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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 88,011
(First DCA No. 94-2714)

RECCHI AMERICA INC. and
PALMER & CAY CARSWELL,

Appellants,

vs.

ASTLEY HALL,

Appellee.
_____/

APPELLEE'S ANSWER BRIEF

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PREFACE

This is an appeal from a decision of Florida's First District Court of Appeal which reversed a Judge of Compensation Claims denial of workers' compensation benefits and declared the irrebuttable presumption section of Florida's Drug-Free Workplace Act unconstitutional. Appellants, Recchi America Inc. and Palmer & Cay Carswell Insurance are the employer and servicing agent, respectively (hereinafter collectively Recchi America) and were the Appellees before the First District Court of Appeal. Appellee, Astley Hall, is the employee/claimant and was the Appellant before the First District Court. The parties will be referred to by name. The following symbols will be used:

(R.) -- Record on Appeal

(A.) -- Appendix to Initial Brief

STATEMENT OF THE CASE AND FACTS

Recchi America's Statement of the Case and Facts is essentially accurate but significantly incomplete. Accordingly, Hall supplements that statement as follows.

Recchi America established its drug and alcohol policy on April 1, 1991, nine months after the effective date of Florida's Drug-Free Workplace Act and three months after passage of the enabling Division rules (R.65). Recchi America prepared its policy using advice from its workers' compensation carrier and its attorney and literature from the construction association (R.66). That policy provides that any employee, chosen at random, may be required to submit to drug/alcohol screening upon request (R.335). Beyond that, the policy provides that employees in job classifications which have a direct impact on the safety of themselves or others may be tested "on an indiscriminate basis" (R.335). In addition, the policy provides for testing based upon reasonable suspicion, defined to include "involvement in an accident which resulted in injury to the employee or to a fellow employee or which causes property damage" (R.337).

Pursuant to its "drug-free workplace" program, Recchi America tests all employees who are involved in a workplace accident without regard to whether the worker caused the accident (R.62). Enrique Espino, Executive Vice President for Recchi America, explained the benefits of the program as including the safety of co-workers, controlling drug abuse in this country, and the benefit of reduced workers' compensation premiums (R.65).

Astley Hall worked for eight years with three different construction companies before joining Recchi America in May 1991 (R.39, 40).

On May 20, 1991, Hall executed the Recchi America drug policy documents which explained that Hall could be terminated from his employment should he test positive for drugs or alcohol (R.333). At no place in the documents is there any notification that Hall's workers' compensation benefits could be affected by the outcome of any drug or alcohol screen (R.329, et seq.). The documents also failed to include any notice of the existence of Fla. Stat. § 440.102 (1993) or Fla. Admin. Code Sec. 38F-9.005 (1993).

Hall gave a urine sample at the time of his hiring which tested negative for each of the ten drugs screened by Recchi America's laboratory (R.45, 46). No evidence was presented that Hall ever appeared for work under the influence of drugs or alcohol or that any of Hall's superiors had ever suspected Hall of appearing for work under the influence of drugs or alcohol. Hall testified that he has smoked marijuana four or five times in the last fifteen years (R.47). Hall admits that on the evening of Saturday, June 8, 1991, he smoked marijuana (R.46).

Before 9:00 a.m. on the morning of Thursday, June 13, 1991, as Hall was doing concrete form work, a co-worker tripped, jabbing a "screed" (a longish steel apparatus) into the back of Hall's head (R.42). Hall offered unrefuted testimony that he did nothing to cause the accident (R.43).

Hall was taken to the Workers' Compensation Medical Center by

his co-workers, signing in at 9:05 a.m. (R.43, 261). His treating physician, Dr. Alan Yurkiewicz, testified that he first observed Hall shortly after 9:05 (R.261). Yurkiewicz testified, and his notes confirmed, that Hall was alert, oriented, and responsive (R.250).

Dr. Yurkiewicz diagnosed Hall with a mild cervical strain and a 4.5 centimeter laceration to his scalp which required fifteen stitches to close (R.251, 262). Dr. Yurkiewicz testified that Hall's scalp laceration was in the occipital region, which is the "back, top back" of the head (R.263). Because Hall had suffered an injury to his head and was complaining of headaches, Dr. Yurkiewicz had to pay special attention to Hall's responsiveness and affect since those are indicators of swelling, cerebral bleeding or changes in neurological status (R.264). Dr. Yurkiewicz testified that he directly observed Hall for approximately thirty minutes of the 90-minutes that Hall was kept at the Medical Center (R.262). Dr. Yurkiewicz testified from his written notes that he detected no altered consciousness or affect (R.263). Dr. Yurkiewicz testified within reasonable medical probability that all of Hall's symptomatology came from the blow to the head (R.264).

Within thirty minutes after arriving at the Workers' Compensation Medical Center, Hall was required to give a urine sample for drug testing pursuant to Recchi America's drug policy (R.261, 268). Hall's urine specimen was taken by Randy Rafferty, a licensed practical nurse (R. 257, 264). After urinating in the specimen cup, Hall was required to carry the urine specimen to

Rafferty (R.356), who checked the temperature of the specimen to assure that it was at or near body temperature, then sealed the specimen in Hall's presence for transmittal to the laboratory (R.299).

Pursuant to Recchi America's direction, the urine sample was sent to National Health Laboratories for testing. Hall's specimen tested out two percent above the 100 nanogram (billionth of a gram) per milliliter positive cut-off for marijuana metabolites (R.490).[1] A confirmatory GC mass spectrography examination (which has a lower positive threshold given its different extraction process) showed 78 ng/ml of marijuana metabolite, confirming the positive result (R.423, 483).

Dr. Donald Stalons, National Health Laboratories' Director, testified that this 78 ng/ml level cannot be used to assess Hall's motor impairment at the time of the accident and cannot be used to determine when Hall ingested the marijuana (R.305). Dr. Stalons admitted that a particular level of metabolite has analytical merit only to determine whether or not marijuana metabolite is present in the urine sample (R.305).

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[1]No one thought to ask either expert how the 100 ng/ml cutoff figure was selected. The explanation for that level appears in the midst of an extensive discussion of the drug-testing policy adopted by the Illinois Racing Board in Damayo v. Griffin, 924 F.2d 664, 669 (7th Cir. 1991), vacated, 931 F.2d 1215 (7th Cir 1991). The court explained that the test levels for other drugs are set based upon the level of drug metabolites which current technology can accurately identify, but that the 100 ng/ml level for marijuana metabolites is used despite the ability to identify lower concentrations so as to reduce the chance that an individual exposed to passive inhalation of marijuana smoke will produce a "positive" reading.

Dr. Jay Poupko is a Ph.D. in pharmacology with post-doctoral training at Columbia University in molecular toxicology and a member of the faculty of the University of Miami School of Medicine Department of Pharmacology doing faculty research in toxicology. Dr. Poupko focuses on alcohol and drug abuse within the broad field of toxicology (R.411-415).

