IN THE SUPREME COURT FOR THE STATE OF FLORIDA

EMMA MURRAY,

Petitioner, CASE NO.: SC07-244

vs. L.T. Case No.: 1D06-475

MARINER HEALTH/ACE USA,

Respondent.

_____/

BRIEF OF VOICES, INC. AMICUS CURIAE ON MERITS IN SUPPORT OF PETITIONER

RICHARD W. ERVIN, III
Florida Bar No. 022964
FOX & LOQUASTO, P.A.
1201 Hays St., Suite 100
Tallahassee, Florida 32301
Ph: (850) 425-1333
Fax: (850) 425-3020
richardervin@flaappeal.com

SUSAN W. FOX, ESQ.
Florida Bar No. 241547
FOX & LOQUASTO, P.A.
112 N. Delaware Ave.
Tampa, Florida 33606
Ph: (813) 251-6400
Fax: (813) 254-6144

Attorneys for Voices, Inc., Amicus Curiae

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STATEMENT OF INTEREST

VOICES, INC., is a nonprofit organization made up of injured workers and their supporters. The purpose of VOICES is to guide injured workers and their families through the workers= compensation system and educate them to their rights under Florida law. As such, VOICES has an interest in issues related to the construction and constitutionality of section 440.34, Florida Statutes (2003).

SUMMARY OF ARGUMENT

Point I: VOICES asks the court to hold that the 2003 version of section 440.34(3), Florida Statutes, continues to provide entitlement to reasonable attorney's fees payable by the E/C.

Point II: Alternatively, if this court finds the First District correctly construed section 440.34, the court should find the First District erred in failing to rule the fee cap can be exceeded if it was confiscatory of an attorney=s time. The statutory scheme prohibits a claimant from agreeing to pay an attorney a reasonable fee and restricts his rights to a statutory percentage that is Amanifestly unfair.@ This ruling restricts the ability to contract for legal representation. In all other contexts, an injured party may obtain legal representation through more generous contingency fees that are the Apoor man's key to the courthouse.@ The statutory percentage limits should be set aside as a violation of equal protection and due process.

ARGUMENT

I Whether the First District Erred as a Matter of Law in Concluding

That the Determination of a AReasonable Attorney=s Fee from an Employer or Carrier@ as Provided in Section 440.34(3), Florida Statutes (2003) Is Limited to the Statutory Guideline Fee Set Forth in Section 440.34(1), Florida Statutes (2003) ?

Standard of Review: As this is a question of law, the review standard is *de novo*. See Gilbreth v. Genesis Eldercare, 821 So. 2d 1226 (Fla. 1st DCA 2002).

Analysis: Injured workers are in a unique class along with incompetents and infants in having no entitlement to freely contract for legal representation. This is so because section 440.34(1), Florida Statutes (2003) dictates that a claimant cannot enter into a retainer agreement with an attorney for fees in excess of the statutory percentage. Several rationales have been stated for the limitations on a claimant=s ability to contract for attorney=s fees. As will be demonstrated, none of these remain valid if the statutory construction of the First District is correct. The end result is that most workers= compensation claimants have lost the right to legal representation. For this reason, VOICES asks the court to consider this interpretation as a prelude to considering the constitutional issues raised by that interpretation. See 48A Fla. Jur. 2d Statutes ' 112 (2000) (court should not resolve a case on constitutional grounds if it is possible to dispose of it on other grounds).

The crux of VOICES= argument is that section 440.34(3), Florida Statutes (2003) still provides entitlement to **reasonable** attorney's fees payable by the E/C:

Claimant shall be responsible for the payment of her or his own attorney's

> fees, except that a **claimant shall be entitled to recover a reasonable attorney's fee from a carrier or employer:**
>
> (a) Against whom she or he successfully asserts a petition for medical benefits only, if the claimant has not filed or is not entitled to file at such time a claim for disability, permanent impairment, wage-loss, or death benefits, arising out of the same accident;
>
> (b) In any case in which the employer or carrier files a response to a petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition;
>
> (c) In a proceeding in which a carrier or employer denies that an accident occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability; or
>
> (d) In cases where the claimant successfully prevails in proceedings filed under s. 440.24 or s. 440.28.

