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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

LOUIS P. PFEFFER AND FRANK CERINO,

Petitioners,

CASE NO. 14-1325
L.T. No.: 1D13-4779
OJCC No.09-021393SHP

v.

LABOR READY SOUTHEAST, INC. and ESIS, et al,

Respondents.
_____/

PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT AND INDEX OF ABBREVIATIONS

This is a workers' compensation appeal of a Final Order of the Judge of Compensation Claims ("JCC") which awarded a guideline fee to the Petitioners under section 440.34, Fla. Stat. (2009) (also referred to as "§440.34") as the prevailing party, instead of a reasonable fee as warranted under the facts of the case.

In this Brief, Petitioners will use the following terms and abbreviations:

Petitioners will also be referred to Pfeffer or Cerino and the as Ms. Zygmond will be referred to as the "Claimant."

Respondents will also be referred to as Employer/Carrier or "E/C" and Employer/Carriers in general will be referred to as "E/Cs."

Major contributing cause will be referred to as "MCC."

The Lower Tribunal will also be referred to as the "JCC."

Petition for Benefits will be referred to as "PFB."

The Florida Workers' Compensation Act/Chapter 440 and the legislative changes passed in 2003 and 2009 will be referred to as the "Act".

In light of the new electronic record, which has dispensed with the need for multiple paper book volumes in favor of one consolidated electronic volume, Petitioner will make record cites as follows: (Record. page number) e.g.- (R. 10).

All emphasis in bold or italics has been supplied by counsel unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

A. Litigation to Obtain Benefits for Zygmond:

Ruth Zygmond is a 56-year-old Hispanic female employed as a laborer. While cleaning bathrooms at the Manheim Auto Auction, she was injured at work on July 30, 2009 when she slipped and fell on oil on the floor, landing on her right knee. (R. 288-89) Although Zygmond had a prior right knee injury involving patella and femur fracture repairs in 2000, she resumed to her usual activities and returned to work without restrictions. (R. 308, 310)

From the outset of the case, Zygmond's injuries were mis-diagnosed by the medical providers selected by the E/C. The E/C initially authorized Concentra, who diagnosed a right knee contusion, when Zygmond had actually sustained a fractured kneecap as a result of her work accident. (R. 290, 293-95, 308) She was placed in an immobilizer and returned to work with restrictions of using crutches 100% of the time and no prolonged standing or walking (i.e., sedentary duty). (R. 290) Instead of paying lost wage benefits, the E/C offered Zygmond "transitional duty" starting on August 6, 2009, which involved sitting in a lawn chair, exposed to the hot August Florida sun and elements, wearing a hard-hat and vest, and holding a Labor Ready sign. (R. 291, 295) Zygmond complied and performed the job from August 10th through November 11, 2009, missing a few days due to severe pain. (R. 295)

Due to her continued complaints of severe pain and inability to walk, Concentra referred her to an orthopedic surgeon. (R. 291)

Vested with the unfettered right to select who Zygmond would see for medical care[1], the E/C sent her Dr. Chalal, who on September 17, 2009 diagnosed a right knee contusion due to the accident, along with underlying right knee degenerative joint disease and a history of right femur surgery in 2000 for fracture of the patella. (R. 292, 310-317) Dr. Chalal prescribed anti-inflammatory medication and kept her on modified duty with limited walking, standing, and squatting. (R. 310-17) Despite her continued complaints and needing crutches, after three visits, Dr. Chalal placed her at MMI for the knee contusion, indicting she had no permanent impairment and required no future treatment for her work accident. (R. 310-327) Upon receiving this full duty release, the E/C terminated Zygmond's transitional work status. (R. 295-96)

Zygmond next retained attorney Pfeffer on October 28, 2009, discharging attorney Andrew Neuwelt who had represented her since August 2, 2009. (R. 7, 246) Pfeffer has been admitted to the Florida Bar since 1984, practicing primarily in the field of workers compensation and employment law. (R. 39) He agreed to represent Zygmond under a written agreement that if he were successful in obtaining benefits, he would be paid a "reasonable fee." (R. 39-52, 248) Pfeffer requested a one-time change in

[1]See *TW Servs., Inc. v. Aldrich*, 659 So.2d 318, 322 (Fla. 1st DCA 1994) (reversing JCC's authorization of a specific doctor for future medical treatment because section 440.13 gives the employer the right to select treating physicians).

physicians[2], and the E/C selected Dr. Lambe, who evaluated Zygmond on four visits from December of 2009 to June of 2010. (R. 292-93) On the second visit, after ordering a MRI and comparing x-rays of the knee before and after the accident, Dr. Lambe diagnosed a new fracture of the patella caused by the work accident. (R. 293) Dr. Lambe did not recommend surgery. His treatment was limited to therapy, medication, a knee brace and limiting her to sedentary duty. (R. 293) On June 24, 2010, he advised that he had nothing more to offer Zygmond and placed her at MMI. Despite the fact that she remained in pain with difficulty walking, he opined that she sustained no permanent impairment from her accident. (R. 293-94)

By this time, not only was Zygmond without medical care and continuing to suffer from severe pain and problems walking and standing, she also was not working and was not being paid any lost wage benefits. Thus, Mr. Pfeffer, at his own expense, arranged for Zygmond to be evaluated by an IME physician who was not subject to the control of the E/C. On January 28, 2010, Zygmond was evaluated by orthopedic surgeon Dr. Richard Weiner. He reviewed all of her past and current medical records and diagnostic studies and opined that Zygmond sustained a new patella fracture with loss of fixation as a result of her compensable July 30, 2009 work accident. (R. 308-09) Dr. Weiner noted that this new fracture was seen on the CT scan ordered by Concentra. (R. 308-09) He recommended extensive physical therapy followed by surgery to include quadricepsplasty,

[2]See Section §440.13(2)(f), Fla. Stat. (2009).

a possible patella lengthening procedure and possibly a total knee replacement, warning that "treatment should be as soon as possible to restore her quadriceps mechanism." (R. 308-09)

Aware that Zygmond had sustained a fractured knee cap from the accident, that she was on sedentary duty, and that per Dr. Weiner, she needed surgery, the E/C nonetheless denied disability and medical benefits. The E/C asserted that Zygmond's work injuries were limited to a temporary contusion and that her current knee problems were due to her pre-existing condition. (R. 301-27) The E/C moved for the appointment of an Expert Medical Advisor (EMA) to resolve the conflict in opinions of the doctors.[3] (R. 301-27) The JCC granted the E/C's motion and appointed orthopedic surgeon Dr. Mikolajczak as the EMA. (R. 6, 293) After an examination and review of the records, Dr. Mikolajczak concluded that the major contributing cause of Zygmond's fractured right patella was the July 30, 2009 accident and that she required surgery. (R. 6, 293)

On December 6, 2010, while waiting for the E/C to authorize the right knee surgery, a merits hearing was held on Zygmond's claim for temporary compensation at the correct average weekly wage (AWW). The E/C refused to pay benefits, contending that: Zygmond unjustifiably refused suitable employment, and, even if Zygmond was entitled to benefits, her AWW/CR was correctly calculated at $9.86 a week with a state minimum CR of $20.00 per week. (R. 286-300) Following merits hearing, the JCC entered a Final Order and ruled

[3]See Section 440.13(9), Fla. Stat. (2009).

that Zygmond was entitled to temporary benefits from the date of accident onwards, finding that the "transitional work" offered by the E/C was not suitable gainful work for a woman suffering from a patella fracture in severe pain and with severe limitations of walking and standing. (R. 286-300) The JCC also found that the E/C had terminated transitional work after Dr. Chalal released Zygmond back to "full duty" on November 10, 2009. (R. 295) The JCC also rejected the E/C's position on the AWW and determined that Zygmond's correct AWW was $253.75 which translated to a weekly compensation rate (CR) of $169.25. (R. 206-300) Per the Final Order, Zygmond was paid $12,648.68 in back TPD benefits and such benefits continued to be paid until July 29, 2011, when she reached the statutory maximum of 104 weeks of benefits. (R. 192, 201)

Following the merits hearing, the E/C failed to authorize Dr. Weiner or any other surgeon to perform the complex knee surgery Zygmond needed. Thus, Mr. Pfeffer was compelled to file an additional Petition seeking surgery and had to engage in further litigation to secure the benefits the EMA recommended.[4] (R. 6, 39-40) Ultimately, the E/C authorized orthopedic Dr. Golden. However, Dr. Golden refused to perform anything beyond an evaluation, opining that she required surgery in a university setting. (R. 6,

[4]It must be noted that at this point, the E/C was "out of bullets" in terms of any legitimate reasons for not authorizing the surgery. Section 440.13(9), Fla. Stat. (2009) unambiguously provides that "the opinion of the expert medical advisor is **presumed to be correct** unless there is clear and convincing evidence to the contrary....."

