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' REPLY BRIEF

LOUIS P. PFEFFER, ESQ.
250 South Central Blvd.
Suite 205
Jupiter, Florida 33458
(561) 745-8011
lpfeffer@pfefferlaw.com
Counsel for Petitioners

MICHAEL J. WINER, ESQ.
Law Office of Michael J. Winer, PA.
110 North 11th St., 2nd Floor
Tampa, Florida 33602-4202
(813) 224-0000
Mike@mikewinerlaw.com
Co-counsel for Petitioners

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PRELIMINARY STATEMENT AND INDEX OF ABBREVIATIONS

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

Respondents' Answer Brief will be cited as "AB" followed by the page number, e.g., (AB, 10)

Petitioners will also be referred to Pfeffer or Cerino and Ms. Zygmond, in particular, will be referred to as the "Claimant" (with a capital "C") and claimants in general will be referred to as "claimants" (lowercase "c").

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

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

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

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.

ARGUMENT

Although Respondents object to the Statement of Facts set forth in the Initial Brief, they fail to cite to specific errors or omissions. Petitioners stand by the facts as accurate and proper.

I. PETITIONERS HAVE STANDING TO ASSERT THE CONSTITUTIONAL INFIRMITIES OF FLORIDA STATUTE 440.34.

Respondents claim that Petitioners lack standing to assert the constitutional infirmities of §440.34 as they are not parties, that Ms. Zygmond is the real party-in-interest, and that Zygmond lacks standing because she received all her benefits through Petitioners' efforts, and thus suffered no "redressable injury." (AB, 10) Such claims are wrong both on the facts and the law.

First, Petitioners suffered economic harm due to the award of an unfair and unreasonable fee which did not even cover their overhead. Petitioners' losses are not merely "retrospective dissatisfaction." (AB, 10) Instead, as the record showed, if Pfeffer was not to receive a reasonable fee for succeeding, he would have never taken Zygmond's case due to financial and ethical concerns. (R. 248-250) Petitioners have a property right to be compensated for the meritorious legal work they performed and have standing to contest an order denying or determining the amount of such fee. See *Rosenthal, Levy et al v. Scott*, 17 So. 3d 872 (Fla. 1st DCA 2009); *Levine, Busch, Schnepper et al v. Pool Piling Enters*, 847 So. 2d 1039 (Fla. 1st DCA 2003).

Beyond suffering economic harm, Petitioners, as officers of the court, possess a sufficient interest in raising the

constitutional arguments, including a violation of Separation of Powers. See *Alachua County v. Scharps*, 855 So. 2d 195, 200 (Fla. 1st DCA 2003) (To have the adverse interest necessary for standing on the sole claim presented in this appeal, the Plaintiffs had to assert a violation of their constitutional right.) Petitioners, as licensed attorneys and mandatory members of the Florida Bar, serve the primary function of acting as an officer of the court for the administration of justice. *See The Florida Bar v. Schreiber*, 407 So. 2d 595 (Fla. 1981). Petitioners have a professional responsibility to perform functions necessary for the operation of the judicial system and have standing to challenge §440.34, which impermissibly, "directly or indirectly," interferes with the exercise of their ethical duties as officers of the court. *See Abdool v. Bondi*, 141 So. 3d 529, 553 (Fla. 2014).

Respondents' "form over substance" argument, that Petitioners are not "named parties" (AB 9-10), was never raised before the JCC in the proceedings below and has thus been waived. (R. 4-13, 191-95) Petitioners are indeed parties for this appeal. Florida jurisprudence recognizes that a "party" is "any person who participates in litigation regardless of whether or not actually named in the pleadings." *See Visoly v. Security Pacific Credit Corp*. 768 So. 2d 482, 489 (Fla. 3d DCA 2000); *Portfolio Invs. Corp. v. Deutsche Bank*, 81 So. 3d 534 (Fla. 3d DCA 2012)(litigant who filed motions and participated at hearing was party, and rejecting standing argument raised first time in answer brief). In the

instant case, Petitioners were more than just named in the pleadings. In fact, the JCC ordered the Respondents to pay attorney fees and costs directly to Petitioners Cerrino and Pfeffer. (R. 13)

