IN THE SUPREME COURT OF FLORIDA

PAMELA K. COON, as Personal Representative of the Estate of JERRY FRANK COON, Deceased,

Petitioner,

v.

CASE NO. 69,468

THE CONTINENTAL INSURANCE COMPANY, c/o Underwriters Adjusting Company,

Respondent.

On Review of A Decision of
the Second District Court of Appeal

ANSWER BRIEF OF RESPONDENT THE CONTINENTAL INSURANCE COMPANY

Michael L. Rosen
Charles E. Bentley, of
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, Florida 32302
(904) 224-7000

Attorneys for Respondent

TABLE OF CONTENTS

		Page
TABLE OF CITATIONS		ii
INTRODUCTION		1
STATEMENT OF THE CASE AND FACTS		2
SUMMARY OF THE ARGUMENT		9
ARGUMENT		12
I.	The District Court Properly Held That CONTINENTAL's Lien For Workers' Compensation Benefits Under Section 440.39(3)(a), Florida Statutes (1981), Was Not Subject To Reduction For A Proportionate Share of COON's Attorneys' Fees and Costs	12
II.	The District Court Properly Refused To Reduce CONTINENTAL's Lien Based Upon A Pro Rata Comparison Of The Settlement With The Amount Of The Jury Verdict.	38
III.	The District Court Properly Applied CONTINENTAL's Lien To That Portion Of The Settlement Allocated To The Children.	46
CONCLUSION		48
CERTIFICATE OF SERVICE		49

TABLE OF CITATIONS

Cases	Page(s)
Adjustco, Inc. v. Lewis, 491 So.2d 578, 581 (Fla. 1st DCA 1986)	27
Aetna Insurance Co. v. Norman, 468 So.2d 226 (Fla. 1985)	passim
Alexsis, Inc. v. Bryk, 471 So.2d 545 (Fla. 4th DCA 1985)	passim
American States Insurance v. See-Wai, 472 So.2d 838 (Fla. 5th DCA 1985)	25,34
Brooks v. Anastasis Mosquito Control District, 148 So.2d 64, 66 (Fla. 1st DCA 1963)	19
C & T Erectors, Inc. v. Case, 481 So.2d 499 (Fla. 2d DCA 1985)	passim
Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977)	17
City of Tallahassee v. Chambliss, 470 So.2d 43, 45 (Fla. 1st DCA 1985)	27,40
Continental Insurance Co. v. Coon, 493 So.2d 485 (Fla. 2d DCA 1986)	1
Cooper Transportation, Inc. v. Mincey, 459 So.2d 339 (Fla. 3d DCA 1984)	23,40
Dade County v. National Bulk Carriers, Inc., 450 So.2d 213, 216 (Fla. 1984)	33
Department of Health & Rehabilitative Services v. Culmer, 402 So.2d 1273, 1275 (Fla. 3d DCA 1981)	23
Division of Risk Management v. Nationwide Insurance Co., 12 F.L.W. 135 (Fla. 1st DCA Dec. 31, 1986)	27
Dobbs v. Sea Isle Hotel, 56 So. 341, 342 (Fla. 1952)	15,41
Gay v. Canada Dry Bottling Co., 59 So.2d 788, 790 (Fla. 1952)	36

Griffis v. State,
356 So.2d 297 (Fla. 1978) 31

Heredia v. Allstate Insurance Co.,
358 So.2d 1353, 1355 (Fla. 1978) 31

Hewitt, Coleman & Assoc. v. Grattan,
432 So.2d 125 (Fla. 2d DCA 1983) 21,27

Hoffman v. Jones,
280 So.2d 431, 433-34 (Fla. 1973) 34

Holly v. Auld,
450 So.2d 217, 219 (Fla. 1984) 20

Jacobs Engineering Group, Inc. v. Coon,
492 So.2d 372 (Fla. 2d DCA 1986) 4

Liberty Mutual Insurance Co. v. Rodriguez,
436 So.2d 1091 (Fla. 3d DCA 1983) 23

Lee v. Risk Management,
409 So.2d 1163 (Fla. 3d DCA 1982) passim

Lumberman's Mutual Casualty Co. v. Simon,
375 So.2d 894, 895 (Fla. 4th DCA 1979) 40

Martel v. Gibeaut, Inc.,
330 So.2d 493 (Fla. 4th DCA 1976) 8

Maryland Casualty Co. v. Whitely,
375 So.2d 18 (Fla. 1st DCA 1979),
cert. denied, 383 So.2d 1205 (Fla. 1980) 43

National Ben Franklin Insurance Co. v. Hall,
340 So.2d 1269 (Fla. 4th DCA 1976) passim

Orange County v. Sealy,
412 So.2d 25 (Fla. 5th DCA 1982) 25

Peninsular Life Insurance Co. v. Pickleshimer,
402 So.2d 1326, 1327 (Fla. 4th DCA 1981) 37,43

Ramar-Dooley Construction Co. v. Norris,
341 So.2d 546, 548 (Fla. 2d DCA 1977) 43

Reliance Insurance Co. v. Davis,
491 So.2d 1177 (Fla. 4th DCA 1986) 34

Risk Management Services v. McCraney,
420 So.2d 374, 375 (Fla. 1st DCA 1982) 27

Risk Management Services, Inc. v. Scott,
414 So.2d 220 (Fla. 1st DCA 1982) 21,26,28

S.R.G. Corp. v. Department of Revenue,
365 So.2d 687 (Fla. 1978) 31

St. Petersburg Bank & Trust Co. v. Hamm
414 So.2d 1071, 1073 (Fla. 1982) 31

Safeco Insurance Co. v. Sarkisian,
389 So.2d 1088, 1089 (Fla. 4th DCA 1980) 43

Seddon v. Harpster,
403 So.2d 409, 411 (Fla. 1981) 35

Sentry Insurance Co. v. Keefe,
427 So.2d 236 (Fla. 3d DCA 1983) 23,25

State v. Egan,
287 So.2d 1, 4 (Fla. 1973) 19

State v. Putnam County Development Authority,
249 So.2d 6, 10 (Fla. 1971) 20

State Department of Revenue v. Swinscoe,
376 So.2d 1 (Fla. 1979) 36

State Department of Transportation v. Knowles
402 So.2d 1155 (Fla. 1981) 36

State Division of Risk Management v. McDonald,
436 So.2d 1134 (Fla. 5th DCA 1983) 25,28,34

State ex rel. City of Casselberry v. Mager,
346 So.2d 267, 269 n. 5 (Fla. 1978) 18

Sullivan v. Mayo,
121 So.2d 424, 428 (Fla. 1960) 8,37

Tohn v. Montgomery Elevator Co.,
400 So.2d 1061, 1062 (Fla. 1st DCA 1981) 32

United Parcel Services v. Carmadella,
432 So.2d 702, 704 (Fla. 3d DCA), pet. for
rev. denied, 441 So.2d 631 (Fla. 1983) 23,41

Van Pelt v. Hilliard,
75 Fla. 792, 78 So. 693 (1918) 31

Webb v. Hills Van Service,
414 So.2d 262, 262-63 (Fla. 1st DCA 1982) 37

Whitely v. United States Fidelity & Guaranty Co.,
454 So.2d 63 (Fla. 1st DCA 1984),
pet. for rev. denied, 462 So.2d 1108 (Fla. 1985) 26,40

Williams v. American Surety Co.,
99 So.2d 877, 880 (Fla. 2d DCA 1958) 41

Winn-Dixie Stores, Inc. v. Roca,
480 So.2d 171, 172-73 (Fla. 3d DCA 1985) 23

FLORIDA RULES

Fla. App. Rule 9.220 1

FLORIDA STATUTES

Section 440.16(1)(b)2, Fla. Stat. 46
Section 440.17, Fla. Stat. (1981) 46
Section 440.39(3)(a), Fla. Stat. (1981) passim

LAWS OF FLORIDA

Ch. 83-305, §15, Laws of Fla. 13

OTHER AUTHORITIES

Art. v, §3(b)(c), Fla. Const. 1

INTRODUCTION

This case is before the Court for review of a decision of the Second District Court of Appeal, Continental Insurance Co. v. Coon, 493 So.2d 485 (Fla. 2d DCA 1986) [A 1-2],[1] which conflicts with the decision of the Fourth District in Alexsis, Inc. v. Bryk, 471 So.2d 545 (Fla. 4th DCA 1985) [A 3-5]. The issue on which conflict arises is whether section 440.39(3)(a), Florida Statutes (1981) [A 6], authorized a court to reduce a workers' compensation carrier's lien on the proceeds of an employee's third-party tort action by deducting a portion of the attorneys' fees and costs incurred by the employee in the third-party litigation. The Court has jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

This answer brief is filed on behalf of the respondent, THE CONTINENTAL INSURANCE COMPANY ("CONTINENTAL"), which was the appellant below. The petitioner here is PAMELA K. COON ("COON"), who was the appellee in the district court. Appearing as amicus curiae in support of COON is the ACADEMY OF FLORIDA TRIAL LAWYERS ("AFTL"), which did not participate below.

