OIA 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' ANSWER BRIEF

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

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PRELIMINARY STATEMENT

Throughout this brief BERTHA PULIDO DE AYALA will be referred to as Petitioner, MAXIMIANO AYALA as the deceased, and FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY and STEVE'S HARVESTING, INC., as Respondents.

Further, references to the Appendix to Respondents' answer brief will be cited as (A.).

STATEMENT OF THE FACTS AND OF THE CASE

Respondents accept Petitioners' Statement of the Facts and of the Case with the following corrections and exceptions:

First, Petitioners state that in addition to being a Mexican citizen, the decedent, MAXIMIANO AYALA, also legally lived and worked in the United States for approximately 25 years at the time of his death. Although this may be a true statement, it was not alleged in the Amended Complaint, (A. 1-8) and should not be considered by this Court.

Secondly, Petitioners continually refer to the fact that the decedent's son, JOSE AYALA, was a natural born United States citizen, although admittedly not a minor at the time of his father's death. This assertion is completely outside of the record on appeal and is completely irrelevant because the Petitioners have made no allegation in their Amended Complaint below, (A. 1-8) that JOSE AYALA was dependent upon the decedent sufficient to bring him within the purview of Section 440.16(7) Fla. Stat. (1983).

Next, Petitioner, BERTHA PULIDO DE AYALA, states that at the time of her husband's death, she was a Mexican resident and citizen but held a "green card" which allowed her to legally live and work in the United States. Again, this statement, like the others set forth above, is nothing more than the proverbial "red herring" in that it was not alleged in the Amended Complaint and is contained nowhere in the record on appeal. (A. 1-8)

Petitioners also refer to the fact that they have made demand upon the Respondent, FLORIDA FARM CASUALTY INSURANCE COMPANY, for the One Hundred Thousand Dollar ($100,000.00), to be paid pursuant to Chapter 440, Fla. Stat. (1983). This fact is also in error as Section 440.16(1) does not provide for a lump sum death benefit of One Hundred Thousand Dollar ($100,000.00), but rather provides a formula for compensation to be paid to dependents of a deceased worker, which compensation shall not exceed One Hundred Thousand Dollars ($100,000.00) (emphasis added).

Lastly, Petitioners attempt to cloud the issues in this case by portraying this matter as one involving racial discrimination.

> The racial differences between Mexicans and Canadians are obvious. The effect of the statute is that fair-skinned Caucasian Canadians are given the same benefits as United States citizens while brown-skinned Mexican aliens are denied them. (Petitioners' Initial Brief at 16-17).

Again, Respondents take issue with this statement as this case has nothing whatsoever to do with race. As stated by the Supreme Court of Utah in Martinez v. Industrial Commission of the State of Utah, 720 P.2d 416 (Utah 1986), "[T]he statute is not based on race at all. It applies to the citizens of all countries except Canada, unless a treaty overrides it." 720 P.2d at 418.

With the exception of the above assertions which are not supported by the evidence and which are wholly outside the record in this case, Respondents accept the Petitioners' Statement of the Facts and of the Case.

SUMMARY OF ARGUMENT

Section 440.16(7) Fla. Stat. (1983) was held by the trial court to be unconstitutional under the Due Process and Equal Protection Clauses of both the Constitution of the United States and the Constitution of the state of Florida.

The trial court did not find that said section violated Article I, Section 21 known as the "access to courts" provision of the Florida Constitution and it should not therefore be considered by this Court. However, Respondents contend that in any event, said statutory section does not violate Article I, Section 21 of the Florida Constitution.

First, the statute in question provided for a death benefit to nonresident alien dependents other than Canadians and United States citizens in the amount of $1,000. Respondents contend that both the Constitution of the United States and the Constitution of the state of Florida are territorial in their application and only apply to those residents, whether aliens or citizens, within the territorial boundaries of the United States or of the state of Florida. Johnson v. Eisentrager, 339 U.S. 763 (1950). Accordingly, because nonresident aliens are not entitled to the protection of either the United States or the Florida Constitutions, it is permissible to discriminate against said nonresident aliens.

Further, there is no deprivation of Due Process because a nonresident alien dependent's right to compensation is a statutory privilege and not a protected property right.

Therefore, the Florida Legislature is under no constitutional obligation to provide any death benefits whatsoever to nonresident alien dependents. Because there is no constitutional obligation to provide any death benefits to nonresident alien dependents, it matters not whether they are given a statutory gratuity of one dollar or one thousand dollars.

Assuming arguendo that the Equal Protection Clauses of the United States and Florida Constitutions apply to the Petitioners, the statute in question would not violate constitutional guarantees. Because the Petitioners are nonresident alien dependents, not subject to our laws, not dependent upon our institutions and peoples, and not likely to become public charges or wards within the United States, a rational basis test as opposed to a strict scrutiny test is the appropriate standard for review. Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P.2d 1319 (Ariz. Ct. App. 1982), appeal dism'd, 459 U.S. 899 (1982).

The above are legitimate reasons for the Legislature to discriminate against nonresident alien dependents who share none of the duties and burdens which resident aliens have in common with citizens of the United States. Further, the burden to prove that a statute does not rest on any reasonable basis or that it is as arbitrary is on the challenger. Petitioners herein have not met said burden and

have offered no evidence in this proceeding to support such a challenge.

Lastly, Petitioners contend that the statute in question violates Florida's access to courts clause contained within Article I, Section 21 of the Florida Constitution. As stated above no provision of the Florida Constitution has application to nonresident alien dependents outside the territorial boundaries of the state of Florida.

Assuming arguendo that Article I, Section 21 did apply, there has been no showing that a reduced death benefit in the amount of $1,000 is unreasonable given the Petitioners nonresident alien status as residents of the Republic of Mexico.

Additionally, the Petitioners' right to bring a wrongful death action has not been totally abolished and the Legislature is therefore not required to provide a reasonable alternative pursuant to the test set forth by this Court in Kluger v. White, 281 So.2d 1 (Fla. 1973). The death benefits provided to workers' dependents by statute supplement the Florida Wrongful Death Act during the period of the employer/employee relationship. A wrongful death action is still available against third party tort-feasors and is still available against the employer if the employee is not killed while in the course and scope of his employment.

Paragraph 5 of the Petitioners' Amended Complaint below specifically alleges that the death of MAXIMIANO AYALA was

caused by the negligence of a third party tort-feasor, to wit: Joseph Franklin Bradley, an employee of Larson Dairy, Inc. (A. 2). Therefore, the Petitioners may still sue said third party tort-feasor. The Petitioners' right to bring an action against either Joseph Franklin Bradley or Larson Dairy, Inc., has never been abolished.

For all of the reasons set forth above and as further set forth in this Brief, Respondents urge this Court to uphold the constitutionality of Section 440.16(7) Fla. Stat. (1983) as applied to the Petitioners herein.

