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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-2082

MARVIN CASTELLANOS,

Petitioner,

vs.

L.T. Case Nos.: 1D12-3639
09-027980GCC

NEXT DOOR COMPANY and
AMERISURE INSURANCE CO.,

Respondents.
_____/

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS, NEXT DOOR COMPANY and AMERISURE INSURANCE CO.

Raoul G. Cantero
David P. Draigh
WHITE & CASE LLP
Southeast Financial Center
200 S. Biscayne Blvd., Ste. 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Counsel for Respondents, Next Door Company and Amerisure Insurance Co.

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STATEMENT OF THE CASE AND FACTS

At issue in this appeal is the constitutionality of an amendment (the "2009 Amendment") to section 440.34 of the Florida Workers' Compensation Statute, which awards prevailing-party attorneys' fees according to a schedule.

Petitioner, Marvin Castellanos, appeals from the October 23, 2013, order of the First DCA, *Castellanos v. Next Door Co./Amerisure Insurance Co.*, 124 So. 3d 392 (Fla. 1st DCA 2013) (the "Opinion"). The Opinion affirmed an order of a Judge of Compensation Claims ("JCC") that awarded Castellanos prevailing-party attorneys' fees to be paid by his employer/carrier—Respondents, Next Door Company and Amerisure Insurance Co. ("Next Door"). The JCC applied the schedule in section 440.34(1), Florida Statutes, to the total benefits recovered, $822.70, and awarded fees of $164.54. Although the payment terms in Castellanos's retainer agreement with his attorney are identical to the schedule, he argues that the 2009 Amendment, which removed the word "reasonable" and limits prevailing-party attorneys' fees to those determined by a schedule, renders section 440.34 unconstitutional both facially and as applied.

As we show below, this Court should affirm the Opinion and answer the certified question "yes."

A. Nature of the Case and Course of Proceedings

Castellanos was injured at work on October 12, 2009 (RI. 1308).[1] Within two weeks, he engaged workers' compensation counsel—found by the JCC to be "exceptionally skilled, highly respected" (RI. 18)—to represent him in his petition for workers' compensation benefits (RI. 106). Under their retainer agreement, which Castellanos's counsel described as "completely contingent," counsel would be paid 20 percent of the first $5,000 of benefits obtained; 15 percent of the next $5,000 of benefits obtained; and ten percent of all benefits obtained in excess of $10,000 (RI. 172, 256). As counsel conceded, that is precisely the schedule set forth in section 440.34(1) (RI. 172). *See also* § 440.34(1), Fla. Stat. (2009).

On October 29, 2009, Castellanos filed his claim for workers' compensation benefits with the JCC (RI. 12). On September 8, 2010, the JCC ordered Next Door to accept compensability of Castellanos's injury, to pay him benefits, and to pay his attorneys' fees and costs in an amount to be determined (RI. 1314-315). On May 11, 2011, Castellanos filed his Verified Motion for Attorney's Fees and Costs (RI. 79-142). After a hearing, the JCC found that Castellanos obtained total benefits of $822.70 (RI. 13). Castellanos's counsel sought a total fee recovery of $36,817.50, based on an hourly rate of $350 (RI. 12). Under section 440.34(1) and Castellanos's retainer agreement, however, the attorneys' fee on $822.70 of

[1] "RI. #" refers to the page number of Record Volume I.

benefits obtained is $164.54 (RI. 13). Therefore, the JCC awarded a prevailing-party attorneys' fee of $164.54 (RI. 19). Castellanos also requested and was awarded $4,630.65 in costs (RI. 12, 19). On July 27, 2012, Castellanos appealed the JCC's order to the First District Court of Appeal (RI. 9).

B. Disposition in the First DCA

The First DCA affirmed. The court "considered [Castellanos's] arguments that section 440.34 should be deemed in violation of several constitutional provisions," but, "[b]ased on our precedent," held that "we are bound to conclude that the statute is constitutional, both on its face and as applied." *Castellanos*, 124 So. 3d at 394 (citations omitted). The First DCA also certified a question of great public importance: "Whether the award of attorney's fees in this case is adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and Federal Constitutions." *Id.*

C. Standard of Review

"Determination of whether a statute is constitutional is a pure question of law . . . reviewed de novo." *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013).

SUMMARY OF THE ARGUMENT

The 2009 Amendment to section 440.34, Florida Statutes, which allows prevailing-party attorneys' fees to claimants based on a fixed schedule, is in derogation of the American rule that each side is to bear its own fees, and therefore

must be strictly construed. Indeed, the Legislature could decide to eliminate such prevailing-party fees entirely. Therefore, no constitutional basis exists to challenge the Amendment, and none of Castellanos's constitutional arguments has any merit. The 2009 Amendment does not violate separation of powers because it is the Legislature, not the Judiciary, that has the substantive authority to determine the circumstances under which attorneys' fees are available. The statute does not violate due process because Castellanos received all the process that was due: a hearing at which he was awarded benefits, attorneys' fees, and costs. The 2009 Amendment does not violate the right to be rewarded for industry because regulation of Castellanos's attorney's "right" to attorneys' fees is not subject to strict scrutiny, and businesses do not have a right to be free from government regulation. The 2009 Amendment does not violate equal protection because workers' compensation claimants are not a protected class. Finally, the 2009 Amendment does not violate Castellanos's right to contract, his freedom of speech, or his access to courts, particularly because Castellanos was able to hire counsel of his choice and has had repeated access to the courts. The Court should affirm the Opinion and answer the certified question "yes."

