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COURT OF APPEALS

STATE OF NEW YORK

ACE FIRE UNDERWRITERS INSURANCE COMPANY,

Appellant,

-against-

No. 177

SPECIAL FUNDS CONSERVATION COMMITTEE,

Respondent.

20 Eagle Street
Albany, New York 12207
October 19, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: First matter on this
2 afternoon's calendar is appeal number 177, Ace Fire
3 Underwriters Insurance Company v. Special Funds
4 Conservation Committee. Counsel?

5 MS. LEVINE: Thank you, Your Honor. May it
6 please the court, I am Lisa Levine and I represent
7 the appellant, Ace Fire Underwriters Insurance
8 Company. May I please have two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may.

10 MS. LEVINE: Thank you very much.

11 On behalf of appellant, we respectfully
12 submit that the First Department incorrectly held
13 that a workers' compensation carrier can seek - - -
14 can seek a consent order from the Workers'
15 Compensation Board - - -

16 JUDGE PIGOTT: I couldn't figure out how
17 you got into Supreme Court. Can you tell me how you
18 did that? Because you weren't - - - you know, you
19 had the plenary action, and if you were - - - if you
20 had stayed there, I can see where this could get - -
21 - get taken care of. But is it a DJ, is it a - - -
22 is it a mandamus, is it a - - - I - - - I just didn't
23 know what form - - - there's no summons and
24 complaint. There's no - - -

25 MS. LEVINE: No, Your Honor. I filed - - -

1 I filed a petition. This was a - - - an issue of
2 first impression.

3 JUDGE PIGOTT: But a petition - - -

4 MS. LEVINE: A petition - - -

5 JUDGE PIGOTT: I mean, I can't file a
6 petition in Supreme Court. They'd say what are you
7 doing?

8 MS. LEVINE: In - - - in - - - what we did
9 was follow the mandate in Workers' Compensation Law
10 Section 29(5) which permits an injured - - -

11 JUDGE PIGOTT: But that's over in Comp,
12 right?

13 MS. LEVINE: But that - - - with all due
14 respect, that permits an injured worker to seek a
15 consent order in the trial court with a third party -
16 - -

17 JUDGE PIGOTT: In the context of his - - -
18 of his lawsuit. So when Carlos - - - I forget his -
19 - - his last name has escaped me at the moment - - -
20 is trying to get his case settled, as - - - as we all
21 know, he's - - - he's got the workers' compensation
22 lien that he's got to get that sat - - - satisfied.

23 So - - - so he either agrees, you know, and
24 there's a settlement, and - - - and a holiday and all
25 of that, or you don't, in which case then you got to

1 - - - you got to litigate it. But all of that's
2 Comp.

3 You're - - - the Special Fund is only Comp.
4 They - - - they're like a fish out of water when
5 they're not - - - when they're not in Comp. And - -
6 - and I think the two of you now are agreeing that
7 you're in Supreme Court, and I don't even know how
8 that happens.

9 MS. LEVINE: Well, even though - - - even
10 though this Special Funds only is liable for
11 reimbursement of certain benefits that are paid to
12 the carrier under 15(8), there is no remedy for a
13 workers' compensation carrier to seek reimbursement
14 if it fails to obtain consent. Now it these - - -

15 JUDGE STEIN: What's the basis of the
16 consent requirement?

17 MS. LEVINE: What is - - - the basis of the
18 consent requirement is in Section 29(5) in that - - -

19 JUDGE STEIN: Where?

20 MS. LEVINE: The Catapano court
21 specifically said - - - the Third Department held in
22 Catapano v. Jaw that where 15(8) liability has been
23 found pursuant to workers' compensa - - - pursuant to
24 Workers' Compensation Law Section 29(5), the carrier
25 must seek prior consent from the fund - - -

1 JUDGE STEIN: Okay. And what - - - what
2 was Catapano based on? I mean, where did they - - -
3 I guess I don't see it in the statute at all, but
4 everybody - - - everybody, including both sides here
5 - - -

6 MS. LEVINE: Yeah.

7 JUDGE STEIN: - - - seem to agree that that
8 is a requirement. Is that because the Third
9 Department said so?

10 MS. LEVINE: That - - -

11 JUDGE STEIN: Is it as simple as that or -
12 - -

13 MS. LEVINE: I believe the Third Department
14 did base its reasoning on prior Workers' Compensation
15 Board decisions such as Brigotta Farmland - - -

16 JUDGE PIGOTT: If I have a - - - if I have
17 a personal injury case and I settle it without the
18 consent of the carrier, without - - - without the - -
19 -

20 MS. LEVINE: Correct.

21 JUDGE PIGOTT: - - - you would be in that -
22 - - you - - - you would be complaining in the context
23 of the - - - of the personal injury lawsuit. You'd
24 be going in and saying, you know, judge, they - - -
25 they settled this case for half a million dollars and

1 we've got a lien of 330,000 dollars and they didn't
2 talk to us and we're entitled to that money. But it
3 would be in the context of the lawsuit.

