IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CASE #: SC15-725
LT Claim No: 1D14-3077

Daniel Stahl

Petitioner,

v.

Hialeah Hospital and
Sedgwick Claims Management
Services

Respondents

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

This brief is filed on behalf of the Petitioner, Daniel Stahl, a workers' compensation claimant before the lower administrative tribunal and the Appellant before the First District Court of Appeal.

The Respondents are Hialeah Hospital, Daniel Stahl's employer on December 8, 2003, the date of his industrial accident and Sedgwick Claims Management Services, the third party administrator of Hialeah Hospital's self-insured workers' compensation program. The Petitioner will be referred to as the Petitioner, the injured worker or by his name. The Respondents will be referred to as the Employer, the Servicing Agent or by their names.

All references to the Record of Proceedings will be identified by the letter P. followed by the page number (P.). All references to the Appendix will be identified by the letter A. followed by the appendix letter (A.). All emphasis added will be that of the Petitioner unless designated otherwise.

Workers' compensation briefs and the courts opinions generally use acronyms. In this brief the Division of Administrative Hearings, Office of the Judges of Compensation Claims will be DOAH/OJCC, the Judge of Compensation Claims will be JCC, Permanent Total Disability will be PTD, Maximum Medical

Improvement will be MMI, Permanent Impairment Rating will be PIR, Petition for Benefits will be PFB, and AWW will be Average Weekly Wage.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

This case originated before the DOAH/OJCC when the jurisdiction of the JCC was invoked by the filing of a PFB on November 18, 2005. That PFB was voluntarily dismissed before a final hearing was held. Thereafter the Petitioner sought to have his on the job injury claim treated as a tort suit for damages against the Respondents, his employer. A complaint was filed in the Circuit Court for the 11th Judicial Circuit. That action not only requested damages but also requested a declaration by the court that the compensation act was facially unconstitutional because of the lack of any benefit for permanent partial disability pursuant to §440.15(3) Fla. Stat. 2003. In other words that the lack of such benefit made § 440.11 Fla. Stat. (2003) (The exclusive remedy provision) unconstitutional. That matter reached the Third District Court of Appeal. In their opinion rejecting Stahl's right to have his remedy declared, the court rendered an opinion dated January 19, 2011, (rehearing denied February 14, 2011). That opinion contained the following language: "...we nevertheless conclude that he (Stahl) lacked standing to challenge the constitutionality of § 440.15(3). To challenge this section of the statute, the plaintiff must demonstrate through a finding

made in the OJCC proceeding, or a showing of evidence- that but for the provisions of section 440.15(3), as amended in 2003, he would be entitled to receive wage loss benefits" (word in parenthesis added) (Citations omitted), *Stahl v. Tenet Health Systems d/b/a Hialeah Hospital*, 54 So. 3d 538 (Fla. 3 DCA 2011).

The Appellant then immediately re-filed his PFB with DOAH/OJCC on February 23, 2011. That PFB requested:

"Compensation for Disability, partial in nature, from MMI to date... claimant has a loss of wage earning capacity". A second PFB dated May 3, 2011 requested PTD benefits.

Thereafter this matter appeared before the First DCA on five (5) occasions before the appeal resulting in the ruling that §440.15 and §440.13 were constitutional. In case number 1D11-3841 the court denied Stahl's Petition for a Writ of Mandamus, *Stahl v. Hialeah*, 82 So. 3d 954 (Fla. 1 DCA 2011); in case 1D11-6150 the court affirmed an order of JCC Castiello, *Stahl v. Tenet*, 86 So. 3d 1122 (Fla. 1 DCA 2012); in case 1D11-5076 the court wrote that the JCC abused his discretion when he dismissed Stahl's petitions, *Stahl v. Hialeah Hospital*, 100 So. 3d 723 (Fla. 1 DCA 2012); in case 1D12-5622 the court denied Stahl's Writ of Prohibition which sought to disqualify JCC Castiello, *Stahl v. Hialeah Hospital*, 110 So. 3d 445 (Fla. 1 DCA 2013); and in case 1D13-3929 the court granted Stahl's Petition for Writ of Certiorari

and wrote an opinion reversing JCC Castiello's order requiring Stahl to undergo an IME with an Orthopedic physician after the Employer/Servicing agent had already had their one IME with a psychiatrist, *Stahl v. Hialeah Hospital*, 127 So. 3d 1283 (Fla. 1 DCA 2013).

Finally, the substantive issues were resolved with Appellees new counsel and the agreed final order of June 23, 2014 was rendered by a newly assigned JCC. A timely appeal followed to the First DCA resulting in the opinion from which this petition emanates.

STATEMENT OF THE FACTS

The facts were agreed by the parties for this facial constitutional challenge to the exclusive remedy provision of §440.11 (Fla. Stat. 2003). The order of the DOAH/OJCC sets out those facts as follows:

1. Stahl's AWW is at least 912.00 per week. The compensation rate is the maximum for his date of accident, $608.00 per week.

2. Stahl, a nurse at Hialeah Hospital, suffered an injury by accident arising out of and in the course and scope of his employment on December 8, 2003 when, while lifting a patient without adequate help, injured his low back.

3. After receiving authorized care with Dr. Basil Yates, Stahl was found to be at MMI on October 6, 2005. He was left with a 6% Permanent Impairment and restricted to no lifting above 10 lbs.

4. On the date Stahl reached MMI he was unemployed. He was therefore entitled to Impairment Income Benefits of 12 weeks for his 6% Impairment at 75% of his compensation rate. The total paid for this career ending injury was $5,472.00.

5. The claim for re-authorization of Dr. Basil Yates which had survived a Statute of Limitations defense was rendered moot by the Appellees agreeing to send Mr. Stahl back to Dr. Yates at their expense.

6. When Stahl does return to Dr. Yates for 'post MMI' care, Stahl will be required to pay Dr. Yates a $10.00 co-payment pursuant to § 440.13(14)© Fla. Stat. 2003.

7. The parties agreed and the JCC found as fact, that all indemnity benefits for partial "disability" were removed from chapter 440 effective October 1, 2003. Even the "Obligation to Rehire" which had been contained in §440.15(6) Fla. Stat. 1994, had been repealed effective October 1, 2003.

