***ARIZONA SUPREME COURT***
***ORAL ARGUMENT CASE SUMMARY***

**Twin City Fire Insurance v. Leija, CV-17-0280-PR**

**PARTIES:**

*Petitioner:* Twin City Fire Insurance Company

*Respondent:* Graciela Leija, as surviving spouse of Victor Leija

**FACTS:**

In January 2008, Victor Leija and Forrest Stockman were on the roof of the three-story Bank of America building in Glendale, preparing to perform window washing services for their employer, Omega Services, LLC ("Omega"). Omega provided them with a "rolling outrigger" system, rather than the "scissor lift" system they had previously used. Neither man had been trained on the proper use of the rolling outrigger system and Stockman, the more experienced of the two, did not properly set up the system on the building's roof. While Victor was attempting to set up a scaffold as part of the system, it collapsed, injuring Stockman and causing Victor to fall three stories to his death.

The Division of Occupational Safety and Health cited Omega for failing to repair a defect in the scaffold, failing to properly secure the scaffold to the building, and failing to make sure Victor Leija wore a safety harness. Omega's workers' compensation carrier, Twin City, accepted the claim and pays monthly benefits to Victor's family and his widow, Graciela Leija (collectively the "Leijas"); the payments eventually will total approximately $575,000.

The Leijas and Stockman sued numerous third parties, including the owner of the building (the City of Glendale), the property manager, the building maintenance company, the company that furnished the scaffold, and the company that fabricated it. The Leijas' complaint alleged negligence by each. The defendants all cited Omega as a non-party at fault.

The Leijas eventually settled with all defendants, recovering a total of $1,600,000. All defendants other than the City settled for the limits of their insurance policies; the parties dispute whether the City, which was an additional insured on two of the other defendants' policies, settled for the limits of its insurance.

As Omega's insurance carrier, under A.R.S. § 23-1023(D), Twin City was entitled to a lien against the $1,600,000 that the Leijas obtained from the third-party defendants. Twin City agreed to partially compromise its lien, but settlement negotiations eventually broke down.

Twin City filed a complaint seeking to enforce its lien under A.R.S. § 23-1023(D). The Leijas filed a motion asking the trial court to hold a trial at which they would establish their total damages and Omega's comparative fault for those damages. Both sides then moved for summary

judgment. The trial court granted summary judgment to Twin City. The trial court denied the Leijas' request for a damages trial and rejected their argument that Twin City owed a duty to compromise its lien under *Aitken v. Industrial Commission*, 183 Ariz. 387 (1995), to account for the percentage of fault of its insured, Omega.

The court of appeals reversed. The court began by outlining Arizona's workers' compensation scheme, noting that a worker's survivors may sue a third party "whose 'negligence or wrong'" contributed to the death. *Twin City Fire Ins. Co. v. Leija*, 243 Ariz. 175, 178 ¶ 9 (App. 2017) (quoting A.R.S. § 23-1023(A)). The survivors must notify the employer's workers' compensation insurance carrier of the lawsuit so that it "may intervene to protect its interests." *Id.* (quoting A.R.S. § 23-1023(C)). And the scheme grants "a lien to the carrier 'on the amount actually collectable from the [third-party defendant] to the extent of such compensation and medical, surgical and hospital benefits paid.'" *Id.* (alteration in original) (quoting A.R.S. § 23-1023(D)).

The court noted that when "joint-and-several liability was the general rule in Arizona," the lien granted to a carrier under § 23-1023 "did not impair the purpose of the statutory workers' compensation scheme, which is to protect injured workers." *Id.* ¶ 10. This is because third-party wrong-doers used to pay out "total recoveries" because "under the law existing at the time, [they] were responsible for *all* damages regardless of how big or small their respective portions of liability might have been." *Id.* Insurance carriers obtained liens against these "total recoveries" only to the extent the carrier had paid the worker's medical benefits. Thus, when joint-and-several liability was the law in Arizona, even after a carrier's lien was satisfied, "an injured worker 'received a full measure of damages from third parties whose conduct contributed to the result.'" *Id.* (quoting *Aitken*, 183 Ariz. at 390).

