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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF TERRANOVA,

Appellant,

-against-

NO. 125

LEHR CONSTRUCTION, CO., ET AL,

Respondents.

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20 Eagle Street  
Albany, New York  
November 15, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 125, Matter of  
3 Terranova v. Lehr.

4 MR. GREY: Your Honor, may I reserve two minutes  
5 for rebuttal?

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. GREY: Thank you.

8 CHIEF JUDGE DIFIORE: You're welcome.

9 MR. GREY: May it please the court, I'm Robert  
10 Grey. I'm representing appellant Joseph Terranova in this  
11 case. We are asking the court to adopt a very simple and  
12 straightforward rule here which is that any award of  
13 Workers' Compensation benefits that is made after the date  
14 of a third-party settlement, should follow the rule in  
15 Burns unless that future award was already taken into  
16 account under the rule in Kelly.

17 CHIEF JUDGE DIFIORE: How do we interpret the  
18 Appellate Division's decision? Is that a waiver of  
19 additional recovery because they settled?

20 MR. GREY: The - - - the - - - Your Honor, I  
21 believe what the Appellate Division did is they literally  
22 interpreted the dicta in the Burns case that Burns does not  
23 apply to permanent total disability or schedule loss, and  
24 unfortunately the Appellate Division mechanically applied  
25 that language and said okay, this case resulted in a



1 schedule loss award, and therefore Burns does not apply.

2 The problem with that analysis is that it  
3 completely overlooks the core purpose of the Kelly and  
4 Burns decisions, which is, as this court has said, to  
5 equitably apportion the litigation expense between the  
6 injured worker and the compensation carrier.

7 So here, if you elevate - - - as the Attorney  
8 General has characterized it - - - the type of the award  
9 over the timing of the award, then you - - - you violate  
10 the basic purpose of the statute and this court's decisions  
11 in Kelly and in Burns.

12 We believe that the rule that we're advocating  
13 for has three redeeming factors. One is, it is completely  
14 clear and will be easily understood by plaintiffs' personal  
15 injury attorneys and Workers' Compensation carriers. If  
16 the Workers' Compensation case has resolved with a  
17 permanency determination, and that permanency determination  
18 is a permanent total disability or a death case or a  
19 schedule loss award, then everyone will understand that  
20 Kelly applies.

21 If it does not meet any of those criteria, then  
22 everyone will understand that Burns applies, and the  
23 Workers' Compensation Board can handle that issue, as it  
24 has been handling that issue.

25 So we believe, if you adopt the rule that we're



1            requesting, there will be clarity for all the parties  
2            involved. And that's obviously beneficial.

3                         JUDGE STEIN: And the cases have generally talked  
4            about foreseeability or calculability of - - - of the - - -  
5            of the awards, right?

6                         MR. GREY: Yes, Your Honor. The - - -

7                         JUDGE STEIN: That's what they - - -

8                         MR. GREY: - - - the - - - the core question - -  
9            -

10                        JUDGE STEIN: So they - - - they categorize the  
11            different kinds of awards, but basically what they were  
12            looking at was can they be ascertained at the time of the  
13            settlement, regardless of the nature of the award.

14                        MR. GREY: That's exactly right. And the reason  
15            schedule loss ended up in Burns is because if a schedule  
16            loss is determined prior to the date of the third-party  
17            settlement, and the schedule loss results in a number of  
18            weeks that run into the future, you could, at the time of  
19            the third-party settlement, reduce that to present value  
20            and calculate it pursuant to Kelly.

21                        The problem here is the schedule loss was not  
22            awarded before the third-party settlement.

23                        JUDGE STEIN: And just to be clear, so that kind  
24            of award would never be changed, whereas other partial  
25            permanent disability awards may be subject to change; and



1 that's what Burns was looking at, right?

2 MR. GREY: The - - - the decision in Burns was  
3 that because a permanent partial disabil - - - disability  
4 award may change based on return to work or an untimely  
5 death or a failure of labor market attachment, that those  
6 awards are speculative, and because they're speculative, it  
7 would not be fair to the carrier to reduce that to present  
8 value and calculate it at the time of the third-party  
9 settlement.