ARGUMENT

I. SECTION 440.16(7) FLA. STAT. (1983) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF EITHER THE UNITED STATES OR FLORIDA CONSTITUTIONS.

Section 440.16(7) Fla. Stat. (1983) provided:

> Compensation under this Chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, the surviving mother or father whom the employee has supported, either wholly or in part, for the period of 1 year prior to the date of the injury, and except that the Deputy Commissioner may, at the Deputy Commissioner's option, or upon the application of the insurance carrier, to commute all further installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such further installments of compensation as determined by the Deputy Commissioner and provided further that compensation to dependents referred to in this sub-section shall in no case exceed $1,000.00. (emphasis added)[1]

The so-called Equal Protection Clause of the Florida Constitution is contained within Article I, Section 2 and provides:

> All natural persons are equal before the law and had inalienable rights, among which are the rights to enjoy and defend life and liberty, to pursue happiness, to be rewarded

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[1] Effective July 1, 1987, Section 440.16(7) has been amended to provide a $50,000 cap on death benefits to nonresident alien dependents other than Canadians in place of the $1,000 cap contained in the 1983 version. See, Chapter 87-330, Laws of Fla. (1987).

> for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Similarly, the so-called Equal Protection Clause of the United States Constitution is contained within the Fourteenth Amendment and provides in relevant part:

> Section One. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners contend that the Legislature discriminated unjustly and without cause against employees from Mexico as opposed to employees from Canada, but offer no factual support for this assertion.

Initially, Respondents would point out that the statutory section in question applies only to nonresident alien dependents. This factual distinction is of great importance in determining the constitutionality of the statute.

Nonresident alien dependents have been made the subject of special statutory rules in all but nine states. See, generally, Larson, Law of Workmen's Compensation, § 63.51 (1987).

> Five states expressly include nonresident aliens on equal terms with other dependents; five states exclude them from benefits altogether. Most of the rest provide for reduced benefits or the commutation of benefits to a lump sum on a reduced basis, and many restrict the classes of beneficiaries. Residents of Canada are usually accepted. Id. at § 63.51 P. 11-183, 11-184 (emphasis added)

Professor Larson goes on to state that most of the special rules discriminating against nonresident alien dependents are the result of the awkward problem of proof and continuing administration in foreign countries that is unavoidably present in many of those cases. Such difficulties include remanding the case back to the country of residence of the nonresident dependent for findings of fact. See, e.g. Catelli v. Bayonne Associates, Inc., 3 N.J. Super 122, 65 A.2d 617 (1949) and 99 C.J.S. Workmen's Compensation, § 132 (1958).

A. Section 440.16(7) Fla. Stat. (1983) Is Patterned After The United States Longshoremen And Harbor Workers' Compensation Act, 33 U.S.C § 909(g) (1978).

The United States Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 909(g) (1978) provides:

> Aliens: Compensation under this chapter to aliens, not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother who the employee has supported either wholly or in part for the period of one year prior to the date of the injury and accept that the Secretary may, at his option, whereupon the application of the insurance carrier shall, commute all

> future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary. (emphasis added)

It is noteworthy that the section in question, Section 440.16(7) is virtually identical to the federal version, but for the $1,000.00 cap in Florida.

The Fourth District Court of Appeal below determined that the right to compensation is not a fundamental right under either the Florida or United States Constitution but is rather a statutory privilege. See, Florida Farm Bureau Casualty Insurance Co. v. Ayala, 501 So.2d 1346, 1348 (Fla. 4th DCA 1987). See, also, Travelers Insurance Co. v. Sitko, 496 So.2d 920 (Fla. 1st DCA 1986) (Workers' Compensation is purely a creature of statute).

The Congress of the United States had good reason to treat citizens of Canada differently from citizens of other countries with respect to workers' compensation benefits when it enacted 33 U.C.S § 909(g) on March 4, 1927, by Chapter 509 § 9, 44 Stat. 1429. A review of the history of Chapter 33 U.S.C. § 909(g) indicates that witnesses at the Legislative hearings discussed the problems of dealing with mixed crews, i.e., U.S. and Canadian ships in the Great Lakes. The discussion evidently centered on the fact that Canadian and United States seamen serving on those ships should receive the same benefits.

Both 33 U.S.C. § 909(g) and § 440.16(7) Fla. Stat. (1983) make an exception for Canadian citizens. Clearly

this is not an unreasonable distinction given the fact that the United States and Canada share one of the largest unprotected borders in the entire world. Additionally, when one considers the many treaties that the United States has had over the years with Canada and presently has, this distinction is not only easily understood but well founded as well.[2]

Further, although the decision of the Fourth District Court of Appeal below is the first determining the constitutionality of Section 440.16(7), the corresponding section of the federal act has apparently withstood such a challenge.

In Calloway v. Hanson, 295 F.Supp. 1182 (Haw.D. 1969), the appellant, Mrs. Calloway was a resident of San Salvador, El Salvador, Central America, and was the widow of Van Calloway who was killed on October 5, 1966. She filed proceedings to obtain compensation benefits under the Defense Base Act contained in 42 U.S.C.A. § 1652(b) which provided in relevant part that:

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[2] The following is a small and partial list of past and present treaties between the United States and Canada:

Boundary and Waters Treaty of 1909, 36 Stat. 244, 8, between Canada and the United States; Extradition Treaty With Canada, 27 U.S.T. 985, T.I.A.S. 8237 (1974); Tax Treaty With Canada, 36 Stat. 1399 (1942); Tax Treaty With Canada, 59 Stat. 915 (1944); Webster-Ashburton Treaty, 8 Stat. 572 T.S. No. 119 signed by Great Britain and the United States in 1842 and incorporated into subsequent conventions with Britain and Canada; Treaty on Extradition, December 3, 1971, United States and Canada, 27 U.S.T. 983, T.I.A.E. 8237; Treaty Between United States and Canada For The Preservation of The Halibut Fishery of the Northern Pacific Ocean and Bearing Sea, March 2, 1953; Treaty Between United States and Canada known as the "Great Lakes Agreement", February 21, 1952, 3 U.S.T. 4926, T.I.A.S. 2666; (continued on page 12)

> Compensation. . . . for death under this chapter to aliens and non-nationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents except that dependents in any foreign country shall be limited surviving wife and child or children, or if there be no surviving wife and child or children, to surviving father or mother whom the employee has supported either wholly or in part in the period of one (1) year immediately prior to the date of the injury, and accept that the Secretary of Labor may, at his option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens or non-nationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary (emphasis added).

In Calloway, the widow's benefits had been commuted because she was a nonresident alien dependent just like BERTHA PULIDO DE AYALA in the case at bar. Mrs. Calloway contended that Congress intended the dependents of the United States citizens to receive full benefits regardless of their nationality.

