

SC13-2082

X-Copy Received Oct 31, 2013 3:50 PM



**IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA**

Case No. 1D12-3639

Lower Tribunal Case No. 09-027890GCC

MARVIN CASTELLANOS,

Appellant,

v.


NEXT DOOR COMPANY and
AMERISURE INSURANCE CO.,

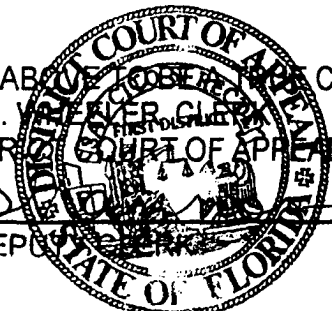
Appellees.

FILED
THOMAS R. HALL
2013 OCT 31 PM 4:30
CLERK, SUPREME COURT

**NOTICE TO INVOKE
DISCRETIONARY JURISDICTION
OF THE SUPREME COURT
(CERTIFIED QUESTION)**

COMES NOW the appellant, Marvin Castellanos, by and through his undersigned co-counsel, Richard A. Sicking and Mark A. Touby, and files this Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida (Certified Question) of the Order of this Court rendered October 23, 2013, pursuant to Art. V, §3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(v) and Fla. R. App. P. 9.120. The nature of the Order is a final order affirming the Judge of Compensation Claims' Order awarding the claimant's attorney \$164.54 for 107.2 hours of legal work. The First District Court of Appeal held:

I CERTIFY THE ABOVE IS A TRUE AND CORRECT COPY
JON S. VANCE, CLERK
FIRST DISTRICT COURT OF APPEAL
BY: 
DEPUTY CLERK



Constrained by the statutory formula set forth in section 440.34(1), Florida Statutes (2009), the judge of compensation claims awarded claimant's counsel an attorney's fee of only \$164.54 for 107.2 hours of legal work reasonably necessary to secure the claimant's workers' compensation benefits. We do not disagree with the learned judge of compensation claims that the statute required this result, and are ourselves bound by precedent to uphold the award, however inadequate it may be as a practical matter.

(*Castellanos v. Next Door Co.*, Fla. 1st DCA Case No. 1D12-3639, opinion filed October 23, 2013, slip decision, at page 1).

The opinion further provided:

..In the circumstances, we certify to the Florida Supreme Court the following as 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.

The fee award is affirmed, and the question of its constitutional adequacy is certified to the supreme court.

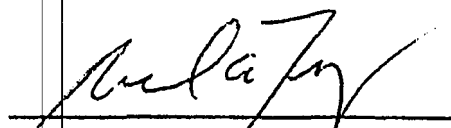
(*Castellanos v. Next Door Co.*, Fla. 1st DCA Case No. 1D12-3639, opinion filed October 23, 2013, slip decision, at page 5).

Respectfully submitted,

RICHARD A. SICKING, ESQ.
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Appellant, Castellanos
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Florida Bar No. 63088


Mark A. Touby

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 31st day of October, 2013, to: Michael J. Winer, Esq. (mike@mikewinerlaw.com), Law Office of Michael J. Winer, P.A., co-counsel for appellant, 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 appellant, 2030 South Douglas Road, Suite 217, Coral Gables, FL 33134; Roberto Mendez, Esq. (rmendez@mendezlawgroup.com), The Law Group of Mendez & Mendez, P.A., counsel for appellees, 7061 Taft Street, Hollywood, FL 33024; 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. (kimberlyhillappellate@gmail.com), Kimberly A. Hill, P.L., 821 S.E. 7th Street, Fort Lauderdale, FL 33301, and Kenneth B. Schwartz, Esq. (kbs@flalaw.com), Kenneth Schwartz, P.A., 1803 S. Australian Avenue, Suite F, West Palm Beach, FL 33409, amicus curiae for Florida Workers' Advocates; Susan W. Fox, Esq. (susanfox@flappeal.com), Fox & Loquasto, P.A., 122 E. Colonial Drive, Suite 100, Orlando, FL 32801, and Richard W. Ervin, Esq. (richardervin@flappeal.com), Fox & Loquasto, P.A., 1201 Hays Street, Suite 100, Tallahassee, FL 32301, amicus curiae for the Florida Justice Association; and Geoffrey Bichler, Esq. (geoff@bichlerlaw.com), Bichler, Kelley, Oliver & Longo, 541 South Orlando Avenue, Suite 310, Maitland, FL 32751, amicus curiae for the Fraternal Order of Police.


