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. ans STEVE'S HARVESTING, INC.,

Respondents.
_____/

AMICUS CURIAE BRIEF
FOR FLORIDA FRUIT & VEGETABLE ASSOCIATION

H. GEORGE KAGAN, ESQUIRE
MILLER, HODGES, KAGAN & CHAIT, P.A.
455 Fairway Drive, Suite 101
Deerfield Beach, Florida 33441
(305) 428-3422

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SUMMARY OF ARGUMENT

This Amicus Curiae Brief is filed in support of the position taken by Respondents, Florida Farm Bureau Casualty Insurance Co. and Steve's Harvesting, Inc.

In the opinion of your Amicus Curiae, Respondent's Brief makes an appropriate reply to the Petition in every substantive and material respect. In an effort to avoid taxing this Court with unnecessary duplication, your Amicus Curiae has limited its supplementary arguments to observation and comment illuminating the perceived fallacies in Petitioners' presentation while also offering some additional insight, drawn from various philosophical tenets of the Workers' Compensation Law, to buttress further the position taken by the Respondents.

It is readily conceded, in this Amicus Curiae Brief, the statutory death benefit in question may well be "unfair"--but that is not the sine qua non for whether the measure is constitutionally infirm. It is not constitutionally infirm. It is within the purview, and not materially different than, a myriad of other "discriminations" that are intrinsic to social legislation which seeks to obviate, wherever practicable, costly and protracted litigation in individual cases where classifiable, recurring injuries are compensated on the basis of broad and sometimes crude economic and sociological assumptions. The "discrimination" felt by

the Petitioners is not materially different than that encountered by other persons occupying "categories" dealt with by the legislature as we will illustrate, but in the main, all, including Petitioner, will be seen to benefit in large or in small measure from that unique system of trade-offs that characterizes the whole of the Workers' Compensation program.

INTRODUCTORY STATEMENT

This Amicus Curiae Brief is filed by Florida Fruit & Vegetable Association and advances the position taken by the Respondents. The interests of your Amicus Curiae are described in its Motion for Leave to File Amicus Curiae Brief, granted by the Court September 24, 1987.

Every effort will be made in this Brief to avoid duplication of arguments already propounded so as to avoid burdening this Court with repetition. The Respondent's Brief has been reviewed and is found, by your Amicus Curiae, to be a worthwhile and complete argument in reply to the challenge presented through Petitioner's Brief. With the essential substantive arguments thereby put before the Court, your Amicus Curiae limits its role, and offers the Court what it hopes will be illuminating observations and comment drawn from the controversy, in particular, and from the philosophical tenets of the Workers' Compensation Law, in general, to better establish the backdrop against which the central arguments unfold.

ARGUMENT

The $1,000.00 limitation on death benefits to the Petitioners, and those similarly situated, strikes your Amicus Curiae as unfair. It is not, however, constitutionally infirm.

The measure has been spruced up lately--it's up from $1,000.00 to $50,000.00 as of July 10, 1987.[1] Does this vast increase support the equivalent of a party admission by conduct, on the part of the legislature, that the previous measure was fatally defective? It does not--the change is no more an indication of "legislative negligence" than are remedial measures taken by an alleged tort feasor with respect to some place or thing suspected of having caused mischief. An improvement is not evidence of wrongdoing.

The formal scope and social purpose of the remedial legislation known as the Florida Workers' Compensation Law is well known to the Court and in many respects, aptly described by the Respondent, but on a less formal plane, it is in many respects characterized by the single trait that it makes no one happy. That is an unfortunate hallmark of a legislative program designed to make reasonably manageable and uniform the arduous task of discerning what unique impact a classifiable injury might have in recurring cases. This is an indispensable element of a statutory scheme of compensation designed to obviate, wherever practicable, protracted administrative and litigious wrangling. In the process, the legislature is free to make crude economic presumptions. An excellent example is the former schedule of impairment benefits which predated the 1979 "Wage Loss" Reforms. Section 440.15 (3)S, Florida Statutes 1976. When an afflicted employee fell within the

