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IN THE SUPREME COURT OF FLORIDA

MARVIN CASTELLANOS,	)	Case No.: SC13-2082
	)	
Petitioner,	)	Lower Tribunal: 1D12-3639
	)	
v.	)	OJCC No.: 09-027890-GCC
	)	
NEXT DOOR COMPANY and AMERISURE INSURANCE CO.,	)	
	)	
Respondents.	)	
	)	

JOINT BRIEF OF 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; and PUBLIX SUPERMARKETS AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE AMICI

The Amici represent a broad spectrum of employers whose interests will be directly and materially affected by the outcome of the instant matter. The industries and businesses Amici represent are involved in contested or litigated workers' compensation claims, as well as legislative and regulatory issues surrounding the operation of the workers' compensation system in Florida. The Amici have been permitted to appear as amicus curiae in numerous appeals filed in Florida and have participated in critical matters before the Florida Legislature, the executive branch, regulatory agencies and courts in Florida.

The Amici have a significant interest in the issues before this Court. The ruling in this case will have a significant impact on potentially thousands of pending and future cases. The Amici are employers which can and do have workers compensation claims. They have an interest in cases interpreting the attorney fee statute, such that the statute does not promote unnecessary and protracted litigation, and its members' due process rights are protected.

PRELIMINARY STATEMENT

Marvin Castellanos will be referred to as "Petitioner" or "Claimant." Next Door Company and Amerisure Insurance Co. will be referred to as "Respondents" or "Employer/Carrier." The various entities listed on this brief will be referred to as "Amici."

SUMMARY OF ARGUMENT

Section 440.34 Fla. Stat. (2009) provides for payment of an attorney's fee to an employee's counsel based upon a sliding scale percentage of the benefits secured for the employee by the efforts of that attorney. The Florida Legislature intended for section 440.34, Florida Statutes (2009) to clearly reflect that an attorney's fee paid to an employee's counsel must be based on the benefits secured for the employee, rather than hours spent on the claim.

Sliding scale percentage contingent fees in workers' compensation cases are not unique to Florida, have withstood challenges in other states, and have been upheld in other areas of Florida law. Neither the Petitioner nor his attorney have a special constitutional status that requires invalidation of the current statute and requires adoption of a different system for awarding attorney fees.

Florida data collected since 2003 does not support any assertion a percentage fee system has denied injured employees due process or access to counsel solely by virtue of the statute. Section 440.34 Fla. Stat. (2009) should be upheld by this Court as being constitutional and construed in a manner consistent with the express language of the statute.

ISSUE

SECTION 440.34 WHICH GRANTS PREVAILING-PARTY ATTORNEY'S FEES ON A SLIDING SCALE BASED ON BENEFITS ACHIEVED DOES NOT VIOLATE CONSTITUTIONAL NORMS OR ELIMINATE CLAIMANTS' ABILITY TO RETAIN COUNSEL.

a. Preface

Amicus Curiae will not seek to reargue points of law and arguments asserted by the Respondents. Both the Petitioner and Amici supporting the Petitioner present a wide variety of assertions about how the statute is defective or unconstitutional. However, Amici respectfully assert the real issue is whether attorneys who voluntarily agree to represent injured employees have some right to receive fees based on some standard other than that established by the Florida Legislature.

b. Sliding-Scale Attorney Fee Provisions are Common, and Have Been Upheld in Florida and Other States

The Florida Legislature amended Section 440.34 Fla. Stat. in 2009 in response to this Court's decision in Murray v. Mariner Health, 994 So. 2d 1051 (Fla. 2008). The purpose of that amendment was to eliminate any ambiguity in the statute concerning the intent to calculate attorney's fees paid by or on behalf a

claimant to be based upon a percentage of the value of the benefits secured.[1] See Chapter 2009-94, Laws of Florida. The effect of that statutory change was recognized and confirmed in Kauffman v. Community Inclusions, Inc., 57 So. 3d 919, 920 (Fla. 1st DCA 2011) rev. den. 68 So. 3d 234 (Fla. 2011).

The Florida Legislature attempted in 2003 to replace attorney's fees being paid to claimant's counsel on a **SERVICES RENDERED** basis with fees being based on the value of the **BENEFITS SECURED** on behalf of the claimant. See, Wood v. Florida Rock Industries, 929 So. 2d 542, 543 (Fla. 1st DCA 2006), rev. den. 935 So. 2d 1221 (Fla. 2006).

