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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

MARVIN CASTELLANOS,

Petitioner,

CASE NO.: SC13-2082

vs.

Lwr. Tribunal: 1D12-3639;
OJCC No. 09-027890GCC

NEXT DOOR COMPANY and
AMERISURE INSURANCE CO.,

Respondents. /

BRIEF OF AMICUS CURIAE FLORIDA PROFESSIONAL FIREFIGHTERS, INC., IN SUPPORT OF PETITIONER MARVIN CASTELLANOS ON THE MERITS

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STATEMENT OF INTEREST

The amicus curiae, Florida Professional Firefighters, Inc., International Association of Firefighters, AFL-CIO, is a state-wide labor organization representing the interests of firefighters, paramedics and lifeguards employed by the State of Florida and its political subdivisions. It lobbies the Legislature and collectively bargains for improvements in workers' compensation. Therefore, it has an interest in attorney's fees paid by, or for, its members in workers' compensation cases.

SUMMARY OF ARGUMENT

Workers' compensation laws were enacted following the 1911 "Triangle Shirtwaist Factory Fire". In order to fully effectuate those laws workers must have the right to competent and responsible legal assistance to obtain benefits. *See, e.g., Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964).

Under Florida statutes, it is a crime for an attorney who represents a worker to be paid a fee either by the employee or the employer/carrier, unless it is approved by the Judge of Compensation Claims. Under a 2009 amendment, the Judge of Compensation Claims cannot approve a fee agreement or award a fee which is more than a statutory fixed percentage of benefits secured, excluding all other facts and considerations. There is no

meaningful opportunity to be heard concerning factors recognized by law for the determination of the amount of claimants' attorneys' fees, other than a percentage of benefits secured. This is not fair and not reasonable.

All statutes have to be fair and reasonable. The repeal of the word "reasonable" in §440.34, Fla. Stat. (2009), violates state and federal guarantees of due process of law.

ARGUMENT

POINT ONE

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.

(Petitioner's Point One)

The standard of review is de novo. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

In 1917, the U.S. Supreme Court decided in *New York Central Railroad v. White*, 243 U.S. 188 (1917), that the 1913 New York Workers' Compensation Act was constitutional. By 1920, most states had enacted workers' compensation laws. Florida was second to last, in 1935, and Mississippi, last, in 1949.[1] The 1935 enactment date of the Florida Workers' Compensation Law may lead one to think that workers' compensation was part and parcel of New Deal legislation passed during the Depression. It was not. The original 1935 Florida Workers' Compensation Law was drawn from the New York Act of 1913. See *Royer v. United States Sugar Corp.*, 4 So. 2d 692 (Fla. 1941).

With regard to unionized employees, New York is an agency shop state, unlike Florida, which is an open shop state. In an agency shop state, an employee would likely be a member of a union. It is the union that represents the employee in his workers' compensation claim against the employer. The union steward and the union officer designated as the workers' compensation coordinator, handle claims at the administrative level. At the formal claims level, the union either has designated lawyers who are members of a union-approved panel or house counsel employed by the union itself, to represent the employee in workers' compensation claims.

[1] Hood, Hardy, and Lewis, "Workers' Compensation and Employee Protection Laws," Ch. 1, at 11 (3rd ed. West 1999).

The interplay between the Bar representing injured workers in industrial accident claims versus labor unions representing injured workers' in industrial accident claims came to a head in 1964 in the Supreme Court of the United States in *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964). The Brotherhood of Railroad Trainmen, a labor union, maintained in Virginia and throughout the country, a Department of Legal Counsel, which recommended to members and their families, the names of lawyers whom the union believed to be honest and competent. The State of Virginia obtained an injunction against the union carrying out its plan of operation in Virginia, finding that the union's plan resulted in the channeling of all, or substantially all, of the workers' claims to lawyers chosen by the union's Department of Legal Counsel. The Supreme Court of Appeals of Virginia affirmed.