8. It was further agreed and found as fact that following MMI Stahl was unable to return to the nursing job he had at the time of his injury due to the

lifting restrictions placed on him. He was unable to earn in the same or other employment the wages he was earning at the time of his injury. Stahl was not advised by the Respondents that he needed to perform a good faith work search. Nevertheless, after a number of years of unemployment Stahl found work as an independent contractor/teacher for a nursing school, suffering a wage loss solely attributable to the permanent effects of his industrial accident. He is not even able to maintain sedentary work for extended periods of time due to his restrictions and limitations. Stahl, it was agreed, did not meet the definition of Permanent Total Disability and was not working as a teacher in a sheltered job. This is notwithstanding the testimony of the owner of the nursing school that Stahl teaches in the morning, is allowed to and does lie down during his lunch break and then resumes teaching in the afternoon.

9. The claim for permanent partial disability benefits was denied as was the claim for PTD benefits. (Appendix A)

SUMMARY OF THE ARGUMENT

Stahl will show that at the time of the adoption of the 1968 Constitution and Declaration of Rights and until September 1, 1970 employees had the absolute right to 'opt out' of coverage of the workers' compensation law and if injured, have the right to a common law cause of action in tort against

their employers for negligently causing their injury. Stahl will show that the requirements set down by the Supreme Court for a constitutional repeal of an existing right to a cause of action were not met.

Stahl maintains that a workers' compensation law that contains no indemnity benefit for permanent partial loss of wage earning capacity, requires the injured worker to contribute to the cost of his or her medical care and lacks any safety enforcement is facially defective and unconstitutional under both the U.S. Constitution, 14th Amendment, and the Declaration of Rights contained in the Florida Constitution of 1968; Right to Trial by Jury; Right of Access to Courts; and Right to be Rewarded for Industry. Stahl will also claim membership in a protected class, the Physically Disabled.

Petitioner will provide authority for the proposition that when fundamental rights are taken away or impinged upon by use of the Police Power of the State, that adequate and substantial benefit must be put in their place. Petitioner will also show that after the adoption of the 1968 Constitution and Declaration of Rights, the Legislature was without the power to eliminate an entire class of benefits provided at the time of adoption without a reasonable replacement. The argument will be made that Permanent Partial Disability

benefits were provided by ch. 440 in 1968 and were totally eliminated effective October 1, 2003.

Stahl will also argue that full medical care is a hallmark of a constitutional workers' compensation scheme. The legislative edict of 1994 that injured workers contribute to their medical care using a $10.00 co-payment formula and the October 1, 2003 requirement that injured workers pay up to 49% of the cost of all their medical care if the facts show apportionment is appropriate, prove that chapter 440, as of October 1, 2003 is not a constitutionally adequate replacement remedy for the tort remedy injured workers gave up for injuries on the job.

Petitioner will argue for a strict scrutiny review since the amendments to the workers' compensation law since 1968 adversely affect fundamental rights contained in the Declaration of Rights and adversely affect a protected class, the Physically Disabled.

Stahl has put the Office of the Attorney General on notice that a Constitutional issue is being raised. Under a strict scrutiny review the State has the obligation and the burden to show a compelling state interest to overcome the presumption that the workers' compensation law as amended from 1968 to 2003 is not unconstitutional. The compelling state interest should be to prevent accidents and injuries via safety rules and enforcement,

avoid putting the burden of injury on the injured worker or permit the use of taxpayer resources to pay for injury and disability caused by industry. The Attorney General has not appeared in this matter. The current law, as of October 1, 2003 fails the tests of adequacy.

ARGUMENT

THE FLORIDA WORKERS COMPENSATION LAW, CH. 440.01 ET. SEQ. IS FACIALLY UNCONSTITUTIONAL BECAUSE IT DENIES SUBSTANTIVE DUE PROCESS IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND DENIES ACCESS TO COURTS IN VIOLATION OF ART. I, § 21 OF THE FLORIDA CONSTITUTION AND IN VIOLATION OF THE INVIOLATE RIGHT TO TRIAL BY JURY GUARANTEED BY ART. I, § 22 OF THE FLORIDA CONSTITUTION

STANDARD OF REVIEW

Discretionary review from an Order of a District Court of Appeal that finds sections of a state statute to be constitutional is *de novo*. A challenge to the facial validity of a provision of state law is reviewed *de novo* by the appellate court, *Florida Department of Revenue v. City of Gainesville*, 918 So. 2d 250 (Fla. 2005).

The method of review of a statute or amendment that adversely affects fundamental rights is strict scrutiny, *Estate of McCall v. United States of America*, 134 So. 3d 894 (Fla. 2014) (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), *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003), *De Ayala v. Florida Farm Bureau Cas. Ins Co.* , 543 So. 2d 204,206 (Fla. 1989), *Jacobson v. Southeast Personnel Leasing, inc.*, 113 So. 3d 1042 (Fla. 1 DCA 2013). Fundamental rights are implicated in the amendments to chapter 440 challenged in this appeal.

For a facial invalidity challenge to be recognized there is only a review of the language of the statute. There is no set of circumstances that exist under which the statute can be constitutionally applied, *Abdool v. Bondi*, 141 So.3d (Fla. 2014).

FUNDAMENTAL RIGHTS AND SUSPECT CLASS

The Declaration of Rights contained in the 1968 Florida Constitution sets out the fundamental rights, three of which are adversely affected by the workers' compensation law, as amended 2003. These rights are the right to trial by jury to redress injurious wrongs (Art. I, § 22); the right of access to the courts (Art. I, § 21); the right to be rewarded for industry (Art. I, § 2); and, as of 1998, the creation of a protected class, the Physically Disabled (Art. I, § 2). The 'inviolate' right to trial by jury was restricted but not obliterated in 1935 (the employee kept his right to 'opt out' and keep his

common law cause of action in tort, per §440.03,04,05,06,07 Fla. Stat. 1967, until repeal eff. Sept. 1, 1970, ch. 70-148, 149, Laws of Florida). The state the used the 'Police Power" as the legal basis for workers' compensation laws, *Johnson v. R.H. Donnelly Co.*, 402 So. 2d 518 (Fla. 1 DCA 1981) Accordingly, the test to be applied is whether the regulation is necessary for the public welfare, in favor of an optional administrative scheme to provide a reasonable alternative to tort litigation, ch. 17481, § 4 Laws of Florida, (1935). The law as amended 2003 must now be looked at as presumptively invalid and unconstitutional under the strict scrutiny test, *North Florida*, id.

