

**IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

Case No. : SC13-2082
LT# 1D12-3639
DOAH/OJCC: 09-027890GCC

MARVIN CASTELLANOS

Petitioner,

VS.

NEXT DOOR COMPANY, ET AL.

Respondent.

**BRIEF OF AMICUS CURIAE
WORKERS' INJURY LAW AND ADVOCACY GROUP (WILG)
FILED ON BEHALF OF PETITIONER MARVIN CASTELLANOS**

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POINT I

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES SEPARATION OF POWERS AND DUE PROCESS OF LAW WHEN:

- A. THIS CONFLICTS WITH RULE 4-1.5 OF THE RULES REGULATING THE FLORIDA BAR;**
- B. THE FEE SCHEDULE IS CONCLUSIVE CONTRARY TO THE *LEE ENGINEERING* CASE;**
- C. THE USE OF THE FEE SCHEDULE PRODUCES AN UNCONSTITUTIONAL RESULT.**

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INTRODUCTION

This brief is filed on behalf of Workers' Injury Law and Advocacy Group (WILG), amicus curiae for Petitioner Marvin Castellanos. By Order dated March 26, 2014, this Court granted WILG's motion seeking leave to appear as amicus curiae aligned with the Petitioner.

INTEREST OF THE AMICUS CURIAE

Amicus curiae Workers' Injury Law & Advocacy Group [WILG] is an organization dedicated to protecting and advocating for the rights of injured workers throughout the United States.

Workers' compensation is a form of insurance that is supposed to provide fast, sure, and adequate medical care and compensation for employees who are injured in the course of their employment (to protect society from the burden of injury that should be borne by the industry served), without the need for counsel. Workers' compensation laws abrogate the employee's right to sue their employer for the tort of negligence (or gross negligence). Also abrogated by F.S. 440.11 (4) (2003)(The Exclusive Remedy provision) is the right to sue a carrier for bad faith handling of a workers' compensation claim pursuant to F.S. 624.155 (2011). Compensation schemes differ between jurisdictions and the same is true of the methods of

compensating attorneys who represent injured workers. To the extent that workers' compensation rate reductions have occurred, such rate reductions have come at the expense of the injured workers and their attorneys, because lawmakers slash benefits and push many of the injured workers out of the system and into other social programs, such as Social Security Disability, Medicare, Medicaid, and group health insurance, A. Widman, *Workers' Compensation A Cautionary Tale*, p. 2 (2006).

"Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics, and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation", A. Widman, *Workers' Compensation A Cautionary Tale*, p. 3 (2006).

"Once a workers' compensation act has become applicable either through compulsion (use of the police power), or election, it affords the exclusive remedy for claims by the employee or the employee's dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent supposed to be put in balance, for, while

the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts.” 6-100 *Larson's Workers' Compensation Law* § 100.01.

The rights of injured employees continue to legislatively diminish in the workers' compensation arena. Preserving the rights of injured employees requires vigilant protection. Vigilant protection requires the services of competent counsel to overcome numerous defenses to claims, many newly enacted, raised by insurance carriers. Workers' compensation insurance carriers in Florida are not subject to the 'bad faith' provisions of the insurance code. Nor are defense fees limited in any way. Well financed defense counsel on behalf of the employers and carriers can make litigation a nightmare for an injured worker. The right to be represented by counsel is ingrained in the American system of jurisprudence and ought not to be taken lightly, or subject to unreasonable restraint. The fee schedule made mandatory by repeal of the word 'reasonable' in 2009 is an unconscionable restraint on the ability of injured workers to hire competent counsel to represent them.

SUMMARY OF THE ARGUMENT

WILG believes the instant cause points out yet another inadequacy of the Florida workers' compensation scheme enacted as amended effective July 1, 2009. That inadequacy is the amount of attorney fees paid to successful claimant attorneys as compared to the statutory and common law in effect on the date of the adoption of the constitution of 1968. WILG believes that the 14th Amendment to the U.S. Constitution (Due Process) as well as various sections of the Declaration of Rights contained in the Florida Constitution (Right to be rewarded for industry, Right of Access to Courts) effective Nov. 5, 1968, provide an ample basis upon which to conclude that the mandatory attorney fee schedule enacted eff. October 1, 2003 as amended eff. July 1, 2009, is invalid as a violation of the constitutional provisions mentioned above. WILG argues on behalf of Marvin Castellanos that the attorney fees currently provided by, and limited by, s. 440.34 Fla. Stat. (2009) are so inadequate that no reasonable person could advocate for them as part of the exclusive replacement remedy of workers' compensation for tort litigation. WILG believes that since 1968 the Florida legislature has so decimated the rights of injured workers and the benefits available to injured workers and their dependents (in case of death) and made the procedures so cumbersome and the ability to hire competent counsel so difficult that the *quid pro quo* has been effectively destroyed. But on the bright side,

