O/a 11-6-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,308
DCA-4 CASE NO. 85-1588

BERTHA PULIDO DE AYALA, Individually and as Personal Representative of the ESTATE OF MAXIMIANO AYALA, Deceased, and the children of MAXIMIANO AYALA, Deceased, by their next friend, BERTHA PULIDO DE AYALA,

Petitioners,

vs.

FLORIDA FARM BUREAU CASUALTY INSURANCE CO. and STEVE'S HARVESTING, INC.,

Respondents.
_____/

RESPONDENTS' REPLY TO AMICUS CURIAE BRIEF OF UNITED FARM WORKERS OF AMERICA, AFL-CIO

DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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PRELIMINARY STATEMENT

Throughout this Brief, the Respondents, FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY and STEVE'S HARVESTING, INC., will be collectively referred to as "FARM BUREAU" and AMICUS CURIAE, UNITED FARM WORKERS OF AMERICA, AFL-CIO, will be referred to as "FARM WORKERS."

SUMMARY OF ARGUMENT

The FARM WORKERS OF AMERICA, AFL-CIO as Amicus Curiae had nothing to add to the arguments already set forth by the Petitioners and rebutted by Respondents. All cases cited by Amicus FARM WORKERS in support of Petitioners either do not involve workers' compensation claims, or involved claims by resident aliens as opposed to non-resident alien dependents.

Because Amicus FARM WORKERS have not cited any relevant supplemental authorities, the decision of the Fourth District Court of Appeal below upholding the constitutionality of Section 440.16(7) Fla. Stat. (1983) should be affirmed.

ARGUMENT

I. SECTION 440.16(7) FLA. STAT. (1983) DOES NOT VIOLATE ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

The FARM WORKERS' Brief continues to reassert Petitioners' argument that the statute in question violates Florida's so-called "access to courts" or "open courts" provision set forth in Article I, Section 21 of the Florida Constitution.

In addition to the Reply set forth below, Respondents continue to rely on the argument set forth in their Answer Brief previously filed in connection with this cause.

First, FARM BUREAU does not dispute that the Petitioners have a right to bring a wrongful death action in the state of Florida. In fact, as pointed out in FARM BUREAU'S Answer Brief, one of the precise reasons why Petitioners have not been denied access to the courts is because they have a viable cause of action against the third party tortfeasor who was evidently primarily, if not wholely, responsible for the accident which caused the death of MAXIMIANO AYALA.

As aptly pointed out in the Amicus Curiae Brief for the Florida Fruit and Vegetable Association, Petitioners may very well be complaining of benefits that would not even have been paid in any amount but for the Workers' Compensation Act itself.

This is true because of the allegations set forth in Paragraph 5 of the Petitioners' Amended Complaint which basically states that MAXIMIANO AYALA was killed when a vehicle owned and

driven by third party tortfeasors "violently and unexpectedly" struck the vehicle in which MAXIMIANO AYALA was riding. (Appendix to Respondent's Brief at A.2, Paragraph 5)

Therefore, by Petitioners' own admission, the accident appears to be the fault of third party tortfeasors who the Petitioners could have sued within the applicable wrongful death statute of limitation period.

FARM WORKERS rely heavily on Arteaga v. Literski, 83 Wis.2d 128, 265 N.W. 2d 148 (1978) for the proposition that the word "person" refers to all persons, not only citizens or those lawfully admitted. (FARM WORKERS' Brief at Page 7).

What the FARM WORKERS fail to note is that the illegal aliens in Arteaga were residents of the state of Wisconsin as opposed to the Petitioners herein who are non-residents.

FARM WORKERS assert that the construction of the constitutional provision at issue in Arteaga should be applied to Article I, Section 21 of the Florida Constitution. To carry this argument to its logical conclusion would only result in Article I, Section 21 of the Florida Constitution being applied to resident illegal aliens and would have absolutely no effect on the Petitioners herein who are non-resident aliens.

FARM BUREAU completely agrees with this conclusion that aliens in the United States are entitled to constitutional protection. What Petitioners and the FARM WORKERS as amicus curiae have consistently overlooked in their briefs is the distinction between resident aliens and non-resident aliens as evidenced by their unfettered use of cases involving resident

aliens in support of their arguments in favor of the non-resident alien Petitioners. The one has absolutely no applicability to the other.

On Pages 6 and 7 of the FARM WORKERS' Amicus Brief, two New Mexico cases are cited in support of Petitioners' argument. One of these cases is inapplicable and the other has been reversed.

