SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DANIEL STAHL,

Petitioner,

vs.

HIALEAH HOSPITAL and SEDGWICK CLAIMS MANAGEMENT SERVICES,

Respondents. /

CASE NO.: SC15-725

Lwr. Tribunal: 1D14-3077

BRIEF OF AMICUS CURIAE FLORIDA PROFESSIONAL FIREFIGHTERS, INC., IN SUPPORT OF PETITIONER, DANIEL STAHL, ON THE MERITS

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TABLE OF CONTENTS

POINT INVOLVED

PETITIONER'S POINT ONE

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, S. 21 OF THE FLORIDA CONSTITUTION AND VIOLATES THE INVIOLATE RIGHT TO TRIAL BY JURY GUARANTEED BY ART. I, S. 22 OF THE FLORIDA CONSTITUTION

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 THE ACT VIOLATES THE 14th AMENDMENT TO THE U.S. CONSTITUTION

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, S. 21 OF THE FLORIDA CONSTITUTION

C- THE ELIMINATION OF THE DIVISON OF SAFETY AND THE REPEAL OF ALL SAFETY RULES WHICH HAD BEEN A PART OF CHAPTER 440, VIOLATES THE QUID PRO QUO

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HAD THE RIGHT TO ENACT THE 2003 AMENDMENTS BASED ON THE HIGH COST OF WORKERS COMPENSATION COVERAGE, THAT REASONING IS NO LONGER VALID

ARGUMENT

TABLE OF CITATIONS

CASES

CONSTITUTION

STATUTES

RULES

STATEMENT OF INTEREST

The amicus curiae, Florida Professional Firefighters, Inc., is commonly called "the firefighters' union". The Florida Professional Firefighters, Inc., is a state-wide labor organization. The firefighters' union is the recognized collective bargaining representative of firefighters, paramedics, emergency medical technicians, and lifeguards in regard to wages, hours, terms and conditions of employment with the State of Florida, counties of Florida and numerous cities of Florida and fire control districts located in Florida.

The Florida Professional Firefighters, Inc., has a direct interest in the outcome of the present case as it is an organization of employees whose local organizations engage in collective bargaining with the governmental units of Florida, which agreements may include improvements in workers' compensation benefits and procedure. See *Tampa Bay Area NFL Football, Inc., v. Jarvis*, 668 So. 2d 217 (Fla. 1st DCA 1996). The Florida Professional Firefighters, Inc., is also a registered lobbyist with the Florida Legislature, concerning laws of interest to employees, including workers' compensation. E.g., §112.1815, Fla. Stat. ["The First Responders' Bill"].

SUMMARY OF ARGUMENT

When the people voted for Access to Courts in the 1968 Constitution, the 1967 Florida Workers' Compensation Law contained a workplace safety provision, with safety rules, safety inspectors and penalties for violations. §440.56, Fla. Stat. (1967).

Later, this provision was transferred to Chapter 442, Fla. Stat., and titled The Florida Occupational Safety & Health Act.

The Florida Occupational Safety & Health Act was distinctly different from the federal Occupational Safety & Health Act (OSHA), which does not apply to state and local government or employers of less than 10 employees.

The Florida Occupational Safety & Health Act was repealed in 2000, making Florida the only state with a repealed workplace safety law.

When the U.S. Supreme Court approved of the constitutional validity of workers' compensation laws in 1917, the Court stated that it expected that there would be other laws providing for accident prevention.

The repeal of the Florida Occupational Safety & Health Act means that it cannot be used to counterbalance the inadequacy of workers' compensation benefits and the loss of full medical care. It imperils the validity of the current Florida Workers' Compensation Law as a whole.

ARGUMENT

PETITIONER'S POINT ONE

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, S. 21 OF THE FLORIDA CONSTITUTION AND VIOLATES THE INVIOLATE RIGHT TO TRIAL BY JURY GUARANTEED BY ART. I, S. 22 OF THE FLORIDA CONSTITUTION

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COST OF WORKERS COMPENSATION COVERAGE, THAT REASONING IS NO LONGER VALID

The amicus curiae, Florida Professional Firefighters, Inc., adopts the brief and argument of the petitioner.