ARGUMENT

SECTION 440.34, FLORIDA STATUTES, WHICH LIMITS RECOVERY OF PREVAILING-PARTY ATTORNEYS' FEES THAT THE LEGISLATURE MAY ELIMINATE ENTIRELY, IS CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED

"Statutes come to the Court clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." *Scott*, 107 So. 3d at 385 (citation and internal quotation marks omitted). Thus, "[e]very reasonable doubt should be resolved in favor of a law's constitutionality," and the "wisdom, policy, or motives which prompt a legislative enactment, so far as they do not contravene some portion of the express or implied limitation upon legislative power found in the Constitution, are not subject to judicial control." *Id.* (citation and internal quotation marks omitted).

Castellanos argues, variously, that the 2009 Amendment is unconstitutional both facially and as applied (*see, e.g.*, br. at 26). As the Court knows, "in a facial constitutional challenge, we determine only whether there is any set of circumstances under which the challenged enactment might be upheld[,]" and if "any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010) (citation and internal quotation marks omitted). An as-applied challenge considers whether there has been a "constitutional application of a statute to a particular set of facts." *Trushin v. State*, 425 So. 2d 1126, 1129-30 (Fla. 1982). As we show below, the 2009

Amendment to section 440.34, which awards prevailing-party attorneys' fees according to a schedule, is constitutional both facially and as applied.

A. The Legislature's Determination to Limit Prevailing-Party Attorneys' Fees Payable by an Employer/Carrier Under Section 440.34 Is Within Its Authority Whether, and to What Extent, to Allow for Prevailing-Party Fees

Florida "follows the 'American Rule' that attorney's fees may only be awarded by a court pursuant to an entitling statute or an agreement of the parties." *Dade Cnty. v. Pena*, 664 So. 2d 959, 960 (Fla. 1995); *see also, e.g.*, *Sheridan v. Greenberg*, 391 So. 2d 234, 237 (Fla. 3d DCA 1980) ("If the award of attorneys' fees . . . is not pursuant to any statutory authority (it being undisputed that there was no contractual arrangement for fees), there is no authority at all for a fee award."). The statutory authority here is section 440.34 (including the 2009 Amendment), which provides that, where a claimant prevails on his or her claim for benefits, the "claimant is entitled to recover an attorney's fee in an amount equal to the amount provided for in subsection (1) or subsection (7) from a carrier or employer." § 440.34(1), (3), Fla. Stat. (2009). There is no question that section 440.34, as amended by the 2009 Amendment—which became effective on July 1, 2009, *see* Ch. 2009-94, § 2, at 3, Laws of Fla.—applies to Castellanos, who was not injured until October 12, 2009, and filed his claim on October 29, 2009. Castellanos admits that "the statute in force on the date of the employee's accident controls" (br. at 13).

As this Court has held, an award of fees under a statute such as section 440.34 "is in derogation of the common law and [] statutes allowing for the award of such fees should be strictly construed." *Roberts v. Carter*, 350 So. 2d 78, 78-79 (Fla. 1977); *see also Dade Cnty.*, 664 So. 2d at 960 (same). Therefore, the plain terms of section 440.34 must be given effect: a claimant is entitled to prevailing-party attorneys' fees from an employer/carrier in the amounts clearly set forth in sections 440.34(1) and (7), Florida Statutes. *See* § 440.34(3), Fla. Stat. (2009). Claimants are entitled to nothing more. Indeed, the Legislature could amend section 440.34 to eliminate *any* prevailing-party attorneys' fee in workers' compensation cases. *See Ship Shape v. Taylor*, 397 So. 2d 1199, 1202 (Fla. 1st DCA 1981) (holding that the claimant was not entitled to appellate attorneys' fees, which once had been available under section 440.34, because, at the time of claimant's injury, the Legislature had eliminated the right to appellate attorneys' fees); *Bureau of Crimes Comp. v. Williams*, 405 So. 2d 747, 748 (Fla. 2d DCA 1981) (holding that a litigant had no vested right in a prevailing-party attorneys' fee award under the Crimes Compensation Act, where the Legislature repealed the fee provision before he became obligated to pay his attorney). Castellanos has no constitutional basis to avoid the statute: he was represented by competent counsel throughout, and he was awarded benefits, attorneys' fees and costs. *See In re Estate of Humphreys*, 299 So. 2d 595, 597 (Fla. 1974) (holding that it is a "well

settled principle of constitutional litigation that a person challenging [a statute] must be affected adversely by the statute's operation").