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[2](con't) Treaty Between United States and Canada Concerning Uses of the Water of Niagra River, February 27, 1950, 1 U.S.T. 694; Treaty on the Protection of Migratory Birds Concluded Between the United States and Great Britain on Behalf of Canada on August 16, 1916, 39 Stat. 1702, T.I.A.S. No. 628; Treaty Between United States and Canada Defining Certain Waters on the West Coast of North America as Sheltered Waters, dated December 9, 1933; Boundary Water Treaty Between the United States and Canada of 1909, 36 Stat. 2448; United States and Canadian Great Lakes Water Quality Agreement of April 15, 1972, United States Treaties and Other International Agreements Vol. 23, Part 1, 1972; Treaty on Income Tax Convention and Protocol Between Canada and United States, August 18, 1937, 50 Stat. 1399, T.S. No. 920; Treaty on Double Taxation Between United States and Canada, November 21, 1951, 2 U.S.T. 2235, T.I.A.S. No. 2347.

In upholding the Department of Labor, the United States District Court for the District of Hawaii held that compensation payable by reason of death to dependents and the phrase "to be paid to such aliens" as used in the statute referred to the status of the payee rather than to the status of the employee.

> It is probably significant to hold that the language used in 42 U.S.C.A. § 1652(b), supra, was not new in the language, but will be found almost verbatim in the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C.A. § 909(g) first enacted March 4, 1927. 295 F.Supp. at 1184.

Likewise, in the case at bar, it is the status of the payee rather than the status of the employee which determines the amount of the benefits to be received. As in Calloway, the payees in the instant case are nonresident aliens who are entitled to a lesser benefit than resident aliens.

The Calloway court went on to hold that the Secretary of Labor's decision in discriminating against a nonresident alien dependent would be upheld because:

> The principals of law abided by the Deputy Commissioner are not forbidden by law, are not without any reasonable legal basis, and are not invalidated by any formal principal of law. Id. (citations omitted) (emphasis added).

The Longshoremen and Harbor Workers' Compensation Act has contained the Canadian distinction since 1927. The statute in question, Section 440.16(7), is virtually identical to the federal act and one would assume copied almost verbatim from the federal act since the Florida version was

enacted some eight years later. See, Ch. 17481, Laws of Fla., § 16 (1935).

Further, prior to the adoption of § 909(g) of the Longshoremen and Harbor Workers' Compensation Act, the United States Supreme Court in Liberato v. Royer, 270 U.S. 535 (1926), affirmed the denial of benefits under the Workmen's Compensation Act of Pennsylvania to alien parents not residents of the United States.

B. The Rights Guaranteed By The Fourteenth Amendment Of The United States Constitution Only Apply To Those Persons Residing Within The Territorial Boundaries Of The United States.

It has long been held that the rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution only apply to those persons residing in the territorial boundaries of the United States and therefore within the jurisdiction of the Constitution. See, Johnson v. Eisentrager, 339 U.S. 763 (1950).

This proposition has recently been affirmed by both the Fifth Circuit Court of Appeals prior to the formation of the Eleventh Circuit and by the United States Supreme Court. In DeTenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975), cert. denied 423 U.S. 877 (1975), the Court stated that:

> Resident aliens, lawfully in the United States, are undoubtedly entitled to the equal protection of the law, Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). It is equally obvious that the Fourteenth Amendment, by its own terms, has no application to aliens not within the jurisdiction of the United States. 510 F.2d at 101. (emphasis added)

Similarly, in Plyler v. Doe, 457 U.S. 202 (1982), reh. denied, 458 U.S. 1131 (1982), the United States Supreme Court considered territorial application of the Fourteenth Amendment. In Plyler, Mexican children who had entered the United States illegally but who resided in Texas sought injunctive and declaratory relief against exclusion from public schools in Texas. The state contended that undocumented aliens because of their immigration status were not "persons within the jurisdiction" of the state of Texas and they therefore had no right to the equal protection of Texas law.

In rejecting this argument the United States Supreme Court reaffirmed the principal that both the Equal Protection and Due Process Clauses of the United States Constitution applied to illegal and legal aliens who were residents of the United States.

> In concluding that "all persons with the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of the state. (citation omitted) Our cases applying the Equal Protection Clause reflect the same territorial theme. . . 457 U.S. at 212.

C. Other States Have Expressly Upheld Similar Constitutional Challenges To Provisions of Their Workers' Compensation Laws.

The states of Connecticut, Arizona, New Mexico and Utah have all upheld constitutional challenges similar to the one

at bar against provisions of their workers' compensation laws which provided for either no death benefits or reduced benefits to nonresident alien dependents of deceased workers other than those from the United States or Canada. See, Frasca v. City Coal Company, 97 Conn. 212, 116 A. 189 (1922); Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980); Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P.2d 1319 (Ariz. Ct. App. 1982), appeal dism'd, 459 U.S. 899 (1982); and Martinez v. Industrial Commission of the State of Utah, 720 P.2d 416 (Utah 1986).

In its opinion below, the Fourth District Court of Appeal cited Pedrazza and Jalifi for the proposition that the rights contained within the Florida and United States Constitutions do not extend to those outside the state or outside the jurisdiction of the United States.

If anything, the decision of the trial judge below supports this conclusion, insofar as the trial court specifically relied upon the Equal Protection Clause contained in the Fourteenth Amendment of the United States Constitution and specifically relied on that portion which provides that "no state shall. . . deny to any person within its jurisdiction the equal protection of the laws." (A. 17) (emphasis added)

In Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980), the Supreme Court of New Mexico held that a section of the New Mexico Workmen's Compensation

Law which denied any benefits to nonresident alien dependents was constitutional. As in the case at bar, the argument against constitutionality was that the section in question violated the due process and equal protection clauses of both the New Mexico and the United States Constitutions. The statute in question provided in relevant part that:

> [No] claim or judgment for compensation, under this act (citation omitted) shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman. 607 P.2d at 599.

As did the Fourth District Court of Appeals below, the Pedrazza court pointed out that the right to workmen's compensation is not a fundamental right nor did the claimant have a vested property interest under the New Mexico Workers' Compensation Act since dependent's benefits arise out of and may only be received as specified by statute. Because the New Mexico Legislature had conferred no property right upon the nonresident alien claimants, there was no deprivation of due process.

Likewise, the Pedrazza court concluded there was no deprivation of equal protection since nonresident aliens were beyond the reach of the equal protection clause which extended only to any person within the state's jurisdiction.

In Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P.2d 1319 (Ariz Ct. App. 1982), appeal dism'd, 459 U.S. 899 (1982), the Arizona Court of Appeals in a well reasoned and detailed opinion had occasion to decide

a constitutional challenge to a similar provision of the Arizona Workmen's Compensation Act. The Arizona Act provided that death benefits to nonresident alien dependents were to be paid at a rate of 60 percent of the amounts paid to resident dependents.