4 You're outside of that, and you're outside
5 of workers' comp. And - - - and I don't know - - - I
6 mean, Comp knows Comp. They - - - they know when the
7 - - - when the Special Fund kicks in, they know, you
8 know, what it has to pay.

9 You've started an action in Supreme Court
10 outside of the plenary action, so somebody's got to
11 take somebody's word that there was indeed a
12 settlement and that it was for half a million doll -
13 - - because that's not part of this case. And then
14 they got to take somebody's word that it belongs in
15 Supreme Court, as opposed to workers' comp where
16 everybody was.

17 MS. LEVINE: I understand. In every
18 scenario, when there is a - - - an action pursuant to
19 29(5) by an injured worker, it occurs because a
20 third-party action has already been settled, and it
21 is out of the court.

22 Now you bring up - - - you have to bring a
23 plenary action in the Supreme Court in the trial
24 court where the third-party action was pending in
25 order to seek a consent order, in order - - - in

1 order to continue your workers' compensation
2 benefits.

3 JUDGE PIGOTT: But while you're saying - -
4 - only if you fail in what you're supposed to do.

5 MS. LEVINE: Correct.

6 JUDGE PIGOTT: You're supposed to get
7 consent before the resolution of the case - - -

8 MS. LEVINE: Correct, Your Honor.

9 JUDGE PIGOTT: - - - and you didn't do
10 that.

11 MS. LEVINE: Correct.

12 JUDGE PIGOTT: So now you say, well,
13 because we didn't do that, we have a right to begin
14 an action in a different court, under a different
15 index number, and everybody's got to take our - - -
16 and apparently they're willing to - - - but say, our
17 word for it, that there was a case, that it was
18 settled, that there was a lien, that the lien was
19 more than the - - - the five years, more than the - -
20 - the - - - and therefore the Special Fund had to - -
21 - has a - - - a reimbursement, and we're entitled to
22 make them consent, because of that.

23 MS. LEVINE: We believe that based on a
24 fair and reasonable interpretation of Workers'
25 Compensation Law 29(5) that the carrier should be

1 able to seek the same judicial remedy. There's an
2 analogy. We're arguing that there is an analogy.
3 The Workers' Compensation Board cannot issue a
4 consent order. If - - -

5 JUDGE PIGOTT: Well, doesn't consent imply
6 it's - - - it's voluntary? I mean, I - - - I don't
7 consent to something that somebody tells me I have to
8 do. I mean, I - - - I either consent or then
9 somebody goes and gets an order and makes me.

10 MS. LEVINE: Correct.

11 JUDGE PIGOTT: All right. So you're not
12 looking for a consent. You're looking for an order
13 making them pay you something based upon the Workers'
14 Compensation Law. And you're doing it in Supreme
15 Court, not within the context of the plenary action,
16 but because you started a new action over here.

17 MS. LEVINE: Correct.

18 JUDGE PIGOTT: Okay.

19 MS. LEVINE: And, again, the analogy would
20 be, the - - - the mechanisms that are in Section
21 29(5), the benefits to a claimant are directed by the
22 Workers' Compensation Board. However, if the
23 claimant does not seek prior consent, those benefits
24 can be terminated by the workers' compensation
25 carrier. And in order to resume those payments, the

1 claimant has to go to the trial court in order to
2 seek an order of consent.

3 JUDGE PIGOTT: And - - -

4 JUDGE STEIN: You're just seeking a
5 parallel construction of this statute - - -

6 MS. LEVINE: Yes, correct.

7 JUDGE STEIN: - - - correct? Is that
8 basically your argument? That if - - - if - - - if
9 you're saying that the claimant has to get consent of
10 the carrier and you're saying that the carrier has to
11 get consent of Special Funds, if you allow the
12 claimant to go to a court and seek nunc pro tunc
13 order, then you have to allow us to do that.

