IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Daniel Stahl,

Appellant,

v.

CASE NO.: SC15-725
L.T. No(s): 1D14-3077

Hialeah Hospital and Sedgwick
Claims Management Services,

Appellees.

_____/

BRIEF OF AMICUS CURIAE, POLICE BENEVOLENT ASSOCIATION (PBA), FRATERNAL ORDER OF POLICE (FOP), INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO (IUPA), AND FLORIDA ASSOCIATION OF STATE TROOPERS (FAST) IN SUPPORT OF APPELLANT'S POSITION

Geoffrey Bichler, Esquire
Florida Bar No. 850632
Bichler, Kelley, Oliver & Longo, PLLC
541 South Orlando Avenue
Suite 310
Maitland, FL 32751
E-mail: geoff@bichlerlaw.com

Attorney for Police Benevolent Association, Fraternal Order of Police, International Union of Police Associations, AFL-CIO, and Florida Association of State Troopers, Amicus Curiae

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PRELIMINARY STATEMENT

Amicus Curiae, Police Benevolent Association, Fraternal Order of Police, International Union of Police Associations, AFL-CIO, and Florida Association of State Troopers will be referred to by either their full names or by the abbreviation "PBA", "FOP, "IUPA", and "FAST" respectively. Daniel Stahl, Appellant, will be referred to as "Petitioner" in this brief, and the Appellees, Hialeah Hospital and Sedgwick Claims Management Services, as the "Employer/Carrier" or "E/C". The Florida Workers' Compensation Act will simply be referred to as "The Act."

INTRODUCTION

This brief is filed on behalf of The Florida Police Benevolent Association (PBA), The Florida Fraternal Order of Police (FOP), The International Union of Police Associations, AFL-CIO (IUPA), and The Florida Association of State Troopers (FAST), amicus curiae for Petitioner Daniel Stahl. By Order dated November 10, 2015, this Court granted the Motion of these four organizations seeking leave to appear as amicus curiae.

STATEMENT OF INTEREST

The PBA, FOP, IUPA, and FAST all represent the interests of law enforcement officers through legal, legislative, and political action. They also assist members with legal issues including workers' compensation disputes. Thus, all three organizations have great interest in the outcome of this matter and can assist the Court in understanding the issues before it.

As this Honorable Court is aware, law enforcement is among the most dangerous of professions with an ever present possibility of severe injury or death. In Florida, benefits for work related injuries or deaths are essentially limited to workers' compensation benefits under Chapter 440, Fla. Stat., also known as the Workers' Compensation Act (hereinafter "The Act"). Limitations and restrictions on benefits payable under The Act, and in particular reductions in benefits since 2003, have had a severe and adverse impacted Florida law enforcement officers,

who depend on adequate compensation being provided when injured or killed in the line of duty.

When serious injuries occur in the law enforcement profession, it is not uncommon for officers to become permanently incapable of law enforcement duties without being permanently disabled from all types of employment. In these instances, officers find themselves out of their chosen profession, due to a work injury, and forced to rely solely on the extremely limited and inadequate impairment benefits currently available under F.S. Section 440.15. Consequently, the elimination of "permanent partial disability", commonly referred to as wage loss, and one of the subjects of this appeal, is of enormous significance to the law enforcement community. Similarly, the medical co-payment for work related injuries, the other subject of the present appeal, (which eliminated the previously required "full medical care" for work injuries) is particularly offensive to law enforcement officers and other "first responders" who sacrifice their own safety and wellbeing for the sake of the public. Amicus will address the constitutional validity of current Act in light of This Court's seminal decision in Kluger v. White, 281 So. 2d 1 (Fla. 1973).

SUMMARY OF ARGUMENT

Amicus submits that a reasoned analysis of the constitutional issues implicated in this case, in combination with the other issues that remain pending

before this Court in 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) and Castellanos v. Next Door Co., 124 So. 3d 392 (Fla. 1st DCA 2013)(Rev. Granted SC13-2082), require the Court to determine whether the Act remains constitutionally valid under Kluger v. White, 281 So. 2d 1 (Fla. 1973). Amicus will argue that Kluger does not require a determination of whether the specific provisions implicated in this case are unconstitutional. Instead, Kluger requires the Court to consider whether the restrictions on disability payments, and the elimination of full medical care for work injuries, render the entire Act, writ large, unconstitutional as an "exclusive remedy" for work injuries. The only reasonable conclusion that can be drawn from the current deplorable state of the Act is that it provides a wholly inadequate alternative to either common law rights and remedies, or the statutory rights and remedies, as they existed for work injuries in 1968. As such, the current Act is facially unconstitutional as an exclusive remedy.