The 1998 amendment to the Florida Constitution, Art. I §2 changed the protection of the Physically *Handicapped* to the Physically *Disabled.*

Disability is defined in chapter 440 as "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury", §440.02(13) Fla. Stat. (2003).

The reason for the 1974 constitutional amendment which added "Physical Handicap" to Art. I §2 and the change in 1998 to "Physical Disability" was to create a protected class and require strict scrutiny of legislation affecting that class, *Commentary to 1974 and 1998 Amendments, 1974 Senate Joint Resolution 917, 1998 Constitution Revision Commission, Revision 9.*

Factually, it is agreed that the Appellant has a 'physical disability' as defined in ch. 440.

The workers' compensation law is 'intended' to deliver disability and medical benefits to an injured worker, §440.015 Fla. Stat. (2003). As such the law that creates varying classifications of benefits for the disabled as a protected class (Temporary Total Disability, Temporary Partial Disability, Permanent Total Disability,) must be subject to strict scrutiny.

RATIONAL BASIS TEST NO LONGER VALID

On July 10, 2003, the Florida Supreme Court in a lengthy opinion which was not without dissent, held that the constitutional test for any law which affects certain classifications or fundamental rights must pass the strict scrutiny test, *North Florida*, id.. That decision ruled on a woman's right to privacy and held that Art I § 23, guaranteeing the right to privacy was the guarantee of a fundamental right and any law impinging on that right must be reviewed under the strict scrutiny standard. Is the 'inviolate' right to trial by jury guaranteed by Art. I, § 22, or the right of access to the courts guaranteed by Art I, § 21, or the right to be rewarded for industry, or the rights of the physically disabled in Art. I, § 2, any less a fundamental right than the right of privacy?

This court has said that in reviewing general social and economic legislation which does not employ a suspect classification or impinge on a fundamental right, courts apply the "rational relationship" test. The workers' compensation law affects a suspect class, the physically disabled, and impinges on three other fundamental rights, trial by jury, right to be rewarded for industry and access to courts. The test is strict scrutiny, *DeAyala,* id., *North Florida*, id.

Thus, the burden is on the state to prove that basic fundamental rights must give way to a compelling state interest (an interest which cannot be presumed) and that the replacement for those rights is the least intrusive means of satisfying the state's interest. There is no evidence that restoring the right to be rewarded for industry or the right to access to the courts or the right to trial by jury is more intrusive than the current workers' compensation law. All the reasons stated in the past for the adoption of a workers' compensation law in Florida in 1935 are gone! When enacted in 1935 there were little in the way of social safeguards for the injured and disabled. Social Security Disability was not yet enacted. Medicare and Medicaid were not even words. There was no OSHA, no Americans with Disabilities Act, no Family Medical Leave Act, no ADEA, no ERISA, no 401k's, no food stamps, rarely group health or disability insurance, (no

AFLAC), no medical savings accounts and the tort system based on contributory negligence common law standards was cumbersome. No more. The injured and disabled worker will not be left destitute if workers' compensation is not the exclusive remedy.

In 1935 the defendant Employer had contributory negligence, fellow servant responsibility and assumption of the risk as absolute defenses. No more, *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973). Plaintiffs could not 'borrow' against future recoveries in tort in 1935. Today, they can; but they can't borrow against future recoveries under the workers compensation law. That is strictly prohibited, § 440.22 (Fla. Stat. 2003). In 1935 Employers may not have had the ability to insure and re-insure liability risk at the levels that are available today. If Ford survived the Pinto and Phillip Morris survived tobacco suits, employers can survive suits from employees for injuries on the job and be able to budget for that risk the same as any other insured risk. Part II of the Workers' Compensation and Employer Liability Policy already insures employers for tort actions by employees for injuries on the job where the employee can already avoid the exclusive remedy in limited circumstances.

The absolute most important social purpose of workers' compensation laws should be to prevent injury. The Florida workers' compensation law

currently has no penalty for unsafe workplaces. Employers can be grossly negligent and even intentionally cause injury, and still be immune from suit, 440.11(1) (b) Fla. Stat. (2003). But if an employee does not use a safety device provided for his protection, the employee suffers a 25% reduction in indemnity benefits 440.09(4) Fla. Stat. (2003). Florida has disbanded its Division of Safety and repealed all safety rules and regulations. The unsafe Pinto is gone, and the use of cancer causing tobacco is on the wane thanks to the tort system. Totally uninspected workplaces remain in Florida. Many of them are firehouses and courts. OSHA only covers some private workplaces. Government in Florida, the states' largest cumulative employer, is not covered by any safety laws. OSHA reported in 2011 that it would need 230 years to inspect each Florida covered workplace one time, *U.S. Department of Labor, Bureau of Labor Statistics*, FY 2011.

Our forefathers said it best, "I consider trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution", Thomas Jefferson, Letter to Thomas Paine, 11 July 1789, in *The Papers of Thomas Jefferson* 15:269 (Julian P. Boyd ed. 1958).

And, "That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be

held sacred", *The Virginia Declaration of Rights*, 1776. Florida's Constitution holds the right to trial by jury "inviolate" except, that is, if you are a brain damaged baby or an employee.

A- THE BENEFITS AVAILABLE TO ALL INJURED EMPLOYEES SINCE OCTOBER 1, 2003 UNDER CHAPTER 440 FLA. STAT. ARE INADEQUATE AND THEREFORE CANNOT BE THE EXCLUSIVE REMEDY FOR ON THE JOB INJURIES BECAUSE THEY VIOLATE THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

ADEQUACY OF BENEFITS

It is obvious that a reduction in the compensation rate to 10% of the AWW with a maximum compensation rate of $100.00 per week would not pass due process constitutional muster as adequate. This case asks the court to determine that the line between a constitutional exclusive replacement remedy for common law tort and an inadequate remedy has already been crossed.

