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**IN THE SUPREME COURT**
**STATE OF FLORIDA**

Daniel Stahl

Petitioner,

vs.

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

Hialeah Hospital and
Sedgwick Claims Management
Services

Respondents.

___________________________/

# AMICUS CURIAE AMENDED BRIEF OF FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF POSITION OF PETITIONER STAHL'S INITIAL BRIEF ON THE MERITS

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**TABLE OF CONTENTS**

Table of Citations . . . . . . . . . . . . . . . . . . . . . . . . . . i-v

Introduction . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

Statement of the Identity of the Amicus Curiae
and its Interest in the Case . . . . . . . . . . . . . . . . . . . 1

**I. §440.34 IS UNCONSTITUTIONAL AS IT IMPERMISSIBLY VIOLATES THE RIGHTS OF EQUAL PROTECTION AND RIGHT TO TRIAL BY JURY**
. . . . . . . . . . . . . . . . . . . . . . . . 2-11

**II. THE WORKERS' COMPENSATION STATUTE NO LONGER REMAINS A REASONABLE ALTERNATIVE TO COMMON-LAW REMEDIES BECAUSE IT NO LONGER SERVES ITS INTENDED PURPOSE.**
. . . . . . . . . . . . . . . . . . . . . . . . 11-20

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

Certificate of Type Size and Style . . . . . . . . . . . . . . 20-21

Certificate of Service . . . . . . . . . . . . . . . . . . . . . 21

## TABLE OF CITATIONS

### FLORIDA CASES

*A.B. Taff & Sons v. Clark*,. . . . . . . . . . . . . . . . . . . . 13
110 So.2d 428 (Fla. 1st DCA 1959)

*Alston v. Etcetera Janitorial Servs.*,.. . . . . . . . . . . . . . 14
634 So. 2d 1133, 1134 (Fla. 1st DCA 1994)

*Amos v. Gartner, Inc.*,. . . . . . . . . . . . . . . . . . . . . 10
17 So. 3d 829, 833 (Fla. 1st DCA 2009).

*Branham v. TMG Staffing Services*,.. . . . . . . . . . . . . . . 14
994 So.2d 1172 (Fla.1st DCA 2008)

*Bysczynksi v. UPS/Liberty Mutual*,.. . . . . . . . . . . . . . . 10
53 So.3d 328 (Fla. 1st DCA 2010)

*Caribbean Conservation Corp., Inc. v.*
*Florida Fish & Wildlife Conservation Com'n*,.. . . . . . . . . . . 3
838 So. 2d 492 (Fla. 2003)

*Castellanos v. Next Door*,.. . . . . . . . . . . . . . . . . . . . 8
Sup. Ct, Case No. Sc13-2082

*Cynthia Richardson v. Aramark/ Sedgwick, CMS*,.. . . . . . . . . . . 8
Sup. Ct, Case No. SC14-738

*Estate of McCall v. US*,.. . . . . . . . . . . . . . . . . . . . . 3,5
134 So. 3d 894 (Fla. 2014)

*Florida Erection Services, Inc. v. McDonald*,. . . . . . . . . . 13-14
395 So.2d 203, 210 (Fla. 1st DCA 1981)

*Floyd v. State*,.. . . . . . . . . . . . . . . . . . . . . . . . . 4
90 So.2d 105, 106 (Fla.1956)

*Frankel v. Loxahatchee Club, Inc.*,. . . . . . . . . . . . . . . 16,18
No. 1D15-1289 (Fla. 1st DCA, Nov. 5, 2015)

*Gallagher Bassett Services v. Mathis*,.. . . . . . . . . . . . . . 15
990 So.2d 1214(Fla.1st DCA 2008

Giaimo v. Florida Autosport, Inc.,. . . . . . . . . . . . . . . . . 10
154 So. 3d 385 (Fla. 1st DCA 2014)

*Hillsborough County G.E.A. v. Hillsborough Co.*
*unty Aviation Auth.*,. . . . . . . . . . . . . . . . . . . . . . . . 7
522 So.2d 358, 362 (Fla.1988)

*Hollywood, Inc. v. Hollywood*,.. . . . . . . . . . . . . . . . . . . 4-5
321 So. 2d 65, 71 (Fla. 1975)

*In re 1978 Chevrolet Van*,.. . . . . . . . . . . . . . . . . . . . . 5
493 So.2d 433, 434 (Fla.1986)

*In re T.W.*,.. . . . . . . . . . . . . . . . . . . . . . . . . . . 4
55,1 So.2d 1186 (Fla. 1989)

*Jacobson v. Southeast Personnel Leasing*,. . . . . . . . . . . . . 7
113 So. 3d 1042 (Fla. 1st DCA 2013)

*Johnson v. Dicks*,.. . . . . . . . . . . . . . . . . . . . . . . 14
76 So. 2d 657, 661 (Fla. 1955)