Castellanos argues that section 440.105(3)(c), Florida Statutes, "makes it a first degree misdemeanor for anyone to be paid anything for representing anyone in regard to a workers' compensation claim without approval of a [JCC]," and that the 2009 Amendment amended section 440.34(1) to "provide that the JCC '. . . shall not approve . . . an attorney's fee in excess of the amount permitted by [the schedule] in this section'" (br. at 12-13). Castellanos also argues that he is "preclud[ed] . . . from paying anything to his attorney to augment" the scheduled fees (br. at 29).

But Castellanos did not agree to pay his counsel any amount beyond the schedule amount in section 440.34(1) (RI. 172, 256). And he does not challenge the constitutionality of section 440.105(3)(c) here. Nor could he, because the "constitutionality of a criminal statute should be determined either in a proceeding wherein one is charged under the statute or in an action alleging an imminent threat of such prosecution." *Tribune Co. v. Huffstetler*, 489 So. 2d 722, 724 (Fla. 1986) (holding that a defendant who had not been charged with violating a statute had no standing to "vindicate the constitutional rights of another"). And even if the statute grants Castellanos the right to limit fees paid to his attorney, he may freely waive that statutory right. As this Court has observed, "[i]t is fundamental that

constitutional rights which are personal may be waived." *In re Amendment to the Rules Regulating the Fla. Bar-Rule 4-1.5(f)(4)(B) of the Rules of Prof'l Conduct*, 939 So. 2d 1032, 1038 (Fla. 2006) (quoting *In re Shambow's Estate*, 15 So. 2d 837, 837 (1943)). *See also Gay v. Whitehurst*, 44 So. 2d 430, 432 (Fla. 1950) ("One may waive or remit any constitutional or statutory privilege made for his personal benefit."); *Del Prado v. Liberty Mut. Ins. Co.*, 400 So. 2d 115, 116 (Fla. 4th DCA 1981) ("Statutory rights can be waived.").[2]

Therefore, this Court should affirm the Opinion and answer the certified question "yes."

B. Castellanos Fails to Meet His Burden of Showing That the 2009 Amendment Is Unconstitutional Either Facially or as Applied

Castellanos presents five reasons why the statute is unconstitutional: (1) that it violates separation of powers and due process of law (br. at 12-26); (2) that it constitutes a taking of property without due process of law and in violation of the right to be rewarded for industry (br. at 26-31); (3) that it violates the equal protection clause (br. at 31-33); (4) that it violates the right to contract and the right

[2] Castellanos does not challenge, and this Court need not decide, the constitutionality of section 440.105(c)(3). The First DCA recently held, however, that as applied to cases where the legal fees sought are for defending an employer/carrier's motion to tax costs, that section is not a permissible exercise of the state's police power to restrict workers' First Amendment rights, under the United States Constitution, to contract for legal services. *See Jacobson v. Se. Pers. Leasing, Inc.*, 113 So. 3d 1042, 1051 (Fla. 1st DCA 2013).

to freedom of speech (br. at 33-37); and (5) that it violates the right of equal access to the courts (br. at 37-39). As we show below, all of these arguments lack merit. The Court should affirm the Opinion and answer the certified question "yes."

1. The 2009 Amendment Does Not Violate Separation of Powers or Due Process of Law Because Whether to Award Prevailing-Party Attorneys' Fees Is a Legislative Function

Under the rubric of separation of powers, Castellanos makes a series of arguments that the 2009 Amendment is unconstitutional, including that section 440.105(3)(c) makes it a misdemeanor to pay his attorney anything other than a scheduled fee (br. at 12). That argument, which does not address separation of powers or due process, fails for the reasons stated above.

Castellanos's only separation of powers argument, citing *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454, 457 (Fla. 1968), is that the "[a]llowance of fees is a judicial function" (br. at 21). But *Lee* stated that "[a]llowance of fees is a judicial *action*." *Id.* at 457 (emphasis supplied). *Lee* did not hold that the judiciary is the *source* of any substantive right to attorneys' fees; such a holding would be contrary to this Court's established law. Indeed, under the Florida Constitution, "this Court has the exclusive authority to adopt rules of judicial practice and procedure for actions filed in this State, while the Legislature is charged with the responsibility of enacting substantive law," and it "is clear that the circumstances under which a party is entitled to costs and attorney's fees is

substantive." *Se. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 78-79 (Fla. 2012) (citation and internal quotation marks omitted). *See also Frederick v. Monroe Cnty. Sch. Bd.*, 99 So. 3d 983, 984 (Fla. 1st DCA 2012) (noting that the imposition of prevailing-party costs under section 440.34(3) is substantive and within the Legislature's authority); *Globe Sec. v. Pringle*, 559 So. 2d 720, 722 (Fla. 1st DCA 1990) ("Workers' compensation is a creature of statute and, therefore, must be governed by what the statute provides, not by what we may feel the law should be.").

