OIA 5-7-87

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 THE MERITS

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-and-
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I
STATEMENT OF THE CASE AND FACTS

This case concerns the propriety of the district court's calculation of a workers' compensation lien under the 1981 statute, §440.39(3)(a), Fla. Stat. (1981), which provided in relevant part 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 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. Such proration shall be made by the judge of the trial court upon application therefor and notice to the adverse party.

The pertinent facts of this case are succintly stated in the district court's opinion, *Continental Ins. Co. v. Coon*, 493 So.2d 485, 486 (Fla. 2nd DCA 1986), *review granted*, Case No. 69,468 (Fla. January 7, 1987):

> On November 4, 1981, Jerry Frank Coon was injured in an industrial accident. He died five days later and Pamela Coon, his widow, became personal representative of his estate. The Coon estate prosecuted an action against some third-party tort-feasors which the estate contended were responsible for Coon's injury and resulting death. Pursuant to section 440.39(3)(a), Florida Statutes (1981), Continental filed a claim of lien against the proceeds received by the Coon estate as a result of its litigation. The estate received a settlement from some of the tort-feasors and a jury verdict in its favor against others resulting in a substantial award of compensatory damages. Continental claimed it was entitled to be reimbursed for the full amount of $71,336.45 it paid to Jerry Frank Coon and his estate as workers' compensation benefits.
>
> The trial court determined that Continental's lien should be reduced by a pro rata deduction for the attorneys' fees and for costs incurred by the Coon estate in its action against the third-party tort-feasors. Consequently, Continental was allowed

a net recovery of $30,445.49. This appeal ensued.[1/]

Continental appealed, claiming that the trial court should have paid Continental the entire amount of its lien off the top of the settlement (after the deduction of fees and costs), without reducing the lien pro rata by the amount of costs and attorneys' fees incurred by Pamela Coon in prosecuting the action and securing the settlement. Mrs. Coon cross-appealed, on two grounds: 1) that the trial court had not gone far enough in reducing Continental's lien, but should also have factored in the extent to which Mrs. Coon had settled the case for less than its true value; and 2) that the trial court had erred in deducting a portion of the compensation lien from that part of the settlement allocated to the two Coon children, because the wrongful-death statute does not authorize direct payment for the benefit of a child if the decedent leaves a spouse, but only an enhanced payment to the spouse on account of such children.

Without describing or addressing either point on cross-appeal, the district court rejected both of them. 493 So.2d at 486. But the district court accepted Continental's position that the 1981 statute "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" (*id.*). The district court

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[1/] Since the district court reversed the trial court's calculation of the lien, we are concerned here primarily with the district court's interpretation of the statute, and we need not outline in great detail the specific calculations of the trial court. In essence, the trial court, focusing only upon the amount of the settlement (since the jury verdict for additional damages was on appeal), determined how much of the workers' compensation payments were assertedly made on behalf of each of the parties receiving a share of the settlement, thus determining the total lien claimed against each such party, and then reduced each such lien by 40%, representing that party's share of a reasonable attorneys' fee, and further by a percentage of the costs reflecting the percentage of the lien attributable to that party. For example, the compensation lien against the widow's share of the settlement was calculated to be $37,845.69, and the trial court reduced that lien by 40% (or $15,138.28) for attorneys' fees, plus another 40.8% of the total amount of costs (or $5,608.88), which was the widow's percentage of the total lien, thus reducing the lien against the widow's share from $37,845.69 to $17,098.53 (R. 34-35). In the same order, however, the trial court further provided that if the judgment for additional damages should be affirmed, or if there should be any further settlement, those additional funds also would be subject to a compensation lien (R. 35).