---

[1] Pursuant to Florida Rule of Appellate Procedure 9.220, this brief is accompanied by an Appendix, which contains a copy of the Second District's decision below and other pertinent portions of the record. Included in the Appendix for ease of reference are copies of the Fourth District's decision in Alexsis, the 1981 version of section 440.39(3)(a), and the 1983 amendment to the statute. References to the Appendix are signified as [A ___]. References to other portions of the record before the district court are signified as [R ___].

STATEMENT OF THE CASE AND FACTS

The facts are not in dispute and are accurately recited in the district court's opinion. To ensure that the Court has a thorough understanding of the context in which this controversy arises, however, CONTINENTAL believes that a more comprehensive statement of the factual and procedural background is warranted.

In November of 1981, Jerry Frank Coon was fatally injured by the explosion of an electrical motor starter while employed by CONTINENTAL's insured [R 1,4,11]. CONTINENTAL properly paid all sums due to the COONS as benefits under the Workers' Compensation Law, including disability and death benefits, medical expenses, and funeral expenses, which altogether totalled $71,336.45 [R 47-50].

PAMELA K. COON, as personal representative of her husband's estate, subsequently filed a wrongful death suit against a number of third parties. Alleging negligence in the design, manufacture, and installation of the electrical equipment, COON sought damages for herself as surviving spouse, for the two minor children, and for the estate [R 11-17]. Ultimately, three of the defendants settled with COON for a total of $175,000 [A 8]. The claims against the remaining third-party tortfeasors proceeded to a trial that resulted in a jury verdict awarding the COONS a total of $1.5 million in compensatory damages, allocated as follows:

For PAMELA K. COON, as widow:	$800,000
For APRIL LEANNE COON, as daughter:	$250,000
For JERRY FRANK COON, as son:	$300,000

For ESTATE OF JERRY FRANK COON: $150,000

A Final Judgment was entered in accordance with the jury verdict, but the trial court reserved jurisdiction to approve the $175,000 settlement agreement as to the other defendants and to issue an amended judgment reflecting the appropriate set-off for that amount as against the jury awards [R 18-19].

CONTINENTAL filed a Notice Of Claim Of Lien For Payment Of Workers' Compensation Benefits, asserting its right under section 440.39(3)(a), Florida Statutes (1981), to be reimbursed out of the COONS' recovery for 100% of all sums paid by CONTINENTAL as benefits under the Workers' Compensation Law [R 20-22]. Section 440.39(3)(a) provided in pertinent part that in any action against a third-party tortfeasor to recover for injuries to an employee,

> the employer or the insurance carrier . . . may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which said notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law. 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 percent of what it has paid and 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 collectibility. The burden of proof will be upon the employee.

(Emphasis added.) When the COONS disputed CONTINENTAL's entitlement to recover 100% of the amount of benefits paid and

moved to strike the lien, CONTINENTAL filed a Motion For Determination Of Workers' Compensation Lien [R 23-24].

On July 1, 1985, the trial court entered an Order On Post Trial Motions and Order Modifying Final Judgment, which (a) approved the $175,000 settlement agreement with three of the defendants; (b) set off the amount of that settlement recovery from the $1.5 million judgment against the remaining defendants; (c) denied the COONS' motion to strike CONTINENTAL's workers' compensation lien; and (d) directed that the funds received by the COONS under the settlement be held in trust pending a final determination of the amount to which CONTINENTAL was entitled under its lien [A 8-9].

The final judgment against the non-settling defendants was accordingly modified to award the following amounts in addition to the $175,000 settlement:

For PAMELA K. COON, as widow:	$707,250
For APRIL LEANNE COON, as daughter:	$220,250
For JERRY FRANK COON, as son:	$265,000
For ESTATE OF JERRY FRANK COON:	$132,500

The court also taxed costs against the non-settling defendants in the amount of $9,520.17 [A 9]. That judgment was separately appealed, and was subsequently affirmed by the Second District.[2]

On July 5, 1985, the trial court conducted a hearing on CONTINENTAL's Motion For Determination Of Workers' Compensation

---

[2] Jacobs Engineering Group, Inc. v. Coon, 492 So.2d 372 (Fla. 2d DCA 1986).

Lien [R 36-68]. It was undisputed that the amount of workers' compensation benefits and expenses paid or to be paid by CONTINENTAL totalled $71,336.45 [R 47-50], and there was no issue as to the employee's comparative negligence or the limits of insurance coverage and collectibility. The COONS contended, however, that CONTINENTAL was not entitled to recover 100% of the benefits paid to the COONS, but rather the lien should be reduced by deducting a proportionate amount of the COONS' attorneys' fees and costs in the third-party tort action [R 40-44], and by treating the children's portion of the recovery as not being subject to the workers' compensation lien [R 55-60].

Although the trial court rejected the COONS' arguments regarding exemption of the children's share [R 60-66], the judge accepted the contention that a proportionate share of the COONS' attorneys' fees and costs should be deducted from CONTINENTAL's lien. CONTINENTAL argued that the language of section 440.39(3)(a) as it existed in 1981 expressly provided for 100% recovery of workers' compensation benefits paid by applying the lien against the net tort recovery -- i.e., the amount remaining after the attorneys' fees and costs are deducted -- and that such liens did not become subject to a deduction for attorneys' fees and costs until after the statute was amended to authorize such proration in 1983 [R 50-55]. The trial court agreed that the 1981 version of the statute would govern [R 52], but nonetheless ruled that the COONS could reduce CONTINENTAL's lien by 40% for attorneys' fees and by a proportionate share of their litigation costs [R 62].

CONTINENTAL then moved for reconsideration, renewing its argument that the 1981 version of section 440.39(3)(a) entitled CONTINENTAL to recover 100% of the workers' compensation benefits paid, and asserting that the trial court, by requiring the deduction for attorneys' fees and costs, had in effect applied the amended 1983 version of the statute [R 27-31].[3] At a hearing on CONTINENTAL's motion for reconsideration [R 78-103], the trial judge reaffirmed his ruling that even under the 1981 version of section 440.39(3)(a), CONTINENTAL's lien was subject to a deduction for a proportionate share of the attorneys' fees and costs incurred by the COONS in suing the third-party tortfeasors [R 92-94].[4]

On July 17, 1985, the trial court entered its Order On Motions For Determination Of Lien [A 10-13]. As a consequence of the 40% deduction for attorneys' fees and the proportionate deduction of the COONS' total costs, CONTINENTAL's lien for bene-

---

[3]CONTINENTAL also objected to the fact that the proposed order (a) limited CONTINENTAL's lien recovery solely to a pro rata share of the $175,000 settlement, without taking into consideration the substantially greater amounts awarded the COONS in the modified final judgment against the non-settling defendants; (b) computed the deduction for costs based on the total of $25,935.71 which the COONS claimed to have expended, rather than the taxable costs of $9,520.17 actually awarded in the modified final judgment; and (c) reflected a total deduction for attorneys' fees and costs of $36,942.21, and a balance payable to CONTINENTAL of only $30,445.49, which sums did not even total the entire lien amount of $71,336.45 [R 29-30].

[4]The court also decided that the deductions should be determined by considering only the $175,000 settlement, and that the reduction for costs should be computed on the basis of the total amount of $25,935.71 which the COONS claimed to have expended, rather than the taxable costs of $9,520.17 allowed in the modified final judgment [R 87-88].

fits paid of $71,336.45 was reduced to $30,445.49 [A 13]. CONTINENTAL thereafter filed a timely notice of appeal [R 69-70], and the COONS filed a notice of cross-appeal [R 77].

