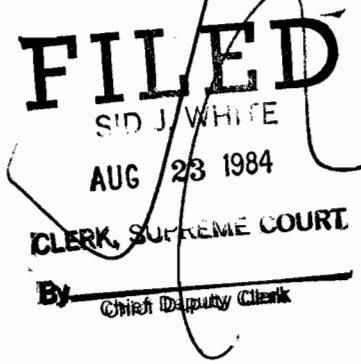
IN THE SUPREME COURT OF FLORIDA

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 PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE

The Petitioner, Betty Newton, is the widow of Leslie Curtis Newton, the deceased employee in this workers' compensation case. She was the claimant in the proceedings before the Deputy Commissioner and the Appellee before the First District Court of Appeal. Her husband's employer, McCotter Motors, Inc., and its servicing agent, Corporate Group Service, were the Appellants below.

This is discretionary review of a decision of the First District Court of Appeal, which expressly declared the one year and five year provisions of §440.16, Fla. Stat., to be valid. It is also a case of first impression in Florida, although a similar statute was declared unconstitutional in Oklahoma.

At the hearing before the Deputy Commissioner, the Petitioner presented her own testimony, the testimony of her husband's treating physician, and of the Medical Examiner of Broward County, Dr. Ronald K. Wright. The employer/carrier presented no evidence. The employer/carrier did not dispute that Leslie Newton died as a result of his industrial accident, nor that the Petitioner is his widow and dependent. They contended that the statute provides no legal remedy to the Petitioner and that the lack of a remedy is constitutional. The Deputy Commissioner awarded benefits, having determined that the statutory requirements that the death occur within one year of the accident or five years of the accident following continuous disability, if applied to the present case, would produce an unconstitutional result.

The First District Court of Appeal reversed, without oral argument, holding:

> "In the past, this Court and the Florida Supreme Court have upheld similar attacks on other sections and subsections of chapter 440. In light of the precedent set by those cases, we find that appellee has not sustained her burden of showing that section 440.16(1) is unconstitutional. (Appendix 18).[1]

The District Court of Appeal pointed out:

> "The five year limit on benefits payable for death after continuous disability has remained in effect since the enactment of section 440.16(1), Florida Statutes, in 1935. Medical testimony was presented at the hearing to the effect that although such a five year limitation may have had a basis in fact in 1935 because of the lesser medical ability then to either prolong life or to determine the cause of death after a long period of time, the statute has no basis in fact today since the state of the art of medicine has advanced to the extent that the ability to prolong life has vastly improved as has the ability to determine cause of death even after long periods of disability." (Appendix 17).

In reversing the Order of the Deputy Commissioner, the District Court of Appeal held:

> "While we hold section 440.16(1), Florida Statutes, constitutional, and decline to invade the province of the legislature in this regard,

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[1] Throughout the opinion, the deceased employee is incorrectly referred to as the claimant.

> we recognize the equities of appellee's arguments and suggest that section 440.16(1) should be revisited by the Florida legislature to address and debate the public policy underlying the one year and five year limitations in light of the advances made in medical science since the enactment of that statute." (Appendix 21).

STATEMENT OF THE FACTS

Leslie Curtis Newton suffered an admittedly compensable accident on April 30, 1973, admittedly resulting in permanent total disability, which was paid to the date of his death on May 5, 1982 (R. 25, 48), nine years later.

His treating physician, Dr. Augustine, testified:

> "If you ask me if the death is due to the complications of his treatment, probably yes." (R. 72).

Betty Newton and Leslie Newton were living together as husband and wife (R. 17, 19). She was dependent upon him for support (R. 17).

Dr. Ronald K. Wright is a forensic pathologist and the Medical Examiner of Broward County (R. 87, 88).

Dr. Wright testified that, in 1935, it was not possible to determine the cause of death after more than five years (R. 92), and medicine did not have the ability to prolong life for such a period of time (R. 91-93). Actually, there was little difference in applied medicine between 1900 and 1935 (R. 98). Medicine did not change significantly until World War II (R. 99). In 1935, there were no antibiotics, blood transfusions, intravenous

injections, breathing machines, nor laboratory controls of body chemistry, etc. (R. 91-101). The seriously injured or bedridden died in a few days or a week (R. 94).

Today, advances in medicine have created a large number of people "who stay alive for a period of time but do not get well" (R. 91).

> "We have very unfortunately done a magnificent job of prolonging death ... we cannot distinguish between individuals who are fatally injured and those who are not. We treat them all, and with the advances in medical science which we currently enjoy, we can keep both 'alive' ... it creates vast numbers of individuals who do not get well ... depending upon how you look upon it, you have just prolonged dying".
> (R. 92-93).