(Emphasis added.) Under the plain language of the statute, a claimant is entitled to "recover a **reasonable** attorney's fee" from the carrier.

To the extent that the First District determined that the amount of the fee was controlled by subsection 440.34(1), VOICES submits that such was error because subsection (1), as amended in 2003, only applies to a claimant's liability to his or her attorney and purports to regulate any fee to be paid under that subsection by requiring the JCC to approve its payment. Any other reading creates ambiguity or conflict within the statute in that subsection (3), dealing with the E/C's liability for attorney's fees, requires award of "reasonable attorney's fees," and the JCC recognized the application of subsection (1) results in a fee that is not reasonable.

Section 440.34(1) states:

> (1) A fee, gratuity, or other consideration may not be paid **for a claimant** in connection with any proceedings arising under this chapter, unless approved as reasonable by the [JCC] . . . . Any attorney's fee approved by a [JCC] for benefits secured **on behalf of a claimant** must be equal to [the 20/15/10/5 percentage] . . . . The [JCC] shall not approve a compensation order, a joint stipulation for lump-sum settlement, a stipulation or agreement **between a claimant and his or her attorney**, . . . that provides for an attorney's fee in excess of the amount permitted by this section. The [JCC] is not required to approve any retainer agreement **between the claimant and his or her attorney**. [Emphasis added.]

Read properly, subsection (1) only refers to the claimant's personal liability for fees to his or her attorney. In contrast, subsection (3) states a general rule reflected in subsection (1) that a "claimant shall be responsible for the payment of her or his own attorney's fees" pursuant to the percentage formula, but then lists four exceptions when "a claimant shall be entitled to recover a **reasonable** attorney's fee from a carrier or employer." Although section 440.34 has been revised many times, the applicable language of subsection (3) dates back to the early days of workers' compensation and has continuously been construed as providing reasonable attorney's fees for a claimant's attorney when the E/C denies a claim. The legislature is presumed to be aware of prior court construction and to intend to overrule such construction when it does so expressly, because the judicial construction is presumed adopted by subsequent re-enactment.

Malar v. Sec. Nat'l Ins. Co., 898 So. 2d 69 (Fla. 2005).

The language in section 440.34(3) was first construed in Lockett v. Smith, 72 So. 2d 817 (Fla. 1954), as entitling a claimant's attorney to an award of "reasonable attorney's fees." The court quoted section 440.34(1) (now 440.34(3)) as follows:

> (1) If the employer or carrier shall file notice of controversy as provided in 440.20 of this chapter, or shall decline to pay a claim on or before the twenty-first day after they have notice of same, or shall otherwise resist unsuccessfully the payment of compensation, and the injured person shall have employed an attorney at law in the successful prosecution of his claim, there shall, in addition to the award for compensation be awarded a reasonable attorney=s fee.

Id. at 817. Recognizing the case was one of first impression in Florida, the Lockett court concluded that "[t]he salutary purpose of Section 440.34(1) . . . should not be nullified by restrictive interpretation." Id. Next, in Florida Silica Sand Co. v. Parker, 118 So. 2d 2 (Fla. 1960), this Court observed that a "safe guide in fixing the amount of fees to be awarded to an attorney is . . . Canon XII of the Rules of Ethics governing attorneys." Id. at 4. This rule is now Rule 4-1.5 of the Rules Regulating The Florida Bar, which describes factors considered in awarding Areasonable@ fees.

