Filing # 9598685 Electronically Filed 01/27/2014 06:30:00 PM

RECEIVED, 1/27/2014 18:33:37, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Bradley Westphal,

Appellant,

v.

CASE NO.: SC13-1930
L.T. No(s): 1D12-3563
10-019508SLR

City of St. Petersburg/City of St. Petersburg Risk Management & State of Florida,

Appellees.

_____/

BRIEF OF AMICUS CURIAE, POLICE BENEVOLENT ASSOCIATION, THE FLORIDA FRATERNAL ORDER OF POLICE, AND INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO IN SUPPORT OF APPELLANT POSITION

Geoffrey Bichler, Esquire
Florida Bar No. 850632
Bichler, Kelley, Oliver & Longo, PLLC
541 South Orlando Avenue
Suite 310
Maitland, FL 32751
E-mail: geoff@bichlerlaw.com

Attorney for Police Benevolent Association, The Florida Fraternal Order of Police, and International Union of Police Associations, AFL-CIO, Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

PRELIMINARY STATEMENT

Amicus Curiae, Police Benevolent Association, the Florida Fraternal Order of Police, and International Union of Police Associations, AFL-CIO will be referred to by either their full names or by the abbreviation "PBA", "FOP, and "IUPA", respectively. Bradley Westphal, Appellant, will be referred to as "Petitioner" in this brief, and the Appellees, City of St. Petersburg, City of St. Petersburg Risk Management and State of Florida, as the "Employer/Carrier" or "E/C". The Florida Workers' Compensation Act will simply be referred to as "The Act."

INTRODUCTION

This brief is filed on behalf of The Florida Police Benevolent Association (PBA), The Florida Fraternal Order of Police (FOP), and The International Union of Police Associations, AFL-CIO (IUPA), amicus curiae for Petitioner Bradley Westphal. By Order dated December 18, 2013, this Court granted the Motion of these three organizations seeking leave to appear as amicus curiae.

STATEMENT OF INTEREST

The PBA, FOP, and IUPA all represent the interests of law enforcement officers through legal, legislative, and political action. They also assist members with legal issues including workers' compensation disputes. Thus, all three organizations have great interest in the outcome of this matter and can assist the Court in understanding the issues before it.

As this Honorable Court is aware, law enforcement is among the most dangerous of professions with an ever present possibility of severe injury or death. In Florida, benefits for work related injuries or deaths are essentially limited to workers' compensation benefits under Chapter 440, Fla. Stat., also known as the Workers' Compensation Act (hereinafter "The Act"). Limitations and restrictions on benefits payable under The Act have adversely impacted Florida law enforcement officers, who depend on adequate compensation being provided when injured or killed in the line of duty. Because catastrophic injuries often occur in

the law enforcement profession, it is not uncommon for officers to remain "temporarily disabled", without having achieved maximum medical improvement, for more than 104 weeks. Thus, the 104 week limitation on temporary benefits contained in Section 440.15(2)(a), which is the subject of this appeal, seems particularly arbitrary and capricious when applied to law enforcement officers and other "first responders" who sacrifice their own safety and well being for the sake of the public. Amicus will highlight the negative impact the current version of The Act has on law enforcement officers.

SUMMARY OF ARGUMENT

Amicus joins the Petitioner in suggesting that the En Banc decision below was wrongfully decided and that the statutory construction employed by the majority was, in fact, "judicial legislation" violative of the Separation of Powers Doctrine as contained in Article II, Section Three of the Florida Constitution. Since the majority opinion below was in error, and since there is no reasonable possibility of construing the statutory provisions implicated in this matter in a way that could avoid constitutional scrutiny, it is incumbent upon this Honorable Court to consider whether current restrictions on disability benefits violate the fundamental rights of the Petitioner as outlined in the Declaration of Rights of the Florida Constitution which became effective on November 5, 1968.

