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In the Supreme Court of Florida

CASE NO. SC14-738
LT NOS. 1D13-4138; 09-030957TWS

CYNTHIA RICHARDSON,

Petitioner,

- v. -

ARAMARK/SEDGWICK CMS,

Respondent.

ANSWER BRIEF OF ARAMARK/SEDGWICK CMS

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL CERTIFYING A QUESTION OF GREAT PUBLIC IMPORTANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Treatises

Legislative History

INTRODUCTION

The petitioner, Cynthia Richardson, seeks review of the February 18, 2014, decision of the First District in *Richardson v. Aramark/Sedgewick CMS*, 134 So. 3d 1133 (Fla. 1st DCA 2014), which affirmed an order of the judge of compensation claims ("JCC") awarding Richardson prevailing party attorney's fees. This proceeding involves a purported as-applied challenge to the constitutionality of the attorney's fees cap contained in sections 440.34(1) and 440.105(3)(c), Florida Statutes.

STATEMENT OF CASE AND FACTS

Richardson injured her back, shoulders, and neck at work on October 26, 2009. (R.32.)[1] In September 2012, her pain management provider discharged her for non-compliance with a pain management agreement. (R.239.) Through counsel, she filed a petition for benefits on October 2, 2012, seeking authorization for a new pain management provider (R.36, 38-40.) On March 22, 2013, several days after a second petition for benefits asking for authorization was filed, the E/C responded that the new pain management provider was authorized. (R.32-34, 592.)

After the E/C abandoned its initial position of denying entitlement to attorney's fees, Richardson filed a verified motion for attorney's fees, in which her

[1] Citation to the record on appeal shall be "R.[page number]."

counsel asserted that he had expended 105.45 hours in securing the benefit for his client, and that a reasonably hourly rate would be $250 to $300 per hour, for a total of $26,362.50 to $31,635.00. (R.21.) In support of the motion, Richardson submitted the affidavit of David E. Mallen, an attorney whose practice consists of representing workers' compensation claimants. (R.74.)

Mallen affirmed that based upon the criteria set forth in the rules of professional conduct and in *Lee Engineering & Construction Co. v. Fellows*, 209 So. 454 (Fla. 1968), $250 to $350 was a reasonable hourly fee for the "105.12" hours required to pursue the benefits, or a total of $26,362.50 to $36,792.00. (R.75-76.) Mallen opined that the cap on fees set forth in section 440.34(1), Florida Statutes (2009), had "severely suppressed my ability to represent workers' compensation claimants." (R.78.) He further opined that "the statutorily-capped attorney fees reward a litigious defense and destroy the claimant's ability to obtain competent counsel as evidenced in *Keeto v. Davis* [sic]."[2] (R.78.) Mallen affirmed that his average fee for dates of accident prior to October 2003 had been more than $250 per hour, and that since October 2009, his average fee had been under $75 per hour. (R.78.) The balance (if not the majority) of the affidavit consisted of

[2] *Davis v. Keeto, Inc.*, 463 So. 2d 368, 371 (Fla. 1st DCA 1985) (observing that if the amount of benefits obtained were the lone factor considered in setting the maximum amount of a fee award, "the employer/carrier could resist payment of smaller claims, and those claims would be virtually uncollectable").

Mallen's legal opinions on the constitutionality of the fee cap in section 440.34. (R.78-80.)

Attached to Mallen's affidavit were summaries from the annual reports of the Office of the Judge of Compensation Claims ("OJCC") for the fiscal years 2001-2002 through 2011-2012. (R.107-26.) The summaries showed that the gross number of petitions filed had declined from 150,801 in 2002 to 61,354 in 2012. (R.108, 125.) The summary for 2011-2012 reflected that the amount of claimant attorney's fees paid for that fiscal year was $152,848,003, and that the amount of defense fees reported was $264,022,959. (R.108.) Also attached to the affidavit was a document entitled "The following is a post by David DePaolo on linkedin," in which the author wrote that the total amount of claimant and defense fees paid for the fiscal year 2002-2003 was $430,705,423, with 48.9% of that amount paid to claimants and 51.1% paid to the defense. (R.128.) Attached as well to the affidavit was a printout of a May 2012 article from the website of Insurance Journal, which stated: "[Florida s]tate regulators reported that workers' comp insurers paid out only about $200 million in excess profits since 2003, which is less than one percent of the state's total premium base." (R.127.)

At a hearing on the motion for attorney's fees, the parties stipulated that the value of the pain management benefits secured was $10,000. (R.826.)

Mallen testified at the hearing that the OJCC annual reports were "some of the best evidence you could ever . . . find in print of the *Keeto* effect" and how claimants were

> literally unable to bring their claims, unable to find lawyers to bring their claims, unable to pursue smaller benefits – uh, unable to have their attorneys paid, while, at the same time, the Defense Bar hasn't seen any – uh – uh, negative impact of the – uh, 2003 or 2009 – uh, reforms.