251) Frustrated by her inability to obtain surgery for her fractured right kneecap and now not receiving any lost wage benefits from the E/C, Zygmond terminated Pfeffer's services on 9/8/11 and retained Cerino to represent her. (R. 201, 252)

Attorney Cerino filed multiple claims seeking authorization for the right knee surgery and permanent total disability benefits effective July 30, 2011, when Zygmond's 104 weeks of temporary benefits expired. (R. 9) The surgery, which Dr. Weiner, the EMA and Dr. Golden all opined was necessary, was never authorized. (R. 257-259) Fed up with the process and having not received any workers' compensation lost wage benefits for almost one year[5], on July 11, 2012, Zygmond agreed to a settlement of her entire work comp claim for $87,500. (R. 18-23) As part of the settlement, the E/C agreed to be responsible for the liens for attorney fees and costs for Pfeffer and Neuwelt. The JCC entered an Order under Section 440.20(11) on December 16, 2012 retaining jurisdiction on the issue of approval and division of attorney fees and costs. (R. 125-26)

B. The Award of Attorneys' Fees:

Based upon the E/C's denial of benefits, Pfeffer sought a "reasonable" fee based on the factors in Rule 4-1.5(b) and *Lee Engineering v. Fellows*, 209 So 2d.454 (Fla. 1968) based on his hours spent at a reasonable hourly rate. (R. 39-43) Cerino sought a "statutory" fee of $9500 on the overall settlement. (R. 9)

[5] The E/C's payout sheet reflects that Zygmond last received temporary partial disability benefits ("TPD") on 8/3/11. (R. 201)

However, the JCC was limited to making a "quantum meruit" division of the total fee amount, and was constrained to divide the "guideline" fee among the three attorneys.[6] (R. 191-95) On July 18, 2013, a hearing was held on the issue of the "quantum of attorneys" fees for the claimant's prior and current attorneys. (R. 203-262)

There was no disagreement on the benefits secured through the efforts of Zygmond's counsel: $21,000.00 were paid in indemnity benefits, $14,170.79 in medical benefits, and a whole case lump sum settlement of $87,500.00 was paid to the Claimant, for a total of $122,670.79. (R. 5, 10) The statutory attorney's (guideline) fee per §440.34, Fla. Stat. (2009) equaled $13,017.80, to be split by her three attorneys. Throughout this odyssey, the E/C paid its attorney over $50,000.00 to defend Zygmond's claims. (R. 5, 201-02)

Pfeffer provided unrebutted testimony at the hearing. (R. 241-257) He testified that he represented Zygmond for almost two years on a mandatory contingency fee basis and he expended in excess of 180 hours (R. 58-90) and almost $2,000.00 of his own money in costs. (R. 53-57) Due to the significant litigation occurring as a result of the E/C's decision to contest this case at every stage, Pfeffer testified that he was compelled to expend significant time and labor in the following activities in the prosecution of Claimant's claim for workers' compensation benefits:

---

[6] See Rosenthal, Levy & Simon v. Scott, 17 So3d 872 (Fla. 1st DCA 2009)(2009)(the 2003 amendments clearly limit the total amount of fees that may be paid, and that JCC's are charged with apportioning the fees between former and present counsel.)

-preparation for/attendance at 4 mediations;
-preparation for/attendance at 5 depositions;
-preparation for/prosecution of claims at a Hearing;
-attendance at 5 status conferences;
-preparation of a Motion for Emergency Conference;
-preparation for/attendance at a medical conference;
-multiple telephone/office conferences with Claimant;
-filed and/or defended numerous discovery and trial motions which required hearings; and
-filed 2 Motions for Advance.

(R. 8)

Pfeffer testified to the risks taken in representing Zygmond, recounting that a state mediator was shocked that he would even represent Zygmond with the degree of preexisting knee injuries in light of the MCC standard in compensation cases. (R. 248) Pfeffer resisted the E/C's requests for a quick settlement, and pursued claims for medical and disability benefits, and but for his efforts, Zygmond would have been forced into settling her claim for $5,000 to $10,000, perhaps less. (R. 41, 241-57) If he was not to receive a "reasonable" attorney fee, Pfeffer would have never taken Zygmond's case due to financial and ethical concerns. (R. 248-250)

Pfeffer introduced expert testimony from Professor Timothy Chinaris, the Ethics Director for the Florida Bar from 1989 to 1997. (R. 132-190) Professor Chinaris testified that lawyers need to be "fairly compensated for valuable services they perform for clients." (R. 154-56) Chinaris explained:

> Well, there are several interests, I think, that are ba1anced when you talk about reasonable fees. I guess the overriding interest is that we want lawyers to be fairly compensated for valuable services they perform for clients and we want clients to pay a fair, not excessive, rate for those services. So the idea of a

> reasonable fee really covers both of those interests. If you, for example, charge a fee that is too high, a client pays more than really the service might be worth and lawyer gets more, kind of a windfall, that the lawyer might not really have been set to earn. And it also has a broader effect. If that lawyer's fees are too high, people won't be able to afford lawyers, people will forego lawyers in cases where they really need protection or need representation or advice and the clients suffer, the public suffers, people are more easily taken advantage of, and our system of -- kind of our free-market system of people being able to contract and take care of themselves, it doesn't work as well as it should if one side has legal representation, the other side can't afford it because the lawyer might be charging an unreasonably high fee.
>
> On the other hand, you have to be concerned if a fee is too low, because it's been recognized in a variety of areas that if a lawyer is forced to take a fee that is too low, lawyers being human, there is always that incentive that a lawyer may not provide the client with the -- enough time or enough effort into the case to provide the kind of representation that really we consider competent representation.

(R. 154-156)

Professor Chinaris opined that §440.34, by not providing for a reasonable fee but instead mandating a guideline fee based purely on benefits obtained, impermissibly creates a conflict of interest for a claimant's attorney. (R. 132-190) Chinaris testified regarding Rule 4-1.7, explaining that:

> a lawyer is not supposed to represent a client if there's a substantial risk that the lawyer's representation of the client might be materially limited by any number of things, including the lawyer's own personal interest. And the lawyer obviously has a personal interest in making a fee that is at least enough to break even in a case. And so below a certain level, a lawyer is just going to feel that the lawyer is not going to be compensated enough to be able to put in proper representation and, therefore, under the conflict rule really should

> decline to take the case. That creates an impermissible conflict of interest.

(R. 167-168)

Without authority to consider Pfeffer's constitutional arguments and prevented by §440.34(1) from determining *or* awarding a "reasonable" fee, the JCC simply took the agreed upon $122,670.79 in total benefits secured for Zygmond and determined that the $13,017.80 statutory fee would be split between Zygmond's three attorneys. (R. 5-13) Although finding that Pfeffer's services had the "greatest impact on her ultimate recovery" (R. 12), the JCC awarded fees based upon the ratio of each attorney's hours into the total 258.10 attorney hours claimed by all counsel, and divided each attorney's respective percentage into the statutory fee. (R. 12) The JCC found that Mr. Neuwelt's 11.10 hours were 4%, Mr. Cerino's 67.00 hours were 26%, and Mr. Pfeffer's 180 hours were 70% of the total 258.10 hours. She thus allocated the guideline attorney fee of $13,017.80 as follows: Mr. Neuwelt -$520.71 (4% x $13,017.80); Mr. Pfeffer – $9,112,46 (70% x 13,017.80); and Mr. Cerino- $3,384.63 (26% x $13,017.80). (R. 12) This equated to $50 per hour for a highly difficult and contingent case. This appeal timely followed. (R. 3) On June 24, 2014, the First District entered an Per Curiam Affirmance stating:

> Based on *Castellanos v.Next Door Company*, 124 So.3d 392 (Fla.1st DCA 2013), we AFFIRM. In so doing, we certify that out disposition of the instant case passes upon the same question we certified in *Castellanos*. Id. at 394. See *Jollie v. State*, 405 So.2d 418, 421 n.* (Fla. 1981).

SUMMARY OF ARGUMENT

The Legislature has unconstitutionally encroached on the Judicial Branch's power to administer Justice and regulate attorneys who are officers of the court. In eliminating "reasonable" attorney fees and mandating that fees be arbitrarily awarded solely on a statutory schedule, Florida Statute §440.34(1) is unconstitutional, both facially and as applied, as it violates the separation of powers by inherently and impermissibly placing attorneys representing injured workers in a conflict of interest prohibited by Florida Bar Rule 4-1.7. Further, the irrefutable guideline fee in §440.34 ignores this Court's past pronouncements on the pivotal role that attorneys, as officers of the court, play in ensuring the administration of justice in Florida courts, and ignores the critical importance that "reasonable" attorneys fees play in assuring a credible, fair and functioning justice system.