In holding that the statute in question did not violate the Equal Protection Clause of the United States Constitution, the Arizona Court of Appeals concluded that the status of a suspect class was not afforded to nonresident aliens who were outside of the jurisdiction of the Constitution, citing the United States Supreme Court's decision in Johnson v. Eisentrager, supra.

The Jalifi court went one step further and stated that even though the Equal Protection Clause did not apply to the claimant therein, they would have decided the case in the same way, even if they assumed that the Equal Protection Clause did apply because the statutory provision in question did not violate it.

The court noted that alien-based classifications have historically been subject to a strict scrutiny test as opposed to a rational basis test for purposes of an equal protection analysis. The court researched several past decisions and concluded that "[T]he underlying rationale of those decisions is that resident aliens, like citizens, 'pay taxes, serve in the military and contribute to economic growth'" (citations omitted) 644 P.2d at 1321 (emphasis in original).

The Court summarized by noting that those cases calling for strict scrutiny of alien status were the result of statutes which obstructed the normal affairs of resident alien life wherein those resident aliens bore the burdens imposed by society but could not receive all the benefits.

In applying this argument to Mrs. Jalifi, the Arizona Court stated that:

> Petitioner was not a resident of the United States on the date of her husband's death. In fact, since her marriage to Miguel Jalifi, petitioner has always resided in Mexico. Petitioner therefore shares none of the 'duties and burdens' which resident aliens have in common with citizens of the United States. 644 P.2d at 1322. (emphasis added)

The Arizona Court then held that the Constitutional challenge must be analyzed in accordance with the rational basis test and it was incumbent upon the appellant to establish that the statute as applied to her was arbitrary and could not be justified under any reasonable set of facts.

Likewise, in the case at bar, Petitioners have urged that this Court adopt a strict scrutiny analysis of their equal protection claims. Clearly, in light of Jalifi a strict scrutiny analysis would be inappropriate in that Petitioners are all outside of the territorial boundaries of both the State of Florida and of the United States and are therefore outside the jurisdiction of both the United States and Florida Constitutions.

Further, assuming arguendo that the Equal Protection Clauses of both the Florida and United States Constitutions

even applied, a rational basis test is more appropriate than a strict scrutiny test in that the Petitioners share none of the duties and burdens which resident aliens have in common with citizens of the United States and of the state of Florida.

In addressing Mrs. Jalifi's claims, the Arizona Court next determined whether or not the statute in question served a legitimate state interest which could be reasonably justified. The Court concluded that the Act reasonably distinguished between resident aliens who were more likely to become public wards without full benefits and nonresident aliens who probably would not become public charges due to their nonresident states.

This conclusion appears to be in harmony with the conclusion reached by this Court in McCoy v. Florida Power & Light Company, 87 So.2d 809 (Fla. 1956) that the Workmen's Compensation Law was designed to prevent those who depend on the workers' wages from becoming charges on the community. Clearly, resident aliens are more likely to become charges or public wards than nonresident aliens residing in foreign countries.

As an additional ground for upholding the statute, the Jalifi Court noted that the cost of living in most foreign countries was substantially less than in the United States. Moreover, as a third ground for upholding the statute, the Jalifi court cited Larson, supra, for the general proposition that most of the special rules applied to nonresident

aliens were the result of the awkward problems of proof in continuing administration in foreign countries that is unavoidably present in those types of cases.

The most recent pronouncement by a state Supreme Court on the issues at bar was that of the Supreme Court of Utah in Martinez v. Industrial Commission of the State of Utah, 720 P.2d 416 (Utah 1986). There, the Supreme Court of Utah upheld similar constitutional challenges to a statute which provided in part:

> When any alien dependent of the deceased resides outside of the United States of America and any of its dependencies and Canada such dependent shall be paid not to exceed one-half the amount provided herein. 720 P.2d at 417 (emphasis added).

In asserting that the statute was unconstitutional because it denied her equal protection of the law, the plaintiff therein, Mrs. Martinez, like the Petitioners herein, attempted to cloud the issue by contending that the Utah Act racially discriminated against Mexicans because it allowed Canadian nonresident alien dependents full death benefits while reducing the death benefits due residents from all other countries.

The Martinez Court noted that "the statute is not based on race at all. It applies to the citizens of all countries except Canada, unless a treaty overrides it." Id. at 418.

Like the Jalifi Court, the Utah Supreme Court noted that the Equal Protection Clause only applied to aliens who resided within the territorial jurisdiction of the state.

Like the Petitioners herein, the plaintiff in Martinez argued that the New Mexico statute at issue in Pedrazza was distinguishable because it did not provide for any death benefits to nonresident alien dependents. Mrs. Martinez, like the Petitioners herein, contended that a partial payment of benefits to a nonresident alien established an adequate "nexus" between the state and the nonresident alien sufficient to assert application of the Equal Protection Clause.

In disposing of this argument, the Martinez Court held that:

> The argument is without merit; if the state were to grant no death benefits to non-resident aliens whatsoever, there would be no nexus and no denial of equal protection. There is no basis in reason for the position that the Fourteenth Amendment is not applicable when the discrimination is complete but is applicable when the discrimination is only partial. Id. at 419.

Prior to the adoption of Section 440.16(7) as first enacted in 1935 by the Florida Legislature and prior to the adoption of Section 909(g) of the Longshoremen and Harbor Workers' Compensation Act, the Supreme Court of Connecticut also had occasion to address a constitutional challenge to a statute similar to the one at bar.

In Frasca v. City Coal Company, 97 Conn. 212, 116 A. 189 (1922), a widow attempted to obtain death benefits under the Connecticut Workmen's Compensation Act for the death of her husband who was employed by the City Coal Company. At the time of the husband's death, the widow was a resident

and citizen of the country of Italy and claimed that she was not subject to the provision of the Connecticut Act which limited compensation to alien dependents to one-half of the amounts indicated in the Act unless such dependents were residents of the United States or Canada.

> If he was a citizen his nonresident alien dependents may be awarded only one-half the compensation indicated in the Act for his resident dependents; if he was an alien, his nonresident alien dependents would be treated in the same manner. The restriction affects the alien dependents of nationals and Italians alike. There is no discrimination unfavorable to the subjects of Italy or any foreign country because of nationality. The resident alien dependents of any nationality are not affected. The alien dependent who resides in a foreign country might reasonably be regarded by the Legislature less favorably than the alien who lives in our country, subject to our laws and conditions of living, and dependent for protection, and perhaps upon our institutions and our peoples. 116 A. at 192 (emphasis added).

In the instant case, as in Frasca, the Florida statute, like the Connecticut statute, does not discriminate against the worker himself whether or not he is a citizen or a resident alien. Further, resident alien dependents of any nationality are entitled to the full benefits envisioned by Chapter 440, Fla. Stat. It is the nonresident alien dependent residing in a foreign country who is treated less favorably than the alien who lives in our state. As the Frasca Court pointed out, such a nonresident alien dependent might reasonably be regarded by the Legislature less favorably than a resident alien presently residing in our country, subject to our laws and conditions of living, and

dependent for protection and perhaps upon our institutions and our peoples. 116 A. at 192.