Castellanos also argues, quoting *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 141-42 (Minn. 1999), that the fee schedule violates separation of powers because it "impinges on the judiciary's inherent power to oversee attorneys and attorney fees" (br. at 23-24). Whether or not that is Minnesota law, it is not the law of Florida. *See also Ingraham ex rel. Ingraham v. Dade Cnty. Sch. Bd.*, 450 So. 2d 847, 849 (Fla. 1984) (holding that the Legislature may cap attorneys' fees without "usurp[ing] . . . the power of the judiciary to regulate the practice of law").

Castellanos argues that a "JCC is now confronted with having to choose from conflicting laws," namely section 440.34 or Rule 4-1.5(b) of the Rules Regulating the Florida Bar (br. at 19-20), and that the JCC should apply Rule 4-1.5(b). But Castellanos confuses two issues: one issue—the one relevant here—is how much of a prevailing employee's attorneys' fees must be borne by the

employer and the carrier; the other—*not* relevant here—is how much an attorney may reasonably charge a client for legal services. Section 440.34 addresses the former; Rule 4-1.5(b) addresses the latter.

Moreover, the Judiciary has no authority to promulgate rules governing practice and procedure before the JCC. *Amendments to the Fla. Rule. of Workers' Comp. Procedure*, 891 So. 2d 474, 478 (Fla. 2004). And, as shown above, the Legislature—not the Judiciary—creates the substantive law governing when prevailing-party attorneys' fees are available. Indeed, the Rules Regulating the Florida Bar do not create any substantive right to attorneys' fees; they "cannot alter, amend or eliminate a substantive right." *Demadrano v. Labor Finders of the Treasure Coast*, 8 So. 3d 498, 500 (Fla. 1st DCA 2009) (citation and internal quotation marks omitted); *see also Schick v. Dep't of Agric. & Consumer Servs.*, 599 So. 2d 641, 644 (Fla. 1992) (noting that where the "legislature specifically sets forth the criteria it deems will result in a reasonable award and will further the purpose of the fee-authorizing statute," the criteria enumerated in Rule 4-1.5 must be ignored and "only the enumerated factors may be considered"). Castellanos argues that this Court, in *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008), "rejected" the "reasoning in *Wood[v. Florida Rock Industries & Crawford & Co.*, 929 So. 2d 542 (Fla. 1st DCA 2006) . . . that the Rules Regulating the Florida Bar, specifically Rule 4-1.5 do not apply to workers' compensation cases" (br. at 18).

But that is not what *Wood* holds. *Wood* holds, as this Court has held, that "Florida Statutes govern counsel's entitlement to fees, and the Rules of Professional Conduct cannot change the result." *Wood*, 929 So. 2d at 544 (holding that "rules"—specifically Rule 4-1.5(b)—"can never create or alter a litigant's substantive rights") (citation omitted).

Relying on *Florida Silica Sand Co. v. Parker*, 118 So. 2d 2, 5 (Fla. 1960), as well as two cases that cite *Florida Silica* for the same point—*Wideman v. Daryl Products Corp.*, 127 So. 2d 448, 451 (Fla. 1961), and *Lee Engineering & Construction Co. v. Fellows*, 209 So. 2d 454, 458 (Fla. 1968)—Castellanos argues that a fee schedule "is helpful but it is not conclusive" (br. at 20-21). But *Florida Silica* is irrelevant because, when it was decided, section 440.34(1) provided "a reasonable attorney's fee" award to a prevailing claimant. 118 So. 2d at 4. And the fee schedule this Court referred to was not a legislative enactment, as it is here; it was promulgated by the executive-branch Florida Industrial Commission. *Id.* at 5. Moreover, in the 1960s, prevailing-party attorneys' fees were not granted to claimants as of right; a prevailing claimant had to show that it was "*necessary*, and not merely expedient, to employ an attorney to represent him." *Port Everglades Terminal v. Canty*, 120 So. 2d 596, 602 (Fla. 1960). The Legislature has since clearly defined when and in what amount prevailing-party fees may be awarded. *Cf. Se. Floating Docks, Inc.*, 82 So. 3d at 73, 79 (noting that the offer-of-judgment

statute requires the court to execute a simple calculation to set the amount of attorneys' fees, reflecting the Legislature's "intentional policy choice to limit discretion in the award of attorney's fees").

Castellanos complains that "[t]here were no legislative findings in 2009 to explain the repeal of the word 'reasonable' in the statute" (br. at 22). But his own authority—the legislative history to the 2009 Amendment—shows the contrary. The legislative history notes that, after the 2003 amendments to the Workers' Compensation Statute, there were six consecutive decreases in insurance rates, for a cumulative reduction of 60 percent (br. app. at 3). But *Murray*, 994 So. 2d at 1062-63—which, contrary to the Legislature's intention in 2003, reinserted a "reasonable attorney's fee" into the statute—led to a 6.4 percent increase in worker's compensation rates effective April 1, 2009 (br. app. at 3, 5). Reversing that outcome was the Legislature's express purpose in deleting the word "reasonable" via the 2009 Amendment.

