Filing # 12406746 Electronically Filed 04/11/2014 12:28:55 PM

RECEIVED, 4/11/2014 12:33:41, John A. Tomasino, Clerk, Supreme Court

**IN THE SUPREME COURT FOR THE STATE OF FLORIDA**

MARVIN CASTELLANOS,

Petitioner,

CASE NO.: SC13-2082

L.T. Case Nos.:
1D12-3639
OJCC No.: 09-027890GCC

vs.

NEXT DOOR COMPANY/
AMERISURE INSURANCE CO.,

Respondents.

# BRIEF OF FLORIDA JUSTICE ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF PETITIONER

---

SUSAN W. FOX, Esq.
Florida Bar No. 241547
FOX & LOQUASTO, P.A.
122 E Colonial Dr., Ste 100
Orlando, FL 32801
Ph: (407) 802-2858
E-mail: susanfox@flappeal.com

RICHARD W. ERVIN, Esq.
Florida Bar No. 022964
FOX & LOQUASTO, P.A.
1201 Hays Street, Suite 100
Tallahassee, Florida 32301
Ph: (850) 425-1333
Fax: (850) 425-3020
richardervin@flappeal.com

Attorneys for Florida Justice Association, Amicus Curiae

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**RULES**



**OTHER**

## STATEMENT OF INTEREST

The Amicus Curiae, Florida Justice Association (FJA), is a statewide not-for-profit organization of approximately 4,000 members, most of whom are trial and appellate lawyers. The FJA frequently appears in cases involving issues important to the rights of individuals and to the administration of justice. The Objectives and Goals set forth in the Charter of the FJA are as follows:

> Section I. The objectives of this corporation are to: (a) Uphold and defend the principles of the Constitutions of the United States and the State of Florida. (b) Advance the science of jurisprudence. (c) Train in all fields and phases of advocacy. (d) Promote the administration of justice for the public good. (e) Uphold the honor and dignity of the profession of law. (f) Encourage mutual support and cooperation among members of the Bar. (g) Diligently work to promote public safety and welfare while protecting individual liberties. (h) Encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

Article II, Academy of Florida Trial Lawyers Charter, approved October 26, 1973.

Consistent with the foregoing, the FJA has one of the State's most active amicus curiae committees, whose members work on a pro bono basis to address important issues of substantive and procedural law of widespread importance to the FJA's members and our clients, as well as to all of the citizens of the State.

The brief of amicus supports the arguments made in petitioner's initial brief to the extent they assert that the First District Court of Appeal's rejection of the challenge to the attorney fee schedule provided in section 440.34(1), Florida Statutes (2009), brings about a confiscation of the claimant's attorney's time, efforts and talents, thereby requiring that the statute be declared unconstitutional as an unwarranted intrusion into the inherent judicial powers of the courts, contrary to Article II, section 3 of the Florida Constitution, as applied to facts showing that the schedule results in a total statutory fee of $164.54, equating to an hourly fee of approximately $1.53, based on the reasonable expenditure by claimant's attorney of 107.2 hours.

## PRELIMINARY STATEMENT

Marvin Castellanos, petitioner, will be referred to as "claimant" in this brief, and the appellees, Next Door Company/Amerisure Insurance Company, as the "employer/carrier," or "E/C." References to the record on appeal will be abbreviated by the letter "R" followed by the applicable page number in parentheses, while to the judge of compensation claims, by the letters "JCC."

## SUMMARY OF ARGUMENT

It is claimant's position that this court should decide that the fee statute, section 440.34(1), Florida Statutes (2009), is, as applied to the facts in the present

case, by restricting claimant's attorney to a maximum statutory fee of no more than $164.54, despite the claimant's attorney's reasonable expenditure of a total of 107.2 hours in successfully prosecuting his client's claims, an unconstitutional violation of the separation of powers doctrine of the Florida Constitution, because it results in a confiscation of the attorney's reasonable time and efforts. Accordingly, this court should declare the statute unconstitutional in its application and remand the case with directions for a fee to be awarded which is not confiscatory of the attorney's services.