10 But - - - to borrow a line from the Kelly  
11 decision - - - to stem the inequity that would occur to the  
12 injured worker if the carrier contributed nothing, the  
13 court adopted a pay-as-you-go rule to make sure that the  
14 compensation carrier paid their fair share.

15 What's going on here is the compensation carrier  
16 is taking the position that because it's a schedule loss,  
17 they escape paying their fair share, and - - - and we don't  
18 believe the court should countenance that.

19 JUDGE RIVERA: How often do you have this kind of  
20 time - - - timeliness quirk or time quirk where you have  
21 the - - - the settlement up front and that's why, in part,  
22 you don't know what that award's going to be from the  
23 Workers' Comp point?

24 MR. GREY: It - - - it happens more often than -  
25 - - than you might think, Your Honor.



1 JUDGE RIVERA: Uh-hum.

2 MR. GREY: The - - - the closer in time to the  
3 date of the accident the personal injury case settles, the  
4 more likely it is that there are still unresolved issues in  
5 the Workers' Compensation case. That - - - that is, in  
6 fact, what happened here, and it is not an uncommon  
7 situation.

8 CHIEF JUDGE DIFIORE: Does your proposed rule  
9 apply whether the third-party action settles or goes to a  
10 verdict?

11 MR. GREY: No. The - - the - the question is not  
12 whether the third-party action resolves by settlement or by  
13 trial. The question is whether, at the time the third-  
14 party action resolves, we have a fair degree of certainty -  
15 - -

16 CHIEF JUDGE DIFIORE: Resolved.

17 MR. GREY: Resolves.

18 CHIEF JUDGE DIFIORE: Um-hum.

19 MR. GREY: We have a fair degree of certainty  
20 about what's going to happen with the Workers' Compensation  
21 award. We will either know that because there's been a  
22 classification - - -

23 CHIEF JUDGE DIFIORE: Right.

24 MR. GREY: - - - of some sort or a schedule loss,  
25 or we won't. If we know it, then we can apply Kelly. If



1 we don't, then we should apply Burns.

2 JUDGE FAHEY: Is there - -- is there any case law  
3 - - - wasn't there a Third Department case, Stenson, that -  
4 - - that spoke to this issue? That's the only case that I  
5 saw that spoke to this issue.

6 MR. GREY: Yes, Your Honor. What - - -

7 JUDGE FAHEY: Can you address that?

8 MR. GREY: - - - what happened after - - - after  
9 Burns - - -

10 JUDGE FAHEY: Um-hum.

11 MR. GREY: - - - is compensation carriers  
12 initially took the position that the Burns rule only  
13 applied to permanent partial disability cases.

14 JUDGE FAHEY: Um-hum.

15 MR. GREY: so if you had an unresolved case or an  
16 award for temporary disability that was ongoing, their  
17 position was that Burns did not apply.

18 JUDGE FAHEY: Um-hum.

19 MR. GREY: The Third Department clarified that in  
20 Stenson and said Burns applies to anything that's not  
21 already resolved and determinable, and is non-speculative,  
22 like a permanent, total, or a death case, and again, they  
23 picked up on the dicta regarding schedule.

24 JUDGE FAHEY: So - - - so - - - oh. So Stenson -  
25 - - do you think Stenson works against you in this case?



1 MR. GREY: I don't. I think Stenson works - - -

2 JUDGE FAHEY: How so?

3 MR. GREY: - - - works for me. Stenson and  
4 Burns, I think, both are right in line with Kelly and right  
5 in line with what the statute says - - - Section 29 of the  
6 Workers' Compensation Law - - - which is that the goal here  
7 is to equitably apportion the litigation expense between  
8 the plaintiff and the compensation carrier.

9 If there is certainty about the resolution of the  
10 Workers' Compensation award, then we don't apply Burns; we  
11 apply Kelly. If there is - - -

12 JUDGE STEIN: So are you saying that the court  
13 wasn't looking at the situation we have before us now when  
14 they decided Stenson and just sort of weren't thinking  
15 about that issue?

