISCUSSION

There are two issues before this Court. The first is whether the trial court erred in allowing Mr. Scheeler's attorneys to recover their fees and costs from the sums awarded to Alfred Scheeler. The other is whether the trial court erred by granting the St. Bernard Parish Police Jury a preliminary injunction because in effect this move gave the defendant a suspensive appeal which it did not request.

The trial court reasoned that Mr. Scheeler's attorneys must be allowed to recover their fees and expenses because to allow the St. Bernard Parish Police jury to "seize" the entire amount owed by it to Mr. Scheeler pursuant to its right of contribution would be to "make the plaintiff suffer an actual loss." The trial court reasoned that such a result is not permitted in light of the Supreme Court decision in Moody v. Arabie, 498 So.2d 1081 (La. 1986) and the Court of Appeal decisions of Durham Life insurance Co. v. Lee, 626 So.2d 706 (La. App. 1 Cir. 1993) and Liberty Mutual Insurance Co. v.

Weinberger, 329 So.2d 254 (La. App. 4 Cir. 1976).

In Moody v. Arabie, supra., the Louisiana Supreme Court addressed the issue of whether an employer or its insurer is obligated to pay a portion of the attorney's fees when a third party suit is brought or recovery is effected by the injured worker. The Court determined that the worker and the compensation insurer are co-owners of the right to recover damages from the third party and that co-owners are obligated to bear their proportionate share of the reasonable and necessary litigation expenses, including attorney's fees, according to their interest in the recovery.

In Liberty Mutual v. Weinberger, supra., the defendant, who was injured in a two automobile accident, was paid medical expenses under the host driver's insurance policy. That policy entitled the insurer to reimbursement from the defendant out of any recovery from any person legally responsible for the injury causing the medical expense. The defendant settled with the other driver's insurer, but refused to reimburse her host's insurer. The Court held that the insurer could recover but said recovery would be paid out of the net "proceeds" which the court determined was the balance after attorney's fees and costs were subtracted.

In Durham Life Insurance Co. v. Lee, supra., the insurer filed suit against its insureds for the full amount of medical expenses paid on the policy after the insureds received judgment against a tortfeasor for medical costs due to an automobile accident. The First Circuit Court of Appeal held that the insurer was conventionally subrogated to the insureds' rights against the tortfeasor, but the amount owed the insurer did not include attorney fees incurred by the insureds in recovery settlement. This meant that the insureds were required to reimburse the insurer only from the "net" proceeds of the settlement with the tortfeasor.

In the instant case, the Law Office of Tonry & Ginart undertook the representation of Alfred Scheeler pursuant to a "CONTRACT FOR THE ENGAGEMENT OF LEGAL SERVICES", which was a contingency fee agreement. By the terms of a contingency fee agreement, a lawyer takes an interest in a client's personal injury lawsuit. This means that a lawyer is entitled to a percentage of a plaintiff's lawsuit against a defendant. Under the "net proceeds" rationale of Liberty Mutual and Durham Life Insurance Co., this would mean that only the portion of a plaintiff's lawsuit that had not been assigned to others would still be theirs. According to this logic, the

trial court did not err when it found that the Law Office of Tonry & Ginart was entitled to their attorney's fees and costs.

Mr. Scheeler contends that the trial court erred by granting the defendant a preliminary injunction because in effect this move granted the defendant a suspensive appeal which it did not request. Prior to the trial court's granting of the preliminary injunction, the Shephard judgment against Mr. Scheeler and the St. Bernard Parish Police Jury was executed against the St. Bernard Parish Police Jury pursuant to the applicable version of La. C.C. art. 2324. In a separate action, the St. Bernard Parish Police Jury sought contribution from Mr. Scheeler for the excess that was paid above its share as a solidary obligor on the Shephard judgment. The trial court granted injunctive relief to the St. Bernard Parish Police Jury on the basis that St. Bernard had already paid more than its legal share of the judgment and that to allow Mr. Scheeler to enforce his judgment would result in payments by St. Bernard that were in excess of its legal responsibility.

Louisiana Code of Civil Procedure Article 3601 states: "An injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law." For a

preliminary injunction, the mover must also show that he is entitled to the relief sought and must make a prima facie showing that he will prevail on the merits of the case. HCNO Services, Inc. v. Secure Computing Systems, Inc., 96-1693, 96-1753 (La. App. 4 Cir. 4/23/97), 693 So.2d 835, 841. The right of contribution is a separate cause of action that arises when one of the tortfeasors pays in excess of his virile portion. Cole v. Celotex Corp., 599 So.2d 1058, 1071 (La. 1992). The St. Bernard Parish Police Jury, by its excess payment, has made a prima facie showing that it will prevail on the merits of this lawsuit. Although injunctive relief is not generally granted when only monetary damages are sought in a suit, courts have held that if a judgment would be valueless because of insolvency of the judgment debtor or other reasons, injunctive relief may be proper. HCNO Services, Inc., *Supra*; Ciambotti v. Decatur – St. Louis, Lupin, Properties Ventures, 533 So.2d 1352 (La. App. 3 Cir.1988). This is such a case. Accordingly, we find no error in the trial court’s granting of the preliminary injunction without bond, which prevented the payment of the “net proceeds” of the Scheeler judgment to the plaintiff.

CONCLUSION

For the foregoing reasons, we find no error on the part of the trial court and affirm its judgment.

AFFIRMED