Richard A. Sicking

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MARVIN CASTELLANOS,

Appellant,

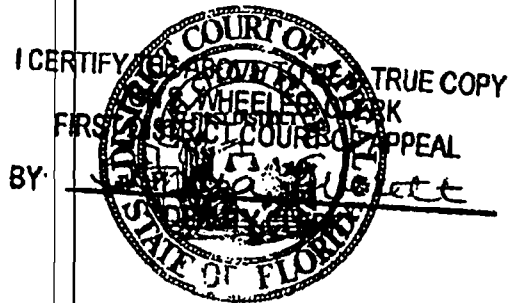
v.

NEXT DOOR COMPANY/
AMERISURE INSURANCE
CO.,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D12-3639



Opinion filed October 23, 2013.

An appeal from an order of the Judge of Compensation Claims.
Gerardo Castiello, Judge.

Date of Accident: October 12, 2009.

Richard A. Sicking, Coral Gables, Michael J. Winer of the Law Office of Michael J. Winer, P.A., Tampa, and Mark A. Touby of Touby, Grindal & Chait, P.L., Coral Gables, for Appellant.

Roberto Mendez of the Law Group of Mendez & Mendez, P.A., Hollywood, for Appellees.

Susan W. Fox of Fox & Loquasto, P.A., Orlando, and Richard W. Ervin of Fox & Loquasto, P.A., Tallahassee, for Florida Justice Association, Amicus Curiae.

Geoffrey Bichler of Bichler, Kelley, Oliver & Longo, P.L.L.C., Maitland, for Fraternal Order of Police, Amicus Curiae.

Kimberly A. Hill of Kimberly A. Hill, P.L., Fort Lauderdale, and Kenneth B. Schwartz of Kenneth Schwartz, P.A., West Palm Beach, for Florida Workers' Advocates, Amicus Curiae.

Christopher Smith, Tampa, for the Workers' Compensation Section of the Florida Bar, Amicus Curiae.

BENTON, J.

Constrained by the statutory formula set forth in section 440.34(1), Florida Statutes (2009), the judge of compensation claims awarded claimant's counsel an attorney's fee of only \$164.54 for 107.2 hours of legal work reasonably necessary to secure the claimant's workers' compensation benefits. We do not disagree with the learned judge of compensation claims that the statute required this result, and are ourselves bound by precedent to uphold the award, however inadequate it may be as a practical matter.

The judge of compensation claims, as an executive branch adjudicator, was without authority to declare section 440.34 unconstitutional. See Barr v. Watts, 70 So. 2d 347, 350-51 (Fla. 1953); State ex rel. Atl. Coast Line Ry. Co. v. State Bd. of Equalizers, 94 So. 681, 683 (Fla. 1922) (holding the "right to declare an act unconstitutional . . . cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution"); Ariston v. Allied Bldg. Crafts, 825 So. 2d 435, 438 (Fla. 1st DCA

2002) ("A JCC clearly does not have jurisdiction to declare a state statute unconstitutional or violative of federal law."); Hensley v. Punta Gorda, 686 So. 2d 724, 725 (Fla. 1st DCA 1997) ("As an administrative officer vested with only certain limited quasi-judicial powers, a judge of compensation claims does not have jurisdiction to declare a portion of the Florida Workers' Compensation Act unconstitutional or violative of a federal statute.").

The constitutional validity of a statute governing administrative proceedings is instead a question for the reviewing court. "Accordingly, this court has jurisdiction to consider such claims in the first instance." Id. (citing Sasso v. Ram Prop. Mgmt., 431 So. 2d 204, 207-08 (Fla. 1st DCA 1983), approved 452 So. 2d 932 (Fla. 1984)). See Anderson Columbia v. Brown, 902 So. 2d 838, 841 (Fla. 1st DCA 2005) ("The JCC and the parties recognized that the JCC does not have jurisdiction to address the constitutionality of a statutory provision. Thus, the claimant's opportunity to mount a constitutional challenge would be on direct appeal of the attorney's fee order." (citation omitted)); Grabau v. Dep't of Health, Bd. of Psychology, 816 So. 2d 701, 706-07 (Fla. 1st DCA 2002) ("The facial unconstitutionality of a statute may be raised in a district court of appeal on direct review under section 120.68, Florida Statutes, after an aggrieved party completes the administrative process. Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 157 (Fla. 1982).").