*Johnson v. Koffee Kettle Restaurant*,. . . . . . . . . . . . . . . 14
125 So.2d 297, 299 (Fla. 1961)

*Level Three Communications LLC v. Jacobs*, ,.. . . . . . . . . . . 3
841 So.2d 447(Fla.2003)

*Louis P. Pfeffer and Frank Cerino v. Labor Ready*,.. . . . . . . . 8
Sup. Ct, Case No. SC14-1325

*Martinez v Scanlan*,.. . . . . . . . . . . . . . . . . . . . . . 11,21
582 So.2d 1167 (Fla. 1991)

*McCoy v. Florida Power & Light Co.*,.. . . . . . . . . . . . . . . 13
87 So. 2d 809 (Fla. 1956)

*McGee v. C. Ed De Brauwere & Co.*,.. . . . . . . . . . . . . . . . 5
162 So. 2d 510 (Fla. 1935)

*Mitchell v. Moore*,. . . . . . . . . . . . . . . . . . . . . . . . 7
786 So.2d 521, 527 (Fla.2001)

*Mullarkey v. Florida Feed Mills*,. . . . . . . . . . . . . . . . . . 5
268 So.2d 363 (Fla. 1972)

*North Florida Women's Health v. State*,. . . . . . . . . . . . Passim
866 So. 2d 616 (Fla. 2003)

*Port Everglades Terminal Co. v. Canty*,. . . . . . . . . . . . . . 13
120 So. 2d 596 (Fla. 1960)

*Schafrath v. Marco Bay Resort, Ltd*,.. . . . . . . . . . . . . . . . 14
608 So.2d 97(Fla.1st DCA 1992)

*Staffmark v. Merrell*,.. . . . . . . . . . . . . . . . . . . . . . 18
43 So. 3d 792, 798 (Fla. 1st DCA 2012)(Webster, dissenting)

*State v. Griffith*,. . . . . . . . . . . . . . . . . . . . . . . . 4
561 So.2d 528, 530 (Fla.1990)

*State v. J.P.*, .. . . . . . . . . . . . . . . . . . . . . . . . . 7
907 So.2d 1101, 1109 (Fla. 2004)

*State v. Webb*,. . . . . . . . . . . . . . . . . . . . . . . . . . 6
335 So.2d 826 (Fla. 1976)

*State Farm Insurance Company*,.. . . . . . . . . . . . . . . . . . 6
296 So. 2d 9 (Fla. 1974)

*Sullivan v. Mayo*,.. . . . . . . . . . . . . . . . . . . . . . 13,19
121 So.2d 424 (Fla. 1960)

*Turner v. PCR, INC.*,. . . . . . . . . . . . . . . . . . . . . . . 5
754 So. 2d 683, 686 (Fla. 2000)

*US Sugar Corp. v. Henson*,.. . . . . . . . . . . . . . . . . . . 10
823 So.2d 104 (Fla. 2002)

*Waggon-Dixon v. Royal Caribbean Cruises, LTD.*,. . . . . . . . . . 5
679 So. 2d 811 (Fla. 3d DCA 811)

*White Egret Condominium, Inc. v. Franklin*,. . . . . . . . . . . 11
379 So. 2d 346, 351 (Fla. 1979)

**STATUTES**

§440.03, Fla. Stat.(1969) . . . . . . . . . . . . . . . . . . . . 5

§440.05(2), Fla. Stat.(1969) .. . . . . . . . . . . . . . . . . . 5

§440.07, Fla. Stat.(1969) . . . . . . . . . . . . . . . . . . . . 5

§440.09(1), Fla. Stat.(2009) .. . . . . . . . . . . . . . . . . 10

§440.09(1), Fla. Stat.(2015) .. . . . . . . . . . . . . . . . . 15

§440.13(2)(c), Fla. Stat... . . . . . . . . . . . . . . . . . 12,16

§440.13(5), Fla. Stat.(2009). . . . . . . . . . . . . . . . . . 10

§440.15(1), Fla. Stat.. . . . . . . . . . . . . . . . . . . . . 12,17

§440.15(2), Fla. Stat.. . . . . . . . . . . . . . . . . . . . . 12,17

§440.15(3), Fla. Stat.. . . . . . . . . . . . . . . . . . . . . 12

§440.15(4), Fla. Stat.. . . . . . . . . . . . . . . . . . . . . 12

§440.15(5)(b), Fla. Stat... . . . . . . . . . . . . . . . . 12,17-18

§440.26, Fla. Stat.(1979).. . . . . . . . . . . . . . . . . . 15

§440.26(1), Fla. Stat.. . . . . . . . . . . . . . . . . . . . . 15

§440.34, Fla. Stat. . . . . . . . . . . . . . . . . . . . . . . 8

§440.45(2)(a), Fla. Stat.(2015) . . . . . . . . . . . . . . . . . 9

**CONSTITUTION**

*Florida Constitution*. . . . . . . . . . . . . . . . . . . . . . 18
Article I Section 21