> "In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power, a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the

> business, and, however it may be charged up, is an expense of operation, as truly the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon the injured employee or his dependents. *New York Central Railroad Company v. White,* 243 U.S. 188, 203, 204, 37 S. Ct. 247, 61 L. Ed. 667 (1917).
>
> "This of course is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that compensation prescribed is unreasonable in amount, either in general or in the particular case. **Any question of that kind may be met when it arises**" id. p.205, 206.

In almost a century the question of the adequacy of the benefit structure of a state workers' compensation law has not arisen at the appellate court level. Until now. It arises herein and it arises concurrently in the case of *State of Florida, Office of the Attorney General v. FWA, WILG and Elsa Padgett,* 167 So. 3d 500 (Fla. 3 DCA 2015), (Petition for discretionary review pending in SC15- 1255). The trial court opinion in *FWA, et. al.* may be found at FLWSUPP2110FLOR, (Appendix B).

In *FWA*, id. 11th Circuit Judge Jorge Cueto knew where to draw the line. He found that the Florida Workers' Compensation law absent any indemnity

to compensate for permanent partial disability (permanent partial loss of wage earning capacity), could not meet the test of adequacy for an exclusive replacement remedy for tort.

On October 20, 2015 ten (10) members of the Congress of the United States wrote to Labor Secretary Thomas E. Perez to complain about the sorry state of state workers' compensation plans, the inadequate benefits and the drain on federal programs, "State workers' compensation laws are no longer providing adequate levels of support and compensation for workers injured on the job; instead, costs are increasingly being shifted to the American taxpayers to foot the bill" (Appendix C).

DEFICIENCIES IN THE BENEFITS ALLOWED

As of October 1, 2003 the benefit scheme in chapter 440 was so decimated and eviscerated from that which the law provided in 1968 as to be unrecognizable.

Definition:

ad·e·quate, adjective;

1. as much or as good as necessary for some requirement or purpose; fully sufficient, suitable, or fit (often followed by to or for): This car is adequate to our need§ adequate food for fifty people.
2. barely sufficient or suitable; Being adequate is not good enough.
3. Law. reasonably sufficient for starting legal action: adequate ground

Synonyms:

1. satisfactory, competent, sufficient, enough; capable

When the government wants a citizen's property for a public purpose, the government takes that property in a process called Eminent Domain. This is an exercise of the Police Power of the state. The property owner must be paid just and *adequate* compensation. Our system of jurisprudence has developed a fair way to determine the adequacy of the payment for the property right given up; trial by jury, §73.071 Fla. Stat. Ann (2002).

When the State of Florida determined that its citizens who are hurt at work should lose their fundamental and inviolate right to trial by jury to redress a wrong, the legislature enacted a workers' compensation law and deemed the resulting benefits of the act to be the exclusive remedy for the loss suffered. But it only became **the exclusive remedy** eff. Sept. 1, 1970 with the repeal of the 'opt out' provisions. An administrative process was set up to replace trial by jury. The Executive chooses the administrative judges. The Police power of the state is the basis for the taking. The adequacy of the replacement remedy has not been a challenged, until now.

Former Chief Justice Charles Evans Hughes said,

> "The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'let me find for the people of my country, and I care little who lays down the general principles'", *Important Work of Uncle Sam's Lawyers*, 17 American Bar Association Journal 237, 238 (1931).

In a society where a significant portion of the population is dependent upon social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the condemnation of property for public purposes might seem of more far reaching significance. But in a society that considers the individual as its basic unit a decision affecting the life of a person or a family should not be taken by any means that would be unfair for a property owner. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure. Judge E.R. Mills wrote: "Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the

pocketbooks of consumers are affected daily by it", *Singletary v. Mangham Construction,* 418 So. 2d 1138 (Fla. 1 DCA 1982).

Workers' compensation laws have a 100+ year history in the United States. Initially business interests challenged the constitutionality of laws that made business pay for injury without proof of fault. The New York Act, ruled unconstitutional due to a defect in the New York Constitution was re-enacted after the New York Constitution was amended, and then again reviewed by our highest court. The Supreme Court was asked by the New York Central Rail Road (NYCRR) to determine if the due process, 14th Amendment rights of the employer were being violated by requiring the employer to provide benefits for injury to an employee without fault on the part of the employer.

The nation's highest court reviewed the procedural aspects of the act and concluded that there were sufficient due process safeguards in place in the adjudicatory process and that making the employer pay for injury caused by industry because the injured worker was providing a service from which the employer financially benefitted, did no violence to our legal system. **The police power of the state was being used to protect the taxpayers from paying for the cost of injury caused by**

industry. In addition, the court found that lack of adequate compensation for injury may very well lead to criminal activity, *NYCRR*, id.

In that same case the court specifically warned that the court was not reviewing the adequacy of the benefits in the New York Act:

> "This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. ***Any question of that kind may be met when it arises***", *New York Central Rail Road v. White*, 37 § Ct. 247, 243 U.§ 188, 61 L. Ed. 667 (1917)(emphasis added).

That was 1917. Now, 98 years later, in an apparent case of first impression nationwide, this court is asked to determine whether or not the Florida workers' compensation law provides adequate, reasonable and significant benefits. If the act fails to provide adequate benefits, it fails as an exclusive replacement remedy for tort. If it fails as an exclusive replacement remedy, § 440.11 Fla. Stat. (2003) is unconstitutional.

While this appeal tests the validity of ch. 440's exclusive remedy provision, the court need not invalidate any of the other existing benefit

or procedural provisions of the act. The Supreme Court has fashioned a similar remedy in the past and created a bright line for determining the adequacy of the exclusive remedy;

> "Although ch. 90-201 undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. 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. Furthermore, while there are situations where an employee would be eligible for benefits under the pre- 1990 workers' compensation law and now, as a result of chapter 90-201, is no longer eligible, **that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances**". *Martinez v. Scanlan*, 582 So. 2d 1167,1171 (Fla. 1991) (emphasis added).

Had Mr. Stahl been injured when the 1991 version of the law was in effect his benefits for his loss of future wage earning capacity would have been $30,351.36 instead of the $5,472.00 he received under the 2003 version of the law. His AWW was $912.00. 80% of that is $729.60. Using $0 earnings, Mr. Stahl would have been paid 80% of $729.60 for 52 weeks, $583.68, the maximum for his 6% impairment (for which he gets no additional money). $583.68 for 52 weeks is $30,351.36, § 440.15 (3) (b) 4. D. II, Fla. Stat. 1991. While this is not a pot of gold, it is five and a half times better than after the 2003

amendments went into effect.