This amicus curiae brief is submitted in regard to the effect of the repeal of the Florida Occupational Safety and Health Act on the present case. (Petitioner's Point One C).

The standard of review is de novo. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925 (Fla. 1st DCA 2005); *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013) (constitutional validity of statutes).

When the United States Supreme Court held that a statutory workmen's compensation scheme was constitutionally valid in 1917, the U.S. Supreme Court stated that it expected that there were other laws providing for accident prevention measures. *New York Central R. R. Co. v. White,* 243 U. S. 188, at 207, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

The absence of a workplace safety program highlights that the Florida Workers' Compensation Law does not continue to provide a reasonable alternative to the preexisting common law and statutory rights of Access to the Courts available at the time of the adoption of the 1968 Constitution.

Here is the full story of the repeal of the workplace safety program. In 1967, the Florida Workers' Compensation Law contained a workplace

safety provision, §440.56, Fla. Stat. (prior to OSHA). It applied to every employer who was thereby obligated to "furnish employment which shall be safe for the employees therein..." (Emphasis added). §440.56(1), Fla. Stat. (1967). The Florida Industrial Commission (FIC) was authorized to adopt safety rules. §440.56(2)(a), Fla. Stat. (1967). The FIC was authorized to enter and inspect places of employment for proper enforcement of the workplace safety rules. §440.56(5), Fla. Stat. (1967). The FIC was authorized to impose fines for violations, §440.56(8)(a), Fla. Stat. (1967), and to obtain injunctions against violations. §440.56(8)(b), Fla. Stat. (1967). Indeed, there had been a workplace safety provision in the Florida Workers' Compensation Law since 1937. Vol. 2, Fla. Stat. (1967), at 2123.

The 1967 Florida Workers' Compensation Law, including the workplace safety provision, is what the people expected an employee's remedy to be for workplace accidents when they voted for Access to Courts, Art. I, §21, Fla. Const., in 1968.

In 1993, Section 440.56, Fla. Stat., was essentially the same with a few amendments. One of which was that the safety program was then run by the Division of Workers' Compensation of the Department of Labor and Employment Security. §440.02(12) and §440.56(2), Fla. Stat. (1993).

Chapter 93-415, §109, Vol. I, Part I, Laws of Fla. (1994), at 214 repealed §440.56, Fla. Stat., in its entirety effective January 1, 1994. Id., at 215. However, the workplace safety program did not disappear just then.

In earlier sections of Ch. 93-415, §§62-69, Laws of Fla. (1993), Vol. I, Part One, pages 184-189, it was recreated as the Division of Safety in the Department of Labor and Employment Security. It was upgraded by title as the "Florida Occupational Safety and Health Act", Ch. 93-415, §52, Laws of Fla. (1993), Vol. I, Part One, Laws of Fla. (1994) at 184, creating §442.001, Fla. Stat., et seq. [It never became known as FOSHA or FLOSHA after the federal OSHA].

There already was a Chapter 442 entitled "Occupational Health and Safety", but it was a different law. §442.103, Fla. Stat. (1993). It established the "Florida Toxic Substances List", dealing with toxic substances. §442.103, Fla. Stat. Previously, it did incorporate Section 440.56, Fla. Stat., by Section 442.20, Fla. Stat.

In the 1995 Florida Statutes, §440.56, Fla. Stat., and Chapter 442, Fla. Stat., are melded together and re-titled "Occupational Safety and Health". Vol. 3, Fla. Stat. (1995), at 614.

Then in 1999, the Legislature passed a Government Reorganization Act. Ch. 99-240, Laws of Fla., at 2148. It amended Chapter 442 to prohibit

the Division of Safety from adopting rules, making inspections, or imposing penalties on private employers. Ch. 99-240, §§7-10, at 2159-2160.

After the effective date, October 1, 1999, the Division was only authorized to deal with public employers. Ch. 99-240, §§7-10, Laws of Fla., at 2159-2160. This was in effect for less than a year, however.

