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SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

BRADLEY WESTPHAL,

Petitioner,

vs.

CITY OF ST. PETERSBURG/ CITY OF ST. PETERSBURG RISK MANAGEMENT and STATE OF FLORIDA,

Respondents. /

CASE NO.: SC13-1930

Lwr. Tribunal: 1D12-3563
OJCC Case No. 10-019508SLR

BRIEF OF AMICUS CURIAE FLORIDA PROFESSIONAL FIREFIGHTERS, INC., IN SUPPORT OF PETITIONER, BRADLEY WESTPHAL, ON THE MERITS

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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

POINT INVOLVED

PETITIONER'S POINT TWO

THE 104 WEEKS LIMITATION ON TEMPORARY TOTAL DISABILITY IN SECTION 440.15(2), FLA. STAT., IS UNCONSTITUTIONAL AS IT IS NOT AN ADEQUATE REMEDY IN VIOLATION OF THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION:

A. IT IS NOT AN ADEQUATE REMEDY COMPARED TO THE 350 WEEKS AVAILABLE IN THE 1967 FLORIDA WORKERS' COMPENSATION LAW WHEN THE PEOPLE VOTED FOR THE ACCESS TO COURTS PROVISION;

B. IT IS NOT AN ADEQUATE REMEDY IN TERMS OF NATURAL JUSTICE AND FUNDAMENTAL FAIRNESS -- DUE PROCESS OF LAW;

C. IT IS NOT AN ADEQUATE REMEDY COMPARED TO THE DURATION OF TEMPORARY TOTAL DISABILITY IN OTHER STATES;

D. IT IS NOT AN ADEQUATE REMEDY SINCE FULL MEDICAL CARE IS NO LONGER AVAILABLE;

E. IT IS NOT AN ADQUATE REMEDY SINCE THE FLORIDA OCCUPATIONAL SAFETY & HEALTH ACT HAS BEEN REPEALED.

ARGUMENT

PETITIONER'S POINT TWO 3-10

CONCLUSION 11

CERTIFICATE OF SERVICE

CERTIFICATE OF FONT SIZE AND STYLE

TABLE OF CITATIONS

CASES

New York Central R. R. Co. v. White,
243 U. S. 188,
37 S. Ct. 247,
61 L. Ed. 667
(1917) 10

Scott v. Williams,
107 So. 3d 379
(Fla. 2013) 4

Sunset Harbour Condo. Ass'n v. Robbins,
914 So. 2d 925
(Fla. 1st DCA 2005) 4

Tampa Bay Area NFL Football, Inc., v. Jarvis,
668 So. 2d 217
(Fla. 1st DCA 1996) 1, 9

*Westphal v. City of St. Petersburg/
City of St. Petersburg Risk Management
and State of Florida*,
2013 WL 718653
(Fla. 1st DCA Feb. 28, 2013);
38 Fla. L. Weekly D504
(Fla. 1st DCA Feb. 28, 2013)
[*Westphal I*] 11

Westphal v. City of St. Petersburg,
en banc, 122 So. 3d 440
(Fla. 1st DCA 2013)
[*Westphal II*] 11

CONSTITUTION

Art. I, § 21, Fla. Const. .....passim

STATUTES

§112.1815, Fla. Stat. 1

§440.02(12), Fla. Stat. (1993) 5

§440.11, Fla. Stat. 10

§440.15(2), Fla. Stat. 3

§440.56, Fla. Stat. 4-6

§440.56, Fla. Stat. (1967) 2, 4

§440.56(1), Fla. Stat. (1967) 4

§440.56(2)(a), Fla. Stat. (1967) 4

§440.56(2), Fla. Stat. (1993) 5

§440.56(5), Fla. Stat. (1967) 5

§440.56(8)(a), Fla. Stat. (1967) 5

§440.56(8)(b), Fla. Stat. (1967) 5

Ch. 442, Fla. Stat. 2, 6-9

Ch. 442, Fla. Stat.; Vol. 3, Fla. Stat. (2001) 8

§442.001, Fla. Stat. 6

§442.103, Fla. Stat. 6

§442.103, Fla. Stat. (1993) 6

§442.20, Fla. Stat. 6

§633.01(1), Fla. Stat. (2001) 8

§633.45(1)(a), Fla. Stat. (2001) 8

§§633.502-633.536, Fla. Stat. (2013) 8

Ch. 93-415, §52, Laws of Fla. 6

Ch. 93-415, §§62-69, Laws of Fla. 5

Ch. 93-415, §109, Laws of Fla. 5

Ch. 99-240, §§7-10, Laws of Fla. 6

Ch. 99-240, §14, Laws of Fla. 7

Ch. 2000-150, §4(2)(d), Laws of Fla. 7

Ch. 2002-404, §15, Laws of Fla. 8

Ch. 2013-183, §76, Laws of Fla. 8

Florida Workers' Compensation Law ..... passim

Florida Occupational Safety & Health Act ..... passim

OSHA 2, 4, 6, 9

29 USC §652(5) 9

RULES

29 CFR §1904.1 and §1904.2 9

Fla. Admin. Code R. 69A-62.004 8

STATEMENT OF INTEREST

The petitioner, Bradley Westphal, was a firefighter employed by the respondent, City of St. Petersburg, and a member of the firefighters' union.