FARM WORKERS first cite the decision of the Supreme Court of New Mexico in Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (N.M. Ct.App. (1976), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976) in support of their argument that the word "person" is all inclusive including within its embrace, non-resident illegal aliens. Torres, like Arteaga, supra, has no application.

Although Torres involved illegal aliens, the holding of the case was that their right to bring a wrongful death act under New Mexico law applied only to those aliens present in the state of Mexico. 553 P.2d at 724.

What is even more interesting is that amicus FARM WORKERS rely on the decision of the New Mexico Supreme Court in Torres, supra, but fail to point out that it was the New Mexico Supreme Court who four years later decided Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980), one of the main cases relied upon by FARM BUREAU. As the Court will recall and as pointed out in FARM BUREAU'S Answer Brief, Pedrazza held that the section of the New Mexico Workers' Compensation Law, which provided no death benefits to non-resident alien dependents, was constitutional. Obviously, in deciding this point, the Pedrazza court was aware of its prior decision in Torres

which FARM WORKERS argue is inapposite. Thus, both Arteaga and Torres involved a resident alien's right to bring a wrongful death act and at least in the case of a subsequent decision in New Mexico, had absolutely no bearing on the question of a non-resident alien dependent's right to receive Workers' Compensation benefits.

Petitioners next cite Gutierrez v. Kent Nowlin Construction Co., 99 N.M. 394, 658 P.2d 1121 (N.M. Ct.App. 1981), rev'd, 99 N.M. 389, 658 P.2d 1116 (1982) for the proposition that illegal aliens have a clear right of access to the courts. Gutierrez has been reversed.

In Kent Nowlin Construction Co. v. Gutierrez, 99 N.M. 389, 658 P.2d 1116 (1982), the Supreme Court of New Mexico relied on its prior opinion in Pedrazza, supra, to support its holding that resident dependents residing outside the United States at the time of the worker's injury are barred from pursuing their common law remedies due to the exclusive remedy provisions under the [Workers' Compensation] Act.

The Court concluded that to hold otherwise would subject employers to unlimited liability and defeat the underlying principals of the Act.

Therefore, in the State of New Mexico, non-resident dependents have no right of recovery from a decedent's employer because they are precluded from recovering death benefits under the Workers' Compensation Act and precluded from maintaining a common law action for wrongful death against the employer under Gutierrez.

FARM WORKERS conclude their analysis by stating that MR. AYALA'S death must not be permitted to extinguish the rights he otherwise would have enjoyed had he suffered less severe injury. Again, this argument is without merit in that the decedent, MAXIMIANO AYALA, has not been denied any benefits. FARM WORKERS continue to confuse the benefits available to an injured worker with those available to his dependents. As pointed out in FARM BUREAU'S Answer Brief:

> The right of a worker's dependents to death benefits is an original and dependent right separate from the worker's right to benefits for injuries he suffers in an industrial accident. The dependent's right is not derived from the right of an employee to compensation benefits (citations omitted). The right to death benefits vests at the death of the worker pursuant to the Workmen's Compensation Act which creates that right. (citation omitted) Since the right to death benefits arises from a statute, it is also subject to the limitations imposed by it. In short, the Act does not deprive the plaintiff of a vested right. What vests is the right defined by the statute itself. Martinez v. Industrial Commission of the State of Utah, 720 P.2d 416 (Utah 1986), at 417, 418.

FARM WORKERS continue to assert that $1,000 under the Workers' Compensation Act does not even approach adequate compensation. In response to this argument, Respondents rely on the Amicus Brief in support of their position filed by the Florida Fruit and Vegetable Association. As stated on Page 7 of said Brief, many of the Petitioners' illustrations of unfairness are inherently defective. FARM WORKERS and Petitioners continue to contend that there is a vast disparity between the $100,000 death benefit available for residents and the $1,000 death benefit available for non-resident dependents. This characterization is

a fallacy as pointed out both in Respondent's Answer Brief and in the Amicus Brief filed by the Florida Fruit and Vegetable Association.

The benefit available to resident dependents is computed under § 440.16 subject to the limits of § 440.12(2). The bottom line is that the Workers' Compensation Act provides a complicated formula for payment of benefits which may not exceed $100,000. As pointed out on Page 7 of the Florida Fruit and Vegetable Association's Amicus Brief, even if the decedent did leave a resident dependent son, that son might only have been entitled to perhaps one week's benefit.