Appellant suggests that the right to the tort remedy be a post accident option for all injured workers now that their benefits under chapter 440 have become so decimated as to be illusory, *Staffmark v. Merrell*, 43 So. 3d 792, 797 (Fla. 1 DCA 2010) (Webster, J. Concurring). Full medical care is no longer available, see: §440.13(14) ©, Fla. Stat. (1994) and §440.15(b) Fla. Stat. (2003) (a $10.00 co-pay after MMI and the apportionment of medical care). There is no compensation in the act for permanent partial disability (wage-loss for permanent partial disability), § 440.15 Fla. Stat. (2003).

Appellant seeks for the court to leave chapter 440 intact as one solution, except for § 440.11 which must be held unconstitutional. Injured workers would be given the option of seeking an administrative or a judicial recovery. The exclusive remedy in the Florida Workers' Compensation act of 2003 is a dinosaur, no different than Contributory Negligence, abolished in *Hoffman*, id. If the benefits become adequate, lawsuits would be the second choice.

Every employer with a workers' compensation insurance plan also has existing coverage for adverse judgments for damages in a suit by an

employee for an on the job injury. This is called Part II coverage under the standard *Workers' Compensation and Employer Liability* policy of insurance. Part II serves a useful current purpose because more and more employees are able to avoid the exclusive remedy defense to a tort suit on a case by case basis when the employer takes advantage of amendments limiting coverage under the act to deny benefits, *Martinez*, id, fn. 4, *Byerley v. Citrus Publications*, 725 So. 2d 1230 (Fla. 5 DCA 1999), *Coastal Masonry, inc v. Gutierrez*, 30 So. 3d 545 (Fla. 3 DCA 2010), *Francoeur v. Pipers*, 560 So. 2d 244 (Fla. 3 DCA1990), *Quality Shell v. Roley* 186 So. 2d 837 (Fla. 1 DCA 1966), *Rush v. Bellsouth Telecommunications*, 773 F. Supp. 2d 1261 (Fla. ND 2011), *Picon v. Gallagher Bassett Services, inc.* 548 Fed. Appx. 561, U.S. Court of Appeal, 11th Cir. 2013.

FACIAL INVALIDITY

On the date of the adoption of the 1968 Constitution and Declaration of Rights, all employees covered by chapter 440, the workers' compensation law, had the right to 'opt out' of coverage of the law and have a cause of action in tort versus their allegedly negligent employer. That cause of action continued to exist up to September 1, 1970 when the legislature quietly

repealed those sections of the law allowing the 'opt out', §440.04, 05, 06, 07, 08, Fla. Stat. 1967 (ch. 70-148, 70-149, Laws of 1970). No replacement for the right to 'opt out' and the right to the tort cause of action was enacted. Thereafter no injured employee could enjoy the same rights and a cause of action in tort as was provided for in ch. 440 at the time of the adoption of the 1968 Constitution. There is no set of circumstances under which the statute can be read as constitutional, *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

When the citizens of Florida ratified and adopted their last constitution (to include the Declaration of Rights) in November 1968, that document set a bright line for what is constitutional thereafter. This court explained the meaning of those words in *Kluger*, id. In the simplest terms imaginable, the legislature could change existing rights but could not eliminate existing rights or an existing cause of action without providing a reasonable replacement. Two causes of action available to employees at the time of the adoption of the 1968 Constitution have been legislated out of existence after 1968 without any replacement. Petitioner must take the position that the workers' compensation act in effect in 1968 was constitutionally adequate as an optional replacement remedy. The Supreme Court actually found

otherwise. A decision of the court found one class of benefits provided in the 1968 act, temporary total disability for up to 350 weeks, to be inadequate, *Thompson v. Florida Industrial Commission*, 224 So. 2d 286 (Fla. 1968) (This statute is clear and unambiguous in its language. The carrier was justified in ceasing to pay additional temporary total disability benefits. The Florida Workmen's Compensation Act is inadequate in failing to provide for a situation such as this (Claimant was still TTD after exhausting 350 weeks of benefits). However, the remedy lies with the Legislature and not with the Florida Industrial Commission or the Court). What did the legislature do in light of the Supreme Court's decision? **The length of time that Temporary Benefits could be collected in 1968 was 13 years**. 350 weeks of TTD (7 years), followed by 5 years of TPD, then up to 1 year for vocational rehabilitation TTD, §440.15 Fla. Stat. (1967). **As of October 1, 2003 the maximum length of time benefits for TTD, TPD and Vocational TTD is 104 weeks, 2 years,** (an 85% reduction in entitlement), §440.15 Fla. Stat.(2003). Petitioner believes the remedy for inadequate benefits lies with the court as a violation of the Declaration of Rights and 14th Amendment to the U.S. Constitution, *NYCRR,* id. A

constitutional challenge to the current 104 week limitation on TTD, TPD and TTD for Vocational Rehabilitation (combined) is pending in the Supreme Court, *Westphal v. City of St. Petersburg,* 122 So. 3d 440 (Fla. 1 DCA 2014) (*en banc*) rev. pending SC13-1930.

In 1970 an investigation into the adequacy of state workers' compensation benefits was begun by the Federal Government. The 1970 OSHA, a product of the Nixon administration, required the selection of a National Commission to study the adequacy of state laws creating workers' compensation programs and setting benefit levels.

The National Commission was required to report to the President and Congress in 2 years. It consisted of stakeholders from every group affected. The report was on time and **unanimous** finding the state workers compensation laws in existence in 1970 were **inadequate,** *Report of the National Commission on State Workmens' (sic Workers') Compensation Laws*, http://www.workerscompresource§com/National Commission Report/national commission-report.htmcitation/link.