the constitutional issue herein, related to attorney fees, need not be reached in this case because it has already been decided by this court in *Lee Engineering and Development v. Fellows*, 209 So. 2d (Fla. 1968) (Applying Canon 12 of the Canons of Professional Ethics, the predecessor to Rule 4-1.5(b)). Stare Decisis rules.

ARGUMENT

POINT I

THE 2009 AMENDMENT TO §440.34, FLA. STAT., DELETING THE WORDS REQUIRING A REASONABLE ATTORNEY'S FEE AND MANDATING A CONCLUSIVE FEE SCHEDULE VIOLATES SEPARATION OF POWERS AND DUE PROCESS OF LAW WHEN:

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STANDARD OF REVIEW: **de novo**, a challenge to the facial invalidity of a provision of state law is reviewed de novo by the court, *Florida Department of Revenue v. City of Gainesville*, 918 So. 2d 250 (Fla. 2005).

The formula for the type of review of a statute or amendment that adversely

affects *fundamental rights* is strict scrutiny, *McCall v. United States of America*, Sup. Ct. Fla., case # SC11-1148 (March 13, 2014)(Unless a suspect class or *fundamental right* protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge), *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003), *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204,206 (Fla. 1989), *Jacobson v. Southeast Personnel Leasing, inc.*, 113 So. 3d 1042 (Fla. 1 DCA 2013). A number of fundamental rights are implicated in this appeal.

However, the constitutional issues have already been decided by this court and need not be re-addressed. The certified question posed by the District Court asks this court to determine if the fee awarded in this case is 'adequate', and consistent with access to courts, due process, equal protection and other requirements of the Florida and Federal Constitutions. Both fundamental rights and non fundamental rights are implicated by the District Court's question. Strict scrutiny must apply. The District Court found the amount of the fee had to be upheld, "however inadequate it may be as a practical matter", *Castellanos v. Next Door Company*, 124 So. 3d 392 (Fla. 1 DCA 2013), Rev. Pending *Castellanos v. Next Door Company*, Case # SC13-2082. This DCA result was

required by the doctrine of **Stare Decisis** at the DCA level of review. The DCA said that it *had to follow its prior decisions* upholding the use of a statewide mandatory fee schedule.

This brief will concentrate on the Doctrine of Stare Decisis as the reason why constitutional issues need not be reached again as this court has already decided the issue in an opinion that the DCA should have followed but didn't when considering both the 2003 amendment to the Attorney Fee provision in chapter 440.34 and the 2009 amendment as well.

This court has already ruled that the legislature may not enact a mandatory statewide attorney fee schedule in workers' compensation matters.

When the citizens of Florida ratified and adopted their last constitution (to include the Declaration of Rights) in November 1968, that document set a bright line for what is constitutional thereafter. This court explained the meaning of those words in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). In the simplest terms imaginable, the legislature could change existing rights but could not eliminate existing rights without providing a reasonable replacement. It is therefore necessary that amicus must take the position that the workers' compensation act

in effect in 1968 was constitutionally adequate as a replacement remedy. The adoption of the 1968 constitution in November 1968 not only set a bright line as to the statutory rights in effect but also set in stone the common and decisional law in effect. One of those decisions was *Lee Engineering and Development Corp. v Fred Fellows*, 209 So. 2d 454 (Fla. April 10, 1968).

Under the maxim *stare decisis*, this adjudication by Florida's highest court formed a part of the unwritten common law. The power of reconsidering and new-modeling adjudications will be exercised with great delicacy and caution. Adjudications once deliberately made, are held as forming part of the settled law, *Martin v. Waddell's Lessee*, Sup. Ct. of the U.S., 41 U.S. 367 (January 1, 1842). Florida strictly follows the Doctrine of Stare Decisis. The cases are voluminous. One of special interest is *North Florida Women's Health and counseling Services v. State*, 866 So. 2d 612 (Fla. 2003) (...The Supreme Court cannot forsake the doctrine of stare decisis and recede from its own controlling precedent when the only change has been in the membership of the court...the presumption in favor of stare decisis is strong, and where the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of stare decisis is at its zenith).