## ARGUMENT

**A RIGID APPLICATION OF THE FEE FORMULA PROVIDED IN SECTION 440.34(1), FLORIDA STATUTES (2009), AS APPLIED TO FACTS AS THOSE IN THE PRESENT CASE, SHOWING THAT THE FEE AWARDED THE INJURED WORKER'S ATTORNEY AT THE CARRIER'S EXPENSE YIELDED AN HOURLY FEE OF APPROXIMATELY $1.53, VIOLATES THE RULE APPROVED IN MAKEMSON v. MARTIN COUNTY, 491 SO. 2D 1109 (FLA. 1986), AND ITS PROGENY, STATING THAT IF, IN AN UNUSUAL OR EXTRAORDINARY CASE, A STRICT APPLICATION OF THE STATUTORY FEE MAXIMUM RESULTS IN A CONFISCATION OF THE PARTY'S ATTORNEY'S TIME, ENERGY, AND TALENTS, THE COURT THEN HAS AUTHORITY TO EXCEED THE STATUTORY FEE LIMITATION.**

***Standard of Review:*** Because the above issue involves a constitutional challenge, it is governed by the *de novo* review standard. See Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

***Analysis:*** In 2003, the Florida Legislature amended section 440.34, Florida Statutes, by removing from subsection (1) the factors that had formerly allowed a judge of compensation claims (JCC) to depart from the statutory guideline fee schedule. In so doing, however, the legislature failed to delete the word "reasonable" from the statute, an omission which the Florida Supreme Court five years later ruled created an ambiguity that permitted a construction allowing the JCC to depart from the schedule in appropriate cases. See Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008). The court explained that the fee schedule in section 440.34(1), Florida Statutes, when read with subsection (3), outlining the circumstances entitling prevailing claimants to "a reasonable attorney's fee" at the carrier's expense, creates an ambiguity as to whether the fee schedule is the sole means for determining a reasonable attorney fee. This court decided that the fee schedule is not the exclusive method, and it concluded that the discretionary factors which were removed from the statute in 2003 would continue to be applied in determining what should be a reasonable attorney's fee. Id. at 1053.

The subsequent version of section 440.34, enacted in 2009, was clearly designed to be a legislative repeal of the Murray decision. It sought to achieve this result by leaving intact most of the prior language adopted by the 2003 amendments, while deleting all references to the term "reasonable" throughout the statute and by explicitly providing in subsection (3), pertaining to carrier-paid fees, that the amount to be awarded could not exceed the amount established by the fee schedule in subsection (1). Based on the language used in section 440.34, it appears that not only are carrier-paid fees expressly limited to the amount provided in the fee schedule, but also all fees, including those for which the claimant is responsible, because subsection (1) expressly states that the judge shall not approve *any* fee in excess of the fee formula. In fact, if an attorney entered into a fee agreement with the client for an amount more than the fee schedule, he or she could be subjected to prosecution for committing a first-degree misdemeanor. See § 440.105(3)(c).

The dubious constitutional effect of the 2009 legislation is vividly illustrated by the facts at bar. Because the JCC below determined he had no discretion to depart from the fee formula provided in subsection (1), and because the benefits secured by the attorney on behalf of the client were limited to $822.70, he concluded the total fee allowed by the formula could not exceed $164.54[1] (R-13), which, once

[1] This sum is arrived at by determining 20 percent of the first $5,000 of the amount of the benefits secured, as provided in section 440.34(1), which, as applied to the

counsel's total services of 107.2 hours are taken into consideration, results in an hourly fee of approximately $1.53. The JCC also found, based on the complexity of the case and the difficulty of the issues, which required experience and skill on the part of the attorney in obtaining the award of benefits, the amount of time expended by claimant's counsel was reasonable (R-18).