16 MR. GREY: Your Honor, I have been unable to find  
17 any case where the issue presented here has ever been  
18 directly presented. That - - - that's why I say it was  
19 dicta in Burns. Burns did not involve a schedule loss.  
20 None of the cases that Burns cites involve a schedule loss.  
21 And none of the cases that those cases cite involve a  
22 schedule loss.

23 JUDGE STEIN: So are you also saying that it was  
24 dicta in Stenson?

25 MR. GREY: Yes.



1 JUDGE STEIN: Yeah.

2 MR. GREY: Yes. What I'm saying is that the  
3 court should focus - - - the question that the court should  
4 focus on is whether at the time of the third-party  
5 settlement, the future Workers' Compensation benefit was  
6 certain or uncertain. If it's uncertain, which was the  
7 case here, then Burns should apply.

8 CHIEF JUDGE DIFIORE: And there's no need for us  
9 to get into the determination with respect to the  
10 settlement letter that was entered into reserving the  
11 Kelly, Burns - - -

12 MR. GREY: There were two settlement letters,  
13 Your Honor, as you know.

14 CHIEF JUDGE DIFIORE: Um-hum.

15 MR. GREY: The carrier here issued a consent  
16 letter that - - - that cited solely to Kelly. And I  
17 completely agree that had that been the consent letter in  
18 this case, there would have been no reservation of Burns  
19 rights. However, that letter was rejected specifically to  
20 preserve this claim. And in the second consent letter,  
21 there was a specific reservation of rights under Burns in  
22 order to preserve this claim, which is why we're here.

23 CHIEF JUDGE DIFIORE: Okay, thank you, counsel.

24 MR. GREY: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?



1 MR. WOODS: Good afternoon. May it please the  
2 court; Patrick Woods on behalf of the Workers' Compensation  
3 Board.

4 I'd like to make it clear at the outset what the  
5 Board and the Third Department did not do in this case.  
6 Much of the briefing here has focused on whether this  
7 particular award was readily ascertainable at the time of  
8 the third - - - the consent to settlement letter. That is  
9 not the analysis that either the Board or the Third  
10 Department applied in this case, although it is the  
11 analysis that we are - - - we urge this court to change the  
12 rule to permit the Board to apply.

13 Accordingly, we believe that the appropriate  
14 disposition of the case here is for the court to announce a  
15 clarification of the rule that permits a more flexible  
16 approach than the one applied by the Third Department that  
17 is based - - -

18 JUDGE WILSON: You like Mr. Grey's rule? Is that  
19 the rule you would want?

20 MR. WOODS: Not precisely, Judge. The - - - Mr.  
21 Grey's rule is certainly better than the rule that the  
22 Third Department applied in this case. We think there are  
23 two formulations of the rule that would more fully support  
24 the statutory objective here.

25 One is a completely flexible rule that says that

1 either the Board or the court whose being petitioned would  
2 at the - - - would, at that time, make an ascertainability  
3 determination based on everything that's in front of it, or  
4 a rule that takes the dicta from Burns and makes clear that  
5 those classifications of death, total disability, and  
6 schedule loss of use are presumptive but not determinative,  
7 so that if there's a dispute about whether this particular  
8 award is determinable, then the court will get into it. So  
9 - - -

10 JUDGE WILSON: So are you - - -

11 JUDGE STEIN: But do - - -

12 JUDGE WILSON: Sorry.

13 JUDGE STEIN: - - - do you acknowledge that  
14 there's a difference between a schedule loss of use award  
15 that has already been made and one that has not? Or a  
16 deter - - - even a determination of the schedule loss of  
17 use?

18 MR. WOODS: Certainly. Once - - - once the  
19 schedule loss of use - - - use award had been rendered,  
20 it's going to be readily ascertainable. And a court  
21 confronted with that situation would have an absolutely  
22 easy lift in figuring out that it is readily ascertainable.

