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IN THE SUPREME COURT OF FLORIDA

CASE NO: 83-1356

AETNA INSURANCE COMPANY,

Petitioner,

v.

JAMES NORMAN and
NATALIE NORMAN, his wife,

Respondents.

/

PETITIONERS' BRIEF ON JURISDICTION

On Petition For Review Of The Decision Of
The First District Court Of Appeal Of Florida,
Case No: 83-1356, Rendered February 7, 1984

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INTRODUCTION

On June 2, 1983 in case number 80-22087, an equitable distribution proceeding, Circuit Court Judge Mario P. Goderich entered an order awarding the Petitioner $2,947.47 as the Petitioner's equitable share and distribution of the Respondent's settlement of a third party action. (Appendix, pp. 1-3)

The Third District Court of Appeal of Florida, in case number 83-1356, on February 7, 1984, reversed and remanded the Circuit Court Judge's order. (Appendix pp. 4-7)

The Petitioner's office never received notice of the filing of an opinion until after the mandate had been issued. In fact, the Petitioner's office received a notice from the Third District Court of Appeal on February 24, 1984 notifying them that on February 23, 1984 the Third District Court of Appeal had issued a mandate.

As will be established in this Brief on Jurisdiction, the February 7, 1984 opinion of the Third District Court of Appeal of Florida in case number 83-1356 expressly and directly conflicts with numerous decisions of other District Courts in the State of Florida including the following; Risk Management Services, Inc. v. McCraney 420 So2d 374 (Fla. 1st DCA 1982), Risk Management Services, Inc. v. Scott 414 So2d 220 (Fla. 1st DCA 1982), American States Insurance Company v. Johnson 426 So2d 1222 (Fla. 4th DCA 1983), Maryland Casualty Insurance Company v. Reeves

418 So2d 1257 (Fla. 4th DCA 1982). The conflict involves the Third District Court of Appeal's reduction of the Respondent's net recovery by the percentage of comparative negligence involved in the case.

For this reason, the Petitioner respectfully urges this Court to accept discretionary jurisdiction to review the February 7, 1984 decision of the Third District Court of Appeal of Florida in case number 83-1356 or in the alternative to relinquish jurisdiction and send the case back to the Third District Court of Appeal so that the Third District would obtain jurisdiction and be able to entertain a motion by Petitioner to recall the mandate and entertain a motion fo re-hearing regarding the above mentioned issue. That is, the Petitioner would prefer to give the Third District Court of Appeal an opportunity to grant a motion by Petitioner for a re-hearing on the specific issue which is the basis for this appeal. This extraordinary situation arose from the failure of the Third District Court of Appeal to notify the Petitioner's office of the filing of an opinion until after the mandate had issued.

QUESTION PRESENTED

The question presented is whether the decision in the instant case is in conflict with those cases holding that the claimant's net recovery should not be reduced by a percentage relating to comparative negligence or uncollectability of insurance.

ARGUMENT

The present decision is in direct conflict with those cases holding that the claimant's net recovery should not be reduced by a percentage relating to comparative negligence or uncollectability of insurance. In the instant case the Petitioner had paid $26,795.17 in Workers' Compensation Benefits to the Respondent. (Appendix p.4)

Thereafter, the claimant settled a third party claim based on the work related accident for $75,000.00 (Appendix p.5) After substracting attorney's fees and costs in the amount of $36,267.47 from the total settlement figure the Third District Court of Appeal arrived at $38,732.53 as the Respondent's net recovery in the third party lawsuit. (Appendix p.5)

Thereafter, the Third District Court of Appeal properly held that the total amount of benefits paid and to be paid by the carrier should be reduced by fifty per cent (50%) due to the Respondent's comparative negligence. However, the Third District Court of Appeal then made an unwarranted and, very probably, an inadvertent computation. In determining the total amount (Cap) on the carrier's lien the Third District Court of Appeal reduced the Respondent's net recovery by fifty per cent (50%) (the claimant's comparative negligence) yielding a figure of $19,366.26.