[1]Section 440.16 (7) Laws, 1987, Chapter 330.

schedule, elements bearing on his or her particular earning capacity in a specific case became completely immaterial, and just as the employer could not attempt to show a scheduled injury had no effect on a claimant's earning capacity--the claimant was precluded from showing unique loss resulting from a "scheduled" injury, for the scheduled recovery was conclusively presumed to compensate adequately. Thereby, one who sustained no loss in earning capacity was compensated the same as one suffering a grievous (but less than total) loss--clearly discriminatory, but with a rational basis in its furtherance of an important public purpose. See Mims and Thomas Manufacturing Co. v. Furgeson, 340 So.2d 920, (Fla. 1976).

Petitioners seem to vacillate on whether they feel they have been stripped of "all rights" by the measure in question or whether they are treated unfairly because the benefits in question are so very low, for they use these grievances interchangeably; the two are certainly not the same.[2]

We need not spend a great deal of effort dispelling the notion, oft raised by Petitioners, that they are left bereft of all rights and benefits under the statutory trade-off that characterizes the whole of the Compensation Act. It is important, though, to

[2]Petitioners make reference to a total denial, either expressly or by inference, at Pages 3, 8, 11 of their brief whereas references demeaning the amount of benefits due them as too paltry are found at Petitioners' Brief, Pages 7 and 12.

reiterate some of the rights and benefits that do obtain and inure, either directly or indirectly, to Petitioners' benefit. First, of course, we must define our terms. There are employees, see §440.02 (11) and there are children, §440.02 (5); parents, §440.02 (15); and spouses, § 440.02 (19), Florida Statutes. The Petitioners assert the law unjustly discriminates against "employees from Mexico." (Petitioners' Brief, Page 16) The law does not discriminate against "employees" in any respect. Your Amicus Curiae is given to know the decedent lost his life on the day of the accident but had he lingered in the hospital 1, 50, or 150 days, at enormous intensive care, per diem cost, only then to succumb to his fatal injuries--his estate and his dependents would have been relieved of the economic burden of these extraordinary medical bills which would have been paid in full on behalf of the employee in addition to any and all compensation benefits due during the period of life. Should the employer/carrier have been recalcitrant in accepting benefits, the employee, even through his estate, would have been free to prosecute a claim for the aforementioned benefits and receive attorney's fees from the employer/carrier under appropriate statutory criterion. All of this applies to all employees regardless of race, country of origin or status of dependents.

Qualifying overseas dependents are treated differently than residents, however, but they have had bestowed upon them "some" (versus no) benefits. There is of course the $1,000.00 death benefit and the statutory funeral allowance in the same amount as

pertains to any other employees (and the fact this funeral benefit may be insufficient to cover the transport of any other employee, regardless of where his or her dependents reside, to a home, city, state or land affects all similarly situated Florida employees uniformly).

To further rebut the notion that petitioners are deprived of a wrongful death action without "any" corresponding benefit--your Amicus Curiae raises the question: What wrongful death action? On the one hand, the record is capable of supporting a rather clear inference to the effect there is no conceivable right of action against the employer as gleaned from the circumstances set forth in Paragraph 5, Petitioners' Amended Complaint (Petitioners' Appendix, Pages 1 and 2.[3] There is the distinct possibility the statutory death benefit tendered (and rejected), the funeral allowance paid, and any medical bills generated during the tragic, albeit futile fight for life, regardless of duration, are benefits which the employer has been compelled to pay on account of the negligence of others, while wholly blameless itself. This trade off is continually ignored by the Petitioners throughout their Brief. They may demean the benefits in question--we will address that--but these benefits are not "nothing", for Petitioners may very well be

[3]"The motor vehicle Maximano Ayala was driving was struck violently and unexpectedly by a motor vehicle owned by Larson Dairy, Inc., and driven by one of their employees, Joseph Franklin Bradley. The Larson Dairy motor vehicle failed to stop, yield and grant the privilege of immediate use of the intersection in obedience to a stop sign erected by a public authority."

complaining of benefits that would not be paid in any amount but for the statutory trade offs that characterize the Workers' Compensation program, (i.e. the employer is liable without fault).