Eight years later, in Lee Engineering & Construction Co. v. Fellows, 209 So. 2d 454 (Fla. 1968), the court addressed the issue of reasonable workers' compensation attorney fees. The court noted that the Florida Workers' Compensation Law was passed as administrative legislation "to be simple, expeditious, and inexpensive so that the injured employee, his family, or society generally, would be relieved of the economic stress resulting from work-connected injuries, and place the burden on the industry

which caused the injury." Id. at 456. The benefits were payable under the Act with "little, if any, delay or long deliberation." Id. While the act was initially pitched on the theory that a claimant could litigate his own cause, this intention "ha[d] not been practical," and, therefore, a "lucrative law practice [existed] on both sides of the controversies." Id. at 457. The court observed, "It is obvious that fees should not be so low that capable attorneys will not be attracted." Id. As such, the court found that a strict contingent percentage fee based on the total amount awarded was not appropriate, and the fee should bear greater relationship to services rendered. Id. at 458. Therefore, the court adopted factors then found in Canon XII of the Rules of Ethics, now Rule 4-1.5. The Lee Engineering court added: "In fixing fees, it should never be forgotten that the [legal] profession is a branch of the administration of justice." Id. at 459.

These factors remained a part of section 440.34(1) until October 1, 2003. By deleting the Lee Engineering factors from subsection (1), the legislature apparently intended, consistent with prior practice, to disallow variance from the statutory percentage when the claimant pays the attorney's fee individually, out of the benefits awarded. Even under the prior version of the statute, fees payable by claimants themselves were limited to the statutory percentage because subsection (1) stated, "Any attorney's fee approved by a judge of compensation for services rendered to a claimant **must equal**" the statutory percentage schedule. This language was retained in the 2003 amended version, but was incorrectly relied on by the First District to preclude an award of a reasonable fee against the E/C, without considering the exceptions listed in

subsection (3).

Under the circumstances, subsections (1) and (3) should be construed in *pari materia*, and, if the provision in subsection (1) were properly read in this context, it should be understood as only limiting fees payable by a claimant to his or her lawyer. This limitation avoids loss by the claimant of the subsistence level of benefits provided by the workers' compensation act when the claimant must pay fees, and the E/C has not committed any of the acts that subject it to liability for a fee. However, the overall provisions of section 440.34, read as a whole, continue to provide that when a fee is payable by the E/C, as a result of an award, not from the JCC's approval of a fee owed to the lawyer, the amount of the fee must be "reasonable" and not a strict percentage calculation. This reading is more consistent with the Lee Engineering admonition that strict contingency fees are not generally appropriate in workers' compensation cases[1].

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[1]In discussing attorney=s fees, Professor Larson observed that the difficulty with the claimant=s attorney=s fees lies in the incompatibility between the original idealized theory that claimants did not need an attorney in workers= compensation cases and the practical reality that a claimant needs an attorney to pursue a claim when the E/C denies needed benefits. A corollary of this incompatibility is the continuing lack of agreement as to the part lawyers should play in workers= compensation. Those opposed to legal fees argue they unnecessarily reduce the claimant=s already-reduced benefits, while the other side cites to the reality that the system is not self-executing and a claimant is best served when he or she has a lawyer pushing his or her case forward. Arthur Larson & Lex K. Larson, Larson=s Workers= Compensation Law ' 133.05 (2007). The Florida Supreme Court=s ruling in Lee recognized the reality of lawyer-involvement and the corresponding need to pay a reasonable fee.

Professor Larson warned that some legislatures, in their zeal to save claimants from diminution of their benefits through legal fees, have carried the restrictions on fees to the point in which they have injured claimants as a class by making it impossible for claimants= lawyers to give the time necessary to prepare each case. Arthur Larson & Lex

Lee Engineering, 209 So. 2d at 457.

Other legislative changes accompanying the 2003 amendments to section 440.34 support reading this section to state that the percentages set forth in subsection (1) are intended to standardize the attorney's fees personally payable by claimants, rather than to limit the fees when the E/C is liable. Section 440.20(11)(c), Florida Statutes (2003), states that in the event of a lump sum settlement, the JCC retains only the authority to approve the attorney's fees paid by the claimant under section 440.34(1), and that A[a]ny order entered by a judge of compensation claims approving attorney=s fees . . . is not considered to be an award.@ (Emphasis added.) Moreover, this section applies to all claims not previously settled, without regard to the date of accident. See ' 440.20(11)(e), Fla. Stat. This statute thus clarifies that the strict percentage fee allowed under section 440.34(1) is applicable only when a claimant pays his or her own fees, not when the E/C pays fees under section 440.34(3).

