O/a 11-6-87

IN THE SUPREME COURT OF FLORIDA

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

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

Petitioner,

vs.

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

Respondents.
_____/

PETITIONERS' REPLY BRIEF

ON APPEAL FROM THE ORDER OF THE

FOURTH DISTRICT COURT OF APPEAL

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TABLE OF AUTHORITIES

CASES CITED:

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FLORIDA STATUTES:

FLORIDA CONSTITUTION:

UNITED STATES CONSTITUTION:

LAWS OF FLORIDA:

UNITED STATES CODE:

OTHER AUTHORITIES:

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PREFACE

This Court accepted jurisdiction of this case by Order dated June 24, 1987. In the Reply Brief, Petitioner BERTHA PULIDO DE AYALA, individually and in her representative capacities shall be referred to as "MRA. AYALA" and the Respondent FLORIDA FARM BUREAU CASUALTY INSURANCE COMPANY, and STEVE HARVESTING, INC., shall be referred to as "FARM BUREAU" unless the context requires specific reference to STEVE'S HARVESTING, INC.

The symbol "R" shall stand for the record on appeal, and the symbol "A" refers to the Appendix filed with the Petitioner's Initial Brief, and the symbol "AR" refers to the one document filed with this Reply Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Facts and of the Case as represented in her Initial Brief.

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ARGUMENT

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

FARM BUREAU argued that Section 440.16(7), Fla. Stat. (1983) does not violate Article I, Section 21 of the Florida Constitution in that the trial judge did not consider that Article even though the order as amended of the trial judge ruled the section sub judice unconstitutional under the Florida Constitution. (A-15) (AR-1)

The intellectual bankruptcy of FARM BUREAU'S position is made apparent from the several arguments it advances in the Answer Brief. Curiously, on page 42 of the Answer Brief we are advised that Petitioners (MRS. AYALA) have not met their burden of proving that Article I, Section 21 is unconstitutional. Article I, Section 21 is the Constitution. We are further told that there are awkward problems of proof and continuing administration in foreign countries that are unavoidably present in these types of cases which allow constitutional discrimination against nonresident alien dependents, except per chance you happen to be of Canadian alienage.

FARM BUREAU reports in support of its position that the Congress of the United States had good reason to treat citizens of Canada differently from citizens of other countries when it enacted 33 U.S.C. Section 909(g) on March 4, 1927 because U.S. and Canadian ships on the Great Lakes

contained mix crews. Since it insures the industry, it would be rather naive to assert that FARM BUREAU is unaware of the "mixed crews" of predominately Mexican and black Americans who harvest citrus fruit and vegetables each year in this state. However, FARM BUREAU'S comparison of the Longshoremen and Harbor Workers' Compensation Act to Florida Statutes Section 440.16(7) is misdirected. Classification of aliens is within the exclusive domain of the Federal Government. U. S. CONST. art. VI cl. 2.

FARM BUREAU declares that because of the shear length of the unprotected Canadian border contiguous to the United States, and the number of treaties between the two countries, so vast that only a partial listing could be made, that the reader can easily understand the well-founded distinction between the dependents of Canadians and those of Mexicans.

Obviously, rights and privileges may be conferred on aliens by treaties entered into between the United States and countries of which the aliens are citizens; however, neither the treaties listed by FARM BUREAU nor any found by MRS. AYALA, either Canadian or Mexican, confer the professed well founded and easily understood distinction between Canadians and Mexicans asserted by FARM BUREAU with regard to the section sub judice.

FARM BUREAU advances that the Constitution of the State of Florida is territorial in its application and only applies to those residents, whether aliens or citizens within its boundaries, which boundaries the reader of the Answer Brief must implicitly conclude to encompass Canada as well to stay within FARM BUREAU'S raw argument.

FARM BUREAU cites Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed 1255, 70 S. Ct. 936 (1950) as authority for its position on both the state and federal levels. Eisentrager is a United States Supreme Court case that dealt with nonresident enemy aliens during wartime that were captured in China by the U.S. Army, tried and convicted in China by an American military commission. At no time were the enemy aliens in the U.S., let alone the State of Florida. The case is distinguishable on its facts and application to the U.S. Constitution as opposed to the Florida Constitution. The classification of aliens by the Federal Government has been discussed and the point made.

On the state level, the Supreme Court of Wisconsin ruled on a Wisconsin constitutional provision (Article 1, Section 9) similar to Florida's open access provision for its opinion that the unqualified use of the word "person" in their constitution required a definition including all persons, not only citizens, or those lawfully admitted. Arteaga v. Literski, 83 Wis. 2d 128, 265 NW 2d 148 (1978).