B. THE LEGISLATURE HAS ELIMINATED TWO CAUSES OF ACTION THAT WERE AVAILABLE TO INJURED EMPLOYEES AT THE TIME OF THE ADOPTION OF THE

1968 CONSTITUTION AND DECLARATION OF RIGHTS WITHOUT ANY REPLACEMENT REMEDY THEREBY DENYING ACCESS TO COURTS IN VIOLATION OF ART. I, § 21 OF THE FLORIDA CONSTITUTION AND DENYING THE INVIOLATE RIGHT TO TRIAL BY JURY IN VIOLATION OF ART. I, § 22 OF THE FLORIDA CONSTITUTION

CAUSE OF ACTION NUMBER ONE:

The effects of the repeal of 'opt out' are clear, *Mullarkey v. Florida Feed Mills,* 268 So. 2d 363 (Fla. 1972), a pre-1970 accident, (The non-dependent parent and personal representative of a deceased minor employee sought to bring suit against the employer under the Survival Statute and the Wrongful Death Statute. The court held that the deceased minor employee, having brought himself within the provisions of the Workmen's (sic) Compensation Act (**by NOT opting out!**), bound himself as well as his representatives and survivors to the exclusive remedy provision of the Act. In reaching that decision, the court quoted from its earlier decision, *Howze v. Lykes Bro§, Inc.*, 64 So.2d 277 (Fla.1953), as follows:

"Appellant contends that it was not the purpose of the Workmen's Compensation Act to exclude the father from recovering damages for mental pain and suffering in a case like this, but we think Section

440.11, F.S.A. (the exclusiveness of liability section) is a complete answer to this contention. The philosophy of workman's compensation is that when employer and employee accept the terms of the act their relations become contractual and other statutes authorizing recovery for negligent death become ineffective".

Repeal of the 'opt out' in 1970 was the real end of a cause of action in tort and the real beginning of the 'exclusive remedy'. Since repeal came about after the adoption of the 1968 constitution, the right to 'opt out', the right to a cause of action, as valuable as it was according to Mullarkey, id. needed a replacement for the act to remain constitutional, *Kluger, id.* There was no replacement. Then *Hoffman, id.* put the icing on the cake as far as the value of the lost cause of action was concerned.

Definition:

INVIOLATE; adjective,

not violated or profaned, pure.

Both before and after the adoption of the Declaration of Rights in the 1968 Florida Constitution the word "inviolate" was part of the right to trial by jury. The 1885 Constitution, Section 3 provided:

"The right to trial by jury shall be secured to all, and remain inviolate forever".

Nevertheless the legislature, without a vote of the electorate, or a constitutional amendment made the right to trial by jury optional by enacting chapter 440 in 1935. The police power was used to justify this legislative action without the need to amend the constitution. But there was one escape clause, the right to 'opt out' was granted to employees and employers alike in §440.04, 05, 06, 07 08 Fla. Stat. 1935. In effect, the inviolate right to trial by jury was preserved for those who desired to keep it. The right to 'opt out' remained in the act through the adoption of the Constitution of 1968, which contained similar language deeming the right to trial by jury "inviolate", Art I § 22 Fla. Const. 1968. The right to 'opt out' was quietly repealed by the 1970 legislature eff. September 1, 1970 (Laws of 1970). There is no legislative history. Elimination of a cause of action available in 1968 without a replacement is clearly unconstitutional, *Kluger,* id.

The legislative history behind the 'opt out' repeal is non-existent. The legislature made no attempt to satisfy the need to show an overpowering public necessity to repeal the 'opt out' provisions of the

act nor any lack of an alternative method to meet a public necessity. On September 1, 1970 chapter 440 became unconstitutional. The exclusive remedy provided for in § 440.11 Fla. Stat. has remained unconstitutional and invalid from September 1, 1970 to this very date. It is interesting that no one noticed that the inviolate right to trial by jury that existed from 1935 to 1970 had been eliminated. It was a right available at the time of the ratification of the 1968 constitution. The legislators who passed the original act knew that they could not totally eliminate the right to trial by jury. Inviolate is inviolate. Workers' Compensation, as a replacement remedy was fashioned so that the right to a cause of action in tort for an injury on the job remained.

It is impossible to find reported decisions of any appellate court or any other authority that provides the reason why the 'opt out' provisions of the law required repeal. One reported case out of Florida concerned an employer that had 'opted out'. In that case the employee who sued was able to take advantage of the statutes provisions removing certain common law defenses from the defendant employer. Unfortunately for the employee the jury either found that the employer was not negligent at all in causing the injury or the employee was 100%

at fault. Judgment for the employer was affirmed on appeal, *Baker v. Great Atlantic & Pacific Tea Co.*, 212 F. 2d 130 (U.S. Court of Appeals, 5th Cir. 1954).

A divided Supreme Court held that prior to the repeal of § 440.07 Fla. Stat. (1969), the failure of a minor employee to 'opt out' bound his parents to the non-existing remedies for them under chapter 440 in the case of the death of their son who was not dependent upon them for support, *Mullarkey v. Florida Feed Mills, inc.*, id. Prior to the 1970 repeal of the 'opt out' provisions our Supreme Court characterized the provisions of the workers' compensation act as "optional", *Chamberlain v. Florida Power Corp.*, 198 So. 486 (Fla. 1940). The law only became the real 'exclusive remedy' when the right to 'opt out' was repealed! See also, *Vanlandingham v. Florida Power and Light Co.* 18 So. 2d 678 (Fla. 1944).

Justice Richard W. Ervin spoke to a meeting of Workers' Compensation Deputy Commissioners (now called Judges of Compensation Claims) on April 7, 1986 (Appendix D with handwritten

notes by Justice Ervin). Justice Ervin commented on the fairness of the scheme:

> "The greater question is whether workers' compensation is realistically fair to all concerned. Does the fact that it only provides the worker a percentage of his wage loss plus medical treatment and some supplementation in certain instances provide a sufficient "trade off" for civil law compensatory damages? Sure there is "no fault" comp liability but does this warrant lesser compensation than something closer to civil law damages. Sadowski and the 1979 Legislature think it does and argue that **history and reason support only recompense for wage-loss, and that "wage loss" is all that an employer logically owes a disabled employee.** Others would contend that industrial accidents justify a public policy which measures workers' compensation a "trade off" within a reasonable range of recognized civil compensatory damages". Emphasis added.