23 JUDGE STEIN: Okay. But what you're saying is is  
24 that if it hasn't already been rendered, it may or may not  
25 be ascertainable. Is that what you're saying.



1 MR. WOODS: That's correct, Judge.

2 JUDGE STEIN: Okay.

3 MR. WOODS: And - - -

4 JUDGE WILSON: It sounded to me as if you were  
5 saying you'd like Mr. Grey's rule plus some additions. Is  
6 that fair or no?

7 MR. WOODS: I - - - I think - - - if I'm  
8 understanding Mr. Grey - - - Grey's rule correctly, what he  
9 would like is timing trumps type rather than type trumps  
10 timing. Our concern - - -

11 JUDGE FAHEY: Right. So wouldn't he - - -  
12 wouldn't he be asking for Burns then Kelly after the  
13 determination?

14 MR. WOODS: I think that's correct. And I - - -

15 JUDGE FAHEY: So that's really what we're talking  
16 about here, the sequence, as opposed to just - - - just  
17 Kelly or just Burns, in this rare situation it's Burns then  
18 Kelly.

19 MR. WOODS: I think that - - -

20 JUDGE FAHEY: After the schedule loss of use is  
21 decided.

22 MR. WOODS: I think that's generally correct.

23 JUDGE FAHEY: Um-hum.

24 MR. WOODS: The reason that we have some  
25 reservation with Mr. Grey's formulation is because in a



1 hypothetical situation, it could undermine the appropriate  
2 application of Kelly.

3 JUDGE WILSON: Right. So you'd want flexibility  
4 to make a determination as to ascertainability, among other  
5 things, based on the facts of particular cases?

6 MR. WOODS: Correct, Judge. Because we can  
7 envision a scenario where, for example, you have a schedule  
8 loss of use award that has not yet been rendered, there is  
9 a third-party judgment, but there's no dispute between the  
10 parties as to the degree of the impairment.

11 In that scenario, it would be readily  
12 ascertainable, and the claimant should be able to get a  
13 lump-sum up-front allocation under Kelly, but if you apply  
14 a strict timing-trumps-type rule, then that would not be  
15 available to that claimant.

16 JUDGE RIVERA: And - - and - and the likelihood  
17 of that hypothetical in terms of the experience of the  
18 Board, is what?

19 MR. WOODS: I - - -

20 JUDGE RIVERA: Is that on the fringes or is that  
21 more regular than not?

22 MR. WOODS: I can't - - - I can't give the - - -  
23 I can't give you an exact - - -

24 JUDGE RIVERA: Um-hum.

25 MR. WOODS: These cases are relatively new, and



1           there hasn't been that much development.

2                       JUDGE RIVERA:   okay.

3                       MR. WOODS:   But the issue is live.   As of this  
4 morning, there were four cases ready for Board review that  
5 are being held on the outcome of this case.   And I would  
6 stress that this is an opportunity for the court to nip  
7 this issue in the bud before it blooms into a larger  
8 problem down the road.

9                       JUDGE STEIN:   Did - - - also just to clarify.  
10 The - - - the Board never made a determination regarding  
11 the - - - the settlement letter and - - - and whether the  
12 carrier had expressly reserved or disclaimed its  
13 obligations.

14                      MR. WOODS:   The Board didn't - - - didn't apply  
15 the kind of analysis it would have to if the court were to  
16 adopt the rule that we have suggested or Mr. Grey's rule in  
17 this case.   It took sort of the talismanic invocation of  
18 Burns and Kelly and these - - - in this document as putting  
19 it into the two baskets we sort of described in our brief  
20 and analyzing it that way.   Whereas, I think if it went  
21 back, the Board would have to look at it under the new  
22 rule.

23                      CHIEF JUDGE DIFIORE:   Thank you, Mr. Woods.

24                      MR. WOODS:   Thank you.

25                      CHIEF JUDGE DIFIORE:   Counsel?



1 MR. PERIGOE: Your Honors, I'm Evan Perigoe. I'm  
2 here representing New Hampshire Insurance Company and the  
3 employer, Lehr Construction.