Section 440.34 also impermissibly violates Petitioners' right to be rewarded for industry by providing unreasonable fees that are confiscatory and it also violates rights to free speech.

Further, §440.34 as enacted in 2009 violates Petitioners' rights to due process and to equal protection by denying the Petitioners' ability to contract with and represent injured workers. Section 440.34 violates equal protection because it treats employees and their attorneys differently based on an illogical and arbitrary premise. The unilateral application of §440.34, which limits only Claimants in their ability to contract with counsel

(under threat of criminal prosecution to the attorney for taking a fee that exceeds the guideline) is unconstitutional because it is arbitrarily and capriciously imposed. Section 440.34 violates due process because it bears no reasonable relation to a permissible legislative objective and is discriminatory, arbitrary and oppressive. By severely impairing, if not altogether eliminating, a claimant's ability to obtain the assistance of counsel, a claimant's due process rights to be heard and to present evidence in a meaningful way are eliminated. Section 440.34 is discriminatory and arbitrary, as these fee restrictions impair only claimants. The opportunity to be represented by counsel in both civil and criminal proceedings is equated with due process.

The Act also violates the access to court's provision of the Florida Constitution. The Act no longer provides "a reasonable alternative to protect the rights of the people of the State to redress for injuries." While the rights available through statutory or common law existing upon the adoption of the Declaration of Rights need not be "frozen" in time to mirror those rights as they existed in 1968, Petitioners submit that the rights substituted by the Legislate must be a "reasonable alternative" to those rights which are taken. The guideline only fee under §440.34 (2009) provides no "commensurate benefit" as an alternative to the preexisting right of a reasonable fee as existed upon the passage of the Declaration of Rights in 1968, when reasonable fees existed.

ARGUMENT

Petitioners provide a brief history of reasonable fees available in workers' compensation. In 1941, the Legislature revised the statutory scheme and mandated that in some instances, the E/C should pay for the claimant to have an attorney. See ch. 20672, § 11, Laws of Fla. (1941); *Great American Indemnity Co. v. Smith*, 24 So. 2d 42, 44 (Fla. 1945) (pointing out that §440.34 was amended in 1941 to provide for the assessment of attorneys' fees if the E/C declined to pay a claim within a stated time or resisted unsuccessfully such payment). For over 67 years, Florida law allowed the recovery of reasonable attorneys' fees at the expense of the E/C for a claimant who successfully prosecuted his claim.

The reasons for the allowance of reasonable fees were obvious and many. It reflected a public policy decision that "claimants are entitled to and are in need of counsel under those conditions." *Pilon v. Okeelanta Corp.*, 574 So.2d 1200, 1201 (Fla. 1st DCA 1991); *Murray v. Mariner Health*, 994 So. 2d 1051, 1058 (Fla. 2008). As this Court stated in *Ohio Casualty v. Parrish*, 350 So.2d 466, 470 (Fla. 1977), the purpose of attorney fee shifting was:

> to enable an injured employee who has not received an equitable compensation award to engage competent legal assistance and, in addition, to penalize a recalcitrant employer.... Thus, in adding attorney's fees to the injured worker's compensation award, Section 440.34, Florida Statutes (1975), discourages the carrier from unnecessarily resisting claims in an attempt to force a settlement upon an injured worker.

Id. at 470.

The fees provisions found in section 440.34 reflect a recognition by the legislature that "without the intervention or potential intervention of an attorney acting for the claimant, medical or compensation benefits due the claimant are likely to be delayed or denied to the claimant." See *Crittenden Orange Blossom Fruit v. Stone*, 492 So.2d 1106, 1110 (Fla. 1st. DCA 1986). Removing reasonable fees allows the E/C to resist payment of smaller claims (rendering them virtually uncollectible), leaving claimants without the assistance of competent counsel and "as helpless as a turtle on its back." *Davis v. Keeto*, 463 So 2nd 368, 371 (Fla. 1st DCA 1985). True as it was 60 plus years ago, it still rings true today that this purpose can only be achieved if the E/C has an incentive (avoidance of reasonable attorney's fees as a result of extensive litigation) to provide benefits timely. See *Sam Rogers Enterprises v. Williams*, 401 So. 2d 1388 (Fla. 1st DCA 1981). In *Rivers v. SCA Services*, 488 So.2d 873, 876 (Fla. 1st DCA 1986), the court stated:

> Application of the provisions of Section 440.34(1) in a manner that promotes such a chilling affect on the Claimant's right to obtain legal services . . . is inconsistent with the benevolent purposes of the Workers' Compensation Act.

All of the aforementioned cases involving a carrier's unjustified delay or refusal to provide benefits occurred before July 1, 2009 when the law imposed the threat of imposition of "reasonable" attorney fees. In *Murray* (*supra*), this Court was presented with a similar set of facts to those in the case at bar. There, the attorney fees were determined on the basis of the

guideline formula which resulted in a fee award of $8 an hour for her attorney, which the witnesses testified was "manifestly unfair" and placed claimants at a disadvantage. In *Murray*, this Court resolved the issue on the basis of statutory construction, obviating the need to reach the constitutional issues, holding that the "decision in *Lee Engineering* controls" and provides the standard for reasonable attorney fees. *Id.*, at 1062.

In response to *Murray*, the Florida Legislature wasted no time and amended §440.34 in 2009 to simply excise the word "reasonable" from §440.34, thereby eliminating any ambiguity but also ignoring the potential constitutional issues warned of in *Murray*. Section 440.34 (2009) now provides for a "guideline fee" only, which affords no authority to the JCC to exercise discretion when awarding a fee. Instead, the fee must be based on the guideline, regardless of how unreasonable or manifestly unfair the result and regardless of how vigorous the E/C's defense (to wit, the E/C here case spent $50,000 to defend the case). (R. 201-02, 257) Further, §440.105(3) makes it a crime for a claimant to contract with an attorney to make up the invariable shortfall that occurs between a guideline fee and a reasonable one. The effect is evident- the legislation has and will preclude many claimants from finding counsel and also puts counsel in an ethical conflict with clients. As established in the instant case, workers like Ms. Zygmond will not get representation. (R. 248-250) This act of legislative

defiance has given E/Cs unfettered power to delay or deny claims with no meaningful deterrent or penalty.

Long ago, this Court recognized that removing the potential award of reasonable attorneys fees would encourage carriers to unnecessarily resist "claims in an attempt to force settlement upon an injured worker." *Ohio Casualty*, at 470. This evil has now arrived. As confirmed by Pfeffer's unrebutted testimony, because of the arbitrary caps on fees under §440.34, "the whole workers' comp system has become to the point where basically it's a settle system.....Carriers expect you to settle the case." (R. 247-249) Pfeffer testified that the "only way you can survive as a claimant's attorney is by settling the cases, click, click, click." (R. 249) And more troubling, in this Kafkaesque system, the claimant's own attorney frequently becomes the adversary insurance company's best friend by "counseling" the client to settle, just so the attorney (knowing he cannot litigate a contingent case against the E/C's unlimited resources when he has with no ability to get a reasonable fee) can earn a fee to stay financially afloat. The constant ethical dilemma plaguing attorneys faced with the virtual certainty of unreasonable fees can be summarized by these musings:

> Should I shortchange my client, and try to simply, quickly settle this workers compensation claim for whatever the insurance company is offering and make a modest fee? How can I justify risking my own money and my time to prosecute increasingly complex and legally difficult claims using employer controlled doctors to get my client benefits that are relatively worth peanuts, when I have office rent, payroll, taxes, insurance, licensing fees to run my business,

> let alone needing money to survive to pay for personal rent, food, automobile, health insurance, credit cards for myself and my family? What do I do? If I take on the risk of zealously representing this client and if I win, the client may win but I thereby lose.

It is against this backdrop that Petitioners present their arguments that the current law violates various rights and protections granted to him under the Constitution.

STANDARD OF REVIEW:

Because all of the foregoing issues involve a constitutional challenge, they are each governed by the de novo review standard. See *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006).

I. §440.34 VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Article II, Sec. 3, of the Florida Constitution provides:

> Branches of government. The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The principles underlying the governmental separation of powers antedate our Florida Constitution and were collectively adopted by the union of states in our federal constitution. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260; (Fla 1991); *Mistretta v. United States*, 488 U.S. 361, 380, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). The fundamental concern of keeping the individual branches separate is that the fusion of the powers of any two branches into the same department would ultimately result in the destruction of liberty. *Chiles*, at 263.

