O/A 4-10-85

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 65,764

BETTY NEWTON,

Petitioner,

vs.

McCOTTER MOTORS, INC., CORPORATE GROUP SERVICE, INC. and DIVISION OF WORKERS' COMPENSATION OF THE FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Respondents.

BRIEF OF RESPONDENTS ON THE MERITS

B. C. PYLE, P.A.
ATTORNEY AT LAW
P. O. Box 66078
Orlando, FL 32853
305/898-0497
Attorney for Respondents

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

The deceased employee, Leslie Curtis Newton, sustained various bodily injuries while employed by the employer, McCotter Motors, Inc., on April 30, 1973. The employer/carrier furnished the employee all necessary medical care to the date of his death on May 5, 1982, paid him temporary total disability benefits to the date of his maximum medical improvement, and thereafter, accepting him as a permanent total disability case, paid permanent total disability benefits (Order, R-128, 131).

The employee had back surgery following his accident, and subsequent anticoagulant therapy for thrombophlebitis. His attending physician at the time of his death attributed his death to massive bleeding in the brain (Order, R-129-30). The employee had been continuously disabled from the date of his accident until the date of his death (Order, R-131).

Following his death, which occurred nearly nine (9) years after the date of accident, his widow filed a claim for dependency death benefits. The employer/carrier contested the claim on the ground that the employee's death occurred more than five years following the accident date, and that the claim was thereby barred by the statute which allows dependency benefits only if the employee's death occurs within five (5) years of the accident date. (Florida Statutes 440.16(1). The employer/carrier did not contest causal connection between the accidental injury and the employee's death, nor the dependency of the widow.

The Deputy Commissioner found the claim to be compensable, holding that to deny benefits under the Statute would constitute an unconstitutional application of the Statute.

On appeal, the First District Court of Appeal (McCotter Motors, Inc. v. Newton, 453 So.2d 117, 1984) reversed, holding in effect that the claim was barred by the Statute. A motion for rehearing was denied.

Petitioner (the widow) then invoked the extraordinary jurisdiction of this Court, asserting that questions of due process and equal protection of the law are involved. This Court accepted jurisdiction.

Respondent relies upon the clear, unambiguous provisions of the involved Statute, and invites the Court's attention to the fact that the District Court of Appeal held the Statute to be constitutional, and declined "to invade the province of the legislature", at the same time suggesting that the Legislature should reconsider the Statute involved "in light of the advances made in medical science since the enactment of that Statute." The District Court apparently accepted some of the statements of a witness for Petitioner (Dr. Wright) with regard to the status of medicine, as proffered by Petitioner:

> "Dr. Wright stated that there really was not much progress in medicine between 1900 or 1920 and 1935," (Petitioner's Brief, p. 8)

a statement so far from the factual as hardly meriting comment (but which will be treated later) and certainly one which this Court cannot possibly accept; however, the Court should

not reach the matter of giving it consideration, for it has no predicate in the present and proper determination of constitutional questions which have been raised, there being no basis upon which the constitutionality of the Statute involved can properly be impugned.

Petitioner has seen fit to suggest two "Points Involved", which can properly be considered in a single consolidated argument, which procedure we shall follow.

For the convenience of the Court, the cases of Roberts v. Merrill and Ruiz v. Industrial Accident Commission are appended to this Brief.

POINTS INVOLVED
(AS PRESENTED BY PETITIONER)

POINT ONE

THE PROVISIONS OF CHAPTER 440.16(1), FLA. STAT., REQUIRING THAT A COMPENSABLE DEATH OCCUR WITHIN ONE YEAR OF THE ACCIDENT OR WITHIN FIVE YEARS OF THE ACCIDENT FOLLOWING CONTINUOUS DISABILITY VIOLATE CONSTITUTIONAL GUARANTEES OF DUE PROCESS OF LAW (ACCESS TO COURTS)

POINT TWO

THE PROVISIONS OF CHAPTER 440.16(1), FLA. STAT., REQUIRING THAT A COMPENSABLE DEATH OCCUR WITHIN ONE YEAR OF THE ACCIDENT OR WITHIN FIVE YEARS OF THE ACCIDENT FOLLOWING CONTINUOUS DISABILITY VIOLATE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION OF THE LAW.

ARGUMENT

The Statute does not violate constitutional guarantees of due process of law (access to the courts) or equal protection of the law.

