AA-54166-5/mm/20204998

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

EMMA MURRAY,

Petitioner,

CASE NO: SC07-244

Vs. Lower Tribunal: 1D06-475

MARINER HEALTH/ACE USA,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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This is a Response Brief on Jurisdiction requesting that this Honorable Court decline discretionary jurisdiction to review a per curiam affirmance decision of the First District Court of Appeal, Tallahassee, Florida, in its opinion filed on December 1, 2006. The Court's Order of October 16, 2006, referenced in the Petitioner's cover sheet, was withdrawn by the First District Court of Appeal on October 16, 2006 so the per curiam decision dated December 1, 2006 is the object of the Court's attention.

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case involves a challenge to the constitutionality of the 2003 amendments to Florida Statute 440.34 which, except for some provisions not at issue here, establishes guideline attorney fees based upon a percentage of the benefits obtained and eliminates fee awards based upon an hourly rate in nearly all workers' compensation cases arising after October 1, 2003. Noteworthy, the potential party whose interest would affected by any decree issued by this Honorable Court, trial counsel Brian Sutter, was not named as a party before the First District Court of Appeal or in this Appeal. Emma Murray, whose interests will not be affected by any decree because the benefits she was awarded are not at issue, is the only named Appellant which appears to be contrary to this Honorable Court's rationale in *Armour Fertilizer Works v. N.G. Wade, Inv. Co.*, 105 So. 819 (Fla. 1925), which suggests that some named party should be affected by the decree requested in order for the Court to exercise its jurisdiction. (Please see the Order which was appealed in the Record on Appeal Volume II, page 00312, hereinafter abbreviated thusly: VII-00312.) The decision which the Petitioner requests this Honorable Court to exercise its discretionary jurisdiction to review is a per curiam affirmance issued by the First District Court of Appeals on December 1, 2006, in which that Court followed its recent precedents in *Lundy v. Four*

Seasons Ocean Grand Palm Beach, 932 So. 2d 506 (Fla. 1st DCA 2006) rev. den. 939 So. 2d 93 (Fla. 2006) and *Campbell v. Aramark & Specialty Risk Services*, 933 So. 2d 1255 (Fla. 1st DCA 2006), rev. den. 933 So. 2d 1255 (Fla. 2006).

When this Honorable Court declined exercising its discretionary jurisdiction in the case of *Lundy v. Four Seasons Ocean Grand Palm Beach*, supra, it decided not to review the very same challenges to 440.34 Florida Statute (2003), which are presented by the Petitioner; 1) equal protection, 2) due process and 3) separation of powers. An additional issue; that the statute denies access to the Courts because it impairs injured workers the ability to retain counsel, had been withdrawn at oral argument in the Lundy case, but the First District Court of Appeal commented in Lundy, supra at 510, that the appellants' argument was unpersuasive because the appellants failed to demonstrate that the statute unduly burdened injured workers' in their ability to retain counsel. Similarly, in the instant case, the Record on Appeal (VI-00142) contains no testimony from Emma Murray regarding her having difficulty obtaining counsel in order to process her claim. However, almost as if anticipating a constitutional challenge to the statute, the experts retained by the Appellant's attorney and her attorney himself testified that the statute as amended would make it difficult for some workers somewhere, but not Emma

Murray, the injured worker in this case, to obtain representation. In summary, Emma Murray's ability to access the Courts is not a true controversy at issue in this case.

SUMMARY OF ARGUMENT

The December 1, 2006 per curiam affirmance issued in this case (please see Respondent's Appendix) cited as precedents that Court's previous decisions in *Lundy v. Four Seasons Ocean Grand Palm Beach,* Supra, *Campbell v. Aramarck,* supra and *Wood v. Florida Rock Industries*, 929 So. 2d 542 (Fla. 1st DCA 2006) as binding. The per curiam decision did not "expressly" declare Florida Statute 440.34(2003) to be valid and constitutional in as much as there was no written opinion addressing each of the Petitioner's challenges to the constitutionality of 440.34 Florida Statute (2003). Second, the only named appellant, Emma Murray, will not be affected by a decree of this Honorable Court even if it exercises jurisdiction. Only the trial attorney, who is not a party to these proceedings, might be affected by a decree.

