IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ, et al.,

Appellants/Cross Appellees,

vs. CASE NO. 77,179

MARK SCANLAN, et al.,

Appellees/Cross Appellants.
_____/

DEFENDANT/APPELLANTS, MARTINEZ, MENENDEZ, AND LEWIS' ANSWER BRIEF

Respectfully submitted,
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PRELIMINARY STATEMENT

The Plaintiffs/Appellees/Cross-Appellants will be referred to as Plaintiffs; Defendants/Appellants/Cross-Appellees will be referred to as Defendants; Intervenor/Appellant/Cross-Appellee Associated Industries of Florida will be referred to as AIF; Intervenor/Cross-Appellee Tampa Bay Area NFL, INC. (the Bucs) and South Florida Sports Corporation (the Dolphins) shall be referred to as the Bucs and Dolphins; and the Florida Chamber of Commerce shall be referred to as the Chamber. Employers Association of Florida and Florida Fruit and Vegetable Association; Harper Bros. Inc. and Lee County Electrical Cooperative and the Academy of Florida Trial Lawyers (AFTL) shall be referred to as amici collectively or individually as Employers, Harper Bros. and AFTL.

Defendants/Appellants/Cross-Appellees adopt the brief and the positions of AIF, the Chamber, and Commissioner of Insurance Tom Gallagher, and the Bucs and Dolphins. Additionally, in order to avoid duplication of some of the arguments, the Defendants adopt the brief of Amici Employers and Harper Bros.

STATEMENT OF THE CASE AND FACTS

The Defendants adopt and incorporate by reference the Statement of the Case submitted by the Defendants in the initial brief, as well as the Statement of the Facts submitted by the Defendants in their initial brief.

The Defendants note the Statement of the Facts submitted by the Plaintiffs, but augment for purposes of their brief as follows:

The testimony of William McCue (T716-787) discussed the construction industry's numerous problems resulting from the exemption of sole proprietors, corporate officers, and partners from the requirement to have workers' compensation coverage. These problems were presented to the Legislature which resulted in the deletions of exemptions for the above-mentioned personnel. Additionally, Joe Mastavido (T607-650) testified regarding the provisions of Section 440.572, Florida Statutes (1990) and the ability of a self-insurer with a net worth of not less than $250,000,000 contracting to assume the liabilities of contractors and subcontractors. The testimony was that there were similar provisions for utilities and that there has been no problem with that concept, nor with a self-insurer with assets of $250,000,000 not paying claims or being insolvent.

SUMMARY OF THE ARGUMENT

Other than the issues for which Defendants have appealed in the initial brief, the trial court was correct in rejecting the claims to the constitutionality of Chapter 90-201, Laws of Florida, subject to the cross-appeal of Plaintiffs below.

The trial court was correct in ruling that there was no violation of Article III, Section 12, Florida Constitution. The court may find that the appropriations in Chapter 90-201, Laws of Florida, are not violative of constitutional provisions because that act is a law containing appropriations and is not a general appropriations law containing prohibited subjects.

The trial court did not err when it ruled that the Plaintiffs have not met their burden of proof necessary to sustain their constitutional challenge to the numerous sections of the act which were attacked in a "shotgun" method. In addition to failing to submit any evidence or to having inadequate evidence to support their points, Defendants contend that the Plaintiffs abandoned a number of issues by not presenting evidence to the trial court so that they are not preserved for appeal.

The trial court was correct in ruling that the amendments to Chapter 440, Florida Statutes, in Chapter 90-201, Laws of

Florida, concerning independent contractors, sole proprietors, corporations and partnerships was constitutional. In any event, their argument is mooted by the enactment of House Bill 11-B, signed into law on January 24, 1991. Even if these prior deletions of exemptions from requirements to have workers compensation had not been repealed by the 1991 act, the Plaintiffs have failed to show how the prior act of the Legislature was unconstitutional.

The trial court finding that certain provisions of the 1990 act, if unconstitutional, were severable was correct. Plaintiffs contend that the provisions are not severable so that the entire act must be declared unconstitutional. This is contrary to established law and should be rejected.

The rejection of the challenge to the Drug-Free Workplace Program by the trial court was correct. Additionally, it appears that no evidence was submitted on this issue to the trial court so it is not preserved for appeal. Even if not abandoned by failing to preserve it below, the Drug-Free Workplace Program is constitutional. The Drug-Free Workplace Program is not a governmental program implicating the Fourth Amendment to the United States Constitution or the rights to privacy under Article I, Section 23, Florida Constitution.

Also, the trial court was correct in not declaring unconstitutional the challenges to Section 440.572, Florida Statutes, regarding the exemption of the self-insurer with assets of $250,000,000 and that the provisions concerning the Florida Self-Insurance Guarantee Association, Inc., under Section 440.385(3)(a), Florida Statutes, does not deprive Plaintiffs or claimants of the right to benefits in the event of an insolvent employer.

I.

THE TRIAL JUDGE WAS CORRECT IN RULING THAT THE COMPREHENSIVE ECONOMIC DEVELOPMENT ACT OF 1990 DID NOT VIOLATE THE PROVISIONS OF ARTICLE III, SECTION 12, OF THE FLORIDA CONSTITUTION.

In initiating their "shotgun" attack on Chapter 90-201, Laws of Florida (the Comprehensive Economic Development Act of 1990), Plaintiffs challenged, the act in part, as violating the provisions of Article III, Section 12, Florida Constitution. Article III, Section 12, Florida Constitution, provides:

> Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

Contrary to the allegations of the Plaintiffs, the Comprehensive Economic Development Act of 1990, in dealing with the provisions of the workers' compensation law, does not violate the above referenced constitutional provision. In Plaintiffs' brief addressing the issue of appropriations, they cite Sections 37 (sic),[1] 54, 115, 116, 117, 118 and 119 as containing appropriations of approximately $10 million and argue that these appropriations violate Article III, Section 12, Florida Constitution. (Appellee/Cross Appellants' Brief on the issue of

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[1] Apparently, the reference to Section 37 is a mistake as there is no appropriation in that section. Rather, Defendants believe that the correct reference was to Section 38.