Dr. Poupko explained that, unlike alcohol, marijuana and other drugs are usually measured in the urine rather than in the blood stream (R.420). Urine tests are inherently incapable of determining whether there is any active drug present in the individual. Instead, the urine test measures a metabolite (a broken down by-product) of the drug, which does not imply anything about the presence of an active drug in the blood at a relevant time (R.420). In the case of marijuana, they measure an inactive metabolite which has no effect on the nervous system (R.420, 421).

Dr. Poupko testified that the 78 inactive nanograms found in Hall's urine is entirely consistent with Hall having smoked marijuana five days before the accident, as Hall claimed (R.429). Dr. Poupko explained that a person who smokes marijuana remains impaired for only four to six hours after ingestion of the last dose (R.435). Clearly then, someone who smoked marijuana on a Saturday night would not be impaired five days later. In fact, there would be no difference between his motor skills and someone who did not smoke marijuana at all (R.435).

According to Dr. Poupko, in order to determine whether Hall was intoxicated on the date in question, he would need to have

actually seen him or have some objective evidence or description of his performance on that date (R.438). Of course, we have that in this case by virtue of the testimony of Dr. Yurkiewicz, the emergency room physician who closely observed Hall in the immediate aftermath of the accident, finding him to be alert, oriented and responsive and finding within reasonable medical probability that all of his symptomatology was directly attributable to the head injury (R.263, 264).

The Judge of Compensation Claims issued a final order accepting the testimony of the claimant that he smoked marijuana on the Saturday prior to the accident of Thursday, June 13, 1991. The JCC expressly did "not find that the marijuana ingestion primarily caused the injury" (R.631-632). Nonetheless, the JCC felt compelled to deny Hall's claim based upon the fact that there was a positive confirmed drug test and based upon his conclusion that Recchi America had established a drug-free workplace program (R.632).

Hall timely appealed to Florida's First District Court of Appeal, asserting: (1) that Florida's Drug-Free Workplace Act violated Hall's rights under the Fourth Amendment to the United States Constitution and his right to privacy under the Florida Constitution by encouraging the employer to perform (and requiring Hall to submit to) suspicionless searches; (2) that the Drug-Free Workplace Act's irrebuttable presumption of causation violated Due Process and Equal Protection guarantees; and (3) that the JCC had erred in concluding that Recchi America had established a drug-free

workplace.

By opinion dated March 19, 1996, a unanimous panel of Florida's First District Court of Appeal (Davis, Barfield and Kahn, JJ., concurring) issued its opinion reversing the denial of Hall's workers' compensation benefits and declaring the irrebuttable presumption provision of Florida's Drug-Free Workplace Act unconstitutional on Due Process grounds. The Court noted but did not reach, inter alia, Hall's claim of unconstitutionally based upon Fourth Amendment and Florida Right of Privacy constitutional protections. (A.3).

SUMMARY OF THE ARGUMENT

Urine testing is inherently incapable of determining whether an active drug is present in an individual at a particular time (i.e., at the time of injury). Moreover, the subject industrial accident was clearly not Astley Hall's fault, in any event. The clear and convincing rebuttable presumption of causation which arises from a positive urine test even outside of Drug-Free Workplaces, already places upon the employee/claimant the full burden of any uncertainty in determining the relevant causation question. Because of the gross imprecision involved in equating a positive urine test with causation of the workers' injury and because there is no need for an irrebuttable presumption in this context, due process demanded the First District Court's declaration of unconstitutionality under settled Due Process principles.

Because the subject presumption impaired Hall's fundamental right of access to the courts and infringed Hall's right to be rewarded for the fruits of his industry (i.e. his earned workers' compensation insurance protection), application of strict scrutiny to the subject presumption would have proved fatal even had the First District not disposed of the presumption pursuant to the three-prong reasonableness test.

Recchi America's attempted defense of the irrebuttable presumption on a contract theory ignores the fact that workers' compensation is a mandatory legislative insurance scheme which substitutes for an employee's common law right of access to the

courts for redress of injuries. Moreover, philosophical repugnance aside, because the statute does not mandate (nor did Recchi America voluntarily provide) any notice that Hall's workers' compensation benefits would be forfeited upon a positive test result, no "agreement" for forfeiture of workers' compensation benefits ever occurred.

Although the First District Court was not required to reach the Fourth Amendment or Florida's Right of Privacy issues, those constitutional protections remain an insurmountable hurdle to the relief Recchi America seeks from this Court. By adoption of the Drug-Free Workplace Act the Florida Legislature has expressed its preference for drug testing by private employers in the strongest possible terms -- legislating significant financial inducements for employers to adopt such programs, removing all significant legal barriers which might deter employers from seeking to invade the privacy of their workers, mandating that the State of Florida share in the "fruits" of such testing and automatically forfeiting a workers' right to compensation benefits should he refuse to submit to a test demanded by his employer. The Florida Legislature's active encouragement, endorsement and participation in this illegal testing renders it constitutionally proscribed state action.

Employer-demanded urine testing is highly invasive of a workers' privacy and dignity interests. That invasion arises from the procedure itself, what it discloses, and what it implies. While reasonable suspicion workplace drug-testing has been upheld as consistent with the Fourth Amendment, suspicionless (i.e.

blanket pre-employment, blanket post-accident or random) testing has been approved only where some special need has been shown as to a particular class of worker beyond the generalized need for law enforcement.

The State of Florida's need for suspicionless testing of its entire labor force cannot be "special", by definition. No Constitutionally recognized special need supported the suspicionless testing of a common laborer such as Astley Hall. As such, that suspicionless test (and the statute which induced it) clearly violated the Fourth Amendment.

By adoption of an express Constitutional right of privacy, the voters of Florida decreed that its citizens have a right to be "let alone" -- a protection which extends beyond the specific guarantees of the U.S. Constitution. Because suspicionless drug testing of ordinary workers is not necessary to achieve any compelling state interest, Florida's Right of Privacy is also violated by this Act.

Even were this Court to conclude that Florida's Drug-Free Workplace Act is constitutional in all respects, the JCC erred in finding that Recchi America had established a drug-free workplace inasmuch as its drug-testing notice documentation failed to include all of the statutorily required notices.

LEGAL ARGUMENT

POINT I

THE FIRST DISTRICT COURT CORRECTLY CONCLUDED THAT THE IRREBUTTABLE PRESUMPTION/FORFEITURE PROVISION VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES AND FLORIDA CONSTITUTIONS

A. REASONABLENESS ANALYSIS

Florida's workers' compensation program was established for two reasons: (1) to see that workers were rewarded for their industry by receiving reasonably adequate and certain payment for workplace accidents; and (2) to replace an unwieldy tort system that made it virtually impossible for businesses to predict or insure against the cost of industrial accidents. De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204, 206 (Fla. 1989). While workers' compensation aims to relieve society of the burden of caring for an injured employee by placing the burden on the industry involved, it has long been recognized that industry should not have to carry the burden of compensating for a death or injury for which it is not responsible. See, Whitehead v. Keene Roofing Co., 43 So.2d 464 (Fla. 1949) (discussing wilfully self-inflicted/suicide limitation). Accordingly, the Florida Legislature has long-provided that a worker is not entitled to receive workers' compensation benefits if his injury was caused by his own intoxication. See, Fla. Stat. § 440.09(3) (1993); Zee v. Gory, 189 So. 34 (Fla. 1939); Domino's Pizza v. Gibson, 668 So.2d 593, 596 (Fla. 1996).