The amicus curiae, Florida Professional Firefighters, Inc., is commonly called "the firefighters' union". The Florida Professional Firefighters, Inc., is a state-wide labor organization. The firefighters' union is the recognized collective bargaining representative of firefighters, paramedics, emergency medical technicians, and lifeguards in regard to wages, hours, terms and conditions of employment with the State of Florida, counties of Florida and numerous cities of Florida and fire control districts located in Florida.

The Florida Professional Firefighters, Inc., has a direct interest in the outcome of the present case as it is an organization of employees whose local organizations engage in collective bargaining with the governmental units of Florida, which agreements may include improvements in workers' compensation benefits and procedure. See *Tampa Bay Area NFL Football, Inc., v. Jarvis*, 668 So. 2d 217 (Fla. 1st DCA 1996). The Florida Professional Firefighters, Inc., is also a registered lobbyist with the Florida Legislature, concerning laws of interest to employees, including workers' compensation. E.g., §112.1815, Fla. Stat. ["The First Responders' Bill"]

SUMMARY OF ARGUMENT

When the people voted for Access to Courts in the 1968 Constitution, the 1967 Florida Workers' Compensation Law contained a workplace safety provision, with safety rules, safety inspectors and penalties for violations. §440.56, Fla. Stat. (1967).

Later, this provision was transferred to Chapter 442, Fla. Stat., and titled The Florida Occupational Safety & Health Act.

The Florida Occupational Safety & Health Act was not redundant of the federal Occupational Safety & Health Act (OSHA), which does not apply to state and local government or employers of less than 10 employees.

The Florida Occupational Safety & Health Act was repealed in 2000, making Florida the only state with a repealed workplace safety law.

When the U.S. Supreme Court approved of the constitutional validity of workers' compensation laws in 1917, the Court stated that it expected that there would be other laws providing for accident prevention.

The repeal of the Florida Occupational Safety & Health Act means that it cannot be used to counterbalance the inadequacy of the 104 weeks available for temporary disability, and it imperils the validity of the current Florida Workers' Compensation Law as a whole.

ARGUMENT

PETITIONER'S POINT TWO

THE 104 WEEKS LIMITATION ON TEMPORARY TOTAL DISABILITY IN SECTION 440.15(2), FLA. STAT., IS UNCONSTITUTIONAL AS IT IS NOT AN ADEQUATE REMEDY IN VIOLATION OF THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION:

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D. IT IS NOT AN ADEQUATE REMEDY SINCE FULL MEDICAL CARE IS NO LONGER AVAILABLE;

E. IT IS NOT AN ADQUATE REMEDY SINCE THE FLORIDA OCCUPATIONAL SAFETY & HEALTH ACT HAS BEEN REPEALED.

The amicus curiae, Florida Professional Firefighters, Inc., adopts the brief and argument of the petitioner.

This amicus curiae brief is submitted in regard to the effect of the repeal of the Florida Occupational Safety and Health Act on the present case.

The standard of review is de novo. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925 (Fla. 1st DCA 2005); *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013) (constitutional validity of statutes).

The absence of a workplace safety program highlights that the Florida Workers' Compensation Law does not continue to provide a reasonable alternative to the preexisting common law and statutory rights of access to the courts available at the time of the adoption of the 1968 Constitution.

Here is the full story of the repeal of the workplace safety program. In 1967, the Florida Workers' Compensation Law contained a workplace safety provision, §440.56, Fla. Stat. (prior to OSHA). It applied to every employer who was thereby obligated to "furnish employment which shall be safe for the employees therein..." §440.56(1), Fla. Stat. (1967). The Florida Industrial Commission was authorized to adopt safety rules. §440.56(2)(a), Fla. Stat. (1967). The FIC was authorized to enter and inspect places of

employment for proper enforcement of the workplace safety rules. §440.56(5), Fla. Stat. (1967). The FIC was authorized to impose fines for violations (§440.56(8)(a), Fla. Stat. (1967), and to obtain injunctions against violations. §440.56(8)(b), Fla. Stat. (1967). Indeed, there had been a workplace safety provision in the Florida Workers' Compensation Law since 1937. Vol. 2, Fla. Stat. (1967), at 2123.