1. THE SEPARATION OF POWERS PRECLUDES THE LEGISLATURE FROM ENCROACHING ON THE JUDICIAL BRANCH'S POWER TO ADMINISTER JUSTICE AND REGULATE ATTORNEYS.

The separation of powers doctrine encompasses two fundamental prohibitions: first, no branch may encroach upon the powers of another. See, e.g., *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953). Second, no branch may delegate to another branch its constitutionally assigned power. See, e.g., *Smith v. State*, 537 So. 2d 982, 987 (Fla. 1989). Section 440.34 (2009) violates both of these fundamental prohibitions. Under Article V, §15, the Supreme Court is the exclusive government regulator of attorneys and the practice of law. Article V, §1 gives the Judicial Branch the *sole* authority and "duty"... "to guarantee the rights of the people to have access to a functioning and efficient judicial system". *Chiles*, at 268-69. The Legislature is not in the Justice business; nor is the Executive branch. The administration of Justice and the protection of rights under the Constitution belongs solely to the Judicial Branch. See, e.g., Article V, §1; *Chiles,* at 260.

An attorney is "not only a representative of the client, but also an officer of the court." *Moakley v. Smallwood*, 826 So. 2d 221,224 (Fla. 2002). As an officer of the Court, the practice of law is "intimately connected with the exercise of judicial power in the administration of justice." *In re Hazel H. Russell*, 236 So. 2d 767, 769 (Fla. 1970). This Court, through the Florida Bar, has promulgated the Code of Professional Responsibility including Rules of Professional Conduct and Rules of Discipline.

2. THE ELIMINATION OF A REASONABLE FEE IN §440.34(1) VIOLATES THE SEPARATION OF POWERS BY SUBVERTING THE JUSTICE SYSTEM FOR INDIVIDUALS AND THE PUBLIC AT LARGE AND BY ENCROACHING ON THIS COURT'S EXCLUSIVE POWER TO REGULATE ATTORNEYS.

The allowance of attorney's fees is a judicial action. *Lee Engineering & Constr. Co. v. Fellows*, 209 So.2d 454, 458 (Fla. 1968). A lawyer must comply with the Code of Professional Responsibility, including without limitation those provisions relating to the setting, charging, and collecting of fees. e.g. *In re The Integration Rule of the Florida Bar*, 235 So. 2d 723 (Fla. 1970). Rule 4-1.5 (a) (1) and (b) of the Rules of Professional Conduct prohibits "clearly excessive" fees and mandates that fees be "reasonable." Florida Courts have not hesitated to overturn attorney fees that are either excessive or inadequate in accordance with the Rules of Professional Conduct. See *Canal Authority v. Ocala Manufacturing Ice and Packing Company*, 253 So. 2d 495 (Fla. 1st DCA 1971) (considering factors in Code of Professional Responsibility award of inadequate attorney fees was an abuse of judicial discretion). The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact, it results in "a species of social malpractice that undermines the confidence of the public in the bench and bar. It brings the court into disrepute and destroys its power to perform

adequately the function of its creation." *Baruch v. Giblin*, 122 Fla. 59, 164 So. 831, 833 (1935); *First Baptist Church of Cape Coral, Fla., Inc. v. Compass Constr., Inc.*, 115 So. 3d 978, 984 (Fla. 2013)(LEWIS, J., dissenting).

To carry out their duties to both client and the public at large, attorneys, as officers of the court, must be paid a "reasonable" fee or the system will not work properly. In *Baruch*, this Court stressed the importance of reasonable attorney fees:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Baruch v. Giblin, 122 Fla. 59, 63, 164 So. 831, 833 (1935).

The holding of *Baruch* regarding the importance of awarding "reasonable" attorney fees has repeatedly been cited by Florida Courts. E.g. *Travieso v. Travieso,* 474 So. 2d 1184, 1188 (Fla. 1985); *Dade County v. Oolite Rock Company*, 311 So. 2d 699, 703 (3rd DCA 1975) (reasonable fees essential to establish and retain public confidence in the judicial process);*The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990)(Attorney suspended for charging excessive fee); *Uhnlein v. Department of Revenue*, 662 So. 2d 309 (Fla.

1995)(lodestar approach of *Rowe* provides a suitable foundation for objective structure in establishing reasonable attorney fee in common fund case rather than percentage approach); *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 114 (Fla.1985) (recognizing the importance of reasonable attorneys' fees on the credibility of the court system and the legal profession).

Attorney fees must be reasonable. If fees are too low, justice for individual clients and the public suffers; if fees are too high, the credibility of the legal system is called into question. Thus, it follows that the legislature can not mandate unreasonable fees because it encroaches on a judicial function, harms the public, and impinges the independence of attorneys. Florida Courts have not hesitated to overturn attorney fees that are either excessive or inadequate in accordance with the Rules of Professional Conduct. See *Marchion Terrazzo v. Altman*, 372 So. 2d (Fla. 3rd DCA 1979)(inadequate fee award constitutes abuse of discretion and must be reversed under the principles in the Code of Professional Responsibility which apply not only where the fee is found to be excessive, but also where it is found to be inadequate); *Urbieta v. Urbieta* 446 So. 2d 230 (Fla. 3rd DCA 1984)(award of fees so inadequate where fee not reflective of time expended and the importance of legal services rendered).

The Bar and this Court recognize the direct correlation that exists between reasonable fees and competent and zealous representation free of conflicts of interest, and that attorneys

who receive inadequate fees are, as part of human nature, subject to shirking their professional obligations to provide competent and zealous representation.[7] In *Florida Bar Ethics Opinion 98-2* (June 18, 1998) the Bar ruled that an attorney may not ethically enter into flat fee agreement in which "the set fee is so low as to impair her independent professional judgment or cause her to limit the representation" of a client. In so ruling, the Florida Bar adopted verbatim *Ohio Ethics Opinion 97-7* which concluded:

> an attorney or law firm may enter into a contract with a liability insurer in which the attorney or law firm agrees to do all or a portion of the insurer's defense work for a fixed flat fee. **However, the fee agreement must provide reasonable and adequate compensation; it must not be excessive or so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate. The fee agreement must not adversely affect the attorney's independent professional judgment; the attorney's representation must be competent, zealous, and diligent;** and the expenses of litigation, in addition to the flat fee, must ultimately be borne by the insurer.

The ethical requirement of reasonable and adequate compensation applies with no less force to fees arising by statute. This Court has long held that the legislature is without any authority to *directly or indirectly interfere* with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court. See *The Florida Bar v. Massfeller*, 170 So.2d 834 (Fla.1964); *State ex rel. Arnold v. Revels*, 109 So.2d 1

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[7]See also In the Matter of THE FLORIDA BAR, In re AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY (CONTINGENT FEES), 349 So.2d 630 (Fla. 1977)(Argument III, equal protection, infra)

(Fla.1959). Affirming its authority to regulate attorneys in *Abdool v. Bondi*, 141 So. 3d 529, 553 (Fla.2014), this Court remarked:

> This Court has the inherent authority to adopt and enforce an ethical code of professional conduct for attorneys. See *In re The Florida Bar*, 316 So. 2d 45, 47 (Fla. 1975)("The authority for each branch to adopt an ethical code has always been within the inherent authority of the respective branches of government... The judicial branch has... a code of professional responsibility for lawyers, and, in addition, has the procedure to interpret them and the authority to enforce them..."). *The Legislature, therefore, is without authority to directly or indirectly interfere with an attorney's exercise of his or her ethical duties as an officer of the court....(citations omitted)...* A statute violates the separation of powers clause when it interferes with the ethical duties of attorneys, as prescribed by this Court.

Without the prospect of reasonable attorneys fees being paid for an attorney's professional labor, conflicts of interest inevitably arise. (R. 167) Section 440.34 is thus unconstitutional, both facially and as applied, as the Legislature has interfered with an attorney's exercise of his or her ethical duties. *Id.*

Further, when a statute puts an inflexible fee cap on the amount of compensation an attorney can receive, it is an unconstitutional violation of the doctrine of separation of powers. In *Irwin v. Surdyk's Liquor*, 599 N.W. 132, 142 (Minn. 1999), the Minnesota Supreme Court considered a mandatory guideline fee in a workers' compensation case which was awarded by a quasi-judicial officer of the executive branch. The court struck the statute as unconstitutional, holding that "legislation that prohibits this court from deviating from the precise statutory amount of awardable

attorney fees impinges on the judiciary's inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees." This legislative delegation of attorney fee regulation exclusively to the executive branch of government violates the doctrine of separation of powers as it impinges on the courts inherent power to oversee attorneys. *Id*.

