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.

_____/

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PETITIONER'S REPLY BRIEF ON THE MERITS

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-and-
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AUTHORITIES

I
STATEMENT OF THE CASE AND FACTS

At the outset, we must correct a serious misstatement of the facts which is repeated by Continental throughout its brief. As we acknowledged twice in our initial brief (p. 2 n.1, p. 3 n.3), Pamela Coon, as personal representative of the estate, secured not only the $175,000.00 settlement from some of the tortfeasors--on the basis of which settlement the trial court fashioned the compensation lien--but in addition a jury verdict against the other tortfeasors in the amount of $1.5 million. The judgment entered on that verdict was on appeal, and thus was not yet final, at the time the trial court fashioned its compensation lien. For this reason, the trial court focused exclusively upon the $175,000.00 settlement in calculating Continental's lien. In the process, however, as we noted twice in our brief, the trial court ***explicitly*** provided in its written order that if the additional jury verdict should be affirmed, of course it would be available to satisfy all or part of the remainder of Continental's compensation lien (R. 35). And yet repeatedly throughout its brief, Continental rails against the unfairness of permitting an outcome which would significantly reduce Continental's recovery below the amount of compensation payments which it made, and yet at the same time allow the estate and the survivors to pocket not only the bulk of the initial $175,000.00 settlement, but the entirety of the subsequent $1.5-million judgment on the jury verdict as well.

This repeated refrain of Continental is a serious and indefensible distortion of the facts of this case. As Continental knows full well, the jury verdict will be available upon remand to satisfy at least a portion of its remaining lien, should this Court reverse the district court's decision. The sole question before the trial court, before the district court, and before this Court, is whether the formula applied to the $175,000.00-settlement--which was the only final judgment before the trial court at the time it fashioned Continental's lien--reflected an appropriate interpretation of §440.39(3)(a), Fla. Stat. (1981).

II
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.

Our argument here is that the language of §440.39(3)(a) is inherently ambiguous; that the ambiguity must be resolved by reference to the underlying purposes of the statute; and that those purposes are inconsistent with an outcome under which the entire result of a plaintiff's effort is to compensate his attorneys, to pay the court costs, and to compensate his employer or its compensation carrier for benefits admittedly paid to the plaintiff or his decedent, leaving nothing or almost nothing to compensate the plaintiff's other damages--even though it was the plaintiff's effort which secured the settlement or judgment. Continental answers first (brief at 13-20) that there is no ambiguity in the statute, and that our demonstration of such an ambiguity was an "attempt[] to fabricate a finding of ambiguity," and a "manifest perversion" of the rules of statutory construction (Continental's brief at 16).

The sole basis for these accusations by Continental is its belief (brief at 17-19) that there is no conflict between the "pro rata" language of the statute on the one hand, and on the other the statute's subsequent language calling for payment of the entire lien after the subtraction of attorneys' fees and costs. To the contrary, Continental asserts, what the "pro rata" language really means is that the trial court must fashion a "pro rata" reduction only if one of the two subsequently-prescribed statutory exceptions to the payment rule are satisfied--that is, only if "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." §440.39(3)(a), Fla. Stat. (1981).

In other words, Continental's entire argument depends upon the assumption that the

"pro rata" language of the earlier sentence of the statute is entirely redundant and superfluous, because it is merely a short-hand reference to the more-explicit language of the next sentence, concerning comparative negligence and the limits of insurance coverage and collectibility. Thus, Continental's self-righteous charges of fabrication and perversion (Continental's brief at 16) depend entirely upon an assumption which would require this Court to ignore one of the fundamental rules of statutory construction--which we cited in our initial brief (p. 7 & n.7), and which Continental also acknowledges (brief at 17)--that statutory language should not be construed as meaningless surplusage. And yet, that is the obvious predicate of Continental's argument.

We respectfully submit that because the "pro rata" language must have some meaning, it can only have the meaning which we have advanced--that both the plaintiff and the employer or compensation carrier will share pro rata the expenses of securing the settlement or judgment in question. Continental has suggested no other meaning of this "pro rata" language which would not render it superfluous.

Nevertheless, Continental raises two arguments against our charge that the statute is ambiguous. First (brief at 17), Continental contends that if the Court should adopt our interpretation of the statute, it would be doing precisely what we are attempting to avoid--that is, rendering a part of the statute superfluous--the part which calls for the compensation carrier to recover 100% of its lien after the payment of attorneys' fees and costs. But to the contrary, we are not asking this Court to accept without reflection that part of the statute which supports our position, and to reject without reflection the contradictory part of the statute which Continental emphasizes. That is Continental's game--not ours. Our point, which we could not have made more clear in our initial brief (pp. 6-7), is that the statute is ***ambiguous*** because of the conflict between these two phrases, and that the ambiguity must be resolved ***not*** by blindly choosing one over the other (which is what Continental advocates), but rather by resorting to the traditional

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rules of statutory construction--which we will discuss in a moment. As we pointed out (brief at 8-9 & nn. 14, 15), when two parts of a statute contradict each other, one of them has to give. In such circumstances, the court should adopt that construction which is most consistent with the underlying purpose of the statute, even if that means sacrificing other parts of the statute which are unavoidably-inconsistent with that interpretation.