(R.846.) Mallen further testified that the decrease in the number of petitions reflected in the annual reports

> memorializes and evidences the *Keeto* effect that . . . from the moment these fee caps were – uh, attempted to be put into place in '03 and then replaced in '09 – uh, claimants are unable to successfully secure attorneys and bring claims, especially for the *Keeto* effect, smaller cases. They – if you have an unpaid prescription, an unpaid medical bill, an unpaid MRI . . . uh, your physical therapy wasn't paid, you're helpless. There's nothing you can do. No one will take that case.

(R.847.)

Noting that the total amount of fees paid had remained essentially the same over the period from 2002 to 2012, while the defense bar's share of fees had risen to over sixty percent in 2012 from an almost equal share in 2002, Mallen observed:

> That alone is evidence of the *Keeto* effect. That alone is staggering, but when you take into account that claims are down, claimants' fees are down, petitions are down, the percentage of claimants' fees are down, while at the same time, on less than half the cases, fewer than half the

> cases the Defense Bar is still billing the same amount – they're billing two to three times the amount per case as they did before these – uh, went into effect, because their fees are unregulated. Their fees don't have to be approved. Their fees are unchecked. And it's just a license to litigate.

(R.848-49.)

The JCC issued an order stating that, as an executive branch officer, he did not have the inherent judicial power to exceed the fee cap contained in section 440.34, Florida Statutes. (R.10.) He therefore ordered the E/C to pay claimant's counsel the statutory guideline fee of $1,750, as well as $1,250 in costs. (R.10-11.)

Based upon its decision in *Castellanos v. Next Door Co.*, 124 So. 3d 392 (1st DCA 2013), *review granted*, 145 So. 3d 822 (Fla. 2014), the First District affirmed. *Richardson*, 134 So. 3d at 1134. The First District certified that its disposition of the case passed upon the same question certified in *Castellanos*. *Id.* That question read: "Whether the award of attorney's fees in this case is adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and federal constitutions." *Castellanos*, 124 So. 3d at 394.

After Richardson filed a notice of invoking the Court's discretionary jurisdiction, the Court ordered that the proceedings be stayed pending disposition of *Castellanos*. (Order of Apr. 24, 2014.) Two days after hearing oral argument in *Castellanos*, the Court lifted the stay and accepted jurisdiction. (Order of Nov. 7, 2014.)

SUMMARY OF ARGUMENT

The application of the statutory fee scheme in this case worked no violation of the separation of powers provision of article II, section 3 of the Florida Constitution. The cases upon which Richardson relies to support her argument are fundamentally grounded in the judicial branch's role in protecting the constitutional right to effective assistance of counsel, which is inapplicable in the workers' compensation context. In addition, while the inherent power of the judiciary in Florida encompasses the regulation of attorneys, that power does not extend to the right to attorney's fees, which is a substantive right within the domain of the Legislature. Furthermore, the conclusory and anecdotal opinion evidence introduced by Richardson is insufficient to overcome the presumption of constitutionality.

Although Richardson contends in the alternative that section 440.34(1) violates the right to be rewarded for industry, she does not possess standing to assert a violation of a constitutional right personal to her counsel. Even if she did have standing, Richardson is incorrect that the right to rewarded for industry is a fundamental right requiring the application of strict scrutiny because the Court's precedent has regularly required application of the rational basis test. The challenged statutory scheme is not arbitrary because it treats all workers' compensation claimants the same, and it bears a rational relationship to the legitimate state interest in regulating attorney fees in workers' compensation cases.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law subject to de novo review. *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010).

ARGUMENT

I. The Statutory Fee Scheme in Sections 440.34(1) and 440.105(3)(c), Florida Statutes, Is Constitutional as Applied to the Facts of This Case.

It is well established that a law enacted by the Legislature is presumed to be constitutional, and that all reasonable doubts are to resolved in favor of its validity. *Belk-James, Inc. v. Nuzum*, 358 So. 2d 174, 177 (Fla. 1978). The burden rests on the party challenging the law to show that it is invalid. *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1214 (Fla. 2000). An as-applied challenge, as Richardson makes here, involves "the constitutional application of a statute to a particular set of facts." *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002).

A. Richardson Has Failed to Show That the Fee Cap Violates the Separation of Powers Provision in the Florida Constitution.

Richardson contends that the attorney's fees schedule contained in section 440.34(1), Florida Statutes (2009), is unconstitutional on the grounds that its application to the facts of this case violates the separation of powers provision contained in article II, section 3 of the Florida Constitution. Richardson also challenges on the same grounds the constitutionality of section 440.105(3)(c),

which makes it a first-degree misdemeanor for any attorney to receive a fee that has not been approved by a judge of compensation claims.

As a preliminary matter, it must be noted that Richardson's challenge to section 440.105(3)(c) fails right out of the gate. Section 440.105(3)(c) is a criminal statute, and her counsel was not (and could not have been) charged with its violation. As the Court has held, "the constitutionality of a criminal statute should be determined either in a proceeding wherein one is charged under the statute or in an action alleging an imminent threat of such prosecution." *Tribune Co. v. Huffstetler*, 489 So. 2d 722, 724 (Fla. 1986).