ARGUMENT

I. THE WORKERS' COMPENSATION ACT VIOLATES ARTICLE 1, SECTION 21 OF THE FLORIDA CONSTITUTION AS THE "EXCLUSIVE REMEDY" FOR WORKPLACE INJURIES PURSUANT TO THIS COURT'S REASONING IN *KLUGER V. WHITE*, 281 SO. 2D 1 (FLA. 1973).

The State of Florida has enacted a comprehensive Workers' Compensation Act "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 employment at a reasonable cost to the employer" (§440.015, Florida Statutes (2009)). Contained within this policy, which is the foundation upon which The Act is built, is the notion that the employer, who benefits or profits from the labor of an employee, must relieve society of the consequences of a broken body, a diminished income, or an outlay for medical and other care due to a work injury. Mobile Elevator v. White, 39 S. 2d 799 (Fla. 1949). Florida's workers' compensation system is also based on the "mutual renunciation of common law rights and defenses by employers and employees alike." §440.015, Florida Statutes (2009). The mutual renunciation of common law rights and defenses assumes both an "exclusive remedy" for injured workers and a "reasonable" replacement for common law rights and remedies. Where the reasonableness of the replacement (i.e. workers' compensation benefit) fails, it is submitted by Amicus that the exclusiveness of the remedy must also fail, allowing the injured worker to pursue common law rights and remedies as an alternative.

In Kluger, supra the Court held:

> "...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...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..."

Kluger, supra, at 4. Thus, under the Kluger analysis workers' compensation can only be the exclusive remedy for injured workers, if it provides a **reasonable alternative** for common law and/or statutory rights existing in 1968. In fact, the Court in Kluger, in discussing the Workers' Compensation Act at the time, stated that although the Act "abolished the right to sue one's employer in tort" it "provided adequate, sufficient, and even preferable safeguards for an employee who is injured on the job." Id. As noted by learned counsel for Petitioner, this language seems to come directly from the seminal case of New York Central R.R. Co. v. White, 243 U.S. 188, 375 S. Ct. 247, 61 L. Ed. 667 (1917), which upheld the validity of the New York Workmen's Compensation Law. The Court in White, supra, recognized that a necessary consideration of the constitutional validity of any workers' compensation scheme is whether "the arrangement is arbitrary and unreasonable." Id. a 202. Given the current state of the Act one can scarcely find a provision that is not both arbitrary and unreasonable but the larger point is simple: what might have been a reasonable and adequate bargain for injured workers in 1968 has long since been soured by sweeping legislative reductions.

As this Court is aware, the current version of the Act arbitrarily and unreasonably caps temporary disability payments to injured workers at 104 weeks. The constitutional validity of this limitation has yet to be determined, and remains pending in the case of Westphal v. City of St. Petersburg, 122 So.3d 440 (Fla. 1

DCA 2014) (en banc) rev. pending SC 13-1930. Of course, Westphal centers on a bizarre notion that maximum medical improvement, a purely factual determination, can be legislatively mandated to occur at a specified time regardless of circumstance. The established maximum medical improvement then triggers the establishment of whole body impairment, if any, and the payment of incredibly modest and frequently non-existent, "impairment benefits" under §440.15(3), Fla. Stat. 2003. While Mr. Westphal's case dealt with the arbitrary cap on temporary benefits implicating mandatory impairment benefits, the Petitioner's case deals with impairment benefits as a substitute for an entirely eliminated classification of benefits: namely permanent partial disability benefits. If the arbitrary capping of temporary disability benefits at the statutorily mandated 104 weeks is problematic, as Amicus has argued in the Westphal matter, how much more troubling and egregious is the complete elimination of an entire classification of benefits for a woefully inadequate and arbitrary substitute?

The Petitioner here received a meager, and frankly insulting, payment of $5,472.00 for a career ending injury. The payment resulted from a six percent (6%) whole body impairment at maximum medical improvement for a low back injury. This result is all too common under the current Act where severe orthopedic injuries result in modest impairment ratings even though permanent physical restrictions may mean the end of a career. Since 2003 it seems all too

obvious that countless injured workers (including many law enforcement officers) have suffered career ending work injuries, received meager impairment benefits, and been forced to attempt a transition to a new career without the benefit of permanent partial disability benefits, also known as "wage loss benefits". Amicus submits that the elimination of permanent partial disability payments, as demonstrated by Petitioner, is further compelling evidence, as if more were needed, that the current version of the Act is so patently unjust that it is unconstitutional under Kluger, supra.