Likewise, if the Petitioner widow, BERTHA PULIDO de AYALA, was not dependent on the Petitioner, she would have received no death benefits, not even $1,000.

Both Petitioners and FARM WORKERS as amicus, continue to refer to the fact that Petitioners have been denied constitutional protections "since they were offered a mere $1,000 pittance along with the empty consolation of speed and certainty." (Amicus Brief of FARM WORKERS at Page 10).

Again, this is a mischaracterization since Petitioners always had available to them a cause of action for wrongful death against the third party tortfeasors, who, as Petitioners state, "violently and unexpectedly" struck the motor vehicle in which the decedent was riding. As such, by Petitioners' own admissions, it is entirely possible that the Respondents herein, as employer and Workers' Compensation carrier for the decedent, may have been wholely without fault. In such an event, the $1,000

benefit tendered by FARM BUREAU is over and above any entitlement to damages to which the Petitioners would be entitled but for the Florida Workers' Compensation Law.

The amicus FARM WORKERS next make a series of incongruous statements. First, on Page 11 of the FARM WORKERS' Amicus Brief it is stated that the distinct nature of Article I, Section 21 requires Florida courts to treat Petitioners' claims differently than in those cases cited by FARM BUREAU in support of the constitutionality of § 440.16(7). In the next breath, the FARM WORKERS cite the decision of the Arizona Supreme Court in Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984) as an example of a state like Florida, with a constitutional provision specifically directed toward preserving an established cause of action.

What the FARM WORKERS fail to note is that another Arizona decision, Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P.2d 1319 (Ariz. Ct. App. 1982), appeal dism'd, 459 U.S. 899, 103 S.Ct. 200 (1982), was a case relied on throughout the course of these proceedings by FARM BUREAU which held a similar provision of the Arizona Workmen's Compensation Law constitutional as applied to non-resident alien dependents.

Specifically, it is noteworthy that the Kenyon court specifically discussed states which contained "open court" provisions in their constitutions including Alabama, Florida, Kentucky and Wyoming. 688 P.2d at 965-966.

> Instead of an open court provision, Arizona has a more specific and stronger requirement. Art. 18, § 6 provides as follows:
>
> > The right of action to recover damages for injuries shall never be abrogated, and the

> amount recovered shall not be subject to any statutory limitation. 688 P.2d at 966 (emphasis added).

The Supreme Court of Arizona, the same state which decided Jalifi, supra, went on to state that:

> Given the specific provisions of the Arizona Constitution--stronger than the open court provisions in the Constitution of South Dakota, Florida, North Carolina, Kentucky and Alabama--we believe that any statute which bars a cause of action before it could legitimately be brought abrogates rather than limits the cause of action and offends Article 18, § 6 of the Arizona Constitution. 688 P.2d at 966-967 (emphasis added)

Thus, the Arizona Supreme Court is on record that their Constitution contains a stronger open court provision than that contained in the Florida Constitution. This is also the same state that decided Jalifi, supra, in which it was held that a provision of the Arizona Workmen's Compensation Law similar to the one at bar was constitutional even though it discriminated as to the amount of death benefits to be paid to non-resident alien dependents. Despite the fact that FARM WORKERS in their Amicus Brief have failed to point out this most interesting anomaly to the Court, FARM BUREAU continues to rely heavily on the Jalifi decision and the other decisions contained within its Answer Brief.

Like Petitioners, amicus, FARM WORKERS attempt to argue supposition which is not in evidence in these proceedings. On Page 14 of the FARM WORKERS' Brief, Petitioners' statement is quoted to the effect that $1,000 would not even cover the cost of a decent Christian burial in Mexico. Whether or not this is a

true statement matters not as it is wholely outside the record and unsupported by any evidence below.

FARM WORKERS finally come to the illogical conclusion that FARM BUREAU has cited no facts or legislative findings to support their argument that resident aliens are more likely to become public charges than non-residents. Perhaps the FARM WORKERS have somehow forgotten or overlooked the fact that "the burden is on the challenger to prove that a statute does not rest on any reasonable basis or that it is arbitrary." Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, (Fla. 1981). It is the Petitioners who have failed to introduce any evidence in support of carrying their burden that the statute is not reasonable, not the Respondents. As stated by the Supreme Court of Utah in Martinez v. Industrial Commission of the State of Utah, 720 P.2d 416 (Utah 1986):

> The statute at issue has been on the books a long time. The Plaintiff offers no evidence that it has had any such effects [of encouraging employers to hire aliens in preference to citizens in order to reduce their exposure to Workers' Compensation claims or that non-resident aliens would be encouraged to join the resident worker so that they could enjoy full benefits if anything happened to the worker]. 720 P.2d at 419.