Next, this Honorable Court has considered the constitutional challenges raised by the Petitioner when it denied review in *Lundy v. Four Seasons Ocean Grand Palm Beach,* supra, and *Campbell v. Aramark,* supra. The alleged denial

of access to the Courts is nonexistent in the case at bar, and there is nothing in the record on appeal to suggest that the Appellant, Emma Murray, had difficulty obtaining representation or gaining access to the Courts.

ARGUMENT

I.
DISCRETIONARY JURISDICTION AND PARTIES

It is alleged the December 1, 2006 per curiam affirmance expressly declared Florida Statute 440.34 (2003) constitutional.

In the case of *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980) this Honorable Court discussed what constituted an express opinion. While that case dealt with conflicts between decisions of the District Courts, the rationale is noteworthy:

> The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to."…. The single word "affirmed" comports with none of these definitions. Accordingly, we hold that from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review per curiam decisions of the several District Courts of Appeal of the State rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another District Court of Appeal or the Supreme Court. (At page 1359.)

It is true that in the instant case the discretionary jurisdiction of the Court is not requested on the basis of a conflict of opinions between the District Courts of Appeal, but this Honorable Court's rationale dealing with what constitutes a "express" opinion is worthy of a consideration.

(See also *Dodi Pub. Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980) in which the Florida Supreme Court did not consider a per curiam affirmance an "express" conflict with a decision of another District Court of Appeal; "The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the District Court before us for review, not whether there is a conflict in a prior written opinion, which is now cited for authority. (At page 1369) and *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006) in which the Court concluded that Article V Section 3(b)(1) does not authorize the Supreme Court's jurisdiction over unelaborated per curiam decisions issued by the Court of Appeal.)

The Petitioner relies upon the cases of *De Ayala v. Florida Farm Bureau Casualty Insurance*, 543 So. 2d 204 (Fla. 1989) and *Acton II v. Fort Lauderdale Hospital*, 440 So. 2d 1282 (Fla. 1983). However, those cases are distinguishable from the case at bar because in those cases the Courts of Appeal issued written opinions which in detail "expressly" ruled on the constitutionality of the Statues contested. In the instant case, the PCA affirmance did not contain a explanation or rationale addressing the constitutional challenges to the Statute but instead relied upon the prior precedents. The Petitioner's request that this Honorable Court review the matter and return to the guidelines established in *Lee Engineering and*

Construction Company v. Fellows, 209 So. 2d 454 (Fla. 1968), would represent a total disregard to the legislature's intent.

II.
EQUAL PROTECTION

Next, the Petitioner argues that Florida Statute 440.34(2003) violates this injured worker's right to equal protection. In fact, the named party, Emma Murray, received all the benefits she was entitled to in the Court's award. The real argument here is about equal protection for injured workers' attorneys. However, this is an extremely poor case in which to argue that the law is unfair because the attorney representing the employer earned more fees than the injured worker's attorney. An Offer of Settlement had been made in this case prior to trial which would have resulted in Emma Murray receiving more money than she was awarded (V1-0076). The Offer of Settlement was rejected. The Appellee could not force the Appellant to settle her case, which would have reduced the hours her attorney devoted to the case. The fact that the employer spent more money defending the case does establish a violation of Appellant's right to equal protection.