Amicus submits that a reasoned analysis of the constitutional issues implicated in this case require the Court to revisit the initial panel decision below, and to determine whether The Act remains constitutionally valid under Kluger v. White, 281 So.2d 1 (Fla. 1973). It is respectfully submitted that Kluger does not require a determination of whether the specific provisions of the Act implicated in this case are constitutional. Rather, Kluger requires the Court to consider whether the restrictions on disability payments implicated here make the entire Act, writ large, unconstitutional. The only reasonable conclusion that can be drawn from the current deplorable state of The Act is that it provides a wholly inadequate alternative to either common law rights and remedies, or the statutory rights and remedies as they existed in workers' compensation in 1968.

ARGUMENT

I. THE MAJORITY OPINION VIOLATES ARTICLE II, SECTION THREE OF THE FLORIDA CONSTITUTION AS IT CREATES SUBSTANTIVE LAW IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE

The standard of review for pure questions of law is de novo and decisions of lower courts are afforded no deference. D'Angelo v. Fitzmaurice, 863 So.2d, 311, 314 (Fla. 2003).

When considering the opinion below, the Court must first determine whether the strained analysis of the majority reflects a viable application of statutory construction in order to avoid constitutional infirmities. Of course, the Court must

interpret a statute, and ambiguities contained therein, to avoid constitutional issues where possible. See State v. Giorgetti, 868 So.2d 518 (2004). By the same token, Courts are without power to construe unambiguous statutes "in a way which would extend, modify, or limit" the express terms or the reasonable and obvious implications of same. Holy v. Auld, 450 S.2d 217, 219 (Fla. 1984). The decision below is so completely problematic with regard both to analysis and application that it can only be considered new substantive law and thus violative of the "strict" separation of powers mandated by the Florida Constitution.

The legislation in question, Section 440.15(2), Fla. Stat. (2013) explicitly, and without ambiguity, limits all temporary total disability to 104 weeks. There are no exceptions. The legislative history is, furthermore, quite clear in providing that the intent of the 1993 reforms to The Act was, in part, to limit temporary benefits so that they would not exceed 104 weeks. See "House of Representatives, As Further Revised By the Committee on Commerce, Final Bill Analysis & Economic Impact Statement," §20, pg. 11 (Nov. 30, 1993), and "Senate Staff Analysis and Economic Impact Statement," Senate Bill 12-C, October 29, 1993 ("Once the employee reaches the maximum number of weeks, temporary disability benefits will cease."). The majority below has therefore exceeded its limited role in judicial review, and created a classification of new benefits called "temporary

permanent total disability" for which there is no support in the explicit and unambiguous language of the statute or the legislative history related to same.

Judge Thomas, in his opinion below, which dissents in part, raised concerns that the majority opinion was abrogating legislative power by:

> "transforming a statutory limitation of **temporary disability benefits, which was enacted to reduce costs, into an entitlement** to permanent disability benefits. The majority opinion thus disregards express legislative intent to reduce costs imposed on Florida's employers from inappropriate awards of permanent total disability benefits."

Westphal v. City of St. Petersburg, 122 So.3d 440, 452 (Fla. 1st DCA 2013). This Court has recognized that the judiciary is without power to modify temporary benefits in workers' compensation matters even where they are deemed inadequate. See Thompson v. Fla. Indus. Comm'n, 224 So.2d 286, 289 (Fla. 1969). The majority below ignored clear limitations on its power and created substantive rights in an attempt to maintain the constitutional viability of The Act. The case at Bar, however, is just the latest in a line of cases where the 1st DCA has expressed concern with the validity of the statutory scheme while straining to interpret the statute in a way that would avoid constitutional scrutiny.

As the Court is aware, the 1st DCA has a unique role in workers' compensation in the State of Florida. All appeals of workers' compensation decisions in Florida go to the First District and thus, conflict jurisdiction can rarely,

if ever, be invoked by a party seeking Supreme Court review.[1] As a consequence, the 1st DCA is normally the Court of last resort where issues involving work injury claims are concerned. Given this context, and the finality of nearly all workers' compensation decisions rendered by the 1st DCA, it is not surprising that the Court has on several occasions called on the Legislature to revise The Act in order to protect its viability[2].

