IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ; TOM GALLAGHER; HUGO D. MENENDEZ; GERALD A. LEWIS; ASSOCIATED INDUSTRIES OF FLORIDA; FLORIDA CHAMBER OF COMMERCE; NATIONAL COUNCIL ON COMPENSATION INSURANCE; and EMPLOYERS INSURANCE OF WAUSAU,

Appellants/Cross-Appellees

CASE NO. 77,179

v.

MARK SCANLAN; PROFESSIONAL FIRE FIGHTERS OF FLORIDA, INC.; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 606; FLORIDA AFL-CIO; and COMMUNICATION WORKERS OF AMERICA, and FLORIDA POLICE BENEVOLENT ASSOCIATION,

Appellees/Cross-Appellants

_____/

ANSWER BRIEF OF CROSS-APPELLANTS COMMUNICATION WORKERS OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

This answer brief argues for Appellees/Cross-Appellants Communication Workers of America. These Appellees/Cross-Appellants adopts all arguments, statements and conclusions set forth and submitted to this Court by Cross-Appellants Scanlan, PFFF, Stanfill, Ortega & Davis. Richard A. Sicking, Esq. Attorney; and the Statement of the facts submitted to this Court by Cross-Appellants IBEW & AFL-CIO. Jerold Feuer, Esq., Attorney.

SUMMARY OF THE ARGUMENT

Substantive rights of parties to a Workers' Compensation Claim are fixed as of the time of injury. This conclusion is beyond dispute, and no degree of "curing" can change that. Furthermore any retroactive legislative impact upon Workers' Compensation impedes the obligation of contract as guaranteed in the Florida as well as the federal constitutions. See, e.g., United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) and Allied Structural Steel Co. v. Spannus, 438 U.S. 234 (1978). As to these points Cross-Appellants are on firm ground, and this Court has so recognized.

This Court in Sullivan v. Mayo, 121 So. 2d 424 (Fla. 1960) best summarized the answer brief of Cross-Appellants.

In Sullivan, supra, the Court, speaking through Justice Thornal, faced the question, among others, of whether the appeal of a workmen's compensation trial order would be to the District Court of Appeal {as provided for at the date of accident} or to the Supreme Court {as provided for at date of appeal}.

The court held: "We interpolate that the forum in which a review may be obtained is a procedural matter and not a substantive right.', and that the proper forum was the Supreme Court...."

The Court went on to note:

> It...seems to us that the impact of the 1977 Amendment was procedural...it did not abridge the existent right of claimant to have the entire fee paid by a recalcitrant employer/carrier, but only spoke to the steps by which the amount of that fee {still to be paid, en toto, by employer/carrier} would be determined by the trial. There is no reason to believe that a fee, based on the same factual base, would be any more - or any less - after that 1977 Amendment than a fee entered just prior to that amendment.

> The provisions of the 1978 amendment are obviously substantive, but that question is not before us.
>
> The fact that a principle first enunciated by case law, is later statutorily adopted does not seem controlling in whether the {statutory adoption} be substantive or procedural...the test should be 'what was the change?', and then whether that change was, in fact, a substantive one. In this cause, the right of claimant to have the entire attorney's fee paid was not violated, inclusion by the legislature of the initial percentages, followed by the enumerated factors by which the percentage factor could be increased or decreased, does not seem such a radical, or substantive, deviation from Lee Engineering & Construction Company v. Fellows, supra.

In Okaloosa County Gas District v. Mandel, 394 So.2d 453 (Fla. 1 DCA 1981), the Court discussed application of Section 440.34, Florida Statutes (1977), which had the 25%/20%/15% starting place value in it. The Court stated:

> On August 21, 1978, the deputy originally awarded a fee of $10,000, deviating only slightly from the statutory formula set forth in Section 440.34, Florida Statutes (1977) because there was nothing particularly unique or novel about the issues in the case and attorney time should not have exceeded 40 hours. (The attorney estimated time spent of 61.76 hours). The Industrial Relations Commission, approving the deputy's factual findings, reversed, holding that the award was plainly excessive. On remand, the deputy reduced the award to $7,950.00. Under the sliding scale provisions of the statute an award would initially have been set at $11,025.00.
>
> In affirming the first point, we have considered the percentage fee schedule and Lee Engineering factors codified in Section 440.34, effective here after the accident date, but before the time of the deputy's award. The statute in this regard is not the type of radical or substantive change which would preclude retrospective application. See Florida International University v. Phillips, IRC Order 2-3902 (1979). 'The amendment, in effect, merely amplified the case law and altered in certain respects the burden of proof on fee issues by specifying grounds for departure from the stated schedule.' Lawrence Nali Construction Co. v. Price, IRC Order 2-3909 (1979)," 394 So.2d at 453-454