1. *Makemson* Does Not Warrant a Finding That the Fee Cap Is Unconstitutional as Applied.

Richardson places great stock in *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), as a basis for finding the statutory fee cap unconstitutional under the separation of powers provision in the Florida Constitution. (Brief of Pet'r at 23-25.) *Makemson*, however, involved highly unusual circumstances and atypical representation. The attorney in *Makemson* was appointed by the court pursuant to section 925.036, Florida Statutes (1981), to represent an indigent defendant charged with murder, kidnapping, and armed robbery. 491 So. 2d at 1110-11. The victim was of considerable local prominence, and the office of the state attorney brought the full power of its weight to bear. *Id.* at 1111. After a change of venue, the attorney spent sixty-four hours in a courthouse some 150 miles from his home.

Id. Section 925.036 allowed only $3500 as compensation for the representation, and did not allow for the consideration of any exceptional circumstances that might arise during the representation. *Id.* at 1112.

The Court found section 925.036 unconstitutional as applied to the facts of the case inasmuch as it "curtail[ed] the court's inherent power to ensure the adequate representation of the criminally accused." *Makemson*, 491 So. 2d at 1112. By becoming such "an oppressive limitation," the statute "impermissibly encroache[d] upon a sensitive area of judicial concern." *Id.* Thus, the statute not only violated the separation of powers provision in article II, section 3 of the Florida Constitution, but also – and "[m]ore fundamentally" – interfered with the Sixth Amendment right to counsel. *Id.*

The Court in *Makemson* observed that its focus was on "the defendant's right to effective representation rather than the attorney's right to fair compensation," although it found "the two inextricably linked." *Makemson*, 491 So. 2d at 1112. Unlike *Makemson*, however, here there is no constitutional right of effective representation to which any right of the attorney to fair compensation can be linked. A claimant has no constitutional right to counsel in workers' compensation proceedings. *McDermott v. Miami-Dade County*, 753 So. 2d 729, 732 (Fla. 1st DCA 2000).

Furthermore, the workers' compensation system in Florida is entirely a creature of statute. *City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1200 (Fla. 2000). In enacting the Workers' Compensation Law, the Legislature intended that, as a general rule, claimants pay their own attorney's fees.[3] *See* Fla. H.R. Gen. Gov't Pol'y Council, CS for HB 903 (2009) Staff Analysis 3 (final Mar. 18, 2009) ("Generally, a workers' compensation claimant is responsible for paying his or her own attorney's fees."). Indeed, any right to prevailing party attorney's fees in a workers' compensation proceeding is, as discussed *infra*, a substantive right within the prerogative of the Legislature, which could simply decide to abolish such fees.

In short, without a constitutional concern with which a claim of purportedly unfair attorney compensation can be combined, the claimant is left with just that: a claim that the amount of fees the employer-carrier has been required to pay his or her attorney is inadequate. Rather than being a violation of the separation of powers doctrine that can be remedied in the courts, this is merely a claim of unfairness that can only be redressed in the Legislature.

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[3] Indeed, "attorney-fee legislation in many of the states requires each party to pay his or her own attorney, regardless of whether the party prevails, and no constitutional provision appears to be implicated." *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 511 (Fla. 1st DCA 2006) (Ervin, J., concurring) (citing 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 133.01, at 133–2, 3 (2005)).

Additionally, *Makemson* provides a faulty basis to challenge the section 440.34(1) fee cap as being unconstitutional as applied in this case. Counsel for the claimant began his representation in this case in September 2012, (R.36, 55), more than three years after the 2009 amendment to section 440.34 went into effect. Counsel was thus well aware of the fee cap in section 440.34(1) when he accepted the claimant's case. This Court has rejected *Makemson* challenges to fee caps where the attorney undertook representation of a client with knowledge of the cap. *See Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 931 (Fla. 2002) (finding *Makemson* inapplicable where appointed conflict counsel in capital case "accepted representation knowing that the chief judge of the circuit had established an hourly rate of $40").

2. The Fee Cap Does Not Intrude Upon the Inherent Power of the Judiciary.

Richardson nevertheless claims that the doctrine of inherent judicial power, as invoked by the Court in *White v. Board of County Commissioners of Pinellas County*, 524 So. 2d 428 (Fla. 2d DCA 1988), and, more recently, in *Public Defender, Eleventh Judicial Circuit v. State*, 115 So. 3d 261 (Fla. 2013), precludes the Legislature from enacting a fee cap in workers' compensation proceedings because the judiciary is charged with the regulation of the practice of law. (Brief of Pet'r at 25-27.) But such regulation is a judicial ***function***. The "[a]llowance of fees is a judicial ***action***." *Lee Eng'g & Constr. Co. v. Fellows*, 209 So. 2d 454,

457 (Fla. 1968) (emphasis added). The judiciary cannot be the ***source*** of any right to attorney's fees because "the circumstances under which a party is entitled to costs and attorney's fees is substantive," *Timmons v. Combs*, 608 So. 2d 1, 2-3 (Fla. 1992), and the Legislature "is entrusted with the task of enacting substantive law." *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995).