Just as the legislature's "power to tax is the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316 (1819), the legislature's power to arbitrarily and unreasonably limit the fees of an attorney is the power to regulate the attorney's conduct. This Court addressed the judiciary's role in the control of fees:

> Inadequate fees and excessive fees are not reasonable attorney fees. Further, we expect the appellate courts to review the factors presented to the courts so that only reasonable and necessary fees are awarded.

Murray, 994 So.2d at 1062.

In deleting the term reasonable from §440.34, the legislature has now assumed oversight of fees and in so doing, has clearly exercised "powers appertaining to" the judicial branch.

3. THE ELIMINATION OF REASONABLE ATTORNEY FEES INHERENTLY PLACES A CLAIMANT'S ATTORNEY IN A PROHIBITED CONFLICT OF INTEREST.

In the instant case, Petitioners were ethically bound to prosecute the Claimant's case with diligence and thoroughness.[8] As a result, Petitioners had their time and efforts confiscated by a

[8] See Rules Regulating the Florida Bar 4-1.1 and 4-1.3.

fee that was unreasonable and manifestly unjust. Professor Chinaris testified that reasonable attorneys fees ensure competent representation and protect the public. More importantly, Chinaris provided unrefuted expert testimony that the absence of reasonable fees, as exists in §440.34 (2009), impermissibly creates a conflict of interest for claimants' attorneys. (R. 154-56) An attorney's failure to avoid prohibited conflicts of interest constitutes grounds for disciplinary proceedings. *See The Florida Bar v. Brown*, 978 So.2d 107 (Fla. 2008).

Because allowance of fees is a judicial action, *see Lee Engineering* (*supra*), Petitioners submit that awarding *specific* fees is judicial action subject to judicial power, because the judicial branch (not the legislative or executive branch) is duty bound to protect access to justice and the rights of individuals. These goals cannot be realized without fees that are reasonable and based upon evidence which takes into account the factors set forth in the Code of Professional Responsibility. See *Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986)(a statute restricting fees to attorneys representing the criminally accused was unconstitutional when applied in such manner as to curtail the Court's inherent power to ensure the adequate representation of the criminally accused.)

The application of the separation of powers doctrine to a legislative mandate on what fees can be awarded was addressed in *Maas v. Olive*, 992 So.2d 196 (Fla. 2008) (Olive II). There, this Court construed a similar statutory fee limitation which provided

that "compensation above the amounts set forth in section 27.711 is not authorized. §27.7002(5)." This Court held that "in appropriate cases courts have inherent authority to grant compensation in excess of the statutory fee schedule." *Id.* at 205. The power to grant fees in excess of a statutory schedule in extraordinary and unusual circumstances stems from the courts' authority to do things essential to the performance of their judicial functions. *Id.* at 203. This authority emanates from the separation of powers provision of the Florida Constitution. *Id.* at 204.

In *Rose v. Palm Beach County*, 361 So.2d 135, 137 (Fla.1978), this Court recognized the inherent power of the courts and the importance of the doctrine of separation of powers, stating:

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction.
> .....
> The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.

The Florida Supreme Court has established rules governing attorney fees in Rule 4-1.5. The Legislature, by enacting a rigid, inflexible, and mandatory standard in §440.34, has encroached upon this judicial function by governing attorney fees in workers'

compensation cases and by giving the executive branch (the JCC) exclusive review as to the amount of an attorney fee with no regard for reasonableness of that fee. The judicial branch retains the sole constitutional power to regulate attorneys and fees. Indeed, because "allowance of fees is a judicial action," it is an improper exercise of authority for the legislative branch to delegate such final determination to the executive branch. Thus, §440.34 is unconstitutional, both facially and as applied, as it violates the separation of powers provision of the Florida Constitution.

THE SOLUTION: JCCs are a judicial tribunal performing the functions of a court for purposes of "due process" provisions of the State Constitution. Thus, Petitioners assert that the JCC fits within the broad use of the term "court," and as such, it is within the inherent power of a court in Florida to depart from the statute's fee guidelines when necessary in order to ensure that an attorney is not compensated an amount which is unreasonable and confiscatory of his time, energy and talents. *See Makemson* (*supra*).

In furtherance of this, the Legislature empowered JCCs to do "all things conformable to law .... necessary to enable the judge to effectively discharge the duties of his or her office." See Fla. Stat. §440.33 (2009). Petitioners submit that this power allows and compels the JCC to award reasonable attorney's fees-- no more and no less. To fail to reach this conclusion would require JCCs to award manifestly unfair and unreasonable fees which place claimant's attorneys in ethical compromises against their clients.

II. §440.34 VIOLATES THE RIGHT TO BE REWARDED FOR INDUSTRY AND THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH.

Article I, Section 2 of the Florida Constitution provides:

> SECTION 2. Basic rights -All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to **be rewarded for industry**,....

Petitioners allege that §440.34 impermissibly infringes on their fundamental right to be rewarded for industry. Attorneys Pfeffer and Cerino spent valuable time and resources using their education, experience and training to represent Zygmond in a highly contingent case. (R. 172, 254-55) After spending a combined 240 hours, over three years, and over $2,500.00 of their own money to successfully represent Zygmond and obtain benefits that the E/C wrongfully withheld (against an E/C that paid its attorneys over $50,000 to litigate the case), Pfeffer and Cerino were left with a fee of approximately $50 per hour. As Professor Chinaris remarked, "in a hotly contested contingent fee case, you would have a hard time finding a lawyer who would take it on at that rate." (R. 173) Thus, Petitioners' right to be rewarded for industry was denied when the JCC awarded a fee that was unreasonable.

This right is subject to a strict scrutiny standard. See *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So.2d 204, 206 (Fla. 1989)("When a statute or ordinance operates to the disadvantage of a suspect class or impairs the exercise of a fundamental right, then the law must pass strict scrutiny.) This

section of the Florida Constitution guarantees to everyone in this state the inalienable right to be rewarded for industry and to acquire, possess and protect property. In *Shevin v. International Inventors, Inc.*, 353 So.2d 89, 93 (Fla. 1977), one of the few decisions addressing the "right to be rewarded for industry," this Court stated that inherent in that protection (i.e., the "inalienable right to be rewarded for industry") is the right to do business and to contract free from unreasonable government regulation. *Id.* This Court held that Chapter 501.136, which was intended to "to safeguard the public against fraud, deceit and financial hardship and to foster and encourage competition and fair dealing in the field of invention development services" was constitutionally onerous, unreasonable and violated the right to be rewarded for industry (under Art. I Sec. 2 of the Florida Constitution (1968)). *Id.* at 93. This Court held:

> The cumulative effect of the statute would be to substantially diminish the Plaintiff's ability to engage in business in the State of Florida and might constitute a substantial prohibition of the business altogether because of substantial impossibility of compliance. Such a result constitutes an unconstitutional infringement on Plaintiff's inherent right of liberty to engage in business.

Id.

The same circumstances apply in the instant case. Section 440.34 shares a purported benevolent purpose of protecting injured workers. In reality, §440.34 harms the workers it seeks to protect by substantially diminishing, if not eliminating, their ability to

retain counsel. The fee guidelines also restrict the ability of Petitioner, as an attorney, to engage in business in the State of Florida for representing injured workers. Indeed, as reflected by the unrefuted testimony of Pfeffer, in the absence of a reasonable fee, he would have never taken Zygmond's case due to financial and ethical concerns associated with a guideline only fee. (R. 248-250)

Compounding the situation is the fact that §440.105(3)(c) makes it a crime to receive a fee which is not in compliance with §440.34, thereby precluding claimants from paying anything to their attorneys to augment the inadequate guideline fee. Injured workers cannot even pay attorneys for an hour of time to get counsel regarding their rights and responsibilities under Chapter 440, and further, injured workers cannot even pay an attorney for advice as to how they should handle their own claim on a *pro se* basis. To make matters worse, when claimants lose their cases, they are now obligated to pay costs to the E/C. See §440.34(3), Fla. Stat. (2003). It is an absurd result, if not Orwellian one, that claimants can legally contract with an attorney for a reasonable fee for defense in the cost proceedings and likewise can contract with an attorney for defense of the enforcement of those cost proceedings in Circuit Court, but claimants cannot, due to the prohibitions in §440.34 and §440.105, contract with an attorney for a reasonable fee to help win their case and avoid that result.[9]

[9]*See Jacobson v. Southeast Pers. Leasing, Inc.*, 113 So. 3d 1042, 1045 (Fla. 1st DCA 2013)("We conclude to the extent that sections 440.34 and 440.105(3)(c), Fla. Stat., prohibit Claimant

The pejorative effect is obvious- a total prohibition on the business representing injured workers in small value, disputed workers' compensation claims. This results in the substantial impossibility of compliance, as there is no ability for an attorney to be rewarded for his skilled services and industry. Such a result constitutes an infringement of the inherent right of liberty to engage in business and must be found unconstitutional. Under strict scrutiny, the legislation is presumptively unconstitutional and the State must prove that the legislation furthers a compelling State interest through the least intrusive means. See *North Florida Women's Health v. State*, 866 So.2d 616, 635 (Fla. 2003). In the instant case, the State has failed to prove that a compelling State interest through the least intrusive means, rendering it unconstitutional. Even if there is a compelling interest in regulating attorney's fees, §440.34 does not accomplish that goal by the least intrusive means as it harms the very class it intends to protect (claimants) by leaving them unrepresented.