In Cone Brothers Contracting v. Gordon, 453 So.2d 420 (Fla. 1st DCA 1984), the Court was faced with the determine of whether

the $7,500 limitation on limp sum advances enacted in 1983 was substantive or procedural. The Court stated in even stronger language than Sullivan:

> Finally, the deputy held that the 1983 amendments to sections 440.20(10) and 440.20(11)(d), increasing the discount rate to 8 percent and limiting the amount to be advanced to $7,500 in any 48 month period, were substantive amendments and prospective only. Consequently, the deputy would not apply them to the instant case.
>
> We first address the employer/carrier's third point, for should we agree with their position that the 1983 amendments are procedural, and therefore to be applied retroactively, we would then find it unnecessary to reach their constitutional argument made under Point L. However, we do not agree with the E/C on this point, and accordingly, affirm.
>
> As claimant's injury took place in November, 1978, the statute applicable to claimant generally, for substantive purposes is the 1978 supplemental version. Section 440.20(10), Florida Statutes (Supp. 1978), provides that a lump sum award shall be computed at a 4 percent true discount.
>
> In 1979, section 440.20(10) was renumbered as section 440.20(12) and was subdivided. See chapters 79-400 and 79-312, Laws of Florida. Section 440.20(12)(b), Florida Statutes (1979), continues to provide for a 4 percent discount rate.
>
> However, in 1983, the legislature substantially amended section 440.20(12) and section 440.20(13) (formerly section 440.20(11), Florida Statutes (Supp. 1978)), providing for an 8 percent discount rate and limiting a claimant's receipt of a lump sum advance payment in excess of $2,000, to $7,500 or twenty-six weeks of benefits in any 48-month period, whichever is greater 83-305, Laws of Florida; section 440.20(12)(12)(c) and (13)(d), Florida Statutes (1983). Although the effective date of these amendments was June 30, 1983, id, the E/C, nonetheless, would have us apply them to claimant's case, arguing that they are procedural in nature, as dealing primarily with the 'amount and timing' of a limp sum advance.
>
> Once again, we emphasize the venerable rule of statutory construction that absent clear legislative expression to the contrary, a law is presumed to apply prospectively. See Special Disability Trust Fund, et al. v. Motor and Compressor Company, 446 So.2d 224, 227 (Fla. 1st DCA 1984), and cases cited therein. Nothing in chapter 83-305 suggests that the 1983 amendments to sections 440.20(12) and (13), Florida Statutes (1979), should operate in any way other than

prospectively. Nor are we persuaded that the amendments with which we are concerned herein are anything but substantive in nature. Both the increase in the discount rate to 8 percent and the $7,500 cap placed on the lump sum payments work to substantially reduce a claimant's award.

All parties had expectations, entitlements, and perceptions arising from the 1978 version of chapter 440. Specifically, sections 440.20(11)(d), Florida Statutes (Supp. 1978), set forth those rights and liabilities, in the form of the amount and kind of benefits to be paid and received, 'to enable a disabled claimant to become a self-sustaining and productive member of society.' Herndon v. City of Miami, 224 So.2d 681, 682 (Fla. 1969). We decline to ride roughshod over these rights and liabilities by accepting the E/C's argument.

By our holding that section 440.20(10), Florida Statutes (Supp. 1978) is applicable in the instant case, we must necessarily decide the issue raised under the E/C's first point, whether that section, as applied, amounts to an unconstitutional taking of their property without due process of law. To support their position, the E/C argue that a lump sum advance payment unconstitutionally deprives the carrier of property in that the carrier is required to provide a claimant benefits to which he is not yet, or may never by, entitled, and also that the lump sum award could either cause a carrier to increase premiums substantially or to rune the risk of being left without adequate funds to pay other claims as they arise, ultimately being forced out of business. In essence, the E/C argue that the statute renders it constitutional.

