D/A 11-6-87

IN THE SUPREME COURT OF FLORIDA

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.

CASE NO: 70,308

APPELLATE NO: 85-1588

PETITIONER'S INITIAL BRIEF

ON APPEAL FROM THE ORDER OF THE

FOURTH DISTRICT COURT OF APPEAL

ROGER N. MESSER, ESQ.
RICHARD D. SNEED, JR., ESQ.
Law Offices of
SNEED & MESSER, P.A.
700 Virginia Avenue
Suite 104-Sun Bank Bldg.
Fort Pierce, FL 34982
Telephone: 305/465-2330

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LAW OFFICES OF SNEED & MESSER, P. A., 700 VIRGINIA AVENUE, SUITE 104-SUN BANK BLDG., FT. PIERCE, FLORIDA 33450 (305) 465-2330

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LAW OFFICES OF SNEED & MESSER, P. A., 700 VIRGINIA AVENUE, SUITE 104-SUN BANK BLDG., FT. PIERCE, FLORIDA 33450 (305) 465-2330

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PREFACE

The symbol "R" shall stand for the Record on Appeal, the symbol "A" refers to the Appendix filed herewith by the Petitioner.

STATEMENT OF THE FACTS AND OF THE CASE

On or about March 9, 1984, MAXIMIANO AYALA, was killed in an accident in the State of Florida while performing duties within the scope of his employment for the Respondent employer, STEVE'S HARVESTING, INC. At the time of the accident and death, STEVE'S HARVESTING, INC. was insured for worker's compensation claims by FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY (hereinafter "FARM BUREAU").

The decedent was survived by his wife, BERTHA PULIDO DE AYALA, four minor sons and two minor daughters. Additionally, the decedent was survived by his son, JOSE AYALA, who was nineteen at the time of his father's death. JOSE AYALA is a natural born United States citizen. The decedent was also survived by his parents who were dependent upon MAXIMIANO AYALA for their support. The wife, minor children and parents of the decedent were all citizens and residents of the Republic of Mexico at the time of the accident. BERTHA PULIDO DE AYALA (hereinafter "MRS. AYALA") is the appointed personal representative of the estate of MAXIMIANO AYALA, deceased, whose estate is presently being administered in the Nineteenth Judicial Circuit of Florida (R-2).

MAXIMIANO AYALA, a Mexican citizen, had legally lived and worked in the United States for approximately twenty-five years at the time of his death. While MRS. AYALA, the decedent's widow, is a citizen of Mexico and

maintains a residence in Mexico, she also holds a "green card" issued by the United States Department of Immigration and Naturalization, which document allows her to legally live and work in the United States.

Subsequent to MR. AYALA'S death, MRS. AYALA, through her attorney, made demand upon the Respondent, FARM BUREAU, for the maximum death benefit, $100,000.00, to be paid to her and to the children of the decedent pursuant to Chapter 440, Fla. Stat. (1983), commonly known as the Florida Workers' Compensation Act. Said demand was made by letter dated August 24, 1984 (R-6-7).

By letter dated August 30, 1984, FARM BUREAU tendered the statutory limit of $1,000.00 by check, to the personal representative of the deceased pursuant to Section 440.16(7), Fla. Stat. (1983) (R-8). This payment was never accepted by MRS. AYALA.

The instant litigation was commenced on or about December 12, 1984, when the Petitioner filed her Complaint for Declaratory Relief in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. (R-1-8). Said Complaint alleged that Section 440.16(7) was invalid and unenforceable both on its face and as applied to the Petitioner as violative of the United States Constitution and the Constitution of the State of Florida. Further, said Complaint alleged that Section 440.16(7), Fla. Stat. arbitrarily and unreasonably

discriminated against resident aliens injured in a job related accident that resulted in their death when their dependents were not residents of the State of Florida. The Complaint further alleged that the statute in question discriminated against resident aliens since it denied them insurance benefits during their lifetime which would otherwise be available to them. (R-4)

