SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Petitioner

v. CASE NO.: SC07-244

MARINER HEALTH/ACE USA,

Respondents

ON PETITION FOR REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

AMENDED BRIEF OF AMICUS CURIAE, FLORIDA POLICE BENEVOLENT ASSOCIATION ON BEHALF OF PETITIONER'S POSITION

Todd J. Sanders, Esq.
Fla. Bar. No.: 860920

Geoffrey Bichler, Esq.
Fla. Bar No.: 850632

Bichler & Kelley, P.A.
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789
(407) 599-3777
Counsel for Amicus Curiae, Florida Police Benevolent Association

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PRELIMINARY STATEMENT

Amicus Curiae, the Florida Police Benevolent Association will be referred to by either its full name or by the abbreviation "FPBA."

Judges of Compensation Claims shall be referred to by the letters "JCC's".

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

The Florida Police Benevolent Association (FPBA) is a large statewide organization that represents law enforcement officers throughout the State of Florida. Its members are frequently claimants in workers' compensation cases, and who require the assistance of effective counsel in pursuing their rights under the workers' compensation laws, including the Heart/Lung Bill. As such, the FPBA's members share the interests of the Petitioner and all other workers' compensation claimant's in ensuring access to the courts via effective counsel, which access is affected by the fee statute at issue in this case.

SUMMARY OF ARGUMENT

To the extent that §440.34, Fla. Stat. as significantly amended in 2003 prohibits workers' compensation claimants from entering into contracts with attorneys whereby said claimants agree to pay an hourly attorney's fee out of their own funds, or using the funds of another person or organization (other than employer/carriers), it is an unconstitutional infringement on such claimants' right to contract, and thus the statute should be stricken as unconstitutional.

ARGUMENT

SECTION 440.34, FLA. STAT. (2003) IS UNCONSTITUTIONAL BECAUSE IT UNJUSTIFIABLY INFRINGES ON THE RIGHT OF CLAIMANTS TO CONTRACT.

The Florida Police Benevolent Association represents law enforcement officers throughout the State of Florida. One of the most significant legislative acts applying to law enforcement officers ever passed in Florida is the "Heart/Lung" Bill, codified at §112.18, Fla. Stat. This law provides medical and other benefits for those law enforcement officers (as well as fire fighters and corrections officers) who contract hypertension, heart disease, or tuberculosis when certain prerequisites are satisfied. The statute, and the statutory presumption embodied in it, "is the expression of a strong public policy," as this Honorable Court explained in *Caldwell v. Division of Retirement, Florida Dept. of Administration*, 372 So. 2d 438, 441 (Fla. 1979). It serves as a measure of protection for law enforcement officers who in turn risk their lives everyday protecting Florida's citizens. However, the act is meaningless if the governmental entities responsible for providing the benefits the act requires refuse to do so without protracted litigation and law enforcement officers cannot obtain legal counsel to assist them in such litigation. Both of these situations are now occurring with

increasing frequency, and the blame for the latter rests squarely with the restrictive attorney fee provisions of §440.34.

In one case involving a police officer,[1] *Weimer v. City of Kissimmee*,[2] the claimant brought a hypertension claim under the Heart/Lung Bill, and, when the claim was denied, he identified a law firm he wanted to represent him. The firm agreed to do so, and expended nine hours in that regard, but when it became apparent that the case was going to require a great deal of litigation, the claimant's lawyers informed him that they could not economically continue to represent him under the strictures of the contingency fees allowable under §440.34. The claimant reasserted his desire to retain the firm, as they were experts in Heart/Lung claims, and freely agreed to enter into a contract whereby he would pay his attorneys an hourly fee for their services as opposed to the contingency fees pursuant to §440.34. [3]

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[1] Actually, he was a police officer when he filed his §112.18 claim, but was terminated shortly afterwards.

[2] *Mark Weimer v. City of Kissimmee*, OJCC# 06-021829TWS, which currently before the First District Court of Appeal on petition for writ of certiorari (1D07-4549).

[3] As noted in the concurring opinion to *In re Amendment to the Rules Regulating the Florida Bar – Rule 4-1.5(F)(4)B) of the Rules of Professional Conduct*, 939 So. 2d 1032, 1041 (Fla. 2006), "[t]here are many reasons why a client would choose a particular lawyer at a rate which would be higher than that charged by other lawyers." It is reasonable to assert that one such reason would be an attorney's expertise in a particular field of law.

However, when the claimant and his attorneys sought approval of this contract, and authorization for the attorneys to transfer a portion of the retainer fee paid by the claimant from their escrow account to their operating account, the JCC rejected both requests, finding that §440.34 did not allow him to grant either. As a consequence, Mr. Weimer's attorneys were forced to withdraw from the case and he is currently representing himself, having been unable to find new counsel.