No evidence was presented at the hearing to support any of these allegations. The E/C have simply failed to show that the statute, as applied to them, is arbitrary and capricious, or oppressively prejudicial, other than by expounding on what is pure speculation. We therefore decline to hold that section 440.20(10) is unconstitutional." 453 So.2d at 422-423

In a footnote on page 423 the Court noted:

We distinguish this case from Myers v. Carr Construction Co., 387 So.2d 417 (Fla. 1st DCA 1980), in which we held section 25, chapter 78-300, amending the interest rate in section 440.20(7) from 6 percent to 12 percent, to be remedial in character and therefore applicable to currently accruing liability arising from an injury that occurred prior to its effective date, although the 6 percent figure still applied to the E/C's liability for compensation prior to the new statute's effective date. In contrast, we are dealing with neither a remedial statute nor 'currently accruing liability,'

but, instead, a statutory right assertible with expectations and liabilities which became fixed at the time of the injury. 453 So.2d footnote at 423

See also Corbitt v. Jones Plumbing, 396 So.2d 854 (1st D.C.A., 1981)

ARGUMENT

I

CONTRARY TO AMICI'S CLAIMS, FLORIDA LAW EXPRESSLY HOLDS THAT SUBSTANTIVE RIGHTS OF PARTIES UNDER THE WORKERS' COMPENSATION ACT ARE FIXED AT THE TIME OF INJURY, AND THEREFORE STATUTORY AMENDMENTS CANNOT APPLY RETROACTIVELY.

In its initial Brief, Florida Association of Self-Insurers; and Florida Group Risk Administrative Association Inc., (hereinafter Self-Insurers), contend that the 1991 Revisions to the Comprehensive Economic Development Act, which ostensibly "cure" the constitutional defects of the 1990 Act apply retroactively, thereby rendering this appeal moot. (Brief for Self-Insurers at 10). As a result of the special session efforts to remedy the constitutional flaws, Amici claim that this Court should apply the new legislation in order to "avoid unnecessary consideration of the 1990 Act" (Brief for Self-Insurers at 11). Amici maintain that this new legislation was remedial and that therefore this Court may apply the law in effect at the time of its decision, the 1991 version of the Act. (Brief for Self-Insurers at 11, 12). While cross-appellants concede that courts on occasion have applied subsequent legislation to cases on appeal, (Brief for Self-Insurers), Florida law clearly holds that this general concept does not apply to Florida Workers' Compensation laws.

While Amici cities various cases for the proposition that legislation may apply retroactively (Brief for Self-Insurers at 12-19), these cases are not persuasive because they only address the question generally. The Florida Supreme Court has considered the issue of the retroactivity of statutory amendments in the specific

context of workers' compensation cases. In Sullivan v. Mayo, 121 So.2d 424 (Fla. 1960), this court stated unequivocally:

> It is well established in Florida that the substantive rights of the respective parties under the Workers' Compensation Law are fixed as of the time of the injury to the employee. (emphasis added)

The Sullivan court reasoned that the acceptance by the employer, employee and insurance carrier of the provisions of the workers' compensation law constitutes a contract between the parties which contemplates the provisions of the law at the time of the injury. 121 So.2d at 428. Following this rule, Florida courts consistently have refused to apply retroactively workers' compensation amendments affecting substantive rights. See e.g. Aaron v. Florida Power & Light Co., 126 So.2d 889 (Fla. 1961), Ship Shape v. Taylor, 397 So.2d 1199 (Fla. 1st DCA 1981), St. Vincent De Paul Society v. Smith, 431 So.2d 252 (Fla. 1st DCA 1983). In all of these cases, the courts recognized that because a particular worker's compensation amendment affected substantive rights, that amendment could not apply retroactively during appeal.

Clearly, the provisions of the Act which the 1991 special session attempted to "cure" are substantive in nature and therefore should not apply retroactively under the Sullivan rule. The International Trade provisions, and provisions relating to the Industrial Relations Commission, the Workers' Compensation Oversight Board, and the Joint Legislative Management Committee, all of which Amici cite, (Brief for Self-Insurers at 12) are substantive in nature. These provisions are not procedural primarily because they effect questions of liability, compensation

and recovery. See e.g., Martel v. Gibeaut, Inc., 330 So.2d 493, 494 (Fla. 4th DCA 1976) (amendments affecting scope of potential liability are substantive). Ralston Purina Co. v. Byers, 457 So.ed 1138 (Fla. 1st DCA 1984) (amendments affecting eligibility for benefits are substantive). Therefore, because these provisions affect substantive rights under Florida's workers' compensation laws, Sullivan bars retroactive application of the 1991 amendments.

Furthermore, this court's language in Sullivan clearly demonstrates that the factor controlling retroactivity of workers' compensation statutes is whether the amendment affects substantive rights, not whether it is remedial in nature. Therefore, even if Amici's claim that the 1991 amendments were remedial is valid (Brief for Self-Insurers at 15), according to Sullivan, this is irrelevant. The Martel court expressly drew this distinction between remedial workers' compensation amendments and those that are substantive. In that case, the court, considering a remedial amendment to the workers' compensation laws, conceded that generally remedial statutes are exceptions to the general rule against retroactivity. 330 So.2d at 494. However, the Martel court found that because the alleged remedial amendments affected substantive rights to recovery under the workers' compensation laws, the court could not apply the amendments retroactively. Id. Thus, the substantive, rather that the remedial, nature of a workers' compensation statute determines whether a court may apply the amendment retroactively. Therefore, Amici's claim that the amendments are remedial is immaterial.

