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.

RESPONDENT'S JURISDICTIONAL REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In 1981, Jerry Frank Coon was fatally injured by the explosion of an electrical motor starter while employed by CONTINENTAL's insured. CONTINENTAL paid all benefits due under the Worker's Compensation Law, totalling $71,336.45. PAMELA K. COON, the petitioner here, then filed a wrongful death suit against a number of third parties involved in the design, manufacture, and installation of the equipment. Ultimately, three of the defendants settled with COON for a total of $175,000, and the claims against the remaining third-party tortfeasors proceeded to a trial that resulted in a jury verdict awarding COON (on behalf of herself, the two surviving children, and the estate) a total of $1.5 million in damages.

CONTINENTAL filed a claim of lien against COON's recovery from the third-party tortfeasors, asserting its right under section 440.39(3)(a), Florida Statutes (1981), to be reimbursed for 100% of all benefits paid to the Coons under the Worker's Compensation Law. The statute provided that in any action against a third-party tortfeasor to recover for injuries to a deceased employee, the carrier may file a lien for benefits paid and, if the tort action is successful, the 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 em-

> ployee 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.

(Emphasis added.) COON disputed CONTINENTAL's entitlement to recover 100% of the benefits paid and moved to strike the lien.

Subsequently, the trial court (a) approved the $175,000 settlement with three of the defendants; (b) set off that amount from the $1.5 million judgment against the remaining defendants; (c) denied COON's motion to strike CONTINENTAL's lien; and (d) directed that the settlement funds be held in trust pending a determination of the amount to which CONTINENTAL was entitled on the lien. (There was no issue as to plaintiff's comparative negligence or the limits of insurance or collectibility of plaintiff's judgment.) The judgment against the third-party tortfeasors was separately appealed.

At a hearing on the lien claim, COON contended that CONTINENTAL was not entitled to receive 100% of the benefits paid, but rather the lien should be reduced by deducting a share of COON's attorney's fees and costs incurred in the third-party litigation. CONTINENTAL argued that section 440.39(3)(a) as it existed in 1981 provided for 100% recovery of benefits paid by applying the lien against the net tort recovery--i.e., the amount remaining after the attorney's fees and costs are deducted--and that such liens did not become subject to a deduction for attorney's fees and costs until after the statute was amended in 1983 to specifically provide for such apportionment. The trial court agreed that the 1981 statute would govern, but nonetheless

ruled that CONTINENTAL's lien should be reduced by deducting a proportionate share of COON's attorney's fees and costs, thus reimbursing CONTINENTAL only $30,445.49 of the $71,336.45 in benefits it had paid.

On appeal, the Second District reversed, reaffirming its prior decisions holding 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. A motion by COON to certify the decision to this Court was denied. After deciding this case, the Second District affirmed the judgment against the third-party tortfeasors, thus upholding COON's recovery of $1.5 million total from the settlement and wrongful death litigation. Jacobs Engineering Group, Inc. v. Coon, 492 So.2d 372 (Fla. 2d DCA 1986).

SUMMARY OF THE ARGUMENT

The conflict with Alexsis arises solely from the Fourth District's improper construction of the statute. Because the conflict has been resolved by the 1983 amendment and by the unanimous decisions of this Court and the other district courts, there is no "real and embarrassing" conflict of sufficient import to warrant an exercise of this Court's discretionary jurisdiction.

ARGUMENT

The Conflict With The Fourth District's Decision In Alexsis Has Already Been Resolved By The 1983 Amendment And By The Decisions Of This Court And Every Other District Court, Which Have Uniformly Rejected The Fourth District's Reasoning.

COON correctly points out that the decision below conflicts with Alexsis, Inc. v. Bryk, 471 So.2d 545 (Fla. 4th DCA 1985), on the question of whether section 440.39 (3)(a), Florida Statutes (1981), authorized a court to reduce a carrier's lien by deducting therefrom a share of the attorney's fees and costs incurred by employees in third-party tort actions. COON also correctly observes that the 1983 amendment to the statute, which added specific language to authorize such a deduction, has resolved the conflict. Ch. 83-305, § 15, Laws of Fla. What COON neglects to mention, however, is that with the sole exception of the Fourth District, every Florida appellate court, including this Court, has construed the 1981 version of section 440.39(3)(a) consistent with the Second District's decision below--i.e., to prohibit reduction of the carrier's 100% lien based on an apportionment of the attorney's fees and costs incurred in employees' suits against third-party tortfeasors.

COON also fails to note that in Alexsis, the Fourth District conceded 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 there nonetheless adopted a contrary construction--which it ac-

knowledged to be in conflict with the First, Second, and Third Districts--based on its perception that the result of applying the statute as written would be "unfair and unreasonable." 471 So.2d at 546-547. Moreover, it is significant that the Fourth District in Alexsis cited as authority for its interpretation the Fifth District's decision in State Division of Risk Management v. McDonald, 436 So.2d 1134 (Fla. 5th DCA 1983)--a decision from which the Fifth District has since receded. See American States Insurance v. See-Wai, 472 So.2d 838 (Fla. 5th DCA 1985).

Alexsis was clearly a departure from the otherwise unanimous interpretation of section 440.39(3)(a) as it existed prior to the 1983 amendment. That a technical decisional conflict exists, however, does not compel an exercise of this Court's discretion to review the decision in this case. Because the conflict has been resolved by the 1983 amendment, this case no longer involves "principles the settlement of which is of importance to the public," nor does it present the kind of "real and embarrassing conflict" that would warrant this Court's attention. See Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958). Quite simply, this conflict arises as a matter of statutory construction, and the proper construction resolves the conflict so as to render unnecessary an exercise of this Court's jurisdiction. See State v. Brown, 476 So.2d 660, 661 (Fla. 1985).