Appropriation, p. 5.) In any event, Sections 38 and 118 of Chapter 90-201, Laws of Florida, have been repealed by House Bill 11-B, 1991.[2] As to those provisions, the repeal of those sections moots the arguments that they violate the provisions of Article III, Section 12, of the Florida Constitution.

Even if the provisions relating to appropriations in Sections 38 and 118 are not moot for having been repealed by a subsequent legislature, these and the other sections are not violative of the Constitution. This Court found in Amos v. Mosley, 74 Fla. 555, 558, 77 So. 619, 626 (1917), that a tax act containing appropriations was not violative of the Florida Constitution because it was:

> ... not a law "making appropriations for the salaries of public officers and other current expenses of the state," but is one inaugurating a . . . governmental policy . . ., and it is a comprehensive scheme embracing the entire state . . . . The matter of appropriations for carrying the law into effect is but a small part of the great purpose of the act.

Amos v. Mosley, 77 So. at 626.

This Court has determined that there is a distinction between general appropriations law and a law making an appropriation. State v. Southern Land & Timber Co., 45 Fla. 374,

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[2] A copy of House Bill 11-B, signed into law on January 24, 1991, has been filed with the Court.

33 So. 999 (1903). Amos v. Mosley, supra. See also the discussion distinguishing an appropriation act and an act containing appropriations in Bengzon v. Secretary of Justice & Insular Auditor, 299 U.S. 410, 57 S.Ct. 252, 81 L.Ed. 312 (1937).

Plaintiffs rely extensively on the case of Thompson v. Graham, 481 So.2d 1212 (Fla. 1985), for the argument that portions of Chapter 90-201, Laws of Florida, pertaining to workers' compensation are appropriations which can only be contained in an appropriations bill. It should be noted that this Court found that in Thompson, there was one section of the bill in which expenditures of funds were authorized for 86 specific items involving over a half billion dollars. Importantly, this Court found that

> [e]ach appropriated item is a distinct project and not dependent on any other; collectively, the allocated funds amount to a general appropriation for educational capital outlay.

Thompson, at 1215. Here, an analysis of the challenged sections of Chapter 90-201, Laws of Florida, reveal that each of the appropriations are but "a small part of the great purpose of the act." Amos v. Mosley, supra.

A review of the challenged provisions and the funds contained in them reveals the following: Section 38 provides for costs and expenses incurred by the members and employees of the

Workers' Compensation Oversight Board and is clearly intended to accomplish the purposes of the act.[3] Section 54 provides for the Joint Select Committee on workers' compensation and the preparation of a report to the Legislature concerning the workers' compensation system. The funds in that section are for the services necessary to prepare a report for the Legislature to consider in addressing issues in this complex area. Section 115 provides for positions in the Department of Labor and Employment Security to implement the workers' compensation act. Section 116 is for 11 positions in the Department of Insurance to fund the Bureau of Workers' Compensation Insurance Fraud. Section 117 creates positions in the Department of Professional Regulation to administer provisions of the act. Section 118 (creating the Workers' Compensation Oversight Board) has been repealed. Section 119 creates positions in the Department of Insurance to fund the Medical Care Pilot Projects provided for by the act.

Reviewed singularly or collectively, it is clear that these sections, which contained funding to accomplish the "great purpose of the act", are not a general appropriations act such as that found in Thompson to be violative of the Florida Constitution. As noted above, the fact that a bill or law contains an appropriation does not make it a general

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[3] As noted above, Sections 38 and 118 have been repealed.

appropriations act. In Amos, supra, this Court reviewed a provision in the Oregon Constitution, identical to Florida's prohibition against other subjects in an appropriations bill, and the case of Evanhoff v. State Industrial Acc. Commission, 78 Or. 503, 154 P. 106 (1915). In Evanhoff, the Oregon Court concluded that the constitutional provision (the same as Florida's) "does not prohibit the Legislature from passing an act designed to effect a particular purpose, and in the same act to provide the funds necessary to accomplish that purpose." Interestingly, the Evanhoff decision involved the constitutionality of the Oregon Workers' Compensation Act. Based on the finding in Evanhoff, this Court reached the decision noted above that the appropriations in Amos, supra, were but a "small part of the great purpose of the act." Id. 74 Fla. at 558, 77 So. at 626. Providing for funding to implement the workers' compensation law as the Legislature did in Chapter 90-201, Laws of Florida, warrants the same result in this case as in Amos.

Based on the argument and authority set out above, this Court should find that the inclusion of funds to accomplish the purpose of Chapter 90-201, Laws of Florida, does not constitute a general appropriations act such that the inclusion of these funds in the act would violate Article III, Section 12, Florida Constitution.

II.

THE PLAINTIFFS HAVE NOT MET THE BURDEN OF PROOF NECESSARY TO SUSTAIN THEIR CONSTITUTIONAL CHALLENGE.

As they did in the Second Amended Complaint, the Plaintiffs here have made a "shotgun" attack on the constitutionality of numerous provisions of that portion of Chapter 90-201, Laws of Florida, pertaining to workers' compensation. Rather than responding seriatim to each of the Plaintiffs' numerous challenges, the Defendants simply state that the Plaintiffs have not met their burden of proof to sustain their attack. As noted in the Defendants' initial brief, this is a challenge to the facial validity of the act and is not an attack on the act "as applied." Chapter 90-201, Laws of Florida, is presumed to be constitutionally valid. In re Estate of Caldwell, 247 So.2d 1, 3 (Fla. 1971). To overcome this presumption, the Plaintiffs must prove the alleged invalidity beyond a reasonable doubt. Department of Business Regulation v. Smith, 471 So.2d 138, 143 (Fla. 1st DCA 1985). This Court noted, in State v. Canova, 94 So.2d 181, 184 (Fla. 1957), that "[t]o overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law."