II

IN OPPOSITION TO AMICI'S CONTENTION, FLORIDA LAW EXPRESSLY HOLDS THAT RETROACTIVE APPLICATION OF AMENDMENTS TO THE WORKERS' COMPENSATION LAWS CONSTITUTES AN IMPAIRMENT OF CONTRACT.

> In Hardware Mutual Casualty Co. v. Carlton, 9 So.2d 350 (Fla. 1942), the Court stated:
>
> The acceptance of the application of Workmen's Compensation Statutes, Acts 1935, c.17481, by employer, employee and insurance carrier constitutes a contract between the parties embracing the provisions of the statutes as they may exist at the time of any injury compensable under the terms of the statute. See Chamberlain v. Florida Power Corporation, 144 Fla. 719, 198 So. 486, Liberato v. Royer, 270 U.S. 535, 46 S.Ct. 373, 70 L.Ed. 719....
>
> It therefore, follows that when claimant was injured in November of 1940, the Act of 1941, supra, was not in existence and was not a part of the contract.
>
> In Page on Contracts, Vol. 6, Sec. 3674, the author says: The obligation of a contract is impaired when the substantive rights of the parties thereunder are changed. The extent to which their substantive rights are impaired is probably immaterial since they are entitled to their rights under the original contract without any change.
>
> It appears to us that to hold the provisions of Sec. 34(a), as amended by Chapter 20672, Acts of 1941, retroactive would be in violation of Sec. 10, Article I of the Constitution of the United States." 9 So.2d at 359-360

In the face of such strong language Amici nevertheless attempts to justify retroactive application of the 1991 Act to this appeal by alleging such application would not impermissible impair substantive and vested rights. (Brief for Self-Insurers 15, 19). However, this argument, and the cases Amici cites to support it, are unpersuasive because they are inapposite. The rule that the retroactive application of workers' compensation laws impairs the contract between employer, employee and insurance carrier is such a basic tenet of Florida law that as far back as 1953 the Florida Supreme Court had occasion to declare:

> To hold that chapter 26877 sec. 2 [the statutory predecessor to chapter 440]...is retroactive would...constitute it in impairment of the obligation of contract.

Phillips v. City of West Palm Beach, 70 So.2d 345, 347 (Fla. 1953). Again, in Sullivan, the Florida Supreme Court directly addressed the impairment of rights concern when it considered the legality of the retroactive application of a workers' compensation amendment. 121 So.2d at 428. Based upon its finding that the mutual acceptance by all parties of the workers' compensation laws constituted a contract, the Sullivan court explained that "any subsequent enactment could not impair the substantive rights of the parties established by this contractual relationship." Id. Thus, in evaluating retroactive application of substantive provisions of a workers' compensation statute, this court found that such application impaired the rights existing at the time of the injury. Id. Therefore, the Sullivan court refused to apply the statutory amendment retroactively. Id.

Lower Florida Courts consistently have applied this rule. Addressing the question of whether personal injury protection (PIP) and workers' compensation benefits should be set off against Uninsured Motorist (UM) insurance, the First District Court of Appeal held that, although subsequent statutory amendments indicated that such payments are to be set off against UM coverage, this was not the state of the law existing at the time of the insurance contract. Carter v. Government Emp. Ins. Co., 377 So.2d 242, 243 (Fla. 1st DCA 1979). The Carter court found that the statutory amendment substantially changed the contractual

obligations that the parties had anticipated. 377 So.2d at 243. Therefore, retroactive application of the statutory amendment constituted an unconstitutional impairment of contract. Id. (citing this court's decision in Dewberry v. Auto-Owners Ins. Co., 363 So.2d 1077 (Fla. 1978)).

Applying similar reasoning, in Johnson v. R.H. Donnelly Co., 402 So.2d 518 (Fla. 1st DCA 1981), the court refused to declare a workers' compensation provision unconstitutional under impairment of contract. The court explained that because the statute at issue was not a retroactive law changing rights existing at the time of the amendment, the court could not find that the law impaired the contract. 402 So.2d at 521. The court determined that its decision was in harmony with the supreme court's decision in Sullivan.

If that is not enough, other courts in Florida have spoken with an equally firm voice.