On appeal, the Second District reversed, reaffirming its prior holding in C & T Erectors, Inc. v. Case, 481 So.2d 499 (Fla. 2d DCA 1985), that the 1981 statute authorized a carrier to recover 100% of the total benefits paid. The district court noted conflict with the Fourth District's decision in Alexsis, Inc. v. Bryk, 471 So.2d 545 (Fla. 4th DCA 1985), but observed that the conflict was resolved by the 1983 amendment to the statute, and declined to follow Alexsis as being contrary to the meaning of the 1981 version:

> Continental correctly points out that section 440.39(3)(a), as it existed when Coon was injured in 1981, authorized a workers' compensation carrier to recover 100% of the total benefits it paid without any deduction for attorneys' fees and costs incurred in an action against third-party tort-feasors. C & T Erectors, Inc. v. Case, 481 So.2d 499 (Fla. 2d DCA 1985). The trial court properly determined that the 1981 statute applied. It erred, however, in deducting attorneys' fees and costs from Continental's recovery.
>
> Appellee suggests we recede from our position in C & T Erectors, Inc. and follow the view of the Fourth District Court of Appeal expressed in Alexsis, Inc. v. Bryk, 471 So.3d 545 (Fla. 4th DCA 1985) and National Ben Franklin Insurance Co. v. Hall, 340 So.2d 1269 (Fla. 4th DCA 1976). We rejected this argument in C & T Erectors, Inc., and we decline the invitation to revisit our holding in that case. We noted in C & T Erectors, Inc., that the conflict between our court and the Fourth District in the decisions on this point has been resolved by the 1983 amendment to section 440.39(3)(a). The 1983 statute provides that attorneys' fees and costs expended in third-party tort

> actions are to be prorated and the workers' compensation carrier's lien reduced accordingly. C & T Erectors, Inc., 481 So.2d at 501. Of course, we are bound to adhere to the meaning of section 440.39(3)(a) as it existed when Mr. Coon's accident occurred in 1981. Sullivan v. Mayo, 121 So.2d 424, 428 (Fla. 1960); Martel v. Gibeaut, Inc., 330 So.2d 493 (Fla. 4th DCA 1976).

493 So.2d at 486. COON moved for clarification, for certification of the decision to this Court based on the conflict with Alexsis, and for a stay of mandate, but those motions were denied. COON then filed its petition for review on which this Court agreed to accept jurisdiction.

SUMMARY OF THE ARGUMENT

The Second District properly held that CONTINENTAL's lien could not be reduced by deducting a portion of the attorneys' fees and costs incurred by the COONS in their suit against the third-party tortfeasors. The provisions of section 440.39(3)(a) in effect in 1981 specifically provided for the carrier to recoup 100% of the benefits it had paid to the employee by applying the lien to the employee's net tort recovery -- i.e., the amount remaining after the employee's attorneys' fees and costs are deducted. This application of the statute is consistent with its plain language and legislative history as construed by this Court and by four of the five district courts.

Since the legislature expressly provided that the carrier's 100% lien was subject to reduction only where the employee recovers less than his full damages due to comparative negligence or limits of insurance coverage and collectibility -- neither of which was established here -- no other exception may be implied. COON's contention that the statute is ambiguous and thus subject to judicial construction is without merit. The provision that the employer or carrier has a lien "to the extent that the court may determine to be their pro rata share" of benefits paid refers to cases where the employee proves a diminished recovery due to comparative negligence or insurance limits; it is not inconsistent with, and certainly cannot override, the specific directive that the carrier shall recover 100% of what it paid from the employee's net recovery, after all attorneys' fees and costs are deducted.

No court has found the statute ambiguous; even the Fourth District in Alexsis conceded that deducting attorneys' fees and costs from the carrier's lien was contrary to the literal language of the statute. Unambiguous statutes are not open to judicial construction, nor can rules of construction be used to create ambiguity. Courts must give effect to the plain meaning of a statute as written by the legislature even if a different result may seem preferable.

Allowing the carrier to recover 100% of the benefits it paid is neither unfair nor inconsistent with the policy of the workers' compensation law. The COONS' contention that the district court's application of the statute leaves them "virtually nothing" ignores the fact that they have previously received $71,336.45 in benefits from CONTINENTAL, will net another $7,727.84 from the settlement, and have now recovered an additional $1,518,731.24 on their judgment against the third-party tortfeasors. Requiring reimbursement of the carrier from the employee's tort recovery is not inconsistent with the purpose of placing the primary burden of compensation on the employer; it merely prevents the employee from enjoying a double recovery when that burden is shifted to third-party tortfeasors.

The Fourth District's conflicting decision in Alexsis is clearly erroneous. First, it was admittedly contrary to the plain language of the statute, and concededly in conflict with other district court decisions, one of which has since been approved by this Court. Second, it relied on a case that has since been overruled, and it rested on the notion -- since

discredited by this Court and even by the Fourth District itself -- that the National Ben Franklin proration formula continued to apply to the statute as it existed from 1977 until 1983. Finally, it improperly gave retrospective effect to the 1983 amendment, which was clearly a substantive change of an unambiguous provision and not a clarification of any doubtful language.

There is no basis to support COON's contention that CONTINENTAL's lien should be reduced in proportion to the difference between the settlement and the jury verdict, thus limiting CONTINENTAL's recovery to less than 5% of the benefits it paid despite the statutory directive for 100% recovery. COON's theory rests on the discredited notion that the National Ben Franklin formula applies to the 1981 statute. This Court should not create implied exceptions to the 100% rule, nor should it strain the meaning of the word "collectibility" to accomplish that result indirectly. In any event, the COONS have collected the full amount of their judgment. The district court's refusal to exempt the children's portion of the settlement from the carrier's lien was entirely proper. It is ludicrous to suggest that the children were not beneficiaries of CONTINENTAL's compensation solely because those payments, which were concededly increased on account of the children, were remitted directly to Mrs. Coon rather than by separate checks to the children.

ARGUMENT

I. The District Court Properly Held That CONTINENTAL's Lien For Workers' Compensation Benefits Under Section 440.39(3)(a), Florida Statutes (1981), Was Not Subject To Reduction For A Proportionate Share Of COON'S Attorneys' Fees And Costs.

This case presents a straightforward issue of statutory interpretation regarding the language of section 440.39(3)(a), Florida Statutes (1981), which provides an insurance carrier who has paid workers' compensation benefits a lien on any judgment or settlement recovered by the employee or his dependents against third-party tortfeasors. The specific question is whether the statute contemplates that the attorneys' fees and costs incurred by an employee in prosecuting claims against third-party tortfeasors (a) should be prorated and deducted from the lien, thereby reducing the carrier's recovery to some amount less than 100% of the total benefits paid; or (b) should be subtracted at the outset from the gross amount of the employee's settlement or judgment, thereby leaving a net recovery from which the carrier is entitled to receive 100% of the benefits paid.

In its opinion below, the Second District reaffirmed its prior decisions adopting the latter interpretation and held that the 1981 version of the statute "authorized a workers' compensation carrier to recover 100% of the total benefits it paid without any deduction for attorneys' fees and costs incurred [by the employee or his dependents] in an action against third-party tort-feasors." 493 So.2d at 486. As grounds for urging this Court to quash that ruling and to approve the

conflicting decision of the Fourth District in Alexsis, Inc. v. Bryk, 471 So.3d 545 (Fla. 4th DCA 1985), COON contends[5] (a) that the statute is ambiguous and thus is subject to judicial construction; (b) that a construction of the statute which allows CONTINENTAL to recover 100% of the benefits it paid, without proration of the COONS' attorneys' fees and costs, is unfair and inconsistent with "the central underlying purpose of placing the primary burden of work-related compensation upon the employer"; and (c) that the 1983 amendment to the statute, which added language specifically authorizing proration of attorneys' fees and costs against the carrier's lien,[6] should be given retrospective effect as a "clarification" of the original legislative intent. Analysis reveals, however, that COON's contentions are without merit, and that the Second District's application of the statute in this case is consistent with the plain language and legislative history of the statute as construed by this Court and by four of the five district courts.

(a) The statutory language is plain and unambiguous.

At the time of Mr. Coon's injury in 1981, the portion of section 440.39(3)(a) at issue here provided that in any action

---

[5]Because the arguments advanced by the AFTL in its amicus brief are essentially identical to those of COON, references to COON's arguments throughout this brief should be regarded as applicable to both parties.

[6]Ch. 83-305, §15, Laws of Fla. [A 7].

against a third-party tortfeasor to recover for injuries to an employee,

> the employer or the insurance carrier . . . may file in the suit a notice of payment of compensation and medical benefits to the employee or his dependents, which said notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law. 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 percent of what it has paid and 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 collectibility. The burden of proof will be upon the employee.

(Emphasis added.)

The plain and unambiguous language of this statute is fairly susceptible of only one interpretation. In effect, it prescribes a simple two-step procedure for determining the amount of the carrier's lien. First, the court must take the gross amount of the employee's recovery under the settlement or judgment and deduct from that the attorneys' fees and costs incurred by the employee in the suit against the third-party tortfeasors. Then, after deducting the attorneys' fees and costs from the employee's gross recovery, the carrier is entitled to recoup out of the employee's net recovery 100% of the benefits it paid to the employee, unless the employee establishes that he recovered less than the full value of damages either because of comparative

negligence or because the insurance coverage was limited in amount and collectibility.

Since the COONS did not establish that they recovered less than the full value of their damages as a result of comparative negligence or due to the limits of insurance coverage and collectibility, there is simply no authority in the statute for reducing CONTINENTAL's recovery to anything less than 100% of the benefits it paid to the COONS under the Workers' Compensation Law. The legislature provided only two exceptions under which the carrier's 100% lien may be reduced, neither of which applies in this case. To create another exception for proration of the COONS' attorneys' fees and costs would fly in the face of the plain and unambiguous language requiring those litigation expenses to be treated as an "above-the-line" deduction. Moreover, it would violate the settled principle of statutory construction that the express mention of one thing is the exclusion of another ("expressio unius est exclusio alterius") and the related rule that courts may not imply or write into a law exceptions other than those prescribed by the legislature. E.g., Dobbs v. Sea Isle Hotel, 56 So. 341, 342 (Fla. 1952).