Richardson further contends that through its 2009 amendment of section 440.34(1), Florida Statutes, the Legislature has "abrogated" the time and labor factor set forth in Rule Regulating The Florida Bar 4-1.5(b)(1)(A) for determining a reasonable attorney's fee. (Brief of Pet'r at 28.) Richardson, however, conflates ethical rules with substantive law. The rules of professional conduct govern what an attorney may ethically charge for his or her services. Section 440.34(1) dictates the amount of attorney's fees a prevailing claimant may recover from an employer-carrier. Neither the Rules Regulating The Florida Bar nor any other rule of court create any right to attorney's fees inasmuch as that is a substantive right within the exclusive purview of the Legislature. *See Dvorak*, 663 So. 2d at 611; *Timmons*, 608 So. 2d at 2-3. Moreover, the Court has specifically recognized that a statutory cap on attorney's fees "does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law." *Ingraham ex rel. Ingraham v. Dade County Sch. Bd.*, 450 So. 2d 847, 849 (Fla. 1984).

Richardson next maintains that a Minnesota case, *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132 (Minn. 1999), is "highly instructive." (Brief of Pet'r at 29.) *Irwin* did strike down a statutory workers' compensation fee scheme apparently similar to the one contained in chapter 440. However, it did so by taking an inordinately expansive view of the doctrine of inherent judicial power, finding that the statute "impinges on the judiciary's inherent power to oversee attorneys ***and attorney fees***." *See id.* at 140. While the judicial power to regulate the practice of law in Minnesota may well encompass the regulation of attorney's fees, that is clearly not the law in Florida. *See Ingraham*, 450 So. 2d at 849.

Richardson then asserts that another rule applicable to the facts of this case "is that once the legislature confers a statutory right, it must furnish such right to all persons without invidious discrimination or run afoul of the equal protection clause." (Brief of Pet'r at 31.) Richardson contends that while the Legislature has provided claimants with a statutory right to attorney's fees, it has only required claimant's counsel to seek approval from the JCC of the fee amount paid, and not counsel for the employer-carrier. (*Id.*)

Confusingly, Richardson apparently argues that this is somehow in violation of the principle set forth in *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), in which

the Court required the filing of an *Anders*[4] brief before appointed appellate counsel could withdraw in an appeal from an involuntary civil commitment order. Richardson points out that the *Pullen* Court found "constitutional constraints [to be] imposed on the state when it chooses to" create appellate review. To the extent that Richardson argues that constitutional constraints are imposed here by mere dint of a provision requiring that statutorily granted prevailing claimant's fees be approved by the JCC, where an employer-carrier's fees are subject to no such approval, it should be noted at issue in *Pullen* was one of the most fundamental of rights: the right to liberty. No such fundamental right is implicated by section 440.34(1).

As yet another purported example of a case involving a statutory rather than constitutional right, Richardson cites *Remeta v. State*, 559 So. 2d 1132 (Fla. 1990). In *Remeta*, the Court extended *Makemson* to appointments of counsel in executive clemency proceedings pursuant to section 925.034, Florida Statutes (1987), on the basis that "this statutory right necessarily carries with it the right to have effective assistance of counsel." *Remeta*, 559 So. 2d at 1135. According to Richardson, "[t]he statutory right to counsel in workers' compensation cases necessarily carries with it the right of the injured worker to have access to counsel." (Brief of Pet'r at 32.)

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[4] *Anders v. California*, 386 U.S. 738 (1967).

There is, of course, no "statutory right to counsel in workers' compensation cases." And there certainly is no companion "right of the injured worker to have access to counsel" – whatever Richardson means by that. *See Bova v. State*, 410 So. 2d 1343, 1345 (Fla. 1982) ("Right-to-counsel protections do not extend to civil parties . . . ."). Similar to the concern expressed in *Makemson*, the concern of the Court in *Remeta* was "to ensure effective representation and give effect to the right to counsel in these death penalty clemency proceedings." 559 So. 2d at 1135. As discussed *supra*, the constitutional considerations inherent in a criminal case, and certainly a death penalty case, are obviously all too absent in a workers' compensation proceeding.

Citing two parental rights cases, *In the Interest of D.B.*, 385 So. 2d 83 (Fla. 1980), and *Board of County Commissioners of Hillsborough County v. Scruggs*, 545 So. 2d 910 (Fla. 2d DCA 1989), Richardson argues that "the inherent judicial power under the separation of powers doctrine" to invalidate fee cap statutes "is not limited only to criminal cases inhering in the Sixth Amendment right to counsel." (Brief of Pet'r at 34-35.) Yet like the criminal cases cited by Richardson, in which the fundamental guarantee of effective assistance of counsel was implicated, the parental rights cases also involved a fundamental interest: the "constitutionally protected interest in preserving the family unit and raising one's children." *D.B.*, 385 So. 2d at 90.