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acknowledged that a 1983 amendment to §440.39(3)(a) explicitly provided that "attorneys' fees and costs expended in third-party tort actions are to be prorated and the workers' compensation carrier's lien reduced accordingly."[2/] But the district court felt that the 1983 amendment represented not an effort to better state the legislature's earlier intention in the 1981 statute, but rather to change the statute. Since the 1981 statute admittedly governed the instant case, the district court reversed the trial court's order deducting attorneys' fees and costs from the carrier's lien, and remanded with instructions that the lien be in its entirety out of the settlement. The instant proceeding ensued.[3/]

II
ISSUES ON APPEAL

A. WHETHEE THE DISTRICT COURT ERRED IN RULING THAT CONTINENTAL'S LIEN FOR WORKERS' COMPENSATION BENEFITS UNDER §440.39(3)(a), FLORIDA STATUTES (1981), WAS NOT SUBJECT TO REDUCTION FOR A PROPORTIONATE SHARE OF ATTORNEYS' FEES AND COSTS.

B. WHETHER THE DISTRICT COURT ERRED IN RULING ON CROSS-APPEAL THAT CONTINENTAL'S LIEN UNDER THE 1981 STATUTE WAS NOT SUBJECT TO REDUCTION IN A MANNER REFLECTING THE RELATIONSHIP BETWEEN THE SETTLEMENT IN QUESTION AND THE TRUE VALUE OF THE PLAINTIFF'S DAMAGES.

C. WHETHER THE DISTRICT COURT ERRED IN RULING ON CROSS-APPEAL THAT THE TRIAL COURT WAS RIGHT

[2/] The 1983 amendment provided for reimbursement to compensation carriers of only "their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit, including reasonable attorney's fees for the plaintiff's attorney." The statute continues: "In determining the employer's or carrier's pro rata share of those costs, and attorney's fees, the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment which are costs and attorney's fees."

[3/] Two weeks after the district court's decision in this case, the district court affirmed the additional money judgment against the non-settling defendants, in an unpublished per-curiam decision without opinion. *Jacobs Engineering Group, Inc. v. Coon*, Case No. 85-1683 (Fla. 2nd DCA July 25, 1986) (unpublished). Under the trial court's order, that judgment would have been available to satisfy the rest of Continental's lien, had the trial court's order been affirmed (R. 35). *See* note 1, *supra*.

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TO ORDER A DEDUCTION FROM THAT PART OF THE SETTLEMENT ALLOCATED TO THE COON CHILDREN, AS PARTIAL PAYMENT OF THE COMPENSATION LIEN.

III
SUMMARY OF THE ARGUMENT

We will argue first that the district court erred in failing to agree with the trial court that under the 1981 version of the statute, a compensation carrier is required to bear a proportional share of the plaintiff's expenses (in fees and costs) of securing the judgment or settlement in question, rather than placing that entire burden upon the plaintiff. Although there is isolated language in the 1981 statute which supports that interpretation, statutory language should not be read in isolation, and the 1981 statute also explicitly provides that the compensation carrier's lien should reflect a "pro rata" share of the benefits paid. At the least, therefore, the statute is ambiguous, and in interpreting it, the Court should reject a construction which frustrates the statute's underlying purpose of placing the primary burden of expenses incident to work-related injuries upon the employer. That objective counsels against a statutory construction which would divide the proceeds of a settlement primarily between the plaintiff's attorney and the plaintiff's employer (or employer's insurer), leaving nothing or next to nothing for the plaintiff. This conclusion is only reinforced by a 1983 amendment to the statute, in which the legislature made clear that it intended no such result. The construction adopted by the district court is inconsistent with the manifest purpose of the statute, with the rules of statutory construction, with common sense, and with fundamental fairness.

Second, we contend that the district court erred on cross-appeal by failing to recognize that Continental's entitlement only to a pro rata share of its compensation payments required the trial court to fashion the lien in part according to the relationship between the amount of the settlement of this case and the true value of the plaintiff's damages. The end result even of the formula adopted by the trial court in this case was that the estate's share of the settlement was reduced to nothing after the payment of

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attorneys' fees, costs and the compensation lien; and the shares of the widow and the two children were significantly reduced after such payments. We submit that such an outcome is inconsistent with the statutory requirement of a pro rata distribution, which necessarily implies a sharing between the compensation carrier and the plaintiff of the risks attending the litigation--including the risk that the plaintiff will be required to settle for an amount less than the true value of his damages. After all, it is the plaintiff's effort--including his calculation of those costs and benefits of settling--which have produced the recovery from which the compensation lien is taken. In this context, the only fair outcome--the only outcome consistent with the statutory requirement of a pro rata distribution--is a proportional allocation of those risks between the plaintiff and the compensation carrier--that is, a sharing of the extent to which the settlement of the case does not reflect the true value of the plaintiff's damages. For this reason too, the district court's decision should be reversed, and the case remanded with instructions that the trial court fashion such a pro rata allocation.