That statute's approach was upheld as facially constitutional in Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506, 509-510 (Fla. 1st DCA 2006). In so ruling, the First District engaged in a thorough discussion and analysis of why none of the various alleged constitutional infirmities existed and why basing an attorney's fee on a percentage of the benefits achieved was constitutional.

At common law, neither the Petitioner nor his attorney had a right to obtain an attorney's fee from an employer or carrier upon prevailing in any litigation. The original workers compensation statute adopted in 1935 made the employee solely responsible for payment of fees to their counsel. As noted by this Court in

[1] Amici recognize Section 440.34(7) provides a specific exemption to the percentage provision in disputed medical-only claims, but that subsection did not apply in this case.

Hardware Mut. Cas. Co., v. Carlton, 9 So. 2d 359, 360 (Fla. 1942), an injured employee was solely responsible for paying his or her attorney until the attorney fee statute was amended in 1941 to provide for recovery of an attorney's fee from an employer/carrier in limited circumstances.

A claimant's attorney's fee being based solely on a percentage of the "benefits secured" is neither novel nor unprecedented in Florida. In at least two other areas, the amount of an attorney's fee is limited to a percentage of the recovery. Section 768.28(8) Fla. Stat. limiting the payment of an attorney's fee to 25 percent of a recovery was held to be constitutional, did not violate or impair the right to contract, or violate the Florida Supreme Court's ability to regulate the practice of law. See Ingraham v. Dade Co. School Board, 450 So. 2d 847, 849 (Fla. 1984).

An example more analogous to the instant matter involves eminent domain cases. Article X, Section 6(a) of the Florida Constitution has been interpreted to provide a prevailing landowner with the right to recover an attorney's fee as a component of "full compensation" in eminent domain cases. See Joint Ventures, Inc. v. DOT, 563 So. 2d 622, 624 (Fla. 1990). Section 73.092(1) Fla. Stat. (2014) requires attorney's fees in such proceedings be based "solely on the benefits achieved for the client." Section 73.092(1)(a) Fla. Stat. (2014) defines "benefits as "the difference, exclusive of interest, between the final judgment or settlement and

the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired." Section 73.092(1)(c), Fla. Stat. (2014) sets forth the sliding-scale formula for determining the percentage of attorney's fee a landowner's attorney may receive from the condemnor.

Prior to the Florida Legislature providing for attorney's fees to be based upon a specific percentage of the landowner's "benefit," attorney's fees were calculated by a trial court based upon a "reasonable fee." See Section 73.091 Fla Stat. (1993). However, after October 1, 1994, attorney's fees were to be based upon a statutory percentage. See Chapter 94-162, Laws of Florida. The constitutionality of the statute was challenged on the ground that it deprived trial courts of the ability to determine a reasonable fee to a landowner. The Fifth District in Seminole County v. Coral Gables Fed. Savings & Loan Assoc., 691 So. 2d 614 (Fla. 5th DCA 1997) rejected that argument, observing:

> Where the legislature is silent on the factors it considers important in determining a reasonable fee, courts may look to the criteria enumerated in rule 4-1.5 of the Rules Regulating The Florida Bar. Schick v. Dept. of Agriculture & Consumer Services, 599 So. 2d 641, 643 (Fla. 1992). However, 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, only the statutory factors may be considered....In the instant case, the legislature essentially decided that a

> percentage of the benefits is a reasonable fee, and in Schick, the supreme court stated that the legislature can enact attorney's fees provisions which "it deems will result in a reasonable award." 599 So. 2d at 644. Accordingly, we find this issue has no merit.

Id. at 615.

The Florida Legislature's decisions in 2003 and 2009 to base the calculation of attorney's fees on a percentage of benefits is neither unique nor unprecedented when considered in the context of what other states have set as limits on attorney's fees in worker's compensation statutes in their jurisdictions. Most states have adopted some form of statutory restriction on worker's attorney's fees. See 8 Arthur Larson and Lex Larson, Larson's Worker's Compensation Law, § 133.04 (2014). Restrictions on attorney fees in worker's compensation matters have been upheld as a proper exercise of the police power. See Yeiser v. Dysart, 267 U.S. 540, 541, 69 L. Ed. 775, 45 S.C. 399 (1925).