> In Richardson v. Honda Motor Co., Ltd., 686 F.Supp. 303 (M.D. Fla. 1988), the Court stated:
>
> "A substantive law creates, defines; and regulates rights as opposed to procedural or remedial law which prescribes a method of enforcing the rights or obtaining redress for their invasion. Black's Law Dictionary, 4th Ed. (1951). In Florida, each side is obligated to pay its own attorney's fees unless a right to assess those fees is awarded by a statute or agreement between the parties. Young v. Altenhaua, 472 So.2d 1152, 1154 (Fla. 1985). Given that rule of law, the Supreme Court of Florida has found that a '...statutory requirement for the non-prevailing party to pay attorney fees constitutes' a new obligation or duty,' and is therefore substantive in nature.' Young, at 1154. See also L. Ross, Inc., v. R.W. Roberts Construction Co., Inc., 481 So.2d 484 (Fla. 1986); Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982); Love v. Jacobson, 390 So.2d 782 (Fla. 3d DCA 1980); and Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984).

> The statute in question allows the court to a assess attorneys' fees against a party unreasonably rejecting an offer of settlement; a right to attorneys' fees under these circumstances did not previously exist in Florida. The Court cannot agree with Plaintiffs that section 45.061, Florida Statutes is a remedial statute, but is satisfied that the section is substantive in nature.
>
> It is well-established in Florida that a substantive statute is presumed to be prospective unless the legislature has expressed in clear and explicit language an intent for the statute to have retroactive effect. 49 Fla. Jur. 2d, Statutes § 107. Section 43.061 contains no clear or explicit language manifesting an intent for the section to apply retroactively. Therefore, the Court finds the effect of section 45.061, Florida Statutes to be prospective. The instant cause of action accrued prior to the passage of the statute and consequently section 45.061 is inapplicable to this cause of action." 686 F.Supp. at 304

In Love v. Jacobson, 390 So.2d 782 (Fla. 3d DCA 1980), the District Court was asked to review an award of attorney's fees made under Section 57.105, Florida Statutes (1978), which id not become effective until approximately a year and a half after the commencement of the action to which it was applied. The Court, in reversing the determination that a fee was due under this statute, stated:

> "Section 57.105, Florida Statutes (Supp. 1978) provides:
>
> > 'Attorney's Fee - The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.'
>
> Prior to the effective date of that statute, June 15, 1978, no right to attorney's fees existed for the complete absence of a justiciable issue of law or fact. Unless legislative intent to the contrary is disclosed, statutes operate prospectively. Walker & LaBerge v. Halligran, 344 So.2d 239 (Fla. 1977); Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Foley v. Morris, 339 So.2d 215 (Fla. 1976). No clear legislative intent mandating retroactive application appears in the language of the statute. Even without a legislative mandate,

however, procedural rights granted by a statute may be applied retroactively because no vested rights in any mode of procedure exist. Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207 (1949); Walker & LaBerge v. Halligran, supra. If the statute does not affect vested rights or create new obligations, it may be applied retroactively. Conversely, parties are entitled to rely on substantive rights which vested before the passage of a new statute. Walker & LaBerge v. Halligan, Supra.

Appellee contends that the rights afforded by the statute are procedural rather than substantive and are therefore retroactive. We disagree. The right afforded by the statute is not, as appellee suggests, the right to file a frivolous suit; it is, instead, a right to recover attorney's fees when a justiciable issue as described in the statute is absent. That right did not exist prior to the enactment of Section 57.105, Florida Statutes (Supp. 1978). We disagree with appellee's argument that because the statute appears under the heading of court costs, it presents only a new procedural device for obtaining recovery. See generally, Allen v. Dutton, 384 So.2d 171 (Fla. 5th DCA 1980). In our view, a new right has been created and the award of attorney's fees is not retroactive under the statute. Tuggle v. Government Employees Insurance Co., 220 So.2d 355 (Fla. 1969); Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977); 390 So.2d at 783

III

CONCLUSION

Based upon this court's rule in Sullivan, cross-appellants submit that the 1991 Act does not apply retroactively to injuries sustained by workers while the challenged sections of the workers' compensation act were in effect. Therefore, any "curative" attempts by the legislature are ineffective and do not render this appeal moot. Furthermore, this court's decision in Phillips and the subsequent Florida case law clearly support cross-appellant's assertion that retroactive application of the 1991 amendments would be an unconstitutional impairment of contract.

III

CONCLUSION

For the foregoing reasons, cross-appellants respectfully request this court to affirm the trial court's holding and declare the Drug Free Workplace provisions of the Comprehensive Economic Development Act of 1990 unconstitutional.

Respectfully Submitted,
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Certificate of Service

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by ~~hand~~ this ~~January 28~~, 1991, on all counsel of record on the attached service list.
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