4 JUDGE STEIN: Counsel, I was sort of starting to  
5 get at Brisson a little bit just a second ago, in terms of  
6 what the carrier has to do in order to - - - to you know,  
7 expressly and unambiguously indicate that it's not  
8 responsible for any future payments. No determination was  
9 made as to whether your settlement agreement here did that,  
10 correct?

11 MR. PERIGOE: Right. And that's the - - - that  
12 is the argument that we raised in front of the Third  
13 Department and - - - and that we continue to raise here,  
14 that essentially on page - - -

15 JUDGE STEIN: Well, how did you do that? I mean,  
16 they reserved their rights under Burns.

17 MR. PERIGOE: Well, on page 43 of - -- of the  
18 record, if you'll consult it, it says it's - - - that the  
19 carrier's lien is - - - the carrier's paying off its lien  
20 pursuant to Kelly. Now, under Kelly, the carrier only has  
21 an obligation to make one payment. Once that one payment  
22 is made, it extinguishes the carrier's obligation to make  
23 further payments towards the litigation costs - - -

24 JUDGE STEIN: But then why talk about Burns at  
25 all?



1 MR. PERIGOE: Frankly, it looks like, based on  
2 the course of the negotiations, the counsel for Terranova  
3 was trying to put in some kind of escape hatch or way out  
4 from the agreement that he was making - - -

5 JUDGE STEIN: So what we're - - - wouldn't you  
6 have had to have said - - - you agreed to those terms. And  
7 - - - and you signed that - - - that agreement. Wouldn't  
8 you have had to have said but that doesn't mean we owe you  
9 any more money?

10 MR. PERIGOE: Right.

11 JUDGE STEIN: Or something?

12 MR. PERIGOE: We certainly could have been more  
13 clear. But we take the position that it's - - - it's  
14 almost as if we have a situation where someone is signing a  
15 contract saying the contract is going to be subject to New  
16 York law. Notwithstanding that, we'd like to reserve all  
17 of our rights under California law. And it just is - - -  
18 it's inconsistent.

19 JUDGE WILSON: But it's almost as if you're  
20 saying that you know there wasn't a meeting of the minds.

21 MR. PERIGOE: We can certainly say that we see an  
22 attempt to perhaps get around a meeting of the minds. But  
23 certainly we don't think that it was unclear to the people  
24 who were involved in drafting this agreement.

25 JUDGE WILSON: On both sides?



1 MR. PERIGOE: On both sides. It was - - -

2 JUDGE STEIN: So - - -

3 MR. PERIGOE: - - - it was an attempt at  
4 lawyering around this issue that shouldn't have been made.  
5 And really, in truth, since almost all of these consents to  
6 settle these third-party actions actually do happen by  
7 negotiation between the claimant and the insurance carrier,  
8 really just getting clear on this issue is going to solve  
9 ninety-nine percent of these cases without having to come  
10 to this court or any other court.

11 JUDGE STEIN: So - - - so I'm - - - I'm confused.  
12 All right? Let's say we're not talking about a schedule  
13 loss of use, we're talking about some other kind of claim  
14 where payments have already been made at the time of the  
15 settlement of the third-party action, okay, and - - - and  
16 but it's recognized that the - - - that there'll be future  
17 payments, and they're not readily ascertainable, so we - -  
18 - you have a clear Burns situation. Right?

19 MR. PERIGOE: Yes.

20 JUDGE STEIN: Is that a clear Burns situation?

21 MR. PERIGOE: Yes.

22 JUDGE STEIN: Okay. So when - - - so are you  
23 saying that the carrier then never makes a payment or - - -  
24 you know, however it's done - - - as to their share of  
25 costs at the time of the settlement, and then additional



1 payments are made later on?

