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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF BETH V.,

Appellant,

-against-

No. 202

NEW YORK STATE OFFICE OF CHILDREN  
AND FAMILY SERVICES, and NEW YORK  
STATE INSURANCE FUND, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
October 17, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 202, Matter of Beth  
2 V. v. The New York State Office of Children and  
3 Family Services.

4 Counselor, would you like any rebuttal  
5 time?

6 MR. BUCKLEY: Yes, I would, Your Honor, if  
7 I could have two minutes.

8 CHIEF JUDGE LIPPMAN: Two minutes. Sure.  
9 Go ahead. You're on.

10 MR. BUCKLEY: This is a claim for Workers  
11 Compensation benefits, and Beth V. - - -

12 CHIEF JUDGE LIPPMAN: Counsel, talk to us  
13 about punitive damages. Were there any punitive  
14 damages at all?

15 MR. BUCKLEY: No, there were no punitive  
16 damages, Your Honor, in this case.

17 CHIEF JUDGE LIPPMAN: So how does that  
18 affect the issue that we have in front of us?

19 MR. BUCKLEY: I don't believe that it  
20 affects it in any way because the damages in this  
21 case were set forth in a stipulation that was - - -

22 JUDGE READ: Well, that's stipulations of  
23 physical injuries, correct?

24 MR. BUCKLEY: Yes, physical injuries  
25 including the loss of enjoyment of life and the

1 emotional response thereto.

2 JUDGE READ: And you did that for tax  
3 purposes; is that correct?

4 MR. BUCKLEY: Yes. If you - - - if you do  
5 a stipulate - - - or if you settle a claim for  
6 physical injuries, it's nontaxable.

7 JUDGE READ: What if you had - - -

8 MR. BUCKLEY: If you settle a claim for  
9 loss of wages, punitive damages, it would be taxable.

10 JUDGE READ: Could you have settled the  
11 claim and allocated everything to pain and suffering,  
12 for example?

13 MR. BUCKLEY: Well, you probably could, but  
14 the stipulation was more meticulous and more - - -  
15 more specific than that because the attorney general  
16 who was representing the State of New York who  
17 ultimately paid this settlement set forth a  
18 stipulation that required a lien of the Victims  
19 Compensation Board to be paid back, and there was no  
20 - - - absolutely no mention of the adjustment or  
21 resolution of any of the Workers Compensation claims  
22 because the case was being settled only for the  
23 physical injuries, the emotional reaction thereto,  
24 and the loss of enjoyment of life.

25 JUDGE SMITH: But if you - - - you've got a

1           third-party tort award, the lien - - - the comp lien  
2           attaches to the whole thing. Certainly it attaches  
3           to pain and suffering as well as the medical and the  
4           lost wages, doesn't it?

5                   MR. BUCKLEY: Yes, Your Honor, but if you  
6           follow the true statutory construction of Section 29,  
7           subdivision 1 and 6, the lien only attaches when you  
8           bring a claim against somebody who is not - - -

9                   JUDGE SMITH: Not in the same employ.

10                   MR. BUCKLEY: - - - not in the same employ.  
11           When you bring a claim against an employer for other  
12           actions other than - - -

13                   JUDGE SMITH: Haven't we held that we don't  
14           take that literally? I mean, the other statute, the  
15           statute - - - we have a statute that says you can  
16           never bring any cause of action whatever against your  
17           employer, but we said there are exceptions to that,  
18           and there are also exceptions to the Section 29 lien.

19                   MR. BUCKLEY: Yes. But in this case, I  
20           don't think the exception should attach because the  
21           wrong that was done to Beth V. was a continuing wrong  
22           that started months before this lawsuit was commenced  
23           and she had the injuries. She was - - - there was a  
24           hostile work environment where she complained about  
25           the conduct of this inmate, and nothing was done.