Needless to say, the pleas of the 1st DCA in these cases have gone unheeded and the Legislature has only altered The Act in ways that make benefits available to injured workers more difficult to secure.[3] Regardless, it is against this backdrop that the 1st DCA labored to find a means of construing the statute in a way that would avoid larger constitutional issues. Ultimately, the Legislature determines as a policy matter what benefits are available to injured workers. The Court cannot,

---

[1] The last time this Court granted conflict review in a workers' compensation matter was in Sanders v. City of Orlando, 997 So.2d 1089 (Fla. 2008).

[2] Staffmark v. Merrell, 43 So.3d 792 (Fla. 1st DCA 2010). Concurring opinion by Judge Webster warned that the apportionment provisions in 440.15(5)(b) might well lead the courts to conclude that the rights to benefits have become largely illusory and "no longer a reasonable alternative to common law remedies"; he urged the Legislature to consider amendment of the problematic provisions. Staffmark @ 798; Crum Services v. Lopez, 975 So.2d 1184 (Fla. 1st DCA 2008). Judge Van Nortwick specially concurring and advising that in certain circumstances injured workers will be left "without medical care" for injuries "or the Florida taxpayers will bear the cost" of such care. Crum @ 1188. Judge Van Nortwick ends by urging the Legislature to "give consideration to statutory amendments that will better assure seamless workers' compensation coverage under employee leasing arrangements." Crum @ 1188; Matrix v. Hadley, 78 So.2d 621 (Fla. 1st DCA 2007). Judge Van Nortwick addressing the limits on temporary disability benefits wrote: "I urge the Legislature to address this inadequacy under Workers' Compensation Law". Matrix @ 634; and Frederick v. Monroe County School Board, (Fla. 1st DCA 2012). Court recommends: "that the Legislature consider whether an employee who files a Petition for Benefits in good faith should be subject to the imposition of costs "where he or she loses the case on the merits". Frederick @ . Judge Thomas writing for the Court with Judges Benton and Rowe concurring.

[3] Most notably, the Legislature convened after this Court rendered it's decision in Murray v. Mariner Health, 994 So.2d 1051 (Fla. 2008) and amended The Act to remove the word "reasonable" from the statute as it related to attorney's fees.

as here, sweeten the "bargain" by finding entitlement to benefits where no entitlement is codified. Amicus submits that the decision must be overturned, as judicially created substantive law, and that the entire Act must be analyzed under Kluger v. White, 281 So.2d 1 (Fla. 1973).

II. KLUGER V. WHITE, 281 SO. 2D 1 (FLA. 1973) REQUIRES THE COURT TO DETERMINE WHETHER THE ACT VIOLATES ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION AS AN "EXCLUSIVE REMEDY" FOR WORKPLACE INJURIES.

The State of Florida has enacted a comprehensive Workers' Compensation Act "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful employment at a reasonable cost to the employer." (§440.015, Florida Statutes (2009)). Within this policy, which is the foundation upon which The Act is built, is the notion that the employer, who benefits or profits from the labor of an employee, must relieve society of the consequences of a broken body, a diminished income, or an outlay for medical and other care due to a work injury. Mobile Elevator v. White, 39 S. 2d 799 (Fla. 1949). Florida's workers' compensation system is also based on the "mutual renunciation of common law rights and defenses by employers and employees alike." §440.015, Florida Statutes (2009). The mutual renunciation of common law rights and defenses assumes both an "exclusive remedy" for injured workers and a "reasonable" replacement for common law rights and remedies.

Where the reasonableness of the replacement (i.e. workers' compensation benefit) fails, it is submitted by amicus that the exclusiveness of the remedy must also fail, allowing the injured worker to pursue common law rights and remedies as an alternative.

In Kluger, supra the Court held:

> "...where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida...the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries..."