The JCC in *Weimer* made no findings with respect to the claimant's assertion that a refusal to approve the contract violated his constitutional rights to enter into the contract of his choice. Rather, the JCC simply stated that §440.34(1) by itself, and in conjunction with §440.105(3)(c), prohibited the contract[4]. That is, the statute as so-interpreted, rendered the contract illegal. To the extent that the JCC's interpretation was correct, §440.34 in its current form is an unconstitutional infringement on a claimant's right to contract.

"The right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects, is an element of civil liberty possessed by all persons who are sui juris. It is both a liberty and property right and is within the protection of the guaranties

[4] This despite the fact that §440.34(3)(a) provides that claimants are responsible for payment of their own attorney's fees.

against the taking of liberty or property without due process of law." *State v. Ives*, 167 So. 394, 398-99 (Fla. 1936). (citations omitted). "The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law." *Lawnwood Medical Center v. Seeger*, 959 So. 2d 1222, 1224 (Fla. 1st DCA 2007) (citation omitted). The court in *Ives* cautioned, however, that this right is not an absolute, and may be limited in the interest of the public welfare, but added that "[f]reedom of contract is the general rule; restraint is the exception, and when it is exercised to place limitations upon the right to contract, the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances." *Ives*, 167 So. at 399.

In order to withstand a constitutional challenge on this point, the statute(s) in question must serve a "demonstrable, overriding public policy to be served by limiting" a person's (including a workers' compensation claimant's) right to enter into such a contract. *In re The Florida Bar in re Amendment to the Code of Professional Responsibility (Contingent Fees)*, 349 So. 2d 630, 634 (Fla. 1977). There are three major potential public policy implications involving attorney's fees in workers' compensation proceedings: 1) a claimant's access to the courts; 2) the potential for abuse or overreaching; and 3) the "burden" on insurance companies and self-

insured entities with respect to paying hourly attorney's fees after they finally agree, or are ordered, to provide benefits they initially refused to provide, and the oft-claimed attendant potential impact of paying these fees on insurance premiums and the general costs associated with administering workers' compensation claims. The FPBA will address each of these separately.

1. *Claimants' Access to the Courts.*

Typically, the access to the courts issue with respect to attorney's fees has to do with whether to allow contingency fees, not whether to permit hourly attorney fees that are *voluntarily paid by a client.* The latter system is the rule rather than the exception. The former came about so as to open the courts to those without the means to pay for an attorney to pursue their claim. "It is irrefutable that the poor and least fortunate in our society enjoy access to our courts, in part, because of the existence of the contingent fee." *In re the Florida Bar*, 349 So. 2d at 633. The court called the contingent fee the "'poor man's key to the courthouse,'" which is somewhat ironic in the context of the *Weimer* case, where the contingent fee was not a key to the court house door, but a bar - the claimant wanted a particular law firm to

handle his claim, but that firm could not do so based on the limits imposed by the contingency fees allowable by §440.34[5].

Thus, unlike the typical case where a person of limited means is only able to hire an attorney because of the availability of a contingency fee agreement, in *Weimer* the claimant was *unable* to hire an attorney precisely *because of* a statutory contingency fee statute - one which the JCC found was the only lawful attorney's fee that is payable in workers' compensation cases. This flies in the face of a claimant's constitutional right to contract. Also, assuming that at least one reason for these restrictions is to protect claimants by assuring that they get as much in the way of benefits as possible, it is contrary to the claimant's right to waive this "protection".

The concurring opinion in *In re Amendment to the Rules Regulating the Florida Bar – Rule 4-1.5(F)(4)B) of the Rules of Professional Conduct*, 939 So. 2d 1032, 1041 (Fla. 2006) noted that "constitutional rights which are personal may be waived . . . ." It is only logical then, that if a person can waive *constitutional* rights, he can also waive mere *statutory* rights such as those in §440.34. This is what the claimant in *Weimer* wished to do, but which the JCC refused to allow. In fact, the JCC's interpretation of §440.34 in conjunction with §440.105(3)(c) makes it *illegal* for a claimant to exercise

[5] Six other attorneys submitted affidavits in *Weimer* stating that they would not take the claimant's claim for the same reason.

this right. At issue in *In re Amendment* was, *inter alia*, whether plaintiffs in medical malpractice cases could waive their rights under the fee cap provisions Florida voters inserted into the State's constitution at Art. 1, §26. This Honorable Court allowed such a waiver, subject to certain requirements (which did not, interestingly, include judicial review of such waivers, unlike in workers' compensation cases where the JCC is required to be involved in any payment of, or agreement to pay, attorneys' fees).