The Court in *D.B.* found that the due process clause of the Florida and United States Constitutions mandated a right to counsel in proceedings where this interest was at stake. 385 So. 2d at 90-91. Recognizing both this right to counsel and the interest it safeguards – and relying on *Makemson* – the Second District in *Scruggs* held that an attorney's fee cap was "unconstitutional as applied to extraordinary and unusual civil dependency proceedings where counsel is constitutionally required to be appointed." 545 So. 2d at 912. Thus, it is clear that the doctrine of inherent judicial power will invalidate a fee cap statute in cases where a right to counsel has been granted to protect fundamental constitutional interests. No such right to counsel has been granted in workers' compensation proceedings because there is no fundamental constitutional interest at stake.

Richardson next notes that in *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008), the Court avoided reaching constitutional issues by relying on statutory interpretation to find the 2003 version of section 440.34(1) ambiguous. She posits that the reason the Court avoided invalidating the statute was because a month before, it had issued its opinion in *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008), in which the Court found that the fee schedule imposed on capital collateral counsel in section 27.7002, Florida Statutes (2007), could only be constitutionally construed to allow for "compensation in excess of the statutory fee caps where a trial court exercises its inherent authority to grant such fees in light of extraordinary

circumstances in a case." *Id.* at 204. Richardson then apparently suggests that the same should hold true in the present case, where "the numerous defensive ploys raised by the E/C's attorney" purportedly "required an extensive amount of time and skill by claimant's counsel to overcome." (Brief of Pet'r at 37.)

Again, however, as in *Makemson*, the concern of the Court in *Olive* was that the statutory fee cap impinged upon the judiciary's ability to protect a criminal defendant's right to counsel under the Sixth Amendment. *See Olive*, 992 So. 2d at 202-03. No such constitutional concern is implicated here. The tribunals of the legislatively created worker's compensation system are presided over by individuals who are not members of the judicial branch – individuals who do not possess the inherent power of a circuit court. They are members of the executive branch. Their rules of procedure are promulgated not by the supreme court, but rather by the executive branch as administrative rules. *See Amendments to the Fla. Rules of Workers' Compensation Procedure*, 891 So. 2d 474, 479 (Fla. 2004). Without the inherent power of the judiciary – and absent legislative permission to do so – a JCC simply lacks all authority to award fees in excess of a statutory cap, even "in light of extraordinary circumstances in a case."

Richardson also cites *Joseph v. C.C. Oliphant Roofing Co.*, 711 A.2d 805 (Del. Super. Ct. 1997), which upheld a statutory cap on workers' compensation attorney's fees as applied to the facts before it. Richardson notes that the Delaware

court nonetheless cited *Makemson* in musing that an unreasonably low fee cap might materially impair the abilities of counsel to effectively represent their clients. (Brief of Pet'r at 37-38.) However, the Delaware court observed that "[f]ees charged by Delaware attorneys are subject to the Court's regulation," *Joseph*, 711 A.2d at 808, which differs from Florida law. *See Ingraham ex rel. Ingraham v. Dade County Sch. Bd.*, 450 So. 2d 847, 849 (Fla. 1984) (statutory cap on fees "does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law").

Additionally, *Joseph* characterized the Delaware workers' compensation system as "a cooperative venture between the legislature and the judiciary to provide employees with a prompt remedy for workplace injuries." 711 A.2d at 810. In Florida, it is "fully within the power of the Legislature to provide for a Workmen's Compensation system which supersedes other legislation affecting compensation or relief after death or injury." *Mullarkey v. Florida Feed Mills, Inc.*, 268 So. 2d 363, 366 (Fla. 1972); *see also Rollins v. Southern Bell Tel. & Tel. Co.*, 384 So. 2d 650, 652 (Fla. 1980) ("In implementing the [workers' compensation] system, the legislature removed the mechanics of compensation for such injuries from the court system and placed it in the executive branch . . . ."). The judiciary's role in worker's compensation proceedings is limited to appellate review. *See* § 440.271, Fla. Stat. (2009).

3. The Evidentiary Showing Made Below Is Insufficient to Overcome the Presumption of Constitutionality.

Interestingly, Richardson cites *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990), in which the U.S. Supreme Court rejected a constitutional challenge to a contingency fee limitation on attorney's fees set forth in the Black Lung Benefits Act of 1972. The Court found that the respondent had made an insufficient showing that black lung claimants were unable to retain counsel and that this inability was caused by the statutory fee scheme. *Id.* at 726. Richardson points out that the Court nevertheless "recognized that a contingency fee cap may impact a person's federal due process rights if the statutory scheme affects the person's ability to obtain counsel." (Brief of Pet'r at 38.) Richardson asserts that unlike *Triplett* (and *Joseph*), she put on evidence supporting a fee award in excess of the fee cap. According to Richardson, Mallen's opinion that the fee cap was the primary reason claimants were increasingly unable to find attorneys was supported by statistical evidence of both a decline in claims since the original enactment of the fee cap in 2003 and a decrease in the amount of attorney's fees paid during the same period. (Brief of Pet'r at 38-39.)