1 And that was the basis of the deprivation of her  
2 constitutional rights.

3 CHIEF JUDGE LIPPMAN: What makes the offset  
4 here unfair? Why is it unfair - - -

5 MR. BUCKLEY: Well, it's unfair because - -  
6 -

7 CHIEF JUDGE LIPPMAN: - - - from a policy  
8 point of view?

9 MR. BUCKLEY: From a policy point of view,  
10 when Mr. Bains, who testified in this case, he's the  
11 lawyer that handled the civil rights lawsuit, he had  
12 no economic report that would have set up what her  
13 economic damages were in the lawsuit. There was no  
14 claim in the lawsuit or any projection of future  
15 medical losses after the settlement of the lawsuit  
16 because in the stipulation that was done before the  
17 federal district court, which purports to be the  
18 entire agreement of all the parties, and it does say  
19 that, there was no mention of limiting or a credit to  
20 the State of New York for the Workers Compensation  
21 lien.

22 JUDGE GRAFFEO: Counsel, how do you deal  
23 our Petterson precedent, because Petterson said if  
24 it's the same injury that's the predicate for the  
25 Workers Comp award and then a later tort award, that



1                   MR. BUCKLEY: That's how Patterson (sic) is  
2 distinguished. And Patterson was an impleader case  
3 where the employer was - - - that's the accident that  
4 happened in Connecticut, and Connecticut law allowed  
5 a co - - - a suit against a co-employee, which we  
6 don't allow in New York state.

7                   JUDGE PIGOTT: Mr. Buckley, with respect to  
8 the punitive aspect of this and the testimony of the  
9 lawyer that it was for punitive damages, is it your  
10 view that simply saying that and saying it to say  
11 that it's for purposes of income tax - - - for income  
12 tax purposes, does that do it? I mean, because  
13 punitive damages is pretty serious, and in any other  
14 case, it's not even covered by insurance.

15                   MR. BUCKLEY: Right.

16                   JUDGE PIGOTT: So did the defendant know  
17 that this money was being - - - was being paid out by  
18 the State of New York in punitive damages for what  
19 occurred there?

20                   MR. BUCKLEY: I think probably the reason  
21 why the State didn't want to denominate this as  
22 punitive damages is they were paying on behalf of the  
23 co-employees that were also - - - the three  
24 supervisors that were brought into this, and if it  
25 was punitive damages at the settlement, the State of

1 New York couldn't indemnify them.

2 JUDGE PIGOTT: Well, that's exactly right.  
3 And so I'm wondering why somebody wasn't saying that  
4 because if it is punitive damages, State doesn't have  
5 to pay, and it's going to come out of the employees,  
6 and they're not covered by insurance for punitive  
7 damages. So all of that seems to gravitate to the  
8 point that it's not punitive damages, and the fact  
9 that somebody wants to call it that for purposes of  
10 the Internal Revenue Service is a whole separate  
11 argument with that part of the government, is it not?

12 MR. BUCKLEY: My understanding of the  
13 stipulation was that they said it was not punitive  
14 damages; it was for the physical injury, the loss of  
15 enjoyment of life, and the emotional upset.

16 JUDGE PIGOTT: Right. So your argument is  
17 that conscious pain and suffering - - -

18 MR. BUCKLEY: It's the pain and suffering,  
19 the loss of enjoyment of life. There was no dealing  
20 with the lost wages or the future lost wages or  
21 future medical.

22 JUDGE PIGOTT: So you're saying that if  
23 it's for conscious pain and suffering it's not  
24 subject to the Workers Compensation liens?

25 MR. BUCKLEY: That's - - - I would say that

1 in this particular case where you're bringing a case  
2 against an employer and co-employees, which by the  
3 statute says that there's no lien on those salaries.

4 JUDGE SMITH: You concede that in the  
5 typical case, the ordinary garden variety case, the  
6 lien does attach to pain and suffering damages?

7 MR. BUCKLEY: Yes, Your Honor, it does  
8 attach to pain and suffering in the usual garden  
9 variety case where you sue a true third party. The  
10 defendants in this case aren't third-party defendants  
11 as described by the statute. And I think there  
12 should be given some deference to statutory  
13 construction because it is pretty clear and  
14 unambiguous what's being stated in the statute.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.  
16 You'll have your rebuttal time. Thank you.

17 MR. BUCKLEY: Okay. Thank you, Your Honor.

18 MR. PHILLIPS: Good afternoon, Your Honors.  
19 Tom Phillips for the State Insurance Fund and the  
20 employer.

21 CHIEF JUDGE LIPPMAN: Counselor, does this  
22 case turn on whether it's punitive damages or not?

23 MR. PHILLIPS: I don't think it makes any  
24 difference, Your Honor. The statute says "all  
25 recoveries". And punitive damages essentially are

1 just a finding that there was negligence, but it was  
2 so bad that we're going to make an award to punish  
3 more than we would in a normal case.