It is not the position of amicus that the application of the fee schedule would necessarily in every case be unreasonable. If a situation existed involving a substantial sum of benefits secured, and a relatively small number of hours expended, the attorney, under such circumstances, would likely be amply rewarded for his or her services. Nevertheless, the application of the fee formula to facts, such as those in the present case, where the benefits obtained are minimal, but the reasonable services expended considerable, must be determined, under the circumstances, a confiscation of the attorney's time and efforts, thereby making the statute unconstitutional as applied.

The first Florida case to so hold was Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986), in which the court concluded that a statute which set a maximum fee limitation for compensation to attorneys who were appointed by the court to represent indigent criminal defendants was unconstitutional when applied

---

facts in the present case, *i.e.*, 20 percent of $822.70, equates to a total fee of $164.54.

in a manner which impermissibly encroached upon a court's inherent power to ensure adequate representation of the criminally accused, because it interfered with a defendant's right to effective representation by counsel. Although it may be contended that the court's decision in Makemson inhered in the Sixth Amendment right to counsel in criminal cases, the supreme court did not limit its holding solely on such basis, but it additionally held that "it was within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents." Id. at 1115.

The court continued that the focus of a court's attention must be "the defendant's right to effective representation rather than the attorney's right to fair compensation." Makemson, 491 So.2d at 1112. It continued, however, the "link between compensation and the quality of representation remains too clear." Id. at 1114. Such factor has long been an essential consideration in assessing the reasonableness of a fee. As this court recognized in its determination of a fee awarded in a workers' compensation case: "[O]n the one hand they [fees] will not be so low as to lack attraction for capable and experienced lawyers to represent

workmen's compensation claimants." Florida Silica Sand Co. v. Parker, 118 So.2d 2, 4 (Fla. 1960).

Later Florida cases following Makemson carefully pointed out that their decisions holding fee caps unconstitutional as applied to the particular circumstances before them were based on the separation of powers clause of the constitution. See White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376, 1378 (Fla. 1989), where the Florida Supreme Court held that an order which limited an attorney to the maximum statutory fee provided for representation of an indigent defendant in a capital case could be exceeded on the theory that the legislative fee cap was an unwarranted intrusion on the judiciary's inherent powers of the courts to appoint attorneys to provide such service. In so deciding, the court approved the dissenting opinion of Judge Lehan in White v. Board of County Commissioners of Pinellas County, 524 So.2d 428, 431-432 (Fla. 2d DCA 1988), which explained the constitutional basis for exceeding statutory fee caps in the following manner:

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine

> exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safeguarding of fundamental rights.

Although it is true that the issues confronting the court in the above cases pertained to a defendant's right to court-appointed counsel in the criminal sector, the application of the inherent judicial doctrine has not been confined to only criminal cases. It has also been applied to parental termination and dependency cases. See In the Interest of D.B., 385 So. 2d 83 (Fla. 1980), and Board of County Com'rs of Hillsborough County v. Scruggs, 545 So. 2d 910 (Fla. 2d DCA 1989). See also Remeta v. State, 559 So. 2d 1132 (Fla. 1990) (involving the statutory right to counsel in executive clemency proceedings);

In D.B. and Scruggs, the courts observed that while there was no fundamental, constitutional right to counsel in dependency proceedings, the right to same might arise through the application of the Due Process of Law Clause, depending on the nature or complexity of the proceeding required by statute. In fact, a Minnesota Supreme Court opinion specifically recognized the applicability of the inherent judicial powers doctrine in a workers' compensation case where a statutory fee cap was exceeded. See Irwin v. Sturdyk's Liquor, 599 N.W. 2d 132 (Minn. 1999). The court noted that a finding had been made at the trial level that the statutory fees awarded were inadequate to reasonably compensate the claimant's attorney, and the

court, applying a separation of powers analysis, decided the statutory-fee cap was unconstitutional as applied by making the following observations:

> Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees. This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers. . . . Accordingly, to the extent it impinges on our inherent power to oversee attorneys and attorney fees and deprives us of a final, independent review of attorney fees, we hold that section 176.081 is unconstitutional.