The Workers' Compensation Research Institute (WCRI) and the International Association of Industrial Accident Boards and Commissions (IAIABC) has prepared a report entitled "Workers' Compensation Laws as of January 1, 2014." The Table relating to attorney's fee provisions in the United States and Canada is attached as Appendix "A." That report identifies 29 states which apparently utilize a straight percentage method for calculating the amount of an attorney's fee due to an employee's attorney. All 29 provide for the injured

employee to pay an attorney's fee to their counsel. Of those 29 states, 9 appear to contain provisions requiring an employer/carrier to be responsible for the employee's attorney's fees under certain criteria. Florida is one of the 9 states. One state (Arkansas) requires attorney's fee awards to be paid equally by the employee and the employer (with certain exceptions). That means 19 of the 29 states require the employee to bear all of the responsibility for their counsel's attorney's fee.

Florida's workers' compensation attorney's fee percentages are consistent with the majority of states. Two of the 29 states have a maximum percentage lower than utilized in Florida, and 12 states allow for a maximum percentage that is higher than that established in Florida. That means 14 other states placed the maximum percentage at 20%, which is the same as set forth in Section 440.34 Fla. Stat. (2009). In addition to Florida, nine other states allow for a graduated percentage based upon the amount of the benefits secured.

A graduated attorneys' fee statute was challenged in Injured Workers v. Franklin, 942 P.2d 591 (Kan. 1997). The statute limited what lawyers representing claimants could charge their clients. They were confined to a specified contingent fee, but attorneys for employer/carriers were not limited. The Kansas Supreme Court held the statute's limitations did not interfere with its inherent power to regulate the practice of law. Id. at 616. The statute also did not create any equal

protection issues because claimants and employer/carriers were clearly distinguishable. Id. at 617. The statute was held not to violate equal protection or due process, and found to be constitutional. Id. at 619 & 623.

In Smith v. McKee Foods, _____ S.W.3d _____, 2000 WL 177602 (Ark. App. Feb. 9, 2000), a claimant challenged the constitutionality of a statute which limited an attorney's fee to thirty percent (30%) of the benefits secured, of which one-half was to be paid by the employer/carrier and one-half by the claimant. Because the dispute was over medical benefits, the statute prohibited the claimant from paying his counsel. The statute effectively limited claimant's attorney to receiving a fee from the employer/carrier equal to fifteen percent of benefits secured. That produced a fee of $16.20.

In upholding the statute, the court stated:

> While we are sympathetic to appellant's argument, we are unable to remedy the situation. The statute at issue is clear. It establishes a maximum attorney's fee which can be awarded in controverted claims before the Arkansas Workers' Compensation Commission. Although we agree that attorneys should be compensated for the time spent in defending the rights of their clients, the legislature has spoken in this matter. Where the intention of the Legislature is clear from the words used, there is no room for construction and no excuse for adding to or changing the meaning of the language employed. Bishop v. Linkway Stores, Inc., 280 Ark. 106, 655 S.W.2d 426 (1983); Call v. Wharton, 204 Ark. 544, 162 S.W.2d 916 (1942); . " If we change it, we thereby encroach upon the peculiar function of the sovereign power lodged in a coordinate branch of the government." Caldarera v.

> McCarroll, Commr. of Rev., 198 Ark. 584, 587, 129 S.W.2d 615, 616 (1939) (quoting Arkansas Valley Trust Co. v. Young, 128 Ark. 42, 195 S.W. 36 (1917)). Appellant's remedy is with the legislature. We cannot alter the clear meaning of the statute.

New Mexico's worker's compensation statute which limited the total amount of an award of an attorney's fee paid by an employee to $12,500 was challenged as unconstitutional in Wagner v. AGW Consultants, 137 N.M. 734, 745, 114 P. 3d 1050, 1061 (2005). That maximum fee covered all attorney legal services, paralegal services, and legal clerk services related to a single accidental injury. The maximum fee an attorney could receive applied whether the case was before a compensation judge or an appeal. See N.M. Stat. Ann. § 52-1-54(I). The Supreme Court of New Mexico upheld the statute and ruled it did not violate separation of powers, due process, or equal protection guarantees.