FARM WORKERS next cite several cases in support of their argument that the $1,000 limit on death benefits available to non-resident alien dependents is inadequate. Like those cases cited by Petitioners in their Initial Brief, those cited by the FARM WORKERS at Page 15 and 16 of their Brief are all cases which involved residents as opposed to non-residents.

The last case cited by the FARM WORKERS is that of the United States Supreme Court in Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59, 98 S.Ct 2620 (1978) in support of their contention that limitations on non-economic recovery are unconstitutional. Again, Duke Power Company involved a limitation of $560 million on liability for nuclear accidents under the Price-Anderson Act. The case involved resident parties and had absolutely nothing to do with Workmen's Compensation. Further, the ultimate holding of Duke Power was that the act in question did not violate either the Due Process or Equal Protection Clause of the United States Constitution.

Likewise, the case of Johnson v. St. Vincent Hospital, 273 Ind. 374, 404 N.E.2d 585 (1980), also cited by FARM WORKERS' in their Amicus Brief, has no application to the case at bar. In fact, the Indiana Supreme Court in Johnson cited the decision of the United States Supreme Court in Duke Power for the proposition that a statutory limitation is clothed with a presumption of constitutionality. 404 N.E.2d at 600.

II. SECTION 440.16(7) FLA. STAT. (1983) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF EITHER THE FLORIDA OR FEDERAL CONSTITUTION.

FARM WORKERS conclude that Article I, Section 2, the Equal Protection Clause of the Florida Constitution, extends to all natural persons. Accordingly, it is concluded that non-resident alien dependents must be included within the definition of said "natural persons" and that therefore the statute in question must violate the Equal Protection Clause.

As set forth in Respondents' Answer Brief, constitutional protections only apply to those natural persons within the territorial jurisdiction to which the Constitution applies and has no application to the Petitioners who reside in the country of Mexico.

Lastly, FARM WORKERS, as did Petitioners, cite the decision of the United States Supreme Court in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982), reh'g denied, 458 U.S. 1131, 103 S.Ct. 14 (1982) for the proposition that the State of Florida cannot discriminate against or classify aliens.

Again, as pointed out by FARM BUREAU in its Answer Brief, the Plyler decision involved resident aliens as opposed to non-resident aliens. In fact, a correct reading of Plyler indicates that the state of Texas was contending that undocumented aliens, because of their immigration status, were not "persons within the jurisdiction" of the state of Texas and that they therefore had no right to the equal protection of Texas law.

In rejecting this argument, the United States Supreme Court reaffirmed the principle that constitutional protections only apply to those "within the boundaries of the state." 457 U.S. at 212.

FARM WORKERS conclude by asserting that there is no rational basis for discriminating against aliens generally because once certain benefits are provided by the state, although not required, they must be distributed in accordance with the Equal Protection Clause. (citing Heckler v. Mathews, 465 U.S. 728, 104

S.Ct. 1387 (1984) and Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309 (1982)).

As set forth on Page 25 of FARM BUREAU'S Answer Brief, both Heckler and Zobel involved non workers' compensation claims by resident citizens and did not involve questions relating to non-resident alien dependents.

CONCLUSION

As stated in the Amicus Curiae brief filed by the Florida Fruit and Vegetable Association, the $1,000 limitation on death benefits to the Petitioners, non-resident alien dependents residing in the country of Mexico, may be unfair, but is not constitutionally infirm. (Amicus Curiae Brief of Florida Fruit and Vegetable Association at Page 1)

Accordingly, the decision of the Fourth District Court of Appeal below should be affirmed in its entirety and the petition for discretionary review dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Roger N. Messer, Esquire and Richard D. Sneed, Esquire, SNEED & MESSER, P.A., attorneys for Petitioners, 700 Virginia Avenue, Suite 104, Fort Pierce, Florida 34982; Ira L. Gottlieb, Esquire, LYONS, BEER, SCHNEIDER, CAMACHO, MACRI-ORTIZ & DUNPHY, Post Office Box 30, Keene, California 93531; Steven Bloom, Esquire, KAPLAN, SICKING & BLOOM, P.A., Suite 200, Forum III, 1657 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401; and H. George Kagan, Esquire, MILLER, HODGES, KAGEN & CHAIT, P.A., 455 Fairway Drive, Suite 101, Deerfield Beach, Florida 33441 this 19 of October, 1987.

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