The Respondents, Defendants in the Trial Court below, timely filed a Motion to Dismiss the Complaint, alleging that the Petitioner, Plaintiff below, failed to exhaust all of her administrative remedies for the reason that the instant action was within the exclusive jurisdiction of the Deputy Commissioners of the Department of Labor and Employment Security and that the Circuit Court was without jurisdiction to entertain the subject matter contained in the Complaint (R-9-10). Said Motion to Dismiss came on for hearing before the Honorable Phillip G. Nourse, Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, on February 13, 1985. A transcript of said hearing is contained in the Record on Appeal. (R-Court Reporters 1-21).

At the hearing, Judge Nourse required MRS. AYALA to file a brief in support of her position within twenty days and further required FARM BUREAU and STEVE'S HARVESTING, INC. to file their Answer Brief twenty days thereafter. The Court stated that the briefs to be submitted should address

two points. First, whether the Court had the authority to hear the issues raised in the Complaint and second, if the Court did have the authority, was the statute in question constitutional (R-Court Reporters 18-21). The Court further required the Respondents to file an Answer to the Complaint before all the briefs were submitted so that the matter would be at issue and the Court could decide on the briefs without the benefit of argument (R-Court Reporters 20). After the February 13, 1985, hearing, the Petitioner filed an Amended Complaint which corrected the style of the original Complaint so as to list the proper aggrieved parties pursuant to Fla. Stat. Section 440.16(1)(b). (R-15-22). Thereafter, the Respondents' Answer was served on April 12, 1985. (R-23-26).

The brief in the Circuit Court of the Petitioner, Plaintiff below, was served on May 8, 1985 (R-27-36) and the brief of FARM BUREAU and STEVE'S HARVESTING, INC., Defendants below, was served on June 3, 1985. (R-37-54). The Petitioner's Reply Brief at the Circuit Court level was served on June 7, 1985, along with a Notice of Trial which requested one-half day, non-jury trial (R-58-63).

The briefs were submitted and Judge Nourse issued his opinion on June 13, 1985, without the benefit of oral argument. The opinion was in the nature of a Final Judgment and held that the Circuit Court had jurisdiction to decide the constitutionality of Section 440.16(7) and further held

that Section 440.16(7) was unconstitutional under the Fourteenth Amendment of the United States Constitution. (R-98-100) (A-37-42). The Petitioner then filed a Motion for Clarification as to whether the statute in question was also unconstitutional under the Constitution of the State of Florida. After a hearing on the Motion for Clarification on July 3, 1985, the Trial Court held that Florida Statute Section 440.16(7), was also unconstitutional under the Florida Constitution and corrected its prior opinion so as to reflect this fact by interlineation on the last page of said opinion (R-100).

The Respondents' Notice of Appeal to the Fourth District Court of Appeals was thereafter timely filed on July 2, 1985 (R-104).

The following briefs were timely filed at the Fourth District Court of Appeals level:

1. Appellant's Initial Brief;
2. Appellee's Answer Brief;
3. Appellants' Reply Brief;
4. Amicus Curiae Brief of the United Farm Workers of America, AFL CIO in support of Appellee;
5. Appellants' Answer Brief to the Amicus Curiae Brief of the United Farm Workers of America.
6. Amicus Curiae Brief of the Associated Industries of Florida which essentially adopted the Appellants' brief.

After oral argument, the Fourth District Court of Appeals published its opinion in Florida Farm Bureau v. Ayala, 501 So.2d 1346 (Fla. 4th DCA 1987) (A-46-48). The District Court held that the Lower Court Judge was correct in finding that he had jurisdiction to consider the declaratory judgment action. However, it reversed the Lower Court Judge's ruling that Section 440.16(7) Florida Statute (1983) was unconstitutional.