14 MS. LEVINE: Yes, Your Honor. That - - -

15 JUDGE STEIN: Is that your argument,
16 basically?

17 MS. LEVINE: That is exactly our argument.
18 And since the - - - the Third Department in Catapano
19 v. Jaw has stated that the workers' compensation
20 carrier must seek prior consent or lose its right to
21 reimbursement, and leave to appeal was denied here.
22 This leaves the carrier without a remedy. Section
23 29(5) is an equit - - - is - - -

24 JUDGE PIGOTT: Well, you're without a
25 remedy because you didn't do - - - I don't want to

1 say you didn't do your job, but I mean, you should
2 have gotten this consent at the time that the
3 settlement was going.

4 MS. LEVINE: Yes, Your Honor, but - - -

5 JUDGE PIGOTT: So once you - - - once that
6 happens, I mean, why does everything else have to
7 change? I mean - - -

8 MS. LEVINE: The intent - - -

9 JUDGE PIGOTT: - - - you're out of luck.

10 MS. LEVINE: The intent of the statute is
11 equitable. It is to prevent double recovery and also
12 the intent of 15(8), which directs - - - which
13 permits reimbursement from the Special Fund was
14 enacted, in part, to remove some of the obstacles to
15 carrier reimbursement where there is this second
16 injury. So these statutes are remedial and - - -

17 JUDGE RIVERA: Well, was that to
18 incentivize?

19 MS. LEVINE: Excuse me, I'm sor - - -

20 JUDGE RIVERA: Was that to incentivize
21 coverage or am I misun - - -

22 MS. LEVINE: I'm sorry?

23 JUDGE RIVERA: What - - - is there some
24 other goal? Was there some incentivizing goal?

25 MS. LEVINE: As far as - - -

1 JUDGE RIVERA: Of the statute?

2 MS. LEVINE: Of Section - - -

3 JUDGE RIVERA: Incentive to insure - - -
4 right, I understand the point about reducing the
5 burden on you. Is there something to incentivize
6 you?

7 MS. LEVINE: To incentivize the carrier?

8 JUDGE RIVERA: Yes.

9 MS. LEVINE: To comply - - - I'm sorry; I'm
10 not understanding.

11 JUDGE RIVERA: Yes, to comply.

12 MS. LEVINE: To comply?

13 JUDGE RIVERA: To ensure that you get this
14 money.

15 MS. LEVINE: Obtaining reimbursement.

16 JUDGE RIVERA: Right.

17 MS. LEVINE: Obtaining reimbursement.

18 That's the incentive. So the carrier's left without
19 a remedy and there are cases when the failure to
20 obtain consent is in - - - inadvertent and many cases
21 where there's no prejudice to the fund. So to deny
22 the carrier a remedy would be inequitable and not in
23 - - - in a fair reading and a logical reading of the
24 statute.

25 JUDGE RIVERA: But it's not automatic,

1 right? It's still for the court to decide.

2 MS. LEVINE: What - - -

3 JUDGE RIVERA: What - - - what would you
4 have to establish to the court?

5 MS. LEVINE: We would have to establish
6 under 15(8) the entitlement to reimbursement, that
7 there is a prior existing injury, and a second injury
8 that's a workers' compensation injury, and after it
9 has - - - it has to be a material and greater injury.
10 And after 260 week, the carrier would be entitled to
11 reimbursement. The Workers' Compensation Board would
12 find that the carrier is entitled to that
13 reimbursement.

14 JUDGE RIVERA: Do you have to establish why
15 you didn't seek consent?

16 MS. LEVINE: Would we - - - we would have
17 to establish why we did not seek consent. That is
18 set forth in 29(5). There are certain steps - - -

19 JUDGE PIGOTT: Of the Workers' Compensation
20 Law.

21 MS. LEVINE: Of the Workers' Compensation
22 Law that apply to the claimant and that we do not
23 argue should apply to a carrier in making a motion in
24 the trial court. That - - -

25 JUDGE RIVERA: So - - - so it's possible

1 that the court might not grant this?

2 MS. LEVINE: Absolutely. The - - - in the
3 granting of such motion is left to the sound
4 discretion of the trial judge.

5 JUDGE RIVERA: So you're already
6 incentivized to try and get the - - - the consent
7 upfront, because you risk the judge not agreeing with
8 you?

