IN THE SUPREME COURT OF FLORIDA

Daniel Stahl,

Petitioner,

v.

Hialeah Hospital and Sedgwick Claims Management Services,

Respondents.
_____/

CASE NO. SC15-725
DCA NO. 1D14-3077

BRIEF OF AMICUS CURIAE, VOICES INC., IN SUPPORT OF PETITIONER'S POSITION

Kimberly A. Hill, Esquire, B.C.S.
Florida Bar Number 814059
Kimberly A. Hill, P.L.
821 SE 7th Street
Fort Lauderdale, FL 33301
(954)881-5214
kimberlyhillappellatelaw@gmail.com

Attorney for Voices, Inc., Amicus Curiae

TABLE OF CONTENTS

Page

Table of Authorities……..…...iii

Preliminary Statement……...1

Introduction……...1

Statement of Interest…….….1

Summary of Argument…….….2

Argument……...3

POINT I

THE LEGISLATIVE REPEAL OF THE 'OPT OUT' PROVISION IN COMBINATION WITH THE REDUCTION OF WORKERS' COMPENSATION BENEFITS BELOW THE MINIMUM STANDARD ALREADY SET BY THIS COURT (FULL MEDICAL AND WAGE LOSS BENEFITS) VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION BECAUSE THE LEGISLATURE IS WITHOUT POWER TO ABOLISH SUCH A RIGHT WITHOUT PROVIDING A REASONABLE ALTERNATIVE TO PROTECT THE RIGHTS OF THOSE IMPACTED TO REDRESS FOR INJURIES ……3

Standard of Review……...3

Conclusion…….…..20

Certificate of Service…….…..21

Certificate of Typeface Compliance……...…….22

TABLE OF AUTHORITIES

CASES **Page(s)**

Acton v. Fort Lauderdale Hospital,
440 So.2d 1282 (Fla. 1983)…….2, 3, 12

Altman Contractors v. Gibson,
63 So.3d 802 (Fla. 1st DCA 2011)……10

Bradley v. Hurricane Restaurant,
670 So.2d 162 (Fla. 1st DCA 1996)…….12

Bysczynski v. United Parcel Services, Inc.,
53 So.3d 328, 330 (Fla. 1st DCA 2010)……. 10

Castellanos v. Next Door Co.,
124 So.3d 392 (Fla. 1st DCA 2013) Rev. Granted SC13-2082……...15

Eller v. Shova,
630 So.2d 537 (Fla. 1993)…….4, 5, 6

Florida Department of Revenue v. City of Gainesville,
918 So.2d 250 (Fla. 2005)…… ……...3

Grice v. Suwannee Manufacturing Company,
113 So.2d 742(Fla.1st DCA 1959)……6

Kluger v. White,
281 So.2d 1 (Fla. 1973)……..……...3, 4, 5, 6, 8

Mahoney v. Sear Roebuck and Company,
440 So.2d 1285 (Fla. 1983)…….12

Martinez v. Scanlan,
582 So.2d 1167 (Fla. 1991)…….7, 8, 9, 11, 14, 15, 17, 20

Mullarkey v. Florida Feed Mills, Inc.,
268 So.2d 363, 365, 366 (Fla. 1972)…….2, 6

Psychiatric Associates v. Siegel,
610 So.2d 419, 424 (Fla. 1992)…….4

Russell House Movers, Inc. v. Nolin,
210 So.2d859, 862-63 (Fla. 1968)……...14

Stahl v. Hialeah Hospital,
160 So.3d 519 (Fla. 1st DCA 2015) Rev. Granted SC15-725……13, 15

Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management,
122 So.3d 440 (Fla. 1st DCA 2013) (en banc) Rev. Granted SC13-1930……..….15