Further, "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, 367 (Fla. 1981). Nowhere in the record on appeal is there any evidence whatsoever that the Petitioners have met this burden of proof. There has not been one shred of evidence introduced into this proceeding either below or on appeal which would prove that the statue in question in unreasonable or arbitrary. As stated by the Supreme Court of Utah in Martinez, supra:

> The plaintiff further asserts:
>
> > First, employers might be encouraged to seek out and hire aliens in preference to citizens in order reduce their exposure to workers' compensation claims. Second, nonresident aliens may be encouraged to join the resident worker so that, should anything happen to the worker, they could enjoy full benefits. Third, aliens may not come to Utah to work.
> >
> > The statute at issue has been on the books a long time. The plaintiff offers no evidence that it has had any such effects. Nor does she demonstrate how such effects would interfere with federal statues or policy. 720 P.2d at 419 (emphasis added).

Just as in Martinez, the Petitioners in the case at bar have offered no evidence that our statute, which has been on the books since 1935, has had any of these effects.

D. Every Case Cited By Petitioners In Support Of Their Arguments Involved Resident Aliens As Opposed To Nonresident Alien Dependents.

Petitioners cite the decisions of the United States Supreme Court Heckler v. Mathews, 465 U.S. 728 (1984) and Zobel v. Williams, 457 U.S. 55 (1982) for the proposition that once benefits are provided by a state they must be distributed in accordance with the Equal Protection Clause. Heckler did not involve any questions relating to nonresident alien dependents but rather involved a class action brought by a retiree concerning pension offset provisions in the Social Security Act. Likewise, Zobel did not involve a question or issue relating to nonresident alien dependents.

As has been pointed out above, the Equal Protection Clause does not extend to nonresident alien dependents. Johnson V. Eisentrager, and Plyler v. Doe, supra. Further, since nonresident alien dependents are not entitled to due process or equal protection under the law, Petitioner's statement that while "certain benefits may not be required to be provided by the state, once they are provided, they must be distributed in accordance with the Equal Protection Clause" is clearly in error. As pointed out by the Supreme Court of Utah in Martinez, supra,

> [i]f the state were to grant no death benefits to nonresident aliens whatsoever, there would no be nexus and no denial of equal protection. There is no basis in reason for the position that the Fourteenth Amendment is not applicable when the discrimination is complete, but is applicable when the discrimination is only partial. 720 P.2d at 416.

Petitioners next contend that in addition to being unconstitutional, Section 440.16(7) Fla. Stat. (1983) violates the public policy of the state of Florida in that it encourages the hiring of alien labor over the hiring of American citizens. There is absolutely no testimony or evidence in the record below which would tend to support this bold assertion. As set forth above, 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, 367 (Fla. 1981). Further, the Supreme Court of Utah in response to a similar argument stated that

> 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 the hiring of alien labor over American citizens] Nor does she demonstrate how such effects would interfere with federal statutes or policy. 720 P.2d at 419.

Petitioners next cite several decisions of the United States Supreme Court in support of their proposition that aliens constitute a "suspect class" and that any state statutes which discriminates against aliens must satisfy the requirements of a "strict scrutiny" analysis. In support of this proposition, Petitioners cite Graham v. Richardson, 403 U.S. 365 (1971), Nyquist v. Mauclet, 432 U.S. 1 (1977), appeal dism'd, Rabinovitch v. Nyquist, 433 U.S. 901 (1977), In re Griffiths, 413 U.S. 717 (1973) and Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948).

Each of the cases cited above by Petitioners in support of their argument involved claims by resident aliens. None of the cases involved the question of nonresident aliens.

Petitioners next cite In re Estate of Fernandez, 335 So.2d 829 (Fla. 1976) for the proposition that this Court has also held unconstitutional a statute which discriminates against aliens. Again, Fernandez involved resident aliens and had nothing whatsoever to do with nonresident alien dependents.

Petitioners next cite Plyler v. Doe, supra, for the proposition that states enjoy no power with respect to the classification of aliens and therefore may not discriminate between Canadian aliens and Mexican aliens. Again, Petitioners confuse the obvious. As pointed out above, Plyler involved resident illegal alien school children and had nothing whatsoever to do with nonresident alien dependents who do not enjoy the protection of either the Florida or United States Constitution.

Petitioners next cite the decision of the Kansas Supreme Court in Vietti v. George K. Mackie Fuel Co., 109 Kan. 179, 197 P. 881 (1921) for the proposition that a statute which provided a reduced death benefit to alien dependents of a deceased workman was unconstitutional. Again, like all of the other cases cited by Petitioners, Vietti involved resident aliens and had nothing to do with nonresident alien dependents.

Lastly, Petitioners attempt to distinguish Jalifi, supra, by contending that the Arizona statute provided for a payment of sixty percent of the funds otherwise payable while the Florida Statute provides for a payment of $1,000.00.

As set forth above, the right to workmen's compensation benefits is a statutory privilege which need not be accorded at all to nonresident alien dependents. The $1,000.00 amount set forth in the Florida statutes is a gratuity not required by law.

II. SECTION 440.16(7) FLA. STAT. (1983) DOES NOT VIOLATE EITHER THE DUE PROCESS CLAUSE OF EITHER THE UNITED STATES OR FLORIDA CONSTITUTIONS.

The so-called Due Process Clause of the Constitution of the United States of America is contained within the Fourteenth Amendment which provides in relevant part:

> Section One. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

Similarly, the Due Process Clause of the Constitution of the state of Florida is contained within Article I, Section 9 and provides:

> No person shall be deprived of life, liberty or property without due process of law or

twice be put in jeopardy for the same offense or be compelled in any criminal matter to be a witness against himself.

A. The Rights Guaranteed By The Due Process Clauses Of The United States Constitution And The Florida Constitution Only Apply To Those Persons Residing Within The Territorial Boundaries Of The United States Or The State Of Florida.

As set forth above, constitutional provisions of both the federal or state constitutions only apply to those persons within the territorial jurisdiction of the United States or of a particular state. See, Johnson v. Eisentrager, supra; DeTenorio v. McGowan, supra; Plyler v. Doe, supra; Jalifi, supra; and Martinez, supra.

B. The Right To Compensation Pursuant To Section 440.16(7) Fla. Stat. Is Not A Protected Property Right But Rather A Statutory Privilege.