To avoid the possibility of a loose pellet from this shotgun attack ricocheting around the courtroom, Defendants

suggest that, as noted in the brief submitted by Defendant Gallagher, the record below simply does not support the numerous allegations of Plaintiff's in their briefs to this Court. Defendants contend that Plaintiff's arguments are unsupported by the evidence in the record and certainly do not have the force and effect of proving beyond a reasonable doubt that the actions of the Legislature, in addressing this complex subject, are unconstitutional. Quite frankly, the arguments of the Plaintiffs are a hyperbole of verbiage distal to the law and to the facts. They are clearly hypothetical, speculative arguments made on an "as applied" basis. These arguments do not support a finding of facial invalidity of the Chapter 90-201, Laws of Florida.[4]

As noted at pages 12 through 15, infra, many of the arguments raised in Plaintiffs' briefs were abandoned at the trial level.[5] However, Defendants would urge that this Court strike or disregard all arguments not raised below, including those abandoned below and those for which no evidence or argument was made in the court below. It is far too late in the game for the Plaintiffs to raise those issues either for the first time on appeal or to attempt to resurrect those issues abandoned below.

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[4] The arguments of Plaintiffs here and below are simply that; argument without foundation which, when exposed to the principals of constitutional law enunciated by this Court, must fail.

[5] The issues were either abandoned or no evidence was presented below addressing them. In either event the result is the same; Plaintiffs did not meet the heavy burden of proof.

In Defendants' initial brief, it was argued that the trial court erred in finding that the Plaintiffs below had met their burden of proof in declaring portions of Chapter 90-201, Laws of Florida, unconstitutional. For the reasons argued in that brief that the court erred, Defendants submit that the judge was correct in finding that the Plaintiffs had not met the burden of proof required to hold unconstitutional the challenged portions addressed in Plaintiffs' cross-appeal. The Plaintiffs' evidence in the record below, limited and narrow as it is, simply does not support the conclusion that Chapter 90-201, Laws of Florida, is unconstitutional beyond a reasonable doubt. Analyzed in a light most favorable to the Defendants (who prevailed on these issues), the paucity of competent evidence in the record must lead this Court to the conclusion that the trial court was correct when it ruled that the provisions of Chapter 90-201, Laws of Florida, challenged below are indeed constitutional.

ISSUES RAISED BY PLAINTIFFS' BRIEFS FOR WHICH THERE APPEARS TO BE NO EVIDENCE IN THE RECORD

The Plaintiffs have raised issues in their briefs, for which the Defendants are unable to find any supporting evidence in the record below. They are:

1. Section 440.19(1)(c), F.S. - defining "remedial treatment or attention".
2. Section 440.25(3)(b), F.S., relating to mediation (Scanlan and Professional Firefighters brief, page 14).

3. Hospital Charge Reimbursement (Scanlan and Professional Firefighters brief, page 16).

4. Penalties for failure to comply with the Medical Fee Schedule (Scanlan and the Professional Firefighters brief, page 17).

5. Redefinition of independent contractors (Scanlan and the Professional Firefighters brief, page 18).

6. Inclusion of all employees under the workers' compensation system (Scanlan and the Professional Firefighters brief, page 20).

7. Section 440.10(1), F.S., which provides that subcontractors who misrepresent the number of their employees on their payroll in order to avoid coverage are guilty of a felony (Scanlan and the Professional Firefighters brief, page 21).

8. Legislative overruling of Gator Freightways, Inc. v. Roberts, 550 So.2d 1117 (Fla. 1989) (Scanlan and the Professional Firefighters brief, page 21).

9. Section 440.09(3), F.S., providing that if an employee has a positive confirmation of a drug, it shall be presumed that the injury was occasioned primarily by the intoxication of or by the influence of the drug upon the employee. (Scanlan and Professional Firefighters brief, page 26).

10. Section 440.102(1)(j), F.S., - "reasonable suspicion drug testing" (Scanlan and the Profession Firefighters brief, page 26).

11. Special circumstances for compensability. (Scanlan and the Professional Firefighters brief, page 27-35).

12. Section 440.15(2)(b), F.S., - catastrophic loss benefit (Scanlan and the Professional Firefighters brief, page 36).

13. Section 440.15(3)(b)(2), F.S., repealing "deemed earnings" (Scanlan and the Professional Firefighters brief, page 39).

14. Section 440.15(3)(b)(6), F.S., - termination of wage loss benefits if the employee is convicted of conduct punishable under particular statutes (Scanlan and the Professional Firefighters brief, page 40).

15. Disqualification from benefits if the employee, at the time of entering into employment, falsely represents himself as not having been previously disabled or injured (Scanlan and the Professional Firefighters brief, page 4-41).

16. Calculation of wage loss after subsequent injury (Scanlan and the Professional Firefighters brief, page 41).

17. Disqualification of reimbursement from the Special Disability Trust Fund for employers under certain circumstances (Scanlan and the Professional Firefighters brief, page 42).

18. Lump sum settlements for claimants with permanent impairment ratings from 1 to 5% (Scanlan and the Professional Firefighters brief, page 42).

19. Attorneys' fees based upon value of future medical benefits secured not more than five years after the date the claim is filed (Scanlan and the Professional Firefighters brief, page 43-44).

As there was no evidence supporting Plaintiffs' challenge to the issues presented to the trial court, the finding of constitutionally by the court below on these points should be summarily affirmed.

III.

THE TRIAL COURT WAS CORRECT IN RULING THAT THE AMENDMENTS TO CHAPTER 440, FLORIDA STATUTES, REGARDING INDEPENDENT CONTRACTORS WAS CONSTITUTIONAL.

The Plaintiffs, in the cross-appeal brief of Mark Scanlan and the Professional Firefighters of Florida, challenge the amendments to Chapter 440, Florida Statutes, repealing exemptions for small contractors in the construction industry.[6] Once again, Plaintiffs take issue with the wisdom of the 1990 Legislature in its decision to require all independent contractors and small businesses and partnerships to have workers' compensation coverage. Additionally, the Plaintiffs complain that the Legislature is attempting to legislatively overrule case law by statutory amendment.[7]

The preamble to Chapter 90-201, Laws of Florida, and the evidence of record reflect that the Legislature acted to address a crisis in the workers' compensation system and to address the problems created in the construction industry by the exemptions formerly granted to independent contractors and others. For many years, the construction industry has been treated differently

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[6] As noted in Section II of this brief, it does not appear from the record that this issue was discussed below or that it has been preserved for appeal here.