CONSTITUTION, STATUTES AND RULES

Art. 1, §21, Fla. Const. (1968)……...……3, 5

§440.015, *Fla. Stat*……..7, 16

§440.02(1), *Fla. Stat*……10

§440.03, *Fla. Stat*. (1969)……..6

§440.05(2), *Fla. Stat*. (1969)…….6

§440.07, *Fla. Stat*. (1969)……..6

§440.11, *Fla. Stat*. ……..20

§440.13(1), *Fla. Stat*.....7, 14

§440.13(2)(a), *Fla. Stat*.....13

§440.13(3)(a)1, *Fla. Stat*.……..12

§440.13(13)(c), *Fla. Stat* (1993)…… ….....13

§440.15(3)(a),*Fla. Stat*……12

§440.15(3)(a),*Fla. Stat*……12

§440.15(3)(b),*Fla. Stat*……12

§440.15(3)(g)1-4, *Fla. Stat*. (2003)…….13

§440.15(5)(a), *Fla. Stat.*……..14, 17

§440.15(5)(b), *Fla. Stat*. (2003)……..14

PRELIMINARY STATEMENT

In this brief, Amicus Curiae, Voices, Inc., will be referred to as Voices, Inc.; Petitioner, Daniel Stahl, will be referred to as "Claimant" or "Petitioner" and the Respondents, Hialeah Hospital and Sedgwick Claims Management Services, will be referred to as the "Respondents," the "Employer/Carrier," or the "E/C." The Judge of Compensation Claims will be referred as the "JCC." References to the record on appeal will be by the "R." followed by the applicable page number.

INTRODUCTION

By Order dated November 4, 2015, this court granted the motion for leave for the undersigned to file an amicus brief on behalf of Voices Inc., in support of Petitioner's position.

STATEMENT OF INTEREST

Voices, Inc., is a nonprofit advocacy group for injured workers in Florida and their supporters. The purpose of Voices, Inc., is to guide injured workers and their families through the Worker's Compensation system and educate them as to their rights under the law. The matter before the court presents serious Constitutional and public policy implications regarding the adequacy of the benefits provided to injured workers by the Florida Workers' Compensation Law, and the abrogation of certain fundamental rights guaranteed to all Florida citizens including, but not limited to, the Right of Access to the Courts (there shall be no

right without a remedy) and the Right to Trial by Jury, the only right in the Declaration of Rights termed "inviolate" by the framers. As such, Voices, Inc., has an interest in and is uniquely positioned to assist the Court on the proper disposition of the issues raised by the Petitioner in this case.

SUMMARY OF ARGUMENT

Voices, Inc., maintains that the Legislature was without authority to repeal the ‘opt out’ provision, which encompasses the inviolate right to trial by jury, without providing a reasonable alternative to protect the rights of injured workers for redress of injuries and there has been no showing of an overpowering public necessity for the abolishment of the right. The ability of an injured worker to ‘opt out’ was a critical part of the Workers’ Compensation Law in 1968 when the citizens of Florida adopted the Constitution and the Declaration of Rights. At that time, and until 1970, all employees covered by the Workers’ Compensation Law had the right and option to 'opt out' of coverage and have a cause of action in tort against their employer. *Mullarkey v. Florida Feed Mills, Inc.*, 268 So.2d 363 (Fla. 1972).

The Workers' Compensation Law was deemed by the Legislature to be the exclusive remedy, pursuant to §440.11, *Fla. Stat.*, with limited exceptions, for the injuries suffered on the job. However, it only became the exclusive remedy effective September 1, 1970 when the ‘opt out’ provision was repealed. Since

then the Legislature has systematically reduced benefits to the point that injured workers are no longer entitled to full medical and wage loss benefits, the exclusive remedy is no longer adequate and the Worker's Compensation Law is unconstitutional. The allowance of full medical and wage loss benefits has always been a benchmark upholding the law on an access to courts challenge. *See. e.g., Acton v. Fort Lauderdale Hospital*, 440 So.2d 1282 (Fla. 1983).