Why would a claimant wish to forego the statutory guideline fees and instead agree to pay his attorneys an hourly fee - win or lose? One reason is that he may want a particular lawyer due to that lawyer's acknowledged expertise in the type of claim the claimant has (as was the case in *Weimer*), and might not be able to persuade that lawyer to take the case otherwise due to various hurdles. Also, although only five years worth of medical benefits can be considered in evaluating the amount of a fee under §440.34, a claimant's condition may well require medical care extending beyond five years. A classic example of this is a claim under §112.18, dealing with hypertension, heart disease, and tuberculosis. All are conditions that do not go away, and thus require care for life. Such care over a lifetime can be very expensive, and a claimant who is faced with the prospect of needing such care for such a long period of time, and not being able to afford health

insurance after retiring or leaving work on a disability pension, or not qualifying for Medicare, may well find it worth his/her while to spend several or more thousand dollars of his own money to obtain the best counsel he can find to fight for compensability of his claim, and thus, if successful, ensure entitlement to his medical care being provided by the employer/carrier. And if this is what the claimant wishes to do, then it should not be subject to any interference by the legislature or the judge of compensation claims.

The same rationale applies to a situation in which an organization such as the FPBA may wish to assist a member who is pursuing a Heart/Lung case by paying for the member's attorney's fees. There are various reasons this or another organization may wish to do this, including, *inter alia*, "sending a message" to particularly recalcitrant governmental entities that they will not be able to intimidate law enforcement officers from exercising their rights under §112.18 simply by denying all such claims outright, and then engaging in protracted litigation. Another reason may be that a member's condition is so serious, and the stakes with respect to benefits for the member and his/her family so high, that the organization feels compelled to assist the member by funding his litigation. But, under the interpretation of §440.34 as explained by the JCC in *Weimer*, this option

is not available to a claimant – indeed, the organization would be committing a crime by attempting to help its member in need. And yet, nothing in the law prohibits governmental entities from funding its own side of the litigation without restriction, including paying its attorneys any hourly fee upon which they and their attorneys agree.

Another interesting aspect of the *In re Florida Bar* case was that this Court's enthusiasm for contingency fees extended beyond just mere approval, but also *against* the Bar's proposal for a maximum contingency fee schedule on the ground that doing so would "impinge upon the constitutional guarantee of freedom of contract." 349 So. 2d at 632. And yet, this is precisely what §440.34(2) does by not only limiting the amount of fees an attorney may be paid by calculating them based on the value of the benefits secured, but also by limiting the amount of such benefits that can be considered when calculating these fees to the estimated medical costs for a five year period, no matter how long the claimant is likely going to need treatment.

If the JCC in *Weimer* was correct, then in Florida a person can waive his right to an attorney when accused of a crime or undergoing questioning by the authorities, waive his right to be silent, waive his right to a jury trial, waive his right not to testify against himself, waive his right to insist upon a

warrant before his property is searched, and waive his right to keep more of the money awarded him in a medical malpractice case, but he cannot waive his "right" to have his attorney's fees in a workers' compensation case be limited by §440.34. The same is true of employer/carriers who are apparently not free to waive their rights to have the fees they pay to a claimant's attorney on behalf of the claimant be limited by §440.34. The fact that the workers' compensation scheme is a pure creature of statute does not, nor should it, exempt it from basic constitutional requirements such as the right to contract. And this fundamental principle should not be restricted to a claimant's right to enter into the fee agreement of his choice with the attorney of his choice. It also applies to the right of employer/carriers to agree to the payment of an attorney's fee to a claimant's attorney that is in excess of the §440.34 guidelines if they so wish.[6] The only way to interpret §440.34's restrictions that is consistent with the basic constitutional rights described herein is that the statute prohibits a JCC from *ordering* a claimant or an employer/carrier from paying a fee that exceeds the guidelines set forth in that statute.

As noted in *Ives*, any limitation on this right "can be justified only by exceptional circumstances." *Ives*, 167 So. at 399. Any restraint on the

[6] An employer/carrier may agree to do so where, for example, it will make it easier to effectuate settlement of a claim.

Claimant's right to contract must be reasonable and in the interest of the public welfare. *Id*. There is no exceptional circumstance justifying a prohibition against workers' compensation claimants from paying their attorneys an hourly fee with their own funds, or those of others. Nor is such a prohibition reasonable or in the interest of the public welfare. This is especially true where the inability to pay such fees may operate as a bar to claimants, including law enforcement officers, from asserting their rights under the workers' compensation statutes (or the Heart/Lung Bill) because they cannot obtain counsel.[7]

Based on the foregoing, to the extent that §440.34 and/or §440.105(3)(c) deprives a claimant of the right to enter into a contract with the attorney of his choice pursuant to which he agrees to pay his attorney an hourly fee that exceeds the fees allowable by §440.34, the FPBA respectfully requests that this Honorable Court strike it as unconstitutional.