In another place in Ch. 99-240, Laws of Fla., the Florida Occupational Safety and Health Act, the entire Chapter 442, Florida Statutes, was repealed. Ch. 99-240, §14, at 2165.

However, the effective date of the repeal was July 1, 2000, and the Department of Labor and Employment Security was ordered to submit a proposed reauthorization of the Division of Safety and Chapter 442, Fla. Stat., by January 1, 2000, Ch. 99-240, §14, at 2165-2166. This is called a "sunset" law. It requires an agency to justify its continued existence. It is, however, a "dead hand" act which imposes an obligation on a subsequent session of the Legislature (some members may not have even been elected yet) to do something.

All the 2000 Legislature did was refer the matter to a task force. Ch. 2000-150, §4(2)(d), Laws of Fla. The Legislature adjourned without having repealed the "sunset" of the Florida Occupational Safety and Health Act, Chapter 442 of the Florida Statutes. On July 1, 2000, Chapter 442, Fla.

Stat., became repealed together with the safety rules that had been adopted under authority of Chapter 442, Fla. Stat., and the employees of the Division of Safety went home. Thus, Florida became unique among the states by having a repealed occupational safety and health act. It has never been re-enacted.

This is why Chapter 442 is unexplainedly missing from Vol. 3, Fla. Stat. (2001), at 1567-1568, and ever since.

A strange thing happened when Chapter 442, Fla. Stat., was repealed in 2000. Both the workplace safety provision and the toxic substance list were repealed. The State Fire Marshal responded to this by adopting the Florida Toxic Substances List by rule under the APA, which became Fla. Admin. Code R. 69A-62.004. The rule became permanent on November 21, 2001. He did so under authority of Florida Statutes, §633.01(1), Fla. Stat. (2001) and §633.45(1)(a), Fla. Stat. (2001), in regard to the employment of firefighters. No one has challenged this rule. The current statutes are somewhat similar.

There is now a statute which is the Florida Firefighters Occupational Safety and Health Act. §§633.502-633.536, Fla. Stat. (2013). Ch. 2002-404, §15, Laws of Fla.; Ch. 2013-183, §76, Laws of Fla. While it addresses firefighters, it does not specifically address paramedics, emergency medical

technicians, lifeguards and others, who perform rescues. There is no equivalent for other employments. None at all.

It must be wished that the Florida Occupational Safety and Health Act still existed and applied not only to firefighters, but to all other workers as well.

Wishing will not make it so.

Labor organizations can improve upon the Florida Workers' Compensation Law (including workplace safety) by collective bargaining agreements. *Tampa Bay Area NFL Football, Inc.*, supra. This, of course, requires the cooperation and agreement of an enlightened employer who believes that spending money to prevent accidents is worthwhile. By its very nature, this is a hit and miss approach to workplace safety. It is no substitute for a state statute with state safety rules, state inspectors and state enforcement. Non-union employees would have no such opportunity.

The repeal of the Florida Occupational Safety and Health Act is a fatal flaw in the Florida Workers' Compensation Law.

The Florida Occupational Safety and Health Act was not redundant of the federal Occupational Safety and Health Act. OSHA does not apply to state and local government. 29 USC §652(5). In the aggregate, government in Florida (state, counties, cities, etc.) is the largest employment in the state.

Since repeal of Ch. 442, Fla. Stat., in 2000, Florida has had no occupational safety and health act for the state's largest employment. Furthermore, private employers of less than 10 employees and private employers in retail, service, finance and insurance industries are partially exempt from OSHA. 29 CFR §1904.1 and §1904.2. They only have to report fatalities or accidents in which 3 or more employees are hospitalized. Ibid. For these employers and employees there is no Florida Occupational Safety and Health Act any more.

These particular workers' compensation-covered employers have immunity from suit under §440.11, Fla. Stat., when their employees have been negligently killed or injured at work. However, at the same time, employers are not required by Florida law to make any effort, nor to spend any money, nor to do anything to prevent death or injury of their employees.