Third, we will argue that the district court erred in rejecting Mrs. Coon's contention on cross-appeal that the trial court was wrong to allocate a portion of the compensation lien to those parts of the settlement provided for the two Coon children. Because those children did not directly receive any compensation benefits, and indeed had no independent statutory entitlement to any compensation benefits, they should not have been required to pay any of the compensation lien.

IV
ARGUMENT

A. THE DISTRICT COURT ERRED IN RULING THAT CONTINENTAL'S LIEN FOR WORKERS' COMPENSATION BENEFITS UNDER §440.39(3)(a), FLORIDA STATUTES (1981), WAS NOT SUBJECT TO REDUCTION FOR A PROPORTIONATE SHARE OF ATTORNEYS' FEES AND COSTS.

As the instant conflict proceeding itself demonstrates, this Court has not yet

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interpreted the 1981 version of §440.39(3)(a).[4/] Admittedly, however, there are a number of district-court decisions which are consistent with Continental's interpretation of the 1981 statute.[5/] On the other hand, we are aware of only one decision to the contrary, *Alexsis, Inc. v. Burk*, 471 So.2d 545 (Fla. 4th DCA 1985), which of course we will discuss at length. Although the district-court decisions clearly preponderate against us, we believe that all of them ignore the fundamental principles of statutory construction, and that *Alexsis* was rightly decided.

The district court in the instant case did not explain its reasoning, but rather relied upon its earlier decision in *C & T Erectors, Inc. v. Case*, 481 So.2d 499 (Fla. 2nd DCA 1985). In that decision, the court purported to enforce the "manifest meaning" of the 1981 statute, and in particular its declaration that the "employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted, 100% of what it has paid and future benefits to be paid," unless that amount should be reduced by the amount of any "comparative negligence or because of limits of insurance coverage and collectibility." Although this isolated statutory language does support the district court's interpretation, it is well-settled that statutory language should not be read in isolation; rather, statutes must be

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[4/] In the district court, Continental relied upon this Court's decision in *Aetna Ins. Co. v. Norman*, 468 So.2d 226 (Fla. 1985), but *Norman* holds only that the compensation carrier in that case was entitled to recoup benefits paid or to-be-paid, reduced by the 50% comparative negligence found by the trial court to be attributable to the plaintiff. *Norman* 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. Even the district court in the instant case implicitly acknowledged that, by relying entirely upon other district-court decisions.

[5/] *See, e.g., C & T Erectors, Inc. v. Case*, 481 So.2d 499 (Fla. 2nd DCA 1986); *American States Ins. v. See-Wai*, 472 So.2d 838 (Fla. 5th DCA 1985); *Cooper Transportation, Inc. v. Mincey*, 459 So.2d 339 (Fla. 3rd DCA 1984), *review denied*, 472 So.2d 1181 (Fla. 1985); *Whitely v. United States Fidelity & Guaranty Co.*, 454 So.2d 63 (Fla. 1st DCA 1984), *review denied*, 462 So.2d 1108 (Fla. 1985); *United Parcel Service v. Carmadella*, 432 So.2d 702, 704 (Fla. 3rd DCA), *review denied*, 441 So.2d 631 (Fla. 1983); *Sentry Ins. Co. v. Keefe*, 427 So.2d 236 (Fla. 3rd DCA 1983); *Risk Management Services, Inc. v. Scott*, 414 So.2d 220 (Fla. 1st DCA 1982); *Lee v. Risk Management*, 409 So.2d 1163 (Fla. 3rd DCA 1982).