The absurdity of applying a strict percentage analysis when the E/C wrongly denies benefits and is liable for fees may be demonstrated by the following example. A

K. Larson, Larson=s Workers= Compensation Law ' 133.07 (2001). Larson=s includes a suggested statutory provision on attorney=s fees, drafted by a neutral, multi-interest committee, that is similar to the interpretation of section 440.34 urged by VOICES in this case. Id.

claimant may believe he or she is entitled to temporary indemnity benefits equaling $750, but the E/C denies compensability. The claimant would have to find an attorney willing to bring the claim for a fee of exactly $150. The attorney would typically have to take multiple depositions, expend costs out of pocket in the likely event of an indigent claimant, attend a final hearing, as well as subsequent hearings on costs, all for $150 if he or she prevailed. If the claimant did not prevail, the claimant could be responsible for payment of all the E/C's costs under section 440.32(1), thus eliminating any chance the claimant=s attorney could recover costs from the claimant. Under these provisions, the First District=s interpretation turns a workers' compensation claim into a lose-lose proposition for the attorney and deadly game of Russian Roulette for the injured worker.

> A rigid application of the fee percentage as a proportion of benefits secured:
>
> will tend to deter attorneys from accepting employment and impede the claimant's ability to obtain legal representation and assistance in obtaining such benefits. Application of the provisions of section 440.34(1) in a manner that promotes such a chilling effect on the claimant's right to obtain legal services in the face of bad faith denial of benefits is inconsistent with the benevolent purposes of the Worker's Compensation Act.

Rivers v. SCA Servs. of Fla. Inc., 488 So. 2d 873, 876 (Fla. 1st DCA 1986). Similarly, an inflexible interpretation of the 2003 amendments to the attorney=s fee statute turns the workers' compensation system up-side-down. The legislature did not utilize clear and unambiguous language mandating such a result or indicate an intention to overturn long-standing interpretations of section 440.34, but retained the provisions for payment of a

reasonable fee under section 440.34(3).

II If the First District=s Statutory Interpretation Is Correct, Section 440.34 Violates a Claimant=s Right to Due Process and Equal Protection.

Standard of Review: *De novo*. See Point I.

Analysis: The JCC and the First District have ruled that a claimant has no entitlement to recover attorney=s fees from the carrier other than strict statutory percentage fees, even in a case in which the percentage is Amanifestly unfair.@ VOICES submits that this interpretation undercuts the fundamental basis for and cannot be reconciled with this court=s prior decisions on workers= compensation attorney=s fees and ultimately deprives a claimant of due process and equal protection.

First, it is well settled that the ability to contract for and receive legal representation is a fundamental right. United States Dep=t of Labor v. Triplett, 494 U.S. 715 (1990). Injured workers are in a unique class with incompetents and infants in having no ability to freely contract for legal representation, because section 440.3491) precludes retainer agreements that exceed the percentage formula. The several rationales that have been stated for the limitations on a claimant=s ability to contract for attorneys fees are no longer valid under the statutory construction of the First District. Initially, for example, the courts justified the limitation on a claimant=s ability to obtain legal representation on the theory that in most cases, **legal representation was not needed**. In A. B. Taff & Sons v. Clark, 110 So. 2d 428, 436 (Fla.1959), this court stated Athat the Workmen's Compensation Law was to be self-executing and that benefits were to be paid *without the necessity of any legal or*

administrative proceedings.@ (Emphasis added). A[F]ormal pleadings, such as attorneys are versed in preparing, are quite unnecessary@ as benefits are paid Awith[out] all the niceties of expert legal attention.@ Id. at 433. A few years later, in Lee Engineering & Construction Co. v. Fellows, this court recognized that while the act was initially pitched on the theory that a claimant could litigate his own cause, this intention had not been practical. 209 So. 2d at 457. In light of this, the court found strict contingent percentage fees based on the total amount of benefits awarded were not appropriate, and the fee should bear relationship to the services rendered. Id. at 458.