The Supreme Court of the United States granted certiorari and reversed, holding that the First and Fourteenth Amendments of the U.S. Constitution protected the right of the members through their union to maintain and carry out the plan, which was a superior constitutional right compared to the regulation of the practice of law by the State of Virginia. The court held that the right of the workers, personally or through the union, to advice concerning the need for legal assistance and most importantly,

which lawyer a member could confidently rely on, is an inseparable part of the constitutionally guaranteed right to assist and advise each other, provided for by First Amendment free speech guarantees.

While the rights to be asserted there were under the Federal Employers Liability Act ("FELA"), authorized by Congress for the redress of industrial injury, the U.S. Supreme Court later held that those same rights applied to employees in state workers' compensation cases. *United Mine Workers of America v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *see also United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

The U.S. Supreme Court noted that unions had been the moving force that brought about the passage of the statutes involved, but it is not enough that the statutes exist. Injured workers would need competent and responsible counsel to assist them in making claims. The Supreme Court stated:

> It soon became apparent to the railroad workers, however that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have. Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing

to settle a case for a quick dollar.

* * * * *

> Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. *Gideon v Wainwright*, 372 US 335, 9 L ed 2d 799, 83 S Ct 792, 93 ALR2d 733, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. The state can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. at 92, 94.

It is not enough that there is a Florida Workers' Compensation Law. Employees have the right to be represented by counsel who are competent and responsible. *See Brotherhood of Railroad Trainmen v. Virginia*, *supra*. The employer/carrier is represented by skilled and experienced counsel. The worker has the same right. *Id*.

The original Florida Workers' Compensation Law of 1935 contained an attorney's fee statute which implemented the American practice of each party paying his own attorney, but the employees' attorney could only be paid a fee approved by the government. Section 34(a) of Ch. 17481, Laws of Fla. (1935), provided that no claim for legal services shall be valid unless approved by the commission. Section 34(b) of Ch. 17481, Laws of Fla.

(1935), provided that any person who receives any fee, etc., without approval of the commission or who solicits employment for a lawyer or for himself, etc., has committed a misdemeanor (at 1481-1482). This became §440.34, Fla. Stat. (1935).

An amendment in 1941 changed the workers' compensation attorney's fee statute to the English practice under certain circumstances. Section 11(a) of Ch. 20672, Laws of Fla. (1941), at 1713, provided that if the injured person employed an attorney and the employer or carrier filed a notice of controversy or declined to pay a claim within 21 days of notice, or otherwise resisted unsuccessfully the payment of compensation, there shall be added to the award, a reasonable attorney's fee. An add-on appellate attorney's fee was also enacted. The criminal penalty for receiving fees which were not approved by the government, remained the same, but was moved to subsection (3). This became §440.34, Fla. Stat. (1941).

Leading up to and during World War II, there was full employment in Florida.[2] Unions were organizing. One selling point was that the union would represent workers in their workers' compensation cases, as unions did in other states. *See, e.g., Brotherhood of Railroad Trainmen v. Virginia*, *supra*; *United Mine Workers of America v. Illinois State Bar Assn.*, *supra*.

[2] *See Protectu Awning Shutter Company v. Cline*, 16 So. 2d 342 (Fla. 1944).

It is a mistake to think of the 1941 Florida workers' compensation attorney's fee statute just as a pro-lawyer enactment. It was not. Rather, the legislative enactment made it possible for injured workers and their families to be represented by the Florida Bar without the employee being a member of a labor union. Labor unions would not represent injured Florida workers in workers' compensation claims; the Florida Bar would.

Lee Engineering and Construction Co. v. Fellows, 209 So. 2d 454 (Fla. 1968), decided how to determine the amount of a reasonable attorney's fee in workers' compensation cases. The Supreme Court of Florida approved of agreements by the parties to the dollar amount of a fee, which would serve a useful purpose in the expeditious administration of the workers' compensation law. *Id*. at 457. However, when there was no stipulation of the parties fixing the dollar value, there should be proof by which a Deputy Commissioner could determine the value of the service. The Court cited Canon 12 of the Canons of Professional Ethics as the method for deciding the amount of attorney's fees:

> In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will

> involve the loss of other employment while employed in the particular case or antagonisms, with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

209 So. 2d at 458.

In 1979, the Legislature made major changes in the Florida Workers' Compensation Law through Ch. 79-40, Laws of Fla. The law was changed to the wage loss system, in §440.15(3), Fla. Stat. It was at this time that the Legislature adopted the first fee schedule based on the benefits secured: 25% of the first $5,000; 20% of the next $5,000; and 15% of the remaining amount. However, the statute went on to provide that the deputy commissioner shall consider certain factors in each case by which he may increase or decrease the attorney's fees based on the circumstances of the particular case. §440.34, Fla. Stat. (1979). These were the factors which were codified by the Legislature from the *Lee Engineering* case.