Sections 440.105(3)(c) and 440.34, Fla. Stat. (2009) are also unconstitutional as they violate the fundamental rights of free speech by prohibiting claimants from consulting or retaining an attorney for a reasonable fee so the Claimant's own words can be given a voice through her attorney, spoken or written, before the

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from retaining counsel to defend a motion to tax costs against him, those statutes infringe upon Claimant's constitutional rights under the First Amendment of the Constitution.").

court during litigation. *Jacobson*, at 1048. Zygmond was not permitted to pay her attorneys a dime for their time and effort, as it is a crime under §440.105(3)(c). The sole method of compensation under when benefits are wrongfully denied is that the E/C must pay the fee under the guideline formula. On the other hand, Respondents were free to pay their counsel whatever they deemed fit to defend the case, which was $50,000 in this case. Consequently, for claimants and Petitioners, sections 440.105(3)(c) and 440.34(1) abridge their rights to free speech and to petition government. These arguments have been more thoroughly set forth in *Castellanos v. Next Door Co.* (Case No.: SC13-2082) in the Petitioner's Brief and the Amicus Brief filed by Fraternal Order of Police, *et al*, and are endorsed and incorporated herein by reference.

III. §440.34 IS UNCONSTITUTIONAL AS IT IMPERMISSIBLY VIOLATES EQUAL PROTECTION AND DUE PROCESS.

A. EQUAL PROTECTION

1. Strict Scrutiny

Petitioners assert that Zygmond, as an injured worker, and as are all injured workers by their very definition, was disabled, albeit temporarily (a finding made by the JCC herein). (R. 286-300) The fundamental right of "a prohibition against discrimination against the disabled" ("no person shall be deprived of any right because of physical disability") was adopted in the 1998 amendments to the Florida Constitution, Art. I, Section 2. The Constitution created a protected class, the disabled, and required strict

scrutiny of legislation affecting that class. See Commentary to 1974 and 1998 Amendments, 1974 Senate Joint Resolution 917, 1998 Constitution Revision Commission, Revision 9. This Court has held that the constitutional test for any law which affects certain classifications (of persons) and fundamental rights must pass the strict scrutiny test. *De Ayala v. Florida Farm Bureau*, 543 So.2d 204 (Fla. 1989) (the standard of review for the constitutionality of a statute that affects a suspect class in strict scrutiny).

In the instant manner, Section 440.34 affects a suspect class, disabled workers such as Zygmond (and her attorneys), and treats that class differently than persons with no disability. Thus, §440.34, which unquestionably intrudes into the Claimant's equal protection rights as a disabled person, is presumptively invalid. See *North Florida,* at 635. The State has failed to prove that the legislation furthers a compelling State interest through the least intrusive means, rendering the legislation unconstitutional. *Id*.

2. RATIONAL BASIS

This Court in *Estate of McCall v. US*, 134 So.3d 894 (Fla. 2014) stated that "Unless a suspect class or fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge." Analyzed under a rational basis standard, the dissimilarity in which §440.34 treats claimants vis-a-vis everyone else (E/Cs) is not rationally related to any legitimate state interest. With §440.34, the State has three

legitimate interests. The first is the regulation of attorneys' fees to protect a claimant because his benefits are limited (and allowing an attorney to obtain a portion thereof, particularly when it is a substantial sum, 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.) See *Samaha v. State*, 389 So.2d 639, 640 (Fla. 1980). The second is to lower the overall cost of the worker's compensation system. See *Acosta v. Kraco, Inc.*, 471 So.2d 24 (Fla. 1985). Finally, the fee shifting provision of §440.34 exists to "enable an injured employee who has not received an equitable compensation award to engage competent legal assistance and, in addition, to penalize a recalcitrant employer." See *Ohio Casualty*, at 470 (*supra*).

Sections 440.34 and 440.105(3) do not rationally relate to this first objective, instead resulting in a denial of equal protection as the Legislature created irrational classifications which result in an arbitrary or capricious application of the law.[10] Claimants like Zygmond cannot succeed without the help of counsel, and counsel like Petitioners will not represent Claimants unless

[10] Another state supreme court agrees with this assertion. In Corn v. New Mexico Educators Federal Credit Union, 889 P. 2d 234, 243 (N.M. Ct. App. 1994), the court addressed a statute that restricted what claimants could pay their own attorneys but provided no such restriction relating to carrier attorneys' fees. The New Mexico Court held that such dissimilar treatment was a denial of equal protection, characterizing the one-sided attorney fee restriction as "so attenuated as to render the distinction arbitrary and irrational." overruled on other grounds, Trujillo v. City of Albuquerque, 965 P.2d 305, (N.M. 1998).

they are assured a reasonable fee. (R. 248) Thus, the guideline fee of §440.34 is totally illogical and irrational to the stated purpose of protecting claimants. A statutory classification violates equal protection if it treats similarly situated people differently based on an illogical or arbitrary premise. See *McElrath v. Burley*, 707 So.2d 836 (Fla. 1st DCA 1998).

The Legislature has criminalized the act of a claimant lawyer trading services for money, even where the client has both the funds and the desire to pay. The Legislature created two classifications: injured workers and their attorneys (citizens of the state of Florida) and the other class- E/Cs (also citizens). The latter class may freely contract with lawyers to represent their interests, while claimants and their attorneys are strictly prohibited from doing so under the threat of criminal prosecution of the lawyer.[11] The law permits no exception and no procedure to address the individual injured worker's capacity and desire to contract with a lawyer for services. The differential treatment is completely arbitrary. Many, if not most all, injured workers possess the intelligence and acumen to enter into a contract with

[11] See §440.103(3)(c), Fla. Stat. (2009)(c)(It is unlawful for any attorney .... to receive any fee .... from a person on account of services rendered for a person in connection with any proceedings arising under this chapter, unless such fee, consideration, or gratuity is approved by a judge of compensation claims....) JCCs have only applied this prohibition to claimant attorneys and not to employer or carrier attorneys. *Jacobson*, at 1049 (*supra*); *Altstatt v. Florida Dept. of Agriculture*, 1 So.3d 1285 (Fla. 1st DCA 2009).

a lawyer without being harmed. What claimants cannot do is navigate the procedurally and substantially complex workers' compensation system on their own. Further, the guideline only fee in §440.34 (2009) bears no rational relationship to the objective of enabling an injured employee to engage competent legal assistance and to penalize a recalcitrant employer. See *Ohio Casualty*. It does the opposite– preventing claimants from engaging competent counsel and providing no meaningful penalty to the recalcitrant employer.

Courts have repeatedly recognized the complexity of the workers' compensation system. E.g., *Bysczynksi v. UPS/ Liberty Mutual*, 53 So.3d 328 (Fla. 1st DCA 2010)("This case illustrates the complex nature of Florida's current Workers' Compensation Law, and the myriad of thorny legal and medical issues which accompany even the most fundamental decisions regarding an injured worker's entitlement to, and a carrier's liability for, medical treatment.") Taking into account the undisputed complexity of the workers' compensation system and the undisputed need for counsel to succeed, the fee restrictions irrationally relate to the intended purpose of protecting claimants. In addition, all lawyers swear to an oath of conduct and are subject to Bar Rules which obviate any concerns that attorneys will fleece their own clients. This further removes any rational relationship to protecting the rights of the class.

In the Matter of THE FLORIDA BAR, In re AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY (CONTINGENT FEES), 349 So.2d 630 (Fla. 1977), this Court reviewed a Petition for Amendment of the Code of

Professional Responsibility, recognizing the "constitutional right to make contracts for personal services so long as no fraud or deception is practiced and the contracts are legal in all respects." *Id.* at 632. This Court rejected a proposed amendment to impose a maximum contingent fee schedule and "impinge upon the constitutional guarantee of freedom of contract." *Id.* Dispensing with the notion that such a cap, which only exists in §440.34, was necessary, this Court rhetorically asked "where is the rational basis for the proposed regulation?" Id. This Court commented:

> On the record, briefs and argument before us there is no more rational basis to adopt as a part of our Code of Professional Responsibility the suggested maximum fee schedule than there is to establish such a maximum on the fees contracted for by architects, engineers, accountants or physicians, to name a few similar professions, for their activities to affect the public interest. It may be that to do so would lower the costs of such professional services, although there is no such guarantee. It is just as likely that the result would be to diminish the quality of service clients of these professions would receive or eliminate the services altogether for some..... However, we are persuaded that the most effective way to prevent any such overreaching is through diligent application of the time-tested criteria already contained in the Code of Professional Responsibility. The Florida Bar is charged with the responsibility to prosecute vigorously those who do not observe the Disciplinary Rules. We expect the Bar to discharge that responsibility diligently.