Id. at 142.

Similarly, the Florida Constitution assigns to the Florida Supreme Court the "exclusive jurisdiction to regulate the admission of persons to the practice of law. . . ." Art. V, § 15, Fla. Const. Indeed, this court itself has explicitly recognized that "[a]llowance of fees is a judicial action." Lee Engineering & Const. Co. v. Fellows, 209 So.2d 454, 457 (Fla. 1968). Nor is a fee schedule a "conclusive" indicator of a reasonable fee amount. Florida Silica Sand Co. v. Parker, 118 So.2d 2, 5 (Fla.1960).

The basis for the Minnesota Supreme Court's decision in Irwin v. Sturdyk's Liquor was nearly identical to the reasons expressed by Judge Lehan's dissent in White, which this court later approved. Note the following:

> The cornerstone of the doctrine of the inherent powers of the courts to regulate the practice of law is the doctrine of separation of powers. An attorney is part of the judicial system which is, of course, a separate, independent branch of government. Rules Regulating the Florida Bar (Preamble to ch. 4, Rules of Professional Conduct), 61 Fla.B.J. 64, 65 (Sept.1987). An attorney is "an officer of the Court and a member of the third branch of government." DeBock v. State, 512 So.2d 164, 166 (Fla.1987). To fulfill the separation of powers doctrine the inherent powers doctrine may be invoked when there is the necessity to protect the independence of the judicial branch from the executive or legislative branches so as to provide the checks and balances to which the success of this country's form of government is to a large extent attributable.

White v. Board of County Commissioners of Pinellas County, 524 So. 2d at 431.

Two recent opinions of the Florida Supreme Court have applied the Makemson rule to exceed the statutory fee cap provided for the capital collateral representative in postconviction proceedings. In Olive v. Maas, 811 So. 2d 644 (Fla. 2002) (Olive I), attorney Mark Olive sought a declaration of his legal rights under section 27.711 as to the compensation that he could claim for representing a death row inmate. Olive alleged that he would be required to work in excess of the statutory limit in order to effectively represent his client, and sought a judicial declaration that the strict application of the limitations in the Registry Act and the contract that registry counsel was statutorily required to sign unconstitutionally curtailed the trial court's inherent power to ensure adequate representation of death row inmates.

Upon Olive's refusal to sign a contract registering his availability to serve in such capacity, Roger A. Maas, the Executive Director of the Commission on the Administration of Justice in Capital Cases, asked the judge who had appointed Olive to select another attorney. When the court did so, Olive filed his complaint for declaratory relief seeking a determination of his rights under the Act. Maas responding by filing a motion to dismiss for the asserted reason that, as Olive had no client and no case to pursue, the circuit court was without jurisdiction to render a declaratory judgment because his claims were speculative and not based on a present controversy. Olive I at 647. The trial court granted Maas's motion as to all counts of the complaint, except that seeking injunctive relief in count III, and, as to it, the court granted Olive's motion for summary judgment, enjoining Maas from excluding Olive from the registry list. On appeal and cross-appeal from the judgment rendered, the First District Court of Appeal, on Olive's suggestion, certified the case to the supreme court as one of great public importance requiring immediate resolution.[2]

---

[2] In doing so, the First District Court in Olive v. Maas, 911 So. 2d 837, 843 (Fla. 1st DCA 2005), made the following pertinent observations:

> Relying on a series of cases--Makemson v. Martin County, 491 So.2d 1109 (Fla.1986); White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376 (Fla.1989); and Remeta v. State, 559 So.2d 1132 (Fla.1990)--in which the supreme court had held statutory maximum fees to be unconstitutional when inflexibly imposed in cases