Yet the showing made below would have also fallen well short in *Triplett*. Mallen simply made the conclusory affirmation in his affidavit that the fee cap had "severely suppressed" his "ability to represent" claimants, and had "destroy[ed] the claimant's ability to obtain competent counsel as evidenced in [*Davis v.*] *Keeto*."

(R.78.) Although he purported to rely on OJCC reports showing a decline in the number of petitions filed and a somewhat larger share of the attorney's fee pie going to defense counsel, this was insufficient to establish that claimants actually ***were*** unable to obtain counsel. A drop in the number of petitions can mean any one of a number of things, from fewer claimants needing benefits to more claimants receiving benefits without the need to file a petition. Similarly, the larger percentage of fees going to the defense bar can simply be reflective of an increase in hourly rates charged. The only evidence that claimants were increasingly unable to find attorneys was Mallen's own conclusory *ipse dixit* assertion.

In *Triplett*, the lower court had relied upon the assessments of three lawyers. 494 U.S. at 723. One opined that "fewer qualified attorneys were accepting black lung claims" and that more claimants were proceeding *pro se*. *Id.* Another stated that "few attorneys are willing to represent black lung claimants." *Id.* The third testified to a U.S. House of Representatives subcommittee that many of his colleagues "had stated unequivocally that they would not take black lung cases." *Id.* The Court was emphatically dismissive of this showing:

> This will not do. . . . [T]his sort of anecdotal evidence will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled. . . . The impressions of three lawyers that the current system has produced "few" lawyers, or "fewer qualified attorneys" (whatever that

> means), and that "many" have left the field, are blatantly insufficient to meet respondent's burden of proof, even if entirely unrebutted.

Id. at 723-24. As in *Triplett*, Mallen's mere anecdotal assessment "will not do."

The *Triplett* Court also found that even if the respondent had demonstrated an unavailability of attorneys, "he would have been obliged further to show that its cause was the regulation of fees. He did not do so." 494 U.S. at 724. Similarly, here, Richardson did not establish that any purported unavailability of attorneys was due to the fee cap. The OJCC reports (and the "LinkedIn" post) certainly did not establish such causation. And while Mallen continually referred to the "*Keeto* effect" in his testimony, the thirty-year-old general inference of a First District jurist is just that: a thirty-year-old general inference. It is not evidence, and certainly not evidence establishing a causal connection between an (unproven) unavailability of attorneys and the statutory fee cap. The type of woefully inadequate evidentiary showing made below is one upon which Florida's constitutional jurisprudence simply cannot rely.

4. *Makemson* Does Not Require That the Fee Cap Be Read as Directory Rather Than Mandatory.

Richardson finally suggests that based upon her showing that the application of the fee schedule is confiscatory of the lawyer's time, energy, and talents, the Court should follow the approach it took in *Makemson* and hold that the fee cap is directory rather than mandatory. (Brief of Pet'r at 39.) Again, however,

Makemson is almost ludicrously inapposite. The circumstances surrounding a criminal defendant who faces the overwhelming power of the state to take his very life do not remotely equate with the circumstances surrounding a workers' compensation claimant who seeks benefits for a job-related injury. Counsel in *Makemson* (and in the other criminal cases cited by Richardson) served a well-defined and fundamental constitutional interest – the right of the criminally accused to effective assistance of counsel. By extreme contrast, counsel in the legislatively created, executive branch workers' compensation proceedings serve only a private purpose.

The Legislature thus may constitutionally provide for fee caps in those proceedings without violating the separation of powers provision in article II, section 3 of the Florida Constitution. The Court should therefore affirm the decision of the First District.

B. The Application of the Fee Cap in This Case Did Not Violate the Right to Be Rewarded for Industry.

1. Richardson Does Not Possess Standing to Assert a Violation of Her Counsel's Rights.

As an alternative constitutional challenge, Richardson claims that the fee cap is, "as applied to the facts, a violation of claimant's counsel's fundamental right to be rewarded for industry" under the Equal Protection Clause in article I, section 2 of the Florida Constitution. (Brief of Pet'r at 39-40.) What is perhaps most

notable about this contention is that Richardson is not arguing that the application of the statute infringes upon her own right to be rewarded for industry, but rather her ***counsel's*** right to be rewarded for industry.

Richardson does not have standing to assert an ostensible infringement of a fundamental right possessed by anyone other than herself. The fee cap simply did not violate her equal protection rights. "It is a well established principle that the courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected adversely by it." *Henderson v. Antonacci*, 62 So. 2d 5, 8 (Fla. 1952). To establish standing in constitutional situations, a party must show that he or she suffered a "distinct and palpable" injury-in-fact that "is likely to be redressed." *Peregood v. Cosmides*, 663 So. 2d 665, 668 (Fla. 5th DCA 1995).