*Florida Constitution*. . . . . . . . . . . . . . . . . . . . . . 4-5
Article I Section 22

*Florida Constitution*. . . . . . . . . . . . . . . . . . . . . . 10
Article VI

**OTHER CASES:**

*Corn v. New Mexico Educators Federal Credit Union*,. . . . . . . 12
889 P. 2d 234 (N.M. Ct. App. 1994)

*Great Atlantic and Pacific Tea Co v. McConnell*,. . . . . . . . . 6
199 F. 2d 569 (U.S.C.A. Fifth Cir., 1952)

*In re Oliver*,. . . . . . . . . . . . . . . . . . . . . . . . 7
333 U. S. 257, 266 (1948) (Black, J.) (footnotes omitted)

*Reno v. Flores*,. . . . . . . . . . . . . . . . . . . . . . . . 8
507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)

*Smothers v. Gresham Transfer, Inc.*,. . . . . . . . . . . . . . . 22
23 P.3d 333 (2001)

**OTHER AUTHORITIES**

"*Workers' Compensation: Can the State System Survive*?,".. . . 22
Professor John Burton, pp. 15-16 (Appendix)

http://www.propublica.org/article/the-demolition-of-workers.. 22
-compensation

## INTRODUCTION

In this brief, Petitioner, Stahl, will be referred to as Claimant. Respondents will be referred to as the Employer/Carrier or E/C. The Judge of Compensation Claims will be referred to as the JCC. Florida Justice Association will be referred to as FJA. References to the record on appeal will be designated by the letter "R" followed by the appropriate volume and page number. Chapter 440 and the Florida Workers' Compensation law is also referred to as the "Act."

## IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

FJA is a state wide organization of attorneys dedicated to strengthening and upholding Florida's civil justice system and protecting the rights of Florida's citizens, including injured workers. As such, FJA has an interest in the issue of the validity and interpretation of the Act.

## SUMMARY OF ARGUMENT

The infringement of fundamental rights must be judged under a strict scrutiny standard. Chapter 440 is unconstitutional as it impermissibly violates fundamental rights of equal protection and due process vis-a-vis the denial of a right to trial by jury. Further, the legislature has so curtailed the benefits an injured worker can obtain under the Act that the intended purpose of the Act has become frustrated, resulting in a system in which society as a whole must now bear the expenses of work related injuries instead of the industry who created the harm.

## ARGUMENT:

### I. §440.34 IS UNCONSTITUTIONAL AS IT IMPERMISSIBLY VIOLATES THE RIGHTS EQUAL PROTECTION AND RIGHT TO TRIAL BY JURY.

#### A. STANDARD OF REVIEW

Whether a state statute is constitutional is a question of law subject to de novo review. *Caribbean Conservation Corp., Inc. v. Fla. Fish & Wildlife Conservation Com'n*, 838 So.2d 492 (Fla. 2003).

#### B. ARGUMENT ON THE MERITS

Constitutional challenges to laws that replace and derogate fundamental rights or involve a suspect class must be reviewed using the strict scrutiny standard. *North Florida Women's Health v. State*, 866 So. 2d 612 (Fla. 2003); *Estate of McCall v. US*, 134 So. 3d 894 (Fla. 2014). This Court in *North Florida* clearly mandated that strict scrutiny review applies to **each and every fundamental right**. *North Florida,* at 635; *Level Three Communications LLC v. Jacobs*, 841 So.2d 447, 454 (Fla.2003) ("When considering a statute that abridges a fundamental right, courts are required to apply the strict scrutiny standard to determine whether the statute denies equal protection"). In *North Florida*, the Court elaborated:

> it is settled in Florida that *each* of the personal liberties enumerated in the Declaration of Rights is a fundamental right. Legislation intruding on a fundamental right is presumptively invalid and, where the right of privacy is concerned, must meet the strict scrutiny standard.

*Id.*

Under strict scrutiny, a court must review the legislation to

ensure it furthers a compelling State interest through the least intrusive means and the State bears the burden to prove this. The legislation is presumptively unconstitutional. *Id;* See generally *In re T.W.*, 55,1 So.2d 1186 (Fla. 1989). Application of the wrong standard of review may tilt the appellate playing field and irreparably prejudice a party's rights. *North Florida*, at 626.

**RIGHT TO TRIAL BY JURY:**

The Declaration of Rights contained in the 1968 Florida Constitution sets out the fundamental rights of citizens. Among these fundamental rights is the right to a trial by jury. Article I, Section 22 of the Florida Constitution provides:

> The right of trial by jury shall be secure to all and remain inviolate....