2 MR. PERIGOE: Right. It's a - - - it's a pay-as-  
3 you-go system under Burns.

4 JUDGE STEIN: Right. So something is paid at the  
5 time of settlement - - -

6 MR. PERIGOE: Right.

7 JUDGE STEIN: - - - under those circumstances.

8 MR. PERIGOE: But what normally happens is that  
9 the carrier actually gets to satisfy its lien against the  
10 third - - - so the third-party settlement is usually made  
11 after the carrier has made some payments. So the carrier  
12 says we paid some medical and indemnity benefits; we'd like  
13 that paid back, please, out of the third party.

14 And in fact, one of the - - -

15 JUDGE STEIN: Well, and that's what happened  
16 here?

17 MR. PERIGOE: Yes.

18 JUDGE STEIN: And then the question was, is there  
19 anything else going forward? And in what you consider the  
20 true Burns case, then payments would be made going forward.

21 MR. PERIGOE: That would be the true Burns case,  
22 yes.

23 JUDGE STEIN: Okay. So why - - - I - - - I  
24 thought you said that once you made a payment under Kelly,  
25 that there - - - that's it; you never get anything else?



1 Was that just - - -

2 MR. PERIGOE: I was interpreting Your Honor's  
3 question as being in an instance where you didn't have a  
4 schedule loss of use issue, essentially a Stenson case.

5 Stenson was a case where there was basically no  
6 chance of there being a schedule loss of use, a death, or a  
7 total disability. That wasn't in the cards in Stenson.  
8 And so everybody knew that Kelly was never going to be  
9 applicable. And the appropriate award in that circumstance  
10 is to just start applying Burns before the Workers'  
11 Compensation Board gets to the point of resolving what the  
12 final classification of the claimant is going to be, and  
13 then to just keep paying Burns thereafter, because it's  
14 going to be a permanent partial disability.

15 JUDGE STEIN: So it's just a matter of what you  
16 call it, really. In other words, you're calling it a Kelly  
17 payment because this is what's ascertainable, and - - - and  
18 then a later Burns payment - - - or whether you're calling  
19 it all Burns or all - - - all Kelly. You're saying there  
20 can be no - - -

21 MR. PERIGOE: Certainly, I think - - -

22 JUDGE STEIN: - - - overlap.

23 MR. PERIGOE: - - - Justice Fahey - - - I should  
24 say Judge Fahey's question earlier about can we have first  
25 some Burns payments - - -



1 JUDGE STEIN: Exactly.

2 MR. PERIGOE: - - - and then a final Kelly  
3 payment? That's something that's perfectly acceptable  
4 under the current regime. The issue is, when the carrier  
5 is negotiating these consents, it's trying to produce the  
6 most favorable outcome for itself, and is frequently going  
7 to ask for we'd like to make one payment, and after that  
8 we'd like to not make any more.

9 JUDGE FAHEY: But isn't it kind of a sandbag if  
10 you do it that way? Aren't you really sandbagging the  
11 other party? I mean, 29(1) has some public policy  
12 implications that - - - that require a recognition of an  
13 equitable distribution of - - - of legal expenses. And - -  
14 - and the approach that you're taking undermines that.

15 MR. PERIGOE: I - - - I don't think it does,  
16 Judge.

17 JUDGE FAHEY: Okay.

18 MR. PERIGOE: And the reason for that is that - -  
19 - and no - - - no argument has been made here for  
20 invalidating a contract, which is essentially what would be  
21 necessary. But there - - - there are times when you can  
22 invalidate a contract.

23 JUDGE FAHEY: Um-hum.

24 MR. PERIGOE: Public policy is a perfectly good  
25 reason to invalidate a contract - - -



1 JUDGE FAHEY: Um-hum.

2 MR. PERIGOE: - - - as is the contract being  
3 simply inequitable.

4 So if we had a situation where the carrier was  
5 contributing absolutely nothing, was taking a massive  
6 credit, that would simply be thrown out as unconscionable  
7 or as against public policy. That's clearly not where we  
8 are here. This is an issue about 3,000 dollars. It - - -

9 JUDGE FAHEY: But let - - -

10 MR. PERIGOE: - - - whether or not - - -

11 JUDGE FAHEY: - - - let's take the principle,  
12 though, because we're the Court of Appeals, so everything  
13 we do has other effects. So the principle would be that in  
14 this scenario, you pay no legal costs, right?

