IN THE SUPREME COURT OF FLORIDA

Appeal 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, ACADEMY OF FLORIDA TRIAL LAWYERS', BRIEF ON THE MERITS

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INTRODUCTION

In this appeal, the Plaintiff in the trial court, PAMELA K. COON, as Personal Representative of the Estate of JERRY FRANK COON, Deceased, will be referred to as the Appellant or Petitioner. The Defendant, THE CONTINENTAL INSURANCE COMPANY, will be referred to as Appellee or Defendant. References to the Record on Appeal will be made by the symbol (R.) followed by the appropriate page number. All emphasis is added unless otherwise indicated.

STATEMENT OF CASE AND FACTS

Petitioner, ACADEMY OF FLORIDA TRIAL LAWYERS, adopts the Statement of Case and Facts as presented by Petitioner.

ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED IN RULING 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 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 HTE PLAINTIFF'S DAMAGES.

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

SUMMARY OF ARGUMENT

The Second District in Continental Ins. Co. v. Coon, 493 So.2d 485 (Fla. 2d DCA 1986) erred in reversing the lower court's construction of Section 440.39(3)(a), Fla.Stat. (1981). That statute read in its entirety, rather than isolated portions, requires a compensation carrier to bear a proportionate share of the plaintiff's fees and costs. The District Court, however, interpreted the statute to place the entire cost of securing reimbursement of the compensation carrier's lien upon the plaintiff. This statutory interpretation works an extreme hardship upon the plaintiff, here, effectively precluding the plaintiff from a recovery, as settlement or litigation proceeds are realized primarily by the plaintiff's counsel and the compensation carrier. The District Court's interpretation of the statute effectively leaves the plaintiff with little if any recovery and defeats the purpose of the compensation statute.

This statutory construction while being fundamentally unfair to the plaintiff, results in free legal services for the compensation carrier. The carrier is obligated by statute to provide compensation benefits to an injured worker whatever the cause of the worker's injury. The decision of the district court provides the carrier with the benefit of legal services at the sole expense of the plaintiff. In essence, this interpretation operates to unjustly enrich the carrier by forcing the plaintiff to fund the entire litigation, both fees and costs, with the primary benefit inuring to the carrier, at absolutely no risk or expense.

On cross-appeal, the district court further erred in failing to

reverse the decision of the lower court. The trial court should have ruled that Continental Insurance Company is entitled only to a pro rata share of its compensation payments based upon the relationship between the settlement and the true value of the plaintiff's damages. By failing to consider the value of the damages, the trial court effectively reduced the share of the estate to a minimal recovery after the payment of attorney's fees, costs and the compensation lien. This decision of the trial court defeats the statutory requirement of a pro rata distribution. The proper reading of the 1981 statute requires a sharing of costs and fees between the compensation carrier and the Plaintiff. The compensation carrier and the plaintiff, therefore, share a reduction of the settlement when that settlement does not properly reflect the damages to the plaintiff. Therefore, the District Court's opinion should also be reversed with directions to the trial court to provide for a pro rata allocation between the carrier and the plaintiff, based upon the true value of the damages sustained.

Finally, the District Court erred on cross-appeal in affirming the trial court's allocation of a portion of the compensation lien to the settlement provided to the minor children. By statute, the minor children have no independent right to compensation benefits and the minors did not directly receive compensation benefits. It is inconsistent, therefore, to require them to pay any portion of the compensation lien, when they have no independent right to benefits and do not directly receive benefits.

ARGUMENT

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

This conflict requires the interpretation of Section 440.39(3)(a), Fla.Stat. (1981) which provides 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 that suit have been deducted 100% of what it is 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 damage 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 therefore and notice to the adverse party.

The contruction of this statute generated the conflict proceeding before this Court. This Court has not yet interpreted this aspect of the 1981 language of Section 440.39(3)(a). The prior decision in Aetna Insurance v. Norman, 468 So.2d 226 (Fla. 1985) is silent on the issue of applying the pro rata formula to costs and fees incurred by the plaintiff. Norman dealt only with the issue of comparative negligence, affirming the District Court's reduction of

the carrier's lien by fifty (50%) percent, based upon the plaintiff's fifty (50%) percent comparative negligence. Many other district court decisions interpret this section in a manner similar to the position taken by Continental Insurance. See C & T Erectors, Inc. v. Case, 481, So.2d 499 (Fla. 2d 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. 3d DCA 1984), review denied, 472 So2d 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 (Fla.3d DCA 1983), review denied, 441 So.2d 631 (Fla. 1983); Sentry Ins. Co. v. Keefe, 427 So.2d 236 (Fla. 3d 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. 3d DCA 1982). Only one decision, Alexsis, Inc. v. Burk, 471 So.2d 545 (Fla. 4th DCA 1985) holds to the contrary. The opinion in Alexsis, however, is the better reasoned decision and should be followed in order to comport with the legislative intent of the 1981 statute.

The Fourth District in Alexsis, construed this section of the workers' compensation statute to require a proration of attorney's 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. In construing the statutory language, the Court concluded that the carrier should bear its proportionate share of the attorney's fees and costs holding:

> To hold otherwise, it 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, it would be that the prosecution of the tort claim would primarily benefit the compensation carrier and the employee's lawyer. 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.