This right is one "secure to all" and is the only constitutional right which our framers have labeled as "inviolate," i.e., free from injury or violation. There is no right which can be more fundamental, as this is indisputably one of the "most basic rights guaranteed by our constitution." *State v. Griffith*, 561 So.2d 528, 530 (Fla.1990); see also *Floyd v. State*, 90 So.2d 105, 106 (Fla.1956) (stating that "right of an accused to trial by jury is one of the most fundamental rights guaranteed by our system of government"). As this Court stated, "Questions as to the right to a jury trial should be resolved.....in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions." *Hollywood, Inc. v. Hollywood*, 321

So. 2d 65, 71 (Fla. 1975). Without question, the "inviolate" right to a jury trial is a fundamental right.

As noted by this Court in *McCall (supra*), the right to trial by jury is guaranteed only in those cases where the right was enjoyed at the time the first Constitution of Florida became effective in 1845. *McCall*, at 937; Citing *In re 1978 Chevrolet Van*, 493 So.2d 433, 434 (Fla.1986)("Thus, section 22 of article I guarantees the right to trial by jury in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845.") *Id*. At common law, Florida recognized a cause of action against employers for injuries that occur in the workplace, one which would have existed at the time of this state's first constitution. See *Turner v. PCR, INC*., 754 So. 2d 683, 686 (Fla. 2000)(recognizing the employee's right to a common-law action for negligence against an employer.); See also *McGee v. C. Ed De Brauwere & Co.*, 162 So. 2d 510 (Fla. 1935), *Great Atlantic and Pacific Tea Co v. McConnell*, 199 F. 2d 569 (U.S.C.A. Fifth Cir., 1952), similarly, *Waggon-Dixon v. Royal Caribbean Cruises, LTD.*, 679 So. 2d 811 (Fla. 3d DCA 811). In addition, in 1968 (when the Declaration of Rights was adopted), an individual injured at work retained either the right to sue in tort for injury and have a jury trial to determine the full amount of her damages[1], including **full**

[1] *Mullarkey v. Florida Feed Mills*, 268 So.2d 363 (Fla. 1972)("The deceased had the option to accept or reject coverage at the time of employment, under authority of Fla. Stat. §440.03 (1969), 440.05(2) (1969) and 440.07 (1969), F.S.A.")

lost wages and other non-economic damages, all without legislatively imposed restrictions imposed by the workers' compensation system, or that worker could file a workers' compensation claim. From these common law rights, it naturally flows that the right to sue one's employer for a work injury and to have a jury trial for that claim was one that citizens in Florida enjoyed at the time the first Constitution of Florida became effective in 1845[2].

Amicus concedes that a jury trial is not required for administrative adjudications for rights which were nonexistent in 1845 when Florida was admitted to the union and the constitution first became effective. See *Dudley*; *State v. Webb*, 335 So.2d 826 (Fla. 1976). However, in the instant case, it is the right to sue the employer in tort (and commensurate right to a jury trial on that action) which the Act has infringed upon, and it is not the administrative action of a workers' compensation claim.

Further, Amicus is not unmindful of this Court's decision in *State Farm Insurance Company*, 296 So. 2d 9 (Fla. 1974) in which it questioned that:

> Does the abrogation of an existing cause of action, triable by jury, violate the right to jury trial? If

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[2]"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial." *In re Oliver*, 333 U. S. 257, 266 (1948) (Black, J.) (footnotes omitted).

> such is the case, the Legislature would lose a great deal of flexibility, for it could not enact laws such as workmen's compensation acts, which abrogate a preexisting right to jury trial.

*Id*. at 22.

Amicus does not suggest that the Legislature is without the right to enact such laws. Certainly it is. Rather, Amicus simply suggests that when the Legislature does enact a law that impairs the exercise of a fundamental right (such as a jury trial), then the law must pass strict scrutiny. *North Florida,* at 635; See also, e.g., *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Mitchell v. Moore*, 786 So.2d 521, 527 (Fla.2001).

The strict Scrutiny standard applies for juvenile curfews, e.g *State v. JP*, 907 So. 2d 1101, (Fla. 2014), for privacy rights, e.g. *North Florida* (supra), for statutes which interfere with public employees' rights to bargain collectively, e.g. *Hillsborough County G.E.A. v. Hillsborough County Aviation Auth*., 522 So.2d 358, 362 (Fla.1988), and even for the right of an injured worker to exercise free speech. e.g. *Jacobson v. Southeast Personnel Leasing*, 113 So. 3d 1042 (Fla. 1st DCA 2013). In light of these fundamental rights, can it be said that the *inviolate* right to trial by jury is any less fundamental or important? Obviously not. In light of that and given this Court’s holdings, this case too must be decided under a strict scrutiny standard where the legislation has removed Stahl’s right to trial by jury.

**EQUAL PROTECTION/ DUE PROCESS AND ACCESS TO COURTS:**

The dissimilarity in which the Act treats injured workers vis-a-vis those injured outside of their employment is not related to any compelling state interest. Even if it is, the current Act does not accomplish that goal through the least intrusive means. This is so because of the systematic take-aways of the rights of injured workers which has occurred over the past 40 plus years. These are chronicled in Petitioner's Initial Brief (pp. 38-42), and in the Briefs of Fellow Amicus Voices (pp. 8-15) and Florida Workers Advocates (FWA). Amicus FJA adopts and alleges those same arguments herein. In essence, because of these "takeaways" and reductions of benefits, without an opt out clause, the workers' compensation law no longer adequately provides benefits to many of these injured workers, including claimant/petitioner herein.