In an effort to overcome these obstacles, COON suggests that the statute is ambiguous and thus susceptible of judicial construction. Specifically, COON focuses on the language which provides that when the employer or carrier files a notice of payment of benefits to the employee or his dependents, "said notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their

pro rata share for compensation and medical benefits paid. . . ." (Emphasis added.) Seizing upon this clause, COON reasons that (a) the statutory language directing that the carrier shall recover 100% of what is has paid from the employee's net recovery after attorneys' fees and costs are deducted "should not be read in isolation," but should be considered together with the "pro rata share" clause; (b) unless it is construed to require that a portion of the employee's attorneys' fees and costs be allocated to the carrier, the "pro rata share" language of the statute "would be entirely superfluous" and "mere surplusage"; (c) allowing the carrier to recover 100% of the benefits it paid, without deducting a portion of the employee's attorneys' fees and costs, would be "positively inconsistent with the statute's explicit requirement of a 'pro rata' allocation"; and (d) this inconsistency between the "pro rata share" phrase and the language prohibiting any deduction of the employee's attorneys' fees and costs from the carrier's 100% lien renders the statute ambiguous, thus opening the door for judicial interpretation. (Petitioner's Initial Brief at 6-7; see also AFTL's Brief at 12.)

Despite the impressive array of authorities and rules of statutory construction from which COON attempts to fabricate a finding of ambiguity, her reasoning is fatally flawed. Initially, COON's reliance on the rule that particular phrases of a statute should not be read in isolation is a manifest perversion of that principle. COON's argument would actually require this Court to isolate the "pro rata share" phrase, which has no apparent relation to the allocation of attorneys' fees or

costs, and infer or imply a meaning which directly contradicts the express statutory language specifically mandating that attorneys' fees and costs are to be deducted from the gross tort recovery before the carrier's 100% lien is satisfied. In construing a statute, "[i]nference and implication cannot be substituted for clear expression." Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977).

An equally serious deficiency in COON's argument is the erroneous premise that unless the "pro rata share" clause is construed to require an allocation of attorneys' fees and costs, it would be "entirely superfluous" or "mere surplusage." Of course, even if COON's theory were correct, it would simply transfer the defect from one phrase to another by requiring this Court to nullify -- and deem "entirely superfluous" -- the specific language mandating that the carrier shall recover 100% of what it has paid from the net recovery after the employee's attorneys' fees and costs have been deducted. The Court is not confronted with such a dilemma here, however, because the "pro rata share" clause can in fact be given an effect that is consistent with the plain language of the statute and avoids any conflict with the provision authorizing 100% recovery on the carrier's lien.

Quite simply, the provision that the employer or carrier has a lien on the tort recovery "to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid" has reference to those cases in which 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 collectibility." This reading of the statutory language finds support not only in the settled principle that "[a] statute should be interpreted to give effect to every clause in it and to accord meaning and harmony to all of its parts," State ex rel. City of Casselberry v. Mager, 346 So.2d 267, 269 n. 5 (Fla. 1978), but also in the legislature's presumably deliberate use of the word "may" in the disputed clause.

By providing that the carrier has a lien "to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid," the statute plainly contemplates that there will be cases in which the court may not be required to determine any pro rata share. If the "pro rata share" clause is construed with reference to the subsequent language authorizing a reduction of the carrier's lien where the employee can demonstrate to the court that he recovered less than the full value of his damages due to comparative negligence or insurance limits, the legislature's use of the word "may" comports with common sense. In some cases (where the employee proves a diminished recovery due to comparative negligence or limited insurance coverage and collectibility) the court may determine that the carrier can recover only a pro rata share of the benefits it paid; in other cases (where the employee either has failed to carry his burden of proof or has in fact recovered his full damages), it may not.

Conversely, if the "pro rata share" clause is construed to require an allocation of the employee's attorneys' fees and costs against the carrier's lien, without more specific language to indicate such an intent, the use of the word "may" would be inappropriate because the employee will necessarily incur some attorneys' fees and costs in all third-party tort actions. Thus, the interpretation urged by COON would not only create an unnecessary inconsistency between the "pro rata share" clause and the provision that the carrier "shall recover . . . 100 percent of what it has paid" from the amount remaining after the employee's attorneys' fees and costs have been deducted, but it would require this Court to read the word "may" as meaning "shall" -- a patently improper result. See, e.g., Brooks v. Anastasia Mosquito Control District, 148 So.2d 64, 66 (Fla. 1st DCA 1963).

In essence, COON proposes that this Court should use rules of construction to create ambiguity by inferring an unnecessary conflict between two clauses of the statute, one of which specifically deals with the matter in plain and unmistakable language. As this Court has observed, however, rules of statutory construction "are useful only in case of doubt and should never be used to create doubt, only to remove it." State v. Egan, 287 So.2d 1, 4 (Fla. 1973). Where, as here, a statute contains language that specifically deals with a particular matter and there is other language elsewhere in the statute that might be interpreted as conflicting, courts should not allow the specific directive to be defeated, but should strive "to read the several provisions of the act as consistent with one another

rather than in conflict, if there is any reasonable basis for consistency." State v. Putnam County Development Authority, 249 So.2d 6, 10 (Fla. 1971).

Since the "pro rata" share clause can be given a reasonable field of operation without conflicting with the provision that specifically prohibits any deduction of attorneys' fees and costs from the carrier's lien, there is no inconsistency in the statutory language. Absent any such inconsistency, there is no ambiguity that requires or permits judicial interpretation. When a statute contains unambiguous language that conveys a plain meaning, there is no occasion to resort to rules of statutory construction. The judiciary has no power to invade the province of the legislature by construing an unambiguous statute so as to extend, modify, or limit its express terms, and "it is not the court's duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court." Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984).

(b) The decisional law overwhelmingly supports the Second District's application of the statute consistent with its plain meaning.

It is significant that no Florida court has found the language of this statute to be ambiguous. Even the Fourth District in Alexsis admitted that "[a] literal reading of the statute appears to require the injured employee to bear all the costs and attorneys' fees involved in the tort recovery. . . ." The court in Alexsis nonetheless adopted a contrary construction

based on its perception that the result of applying the statute as written would be "unfair and unreasonable." 471 So.2d at 546-47.

To obtain what it deemed a more palatable result, the Fourth District in Alexsis ruled that its decision in National Ben Franklin Insurance Co. v. Hall, 340 So.2d 1269 (Fla. 4th DCA 1976), which had construed the pre-1977 version of section 440.39(3)(a), continued to authorize the proration of attorneys' fees and costs despite the explicit contrary language inserted by the legislature in a 1977 amendment:

> Because National Ben Franklin pre-existed the drafting of the version of the statute in question here, we believe the legislature contemplated that the judicial gloss requiring proration adopted in National Ben Franklin would also apply to this statute.

471 So.2d at 446. In so ruling, the Fourth District expressly acknowledged decisional conflict:

> We recognize, however, that other district courts have ruled to the contrary. See Aetna Insurance Co. v. Norman, 444 So.2d 1124 (Fla. 3d DCA 1984); Hewitt, Coleman and Associates v. Grattan, 432 So.2d 125 (Fla. 2d DCA 1983); Risk Management Services, Inc. v. Scott, 414 So.2d 220 (Fla. 1st DCA 1982).

Id. at 547.

Alexsis is clearly a departure from the otherwise unanimous interpretation of section 440.39(3)(a) as it existed from 1977 until 1983. Prior to 1977, the statute contained language which was interpreted to require that when an injured employee obtained a settlement or judgment in litigation against third-party tortfeasors, the carrier's lien would be reduced by

apportioning a share of the employee's attorneys' fees and costs based on the "equitable distribution" formula enunciated in National Ben Franklin. In 1977, however, the statute was rewritten in a manner which plainly provides -- as the Fourth District itself conceded in Alexsis -- that the carrier shall receive 100% of the benefits it has paid out of the employee's net recovery from the third-party tortfeasors, after all the attorneys' fees and costs have been deducted.

The effect of the 1977 amendment was first addressed in Lee v. Risk Management, 409 So.2d 1163 (Fla. 3d DCA 1982), where the Third District concluded that:

> by amending the apportionment requirements out of existence, and by instead stating only that the lien is to be based upon the amount of the "judgment after attorney's fees and costs . . . have been deducted [emphasis supplied]" -- in other words, taken off the top as the trial court did below -- the legislature has clearly evinced its intention that the burden of these charges is now to be placed on the plaintiff, and conversely that the carrier's reimbursement is not to be diminished by any share of those expenses.