Id.

With the protections of the Bar and the Disciplinary Rules in place, very few members of the class need protection from unscrupulous attorneys or ill advised fee arrangements. Further, as noted in Argument I, *supra*, this is a judicial function, not a

legislative one. Thus, the classification bears no rational relationship to a legitimate legislative goal of protecting the class because not all members of the class are similarly situated. Injured workers need protection from E/Cs who deny their claims, force them into litigation and settlements by starving them out, exactly what Respondents did in the instant case.

With regard to the purported legislative interest of reducing premiums, §440.34, with its unilateral application, in unconstitutional because it is arbitrarily and capriciously imposed. See *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317, 319 (Fla. 1987). This Court previously reasoned in *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000) that the type of classification regarding aggregate caps or limitations on noneconomic damages violates equal protection when applied without regard to the number of claimants entitled to recovery. *Id*. at 972. Similarly, in *McCall*, this Court held that to reduce the cap on wrongful death noneconomic damages is not only arbitrary, but irrational, and "offends the fundamental notion of equal justice under the law." *McCall* at 901. This Court further stated that "[t]he constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation." *Id* (citing *Caldwell v. Mann*, 157 Fla. 633, 26 So.2d 788, 790 (1946)).

Differentiating between a claimant and an E/C with respect to

limitations on the payment of fees by one but not the other bears no rational relationship to the Legislature's stated goal of alleviating any purported crisis in the workers compensation industry. Further, §440.34 does not place claimants and E/Cs "before the law on equal terms" and it prevents claimants from enjoying "the same rights as belong to... others in a like situation." Thus, §440.34 is unconstitutional.

B. DUE PROCESS:

Section 440.34 (2009) further violates Zygmond's and Petitioners' due process rights. In *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla.1974), this Court held that the test used to determine whether a statute violates due process "is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." *Id.* at 15. Petitioners respectfully submit §440.34 and §440.105 violate their and the Claimant's procedural and substantive due process rights. By severely impairing, if not altogether eliminating, a claimant's ability to obtain counsel, a claimant's due process rights to be heard and to present evidence and in a meaningful way are eliminated, along with their counsel's ability to provide their clients with zealous representation free of conflicts of interest. Section 440.34 is discriminatory and arbitrary, as these fee restrictions impair only claimants and not carriers.

It accords with logic and reason that absent *pro bono* work, lawyers are not expected to work for free or for *de minimius*

compensation. "In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay, and children to educate." *United States Department of Labor v. Triplett*, 494 U.S. 715, 724-725 (1990). As this passage points out, the private practice of law is still a business. A lawyer who offers his time and the benefit of his experience should be able to receive reasonable compensation for his efforts. Indeed, it is for this very reason that the Bar and this Court has implemented rules that require that an attorney received a "reasonable" fee. (See Argument I, *Supra*)

The Claimant needed counsel to represent her in this case. The opportunity to be represented by counsel in both civil and criminal proceedings is equated with due process. *Times Publishing Co. v. Burke*, 375 So.2d 297 (Fla. 2d DCA 1979); *Sheinheit v. Cuenca*, 840 So.2d 1122 (Fla. 3d DCA 2003); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Petitioners respectfully submit that §440.34 and §440.105 (2009) are oppressive and violate the Claimant's procedural and substantive due process rights. By severely impairing, if not eliminating her ability to obtain counsel, the Claimant's due process rights to be heard and to present evidence in a meaningful way are eliminated along with Petitioners' ability to provide their clients with zealous representation free of conflicts. Any remaining due process rights are illusory as it is highly unlikely that a claimant would possess the legal skills to successfully prosecute a workers' compensation

claim. Further, Petitioners have a liberty and property interest in their legal time and expertise accumulated through investment in education and years of practice. By mandating strict application of the guideline fee without consideration of any factor other than the benefits obtained, §440.34 confiscated Petitioners' time, energy and talents without due process or opportunity to be heard. This fee restriction was discriminatory and oppressive as it only impairs attorneys representing claimants and it likewise bears no reasonable relationship to a legitimate legislative objective. See *Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.*, 753 So. 2d 55, 59 (Fla. 2000)(The effect of the attorney-fee provision in §627.736(5) delays insureds from receiving medical benefits by encouraging medical providers to require payment from insureds at the time the services are rendered rather than risk having to collect through arbitration and §627.736(5) arbitrarily distinguishes between the providers and insureds, violating providers' due process rights, and is unconstitutional.)

IV. THE WORKERS' COMPENSATION ACT NO LONGER REMAINS A REASONABLE ALTERNATIVE TO COMMON-LAW REMEDIES AND VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION.

The mandatory workers compensation law substitutes the benefits and procedures provided therein for the common law right of an employee to sue for injury. This 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, or where such right has become a part of the common law of the State

> pursuant to Fla. Stat. Sec. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a *reasonable alternative* to protect the right of the people of the State to *redress for injuries*, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973) (Emphasis supplied).

Those in the workers' compensation arena have debated for decades the question- at what point has the Legislature so curtailed benefits under the Act that it no longer provides "a reasonable alternative to protect the rights of the people of the State to redress for injuries?" *Id*. Petitioners assert that we are far past that point. The undisputed evidence in the present case shows that workers' compensation is no longer simple, expeditious, inexpensive or self-executing. The imposition of costs against an employee who does not prevail[12] accompanied by defenses of fraud (with criminal consequences) plus now, the inability to retain an attorney due to a rigid fee schedule render the system an unreasonable alternative. Rejecting a similar argument in *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991), this Court held that the workers' compensation law remains a reasonable alternative to tort litigation because:

> It continues to provide injured workers with **full medical care** and wage-loss payments for total or partial disability regardless of fault and **without the delay and uncertainty of tort litigation.**

[12]See §440.34(3), Fla. Stat. (2003); Ch. 2003-412, §26, p. 3944, Laws of Fla.

Thus, as to that attack, the statute passed constitutional muster. However, significant changes in the law have occurred since the decision in *Scanlan*, all of which further deprived the rights and access to courts of injured workers. In 1990, 1993, 2003 and 2009 the legislature instituted wide scale changes to the Act. These reductions in benefits have been more thoroughly set forth in the Amicus Brief filed by FWA and FJA in *Castellanos v. Next Door Co.* (#SC13-2082) and are incorporated herein by reference.

There has been a death of constitutionality by a thousand legislative cuts- a systematic stripping of benefits through numerous legislative "reforms." While no single cut is fatal; the cumulative cuts sound the death knell. The civil tort system offers a plethora of advantages compared to the Act. While both systems impose costs against the losing party, the plaintiff in circuit court retains the right to retain an attorney and the right to recover the full measure of his damages, including full lost wages. The circuit court plaintiff has the right to have a jury decide his case without having to meet the onerous major contributing cause standard.[13] So what "reasonable alternative" does the injured worker receive? Only that he need not prove fault. He still must abide by

[13]Instead of a liberalized "proximate cause" standard in civil court, a claimant must show, through "medical evidence only", at least 51%. See §440.09(1)(the compensable injury must be the major contributing cause of any resulting injuries.)

the same rules of evidence[14] (including complex *Daubert* hearings[15]), navigate the procedurally difficult system and then substantively prove his case with evidence only from authorized doctors handpicked by the E/C or by an IME that he pays for himself.[16] Then, he must dodge a myriad of affirmative defenses. If he can do all of that, he gets limited benefits, with nothing for pain and suffering. Nothing else is given in exchange for all he surrenders. Is that a "reasonable alternative?" No, it is a forced one.

So after chronicling all of these problems, with all of the changes in standards of proof and documenting all of benefits which have been stripped from workers and highlighting all of the procedural complexities which have been added to the Worker's Compensation system, one would be compelled ask, "why is it that a reasonable attorney's fee is the fix to the problem?" That indeed is the $64,000 question. The answer is obvious. The allowance of a **reasonable** attorney fee for a claimant who prevails is the key that unlocks the courthouse door for the claimant. It allows the claimant to secure representation when he otherwise would not be able to, such as the claimant in the instant case. Without intervention of competent counsel, the claimant is "as helpless as

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[14] The Florida Evidence Code applies in workers' compensation matters. *Amos v. Gartner, Inc.*, 17 So. 3d 829(Fla. 1st DCA 2009).