Voluntary safety inspections could have an effect on rates, but this would not apply to self-insured employers and it still is only voluntary.

Most importantly, a serious question of Access to Courts and due process of law is presented by the repeal of the Florida Occupational Safety and Health Act.

It is one thing to explain how Florida's law for safety in the workplace disappeared. It just is what it is; it has disappeared by repeal. It does not

matter why the law was repealed, only that it was repealed. However, one year earlier, the Legislature itself gave insight as to why the law was repealed. In 1999, the Legislature passed a Government Reorganization Act in Ch. 99-240, at 2148, Laws of Fla. In this act, the Legislature amended Chapter 442, Fla. Stat., to provide that the division of safety was prohibited after October 1, 1999, to adopt rules, make inspections or impose penalties on private employers. Ch. 99-240, §§7-10, at 2159-2160, Laws of Fla. So, one year prior to repeal, the Legislature had already absolved private employers of any supervised obligation to prevent accidents suffered by employees in the workplace.

Plainly, it is cheaper for the employer to pay the inadequate benefits of the Florida Workers' Compensation Law than to spend money to prevent accidents. Or, at least, the employer no longer has to face inspections, pay fines, or endure stop-orders for failing to provide a safe place to work.

The United States Supreme Court already decided in 1917 in *New York Central R.R. Co.* vs. *White*, supra, that a constitutional workers' compensation law must have accompanying accident prevention laws.

The repeal of the Florida Occupational Safety and Health Act by the Florida Legislature in 2000, renders the Florida Workers' Compensation Law invalid. The ripple effect creates an illusion to the employee that any

injury sustained while working will be the responsibility of the employer, even under the most deplorable of working conditions, but such is no longer the case. An injured worker doesn't realize his employer is no longer required to provide a safe place to work; nor provide full medical care or adequate compensation for lost earnings. Employers are profiting from the Legislature's having shifted the burden to care for the injured employee away from the industry served to the worker himself and society generally.

The remedy: This Court should indicate to the Legislature that there must be a safety in the workplace law to accompany the Florida Workers' Compensation Law, to be adopted at the next session of the Legislature and that upon the failure to do so, this Court would adopt such measure, a warning previously given in *Dade County Classroom Teachers Ass'n v. Legislature* [*Ryan II*], 269 So. 2d 684 (Fla. 1972).

CONCLUSION

The Supreme Court of Florida should reverse the decision of the Florida First District Court of Appeal and declare unconstitutional such provisions of the Florida Workers' Compensation Law which adversely affect the claimant in the present case. Alternatively, the Court should hold that the current Florida Workers' Compensation Law is no longer an adequate remedy for injury to employees at work as understood by the

people when they voted for Access to Courts in the 1968 Constitution. Thus, the law should revert to the way the Florida Workers' Compensation Law read in 1976, prior to the impermissible take-aways that began in 1977; or the Court should declare the Florida Workers' Compensation Law to be no longer an exclusive remedy.

Respectfully submitted,

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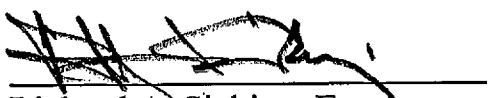

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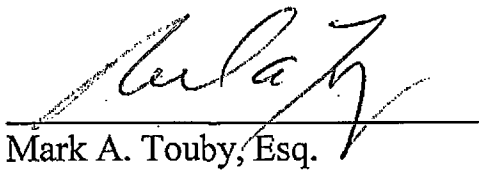

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CERTIFICATE OF SERVICE

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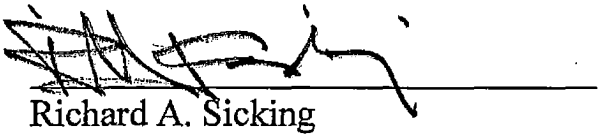

Richard A. Sicking

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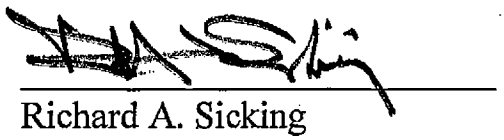

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