Prior to 1990, a positive test for drugs or alcohol had the effect of shifting the burden of proof to the worker to show by a

preponderance of the evidence that the injury was not occasioned primarily by intoxication or drug influence. Fla. Stat. § 440.09(3) (1993); Avalos v. Williford Farms, Inc., 561 So.2d 1344, 1346 (Fla. 1st DCA 1990).

Chapter 90.201, Laws of Florida (1990), effective July 1, 1990, created the drug-free workplace program (codified at Fla. Stat. § 440.101 and 440.102 (1993)) and amended the above-cited provisions of Fla. Stat. § 440.09. The primary change to Fla. Stat. § 440.09 was to subsection (3)[2], which was amended to raise the employee's burden of proof upon a positive test result from a preponderance of the evidence to a clear and convincing proof standard "[i]n the absence of a drug-free workplace program", while implicitly rendering that presumption irrebuttable in Drug-Free Workplace cases. Additionally, the Florida Legislature added Fla. Stat. § 440.09(7)(a) (1993), which authorized all employers with reasonable suspicion that a worker's injury was occasioned primarily by the worker's intoxication to require a test for alcohol or drugs (irrespective of whether a drug-free workplace program had been instituted).

The express provisions of Fla. Stat. § 440.09 (1993) applicable outside of drug-free workplaces fully assure the protection of industry from being forced to bear the financial burden of self-induced injury from drug or alcohol abuse. These protective provisions were not challenged by Hall below and are

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[2]The 1996 amendments to Chapter 440 recodified this subsection at § 440.09(7)(c).

entirely unaffected by the First District Court's decision. The effect of the First District Court's holding is confined solely to the irrebuttable presumption of causation which the Legislature adopted for workers who test positive for drugs or alcohol in a drug-free workplace.[3]

In adopting this unprecedented irrebuttable presumption of causation, the Florida Legislature extended the effects of a positive drug test far beyond the logical limits of what a urine test can establish. It is undisputed that a positive drug test at the time of the industrial accident does not establish that the industrial accident was causally related to the claimant's drug or alcohol use. This is so both because (as in the present case) the industrial accident may not be the fault of the claimant and because urine testing is inherently incapable of determining whether an active drug is present in the individual at the time of the injury. Urine tests for marijuana measure only inactive metabolites having no effect on the nervous system. A positive test may thus reflect drugs ingested days or weeks earlier -- leaving the claimant in a totally unimpaired state at the time of the accident (R.420, 421, 435).

The temporal uncertainty of urine test results was discussed by the United States Supreme Court in its seminal employee drug-testing decision, Skinner v. Railway Labor Executives' Association,

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[3]The irrebuttable presumption may be interpreted as arising solely by implication from Fla. Stat. § 440.09 (3) or in conjunction with the forfeiture provision of F.S. § 440.101 (1993).

489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In that case a drug-testing program adopted for railway workers provided for drug-testing in the aftermath of major train accidents and when employees violated safety rules. The Court of Appeals had concluded that the post-accident testing regulations were unreasonable based solely on the fact that blood and urine tests are incapable of measuring current drug intoxication or degree of impairment. The United States Supreme Court rejected that reasoning, but stated:

> Even if urine test results disclosed nothing more specific than the recent use of controlled substances by a covered employee, this information should provide the basis for further investigate work designed to determine whether the employee used drugs at the relevant times.

Skinner, 489 U.S. at 631-632, 109 S.Ct. at 1421 (emphasis added); see also, Rutherford v. Albuquerque, 77 F.3d 1258, 1262 (10th Cir. 1996) (testing which reflects exposure to drugs ingested weeks earlier is a "uniquely unreliable gauge" of on-the-job conduct); Peranzo v. Coughlin, 675 F.Supp. 102 (S.D. N.Y. 1987), affirmed, 850 F.2d 125 (1988) (N.Y. Corrections Dept. admitted that it could not create irrebuttable presumption of drug use from urine testing for purposes of disciplinary and parole decisions).

The First District Court correctly recognized below that the irrebuttable presumption provision equating a positive drug test with causation of an industrial accident does not even meet the three-prong reasonableness test which governs in cases not involving fundamental or important Constitutional rights. See, In

Re Greenberg's Estate, 390 So.2d 40, 48 (Fla. 1980), app. dismissed, 450 U.S. 961, 101 S.Ct. 1475, 67 L.Ed.2d 610 (1981). That three-prong test, derived from the United States Supreme Court's holding in Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), was correctly stated by the First District Court's opinion, as follows:

> The Constitutionality of a conclusive presumption under the Due Process Clause is measured by determining (1) whether the concern of the Legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence and (3) whether the expense and other difficulties of individual determination justified the inherent imprecision of a conclusive presumption. Markham v. Fogg, 458 So.2d 1122, 1125 (Fla. 1984); Bass v. General Development Corp., 374 So.2d 479, 484 (Fla. 1979).

Hall v. Recchi America Inc., 671 So.2d 197, 200 (Fla. 1st DCA 1996).

While one could quarrel that even the first two prongs of this test are not satisfied absent a showing that some problem existed prior to 1990 with workers harming themselves and then successfully rebutting the presumption of causation[4], the First District Court's conclusion that the subject conclusive presumption failed to satisfy the third prong of the Due Process reasonableness test is clearly correct. The imprecision involved in equating a positive

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[4]Research has disclosed only one reported case in which even the preponderance of the evidence presumption was successfully rebutted. See, City of Tampa v. Green, 390 So.2d 1220 (Fla. 1st DCA 1980).

drug test with causation of an industrial accident is indisputably cavernous and the need for such a rule could not be less apparent. As a general matter, determining this intoxication causation question is no more expensive or difficult than deciding any other causation question. It is certainly no more difficult or expensive than it would be if the same test had been performed by a non-drug-free workplace employer. In many cases (such as the one at bar) the worker is so clearly an innocent victim of a co-worker's negligence that the entire causation inquiry becomes indisputable. Moreover, the rebuttable presumption already requires the claimant to establish by clear and convincing proof the lack of causation upon a positive drug test. Thus, any uncertainty which may exist in a given case must already be borne by the claimant, not his employer.[5] Thus, the First District Court's conclusion that this irrebuttable presumption failed the third-prong of the Weinberger test is plainly correct and its holding should be affirmed without further ado.