Kluger, supra at 4. Thus, the Kluger court explicitly recognized that in order for workers' compensation to be the exclusive remedy for injured workers, it must provide a reasonable substitute for common law and/or statutory rights existing in 1968. In fact, the Court in Kluger stated that although the Act "abolished the right to sue one's employer in tort" it "provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job." Id. As noted by learned counsel for Petitioner, this language seems to come directly from the seminal case of New York Central R.R. Co. v. White, 243 U.S. 188, 375 S. Ct. 247, 61 L. Ed. 667 (1917), which upheld the validity of the New York Workmen's Compensation Law. The Court in White, supra, recognized that a necessary consideration of the constitutional validity of any workers' compensation scheme is whether "the arrangement is arbitrary and unreasonable." Id. a 202.

As the Court is aware the Act requires that MMI be established within 104 weeks regardless of whether additional surgical intervention is warranted, or whether an injured worker might actually expect further recovery and improvement. The requirement, as contained in §440.15(3)(d) which operates in conjunction in §440.15(2)(d), is completely at odds with the definition of MMI contained in §440.02(10). The Act defines MMI as follows: "...the date after which further recovery from, or lasting improvement to, any injury or disease can no longer be reasonably anticipated *based upon reasonable medical probability*. (Emphasis added). Clearly the assessment of MMI is a medical determination which requires medical evidence establishing that further recovery or improvement cannot be anticipated. The notion that MMI can be statutorily mandated at a specific time, without regard to the factual circumstances related to an injured worker's recovery, is the very definition of arbitrary and unreasonable. Under Kluger, supra, the question is not whether the 104 week limitation of TTD is unconstitutional but rather whether the entire Act passes muster as an "adequate" alternative to common law rights or statutory rights as they existed in 1968.

The statutorily imposed "quid pro quo", where injured workers receive ever diminishing benefits while employers are shielded from common law tort actions, has not been considered by this Court since Martinez v. Scanlon, 582 So. 2d 1167 (Fla. 1991). The many negative changes to the law, which have uniformly applied

to injured workers, are recounted well by the Petitioner, but the Court should also consider the increased difficulty injured workers face in securing the paltry benefits currently available.

The workers' compensation system has become enormously complex and increasingly unworkable since 1968. Originally created to be a simple and efficient statutory scheme providing medical care and lost wages, the law is now a morass of procedural and evidentiary hurdles so onerous that only experts can begin to understand it. Davis v. Keeto, 463 So.2d 368 (Fla. 1st DCA 1985). Perhaps the simplest comparison between the 1968 statute and the current version of The Act is the length of each law. In 1968, The Act, which included many provisions benefitting injured workers that have since been deleted, was only 68 pages in length. The current version of The Act is 170 pages long. In 1968, The Act dealt with the provision of medical care for work injuries in three simple and easily understood paragraphs. Today, The Act takes nearly 30 pages to deal with issues related to medical care. In 1968, a letter from an injured worker could be sufficient to trigger a claim. Today, numerous procedural and specificity requirements block court access for the injured worker. Additionally, substantive medical and indemnity benefits for work injuries have slowly and consistently eroded to the point that the current Act bears virtually no resemblance to The Act

of 1968. Given both the substantive and procedural changes to The Act, it is no longer viable as an exclusive remedy for workplace injuries.

III. EVEN IF KLUGER REQUIRES THE ABOLISHMENT OF A CAUSE OF ACTION EXISTING IN 1968, THE CURRENT VERSION OF THE ACT ELIMINATES THE "OPT OUT" PROVISION WHICH EXISTED IN 1968 AND THE CURRENT VERSION OF THE ACT ELIMINATES THE ABILITY OF THE INJURED EMPLOYEE TO SUE HIS EMPLOYER UNDER A COMMON LAW INTENTIONAL TORT THEORY.

A. THE CURRENT VERSION OF THE ACT ELIMINATES THE RIGHT OF AN EMPLOYEE TO "OPT OUT" OF THE WORKERS' COMPENSATION SYSTEM AS IT EXISTED IN 1968.

Pursuant to Kluger, supra, it is the statutory and common law that was in effect at the time of the adoption of the 1968 Constitution that governs the access to courts issue. The "exclusive remedy" provision of the Act provides in §440.11(1), Florida Statutes (2003):

> "The liability of an employer prescribed in §440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third party tort feasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or admiralty on account of such injury or death..."