Castellanos argues that the fee schedule in section 440.34 violates due process because, citing *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970), "[e]ven when a state sets up a social economic program that is a mere entitlement, the state must run that program with due process of law" (br. at 24). He also argues, citing *Florida Forest and Park Service v. Strickland*, 18 So. 2d 251, 254 (Fla. 1944), that a "workers' compensation claim is far more than an entitlement, it is a property

right" (br. at 24-25). But Castellanos received all the benefit of that property right. He had a hearing, he received a compensation award that he does not contest, and he has had two appeals. And his cases do not apply. *Goldberg* held that individuals receiving welfare benefits on a continuous basis could not have those benefits terminated without a pre-termination evidentiary hearing. 397 U.S. at 264. And *Florida Forest* merely held that a judicial limitation on workers' compensation rights must be applied prospectively. 18 So. 2d at 254. In short, the Legislature's decision to prospectively limit recovery of attorneys' fees does not violate due process. *See Noel v. M. Ecker & Co.*, 422 So. 2d 1062, 1063 (Fla. 1st DCA 1982) (holding that an injured employee's due process rights were not violated by an amendment to the workers' compensation statute that eliminated his right to compensation for an injury that was compensable under the statute before the amendment).

Finally, Castellanos argues that it was "inappropriate for the First [DCA] to resurrect *Lundy[v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506 (Fla. 1st DCA 2006)] . . . in *Kauffman[v. Community Inclusions, Inc.*, 57 So. 3d 919 (Fla. 1st DCA 2011)]" (br. at 18). But *Lundy*, which rejected the separation-of-powers and due process arguments Castellanos makes here, was vacated on other grounds by *Murray*, 994 So. 2d at 1062, which expressly did not reach any constitutional issues. Thus, *Murray* did not disturb *Lundy*'s constitutional analysis.

See Webb Furniture Co. v. Everett, 141 So. 115, 116 (Fla. 1932) ("a judgment of reversal is not necessarily an adjudication of any other question [than] that discussed and decided by the appellate court"); *Kauffman*, 57 So. 3d at 921 (holding that *Murray* "did not cast any doubt on the reasoning used in *Lundy* . . . in rejecting constitutional claims like those made here"); *Jacobson*, 113 So. 2d at 1052-53 (Wetherell, J., concurring) (concurring that sections 440.105(3)(c) and 440.34 are unconstitutional as applied in that case, and noting that the "majority opinion [does not] undermine the continued viability of" *Lundy* and *Kauffman*, and does not "call into doubt the validity of the statutory limitations on claimant-paid fees generally").

2. The 2009 Amendment Does Not Violate Castellanos's Attorney's Right to Be Rewarded for Industry Because Attorneys Are Not Immune to Governmental Regulation

Claimant argues that his attorney's right to be rewarded for industry under the Florida Constitution "was denied when the JCC awarded a fee that was unreasonable and confiscatory," and he claims that the right to be rewarded for industry is a fundamental right subject to strict scrutiny (br. at 27). But his only case in which a claim for violation of the right to be rewarded for industry was subjected to strict scrutiny is *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So. 2d 204 (Fla. 1989). In that case, which "hing[ed] . . . on the constitutional rights of the worker, now deceased[,]" the Court invalidated a statute

involving "alienage, one of the traditional suspect classes," which reduced the death benefit payable to the worker's dependents from $100,000 to $1,000, for the sole reason that those dependents were not residents of the U.S. or Canada. *Id.* at 206-07. Here, Castellanos asserts the right to be rewarded for industry not on his own behalf but on behalf of his attorney, who is not a member of any suspect class. Moreover, this Court has held that the right of a business to be free from government regulation is *not* a fundamental right subject to strict scrutiny. *Lane v. Chiles*, 698 So. 2d 260, 263 n.2 (Fla. 1997) (refusing to apply strict scrutiny to a state statute regulating the fishing industry because the "property and liberty interests in the pursuit of a livelihood are not fundamental interests requiring strict scrutiny") (citation omitted); *see also United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668, 671 (Fla. 1979) (holding that no fundamental right was at stake and applying the rational basis test to a regulation on yacht brokers).

Castellanos's only other right-to-be-rewarded-for-industry case is *Shevin v. International Investors, Inc.*, 353 So. 2d 89 (Fla. 1977). But *Shevin* found that a statute violated the right to be rewarded for industry only because it was so complicated and ambiguous that it would be impossible to comply with it, and therefore it would effectively prohibit the plaintiff from doing business in Florida. *Id.* at 92-93. The fee statute at issue here is not such an outright prohibition on business. Castellanos's own experts testified that a workers' compensation

attorney makes business decisions to accept or decline certain cases, factoring in the ratio of potential losses and successes and the contingent nature of any potential fees (RI. 423-24, 686). And Castellanos's own attorney testified that he was aware of the fee schedule, and aware that he would receive no compensation for his time at all if he did not secure any benefits (RI. 256).