9 MS. LEVINE: Correct, particularly if
10 there's a delay.

11 JUDGE PIGOTT: But just so - - - just so
12 I'm clear. Catapano, the - - - the claimant was - -
13 - would - - - I mean, the - - - the injured worker,
14 that was his case. I mean, he - - - he was the - - -
15 he was in the case. In your case, that one's done.
16 I mean, I - - - I would just picture if I was a
17 Supreme Court judge and you came to me with this and
18 said, this is a workers' compensation case; there was
19 a settlement. We were supposed to get consent. We
20 didn't. They now refuse to give consent. We want
21 you to order them to give consent, because - - - and
22 then you'd have to go through that whole litany of
23 the - - - of the 160 weeks or whatever - - - whatever
24 it is, et cetera.

25 And I don't understand why, me, as a - - -

1 as a Supreme Court - - - or any judge, would say,
2 okay, I don't know anything about the plenary action;
3 I know little or nothing about workers' comp, but I'm
4 going to accept your representations on all of this.
5 I mean, why - - - why wouldn't it have been in either
6 one of the other places as opposed to a plenary
7 action attached to nothing?

8 MS. LEVINE: Well, what ha - - - in
9 Catapano and in many other 29(5) motions that I have
10 appeared on, the underlying third-party action often
11 times has been settled or disposed of in one way or
12 another quite a long time ago. And for whatever
13 reason, the claimant then comes back before the
14 Workers' Compensation Board and says, where are my
15 benefits? I'm entitled to benefits. They did not
16 seek consent to settlement, and the carrier stopped
17 paying benefits. In that ca - - -

18 JUDGE PIGOTT: In Comp, at the Comp Board.

19 MS. LEVINE: At the Comp Board, but then
20 that claimant, however many months or years later,
21 and in often times, it is years later, because there
22 is an established delay, will go to the Supreme
23 Court, and certainly not the same justice as - - -

24 JUDGE PIGOTT: No, I see that. I see the
25 claimant doing it.

1 MS. LEVINE: Correct.

2 JUDGE PIGOTT: The claimant's not here.

3 MS. LEVINE: The claimant is not in this
4 case.

5 JUDGE PIGOTT: So - - -

6 MS. LEVINE: Claimant was in this case.

7 JUDGE PIGOTT: But he's not anymore, so I -
8 - - do you see my - - - my point? In other words, if
9 - - - if - - - if - - -

10 MS. LEVINE: I do.

11 JUDGE PIGOTT: Okay.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.
13 Counsel?

14 MS. SINGER: Good afternoon. I'm Jill
15 Singer for the Special Funds Conservation Committee.
16 And I'm sure you don't hear this very often, but I
17 agree - - - I agree with the appellant that - - - I
18 mean, it's undisputed.

19 JUDGE FAHEY: Given the fact that you
20 agree, it - - - it goes back to Judge Pigott's point.
21 Shouldn't we be hearing from the Workers'
22 Compensation Board? You're not-for-profit, right or
23 you're - - -

24 MS. SINGER: Right.

25 JUDGE FAHEY: - - - you're the agent for a

1 not-for-profit, right?

2 MS. SINGER: Exactly.

3 JUDGE FAHEY: Why wouldn't be hearing from
4 the Workers' Comp Board in this context?

5 MS. SINGER: Because the - - - the carrier
6 never pursued this under Section 23 of the Workers'
7 Compensation Law which would have been the - - -
8 would have went to the Board panel, and then it would
9 go to the Third Department, and then you're right,
10 the exclusive jurisdiction over workers' comp cases
11 are - - - are with the Third Department, in which
12 case the Board would be a party to that action, but
13 this is not the avenue that - - -

14 JUDGE PIGOTT: That's the normal way,
15 right?

16 MS. SINGER: Right. If it's a - - - if
17 it's a - - -

18 JUDGE FAHEY: So it had come up that way,
19 then the Workers' Comp Board would be here right now
20 arguing their point of view and what policy they
21 represent. But without them here - - -

22 MS. SINGER: Yes.

23 JUDGE FAHEY: - - - you two both agree on
24 what result we should come to - - -

25 MS. SINGER: Yes.

1 JUDGE FAHEY: - - - and that would be a
2 detriment, theoretically, to them, even though they
3 aren't here.

4 JUDGE STEIN: But hasn't the Board said
5 that they have no authority to grant a nunc pro tunc
6 order? Does - - -

7 MS. SINGER: There are - - -

8 JUDGE STEIN: Haven't they said that - - -

9 MS. SINGER: Yes.

10 JUDGE STEIN: - - - it needs to go through
11 the court?

12 MS. SINGER: There are - - - I mean,
13 there's case law that the Board does not have the
14 authority to issue a consent. That's their - - - you
15 know, it's not just Board decisions, there are - - -
16 there are case - - -

17 JUDGE STEIN: So - - - so could - - - could
18 the carrier go to the Board and seek consent and have
19 it get to the Appellate Division that way? That - -
20 - that's my question.