This was part of the Florida Workers' Compensation Law in 1968 which the people knew to be the remedy for injuries at work suffered by an employee. The 1967 Florida Workers' Compensation Law is what the people knew to be an employee's remedy for workplace accidents when they voted for Access to Courts, Art. I, §21, Fla. Const., in 1968.

In 1993, Section 440.56, Fla. Stat., was essentially the same with a few amendments. One of which was that the safety program was then run by the Division of Workers' Compensation of the Department of Labor and Employment Security. §440.02(12) and §440.56(2), Fla. Stat. (1993).

Chapter 93-415, §109, Vol. I, Part I, Laws of Fla. (1994), at 214 repealed §440.56, Fla. Stat., in its entirety effective January 1, 1994. Id., at 215. However, the workplace safety program did not disappear just then.

In earlier sections of Ch. 93-415, Sections 62-69, Laws of Fla. (1993), Vol. I, Part One, pages 184-189, it was recreated as the Division of Safety in

the Department of Labor and Employment Security. It was upgraded by title as the "Florida Occupational Safety and Health Act", Ch. 93-415, §52, Laws of Fla. (1993), Vol. I, Part One, Laws of Fla. (1994) at 184, creating §442.001, Fla. Stat., et seq. [It never became known as FOSHA or FLOSHA after the federal OSHA].

There already was a Chapter 442 entitled "Occupational Health and Safety", but it was a different law. §442.103, Fla. Stat. (1993). It established the "Florida Toxic Substances List", dealing with toxic substances. §442.103, Fla. Stat. Previously, it did incorporate Section 440.56, Fla. Stat., by Section 442.20, Fla. Stat.

In the 1995 Florida Statutes, §440.56, Fla. Stat., and Chapter 442, Fla. Stat., are melded together and re-titled "Occupational Safety and Health". Vol. 3, Fla. Stat. (1995), at 614.

Then in 1999, the Legislature passed a Government Reorganization Act. Ch. 99-240, Laws of Fla., at 2148. It amended Chapter 442 to prohibit the Division of Safety from adopting rules, making inspections, or imposing penalties <u>on private employers</u>. Ch. 99-240, §§7-10, at 2159-2160.

After the effective date, October 1, 1999, the Division was only authorized to deal with public employers. Ch. 99-240, §§7-10, Laws of Fla., at 2159-2160. This was in effect for less than a year, however.

In another place in Ch. 99-240, Laws of Fla., the Florida Occupational Safety and Health Act, the entire Chapter 442, Florida Statutes, was repealed. Ch. 99-240, §14, at 2165.

However, the effective date of the repeal was July 1, 2000, and the Department of Labor and Employment Security was ordered to submit a proposed reauthorization of the Division of Safety and Chapter 442, Fla. Stat., by January 1, 2000, Ch. 99-240, §14, at 2165-2166. This is called a "sunset" law. It requires an agency to justify its continued existence. It is, however, a "dead hand" act which imposes an obligation on a subsequent session of the Legislature (some members may not have even been elected yet) to do something.

All the 2000 Legislature did was refer the matter to a task force. Ch. 2000-150, §4(2)(d), Laws of Fla. The Legislature adjourned without having repealed the "sunset" of the Florida Occupational Safety and Health Act, Chapter 442 of the Florida Statutes. On July 1, 2000, Chapter 442, Fla. Stat., became repealed together with the safety rules that had been adopted under authority of Chapter 442, Fla. Stat., and the employees of the Division of Safety went home. Thus, Florida became unique among the states by having a repealed occupational safety and health act. It has never been re-enacted.

This is why Chapter 442 is unexplainedly missing from Vol. 3, Fla. Stat. (2001), at 1567-1568, and ever since.

A strange thing happened when Chapter 442, Fla. Stat., was repealed in 2000. Both the workplace safety provision and the toxic substance list were repealed. The State Fire Marshal responded to this by adopting the Florida Toxic Substances List by rule under the APA, which became Fla. Admin. Code R. 69A-62.004. The rule became permanent on November 21, 2001. He did so under authority of Florida Statutes, §633.01(1), Fla. Stat. (2001) and §633.45(1)(a), Fla. Stat. (2001), in regard to the employment of firefighters. No one has challenged this rule. The current statutes are somewhat similar.

There is now a statute which is the Florida Firefighters Occupational Safety and Health Act. §§633.502-633.536, Fla. Stat. (2013). Ch. 2002-404, §15, Laws of Fla.; Ch. 2013-183, §76, Laws of Fla. While it addresses firefighters, it does not specifically address paramedics, emergency medical technicians and lifeguards who perform rescues. There is no equivalent for other employments.