409 So.2d at 1165 (emphasis added). Significantly, the Third District declined to consider the allegations of unfairness that led the Fourth District in Alexsis astray:

> With great force and persuasiveness, the appellant claims that the result is unwise and unjust. We do not say because it does not matter if we agree with these views. Only the legislature has authority in this field. It has made its policy decision and that conclusion must and will be followed.

Id.

In subsequent decisions, the Third District has consistently reaffirmed its interpretation in Lee v. Risk Management by declaring that "the trial court is mandatorily precluded by the new '100%' version of Sec. 440.39(3)(a), Fla. Stat. (1981), from reducing a compensation carrier's third-party lien beyond the extent that full recovery is limited by uncollectibility or comparative negligence." Sentry Insurance Co. v. Keefe, 427 So.2d 236, 236 (Fla. 3d DCA 1983); see also Liberty Mutual Insurance Co. v. Rodriguez, 436 So.2d 1091 (Fla. 3d DCA 1983). In Sentry Insurance, the court noted that the statute "forbids" the apportionment of any attorneys' fees and costs to the carrier as was previously required under the "equitable distribution" formula of National Ben Franklin.[7] Subsequently, in Cooper Transportation, Inc. v. Mincey, 459 So.2d 339 (Fla. 3d DCA 1984), pet. for rev. denied, 472 So.2d 1181 (Fla. 1985), the Third District again held that there was "no basis" in the 1981 statute "to require the . . . carrier to pay a pro rata share of costs and attorney's fees in obtaining the recovery." 459 So.2d at 342.

The Third District's conclusion that a carrier's lien was not subject to the National Ben Franklin proration formula

---

[7]See also Winn-Dixie Stores, Inc. v. Roca, 480 So.2d 171, 172-73 (Fla. 3d DCA 1985); Aetna Insurance Co. v. Norman, 444 So.2d 1124, 1125 (Fla. 3d DCA 1984); approved in pertinent part, 468 So.2d 226 (Fla. 1985); Liberty Mutual Insurance Co. v. Rodriguez, 436 So.2d 1091, 1092 (Fla. 3d DCA 1983); United Parcel Services v. Carmadella, 432 So.2d 702, 704 (Fla. 3d DCA), pet. for rev. denied, 441 So.2d 631 (Fla. 1983); Department of Health & Rehabilitative Services v. Culmer, 402 So.2d 1273, 1275 (Fla. 3d DCA 1981).

under the 1981 statute has been upheld by this Court. Although reversing on an unrelated point, the Court in Aetna Insurance Co. v. Norman, 468 So.2d 226 (Fla. 1985), approved the Third District's ruling that the employee's gross settlement recovery should first be reduced by the entire amount of his attorneys' fees and costs, and then "subsection 440.39(3)(a) entitled [the carrier] to receive from the net tort recovery . . . an amount equal to 100% of the benefits paid or to be paid." 468 So.2d at 227-28.

COON insists that this Court's opinion in Aetna "says nothing about the appropriate formula for factoring in the costs and fees which the plaintiff must pay his counsel, and thus is not controlling precedent." (Petitioner's Initial Brief at 6 n. 4.) The AFTL likewise asserts that the Aetna decision "is silent on the issue of applying the pro rata formula to costs and fees incurred by the plaintiff." (AFTL's Brief at 9.) Those contentions are flatly refuted by a reading of the Aetna opinion.

While it is true that the Court did not discuss the issue at length in Aetna, the majority opinion clearly acknowledges the lower courts' findings that "the net tort recovery on the $75,000 settlement [was] reduced to $38,732.53 by $36,267.47 in attorney's fees and costs," and that "subsection 440.39(3)(a) entitled Aetna to receive from the net tort recovery of $38,732.53 an amount equal to 100 percent of the benefits paid or to be paid." 468 So.2d at 227-28. Then, following a discussion of an unrelated issue regarding the extent to which the carrier's lien would attach to future benefits, this Court concluded:

> We agree with the rest of the decision under review and quash only the point discussed above.

Id. at 238 (emphasis added). Not only did this Court agree with the application of the carrier's lien to the employee's net recovery after all attorneys' fees and costs were deducted, but it cited Lee v. Risk Management and Sentry Insurance with approval, and expressly disapproved the Fifth District's decision in Orange County v. Sealy, 412 So.2d 25 (Fla. 5th DCA 1982), which had applied the old National Ben Franklin "equitable proration" formula to the carrier's lien. Id. Such treatment can hardly be characterized as "silence."

In the Orange County decision and later in State Division of Risk Management v. McDonald, 436 So.2d 1134 (Fla. 5th DCA 1983), the Fifth District initially adhered to the "equitable distribution" formula and rejected the Third District's construction of section 440.39(3)(a). Significantly, McDonald was the only case cited by the Fourth District in Alexsis as support for its conclusion that National Ben Franklin continued to authorize proration even after the 1977 amendment. In a case decided subsequent to Alexsis, however, the Fifth District expressly receded from McDonald and aligned itself with the Third District. American States Insurance v. See-Wai, 472 So.2d 838 (Fla. 5th DCA 1985).

In American States, the Fifth District observed at the outset that the determination of the carrier's lien was controlled by this Court's decision in Aetna Insurance Co. v. Norman, and was unaffected by the 1983 amendment. 472 So.2d at 840. Acknowledging "that the National Ben Franklin formula was

abrogated by the 1977 amendment," and that it "must apply the formula set forth by the Third District and approved by the Florida Supreme Court," the Fifth District concluded

> that [the carrier] is entitled to recover from the settlement obtained by [the employee] (after attorney fees and costs are deducted) . . . 100% of what it has paid . . . reduced by [the employee's] comparative negligence. . . .

472 So.2d at 840-41.

Unlike the Fifth District, which had initially adhered to National Ben Franklin "equitable distribution" formula, the First District immediately recognized the change from the 1975 law and adopted the Third District's interpretation of section 440.39(3)(a). In Risk Management Services, Inc. v. Scott, 414 So.2d 220 (Fla. 1st DCA 1982), the First District explained that "[n]o restriction was made in the 1975 statute that the insurer's recovery be limited to the remainder after employee's attorney's fees and costs were deducted," but

> [t]he amended section clearly allows the employee to deduct his entire attorney's fees and costs from his recovery in the third party action before any amount is paid over the insurer. There is nothing in the present statute which provides for apportionment of those items. See Lee v. Risk Management, Inc. . . . Appellee's claim that the differences in the statutes would not affect the applicability of the Ben Franklin case is without merit.

414 So.2d at 222 (emphasis added).

The First District reinforced that construction of section 440.39(3)(a) in Whitely v. United States Fidelity & Guaranty Co., 454 So.2d 63 (Fla. 1st DCA 1984), pet. for rev. denied,

462 So.2d 1108 (Fla. 1985), plainly rejecting the arguments advanced by COON here:

> [The employee] urges that the trial court erred in requiring him to bear the cost of all attorney's fees in the portion of the settlement proceeds retained by him rather than requiring the carrier to bear a proportionate share of those fees based on its lien recovery. However, 440.39(3)(a), Florida Statutes (1979), specifically provides that the carrier should recover from the judgment, "after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted," 100 percent of the workers' compensation payments it has made. In contrast to prior and subsequent statutes, the 1979 statute makes no provision for apportionment of attorney's fees. Under that statute, to diminish the carrier's reimbursement by any share of the attorney's fees would be error.

454 So.2d at 64-65 (emphasis added). That result was most recently reaffirmed by the First District in Adjustco, Inc. v. Lewis, 491 So.2d 578, 581 (Fla. 1st DCA 1986).[8]

Finally, the Second District aligned itself with the majority in Hewitt, Coleman & Associates v. Grattan, 432 So.2d 125 (Fla. 2d DCA 1983). Although the peculiar circumstances of that case permitted a determination of the carrier's lien under the National Ben Franklin formula based on the parties' own "invited error," the Second District cited the Third District's decision in Lee v. Risk Management and the First District's deci-

---

[8]See also Division of Risk Management v. Nationwide Insurance Co., 12 F.L.W. 135 (Fla. 1st DCA Dec. 31, 1986); City of Tallahassee v. Chambliss, 470 So.2d 43, 45 (Fla. 1st DCA 1985); Risk Management Services v. McCraney, 420 So.2d 374, 375 (Fla. 1st DCA 1982).

sion in Risk Management Services, Inc. v. Scott with approval, and observed "that a 1977 amendment to section 440.39(3)(a) substantially changed the wording of the statute and rendered the National Ben Franklin formula obsolete." Id. In addition, the court noted that "[h]ad there been no showing of comparative negligence, the statute would have dictated a 100% reimbursement because the carrier's payments did not exceed [the employee's] net recovery." Id. at n. 2 (emphasis added).