Lee Engineering, id. is such a watershed decision. Note from the opinion: "However, the question of whether attorney's fees are excessive recurs so often that we requested oral argument on the question of the \$7,200.00 attorneys' fees and **also requested two attorneys-one generally representing management and one generally representing claimants- to give us the benefit of their opinion by appearing at a hearing and submitting briefs as amicus curiae.** The Florida Industrial Commission requested to be heard and submitted a brief on the impact of stipulations as well, id. at 456. **Richard A. Sicking** was the Claimant's amicus. **Warren Rose** was the Management's amicus. The court could not have been more deliberate in its consideration of the issue of claimant attorney fees in workers' compensation matters than it was in *Lee Engineering*, id..

One of the guiding factors mentioned by the *Lee Engineering*, id. court was taken from *Larson*, "...but it is obvious that fees should not be so low that capable attorneys will not be attracted, nor so high as to impair the compensation program", *Larson, Workmens (sic) Compensation Law*, Vol. 2, sec. 83. The First DCA has already concluded that the fee that had to be awarded to *Castellanos, supra.* attorney was 'inadequate". Because of the mandatory

nature of the legislatively enacted fee schedule even the district court had no jurisdiction to consider the evidence and determine if the fee was appropriate for the work done. Likewise, stipulations of the parties to settle the amount of a reasonable fee cannot be considered.

"Allowance of fees is a judicial action", *Lee Engineering*, id. at 457. The current mandatory fee schedule excludes all judicial input. In prior cases the court insisted on: "...the necessity of some evidence in the record to reflect the reasonable value of the services rendered, as well as the customary charge for such services in the community where they were rendered" and further:

"We understand that the respondent Florida Industrial Commission has promulgated a minimum schedule of fees to be used as a guide by the deputy commissioners. **Such a schedule is helpful but it is not conclusive. Innumerable economic factors enter into the fixing of reasonable fees in one community which might not be present in others.** In addition to the minimum schedule it appears to us that supplemental evidence should be presented", *Florida Silica Sand Co. v. Parker*, 118 So. 2d 2 (Fla. 1960).

In *Lee Engineering*, id. the court considered that a fee schedule might be set by the legislature in the future. The court dismissed such a possibility saying:

"Should the legislature set such a schedule by statute it would be less sensitive to the changing needs of the program. **The tendency to apply a**

contingent percentage to the total value of the award, in the absence of a stipulation or other evidence, is *not an appropriate method* for fixing a fee in Workmen's (sic) Compensation cases" id. at 458.

The court ended its opinion with a list of the factors that must be considered, only one of which was the benefits to the claimant. This list is duplicated almost word for word in Rule 4-1.5(b) of the *Rules of Professional Conduct*. The court admonished that:

"No one of these considerations in itself is controlling", id at p.459.

Lawyers were told, in no uncertain terms:

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee" id. at p.459.

From 1968 to July 1, 2009, the attorney fee provision in §440.34 had provided for a reasonable attorney fee for an injured workers attorney if legal services were necessary to obtain wrongfully denied or delayed benefits. The immunity granted carriers in §440.11(4) was, in effect, a codification of the exchange of reasonable fees in compensation cases for reasonable fees in bad faith actions under the Insurance Code. Workers' compensation carriers in Florida are the only insurance carriers that need not treat their policyholders or

beneficiaries in good faith. The penalty under the 2009 amendments to s. 440.34 is a fee approximating 10% of the benefits obtained. Bad Faith Fees awarded under §624.155 are not limited by a schedule and, unlike workers' compensation fees, may be subject to a 'multiplier'.

The legislature tried to limit carrier paid workers' compensation claimant attorney fees to the draconian mandatory fee schedule in the 2003 amendments. This court interpreted the statute to provide reasonable fees, *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008). The constitutional issues did not have to be reached and the application of *Lee Engineering*, id. by stare decisis was not necessary. But, *Lee Engineering*, id. was certainly relied upon by the court in *Murray*: "Accordingly, we have determined that reasonable attorney fees for claimants, when not otherwise defined in the workers' compensation statute, are to be determined using the factors of Rule 4-1.5(b) of the Rules Regulating the Florida Bar" id. at 1053, and:

"In sum, our decision in *Lee Engineering* controls our decision here", id. at 1062.