Castellanos also cites *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), and cases following it, for the proposition that the fees awarded under section 440.34 are "confiscatory" and "unconstitutional as applied" (br. at 30). But in all of those cases, unlike here, the defendant or litigant had a constitutional right to counsel under the Sixth Amendment or under Florida law. *See Bd. of Cnty. Comm'rs of Hillsborough Cnty. v. Scruggs*, 545 So. 2d 910, 912 (Fla. 2d DCA 1989) (holding that a $1,000 fee limit for constitutionally required court-appointed counsel was "unconstitutional as applied to extraordinary and unusual civil dependency proceedings"). Since 1986, *Makemson* has been cited by Florida courts at least 60 times, and those cases involved either criminal or parental-rights proceedings, for which Florida law provides a right to counsel. Castellanos argues that section 440.34 is unconstitutional as applied to him, but this Court has rejected *Makemson* as the basis for invalidating a cap on attorneys' fees where, as here, the attorney contesting the fee cap voluntarily accepted the case with full knowledge of it. *See Sheppard, P.A. & White v. City of Jacksonville*, 827 So. 2d 925, 930

(Fla. 2002) (finding that, where an attorney voluntarily accepted a case with full knowledge of a fee cap, the cap did not unlawfully restrict the judicial branch's ability to secure adequate counsel for defendants in capital cases). In this case, Castellanos's counsel concedes that he took this case with full knowledge of section 440.34, and his retainer agreement adopts its payment terms (RI. 172, 256).

3. The 2009 Amendment Does Not Violate the Equal Protection Clause Because Workers' Compensation Claimants Are Not a Protected Class

Castellanos argues that the 2009 Amendment violates the equal protection clause because it creates an "unequal contest between the worker and the employer/carrier because there [is] no limit on attorney's fees paid by the employer/carrier to its own attorney" (br. at 32-33). But the only authority he cites is *Corn v. New Mexico Educators Federal Credit Union*, 889 P.2d 234 (N.M. App. 1994), *overruled by Trujillo v. City of Albuquerque*, 965 P.2d 305, 314 (N.M. 1998). Under Florida law, Castellanos's equal protection challenge is subject only to rational basis scrutiny because workers' compensation claimants are not a suspect class. *Acton v. Fort Lauderdale Hosp.*, 440 So. 2d 1282, 1284 (Fla. 1983) (holding that injured workers are not a suspect class). Under rational basis scrutiny, Castellanos "bears the burden of demonstrating that the statutory distinction at issue in this case has no rational relationship to a legitimate state purpose." *Lucas v. Englewood Cmty. Hosp.*, 963 So. 2d 894, 895 (Fla. 1st DCA

2007). Castellanos does not even attempt to meet that burden, and courts have held that the state has a legitimate interest in regulating attorneys' fees in workers' compensation cases given the public policy of preserving the claimant's rights to any benefits recovered and reducing the cost of workers' compensation insurance premiums. *Samaha v. State*, 389 So. 2d 639, 640 (Fla. 1980); *see also Khoury v. Carvel Homes S., Inc.*, 403 So. 2d 1043, 1045 (Fla. 1st DCA 1981) (holding that the workers' compensation fee statute did not violate equal protection and recognizing "the State's interest in regulating attorney's fees for injured workers as legitimate"); *Acosta v. Kraco, Inc.*, 471 So. 2d 24, 25 (Fla. 1985) (noting that reducing workers' compensation insurance premiums is a legitimate purpose of the workers' compensation system).

4. The 2009 Amendment Does Not Violate the Right to Contract or of Freedom of Speech Because Contract Rights Are Not Absolute and Because Castellanos Was Represented by Counsel

Castellanos next argues that the 2009 Amendment violates an employee's right to contract with an attorney of his choice at an agreed-upon fee (br. at 33-34). But his principal argument addresses the provisions of section 440.105(3)(c) (br. at 34-35). As shown above, however, he does not have standing to challenge a criminal statute that does not apply to him under any circumstances.