15 MR. PERIGOE: Not none. No.

16 JUDGE FAHEY: Okay.

17 MR. PERIGOE: The - - - the carrier has had to  
18 make its - - - its contribution - - -

19 JUDGE FAHEY: Besides your costs, I mean, in this  
20 case, though. Yeah?

21 MR. PERIGOE: No, there has been some  
22 contribution. The carrier only got - - - it was just a  
23 lesser amount, because - - -

24 JUDGE STEIN: Well, what if - - - what if the  
25 carrier had only paid a very small amount - - - the



1 settlement came even sooner than it did here - - - so then  
2 it would - - - it would still meet that public policy?

3 MR. PERIGOE: As I said, there - - - there does  
4 come a point - - - and that's of course a point that a  
5 court should draw - - - where it would be so - - - it  
6 wouldn't be an equitable distribution anymore or an  
7 equitable portion of the legal fees. I don't think we're  
8 in that situation here.

9 And in fact, one thing that I think is really  
10 important to remember - - - because we have the Board  
11 essentially urging that claimants shouldn't be allowed to  
12 make these kinds of agreements with carriers, and you - - -  
13 is that really more often it's the carrier that gives up  
14 part of its lien in order to encourage the claimant to go  
15 forward and do the settlement. Because in a lot of these  
16 cases - - - I mean, the whole reason for Section 29 is that  
17 we have claimants who really aren't in a position to get  
18 anything out of their third-party action, because they're  
19 going to get more in Workers' Compensation benefits than  
20 they're ever going to get in their third-party case.

21 So the whole purpose of this is to make sure that  
22 the claimant isn't settling for too little. That's what  
23 29(5) is all about.

24 JUDGE WILSON: Do you have a difficulty with Mr.  
25 Woods' proposal that the Board get additional flexibility,



1 and we interpret our prior decisions to allow that instead  
2 of imposing categorical rules?

3 MR. PERIGOE: I actually think the - - - the  
4 first proposal that Mr. Woods made - - - and it's the first  
5 time I've heard it actually was today - - - was - - - it  
6 would actually be very much in line with this case.

7 What we - - - we have here is we have some folks  
8 coming to the Board where we have the treating doctor and  
9 the independent medical examiner, at the time of this  
10 third-party settlement, both looked at this person and had  
11 both said there's no lost range of motion in this person's  
12 knee. The only basis for any kind of injury that they've  
13 got is that this guy had a knee surgery.

14 And there's - - - when there's absolutely no  
15 other facts like that, that is precisely the kind of  
16 circumstance where you don't have to wait - - -

17 JUDGE STEIN: But then someone came along and  
18 said no, no, no, it's fifty-five percent - - -

19 MR. PERIGOE: Right.

20 JUDGE STEIN: - - - and what if the Board had  
21 agreed with that; then what? Then - - -

22 MR. PERIGOE: Well, we - - - we take the position  
23 that there was simply a zero percent probability that that  
24 was ever going to happen, because - - -

25 JUDGE STEIN: Well, maybe it wouldn't have been



1 fifty-five, maybe it would have been thirty-five.

2 MR. PERIGOE: We - - - we take the position that  
3 there's simply no chance that the Board is going to look at  
4 someone who has recovered the full use of their leg after  
5 surgery and that their own doctor has found this, and then  
6 going to award that person a schedule loss of use that's  
7 more than negligent, more than ten percent.

8 JUDGE FAHEY: It was ten percent to fifty-five  
9 percent. I thought that's what we were talking about. The  
10 Board's doctor versus the - - - the claimant's doctor.

11 MR. PERIGOE: Right. The - - - the Board  
12 actually threw out Dr. McMahon's opinion, the first time it  
13 looked at it saying, actually, this is really an  
14 independent medical exam that you didn't go through all of  
15 the steps for. The Board then wavered on that and  
16 overturned that.