In agreeing with Olive's contentions on the merits, the supreme court ruled that "trial courts are authorized to grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases." Id. at 654. Similar to the 2009 legislature's action in amending section 440.34, following the supreme court's decision in Murray v. Mariner Health, the legislature, only weeks after Olive I was decided in 2002, added section 27.7002 to the Registry Act for the purpose of explicitly clarifying its intent that the statute's fee limitation could not be exceeded. The new provision expressly provided that compensation above the amounts set forth in section 27.711 "is not authorized." § 27.7002(5), Fla. Stat. (2007). In granting Olive the relief he requested, the trial court construed section 27.7002(5) as permitting compensation in excess of the statutory fee caps

---

involving unusual or extraordinary circumstances, as well as concessions made by Maas and Milligan during oral argument in the case, see Olive, 811 So.2d at 651-53, the supreme court held in Olive I that even though the specific provisions of the Registry Act seemed to indicate an inflexibility to the fee caps, "trial courts are authorized to grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases." Id. at 653-54. Thus, the supreme court explained, "by accepting an appointment, a registry attorney is not forever foreclosed from seeking compensation should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of his or her time, energy and talent and violate the principles outlined in Makemson and its progeny."

where a court exercises its inherent judicial authority to grant such fees in light of extraordinary circumstances.

In its review of the ruling, the supreme court approved the trial court's interpretation of the statute, and, in addressing the state's argument that the rationale of Olive I was no longer effective because the legislature had enacted section 27.7002, Florida Statutes, to clarify its intent that the fee caps could not be exceeded under any circumstances, the court replied:

> While this may have been the Legislature's intent, such an interpretation of the statute would render it unconstitutional. . . . [T]he decision in Olive I rests on the courts' inherent power to ensure adequate representation for death row inmates in postconviction challenges. "[The] courts have authority to do things that are absolutely essential to the performance of their judicial functions." Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla.1978). This authority emanates from the courts' constitutional powers in the Florida Constitution. See art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein."); art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts.").

Maas v. Olive, 992 So. 2d 196, 203-204 (Fla. 2008) (Olive II). Because of the court's construction of the pertinent statutes, it did not decide the constitutional issues.

The facts in Murray and Olive II are strikingly similar. In both cases the legislature expressly stated its intent that the fee caps could not be exceeded; in both

cases, however, the supreme court avoided reaching the constitutional issues raised by interpreting the language in the respective statutes as allowing the statutory fee limitations to be exceeded.

In the present case, the total fee award in the amount of $164.54, based on the statutory fee formula exacting fees in an amount no more than a fixed percentage of the benefits secured, or $822.70, was grossly disproportionate to the time expended by claimant's attorney's successful prosecution of the claims, which the JCC found were complex and difficult. An inflexible adherence to a fee schedule which bears no rational relationship to the concept of the term "reasonable" is precisely the type of statutory schedule condemned by the supreme court in Makemson and its progeny in which the court counseled that the judiciary must not be hesitant from exercising its inherent judicial powers in departing from fee guidelines for the purpose of ensuring that an attorney "is not compensated in an amount which is confiscatory of his or her time, energy and talents." Makemson, 491 So. 2d at 1115.

In so saying the undersigned attorney acknowledges that the First District Court has upheld the 2009 version of section 440.34(1), Florida Statutes, against constitutional attack, see Kauffman v. Communuity Inclusions, 57 So. 3d 919 (Fla. 1st DCA 2011) -- a decision which Castellanos v. Next Door Company/Amerisure Ins. Co., 124 So.3d 392, 394 (Fla. 1st DCA 2013), considered itself bound --

however, it is respectfully pointed out that Kauffman, in so deciding, did not specifically address the Makemson line of cases. Moreover the explanation given by Kauffman for approving the validity of the fee statute, i.e., that because Murray had failed to address any constitutional issues, Murray did not cast any doubt on the reasoning used by three prior First District Court of Appeal's opinions (Campbell v. Aramark, 933 So. 2d 1255 (Fla. 1st DCA 2006); Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. 1st DCA 2006), and Wood v. Florida Rock Industries, 929 So. 2d 542 (Fla. 1st DCA 2006)) in rejecting constitutional challenges to the 2003 fee statute, appears to be unsupported by both the prior decisions of the First District and this court in Murray.