The Petitioner sought to have this Honorable Court take discretionary jurisdiction of this cause and served its jurisdictional brief on April 3, 1987. Respondents served their jurisdictional brief on April 23, 1987. This Honorable Court entered its order accepting jurisdiction and setting oral argument on June 24, 1987.

SUMMARY OF ARGUMENT

MAXIMIANO AYALA was killed on the job in an accident arising out of his employment in March of 1984. At the time of his death, MR. AYALA had been a legal resident of the United States for approximately twenty-five years. He held a "green card" which allowed him to work in the United States.

After his death, MR. AYALA'S wife sought to obtain workers' compensation death benefits from MR. AYALA'S employer and the employer's insurance carrier. MRS. AYALA was prohibited from filing a wrongful death suit against the husband's employer due to the operation of Florida Workers' Compensation Law.

At the time of her husband's death, MRS. AYALA resided in Mexico along with the six minor children of MAXIMIANO AYALA and his two elderly parents who were all dependent upon MR. AYALA for support. Because these nine dependents were all aliens and all resided in Mexico and because they did not reside in Canada or the United States, the carrier denied that it was responsible to pay the full insurance benefit and, instead, pursuant to Florida Statute Section 440.16(7), forwarded a check in the amount of $1,000.00 to MRS. AYALA. This check was not accepted or cashed by MRS. AYALA.

Florida Statute Section 440.16(7) is an archaic and poorly worded attempt by the legislature to discriminate

between Canadian aliens and aliens from other parts of the world, including Mexico. The statute, as worded, and as applied in this particular case is unconstitutional under both the Florida State Constitution and the Constitution of the United States.

With regard to the Florida Constitution, the "access to courts" guaranty contained in Article I, Section 21 of the State Constitution is clearly violated since the workers' compensation statute removes the right to bring a wrongful death suit against the employer while providing essentially nothing in return for the loss of that right.

Florida Statute Section 440.16(7) further violates Article I, Section 9 of the Florida Constitution since the net result of the statute is deprivation of a property right held by MRS. AYALA as personal representative of the estate and on behalf of the dependents of MAXIMIANO AYALA without due process of law.

Perhaps the clearest example of violation of the Florida Constitution comes when one considers Article I, Section 2 of the Florida Constitution in light of the facts in this case. Article I, Section 2 states:

> All natural persons (emphasis added) are equal before the law and have inalienable rights among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except at the ownership, inheritance, disposition and possession of real property (emphasis added) by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race

or religion.

It takes an extremely labored construction of this section of Florida's Constitution to determine that "all natural persons" do not include the widow and minor children of MAXIMIANO AYALA, deceased.

With regard to federal constitutionality, the statute in question is unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution. While there may not be a constitutional right to workers' compensation death benefits, once the state has conferred these benefits, they must be distributed in accordance with the equal protection and due process clauses of the Constitution. Florida Statute Section 440.16(7) attempts to discriminate between different classes of aliens without a showing of a rational basis for the discrimination.

This Court should reverse the District Court of Appeal and affirm the Trial Court's ruling in striking down this unfair, archaic and unconstitutional section of the Florida Statutes.

ARGUMENT

I. WHETHER FLORIDA STATUTE SECTION 440.16(7) IS CONSTITUTIONAL UNDER THE FLORIDA CONSTITUTION.

BERTHA PULIDO DE AYALA sought to have Florida Statute Section 440.16(7)(1983) declared unconstitutional both on its face and as applied on the basis that it violates both the Federal and State Constitutions. The Statute in question provides:

> 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, to surviving father or mother 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, 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 deputy commissioner, and provided further that compensation to dependents referred to in this subsection shall in no case exceed $1,000.