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construed in their entirety and as a whole.[6/] And in addition to the language quoted, the 1981 version of the statute also provides that the compensation carrier has "a lien upon any judgment or settlement recovered" only "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."

And yet, the district court's interpretation of the statute did not effect a "pro rata" allocation, which the statute explicitly requires. To the contrary, it shouldered upon the plaintiff the entire burden of absorbing the full amount of the attorneys' fees and costs incurred in securing the settlement, while leaving the entire remainder of that settlement available to satisfy the entirety of the compensation payments made. That outcome is positively inconsistent with the statute's explicit requirement of a "pro rata" allocation. If Continental's interpretation were correct, then the "pro rata" language of the statute would be 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 deduction 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.[7/] At the least, therefore, the statute is ambiguous, and requires some interpretation by this Court.[8/]

[6/] *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); *Englewood Water District v. Tate*, 334 So.2d 626 (Fla. 2nd DCA 1976); *St. Petersburg v. Earle*, 109 So.2d 388 (Fla. 2nd DCA), *cert. denied*, 113 So.2d 230 (Fla. 1959).

[7/] *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).

[8/] *See Weiss v. Leonardy*, 160 Fla. 570, 36 So.2d 184 (1948); *Englewood Water District v. Tate*, 334 So.2d 626 (Fla. 2nd DCA 1976). *See generally Ryder Truck Rental, Inc. v. Bryant*, 170 So.2d 822 (Fla. 1964); *State v. Stuler*, 122 So.2d 1 (Fla. 1960); *Douglas v. Mutual Life Ins. Co. of New York*, 191 So.2d 483 (Fla. 2nd DCA 1966); *Platt v. Lanier*, 127 So.2d 912 (Fla. 2nd DCA 1961). This task of statutory construction is a question of

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In construing the statute, the central judicial task is to ascertain its legislative purpose.[9/] The court must isolate the legislature's objective in enacting the statute, and interpret it in a manner consistent with that policy and spirit.[10/] Given two available interpretations of an ambiguous statute, the court will avoid that construction which is inconsistent with the legislative purpose,[11/] or which produces unjust or unreasonable consequences;[12/] and will adopt that interpretation which best will effectuate the legislature's intention.[13/] In the face of an ambiguous statute, this search for legislative

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law for the court. *See St. Petersburg v. Austin*, 355 So.2d 486 (Fla. 2nd DCA 1978); *Devin v. Hollywood*, 351 So.2d 1022 (Fla. 4th DCA 1976).

9/ *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); *Gracie v. Deming*, 213 So.2d 294 (Fla. 2nd DCA 1968); *In Re Estate of Jeffcott*, 186 So.2d 80 (Fla. 2nd DCA 1966).

10/ *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).

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

12/ *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) (on remand, "appellant can present arguments and evidence that repayment of the benefits would defeat the purpose of the Unemployment Compensation Law or would be against equity and good conscience"); *Sagaert v. State Department of Labor and Unemployment Security Unemployment Appeals Commission*, 418 So.2d 1228, 1230 (Fla. 3rd DCA 1982) ("A statute will not be interpreted to achieve an illogical or absurd result"), *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 & 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).

13/ *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); *State ex rel. Ashby v. Haddock*, 140 So.2d 631 (Fla. 1st DCA), *reversed on other grounds*, 149 So.2d 552 (Fla. 1962).

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purpose may require a construction which appears in part to contradict the strict letter of the statute.[14/] 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.[15/] Against these principles, we consider the 1981 version of §440.39(3)(a).

It is well-established that the general purpose of the workers' compensation statute is "to shoulder on industry the expense incident to hazards of industry and to lift from the public the burden of supporting those incapacitated by industry."[16/] In this case, acceptance of the statutory construction offered by the district court would directly undermine that purpose, by removing the threshold burden of compensation initially imposed upon the employer, and placing it squarely upon the employee. Thus, for example, the district court's distribution would allocate approximately $26,000.00 of the $175,000.00 settlement to the costs of prosecuting the action (*see* R. 32); another $70,000.00 for attorneys' fees (*see* R. 33); and of the remaining $79,000.00, approximately $71,300.00 to Continental--leaving the estate and the survivors with a grand total of $7,700.00--even though it was the plaintiff's effort which secured the settlement compensating Continental (*see* R. 50). Even if the value of this case--that is, the total damages to all parties represented by the plaintiff--were only $175,000.00, 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 settle-

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[14/] *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).