21 MS. SINGER: They - - -

22 JUDGE STEIN: Is - - - is there a - - - is
23 there a way to do that?

24 MS. SINGER: They didn't do that, and I - -
25 - I don't - - - so I - - - I can't really answer what

1 would have happened - - -

2 JUDGE STEIN: Has - - -

3 MS. SINGER: - - - if they had done that.

4 But I know that there are - - -

5 JUDGE STEIN: Has anybody done that and
6 you're not - - - I mean, you - - - your counsel for
7 the Special Funds. I know you've been counsel for
8 the Special Funds for a while. Has anybody done that
9 before?

10 MS. SINGER: I've never seen anyone try to
11 get consent from the Board, but I have seen the Board
12 in - - - in decisions say, hey, we're not - - - we
13 don't have the authority to give consent, and that's
14 probably the reason that the appellant didn't take
15 that route, and they went immediately to Supreme
16 Court and filed their petition.

17 JUDGE RIVERA: So, I'm sorry. How did - -
18 - how did - - - how did the Board - - - it - - - how
19 did that come up in those decisions you're aware of
20 in front of the Board, because someone went to the
21 Board?

22 MS. SINGER: No, no, I think it was just
23 dicta in the decision itself where they - - - they
24 just said, oh, in - - - in similar cases, where the
25 carrier did not seek the consent of the Special

1 Funds, there have been findings - - - which is what
2 led to Catapano - - - findings where the Board said,
3 okay, well you waived your right to reimbursement;
4 you didn't get the consent of the Special Funds, and
5 in some of those - - - those decisions, just in the
6 dicta, it was implied that - - - that the carrier
7 would need to go to - - -

8 JUDGE PIGOTT: Why do you - - - why do they
9 need your consent at all?

10 MS. SINGER: Because we're a lienor. We -
11 - - we reimburse them for the benefits.

12 JUDGE PIGOTT: You're a lienor on what?

13 MS. SINGER: We reim - - - for benefits
14 paid prior - - - any benefits - - - well, we
15 reimburse the carrier after a certain number of
16 weeks.

17 JUDGE PIGOTT: After - - - after sixty
18 months, right?

19 MS. SINGER: Well, 260 weeks or - - -

20 JUDGE PIGOTT: Right, yeah.

21 MS. SINGER: - - - well, it depends on - -
22 -

23 JUDGE PIGOTT: Five years.

24 MS. SINGER: - - - the case, right, so then
25 that money is essentially our money. We're

1 reimbursing them at, you know - - - under statute.

2 JUDGE PIGOTT: So, but - - - but isn't it
3 within the context of the - - - of the plenary
4 lawsuit? In other words, the injured party here
5 settled it for half a million dollars. There was a
6 compromise in which the - - - the carrier got roughly
7 a hundred and some thousand, there - - - I assume
8 there was a waiver of - - - of - - - of future
9 payments, you know, the holiday, as they always talk.

10 MS. SINGER: Correct.

11 JUDGE PIGOTT: You should have been
12 involved in that, should you not?

13 MS. SINGER: That's exactly the point.
14 They didn't - - - they should have gotten us
15 involved, because we are - - - we - - - you know, we
16 are obligated to reimburse them, but they didn't get
17 us involved, and that's the whole - - -

18 JUDGE PIGOTT: But that's - - - but that's
19 in the context - - -

20 MS. SINGER: - - - problem.

21 JUDGE PIGOTT: - - - of the plenary
22 lawsuit. That's why I don't know understand why
23 you'd be over here, where - - - I mean, suppose I'm
24 the judge, and I say, you know what? I think - - - I
25 think, not only are they right, I think you should

1 pay the first five years. I think you should be paid
2 from the beginning. That would be harmful to the - -
3 - as Judge Fahey's pointing out, to perhaps the
4 Workers' Compensation Board, who's not a party, and
5 would set a precedent that maybe nobody likes,
6 because it has absolutely nothing to do with Comp,
7 but I think it's equitable and fair, and I'm going to
8 do it. And - - - and - - - and I don't even know
9 what happened to the - - - to the injured party.