B. STRICT SCRUTINY ANALYSIS

Because the First District Court correctly concluded that the subject irrebuttable presumption did not even satisfy the limited

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[5]This is not a situation like the right to bail pending appeal issue in Gallie v. Wainright, 362 So.2d 936 (Fla. 1978), where the trier of fact was attempting prediction of the violence-potential of a convicted criminal and misjudgment threatened the lives of the citizenry at large. See, Id. at 944. We are also not dealing here with mere "limited detrimental consequences for [the] unfortunate few". Id. The instant statute requires forfeiture of the insurance protection which, by design, stands between a workers' family and destitution.

three-prong reasonableness test, it was not required to consider whether fundamental or important Constitutional rights were infringed by the presumption. However, such analysis stands as an additional insurmountable hurdle to the relief requested by Recchi America on this appeal. Where an irrebuttable presumption affects important, preferred, or fundamental Constitutional rights, a more stringent, strict scrutiny test is applied. Laurenzo v. Mississippi High School Activities Ass., 662 F.2d 1117, 1119 (5th Cir. 1980); Bass v. General Development Corp., 374 So.2d 479, 484, fn. 4 (Fla. 1979).

The right of access to the courts for redress of injuries is a fundamental right protected by the Fourteenth Amendment's due process guarantee. Sotto v. Wainright, 601 F.2d 184, 191 (5th. Cir. 1979), cert den'd, 445 U.S. 950, 100 S.Ct. 1597, 637 L.Ed.2d 784 (1980). This same Constitutional right is also expressly protected by Art. I, Sec. 21 of the Florida Constitution. The right of access to the courts is so fundamental that even convicted felons may not constitutionally be deprived of this right. Collins v. Cote, 490 So. 2d 164 (Fla. 4th DCA 1986); McCuiston v. Wanicka, 483 So.2d 489 (Fla. 2d DCA 1986); Lloyd v. Farkash, 476 So.2d 305 (Fla. 1st DCA 1985).

The barrier which the Florida Legislature has thrown in Hall's path so as to preclude him from redress for his injuries applies to no other class of litigant in any other court or quasi-judicial forum in this State. As such, this severe impingement upon Hall's right of access to the courts requires application of the strict

scrutiny test.

Additionally, the subject irrebuttable presumption seriously impinges upon a separate right expressly protected by the Florida Constitution -- the right "to be rewarded for industry". Art. I, Sec. 2, Florida Const. This Court has held in the workers' compensation context that legislation impinging upon this right requires application of strict scrutiny. De Ayala v. Florida Farm Bureau Casualty Insurance Co., 543 So.2d 204 (Fla. 1989). In De Ayala, supra, this Court struck down a statute limiting the workers' compensation death benefit payable to families of non-resident alien workers. In applying strict judicial scrutiny under Article 1, Sec. 2 of the Florida Constitution, this Court pointed out that the deceased worker had:

> . . . paid taxes and contributed to the growth of his company and the general economy. His labor, along with that of his . . . co-workers, helped pay for the employer's insurance premiums required under the workers' compensation law. Common sense dictates that he should be entitled to the same "benefits," . . .

Id. at 207.[6]

Astley Hall worked in the construction industry in this state for at least eight years before the subject accident (R.39, 40). He paid taxes and contributed to the growth of his employers and the general economy of the State of Florida. His labor helped pay

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[6]DeAyala also implicated equal protection concerns, but this Court's opinion made clear that strict scrutiny would be required by "either" that suspect class problem "or" by that statute's infringement of the fundamental right to be rewarded for industry. Id. at 207.

for the employer's insurance premiums required under the workers' compensation law. The requirement that he now forfeit his earned insurance protection would clearly impinge upon his fundamental right to be "rewarded for industry".

As this Court has explained, when Constitutionally preferred rights or privileges are at stake, the applicable strict scrutiny standard renders all but the most meaningless or essential irrebuttable presumptions constitutionally invalid:

> When a Constitutionally preferred right or privilege is at issue, however, the more stringent due process test is invoked and the irrebuttable presumption is deemed invalid when [it] is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. See, Vlandis v. Kline, 412 U.S. 441, 452, 93 S.Ct. 2230, 2236, 37 L.Ed.2d 63 (1973).

Bass, supra, at 484, fn. 4. Quite obviously, application of this test is "almost always fatal", see, In Re Greenberg's Estate, supra, at 42-43, and would clearly be fatal for the current presumption, gives its gross imprecision (i.e., not universally true in fact) and the fact that the State plainly has alternative means of making the crucial determination (i.e., by deciding the case on its merits via the rebuttable presumption, as it has done for years without apparent difficulty).

Research has failed to disclose a single authority upholding an irrebuttable presumption under a strict scrutiny analysis. This research finding stands to reason, not just because of the facial stringency of the test but because it is difficult to imagine a case where mere administrative convenience could be so compelling

as to warrant infringement of important or fundamental Constitutional rights. Thus, even were this Court to disagree with the First District Court's reasonableness analysis, the statute's plain infringement of fundamental rights and the consequent application of the strict scrutiny test would require the same result.

C. THE CONTRACT ARGUMENT

Because equating a positive drug test with causation of an industrial accident is grossly imprecise, unsupported by any legitimate need and draconian in its effect upon the injured workers (and their families) whom it affects, Recchi America has attempted to introduce a specious and immaterial contractual justification. In making this argument, Recchi America ignores the fact that Florida's Workers' Compensation Act mandatorily binds employers and workers to the exclusive rights and remedies provided for in Chapter 440 which substitute for a worker's right of access to the courts and confers immunity from suit upon his employer. See, Fla. Stat. §§ 440.03, 440.05, 440.10, 440.11(1) (1993). The fundamentally non-contractual nature of workers' compensation benefits plainly appears in Chapter 440, itself, which expressly mandates that workers may not contractually waive their workers' compensation rights. Fla. Stat. §440.21 (1993).[7]

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[7]Recchi America repeatedly raises a "straw-man" argument that Hall's "breach of contract" warranted termination of his employment. Initial Brief at 18, 19. Hall does not dispute Recchi America's right to terminate his "at will" employment, for any reason or no reason at all.

Moreover, Recchi America can point to no provision of its "employment contract" with Astley Hall whereby Mr. Hall even purportedly agreed to a forfeiture of his workers' compensation benefits upon a positive test result. The documents which Hall signed in connection with testing contain no notice (let alone any agreement) that his workers' compensation benefits would be forfeited upon testing positive for drugs or alcohol. Thus, Recchi America's contract rationale is false in fact, even were it not repugnant to the essential nature of workers' compensation.

D. THE STRICT LIABILITY/CRIMINAL DETERRENCE ARGUMENT

Recchi America appears to recognize the futility of defending this irrebuttable presumption under settled law governing irrebuttable presumptions, relying primarily on inapposite strict liability cases. This reliance ignores the fact that strict liability merely dispenses with the need to prove negligence, but still requiring proximate causation between the legally presumed negligence and the injury. See, e.g., Tamiami Gun Shop v. Klein, 116 So.2d 421, 422 (Fla. 1959).