However, the court of appeals noted that Arizona largely abrogated joint-and-several liability in favor of a comparative fault system of liability; and, after this change, the insurance carrier's lien statute "'may work an injustice' on injured workers" because third-party defendants can name the worker's employer as a non-party at fault, thereby reducing the worker's total recovery by the employer's percentage of fault. *Id.* ¶ 11. As the Arizona Supreme Court stated in *Aitken*:

> Because a worker who elects to receive worker's compensation benefits cannot sue the employer, literal application of § 23-1023(D) in such a situation unfairly penalizes the worker: "Without an equitable adjustment or apportionment, employers and their carriers will continue to obtain full liens against third party recoveries even where those awards have been effectively reduced by virtue of the employers' own fault."

*Id.* (alteration omitted) (quoting *Aitken*, 183 Ariz. at 390). Thus, *Aitken* held that an insurance "carrier may assert a lien on a third party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action." 183 Ariz. at 392.

The court of appeals also discussed *Grijalva v. Arizona State Compensation Fund*, 185 Ariz. 74 (1996), noting that the Court in that case held that "*Aitken* did not address rules governing

the compromise of disputed third party claims." *Twin City*, 243 Ariz. at 180 ¶ 15. Then, the court outlined other court of appeals cases that had interpreted and applied *Aitken* in different procedural contexts, including *Weber v. Tucson Electric Power Co.*, 202 Ariz. 504 (App. 2002), *Stout v. Compensation Fund* (*Stout II*), 202 Ariz. 300 (App. 2002), and *Stout v. State Compensation Fund* (*Stout I*), 197 Ariz. 238 (App. 2000). The court of appeals then held this case was different from those prior cases and that, under *Aitken*, the fact that the Leijas had settled their claims with the various third-party defendants, rather than resolving their dispute through a jury trial, did not "preclude equitable apportionment" of Twin City's lien under A.R.S. § 12-2303(D). Twin City, 243 Ariz. at 181 ¶ 20.

The court of appeals rejected Twin City's argument that *Aitken* is limited to cases involving jury trials. Rather, the "rule of *Aitken* is derived from the purpose of the worker's compensation lien, which the supreme court stated is to 'promote fairness among all parties.'" *Id*. (quoting *Aitken*, 183 Ariz. at 392). Thus, the court of appeals held that the "superior court erred by denying the Leijas' request for a trial to equitably apportion Twin City's lien" and it remanded to the trial court so that it could hold a "fair proceeding" to determine the amount of the Leijas' damages and Omega's percentage of fault. *Id*. ¶ 23.

**ISSUES:**

1. Did the opinion erroneously break from Supreme Court authority in holding that a claimant who settles and dismisses all third-party claims under A.R.S. § 23-1023 may nevertheless obtain a post hoc trial to determine the percentage of employer fault solely to force reduction of the carrier's statutory lien under *Aitken v. Industrial Commission*, 183 Ariz. 387 (1995)?

2. To the extent the opinion's holding is limited to settlements 'for less than the limits of the third party's insurance,' is reversal required where this case settled for policy limits under all participating policies?

**STATUTES:**

In relevant part, A.R.S. § 23-1023 provides:

> A. If an employee who is entitled to compensation under this chapter is injured or killed . . . by the negligence or wrong of another person not in the same employ, the injured employee, or in event of death the injured employee's dependents, may pursue the injured person's remedy against the other person.
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> D. If the employee proceeds against the other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from the other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing the recovery. . . . The insurance carrier or

person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by this chapter for the case. Compromise of any claim by the employee or the employee's dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the insurance carrier or self-insured employer liable to pay the claim.

In relevant part, A.R.S. § 12-2506 provides:

> A. In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.
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> C. The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.