10 So I'm wondering why, everybody who ought
11 to be interested in this case is not here, and the
12 two of you are agreeing, yeah, we could go to the
13 Supreme Court and - - - and - - - and we can order
14 you - - - I don't know how, you know - - - to pay
15 them, and I don't con - - - I don't think that's the
16 consent.

17 MS. SINGER: Like Ms. Levine said, she's
18 making the argument that it's a para-law - - - it's a
19 parallel to the - - - the base of the statute that's
20 already in place. 29(5) allows a claimant to go
21 retroactively to the court to get judicial consent.

22 JUDGE PIGOTT: Because he's hurt or she's
23 hurt. She's - - - she's got on effect on this
24 because after the - - - after the expiration and
25 you're not there - - -

1 MS. SINGER: Right, I think she - - - her
2 argument as well, she's going to be - - - the
3 carrier's going to be hurt because their
4 reimbursement's going to be cut off - - -

5 JUDGE PIGOTT: Only if - - -

6 MS. SINGER: - - - if they don't get the
7 consent.

8 JUDGE PIGOTT: Yeah, because if the
9 claimant wants to bring, you know - - - gets to the
10 end and then is looking for you and you're not there,
11 Ace is going to have to pick it up, but that's the
12 claimant. And the claimant is not going to care,
13 because you - - - one of you is going to pay, because
14 that's - - - you know, that's - - - that's pretty
15 clear.

16 MS. SINGER: Right. The claimant has no
17 interest in this. They've - - - they're getting
18 their workers' compensation benefits the way - - -
19 you know, I - - - assuming the credits more than
20 elapsed by now. I mean, they're getting their
21 workers' compensation benefits. This particular
22 action is about the carrier and the Special Funds and
23 the reimbursement, which is in jeopardy. It's - - -
24 under Catapano, if they waive their reimbursement
25 because they didn't come to us when they should have

1 for consent.

2 JUDGE STEIN: If they don't - - -

3 JUDGE ABDUS-SALAAM: If you both agree - -
4 - I'm sorry.

5 JUDGE STEIN: Go ahead.

6 JUDGE ABDUS-SALAAM: You both agree that
7 your consent is required.

8 MS. SINGER: Correct.

9 JUDGE ABDUS-SALAAM: Do we have to decide
10 that in order for us to do what you both want us to
11 do to reverse this case and send it back?

12 MS. SINGER: I don't think that's disputed.
13 I think it's - - - it's - - - the Catapano, it's - -
14 - it's - - - I think clear. I don't think - - -

15 JUDGE ABDUS-SALAAM: But what if - - -

16 MS. SINGER: - - - it has to be a new
17 decision.

18 JUDGE ABDUS-SALAAM: What if Catapano was
19 just really not before us and was wrongly decided?
20 Do we have to - - - we have to follow it?

21 MS. SINGER: I think it's - - - there's
22 nothing - - - I mean, that the law under Catapano is
23 if the carrier doesn't get consent, which they
24 concede they didn't, then they - - - then they are
25 out for the reimbursement. So, I just think it's a

1 matter of fact that they didn't get the consent, so
2 they're out the reimbursement.

3 JUDGE STEIN: Could - - - could it
4 ultimately affect the claimant if - - - if we said
5 that there was - - - there's no remedy for this
6 failure to get consent of Special Funds, would - - -
7 I mean, would it be realistic to think that the
8 carriers might then raise their rates and - - - and
9 that somehow that there ultimately would be some fall
10 out, no?

11 MS. SINGER: I don't think so. Actually,
12 they - - - it's quite the opposite. They would make
13 sure that they got our consent, if - - - if that was
14 in fact the finding. So I don't see that happening.
15 I don't see an - - - any negative consequence for the
16 claimant.

17 JUDGE PIGOTT: I guess it's not in front of
18 us, but why would you - - - why do you - - - why
19 would not consent under the circumstances of this
20 case?

21 MS. SINGER: Well, they didn't ask - - -
22 they didn't ask for us to consent.

23 JUDGE PIGOTT: That aside?

24 MS. SINGER: They came, you know, several
25 months later and, I mean, we have the Catapano case,

1 which says, hey, you don't have to reimburse them if
2 they didn't get your consent, so

3 JUDGE PIGOTT: So if we - - -

4 MS. SINGER: - - - as a represent - - - you
5 know, as the - - - as an attorney for the Special
6 Funds, why would I then go and say, okay, we're just
7 going to - - - we're just going to reimburse you
8 anyway, when I have a case that says I don't have to.

