IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,468

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

Petitioner,

vs.

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

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

WAGNER, CUNNINGHAM, VAUGHAN & McLAUGHLIN, P.A.
708 Jackson Street
Tampa, Florida 33602
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

BY: JOEL S. PERWIN

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AUTHORITY

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I
STATEMENT OF THE CASE AND FACTS

The facts of this case are well stated in the district court's opinion, which is attached as an appendix to this brief. The petitioner's decedent, Jerry Coon, was injured in an industrial accident, and received workers' compensation benefits from respondent Continental Insurance Co. (hereinafter "Continental") before his death (A. 2). In petitioner Pamela Coon's subsequent wrongful-death action, Continental filed a claim of lien under §440.39(3)(a), Fla. Stat. (1981), in the amount of $71,336.45. Coon eventually received a settlement from some of the defendants, and the trial court interpreted the 1981 version of §440.39(3)(a) to require that Continental's lien be reduced by a pro-rata share of the attorneys' fees and costs incurred by the Coon estate in the action, and thus reduced Continental's net recovery to $30,445.49 (A. 2-3).

In relevant part, §440.39(3)(a) of the 1981 Florida Statutes provided as follows:

> Upon suit being filed, the employer or the insurance carrier, as the case may be, 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 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.

The district court rejected the trial court's interpretation of this language, holding that the statute "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. 2nd 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" (A. 3).

In reaching this conclusion, the district court explicitly acknowledged that it conflicts with the decision in *Alexsis, Inc. v. Bryk*, 471 So.2d 545 (Fla. 4th DCA 1985):

> 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.2d 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 (A. 3-4).

Thus, while noting that the new (1983) statute has "resolved" the conflict by expressly endorsing the pro-rata reduction which the trial court effected in this case, the district court explicitly acknowledged that its interpretation of the earlier (1981) statute is directly in conflict with decisions of the Fourth District Court of Appeal. Coon filed a Motion for Clarification and Certification, which the district court denied in an order dated September 5, 1986. The instant petition was timely filed on October 3, 1986.

II
ISSUES ON REVIEW

A. WHETHER THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *ALEXSIS, INC. v. BYRK*, 471 So.2d 545 (FLA. 4TH DCA 1985).

B. WHETHER THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL CONCERNING THE PROPER INTERPRETATION OF FLORIDA STATUTES.

III
SUMMARY OF THE ARGUMENT

As the district court's decision itself acknowledges, it directly and expressly

conflicts with *Alexsis, Inc. v. Bryk*, 471 So.2d 545 (Fla. 4th DCA 1985), since *Alexsis* explicitly adopts the opposite construction of the 1981 version of §440.39(3)(a). In addition, in contract to *Alexsis*, the district court's decision in this case conflicts with a number of decisions of this Court and other district courts concerning the proper interpretation of statutes.

IV
ARGUMENT

A. THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *ALEXSIS, INC. v. BYRK*, 471 So.2d 545 (FLA. 4TH DCA 1985).

The *Alexsis* case is factually indistinguishable from this one. As in this case, the trial court in *Alexsis* construed the 1981 version of §440.39(3)(a) to require a "proration of attorneys' fees and costs between a workers' compensation carrier and an injured employee out of the proceeds of a third party tort claim and before any payment of the carrier's compensation lien is made." *Id.* at 546. In direct conflict to the decision in the instant case, the district court in *Alexsis* affirmed that pro-ration:

> [W]e believe the subsequent action of the legislature in expressly providing for proration of fees and costs by an amendment to section 440.39(3) effective June 30, 1983 is actually a clarification of legislative intent, originally properly detected in *National Ben Franklin [Ins. Co. v. Hall*, 340 So.2d 1269 (Fla. 4th DCA 1976)].
>
> To hold otherwise would require us to conclude that the legislature intended that the injured employee bear the complete expense of enforcing the carrier's right to recover its compensation payments from the third party tortfeasor. We do not believe the legislature intended such an unfair and unreasonable result. The net result in this case, and others like it, would be that the prosecution of the tort claim would primarily benefit the compensation carrier and the employee's lawyers. There would be little left over for the injured employee. Despite frequent accusations that some laws passed by the legislature are merely "lawyer relief bills," we believe the legislature would be taking a bum rap if we interpreted the statute to permit such a result here.

As the district court acknowledged in the instant case (A. 3), its opinion directly

and expressly conflicts with the fourth district's interpretation of the 1981 statute in *Alexsis, Inc. v. Bryk.* Although both cases acknowledge that the subsequent version of the statute, enacted in 1983, removes the ambiguity by expressly providing for a pro-rata reduction for attorneys' fees and costs, the cases directly and expressly conflict in their interpretation of the 1981 version of the statute, and that conflict must be resolved by this Court.

B. THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL CONCERNING THE PROPER INTERPRETATION OF FLORIDA STATUTES.

The 1981 statute expressly provides that compensation carriers have "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 key phrase in that sentence is "pro rata share," and in *Arex Indemnity Co. v. Radin*, 72 So.2d 393, 395 (Fla. 1954), this Court noted that "the word 'pro rata' used in the amendment, when considered in the light of the remainder of the paragraph and its evident purpose, must be construed in its broadest aspect and not in a technical manner." Those words--"pro rata"--remained in the 1981 statute at issue in this case. Nevertheless, contrary to the fourth district's reasoning in *Alexsis, Inc. v. Bryk*, the district court decided to ignore those words, and instead to provide Continental with a ***complete*** recovery--not a "pro rata share . . . ." That outcome conflicts with a number of well-settled principles concerning statutory construction.

Although there may be isolated language in the 1981 statute which supports the district court's reasoning, it is well-settled that statutory language should not be read in isolation, but must be construed in its entirety and as a whole.[1/] This statute contains

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1/ *State v. Webb*, 398 So.2d 820 (Fla. 1981); *State v. Gale Distributors, Inc.*, 349 So.2d 150 (Fla. 1977); *Wilensky v. Fields*, 267 So.2d 1 (Fla. 1972).

explicit language that compensation carriers are only entitled to what 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." That language is positively inconsistent with the interpretation adopted by the district court, and that interpretation would render the "pro rata" language of the statute entirely superfluous, because the compensation carrier would be entitled not to some proportional share of the benefits paid, but to ***all*** of those benefits after the deductions of fees and costs. That cannot be the meaning of a statute which utilizes the phrase "pro rata," and that phrase must have some meaning, because statutory language should not be construed as mere surplusage.[2/] At the least therefore, this statute is ambiguous, and requires judicial interpretation.[3/]

In construing the statute, the central judicial task is to ascertain its legislative purpose.[4/] The court must isolate the legislature's objective in enacting the statute, and interpret it in a manner consistent with that policy and spirit.[5/] Given two available interpretations of an ambiguous statute, the court will avoid that construction which is

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[2/] *See Alexander v. Booth*, 56 So.2d 716 (Fla. 1952); *Lee v. Gulf Oil Corp.*, 148 Fla. 612, 4 So.2d 868 (1941); *Girard Trust Co. v. Tampashores Development Co.*, 95 Fla. 1010, 117 So. 786 (1928); *State v. Zimmerman*, 370 So.2d 1179 (Fla. 4th DCA 1979); *Forehand v. Board of Public Instruction of Duval County*, 166 So.2d 668 (Fla. 1st DCA 1964); *Vocelle v. Knight Brothers Paper Co.*, 118 So.2d 664 (Fla. 1st DCA 1960).

[3/] *See Weiss v. Leonardy*, 160 Fla. 570, 36 So.2d 184 (1948). *See generally Ryder Truck Rental, Inc. v. Bryant*, 170 So.2d 822 (Fla. 1964); *State v. Stuler*, 122 So.2d 1 (Fla. 1960). This task of statutory construction is a question of law for the court. *See Devin v. City of Hollywood*, 351 So.2d 1022 (Fla. 4th DCA 1976).

[4/] *See Department of Legal Affairs v. Rogers*, 329 So.2d 257 (Fla. 1976); *State v. Egan*, 287 So.2d 1 (Fla. 1973); *Deltona Corp. v. Florida Public Utilities Commission*, 220 So.2d 905 (Fla. 1969); *Devin v. City of Hollywood*, 351 So.2d 1022 (Fla. 4th DCA 1976).

[5/] *See Florida Industrial Commission v. Manpower, Inc. of Miami*, 91 So.2d 197 (Fla. 1956); *Weiss v. Leonardy*, 160 Fla. 570, 36 So.2d 184 (1948); *In Re Ruff's Estate*, 159 Fla. 777, 32 So.2d 840 (1947); *City of Jacksonville Beach v. Albury*, 291 So.2d 82 (Fla. 1st DCA 1973), *aff'd*, 295 So.2d 297 (Fla. 1974); *Wallace Corp. v. Overstreet*, 99 So.2d 626 (Fla. 3rd DCA), *cert. dismissed*, 102 So.2d 727 (Fla. 1958).

inconsistent with the legislative purpose,[6] or which produces unjust or unreasonable consequences;[7] and will adopt that interpretation which best will effectuate the legislature's intention.[8] In the face of an ambiguous statute, this search for legislative purpose may require a construction which appears in part to contradict the strict letter of the statute.[9] Especially where different parts of a statute contradict each other, that interpretation must be chosen which best achieves the legislature's intention, even if that means subordinating unavoidably-inconsistent language.[10] Against these principles, we consider the 1981 version of §440.39(3)(a).