In *Smith v. Chepolis*, 896 So. 2d 934, 935 (Fla. 1st DCA 2005), the court disfavored the very same attempts made by Respondents herein to apply the rule on parties in a "purely mechanical way" to prevent appellate review. The court held that "the right to appeal extends to a nonparty ... adversely affected by an order." *Id*, at 936. In the instant case, Petitioners fully participated in, are personally and professionally affected by the subject order on their fees. They meet the keystone ingredient for standing because they have sufficient personal or property rights at stake to ensure that they "will adequately represent the interest [they] assert." See *Brasfield & Gorrie Gen. Contractor, Inc. v. Ajax Constr. Co., Inc. of Tallahassee*, 627 So. 2d 1200, 1202 (Fla. 1st DCA 1993).

Respondents next urge that because Zygmond "retained counsel (including three different attorneys), asserted substantive rights through her lawyers, and received extensive benefits in the form of indemnity payments, authorized medical care, and a sizable lump sum settlement" that her rights were not violated. (AB, 10) Respondents assert that "should this Court strike down §440.34 it will have no impact on Ms. Zygmond as the actual party litigant/claimant." (AB, 11) Respondents fail to understand both the harm capable of being repeated and the definition of standing. With regard to the former, just because the Claimant was able to secure representation in this

case does not mean that no justiciable controversy exists. In *Murray v. Mariners Health/ACE USA*, 994 So. 2d 1051 (Fla.2008), this Court recognized that a claimant has standing to challenge the fee provisions in §440.34 even though adequately represented by counsel. Regarding the second point, Respondents argue that:

> It is a fundamental principle of constitutional law that a party cannot challenge the constitutionality of a statute unless it can be demonstrated that he has been, or definitely will be, adversely affected by its terms. *M.Z. v. State*, 747 So. 2d 978, 980 (Fla. 1st DCA 1999).

(AB, 11)

Petitioners acknowledge this as the correct test, one they met as they most certainly have been and will be adversely effected by the application of §440.34. Zygmond is likewise affected, as are others similarly situated in future cases. As the court recognized in *Pilon v. Okeelanta Corporation*, 574 So. 2d 1200 (Fla. 1st DCA 1991), imposing barriers to reasonable fees could:

> Ultimately result in a net loss of attorneys willing to represent workers' compensation Claimants. This could ultimately result in a chilling affect on Claimant's ability to challenge Employer/Carrier decisions to deny claims for benefits and disrupt the equilibrium of the party's rights intended by the Legislature in enacting Section 440.34.

II. §440.34 VIOLATES THE SEPARATION OF POWERS DOCTRINE

Respondents argue that the Legislature has "broad authority" to enact substantive law on attorney fee entitlement and "could even abolish prevailing party fees," and thus, if the legislature can abolish fees it "surely has authority to limit those fees to a percentage of benefits secured." (AB 13, 16) Respondents confuse

the legislature's power to establish *entitlement* to fees with the legislature's power to *limit* fees to unreasonable amounts. While fee shifting statutes are constitutional, they become unconstitutional when they eliminate reasonable fees to the point of affecting an attorney's professional independence or when they subvert a fair and functioning justice system.

Respondents' contention that §440.34 is constitutional both facially and as applied is based upon a faulty premise: that the legislature has unfettered power to determine the criteria for awards of fees, whether such fees are reasonable or unreasonable. Their argument directly contradicts this Court's repeated pronouncements on the pivotal role that attorneys play in ensuring the administration of justice in Florida courts and ignores the critical importance that "reasonable" fees play in assuring a credible, fair and functioning justice system. (IB, 19-21); *See Baruch v. Giblin*, 164 So. 831, 833 (Fla. 1935)(unreasonable fees constitute a "species of social malpractice [results] that undermines the confidence of the public in the bench and bar" bringing courts "into disrepute and destroy its power to perform adequately the function of its creation.") Respondents' argument also contravenes the Florida Bar mandate that every "fee agreement must provide reasonable and adequate compensation," which "must not be excessive or so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate." See *Florida Bar Ethics Opinion 98-2* (June 18, 1998). Further, such

contention defies this Courts' holdings in *Lee Engineering v. Fellows*, 209 So. 2d 454, 458 (Fla. 1968) and *Murray at* 1061 (*supra*), requiring that "the factors in Rule 4-1.5(b) are to be applied" in awarding fees in compensation cases.