Even further afield, Recchi America attempts to rely upon certain criminal statutes. Recchi America seems to argue that the gross imprecision of this irrebuttable presumption is not really a problem because, in its view, the Legislature was not primarily concerned with the remedial aspects of drug use in the workplace but, instead, adopted this scheme in a broad-based attempt to deter drug and alcohol abuse in society, generally.

The Florida's Legislature's concern with an employee's off-

the-job sobriety in enacting this scheme was incidental, at best. The title it selected (Drug-Free Workplace) and decision to codify this Act in Chapter 440, both clearly imply as much. Moreover, the Legislature's 1993 clarifying amendment to 440.101 changed the content of the required notice given to workers from a notice not to use drugs "on or off the job," to a notice that they "refrain from reporting to work or working with the presence of drugs or alcohol in his or her body". Fla. Stat. § 440.101 (1993); 440.101 (1996). Clearer expression of the incidental nature of the Legislature's concern with off-the-job sobriety in enacting this program would be difficult to imagine.

Moreover, the Florida Legislature prescribed in the Act that several notices be given to workers as part of setting up these testing programs. See, Fla. Stat. § 440.102(3) (1993). Significantly, the Legislature did not require employers to notify their workers that a positive test result would have any effect upon their workers' compensation benefits. The absence of this notice among all of the required notices positively refutes any notion that the irrebuttable presumption/forfeiture of workers' compensation benefits was significantly motivated by considerations of deterrence. See, Rutherford, supra, at 1263 (absence of prior notice deprived City of any deterrence justification). Moreover, to believe that administering this potentially draconian "punishment" to a relative handful of citizens would achieve a significant deterrent effect that the State's criminal laws, the threat of termination of employment and the rebuttable presumption

of causation do not already provide, seems a bizarre notion which the Legislature surely did not contemplate.[8]

Even if one were to engage the notion that this statute should be viewed primarily as a police power regulation, the means chosen by the Legislature in enacting such legislation must be narrowly tailored to achieve the state's objective through the least restrictive alternative. In Re Forfeiture of 1969 Piper Navajo, 592 So.2d 233, 235 (Fla. 1992). Piper Navajo, supra, involved a legislative attempt to confiscate airplanes illegally equipped with extra fuel tanks in violation of FAA regulation. This Court held that statute unconstitutional on Due Process grounds, stating:

> While the state undoubtedly has a substantial interest in promoting air safety, the Legislature does not have the authority to confiscate airplanes simply because they possess additionally fuel capacity. The central concern of substantive due process is to limit the means employed by the state to the least restrictive way of achieving its permissible ends.

Id. at 236 (emphasis in original).

The workers' compensation insurance protection earned over the course of a workers' entire career by design stands between the

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[8]One must also wonder why, if broadly deterring societal drug abuse were the Legislature's real concern, it limited this "deterrent" to worker's suing for workers' compensation benefits. Surely, if the Legislature felt that forfeiture of the right to seek redress for injuries were such an effective deterrent to drug use, the Legislature would have made drug use a complete affirmative defense in every civil action.

One could also imagine application on the defense side, so that if, for example, a doctor's patient dies or an attorney loses a case, he or she must automatically be tested for drugs and alcohol. Then, if the test is positive, malpractice could be irrebuttably presumed. Needless to say, the absurdity is the point.

workers' family and destitution in the event of industrial accident. A worker and his family should not entirely forfeit that earned insurance protection solely because the worker succumbed to the temptation of as little as a single marijuana cigarette on a Saturday night, had a couple of beers (or martinis) at lunch or showed up for work with a bit too much of a hangover.[9] If convicted felons must retain the Constitutional right to seek redress for their injuries, see, Cullins, supra;, Lloyd, supra; McQuiston, supra, a Florida worker guilty of nothing more than misdemeanor marijuana possession cannot Constitutionally be required to forfeit his right to seek workers' compensation benefits (a "fine" which in some cases could range into the millions of dollars). To allow such important benefits to be forfeited upon such trivial indiscretions entirely unrelated to the causative elements of injury, would be wholly arbitrary and thereby violate, inter alia, Constitutional guarantees of Due Process.[10]

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[9]Recchi America argues that this draconian treatment is justified because of the employee's "recklessness" in using drugs and then going to work. Initial Brief at 20, 22-23. First, whether or not it is reckless would depend on the nature of the work. More fundamentally, however, it is clearly not reckless to smoke marijuana in one's home on a Saturday night and then appear for work Monday morning when the active drug is entirely out of the employees' bloodstream -- the whole point of this dispute. This is an additional fundamental distinction between the current statute and the vehicular homicide statute at issue in Baker v. State, 377 So. 2d 17 (Fla. 1979), a decision which already strains the limits of Due Process. See, Id. at 20-22 (Boyd, J. dissenting), and cases cited therein.

[10]Florida's Contraband Forfeiture Act, which permits forfeiture of articles bearing a causal relationship (Martinez v. Heirich, 321 So.2d 167 (Fla. 2nd DCA 1986)) to felony violations of Florida contraband laws (Fla. Atty. Gen'l Op. 86-40) was recently held to violate the Eighth Amendment Excessive Fines clause as applied to

Finally, as shall become apparent in the succeeding Point, if the police power rationale proffered by Recchi America were the primary consideration and could somehow survive Due Process scrutiny, that very rationale would render the Fourth Amendment and Florida Right of Privacy difficulties with this statutory scheme even more blatantly insurmountable than if the statute were properly judged as serving fundamentally administrative, workplace-centered purposes.[11]

The First District properly applied the law governing irrebuttable presumptions. The Due Process clauses of both the Florida and U.S. Constitutions required the result that it reached.

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the attempted forfeiture of a $21,000 automobile used in the purchase of $20 worth of crack cocaine. In Re One 1993 Dodge Intrepid, 645 So.2d 551 (Fla. 2nd DCA 1994); see also, Austin v. United States, __U.S.___, 113 S.Ct. 2801, 125 L.2d.2d 488 (1993).

[11]The First District Court's disposition of the instant case on Due Process grounds obviated the need for that court to reach Hall's challenges under the Fourth Amendment of the United States Constitution and Florida's Right of Privacy. Similarly, should this Court find the irrebuttable presumption provision violative of Due Process, it also need not reach those questions.

POINT II

THE DRUG-FREE WORKPLACE ACT VIOLATES THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF FLORIDA BY REQUIRING SUBMISSION TO INDISCRIMINATE SUSPICIONLESS SEARCHES

A. STATE ACTION

Because urinalysis drug testing strikes at the heart of the privacy and dignity interests guaranteed by the Fourth Amendment, it is settled law that it constitutes a search within the meaning of the Fourth Amendment if conducted by officers or agents of the government or if conducted by private parties pursuant to government encouragement, endorsement, and/or participation. Skinner, 489 U.S. at 615-616, 109 S.Ct. at 1412.

