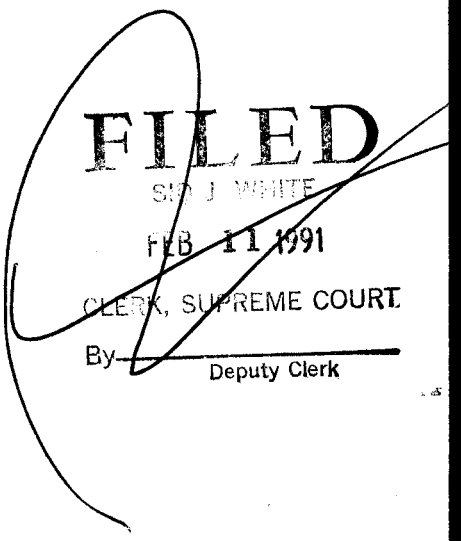
IN THE
SUPREME COURT OF FLORIDA



BOB MARTINEZ, et al.,

Appellants/Cross-Appellees,

CASE NO.: 77,179

vs.

MARK SCANLAN, et al.,

Appellees/Cross-Appellants.

ANSWER BRIEF OF TAMPA BAY AREA NFL, INC. AND SOUTH FLORIDA SPORTS CORPORATION

Dated this 8th day of February, 1991.

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STATEMENT OF THE CASE AND FACTS[1]

This Answer Brief, submitted on behalf of TAMPA BAY AREA NFL, INC. and SOUTH FLORIDA SPORTS CORPORATION, is addressed exclusively to the cross appeal of ALBERT DARRYL DAVIS, a plaintiff in the circuit court. Cross appellant DAVIS has challenged the constitutionality of Florida Statute § 440.09(7)(1989) which applies only to professional athletes. DAVIS is a former professional athlete. Appellees TAMPA BAY AREA NFL, INC. and SOUTH FLORIDA SPORTS CORPORATION, more commonly referred to as the Tampa Bay Buccaneers and Miami Dolphins respectively, are employers of professional athletes and directly affected by the subject statute.

On July 19, 1990, a complaint for declaratory judgment was filed in Leon County Circuit Court challenging the constitutionality of amendments to the Florida workers' compensation law adopted during the 1990 session of the Florida Legislature by a bill entitled "Committee Substitute for House Bill 3809, etc." Certain amendments passed in 1989 were also challenged by the plaintiffs. Among the 1989 amendments attacked was Chapter 89-289, § 6, Laws of Fla. creating Florida Statute § 440.09(7)(1989), which provides:

> If, by operation of s. 440.04, benefits become payable to a professional athlete under this chapter, such benefits shall be reduced or setoff in the total amount of injury benefits or wages payable during the period of disability by the employer under a collective bargaining agreement or contract for hire.

Although this statute obviously applies only to professional athletes, no present or former professional athlete was among the group of original plaintiffs. Also, no employer of professional athletes was named as a defendant. (R. 1310-1375).[2] An amended complaint

[1]This statement of the case and facts is submitted to supplement and clarify the statement of cross appellant Davis. Some duplication is necessary for continuity.

[2]The designation "R" refers to the record on appeal followed by the appropriate page number.

was filed on July 27, 1990. (R. 1376-1440). Still, no professional athletes were named as plaintiffs.

Upon learning of this action, appellees TAMPA BAY AREA NFL, INC. and SOUTH FLORIDA SPORTS CORPORATION immediately filed a motion to intervene as defendants. (R. 1554-1555). Following a properly noticed hearing, the trial court granted the motion to intervene on August 6, 1990. (R. 1629-1632). The trial court also granted the *ore tenus* motion of plaintiffs' counsel to add any necessary plaintiffs.

On August 8, 1990, TAMPA BAY AREA NFL, INC. and SOUTH FLORIDA SPORTS CORPORATION filed a motion to dismiss or strike the amended complaint on the grounds that the plaintiffs lacked standing, there was no present controversy, the trial court lacked subject matter jurisdiction and other grounds. (R. 1621-1623). Pursuant to the trial court's scheduling order entered on August 6, 1990, appellees also filed their answer and defenses. (R. 1624-1628).

On August 9, 1990, a second amended complaint was filed. (R. 1638-1707). The second amended complaint included as plaintiffs three individuals who were formerly professional athletes employed by the Miami Dolphins, BILL STANFILL, RALPH ORTEGA, and ALBERT DARRYL DAVIS. No other plaintiffs had any connection with professional sports and no plaintiff had any connection with the Tampa Bay Buccaneers. Paragraphs 25A through 25I of the second amended complaint contain the allegations upon which the plaintiffs based their standing to bring an action for declaratory judgment in circuit court. In essence, those paragraphs assert that Plaintiffs STANFILL, ORTEGA and DAVIS were professional football players employed by the Miami Dolphins. STANFILL and ORTEGA allege that they were injured while employed by the Dolphins and have submitted claims for workers' compensation benefits. Davis alleges only that he was injured at work and "may be entitled to workers' compensation from the Miami

Dolphins...." (R. 1649). As to each of the three football plaintiffs the second amended complaint alleges "He is interested in, and may be in doubt about his rights under, or may be affected by, Section 6 of Laws of Florida, Chapter 89-289, creating § 440.09(7), Fla. Stat. which the intervenor, Miami Dolphins, would invoke against him in order to deny benefits." (R. 1648-1650). It is upon this foundation that the plaintiffs attempted to build a case establishing their entitlement to a declaratory judgment concerning the constitutionality of Florida Statute § 440.09(7)(1989).