4 JUDGE PIGOTT: Would the argument then  
5 follow that because you want to punish the employer -  
6 - - I realize there's insurance underneath, but  
7 because you want to punish the employer, you're not  
8 doing much punishing if you're saying but you're  
9 going to get all of this back because you don't have  
10 to pay for any medical and you don't have to pay for  
11 any lost wages.

12 MR. PHILLIPS: Well, I mean, the Court in  
13 Petterson read the - - - read the law to broadly  
14 effectuate what the legislature intended, which was  
15 to prevent a double recovery by the claimants and to  
16 shift the burden to the tortfeasor.

17 JUDGE SMITH: In the ordinary third-party  
18 case where there's no employer or co-employee in the  
19 picture, does the lien attach to punitive damages?  
20 Has that been decided?

21 MR. PHILLIPS: I don't - - - the board, in  
22 its infinite wisdom, said in its - - - one of its  
23 decisions in this case that punitive damages were not  
24 subject to the credit, but they didn't cite any  
25 authority for that, and I'm not aware of any. I've

1 never - - - absent when it came up in this case after  
2 the settlement, I've never seen - - - I've never  
3 personally dealt with a case where there were  
4 punitive damages and the issue came up.

5 In the Petterson case, the Court broadened  
6 this statute beyond its literal reading, and yet the  
7 legislature, since 1966, has actually amended the  
8 Workers Compensation Law twice, in the mid 1990s and  
9 in 2007, and they took no action to call out the fact  
10 that they really meant that it royally should not  
11 include actions against the employer and the  
12 co-employees.

13 JUDGE PIGOTT: Does it make sense - - -  
14 pardon me - - - that if the idea of punitive damages  
15 is to punish someone, to allow that someone to then  
16 use that money to avoid what it otherwise  
17 legitimately owes? You know what I mean?

18 MR. PHILLIPS: You mean included - - - is  
19 it right to include the punitive in the credit for  
20 the carrier?

21 JUDGE PIGOTT: No. Would the logic be that  
22 if the idea of punitive damages is to punish the  
23 tortfeasor, in this case it happens to be the  
24 employer, does it make sense to say we're punishing  
25 you by assessing \$100,000 in punitive damages for him

1 or her to then say, well, I'm going to get that back  
2 in the offset anyway, so I don't care what you call  
3 it?

4 MR. PHILLIPS: I believe there was a  
5 federal court decision that was cited in one of our  
6 memos to the board where the federal government, the  
7 district court made the distinction between self-  
8 insured employers and employers who purchased a  
9 policy. And they said in a case where a policy is  
10 purchased so that the employer's damages are limited  
11 to the premium they paid for the policy, that it was  
12 okay to impose the additional penalty, essentially,  
13 against the employer, but in a case where the  
14 employer was self-insured, essentially they'd be  
15 punished twice; they'd be paying twice for the same  
16 injuries, and so it wouldn't be proper.

17 JUDGE PIGOTT: Well, punitive is not for  
18 injury, right? It's not because she was - - - had  
19 all of the damages that she alleged. It's to punish.  
20 And if it's to punish, it just seems to me that logic  
21 would then say that you can't - - - you can't say  
22 you're being fined fifty dollars and say, well,  
23 that's okay because I'll use that money - - - it  
24 should be offset against my license, or something. I  
25 mean, somebody says you can't do that, you can't be

1 punished and say that, because I was punished, I get  
2 my money back.

3 MR. PHILLIPS: Well, I think I'd  
4 distinguish that, Your Honor. If the punishment was,  
5 say, a civil fine then the money goes to the  
6 government, that's one thing, but where the money  
7 ends up in the pocket of the claimant and that - - -  
8 the punitive award is based on the underlying  
9 injuries that the claimant sustained - - -

10 JUDGE PIGOTT: Well, it's based on a  
11 misbehavior. You can have a dollar damages and a  
12 hundred thousand dollars punitive, and I realize it's  
13 - - - but you're saying that if you're self-insured  
14 you can't - - - you can't recoup through the punitive  
15 damages, but if you're insured, your insurance  
16 carrier can.