To be sure, the non-Canadian alien employee gives up

much under Florida Statutes Section 440.11 in return for the $1,000.00 "gratuity", as FARM BUREAU refers to it, afforded by Section 440.16(7).

FARM BUREAU'S costs of living argument has found some credence in other states which have justified a substantial percentage recovery, as decided in Jalifi v. Industrial Commission of Arizona, 132 Ariz. 233, 644 P.2d 1319 (Ariz. Ct. App.), though such decisions cannot in good conscience be asserted to justify the meager, and arbitrary sum of $1,000.00 authorized by the section sub judice.

Discernibly, the $1,000.00 award is inadequate. Even though perpetuating the Canadian bias, the Florida legislature must have recently apprehended the inadequacy of the award also (as footnoted by FARM BUREAU'S Answer Brief No. 1) since effective July 1, 1987, Section 440.16(7) Fla. Stat. has been amended to provide a $50,000.00 cap on death benefits to nonresident alien dependents other than Canadian in place of the a $1,000.00 cap in the 1983 version. Chapters 87-330, Laws of Fla. (1987).

There was no discussion on the section sub judice in the Senate Commerce Committee hearing. The Senate floor debate of the foregoing amendment to the Committee substitute for Senate bill no. 821 was short. Senator Gordon, rose and offered the amendment to the bill as reported from the Senate Commerce Committee; succinctly stated that the $1,000.00 limitation was set in 1935 for

aliens when the maximum recovery for citizen was $5,000.00, and that the award had never been raised along with the subsequent increases for citizens. There was no opposition.

It is one thing to argue that death benefits payable pursuant to Chapter 440 of the Florida Statutes are constitutional for the five reason written in Mullarkey v. Florida Feed Mills, Inc., 268 So.2d 363, (Fla. 1972), appeal dism'd 411 U.S. 944 (1973) when the alien had no dependants needing his support or to reason as in Kluger v. White, 281 So.2d 1, (Fla. 1973) that the trade-offs were acceptable since there were adequate, sufficient, and even preferable safeguards for an employee who is injured on the job; but that, it is so much malarkey for FARM BUREAU to state that MRS. AYALA or her husband received a quid pro quo from the Florida Legislature in the form of Section 440.16(7), Fla. Stat.

Unmistakably, $1,000.00 does not approach adequate compensation even under the workers' compensation system, let alone a wrongful death action.

In addition, FARM BUREAU'S announcement that MRS. AYALA has a third party action, was patently obvious to the most casual practitioner of this area. An action against third party tort-feasor has not been precluded by the section sub judice as to citizens and aliens alike. FARM BUREAU'S assertion is axiomatic, conceded and wide of the mark of the points on appeal.

Moreover, FARM BUREAU'S suggestion that there is no factual basis that the section violates the equal protection clause of the Florida Constitution is also without merit. Article I, Section 2 of the Florida Constitution applies to all natural persons. This section specifically reserves the right to regulate the disposition and inheritance of real property by aliens, but nothing in the Constitution allows the legislature to single out aliens for disparate treatment with regard to workers compensation awards.

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

In rebuttal to the various arguments asserted by FARM BUREAU that the section sub judice does not violate the United States Constitution, MRS. AYALA affords the following brief remarks:

First, FARM BUREAU, urges that the Court should solely be concerned about nonresident dependent aliens of the deceased. But, MRS. AYALA has claimed from the outset that workers in a similar situation to her husband MAXIMIANO AYALA, were not dealt with fairly in that they were not awarded insurance benefits which are given to all Canadians, and to all Americans working in the State of Florida. (A-14)

Secondly, state laws governing the rights, privileges

and duties of aliens within the state such as the section in question that deny aliens certain rights enjoyed by citizens are invalid under the supremacy clause of the United States Constitution. U.S. CONST. art. VI, cl. 2. Aliens have been afforded protection under our legal system for some time. Yick Wo v. Hopkins, 118 U.S. 356, 30 L. Ed 220, 6 S. Ct. 1064 (1886). Aliens are also included in the definition of all persons under the Federal Civil Rights Act. 42 U.S.C.A. Section 1981.

MRS. AYALA maintains that the U.S. Constitutional rights of her husband are violated by State action when death occurs in the employment context in Florida under the section sub judice when she is denied an adequate and reasonable alternative remedy of some type, given the arbitrary and capricious award of $1,000.00.

CONCLUSION

It is respectively suggested that the section before the court unconstitutionally restricts the rights of non-Canadian aliens in their legal employment in the State of Florida with regard to insurance death benefits merely because of their alienage, without an adequate consideration for the rights released under the Workers' Compensation Act of this state.

Respectfully submitted,

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