[15/] *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).

[16/] *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 (Fla. 1944).

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ment. Or as the trial court told Continental at the hearing, such an outcome means that the plaintiff is "working for you for nothing" (R. 50).

That outcome is not only fundamentally unfair, but is diametrically inconsistent with the central statutory purpose of placing the burden of compensation upon the employer. Since the statute is sufficiently ambiguous to permit an alternative construction which at the very least would allocate pro rata the expense (in fees and costs) of securing the settlement, an outcome far-more consistent with the underlying statutory purpose than the outcome offered by the district court, its holding is indefensible. That was the conclusion of the court in *Alexsis, Inc. v. Byrk*, 471 So.2d 545, 546-47 (Fla. 4th DCA 1985):

> 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.

In light of the obvious ambiguity in this statute, there is absolutely no reason to permit such a result. Instead, the statute should be construed in the light of its central underlying purpose, and the construction adopted by the district court would not serve that purpose.

Continental argued below (initial brief at 24) that the best measure of the legislature's intention for the 1981 statute (originally enacted in relevant part in 1977) is the fact that the 1983 amendment to the statute, *see* note 2, *supra*, more-specifically codified the interpretation which Coon advanced and the trial court adopted in this case, providing explicitly for reimbursement to compensation carriers of only "their pro rata share for compensation and medical benefits paid or to be paid under the provisions of

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this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit, including reasonable attorney's fees for the plaintiff's attorney." The 1983 statute continued: "In determining the employer's or carrier's pro rata share of those costs, and attorney's fees, the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment which are costs and attorney's fees."

Obviously this is a far more direct way of prescribing the result which the trial court's construction of the 1981 statute achieved in this case. And of course, there are two ways of assessing the 1983 amendment in construing the 1981 statute. One interpretation is that the legislature was making explicit in 1983 what it had intended in 1981 (and earlier), in the light of a number of appellate decisions misconstruing the statute. The alternative interpretation is that the legislature was changing the statute in 1983. The district court opted for the latter interpretation. 493 So.2d at 486. It accepted Continental's contention that the legislature would only amend a statute to change its meaning--not to clarify its meaning. It implicitly assumed that the legislature never fails to be clear, precise, and unambiguous, and thus will amend a statute only to change, but never to clarify, its meaning.

This Court has read enough Florida Statutes to know otherwise. It is equally commonplace, we submit, that legislative amendments are an effort to better clarify the legislature's ***original*** intention for a statute--in light of some ambiguity or confusion which has arisen in the day-to-day application of that statute. That is simply a matter of common sense. Thus, it is not surprising that the Court has specifically held that "[t]he mere change of language [in a statute] does not necessarily indicate an intent to change the law where the intent may be to clarify what was doubtful or to safeguard against misapprehension as to existing law."[17/]

17/ *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529, 531 (Fla. 1973). *Accord, Florida Patient's Compensation Fund v. Mercy Hospital,*

We respectfully submit that in the specific context of this case--in which we are interpreting two different versions of a statute which has the central underlying purpose of placing the primary burden of work-related compensation upon the employer--there can be little question that the 1983 amendment to the statute represented an attempt to clarify the meaning of the earlier version. That was the conclusion of the court in *Alexsis, Inc. v. Byrk*, 471 So.2d 545, 546-47 (Fla 4th DCA 1985):

> We recognize that it is difficult to reconcile the precise language of the statute in question, section 440.39(3)(a), Florida Statutes (1981), with the provision in *National Ben Franklin Insurance Co. v. Hall*, 340 So.2d 1269 (Fla. 4th DCA 1976), permitting the proration of expenses and attorney's fees. 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 even though the carrier directly benefits from the recovery obtained. Under the statute, the carrier is entitled to recover the compensation benefits paid to the employee out of the employee's tort recovery. 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. Neither version of the statute expressly provided for proration. In addition, we believe the subsequent action of the legislature in expressly providing for proration of fees and costs by an amendment to section 440.39(3)(a) effective June 30, 1983 is actually a clarification of legislative intent, originally properly detected in *National Ben Franklin*.