The Circuit Court Judge ruled that the Statute was unconstitutional on both state constitutional grounds and federal constitutional grounds. With regard to the state constitutional question, the Petitioner alleges that Florida Statute Section 440.16(7)(1983) is violative of three articles of the Florida Constitution:

A. Article I, Section 21, the so-called "access to courts" provision;

B. Article I, Section 2, the equal protection clause of the Florida Constitution;

C. Article I, Section 9 of the Florida Constitution, the due process clause of the Florida Constitution.

Article I, Section 21 of the Florida Constitution states that

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

This provision of the Florida Constitution has been in effect in the State Constitution since 1885. The Florida Supreme Court in Holland, for Use and Benefit of Williams v. Mayes, 155 Fla. 129, 19 So.2d 709 (1944), stated that the purpose of Article I, Section 21 "was to give vitality to the maximum that for every wrong there is a remedy."

Clearly, on its face, Fla. Stat. Section 440.16(7) is violative of this clause of the State Constitution since it removes any remedy which the Petitioner has under the workers' compensation statute at the same time denying the Petitioner access to the Courts and redress against the employer in a wrongful death action.

In Chapman v. Dillon, 415 So.2d 12 (Fla. 1982), the Florida Supreme Court indicated that the No-Fault Insurance Law did not violate the "access to courts" clause of the Florida Constitution because there was created a reasonable alternative to a tort action since "the injured party is

assured a recovery of his major and salient economic losses from his own insurer." The right to sue for redress of grievances is a fundamental right. The Workers' Compensation statute has taken away the common law right to file tort actions against employers or to file wrongful death actions as recognized under the law of the State of Florida. In this specific case it has given nothing in return for the loss of those rights.

There is in fact no recovery of the major and salient economic losses of the injured party. The $1,000.00 limitation of benefits called for in Fla. Stat. Section 440.16(7), together with the $2,500.00 funeral benefit will not pay the approximate $5,000.00 cost of the preparation of the body in the United States, shipment of the body to Mexico and its burial in Mexico. The sum provided by the statute, in effect, provides nothing to compensate the widow and six minor children for the loss of support and services from the family bread winner.

This Honorable Court in Smith v. Department of Insurance, 12 F.L.W. 189 (Fla. 1987), Rev. at 12 F.L.W. 277 (1987), _____ So. 2d _____(Fla. 1987), indicated that a $450,000.00 cap on noneconomic damages was violative of Article I, Section 21 of the Florida Constitution. The Court in Smith, supra, discussed at length the seminal case of Kluger v. White, 281 So.2d 1 (Fla. 1973). The holding in

Kluger was as follows:

> Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. Section 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 method of meeting such public necessity can be shown.

The Court in Smith, supra, indicated that there was no relevant distinction between the issue in Kluger and the issue in Smith.

> In Kluger, the legislature attempted to unconstitutionally restrict the right of redress at the bottom of the damages spectrum; here, it attempts to restrict the top of the spectrum. Neither restriction is permissible unless one of the Kluger exceptions is met; i.e., (1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

The constitutional right to access to courts contained in Article 1, Section 21 of the Florida Constitution "has no counterpart in the Federal Constitution and derives its scope and meaning solely from Florida case law." Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979). The Supreme Court in Overland indicated that the common law rights of action protected by the access to courts provision are not only those in place as of July 4, 1776, as F.S.A. Section 2.01 literally provides, but have

been held to be "designed for application to new conditions and circumstances." See also State ex rel. Burr v. Jacksonville Terminal Company, 90 Fla. 721, 106 So. 576 (Fla. 1925).

The Court in Overland, supra, was dealing with a cause of action which was not recognized by statute until 1975. However, a statutory right to bring a wrongful death action has long been recognized in the State of Florida. See e.g. Benoit v. Miami Beach Electric Co., 85 Fla. 396, 96 So. 158 (1923).

In the wrongful death contexts now covered by Florida Workers' Compensation statute with regard to Canadian citizens and United States citizens, the right to the tort action for wrongful death has been replaced by a reasonable alternative and thus passes the Kluger, supra, test. However, with regard to the rights of an alien from any country except Canada, Florida Statute Section 440.16(7) is, on its face, violative of the access to courts clause of the State Constitution since it removes any remedy which such a person has under the Workers' Compensation Statute, while at the same time denying the access to the courts for redress against the employer.