[7] House Bill 11-B, signed into law on January 24, 1991, restores the deletions regarding independent contractors, sole proprietors, small corporations, and small partners complained about in pages 18-21 of the Scanlan cross-appeal. Accordingly, those arguments have been mooted.

than most other types of businesses in that all employees on the construction site had to be covered under workers' compensation. The evidence reflects that this was due to the fact that it is difficult on a construction site to keep track of the employees on the job and the legal fiction requiring the general contractor to be the employer for everyone on the construction site while requiring the general contractor to have workers' compensation for all of those employees whether they worked for that contractor or not (T 728-9). One of the problems addressed was that of having exempt persons working on the job who were later injured. This resulted in general contractors having to provide workers' compensation coverage to persons who had not paid premiums into the system.[8]

The approach the Legislature took in addressing this problem was to require that no corporate officer of a corporation engaged in the construction industry could be exempt from the coverage of Chapter 440, F.S. In addressing the independent contractor, the Legislature found that they were not considered employees under the workers' compensation act. However, the courts, in looking at the construction industry, have historically considered the situation surrounding the employment of the independent contractor when they are injured, and for the most part, concluded that the independent contractor was in fact

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[8] See the testimony of William G. McCue, regarding corporations which had 10, 12, 14 vice-presidents; all of whom were exempt (T 726).

an employee. As the independent contractors did not have any workers' compensation coverage, this required the general contractor to provide workers' compensation coverage for them. The goal of the Legislature in amending Section 440.02(12)(d)1., F.S., (1990) was to eliminate litigation as to whether or not the person was an independent contractor. For purposes of the construction industry, they were independent contractors; however, under the 1990 Act they were not exempt from having workers' compensation coverage.

Contrary to the argument of Plaintiffs, Chapter 90-201, Laws of Florida, does not amend the status of an independent contractor, it simply provides that independent contractors are not exempt from workers' compensation coverage. This is clearly within the authority of the Legislature to require, particularly when the Legislature has been advised of the problem in the construction industry.[9] Over the years, the courts have been required to address numerous challenges to the constitutionality of the workers' compensation system.[10] These challenges have raised access to courts (Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984); Wood v. Harry Harmon Insulation, 511 So.2d 690 (Fla. 1st DCA 1987); due process or equal protection under

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[9] While the enforcement of these provisions were stayed in other proceedings, the trial court below found that the amendments requiring all persons in the construction industry to be covered by workers' compensation were constitutional.

[10] See the discussion of these and other cases in Defendant Gallagher's brief regarding access to courts.

the Florida or United States Constitution, Florida Farm Bureau v. Ayala, 501 So.2d 1346 (Fla. 4th DCA 1987); and denial of equal protection in a scheduled wage loss case, Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983)). In all of these cases, the courts denied the broad constitutional challenges similar to the one raised here because of the finding that there was a rational relationship to the legitimate state interest to provide for an effective workers' compensation system.

In order for this Court to find that the Legislature committed constitutional error in enacting the amendments to Chapter 440, F.S., this Court must be convinced that the Plaintiffs have met their burden of proving, beyond a reasonable doubt, that there is no rational basis for those amendments, and that the requirement that all persons in the construction industry be covered by workers' compensation does not forward a legitimate state interest. Likewise, the Plaintiffs are required, but have failed, to show that the amendments concerning the construction industry are unconstitutional in all factual situations. Once again, Plaintiffs are complaining about provisions of Chapter 90-201, Laws of Florida, on the basis that these provisions are allegedly inadequate, unfair or unwise. This theory of attack was rejected by this Court in Mahoney v. Sears, Roebuck & Company, 440 So.2d 1285 (Fla. 1983), when the Court held that amendments to Chapter 440, F.S., did not

fundamentally alter the workers' compensation system as a reasonable litigation alternative. Clearly, requiring all members of the construction industry to be afforded benefits under the workers' compensation system is a reasonable alternative to tort litigation regarding injuries received on the job by these previously exempt individuals.

As noted above, however,[11] under the 1991 Act of the Legislature, reenacting these exemptions, this point is moot and we are now where we were prior to the enactment of Chapter 90-201, Laws of Florida, except that there is a limit to the number of partners and corporate officers who are exempt from coverage.

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[11] The requirement of Chapter 90-201, Laws of Florida, that all members of the construction industry must be covered by workers' compensation insurance has been repealed, and exemptions for sole proprietors, independent contractors, small corporations, and small partnerships have been restored. See §1 & 2, HB 11-B 1991.

IV

THE TRIAL COURT DID NOT ERR IN FINDING CERTAIN PROVISIONS OF THE 1990 ACT SEVERABLE, IF UNCONSTITUTIONAL.

The trial court ruled unconstitutional several isolated provisions of the 1990 Act. See Final Judgment, R2692, paragraphs 5-9).[12] It found these provisions severable from the remainder of the 1990 Act. Should this Court affirm the trial court's ruling on this point and find these provisions unconstitutional, it must also affirm their severability under clearly established Florida case law.

The Plaintiffs challenge the trial court's ruling that these provisions are severable. The Plaintiffs cite to a few of the correct Florida cases regarding severability but make no attempt to apply the principles enunciated in those cases to the stricken provisions.

Florida law provides that the valid portion of any act or statute will be permitted to stand provided:

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[12] These are: Section 18 as it amends Section 440.13(2)(i)3a, b, c, F.S., ("Super Doc" provision); Section 20 as it amends Section 440.15(1)(b), F.S., (100 mile radius requirement); Section 20 as it amends Section 440.15(3)(b)4e, F.S., (imposing burden of proof on employee); Section 43 of Chapter 89-289, Laws of Florida, and Section 56, Chapter 90-201, Laws of Florida, (repealing 1989 sunsetting provision). All have been re-enacted in the 1991 Act.