9 JUDGE PIGOTT: So it wouldn't bother you if
10 we ordered you to - - - to assume the - - - the - - -
11 the duties that you normally undertake, even though
12 they didn't get your consent.

13 MS. SINGER: I think they'd need to go
14 through the motion. I mean, they would need to go
15 through the hoops, I should say, of - - - of
16 obtaining that consent retroactively, just like a
17 claimant who didn't get the consent of the carrier.
18 It's not as simple as just saying, okay, I'll give
19 consent. I mean, there's - - - under section - - -

20 JUDGE RIVERA: But it's not automatic,
21 right? The judge might deny it?

22 MS. SINGER: Well, right, because under
23 Section 29(5), there's a whole of like - - - a whole
24 series of - - - of steps that they need to show.

25 JUDGE PIGOTT: Like - - -

1 MS. SINGER: They have to file a petition
2 and then they have - - -

3 JUDGE PIGOTT: A petition, where?

4 MS. SINGER: To get the pet - - - the nunc
5 pro tunc order, the judicial consent. The petition
6 under Section 29(5) gets filed with the - - - and
7 this again, relates to claimants versus carriers, not
8 necessarily - - - like, there's nothing like we said
9 out there in this - - - to deal with this particular
10 situation. But under Section 29(5), it is a very - -
11 - there's a very well-structured framework - - -

12 JUDGE PIGOTT: You filed - - -

13 MS. SINGER: - - - for what - - - for what
14 a claimant has to do. What they need to produce in
15 order for a judge to be able to make a - - - an
16 intelligent decision whether it - - -

17 JUDGE PIGOTT: But that's the claimant?

18 MS. SINGER: Right, that's the claimant,
19 like - - - and that's what - - - their argument is
20 that should apply here also.

21 JUDGE PIGOTT: In Comp?

22 MS. SINGER: Correct. That's the claimant
23 in Comp going to the Supreme Court looking for
24 retroactive consent, because for whatever reason they
25 didn't get consent initially and that's a remedy

1 that's set forth in Section 29(5) allowing claimants
2 who for whatever reason didn't get the consent, or
3 maybe the carrier just withheld consent - - -

4 JUDGE RIVERA: Is - - - is it your position
5 they have to satisfy more than these requirements - -
6 -

7 MS. SINGER: No.

8 JUDGE RIVERA: - - - that apply to the
9 claimant?

10 MS. SINGER: No. I - - - I mean, they're
11 actually pretty stringent. They're - - - they're
12 pretty decent requirements. I - - - I have - - -
13 we're just agreeing that they should have that remedy
14 and that - - -

15 JUDGE RIVERA: So - - -

16 MS. SINGER: - - - they should meet those
17 requirements.

18 JUDGE RIVERA: So you're protecting the
19 integrity of the fund and the integrity of the
20 process - - -

21 MS. SINGER: Correct.

22 JUDGE RIVERA: - - - the way you see this
23 case - - -

24 MS. SINGER: Correct.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

1 MS. SINGER: Thank you so much.

2 CHIEF JUDGE DIFIORE: Counsel?

3 MS. LEVINE: Thank you.

4 CHIEF JUDGE DIFIORE: Did you consider
5 going to the Board?

6 MS. LEVINE: We cannot go to the Board,
7 because the Board does not issue an order of consent,
8 therefore there is nothing to appeal to a Board panel
9 or a full Board under Section 23. And therefore,
10 there will be no order of the Board, a full Board to
11 go up to the Third Department.

12 Therefore - - - therefore the carrier has
13 absolutely no remedy. In the Empire State case,
14 which was determined by the Second Department, the
15 carrier failed to get consent and that was, I
16 believe, right after the Catapano decision came down.

17 So that was a particularly, you know,
18 outstanding, you know, issue, because it was - - -
19 the rule was not in place. It was an inadvertent mat
20 - - - you know, situation where the carrier didn't
21 not obtain prior consent. And - - - and as Ms.
22 Singer pointed out, the Fund, under Catapano, can
23 just withhold consent because it wants to. And that
24 does not, you know, stand to reason. That's not in
25 keeping with the - - -

1 JUDGE RIVERA: No, no, it's withho - - - it
2 - - - it's that you didn't comply, right? So they're
3 - - - they're - - -

4 MS. LEVINE: Correct.

5 JUDGE RIVERA: It's not withholding. It
6 says that they're - - - they're not going to pay you
7 because you failed to comply with the requirements
8 that were imposed upon you. You're arguing that
9 there's a safety net for this.