Florida Statute Section 440.16(7) is violative of Article I, Section 9 of the Florida Constitution which states that:

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

This clause has been a part of the Florida Constitution since 1885. The State Supreme Court in L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 139 So. 121 (1932) indicated that legislative acts must accord with the guaranty that no man shall be deprived of life, liberty or property without due process of law.

It has also been held in Tomayco v. Thomas, 143 So.2d 227 (Fla. 3rd DCA 1962) that the constitutional guaranty of due process under the State Constitution extends to every type of legal proceeding. This would, of necessity, include workers' compensation proceedings. It is clear that Florida Statue Section 440.16(7) deprives the Appellee and all others in her class of due process of law for recovery of her property rights.

Perhaps one of the strongest arguments against the constitutionality of the subject statute is Article I, Section 2 of the Florida constitution which states:

> All natural persons (emphasis added) are equal before the law and have inalienable rights among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property (emphasis added) by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race or religion.

This provision of the Florida Constitution has been held to be mandatory. The State Supreme Court in Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1925), stated that

"every word of a State Constitution should be given its intended meaning and effect, and essential provisions of a Constitution are to be regarded as being mandatory."

It is clear that the framers of the State Constitution intended that personal property rights of all natural persons (emphasis added), including aliens, should be protected and should be equal with all other natural persons. In that Fla. Stat. Section 440.16(7) directly contradicts this clause in the Florida Constitution, it is unconstitutional.

The constitutionality of Fla. Stat. Section 440.16(7) has not been determined prior to this case. The State Supreme Court in State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1925) indicated that rights acquired under a statute that has not been adjudicated to be constitutional are subject to a subsequent adjudication that the statute is unconstitutional, even though the statute has been generally considered valid.

It is clear that the state legislature when it created Fla. Stat. Section 440.16(7) discriminated unjustly and without cause against employees from Mexico as opposed to employees from Canada. There is no rational or valid basis for this discrimination. The classification created under the statute is unreasonable and arbitrary.

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. No rational basis for discriminating against aliens in general has been shown in this case. There can certainly be no basis for discriminating between Canadian nonresident aliens and Mexican nonresident aliens. It is a constitutional axiom 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. Heckler v. Matthews, 465 U.S. 728 (1984); Zobel v. Williams, 457 U.S. 55 (1982).

The workers' compensation statute was originally adopted in 1935 in Florida and contained a minimum death benefit recovery for a citizen in the amount of $1,440.00 (350 weeks x $4.00 per week) and a maximum recovery for a citizen of the United States or a Canadian citizen in the amount of $5,000.00. Florida Laws 1935 C. 17481 Section 16. The maximum death benefit for aliens, other than Canadians, with foreign dependents was $1,000.00.

The legislature has, in most respects, recognized the effects of inflation on these death benefits. Through at least fifteen revisions, Section 16 of the Statute has increased maximum death benefits for U. S. and Canadian citizens from $5,000.00 in the 1930's to $25,000.00 in the late 1950's, to $50,000.00 in the 1970's and now to the present level of $100,000.00. The funeral expense benefit

has likewise risen in increments from $150.00 in 1935 to the present level of $2,500.00, a 1,667% increase. Florida Statutes Annotated, Section 440.16, Historical Note.

Meanwhile, the $1,000.00 cap on death benefits for aliens similarly situated with the Petitioner, MRS. AYALA, has remained unchanged over the last half century.

In addition to being unconstitutional, Florida Statute Section 440.16(7) violates the public policy of the State of Florida in that in encourages the hiring of alien labor over the hiring of American citizens. This is true due to the fact that insurance rates are based, in part, upon the amount of money the insurance carrier must pay in the event they have to pay a claim for death under the workers' compensation statute.