Ch. 93-415, §34, at 154-155, Laws of Fla., amended the attorney's fee statute in regard to the amount of attorney's fees in two different ways. First, it reduced the fee schedule to 20% of the first $5,000 of the amount of benefits secured; 15% of the next $5,000; and 10% of the remaining amount

to be provided during the first 10 years after the date the claim is filed and 5% of the benefits secured after 10 years. This enactment also deleted two of the *Lee Engineering* factors. It deleted "the likelihood, if apparent to the claimant, that the acceptance of the particular employment will preclude employment of the lawyer by others or cause antagonism with other clients" and it also deleted "the nature and length of the professional relationship with the claimant." The other *Lee Engineering* factors remained in force.

Canon 12 of the Canons of Professional Ethics eventually became what is now Rule 4-1.5 of the Rules Regulating the Florida Bar, which encompasses the *Lee Engineering* factors.

There have been other various amendments to the attorney's fee statutes which deal either with entitlement or the amount. The 2003 amendment to §440.34, Fla. Stat., by Ch. 2003-412, §26, at 3943-3944, Laws of Fla., originated the percentage of the benefits obtained as a strict limitation on claimants' attorneys' fees. That statute did essentially two things. The statute was amended to provide that the Judge of Compensation Claims shall not approve an attorney's fee in excess of the amount permitted by this section. Ch. 2003-412, §26, at 3943-3944, Laws of Fla.

At the same time, the Legislature repealed the *Lee Engineering* modifying factors. Ch. 2003-412, §26, at 3944, Laws of Fla. This created a

conclusive presumption that a reasonable attorney's fee is 20% of the first $5,000 of the amount of benefits secured; 15% of the next $5,000; and 10% of the remaining amount to be provided during the first 10 years after the date the claim is filed and 5% of the benefits secured after 10 years. The Judge of Compensation Claims could not consider any agreement of the parties to the contrary or consider any other facts.

In *Murray v. Mariner Health Care, Inc.*, 994 So. 2d 1051 (Fla. 2008), the Florida Supreme Court considered the ambiguity in the 2003 amendment between the use of the word "reasonable" in describing claimants' attorneys' fees and the schedule of fees based on a percentage of the benefits secured as the exclusive consideration. The Supreme Court resolved the ambiguity by interpretation in favor of reasonable attorney's fees and not the percentage schedule:

> statutes should be construed in such a manner as to avoid an unconstitutional result [citing authority]

994 So. 2d at 1057. The Supreme Court decided that the *Lee Engineering* factors must apply. 994 So. 2d at 1062.

Thereafter, the Legislature amended the statute to delete the word "reasonable" from subsections (1) and (3), Ch. 2009-94, Laws of Fla., in an unconstitutional attempt to legislatively overrule *Murray*. *See, e.g., Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. 2nd DCA 1969). The

Legislature's removal of the word "reasonable" from §440.34, Fla. Stat., is constitutionally impermissible as all laws have to be reasonable and fair.

One month before *Murray* was decided, the Florida Supreme Court decided a Registry Act case, *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008) [*Olive* II].

In *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002) [*Olive* I], the Florida Supreme Court held that trial courts are authorized to grant attorney's fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collaborative cases. *Id*. at 654. Thereafter, the Legislature amended the statute involved, §27.7002(5), Fla. Stat., to provide that an attorney's fee above the amounts set forth in the schedule of fees in §27.711, Fla. Stat., "is not authorized". In this regard, the Supreme Court held in *Olive II* that

> [w]hile this may have been the Legislature's intent, such an interpretation of the statute would render it unconstitutional.