As pointed out by the decision of the Fourth District Court of Appeals below,

> [T]he general rule is that "[n]onresident aliens are entitled to compensation the same as resident citizens except as otherwise provided by the statute". quoting 99 C.J.S. Workmen's Compensation § 132 (1958) 501 So.2d at 1348 (emphasis in original).
>
> Workers' Compensation is entirely a creature of statute and must be governed by what the statute provides, not by what the deciding authorities feel the law should be. J.J. Murphy & Son, Inc. v. Gibbs, 137 So.2d 553, 563 (Fla. 1962). See, Gregutis v. Waclark Wire Works, 86 N.J.L. 610, 611 92 A. 354 (1914). . . the right to compensation is not a fundamental right under either the Florida or United States United States Constitution; the right to compensation under Chapter 440 is a statutory privilege. Further, the rights contained within the constitutions do not extend to those outside the state or

> outside the jurisdiction of the United States. (citations omitted). Id.

As was the case in Pedrazza, supra, the Petitioners herein do not have a vested property interest under Chapter 440 Fla. Stat. because benefits under workers' compensation acts arise out of and may only be received as specified by statute.

Perhaps this concept was best explained by the Supreme Court of Utah in Martinez, supra.

> A dependent's right to workmen's compensation death benefits is created and defined by statute. (citation omitted). The right of a worker's dependents to death benefits is an original and independent 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 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. 720 P.2d at 417, 418. (emphasis added)

Petitioners cite Tomayko v. Thomas, 143 So.2d 227 (Fla. 3d DCA 1962) for the proposition that the Due Process Clause includes workers' compensation proceedings. As set forth above, this assertion is clearly not the law in the state of Florida. Further, Tomayko involved an appeal from an order directing a judgment creditor's wife to pay over certain money which she allegedly held in trust for the judgment creditor.

Next, Petitioners attempt to distinguish Jalifi, supra, by contending that the Arizona statute provided for a payment of sixty percent of the funds otherwise payable while the Florida statute provides for a payment of one percent of the funds otherwise payable.

Petitioners contend that this is a denial of her due process rights since she has been denied a property right without due process of law.

Again, as perhaps best expressed by the Supreme Court of Utah in Martinez, supra, this argument has no merit because there would be no denial of constitutional protections if a state were to grant no death benefits to nonresident aliens because there would be no nexus between the state and the nonresident alien dependent.

Thus:

> There is no basis in reason for the position that the Fourteenth Amendment is not applicable when the discrimination is complete but is applicable when the discrimination is only partial. 720 P.2d at 419.

III. SECTION 440.16(7) FLA. STAT. (1983) IS NOT VIOLATIVE OF THE SO-CALLED "ACCESS TO COURTS CLAUSE" CONTAINED IN ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION.

Article I, Section 21 of the Constitution of the state of Florida provides

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

A. The Rights Guaranteed By Article I Section 21 Of The Florida Constitution Only Apply To Those Persons Residing

Within The Territorial Boundaries Of The State Of Florida.

As set forth above, rights guaranteed by a state or federal constitution only apply to those persons residing within the territorial boundaries of the United States or of said state. See, Eisentrager, DeTenorio, Plyler, Jalifi and Pedrazza, supra.

Section 440.16(7) Fla. Stat. (1983) limits death benefits to nonresident alien dependents other than Canadians to the sum of $1,000. This section does not affect the dependent's entitlement to other benefits such as funeral expenses. In essence, the Legislature has not eliminated any right of redress but rather has limited the recovery under the statutory scheme of workers' compensation benefits. The statute merely provides a limited benefit to nonresident alien dependents.

Further, as pointed out above, nonresident alien dependents are not within the territorial boundaries of the state of Florida and therefore not entitled to the protections set forth in the Florida Constitution. Nonresident alien dependent's rights are creatures of statute and are limited to those granted by the Florida Legislature. The Florida Legislature, like many other states and like the Congress of the United States, in implementing the Longshoremen and Harbor Workers' Act has seen fit to include nonresident aliens from Canada within that class of dependents entitled to full benefits while excluding nonresident alien dependents from all other

countries. Because nonresident Canadian dependents and nonresident alien dependents from any other country are not entitled to constitutional protections since they are not within the territorial boundaries of the state of Florida or of the United States, the fact that the Legislature has seen fit to include one nationality does not constitutionally require inclusion of another.

B. Section 440.16(7) Fla. Stat. (1983) Does Not Abolish The Petitioners' Right To Bring A Wrongful Death Action Because The Decedent, MAXIMIANO AYALA, Was Killed As The Result Of The Negligence Of A Third Party Tort-feasor.

Paragraph 5 of the Petitioners' Amended Complaint below specifically provides that

> The decedent, MAXIMIANO AYALA, was killed in an accident in Florida on March 9, 1984, while he was performing duties within the scope of his employment for STEVE'S HARVESTING, INC. The motor vehicle MAXIMIANO 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 public authority. (A. 1-2) (emphasis added)

The Workmen's Compensation system in the state of Florida does not abolish the Florida Wrongful Death Act in regard to employees but rather supplements the civil remedy during the existence of the employer/employee relationship. This Court in the seminal case of Kluger v. White, 281 So.2d 1 (Fla. 1973), held that the Legislature could not

completely abolish a constitutional right of access to the courts without providing for a reasonable alternative. Clearly the Petitioners' right of access to the courts has not been totally "abolished" as defined in Kluger, because the Petitioners have always had and presently have the right to bring a wrongful death action against the third party tort-feasors who caused the death of MAXIMIANO AYALA to wit: Larson Dairy, Inc., and its employee, Joseph Franklin Bradley.

Further, as pointed out by this Court in Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363 (Fla. 1972), appeal dism'd, 411 U.S. 944 (1973):

> [t]he Workmen's Compensation Act does not abolish the Survival Statute and the Wrongful Death Acts in regard to employees; rather, the Act only supplants the civil remedies during the existence of the employer/employee relationship (citation omitted). When off the job, the employee is not subject to Workmen's Compensation. Additionally, even when on the job, injury or death resulting from the negligence of a third party tort-feasor gives the employee or his survivors and representatives full right to initiate a tort action under Fla. Stat. § 440.39, F.S.A. (citation omitted). 268 So.2d at 366 (emphasis added)

Thus, even if MAXIMIANO AYALA'S death had not been caused by a third party tort-feasor, his dependents' right to bring a wrongful death action would not have been totally abolished pursuant to the decision of this Court in Mullarkey, supra, but rather, with regard to employees, the Workers' Compensation Act would supplant such a civil remedy during the existence of the employer/employee relationship.

More importantly, MAXIMIANO AYALA'S death was caused by the negligence of a third party tort-feasor. As pointed out in Mullarkey, the survivors of the employee continue to have a full right to initiate a tort action against such third party tort-feasors.

Because the Petitioners' right to bring a wrongful death action has not been totally abolished, this Court's decision in Kluger v. White, supra, is inapplicable and the Legislature is not constitutionally required to provide a reasonable alternative.