Will they be heard to complain of those instances in which there may have been a right of wrongful death action against the employer, assuming such an action does not appear viable in this cause? They have no standing to raise such an argument.

As Respondents point out, however, there is an apparently viable wrongful death action against the negligent third-party tort feasor in this cause--and the Petitioners' rights to proceed against the party causing their damages are vouchsafed to them under that additional part of the trade-offs that represent the Workers' Compensation program known as §440.39, Florida Statutes. In other words, they may collect both under the Workers' Compensation program, for whatever benefits appertain to their status, and then proceed in quest of the full measure of their alleged damages against negligent third parties.

Clearly, they have not been deprived of important rights in exchange for nothing--but is it fair? We have given away the answer at the outset--of course the benefit in question does not strike one as fair. But it is not constitutionally infirm, for in addition to the reasons and authorities set forth by the Respondent, your Amicus Curiae would add the following.

First, it is important to address the fact Petitioners come to this Court with an imperfect understanding of the "full $100,000.00"

benefit, as if it were a check to be meted out, or withheld. It is not. It is a weekly benefit subject to a $100,000.00 maximum and in many cases the maximum is never met--usually through a combination of factors including low compensation rate, the attainment of maturity of minors, etc. Therefor, many of the Petitioners' illustrations of unfairness are inherently defective. As a consequence of this flawed understanding, we see the fallacy where Petitioners state, at Page 18 in the Brief, had the accident occurred 1-1/2 years earlier--by reason of the fact his son would not yet have attained maturity--he would have been entitled to the "full $100,000.00". This is a mistake. He might have been entitled to, perhaps, one week's benefit.

There is no property right here. Referring again, albeit tangentially to what is fair or not; suppose the widow was in this country at the time of the accident and operated a fruit stand or was involved in some other enterprise causing her to be independent of her husband's earnings. The widow, Petitioner, would have received no death benefit, not even $1,000.00. A resident widow or widower not dependent on the decedent for support gets no death benefit. An employee who is very young and without dependents generates no death benefit--as Respondent makes clear through examples and citations to decisional authority in his Brief, Page 40. Are these discriminatory instances unfair? The question is impertinent. Is it fair that a 64-year old near-retiree bestows upon his dependent, based on the statute as presently constituted,

the same death benefit generated by a 20-year old newlywed's job-related death? What the legislature grants by nearly-instantaneous relief, 100% of medical costs, recovery without fault, etc., it extracts in terms of individual inequities stemming from limited recoveries.

Another "benefit" not once mentioned by the Petitioners is the following discrimination favoring the non-resident spouse! Borrowing from our above analogy regarding the widow residing in this country and operating a fruit stand--were she to operate that same fruit stand in her homeland, she would still be entitled to the $1,000.00 death benefit in question because of a trade off which discriminates in favor of dependents in foreign countries. Such non-resident alien dependents living in other countries are given a unique statutory presumption of dependency in exchange for their limited recovery that is not applicable to any United States resident recipient of death benefits (who must, instead, satisfy strict standards of proof of "actual" substantial dependency). The non-resident alien living in another country need only prove support "in whole or in part." Section 440.16 (7), Florida Statutes, 1983. This "mini" statutory trade off within the context of the larger "trade offs" that constitute the whole of Workers' Compensation system is a benefit inuring to the non-resident alien dependent in recognition of the difficulties in administering the claims of foreign dependents difficulties, well established in the Respondent's Brief. A dependent residing in the United States must

satisfy four rigid statutory criterion for substantial financial dependency. See Florida Statutes 440.02 (19), (1983)

Where the Petitioners stray farthest from appropriate comment is in their "brown-skinned" analysis of the legislative enactment in question. Having thought it through and having come up with absolutely nothing beyond the fact a "Canadian" is white and a Mexican is brown-skinned--Petitioner advises this Honorable Court there can be no other basis for the discrimination. How pregnant the rhetoric--how barren the record.