The Second District reaffirmed that reasoning and specifically rejected Alexsis in C & T Erectors, Inc. v. Case, 481 So.2d 499 (Fla. 2d DCA 1985). Reversing a trial court order that had applied the National Ben Franklin formula to reduce the carrier's lien by deducting a portion of the employee's attorneys' fees and costs, the court explained that the statute as it existed in 1981

> contemplates that once the attorney's fees and costs stemming from the third party action are deducted from the tort recovery, the remaining amount represents the outer limit from which the carrier's lien can be satisfied. The total financial burden of the third party action, however, is to be borne solely by the plaintiff in that action. . . . In following the National Ben Franklin formula, however, the lower court . . . improperly prorated and deducted from [the carrier's] entitlement a portion of the attorney's fee and costs incurred by [the employee] in the third party litigation.

481 So.2d at 500 (emphasis added).

Criticizing the trial court's reliance upon State Division of Risk Management v. McDonald, wherein the Fifth District had ruled that the National Ben Franklin formula survived the

1977 amendment to the statute, the Second District in C & T Erectors declared:

> [T]his District, as well as the First and Third, have concluded that the 1977 amendment prohibits the type of proration or apportionment which occurred in National Ben Franklin. . . . We have also considered the most recent decision dealing with this question, Alexsis, Inc. v. Bryk, 471 So.2d 545 (Fla. 4th DCA 1985), and we recognize the forceful equitable considerations underlying the Fourth District's view that National Ben Franklin produces a just result. . . . We do not, however, perceive our function to include departing from the manifest meaning of section 440.39(3)(a) as it existed in 1981.

Id. at 500-01 (citations omitted).

In the present case, the Second District refused to recede from its ruling in C & T Erectors and again rejected the suggestion that it should follow the Fourth District's decisions in Alexsis and National Ben Franklin. As demonstrated by the foregoing analysis, that position is consistent with the conclusions previously reached by every Florida appellate court other than the Fourth District, including this Court in Aetna. Consequently, for this Court to quash the decision below and approve Alexsis, it would necessarily be required to overrule some 19 district court decisions and recede from one of its own. An examination of the Fourth District's rationale in Alexsis confirms that such a marked departure from the plain language of the statute and the overwhelming weight of authority is wholly unjustified.

(c) The Fourth District's interpretation of the statute in Alexsis is clearly erroneous.

In Alexsis, the Fourth District predicated its conflicting construction of section 440.39(3)(a) on essentially three grounds. First, as previously noted, the court acknowledged that "[a] literal reading of the statute appears to require the injured employee to bear all the costs and attorney's fees involved in the tort recovery even though the carrier directly benefits," but it concluded that "[w]e do not believe the legislature intended such an unfair and unreasonable result." 471 So.2d at 546-47. Second, the court stated that "[b]ecause National Ben Franklin pre-existed the drafting of the version of the statute in question here, we believe the legislature contemplated that the judicial gloss requiring proration adopted in National Ben Franklin would also apply to this statute" -- i.e., that there was no intent to change the law in this regard by the 1977 amendment. Id. at 546. Finally, the Fourth District in Alexsis reasoned that the subsequent enactment of the 1983 amendment, expressly subjecting the carrier's lien to a prorated deduction for attorneys' fees and costs, was "actually a clarification of legislative intent, originally properly detected in National Ben Franklin." Id. at 547.

Regarding the Fourth District's conclusion that the legislature could not have intended "such an unfair and unreasonable result" as would follow from "a literal reading of the statute," the Third District properly rejected the same contention in Lee v. Risk Management on the ground that questions of wisdom and

policy are solely within the purview of the legislature. Under settled principles, "[i]t is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the [statutory] language itself conveys an unequivocal meaning." Heredia v. Allstate Insurance Co., 358 So.2d 1353, 1355 (Fla. 1978).

This Court has repeatedly emphasized that the judiciary may not rewrite statutes in a way that deviates from their plain meaning, even when the judges believe that the legislature really intended the statute to be read so as to reach a different result. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). In Hamm, this Court reaffirmed the rules of construction which prohibit judges from elevating perceived policy objectives over the plain language of a statute:

> While legislative intent controls construction of statutes in Florida, Griffis v. State, 356 So.2d 297 (Fla. 1978), that intent is determined primarily from the language of the statute. S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978). The plain meaning of the statutory language is the first consideration.
>
> * * *
>
> Moreover, "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918).

414 So.2d at 1073.

In any event, there is no merit to the notion that application of the statute in accordance with its plain meaning

produces "an unfair and unreasonable result." This is the central point emphasized by the COONS, who claim that failure to deduct a proportionate share of their attorneys' fees and costs from CONTINENTAL's lien would leave them "with a grand total of $7,700.00" out of the $175,000 settlement. Proceeding on the assumption that they would ultimately retain "only 4.4% of the settlement," the COONS protest that this outcome "is not only fundamentally unfair, but is diametrically inconsistent with the central statutory purpose of placing the burden of compensation upon the employer." (Petitioner's Initial Brief at 9-10.) Of course, this argument conveniently ignores the fact that the COONS have already been paid $71,336.45 in benefits by CONTINENTAL, and that the statute merely provides for reimbursement of the amount they previously received.

In other words, the employer or carrier has already borne the initial burden of compensating the employee and his dependents for injury caused by a third party. If the employee and his dependents are able to shift that burden directly to the third party by recovering damages in a subsequent tort action, why should the employer or carrier continue to be saddled with that burden and allow the employee or his dependents to enjoy a double recovery? As the First District has observed, "not to repay to the employer or its insurance carrier the workmen's compensation benefits would permit a double recovery by the plaintiff at the expense of [the] employer, who was not at fault." Tohn v. Montgomery Elevator Co., 400 So.2d 1061, 1062 (Fla. 1st DCA 1981). The workers' compensation law is a substi-

tute for the right to sue an employer, not a supplement to the right to sue third parties.

Contrary to the COONS' representation, a proper application of the statute would not leave them "with a grand total of $7,700" -- it would leave them with a grand total of $79,064.29 ($7,727.84 plus the $71,336.45 previously received from CONTINENTAL in workers' compensation benefits), which is the total amount of the settlement less their attorneys' fees and costs. There is also, of course, the matter of a $1.5 million judgment which the COONS have now recovered against the non-settling third-party tortfeasors. Considered in light of all the facts, it is much more "unjust" and "unreasonable" to infer an ambiguity in the statute as a pretext for allowing the COONS to retain all but $30,445.49 of the $71,336.45 previously paid to them by CONTINENTAL, when the statute expressly mandates 100% reimbursement. While judges may disagree about the propriety of the relief sought by COON, "[t]he courts cannot amend or complete acts of the legislature intending to supply relief in instances where the legislature has not provided such relief." Dade County v. National Bulk Carriers, Inc., 450 So.2d 213, 216 (Fla. 1984).

Insofar as the Fourth District concluded that the National Ben Franklin formula continued to authorize the proration of an employee's attorneys' fees and costs against a carrier's lien despite the explicit contrary language of the 1977 amendment, it is clear that Alexsis retains no vitality. The first case cited by the Alexsis court as being in conflict with that interpretation was the Third District's decision in Aetna,

which has been approved in pertinent part by this Court. Unquestionably, this Court's decision in Aetna must now be deemed controlling, as the Fifth District has already held in American States Insurance Co. v. See-Wai. See Hoffman v. Jones, 280 So.2d 431, 433-34 (Fla. 1973).

Moreover, the only case cited by the Alexsis court as authority for its construction of the statute was Division of Risk Management v. McDonald, which has since been expressly overruled. In American States, the Fifth District receded from McDonald based on the conclusion that "it is apparent from [the Florida Supreme Court's decision in] Aetna that the National Ben Franklin formula is not applicable to cases governed by the language of section 440.39(3)(a), Florida Statutes (1977)," and that "the National Ben Franklin formula was abrogated by the 1977 amendment." As previously demonstrated, that same conclusion had already been reached by the First, Second, and Third Districts.

It appears that the Fourth District itself has now receded from the position enunciated in Alexsis. In Reliance Insurance Co. v. Davis, 491 So.2d 1177 (Fla. 4th DCA 1986), the Fourth District bowed to the authority of Aetna and acceded to the otherwise unanimous view that section 440.39(3)(a), as it existed from 1977 to 1983, was not subject to the National Ben Franklin formula:

> Prior to the 1977 amendment to said statute, it . . . did not specifically provide for deduction from the judgment of attorney's fees and costs. National Ben Franklin was decided under the pre-1977 statute and, thus, the trial court was correct in not relying upon National Ben Franklin, but utilizing

> instead Lee v. Risk Management. Appellant concedes in its brief that the trial court's ruling accurately reflects the Lee formula, but contends that utilization of that formula was error in the light of National Ben Franklin. Since entry of the judgment, the Supreme Court of Florida, in Aetna Insurance Co. v. Norman, 468 So.2d 226 (Fla. 1985), approved the formula used in Lee, and all the applicable cases now accept the fact that National Ben Franklin interpreted a different statute and is no longer applicable.