That the statute in question is arbitrary on its face and is arbitrary as it relates to this particular case is obvious. Consider the accidents of fate which resulted in the unjust denial of benefits to MRS. AYALA and the six minor children. Had MAXIMIANO AYALA died one and one-half years earlier under the same circumstances, the full benefit would have been paid due to the fact that his United States citizen surviving son would have been under the age of majority. Benefits would have been paid to all survivors, not just the citizen, even though all survivors were still residing in Mexico. Had MR. AYALA died during a period of time in which his wife was in the United States working with

him under her own "green card," all of his survivors under the statute would have received the full benefit in the amount of $100,000.00.

Instead, MRS. AYALA and the six children are forced by Fla. Stat. Section 440.16(7) to accept a depression era death benefit which provides nothing for their support. To allow this unjust result to occur on the basis of this archaic, poorly worded and clearly unconstitutional statute would give credence to the old saw that "it's all law and no justice."

II. WHETHER FLORIDA STATUTE SECTION 440.16(7) IS CONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION.

The Honorable Circuit Court Judge ruled that Florida Statute Section 440.16(7) was unconstitutional under the United States Constitution equal protection and due process clauses. With regard to federal constitutionality, the United States Supreme Court employs two distinct standards of review in determining the validity of allegedly discriminatory statutes under the equal protection clause, with the standard applicable to any given case depending on the nature of the classifications drawn by the statute and the nature of the "interests" involved.

The first standard is the traditional or the "rational basis test." Under this standard of review, a statute will be upheld under the equal protection clause if the classifications drawn by the statute are "rationally related" to a "legitimate governmental objective." However, where the discriminatory treatment of the statute is drawn along the lines of a "suspect classification," or involves the deprivation of a "fundamental right," the Court employs a more rigorous standard of review, known as "strict scrutiny," under which a classification can only be upheld if it is essential to the achievement of a compelling state interest. (Emphasis added.) See San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

The statute in question cannot be upheld as constitutional using either of the two standards, the "rational basis test," or the "strict scrutiny test."

In a number of recent cases, the United States Supreme Court has indicated that aliens constitute a "suspect class," so that any state statute which discriminates against aliens must satisfy the requirements of "strict scrutiny" if it is to be upheld. See Graham v. Richardson 403 U.S. 365 (1971). Nyquist v. Mauclet, 432 U.S. 1 (1977). In re Griffiths, 413 U.S. 717 (1973).

Thus, in Graham v. Richardson, supra, the Court held invalid certain state statutes which limited eligibility for welfare benefits to persons who were either (1) U.S. citizens or (2) aliens who had resided in the states for a particular period of time.

The U.S. Supreme Court in Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) stated

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under nondiscriminatory laws.

In Nyquist v. Mauclet, supra, the Court stated that classifications by a state that are based on alienage are inherently suspect and subject to close judicial scrutiny.

In the case at bar, the decedent, MAXIMIANO AYALA, was a resident alien who had legally worked in the United States for approximately the past twenty-five (25) years. He had

paid his full share of taxes and contributed to the community.

MAXIMIANO AYALA and all other aliens like him whose dependents resided in a foreign country other than Canada, were and are denied equal protection of the laws of the United States in that they are denied the insurance benefits available to citizens or other aliens. MR. AYALA was denied the $100,000.00 insurance benefit which was and is available to Canadian workers, even in cases where Canadian workers are in this country illegally.

Since Fla. Stat. Section 440.16(7) discriminates against resident aliens, as well as other aliens, the statute is invalid under the equal protection clause of the State and Federal Constitutions.

The Florida Supreme Court has also, in recent years, held that a statute which discriminates against aliens was unconstitutional. The case of In re Estate of Fernandez, 335 So.2d 829 (Fla. 1976), held that a statute prohibiting aliens from being appointed as personal representatives of a decedent's estate denied equal protection.