There is no evidence that Richardson suffered any equal protection injury-in-fact that is likely to be redressed. Instead, the record demonstrates that she received the assistance of counsel in filing petitions for benefits in the OJCC, and received the benefits due. Richardson simply cannot assert that the fee cap violates the equal protection rights of her counsel because "constitutional rights are personal in nature and generally may not be asserted vicariously." *State v. Long*, 544 So. 2d 219, 221 (Fla. 2d DCA 1989).

This is not to say, of course, that claimants are always precluded from challenging what they believe is an inadequate or improper fee award on appeal. *See Pilon v. Okeelanta Corp.*, 574 So. 2d 1200, 1201 (Fla. 1st DCA 1991) (observing that "a barrier to review a decision to award a fee below the statutory schedule could ultimately result in a net loss of attorneys willing to represent workers' compensation claimants").[5] But where the basis for a claimant's challenge is an alleged violation of a constitutional right that is personal to her counsel – and one for which the claimant herself suffered no injury-in-fact – the claimant cannot establish that she possesses the requisite standing to bring the challenge.

2. Richardson Cannot Show That the Fee Cap Actually Worked a Violation of Her Counsel's Right to Be Rewarded for Industry.

Even assuming Richardson did have standing to assert that the application of section 440.34(1) infringes upon her counsel's right to be rewarded for industry, she has not shown that the fee cap actually resulted in a deprivation of that right. Claimant's counsel was paid $1,750 under the statutory guidelines for his efforts to

[5] Here, of course, the JCC's order did not award a fee below the statutory schedule, but rather in complete accordance with the statute, making *Pilon* – which Richardson cited in her reply brief below to oppose the E/C's standing argument, *see* Reply Brief at 8, *Richardson v. Aramark/Sedgwick CMS*, No. 1D13-4138 – a weak reed upon which to lean.

secure Richardson benefits. Thus, the statutory scheme did not deprive counsel of a reward for his industry; it in fact allowed him to be rewarded for that industry, even if not in as high of an amount as he might like. Although there are no cases construing the precise meaning of the phrase "to be rewarded for industry," it is apparent from the provision's plain language that to deprive a person of that right, a statute or regulation must actually preclude that person from receiving any compensation for a particular industry.

3. The Fee Cap Is Subject Only to the Rational Basis Test Because the Right to Be Rewarded for Industry Is Not a Fundamental Right.

Citing only *De Ayala v. Florida Farm Bureau Casualty Insurance Co.*, 543 So. 2d 204, 206-207 (Fla. 1989), Richardson contends that the right to be rewarded for industry is a fundamental right, requiring that the statutory fee cap be subjected to the strict scrutiny test. (Brief of Pet'r at 40.) However, *De Ayala* primarily employed strict scrutiny because the challenged statute contained a classifier "involv[ing] alienage, one of the traditional suspect classes." 543 So. 2d at 207. Richardson's attorney is not a member of any suspect class.

Moreover, to the extent that it can be read to hold that a statute involving the right to be rewarded to industry is subject to strict scrutiny, *DeAyala* is not only the lone case from this Court to hold as much, but it also cannot be harmonized with earlier and subsequent decisions from the Court. Prior to *DeAyala* – and well after

the right to be rewarded for industry was enshrined in the Florida Constitution in the 1968 – the Court held:

> Among (the constitutionally protected rights) are a person's right to contract and ***the right to pursue a lawful business***, both recognized under the fifth and fourteenth amendments to the United States Constitution and ***under article I, section 2 of the Florida Constitution***. These are not, of course, absolute rights. They are subject to reasonable restraint in the interest of the public welfare. Id. Legislative limitations upon the exercise of these liberties are constitutional if they ***rationally relate to a valid state objective***.

Fraternal Order of Police, Metro. Dade County, Lodge No. 6 v. Dep't of State, 392 So. 2d 1296, 1302 (Fla. 1980) (emphasis added) (quoting *Dep't of Bus. Reg. v. Nat'l Mfd. Housing Fed'n, Inc.*, 370 So. 2d 1132, 1136 (Fla. 1979)).

As the Court has repeatedly stated, it "does not intentionally overrule itself *sub silentio*." *E.g.*, *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). Yet even if the Court did appear to overrule itself unintentionally in *DeAyala*, it has nevertheless since reaffirmed *Fraternal Order of Police* and held that the property and liberty interests in the pursuit of a livelihood are ***not*** fundamental interests requiring strict scrutiny. *Lane v. Chiles*, 698 So. 2d 260, 263 & n.2 (Fla. 1997).

Thus, and assuming the fee cap actually did impinge upon the right of Richardson's counsel to be rewarded for his industry (and that she has standing to challenge the fee cap on her counsel's behalf), Richardson can only show that the statutory scheme is unconstitutional as applied if it does not "bear a rational and

reasonable relationship to a legitimate state objective," and is "arbitrarily or capriciously imposed" *Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014).