491 So.2d at 1179-80 (emphasis added). In light of these subsequent decisions, it can no longer be seriously contended that the 1981 version of the statute is subject to the "judicial gloss" of National Ben Franklin.

Finally, the related theories espoused in Alexsis that the 1977 amendment was not intended to change the application of the National Ben Franklin formula to carriers' liens, and that the 1983 amendment was merely a clarification of what the legislature had always intended, are contrary to established principles of construction. As this Court has held in rejecting similar contentions:

> The legislature is presumed to be aware of existing law and the judicial construction of former laws on the subjects of its enactments. . . . It is also presumed that when the legislature amends a statute, it intends to accord the statute a meaning different from that accorded it before the amendment.

Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981). Seddon and other decisions of this Court establish that where, as here, an amendment to an unambiguous statute is enacted after the law has been judicially construed in accordance with its plain meaning, and the amendment is obviously designed to alter the prior judi-

cial application of the statute, such an amendment cannot be given retrospective effect on the theory that it is merely a "clarification" of prior legislative intent. See, e.g., State Department of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981); State Department of Revenue v. Swinscoe, 376 So.2d 1 (Fla. 1979).

CONTINENTAL does not quarrel with the principle that a statutory amendment may, under some circumstances, be regarded as a clarification of prior legislative intent --i.e., the amendment does not effect a change in the law, but is merely declaratory of existing law. Application of that principle necessarily presupposes, however, that the meaning of the prior law was so unclear or doubtful as to be susceptible of at least two viable interpretations -- one of which is consistent with and confirmed by the subsequent legislative "clarification." In the opinion most frequently cited for the concept of legislative clarification, this Court endorsed the explanation that

> "the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of the law. The court has the right and the duty in arriving at the correct meaning of a prior statute, to consider subsequent legislation."

Gay v. Canada Dry Bottling Co., 59 So.2d 788, 790 (Fla. 1952) (emphasis added).

Unquestionably, the 1983 amendment constituted a substantive change in the plain meaning of section 440.39(3)(a), which cannot be retroactively applied. It is well established in Florida that the substantive rights of the respective parties

under the Workers' Compensation Law are fixed as of the time of the injury to the employee and may not be impaired by subsequent statutory amendments. E.g., Sullivan v. Mayo, 121 So.2d 424, 428 (Fla. 1960). This rule has been held applicable generally to substantive provisions regarding entitlement to and the source of payment of a claimant's attorneys' fees, Webb v. Hills Van Service, 414 So.2d 262, 262-63 (Fla. 1st DCA 1982), and has been applied specifically in a case involving prior amendments to section 440.39(3)(a). Peninsular Life Insurance Co. v. Pickleshimer, 402 So.2d 1326, 1327 (Fla. 4th DCA 1981). Thus, it was improper for the Fourth District in Alexsis to give retrospective effect to the 1983 amendment as a mere "clarification" of the law.

The foregoing authorities confirm that the Second District in this case properly rejected the rationale of Alexsis and correctly applied section 440.39(3)(a) in a manner consistent with the plain language and prior authoritative interpretation of the statute. COON's contention that the statute should be judicially construed to reach a result which directly contradicts the clear import of its provisions and produces a double recovery is meritless. Accordingly, this Court should resolve the conflict by approving the decision below and disapproving the Fourth District's ruling in Alexsis.

II. The District Court Properly Refused To Reduce CONTINENTAL's Lien Based Upon A Pro Rata Comparison Of The Settlement With The Amount Of The Jury Verdict.

As her second point, COON contends that CONTINENTAL's lien for benefits paid should also have been reduced by an amount representing "a proportionate share of the extent to which the settlement of the case did not reflect the true value of the [COONS'] damages," which true value should be measured by the $1.5 million jury verdict. The trial court flatly rejected this argument by denying the COONS' motion to determine the amount of CONTINENTAL's lien based on a pro rata comparison of the settlement with the amount of the jury verdict.[9] The Second District did not even find the argument worthy of discussion. Clearly, COON's theory lacks any basis in law or logic.

The suggestion that CONTINENTAL's lien shold be reduced in the same proportion that the settlement ($175,000) bears to the jury verdict ($1.5 million) would mean that CONTINENTAL could at best recover less than 12% of the benefits it paid to the COONS. In fact, in their motion in the trial court [A 14-20], the COONS contended that application of this principle would limit CONTINENTAL's recovery to only $3,433.37 of its total lien for $71,336.45, or less than 5% of the benefits it paid to the COONS. Putting aside for the moment the rather significant fact that the COONS have already recovered their entire $1.5 million,

---

[9]Order On Motions For Determination Of Lien at page 4, paragraph (8) [A 13].

the threshold question is whether the statute authorizes such a reduction of the carrier's lien.

COON offers two theories to support her claim that the lien should be reduced in the proportion that the settlement bears to the jury verdict. First, COON asserts that there is a "statutory requirement of a 'pro rata' distribution," and that "the only appropriate way to read the 'pro rata' language" is to require the carrier to "share in the diminution of the return" as reflected by the difference between the settlement and the jury verdict. Alternatively, COON asserts that the reference in the statute to "collectibility" as a basis for reducing the carrier's recovery "should also be construed in the broadest possible sense, to include not only cases in which the judgment obtained may be uncollectible in light of the defendant's financial circumstances, but also cases in which the full measure of damages may be uncollectible because of difficulties in prosecution of the lawsuit which require that it be settled for less than its true value." (Petitioner's Initial Brief at 15-16.)

COON's first theory must necessarily fail because it rests upon the discredited notion that section 440.39(3)(a), as it existed in 1981, requires a pro rata reduction of the carrier's lien pursuant to the National Ben Franklin equitable distribution formula. Although any mention of the National Ben Franklin formula is studiously avoided in COON's brief here, a review of the COONS' motion below reveals that their entire argument in this regard was predicated on the contention that "[t]he Ben Franklin formula applies in this case," and that "[t]he Ben

Franklin calculations require a pro ration of the net recovery to the full value of the claim as determined by a jury." [A 15-16.] This Court, along with every other appellate court in Florida including the Fourth District, has now held that the statute as it existed in 1981 prohibited application of the National Ben Franklin formula in determining the amount of the carrier's lien.

It is settled that under this statute "a trial court cannot reduce a workers' compensation lien beyond the extent to which the injured worker demonstrates to the court that he did not recover the full damages sustained because of his comparative negligence or the limits of his insurance coverage and collectibility." Cooper Transportation, Inc. v. Mincey, 459 So.2d 339, 341 (Fla. 3d DCA 1984), pet. for rev. denied, 472 So.2d 1181 (Fla. 1985). More specifically, where the employee and dependents have settled their third-party tort actions for less than the full amount of their damages, the courts have rejected the contention that the carrier's lien should be reduced because the settlement was due to "problems with proof of damages on the plaintiff's case," Lumberman's Mutual Casualty Co. v. Simon, 375 So.2d 894, 895 (Fla. 4th DCA 1979), and have expressly "declined to read into §440.39(3)(a) an additional exception for the situation where an injured employee's damages are limited due to 'questionable liability' of the alleged third-party tortfeasor." City of Tallahassee v. Chambliss, 470 So.2d 43, 45 (Fla. 1st DCA 1985); see also, e.g., Whitely v. U. S. Fidelity & Guaranty Co., 454 So.2d 63, 64 (Fla. 1st DCA 1984), pet. for rev. denied, 462 So.2d 1108 (Fla. 1985); United Parcel Services v.

Carmadella, 432 So.2d 702, 704 (Fla. 3d DCA), pet. for rev. denied, 441 So.2d 631 (Fla. 1983).

To adopt COON's position, this Court would be required (a) to deviate from its own prior decision in Aetna and the overwhelming majority view that section 440.39(3)(a), as it existed in 1981, did not permit application of the National Ben Franklin formula; (b) to depart from the general principle of statutory construction that the mention of one thing implies the exclusion of another ("expressio unius est exclusio alterius"); and (c) to disregard the settled rule that courts, when applying statutes, may not create additional exceptions by implication that were not provided by the legislature. E.g., Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952); Williams v. American Surety Co., 99 So.2d 877, 880 (Fla. 2d DCA 1958).

CONTINENTAL submits that COON has failed to demonstrate any justification for such a drastic result. Certainly, COON's attempt to characterize the consequences of enforcing CONTINENTAL's lien as "leaving virtually nothing for the plaintiff" is a gross exaggeration, because it overlooks the fact (a) that the COONS have already received $71,336.45 in benefits from CONTINENTAL and will net an additional $7,727.84 from the settlement; and (b) that the COONS have also recovered from other third-party tortfeasors another $1,518,731.24 in damages, costs, and interest. In light of the foregoing authorities and factual circumstances, COON's theory that CONTINENTAL's lien must be proportionately reduced based on the relation between the settlement and the jury verdict is manifestly groundless.