Respondents insist, however, that the legislature's power to regulate fees is so great that such power even trumps the Rules of Professional Conduct. (AB 7,18,19) Respondents treat Rule 4-1.5 as irrelevant and "implicating only how much an attorney may ethically charge his own client." (AB, 18) Respondents' analysis altogether ignores Rule 4-1.7(a)(2), which prohibits conflicts of interest. Respondents do not cite any case establishing that the legislature has *absolute*, *unfettered* power to set criteria to determine a "reasonable" attorney's fee. Instead, Respondents rely on *Schick v. Department of Agriculture & Consumer Services*, 599 So. 2d 641, (Fla. 1992) for the proposition that where the legislature specifically sets forth the criteria for a fee, only those legislatively enumerated factors may be considered. (AB, 17) *Schick* is inapposite for two compelling reasons. First, the fee shifting statute there specifically mandated a "*reasonable attorney's fee*" for defending eminent domain actions."[1] In contrast, the fee shifting of §440.34 does not mandate a "reasonable" fee. Second,

[1]See sections 73.091 and 73.092, Florida Statutes (1987), the latter of which mandates a consideration of the many of the very same factors required under Lee Engineering, e.g., the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause.

Schick simply held that a contingency risk multiplier should not be utilized in setting a "reasonable" fee in inverse condemnation actions. There was no grossly unreasonable fee at issue in *Schick* nor was there a fee so low as to impair an attorney's ethical responsibilities to his client. Indeed, this Court implicitly recognized the necessity of "reasonable fees" and the power of the judiciary branch to ensure this requirement is met, stating that in awarding fees that are reasonable:

> the principles to be utilized in computing [the] fees must be flexible to enable the [court] to consider rare and extraordinary cases with truly special circumstances. *Schick,* at 644, citing to *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 835(Fla. 1990).

Respondents argue that §440.34 is constitutional as applied as Zygmond obtained "true justice" when Petitioners complied with their ethical duties and "effectively represented" her. (AB 7,11,21) But Petitioners need not violate their ethical duties and actually injure clients. Instead, a statute which even "indirectly" interferes with an attorney's exercise of their ethical duties violates the separation of powers doctrine. *Abdool,* at 553. (*Supra*)

Without the prospect of reasonable fees, it is almost impossible to zealously assert a client's position with "commitment and dedication" as required by the Code of Professional Responsibility.[2] Pfeffer testified that if he was not able to earn a reasonable fee, he would have never represented Zygmond, because

[2]See, Chapter 4. Rules of Professional Conduct Preamble: a Lawyer's Responsibilities

without this, an attorney "cannot perform his ethical duties of vigorously" representing a client. (R. 248, 250) Pfeffer did not "voluntarily choose to work" on a contingency basis as Respondents suggest. (AB, 19) Rather, the contingent representation at a rate of 10% of benefits obtained was foisted upon him, as this the *only* method of representation permitted by §440.34.

Respondents claim a "reality" where high yield cases effectively offset those with smaller recovery and that "the percentage based fee schedule means some claims will yield substantial fees while others prove to be less profitable." (AB, 19) Respondents allegations are not only without record support, but they are also an outright distortion of the ethical conflicts Petitioners face in attempting to represent injured workers in the unlevel playing field under §440.34. Furthermore, Respondents endorse outcomes where fees would occasionally be unreasonably high, a result also precluded. See *Baruch*, So. 831, 833 (supra).

Pfeffer testified, without rebuttal, that the fee limitations have rendered workers' compensation into "a settle system," where "Carriers ... expect you to settle the case." (R. 247) Why? Because without reasonable fees, Carriers know there is no level playing field and they can deny claims at will. He testified that the "only way you can survive as a claimant's attorney is by settling the cases, click, click, click." (R. 249) Ironically, the system implemented by the legislature defeats the very purpose of having a fee shifting provision in §440.34. 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.