The Legislature created two classifications: injured workers (citizens of the state of Florida) and those not injured at work (also citizens of the state of Florida). The latter class enjoys the inviolate right to a jury trial, they may freely contract with lawyers for a reasonable fee to represent their interests (without any onerous/penal statutory regulations which restrict their ability to hire lawyers)[3], and they can receive full compensation

[3] This court is indeed no stranger to the pejorative consequences of section 440.34, Fla. Stat., and how the deleterious consequences of that law restrict the ability of injured workers to retain counsel. Several cases addressing this problem are currently under review. See *Castellanos v. Next Door*, Sup. Ct, Case No. Sc13-2082(in which the lower tribunal, pursuant to the statute, awarded a guideline fee resulting in a fee of approximately $1.53 per hour); *Louis P. Pfeffer and Frank Cerino*

for their injuries as decided by a jury of their peers. However, injured workers enjoy no such rights, and instead must have a governor appointed JCC (one who is a member of the Executive Branch[4]) decide their entitlement to benefits instead of a jury. Thus, to add insult to the injury of losing his fundamental right to a jury trial, a claimant also loses the right to have his case decided by an Article VI judge who is subject to merit retention and selection meaning that injured workers also have no voting rights as it pertains to the judges who adjudicate their cases. See Article VI of the Florida Constitution.

There has been a death of constitutionality by a thousand legislative cuts- a systematic stripping of benefits through numerous legislative "reforms." While no single cut has yet proved fatal; the cumulative cuts sound the death knell for the grand bargain/*quid pro quo*. The civil tort system offers a plethora of advantages compared to the Act. While both systems impose costs against the losing party, at least the plaintiff in circuit court retains the right to retain an attorney for a reasonable fee, in addition to the right to recover the full measure of his damages, including full lost wages as part of his right to a jury trial. The circuit court plaintiff has the right to have a jury decide his

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*v. Labor Ready*, Sup. Ct, Case No. SC14-1325; and *Cynthia Richardson v. Aramark/ Sedgwick, CMS*, Sup. Ct, Case No. SC14-738 (showing a reasonable expenditure of 90 hours by the attorney for the claimant and yielding an hourly fee of $19.44).

[4] See Section 440.45(2)(a), Fla. Stat. (2015)

case without having to meet the onerous major contributing cause standard.[5] So what "reasonable alternative" does the injured worker receive? Only that he need not prove fault. He still must abide by the same rules of evidence[6] (including complex *Frye* and now *Daubert* hearings[7]), navigate the procedurally difficult system and then substantively prove his case by only using evidence only from authorized doctors selected by the carrier or by an IME that he must pay for himself.[8] A claimant must navigate a workers' compensation system that is complex as to its most basic benefit determinations.[9] Then, he must dodge a myriad of affirmative

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[5] Instead of a liberalized "proximate cause" standard in civil court, the claimant must show, through "medical evidence only", at least 51%. See §440.09(1), Fla. Stat. (2009) "the accidental compensable injury must be the major contributing cause of any resulting injuries."

[6] The Florida Evidence Code applies in workers' compensation matters." See *Amos v. Gartner, Inc.*, 17 So. 3d 829, 833 (Fla. 1st DCA 2009).

[7] See *US Sugar Corp. v. Henson*, 823 So.2d 104 (Fla. 2002); see also Giaimo v. Florida Autosport, Inc., 154 So. 3d 385 (Fla. 1st DCA 2014).

[8] §440.13(5), Fla. Stat. (2009) "...The party requesting and selecting the independent medical examination shall be responsible for all expenses associated with said examination, including.... diagnostic testing...."

[9] Courts have repeatedly recognized the complexity of the workers' compensation system. E.g. *Bysczynksi v. UPS/Liberty Mutual*, 53 So.3d 328 (Fla. 1st DCA 2010)("This case illustrates the complex nature of Florida's current Workers' Compensation Law, and the myriad of thorny legal and medical issues which accompany even the most fundamental decisions regarding an injured worker's entitlement to, and a carrier's liability for, medical treatment.")

defenses. If he can do all of that, he gets limited benefits, with no damages for pain and suffering. Nothing else is given in exchange for all she surrenders. Is that a "reasonable alternative" as contemplated under *Martinez v. Scanlan*, 582 So.2d 1167, 1171, 1172 (Fla. 1991)(holding the 1990 Act constitutional because it provides 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.") No, it is a forced one.