The alternative theory posited by COON likewise depends upon a strained construction of the statute, and specifically the meaning of the term "collectibility." At pages 16-17 of her brief, COON reasons as follows:

> The 1981 statute also provided that any reimbursement to the compensation carrier should be reduced in part upon demonstration that the plaintiff "did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage or collectibility." We submit that the word "collectibility" should also be construed in the broadest possible sense, to include not only cases in which the judgment obtained may be uncollectible in light of the defendant's financial circumstances, but also cases in which the full measure of damages may be uncollectible because of difficulties in prosecution of the lawsuit which require that it be settled for less than its true value.

(Emphasis added.) This theory is readily refuted.

At the outset, it should be noted that the statute is slightly misquoted in COON's brief. Section 440.39(3)(a) provides for 100% recovery on the carrier's lien unless the plaintiffs demonstrate that they "did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility" -- not "limits of insurance coverage or collectibility" as stated in COON's brief. This discrepancy, while undoubtedly inadvertent, is significant here because COON's argument depends upon "collectibility" of the plaintiff's full damages being an independent basis for reducing the carrier's lien.

If the word "collectibility" were preceded by the conjunction "or," it would be fairly arguable that the statute

recognizes three separate causes of diminished recovery by the employee and his dependents which authorize reduction of the carrier's lien: (1) comparative negligence of the employee; or (2) limits of insurance coverage; or (3) collectibility. Because the word "collectibility" is in fact preceded by the conjunction "and," however, it is clear that "collectibility" is not a separate and independent basis for reducing the carrier's lien, but is inextricably related to "limits of insurance coverage." Thus, as the Second District has recognized, there are only two causes of diminished recovery by the plaintiffs for which the statute authorizes a reduction of the carrier's lien: (1) comparative negligence of the employee, or (2) limits of insurance coverage and collectibility. See Ramar-Dooley Construction Co. v. Norris, 341 So.2d 546, 548 (Fla. 2d DCA 1977).

That limits of insurance coverage and collectibility are part and parcel of the same exception was clearly confirmed in Maryland Casualty Co. v. Whitely, 375 So.2d 18 (Fla. 1st DCA 1979), cert. denied, 383 So.2d 1205 (Fla. 1980):

> Inadequate insurance, however, is only one prong of the statutory test. The employee must demonstrate that he got less than the full value of his claim "because of limits of insurance coverage and collectibility."

375 So.2d at 19 (emphasis the court's). See also Peninsular Life Insurance Co. v. Picklesimer, 402 So.2d 1326, 1326 (Fla. 4th DCA 1981); Safeco Insurance Co. v. Sarkisian, 389 So.2d 1088, 1089 (Fla. 4th DCA 1980). These authorities dispel any notion that "collectibility" is an independent ground for reducing a carrier's lien.

In any event, there is no basis whatsoever to support COON's contention that "collectibility" was intended to mean something more than the ability of the plaintiff to collect the amount awarded by the judgment. If the term were construed as COON suggests to encompass situations where "the full measure of damages may be uncollectible because of difficulties in prosecution of the lawsuit which require that it be settled for less than its true value," then COON would be able to accomplish indirectly what Florida courts have held cannot be done directly -- i.e., to create by implication an additional exception to the statutorily prescribed 100% lien where the plaintiffs settle due to "problems with proof of damages on the plaintiff's case" or "due to the 'questionable liability' of the alleged third-party tortfeasor." Once again, COON's argument is simply an invitation to embark upon an impermissible invasion of the legislature's exclusive domain.

The simple facts are these: CONTINENTAL paid a total of $71,336.45 in benefits to the COONS. The COONS prosecuted a tort action against third parties, which resulted in a settlement with some of the defendants for $175,000 and a judgment against other defendants for the balance of $1.5 million plus costs. Section 440.39(3)(a) gives CONTINENTAL a lien upon <u>any</u> judgment or settlement recovered by the COONS to the extent that CONTINENTAL is entitled to receive from the COONS' net tort recovery, after deduction of their attorneys' fees and costs, 100% of the benefits it paid to them.

The obvious purpose of section 440.39(3)(a) is to ensure that if the employee and his dependents receive workers' compensation benefits from the employer or carrier, but later recover damages for the injury from the third parties who were at fault, then the employer or carrier is entitled to be reimbursed for the benefits it paid to the extent that the amount of damages recovered from the third-party tortfeasors exceeds the costs of suing them. In other words, once the injured employee or his dependents have recovered sufficient damages to cover their litigation costs, their first obligation imposed by section 440.39(3)(a) is to repay the employer's carrier for the benefits which it paid to them under the workers' compensation law. The fact that the law imposes the "primary burden" of compensating injured workers on the employer regardless of fault does not mean that the employee and his dependents can simply pocket those benefits as a double recovery if the third parties who were actually at fault are ultimately held accountable.

COON's theory that CONTINENTAL's lien for benefits paid should be reduced based on a pro rata comparison of the settlement with the jury verdict is contrary to the express language and the obvious purpose of section 440.39(3)(a). Accordingly, COON has failed to demonstrate that the courts below erred in refusing to reduce CONTINENTAL's lien on that basis.

III. The District Court Properly Applied CONTINENTAL's Lien To That Portion Of The Settlement Allocated To The Children.

COON's final argument, that the portion of the settlement allocated to the children should not be subject to CONTINENTAL's lien, was properly rejected by the trial court and passed over by the district court. This argument rests on the premise that while the compensation benefits paid by CONTINENTAL were "enhanced" on account of the two children, the payments were made directly to the spouse alone. Thus, according to COON, "the children cannot be said to have been beneficiaries of the compensation payments, and therefore should not have been required to repay those payments out of the proceeds of a settlement secured specifically for their benefit." (Petitioner's Initial Brief at 17-18.)

Any suggestion that the children were not beneficiaries of the compensation payments simply because the money was paid to their mother is sheer sophistry. It is undisputed that under section 440.16(1)(b)2, CONTINENTAL paid to the COONS an additional 16-2/3% in benefits on account of the children. It is also undisputed that the two children were minors, and thus if there had been no surviving spouse a guardian would have been appointed to receive the payments. §440.17, Fla. Stat. (1981). Consequently, benefits <u>are</u> paid on account of the minor children, and they are paid to someone <u>other</u> than the children themselves. To say that the minor children are not beneficiaries simply because they do not recieve a separate check is patently ludi-

crous. If COON's theory were approved, then employees and their dependents could effectively deprive an employer or carrier of any recovery on a workers' compensation lien simply by structuring a settlement so that all proceeds are allocated to the children.

Based on this analysis, it is clear that the courts below ruled properly in rejecting COON's claim that the minor children's share of the settlement should be exempt from the carrier's lien. Accordingly, the decision below should be approved in this respect.

CONCLUSION

The foregoing arguments and authorities conclusively demonstrate that the district court properly refused to reduce CONTINENTAL's lien by deducting a portion of the COONS' attorneys' fees and costs. The 1981 version of section 440.39(3)(a) plainly required that such attorneys' fees and costs be deducted entirely from the COONS' gross recovery, and contained no provision authorizing proration against the carrier's lien as under the pre-1977 and post-1983 versions of the statute. With the sole exception of the Fourth District, every Florida appellate court has construed the statute to prohibit such deductions from a carrier's lien. Since the Fourth District itself has now disavowed the principal rationale for its conflicting decision, Alexsis should be disapproved.

With respect to the two remaining issues, COON has failed to demonstrate any error in the district court's refusal to reduce the lien based on a pro rata comparison of the settlement to the jury verdict or to exempt the children's portion of the settlement from the carrier's lien. Neither contention finds any authority in the statute, and each depends upon a distorted view of the facts or the discredited notion that National Ben Franklin applies to the 1981 statute.

Accordingly, the district court's decision below should be approved based on the plain language and legislative history of the statute, the controlling precedent, and the policy of preventing a double recovery.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to: Bill Wagner, Esquire, of WAGNER, CUNNINGHAM, VAUGHN & McLAUGHLIN, P.A., 708 Jackson Street, Tampa, Florida 33602; to Joel S. Perwin, Esquire, of PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; and to John P. Shevock, Esquire, of GILLESPIE, McCORMICK, McFALL, GILBERT & McGEE, the Caribank Building, Suite 302, 790 East Broward Boulevard, Fort Lauderdale, Florida 33301, on this 30th day of March, 1987.

Michael L. Rosen
Charles E. Bentley, of
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, Florida 32302
(904) 224-7000

Attorneys for Respondent

06516-00175:37