Since the Workers' Compensation Law fails to provide adequate benefits and no longer provides an option for injured workers to 'opt out,' it fails as an exclusive replacement remedy for tort litigation. Voices, Inc., suggests that the line of demarcation for a constitutional replacement remedy was crossed when injured workers were no longer entitled to full medical and wage loss benefits. This was after the law was last declared an adequate replacement in *Scanlan*. As such, the Workers' Compensation Law, as it now exists through various permutations, violates the access to courts provision found in Article I, Section 21 of the Florida Constitution and is in direct contravention of this court's ruling in *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

ARGUMENT

POINT I

THE LEGISLATIVE REPEAL OF THE 'OPT OUT' PROVISION IN COMBINATION WITH THE REDUCTION OF WORKERS' COMPENSATION BENEFITS BELOW THE MINIMUM STANDARD ALREADY SET BY THIS COURT (FULL MEDICAL AND WAGE LOSS BENEFITS) VIOLATES THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION BECAUSE THE LEGISLATURE IS WITHOUT POWER TO ABOLISH SUCH A RIGHT WITHOUT PROVIDING A REASONABLE ALTERNATIVE TO PROTECT THE RIGHTS OF THOSE IMPACTED TO REDRESS FOR INJURIES.

Standard of Review: A constitutional challenge to the facial validity of a statute is reviewed de novo. *See Florida Department of Revenue v. City of Gainesville*, 918 So.2d 250 (Fla. 2005).

A. Introduction to Argument

Article I, Section 21 of the Declaration of Rights in the Constitution of the State of Florida provides:

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

Prior to this court's decision in *Kluger v. White*, 281 So.2d 1 (Fla. 1973), it had never specifically spoken to the issue of whether or not the constitutional guarantee of a 'redress of any injury' bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party.

In declaring the provision at issue in *Kluger* unconstitutional as a violation of the access to courts provision, this court held:

> [t]hat where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. §2.01, F.S.A., the Legislature is 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.

Id at 4. *See also, Eller v. Shova*, 630 So.2d 537 (Fla. 1993).

The provision has since been construed liberally in order to "[g]uarantee broad accessibility to the courts for resolving disputes." *Psychiatric Associates v. Siegel*, 610 So.2d 419, 424 (Fla. 1992).

The 'opt out' provisions existed as a critical part of the Workers' Compensation Law when the citizens of Florida approved the Declaration of Rights. Voices, Inc., maintains that the Legislative repeal of an inviolate right and leaving injured workers without an adequate remedy that incorporates, at a minimum, full medical and wage loss renders the entire Workers' Compensation Law constitutionally invalid as an exclusive remedy.

If this court follows the roadmap set forth in *Kluger* and *Eller* for determining whether the repeal of a statute allowing the injured worker to opt out

and the elimination of full medical and wage loss violates the access to courts provision of Florida's Constitution, it will necessarily conclude that it does because an exclusive remedy that does not meet minimum standards for adequacy (i.e. full medical and indemnity), as previously set forth by this court, is inadequate. *Scanlan, supra.*

B. The Legislative repeal of the 'opt out' provisions, along with the elimination of full medical and wage loss, constitutes the elimination of a previously existing statutory right to access to courts.

In 1935 when the Workers' Compensation Act was put into place it made the right to trial by jury, an inviolate right, optional by the inclusion of 'opt out' provisions. §§440.03, 440.05(2) and 440.07, *Fla. Stat*. (1969). The right to 'opt out' remained part of the Act until September 1, 1970 when those sections were quietly and without explanation or justification repealed by the Legislature. So, the statutory right to 'opt out' predated the 1968 adoption of the Declaration of Rights of the Constitution of the State of Florida. The 'opt out' provisions allowed every employee (and employer) who desired to 'opt out' to do so by filing a timely notice in Tallahassee, §§440.03, 440.05(2) and 440.07, *Fla. Stat*. (1969); *See also, Mullarkey v. Florida Feed Mills, Inc*., 268 So.2d 363 (Fla. 1972); *Grice v. Suwannee Manufacturing Company*, 113 So.2d 742 (Fla.1st DCA 1959).