TAMPA BAY AREA NFL, INC. and SOUTH FLORIDA SPORTS CORPORATION filed a supplemental answer to plaintiffs' second amended complaint for declaratory judgment on August 10, 1990. (R. 1858-1861). Subsequently, following a hearing held on September 5, 1990, the trial court denied appellees' motion to dismiss or strike. (R. 1972-1977). The case was set for trial (R. 1978-1984) and trial memoranda were submitted to the court by appellees (R. 2338-2355) and the football plaintiffs. (R. 2215-2242).

At trial, the plaintiffs called four witnesses on the issue of the constitutionality of § 440.09(7). The three named football plaintiffs testified solely on the narrow issue of their standing to bring the suit. (R. 176,181,232). DAVIS testified that he was injured while under contract with the Miami Dolphins. (R. 177). The record contains few details of the source or extent of DAVIS' injury. He testified that he received $1,500 in wages from the Dolphins and that the Dolphins provided for his medical care. (R. 177). Most importantly, during cross examination DAVIS (and his attorney) admitted that no claim for workers' compensation benefits had been filed by DAVIS and that the Dolphins had not denied him any benefits. (R. 179-180).

During the cross examination of DAVIS, his attorney, Mr. Sicking, with admirable candor, corrected the testimony of DAVIS who mistakenly thought a workers'

compensation claim had been filed on his behalf. (R. 179). Mr. Sicking went on to explain his view that the Workers' Compensation Act is "self administering" and no claim is required. However, as the Implementation Agreement (Exhibit 31) and testimony of the plaintiffs' witness Richard Berthelsen demonstrate, (R.327-328) the Dolphins were not and are not governed by the procedure described in the Florida workers' compensation law. Rather, the procedure applicable to the Miami Dolphins and DAVIS, if any, is outlined in the Implementation Agreement which specifically requires written claims to be submitted by claimants such as DAVIS. The Implementation Agreement governs because professional athletes are specifically excluded from coverage under the Florida workers' compensation law pursuant to Florida Statute § 440.02(14)(c)(3)(1989). Although this exclusion may be waived by the employer pursuant to Florida Statute § 440.04(1989), the Miami Dolphins have not done so but have adopted the alternative procedure specified in the Implementation Agreement. (R. 326-328). The Tampa Bay Buccaneers have waived the exemption but no plaintiff has any connection whatsoever with that organization.

Pursuant to this Implementation Agreement (Exhibit 31), disputes between the Miami Dolphins and their players are to be submitted to arbitration. A local arbitration procedure was established with right of appeal to a higher level of arbitrator. (Paragraphs 7 and 8 of the Implementation Agreement). Plaintiffs STANFILL and ORTEGA were involved in arbitration with the Miami Dolphins on workers' compensation issues prior to the time of this trial. Local arbitration rulings in their cases are part of the record on appeal. (Exhibits 33A, B, C, 36 and 37). DAVIS, however, had participated in no arbitration by the time of the trial in the instant case. That's not surprising inasmuch as DAVIS had not even filed a claim for workers' compensation benefits and no benefits had been denied to him. (R. 180). Judge Hall, accordingly, ruled that DAVIS lacked standing to challenge

the constitutionality of Florida's workers' compensation law in a declaratory judgment action filed in Leon County.

Plaintiffs STANFILL and ORTEGA were injured prior to the effective date of Florida Statute § 440.09(7), had filed claims for workers' compensation benefits, and had participated as parties in arbitration proceedings prior to the time of trial. The most recent arbitration proceedings concerned the issue of whether Florida Statute § 440.09(7) could be applied retroactively to them. Local (Dade County) arbitrators either declined to reach the issue or held that the statute did not apply to STANFILL and ORTEGA. (See exhibits 33A, B, C, 36, and 37). Prior to trial in the instant case, the issue had been argued before the national arbitrator in San Francisco. (R. 328). Coincidentally, on the same day Judge Hall issued his oral ruling in the instant case, the national arbitrator rendered his decision to the effect that Florida Statute § 440.09(7) could not be applied retroactively and did not, therefore, apply to STANFILL and ORTEGA. (R. 2669-2691). Judge Hall, even without benefit of this decision, properly declined to reach the constitutional claims of STANFILL and ORTEGA absent a prior determination that the statute applied to them. Further, Judge Hall declined to decide whether the statute applied to STANFILL and ORTEGA because that issue was for arbitrators pursuant to the Implementation Agreement. (R. 2692-2700). Although a notice of cross appeal was filed in the instant case on behalf of STANFILL and ORTEGA, no initial brief on appeal was filed on their behalf and as to them, the appeal should be dismissed.