There can be little question, we submit, that the ambiguity of the 1981 version of the statute must be resolved in a manner best calculated to fulfill its underlying legislative purpose, by rejecting any contention that the compensation carrier not be required to bear his "pro rata" share of the costs and fees which were necessary to produce the settlement from which the reimbursement to the compensation carrier is obtained. That outcome is consistent with the "pro rata" language of the statute; with its central underlying purpose; with the objective of construing the statute to avoid unreasonable

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Inc., 419 So.2d 348 (Fla. 3rd DCA 1982), *review denied*, 427 So.2d 737 (Fla. 1983). *See Lambert v. Mullan*, 83 So.2d 601, 603 (Fla. 1955); *Tampa & J.R. Co. v. Catts*, 79 Fla. 235, 85 So. 364 (1920); *State Farm Mutual Automobile Ins. Co. v. Bergman*, 387 So.2d 494 (Fla. 5th DCA 1980), *review denied*, 394 So.2d 1151 (Fla. 1981), *approved*, 408 So.2d 1043 (Fla. 1982) (per curiam).

and unfair results; and with the legislature's subsequent clarification of the statute. Although a number of appellate courts of Florida have held otherwise, they have not applied these longstanding principles of statutory construction. At the very least, the compensation carrier should bear its fair share of attorneys' fees and costs.

B. THE DISTRICT COURT ERRED IN RULING ON CROSS-APPEAL THAT CONTINENTAL'S LIEN UNDER THE 1981 STATUTE WAS NOT SUBJECT TO REDUCTION IN A MANNER REFLECTING THE RELATIONSHIP BETWEEN THE SETTLEMENT IN QUESTION AND THE TRUE VALUE OF THE PLAINTIFF'S DAMAGES.

Our contention here, as Mrs. Coon argued below (R. 41-44, 55), is that the trial court's calculation of the compensation lien, according to a ratio reflecting the percentage of the settlement remaining after deduction of attorneys' fees and costs, did not go far enough, and thus was an incorrect determination of the "pro rata" allocation required by the 1981 statute. In this case, the true value of the estate's and the survivors' damages was eventually liquidated by a jury at $1.5 million, and that judgment was later affirmed by the district court. *See* note 3, *supra*. And even absent such a judgment, a plaintiff's damages may also be liquidated in the proceeding to determine the compensation lien, by testimony presented to the trial court. *See, e.g., American States Ins. v. See-Wai*, 472 So.2d 838 (Fla. 5th DCA 1985). We submit that the only appropriate way to read the "pro rata" language of the 1981 statute is to require that the compensation carrier bear not only a proportionate share of the fees and costs which produced the settlement of the case, but also a proportionate share of the extent to which the settlement of the case did not reflect the true value of the plaintiff's damages.

Any other formula could lead to illogical results like the result in this case--in which even the formula applied by the trial court resulted in an allocation in which the estate's share of the settlement ($17,500.00) was reduced to nothing after the payment of attorneys' fees ($7,000.00), costs ($2,593.57), and the compensation lien ($7,906.50); the widow's share of the settlement, in the amount of $92,750.00, was reduced to $24,805.54

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after deducting her attorneys' fees ($37,100.00), costs ($13,745.93), and the compensation lien ($17,098.53); the portion of the settlement allocated to one child ($29,750.00) was reduced to $10,720.67 after deducting fees ($11,900.00), costs ($4,409.07), and the lien ($2,720.26); and the $35,000.00 settlement for the other child was reduced to $13,092.60 after deducting fees ($14,000.00), costs ($5,187.14), and the lien ($2,720.26) (*see* R. 25-26, 32-35).