We do not concede the unconstitutionality of these provisions in this argument. The constitutionality of those provisions are addressed in the initial briefs of Defendants and amici.

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Smith v. Deptartment of Insurance, 507 So.2d 1080, 1089 (Fla. 1987), quoting Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828 (Fla. 1962). Under this test, the stricken provisions are clearly severable.

The elimination of the "Super Doc" provision simply results in the judge of compensation claims having to decide a factual issue without the benefit of a third health care provider, whose opinion is presumed correct (though subject to rebuttal). This provision is scarcely integral to either the act as a whole or even to that section of the statute and can be easily severed. Without this provision, the act as a whole still remains "viable and complete," see Smith, supra, at 1090, and its purposes can easily be accomplished.

The same is true of Section 20 of Chapter 90-201, Laws of Florida, amending Section 440.15(1)(b), F.S., and requiring a certain class of persons not suffering specified injuries to demonstrate the unavailability of "light work" within a 100-mile radius of the person's residence in order to claim compensation for permanent total disability. The elimination of this

requirement simply removes a potential bar to compensation for certain workers found totally and permanently disabled and returns the law to its status prior to 1990 amendment. Similarly, eliminating the consideration of economic conditions in Section 440.15(3)(b)4e, F.S., simply removes a condition precedent the claimant must establish. Removal of this provision has no rippling effect on the statute itself, much less Chapter 90-201, Laws of Florida, as a whole. Plaintiffs do not even attempt to demonstrate that either of these provisions is integral to the statute or to Chapter 90-201, Laws of Florida, as a whole.

In Smith, supra, this Court gave considerable weight to the fact that the Legislature had included a severability clause in the Tort Reform and Insurance Act of 1986 and to the sense of crisis the Legislature had when passing the Act. Similar considerations are important here. Both the 1990 and 1991 acts contain severability clauses. See, Section 120, of SB 8-B (1991). It cannot be seriously contended that the 1990 or 1991 legislature would not have passed this legislation had the purportedly offending provisions not been included.

Finally, the sunsetting provisions contained in Chapters 89-289 and 90-201, Laws of Florida, have nothing to do with the operation of the Act. Even assuming that the workers' compensation law cannot be automatically sunsetted, the elimination of these provisions would have absolutely no effect

on the operation of Chapter 440, F.S., or Chapter 90-201, Laws of Florida.

This Court has been notably reluctant to strike down entire acts because of the invalidity of minor provisions. See, e.g., State v. Williams, 343 So.2d 35 (Fla. 1977); Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); Phillips v. General Finance Corp. of Florida, 297 So.2d 6 (Fla. 1974); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). In fact, the Plaintiffs cite no case where this Court has taken the drastic action Plaintiffs here advocate.

All of the isolated provisions invalidated by the trial court are clearly severable under existing case law. Neither the operation of Chapter 90-201, Laws of Florida, nor the legislative purpose the act will be affected by the elimination of these provisions.

V

THE TRIAL COURT WAS CORRECT IN UPHOLDING THE CHALLENGE TO THE DRUG-FREE WORKPLACE PROGRAM

Sections twelve and thirteen of Chapter 90-201, Laws of Florida, now codified as Sections 440.101 and 440.102, Florida Statutes, were not found to be constitutionally defective by the trial court. As noted above, these sections come to this Court with a presumption of constitutional validity. To overcome this presumption, the Plaintiffs must meet the burden of proving an alleged invalidity beyond a reasonable doubt. Department of Business Regulation v. Smith, supra. See also State v. Canova, supra. Furthermore, a trial court is presumed to be correct when it rules a statute constitutional. In re Estate of Caldwell, supra. See also Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983). As noted at items 9 and 10 on pages 13 and 14, supra, it does not appear that any evidence was produced at trial addressing this issue; thus, Plaintiffs' heavy burden was not met.

A. DESCRIPTION OF THE DRUG-FREE WORKPLACE

The 1990 Legislative Session created the Drug-Free Workplace Program with the passage of Chapter 90-201.[13] The

[13] These provisions were re-enacted in their entirety in SB-8B, 1991.

program can be found in Section 440.102, Florida Statutes (1990). The legislative intent in creating the program can be found in Section 440.101, Florida Statutes (1990). The program sets out methods, standards, and criteria that must be in place before any drug testing can begin.

The Legislative intent regarding drug-free workplaces is crucial to understanding why the program was created and the basis for the program. Section 440.101, Florida Statutes (1990), provides:

> It is the intent of the Legislature to promote drug-free workplaces in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. It is further the intent of the Legislature that drug abuse be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits. If an employer implements a drug-free workplace program which includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the division, the employer may require the employee to submit to a test for the presence of drugs or alcohol and, if a drug or alcohol is found to be present in the employee's system at a level prescribed by rule adopted pursuant to this act, the employee may be terminated and shall forfeit his eligibility for medical and indemnity benefits upon exhaustion of the procedures prescribed in s. 440.102(5). However, a drug-free workplace program shall require the employer to notify all employees that it is a

> condition of employment to refrain from taking drugs on or off the job and if the injured worker refuses to submit to a test for drugs or alcohol, he forfeits his eligibility for medical and indemnity benefits.

The Drug-Free Workplace Program requires that testing conducted by employers be in conformity with the standards established in the law and rules adopted by the Division of Workers' Compensation. §440.102(2), Fla.Stat.(1990). The law specifically states that employers shall not have a legal duty to request an employee or job applicant to undergo drug testing. Id. Therefore, the decision to request a drug test is made by the employer; there is no state mandate requiring drug testing.

Prior to testing, all employees and job applicants must be given a written policy statement from the employer which includes, inter alia, a statement of the employer's policy on employee drug use; the types of testing an employee or job applicant may be required to submit to; the actions the employer may take on the basis of a positive confirmed drug test result; a statement concerning confidentiality; the consequences of refusing to be tested; names, addresses and telephone numbers of Employee Assistance Programs and local alcohol and drug rehabilitation programs; and statements notifying employees and job applicants of their right to challenge positive confirmed test results and the procedures thereby. An employer who does not already have a Drug-Free Workplace is required to ensure that

at least 60 days elapse between a general one time notice to all employees that a drug testing program is being implemented and the beginning of actual drug testing. §440.102(3), Fla.Stat. (1990).