The testimony at trial concerning the professional athletes setoff provision revealed two important points regarding the merits of the plaintiffs' constitutional claims. The first was that injured football players receive definite substantial benefits in lieu of their former doubtful and difficult common law right of action against their employer. Professional football players, including DAVIS, continue to receive full salary during periods of

disability for the year of their injury. (R. 951-971). Also, all medical expenses necessitated by any on-the-job injury are paid by the teams (R. 951-971) without regard to fault or common law concepts of liability. The second important point on the merits of the plaintiffs' constitutional claims revealed by the testimony at trial is that football players are unlike most other employees. In addition to the fact that football players are paid whether they are able to work or not, the current average salary exceeds $300,000 annually. (R. 343). The average player's career lasts less than four years, terminating when the player is 25 or 26 years old. (R. 343). Further, professional football players knowingly participate in a violent sport very likely to result in injury. In short, professional football players are so unlike other employees that different treatment under the workers' compensation law is warranted.

Although Judge Hall dismissed the claims of appellant DAVIS for lack of standing, he did so only after the record was complete for review on appeal. (See R. 169). On this record, Judge Hall's decision is correct as it pertains to appellant DAVIS and should be upheld on the basis that DAVIS lacks standing to bring a declaratory action challenging the constitutionality of Florida Statute § 440.09(7)(1989). Alternatively, if the merits of DAVIS' claims are reached, this court should uphold the constitutionality of the statute.

SUMMARY OF ARGUMENT

ALBERT DARRYL DAVIS lacks standing to bring a declaratory judgment action challenging the constitutionality of Florida Statute § 440.09(7)(1989). DAVIS was added as a plaintiff to an existing lawsuit as an afterthought. He has established no right to workers' compensation benefits. He has filed no claim for wage loss benefits as required by the Implementation Agreement. His employer has denied him no benefits. DAVIS is, in any event, obligated to arbitrate all issues associated with his entitlement to workers'

compensation benefits. While it may be argued that he need not arbitrate constitutional claims, it is clear that his entitlement to workers' compensation benefits must be established before he has any right or standing to challenge the constitutionality of a statute providing for a setoff against such benefits.

Standing is a factual issue for the trial court judge, reviewable only if unsupported by competent, substantial evidence. In this case, all facts of record support the trial court's judgment that DAVIS lacks standing. It is the Plaintiff's burden to establish standing and to demonstrate the existence of a present controversy requiring resolution by the court in this action for declaratory judgment. DAVIS, having filed no claim for benefits and having established no right to benefits, has shown no present controversy and, accordingly, cannot invoke the jurisdiction of the trial court under Florida Statutes Chapter 86.

It is the plaintiff's burden to prove "beyond all reasonable doubt" that a challenged statute is unconstitutional. DAVIS has failed to carry this burden. Florida Statute § 440.09(7)(1989) does not impair any existing contract to which DAVIS is a party. The player contracts do not require the teams to provide workers' compensation to professional athletes. The Collective Bargaining Agreements ("CBAs") expired years ago although the Miami Dolphins continue to operate under the majority of the general terms of the latest CBA. DAVIS' right to workers' compensation benefits is based on the Implementation Agreement (also expired) which incorporates the Florida Workers' Compensation Law "as amended." Thus, by specific agreement, DAVIS has accepted the challenged amendment. In any event, the applicable documents do not require payment of workers' compensation benefits according to the law as of a fixed date. Rather, the entitlement to workers' compensation benefits exists according to the law in effect at the time of injury. Because DAVIS was injured after the effective date of Florida Statute § 440.09(7), the statute applies to him without impairing any contract rights he may have.

No substantive due process problem exists in application of the statute because a suitable substitute remains for any common law cause of action DAVIS may have had against the Miami Dolphins. DAVIS received his full contract wages until able to return to duty. All his medical expenses have been paid by the Miami Dolphins. Further, if DAVIS ever files a workers' compensation claim and establishes his entitlement to wage loss benefits, he will collect those benefits subject only to a setoff for wages he had already received during an applicable disability period pursuant to § 440.09(7).

Professional athletes, particularly football players, are a unique group which justifies the categorization resulting from application of § 440.09(7). This categorization need be supported only by some rational basis. As the statute applies equally to all professional athletes without regard to physical handicap, no heightened level of scrutiny is applicable. No equal protection violation has been demonstrated.

The statute violates no constitutional right of access to courts because a reasonable alternative to the previously existing common law cause of action remains. All employee medical expenses are paid by the employer. Wages continue to be paid by the employer during disability periods. Workers' compensation wage loss benefits would remain payable to the extent that the sum of wage payments made during disability periods is less than the *maximum* workers' compensation benefit provided by law.