The Fourth District in Alexsis must have relied upon the language of the 1981 statute which permits the carrier or employer to recover only to the extent of their pro rata share, in that the decision gives meaning to the entire section and comports with the legislative objective in enacting the statute. Unless the compensation carrier is obligated for its pro rata share of the attorney's fees and costs incurred, the carrier, in effect, has been unjustly enriched. The entire burden of prosecuting this action is placed upon the plaintiff. The plaintiff must incur the time and expense of litigation and the attendant cost of that litigation will be borne by him alone in the event the case is unsuccessful. The carrier, on the other hand, need do no more than file the lien and sit back and wait for the case to come to a conclusion. If the plaintiff prevails, the carrier is there demanding one hundred (100%) percent reimbursement for the lien. Were the carrier required to bring a separate cause of action, it is obvious that costs and fees would be incurred in prosecuting this recovery. However, under the interpretation of this statute by the Court in Coon, the carrier gets the benefit of plaintiff's legal services and it is under no

obligation or at no risk whatsoever.

Not only is this construction fundamentally unfair, it also makes the "pro rata language" of the statute entirely meaningless, as the compensation's carrier is entitled not to its proportionate share of the benefits paid, but to all of those benefits and only after fees and costs have been deducted by plaintiff's counsel. The term pro rata must mean something, therefore, this court is required to construe the meaning of this statute. Alexander v. Booth, 56 So.2d 716 (Fla. 1952). In construing this statute, the court should avoid the construction which produces an unjust or unreasonable result. Sagaert v. State Department of Labor and Unemployment Security Employment Appeals Commission, 418 So.2d 1228 (Fla. 3d DCA 1982). If the statute is interpreted as the Second District has in Coon, the intent of the legislature is defeated. That the legislature did not intend the result in Coon, is reflected by the 1983 clarification of the statute. The 1983 clarification reads:

> "In determining the employer's or carrier's pro rata share of those costs, and attorney's fees, the employer for carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment which are costs and attorney's fees".

This change should be interpreted as a clarification, to avoid the harsh results reached by other districts. As the petitioner's Brief dramatically points out, the $175,000.00 settlement in this case provided the plaintiff with only 4.4% of the settlement. The Fourth District in Alexsis, recognized the potential for this harsh result and observed:

> We recognize that it is difficult to reconcile the precise language of the statute in questions, Section 440.39(3)(a), Florida Statutes (1981), with the provision in National Ben Franklin Ins. 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 attorney's fees involved in the tort recover 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 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.

It is respectfully suggested that the Fourth District is correct. The Legislature attempts to clarify this section by the 1983 legislative change, and this interpretation comports with reason and fairness.

ARGUMENT

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.

Taking the determination of the "pro rata" allocation required by the 1981 statute a step further, the lower court should have properly considered as well the true value of the plaintiff's damages. A proper reading of the statute requires the compensation carrier to shoulder a proportionate burden of the fees and costs which lead to the settlement and should also shoulder a proportionate burden of a reduction of the proceeds based upon the true value of the damages sustained.

Failure to interpret the statute to require an offset for the actual value of the case again, leads to the absurd result in this case where the plaintiff after deduction of costs, fees and the compensation lien was left with only a minimal recovery. For the plaintiff to receive only an infinitesimal percentage of the recovery and for the compensation carrier to be reimbursed 100% for its lien means that the statute is being interpreted to achieve innerlogical or absurd result. Sagaert v. State Department of Labor, Supra. Settlements are based upon, as this court is well aware, the costs of litigation and the liklihood of success. The Plaintiff is often forced to settle a case for less that the true value rather than risking losing everything at trial. Under the trial court's interpretation of the statute, though, the compensation carrier is still entitled to 100% reimbursement of its lien whether the case is

litigated or settled at a discount. This creates a patently unfair situation to the plaintiff. Therefore, a better reading of the statute requires an allocation of not only the costs and fees incurred but also an allocation based upon the extent to which the settlement does not account for the full measure of damages. This is also not inconsistent with the statutory language which provides that the carrier's lien may be reduced based upon comparative negligence or because of the limits of insurance coverage or collectibility. The language of the statute, particularly the issues of collectibility and insurance coverage are part and parcel of this same issue. It makes no difference if the judgment is uncollectible because of the financial resources of the defendant or because the case is settled for less than its true value.

ARGUMENT

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

The Academy has researched this issue and has been unable to find any cases which address this issue either in favor of the petitioner's position or to the contrary. However, the statutory language has been set forth in the Petitioner's Brief and the language by its plain terms authorize's payment to minors directly only if there is no spouse. If there is a spouse, as here, those payments shall go to that spouse for the children's benefit. In contrast, as the petitioner point out, the Florida Wrongful Death Act provides a direct right to the children and their portion of the settlement in this case is directly for their benefit. Therefore, it is logical to conclude that the children cannot be beneficiaries of the compensation benefits. If they are no beneficiaries of the compensation benefits, they should not be required to repay any compensation benefits out of the settlement proceeds secured for their benefit. Therefore, the children should have been excluded from the repayment of Continental Insurance's lien.

CONCLUSION

Based upon the arguments addressed and the case law cited, the District Court's decision should be reversed and the case remanded with instructions to remand to the trial court to fashion a compensation lien consistent with the arguments set forth.

Respectfully submitted,

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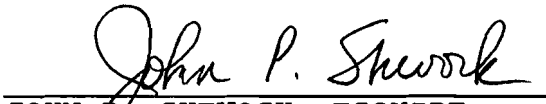
Petitioner, Academy of Trial Lawyers' - Br. on its Merits

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true copy of the foregoing Brief on The Merits was furnished by mail on this 19th day of February, 1987 to: Joel S. Perwin, Esquire, Wagner, Cunningham, Vaughan & McLaughlin, P.A., 708 Jackson Street, Tampa, Florida 33062, and Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; and Holland & Knight, 1 East Broward Blvd., 13th Floor, Fort Lauderdale, Forida 33301.



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