This language has been in the Act since 1935. It was in the Act at the time of the adoption of the Constitution of 1968 in a special session of the Legislature, June 24-July 3, 1968 and ratified by the electorate on November 5, 1968. The Act in 1968, however, contained an "opt out" provision for both the employer and the

employee; these were substantive rights allowing both parties to forego workers' compensation coverage and the exclusive remedy provisions.

In 1970, the Florida Legislature enacted a significant change in the law – directly impacting the rights of the Citizens of this State – when it repealed the right of the employee and employer contained in §440.05 and §440.06 to "opt out" of coverage of the Act. This right to "opt out" of the Act very plainly existed at the time the voters approved the Constitutional revision in 1968. Nevertheless, the Legislature did not provide a "reasonable alternative" (or any alternative for that matter) for the elimination of this right, and no additional workers' compensation benefit was provided in exchange for the elimination of the right to "opt out." Laws of 1970, ch. 70-148.

Thus, until the repeal of the "opt out" provisions of the Act in 1970, the "exclusive remedy" was not actually exclusive at all. It was only exclusive for those employees who did not "opt out" and for the employees of employers who did not "opt out." Somehow this remarkable reality was lost in the analysis of the case at Bar, and in other cases which have considered the constitutional validity of the Act either in whole or in part. Amicus respectfully submits that the elimination of the right to "opt out" of the Act, which existed in 1968, must be factored into any analysis of the constitutional validity of the system as a whole.

B. THE CURRENT VERSION OF THE ACT ELIMINATES THE COMMON LAW RIGHT OF AN INJURED

EMPLOYEE TO SUE AN EMPLOYER FOR AN INTENTIONAL TORT AS IT EXISTED IN 1968 AND AS IT WAS INTERPRETED BY THIS COURT IN TURNER V. PCR, 754 So.2d 683 (Fla. 2000).

In 2003, the Legislature passed an amendment to section 440.11, which added subsection (1)(b) and thereby created a statutory cause of action for intentional torts by employers, to replace the common law action previously recognized by the courts. See, e.g., Pendergrass v. R.D. Michaels, Inc., 936 So.2d 684 (Fla. 4th DCA 2006) (In 2003, the Florida Legislature effectively overruled Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000) when it amended section 440.11 to codify the intentional tort exception recognized by Turner). In doing so, however, the Legislature set an impossibly high burden for employees in general and emergency first responders in particular, thereby effecting an unconstitutional denial of access to the courts.

Prior to 2003, section 440.11 was primarily an immunity statute – setting forth that an employer's liability for workplace accidents is limited to workers' compensation benefits under chapter 440, with certain exceptions. The 2003 amendment thereto was passed by the Legislature with the specific intent to further "limit civil suits against an employer by an injured worker to cases where it can be shown the employer acted with the intent to cause injury or death". Fla. H.R. Comm. on Workers' Comp., HB 25A (2003) Staff Analysis 5 (May 9, 2003). This language in the Staff Analysis indicates the Legislature intended to restrict

workers' intentional tort actions to only the first of the two bases recognized under case law – where the employer had a deliberate intent to injure, but not where the employer intended to engage in conduct which is substantially certain to injure.

In order to accomplish this goal, the Legislature crafted a statutory action for intentional torts by employers that is virtually impossible to meet in any case involving less than deliberate intent to injure, thereby eliminated a long-standing common law action and effecting an unconstitutional denial of access to the courts.

The Legislature did so by providing a definition of the second type of intentional tort that incorporated exceptionally high standards previously rejected by the courts, as well as new hurdles. See §440.11(1)(b), Fla. Stat. (2003-current). First, the Legislature required that the employer's conduct have been "virtually certain" to result in injury, rather than "substantially certain". Id. This is contrary to the elements of the common law action, as defined by this Court. See Turner, supra. Second, the Legislature required proof of deliberate concealment or misrepresentation of the danger and the employee unawareness of the risk. See §440.11(1)(b), Fla. Stat. (2003-current). This is substantially different from the common law action, which the Supreme Court held did not require such elements; rather such circumstances were merely factors relevant to determining substantial certainty. Third, the Legislature required that the employer's knowledge of the danger must be based on similar accidents or explicit warnings. Id. Florida courts

have never treated these specific circumstances as an essential element of the common law action. Fourth, the Legislature required that all elements must be proven by "clear and convincing evidence". Id. Such a high burden of proof was not required to establish the prior common law action.