Assuming that, arguendo, the state may constitutionally discriminate between U. S. citizens and aliens, if it has a rational basis to do so, the state has no power to discriminate between Canadian aliens and Mexican aliens. In Plyler v. Doe, 457 U.S. 202 (1982), the U.S. Supreme Court

stated

> The states enjoy no power with respect to the classification of aliens.

It is true that the right to workers' compensation death benefits is not guaranteed, per se, in the Constitution. However, while there may be no constitutional right to workers' compensation death benefits, once the state has provided for them, they must be distributed in accordance with the equal protection clause of the Fourteenth Amendment to the Constitution. Zobel v. Williams, supra, and Heckler v. Matthews, supra.

The Kansas Supreme Court in Vietti v. George K. Mackie Fuel Co., 109 Kan. 179, 197 P 881 (1921), held part of the Kansas workers' compensation statute unconstitutional. The Kansas statute provided that alien dependents of a deceased workman were limited to a recovery of $750.00, which was substantially less than the benefit awarded to dependents of a workman who was a U.S. citizen. This statute was held unconstitutional on two grounds. The first ground was that the statute in question violated the terms of a treaty between the United States and Italy, and the second ground was that the statutory limitation was also in contravention of the Fourteenth Amendment of the United States Constitution.

The Arizona Supreme Court in Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P2d 1319 (1982),

App. Dismd. Jalifi v. Industrial Commission of Arizona, 459 U.S. 899 (1982), discussed at length the constitutionality of a statute similar to Florida Statute Section 440.16(7).

The Arizona statute provided a reduced rate of payment for the dependents of an alien wherein the dependent resided outside the United States. Under the Arizona statute, nonresident dependents were entitled to receive sixty percent of the benefits otherwise payable to survivors who happened to be American citizens or who happened to live within the State of Arizona. The Court in Jalifi used the "rational basis test" to affirm the constitutionality of the Arizona statute. The Court indicated that the sixty percent level was reasonable given the lower cost of living in Mexico as opposed to the United States.

Jalifi can be distinguished from the case at bar, however, in that the Arizona case 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. The funds provided for in the Florida statute are insufficient, even by Mexican standards, to provide for the decent Christian burial of the remains of the decedent at his home in Mexico, let alone provide for the support of the nine people dependent upon MAXIMIANO AYALA for support during his lifetime.

The limitations of Fla. Stat. Section 440.16(7)(1983) are such that the Petitioner is left with no remedy

whatsoever against the employer or the employer's insurance carrier. The due process rights of the Petitioner are likewise violated since she has been denied a property right without due process of law.

Florida Statute Section 440.16(7) prevents redress of grievances in the courts of this State and results in the existence of an injury without a remedy. It therefore violates at least three articles of the State Constitution and violates two clauses of the Fourteenth Amendment to the United States Constitution. The statute in question should be held unconstitutional on both State and Federal grounds.

CONCLUSION

Florida Statute Section 440.16(7) is patently unconstitutional since it discriminates against Mexican aliens vis-a-vis Canadian aliens in violation of the Florida and United States Constitutions. The statute further unconstitutionally and improperly discriminates against resident aliens (other than Canadians) by denying them insurance coverage guaranteed to all U. S. citizens and Canadian aliens. The statute prevents redress of grievances guaranteed in the courts of the state and results in the existence of injury without remedy. The statute in question should be held unconstitutional on both state and federal grounds and the decision of the Trial Court Judge should be reinstated.

Respectfully submitted,

Law Offices of
SNEED & MESSER, P.A.

By: _____
Roger N. Messer, Esq.

By: _____
Richard D. Sneed, Jr., Esq.
Attorneys for Petitioner
700 Virginia Avenue
Suite 104-Sun Bank Bldg.
Fort Pierce, FL 34982
Telephone: 305/465-2330

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 20th day of July, 1987, to THOMAS A. KOVAL, ESQ. and LOUIS B. VOCELLE, JR., ESQ., Attorneys for Respondents, Post Office Box 3406, Vero Beach, FL 32953-3406.

Attorney