C. The Florida Wrongful Death Act Does Not Predate The Adoption Of The Declaration Of Rights Of The Constitution Of The State Of Florida And Was Not Part Of The Common Law Of The State Of Florida.

Petitioners contend that the $1,000.00 limitation on death benefits to nonresidents alien dependents violates Article I, Section 21 of the Florida Constitution in that it does not provide a reasonable alternative as required by Kluger v. White, 281 So.2d 1 (Fla. 1973). In Kluger, this Court held that:

> [W]here a right of access to the Courts for redress where a particular injury has been provided by statutory law predating the Adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative methods of meeting such public policy can be shown. 281 So.2d at 4. (emphasis added)

Petitioners contend that Section 440.16(7) deprives non-Canadian, nonresident alien dependents from their right to bring a wrongful death action against the decedent's employer without providing a reasonable alternative. In the context of Kluger, it is necessary to examine whether a nonresident alien had a common law right to bring a wrongful death action or a statutory right which predated the adoption of the Declaration of Rights in the Constitution of the State of Florida.

The Florida Wrongful Death Act is a creature of statute which has been in existence in this state since 1883. See, White v. Clayton, 323 So.2d 573, 576 (Fla. 1975) (Adkins, C.J. dissenting). At common law, the rule was that actions for personal wrongs and personal injuries died with the person. Therefore, at common law, no cause for wrongful death existed whatsoever which would entitle either resident or nonresident dependents to bring an action for damages. See, 1 Fla. Jur. 2d, Action, § 77. Only by statute has the common law been amended to provide that no cause of action dies with the person. See, generally, § 46.021, Fla. Stat. (1986).

Therefore, since an action for wrongful death did not exist at common law, the Legislature is under no obligation to provide for a reasonable alternative to such a cause of action.

It next becomes necessary to examine whether or not an action for wrongful death predated the adoption of the

Declaration of Rights of the Constitution of the State of Florida in accordance with the test set forth in Kluger. The "access to courts" provision has been a part of the Constitution of the State of Florida since the Constitution of 1838 when it was contained in Article I, Section 9. Therefore, any statutory cause of action for wrongful death did not predate the adoption of this section of the Declaration of Rights of the Constitution of the State of Florida.

Lastly and most importantly, Kluger only required an alternative remedy "to protect the rights of the people of the state to redress for injuries." Id. at 4 (emphasis added). Thus, Kluger, by its express language, has no application to the rights of nonresident aliens.

D. Assuming That Section 440.16(7) Impermissibly Restricts The Petitioners' Right To Sue For Wrongful Death, The Legislature Has Nonetheless Provided A Reasonable Alternative Remedy And Has Shown An Overpowering Public Necessity For The Abolishment Of The Right.

This Court's most recent pronouncement with regard to Article I, Section 21 of the Florida Constitution was set forth in Smith v. Department of Insurance, 12 FLW 189 (Fla. Apr. 23, 1987), revised 12 FLW 278 (Fla. 1987). Petitioners contend that their right to bring a wrongful death action has not been replaced by a reasonable alternative sufficient to pass the test set forth in Kluger and Smith.

As the Court is aware, Smith involved a $450,000 cap on noneconomic damages and did not involve the question of dependent death benefits under the Florida Workers' Compensation Law.

Several areas of the Workers' Compensation Law have successfully withstood challenges that they violated Article I, Section 21 of the Florida Constitution.

In Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984), appeal dism'd, 469 U.S. 1030 (1984), Sasso was denied permanent total disability benefits and denied wage loss benefits because he was over the age of 65 at the time his work-related injury occurred. Sasso contended that because he could not sue his employer and because his wage loss benefits had been denied that he had been denied a reasonable alternative "of his right to sue" in violation of Article I, Section 21 of the Florida Constitution.

This Court found that there was no constitutional violation in that Sasso had been provided with a reasonable alternative in that his medical expenses had been covered and he had received temporary total disability benefits during his convalescence.

> Sasso thus has received some of the compensation which a tort suit might have provided had he been forced to pay his own expenses and subsequently seek redress in court. Such partial remedy does not constitution an abolition of rights without reasonable alternative as contemplated in Kluger v. White (citations omitted) 452 So.2d at 934. (emphasis added)

Likewise, in Acton II v. Fort Lauderdale Hospital Hospital, 440 So.2d 1282 (Fla. 1983), Acton injured his left knee in a work-related accident but was found not to qualify for permanent impairment benefits because he had suffered no amputation, loss of vision or serious facial or head

disfigurement. He was also found to be ineligible for wage loss benefits because he had returned to work at a higher monthly wage than he received before the accident.

Acton contended that his constitutional guarantee of access to the courts had been violated because he had been denied said benefits. This Court held that:

> The Workers' Compensation Law remains a reasonable alternative to tort litigation. The change from lump sum payments for permanent partial disability to a system offering such payments only for permanent impairments in wage-loss benefits for other types of partial disability may disadvantage some workers, such as Mr. Acton. On the other hand, the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum medical recovery. The Workers' Compensation Law continues to afford substantial advantages to injured workers, including full medical care and wage-loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation. 447 So.2d at 1284 (emphasis added).

Again, in Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983), Mahoney suffered a work-related injury when a tire weight thrown by a fellow employee struck him in the eye. Like Acton and Sasso, he contended that the $1,200 he received in impairment benefits unconstitutionally deprived him of access to the courts for redress of his injury.

In denying Mahoney's constitutional challenge this Court found that Mahoney may well have received more compensation for the loss of his eye prior to a 1979 change in the Workers' Compensation Law but that he did receive fully paid medical care and wage-loss benefits during his recovery

without having to suffer the delay and uncertainty inherent in tort litigation.

> Workers' Compensation, therefore, still stands as a reasonable litigation alternative. The $1,200 award for loss of sight in one eye may appear inadequate and unfair, but it does not render the statute unconstitutional. 440 So.2d at 1286 (emphasis added).

All of the cases cited above stress the point that had the decedent herein, MAXIMIANO AYALA, been injured as opposed to having been killed, he would have received the full benefits under the Workers' Compensation Act which are afforded to every other employee whether they be residents or nonresidents. MAXIMIANO AYALA was not denied any benefits under the act. It is only his nonresident dependents who are being reasonably and rationally discriminated against because they reside in the Republic of Mexico and not in the United States.

This Court has also had occasion to examine in detail a constitutional challenge to dependents' death benefits under the Workers' Compensation Law. In Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363 (Fla. 1972), appeal dism'd, 411 U.S. 944 (1973), a parent challenged the constitutionality of the Workers' Compensation Act as it pertained to compensation for the death of his deceased son who left no surviving dependents. This Court found that death benefits payable pursuant to Chapter 440 Fla. Stat. were constitutional for five specific reasons, all of which are applicable to the petitioners' claims herein.

[b]y his voluntary act, he chose to bind himself, and his representative and survivors in event of death to the provisions of the Act. No unconstitutional discrimination exists under these circumstances.