The statutorily imposed "quid pro quo", where injured workers receive ever diminishing benefits while employers are shielded from common law tort actions, has not been considered by this Court since Martinez v. Scanlon, 582 So.2d 1167 (Fla. 1991). The many negative changes to the law, which are born solely by injured workers, are recounted well by the Petitioner, but the Court must also consider the increased difficulty injured workers face in securing the paltry benefits currently available.

The workers' compensation system has become enormously complex and increasingly unworkable since 1968. Originally created to be a simple and efficient statutory scheme providing medical care and lost wages, the law is now a morass of procedural and evidentiary hurdles so onerous that only experts can begin to understand it. Davis v. Keeto, 463 So.2d 368 (Fla. 1st DCA 1985).

Perhaps the simplest comparison between the 1968 statute and the current version of The Act is the length of each law. In 1968, The Act, which included many provisions benefitting injured workers that have since been deleted, was only 68 pages in length. The current version of The Act is 170 pages long. In 1968, The Act dealt with the provision of medical care for work injuries in three simple and easily understood paragraphs. Today, The Act takes nearly 30 pages to deal with issues related to medical care. In 1968, a letter from an injured worker could be sufficient to trigger a claim. Today, numerous procedural and specificity requirements block court access for the injured worker. Given the increased complexity of the act, the need for legal representation is more obvious than ever. Davis, supra. Yet current fee restrictions, being considered by this Court in Castellanos, supra, make it increasingly unlikely that injured workers will find attorneys willing to take their cases.

"Reasonable" attorney fees were, of course, stricken from the Act by the Florida Legislature in 2009 following this Court's decision in Murray v. Mariner Health, 994 So.2d 1051 (Fla. 2008). "Reasonable fees" were historically available under the fee shifting provisions of the Act were a critical part of the legislative scheme in 1968 when the Declaration of Rights was approved by the citizens of Florida. The amendment of Section 440.34, Florida Stat., to eliminate "reasonable fees" has had the expected impact of making it more difficult for injured workers

to secure representation and thereby assert rights to the horribly diminished benefits currently available under the Act. Indeed, it could be argued that any legal entitlement under the Act is entirely illusory without the ability to enforce it through adequate legal representation. Regardless, all of the substantive and procedural changes to the Act since 1968 have rendered it an entirely **"unreasonable alternative"** at odds with the reasoning in Kluger. As such, the exclusive remedy provisions contained in Section 440.11, Fla. Stat., should be stricken as facially unconstitutional.

II. THE WORKERS' COMPENSATION ACT IS UNCONSTITUTIONAL BECAUSE IT ELIMINATES THE "OPT OUT" PROVISION WHICH EXISTED IN 1968 AND ELIMINATES THE ABILITY OF AN INJURED EMPLOYEE TO SUE HIS EMPLOYER UNDER A COMMON LAW THEORY OF INTENTIONAL TORT.

A. THE CURRENT VERSION OF THE ACT ELIMINATES THE RIGHT OF AN EMPLOYEE TO "OPT OUT" OF THE WORKERS' COMPENSATION SYSTEM AS IT EXISTED IN 1968.

Pursuant to Kluger, supra, it is the statutory and common law that was in effect at the time of the adoption of the 1968 Constitution that governs the access to courts issue. The "exclusive remedy" provision of the Act provides in §440.11(1), Florida Statutes (2003):

> "The liability of an employer prescribed in §440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such

> employer to any third party tort feasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or admiralty on account of such injury or death..."

This language has been in the Act since 1935. It was in the Act at the time of the adoption of the Constitution of 1968 in a special session of the Legislature, June 24-July 3, 1968 and ratified by the electorate on November 5, 1968. The Act in 1968, however, contained an "opt out" provision for both the employer and the employee; these were substantive rights allowing both parties to forego workers' compensation coverage and the exclusive remedy provisions.

In 1970, the Florida Legislature enacted a significant change in the law – directly impacting the rights of the Citizens of this State – when it repealed the right of the employee and employer contained in §440.05 and §440.06 to "opt out" of coverage under the Act. This right to "opt out" of the Act very plainly existed at the time the voters approved the Constitutional revision in 1968. Nevertheless, the Legislature did not provide a "reasonable alternative" (or any alternative for that matter) for the elimination of this right, and no additional workers' compensation benefit was provided in exchange for the elimination of the right to "opt out." Laws of 1970, ch. 70-148.