From this point forward, the prevailing justification for the percentage guideline limits as to claimant-paid fees was that the benefits payable under the act were designed as a partial substitute for the wages of the injured worker, and that since a claimant's benefits are limited, allowing an attorney or other person to obtain a portion thereof from a claimant would thwart the public policy of affording the claimant necessary minimum living funds and cast the burden of support for that person on society generally. Samaha v. State, 389 So. 2d 639, 640 (Fla. 1980) (stating limits on claimant-paid fees were valid because Athe expense of the attorney has been placed on the employer by requiring him to pay reasonable attorney fees caused or created by his failure to timely pay the benefits due an injured employee@); Ohio Cas. Group v. Parrish, 350 So. 2d 466 (Fla.1977) (holding that private agreements for fees protect claimants from personal liability for fees which might reduce their benefits). The First District gives only lip service to the notion of protecting claimant=s benefits without recognizing its practical effect. Moreover, the notion of Aprotecting= injured workers from

litigation costs was abandoned when the legislature provided that if the claimant did not prevail on a claim, the claimant could be responsible for payment of all the E/C's costs under section 440.32(1).

If this court upholds the First District=s statutory construction, the rational for such limitations no longer exists and the statutory percentage law merely impede an injured worker from obtaining legal counsel. No defensible state interest can exist in unilaterally proscribing and restricting the right of claimants to negotiate and obtain legal services while leaving the employers/carriers free to contract with attorneys of their choice without restriction or limitation. In other contexts, an injured party may pay contingent fees of up to 40% of total recovery. See R. Regulating Fla. Bar 4-1.5 (allowing contingency fees up to 40%). Such contingency fees are viewed as the Apoor man's keys to the courthouse.@ In re Am. Code of Prof=l Resp. (Contingent Fees), 494 So. 2d 960, 961 (Fla.1986).Within that limit, lawyers are governed only by the rule that the attorney Ashall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee. . . .@ R. Regulating Fla. Bar 4-1.5. Otherwise, the amount of contingent fees is subject to regulation Aas an issue for professional disciplin[e].@ In re Am. to Rules Reg=l Fla. Bar, 933 So. 2d 417, 433 (Fla. 2006).

Moreover, in any other type of case, a potential client would have to be given an alternative to contingency fee percentages if such percentages would not result in adequate representation; A[w]hen there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee.@ In re Am. to the

Rules Regl Fla. Bar, 933 So. 2d at 433. The commentary to Rule 4-1.5 states that a lawyer should not accept representation when fees available are not sufficient to assure adequate representation.

In workers= compensation cases, fees are restricted to much lower percentages (20/15/10/5% formula) without any allowable alternative basis for fees. The United StSupreme Court has recognized that a contingency fee regulation may impact a person=s federal due process rights if the statutory scheme affected the person=s ability to obtain counsel. United States Dep=t of Labor, v. Triplett, 494 U.S. 715 (1990). In Triplett, the Court was confronted with the question of the constitutionality of a law that prohibits the acceptance of attorney's fees for the representation of black lung claimants unless approved by the Department. Attorney Triplett violated the law and contended that the manner of implementing the fee restriction violated due process rights and rendered qualified attorneys unavailable, and thereby deprived claimants of legal assistance in the prosecution of their claims. Indicating a due process right to counsel was implicated, the court held Triplett had standing to contest the validity of the statute. Id. at 721. Perhaps the greatest significance the Triplett opinion has is Justice Marshall=s concurring opinion with which the majority did not disagree, stating:

> I find it readily apparent that attorneys are necessary to vindicate claimants' rights . . . . [A] black lung claimant must negotiate through a complex regulatory system to receive benefits . . . . The complexity of the system is well documented. . . . As Congress made standards stricter, the regulations became more and more confusing, not only to the claimants, but to the attorneys and the administrative law judges as well@.