The argument is undone on the same page in Brief in which it is raised. The claimant cites the maximum statutory death benefit in 1935 ($5,000.00). (Petitioners' Brief, Page 17)[4] Why does Petitioner suppose the amount has gone up, for residents, as he states at Page 17 of the Brief, 16 times? An increasing fondness for the white-skinnned? No--the changes are based on differing economic realities--which brings us to the point. According to the comparative international statistics produced by the Statistical Abstract of the United States, 1987 (107th Edition, United States Department of Commerce, 1986) for 1983, the gross national product on a per capita basis, in Mexico, was $1,997.00. In the United

[4]Of course, then, as now, the benefit pertains with equal efficacy to both white-skineed and brown-skinned employees and their dependents just-so long as they reside in Florida at the time of the occurrence. In the same vein, the Petitioners' simplistic argument subsumes brown-skinned people inhabit the whole of the earth outside of Canada--which tracks the apparent import of the statute--this is certainly not the case.

States, that figure, for 1983, was $13,492.00 or 6.8 times that of that per capita equivalent for a Mexican--the country of origin of our Petitioners. Will Petitioner be heard to argue this does not track, with exactitude or anywhere near exactitude, the significant disparity that does admittedly exist between the death benefits in question for residents and non-residents? If we continue with our historical survey of the measure in question, especially recent activity as we have alluded to at the outset, it will be seen the subject is one difficult to approach with anything approximating exactitude under the best of circumstances.

The $100,000.00 death benefit mentioned throughout the Petitioners' Brief was enacted as recently as 1982--a few scant months before the accident. (Laws 1982, Chapter 82-237, Section 2, effective May 1, 1982). The benefit was $50,000.00 the year before that. A one-minute difference made a 100% difference in the treatment accorded "white-skinned" resident dependents.

As we mentioned at the outset, it happens the 1987 legislature has raised the non-resident death benefit from $1,000.00 to $50,000.00. Again, one minute's difference on July 9, 1987 would have a 50-fold consequence. Unfair? Indubitably. Constitutionally infirm? No.

Just as was the case with the schedule for impairment benefits described at the outset of our Brief, so too is there a gross inexactitude in the disparity between the different nations whose dependents are impacted by the Florida death benefit scheme and

their respective economies vis-a-vis the United States--but in the case in question, which is the only case in controversy before the Court, there is a tangible and profound difference in the economic realities of the cost of living in the countries in question--this is not the result of an overactive imagination on the part of your Amicus Curiae. It follows, then, that in real and practical effect--Petitioners would seek for themselves a six-fold windfall above and beyond the level of support given a similarly situated dependent residing in this country. We leave it to the Respondent's Brief to illustrate the differences in the burdens and obligations of a resident in the United States vis-a-vis the cost of living and death benefits as compared with those situated similarly to our Petitioners--but in the larger sense--this is the type of discussion that cannot be made with any comforting degree of reassurance--which is why it is the type of discussion we need not give the Court at all, for, the right invented by the Florida Legislature vests, as Respondent has pointed out for the benefit of the Court, in the degree and in the amount established by the Legislature--and there is no deprivation or taking of a right which does not exist but for the legislative enactment.

Taking the philosophical tenets of the Workers' Compensation Law as has been developed by the Respondent into account--it can be seen there is a rational basis and purpose behind the fact all but nine states and the federal jurisdiction restricts benefits for the non-resident alien in such cases. It is not just a fluke, recently

found out for the first time in the United States in Florida, by our Petitioners. There is a rational basis for the discrimination--Respondent, citing the national treatises, sets this out for the Court's consideration. Under appropriate criterion, the enactment in question is not constitutionally infirm.

CONCLUSION

Based on the foregoing reasons and authorities your Amicus Curiae respectfully requests this Honorable Court act in accord with the prayer issued by the Respondent, which is to say the decision of the District Court of Appeal ought to be affirmed and the petition dismissed.

Respectfully submitted,

MILLER, HODGES, KAGAN & CHAIT, P.A.
455 Fairway Drive, Suite 101
Deerfield Beach, Florida 33441
(305) 428-3422

By: H. GEORGE KAGAN