17 JUDGE READ: So I'm confused. Why is it  
18 that there would be a double recovery here if you  
19 couldn't take the - - - you couldn't take the Workers  
20 Comp out of the future, but why would it be a double  
21 recovery if what they're recovering damages for are  
22 violations of civil rights?

23 MR. PHILLIPS: Well, actually, Your Honor,  
24 if you read the federal complaint, after you get by  
25 the general language about constitutional

1           deprivations, it's failure to train, failure to fix  
2           an alarm, failure to do this, failure to supervise.  
3           And the period of time when the claimant was actually  
4           subjected to the abuse or language or whatever by the  
5           inmate that finally assaulted her was between  
6           December 23rd and December 28th when the assault  
7           occurred. So, I mean, that's a short period of time  
8           and the - - -

9                     JUDGE GRAFFEO: So you're claiming there's  
10           not two injuries; there's one injury?

11                    MR. PHILLIPS: Right, there's one - - -

12                    JUDGE GRAFFEO: I'm trying to understand  
13           your - - -

14                    MR. PHILLIPS: It's one injury and - - -

15                    JUDGE GRAFFEO: I'm trying to understand  
16           your posture.

17                    MR. PHILLIPS: All of this arises from the  
18           attack and the abduction, the injuries she suffered  
19           then. And those are all the same injuries that are -  
20           - -

21                    JUDGE SMITH: Well, you say - - -

22                    JUDGE GRAFFEO: What about the hostile work  
23           environment that your adversary talks about?

24                    MR. PHILLIPS: That's part - - - that's one  
25           of the many causes of action, but there's no

1 breakdown - - - the money is not broken down per  
2 action - - - per cause of action, so we have no way  
3 of knowing if it's all related to the hostile work  
4 environment except for the fact that the stipulation  
5 says it's all allocated to the physical injuries and  
6 the pain and suffering.

7 JUDGE SMITH: Well, are we - - - to what  
8 extent do we have to decide that or are we bound by  
9 the board's decision? The board - - - presumably,  
10 the board has said it all - - - it all comes out of  
11 the - - - that the - - - it's not a lien, but that  
12 the recoupment right attaches to the whole amount.  
13 Are we - - - what is our standard review for that?

14 MR. PHILLIPS: Well, you could certainly  
15 uphold the board. I can't - - -

16 JUDGE SMITH: Are we bound to uphold the  
17 board if there's record support for what they did?

18 MR. PHILLIPS: Absolutely. And it's - - -  
19 I believe it would be bad public policy for the Court  
20 to overturn Petterson.

21 JUDGE READ: So is it enough that the  
22 stipulation says "physical injuries" to uphold the  
23 board?

24 MR. PHILLIPS: Well, would the Court allow  
25 the parties to go into federal court and stipulate

1           that it's physical injuries so they can avoid tax  
2           consequences and then come before the state agency  
3           and make an argument that it's something else and we  
4           - - -

5                         JUDGE READ:   So your is yes, it's  
6           substantial evidence.

7                         MR. PHILLIPS:   Yes.

8                         JUDGE READ:   It's enough that they  
9           stipulated to physical injuries.

10                        MR. PHILLIPS:   Absolutely.

11                        JUDGE PIGOTT:   But the key - - - to go back  
12           to this punitive aspect of this, were it to be  
13           punitive damages, and punitive damages are designed  
14           to deter future conduct, that would argue in favor of  
15           it not being a lien, wouldn't you agree, because you  
16           don't want the tortfeasor to benefit from what was  
17           designed to deter them from doing this by having it  
18           reimbursed to them?

19                        MR. PHILLIPS:   Well, that would apply in  
20           the case where this - - - where the employer is self-  
21           insured.  I think you could distinguish it that way.  
22           In that type of a case, maybe punitives wouldn't be  
23           included.

24                        JUDGE PIGOTT:   Yeah, but the fact that you  
25           got insurance, I mean, I don't want to get into

1 fights over premiums or lost histories or things like  
2 that, but I would think - - - and I know you're the  
3 insurer of last resort, but it would have an effect,  
4 I would think, if you were able to get your money  
5 back that you're paying for the Workers Comp if you  
6 can get credit for the punitives, when the whole idea  
7 of the punitives is to punish the tortfeasor.