Kauffman overlooked the fact that one of the above three decisions, Wood, did not address any constitutional issues, but instead, in affirming the fee order limiting claimant's counsel to the amount provided in the fee schedule, decided that the language in the fee statute was "clear and unambiguous." Id. at 544. This court in Murray, of course, held that because the statute was ambiguous, the guideline fee could be exceeded.

In addition, Kauffman seems to have overlooked specific language in Murray strongly intimating that it did in fact reject the reasoning used by Campbell and Lundy in upholdng the validity of the fee statute. Murray specifically disapproved

the First District's prior decisions by expressly stating that in order to avoid a holding that the statute was unconstitutional, it would interpret the statute in a way to avoid any constitutional infirmity. In so doing, this court quoted State v. Giorgetti, 868 So. 2d 512, 518 (Fla. 2004), saying: "'We are also obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional.'" Murray at 1053. Murray emphasized that it preferred to resolve the issues before it on the basis of statutory interpretation, "'so as to avoid an unconstitutional result'" Id. at 1057 (quoting State v. Jefferson, 758 So. 2d 661, 664 (Fla. 2000).

The above statements strongly indicate that if Murray had interpreted the 2003 amended fee statute as it was written, it most likely would have determined the statute unconstitutional as applied. For example, in Murray, the facts demonstrate that a rigid adherence to the fee formula provided in section 440.34(1), Florida Statutes (2003), would have yielded an hourly fee of only $8.11 payable to claimant's attorney. Under the circumstances it is impossible to discern how the Kauffman court could have concluded that Murray "did not cast any doubt on the reasoning used in Lundy, Campbell, and Wood, in rejecting constitutional claims like those made here," id. at 920, particularly in view of Murray's express disapproval of the First District's decisions in Lundy, Wood, and Campbell.

If the First District's decision in Kauffman is allowed to stand, the result would be, as the evidence adduced at the fee hearing below clearly showed, that an ever increasing number of claimants' attorneys will be forced to leave the workers' compensation field, thereby requiring many injured workers to handle their own claims if they wish to proceed. Such a prospect would be devastating to any reasonable expectation of a pro se employee's chances of prevailing when matched against a skilled attorney serving the interests of the E/C.

Chapter 440, as presently structured, creates a labyrinthian maze of obstacles that makes it difficult, if not virtually impossible, for an unrepresented claimant to navigate. As the First District has previously observed: "Without the assistance of competent counsel, claimant would . . . have been 'helpless as a turtle on its back.'" Davis v. Keeto, Inc., 463 So. 2d 368, 371 (Fla. 1st DCA 1985), quoting Neylon v. Ford Motor Company, 27 N.J.Super. 511, 99 A.2d 665 (1953).

Some of the recent statutory amendments include, in addition to the cap on fees, substantial changes winnowing down a claimant's ability to obtain benefits previously furnished him or her under chapter 440, such as the method of apportioning noncompensable disabilities from those caused by the employment. § 440.15(5)(b). In addition, if the cause of the injury were contested, claimant would need to prove that the work-related injury is and remains the major contributing

cause of his or her disability or need for treatment, i.e., that it is more than 50 percent responsible for the injury as compared to all other causes combined. § 440.09(1). The claimant, moreover, would have to be aware of the significance of section 440.25(4)(d), Florida Statutes, requiring that a claimant's failure to raise at the time of the final hearing any benefit that was then ripe, due and owing is deemed waived. See also M.D. Transport v. Paschen, 996 So.2d 902 (Fla. 1st DCA 2008). Finally, and significantly, if the *pro se* claimant was determined the non-prevailing party, he or she would be subject to the payment of all of the E/C's costs.[3] § 440.34(3).

The provisions currently provided in chapter 440, Florida Statutes, bear little resemblance to the legislative design behind the initial enactment of the 1935 Act, which was created "to be simple, expeditious, and inexpensive so that the injured employee, his family, or society generally, would be relieved of the economic stress resulting from work-connected injuries, and place the burden on the industry which caused the injury." Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454, 456 (Fla. 1968).