As set forth in *Kluger*, in such a case, "the Legislature is 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." *Id.* It is only after the repeal of the 'opt out' provisions the Workers' Compensation truly became the exclusive remedy. However, the Legislature did not replace the 'opt out' provisions with anything that represented a reasonable replacement. Perhaps at one time there was a benefit proceeding under the Workers' Compensation Law, as opposed pursuing civil tort remedies, based on the rationalization encompassing a tradeoff as set forth in *Eller*. In upholding the statutory provision addressed in Eller, this court reasoned that "[***I]n exchange for this type of difficult, expensive, and time-consuming lawsuit concerning the safety of her workplace, the workers' compensation statute gives her the ability to quickly recover a significant portion of her damages without regard to fault***." (Emphasis added). *Id*. at 543.

However, such justification can no longer survive scrutiny based on the current benefit entitlements structure set forth in the Workers' Compensation Law because of the systematic decreases in benefits since 1991, after this Court last declared that the Workers' Compensation Law did not violate the access to courts provision more than twenty years ago in *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991). Now, that the Workers' Compensation Law does not provide full medical or wage loss benefits, along with other factors to be discussed infra, injured workers would fair far better in the civil arena, but they have no option to 'opt out' due to

the legislative repeal of these 'opt out' provisions.

The Legislature's stated objective in enacting the Workers' Compensation Law as the exclusive remedy for on the job injuries was "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." §440.015, *Fla. Stat.* The Legislature determined that "a mutual renunciation of common-law rights and defenses by employers and employees" served that objective. However, it is evident that the objective is no longer being served at least not in the case of injured workers. Since injured workers, such as the Petitioner in this case, have no ability to 'opt out,' they are stuck in a wholly inadequate system that does not provide full medical or wage loss benefits and does not otherwise adequately redress their injuries.

C. The Legislature did not provide a reasonable alternative to protect the rights of the people of the state, and in particular injured workers, for redress for injuries:

This court has held that the Workmen's Compensation Law abolished the right to sue ones employer in tort for a job-related injury, but provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job, thus satisfying one of the exceptions to the rule against abolition of the right to redress for an injury. *Kluger.* This is no longer the case. In 1991, about 21 years after injured workers loss of the inviolate right to a trial by jury in 1970 via the

elimination of the 'opt out' provision, this court upheld the 1989 and 1990 amendments to the Workers' Compensation Law in *Scanlan*. While this court upheld the Workers' Compensation Law as constitutionally sound in *Scanlan*, much has changed in the twenty plus years since *Scanlan* was decided.

Although the Legislature had already began chipping away at injured workers' benefit entitlements in 1989 and 1990, this court held that the Workers' Compensation Law "continues to provide injured workers ***with full medical care and wage-loss payments for total and partial disability regardless of fault and without the delay and uncertainty of tort litigation***." (Emphasis added). *Scanlan* at 1171. Using *Scanlan* as the baseline for what was "enough" to satisfy the access to courts provision back then, the destruction of the law as a reasonable alternative began with the 1993 revisions. The problem was compounded by what amounted to a full-scale rewrite of the Workers' Compensation Law in 2003, which served to further erode benefit entitlements including allowing the E/C to apportion medical benefits, which had previously been statutorily prohibited.

After this court determined that the Workers' Compensation Law was still an adequate remedy in *Scanlan*, the Legislature used this as carte blanche to further decrease available benefits pursuant to the Workers' Compensation Law effective in 1994, 2003 and 2009, all of which contributed to a significant reductions in ever-dwindling benefits available to injured workers. A list of all of the changes

and explanations as the impact of these changes on injured workers and their benefit entitlements would easily consume this entire brief, so some of the more significant benefit reductions are set forth in footnote one.[1] These revisions have not only significantly reduced benefits, as described in footnote one, the law has become procedurally and substantively more difficult and cumbersome to navigate. The issue is further complicated by the Legislature's adoption of provisions that inject a myriad complicated medical/legal issues into the law;[2] fraud issues that