8 MR. PHILLIPS: Yes, I agree.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 Thanks.

11 MR. PHILLIPS: Thank you.

12 CHIEF JUDGE LIPPMAN: Counselor.

13 MS. SINGER: Good afternoon.

14 CHIEF JUDGE LIPPMAN: Good afternoon.

15 MS. SINGER: I'm Jill Singer for the  
16 Special Funds. The appellant here argues for too  
17 narrow of an interpretation of Section 29, and it  
18 undermines and defeats the whole purpose of Section  
19 29, which is to allow the Workers Compensation  
20 claimant to sue the actual wrongdoer in addition to  
21 collecting Workers Compensation benefits while giving  
22 the carrier their lien and credit rights to avoid the  
23 double recovery. It doesn't matter how the recovery  
24 is characterized or what you call it.

25 CHIEF JUDGE LIPPMAN: What does matter?

1 MS. SINGER: It matters that it's a  
2 recovery for a wrong, and this Court focused on that  
3 in the Ryan case.

4 JUDGE PIGOTT: So if this was an auto  
5 accident case and part of the recovery was for the  
6 value of the automobile so that they get 5,000  
7 dollars for the damage to the automobile, you're  
8 saying that the Workers Compensation - - - that the  
9 carrier would have a lien on the property damage?

10 MS. SINGER: Well, I guess it depends on  
11 the recovery, if it was - - - the breakdown and well  
12 - - -

13 JUDGE PIGOTT: No, you said for the wrong.

14 MS. SINGER: Right. Negligence - - -

15 JUDGE PIGOTT: Any money - - -

16 MS. SINGER: It's a negligence - - - you're  
17 talking about a negligence action, so it would be the  
18 - - -

19 JUDGE PIGOTT: Well, you said - - - well,  
20 okay. What I'm saying is you said, no matter what,  
21 if they get money for the wrong, you have a lien on  
22 it.

23 MS. SINGER: That's what - - -

24 JUDGE PIGOTT: And I think you'd agree with  
25 me that property damage would be separate.

1 MS. SINGER: That's what the court - - -  
2 the cases especially - - - in particular, the Ryan  
3 case points out that if it's a wrong, if that's what  
4 the action - - -

5 JUDGE PIGOTT: So you would say yes, you  
6 get - - -

7 MS. SINGER: Yes, I would - - -

8 JUDGE PIGOTT: - - - credit for the  
9 property damage as well?

10 MS. SINGER: I guess that's what I'm  
11 saying, Your Honor. I don't know of any breakdown to  
12 that extent, the extent that you're implicating. And  
13 certainly in the cases of Shutter and Hiser where  
14 there was no wrong, the Section 29 rights did not  
15 come into play. So you have to look at whether there  
16 was a wrong in terms of the nature of the recovery  
17 and not look at the actual law that it came from.  
18 Section 29 does not limit or mention any particular  
19 laws. Its applicability is not limited to a  
20 particular law.

21 CHIEF JUDGE LIPPMAN: That makes sense from  
22 a policy perspective?

23 MS. SINGER: Again, it's to avoid the  
24 double recovery.

25 CHIEF JUDGE LIPPMAN: Yeah, yeah, but

1 depending on the nature of what's involved, it in  
2 reality may not be double recovery. You follow what  
3 I'm saying? From a policy perspective, yours is an  
4 awful broad - - -

5 MS. SINGER: But Section - - -

6 CHIEF JUDGE LIPPMAN: - - - rule that you  
7 are contending is the case here.

8 MS. SINGER: Section 29 says "any  
9 recovery". The legislature did not limit that  
10 language, and the language - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but again, that  
12 seems very unfair if you're saying any recovery  
13 literally meaning any recovery.