Under the strict scrutiny, the legislation is presumptively unconstitutional as the State has failed to prove that the legislation furthers a compelling State interest through the least intrusive means. *North Florida*, at 635. The state here has adduced no evidence that the current iteration of the Act accomplishes its legislative goals through the least intrusive means. The disparate manner in which those injured at work are treated as compared to those injured elsewhere results in a denial of equal protection because it creates irrational classifications which are arbitrary, discriminatory and/ or capricious in the application of the law.[10] See *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346, 351

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[10] Another state supreme court agrees with this assertion. In *Corn v. New Mexico Educators Federal Credit Union*, 889 P. 2d 234, 243 (N.M. Ct. App. 1994), the court addressed a statute that restricted what claimants could pay their own attorneys but provided no such restriction relating to carrier attorneys' fees. The New Mexico Court held that such dissimilar treatment was a denial of equal protection, characterizing the one-sided attorney fee restriction as "so attenuated as to render the distinction arbitrary and irrational."

(Fla. 1979). The Legislature has discriminated against injured workers (as compared to other injured citizens) by removing their fundamental right to jury trial and then added insult to injury by placing them in a system with limited benefits, with the elimination of benefits for permanent partial disability, F.S. §440.15(3); the limitation of temporary disability benefits to 104 weeks, F.S. §440.15(2)and(4); the limitation of Permanent Total benefits ending at age 75, F.S. §440.15(1); the elimination of full medical care with a required co-payment for medical treatment post MMI, F.S. §440.13(2)(c); and, the apportionment of all indemnity benefits and all medical benefits, both before and after MMI. F.S.§ 440.15(5)(b). These are not "the least intrusive means" required of strict scrutiny. Rather, this denial of equal protection is accomplished through the most drastic and intrusive means. The Act thus fails to meet constitutional muster.

## II. THE WORKERS' COMPENSATION STATUTE NO LONGER REMAINS A REASONABLE ALTERNATIVE TO COMMON-LAW REMEDIES AND NO LONGER SERVES ITS INTENDED PURPOSE.

The additional burdens placed upon the injured workers to prove their claims as opposed to the minimal burdens placed upon the employers and carriers to defeat the claims renders §440.015 Fla. Stat. meaningless, and it destroys the *quid pro quo* that allows the Act to serve as an adequate substitute for common law rights. Once again, these specifics take-aways are listed in greater detail in the amicus briefs of FWA, WILG (see pp. 5-15), and Voices (pp. 8-15), whose arguments are adopted herein.

As explained by this Court nearly 50 years ago:

> The workmen's compensation law was intended to provide a direct, informal and inexpensive method of relieving society of the burden of caring for injured workmen and to place the responsibility on the industry served.

*Port Everglades Terminal Co. v. Canty*, 120 So. 2d 596 (Fla. 1960); see also *Sullivan v. Mayo*, 121 So.2d 424 (Fla. 1960)(same).

The law was designed to protect workers and their dependents against the hardships that arise from the workers' injury or death arising out of employment and occurring during employment, and to prevent those who depend on the workers' wages from becoming charges on the community, and the law operates to place the burden for such misfortunes upon industry. *McCoy v. Florida Power & Light Co.*, 87 So. 2d 809 (Fla. 1956). To the extent that any action or inaction on the part of the carrier tends to frustrate the purposes of the workers' compensation law, the potential burden on the part of the public to "pick up the slack" is proportionately increased. See *Florida Erection Services, Inc. v. McDonald*, 395 So.2d 203, 210 (Fla. 1st DCA 1981). The legislative intent was and is that the workers' compensation law should be self-executing, and that benefits should be paid without the necessity of any legal or administrative proceedings. *A.B. Taff & Sons v. Clark*, 110 So.2d 428 (Fla. 1st DCA 1959).

The current iteration of the Act has so radically deviated from those noble and precise origins that it no longer meets these objectives and goals. First, burdens of proof have become too

elevated. (see FWA Amicus Brief, pp 9-13). Previously, an injured worker simply need to prove "a state of facts from which it may be reasonably inferred" that the worker was injured during the course and scope of employment. See *Johnson v. Dicks*, 76 So. 2d 657, 661 (Fla. 1955; *Johnson v. Koffee Kettle Restaurant*, 125 So.2d 297, 299 (Fla. 1961); *Schafrath v. Marco Bay Resort, Ltd*, 608 So.2d 97(Fla.1st DCA 1992). Instead of the more onerous "preponderance of the evidence rule," in workers' compensation cases, an injured worker needed "significantly less than proof by a preponderance of evidence," and he was "not held to eliminating the same degree of doubt or uncertainty inherent in the evidence that is required of a party in a court proceeding under the preponderance of evidence rule." *Schafrath*, at 103. This effectively made the claimant's burden of competent substantial evidence. *Id.* The reason for this was the a preponderance of the evidence rule "cut off many who are entitled to workmen's compensation." *Id.; Johnson*, 125 So. 2d at 299. However, the First DCA later clarified those holdings in more recent decisions to, in essence, apply the preponderance standard. See, e.g., *Alston v. Etcetera Janitorial Servs.*, 634 So. 2d 1133, 1134 (Fla. 1st DCA 1994); *Branham v. TMG Staffing Services*, 994 So.2d 1172 (Fla.1st DCA 2008).