Since 2003 the loss of the inviolate right to trial by jury has been in exchange for a scheme that provides no recompense at all for permanent partial inability to earn the same or similar wages that the injured worker earned at the time of the injury. As hard as it is to agree with Sadowski, Petitioner does. Employers owe wage loss to disabled employees.

Judge Ervin also commented in his speech:

> "The courts, particularly the Appellate Courts at highest level lately have been unable to muster the constitutional courage to repel all these legislative intrusions upon the traditional rights of the average citizen "to enjoy and defend life and liberty". Often forgotten is the old axiom, "no wrong without a remedy".
> "It is axiomatic that in human affairs and institutions that if there is no progress toward betterment, they stagnate, grow corrupt and die, even the state or nation itself, and especially so where there is a callous denigration of justice, fairness, equality. Toynbee, the great English social historian points out that nineteen of the world's greatest nations

> passed into the dust bin of history because they were unable to cope with the challenges to human decency".(Appendix D).

Florida is not alone in the race to the bottom. The October 2014 Report of the National Economic and Social Rights Initiative entitled: "*National Trends and Developments in Workers' Compensation*" concluded: "The dire consequences of the roll back on worker' comp rights require immediate correction by the government to ensure, rather than narrow, an injured and ill workers' access to health care and income support" (Appendix E).

Since 2003 the legislature has not stopped its lobbyist fueled evisceration of benefits for injured workers. The repeal of the word 'reasonable' in the attorney fee section in 2009 is one example. The following language was enacted as an amendment to §440.13 in 2014 to further eliminate medical benefits:

> "Reimbursement shall not be made for oral vitamins, nutrient preparations, or dietary supplements. Reimbursement shall not be made for medical food, as defined in 21 U.S.C. § 360ee (b) (3), unless the self- insured employer or the carrier in its sole discretion authorizes the provision of such food. Such authorization may be limited by frequency, type, dosage and reimbursement amount of such food as part of a proposed written course of medical treatment", §440.13 (3) (k) Fla. Stat. (eff. 7/1/2014, Laws 2014, c. 2014-131, § 1).

CAUSE OF ACTION NUMBER TWO:

The seminal case of *Kluger v. White*, id., admonished the legislators that they were:

"...without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, 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*, id. at p. 4.

A second cause of action for injured workers was also eliminated without overwhelming public necessity or replacement. Florida has protected the rights of individuals who may need to sue an insurance company to obtain the benefits provided by the insurance contract. § 624.155 Fla. Stat. has been in effect since 1911, granting the insured or beneficiary of an insurance contract the right to be treated in good faith by the insurer. Thus, insurers guilty of bad faith claims handling not only pay what the insured is due but also pay a reasonable attorney fee to the prevailing insured or beneficiary. In Laws of 1989, c. 89-289, § 18, the legislature eliminated the cause of action for bad faith claims handling in workers compensation matters, §440.11 (4) (1989). There was no indication of overwhelming public necessity and no reasonable alternative was granted, *Kluger*, id. In fact, the claimant's right to receive a *reasonable* attorney fee in a successful workers' compensation claim was repealed in 2009, § 440.34(1). The repeal came after the court interpreted the attorney fee provision of the law to allow reasonable fees, *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008). The courts in Florida and elsewhere recognize

that an injured worker is as helpless as a turtle on its back when it comes to workers' compensation claims and that the help of an attorney is necessary, *Davis v. Keeto*, 463 So. 2d 368 (Fla. 1 DCA 1985), *Neylon v. Ford Motor Co.*, 27 N.J. Super. 511, 99 A. 2d 665 (1953). This court is considering a challenge to the 2009 repeal of the word 'reasonable' in *Castellanos v. Next Door Co*, 124 So. 3d 392 (Fla. 1 DCA 2013), Rev. Granted, SC 13-2082. The word 'reasonable' can be repealed. The concept of reasonableness cannot.

C- THE ELIMINATION OF THE DIVISION OF SAFETY AND THE REPEAL OF ALL SAFETY RULES WHICH HAD BEEN A PART OF CHAPTER 440, VIOLATES THE QUID PRO QUO WHICH ALLOWED THE USE OF THE POLICE POWER OF THE STATE TO ENACT WORKERS' COMPENSATION LAWS AS THE EXCLUSIVE REMEDY IN VIOLATION OF THE INVIOLATE RIGHT TO TRIAL BY JURY, ART. I, § 22 FLORIDA CONSTITUTION

The *Report of the National Commission on State Workmen's (sic) Compensation Laws* (July 1972), id.(The Report) Set out "The Essential Elements of (a State) Workmen's (sic) Compensation Law" There were seven:

1- Compulsory coverage;

2- No occupational or numerical exemptions to coverage;

3- Full coverage of work related diseases;

4- Full medical and physical rehabilitation services without arbitrary limits;

5- Employees choice of jurisdiction for filing interstate claims;

6- Adequate weekly cash benefits for temporary total, permanent total and death cases; and

7-No arbitrary limit on duration or sum of benefits.

The Report also concerned itself with the "Safety Objective" (Report, ch. 5 at p. 87). That chapter begins: **"The encouragement of safety is one of the basic objectives of a modern workmens' (sic) compensation program".**

Florida does not fare well if the current Act is compared to the essential elements identified in 1972. By the numbers:

1-Compulsory coverage- No, not for domestics, not for professional athletes, not for employers with 4 or fewer employees and not for some agricultural workers, §440.02(17).

2- No occupational or numerical exemptions from coverage. Florida has both, numerical §440.02(17) (b) (2) and occupational exemptions §440.02(15)(d).

3- Full coverage of work related diseases. Not in Florida, see §440.02(1) and consider the prohibition against recovery of any compensation if the injury at work is not the major contributing cause (MCC) of the disability or need for medical care §440.02(1). Consider too the arbitrary limit on psychiatric impairment (limited to 1% maximum per 440.15(3) © Fla. Stat. 2003) and

the additional limit on the length TTD or TPD can be paid for psychiatric conditions, § 440.093(3) Fla. Stat. 2003 (temporary benefits for a compensable mental or nervous injury may not exceed 104 weeks or 6 months following MMI for the physical injuries, whichever is less)

4- Full medical and physical rehabilitation without arbitrary limits. Not in Florida. The case on appeal points out that Stahl will only get medical care for his injured back if he, like all injured workers, pays a $10.00 co-payment to see a doctor, §440.13(14)(c)(1994)Fla. Stat. Chiropractic treatment is arbitrarily limited to 24 treatments or 12 weeks §440.13(2)(2) Fla. Stat 2003. Family members are artificially limited to no more than 12 hours pay per day for attendant care services they provide, §440.13(2)(b)(2) Fla. Stat. There is no reason why the legislature could not increase the co-payment, reduce chiropractic care and lower the number of hours a family member could be compensated for attendant care.