14 MS. SINGER: Well, the cases, the Parmelee  
15 case and the Simmons case - - -

16 CHIEF JUDGE LIPPMAN: So it's always double  
17 recovery? Under those cases, it's always double  
18 recovery?

19 MS. SINGER: Well, it says it even covers  
20 damages that are not compensated for in Workers  
21 Compensation. Workers Compensation - - -

22 JUDGE SMITH: Even property damage - - -  
23 aren't you stretching your point by trying to get in  
24 the property? Suppose the guy owns a Rembrandt, it's  
25 destroyed in the accident. The - - -

1 MS. SINGER: Well, we're talking about  
2 personal injury.

3 JUDGE SMITH: - - - comp carrier gets to  
4 take the price of the Rembrandt back?

5 MS. SINGER: We're talking about injuries  
6 here. We're talking about Workers Compensation  
7 injuries predicated upon - - -

8 JUDGE SMITH: You have to limit it to  
9 personal injuries, don't you?

10 MS. SINGER: Well, it's predicated upon the  
11 injuries in the Workers Comp claim, so to that  
12 extent, we were talking about - - -

13 JUDGE SMITH: Well, but they - - - but the  
14 Workers Comp doesn't compensate for pain and  
15 suffering.

16 MS. SINGER: Right, and they don't - - -

17 JUDGE SMITH: But nevertheless the comp  
18 lien does attach to pain and suffering recovery,  
19 doesn't it?

20 MS. SINGER: Yes, because it's any - - -  
21 like I said, Section 29 is very broadly stated, it  
22 applies to any recovery, and even those damages that  
23 are not compensated for in Workers Comp.

24 JUDGE PIGOTT: So if an injured worker  
25 says, I had to borrow 10,000 dollars from my brother

1 so I could get through this whole thing and I'm going  
2 to pay him back with the recovery, you would say we  
3 come first, you can't pay your brother back because  
4 we have a lien on that.

5 MS. SINGER: Well, the lien is in  
6 volleyball. I mean, the Workers Compensation lien -  
7 - - I'm not sure I follow where - - -

8 JUDGE PIGOTT: Part of the 10 - - - 100,000  
9 dollar settlement is 10,000 dollars to pay back the  
10 brother for the money that he loaned him. You'd say  
11 even though that money is going to the brother, you  
12 have a lien on it.

13 MS. SINGER: It's an absolute right. It's  
14 - - - the lien right is absolute. I don't know in  
15 terms of priority - - - I don't know of any case law  
16 that - - -

17 JUDGE SMITH: You wouldn't have the lien if  
18 you hadn't already given the guy 10,000 dollars,  
19 right? The reason the lien exists is that the  
20 carrier has paid out 10,000.

21 MS. SINGER: Right, we pay it like - - -

22 JUDGE SMITH: So he could have paid his  
23 brother - - -

24 MS. SINGER: - - - for benefits paid.

25 JUDGE SMITH: - - - with that money.

1 MS. SINGER: The lien is - - -

2 JUDGE PIGOTT: But except you're talking  
3 about the future. I mean, you've already been  
4 reimbursed for everything you paid to date. This is  
5 the credit for future.

6 MS. SINGER: Right. In order to prevent a  
7 double recovery, we - - -

8 JUDGE PIGOTT: So you're saying - - -

9 MS. SINGER: - - - to right the deficiency  
10 between the amount of the settlement and the amount  
11 owed is in the future Workers Compensation. That's  
12 what Section 29 gives that right to the carrier for -  
13 - -

14 JUDGE PIGOTT: So if he netted out 10,000  
15 dollars and he says, thank God I can at least pay my  
16 brother back, you say no, you can't because that  
17 belongs to us - - -

18 MS. SINGER: Well, that's what the statute  
19 - - -

20 JUDGE PIGOTT: - - - because we're going to  
21 get credit for that going forward, so you can pay him  
22 back if you want, but we're not paying you your wages  
23 and we're not paying you for your medical until that  
24 10,000 is accounted for.

25 MS. SINGER: That's right, because that's -

1 - - the Workers Comp carrier has the right to that  
2 lien and the credit in order to prevent the double  
3 recovery.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 Thanks.