We respectfully submit that such an unfair outcome cannot reflect the meaning of the statutory requirement of a "pro rata" distribution.[18/] Instead, the distribution should reflect not only an assessment against the compensation carrier of its share of the fees and costs which were necessarily expended to produce the settlement from which the compensation carrier's lien is partially repaid, but also should reflect the extent to which the settlement is less than the true value of the damages. After all, it was necessarily an assessment of the likelihood of securing the true value of the case--that is, the difficulties to be confronted in litigating the case--which produced a settlement for less than its true value. In this sense, the return to the compensation carrier is a reflection not only of the money expended by the plaintiff in fees and costs to bring the suit, but just as much of the ***amount*** of money for which the case was settled relative to the true value of the plaintiff's damages. Since the compensation carrier would have received nothing but for the plaintiff's efforts in settling the case for less than the total damages, in light of the difficulties confronting the litigation, the compensation carrier should share in the diminution of the return in the light of those difficulties.

18/ Under the authorities cited in footnote 12, *supra*, "[a] statute will not be interpreted to achieve an illogical or absurd result." *Sagaert v. State Department of Labor and Employment Security Unemployment Appeals Commission*, 418 So.2d 1228, 1230 (Fla. 3rd DCA 1982). Thus in *Comer v. State of Florida, Unemployment Appeals Commission*, 11 FLW 60 (Fla. 3rd DCA December 24, 1985) (per curiam), the court remanded the case to allow the appellant to "present arguments and evidence that repayment of the benefits would defeat the purpose of the Unemployment Compensation Law or would be against equity and good conscience." *Accord, Garcia v. Department of Labor & Employment Security*, 426 So.2d 1171 (Fla. 3rd DCA 1983). We also refer the Court to the other cases cited in footnote 12, *supra*.

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This reasoning, we respectfully submit, is the appropriate way to construe the statutory requirement of a "pro rata" allocation. Any other allocation is not truly "pro rata"--but imposes upon the plaintiff the full burden of the extent to which the settlement of the case did not reflect the full amount of damages. In this case, it resulted (at the trial level) in an allocation in which the various parties represented by the plaintiff received very little for their efforts (the estate received nothing at all)--while the compensation carrier received its lien reduced only by a share of the costs of bringing the suit, but not by the risks of that suit, as reflected in the settlement. Even a cursory look at the numbers outlined above can leave no question that such a result is simply unfair.

In *Arex Indemnity Co. v. Radin*, 72 So.2d 393, 395 (Fla. 1954), this Court noted that "the words '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. Thus, the Court's instruction that the phrase "pro rata" be construed in the broadest possible sense is equally applicable to the 1981 statute. We submit that the most reasonable construction of that phrase--and certainly the broadest construction--is that which we have advocated here. No other result would be consistent with the central statutory purpose of imposing upon the employer the primary burden of sustaining the cost of work-related injuries.

We also submit that the same conclusion can be reached in another way. 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

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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. After all, the statute does not call for a reduction in the compensation lien only where a ***judgment*** is uncollectible. To the contrary, it expressly calls for a reduction if the employee can prove 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 focus of the statute is on the "full value of damages sustained"--and that language is broad enough to encompass a case which is settled for less than its "full value"--that is, a case whose full value is potentially uncollectible--because of difficulties which require its settlement.

By either theory, we respectfully submit that even the outcome effected by the trial court in this case was unfair, and inconsistent both with the statutory requirement of a "pro rata" distribution, and with the underlying statutory purpose of placing the primary burden of compensation upon the employer. Thus, the district court should have accepted our cross appeal. There is something fundamentally wrong with a statutory scheme under which the time and effort of the plaintiff, coupled with an assessment of the risks attending litigation, produce a settlement which ends up being divided between the plaintiff's attorney on the one hand, and his employer or employer's compensation carrier on the other--leaving virtually nothing for the plaintiff. Since it was the plaintiff's effort which produced that reimbursement to the compensation carrier, the carrier should participate only in a "pro rata" allocation of the proceeds. That is what the statute says, and that is the only fair meaning of what the statute says.