Today, the mechanism of dying is known and medicine can now determine the cause of "delayed death" related to an event which happened five or more years earlier (R. 88-89).

Dr. Wright stated that the one year and five year provisions in §440.16, Fla. Stat., no longer have any basis in fact because of the advances in medicine since 1935 (R. 109-111) (Appendix 22-23).

ARGUMENT

POINT ONE

THE SUPREME COURT HAS JURISDICTION TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL WHICH EXPRESSLY DECLARES A STATE STATUTE TO BE VALID, AND SHOULD EXERCISE THAT JURISDICTION WHEN:

A. ANOTHER STATE HAS DECLARED A SIMILAR STATUTE TO BE INVALID;

B. THE DISTRICT COURT OF APPEAL RECOMMENDS THAT THE LEGISLATURE CONSIDER REPEALING THE STATUTE BECAUSE IT HAS BECOME OBSOLETE DUE TO ADVANCES IN SCIENCE.

This Court has jurisdiction under Art. V, §3(b)(3), Fla. Const., because the District Court of Appeal expressly declared §440.16, Fla. Stat., to be valid. The question is whether this Court ought to exercise its discretion to review.

Although it was argued below, the District Court failed to mention that a similar statute was declared unconstitutional in Oklahoma in Roberts v. Merrill, 386 P.2d 780 (Okla. 1963).

It is confusing to the workers' compensation bench and bar to read those two opposite holdings without the First District Court of Appeal distinguishing Roberts v. Merrill, supra, if it could. It would appear to the ordinary reader that the First District Court of Appeal did not know of that case because they did not mention it. Consequently, the decision below would always be held in doubt. It is also surprising that the Court did not mention the Third District's decision in La Bella v. Food Fair, Inc., 406 So.2d 1216

(Fla. 3rd DCA 1981), which touches on the question of the validity of the same statute.

The First District Court held that §440.16, Fla. Stat., is valid because other sections of the Workers' Compensation Law have been held to be valid. First of all, that does not logically follow. Secondly, none of those cases dealt with the question involved here: does a 1935 statute now unreasonably discriminate when advances in science and medicine have completely destroyed any factual basis for the statute? In Ga. Southern & Fla. Ry. Co. v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965), this Court held that a statute which was valid when enacted can become invalid when advances in science and technology destroy the factual basis for the statute. The District Court below overlooked that.

The District Court cited its own decision in Sasso v. Ram Property Management, (Appendix 18), but, in the meantime, this Court affirmed, holding:

> "In Kluger v. White, 281 So.2d 1,4 (Fla. 1973), this Court held that 'the Legislature is without power to abolish [a right to redress for a particular injury provided by statute before the adoption of the Declaration of Rights of the Florida Constitution] without providing a reasonable alternative.'". Sasso v. Ram Property Management, ___ So.2d ___, 9 Fla. L.W. 266, (June 29, 1984).

Unlike Sasso, who received some benefits, the Petitioner-widow in the present case got nothing. The

wrongful death statute was enacted in 1883 and the Declaration of Rights in 1885. Yet, there is no substituted remedy!

The District Court's statement that the Legislature should reconsider the one year and five year rule in light of the "advances made in medical science since the enactment of that statute" (Appendix 21) avoids the issue. If the statute is reasonable, then it is valid and there is no need for the Legislature to reconsider it. If the statute no longer has any basis in fact because of the advances in medical science since its enactment nearly 50 years ago, then the statute unreasonably discriminates against widows and orphans, who have no lobby, and the statute should be declared invalid.

This Court will also note that §440.16, Fla. Stat., is the same as the "year and a day rule" in criminal law, which has been widely repudiated, including Florida.

§440.16, Fla. Stat., is a non-claim statute which requires that, in order to be compensable, a death must occur within one year of the accident or within five years of the accident following continuous disability. In other words, the statute does not permit the claimant-widow to present factual proofs of causal relationship of the death to the accident or of her dependency.

CONCLUSION

This Court has jurisdiction under Article V, Section 3(b)(3). The Court should exercise its discretion to review, first of all to resolve the obvious legal dispute as to why the same statute could be constitutional in Florida but unconstitutional in Oklahoma. More importantly, the Court should review the decision below in order to protect the people of Florida from unreasonable legislation, which legislation became unreasonable because of the advances in medical science over a period of 50 years since its enactment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to B. C. Pyle, Esq., Attorney for Respondents, McCotter Motors, Inc. and Corporate Group Service, Inc., P. O. Box 66078, Orlando, Florida 32853; and to the Department of Labor and Employment Security, Division of Workers' Compensation, 1321 Executive Center Drive, East, Tallahassee, Florida 32301, by regular mail, this 23rd day of August, 1984.

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