It must be wished that the Florida Occupational Safety and Health Act still existed and applied to not only firefighters but to all other workers as well.

Wishing will not make it so.

Labor organizations can improve upon the Florida Workers' Compensation Law (including workplace safety) by collective bargaining agreements. *Tampa Bay Area NFL Football, Inc.*, supra. This, of course, requires the cooperation and agreement of an enlightened employer who believes that spending money to prevent accidents is worthwhile. By its very nature, this is a hit and miss approach to workplace safety. It is no substitute for a state statute with state safety rules, state inspectors and state enforcement.

The repeal of the Florida Occupational Safety and Health Act is a fatal flaw in the Florida Workers' Compensation Law.

The Florida Occupational Safety and Health Act was not redundant of the federal Occupational Safety and Health Act. OSHA does not apply to state and local government. 29 USC §652(5). In the aggregate, government in Florida (state, counties, cities, etc.) is the state's largest employment. Since repeal of Ch. 442, Fla. Stat., in 2000, Florida has had no occupational safety and health act for the state's largest employment. Furthermore, private employers of less than 10 employees and private employers in retail, service, finance and insurance industries are partially exempt from OSHA. 29 CFR §1904.1 and §1904.2. They only have to report fatalities or

accidents in which 3 or more employees are hospitalized. Ibid. For these employers and employees there is no Florida Occupational Safety and Health Act any more.

These particular workers' compensation-covered employers have immunity from suit under §440.11, Fla. Stat., when their employees have been negligently killed or injured at work. However, at the same time, they are not required by Florida law to make any effort, or spend any money, or do anything to prevent death or injury of their employees.

In holding that a statutory workmen's compensation scheme was constitutionally valid, the U.S. Supreme Court stated that it expected that there were other laws providing for accident prevention measures. *New York Central R. R. Co. v. White,* 243 U. S. 188, at 207, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

Voluntary safety inspections could have an effect on rates, but this would not apply to self-insured employers and it still is only voluntary.

Florida's workplace safety act cannot be used to counter balance the 104 weeks limitation on temporary disability, because it has been repealed.

More importantly, a serious question of access to courts and due process of law is presented by the repeal of the Florida Occupational Safety and Health Act.

CONCLUSION

The Supreme Court of Florida should reverse the en banc decision in *Westphal II* and either reinstate the panel decision in *Westphal I*, or its equivalent, that the 104 weeks limitation on temporary disability, "statutory MMI" and physicians rating permanent impairment 6 weeks before "statutory MMI", are unconstitutional as applied to the facts of this case and do so prospectively. Alternatively, the Court should hold that the current Florida Workers' Compensation Law is no longer an adequate remedy for injury to employees at work as understood by the people when they voted for Access to Courts in the 1968 Constitution. Thus, the law should revert to the way the Florida Workers' Compensation Law read in 1976, prior to the impermissible take-aways that began in 1977; or the Court should declare the Florida Workers' Compensation Law to be no longer an exclusive remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service via the Florida Courts E-Filing Portal, in accordance with Fla. R. Jud. Admin. 2.516(b)(1), this 24th day of January, 2014, to: Richard A. Sicking, Esq. (sickingpa@aol.com), co-counsel for petitioner, 1313 Ponce de Leon Blvd., #300, Coral Gables, FL 33134; Jason Fox, Esq. (JayfoxEsq@aol.com), Law Offices of Carlson and Meissner, co-counsel for petitioner, 250 N. Belcher Rd., Suite 102, Clearwater, FL 33765; Kimberly D. Proano, Esq. (kimberly.proano@stpete.org), Office of the City Attorney, counsel for respondent, City of St. Petersburg, P.O. Box 2842, St. Petersburg, FL 33731; Allen C. Winsor, Chief Deputy Solicitor General (allen.winsor@myflorida legal.com), and Rachel E. Nordby, Esq. (rachel.nordby@myfloridalegal. com), co-counsel for the respondent State of Florida, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050; William H. Rogner, Esq. (wrogner@hrmcw.com), Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., 1560 Orange Ave., Suite 500, Winter Park, FL 32789; Richard W. Ervin, III, Esq. (richardervin@flappeal.com), Fox & Loquasto, P.A., 1201 Hays Street, Ste.100, Tallahassee, FL 32301; Andre M. Mura, Esq. (andre.mura@cclfirm.com), Center for Constitutional Litigation, P.C., 777

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/s/Noah Scott Warman
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CERTIFICATE OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been typed in 14 point proportionately spaced Times New Roman.

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