If an employer chooses to test for the presence of alcohol or drugs in order to qualify for discounts to workers' compensation insurance premiums, an employer is required to conduct job applicant testing; reasonable suspicion testing as defined in the act; routine fitness for duty conducted as part of a routinely scheduled employee-fitness-for-duty medical examination that is part of the employer's established policy; and follow up testing for employees who enter into drug or alcohol rehabilitation programs. §440.102(4), Fla.Stat. (1990).

The Drug-Free Workplace Program provides for procedures and employee protection which include, inter alia, sample collection and transportation procedures and documentation, forms for an employee to provide any information he or she deems relevant to the test; initial and confirmation testing by licensed laboratories; preservation of positive confirmed tests for legal challenges to the test results; the right of the employee to have the positive confirmed test results sample retested at other licensed laboratories; the right to submit a written explanation to the employer contesting the test results; if the employee's written explanation is unsatisfactory, the

right to receive a written explanation as to why the employee's explanation is unsatisfactory; the right not to be discharged, disciplined, or discriminated against upon seeking voluntary treatment for drug related problems if the employee has not previously been tested positive for drug use, entered an Employee Assistance Program or other alcohol or drug rehabilitation program; if the test is based upon reasonable suspicion, the employer must promptly detail, in writing, circumstances that formed the basis of the determination that reasonable suspicion existed. §440.102(5), Fla.Stat. (1990). As noted an employee has the right to have a positive confirmed test result independently verified at a licensed laboratory at his own expense and has the right to file an administrative or legal challenge to the positive confirmed test result.

The Drug-Free Workplace Program requires that all positive test results be confirmed by licensed laboratories pursuant to standards as set out in the act. §440.102(6) Fla.Stat. (1990). The Drug-Free Workplace Program also sets out the standards to be followed by drug testing laboratories.

The Drug-Free Workplace Program provides for strict confidentiality provisions. All information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, are confidential and may not be used or received in evidence, obtained in discovery, or disclosed in any public or

private proceedings, except as set out in Section 440.102(8), Florida Statutes. Information on drug test results shall not be released or used in any criminal proceedings against the job applicant or employee. §440.102(8)(c). Fla.Stat. (1990).

B. CONCLUSIVE PRESUMPTION

Plaintiffs argue that the Drug-Free Workplace Program contains an impermissible conclusive presumption; i.e. that a positive confirmed test result conclusively presumes that the accident or injury was occasioned primarily by the drug use of the employee and, therefore, benefits can be denied. This argument is a misreading of the Drug-Free Workplace Program. The Drug-Free Workplace Program does not require a causal connection between drug use and a compensable accident.

The Drug-Free Workplace Program creates an eligibility standard; that is, in order to be eligible to attain and maintain Workers' Compensation benefits an employee who works for an employer who has a Drug-Free Workplace must refrain from the use of drugs on or off the job. If the employee uses drugs in violation of the Drug-Free Workplace requirements and if the employer has reasonable suspicion to test, or tests pursuant to routine fitness for duty or follow-up testing, the employee can be terminated and lose his or her benefits. It is not an issue of whether the drug use was the primary cause of the accident.

An accident is not even necessary for testing. The issue is whether the employee was properly tested for drugs and whether the test results were accurate. If the test is positive and confirmed positive, the employee has the right to file an administrative or legal challenge. §440.102(5) Fla. Stat. (1990). The employee, for example, could challenge the reasonableness of the suspicion, the routine fitness for duty as applied to him or her, the accuracy of the test results, or, chain of custody. However, whether or not the drug use was the primary cause of the accident is not the issue for purposes of a Drug-Free Workplace. Section 440.101, F.S. (1990), specifically states that if an employee tests positive, or refuses to test, he or she forfeits benefits. It is a benefit forfeiture program which does not create any presumptions, conclusive or otherwise.

C. SEARCH AND SEIZURE, RIGHT TO PRIVACY

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures and guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction. Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). Additionally, Article I, Section 23 of the Florida Constitution guarantees that every natural person be free from governmental

intrusion into their private lives. The Plaintiffs assert that the Drug-Free Workplace Program is state action for purposes of the Fourth Amendment and the right to privacy. The threshold question that the Court must first address is whether or not the Drug-Free Workplace Program is state action triggering Fourth Amendment concerns. It should be noted that Florida is an employment-at-will state. Lurton v. Muldon Motor Company, 523 So.2d 706 (Fla. 1st DCA 1988). Florida law has not and does not now prevent a private employer from establishing, as a condition of employment, a requirement that employees refrain from the use of drugs. Since this is what the Drug-Free Workplace Program involves, Defendants assert that it is not state action.

The seminal case on this issue, one that is also cited by the Plaintiffs, is Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). At issue in Skinner was the constitutionality of two separate drug testing programs required for railroad workers by the Federal Railroad Administration. Subpart C of the Federal Railroad Administration regulations mandated drug testing of all employees following a major train accident. Subpart D of the regulations, entitled "Authorization to test for Cause," was permissive. Subpart D authorized railroads to require covered employees to submit to breath and urine tests when, inter alia, after a reportable accident or incident, a supervisor had a reasonable suspicion

that an employee's acts contributed to the occurrence or severity of the accident. Skinner, 109 S.Ct. at 1409. A railroad could also test where a supervisor had a reasonable suspicion that an employee was under the influence of alcohol. Id.

Before the United States Supreme Court considered whether the tests in question were reasonable under the Fourth Amendment it first inquired whether the tests were attributable to the Government or its agents. The Court noted that whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Skinner, 109 S.Ct. at 1411.