At issue in Skinner was the Federal Railroad Administration's policy for drug and alcohol testing of private railroad workers. The regulations were of two types. Subpart C of the regulations mandated that the railroads test their workers following certain major train accidents. Subpart D of the regulations authorized, but did not require, administration of breath or urine tests to workers who violated certain safety rules or exhibited specific observable signs of intoxication. The Federal Railroad Administration argued that searches conducted by the private railroads pursuant to the voluntary provisions of Subpart D did not constitute state action subject to Constitutional restraint. The Supreme Court disagreed:

> . . . we are unwilling to accept Petitioner's submission that tests conducted by private railroads in reliance on Subpart D will be primarily the result of private initiative.

> The 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. In addition, it is mandated that the railroads not bargain away the authority to perform certain tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation and suffice to implicate the Fourth Amendment.

Skinner, 489 U.S. at 615, 616, 109 S.Ct. at 1412. See also, Blum v. Yaretsky, 457 U.S. 991, 1004-1005, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); Int'l Broth. of Elect. Workers v. U.S. Nuclear Regulatory Comm., 966 F.2d 521 (9th Cir. 1992); McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971); McCrory v. Rapides Regional Medical Center, 635 F. Supp. 975 (W.D. La. 1986), aff'd, 801 F.2d 396 (5th Cir. 1986) ; M.J. v. State, 399 So.2d 996, 998 (Fla. 1st DCA 1981).

Florida Stat. § 440.101, et. seq. is replete with provisions whereby the State of Florida encourages, endorses, and participates in the subject testing. Most prominent among these are the mandated discount in workers' compensation insurance premiums for employers who establish a drug-free workplace, Fla. Stat. § 440.102(4), 627.0915 (1993); the special immunity granted to employers who establish a drug-free workplace, shielding them from paying workers' compensation benefits to any worker who tests positive for drugs or alcohol, Fla. Stat. § 440.101 (1993); the conclusive presumption that any discharge, discipline, or refusal to hire "in compliance with this section" shall be deemed to have occurred "for cause", Fla. Stat. § 440.102(7)(b) (1993); the provision that a worker who refuses to submit to an employer-

demanded test for drugs or alcohol thereby forfeits his eligibility for workers' compensation medical and indemnity benefits, Fla. Stat. § 440.101 (1993); and the requirement that positive test results be transmitted to Florida's Department of HRS, Fla. Admin. Code § 38F-9.014(2)(b) 9 (1993).

Recchi America has argued that the Florida Legislature adopted this Drug-Free Workplace Act for the public purpose of discouraging societal drug abuse. If true, that fact would make it all the more clear that drug testing pursuant to this Act is state action. Compare, U.S. v. Gorman, 484 F.Supp. 529, 531 (S.D. Fla. 1980) (discussing relevance of public purpose in state action analysis).

To see the wisdom of the Skinner rule, one need only consider how the issue would be resolved if, instead of drug testing, the Legislature had chosen to offer financial inducements and legal protections/penalties to induce warrantless employer searches of workers' homes or cars or had offered financial inducements and protections to employers who hire only white people or women who have never undergone an abortion. While such hypothetical schemes might be more repugnant in motivation, they would be identical from a state action perspective. To place this scheme beyond Constitutional inquiry as mere "private action" would tie this Court's hands in areas where they plainly must remain free.[12]

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[12]Lest one think this "slippery slope" argument raises unwarranted fears, one should consider the implications of the testing scheme at issue in Ascolese v. Southeastern Pennsylvania Transportation Authority, 902 F.Supp. 533 (E.D. Penn. 1995) (public transport authority's mandatory pregnancy testing of its female police officers held unconstitutional under the Skinner framework).

B. INVASIVENESS OF URINE TESTING

The collection and testing of urine infringes directly upon a citizen's privacy and dignity interests. As the United States Supreme Court stated in Skinner, 489 U.S. at 617, 109 S.Ct. at 1413:

> There are few activities in our society more personal and private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

To speak of urinating in a cup or carrying that still-warm sample to an employer representative for temperature-testing and specimen-sealing in one's presence seems, in itself, an affront to the dignity of this Court. How much more so to the employee who must perform that act? How much more of an affront to know that one's bodily fluid is not being produced voluntarily for the protection of one's health, but instead is being involuntarily demanded as a condition of employment with the unmistakable purpose of discovering evidence of one's wrongdoing? How much more degrading for the blue and pink-collar workers who (because of the unique fashion in which this scheme has been linked to Florida's workers' compensation statute) bear the brunt of this testing, knowing that it is the largely-immune white-collar decision-makers who have decided that this invasion of their privacy must occur? Compare, American Federation of Government Employees v. Roberts, 9 F.3d 1464, 1468 (9th Cir. 1993) (degrading effect is arguably mitigated by fact that all of management is subjected to same

random testing); Chandler v. Miller, 73 F.3d 1543 (11th Cir. 1996) (approving Georgia statute requiring drug testing of candidates for public office). Moreover, because Florida's Drug-Free Workplace Act confers unbridled discretion upon the employer in deciding which employees to test, how often, and on what basis (including, apparently, Recchi America's claim of the right to perform "indiscriminate" testing) it is the most intrusive type of testing. Rutherford, supra, at 1262. See also, National Treasury Employees Union v. Watkins, 722 F.Supp. 766, 770 (D. D.C. 1989) (random testing requiring employees to expose themselves to invasion of privacy on recurring and surprise basis during ordinary workday "is more than even a non-sensitive person should be required to undergo").

The drug-testing process may also require disclosure to one's employer of medications legitimately prescribed by a physician (to refute a positive test result) and the highly private and sensitive health information that this medical treatment information implies. See, Fla. Stat. § 440.102(d); compare, Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533 (Fla. 1987); Webster v. Motorola, Inc., 418 Mass. 425, 637 N.E.2d 203, 207 (1994).

While it is helpful to privacy interests where sample collection is performed by medical personnel with due regard to a worker's privacy in the actual act of urination, such procedures do not deprive urine testing of its fundamentally invasive character. See, e.g., Beattie v. City of St. Petersburg Beach, 733 F.Supp. 1455 (M.D. Fla. 1990) (invalidating firefighter drug testing as

part of pre-existing annual physical examination program); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (remanding for further fact-finding as to appropriateness of testing some employees, despite fact that urination was unobserved).

As the United States Supreme Court concluded in Skinner:

> Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeal have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Skinner, 479 U.S. at 617, 109 S.Ct. at 1413. Urinalysis drug testing is, of course, equally intrusive when required by private employers. Doyon v. Home Depot U.S.A., Inc., 850 F.Supp. 125, 129 (D. Conn. 1994) (applying Fourth Amendment standard to private employer via state privacy statute).