Thus, until the repeal of the "opt out" provisions of the Act in 1970, the "exclusive remedy" was not actually exclusive at all. It was only exclusive for those employees who did not "opt out" and for the employees of employers who

did not "opt out." Clearly, the repeal of the "opt out" provisions eliminated a cause of action available under Kluger in 1968. Amicus respectfully submits that the elimination of the right to "opt out" of the Act, which existed in 1968, makes the statute unconstitutional as an exclusive remedy.

B. THE CURRENT VERSION OF THE ACT ELIMINATES THE COMMON LAW RIGHT OF AN INJURED EMPLOYEE TO SUE AN EMPLOYER FOR AN INTENTIONAL TORT AS IT EXISTED IN 1968 AND AS IT WAS INTERPRETED BY THIS COURT IN TURNER V. PCR, 754 So.2d 683 (Fla. 2000).

In 2003, the Legislature passed an amendment to section 440.11, which added subsection (1)(b) and ostensibly created a statutory cause of action for intentional torts by employers, to replace the common law action previously recognized by the courts. See, e.g., Pendergrass v. R.D. Michaels, Inc., 936 So.2d 684 (Fla. 4th DCA 2006) (In 2003, the Florida Legislature effectively overruled Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000) when it amended section 440.11 to **eliminate** the intentional tort exception recognized by Turner). In doing so, the Legislature set an impossibly high burden for employees in general and emergency first responders in particular, thereby effecting an unconstitutional denial of access to the courts.

Prior to 2003, section 440.11 was primarily an immunity statute – setting forth that an employer's liability for workplace accidents is limited to workers' compensation benefits under chapter 440, with certain exceptions. The 2003

amendment thereto was passed by the Legislature with the specific intent to further "limit civil suits against an employer by an injured worker to cases where it can be shown the employer acted with the intent to cause injury or death". Fla. H.R. Comm. on Workers' Comp., HB 25A (2003) Staff Analysis 5 (May 9, 2003). This language in the Staff Analysis indicates the Legislature intended to restrict workers' intentional tort actions to only the first of the two bases recognized under case law – where the employer had a deliberate intent to injure, but not where the employer intended to engage in conduct which is substantially certain to injure.

In order to accomplish this goal, the Legislature crafted a statutory action for intentional torts by employers that is virtually impossible to meet in any case involving less than deliberate intent to injure, thereby eliminated a long-standing common law action and effecting an unconstitutional denial of access to the courts.

The Legislature did so by providing a definition of the second type of intentional tort that incorporated exceptionally high standards previously rejected by the courts, as well as new hurdles. See §440.11(1)(b), Fla. Stat. (2003-current). First, the Legislature required that the employer's conduct have been "virtually certain" to result in injury, rather than "substantially certain". Id. This is contrary to the elements of the common law action, as defined by this Court. See Turner, supra. Second, the Legislature required proof of deliberate concealment or misrepresentation of the danger and the employee unawareness of the risk. See

§440.11(1)(b), Fla. Stat. (2003-current). This is substantially different from the common law action, which this Court held did not require such elements; rather such circumstances were merely factors relevant to determining substantial certainty. Third, the Legislature required that the employer's knowledge of the danger must be based on similar accidents or explicit warnings. Id. Florida courts have never treated these specific circumstances as an essential element of the common law action. Fourth, the Legislature required that all elements must be proven by "clear and convincing evidence". Id. Such a high burden of proof was not required to establish the prior common law action.

As a result, the new statutory action provides only an illusory remedy **and eliminates a previously available cause of action**. In the six reported District Court decisions applying the post-amendment statute, all have been decided in favor of the employer on the basis that the action could not be proven as a matter of law. See Hunt v. Corr. Corp. of America, 38 So.3d 173 (Fla. 1st DCA 2010) (nurses at jail injured when inmates escaped cells and held them hostage, due to employer's failure to maintain electrical locking system and cell block locks, despite prior warnings and knowledge); Gorham v. Zachry Indus., 105 So.3d 629 (Fla. 4th DCA 2013) (employee injured when prefabricated wall being lifted into place was swayed by high wind speeds, where foreman misrepresented having checked wind speeds prior to lift); Boston v. Publix, No. 4D11-1521 (Fla. 4th DCA

May 1, 2013) (employee crushed between loading dock and tractor overdue for safety inspections with inoperable backup alarm); Guevara v. Doormark, Inc., 946 So.2d 1228 (Fla. 4th DCA 2007) (new employee trained on power saw by co-employee "about one week", no provided written materials relating to operation or safety, and not advised to wear safety items); List Indus. V. Dalien, 107 So.3d 470 (Fla. 4th DCA 2013) (employee injured by press brake not modified since built in 1960s, safety guards not used, foot pedal covered with grease and debris, and no videos used to train employees); C.W. Roberts Contracting v. Cuchens, 10 So.3d 667 (Fla. 1st DCA 2009).