In addition to elevating burdens of proof, the Legislature also removed the presumptions in favor of compensability. Under prior iterations of the Act, every claim of an injured worker was

aided by the presumption "in the absence of substantial evidence to the contrary," that the claim comes within the provisions of the law, and that sufficient notice of the claim has been given. See Section 440.26, Florida Statutes (1979); *Florida Erection Services, Inc.*, at 210. Section 440.26 was repealed,[11] and in its place, the legislature enacted Section §440.015 ("...the laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer"). In addition, claims became infinitely more difficult to establish with the enactment of the stringent "major contributing cause" standard. In its current form, this requires that order to receive medical or disability benefits, workers must now establish their accident is the major contributing cause of their injuries; which means the cause which is more than 50% responsible for the injury compared to all other causes combined for which treatment or benefits are sought. F.S. §440.09(1)(2015); *Gallagher Bassett Services v. Mathis*, 990 So.2d 1214(Fla.1st DCA 2008).

The second way in which the Act has deviated from its origins relates to worker safety. In 2000, the Legislature adjourned without repealing the "sunset" of the Florida Occupational Safety and Health Act, Chapter 442 of the Florida Statutes. At that point, the Division of Safety was disbanded and Florida became unique

[11] Subsection 440.26(1) was repealed effective June 26, 1990, by chapter 90-201, section 26, Laws of Florida.

among the states by having a repealed occupational safety and health act. (see Amicus Brief of Florida Professional Firefighters, Inc., pp 6-12). With the immunity from suit afforded by Chapter 440 and the disbanding of the Division of Safety, employers had little if any financial incentive to maintain a safe workplace.

The third way in which the Act has deviated from its origins relates to reductions in medical benefits. Florida is the only state with medical co-payments for injured workers. See Fla. Stat. §440.13(2)(c)("Notwithstanding any other provision of this chapter, following overall maximum medical improvement from an injury compensable under this chapter, the employee is obligated to pay a copayment of $10 per visit for medical services.) In addition, Florida is the only state with apportionment of medical benefits. See Fla. Stat. §440.15(5)(b)(allowing for the apportionment of all indemnity benefits, both temporary and permanent, and all medical benefits, both before and after MMI.) The pejorative effect of this was just seen in the decision of *Frankel v. Loxahatchee Club, Inc.*, No. 1D15-1289 (Fla. 1st DCA, Nov. 5, 2015), in which the JCC's decision to require the Claimant pay for 25% of the cost of his surgery for his compensable shoulder condition was affirmed as supported by competent substantial evidence. The undeniable result is that the burden of caring for Mr. Frankel's injury has now been shifted to him and to society instead of being borne by industry.

Lastly, the Act has substantially deviated from its origins

with respect to payment of indemnity benefits. Florida is the only state that provides no indemnity for partial loss of wage earning capacity. This, if a worker earned $75,000 per year prior to his injury, and as a result of his limitations from the injury, he can only earn $25,000 afterwards, he gets nothing for that wage loss. Zero. Zip. Further, the current Act limits temporary disability benefits to 104 weeks combined for all periods of disability (to even include the time it takes to retrain a worker). See Fla. Stat. §440.15(2). If the injured worker is totally disabled, his right to permanent total benefits ends at age 75. See Fla. Stat. §440.15(1).

The result forms the perfect storm-- employers are no longer required to provide a safe place to work; nor provide full medical care or adequate compensation for lost earnings. To get the limited benefits, claimants must overcome elevated burdens of proof that make certain claims impossible to win, or when the claimant does win, his medical and indemnity benefits are further reduced by operation of apportionment. On top of this, the legislature imposed fee restrictions making in nearly impossible for some to hire an attorney, which is undeniably necessary to even have remote chance at obtaining the meager benefits which are available. See FN 3, *supra*. Addressing the absurdity of this and how far the Act has deviated from its purpose and origins, Judge Webster noted:

> Our legislature tells us that they intend that the Workers' Compensation Law (i.e., chapter 440, Florida Statutes) be "an efficient and self-executing system . . . which is not an economic or administrative burden"; and that it "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." § 440.015, Fla. Stat. (2008). *I fear that section 440.15(5)(b), as currently written, will frustrate, rather than further, that intent.*
>
> .....
>
> In the longer term, it strikes me that injured workers will be less likely to seek medical treatment, making it more likely that they will be unable to return to the workplace. This is because many who had a preexisting condition but were able to work either because the condition was asymptomatic or because, although symptomatic, it was not debilitating before the workplace injury will simply be unable to afford to pay the portion of the cost of treatment attributable to the preexisting condition based on a physician's opinion. *In this case, for instance, the claimant would have been responsible for 40 percent of the cost of treatment and 25 percent of the cost of surgery had sufficient evidence been presented to establish that the claimant's preexisting condition was in no way attributable to an industrial accident. One can readily imagine many situations where the worker's share of the cost of treatment would be even greater. If, as I think will likely be the case, a significant number of injured workers receive significantly reduced benefits because of section 440.15(5)(b), the courts might well conclude that because the right to benefits has become largely illusory, Florida's Workers' Compensation Law is no longer a reasonable alternative to common-law remedies and that,* accordingly, workers have been denied meaningful access to courts in violation of article I, section 21, of our constitution. (Citations omitted).