17 JUDGE FAHEY: But we can't make a rule based on  
18 the quality of the medical proof or a presumptive factual  
19 analysis. I think that - - -

20 MR. PERIGOE: Well, I think what Mr. Woods was  
21 advising the court - - -

22 JUDGE FAHEY: Um-hum.

23 MR. PERIGOE: - - - in terms of his - - - his  
24 first proposed rule, is that the Workers' Compensation  
25 Board in particular, all the law judges know this area



1 pretty well. They can take a look at a case and they can  
2 say you know what, at this point, I know where this is  
3 going; I know this is a Kelly case; this is absolutely  
4 going to end in a schedule loss of use, and make that  
5 decision. But the really important thing - - -

6 JUDGE STEIN: Well, I thought he was talking  
7 about cases where there was no real dispute about that?

8 MR. PERIGOE: That might have been his - - - his  
9 second one where there's - - -

10 JUDGE STEIN: Second part?

11 MR. PERIGOE: - - - an idea of something that's  
12 presumptive but not determinative.

13 But I think the really important thing here is  
14 that it's the - - - because most of these cases settle with  
15 consent with the carrier and settle based on agreements  
16 that are a lot clearer than this one, and you can - - - you  
17 can ask Mr. Grey about this when he's back up here - - -  
18 that - - - and it's the carrier that has the real incentive  
19 to settle these, because it gets most of the benefit,  
20 there's really not a lot of risk, even if - - - if this  
21 Third Department decision is left completely standing,  
22 claimants have essentially the - - - the litigation upper  
23 hand to be able to say I don't want to settle this right  
24 now; I'll wait for my SLU award, thank you very much; or  
25 you pay me more; or you agree that payments are going to be



1 under Burns.

2 It's - - - it's pretty simple, and that's why we  
3 say that the court should find for the respondents.

4 CHIEF JUDGE DIFIORE: Thank you, Mr. Perigoe.

5 Mr. Grey? Mr. Grey, are there any tripwires to  
6 the flexible approach that your colleague has suggested?

7 MR. GREY: Yes, Your Honor. That was exactly  
8 what I was going to say.

9 CHIEF JUDGE DIFIORE: Um-hum.

10 MR. GREY: I - - - I think that - - - that the  
11 Attorney General and Mr. Perigoe are both looking at the  
12 elephant here from the wrong end. What we're trying to  
13 achieve here - - - I believe what the court is trying to  
14 achieve here, what it said it was trying to achieve in  
15 Kelly and Burns and the Third Department said in Stenson,  
16 is a rule that plaintiffs and compensation carriers can  
17 apply when they're settling a third-party action.

18 If the court decides that we're going to  
19 disregard the type of the settlement and everything will  
20 depend on what the Workers' Compensation Board thinks the  
21 likely outcome is, then what will follow is a plaintiff's  
22 personal injury attorney will never be able to settle a  
23 personal injury case until the Workers' Compensation case  
24 has concluded, because there will be no understanding about  
25 whether this is a Kelly case or a Burns case or - - - or



1 something in between.

2 Not only that, what will happen is there will be  
3 innumerable motions to the Supreme Court under Section  
4 29(5), because that is the court that has the jurisdiction  
5 to decide this issue. And the Supreme Court will be  
6 burdened with deciding what are essentially Workers'  
7 Compensation issues.

8 As I started to point out before - - - and the  
9 Attorney General frankly has it wrong - - - I am not  
10 arguing that timing trumps the type of the award. What I'm  
11 saying is that timing trumps the type of the award if the  
12 award - - - rather than trying to recharacterize what they  
13 say, what I'm saying is if it's not the type of award that  
14 is both subject to Kelly and has been determined before the  
15 date of the third-party settlement, then it's Burns.

16 So both the timing and the type are relevant.  
17 But it's not a flexible rule. It's a rule designed so that  
18 everyone will know at the time the third party settles what  
19 they're dealing with and they can make their adjustments  
20 accordingly.

21 A quick - - -

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. GREY: Thank you.

24 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Terranova v. Lehr Construction, Co., et al, No. 125 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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