Id. at 733. Justice Marshall noted the highly adversarial nature of the system, saying: AAttorneys representing [the defense] actively oppose the award of benefits to a claimant at all levels of the black lung system. Because an [employer] faces the prospect of paying significant awards, it is often willing to pay substantial legal fees to defend against . . . claims.@ Id. Finally, he concluded by noting: AIf the system operates so that claimants cannot obtain representation, it undoubtedly denies those claimants their right to due process.@ Id. at 734.

In a system that restricts a claimant=s ability to contract for attorney=s fees but allows an E/C unlimited expenditure in defense of a claim with no right to exceed the fee cap in extraordinary cases, claimant=s right to due process and equal protection have been denied. While this court will no doubt find troubling the suggestion that a worker=s compensation claimant be permitted to pay a greater portion of benefits to attorneys, a lesser percentage of something is better than a higher percentage of nothing. Injured workers are neither incompetent nor infantile and should be allowed to make economic decisions like other litigants rather than being protected to the point of death of their legal rights. Candidly, it is hope that this prospect be a last resort in favor of a more just construction of section 440.34 consistent with past precedent.

Therefore, alternatively, assuming the First District correctly construed section 440.34 (2003), VOICES submits the First District erred in failing to rule that the fee cap can be exceeded under the circumstances enunciated in Makemson v. Martin County, 491 So. 2d 1109, 1115 (Fla. 1986), and pertinent cases following it, holding that a fee cap was

unconstitutional in its application because it was Aconfiscatory of [an attorney=s] time, energy and talents.@ Makemson involved a defendant=s Sixth Amendment right to effective counsel in a criminal prosecution. Nevertheless, the broad language used in the opinion was not confined to the right of a defendant=s attorney to a reasonable fee in criminal cases only, but extended as well to other types of cases. The court observed that the fee statute limitation also violated Article V, Section 1 (jurisdictional powers of circuit courts), and Article II, Section 3 (separation of powers) of the Florida Constitution. Id. at 1112. It also approved language Ainextricably interlink[ing]@ a defendant=s right to effective representation with the attorney=s right to fair compensation. Id. In deciding that it was within the inherent power of courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary to ensure an attorney was not compensated in a manner Aconfiscatory of his time, energy and talents,@ the Makemson court concluded the mandatory terms of the fee cap must be construed as only directory in their effect. Id. at 1115.

That it was not this court=s intention to restrict its decision in Makemson to criminal cases is made evident by later opinions in civil cases that have followed it. See Remeta v. State, 559 So. 2d 1132 (Fla. 1990) (civil executive clemency proceeding); Olive v. Maas, 811 So. 2d 644 (Fla. 2002) (civil capital collateral proceeding); Fla. Fin. Servs. v. Freeman, 921 So. 2d 598 (Fla. 2006) (although Makemson test applied to a capital collateral attorney=s request for a fee in excess of statutory cap, evidence presented was insufficient to justify greater fee).

Remeta, which dealt with a challenge to a fee statute limiting the amount to no more

than $1000 for an attorney representing a death row inmate seeking executive clemency, indicates that a Sixth Amendment violation is not required for an attack on the statutory fee limitation in a civil proceeding. In so deciding, the supreme court acknowledged that there was no constitutional right to counsel in such proceedings and that the right was extended solely through statute, but considered the distinction immaterial, noting:

> The appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation. As we said in Makemson, our focus must be on A*the defendant's right to effective representation rather than the attorney's right to fair compensation*.@ Unfortunately, the A*link between compensation and the quality of representation remains too clear*.@ Trial courts must have the authority to fairly compensate court-appointed counsel.

Remeta, 559 So. 2d at 1135 (emphasis added, citations omitted).

Remeta observed that the Makemson rule had been extended to dependency proceedings in Board of County Comm'rs v. Scruggs, 545 So.2d 910 (Fla. 2d DCA 1989), which held the rule was not limited to the right to counsel in criminal cases under the sixth amendment. Indeed, the United States Supreme Court has repeatedly recognized that once a state has chosen to provide its citizens a statutory right, due process requires the right be meaningful. See Evitts v. Lucey, 469 U.S. 387, 393 (1985) (holding that if a state has created appellate courts for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of due process).