As we pointed out on appeal to the District Court of Appeal, the Deputy Commissioner actually has no authority to pass upon the constitutionality of the Statute, and recognized that fact in his Order (R-137), but assumed to have authority to refuse to enforce a Statute which he determined to be unconstitutional:

The Statute involved (Sec. 440.16, F.S.),provides:

> "If death results from the accident within 1 year thereafter or follows continuous disability and results from the accident within 5 years thereafter, the employer shall pay . . .to the spouse. . .50 percent of the average weekly wage, said compensation to cease upon the spouse's death or remarriage."

The language of the Statute is not obscure. The facts are not in dispute. The widow is not entitled to benefits under the Statute.

At the outset of the hearing before the Deputy Commissioner, Petitioner's counsel conceded:

> "I believe that you cannot give us the relief that we ask for," (R-2)

but then went on to circumvent the Statute, or to have it set aside, despite recognizing, as did the Deputy Commissioner in his Order, that the Deputy Commissioner had no authority to pass upon the constitutionality of the Statute.

In the case of Barrueta v. Seaferro Company, I.R.C. Order 2-1986 (1970) a claimant had attacked (before the Deputy Commissioner) the constitutionality of Section 440.15(6)(a) in an occupational disease case, on the grounds that the Statute was in violation of the equal protection clauses, and was arbitrary and unreasonable. The Commission said:

> "Such determination lies solely with the Courts of this State and not with a quasi-judicial agency. The JIC should not have made a determination on this issue, one way or the other, in her Order."

Certiorari was dismissed without opinion by the Supreme Court on May 10, 1972.

As mentioned above, both the claimant's counsel and the Deputy Commissioner agree that the Deputy Commissioner cannot properly pass on the question of constitutionality, and we, therefore, see no need to cite the many other authorities to that effect.

The fact that the 1979 amendments to the Compensation Act eliminated most of the "scheduled injury" benefits, did not violate the equal protection or access to the Courts provision of the state or federal constitutions, in Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (1st DCA, 1982).

In Sasso v. Ram Property Management, 431 So.2d 204 (1st App., 1983) it was held that putting a limit on wage loss benefits at age 65 satisfied the rational basis test and the substantial relationship test, and did not violate constitutional guarantees; affirmed by this Court, 452 So.2d

932 (Fla., 1984). It was likewise held that the Deputy Commissioner lacked authority to determine the constitutional issue.

Reduction of wage loss benefits at age 62 was held constitutional in Morrow v. Amcom, 433 So.2d 1230 (1st DCA,1983), citing Sasso. To the same effect, O'Neil v. Department of Transportation, 442 So.2d 961 (1st App., 1983).

The law is well settled that the remedy at the time of accident controls. Plunkett v. Florida Power & Light Co., 1 FCR 35 (1954), and that benefits are fixed by the law in effect at the time of the accident. Hecht v. Parkinson, 70 So.2d 505 (Fla., 1954); Ship v. Taylor, 397 So.2d 1199 (1st App.,1981). Statutory and decisional law at time of accident control; Simmons v. City of Coral Gables, 186 So.2d 493; Subterranean Circus v. Lewis, 319 So.2d 600 (1st App., 1975). Statutory changes operate only prospectively: City of Lakeland v. Catinella, 129 So.2d 133 (Fla., 1961) (except for procedural changes); Martel v. Gibeault, Inc., 330 So.2d 493 (4th App., 1976).

Petitioner suggests that the Statute involved is not a Statute of Limitations. Whether or not it is a Statute of Limitation as to time, it certainly is a Statute of Limitations as to the limit of benefits to be awarded, a concern which was felt by the Legislature in 1935 when the Statute was enacted, just as it should be of consideration today. Under the Statute - a quid pro quod - employers gave up substantial defenses to employee's accident claims, and in return gave a "no fault" remedy, albeit limiting both amounts and duration of benefits,

including widow's benefits. Limitation of benefits both as to amount and duration have been modified many times in the intevening years, and many times this Legislature has had an opportunity to consider and revise the Statute as it deemed to be necessary, but Section 440.16 has not been amended, not even in the very extensive overhaul of the Workers' Compensation Statute (Chapter 440) in 1979. In 1935 the maximum disability benefits was $18 a week (in 1983, $253), with limitations on duration of benfits, both for disability and death - at one time 350 weeks, later $50,000, and even later, a complete elimination of duration of permanent total disability benefits. Likewise, benefits for scheduled injuries were modified over the years, and greatly curtailed in 1979, and all of these revisions have been tested and sustained by the Courts - all having been creatures of Statute. Prior to the enactment of the Statute in 1935, there was no guaranteed remedy for the employee or his dependents.