It is well-established that the general purpose of the worker's compensation statute is "to shoulder on industry the expense incident to hazards of industry and to lift from

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[6] *See Becker v. Amos*, 105 Fla. 231, 141 So. 136 (1932); *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918).

[7] *See In Re Estate of Watkins*, 75 So.2d 194 (Fla. 1954); *Foley v. State ex rel. Gordon*, 50 So.2d 179 (Fla. 1951); *City of Miami v. Romfh*, 66 Fla. 280, 63 So. 440 (1913); *State ex rel. Bash v. County Commissioners of Jefferson County*, 20 Fla. 425 (1884); *Comer v. State of Florida, Unemployment Appeals Commission*, 11 FLW 60 (Fla. 3rd DCA December 24, 1985) (per curiam); *Sagaert v. State Department of Labor and Unemployment Security, Employment Appeals Commission*, 418 So.2d 1228, 1230 (Fla. 3rd DCA 1982), *citing McKibben v. Mallory*, 293 So.2d 48 (Fla. 1974), *and Good Samaritan Hospital Association v. Simon*, 370 So.2d 1174 (Fla. 4th DCA 1979); *Garcia v. Department of Labor and Employment Security*, 426 So.2d 1171 (Fla. 3rd DCA 1983); *State ex rel. Florida Industrial Commission v. Willis*, 124 So.2d 48 (Fla. 1st DCA 1960), *cert. denied*, 133 So.2d 323 (Fla. 1961).

[8] *See Department of Legal Affairs v. Rogers*, 329 So.2d 257 (Fla. 1976); *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So.2d 577 (Fla. 1964); *Cassady v. Consolidated Naval Stores Co.*, 119 So.2d 35 (Fla. 1960); *Overman v. State Board of Control*, 62 So.2d 696 (Fla. 1952); *Adams v. Gordon*, 260 So.2d 246 (Fla. 4th DCA 1972).

[9] *See State v. Webb*, 398 So.2d 820 (Fla. 1981); *Wakulla County v. Davis*, 395 So.2d 540 (Fla. 1981); *Sunshine State News Co. v. State*, 121 So.2d 705 (Fla. 3rd DCA 1960).

[10] *See Sharer v. Hotel Corp. of America*, 144 So.2d 813 (Fla. 1962); *State ex rel. Johnston v. Bessinger*, 155 Fla. 730, 21 So.2d 343 (1945); *In Re National Automobile Underwriters Association*, 184 So.2d 901 (Fla. 1st DCA 1966).

the public the burden of supporting those incapacitated by industry."[11/] In this case, application of the statutory construction offered by Continental would directly undermine that purpose, by removing the threshold burden of compensation initially imposed upon the employer, and placing it squarely upon the employee. In the instant case, for example, the distribution ordered by the district court would allocate approximately $26,000.00 of a $175,000.00 settlement to the costs of prosecuting the action; another $70,000.00 for attorneys' fees; and of the remaining $79,000.00, approximately $71,300.00 to Continental--leaving all the plaintiffs with a grand total of $7,700.00--even though it was the plaintiffs' effort which secured the amount of the settlement. Of course, such an outcome would be directly inconsistent with the overriding statutory purpose of requiring the employer to shoulder the primary burden of employment-related accidents. It would fully compensate the carrier while providing the plaintiff with only 4.4% of the settlement. That outcome is not only inherently absurd, but is diametrically inconsistent with the central statutory purpose of placing the burden of compensation upon the employer--and thus with the underlying rules of statutory construction. Since the statute is sufficiently ambiguous to permit an alternative construction which at the very least would allocate pro rata the economic costs (in fees and costs) of securing a settlement or judgment, an outcome far-more consistent with the underlying statutory purpose than the outcome offered by the district court, the district court's holding is indefensible. It is indefensible because it conflicts with the well-settled principles of statutory construction which have repeatedly been endorsed by this Court.

IV
CONCLUSION

It is respectfully submitted that the order of the district court directly and

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11/ *General Properties Co. v. Greening*, 154 Fla. 814, 18 So.2d 908 (1944). *Accord, Paul Smith Construction Co. v. Florida Industrial Commission*, 93 So.2d 735 (Fla. 1957); *General Properties Co. v. Greening*, 154 Fla. 814, 18 So.2d 908 (1944).

expressly conflicts with decisions of this Court and other district courts of appeal, and that this Court should exercise its discretion to resolve the conflict.

V
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of October, 1986, to: MICHAEL L. ROSEN, ESQ., Holland & Knight, P.O. Drawer 810, Tallahassee, Florida 32302.

Respectfully submitted,

WAGNER, CUNNINGHAM, VAUGHAN &
McLAUGHLIN, P.A.
708 Jackson Street
Tampa, Florida 33602
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

BY: Joel S. Perwin
JOEL S. PERWIN

COON-PBJ/amg