See also Cafe Erotica v. Fla. Dep't of Transp., 830 So. 2d 181, 183 (Fla. 1st DCA 2002) (holding party need not argue the facial unconstitutionality of a statute before an administrative tribunal for the issue to be cognizable on direct appeal); Lee Cnty. v. Zemel, 675 So. 2d 1378, 1381 (Fla. 2d DCA 1996) (holding that appellees should have raised their due process claims on direct appeal of the administrative order rather than filing a subsequent action in circuit court).

In reaching our decision today, we have therefore considered claimant's arguments that section 440.34 should be deemed in violation of several constitutional provisions. Based on our precedent, however, we are bound to conclude that the statute is constitutional, both on its face and as applied. See Kauffman v. Cmty. Inclusions, Inc./ Guarantee Ins. Co., 57 So. 3d 919, 920-21 (Fla. 1st DCA 2011); Campbell v. Aramark & Specialty Risk Servs., 933 So. 2d 1255, 1256 (Fla. 1st DCA 2006), disapproved on other grounds by Murray v. Mariner Health, 994 So. 2d 1051, 1062 (Fla. 2008); Lundy v. Four Seasons Ocean Grand Palm Beach, 932 So. 2d 506, 509-10 (Fla. 1st DCA 2006), disapproved on other grounds by Murray, 994 So. 2d at 1062; Wood v. Fla. Rock Indus. & Crawford & Co., 929 So. 2d 542, 545 (Fla. 1st DCA 2006), disapproved on other grounds by Murray, 994 So. 2d at 1062. In Kauffman, we recognized that section 440.34 was amended in 2009 in response to the supreme court's decision in Murray and noted that although Murray disapproved of this court's decisions in

Lundy, Campbell, and Wood, the supreme court did not address any constitutional issues in Murray and “did not cast any doubt on the reasoning used in Lundy, Campbell, and Wood, in rejecting constitutional claims like those made herein.” 57 So. 3d at 921.

In the circumstances, we certify to the Florida Supreme Court the following as 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.

The fee award is affirmed, and the question of its constitutional adequacy is certified to the supreme court.

Affirmed and question certified.

VAN NORTWICK and PADOVANO, JJ., CONCUR.



DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
2000 DRAYTON DRIVE
TALLAHASSEE, FLORIDA 32399-0950
(850) 488-6151

JON S. WHEELER
CLERK OF THE COURT

Oct 31, 2013

KAREN ROBERTS
CHIEF DEPUTY CLERK

FILED
THOMAS HALL
2013 OCT 31 PM 4:30
LENA, SUPREME COURT

Re: Castellano v. NexDoor Company
Appeal No.: 1D 12-3639
Trial Court No.: 09-027890GCC
Trial Court Judge: Gerardo Castiello

Dear Mr. Hall:

Attached is a certified copy of the Notice Invoking the Discretionary Jurisdiction of the Supreme Court, pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

- ☐ The filing fee prescribed by Section 25.241(3), Florida Statutes, was received by this court and is attached.
- ☒ The filing fee prescribed by Section 25.241(3), Florida Statutes, was not received by this court.
- ☐ Petitioner/Appellant has previously been determined insolvent by the circuit court or our court in the underlying case.
- ☐ Petitioner/Appellant has already filed, and this court has granted, petitioner/appellant's motion to proceed without payment of costs in this case.

No filing fee was required in the underlying case in this court because it was:

- ☐ A summary Appeal, pursuant to Rule 9.141
- ☐ From the Unemployment Appeals Commission
- ☐ A Habeas Corpus proceeding
- ☐ A Juvenile case
- ☐ Other _____

If there are any questions regarding this matter, please do not hesitate to contact this Office.

Sincerely yours,

Jon S. Wheeler

Jon S. Wheeler
Clerk of the Court

By: *C. Shannon*
Deputy Clerk