> "At common law no civil right of action was maintainable to recover damages for the death of a human being occasioned by the negligent or wrongful act of another." 17 Fla. Jur. 2d, Sec. 7; See also Chamberlain v. Florida Power Corp., 198 So.2d 486 (Fla., 1940)

Florida's Wrongful Death Statute was enacted in 1883, later amended, and now is shown as Section 768.27, effective July 1, 1972 as to deaths occurring after that date. The 1885 Constitution contains no express provision as to wrongful death rights.

Chapter 440 (1935) - the Workmen's Compensation Act - took over the exclusive remedy, and right of action, in work-related death cases, Section 440.11 providing:

> "Exclusiveness of Liability. Liability of an employer prescribed in Section 440.10 shall be exclusive and in place of all other liability of such employer . . .to the employee. . .husband or wife, parents, dependents . . ."(Unless the employer fails to secure payment of compensation as required by this Chapter)

Section 768.19 of the Wrongful Death Act provides for right of action, but this, of course, is superseded by the later express provisions of Chapter 440.

Petitioner relies heavily upon an Oklahoma case of 1963 vintage, Roberts v. Merrill, 386 So.2d 780 (Okla.,1963) from which certain quotations are presented in the Brief at pp. 14-16. The opinion is a lengthy one. It recognizes that a different result was obtained in many other jurisdictions. Petitioner fails to note that it was a 5-4 decision, with a strong dissenting opinion which recognized that any change in the involved Statute was for the Legislature, and not for the courts. It also is to be particularly noted that Oklahoma had a provision in its state constitution which guaranteed the right of action for wrongful death, but allowed the Legislature to allow for wrongful death benefits, which remedy would be exclusive. By a very tenuous process, the Court nevertheless held that the Statute was violative of a constitutionally guaranteed access to the courts, in that it imposed a restrictive condition upon a certain class of persons whose decedents died later than the maximum period provided in the Statute.

In the Oklahoma case the employer/carrier relied upon Ruiz v. Industrial Accident Commission, 289 P.2d 229 (Cal.Sup.Ct., 1955), in which a similar provision was upheld by the Accident Commission. The Oklahoma court brushed Ruiz aside, pointing out:

> "The precise question tendered for determination here was not considered by the California Court. The constitution of that State contains no provision similar to our Article 23, Sec. 7, which is a restriction upon the legislative power to curtail the right to effectively pursue a remedy for death. . ."

This, then, was the ratio decidendi of the Oklahoma decision - that there was an underlying constitutional provision which could not be abrogated by the Legislature. We have no such situation in Florida, no constitutionally guaranteed provision. Q.E.D.

It must be noted that there is not one word in the Oklahoma decision to the effect that it was based, in whole or in part, upon any actual or presumed changes in medical knowledge from the time the Statute was originally enacted.

In the Ruiz case, the Workmen's Compensation Statute placing a limitation upon Workmen's Compensation death claims had been modified at least once. In agreement with our own Court, and those of other states, the Court recognized that the rule that all provisions of the Workmen's Compensation Law shall be liberally construed does not mean that the Legislature cannot be deemed meaningless and without design.

In conclusion, the California Court, in Ruiz, said:

> "It thus appears that the Legislature in plain language has declared the governing time limitations, as it has the right to do. There is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretations. (citing a Cal. case). Accordingly, in this case where the bar of the prescribed limitations period was raised, the Commission properly denied relief under the provisions of Section 5406 of the Labor Code."

Likewise, the strong dissent in the Oklahoma case:

> "It is appropriate and proper that, in granting a deceased employee's dependents this new remedy, or "right to an award", the Legislature could prescribe conditions, restrictions and/or limitations governing its invocation. Thus, in addition to limiting the amount that could be awarded on death benefit claims, the Legislature also had the power to place a limitation on the time within which they could be filed, and to name and define those who could maintain them. Such conditions to obtaining those benefits have, in the wisdom of the Legislature, been prescribed by Tit. 85 O.S.1961 Chapter 22, subdiv. 7. I think their prescription is a valid exercise of legislative authority, and should be upheld by this court. For us to emasculate from the death benefits portion of the Workmen's Compensation Law the condition that the death for which this new benefit is provided, must occur within five years from the date of the accident, is, in effect, to legislate-and to render incomplete, an otherwise comprehensive legislative scheme, or plan, under which both claimants and employers forego certain rights they would have in tort actions in return for an expeditious way of handling claims arising out of accidental deaths in the special category of hazardous employments."