5- Employees choice of jurisdiction for filing interstate claims. Yes, it's OK to take your claim elsewhere! But even that right is now limited since the 2011 amendments to the act, §440.094 Fla. Stat. 2011.

6- Adequate weekly cash benefits for temporary total, permanent total and death cases. Not in Florida. Death benefits are capped at $150,000.00. That cap applies no matter how many dependents must be supported or for how

many years. No consideration is given for how much the injured worker was earning at the time of death. The lower the AWW, the longer the time benefits can be paid. At the current maximum compensation rate of $842.00 per week (2015) applicable to anyone earning over $1,263.00 per week, the total benefits will be paid out in less than 3.42 years. PTD benefits eff. 2003 cease at age 75 (they were lifetime in 1968), TTD to include Temporary Partial Disability (TPD) and to include a period of vocational rehabilitation is arbitrarily capped at 104 weeks, even if actual recovery takes longer. And there are no longer any benefits whatsoever for permanent partial disability (PPD), otherwise known as loss of wage earning capacity.

7- No arbitrary limit on duration or sum of benefits. Florida law is all about limits.

Of the 7 essential elements of a state workers' compensation law identified in 1972, Florida has one (1). And that one is the limited ability of the injured worker to take his claim to another jurisdiction!

Of all the deficiencies of the Florida law none is more glaring than the repeal of all safety legislation. Following the enactment of chapter 440 in 1935 and until the passage of c. 93-415, § 209, eff. Jan. 1, 1994, the workers' compensation law always included § 440.56, "Safety Rules and Provisions, Penalty". Although the 1994 amendments removed §440.56

from chapter 440, those provisions were transferred to chapter 442.001 et. seq. Then, by enactment of c. 99-240, s 14, eff. July 1, 2001, Chapter 442 was repealed in its entirety. Florida working citizens have to depend on OSHA for their safety. OSHA doesn't cover all private employments, only those with 10 or more employees. OSHA does not cover any governmental jobs. In 2011 OSHA reported that if it were to inspect each Florida *covered* workplace one time, it would take 230 years to do so, *U.S. Department of Labor, Bureau of Labor Statistics*, id. Effectively, there is no safety required of Florida employers, public or private, large or small. Government, the largest employer in Florida, has no safety regulation.

When § 440.56 was in effect it required every employer as defined in ch. 440 and all employers not defined in chapter 440 to furnish employment which shall be safe for the employees therein, furnish and use safety devices and safeguards, adopt and use methods and processes reasonably adequate to render such and employment and place of employment safe, and do every other thing reasonably necessary to protect the life, health, and safety of such employees, §440.56(1) Fla. Stat. 1993.

For the entire period of time that § 440.56 was a part of chapter 440, the cost of safety inspections and indeed the cost of the entire safety system was paid for by allocations from the Administration Trust Fund, §440.56(7) Fla.

Stat.. §440.50 Fla. Stat. set up the Administration Trust Fund. §440.51 Fla. Stat. required the carriers and self-insured employers to fully fund the administration of the workers' compensation scheme including vocational rehabilitation and safety!

After the repeal of Safety requirements, inspections and fines not only didn't Florida employers have to provide safe workplaces, they no longer had to pay the cost of state regulation. Requiring employers to provide a safe workplace is the best way to reduce the cost of workers' compensation. Florida doesn't need a Triangle Fire or a West Fertilizer explosion as a wake- up call.

D. IF THE LEGISLATURE HAD THE RIGHT TO ENACT THE 2003 AMENDMENTS BASED ON THE HIGH COST OF WORKERS COMPENSATION COVERAGE, THAT REASONING IS NO LONGER VALID

There was no 'crisis' in 1970 when the legislature repealed the last vestige of the right to trial by jury for on the job injury. There was probably no crisis in 1991 when the legislature repealed the presumptions contained in §440.26 (1989) which favored the employee. There may have been a cyclical insurance market problem in 1994 when the legislature enacted the $10.00 co-pay. The same is true for 2003 when the legislature eviscerated the benefit structure to eliminate all compensation for permanent partial

disability and require apportionment of medical costs. It is 12 years since the October 1, 2003 amendments. Premiums didn't just go down the 14% predicted, The *Florida Senate Interim Project Report 2004-110 December 2003* (Appendix F). Premiums went down 56%, *State of Florida, Report of the Offices of the Judges of Compensation Claims, 2012-2013* (Appendix G, P. 11). During that period of time no benefits were restored to injured workers.

This court has indicated it has little patience for the crises mentality, especially where the crisis, if there ever was one, has gone away, *Estate of McCall*, id.

CONCLUSION

The court should not turn a blind eye and deaf ear to the tens of thousands of Florida citizens who suffer on the job injuries with resulting loss of wage earning capacity. That would deny the obvious, natural justice.

Appellant urges the court to reverse the District Court of Appeal, First District and grant whatever relief is just and proper. Appellant suggests that Judge Cueto may have had the right solution. Leave the workers compensation law just as it is, except invalidate the exclusive remedy contained in § 440.11, and/or alternatively go back to the last law that passed constitutional muster , the 1991 law, *Martinez v. Scanlan* , id.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US Mail this 2nd day of Nov, 2015 to: Cindy Galen, Esq., 2030 Bee Ridge Road, Sarasota, Florida 34239 cgalen@eraclide§com Kfoss@ejlawsrq.com Hon. Pamela Jo Bondi, Attorney General, Alan Tanenbaum, Office of the Attorney General, State of Florida, The Capitol, Tallahassee, Fl. 32399-01050, and by E-Mail, atanenbaum@myfloridalegal.com,

CERTIFICATION OF TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that this brief was typed with 14 point font Times New Roman on this 2nd day of Nov., 2015.

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