Before discussing the statutory purposes, however, we must dispose of Continental's second "plain-meaning" argument (brief at 18-19)--that the statute cannot be read to embrace the ambiguity which we have discovered, because the statute says only that the carrier has a lien to the extent that the court "may" determine to be its pro-rata share--and not that the court "must" fashion a pro-rata allocation. This permissive language, Continental suggests, can only support its position that the "pro rata" sentence is meant as a merely-redundant shorthand for the statute's subsequent allowance of a reduction in the lien for comparative negligence or limits in insurance coverage and collectibility, but is positively inconsistent with Coon's interpretation, which would require in every case that the carrier bear a proportional share of the costs of securing the judgment or settlement. Thus, under Coon's interpretation, Continental insists, the word "may" would be inappropriate, because under our interpretation a pro-rata reduction would always be necessary, since "the employee will necessary incur some attorneys' fees and costs in all third-party tort actions" (Continental's brief at 19).

The problem with Continental's argument--which is premised upon the arguably-permissive connotation of the word "may" in the "pro rata" sentence--is that the very same argument applies with equal force to Continental's interpretation of the statute. Continental's interpretation is that the "pro rata" sentence is merely a restatement of the subsequent statutory provision to the effect that a compensation carrier is entitled to 100% of the benefits paid or to be paid, unless the employee can show that he did not

recover the full value of damages because of either comparative negligence or the limits of insurance coverage and collectibility. In this latter part of the statute, the reduction for comparative negligence or for limits on coverage and collectibility does not appear to be permissive at all; to the contrary, that language apparently ***entitles*** the employee, as a matter of right, to a reduction upon proof that the full value of damage which he sustained was not recovered because of comparative negligence or limits in coverage and collectibility. And yet, if Continental were correct that the "pro rata" sentence is merely a short-hand restatement of this provision, then the use of the word "may" in the "pro rata" sentence would appear to suggest--according to Continental's very argument--that the trial court has some discretion as to whether or not to reduce the compensation lien even upon demonstration that the full amount of damages was not recovered because of comparative negligence or limits in coverage and collectibility. And yet, it is clear, and Continental concedes, that the trial court has no such discretion. Thus, the asserted problem with the statute's use of the word "may" is no less apparent under Continental's interpretation of the statute.

We submit, however, that the use of the word "may" is not a problem at all. That word connotes not that the trial court has some discretion to decline to fashion a "pro rata" distribution, but only that the trial court has discretion in determining the ***amount*** of the pro-ration--that is, in calculating the relationship between the amount of the judgment or settlement on the one hand, and the amount of attorneys' fees and costs on the other. After all, this statute does not say that the court "may determine" the pro-rata allocation, but that the compensation carrier has a lien "***to the extent*** that the court may determine to be their pro rata share . . ." (our emphasis). It is the ***extent*** of the pro-rata allocation which the trial court has some discretion in determining--in light of the evidence offered on the amount of fees and costs incurred. It is not the ***fact*** of a pro-rata allocation which the trial court has discretion to ignore. In this context, the "may"

language is perfectly consistent with our own interpretation of the statute--an interpretation which poses conflict with other portions of the statute, and therefore requires resort to the rules of statutory construction.

We discussed those rules at pages 8-9 of our brief, and applied them to this statute at pages 9-12. We established that the purpose of the workers' compensation statute is to impose upon the employer those expenses incident to the hazards of industry. In contrast, the district court's decision would shift that burden to the employee, because it would indemnify the employer (or his carrier) for the full amount of payments made, out of proceeds secured by the employee's efforts, leaving the employee without compensation (or with only partial compensation) for the full amount of the damages he sustained--damages which were not fully compensated by the employer or compensation carrier. In short, as the court noted in *Alexis, Inc. v. Bryk*, 471 So.2d 545, 546-47 (Fla. 4th DCA 1985), and as the trial court noted in the instant case, such an outcome means that the plaintiff is "working for [the employer or compensation carrier] for nothing" (R. 50). And although Continental is correct (brief at 30-31) that if the statute in question were not ambiguous, the wisdom of such a result would be irrelevant, such a non-sensical outcome--which is flatly inconsistent with the statutory purpose--is highly relevant to the appropriate interpretation of an ambiguous statute.