Finally, no basis exists for the assertion that federal labor law has preempted the field of workers' compensation regulation. To the contrary, Florida courts dealing with challenges to the workers' compensation law based upon federal preemption have consistently concluded that workers' compensation issues are appropriate for state regulation.

For the foregoing reasons, this court should affirm the trial court's determination that cross appellant DAVIS lacks standing to bring this action for declaratory judgment

challenging the constitutionality of Florida Statute § 440.09(7)(1989). Alternatively, the constitutionality of the statute should be upheld.

ARGUMENT

I. DARRYL DAVIS LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA STATUTE § 440.09(7)(1989) IN THIS ACTION FOR DECLARATORY JUDGMENT.

Much of the initial brief of DARRYL DAVIS is devoted to the proposition that Florida Statute § 440.09(7)(1989) does not apply to the Miami Dolphins and its players. Obviously, if the statute does not apply to DAVIS he would have no standing to challenge its constitutionality. However, this court need not consider whether the statute applies to the Miami Dolphins or to DAVIS because that issue, among others, must be decided in arbitration rather than this Court pursuant to the Implementation Agreement. (Trial Exhibit 31).

Because Florida workers' compensation law specifically excludes professional athletes from coverage (§ 440.02(14)(c)(3), Fla. Stat. (1989)), DAVIS' entitlement to workers' compensation benefits must arise, if at all, from some contract with the Miami Dolphins. Because the collective bargaining agreements ("CBAs") have expired according to their terms, only DAVIS' player contract (Exhibit 32) and the Implementation Agreement (Exhibit 31) could be the basis of his claim for workers' compensation benefits. Of these, only the Implementation Agreement could be construed as requiring the Miami Dolphins to pay workers' compensation "equivalent benefits" to players such as DAVIS. This agreement, too, has expired by its terms but is currently being voluntarily observed by the Miami Dolphins.

The Implementation Agreement's primary purpose is to establish an arbitration procedure to resolve all disputes between players and the team concerning workers' compensation. Plaintiffs STANFILL and ORTEGA obtained awards of benefits through this system. DAVIS, however, has never submitted any claim for benefits and never participated in any arbitration of his alleged entitlement to benefits. Further, he did not participate in any arbitration on the issue of whether the statute applied to the Miami Dolphins or to him. Rather, contrary to the Implementation Agreement, DAVIS presented that issue for the very first time to a circuit court in Leon County. Even then, he did so in the context of a suit that only included the Miami Dolphins because the Dolphins chose to intervene.

The Agreement to arbitrate is enforceable pursuant to Florida Statutes Chapter 682. The failure of DAVIS to first arbitrate to establish his entitlement to workers' compensation benefits deprives him of standing. In addition, because the trial court, and this court, must defer to the agreed upon arbitration procedure to first establish whether § 440.09(7) even applies to DAVIS, he lacks standing to bring this action, there is no present controversy, and the trial court lacked jurisdiction to enter any declaratory judgment.

More specifically, the issue of standing is a question of fact for the trial court. Miller v. Publicker Industries, Inc., 457 So. 2d 1374, 1375 (Fla. 1984). The constitutionality of a statute may be challenged only by plaintiffs demonstrating that enforcement of the statute will "injuriously affect the plaintiff's personal or property rights." Id. "One may only challenge the constitutionality of a public law when that law directly affects him." Tribune Co. v. Huffstetler, 489 So. 2d 722, 724 (Fla. 1986) (and cases cited therein).

The trial court considered the evidence and concluded that DAVIS had failed to show his personal or property rights would be injuriously affected because DAVIS failed to

prove that the statute applied to him and failed to prove he was otherwise entitled to workers' compensation benefits. This factual determination is "clothed with a presumption of correctness" and not reviewable in this Court if supported by competent, substantial evidence. Markham v. Fogg, 458 So. 2d 1122, 1126 (Fla. 1984); Bradenburg Inv. Corp. v. Farrell Realty, 463 So. 2d 558 (Fla. 2d DCA 1985). Inasmuch as the evidence of record in this case clearly supports the trial court's judgment, this Court must affirm the trial court's decision that DAVIS lacks standing to challenge the constitutionality of § 440.09(7).

Closely associated with the issue of standing in this case is the requirement that DAVIS demonstrate the existence of a present controversy and show that he is entitled to have that controversy resolved in order to invoke the circuit court's jurisdiction to enter a declaratory judgment under Florida Statutes Chapter 86. "It is settled law that a court will not entertain a suit to determine a declaration of rights for parties upon facts which have not arisen, upon matters which are contingent or rest in the future...." State *ex rel* Fla. Bank & Trust Co. v. White, 155 Fla. 191, 21 So. 2d 213, 215 (1944). "[T]he mere possibility of injury at some indeterminate time in the future does not supply standing under our Declaratory Judgment Act." Williams v. Howard, 329 So. 2d 277, 282 (Fla. 1976). "The Declaratory Judgment Act does not give courts jurisdiction to entertain declaratory judgment actions where the plaintiff is merely seeking an answer to satisfy his curiosity." Register v. Pierce, 530 So. 2d 990, 993 (Fla. 1st DCA), rev. denied, 537 So. 2d 569 (Fla. 1988) (citation omitted).