---

[3] For example, this court reversed a JCC's refusal to assess costs in the amount of $13,266.14 against an unsuccessful claimant represented by counsel, concluding that section 440.34(3) did not appear to allow a JCC any discretion as to the assessment. F.A. Richard and Associates v. Fernandez, 975 So. 2d 1224 (Fla. 1st DCA 2008).

It is presumed that the legislature, in enacting the current amendments to the workers' compensation system, did not do so with the intention of providing injured workers with only an illusory right to compensation benefits. It has, however, now established such a complex procedure for processing claims that it would be unreasonable to assume a worker without the assistance of experienced counsel could realistically be expected to prevail.

## CONCLUSION

It is submitted that this court should hold the fee formula provided in section 440.34(1), Florida Statutes (2009), to be an unconstitutional legislative intrusion into the inherent judicial powers of the courts, as applied to facts showing that the formula produces a total fee of $164.54, which equates to an hourly fee of approximately $1.53.

Respectfully submitted,

SUSAN W. FOX, Esq.
Florida Bar No. 241547
FOX & LOQUASTO, P.A.
122 E Colonial Dr., Ste 100
Orlando, FL 32801
Ph: (407) 802-2858
E-mail: susanfox@flappeal.com

RICHARD W. ERVIN, Esq.
Florida Bar No. 022964
FOX & LOQUASTO, P.A.
1201 Hays Street, Suite 100
Tallahassee, Florida 32301
Ph: (850) 425-1333
Fax: (850) 425-3020
richardervin@flappeal.com

Attorneys for Florida Justice Association, Amicus Curiae

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by electronic mail on this // day of April 2014, to Richard A. Sicking, Esq. (sickingpa@aol.com), co-counsel for petitioner, 1313 Ponce De Leon Blvd, #300, Coral Gables, FL 33134; Michael J. Winer, Esq. (mike@mikewinerlaw.com), Law Office of Michael J. Winer, P.A., co-counsel for petitioner, 110 North 11th Street, 2nd Floor, Tampa, FL 33602; Mark A. Touby, Esq. (mark.touby@tgclegal.com), Touby, Grindal & Chait, P.L., co-counsel for petitioner, 2030 South Douglas Road, Suite 217, Coral Gables, FL 33134; Roberto Mendez, Esq. (rmendez@mendezlawgroup.com), The Law Group of Mendez & Mendez, P.A., co-counsel for respondents, 7061 Taft Street, Hollywood, FL 33024; Kurt D. Gallinger, Esq. (kgallinger@amerisure.com), Vice President & Counsel-Government Relations, Amerisure Companies, co-counsel for respondents, 26777 Halsted Road, Farmington Hills, MI; Christopher Smith, Esq. (chris@cjsmithlaw.com), 2805 W. Busch Blvd., Suite 219, Tampa, FL 33618, amicus curiae for the Workers' Compensation Section of The Florida Bar; Kimberly A. Hill, Esq. (kimberlyhillappellatelaw@gmail.com), 821 SE 7th St, Fort Lauderdale, Florida 33301, amicus curiae for Florida Workers' Compensation Advocates; Mark Lawrence Zientz, Esq. (mark.zientz@mzlaw.com), Two Datran Ctr, 9130 S Dadeland Blvd, Ste 1619, Miami, Florida 33156, amicus curiae for MP

Workers' Injury Law And Advocacy Group WILG; Geoffrey Bichler, Esq. (geoff@bichlerlaw.com), Bichler, Kelley, Oliver & Longo, 541 South Orlando Avenue, Suite 310, Maitland, FL 42751, amicus curiae for the Fraternal Order of Police; Bill McCabe, Esq. (billjmccabe@earthlink.net), 1250 S. Hwy. 17-92, Ste. 210, Longwood, FL 32750, amicus curiae for Voices, Inc.

Attorney

## CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Attorney