Continental answers (brief at 32-33) that the outcome sanctioned by the district court is not unreasonable or unfair, because Coon's argument ignores the fact that the plaintiffs have already been paid approximately $71,000.00 in benefits by Continental, and should not be permitted a double recovery of those payments. As Continental puts it (brief at 32) (emphasis deleted): "If the employee and his dependents are able to shift that burden [of compensation from the employer or carrier] directly to the third party by recovering damages in a subsequent tort action, why should the employer or carrier continue to be saddled with that burden and allow the employee or his dependents to

enjoy a double recovery?"

The dispositive answer is that under no scenario can a plaintiff be said to receive a double recovery of any portion of the compensation lien, even if none of that lien is repaid to the carrier or employer--and certainly not if only a pro-rata amount of the lien is paid to the carrier or employer. We say this because of the obvious fact that even when the total amount of damages awarded to a plaintiff equals the total amount of damages suffered, that plaintiff will still be required to pay a substantial percentage to his attorney, and for costs, and thus will ***never*** be fully compensated for the total amount of loss sustained. For this reason, even if the plaintiff were to keep the entire amount of the recovery after deducting fees and costs, and none of it went to the compensation carrier or employer, it still could not be said--as Continental insists--that the plaintiff would be receiving a double recovery of the amount of compensation payments already made. And thus by no measure could it be said that Coon's position--which would simply reduce the carrier's recovery by a pro-rata proportion of the fees and costs--can be said to allow her a double recovery of the amount of compensation payments made. Thus, contrary to Continental's suggestion (brief at 33), there is nothing "unjust" or "unfair" in relieving the plaintiff of a portion of the costs and fees which have been incurred in order to secure a recovery which in part is available to the employer or compensation carrier as partial reimbursement for the amount of compensation benefits paid. To do so is not a double recovery by the plaintiff, because it will still leave the plaintiff undercompensated for the full amount of damages sustained.

And in contrast, as we argued (brief at 9-10), it would be fundamentally unfair to substantially increase the plaintiff's under-recovery by requiring the plaintiff to bear the full amount of the attorneys' fees and costs, even though those fees and costs were incurred at least in part (and in the instant case in primary part) in order to secure a benefit for the compensation carrier or employer. To the contrary, we should spread this

cost around, reducing the amount of under-compensation of the plaintiff, by proportionately under-compensating the compensation carrier, who would not have been benefited at all but for the plaintiff's efforts. That way we allocate the cost of recovery among the parties who benefit from that recovery, rather than imposing those costs exclusively upon the plaintiff.

Contrary to Continental's contention, such an outcome is neither "unjust" nor "unreasonable." And the best proof of that is that this is precisely the outcome which the legislature made explicit in its 1983 amendment of the statute, which remains embodied in the present statute, 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 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." As the statute expressly provides: "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." That is the only fair outcome--the outcome which the legislature has explicitly endorsed.

We submit, therefore, that Continental cannot possibly sustain its contention that its position is even remotely defensible by any standard of fairness or policy. Indeed, none of the cases which has endorsed Continental's interpretation of the statute has even attempted to defend it on the merits; instead these cases simply bow to the legislature's perceived intention. As we have demonstrated, however, these cases have failed to appreciate the inherent ambiguity in the statute's explicit provision for a "pro rata" allocation, and thus the propriety of our resort to the rules of statutory construction. Under those rules, there can be no question that the interpretation most consistent with the legislative intentions underlying the workers' compensation laws is the construction

which the trial court adopted and which we have advocated here.

As we demonstrated (brief at 10-11), these conclusions are not forestalled by the more-explicit language which the legislature did adopt in the 1983 amendment. As we noted, that amendment is best construed--consistent with the underlying purposes of the statute--not as a change in the law, but rather as an attempt "to clarify what was doubtful or to safeguard against misapprehension as to existing law." *State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529, 531 (Fla. 1973). Continental responds (brief at 35) by citing authorities that an amendment "to an unambiguous statute" is presumed to change its meaning; and that an amendment should be viewed as clarifying only if the prior law was "so unclear or doubtful as to be susceptible of at least two viable interpretations" (brief at 36). We agree entirely. As we demonstrated, the prior statute is ambiguous, and resulted in a number of erroneous interpretatons, and the 1983 amendment is best read--consistent with the general purposes of the statute--as an attempt to clarify its meaning. We fully acknowledge that the earlier statute was ambiguous, but we insist, in light of its "pro rata" language, and in light of the manifest purposes of the workers' compensation laws, that the district court's decision was wrong.