Because DAVIS has not yet established any right to workers' compensation benefits, indeed, has not yet even made claim to such benefits, and has not established in arbitration that § 440.09(7) applies to him, he presently seeks a declaration "upon matters

which are contingent or rest in the future." Accordingly, the judgment of the trial court dismissing DAVIS' claims should be affirmed.

II. FLORIDA STATUTE § 440.09(7)(1989) IS CONSTITUTIONAL.

In the event this court reaches the merits of DAVIS' constitutional claims, DAVIS bears the burden of proving to this court that § 440.09(7) is unconstitutional. State v. Bussey, 462 So. 2d 1141, 1144 (Fla. 1985). A presumption of validity accompanies legislative enactments. Department of Business Regulation v. Smith, 471 So. 2d 138, 142 (Fla. 1st DCA 1985) ("The presumption of constitutionality imposes a heavy burden of proof upon one attacking the validity of a statute...."). If a statute is capable of being construed in different ways , the court should accept that construction which comports with constitutional requirements. Firestone v. News-Press Publishing Co., Inc., 538 So. 2d 457 (Fla. 1989). Any doubt is to be resolved in favor of upholding the constitutionality of the challenged statute. Felts v. State, 537 So. 2d 995, 1000 (Fla. 1st DCA 1988), approved, 549 So. 2d 1373 (Fla. 1989) ("Every reasonable doubt should be resolved in favor of the constitutionality of a legislative act, since the presumption of constitutionality continues until the contrary is proven beyond all reasonable doubt.").

Additionally, a fundamental rule of judicial restraint requires courts to decline to reach constitutional issues if a case can be disposed of on other grounds. Escambia County, Fla. v. McMillan, 446 U.S. 48, 104 S.Ct. 1577, 1579, 80 L.Ed.2d 36 (1984); State v. Tsavaris, 394 So. 2d 418 (Fla. 1981), receded from on other grounds, Dean v. State, 478 So. 2d 38 (Fla. 1985). Against this backdrop of judicial restraint and presumption of constitutionality, DAVIS asserts various theories challenging the constitutional validity of § 440.09(7)(1989).

A. FLORIDA STATUTE § 440.09(7)(1989) IMPAIRS NO EXISTING CONTRACT.

DAVIS alleges in his brief that § 440.09(7) violates the impairment of contracts provisions of both the United States and Florida constitutions. In order to be held unconstitutional, the statute must have the effect of changing the substantive rights of the parties to an existing contract. Manning v. Travelers Insurance Co., 250 So. 2d 872, 874 (Fla. 1971); Tri-Properties, Inc. v. Moonspinner Condo. Ass'n, Inc., 447 So. 2d 965, 967 n.2 (Fla. 1st DCA), rev. denied, 455 So. 2d 1033 (Fla. 1984).

DAVIS relies heavily on this Court's decision in Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774 (Fla. 1979). However, in listing the factors to be considered by the court in determining whether a statute impermissibly impairs an existing contract, DAVIS overlooked the threshold consideration identified in the Pomponio case: "In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." Id. at 779 (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978)).

The contract at issue is the Implementation Agreement (Exhibit 31). Ignoring the fact that the implementation agreement expired by its own terms in 1988, paragraph 2 of the agreement provides as follows:

> 2. The workers' compensation rights and benefits to which Miami Dolphin players are entitled are the same as those set forth for other employees in the Florida Workers' Compensation Law, *as amended,* and as interpreted in the Florida Courts except as modified by this Agreement and the 1977 and 1982 CBAs. It is the intent of the parties to avoid litigation of workers' compensation claims by routinely resolving any issue or disputes which may arise between the servicing agent and the player through a fair and reasonable application of the Florida Workers' Compensation Law. (emphasis added)

Clearly, what the parties to this agreement anticipated was that the law would be changed from time to time and those changes were to be adopted by reference into this agreement.

Accordingly, no statutory change of workers' compensation law could impair DAVIS' contract rights because the contract under which he claims entitlement to workers' compensation benefits specifically incorporates the Florida workers' compensation law "as amended."