In the year following *Murray*, id. the legislature met and again amended §440.34 to repeal the word 'reasonable' in the two subsections in which it

appeared in the 2003 version. The legislature again instituted an un-rebuttable presumption that the fee schedule is the one and only reasonable fee, regardless of whether the fee is inadequate and unreasonably low on the one hand or wildly excessive on the other. In other words, confiscatory of the attorney's time and a violation of the right to be rewarded for industry pursuant to Art. I, s. 2 Florida Constitution if too low or a windfall which is an ethical nightmare. The First District Court of Appeal has certified a Question of Great Public Importance which this court has accepted, identifying the statutory fee in question as 'inadequate', *Castellanos v. Next Door Company*, 124 So. 3d 392 (Fla. 1 DCA 2013), Rev. Pending *Castellanos v. Next Door Company*, Case # SC13-2082.

A mandatory fee schedule restricts the availability of qualified lawyers to assist injured workers since most claims are not so large that the fee schedule would provide a reasonable or excessive fee. Injured workers are individuals who have been described by our courts as "Helpless as a turtle on its back", *Davis v. Keeto*, 463 So. 2d 368 (Fla. 1 DCA 1985, *Neylon v. Ford Motor Co.*, 27 N.J. Super. 511, 99 A. 2d 665 (1953). By adhering to the rule of *stare decisis* the court in this situation is not blindly following precedent. The court would be providing stability to a law that has existed from 1968 up until the ill conceived

repeal of the word 'reasonable' by a 2009 legislature bent on overriding a decision of this court. In Florida, the presumption in favor of stare decisis is strong; stare decisis provides stability to the law and to the society governed by that law, *Brown v. Nagelhout*, 84 So. 3d 304 (Fla. 2012).

It took 5 years from the enactment of the 'mandatory fee schedule' eff. October 1, 2003 until the decision in *Murray*, id. In that time the insurance industry collected premiums based upon the presumption that the mandatory fee schedule was a valid law. When this court disagreed and reinstated reasonable fees for all claims related to accidents after October 1, 2003, the insurance industry had to absorb years of unfunded fee obligations. The 2009 amendment, if overturned, will create a similar problem for the insurance industry. Stability is required in the future. By following *Lee Engineering*, id. this court will signal the legislature that there is no 'fix' that can be validly enacted, that judges set fees not legislators. Attorney fees in workers' compensation matters must be judicially controlled and may not be subject to a mandatory fee schedule.

It should be noted that the 2009 repeal of reasonableness was challenged before the First DCA in *Kauffman v. Community Inclusions, inc.*, 57 So. 3d 919 (Fla. 1 DCA 2011). The *per curiam* opinion of the DCA which denied appellants claim that 440.34 as amended 2009 was unconstitutional, mentioned *Murray*, id. but did not mention *Lee*

Engineering, id. A petition for review filed in the Supreme Court requesting that jurisdiction be accepted, was denied by a five justice panel, *Kauffman v. Community Inclusions, inc.*, 68 So. 3d 234 (Fla. 2011). Curiously the opinion as currently reported by West Publishing at 2011 WL 3250421 (Fla.) still contains the following language:

"NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL"

CONCLUSION

Stare Decisis controls the outcome of this matter. Having already decided that the judiciary is the final arbiter of attorney fee amounts in workers' compensation cases, the court need not go any further than to reaffirm that which it said in 1968. WILG respectfully requests that the court reverse the award of an inadequate fee and remand to the JCC to take evidence, follow the Rules of Professional Responsibility set by this court, and award a reasonable fee for the successful prosecution of the claim by claimant's attorney. Alternatively, the court could determine that ch. 440 itself is no longer an adequate remedy in place of common law remedies and hold the exclusive remedy provision of the act, §440.11, invalid.

AMICUS CERTIFICATION

Amicus Curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the font requirements of Rule 9.210(a) Rules of Appellate Procedure have been complied with in this Amicus Brief on this 9th day of April, 2014.

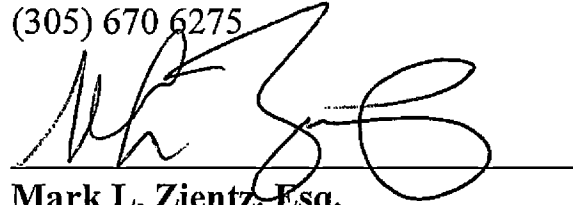
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