As a result, the new statutory action provides only an illusory remedy. In fact, in the six reported District Court decisions applying the post-amendment statute, all have been decided in favor of the employer on the basis that the action could not be proven as a matter of law. See Hunt v. Corr. Corp. of America, 38 So.3d 173 (Fla. 1st DCA 2010) (nurses at jail injured when inmates escaped cells and held them hostage, due to employer's failure to maintain electrical locking system and cell block locks, despite prior warnings and knowledge); Gorham v. Zachry Indus., 105 So.3d 629 (Fla. 4th DCA 2013) (employee injured when prefabricated wall being lifted into place was swayed by high wind speeds, where foreman misrepresented having checked wind speeds prior to lift); Boston v. Publix, No. 4D11-1521 (Fla. 4th DCA May 1, 2013) (employee crushed between loading dock and tractor overdue for safety inspections with inoperable backup alarm); Guevara v. Doormark, Inc., 946 So.2d 1228 (Fla. 4th DCA 2007) (new employee trained on power saw by co-employee "about one week", no provided written materials relating to operation or safety, and not advised to wear safety items); List Indus. V. Dalien, 107 So.3d 470 (Fla. 4th DCA 2013) (employee

injured by press brake not modified since built in 1960s, safety guards not used, foot pedal covered with grease and debris, and no videos used to train employees); C.W. Roberts Contracting v. Cuchens, 10 So.3d 667 (Fla. 1st DCA 2009).

Already, courts have expressed concern regarding the high standards now required. For example, the Fourth District wrote: "Indeed, after Turner, the Legislature adopted an extremely strict exception which, we suspect, few employees can meet. To date, we have not found, nor has a case been cited for us, where an employer has lost its immunity for its conduct". Gorham, 105 So.3d at 634. More specifically, that court noted: "The change from 'substantial certainty' to 'virtually certain' is an extremely different and a manifestly more difficult standard to meet. It would mean that a plaintiff must show that a given danger will result in an accident every-or almost every-time". List Indus., 107 So.3d at 471.

The 2003 amendment to section 440.11 set an impossibly high standard for intentional tort actions, by changing from the "substantial certainty" to "virtual certainty" test, requiring "clear and convincing evidence", and adding two elements that previously were mere factors. As such, it eliminates a type of intentional tort previously recognized in common law and available as a remedy to injured employees, without adding anything into the equation to reasonably replace the same. Further, these four new restrictions on intentional tort claims imposed by the 2003 amendment far exceeds the strict narrow tailoring that must be utilized

when restricting a person's rights to remedy a public necessity. See Mitchell v. Moore, 786 So.2d 521 (Fla. 2001) (noting, where a denial of access to the courts is addressed, "the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way").

Finally, the 2003 amendment to section 440.11 is unconstitutional not only facially, but particularly as applied to firefighters and others similarly situated (such as police officers, security guards, and others in first responder, paramilitary, and other high risk jobs). Danger is all "apparent" in their jobs and they may not ever be able to "exercise informed judgment about whether to perform the work", as required under section 440.11(1)(b), since they must operate in a command structure that requires an increased level of trust in and obedience to supervisors. As such, the replacement of the prior common law action for intentional torts by the statutory action under section 440.11(1)(b) results in a denial of such employees' rights to redress for intentional torts committed by employers, as previously existing in common law in 1968. The elimination of this cause of action is another reason the current version of The Act should be found unconstitutional as the exclusive remedy for workplace injuries.