This result is supported by Florida case law. See, e.g., Angora Enterprises, Inc. v. Cole, 439 So. 2d 832, 834 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984); Century Village, Inc. v. Wellington, etc., 361 So. 2d 128, 132 (Fla. 1978); A-One Coin Laundry Equip. Co. v. Waterside Towers Condo. Ass'n, Inc., 561 So. 2d 590, 593 (Fla. 3d DCA 1990); Kosow v. Condo. Ass'n of Lakeside Village, Inc., 512 So. 2d 349 (Fla. 4th DCA 1987), rev. denied, 520 So. 2d 584 (Fla. 1988); Coral Isle East Condo. v. Snyder, 395 So. 2d 1204 (Fla. 3d DCA 1981). These cases unequivocally hold that where a contract incorporates certain statutes as amended, subsequent amendments to the referenced statute do not impair the obligation of contract and become part of the contract. Accordingly, DAVIS' claim to workers' compensation benefits is subject to the law in effect as of the date of injury. See also, St. Vincent DePaul Society v. Smith, 431 So. 2d 252 (Fla. 1st DCA 1983) (applying the general rule that workers' compensation rights are fixed according to the law in effect as of the date of injury).

B. FLORIDA STATUTE § 440.09(7)(1989) DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

DAVIS argues in his initial brief that § 440.09(7) effectively "makes paragraph 10 of the NFL player contract unlawful." DAVIS fails, however to explain why this result violates due process or to provide authority for his conclusion. Actually, the statute and paragraph 10 of the player contract are not wholly inconsistent. Paragraph 10 of the contract provides for a setoff against workers' compensation benefits at least for the period of time during which a player is disabled. (This provision itself could easily be interpreted

to provide the dollar for dollar setoff specified by the statute.) Section 440.09(7) merely extends (or codifies) the setoff provided by paragraph 10 of the player contract to provide for a setoff in the amount paid during the disability period. The setoff specified in paragraph 10 (by either interpretation) is simply subsumed in the setoff provided by § 440.09(7).

Note that paragraph 10 of the player contract, by itself, confers no right to workers' compensation benefits.[3] That right arises, if at all, from the Implementation Agreement which incorporates the Florida workers' compensation law "as amended." Accordingly, the player contract must be viewed as applicable only to such rights to benefits as may be conferred by the Implementation Agreement and, by reference, the Florida workers' compensation law "as amended."

More traditional substantive due process challenges to the workers' compensation law have questioned whether the remedy available under workers' compensation is a reasonable alternative for the rights of an injured employee under the common law. Florida courts consistently defer to the judgment of the legislature where an alternative remedy of some description is available in place of traditional common law remedies. See, e.g., Mahoney v. Sears Roebuck & Co., 419 So. 2d 754 (Fla. 1st DCA 1982), aff'd, 440 So. 2d 1285 (Fla. 1983). In Mahoney the First District Court upheld the constitutionality of a workers' compensation law amendment that "significantly diminished" the amount of recovery available to an injured worker for the loss of an eye. "Drastic" limitations or the

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[3] Paragraph 10 reads as follows:

WORKMENS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workmen's compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advanced payment of workmen's compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workmen's compensation.

imposition of a dollar cap on the amount of recovery do not comprise a constitutional bar where recovery is not "*totally eliminated.*" Id. at 755 (emphasis in original).

In the instant case, injured football players receive at a *minimum* the *maximum* amount of compensation provided by the Florida workers' compensation law because § 440.09(7) provides employers with only a setoff against amounts already paid as wages to disabled employees and does not reduce the total amount of workers' compensation benefits players receive. These amounts are paid with certainty, without regard to fault, and without the necessity for litigation. Further, all necessary medical expenses are paid in full by the teams, again, without uncertainty or litigation. Thus, although § 440.09(7) may limit the benefits received by a player, that remedy is "expeditious and independent of proof of fault." "In other words, the certain remedy afforded by the act is deemed to be a sufficient substitute for the doubtful right accorded by the common law." Id. See Newton v. McCotter Motors, Inc., 475 So. 2d 230 (Fla. 1985) (and cases cited therein); Sasso v. Ram Property Management, 452 So. 2d 932 (Fla. 1984), appeal dismissed, 469 U.S. 1030, 105 S.Ct. 498, 83 L.Ed.2d 391 (1984).

For the foregoing reasons, this Court should uphold the constitutionality of § 440.09(7) against DAVIS' due process challenge.

C. FLORIDA STATUTE § 440.09(7)(1989) DOES NOT VIOLATE CONSTITUTIONAL EQUAL PROTECTION PROVISIONS.

The standard to be applied by this Court to DAVIS' equal protection claim is *rational basis*. That is, if this Court reaches the equal protection issue with respect to § 440.09(7), the Court must uphold the constitutionality of the statute unless the plaintiffs demonstrate that the statute bears no reasonable relationship to a legitimate state purpose. See Sasso v. Ram Property Management, 431 So. 2d 204, 211-220 (Fla. 1st DCA 1983), approved, 452 So. 2d 932 (Fla. 1984).