See *Staffmark v. Merrell*, 43 So. 3d 792, 798 (Fla. 1st DCA 2012)(Webster, dissenting).

Judge Webster's concerns are not abstract, they are the reality of the Act. See *Frankel* (supra). So what happens to these injured workers who cannot obtain medical benefits through the workers compensation system? What happens to those who seek counsel

to represent them and are told by a multitude of lawyers that they simply cannot take the case due to the pittance of a guideline fee that often pays less than minimum wage, but only after the lawyer is successful? Where do these injured workers go for treatment? They present to public hospitals and county health clinics or they go through Medicaid or Medicare so that taxpayers get stuck with the bill instead of the industry who created the problem. Or, they use health insurance through their employment, again allowing industry to avoid responsibility for the harm it created.

Those negatively affected by the operation of apportionment become saddled with the burden of paying large percentages of the cost of medical care for their compensable injuries. Instead of industry bearing the burden of caring for the injured worker's compensable injuries, see *Canty*, at 596; *Sullivan (supra)*, once again the burden is shifted, this time to the injured worker himself! If he has health insurance, then his health carrier foots the bill. Or maybe he simply does not pay the bill due to lack of funds, and the hospital and doctor get stuck "holding the bag." Under these scenarios, the employer, the entity who is intended to be responsible, escapes liability and the burden is shifted.

And what happens to those injured workers who are left with restrictions rendering them unable to return to their pre injury wage earning capacity, but at the same time unable to meet the definition of permanent and totally disabled under the Act? As noted above, the elimination of wage loss benefits leaves them with

nothing, yet another take-away that contravenes the express intent of the Act. See *Canty*, at 601 ("it is the intention of our workmen's compensation law to compensate an injured workman only for the loss of earning capacity attributable to and resulting from an industrial injury....") Left with significant wage loss and no remedy under the Act, these are the people who become wards of the state. Again, society pays while industry benefits.

The sacrifice of reasonable benefits for injured workers in exchange for lower rates has created a "race to the bottom" to see which state can win. Florida leads the pack. In the process, the Act has become bastardized from its intended purpose and injured workers are the scapegoats sacrificed at the altar. John F. Burton, Jr. is Professor Emeritus in the School of Management and Labor Relations (SMLR) at Rutgers University and at Cornell University and was the Chairman of the National Commission on State Workmen's Compensation Laws, which submitted its report to the President and Congress in 1972. He submitted a paper entitled, "*Workers' Compensation: Can the State System Survive*?" as part of a keynote address for the Centennial Celebration of the Pennsylvania Workers' Compensation Act. He noted the conundrum brought about by an ever decreasing pool of benefits combined with higher burdens of proof vis-a-vis the immunity afforded to employers. He questioned:

> Can a workers' compensation statute both (1) contain requirements that make it impossible for a worker to qualify for workers' compensation benefits and (2) contain provisions that preclude the worker from bringing a tort suit by stating that workers'

> compensation is the exclusive remedy for a workplace injury? In essence, can there be a dual denial doctrine that precludes both workers' compensation and tort remedies?

See "*Workers' Compensation: Can the State System Survive*?," Professor John Burton, pp. 15-16 (Appendix).

Professor Burton's concerns were echoed in a recent article entitled, "The Demolition of Workers' Comp" by Michael Grabell, *ProPublica*, and Howard Berkes, NPR, dated March 4, 2015. The study concluded that, "Over the past decade, states have slashed workers' compensation benefits, denying injured workers help when they need it most and shifting the costs of workplace accidents to taxpayers."[12] In *Smothers v. Gresham Transfer, Inc*., 23 P.3d 333 (2001), the Oregon Supreme Court responded by holding that the Oregon constitution did not allow the legislature to eliminate both the workers' compensation remedy and a tort remedy when the employment is not the major contributing cause of the condition This Court is compelled to reach a similar conclusion here.

**CONCLUSION:**

Amicus requests this Court to find that under the appropriate strict scrutiny standard, the Act as a whole is unconstitutional. This Court should reverse the decision below and return the Act to the last law that passed constitutional muster, which is the 1990 law approved by *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991).

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[12] http://www.propublica.org/article/the-demolition-of-workers-compensation

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is a computer generated brief in Courier New 12-point format and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Electronic Mail to the following on this 17th day of November 2015:

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