Pfeffer testified he was pressed by the E/C to settle Zygmond's claim at an early juncture, but because of his representation, she refused. (R. 251-55). If he had not "zealously, aggressively represented Ms. Zygmond," she would have been forced into settling her case for $5,000 or $10,000. (R. 247-55). But for his zealous representation, the truth of Zygmond's mis-diagnosis by the E/C's doctors and the extent of her injuries (a fractured kneecap) would have been swept under the rug. For claimants in general, and Zygmond in particular, when there is no attorney to help win a case denied by the E/C, the cost of caring for the work related injuries cast on society. In *Port Everglades Terminal Co. v. Canty*, 120 So.2d 596 (Fla.1960), this Court recognized that the workers' compensation law exists to prevent that, stating:

> (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.... (Citations omitted)

Despite the obvious separation of powers violation, Respondents argue that §440.34 is facially constitutional. Citing

Crist v. Ervin, 56 So.3d 747 (Fla. 2010), Respondents argue that "one can envision cases where the statutory fee is not only reasonable but...even excessive." (AB. 6,15) To the contrary, the legislature's removal of the word "reasonable" renders §440.34 facially unconstitutional for a number of reasons. First, removing "reasonable" from §440.34 destroys the system's level playing field which "must remain balanced" and "fair to both sides." See *Perez-Borroto v. Brea*, 544 So. 2d 1022, 1023 (Fla. 1989). Second, deleting "reasonable" from the statute inherently and impermissibly places attorneys representing injured workers in a conflict of interest prohibited by Florida Bar Rule, 4-1.7. Third, the deletion of "reasonable" directly and/or indirectly interferes with an attorney's duty to competently exercise independent legal judgment for the benefit of the client. Fourth, the removal of the word "reasonable" would allow awards of unreasonable fees including excessive fees which undermines the proper functioning of the workers' compensation system threatening public confidence in the credibility of the judicial system. See *Baruch*, (supra).

This Court has traditionally applied a strict separation of powers doctrine. *State v. Cotton*, 769 So.2d 345, 353 (Fla.2000). In so doing, this Court will strike down legislative action that undermines the independence of Florida's judicial offices or officers. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 269 (Fla. 1991)(This Court has an independent duty and authority as a constitutionally coequal and coordinate branch of the government

of the State of Florida to guarantee the rights of the people to have access to a functioning and efficient judicial system). An attorney has the right and duty to practice his profession in the manner required by the Code of Professional Responsibility, unfettered by clearly conflicting legislation which renders the performance of his ethical duties impossible. Accordingly, this Court should strike §440.34 as facially unconstitutional.

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

Respondents do not challenge that the right to be rewarded for industry and first amendment rights are fundamental ones which compel a strict scrutiny standard. Instead, Respondents argue that because everyone in this state has the right to be rewarded for industry, then there can be no "suspect class" because the allegedly affected right belongs to "everyone in this state." (AB, 25) In *Shevin v. International Inventors, Inc.*, 353 So. 2d 89, 93 (Fla. 1977), this Court recognized that "Article I Section 2 of the Florida Constitution (1968) guarantees to everyone the *inalienable* right to be rewarded for industry.... and the right to do business and to contract free from unreasonable government regulation." In *North Florida Women's Health v. State*, 866 So.2d 616, 635 (Fla. 2003), this Court held that:

> [i]t is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. Legislation intruding on a fundamental right is presumptively invalid...

Id. at 635-36.

Thus, the mere fact that all citizens enjoy the right to be rewarded for industry does not diminish the fact that is a fundamental right under the declaration of rights.

Respondents next minimize the criminal implications of §440.105(c)(3) and its impact on free speech, stating that these concerns fo "not apply to Ms. Zygmond and, given the non-existence of charges against counsel, is not subject to constitutional challenge." (AB, 26-27) Respondents fail to apprehend that the instant case, and all other similarly situated claims, involve a real and immediate harm that is irreparable in terms of the criminal consequences imposed on Claimant's attorneys in Florida for proceeding with representation in excess of the guideline fee. If the Claimant attorney accepts any fee that either exceeds the fee schedule or is not approved by the JCC, it is a crime. See §440.105. Thus, the Claimant's attorney is placed in the untenable position of subjecting himself to criminal prosecution or denying to represent the Claimant for the ethical issues noted above, leaving the Claimant helpless and without a voice through her attorney, spoken or written, before the court during litigation, thereby violating her first amendment rights. See *Jacobson v. Southeast Pers. Leasing, Inc.*, 113 So. 3d 1042, 1048 (Fla. 1st DCA 2013). This threat of criminal prosecution for Claimant attorneys imposes a chilling effect and restricts free speech. A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the

full exercise of first Amendment freedoms and establish injury to justify a review by this Court. See *Smith v. California*. 361 U. S. 147; *Dombrowski v. Pfister*, 380 U.S. 479 (1965)(The allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.)