---

[1] For example, the duration of temporary benefits were reduced in 1990 from 350 weeks to 260 week, and, in 2003, they were reduced again to 104 weeks. In 1990, the 10-year wage loss program was reduced to a maximum of 7 years (364 weeks) with entitlement to that cap dependent upon the extent of the impairment. Now, there is no wage loss, but there are impairment benefits, which allow for 2 weeks of benefits for each 1% of impairment. A 6% impairment rating under the 1990 changes would have yielded 78 weeks in benefits; whereas, under the current standard, it would yield entitlement to only 12 weeks of benefits. If the Claimant is not at MMI once 104 weeks have elapsed, there is a gap period for which no benefits are payable between that period and PTD benefit, unless a claimant can prove prospectively that he will be PTD upon reaching MMI. PTD is payable based only on a physical impairment that relegates an injured worker to sedentary work regardless of the debilitating nature of the injury. So, one can apparently never be PTD from psychiatric injuries alone. In addition, medical benefits can now be apportioned; whereas, prior to 2003, they could not be. The E/C has complete control over medical care, unless they fail to act within the statutory parameters, and this is without regard to the physician qualification or rapport with the Claimant. The Claimant is entitled to only one change in physicians at his request during the life of the claim, and again the E/C maintains control over the selection, unless it fails to authorize a change within five (5) days.

[2] *See, e.g., Bysczynski v. United Parcel Services, Inc.*, 53 So.3d 328, 330 (Fla. 1st DCA 2010) (noting "the complex nature of Florida's current Workers' Compensation Law, and the myriad of thorny legal and medical issues which

carry criminal consequences; and increased and almost insurmountable evidentiary burdens of proof for certain types of cases.[3]

In fact, the amendments that came about in 1993 and 2003 have made the Workers' Compensation Law unrecognizable as a system of compensation without contest that provides full medical care and wage loss payments for total or partial disability regardless of fault. *See Scanlan*. The law does not even meet the minimum standard for a constitutional replacement remedy in its current form because it does not allow for full medical or wage loss. The last time the law provided for full medical and wage loss was in 1991. The aggregate effect of the gradual depletion of available benefits through continuous legislative reforms has had a grave impact on injured workers' rights, but the Legislature's removal of the Claimant's entitlement to full medical and wage loss, among other things, has sounded the death knell for the Workers' Compensation Law as a reasonable alternative to tort litigation.

Significantly, the right to receive full medical and wage loss benefits has

---

accompany even the most fundamental decisions regarding an injured worker's entitlement to, and a carrier's liability for, medical treatment.").

[3] *See, e.g.*, *Altman Contractors v. Gibson*, 63 So.3d 802 (Fla. 1st DCA 2011) (Wolf, J., dissenting) (noting that §440.02(1), Florida Statutes (2005), imposes a heightened standard for the compensability of injuries caused by mold exposure, and describing the majority's interpretation of said statute as imposing a "practically impossible burden" on the claimant).

remained the benchmark for upholding constitutionality of the statute and finding by this court that the Workers' Compensation Law is still a viable alternative to tort litigation and in 1968 injured workers were entitled to full medical and wage loss. In fact, the notion of full medical care for work related injuries has existed as a mandatory and integral part of the Workers' Compensation Law since before the access to court provision was adopted. This Court and the Supreme Court of Florida have consistently upheld the statute on access to court grounds based on the rationale that injured workers were still entitled ***"full medical care" and wage loss payments for partial and total disability*** as a rationale for upholding the Workers' Compensation Law under the access to courts provision. *See. e.g., Acton v. Fort Lauderdale Hospital*, 440 So.2d 1282 (Fla. 1983);[4] *Mahoney v. Sear Roebuck and Company*, 440 So.2d 1285 (Fla. 1983);[5] *Bradley v. Hurricane*

[4] In *Action* the Supreme Court upheld 440.15(3)(a) and (b), *Fla. Stat*., The Workers' Compensation Law remains a reasonable alternative to tort litigation. The change from lump sum payments for permanent partial disability to a system offering such payments only for permanent impairments and wage-loss benefits for other types of partial disability may disadvantage some workers, such as Mr. Acton. On the other hand, the new system offers greater benefits to injured workers who still suffer a wage loss after reaching maximum medical recovery. The Workers' Compensation Law continues to afford substantial advantages to injured workers, ***including full medical care*** and wage-loss payments for total or partial disability without their having to endure the delay and uncertainty of tort litigation.