Moreover, an individual's rights to contract and to pursue a lawful business "are not, of course, absolute rights. They are subject to reasonable restraint in the

interest of the public welfare. Legislative limitations upon the exercise of these liberties are constitutional if they rationally relate to a valid state objective." *Fraternal Order of Police, Metro. Dade Cnty., Lodge No. 6 v. Dep't of State*, 392 So. 2d 1296, 1301-02 (Fla. 1980) (internal citations omitted). As *Lundy* held, the "restrictions set forth in section 440.34(1) were enacted to protect the public's welfare by ensuring that a worker is able to retain a substantial portion of awarded benefits so as to prevent the burden of support for that worker from being cast upon society." 932 So. 2d at 510. Thus, section 440.34 does not violate the right to freely contract. *Id.*

Castellanos cites *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Construction, Inc.*, 115 So. 3d 978 (Fla. 2013), to argue "that an alternative fee recovery clause with an hourly rate [is] valid" (br. at 35). But *First Baptist Church* merely enforced an indemnity agreement providing that an insurance company would compensate an attorney at a certain hourly rate. *Id.* at 980. Nothing in that case suggests that such a provision exists in all contracts. *See Nelson v. Marine Grp. of Palm Beach, Inc.*, 677 So. 2d 998, 1000 (Fla. 4th DCA 1996) (noting that the contract at issue did not contain an alternative fee recovery clause, and therefore a fee award could not exceed the amount the client was obligated to pay).

Castellanos also argues that section 440.34 impairs his free speech right to be heard through counsel (br. at 35-36). He cites *Davis v. Keeto, Inc.*, 463 So. 2d 368, 371 (Fla. 1st DCA 1985), but in that case, unlike here, the court found that the employer/carrier was "guilty of bad faith," and the case was decided under an earlier version of section 440.34 that did not mandate a fee schedule. Moreover, statutory fee limits only deprive claimants of the right to hire a lawyer where they can show "(1) that claimants could not obtain representation, and (2) that this unavailability of attorneys was attributable to the Government's fee regime." *See U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 722 (1990). Castellanos has not attempted to make that showing. Nor could he, because he was represented by counsel of his choice throughout these proceedings.

For the same reason, three other United States Supreme Court cases do not apply: in those cases, a state actor completely barred an individual from receiving an attorney's services. *See United Trans. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971) (reversing a state court injunction that "would bar the Union's members, officers, agents, or attorneys from giving any kind of advice or counsel to an injured worked or his family concerning his FELA claim"); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Assoc.*, 389 U.S. 217, 218 (1967) (reversing a state court injunction that prevented a union from "[e]mploying attorneys on salary or retained basis to represent its members with respect to

Workmen's Compensation claims and any and all other claims which they may have under the statutes and laws of Illinois"); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5 (1964) (reversing an injunction restraining a union from maintaining and carrying out a plan for advising injured workers to obtain legal advice and for recommending specific lawyers).

5. The 2009 Amendment Does Not Violate Access to the Courts Because It Did Not Eliminate Any Cause of Action

Finally, Castellanos argues that the 2009 Amendment to section 440.34 violates the access-to-courts provision of the Florida Constitution (br. at 37-39). This Court has interpreted that provision as prohibiting the Legislature from abolishing a statutory right predating the adoption of the Florida Declaration of Rights in 1968 "without providing a reasonable alternative to protect the rights of the people of the State to redress their injuries." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973). A statute which restricts but does not totally eliminate a cause of action does not violate the access-to-courts provision. *See Rucker v. City of Ocala*, 684 So. 2d 836, 843 (Fla. 1st DCA 1997).

That is precisely the case here. The 2009 Amendment does not eliminate any cause of action; it only limits prevailing-party attorneys' fees. Indeed, Castellanos pursued his claim and was awarded benefits, attorneys' fees, and costs. *See Rucker*, 684 So. 2d at 843 ("Because the injured employee's cause of action has not been totally eliminated, however, the amendment does not violate article 1,

section 21."); *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39 (Fla. 1st DCA 1997) (holding that the Legislature did not destroy or abolish a common law right of action by limiting chiropractic care under a statute).

CONCLUSION

For the reasons stated above, the Court should affirm the First DCA's Opinion and answer the certified question "yes."

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Respectfully submitted,

WHITE & CASE LLP

s/*David P. Draigh*

Raoul G. Cantero
Florida Bar No. 552356
David P. Draigh
Florida Bar No. 624268
Southeast Financial Center
200 S. Biscayne Blvd., Suite 4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com
E-mail: ddraigh@whitecase.com

Counsel for Respondents, Next Door Company and Amerisure Insurance Co.

CERTIFICATE OF SERVICE

I CERTIFY that on June 4, 2014, a copy of this brief was filed with the Court and was served on the same day by e-mail upon those listed on the attached service list.

s/ *David P. Draigh*
David P. Draigh

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

s/ *David P. Draigh*
David P. Draigh

SERVICE LIST

Mark A. Touby
Richard E. Chait
Touby, Chait & Sicking, P.L.
2030 South Douglas Road, Suite 217
Coral Gables, Florida 33134
Telephone: (305) 442-2318
Facsimile: (305) 442-2319
E-mail: mark.touby@tgclegal.com
E-mail: richard.chait@fortheworkers.com

Michael Winer
Law Office of Michael J. Winer
110 North 11th Street, 2nd Floor
Tampa, FL 33602
Telephone: (813) 224-0000
Facsimile: (813) 224-0088
E-mail: mike@mikewinerlaw.com
Secondary: starla@mikewinerlaw.com