811 So. 2d at 203.

It should be noted that the §27.711, Fla. Stat., in *Olive II* did not contain the word "reasonable" in regard to attorney's fees; and the case is not based on the constitutional right to counsel in criminal cases. 811 So. 2d at 203.

Thus, in practical effect, the due process approach of *Olive I* and *Olive II* is the same as the interpretation to preserve constitutionality approach in *Murray*. In either case, the judge conducts a due process hearing to determine the legally correct attorney's fee.

The people of Florida in their Constitution gave to the Supreme Court the exclusive power to regulate the practice of law. Fla. Const. Art. V, §15. They did not give that power to the Legislature. The Supreme Court, in the exercise of that power, has adopted Rule 4-1.5 of the Rules Regulating the Florida Bar, which sets forth those factors which are to be used to determine the amount of reasonable attorneys' fees; in other words, what lawyers charge and receive for services. So long as what lawyers charge and receive under the Supreme Court rules and what the public pays under the Legislature's statutes are the same, there is harmony. There is no separation of powers problem. However, now, they are no longer in harmony.

The amended statute is a conclusive presumption that the only legally correct attorney's fee is a percentage of the benefits obtained. A conclusive presumption of this kind has no connection with fact which, therefore, cannot be valid.

> The test for the constitutionality of statutory presumptions is twofold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. [citations omitted] Second, **there must be a**

> **right to rebut in a fair manner**. [citations omitted] (Emphasis added.)

Straughn v. K & K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976).

Under §440.34, Fla. Stat. (2009), there is no right to rebut at all.

The setting for all this is the provision in §440.105(3)(c), Fla. Stat., that a lawyer who represents an employee commits a crime if he receives an attorney's fee, either from the employee or the employer/carrier, without approval of the judge. It provides:

> Whoever violates any provision of this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> * * * * *
>
> It is unlawful for any attorney or other person, in his or her individual capacity or in his or her capacity as a public or private employee, or for any firm, corporation, partnership, or association to receive any fee or other consideration or any gratuity from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims or by the Deputy Chief Judge of Compensation Claims.[3]

§440.105(3)(c), Fla. Stat.

[3] Shortly after the effective date, Shirley Walker, then called Chief Judge of Compensation Claims, entered Executive Order No. 1, decreeing that the criminal statute did not apply to attorneys representing employers or carriers.

The employee's attorney can only get approval if he has secured benefits. §440.34(1), Fla. Stat. If he only gives advice, he cannot be paid at all, for that would be a crime. If he obtains benefits, the Legislature mandates that the fee can only be a statutory fixed percentage of the benefits secured. §440.34(1), Fla. Stat. (2009). This is a conclusive presumption that has no relationship to all of the facts of the case. It is invalid. See *Straughn v. K & K Land Management, Inc.*, 326 So. 2d at 424.

This conflict in separation of powers as to how a reasonable attorney's fee is determined, regardless of who pays, can only be solved in terms of the Constitution itself. It is not a matter of whether the Legislature prevails or the Supreme Court prevails. It is Due Process of Law that prevails: a fair and meaningful hearing to consider all facts, not just a statutory fixed percentage of benefits.

CONCLUSION

The Court should declare invalid the provisions of Ch. 2009-94, Laws of Fla., which prohibit the Judge of Compensation Claims from modifying an attorney's fee to more (or less) than a percentage of the benefits secured, as this violates due process of law by limiting the right to be heard in a meaningful way. Furthermore, the schedule does not distinguish between an excessive or an inadequate fee, such as the attorney's fee in the present case.

The statute would then go back to the format that it was in prior to this unconstitutional amendment, as interpreted by the Florida Supreme Court in *Murray v. Mariner Health Care, Inc*.

Given the Supreme Court's decisions in *Martinez v. Scanlon*, 582 So. 2d 1167 (Fla. 1991), and *Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So. 2d 474 (Fla. 2004), a decision in this case would have to be prospective and not apply retroactively to any attorney's fee for which the determination was final.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 23rd day of April, 2014, to the following:

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CERTIFICATE OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been typed in 14 point proportionately spaced Times New Roman.

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