C. REASONABLE SUSPICION/SPECIAL NEEDS

The Supreme Court has consistently held in drug-testing cases that "reasonable suspicion" of workplace intoxication can be Constitutionally dispensed with as a predicate for testing only where "special needs beyond normal law enforcement" justify such suspicionless searches. Skinner, 489 U.S. at 620, 109 S.Ct. at 1414; see also, Vernonia School District, ____U.S.____, 115 S.Ct. 2386, 2391, 132 L.Ed.2d 564 (1995).[13] That this "special needs

[13]The Vernonia decision approved suspicionless testing of student athletes for "prophylactic and distinctly non-punitive purposes", Vernonia, 115 S.Ct. at 2393 fn. 2, in light of the peculiar in loco parentis relationship between students and school

beyond normal law enforcement" requirement is a real one, was fully demonstrated by the Court's action in Von Raab, supra, wherein the Court made clear that blanket pre-employment drug tests would be impermissible if imposed upon ordinary government employees or the public at large:

> Unlike most private citizens or government employees in general, employee's involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Von Raab, 489 U.S. at 672, 109 S.Ct. at 1394.

The Court thus concluded in Von Raab that while there was a demonstrated special need to conduct suspicionless tests upon the front-line Customs agents tasked with drug interdiction, it was unable to adequately assess on the record before it the special need for (and hence the Constitutionality of) pre-employment testing of employees who merely handled classified material -- remanding for further fact-finding as to those positions. See, Von Raab, 489 U.S. at 677-678, 109 S.Ct. at 1397.

The Constitutional need for limiting suspicionless testing to "special needs" job classifications was perhaps best explained in AFGE v. Roberts, supra, at 1468, where the Ninth Circuit Court stated that "no one would want to live in an Orwellian world in which the government assured a drug-free America by randomly testing the urine of all its citizens." Of course, Roberts involved only a small subclass of federal workers. The instant

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authorities. Vernonia, 115 S.Ct. at 2396-97. The Court emphasized that its decision should not lead to "the assumption that suspicionless drug tests will readily pass Constitutional muster in other contexts". Vernonia, 115 S.Ct. at 2396.

scheme encompasses Florida's entire labor economy.

To similar effect is American Federal of Government Employees v. Thornburgh, 720 F.Supp. 154 (N.D. Cal. 1989) which enjoined random testing of all employees of the Federal Bureau of Prisons:

> The Bureau simply has not demonstrated the special need for its indiscriminate testing program, as required by the Supreme Court, that "in certain limited circumstances . . . is sufficiently compelling to justify the intrusions on privacy entailed by conducting such searches without any measure of individualized suspicion." Von Raab, 109 S.Ct. at 1392; see also, Skinner, 109 S.Ct. at 1421-1422.

In National Treasury Employees Union v. Watkins, 722 F.Supp. 766 (D. D.C. 1989) the Department of Energy sought to conduct random drug testing of its motor vehicle operators. The court refused, stating:

> We believe that the safety risks involved with the motor vehicle operators carrying-out their duties are no greater than the normal risks associated with vehicle use by the general public.

Id. at 769.

In Webster v. Motorola Inc., supra, the Massachusetts Supreme Court applied a privacy statute nearly identical to Florida's Constitutional Right of Privacy but which had been interpreted as applying to private employers irrespective of state action analysis. In sharply limiting Motorola's right to conduct drug testing under the Massachusetts Privacy Act the court stated:

> The Defendants, as do all businesses, have a general interest in protecting the safety of their employees and in providing them a drug-free environment in which to work. This interest alone, however, is not sufficient.

Webster, 637 N.E.2d at 207-208. See also, Guiney v. Rooch, 873 F.2d 1557 (1st Cir. 1989), cert. den'd, 493 U.S. 963, 110 S.Ct. 404, 107 L.Ed.2d 370 (1989); Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992), cert. den'd, 509 U.S. 905, 113 S.Ct. 2996, 125 L.Ed.2d 690 (1993); Ford v. Dowd, 931 F.2d 1286 (8th Cir. 1991) (suspicionless testing of police invalid); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), cert. den'd, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990) (Justice Department employees).

By definition, there can be no special need to conduct suspicionless tests of all job classifications in the Florida economy. To pretend to the contrary is to allow the exception to swallow the rule. The State's needs with respect to its entire labor force is precisely the need for law enforcement . . . nothing more, nothing less.

Florida's Drug-Free Workplace Act requires employees to submit to suspicionless tests demanded by their employer irrespective of any special needs. The mandated premium discount is doled out as a financial inducement to all employers who adopt these suspicionless drug testing programs, irrespective of any history of drug abuse at the workplace or any peculiar safety needs that a particular job classification or workplace may pose. A Florida Chamber of Commerce survey has shown that 4,000 of its 7,000 members -- mostly large companies -- now engage in such testing of their employees for drug use. Editorial, "Anti-Drug Effort Excessive in Denying Workers' Comp", Florida Today, June 21, 1996, pg. 10A.

Once a drug-free workplace program is in place, the unique irrebuttable presumption/forfeiture provision creates a strong financial incentive for employers to test all injured workers, regardless of how remote the likelihood that the injured worker will test positive or how clearly that worker was an innocent victim of co-worker or management negligence or even an "Act of God". The mere possibility that the employer may "get lucky" and catch the injured worker in an indiscretion, saving themselves (or their carrier) potentially large benefit payments, inevitably leads to precisely the sort of blanket post-accident testing scheme adopted by Recchi America -- demanding testing irrespective of the fault of the worker, the severity of the accident or the likelihood that a particular worker has ever used illegal drugs (or abused alcohol). If the roof caves in on the senior citizen kindergarten teacher, this Act induces her testing and simultaneously forces her to submit to that testing -- a plainly unconstitutional result, legally indistinguishable from the current facts. Compare, Fla. Stat. § 440.09(7)(a) (1993) (authorizing testing by all employers with reasonable suspicion that a worker's injury was occasioned primarily by that worker's intoxication or drug impairment).

Recchi America's drug policy is a perfect example of this fundamental Constitutional defect -- forcing workers to submit to suspicionless drug tests despite the absence of any evidence or argument as to why some "special need" exists for suspicionless testing of common laborers like Astley Hall. See, Bolden v. Southeastern Pennsylvania Transp. Authority, 953 F.2d 807 (3rd Cir.

1991), cert. den'd, 504 U.S. 943, 112 S. Ct. 2281, 119 L.Ed.2d 206 (1992) (suspicionless test of maintenance worker invalid); Rutherford, supra, (municipal truck driver presented no special need for suspicionless testing); Beattie, supra (job supervision and suspicion-based testing sufficient to protect City's interest in maintaining drug-free firefighter corps); National Treasury v. Watkins, supra, (surveying drug-testing decisions in Circuit, concluding that most had enjoined random testing and each had narrowed reasonable suspicion testing). The fact that Hall was unfortunate enough to fall victim to a (relatively minor) workplace accident does not alter the analysis or satisfy either Constitutional predicate for testing -- creating neither a special need for suspicionless testing nor the reasonable individualized suspicion which the Fourth Amendment otherwise demands. See, American Federation of Government Employees v. Cheney, 754 F.Supp. 1409, 1417 (N.D. Cal. 1990), affirmed, 944 F.2d 503 (9th Cir. 1991) (invalidating Navy's post-accident testing policy lacking accident causation and severity requirements); Doyon, supra, at 129 (suspicionless post-accident testing not justified by employers' workers' compensation liability); compare, Fla. Stat. § 440.09(7)(a) (1993) (authorizing reasonable suspicion post-accident testing by all employers).