Accord Remeta v. State, 559 So. 2d. at 1135 (if the legislature provides a right to counsel in proceedings not constitutionally mandated, the right carries with it the right to effective assistance of counsel). The same reasoning was applied in Olive v. Maas, in

which the court observed that if the legislature provides a right to counsel in proceedings not constitutionally mandated, the right carries with it the right to have effective assistance of counsel.

The Florida legislature has chosen to provide Florida workers an exclusive remedy for employment-related accidents, thereby denying them any common law remedy that formerly existed. See ' 440.11(1), Fla. Stat. (2003). Based on the JCC=s finding that the fee awarded is manifestly unfair, the Makemson rule should be applied to test the validity of the fee cap to the same extent as in any other proceeding.

CONCLUSION

On Point I, this court should reverse and the case remand for award of a reasonable fee. Otherwise, the fee cap in section 440.34(1) is unconstitutional unless the court applies the Makemson rationale. Respectfully submitted,

RICHARD W. ERVIN, III
Florida Bar No. 022964
FOX & LOQUASTO, P.A.
1201 Hays St., Suite 100
Tallahassee, Florida 32301
Ph: (850) 425-1333
Fax: (850) 425-3020

SUSAN W. FOX, ESQ.
Florida Bar No. 241547
FOX & LOQUASTO, P.A.
112 N. Delaware Ave.
Tampa, Florida 33606
Ph: (813) 251-6400
Fax: (813) 254-6144

Attorneys for VOICES, Inc. Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by U.S. Mail, to **Bill McCabe, Esq**., Shepherd, McCabe & Cooley, 1450 SR 434 West, Suite 200, Longwood, FL 32750and **Brian O. Sutter, Esq**., 2340 Tamiami Trail, Port Charlotte, FL

33952 attorneys for Petitioner; **John R. Darin, II, Esq**., P. O. Box 2753, Orlando, FL 32802, Attorney for Respondent; and to **Richard Sicking, Esq**., Amicus on behalf of Florida Professional Firefighters, Inc., 1313 Ponce de Leon Blvd., Suite 300, Coral Gables, FL 33134, **Roy Wasson, Esq.,** Amicus on behalf of David Singleton, 5901 SW 74 St, Ste 205, Miami, FL 33143, **William H. Rogner, Esq.**, Amicus on behalf of Zenith Ins. Company, 1560 Orange Ave Ste 500, Winter Park, FL 32789, **Rayford H. Taylor, Esq.**, Amicus on behalf of Associated Industries of Fla. and Florida Ins. Council, P.O. Box 191148, Atlanta, GA 31119, **L. Barry Keyfetz**, 44 W. Flagler Street, Suite 2400,Miami, Florida 33130, Amicus On behalf of the Florida Justice Association, **TThomas A. Koval, Esq.**, Amicus on behalf of Associated Industries of Fla. and Florida Ins. Council, 6300 University Pkwy, Sarasota, FL 34240, and **Mary Ann Stiles, Esq.**, Amicus on behalf of Associated Industries of Fla. and Florida Ins. Council, PO Box 460, Tampa, FL 33601, **Marcia K. Lippincott, Esq.**, Amicus on behalf of Seminole County School Board, P.O. Box 953693, Lake Mary, FL 32795, **Scott B. Miller, Esq.**, Amicus on behalf of Florida Association of Self Insurance, Inc., 1560 Orange Ave, Ste 500, Winter Park, FL 32789, **Barbara Wagner, Esq.**, Amicus on behalf of Florida Workers Advocates, 2101 N. Andrews Ave Ste 400, Ft Lauderdale, FL 33311, this 17th day of December, 2007.

_____

Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is type in Times New Roman 14-point font, which complies with the font requirements as set forth in Florida Rule of Appellate Procedure

9.100. _____
Attorney