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 is that the "pro-rata" reduction of the lien should reflect not only the amount of fees and costs incurred in order to obtain the recovery in question, but also the extent to which that recovery did not reflect the full value of the plaintiff's damages. Since the plaintiff--who went to the time and cost and effort to secure the judgment--has received a measure of damages below the true value of his case, then the compensation carrier--whose compensation is dependent upon those efforts by the

plaintiff--should sustain a similar pro-rata reduction. That is the only rational definition of the "pro rata" language of the statute, and the Supreme Court has counseled that the phrase "pro rata" in the statute "must be construed in its broadest aspect and not in a technical manner." *Arex Indemnity Co. v. Radin*, 72 So.2d 393, 395 (Fla. 1954).

Continental answers (brief at 38-41) by citing a few cases which have rejected this argument--which does not of course answer the argument; and by repeating its earlier contention that such a result would depart from the plain meaning of the statute. But the plain language of the statute also calls for a "pro rata" calculation of the compensation lien, and the relevant question is what the phrase "pro rata" means. Since that phrase is at least ambiguous, this question must be answered by reference to the statute's purpose, and Continental has not even bothered to argue that the statute's purpose would be served in any way by its own interpretation of the statute. Thus, in substance, our point goes unanswered.

We also argued (brief at 15-16) that the same conclusion can be reached by reference to the statute's provision that the compensation lien should be reduced in part upon the plaintiff's demonstration that he "did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility."[1/] Our position is that the statute explicitly allows a reduction of the lien when the full value of damages is not recovered because of a limit in collectibility, and that the word "collectibility" should be interpreted to include a case in which the full measure of damages is not "collectible" because, for one reason or another, the plaintiff secures a recovery which is less than its full value. As we noted, the explicit focus of

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1/ We acknowledge that we did misquote the statute at one point in our brief (p. 15), while quoting it correctly at other points (pp. 1, 16), and we acknowledge that the difference is important. Continental is correct (brief at 42) that the misquote was inadvertent, but it is nevertheless inexcusable, and we apologize to the Court and counsel.

the statute is on the "full value of damages sustained"--and that language should be broad enough to encompass the 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.

Continental's response (brief at 42-43) is that--apart from the question of comparative negligence--the statute only allows a reduction in the lien if the recovery is less than full value "because of limits of insurance coverage ***and*** collectability" (our emphasis). Thus, Continental contends, the lien should be reduced only if the insurance coverage is inadequate ***and*** that coverage is uncollectible.

But that interpretation is totally nonsensical. The obvious purpose of this statute is to allow a reduction if the plaintiff is not going to receive the full value of his claim because of some problem with the insurance--that is, because either the amount of coverage is inadequate; or, even if the coverage is adequate, because it is not collectible. It would be absurd to read the statute to require a demonstration that the amount of coverage is inadequate ***and*** that this inadequate amount is also uncollectible. What possible legislative purpose could that serve?

In this light, the only appropriate reading of this statute is that, regarding insurance coverage, it allows reduction of the lien under two criteria--when there is some limit to the amount of insurance coverage ***and*** when there is some limit to the amount of collectibility. In short, the word "and" is used here to establish that there are two aspects of the insurance question which permit a reduction of the lien. There is the question of coverage, ***and*** there is the question of collectibility. That is the only construction of this statute which makes any sense at all, and Continental's construction is totally absurd. Thus, we submit that there is an alternative basis for our contention that the "pro rata" language of the statute requires the trial court to factor in the extent to which the plaintiff has settled the case for less than its true value.

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.

Here we argued (brief at 16-18) that under certain circumstances, this statute does authorize payment directly to a child through his guardian, but not under the circumstances of this case. In some kinds of cases, under the explicit language of the statute, the compensation may be "paid exclusively to the child or children . . . ." §440.16(1)(b)(2), Fla. Stat. (1981). In the instant case, since there is a spouse, all payments went to the spouse, although such payments were enhanced on account of the children. Thus, the children themselves received no compensation payments, and their recovery in the action against the tortfeasor should not have been reduced to accommodate any repayments of the compensation lien.

Continental answers that this point is "sheer sophistory" (brief at 46), but does not bother to answer it. Since there is nothing in the statute which requires that the enhanced payments be made for the benefit of the children--that is that they be expended for the benefit of the children--there is no guaranty whatsoever that the children will receive any benefits from those enhanced payments. It would be fundamentally unfair, therefore, to require them to repay any part of the compensation lien. If Mrs. Coon received enhanced benefits "on account" of the children, then the carrier's pro-rata lien against Mrs. Coon's recovery should be fashioned accordingly.

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

IV
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of April, 1987, to: MICHAEL L. ROSEN, ESQ., Holland & Knight, P.O. Drawer 810, Tallahassee, Florida 32302.

Respectfully submitted,

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