There is absolutely no doubt that the construction given the statute by the Second District in this case is the proper one. Prior to 1977, the statute contained language which was in-

terpreted to require that when an injured employee obtained a settlement or judgment in litigation against third-party tortfeasors, the worker's compensation carrier's lien on the proceeds of that litigation would be reduced by apportioning a share of the employee's attorney's fees and costs based on the "equitable distribution" formula enunciated in National Ben Franklin Insurance Co. v. Hall, 340 So.2d 1269 (Fla. 4th DCA 1976). 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 attorney's fees and costs have been deducted from the employee's gross tort recovery.

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). In subsequent decisions, the Third District has consistently reaffirmed that the statute precluded apportionment of any attorney's fees and costs to the carrier as was previously authorized under the "equitable

distribution" formula of National Ben Franklin. Sentry Insurance Co. v. Keefe, 427 So.2d 236 (Fla. 3d DCA 1983); see also Cooper Transportation, Inc. v. Mincey, 459 So.2d 339 (Fla. 3d DCA 1984), pet. for rev. denied, 472 So.2d 1181 (Fla. 1985); Liberty Mutual Insurance Co. v. Rodriguez, 436 So.2d 1091 (Fla. 3d DCA 1983).

The Third District's conclusion that a carrier's lien was not subject to the equitable distribution formula 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), inherently approved the Third District's ruling that the employee's gross settlement recovery should first be reduced by the entire amount of his attorney's 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. Moreover, the Court 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. 468 So.2d at 228.

In the Orange County decision and 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). As previously noted, however, the Fifth District has now expressly receded from those decisions.

In American States Insurance v. See-Wai, 472 So.2d 838 (Fla. 5th DCA 1985), the Fifth District acknowledged "that the National Ben Franklin formula was abrogated by the 1977 amendment," and concluded that it "must apply the formula set forth by the Third District and approved by the Florida Supreme Court" in Aetna Insurance Co. v. Norman. 472 So.2d at 840-41.

The First District immediately 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), and then reinforced that construction 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):

> [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). See also City of Tallahassee v. Chambliss, 470 So.2d 43, 45 (Fla. 1st DCA 1985).

Since the Second District has also consistently held that there can be no "equitable distribution" under the statute as it existed from 1977 to 1983, C & T Erectors, Inc. v. Case,

481 So.2d 499 (Fla. 2d DCA 1985); Hewitt, Coleman & Assoc. v. Grattan, 432 So.2d 125 (Fla. 2d DCA 1983), only the Fourth District apparently adheres to the position that National Ben Franklin survived the 1977 amendment and continued to authorize a prorated reduction of a carrier's lien for the employee's attorney's fees and costs. The Fourth District's construction of the statute in Alexsis is clearly incorrect, however, because it deviates from what is conceded to be the plain and unequivocal meaning of the statute, ignores the 1977 amendment, and improperly gives the 1983 amendment retrospective effect. In any event, this Court's decision in Aetna Insurance Co. v. Norman, rendered five days before Alexsis, must now be deemed controlling in all the district courts, as the Fifth District has already held in American States. See Hoffman v. Jones, 280 So.2d 431, 433-34 (Fla. 1973).

COON's second asserted basis for conflict is utterly frivolous. COON assumes that the statute is ambiguous, and that its construction by this Court and by four of the five district courts is wrong; yet even the Fourth District in Alexsis admitted that the plain language of the statute would require the result reached here. COON also contends that enforcement of CONTINENTAL's lien would leave her "with a grand total of $7,700.00," and that "such an outcome would be directly inconsistent with the overriding statutory purpose of placing the burden of compensation upon the employer. . . ."

This argument ignores the fact that the statute merely provides for reimbursement to the carrier of benefits already

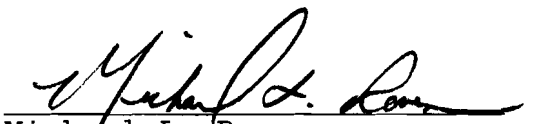
paid to the employee and dependents when the burden of compensation is shifted to third-party tortfeasors. As the First District has observed, "not to repay to the employer or its insurance carrier the workmen's compensation benefits would permit a double recovery by the plaintiff at the expense of [the] employer, who was not at fault." Tohn v. Montgomery Elevator Co., 400 So.2d 1061, 1062 (Fla. 1st DCA 1981). Moreover, COON's statement that the decision below will leave her "with a grand total of $7,700.00" is a gross distortion; in fact, it leaves COON with a total net from the settlement alone of $79,064.29 (including the $71,336.45 previously received in benefits from CONTINENTAL), plus the remainder of the $1.5 million judgment after setting off the settlement amount and deducting the rest of the attorney's fees and costs.

CONCLUSION

There is no need to prolong this litigation and further delay CONTINENTAL's recovery on its statutory lien. The decision below is clearly correct, and any conflict with the Fourth District is no longer of consequence. Accordingly, this Court should deny the petition for review, or, in the alternative, should summarily approve the decision below and disapprove the Fourth District's decision in Alexsis.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Bill Wagner, Esquire, of WAGNER, CUNNINGHAM, VAUGHAN & McLAUGHLIN, P.A., 708 Jackson Street, Tampa, Florida 33602; and 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, on this 17th day of November, 1986.



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

Attorneys for Respondent