III.
DUE PROCESS

It is argued that the 440.34 Florida Statute (2003) violates the Claimant's

due process rights under the Florida and United States Constitutions. It is suggested that Statute will impair injured workers' ability to obtain counsel in order to prosecute workers' compensation claims. However, this Appeal demonstrates that the guidelines found at Florida Statute 440.34 (2003) will not make it impossible for injured workers to find attorneys to handle their cases. The due processes argument may present a true controversy in some future case in which an injured worker can factually demonstrate difficulties in obtaining counsel, but that is not this case. There is no party before this Honorable Court who had difficulty obtaining counsel unlike the real parties in interest exemplified in *De Ayala* case, Supra, (alien dependents of a Mexican worker who had died in Florida requested benefits equal to those provided non-alien dependents) and *Acton II*, supra, (the Claimant was not entitled to permanent impairment benefits.)

The Petitioner cites *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), a case dealing with attorney fees for indigent criminal defendants, to argue that inflexible statutory fee caps in criminal cases should likewise not apply in workers' compensation cases. However, there is no "right" to representation in a workers' compensation case. The systems are very different. The legislature has provided employees assistance through an Ombudsman Office (Florida Statute

440.191 (2002) which assists injured workers, employers, carriers, health care providers and managed care arrangements in fulfilling their responsibilities under the Act. There is no equivalent for the Ombudsman office in the criminal system. References to criminal cases involving indigents' rights to counsel are comparing apples to oranges. However, the court will note that in *Makemsom,* supra, the Appellant was an attorney, a real party in interest in the outcome of the case, unlike the case at bar in which, win or lose, Emma Murray is unaffected. The Petitioner also argues that the *Makemsom* rationale has been applied in Minnesota and Delaware without referencing the statutory schemes in those States to make a true comparison with Florida Law with regard to Attorneys' fees. The Petitioner also cites as authoritative the case of *Davis v. Keto, Inc.*, 493 So. 2d 368 (Fla. 1st DCA 1985) which dealt with a different version of the Statute challenged and has little if any precedential value in the case at bar.

Finally, under section two of Petitioner's argument, he argues that Florida Statute 440.34 (2003) creates an "irributable presumption". Florida Statute 440.34 (2003) does not create a "presumption" as that term is usually referenced with regard to the rules of evidence or findings of fact. This is a mandatory guideline for fees, much like the Florida Bar's cap on contingent fee contracts, rather than a presumption.

IV.
ACCESS TO COURTS

It is argued that Florida Statute 440.34 (2003) violates the injured workers' right to access to the Court's as guaranteed by Article I, Section 21 of the Florida Constitution because it impairs an injured worker's ability to obtain counsel. Again, the fallacy of this argument is that this Honorable Court is once again requested to anticipate some future case involving some unknown Appellant's inability to access the Court's because no Attorney would accept their case. There is nothing in record indicating that the Petitioner in this case, had difficulty obtaining legal counsel.

V.
SEPARATION OF POWERS

The Petition argues that Florida Statutes 440.34 (2003) violates the separation of power provision of Article II, Section 3 of the Florida Constitution. In the case of *Lundy v. Four Seasons Ocean Grand Palm Beach*, supra, the First District Court of Appeal held that the Statute did not violate the separation of power provision of the Florida Constitution. This Honorable Court denied review in that case as well as in the cases of *Campbell v. Aramarch,* supra and *Wood v. Florida Rock,* supra. Still, the Petitioner argues, "this issue deserves the attention of this Honorable Court." In fact, this Honorable Court has repeatedly given this

issue the attention it deserves every time it denied review.

CONCLUSION

For the reason stated above, the Respondent respectfully requests that this Honorable Court deny the Petitioner's Motion to Invoke Discretionary Jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this 25th day of May, 2007 to: Brian O. Sutter, 2340 Tamiami Trail, Port Charlotte, Florida 33952, and William McCabe, Esquire, 1450 State Road 434, West, Suite 200, Longwood, FL 32750

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CERTIFICATE OF COMPLIANCE WITH FLA. R.APP. P. 9.210(2)

I HEREBY CERTIFY that this Initial Brief on Jurisdiction for Respondent was computer generated using Times New Roman fourteen font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P for computer generated briefs.

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