2. *Potential Abuse or Overreaching*

The second potential implication of public policy with respect to attorney's fees in workers' compensation cases involves the potential for abuse or overreaching. However, as noted, this Court did not see a need to

[7] There was evidence presented in both *Weimer* and in the Petitioner herein's case with respect to the difficulty, if not near impossibility, of an unrepresented claimant prevailing in a workers' compensation claim.

approve a cap on contingency fees, finding instead that clients were protected by the ethics and professionalism rules prohibiting a lawyer from entering into any agreement for, charge, or collect an illegal or clearly excessive fee. *In re the Florida Bar*, 349 So. 2d 634. There is no logical reason why this should apply to personal injury and other types of actions, but not to workers' compensation claims.

In *Weimer* there was absolutely no finding of any overreaching or abuse. To the contrary, the claimant testified in no uncertain terms that he wished to hire the lawyers of his choice because they were experts in "Heart/Lung" cases, and because it was his constitutional right to do so. Nor is there any overreaching or abuse in a situation in which an organization such as the FPBA wishes to fund the litigation of one of its members, including paying the fees of attorneys who may not be able or willing to represent the organization's members in Heart/Lung claims.

3. *The "Burden" on Insurers and the "System".*

As the Court is no doubt well aware, one of the primary reasons for the legislature's 2003 overhaul of Chapter 440 was to reduce the costs to workers' compensation insurers of doing business in Florida, which, ostensibly, would result in lower premiums for employers and prevent some insurers from following through with threats to cease doing business in

Florida if something was not done. One way of doing this was to eliminate the authority of a JCC to order an employer/carrier to pay a claimant's attorney's fees on an hourly basis –which authority existed in the 2002 version of §440.34.[8] Assuming, *arguendo,* that allowing employer/carriers to continue to pay their own attorneys hourly fees to litigate workers' compensation claims, but not allow claimants' attorneys to be so paid would achieve the aforementioned goals, these goals would not be thwarted in any way by allowing a claimant to pay his attorney an hourly fee out of his own pocket. In addition, if the intent of §440.34 is to deprive JCC's of the authority to order an employer/carrier to pay a claimant's attorney's fee based on an hourly rate, this goal is not thwarted by an employer/carrier *voluntarily* choosing to do so.

CONCLUSION

The FPBA concurs with the constitutional arguments against §440.34 put forth by the petitioner in this case, as well as those put forth by those serving as amicus curiae on the petitioner's behalf. As for its own argument, the FPBA asserts §440.34 is unconstitutional to the extent that it prohibits a workers' compensation claimant from paying his/her attorney an hourly fee

[8] *See*, Fla. H.R. Comm. On Insurance, H.B. 25A (2003), Staff Analysis (5/9/03), and Fla. S. Comm. On Banking and Insurance, S.B. 50-A (2003), Staff Analysis and Economic Impact Statement (5/19/03, revised 5/20 – 5/23/03).

out of his/her own funds, or with funds provided by an organization such as the FPBA, and therefore the statute should be stricken.

Respectfully submitted,

Todd J. Sanders, Esq.
Fla. Bar. No.: 0860920
Geoffrey Bichler, Esq.
Fla. Bar No.: 850632
Bichler & Kelley, P.A.
807 West Morse Blvd.
Suite 201
Winter Park, Florida 32789
(407) 599-3777
Counsel for Amicus FPBA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this _____ day of December, 2007, to: Bill McCabe, Counsel for Petitioner, 1450 S.R. 434, Ste. 200, Longwood, FL 32750; and John R. Darin, II, P.O. Box 2753, Orlando, FL 32802, counsel for Respondent; . Roy D. Wasson, Esq., 5901 S.W. 74th St., Ste. 205, Miami, FL 33143, Counsel for Amicus Curiae, David Singleton; William H. Rogner, Esq., 1560 Orange Ave, Ste 500, Winter Park, FL 32789, Counsel for Amicus Curiae, Zenith Ins. Co.; L. Barry Keyfetz, Esq., 44 W Flagler St., Ste 2400, Miami, FL 33130, Counsel for Amicus Curiae, Florida Justice Assoc.; Rayford H. Taylor, Esq., PO Box 191148, Atlanta, GA 31119, Counsel for Amicus Curiae, Florida Ins. Council; Thomas A. Koval, Esq.,

6300 University Pkwy, Sarasota, FL 34240, Counsel for Amicus Curiae, Florida Ins. Council; and Mary Ann Stiles, Esq., PO Box 460, Tampa, FL 33601, Counsel for Amicus Curiae, Florida Ins. Council.

_____
Todd J. Sanders, Esq.
Fla. Bar. No.: 0860920

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Todd J. Sanders, Esq.
Fla. Bar. No.: 0860920