6 MS. SINGER: Okay. Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you, counselor.

8 Counselor, rebuttal.

9 MR. BUCKLEY: Yes, Your Honor. Your Honor,  
10 if this - - -

11 CHIEF JUDGE LIPPMAN: Where's she reading  
12 this wrong? She says any recovery for the wrong.

13 MR. BUCKLEY: Well, Your Honor, I've been  
14 doing this Workers Compensation for a long time. And  
15 the compensation board, if you have a settlement of a  
16 lawsuit for punitive damages only, they don't assert  
17 any lien against the punitive damages. I didn't  
18 brief that - - -

19 CHIEF JUDGE LIPPMAN: That's so clear cut,  
20 you don't, yeah.

21 MR. BUCKLEY: That's clear, that's clear if  
22 it was punitive damages. Now - - -

23 CHIEF JUDGE LIPPMAN: And if it's not  
24 punitive damages, what's the - - -

25 MR. BUCKLEY: If it's not - - -

1 CHIEF JUDGE LIPPMAN: - - - what's the  
2 rule?

3 MR. BUCKLEY: - - - punitive damages - - -

4 CHIEF JUDGE LIPPMAN: What's the rule?

5 MR. BUCKLEY: There really is no rule other  
6 than you have to figure out what the settlement is  
7 for, and that's why the Workers Compensation board -  
8 - -

9 CHIEF JUDGE LIPPMAN: You just have to  
10 match it up each time.

11 MR. BUCKLEY: Yeah. In their first  
12 decision, sent us back to have Mr. Bains come in and  
13 testify what this settlement included.

14 JUDGE PIGOTT: The better practice then  
15 would have been at the time you settled your federal  
16 court case you would have had everyone there and said  
17 this is the breakdown, this is the lost wages, this  
18 is the pain and suffering, this is the medical, and  
19 this part is punitive. And then the defendant would  
20 say, yeah, this is punitive because - - - well,  
21 because right now it looks like you were fashioning  
22 the settlement for income tax purposes, and it really  
23 wasn't a punitive aspect of the settlement. And if  
24 they're right, then they get a lien on the entire  
25 thing.

1                   MR. BUCKLEY: And if we had gone - - - if  
2 Mr. Bains had taken this to trial, and when he put in  
3 his damages against the State of New York for the  
4 lost wages, there - - - when the verdict came in,  
5 there would have been - - - because of the collateral  
6 source rule, the lost wages would have been something  
7 that it already paid by the defendant - - -

8                   JUDGE PIGOTT: But prior to that - - -

9                   MR. BUCKLEY: - - - and would have been  
10 reduced by the verdict.

11                  JUDGE PIGOTT: That's right, but the  
12 verdict sheet would have said that, what - - -

13                  MR. BUCKLEY: The verdict sheet would have  
14 said it, but the - - -

15                  JUDGE PIGOTT: - - - how much for punitives  
16 right down at the bottom.

17                  MR. BUCKLEY: But what the - - - what  
18 happened in this case, they entered into a  
19 stipulation where they said what the injuries were  
20 for, the emotional injuries and the injury itself,  
21 but they didn't go the step further to say there's no  
22 lost wage component or no medical benefit component.

23                  JUDGE SMITH: If there had been punitive  
24 damages in there, you would have had to pay - - -  
25 your client would have had to pay - - - they would

1 have had to pay tax on it, right?

2 MR. BUCKLEY: Well, he would have had to  
3 pay - - - she would have had to pay a tax on it, and  
4 also - - -

5 JUDGE SMITH: Is it really fair for her not  
6 to pay the tax and also to - - - for the carrier not  
7 to get the offset because it's punitives?

8 MR. BUCKLEY: Well, here's - - - here's - -  
9 - the other thing is the three supervisors who were  
10 working up at Camp Cass with her, supervising her, if  
11 it was denominated punitive damages, it wouldn't have  
12 been paid by the State of New York or any  
13 municipality.

14 JUDGE SMITH: Doesn't that show that it's  
15 not punitives? If the State paid it, then maybe it  
16 wasn't punitives.

17 MR. BUCKLEY: Well, I - - - it may have  
18 been punitives; it may not have been punitives. But  
19 the - - - whatever - - - we're concentrating on the  
20 lost wage component and the future medical. Right  
21 now, she has no medical coverage through the Workers  
22 Compensation system, and she has no medical coverage  
23 under Medicare or a private insurance policy.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.  
25 Thanks.

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Thank you all. Appreciate it.

(Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Beth V. v. New York State Office of Children and Family Services and State Insurance Fund, No. 202, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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