Respondents also argue that "Ms. Zygmond readily obtained counsel and successfully litigated claims for benefits, so there can be no colorable argument regarding free speech violations." (AB, 28) Respondents ignore the fact that review of this case is proper because the harm is capable of repetition yet evading review, i.e. no attorney will take the next type of these cases absent a reasonable fee (R. 248), and claimants will not be able to find representation on a contingency fee basis using a guideline fee. (R. 173) See *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); *N.W. v. State*, 767 So.2d 446, 447 (Fla. 2000).

Ironically, Respondents cite *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 722 (1990) for the proposition that "When fees are payable by persons other than the claimants ... regulation is designed to assure fairness to the employer [or] carrier ... and to protect those sources from a depletion that would leave other

claimants without a source of compensation" (AB, 14), and there must me more than anecdotal evidence "to prove a challenged regime made attorneys "unavailable," it must be shown that claimants could not obtain representation, and that this unavailability of attorneys was attributable to the fee regime. (AB, 28)

Regarding Respondent's former point (AB, 14), the articulated concerns of "fairness" is precisely what Petitioners are seeking herein- a fee that is reasonable and fair and that would not leave claimants without a source of compensation. In response to Respondents' latter point, the sworn testimony of Pfeffer (an AV[3] rated attorney, practicing in the field of workers' compensation for 30 years) (R. 40-42) and of Professor Chinarous, the Ethics Director for the Florida Bar from 1989 to 1997 (R. 132-190), was anything but anecdotal. Their collective testimony established that absent a reasonable fee, the lawyer is not going to take the case and, therefore, under the conflict rule should decline to take the case due to the impermissible conflict of interest. (R. 167-168) Thus, claimants have their first amendment freedoms abridged because they lose the right, for lack of a reasonable fee, to have an attorney speak on their behalf.

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

Respondents' arguments on this point are based on the flawed premise that claimants do not have a right to counsel in workers

[3] An AV rating by Martindale Hubbell is a status only awarded to 2% of attorneys.

compensation cases. Respondents cite *McDermott v. Miami-Dade County*, 753 So.2d 729, 731-32 (Fla. 1st DCA 2000) in support of their erroneous premise. The facts and holding of *McDermott* were limited to the right of the claimant to consult with his counsel during a break of the claimant's deposition. See *McDermott, at 732)(*"The issue was whether the employer should be allowed to continue the deposition as if it had never been improperly interrupted by McDermott's attorney.") The due process and equal protection rights of injured workers be heard at an evidentiary hearing includes more than simply being allowed to be present and speak. Also included is the right to introduce evidence at a meaningful time and in a meaningful manner and the opportunity to cross examine witness and to be heard on questions of law. *AT& T Wireless Services Inc. v. Castro*, 896 So.2d 828 (Fla.1st DCA 2005). The Claimant's 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). Thus, claimants do have the right to counsel, a right which sections 440.34 and 440.105(3) abridge resulting in a denial of equal protection as the Legislature created irrational classifications which result in an arbitrary or capricious application of the law.[4]

[4] See Corn v. New Mexico Educators Federal Credit Union, 889 P. 2d 234, 243 (N.M. Ct. App. 1994), the court, addressing a statute that restricted what claimants could pay their own

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail the 26th of January, 2015 to: David Lamont, Esquire 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).

Michael J. Winer
Michael J. Winer, Esquire
Florida Bar No.: 0070483
Law Office of Michael J. Winer, P.A.
110 North 11th Street, 2nd Floor
Tampa, FL 33602-4202
Mike@mikewinerlaw.com
Starla@mikewinerlaw.com
Telephone: (813) 224-0000
Facsimile: (813) 224-0088

LOUIS P. PFEFFER
LOUIS P. PFEFFER, ESQ.
250 South Central Blvd., Ste 205
Jupiter, Florida 33458
(561) 745-8011
lpfeffer@pfefferlaw.com
Counsel for Petitioners

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attorneys but provided no such restriction relating to carrier attorneys' fees, 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).