C. THE DISTRICT COURT ERRED IN RULING ON CROSS-APPEAL THAT THE TRIAL COURT WAS RIGHT TO ORDER A DEDUCTION FROM THAT PART OF THE SETTLEMENT ALLOCATED TO THE COON CHILDREN, AS PARTIAL PAYMENT OF THE COMPENSATION LIEN.

Section 440.16(1)(b), Fla. Stat. (1981), provided, in relevant part, the following compensation formula:

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> 1. To the spouse, if there is no child, 50 percent of the average weekly wage, said compensation to cease upon the spouse's death or remarriage.
>
> 2. To the spouse, if there is a child or children, the compensation payable under subparagraph 1. and, in addition, 16 2/3 percent on account of the child or children. However, when the deceased is survived by a spouse and also a child or children, whether such child or children be the product of the union existing at the time of death or of a former marriage or marriages, the deputy commissioner may provide for the payment of compensation in such manner as to the deputy commissioner may appear just and proper and for the best interests of the respective parties and, in so doing, may provide for the entire compensation to be paid exclusively to the child or children; and, in the case of death or remarriage of such spouse, 33 1/3 percent for each child.
>
> 3. To the child or children, if there is no spouse, 33 1/3 percent for each child.

By its plain language, the statute authorizes payment directly to the child or children--that is, to the child's guardian for his benefit--***only*** if there is no spouse.[19/] In contrast, if there is a spouse, the statutory payments ***to the spouse*** are enhanced "on account" of any children--but all payments go to the spouse--***not*** to the child or to the child's guardian for the child's benefit. Sub-section 2. does contain a provision which allows the commissioner to "provide for the entire compensation to be paid exclusively to the child or children"--but no such award was made in this case. To the contrary, as the trial court's order found (R. 33), all such compensation payments were made directly to the widow. And although these payments to the widow were larger than they would have been had there been no children, there is nothing in §440.16 which gave the children any independent rights in such payment--for example the right to ensure that the enhancement of the compensation benefits "on account" of the children be expended for their benefit.

In contrast, the Florida Wrongful Death Act, §768.18(1), Fla. Stat. (1981), specifically defined the "minor children" as "survivors"; section 768.21(1) allowed each "survivor"

19/ *See Wise v. E.L. Copeland Builders*, 435 So.2d 339, 349 (Fla. 1st DCA 1983).

to recover certain damages; section 768.21(3) provided in addition that "[m]inor children" could recover for the loss of parental companionship and guidance, as well as for pain and suffering; and §768.20 required that the action to recover such benefits be brought by the decedent's personal representative, "who shall recover for the benefit of the decedent's survivors and estate . . . ." Under the Florida Wrongful Death Act, therefore, the Coon children were direct beneficiaries, and their allocation of the settlement in this case was secured directly for their benefit.

In the light of these two statutes, Mrs. Coon argued that the trial court should not deduct from the children's portions of the settlement any pro rata share of the compensation benefits paid to the widow, even if a portion of those benefits were paid to the widow only because of the children (R. 55-60, 63-65). The trial court rejected that argument, in allocating a percentage of the compensation repayment to the children's shares of the settlement (R. 33). And the district court rejected our cross appeal on that point. 493 So.2d at 486.

Although there is no authority one way or the other on the point, we submit that the trial court and the district court were wrong. Although additional benefits were paid to the widow "on account" of the children, the children had no independent right in those benefits--no right to assure their expenditure for the children's benefit. For this reason, 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. For this reason too, the district court's order should be reversed, and the case remanded to the trial court with instructions to exclude the children's shares of the settlement from the calculation of Continental's lien.

V
CONCLUSION

It is respectfully submitted that the district court's decision should be reversed, and the cause remanded with instructions to remand the case to the trial court for the

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purposes of fashioning a compensation lien consistent with the arguments advanced in this brief.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of February, 1987, to: MICHAEL L. ROSEN, ESQ., Holland & Knight, P.O. Box 1288, Tampa, Florida 33601.

Respectfully submitted,

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