The Idaho Supreme Court upheld a rule limiting most attorney fees to 25% of "new money" awarded to a claimant in Rhodes v. Industrial Comm'n, 125 Idaho 139, 142-143, 868 P. 2d 467, 470-471 (Idaho 1993). The Court found the statute did not violate an employee's due process or equal protection rights, and did not interfere with the right of attorneys to pursue their profession. Id.

The United States Supreme Court in United States Department of Labor v. Triplett, 494 U.S. 715 (1990) set out the evidentiary burden required of a challenger before a statutory attorney's fee schedule can be invalidated as

unconstitutional. In Triplett, the attorney wanted to charge his clients a contingent fee in "Black Lung" cases, even though such fees were prohibited. The West Virginia Supreme Court of Appeals ruled the statute was unconstitutional because claimants were effectively denied access to counsel. Id. at 719.

On review, the United States Supreme Court upheld the validity of the attorneys fee provision and ruled the challengers failed to carry their burden of making a strong showing of two component parts: (1) claimants could not obtain representation, and (2) this unavailability of attorneys was attributable to the fee statute. Id. at 722.

Assertions by a few claimants' attorneys that "fewer qualified attorneys are accepting . . . claims"; more claimants were proceeding pro se; and other attorneys would not handle such cases did not constitute sufficient proof. The Court stated:

> This will not do. We made clear in Walters that this sort of anecdotal evidence will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled. 473 U.S., at 324, n. 11. The impressions of three lawyers that the current system has produced "few" lawyers, or "fewer qualified attorneys" (whatever that means), and that "many" have left the field, are blatantly insufficient to meet respondent's burden of proof, even if entirely unrebutted.
>
> *****
>
> Even if respondent had demonstrated an unavailability of attorneys, he would have been obliged further to show that its cause was the regulation of fees. He did not do so.

Id. at 723-724.

The West Virginia court's conclusion that lawyers were unwilling to represent claimants appeared to be based on the suggestion fees were inadequate. However, the Supreme Court stated:

> The evidence to support this economic assessment is similar to that for the unavailability of attorneys: small in volume, anecdotal in character, and self-interested in motivation . . . .

Id. at 725.

If a presumptively and facially constitutional statute is going to be declared unconstitutional, the "necessary causality" must be established by more than the "conclusory impressions of interested lawyers as to the effect of the . . . fee regime on the availability of attorneys." Those conclusions did not come close to proving the statutory fee dried up the supply of attorneys. Id. at 726. That is precisely the case here.

c. There is No Evidence Section 440.34 Eliminates Employees' Ability to Retain Counsel

If one is to establish an attorney's fee statute should be declared unconstitutional, a challenger should present evidence of the existence of the two criteria articulated by the United States Supreme Court in Triplett, supra. It does not appear the Petitioner presented sufficient evidence below to establish that attorney's fees based solely on "benefits secured" has resulted in injured workers

being deprived of counsel to represent them for accidents after 2009. In fact, the data appears to establish that no such deprivation exists.

The Office of the Judge of Compensation Claims in the Division of Administrative Hearings ("OJCC") prepares an Annual Report on Florida's Workers' Compensation System pursuant to Section 440.45(5) Fla. Stat. Portions of the 2012-2013 Annual Report are attached as Appendix B to this brief. (Report is available at http://www.jcc.state.fl.us/jcc/files/reports/2013AnnualReport/Index.html).

The OJCC Annual Report reflects the Petition For Benefits ("PFB") volume decreased at an approximate rate of fifteen percent (15.21% to 15.9%) for each of the first of three years after the 2003 reforms became effective (B-2). The rate of decrease slowed for each year thereafter, with the exception of 2008-2009 when a 1.6% increase was recorded (B-2&3). That particular reporting period spanned the period in which the Murray decision was issued by this Court. Opponents of the 2009 attorney fee reform point to the overall decrease in PFB filings between 2002-2003 and 2011-2012 of approximately sixty-two percent (61.6%) (B-4) as proving the attorney fee statute has deprived injured employees of counsel. A careful analysis of the data reflects just the opposite.

Utilizing the 2002-2003 FY filings as a baseline is misleading. The PFB filings in 2002-2003 FY were the highest ever at 151,021 (B-4). The PFBs filed in

that year reflected a thirty percent (30.2%) increase over the prior year alone. PFB filings increased over sixty-one percent (61.47%) between 1998-1999 FY and 2002-2003 FY. The decrease in PFB filings reflects a return to levels that existed prior to the 2002-2003 FY. Even with the decrease, the number of PFB filings for 2012-2013 FY still exceeded the 1995-1996 FY filings (B-4). That means more PFBs were filed in 2012-2013 FY than in a year when claimant's attorneys were able to obtain attorney fees based upon hourly rates. Therefore, the decrease in filings cannot be solely related to the attorney's fee statute.