Richard A. Sicking
Touby, Chait & Sicking, P.L.
1313 Ponce De Leon Blvd., Suite 300
Coral Gables, Florida 33134-3343
Telephone: (305) 446-3700
Facsimile: (305) 446-4014
E-mail: sickingpa@aol.com

Co-Counsel for Petitioner Marvin Castellanos

Kimberly Hill
Kimberly A Hill, Esq
821 S.E. 7th Street
Fort Lauderdale, FL 33301-3120
Telephone: (954) 881-5214
Facsimile: (866) 209-1293
E-mail:
kimberlyhillappellatelaw@gmail.com

Kenneth B. Schwartz
Kenneth B. Schwartz, P.A.
1803 S. Australian Ave., Suite F
West Palm Beach, FL 33409
Telephone: (561)478-5056
Facsimile: (561) 296-9956
E-mail: kbs@flalaw.com

Co-Counsel for Florida Workers' Compensation Advocates, Amicus Curiae, in support of no particular party

Richard W. Ervin
Fox & Loquasto, P.A.
1201 Hays Street, Suite 100
Tallahassee, Florida 32301
Telephone: (850) 425-1333
Facsimile: (850) 425-3020
E-mail: richardervin@flappeal.com
Secondary: admin2@flappeal.com

Susan W. Fox
Fox & Loquasto, P.A.
122 E Colonial Dr., Suite 100
Orlando, FL 32801
Telephone: (407) 802-2858
E-mail: susanfox@flappeal.com

Co-Counsel for Florida Justice Association, Amicus Curiae, in support of Petitioner

Mark L. Zientz
Law Offices of Mark L. Zientz PA
9130 South Dadeland Blvd., Suite 1619
Miami, Florida 33156
Telephone: (305) 670-6275
Facsimile: (305) 670-6588
E-mail: mark.zientz@mzlaw.com

Workers' Injury Law and Advocacy Group, Amicus Curiae, in support of Petitioner

William J. McCabe
William J. McCabe, P.A.
1250 South Highway 17/92, Suite 210
Longwood, Florida 32750-5712
Telephone: (407) 403-6111
Facsimile: (407) 265-0409
E-mail: billjmccabe@earthlink.net

Counsel for Voices, Inc., Amicus Curiae, in support of Petitioner

Noah S. Warman
Sugarman & Susskind
100 Miracle Mile, Suite 300
Coral Gables, Florida 33134-5429
Telephone: (305) 529-2801
Facsimile: (305) 447-8115
E-mail:nwarman@sugarmansusskind.com

Counsel for Florida Professional Firefighters, Inc., Amicus Curiae, in support of petitioner

Geoffrey Bichler
Bichler Kelley Oliver & Longo PLLC
541 South Orlando Avenue, Suite 310
Maitland, FL 32751
Telephone: (407) 599-3777
Facsimile: (407) 599-3780
E-mail: geoff@bichlerlaw.com

Counsel for Fraternal Order of Police (FOP), Police Benevolent Association (PBA) and International Union of Police Associations (IUPA), Amici Curiae in support of petitioner

William W. Large
Florida Justice Reform Institute
210 S. Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 222-0170
Facsimile: (850) 222-1098
E-mail: william@fljustice.org

Counsel for Florida Justice Reform Institute, Amicus Curiae in support of Respondents

Christopher J. Smith
Christopher J. Smith, P.A.
2805 W. Busch Blvd., Suite 219
Tampa, Florida 33618-4561
Telephone: (813) 931-1145
Facsimile: (813) 931-3715
E-mail: chris@cjsmithlaw.com

Counsel for the Workers' Compensation Section of The Florida Bar, Amicus Curiae, in support of no particular party

Mark K. Delegal
Matthew H. Mears
Holland & Knight LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832
E-mail: mark.delegal@hklaw.com
E-mail: matthew.mears@hklaw.com

Counsel for Florida Justice Reform Institute and the Florida Chamber of Commerce, Inc., Amicus Curiae in support of Respondents

Rayford H. Taylor
Casey Gilson P.C.
980 Hammond Drive, Suite 800
Atlanta, GA 30328
Telephone: (770) 512-0300
Facsimile: (770) 512-0070
E-mail: rtaylor@caseygilson.com

Counsel for Associated Industries of Florida, Inc.; Associated Builders & Contractors; Florida Electric Cooperatives Association; Florida Retail Federation; Florida Roofing, Sheet Metal and Air Conditioning Contractors Association; Florida United Businesses Association; Publix Supermarkets; and Walt Disney Parks and Resorts, US, Inc., Amicus Curiae, in support of Respondents

Roberto Mendez
Law Group of Mendez & Mendez PA
7061 Taft Street
Hollywood, FL 33024
Telephone: (954) 964-4408
Facsimile: (954) 964-4492
E-mail: mendez@mendezlawgroup.com

Counsel for Respondents, Next Door Company and Amerisure Insurance Company