In Cates v. Graham, 451 So.2d 475 (Fla. 1984) this Court dealt with the question of a Statute of Repose in the field of medical malpractice, holding the Statute - which imposed a time limit for suit - to be constitutional, and not denying access to the courts.

In the recent case of Pullum v. Cincinnati, Inc., 458 So.2d 1136 (1st App., 1984) the matter of a Statute of Repose and the question of access to the courts was considered, and the Statute was found not to be violative of constitutional guarantees.

In State v. Egan, 287 So.2d 1 (Fla.,1973) a criminal case, the Court pointed out that:

> "A legislative enactment may be replaced only by further legislation and not by time or changed conditions . . .Simply stated, the general rule is that a statute is not repealed by nonuse. The argument set forth in the order of the lower court may be a cogent one when addressed to the legislature, yet courts of justice cannot and do not recognize such a policy as a basis for their decision."

In Maryland Casualty Co. v. Sutherland, 169 So. 679, dealing with judicial construction of the Workmen's Compensation Act, the Court stated the first rule of statutory construction:

> "The legislative history of an act is important to courts only when there is doubt as to what is meant by the language employed. . ."

Sutherland was cited in Rinker Materials v. City of N. Miami, 286 So.2d 552 (Fla., 1973) in which the Court likewise noted, quoting from Sutherland:

> "The intention and meaning of the Legislature must be primarily determined from the language of the statute itself, and not from conjecture aliunde." (Emphasis supplied)

Of particular interest in this connection, is the recent case of A.S.J. Drugs, Inc. v. Berkowitz, 459 So.2d 348 (4th App., December, 1984). In that case the question turned on a proper interpretation of Section 440.39 of the Compensation Act. The employee involved secured settlement from a third party tort feasor and gave a release. The employer went ahead with payment of Workmen's Compensation benefits and then sought subrogation out of the settlement which the employee had secured from the tort feasor.

The Court pointed out that the question had been considered by the Florida Supreme Court in Shelby Mutual v. Russell, 137 So.2d 219 (Fla., 1962). The Court in that case pointed out that there was certainly an intent to give an employer subrogation where benefits were recovered from a third party, but that the Statute said nothing to prohibit defeat of this right by the course of action it was taking in that case. The Court said that although that result was contrary to the expressed legislative intent, it was for the Legislature to make the necessary change. Later, the same question was before the Second District Court of Appeal in Brown v. State Farm Insurance Company, 281 So.2d 364 (Fla. 2d DCA, 1973). That court recognized the difference expressed by the Supreme Court in Shelby and the holding that the problem

should be statutorily corrected and pointed out that the Legislature had taken no action despite the Shelby Mutual holding a decade earlier.

In A.S.J. Drugs the problem was again presented, the lower court having held that based upon precedents, the subrogation right of the employer was outlawed. The Court then said:

> "The legislature has done nothing to remedy the situation, despite the call to do so over 20 years ago in Shelby Mutual, and the Supreme Court has said that we should not move until they do. Accordingly, as to these counts, we affirm."

This situation is quite analogous to that presented in the present case. There may be some question as to whether any change should be made in Section 440.16, but it is entirely clear that if any change is to be made, it should come from the Legislature, and not from the Court.

Much has been said by Petitioner about the state of medical science (or art) in 1935, when the subject Statute was enacted. No journals of the Legislature have been produced showing that that body was concerned with the medical picture at that time. Without such unwarranted conjecture, we are left with the plain language of the Statute which, with other sections of Chapter 440, was concerned with a complete resolution of all claims arising out of work-connected activities, and not with giving 100% relief to any of the parties involved, but giving the worker and his dependents a partial loaf in

exchange for the abolition of the employer's common law defenses. Whether there should have been a five-year or ten-year or one-year limitation on the time in which an employee had to die following an industrial injury, in order for death benefits to be granted, was strictly in the province of the Legislature, which was not replacing any constitutionally guaranteed right.

THE DETERMINATION OF DEATH ARGUMENT

This proposal advanced by Petitioner is so sciolistic as scarcely to warrant response or refutation, but since it occupies so much of Petitioner's Brief, we will address it. The argument was made in three parts, that of Petitioner's counsel, that of his witness, Dr. Wright, and the allusion to the Oklahoma case on which we have previously commented.