[15] See US Sugar Corp. v. Henson, 823 So.2d 104 (Fla. 2002). The more rigorous Daubert standard would now apply to claimants.

[16] §440.13(5), Fla. Stat. (2009) "...The party requesting and selecting the independent medical examination shall be responsible for all expenses associated with said examination..."

a turtle on his back." *Davis*, 463 So. 2d at 371. However, with an advocate acting on his behalf, who is armed with the knowledge that his efforts, if successful, will be rewarded with reasonable compensation as mandated by the Florida Bar guidelines and *Lee Engineering*, the claimant actually has a chance. With his First Amendment rights to free speech, right to due process and equal protection and rights to be rewarded for industry all safeguarded, the attorney can assist the claimant in overcoming the aforementioned procedural hurdles, evidentiary issues and substantive burdens of proof and prosecute and win the claim for benefits. Reasonable attorney's fees are the linchpin of the trade-off that allows the Worker's Compensation system to exist as a reasonable alternative to tort litigation (where injured persons enjoy access to courts for redress of their injuries.)

Article I Section 21 of the Florida Constitution provides:

> Access to courts. The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

It is often been said that the contingency is the "poor man's key to the courthouse." *In re The Florida Bar*, 349 So. 2d 630, 634 (Fla. 1977). In the unique realm of Worker's Compensation however, the guideline fee is a deadbolt instead of a key. Once a reasonable fee is returned to the equation, the courthouse doors are open and justice is again available without sale or denial. The reasonable fee levels the playing field and allows the workers' compensation system to exist as a reasonable alternative because it allows

claimants to access the courts for petition for redress of their injuries. See *Ohio Casualty,* at 470, *supra* (fee shifting enables an injured employee who has not received an equitable compensation award to engage competent legal assistance.)

The reasonableness of the alternative means by which an injury might be redressed, is, of necessity, a recasting of the question of whether a substitute system of redress enacted by the Legislature is a just and adequate substitute for those rights available through statutory or common law existing upon the adoption of the Declaration of Rights of the Constitution of the State of Florida on November 5, 1968. See *Eller v. Shova*, 630 So. 2d 537, 542 n.4 (Fla. 1993). In 1968, an individual injured at work retained either the right to sue in tort for injury and recover the full amount of her damages[17], including **full** lost wages and other non-economic damages, all without legislatively imposed restrictions imposed by the workers' compensation system, or that worker could file a workers' compensation claim, and if successful, her attorney would be paid a reasonable fee. See §440.34, Fla. Stat. (1967). In 2009, claimants have neither option, but instead must hope to find counsel willing to accept only a guideline fee.

While the rights available through statutory or common law existing upon the adoption of the Declaration of Rights need not be

[17] Mullarkey v. Florida Feed Mills, 268 So.2d 363 (Fla. 1972)("The deceased had the option to accept or reject coverage at the time of employment, under authority of Fla. Stat. §440.03 (1969), 440.05(2) (1969) and 440.07 (1969), F.S.A.")

"frozen" in time to mirror those rights as they existed in 1968, Petitioners submit that any rights substituted by the Legislature must be a "reasonable alternative" to those rights which are taken. In other words, a "commensurate benefit" must be provided as an alternative to the preexisting right or there is an access to courts violation. See *Mitchell v. Moore*, 786 So. 2d 521, 528 (Fla. 2001)("[i]n order to find that a right has been violated it is not necessary for the statute to produce a procedural hurdle which is absolutely impossible to surmount, only one which is significantly difficult"..... "In this case, however, there is no commensurate benefit or alternative means for judicial access provided in the statute.); see also *Nationwide Mut. Fire Ins. Co.*, 753 at 59 (*Supra*)(concluding that the mandatory arbitration provision in section 627.736(5) denies medical providers access to courts in because "it provides no commensurate benefits or procedural safeguards for medical providers subject to arbitration.") Here, the guideline fee is not a reasonable alternative to the rights that existed under the workers' compensation law in 1968, which included the right to a reasonable attorney fee payable by the E/C when benefits were wrongfully denied. Further, the guideline only fee, with the attendant ethical conflicts it creates (Argument I, *Supra*), is not a "commensurate benefit[18]" to a reasonable fee.

[18]Webster's Dictionary defines "Commensurate" as "corresponding in size or degree; in proportion." Here, there can be no question that a guideline fee of $50 per hour is significantly less in size, degree and proportion to a reasonable hourly fee that equated to $350 per hour. (R. 9, 29)

THE SOLUTION: This Court should determine §440.34 (2009) to be unconstitutional. In making such a declaration, the workers' compensation system would not collapse and every work place injury would not be thrown into circuit court. In *B.H. v. State*, 645 So.2d 987 (Fla. 1994), after the Court found §39.061 (1990) unconstitutional, it stated that "that Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor." see also *State ex rel. Boyd v. Green*, 355 So.2d 789 (Fla.1978). This rule applies where the loss of the invalid statutory language results in a "hiatus" in the law that would be intolerable to society. *B.H.*, at 995. Thus, the 2002 or the 2008 version of the statute would be "revived."

Petitioners are not unmindful of *Samaha v. State*, 389 So.2d 639 (Fla. 1980). There, an attorney assailed the constitutionality of §440.34(5)(1977) after being criminally charged for extracting a $5,000 fee from a claimant when said fee was not approved by the judge. This Court found that version of the statute did not violate due process, improperly delegate authority to the judge of industrial claims, or violate the equal protection clause by discriminating between contracts that lawyers make with different clients. *Samaha* is inapposite for five controlling reasons. First, the 1977 version the Act bears little if any resemblance to the 2009 version. After *Samaha*, the legislature removed the informality

of the system, by eliminating the "edge" in favor of the claimant when it enacted 440.015, Laws of 1990c. 90-201, s.8 which says:

> (T)he Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or the employer...

Thus, claimants, just like litigants in circuit court, have to prove every element of their claim. Quite simply, the sweet apples of 1977 do not compare to the bitter oranges of the 2012 workers' compensation Act. Second, the basis and rationale for the Act no longer exist. In *Samaha*, this Court relied on *Port Everglades Terminal Co. v. Canty*, 120 So.2d 596 (Fla.1960), quoting that:

> (T)he workmen's compensation law was intended to provide a direct, informal and inexpensive method of relieving society of the burden of caring for injured workmen and to place the responsibility on the industry served. Under the Act, if an injured employee is entitled to recover at all, the amount is fixed and definite, not contingent.... (Citations omitted)

The "direct, informal and inexpensive method of relieving society of the burden of caring for injured workmen" no longer exists. As evidence of the fallacy that the Act creates a "informal and inexpensive" process, Petitioners were compelled to spend 240 hours. The process was the opposite of inexpensive and informal. Also, *Samaha* noted that benefits "relate to the *employee's loss of earning capacity* and direct recuperative expenses." But there are no benefits for loss of earning capacity in the current Act. The idealistic system envisioned under *Canty* no longer exists.

Third, this Court reasoned that the statute was constitutional as the "Legislature is telling all that one doesn't

charge or receive a fee... unless such action and the fee are approved..." *Id*, at 640. Under the current statute, the Legislature said much more: it refused any discretion to the JCC to approve any fee that exceeds the guideline based on the value of benefits.

Fourth, this Court noted since a workmen's compensation claimant's benefits are limited, allowing an attorney to obtain a portion thereof, would thwart the public policy of affording the claimant necessary funds and cast the burden of support for that person on society generally. *Id*. This justification does not exist. While regulating the fees that can be taken from the claimant's weekly benefits might serve this purpose, regulating fees paid by the E/C has nothing to do with protecting a claimants benefits. Further, if the system is so complex that claimants cannot get benefits without an attorney, then it bears no rational relationship to this purpose. Finally, *Samaha* implicated a fee charged to the claimant and not a fee paid by the E/C.

CONCLUSION:

The Act is unconstitutional as it impermissibly violates separation of powers, the right to be rewarded for industry, and is no longer a reasonable alternative to an employee's common law. The Act violates the access to courts and equal protection provisions provision of our constitution and denies due process. This Court should declare §440.34 (2009) unconstitutional and revert to the 2008 version of the statute under which the JCC had the power to award a reasonable hourly fee using the *Lee Engineering* criteria.

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail the 1st of December, 2014 to: David Lamont, Esqquire at dlamont@bleakleybavol.com and to R.G. (Mack) McCormick, Jr., Esquire at MmcCormick@BleakleyBavol.com; Srodgers@BleakleyBavol.com, Attorneys for Respondents and filed with the Supreme Court of Florida.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is a computer generated brief in Courier New 12-point format and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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