The Florida Legislature's attempt to broadly induce indiscriminate urinalysis of the State's entire labor force places us squarely on the threshold of that Orwellian world described by the Ninth Circuit. Fortunately, the Constitution of the United

States allows no such thing.

D. FLORIDA'S RIGHT OF PRIVACY

In Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985) this Court issued its seminal decision interpreting Art. 1, Sec. 23, of the Florida Constitution. In so doing, this Court fittingly quoted from Justice Brandeis' famous dissent in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.

Article 1, Sec. 23, of the Florida Constitution expressly incorporates Justice Brandeis' sentiment by providing that every natural person "has the right to be let alone and free from governmental intrusion into his private life . . . ". In Winfield, supra, this Court made clear its intention to fully effectuate the expressed will of the voters of Florida who adopted this strong protection of the fundamental right of privacy, stating:

> Since the people of this State exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Id. at 548.

This Court has previously held this right of privacy to be applicable in highly similar contexts involving a person's right to control his bodily fluids and maintain the information disclosed by such fluids as confidential. Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989) (right to refuse blood transfusion); Rasmussen, supra (privacy rights of blood donors). While the privacy interest implicated by the subject urine testing and protected by Florida's Right of Privacy clearly overlaps with the privacy interest protected by the search and seizure protections of the Fourth Amendment, there is no apparent reason why those different protective provisions must be construed as precisely co-extensive -- especially given the broader scope and effect of the Florida Right of Privacy and its (albeit brief) history of uniquely protecting bodily integrity and medical confidentiality interests. See, Wons, supra; Rasmussen, supra; Fraternal Order of Police v. City of Miami, 609 So.2d 31 (Fla. 1992) (Kagan, J. concurring). See also, Guiney v. Police Commissioner, 411 Mass. 328, 582 N.E.2d 523 (1991) (utilizing state privacy provision to strike down drug testing of police); Horsemen's Benev. and Protective Assn. v. State Racing Comm., 403 Mass. 692, 532 N.E.2d 644 (1989) (striking down testing of jockeys).

In Winfield, supra at 547, this Court held the right of privacy to be a fundamental right, demanding a compelling state interest standard -- the burden of proof lying with the State to justify an intrusion on privacy by establishing that a challenged regulation serves a compelling state interest and accomplishes its

goal by use of the least intrusive means.[14]

Because no Florida court has interpreted Florida's Right of Privacy in the context of workplace drug testing and because the Fourth Amendment law in this area is well-developed, this Point has primarily focused upon the ways in which the current scheme violates those lesser protections of the Fourth Amendment. Still, the applicability of this broader Florida right and the teachings of this Court's privacy cases should not be overlooked. The "bottom-line" justification which the State (or its surrogate, Recchi America) must offer is why this uniquely broad and intrusive scheme is the least invasive means of accomplishing some compelling State interest. Put simply, why does reasonable suspicion testing not adequately satisfy all compelling State interests outside of "special needs" areas? Absent some persuasive answer to this question, this Act clearly violates Florida's Right of Privacy irrespective of the separate Fourth Amendment analysis.

E. COERCED CONSENT

Recchi America will likely argue, as it did below, that Hall "consented" to this testing by execution of the drug testing policy documents at the time he was hired. However, "consent" to a search is involuntary and ineffectual if required as a condition of employment or if the employee reasonably fears termination should

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[14]As reflected in their Certificates of Service, Hall's briefs to the First District Court were served on Florida's Attorney General so as to allow the State of Florida an opportunity to intervene in defense of the statute's constitutionality. The Attorney General elected not to do so.

he refuse to "consent". Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-1735, 20 L.Ed.2d 811 (1968); Fowler v. New York City Dept. of Sanitation, 704 F.Supp. 1264 (S.D. N.Y. 1989); American Federation of Government Employees v. Weinberger, 651 F.Supp. 726, 736 (S.D. Ga. 1986); Bostic v. McClendon, 650 F.Supp. 245, 249 (N.D. Ga. 1986).

Of course, the above authorities involved isolated policies affecting only an extremely small fraction of the total labor market in any locality. How much more compelling is the coercion exerted where, as here, the unconstitutionally broad policy has been adopted by a majority of the large employers in the State pursuant to a uniform statewide legislative scheme? Surely a Florida worker should not have to stay home and collect welfare or move to another state to enjoy his Constitutional right to be free of unreasonable searches of his bodily fluids. Such a "choice" is no choice at all from a Constitutional perspective.

Florida's Drug-Free Workplace Act is unconstitutional under both the Fourth Amendment and Florida's broader Right of Privacy because it induces performance of (and requires submission to) suspicionless testing where no special need for such testing exists. This was just such a case. Thus, affirmance of the result reached by the First District Court is required on these Constitutional privacy grounds, even should this Court disagree with the First District Court's reasoning under Point I.

POINT III

THE JCC ERRED IN CONCLUDING THAT RECCHI AMERICA HAD ESTABLISHED A DRUG-FREE WORKPLACE

Florida Stat. § 440.102(3)(d) (1993) requires that prior to testing an employee be given notice of the existence of "this section." Florida Stat. § 440.101 (1993), further requires compliance with the Division's notice rules prior to receiving the benefits of a drug-free workplace status. Florida Admin. Code § 38F-9.005(2)(b) (1993) requires that prior to testing all employees or job applicants must be given a written policy statement from the employer which contains a statement advising the employee or job applicant of the existence of that rule.

It is undisputed that the written policy statement given to Astley Hall did not contain the above notices, as required (R.329, et seq.). Accordingly, the JCC erred in concluding that Recchi America was a drug-free workplace and thus erred in applying the irrebuttable presumption of causation to bar Hall's claim. See, Gustafson's Dairy Inc. v. Phillips, 656 So.2d 1386, 1388 (Fla. 1st DCA 1995) (substantial compliance with the statutory criteria for creation of drug-free workplace programs is insufficient). This point, too, acts as an alternative basis for award of Hall's benefits, as without the irrebuttable presumption (applicable only in drug-free workplaces), Hall clearly would have been entitled to his benefits.

CONCLUSION

This Court should affirm the decision of Florida's First District Court of Appeal.

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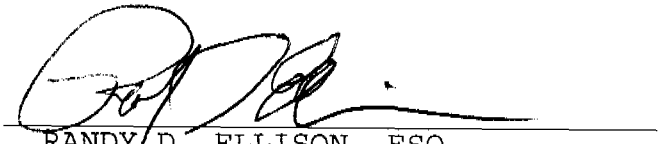
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 1st day of August, 1996 to the following:

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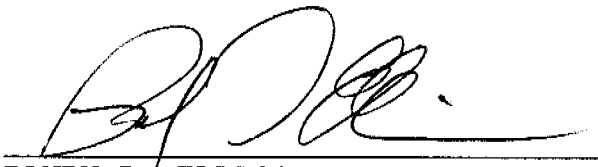

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