All the cases listed in the introduction specifically hold that the carrier's lien even in cases where their pro rata share is less than one hundred per cent (100%) is always in the

amount of the claimant's net recovery. That is, in the instant case, the Respondent's net recovery of $38,732.53 should serve as the limit of recovery by the insurance carrier. When benefits in the future after being reduced by fifty per cent (50%) for the comparative negligence of the claimant finally add up to $38,732.53 then the insurance carrier can no longer take a fifty per cent (50%) because the entire amount in the claimant's net recovery in the third party lawsuit will have, at that point, been exhausted.

The Third District Court of Appeal emphasized the following language in Florida Statutes 440.39(3)(a), Florida Statutes (1981),

> "... the employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted, 100% of what it is paid in future benefits to be paid, unless the employee or dependent can demonstrate to the court that he did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectability..."

Although the case at bar involves a settlement rather than a judgment the same rationale applies. The plain and straight forward reading of Florida Statutes 440.39(3)(a) and all the cases construing the same reveals that the net recovery is never reduced in determining the cap upon the carrier's lien. Rather, the percentage of benefits, or the carrier's pro rata share, are the figures which are reduced to reflect comparative negligence and uncollectability of insurance.

The question of the cap on the employer/carrier's lien was specifically addressed in Risk Management Services, Inc. v. McCraney, supra, 375, "The appellant shall recommence payment of

full benefits, if and when the sum of the amounts recovered and retained pursuant to its lien equals McCraney's net recovery on the tort claim."

In Risk Management Services, Inc. v. Scott, supra, at page 222, the courts stated, "After that, the insurer shall be reimbursed 100% from the employee's recovery subject to a percentage reduction to offset claimant's loss of full recovery, limits of insurance and collectibility." Clearly the reduction referred to in Scott, supra, is the 50% reduction of benefits paid or to be paid not a reduction of the net recovery.

In American States Insurance Company v. Johnson, supra, at 1223 the court adopted the rationale of the First District Court of Appeal in Risk Managment Services, Inc. v. McCraney, supra, "The appellant shall recommence payment of full benefits, if and when the sum of the amounts recovered and retained pursuant to its lien equals net recovery on the tort claim."

In Maryland Casualty Insurance Company v. Reeves, supra, at 1259 the courts stated that, "Under these circumstances the carrier is entitled to reimbursed for what it has paid out in compensation benefits up to the net amount actually received by the claimant after payment of his costs and attorney's fees."

All of the foregoing cases expressly and directly conflict with the opinion of the Third District Court of Appeal in the instant case. In fact, the Petitioner is unable to find even one case in the State of Florida that directs the net recovery to be reduced by a percentage corresponding to the comparative

negligence and/or collectability of insurance in a particular case.

CONCLUSION

The decision of the District Court of Appeal, Third District, that the Petitioner, AETNA INSURANCE COMPANY, seeks to have reviewed is in direct conflict with decisions in the First and Fourth District Courts of Appeal referenced above. Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that the conflicting decisions of the District Court of Appeals are correct and should be approved by this Court, as the controlling law of the State.

Accordingly, the Petitioner, requests this Court to take jurisdiction and entered an order quashing the decision and an order of the Third District Court of Appeal and approving conflicting decisions of the First and Fourt District Courts of Appeal. In the alternative, the Petitioner would request this Court relinquish jurisdiction to the Third District Court of Appeal so that it might hear a motion by the Petitioner for a re-hearing.

Respectfully submitted,

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BY R B Wingate Jr.
RICHARD B. WINGATE, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand-delivered this 14 day of March, 1984 to: Jay Dermer, Esquire, 420 Lincoln Road, Suite 327, Miami Beach, Florida 33139, Joe Unger, Esquire, 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130.

BY RB Wingate Jr.
RICHARD B. WINGATE, JR.