[5] In *Mahoney* the Supreme Court upheld section 440.13(3)(a)1, *Fla. Stat*., noting that Mahoney might well have received more compensation for the loss of his eye prior to the legislative amendments to the Workers' Compensation Law in 1979. Mahoney, however, received ***fully paid medical*** care and wage-loss benefits during

Restaurant, 670 So.2d 162 (Fla. 1st DCA 1996)[6].

As evinced by Petitioner's case, it is irrefutable that injured workers are no longer entitled to full medical benefits or wage loss benefits. One of the statutory sections at issue in Petitioner's case involves a $10.00 co-pay for medical visits after MMI pursuant to §440.13(13)(c), *Fla. Stat*., and the effective elimination of permanent partial disability benefits, pursuant to §440.15(3)(g)1-4, *Fla. Stat*., enacted in 2003. Since 2003 the statutory scheme 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. *See Stahl v. Hialeah Hospital*, 160 So.3d 519 (Fla. 1st DCA 2015). Of course, this is just the tip of the iceberg in terms of takeaways or previous benefit entitlements that no longer exist only some of which are described in footnote one.

While Section 440.13(13)(c), *Fla. Stat*., which was originally enacted in 1993, provides: "(c) Notwithstanding any other provision of this chapter, ***following overall maximum medical improvement from an injury compensable***

---

his recovery from his on-the-job accident without having to suffer the delay and uncertainty of seeking a recovery in tort from his employer or a third party. Workers' compensation, therefore, still stands as a reasonable litigation alternative.

[6] In *Bradley*, this Court concluded that section 440.15(3)(a)3, *Fla. Stat*., does not violate the claimant's right of access to the courts. This Court held "The workers' compensation law remains a reasonable alternative to tort litigation. ***It provides injured workers with full medical care*** and benefits for disability and permanent impairment regardless of fault, without the delay and uncertainty of tort litigation.

under this chapter, the employee is obligated to pay a copayment of $10 per visit for medical services. . . " (Emphasis added). This means that the E/C is not obliged to provide full medical despite §440.13(2)(a), *Fla. Stat*., which requires that "the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require. An injured worker is entitled to medical treatment after MMI, if the injury requires it. It is called palliative care[7] and is not excluded from §440.13(2)(a), *Fla. Stat*.

There are other provisions that deserve mention, not implicated here, that take away full medical from injured workers, including the apportionment provision. See §440.15(5)(b), *Fla. Stat*. (2003). Prior to October 1, 2003, the apportionment of medical was specifically prohibited. The statute as it existed prior to the 2003 amendment to §440.15(5)(a), *Fla. Stat*., provided in relevant part that "[c]ompensation for temporary disability benefits, ***medical benefits***, and wage-loss benefits ***shall not be subject to apportionment.***" *Accord Russell House Movers, Inc. v. Nolin*, 210 So.2d859, 862-63 (Fla. 1968) (holding that "compensation for *temporary* disability and ***medical benefits are not apportionable under the general scheme and intent of our workmen's compensation law***"). (Emphasis added). Now, there is no limitation on

[7] Section 440.13 (1)(n), Fla. Stat. provides: "Palliative care" means noncurative medical services that mitigate the conditions, effects, or pain of an injury.

apportioning medical benefits, even if the accident is the major contributing cause of the need for treatment, i.e. 51% responsible of the need for treatment.

The list of changes that detrimentally impact injured workers goes on and on, but these dramatic changes did not exist until after *Scanlan* was decided. With each legislative re-write of the Workers' Compensation Law, the situation became increasingly portentous toward rendering the law constitutionally invalid. In fact, the reality is that the Workers' Compensation Law no longer serves its intended purpose and in its current incarnation cannot serve as an adequate replacement remedy. In fact, it is asserted that the last time the law was constitutional was in 1990 as determined in *Scanlan*. Since that time the law has become wholly inadequate, benefits are difficult and time consuming to obtain and, in some instances, nearly impossible to obtain either because of limitations on attorney's fees or increased burdens of proof.