As for Dr. Wright, the pathologist, (Depo., R-86-115), we will not attempt to pinpoint the numerous self-contradictions contained in his testimony. In general, with prompting of counsel, he took the position that medicine was an art of the dark ages until after 1935, and that practically all advances pertaining to the prolongation of life or the determination of death occurred after that time, except that these advances had substantially ceased after the year 1979 (R-112). It is to be noted that this civil servant (of Broward County) was born in 1944, and received his M.D. degree in 1971, and like many young people of a more tender age, felt that he had learned it all. It would appear that his credentials as a pathologist are satisfactory, but that his knowledge of medical history is practically non-existent. Some of us are aware of the fact that medicine was practiced in Babylonia, Egypt, China, India and Greece long before the Christian era; that Asclepiades, Hippocrates, Galen (dissection) Vesalius (physiology), Fabricius, and DaVinci knew quite a bit of the

human anatomy and systems; that Harvey discovered the circulation of the blood in 1628; that the nineteenth century produced anesthesia, the germ theory, antisepsis, and typhoid vaccine (1897); that the twentieth century, in its early years (before 1935) brought great advances in medicine, with a dramatic reduction in the death rate; that antibacterial agents were well known and used in the early 1930's; that Alexander Fleming discovered penicillin in 1928; that great advances in endocrinology began early in the twentieth century; that insulin came on the scene in 1921; that chemotherapy was developed in Germany in the first decade of the twentieth century. We might also note that Morgagai's work "On the Seats and Causes of Diseases as Disclosed by Anatomical Dissections" was published in 1761; that Ostler made great contributions to diagnosis and treatment in the late nineteenth and early twentieth century; in short, that medicine has had a continuous development since it first appeared on the human scene and did not have its inception in the year 1935 and subsequent years. We believe that this Court can reasonably take judicial notice of these facts, and give the testimony of this witness the attention and weight which it merits, if any.

This witness likewise was asked for his opinion on questions of law, and the validity of the Statute in question, which he eagerly answered, contending that the language of the Statute had no basis in scientific fact (R-108-109) Of particular interest to the casual reader was the witness's statement (R-108).

> "...that there basically was no treatment of injuries at that particular point in time, other than to lay people down and see whether they died..."

For those of us who were born before 1935, one wonders how we managed to reach maturity. Nevertheless, Petitioner's counsel in his Brief (p.8) says of Dr. Wright:

> "(He) stated that there really was not much progress in medicine between 1900 or 1920 and 1935."

It would appear that Petitioner's counsel has not been reading the medical literature which his witness likewise did not read, or he would not likely have made the completely unwarranted conclusion (Brief, p.11):

> "The statute was enacted in 1935 when medicine did not have the ability to prolong life or determine the cause of death beyond the periods of time in the statute."

The "year and a day" criminal law rule, now abandoned, holds no analogy to the situation presented here. It was a product of a period several centuries removed.

CONCLUSION

1. Neither the principle of access to the courts nor equal protection of the laws is violated by this Statute. It does not violate any constitutionally guaranteed right, but is part of a law (Chapter 440) which substituted for such rights as an injured employee previously had.

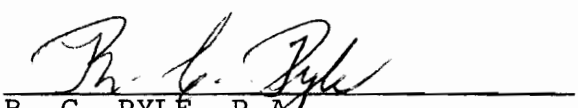
2. The Court should not attempt to amend or set aside a valid act of the Legislature.

3. There is no showing whatever that the Legislature, in 1935, predicated the Statute's provisions applicable to the present case upon the "state of the art" of medical knowledge at that time, or that such "state of the art" was practically non-existent as suggested by Petitioner.

4. The Oklahoma case (Roberts v. Merrill, supra) relied upon by Petitioner, is not analogous - being predicated upon a constitutionally guaranteed right of action - did not rely upon a suggested "state of the art" medical foundation, and cannot possibly be relied upon as persuasive authority here.

5. The action of the District Court of Appeal in declining to legislate upon the question involved, but leaving the matter of any desired change in the Statute to the Legislature, is in accordance with Florida law and precedents, and should be affirmed.

Respectfully submitted,



B. C. PYLE, P.A.
ATTORNEY AT LAW
P. O. Box 66078
Orlando, FL 32853
305/898-0497
Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard A. Sicking, Esquire, P. O. Drawer 520337, Miami, FL 33152, Attorney for Petitioner, Betty Newton, and to the Department of Labor & Employment Security, Division of Workers' Compensation, 1321 Executive Center Drive, East, Tallahassee, FL 32301, by regular mail, this 11th day of February, 1985.

B. C. PYLE, P.A.
ATTORNEY AT LAW
P. O. Box 66078
Orlando, FL 32853
305/898-0497
Attorney for Respondents