The Court concluded that the tests required by Subpart D of the regulations did implicate the Fourth Amendment. In doing so it found that the regulations preempted state law, rules, or regulations covering the same subject matter and were intended to supercede any provision of a collective bargaining agreement or arbitration award construing such an agreement. The Court also found that it conferred upon the Federal Railroad Administration the right to receive certain biological samples and test results procured by railroads pursuant to Subpart D.

The Court went on to find that a railroad could not divest itself of, or otherwise compromise by contract, the authority conferred by Subpart D. The Court noted that a covered employee could not refuse an employer's request to submit to a test and that an employee who refused to submit to a test could be dismissed from the covered service. In light of those provisions the Court was unwilling to accept the Petitioner's submission that the test conducted by private railroads in reliance on Subpart D would be primarily the result of private initiative. Skinner, 109 S.Ct. at 1411, 1412.

The Drug-Free Workplace Program as set out in Section 440.102, Florida Statutes (1990), is distinguishable from problems noted and addressed in the Skinner decision for the following reasons. First, the Drug-Free Workplace Program does not mandate drug testing. Section 440.102(2), specifically states that employers shall not have a legal duty under this section to request an employee or job applicant to undergo testing. Therefore, even in the presence of a program there is no duty or obligation to test. Second, the Drug-Free Workplace Program does not preempt other laws. Section 440.102(7)(g), states that nothing in this section shall be construed to prohibit an employer from conducting medical screening or other tests required by any statutes, rules, or regulations for the purposes of monitoring exposure of employees to toxic or other

unhealthy substances in the workplace or in the performance of job responsibilities. Section 440.102(7)(d) provides that nothing in this section shall be construed to prevent an employer from establishing reasonable rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses and taking action based upon a violation of any of those rules. Therefore, the Drug-Free Workplace Program does not act as a preemption as was the case in Skinner.

In Skinner, the federal regulations were found to supercede collective bargaining agreements or arbitration awards. The Drug-Free Workplace Program specifically provides in Section 440.102(3)(j), that the employee will be given a statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court. Therefore, an employee is given a statement of his rights concerning any collective bargaining agreement which is not superceded by the Drug-Free Workplace Program.

In Skinner, the Court noted that the federal regulation conferred upon the Federal Railroad Administration the right to receive drug test results. However, in the Drug-Free Workplace Program, Section 440.102(8), provides for very strict confidentiality provisions. A review of this section will reveal

that the State does not demand or automatically receive the test results.

The Court noted in Skinner, in concluding that tests conducted by private railroads were not primarily the result of private initiative, that "[t]he Government has removed all legal barriers to the testing authorized by Subpart D and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions." Skinner, 109 S.Ct. at 1412. Prior to the adoption of Sections 440.101 and 102, F.S, Florida had no barriers whatsoever to prevent private employers from creating drug testing programs without due regard for privacy, accuracy, confidentiality, rights to legal challenge, and all of the other protections, procedures, standards and due process that is contained in this law. There is no legal duty to test, no governmental benefit bestowed if testing is done, and no opportunity to share in the fruits of such intrusions. The Florida Drug-Free Workplace Program requirements are distinguishable from the drug testing programs in Skinner, and do not implicate government intrusion or action that would give rise to Fourth Amendment or Right to Privacy Protections.

If, however, the Court finds sufficient state action to give rise to Fourth Amendment and Right to Privacy protections the question becomes whether the searches are reasonable,

considering the affected employee's expectation of privacy balanced against the importance of the state interest being served by the intrusion. This method of balancing was applied by the Skinner court once it determined that state action existed.

In both Skinner and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the Court noted the importance of safety and the threat to safety when drug use was present. In Von Raab the Court noted that the purpose of the testing was "to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." Von Raab, 109 S.Ct. at 1392. The Court went on to note that reasonable tests designed to elicit drug use information did infringe on some privacy expectations, but that those expectations did not outweigh the Government's compelling interests in safety. Von Raab at 1394. Furthermore, the Court noted that "the possible harm against which the Government [sought] to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." Von Raab at 1395.

The Drug-Free Workplace Program allows an employer to protect its interest in promoting safety in the workplace, lessening the dangers of drug use to the employees themselves,

their coemployees, and the public at large. Clearly this is a compelling interest. Reasonable suspicion, routine fitness for duty, job applicant, and follow-up testing are reasonable methods for the employer to protect its interest.

As the Statute states, the Legislature intended to promote drug-free workplaces in order that employers be afforded the opportunity to maximize levels of productivity, enhance competitive positions in the marketplace, and reach desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. §440.101, Fla.Stat.

The cost of workers' compensation insurance has reached a crisis stage in Florida. A safe workplace has been identified as essential in reducing these costs. Here the compelling interest is not only the general interest of public safety, but the specific safety of the workplace for all employees. The nexus between drug testing to prevent the influence of drugs in the workplace and the safety and cost concerns of the workers' compensation system is obvious. This interest clearly outweighs the expectation of privacy held by employees who have been adequately noticed that drug use will not be tolerated and that drug testing will be done.

D. SEVERABILITY

If, in the Court's wisdom, the Drug-Free Workplace Program is found to be constitutionally defective, then Section 440.101 and Section 440.102, are severable from the remaining portions of Chapter 90-201. In Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 317 (Fla. 1984) this Court, quoting Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556 at 559 (Fla. 1974), enunciated the general prerequisite for application of the severability doctrine as follows:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

The legislative purposes as expressed in the whereas clauses of Chapter 90-201, Laws of Florida, can be accomplished by separating out Sections 12 and 13 of the bill (now §440.101 and 102, Fla. Stat.), and thus, even if found unconstitutional, those sections must be deemed severable.

VI

FLORIDA STATUTE 440.572 AND THE EXPANDED INVESTIGATIVE AND RESOLUTION AUTHORITY CONTAINED IN FLORIDA STATUTE 440.19 ARE VALID AND ARE IN CONCURRANCE WITH EXPRESSED LEGISLATIVE INTENT OF CHAPTER 90-201, LAWS OF FLORIDA.