In discovery responses the football Plaintiffs suggested that due to the fact that they were injured they are now physically handicapped and are thus entitled to have § 440.09(7) examined under the "strict scrutiny" test applicable to protected suspect classes. Under this reasoning, virtually all workers' compensation statutes would be subject to strict scrutiny because only injured persons are within the grasp of the statutes. Among the multitude of cases involving equal protection challenges to workers' compensation statutes are many cases applying the reasonable relationship or rational basis standard and no cases applying strict scrutiny based upon physical handicap. Further, § 440.09(7) does not treat "handicapped" persons (by any definition) in any manner differently from non-handicapped persons. The statute applies equally to all persons without regard to physical disability. Thus, because no suspect class is involved, "the statute need only bear a reasonable relationship to a legitimate state interest." Acton v. Fort Lauderdale Hospital, 440 So. 2d 1282, 1284 (Fla. 1983). "The equal protection clause does not invalidate a statute unless the legislation fails to 'bear some reasonable relationship to a legitimate state purpose' and causes 'different treatment so disparate as relates to the difference in classification so as to be wholly arbitrary.'" Rudolph v. Miami Dolphins, Ltd., 447 So. 2d 284, 291 (Fla. 1st DCA 1983), rev. denied, 453 So. 2d 45 (Fla. 1984) (citation omitted).

Professional athletes, and particularly professional football players, occupy a unique position in the workplace justifying the classification effected by § 440.09(7). As noted previously, football players are highly paid participants in a contact sport involving a high frequency of injury. Careers average less than four years compared with over four decades for workers generally. In contrast to most workers, football players continue to receive full salary and other benefits while disabled and not contributing to the team. The Court in Rudolph, supra, relied on some of these same factors in reaching the conclusion that § 440.02, excluding professional athletes from workers' compensation coverage

altogether, did not deny equal protection to players. For the same reasons, this Court should uphold the constitutionality of § 440.09(7).

D. FLORIDA STATUTE § 440.09(7)(1989) DOES NOT DENY THE RIGHT OF ACCESS TO COURTS.

DAVIS contends § 440.09(7) violates his constitutional right of access to courts. This contention fails because § 440.09(7) does not totally abolish the right to recover for employment related injuries and because the Florida workers' compensation law remains a reasonable alternative to the former common law cause of action. The applicable standard was formulated by the Florida Supreme Court in Kluger v. White, 281 So. 2d 1 (Fla. 1973). The legislature may abolish a right of action in two instances: First, where a reasonable alternative to the right of action is provided and, second, where an overpowering public necessity can be demonstrated. The Kluger court pointed to workers' compensation laws as a valid example of a former right of action being replaced by a reasonable alternative. Id. at 4.

However, the Kluger analysis is not applied where a statute limits but does not abolish a cause of action. Where a statute merely limits a cause of action, judicial restraint requires courts to defer to the judgment of the legislature. Sasso, 431 So. 2d at 209. "The constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action." Id. at 210.

Applying the two-tiered analysis of the First District Court in Sasso, 431 So. 2d 210-211, this Court must conclude that § 440.09(7) does not unconstitutionally deny plaintiffs' right of access to courts. First, "it has been generally recognized that chapter 440 provides a reasonable alternative to common law tort actions and so is not violative of the access to the courts provision...." Id. Under Sasso, the question then is whether

§ 440.09(7) "merely limits a claimant's right to wage-loss benefits rather than completely abolishes it."

Obviously, § 440.09(7) does not completely abolish the right to wage-loss benefits. In fact, professional athletes are guaranteed to recover *at least* the maximum benefits allowed by the workers' compensation law. The law merely provides that when an injured player continues to collect wages during a disability period, he won't be permitted to collect additional sums as "wage-loss" benefits. Because the statute provides a setoff for amounts paid as wages to the claimant, if the amount of wages actually paid is less than the maximum amount the claimant is entitled to as workers' compensation wage-loss benefits, the employer must pay the claimant the difference. In addition, all necessary medical expenses are paid without the uncertainty and expense associated with the claimant's former common law remedies. Accordingly, because § 440.09(7) does not completely abolish a formerly existing cause of action and because a reasonable alternative has been provided, the statute does not violate the constitutional guaranty of access to courts.

E. NO FEDERAL STATUTE PREEMPTS STATE REGULATION OF WORKERS' COMPENSATION.

DAVIS asserts that the federal Labor Management Relations Act, 29 U.S.C.A. § 151 et seq., preempts Florida Statute § 440.09(7) by virtue of the supremacy clause of the United States Constitution, Art. 1, § 10. This theory is not at all developed in the pleadings and in response to discovery the plaintiffs asserted reliance on San Diego Building Trades, etc. v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959).

The Garmon case, however, is applicable to the instant case only in the broadest sense. It deals with whether a state court may take jurisdiction of a labor dispute and award damages under a state law to a business besieged by picketing and related tactics. The Supreme Court opinion discusses preemption generally and the scope of the Labor

Management Relations Act. The Court states at one point "[T]he Labor Management Relations Act 'leaves much to the states, though congress has refrained from telling us how much.'" Id. at 79 S. Ct. 777 (citations omitted). Fortunately, other decisions tell us how much and leave to the states the power to regulate in the area of workers' compensation.