It is notable that there are several constitutional challenges to the Workers' Compensation Law pending before this court, upon which jurisdiction has been accepted, including a challenge to the 104 week limitation on temporary benefits (*Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management*, 122 So.3d 440 (Fla. 1st DCA 2013) (en banc) Rev. Granted SC13-1930); a challenge to the viability of the Claimant's paid $10.00 medical co-payment post MMI (*Stahl v. Hialeah Hospital*, 160 So.3d 519 (Fla. 1st DCA 2015) Rev. Granted SC15-725);

and a challenge to provision that mandates applicability of the statutory fee. (*Castellanos v. Next Door Co.,* 124 So.3d 392 (Fla. 1st DCA 2013) Rev. Granted SC13-2082). The fact that all of these constitutional challenges are presently pending should alert this court to the fact that the Workers' Compensation Law as a whole no longer a viable alternative to tort litigation.

Our Legislature tells us that the intent of the Workers' Compensation Law is to be an "efficient and self-executing system … which is not an economic or administrative burden," and that the law is to "be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." *See* §440.015, *Fla. Stat.* (2003). It has long been recognized that the Workers' Compensation Law establishes a system of exchange between employees and employers that is designed to promote efficiency and fairness. Furthermore, it is recognized that, under this no-fault system, the employee relinquishes certain common-law rights with regard to negligence in the workplace and workplace injures in exchange for strict liability and rapid recovery of benefits.

Voices, Inc., submits that, because of the substantially reduced benefit structure, in combination with expanding employer immunity and increasing procedural hurdles and evidentiary burdens, the current incarnation of the Workers' Compensation Law cannot survive this constitutional challenge. In fact,

several current or former judges of the District Court of Appeal, First District, have previously suggested that the Legislature was already dangerously close to reaching the tipping point on injured workers' right to access to courts. For example, in *Staffmark v. Gates*, 43 So.3d 792, 798 (Fla. 1st DCA 2010), Judge Webster wrote in a concurring opinion, that:

> If a significant number of injured workers receive significantly reduced benefits … the courts might well conclude that because the right to benefits has become largely illusory, that, accordingly, workers have been denied meaningful access to courts.

Then, in *Matrix Employee Leasing v. Hadley*, 78 So.3d 621, 633-34 (Fla. 1st DCA 2011), Judge Van Nortwick wrote a dissenting opinion and discussed Judge Webster's prior concurring opinion in *Staffmark*, noting:

> Judge Webster has recently warned about potential constitutional concerns in the context of the apportionment of benefits under section 440.15(5)(b). . . Similarly, in the case of a totally disabled claimant whose rights to temporary disability benefits has expired, but who is prohibited from receiving permanent disability benefits, the elimination of disability benefits may reach a point where the claimant's cause of action has been effectively eliminated. In such a case, the courts might well find that the benefits under the Workers' Compensation Law are no longer a reasonable alternative to a tort remedy and that, as a result, workers have been denied access to courts.

Since an injured worker is unable to obtain trial by jury, even though they once could prior to the repeal of the 'opt out' provision, there is no viable way under the statute for him or her to challenge the deficient benefits they are

required to accept under the 2003 Workers' Compensation Law and/or any version of the scheme that has been in place since the law was last declared constitutional under *Scanlan*. On the other hand, but for the enactment of the Workers' Compensation Law, an injured worker would have been permitted to pursue a tort action in civil court for injuries sustained on the job. He would also have an opportunity to have a jury trial and receive substantial additional damages not permitted by the Workers' Compensation Law.

D. The Legislature has not shown that an overwhelming public necessity exists for the elimination of the inviolate right to trial by Jury and the elimination of full medical and wage loss and the Legislature has failed to show that no alternative method exists for meeting the public necessity.