Section 440.572, F.S. (1990) authorizes a self-insurer having a net worth of not less than $250,000,000 to assume, by contract, the liabilities under this chapter of contractors and subcontractors employed by such individual self-insurer when performing work on or adjacent to property owned or used by this individual self-insurer. An individual self-insurer's net worth may include the assests of the parent company, subsidiaries, sister companies, affiliated companies, or related entities located within the boundaries of the State of Florida. A similar law with regard to public utilities permitting an assumption of the liabilities of contractors and subcontractors has been in existance for many years. See §440.571, F.S. Trial testimony established that there have been no problems with that law regarding insolvency or claimants going without benefits. (T-617)

The Division has established financial classes which are based on net worth of the self-insureds (T-617). Employers whose net worth is in excess of $250,000,000 are not required to provide a bond or reinsurance as security. The Division's rules do require an applicant who uses a parent or affiliate company to

demonstrate sufficient financial strength to operate, and require that the parent or affiliate imdemnify the self-insurer so that if the self-insurer is unable to perform financially, the parent or affiliate would have that responsibility. (emphasis added) (T- 618).

In substance, in order for the applicant to be qualified under this provision, they would either have to show the Division the $250,000,000 through their own financial statement, or through an indemnification agreement through their other company's financial statement. (T-636)

Plaintiffs allege that there is no provision permitting the employee to pierce the corporate veil to collect workers' compensation benefits. Even Defendants' view, a review of the statutes will show there is no statutory provision prohibiting an employee from piercing the corporate veil for workers' compensation benefits.

The Plaintiffs also appear to complain about the Division's increased authority in resolving claims, citing Sections 440.20(10)(b) and (16)(a), (1990).

Chapter 90-201, Laws of Florida, substantially increased the investigative authority and resolution ability of the Division. The clear purpose of this legislative action is expressed in Section 440.19(1)(i)3, Florida Statutes, which provides:

> The legislative intent of this paragraph is to avoid needless litigation or delay in benefits by requiring claimants to provide the employer, carrier, self insurance fund, or servicing agent with sufficient detailed information to facilitate a timely and informed decision with respect to a claim for benefits.

The Division is required to assist injured employees who are not represented by counsel in preparing their claim to meet the specificity requirements of the section, short of being an advocate before the Judge of Industrial Claims. It places a further responsibility on the Division to take a pro-active stance to prevent and resolve disputed issues and in preparing an appropriate dispute resolution report.

The new statutory language clearly gives the Division the authority to review a claim in accordance with its rules to determine if the issue can be resolved without a hearing and allows the Division to concentrate its efforts on the cases that appear to have the possibility of resolution without a hearing. (T-658)

To comply with the legislative intent the Division has added a number of claims specialists and has expanded their current number of field offices to 16, with each office staffed with claims specialists to facilitate handling claims throughout the state (T-662). Additional personnel are being added within the Bureau of Records and data center to make information more readily available to the claims specialist (T-664). The Division

is attempting to streamline the claim process so that carriers and employers may have less paperwork to submit to the state to document payments on claims (T-665). The statute also authorized the Division to allow for alternate electronic reporting methods. Through the Division's rules, the mechanism for such electronic reporting is in place (T-666).

To assist in the implementation, the Division has filed four separate chapters of rules for adoption, including rules for drug testing, claims processing, additional rules on self-insurance, and rules for medical utilization review. (T-667)

The clear legislative intent to the Division is for it to become more actively involved in the resolution of claims, so that its citizens will receive benefits more promptly. To this end, the statute directs the Division to implement the program.

While others may develop an equal or possibly even a better approach to implementation, that is not the issue before this court. The positive actions taken by the Division, are reasonable under the statutory mandate and should be upheld. The clear purpose of the cited sections is for the speedy and summary disposition of claims pursuant to the legislative intent.

THE FLORIDA SELF-INSURANCE GUARANTEE ASSOCIATION INC., STANDS IN THE SHOES OF THE INSOLVENT EMPLOYER AND IS RESPONSIBLE FOR ALL BENEFITS AS REQUIRED BY CHAPTER 440.

The Florida Self-Insurers Guarantee Association, is a creature of statute and, as such, its duties and responsibilities are controlled by statutes. While it is true Section 440.385(3)(a)., Florida Statutes (1990), provides that the association is obligated for payment of compensation under this chapter, such obligation is specifically not limited only to indemnity compensation. To the contrary, that same statutory section specifically provides as follows:

> The association shall be deemed the insolvent employer for purposes of this chapter to the extent of its obligation on the covered claims and, to such extent, shall have all rights, duties and obligations of the insolvent employer as if the employer had not become insolvent. (emphasis added)

Accordingly, the plain meaning and clear intent of the statute can only be interpreted to mean that the Florida Self-Insurers Guarantee Fund will be liable for medical expenses, as well as compensation for lost wages, and indeed any other expense the insolvent employer may have been liable for under the Workers' Compensation Act. For Plaintiffs to argue that this is unconstitutional is clearly erroneous. Accordingly, the finding of the trial court rejecting Plaintiff's allegations should be summarily affirmed.

CONCLUSION

Based on all of the above, the Defendants respectfully suggest that the finding of the trial court holding the sections argued by Plaintiff as unconstitutional may be summarily affirmed. This result is required because the Plaintiffs have not met their heavy burden of proving beyond a reasonable doubt that the portions of the act challenged in their appeals are unconstitutional.

Respectfully submitted,

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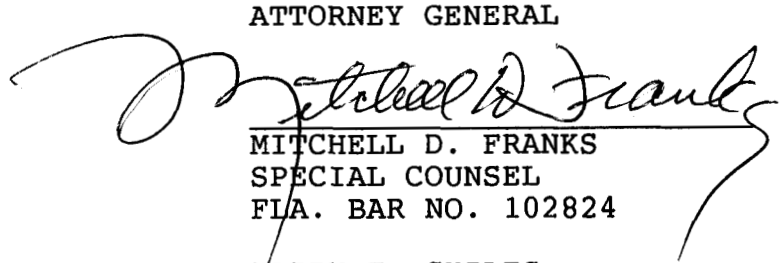

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