Second, we think it fully within the power of the Legislature to provide for a Workmen's Compensation system which supersedes other legislation affecting compensation or relief after death or injury. Distribution of the inevitable costs of industrialism on a rational basis is within the interests of the citizens of this State. General welfare costs are reduced to the extent that compensation keeps the injured and his dependents from the public dole. Protracted litigation is superseded by a expeditious system of recovery (citations omitted).

Third, the concept of exclusiveness of remedy embodied in Fla. Stat. § 440.11, F.S.A. appears to be a rational mechanism for making the compensation system work in accord with the purposes of the Act. In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse towards judgments. Similarly, the employee trades his tort remedies for a system of compensation without contest, thus sparing him the costs, delay and uncertainty of a claim in litigation.

Fourth, the requirement of dependency for compensation in the event of death under Fla. Stat. § 440.16, F.S.A. also appears to be rational in light of the purposes of the Act. Unlike tort remedies, relief under the Workmen's Compensation (other than medical benefits) is directly related to loss of earning power either to the employee, or to those financially supported by him; pain and suffering, loss of consortium in the like are not compensable, because the purpose of the Act is not to provide tort relief, but to supplant the uncertainty of those remedies with a scheduled payment of lost wages. Under this concept, those not financially supported by the deceased suffer no loss with his demise (citations omitted)

> Fifth, the Workmen's Compensation Act, does not abolish the survival statute and the Wrongful Death Acts in regard to employees; rather, the Act only supplants the civil remedies during the existence of the employer/employee relationship (citation omitted). When off the job, the employee is not subject to Workmen's Compensation. Additionally, even when on the job, injury or death resulting from the negligence of a third party tort-feasor gives the employee or his survivors and representatives full right to initiate a tort action under Fla. Stat. § 440.39 F.S.A. (citation omitted). 268 So.2d at 366 (emphasis added).

The Petitioners' constitutional challenges with regard to Article I, Section 21 of the Florida Constitution must fail in light of this Court's holdings set forth above.

Petitioners have not met their burden of proving that Article I, Section 21 is unconstitutional. Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, 367 (Fla. 1981). Assuming that Article I, Section 21 is even applicable, several things are inherently clear with regard to the Petitioners' constitutional challenge.

It is clear that the decedent, MAXIMIANO AYALA, voluntarily chose to live and work in the United States and by his voluntary act, chose to bind himself and his representative and survivors in event of death, to the provisions of the Florida Workers' Compensation Law. As this Court held in Mullarkey, supra, "no unconstitutional discrimination exists under these circumstances." 268 So.2d at 366.

Next, this Court in Mullarkey, supra, held that it is fully within the power of the Legislature to provide for a Workers' Compensation system which supersedes other

legislation affecting compensation after death or injury. General welfare costs are reduced to the extent that compensation keeps an injured and his dependents from the public dole. Id.

As has been pointed out above, this is one of the main distinctions in providing for lesser death benefits to nonresident alien dependents than are accorded to resident dependents whether they be aliens or not. The Petitioners have not met their burden of showing that the $1,000 death benefit payable pursuant to Section 440.16(7) is not a reasonable alternative to tort litigation. There has been no showing that a $1,000 death benefit is unreasonable especially when one considers the time, expense and difficulties involved with a nonresident alien commencing a law suit within the jurisdictional boundaries of the state of Florida and the associated problems with discovery in foreign countries. As pointed out by Professor Larson, most of the special rules with regard to nonresident alien dependents are the result of the awkward problem of proof and continuing administration that is unavoidably present when dependents reside in foreign countries. Larson, Law of Workmen's Compensation, § 63.51 (1987) at p. 11-184. See also, Jalifi, supra.

Likewise, in Frasca v. City Coal Co., 97 Conn. 212, 116 A. 189 (1922), it was held that the alien dependent who resides in a foreign country might reasonably be regarded by the Legislature less favorably than the alien who lives in

our country, subject to our laws and conditions of living, and dependent for protection, and perhaps upon our institutions and our people. 166 A. at 192.

Further, this Court in McCoy v. Florida Power & Light Company, 87 So.2d 809 (Fla. 1956) held that the Workmen's Compensation Law in the state of Florida was designed to prevent those who depend on the workers' wages from becoming charges on the community. 87 So.2d at 810.

Carrying this conclusion one step further as did the Supreme Court of Arizona in Jalifi, supra, nonresident alien dependents do not require the same amount of death benefits as do resident dependents for the precise reason that they will not become charges on the community.

Thus, the awkward problems of administration and proof in foreign countries, the fact that resident aliens are more likely to become public charges than aliens residing in foreign countries, the fact that resident aliens are subject to our laws and conditions of living, dependent for protection upon our institutions and our peoples while nonresidents are not, and the fact that Petitioners share none of the duties and burdens which residents aliens have in common with citizens of the United States; are all reasons well within the power of the Legislature to consider when providing for a Workmen's Compensation system which supersedes other legislation affecting compensation or relief after death. Further all of the above are legitimate reasons

which support a lesser death benefit available to non-resident aliens than to resident alien dependents.

As stated by this Court in Mahoney, supra,

> The [award] may appear inadequate and unfair, but it does not render the statute unconstitutional. 440 So.2d at 1286.

It was the decedent, MAXIMIANO AYALA, who voluntarily traded his tort remedies for a system of compensation without contest when he voluntarily accepted a position of employment in the United States. Unlike tort remedies, the relief under the Workmen's Compensation Act does not include compensation for pain and suffering or loss of consortium. The Act provides for compensation without fault. As pointed out by this Court in Mullarkey, this spared the decedent the costs, delay and uncertainty of a claim in litigation and bound himself, his representatives and survivors in the event of death, to the provisions of the Workmen's Compensation Act.

Further, as set forth above, even under Kluger, the Legislature is not constitutionally required to provide any alternative remedy to the Petitioners in place of a wrongful death action against the employer of MAXIMIANO AYALA because Kluger only requires "a reasonable alternative to protect the rights of the people of the state. . ." 281 So.2d at 4 (emphasis added).

Even assuming arguendo, that Article I, Section 21 applies to the Petitioners, Petitioners have not met their burden of showing that the $1,000 death benefit is unreasonable in light of all of the circumstances set forth above.

CONCLUSION

For the reasons and authorities set forth above, the Respondents, FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY, and STEVE'S HARVESTING, INC., respectfully request this Court to issue a decision affirming the decision of the Fourth District Court of Appeal below.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Answer Brief has been furnished by mail to Roger N. Messer, Esquire, and Richard D. Sneed, Jr., Esquire, 700 Virginia Avenue, Suite 104-Sun Bank Building, Fort Pierce, Florida 33450, this 7 day of August, 1987.

MOSS, HENDERSON & LLOYD, P.A.

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BY _____
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