4. The Fee Cap Is Rationally and Reasonably Related to Legitimate State Interests.

Richardson cites *McCall* for the proposition that "it is doubtful the statutes at issue here could even withstand scrutiny under the rational basis standard." (Brief of Pet'r at 41.) In *McCall*, the Court held that the statutory cap on wrongful death noneconomic damages in section 766.118, Florida Statutes, violated the Equal Protection Clause under the Florida Constitution "because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants." 134 So. 3d at 901. According to Richardson, despite the fact that the statutory fee scheme may result in a generous fee award in rare cases, "the inflexible fee demanded by the schedule in a number of cases such as the present, without factoring in any of the time reasonably expended by the injured worker's lawyer, 'is not only arbitrary, but irrational.'" (Brief of Pet'r at 41) (quoting *McCall*, 134 So. 3d at 903).

The statutory fee schedule is not arbitrary, however, "because it applies to all claimants in a workers' compensation proceeding." *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 510 (Fla. 1st DCA 2006), *disapproved on other grounds*, *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008). Even

if, for the sake of argument, one concedes Richardson's point that the statute was imposed arbitrarily in the case of her counsel, she cannot show that the fee cap does not bear a rational and reasonable relationship to a legitimate state interest. It has long been established that the Legislature may set the amount of fees that claimant's counsel may receive in a given case because "the state has a legitimate interest in regulating attorney fees in work[ers]' compensation cases." *Samaha v. State*, 389 So. 2d 639, 640 (Fla. 1980). That interest is founded on the twin public policies of maximizing the limited availability of workers' compensation benefits and reducing the cost of workers' compensation insurance premiums. *See id.*; *see also Acosta v. Kraco, Inc.*, 471 So. 2d 24, 25 (Fla. 1985) (finding that reducing workers' compensation premiums is legitimate state objective).

Further, the Legislature is responsible for "set[ting] forth the criteria it deems will result in a reasonable award and will further the purpose of the fee-authorizing statute" in such cases. *Schick v. Dep't of Agric. & Consumer Servs.*, 599 So. 2d 641, 644 (Fla. 1992). A statute precluding an attorney from collecting fees that are more than treble the amount of benefits recovered by the claimant plainly bears a rational and reasonable relationship to the state interests involved here.

Although inapposite given that it involved a freedom-of-association challenge to the chapter 440 fee scheme on the grounds that it impaired a

claimant's ability to contract for legal services to defend against an employer-carrier's motion to tax costs, Richardson nevertheless cites to the First District's recent decision in *Jacobson v. Southeast Personnel Leasing, Inc.*, 113 So. 3d 1042 (Fla. 1st DCA 2013), as undermining the legitimate state interests articulated *supra*. (Brief of Pet'r at 42-44.)

Jacobson, however, not only involved a strict scrutiny analysis inapplicable here, but it also left undisturbed the First District's earlier assessment that the fee cap did not constitute an equal protection violation of the Florida Constitution. *See Lundy*, 932 So. 2d at 510 (Fla. 1st DCA 2006) ("Section 440.34(1) is not discriminatory, arbitrary or oppressive because it applies to all claimants in a workers' compensation proceeding, and sets forth a definite formula for determining attorney's fees so as to protect the claimant's interest in retaining a substantial portion of the benefits secured."); *see also Jacobson*, 113 So. 2d at 1052-53 (Wetherell, J., concurring) ("I do not read the majority opinion to undermine the continued viability of [*Lundy*] or to call into doubt the validity of the statutory limitations on claimant-paid fees generally . . . .").

Additionally, Richardson's discussion of the least-restrictive-means test in *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004), misses the mark given that, again, strict scrutiny is inapplicable here. While *Ducoin v. Ros*, No. 2003 CA 696, 2009 WL 5574534 (Fla. 2d Cir. Ct. Apr. 3, 2009), the circuit court judgment cited by

Richardson, did characterize the right to be rewarded for industry as a fundamental right, it nonetheless applied the rational basis test in assessing the constitutionality of the challenged dentistry advertisement statute. *Id.* ("By suppressing the right to advertise legitimate credentials, the dentists are being deprived of the benefits of their industry. . . . Any restrictions placed on advertising must bear a rational relationship to a legitimate interest."). Finally, the anecdotal and/or conclusory surmise of Mallen that Richardson mentions again is, for the same reasons discussed *supra* Part I.A.3, insufficient to support an as-applied challenge to the fee cap as violating the right to be rewarded for industry.

CONCLUSION

For the foregoing reasons, the Court should affirm the opinion of the First District and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I certify that on December 24, 2014, a copy hereof has been furnished to Richard W. Ervin, III, Esq., Fox & Loquasto, P.A., 1201 Hays Street, Suite 100, Tallahassee, Florida 32301, at richardervin@flappeal.com, Charles H. Leo, Esq., P.O. Box 2089, Orlando, Florida 32802, at chickleo@bellsouth.net, and Pam Bondi, Office of Attorney General, The Capitol PL-01, Tallahassee, FL 32399, at oag.civil.eserve@myfloridalegal.com, by e-mail service via the Florida Courts E-Filing Portal.

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