There was no "crisis" in 1970 when the Legislature repealed the right to trial by jury by eliminating the 'opt out' provision. Moreover, if there ever was a crisis, based on the high cost of workers' compensation coverage, after the Workers' Compensation Law was last declared an adequate remedy, it has long since been eradicated and cannot stand as justification for the sweeping changes after 1991 which resulted in the systematic depletion of workers' compensation benefits. In fact, Florida's Insurance Commissioner, Kevin M. McCarty, of The Office of Insurance Regulation, entered an order on November 3, 2015 (See Petitioner's Notice of Supplemental Authority filed on November 5, 2015), mandating that the National Council on Compensation Insurance (NCCI) to lower workers'

compensation rates for Florida employers by 5.1%.

It was noted in the recent order that Florida's workers' compensation market is both competitive and affordable. Mr. McCarty noted that "[***T]his approval would represent a 60% cumulative reduction in Florida workers' compensation rates since 2003*** and having competitive rates is a critical element in bringing new jobs to our state." Furthermore, it was noted that the rate decrease "allows Florida's businesses to continue growing economically, while helping injured workers get the medical assistance they need to return to work." (Emphasis added). The order referencing a 60% reduction in premiums debunks any notion that there is an ongoing crisis and the purported crisis cannot support a determination that an overwhelming public necessity exists for the elimination of the inviolate right to trial by jury and/or the evisceration of the benefit structure beyond the point of providing a reasonable alternative to tort litigation and to access to courts.

The Legislature has not restored any benefits to injured workers since the purported crisis has passed, if one ever existed. Moreover, even if a "crisis" once existed, a crisis is not a permanent condition. *See e.g., Estate of McCall v. United States*, 134 So.3d 894 (Fla. 2014).

As noted by this court in *McCall***,**

> **[**C]onditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation. The United States Supreme Court has recognized that "[a] law depending

> upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48, 44 S.Ct. 405, 68 L.Ed. 841 (1924). *See also Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund, 284 Wis.2d 573, 701 N.W. 2d 440, 468 (2005).* ("A statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. A past crisis does not forever render a law valid." (footnotes omitted)).

Based on the most current available data, this court should conclude that there is no overwhelming public necessity for upholding, as constitutional, the prohibitive changes imposed by the Legislature in the face of a purported ongoing insurance crisis.

CONCLUSION

Voices, Inc., joins Petitioner in urging this court to reverse the District Court of Appeal, First District, and grant whatever relief is just and proper. Voices, Inc., also respectfully and specifically suggests that this court invalidate the exclusive remedy provision contained in §440.11, Florida Statute, and/or alternatively revert back to the last law that passed constitutional muster, which was the 1991 law pursuant to *Scanlan.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the attorneys identified below by electronic mail on this 14th day of November 2015 to: Kimberly J. Fernandes, Esquire, Attorney for the Respondents, 201 South Monroe Street, Suite 5 Tallahassee Florida 32301kfernandes@kelleykronenberg.com; Mark L. Zientz, Esquire, Attorney for the Petitioner, Law Offices of Mark L. Zientz, P.A., 9130 South Dadeland Boulevard, Suite 1619 Miami, Florida 33156 mark.zientz@mzlaw.com.

/s/_____
Kimberly A. Hill, Esquire, B.C.S.
Florida Bar Number 814059
Kimberly A. Hill, P.L.
821 SE 7th Street
Fort Lauderdale, FL 33301
(954)881-5214
kimberlyhillappellatelaw@gmail.com

Attorney for Amicus Curiae, Voices, Inc.

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief was computer-generated using Times New Roman fourteen point font on Microsoft Word, and hereby complies with the font standards as required by Fla. R. App. P 9.210 for computer-generated briefs.

/s/_____
Kimberly A. Hill, Esquire, B.C.S.
Florida Bar Number 814059
Kimberly A. Hill, P.L.
821 SE 7th Street
Fort Lauderdale, FL 33301
(954)881-5214
kimberlyhillappellatelaw@gmail.com

Attorney for Amicus Curiae, Voices, Inc.