CONCLUSION

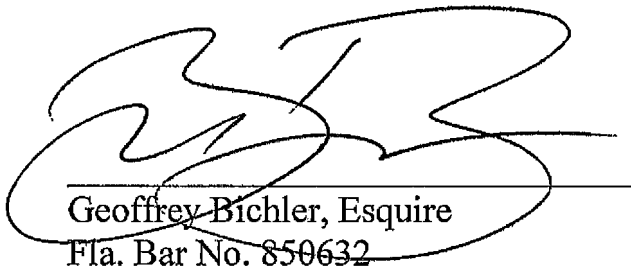
The decision below should be reversed as the Court exceeded its authority and created substantive law. The Court should find the current version of The Act unconstitutional as an exclusive remedy for workplace injuries and allow injured employees the option of pursuing common law remedies.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular Mail on this 27th day of January, 2014 to: Richard A. Sicking, Esquire, 1313 Ponce de Leon Boulevard, #300, Coral Gables, FL 33134 (sickingpa@aol.com); Jason Fox, Esquire, Law Offices of Carlson and Meissner, 250 North Belcher Road, Suite 102, Clearwater, FL 33765, (jayfoxesq@aol.com), co-counsel for Appellant; Kimberly Proano, Esquire, Office of the City Attorney, City of St. Petersburg, Post Office Box 2842, St. Petersburg, FL 33731, (kimberly.proano@stpete.org); Allen Winsor, Chief Deputy Solicitor General and Rachel E. Nordby, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, allen.winsor@myfloridalegal.com, and rachelnordby@myfloridalegal.com); William H. Rogner, Esquire, Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., 1560 Orange Avenue, Suite 500, Winter Park, FL 32789, (wrogner@hrmcw.com); Andre M. Mura, Esquire, Center for Constitutional Litigation, P.C., 777 6th Street, NW, Suite 520, Washington, DC

20001, (andre.mura@cclfirm.com); William McCabe, Esquire, 1250 South Highway 17-92, Suite 210, Longwood, FL 32750, (billjmccabe@earthlink.net); Matthew J. Mierzwa, Jr., Esquire, 3900 Woodlake Boulevard, Suite 212, Lake Worth, FL 33463, (mmierzwa@mierzwalaw.com); Noah Scott Warman, Esquire, Sugarman & Susskind, P.A., 100 Miracle Mile, Suite 300, Coral Gables, FL 33134, (nwarman@sugarmansusskind.com); George T. Levesq ue, General Counsel, Florida Senate, 404 South Monroe Street, Tallahassee, FL 32399, (levesque.george@flsenate.gov); Daniel E. Nordby, General Counsel, Florida House of Representatives, Suite 422, The Capitol, Tallahassee, FL 32399-1300, (daniel.nordby@myfloridahouse.gov); Jeffrey E. Appel, Esquire, 624 Commerce Drive, Suite 104, Lakeland, FL 33813, (ciappel@jealaw.net); Barbara Wagner, Esquire, 1 Financial Plaza, Floor 7, Ft. Lauderdale, FL 33394-0015, (barbw@sportsinjurylaw.com); and Richard W. Ervin, III, Esquire, Fox &

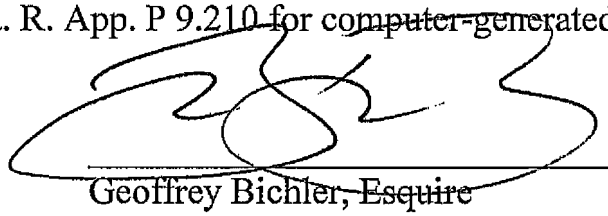
Loquasto, P.A., 1201 Hays Street, Suite 100, Tallahassee, FL 32301, (richardervin@flappeal.com).



Geoffrey Bichler, Esquire
Fla. Bar No. 850632
Bichler, Kelly, Oliver & Longo, PLLC
541 South Orlando Avenue, Suite 310
T: (407) 599-3777
F: (407) 599-3780

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was computer-generated using Times New Roman fourteen point font on Microsoft Word, and hereby complies with the font standards as required by Fla. R. App. P 9.210 for computer-generated briefs.



Geoffrey Bichler, Esquire
Fla. Bar No. 850632