"New cases" are defined in the OJCC's report as those in which a PFB has been filed for the first time. The report indicates such "new cases" are more indicative of the rate injured employees are litigating their injuries than the raw number of PFBs being filed in any given year, because multiple petitions can be filed on behalf of a claimant (B-5).

It has been alleged the attorney fee statute is denying injured workers access to the system because lawyers will not represent them by filing PFBs related to accidents arising after the passage of the 2003 and 2009 attorney fee statutes. Once again, the statistics reflect just the opposite. "New cases" rose almost sixty percent (59.97%) between 2001-2002 FY and 2002-2003 FY (B-5). While the number of "new cases" has decreased since 2003, the number of "new cases" filed has been consistently a larger percentage of the PFBs filed in a specific year. In short, while

the overall volume of claims has decreased, the percentage of those claims that are "new" claims is an increasingly larger percentage of the total cases (B-6). It appears litigation involving new claims remains reasonably consistent, and new or initial claims are continuing to be filed on behalf of injured employees (B-6). The percentage of all PFBs filed which are "new cases" has continued to increase each year since 2001-2002. In FY 2001-2002 "new cases" were approximately twenty-nine percent (29.4%) of all PFBs filed. That percentage increased to about fifty percent (49.8%) in 2012-2013 FY (B-6).

The OJCC report does not support another common assertion that employees injured after 2003 "cannot get attorneys." While the exact number of claimants filing pro se petitions cannot be specifically determined, the percentage of pro se claimants filing new claims on their own has decreased from approximately twenty-two percent (21.94%) in 2002-2003 to less than eleven percent (10.94%) in 2012-2013 (B-7). Since 2010-2011, the annual percentage of pro se claims has remained below eleven percent (B-7).

As noted by the OJCC report, the number of new cases filed each year has decreased, but the pro se claimant population has not increased (B-7). The pro-se claimant population has not increased significantly by virtue of either the 2003 or 2009 attorney fee statutes, and it appears fewer workers are representing themselves (B-8). The number of pro se claimants last year was only twenty-five

percent (25.34%) of the number of pro se claimants in the system prior to the 2003 attorney's fee statute becoming effective (B-7).

The fact the number of overall claims has been in a decreasing pattern is not surprising when viewed in the context of the rest of the country. The National Council on Compensation Insurance Inc. ("NCCI") made a presentation at an Advisory Forum on October 3, 2013. Portions of that presentation are attached as Appendix C. The data compiled by NCCI reflects countrywide lost-time injury frequency has decreased by a cumulative fifty-five percent (55.4%) between 1991 and 2011 (C-2). Florida's lost-time frequency has decreased thirty-eight percent (38.0%) between 1997 and 2011 (C-3). Even with the decline in frequency, Florida's claim frequency per 100,000 workers is lower than Tennessee and higher than Alabama, Georgia, North Carolina and South Carolina (C-4).

Based upon the OJCC and NCCI recent reports, workers injured after 2009 continue to file claims and be represented by attorneys. There does not appear to be any statistical information that the attorney fee amendment in 2009 has effectively prohibited injured workers from pursuing claims with the assistance of counsel. The data refutes the allegation that injured claimants after 2009 are not getting representation or having their claims being pursued by attorneys.

CONCLUSION

Based upon the foregoing citation of authorities and arguments, Amicus respectfully requests this Court reject the various arguments advanced by the Petitioner to avoid the application of the express statutory language of Section 440.34 Fla. Stat. (2009).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2014, a copy was submitted by electronic filing to the Florida Supreme Court, Clerk's Office, 500 South Duval Street, Tallahassee, FL, 32399 and a true and correct of the foregoing Amicus Brief has been served by U.S. Mail to:

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CERTIFICATE OF TYPE FACE COMPLIANCE

I hereby certify that this Answer Brief was computer generated using Times New Roman 14-point font on Microsoft Word, and hereby complies with the font standards as required by Fla. R. App. P. 9.210 for computer generated briefs.

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