10 MS. LEVINE: What I'm saying, Your Honor,
11 is that there are occasions when there is an
12 inadvertent failure by the carrier to seek that
13 consent at the time that the third-party action
14 settles.

15 JUDGE RIVERA: Is that a requirement, by
16 the way?

17 MS. LEVINE: I'm - - - I'm sorry to - - -

18 JUDGE RIVERA: In terms of the statute for
19 purposes - - - what - - - what she's already set out
20 - - - these are stringent requirements. Is that one
21 of the requirements that it's inadvertent?

22 MS. LEVINE: Well, under - - - under 29(5)
23 you have to prove reasonableness, no delay, no
24 prejudice to the carrier, and among - - - among other
25 things, but two of the big factors, and again, it's

1 up to the discretion of the trial court. You know,
2 there have been cases when the delay has been
3 egregious or when a settlement is not reasonable.
4 And where the fault is totally due to - - -

5 JUDGE PIGOTT: But if the settlement's not
6 reasonable, that's in the context of the plenary
7 action, right?

8 MS. LEVINE: Correct, Your Honor.

9 JUDGE PIGOTT: Doesn't - - - I - - - I - -
10 - you can see where I'm hung up on this. I - - - I -
11 - - it just seems to me that the claimant, who under
12 29 can - - - can make this petition, is not in this
13 lawsuit. And - - - and - - - and whether or not the
14 - - - the settlement was a good one or not, or
15 whether, you know, et cetera, can't be in front of
16 this court, because you - - - you - - - it seems to
17 me what you should have done is - - - is move within
18 the context of - - - of - - - of - - - I forget his
19 last name - - - the - - - the lawsuit that was
20 brought on the - - - on the plenary action, and - - -
21 and then said, you know, this - - - we need the
22 consent of this.

23 MS. LEVINE: 20 - - - a motion for 29(5),
24 when a - - - when a lawsuit is - - - is still live -
25 - -

1 JUDGE PIGOTT: Right.

2 MS. LEVINE: - - - okay, a claimant can
3 request consent and can even do that, you know, in -
4 - - in the courtroom. Once the case is settled, then
5 the - - - the claimant would be in - - - in the same
6 position as we're arguing the carrier is in now,
7 because that third-party action is settled, and what
8 we're talking about here are the residual rights that
9 a claimant would then have to obtain continuing
10 workers' compensation benefits.

11 Sometimes when a claimant has not sought
12 consent, the carrier has not been able to recoup its
13 lien. So that is an equitable consideration also,
14 just like here - - -

15 JUDGE PIGOTT: In the context - - -

16 MS. LEVINE: - - - the Fund has its lien in
17 - - - in the context of workers' compensation
18 benefits - - -

19 JUDGE PIGOTT: - - - of the plenary action.

20 MS. LEVINE: - - - reimbursement thereof, a
21 third-party action arising from - - -

22 JUDGE PIGOTT: Well, there's no third-party
23 action. I mean, there - - - there - - -

24 MS. LEVINE: There was arising from - - -

25 JUDGE PIGOTT: Well - - -

1 MS. LEVINE: - - - the same injuries.

2 JUDGE PIGOTT: It could be in any given
3 case, a third party - - - but it's not always true.
4 And - - - and - - - I mean, in a simple auto accident
5 case, there can be a comp lien, and then it's a
6 straight-up negligence case. And the State and the -
7 - - and the Special Fund can kick in, because of - -
8 - of the type of injury. You wouldn't have any
9 third-party action. They would need your consent.
10 And if you've got - - - if you're worried about the
11 tail on the Special Fund, you need their consent to
12 get your consent to get the thing settled, all of
13 which affects the plaintiff.

14 MS. LEVINE: This consent issue, Your
15 Honor, only - - - really only concerns when there is
16 a third-party action that arose out of the same
17 injuries as the workers' compensation claim, so it is
18 that limited circumstance. And in an automobile, you
19 know, accident case obviously, the - - - the - - -
20 there is a - - - the no-fault consideration, so.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MS. LEVINE: Thank you very much.

23 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Ace Fire Underwriters Insurance Company v Special Funds Conservation Committee, No. 177, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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