State law may be preempted in several ways; by a clear expression that congress intends to preempt state law, when there is actual conflict between state and federal law, when compliance with both state and federal law is physically impossible, where federal law implicitly bars state regulation in a particular area, where federal law is so pervasive as to occupy an entire field leaving no room for state legislation, or where state law poses an obstacle to accomplishment of federal objectives. Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890, 1898, 90 L. Ed. 2d 369 (1986). There is a presumption against preemption. Broughton v. Courtney, 861 F. 2d 639 (11th Cir. 1988).

Nothing in the Labor Management Relations Act specifically or implicitly prevents state regulation in the area of workers' compensation. Nothing about § 440.09(7) conflicts with or prevents the effect of any provision of the federal act, nor is compliance with both laws impossible. In short, there is no basis for the assertion that § 440.09(7) is preempted by federal law.

> "Nothing in this record *or in the law generally* suggests that Florida's efforts to statutorily regulate workers' compensation rights between this employer and its employees [is] in any conflict with federal law or would frustrate the federal scheme in regard to labor contracts. Certainly, Congress has not preempted the area of workers' compensation law; to the contrary, it has directed, by precluding removal of such actions [28 U.S.C.A. §1445(c)] that such disputes be left to state resolution."

Southwest Gulfcoast, Inc. v. Allan, 513 So. 2d 219, 226 (Fla. 1st DCA 1987) (emphasis added).

Accordingly, plaintiffs' preemption claim must fail. See Griffith v. Parrish Construction & Door Service, 409 So. 2d 62 (Fla. 1st DCA), rev. denied, 418 So. 2d 1279 (Fla. 1982) (workers' compensation statute that conflicted with union requirements upheld against preemption challenge).

CONCLUSION

Having considered the evidence presented at trial, Judge Hall ruled that DAVIS lacked standing to challenge the constitutionality of Florida Statute § 440.09(7)(1989). This finding of fact is not reviewable in this court because the record includes competent, substantial evidence in support of that conclusion. Further, DAVIS has failed to demonstrate the existence of a present controversy and the need to have the controversy resolved. He has made no claim for workers' compensation benefits. He has established no entitlement to workers' compensation benefits. The pleadings suggest only that DAVIS "may be entitled to workers' compensation" benefits. (R. 1649). The uncertainty of DAVIS' entitlement to benefits is one of several contingencies that preclude any finding of standing or any finding that the trial court had jurisdiction of this action under the Declaratory Judgment Act. On this basis alone, the judgment of the trial court as to DAVIS should be affirmed.

If this Court reaches the merits of the constitutional questions, it must begin with the presumption that § 440.09(7) is constitutional and all doubts must be resolved in favor of upholding the statute. DAVIS bears the burden of proving the statute is unconstitutional beyond a reasonable doubt.

No contract is impaired by application of § 440.09(7). The collective bargaining agreements have expired. Even so, only such benefits as may be available under state law were included in their provisions. The Implementation Agreement has expired as well but

because the Dolphins continue to voluntarily observe it, that contract, if anything, is the basis for DAVIS' claim to workers' compensation, That agreement specifically incorporates Florida workers' compensation law "as amended," meaning the parties agreed to be bound by future amendments to the statute such as § 440.09(7). (No one has complained over the years as statutory changes increased benefits.) Thus, this amendment does not change the original contract of the parties to the Implementation Agreement. (As another point of interest, note that the Implementation Agreement expired before DAVIS entered the league and that one of the parties to that agreement, the NFLPA, no longer exists as a bargaining agent for the players.)

The due process and access to courts claims fail primarily because the players receive full payment of all medical expenses and *at least* the maximum wage-loss benefit provided by law. Therefore, the workers' compensation law remains a reasonable alternative to the uncertain and costly remedies afforded workers under the common law.

On the equal protection issue, applying the rational basis test the Court will quickly determine that football players are in a class by themselves by virtue of the type of occupation, duration of career, pay scales, age of retirement, post-football earning potential and other factors. The same factors providing a rational basis for the exclusion of professional athletes from workers' compensation altogether, Rudolph, supra, support a finding of constitutionality as to § 440.09(7) which merely provides a setoff for injury benefits already paid to players.

Finally, DAVIS suggests that some provision of federal labor law preempts § 440.09(7). Although DAVIS refuses to identify any specific provision of federal law which might be said to preempt the state law, there appears to be no effective conflict between the state law and any federal law, much less any specific indication of

congressional intent to preempt state workers' compensation laws, an area traditionally left to the individual states.

Accordingly, for the foregoing reasons this Court should affirm the judgment of the trial court as to DAVIS and decline to reach the constitutional issues presented by DAVIS. Alternatively, this Court should uphold the constitutionality of Florida Statute § 440.09(7) facially and as applied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel of record this 8th day of February, 1991.

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