Already, courts have expressed concern regarding the high standards now required. For example, the Fourth District wrote: "Indeed, after Turner, the Legislature adopted an extremely strict exception which, we suspect, few employees can meet. To date, we have not found, nor has a case been cited for us, where an employer has lost its immunity for its conduct". Gorham, 105 So.3d at 634. More specifically, that court noted: "The change from 'substantial certainty' to 'virtually certain' is an extremely different and a manifestly more difficult standard to meet. It would mean that a plaintiff must show that a given danger will result in an accident every-or almost every-time". List Indus., 107 So.3d at 471.

The 2003 amendment to section 440.11 set an impossibly high standard for intentional tort actions, by changing from the "substantial certainty" to "virtual

certainty" test, requiring "clear and convincing evidence", and adding two elements that previously were mere factors. As such, it eliminates a type of intentional tort previously recognized in common law and available as a remedy to injured employees, without adding anything into the equation to reasonably replace the same. Further, these four new restrictions on intentional tort claims imposed by the 2003 amendment far exceeds the strict narrow tailoring that must be utilized when restricting a person's rights to remedy a public necessity. See Mitchell v. Moore, 786 So.2d 521 (Fla. 2001) (noting, where a denial of access to the courts is addressed, "the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way").

Finally, the 2003 amendment to section 440.11 is particularly offensive as applied to first responders like police officers. Danger is all "apparent" in their jobs and they may not ever be able to "exercise informed judgment about whether to perform the work", as required under section 440.11(1)(b), since they must operate in a command structure that requires an increased level of trust in and obedience to supervisors. As such, the replacement of the prior common law action for intentional torts by the statutory action under section 440.11(1)(b) results in a denial of such employees' rights to redress for intentional torts committed by employers, as previously existing in common law in 1968. The elimination of this

cause of action is another reason the current version of The Act is unconstitutional as the exclusive remedy for workplace injuries.

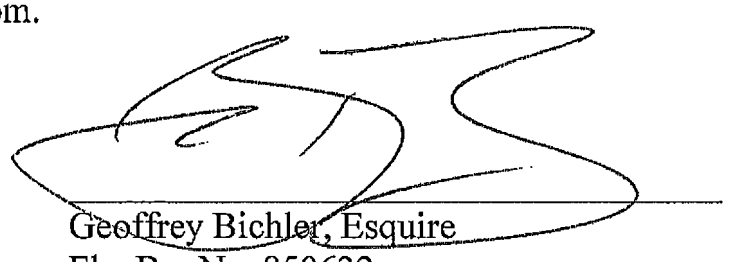
CONCLUSION

The Court should find the current version of The Act unconstitutional as an exclusive remedy for workplace injuries as it provides woefully inadequate benefits in exchange for immunity from suit; the grand bargain is no more. The elimination of both permanent partial disability payments and "full medical" coverage as demonstrated by the Petitioner is simply the last straw.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular Mail on this 17th day of November, 2015 to: Gerald Rosenthal, Esquire at grosenthal@rosenthallevy.com; Kimberly A. Hill, Esquire at kimberlyhillappellatelaw@gmail.com; Kimberly A. Johnson, Esquire at kfernandes@kelleykronenberg.com and klongley@kelleykronenberg.com; Louis P. Pfeffer, Esquire at lpfeffer@pfefferlaw.com and kmoore@pfefferlaw.com; Mark Zientz, Esquire at mark.zientz@mzlaw.com; Michael J. Winer, Esquire at mike@mikewinerlaw.com and starla@mikewinerlaw.com; Ramon Malca, Esquire at rmalca@malcaandjacobs.com and rmsec@malcaandjacobs.com; Richard A. Sicking, Esquire at ejcc3@fortheworkers.com; Russell H. Young, Esquire at ryoung@eraclides.com and kfoss@eraclides.com; William H. Rogner, Esquire at

wrogner@hrmcw.com and mmcguigan@hrmcw.com; and William J. McCabe, Esquire at mccabelaw5@gmail.com.



Geoffrey Bichler, Esquire
Fla. Bar No. 850632
Bichler, Kelly, Oliver & Longo, PLLC
541 South Orlando Avenue, Suite 310
T: (407) 599-3777
F: (407) 599-3780

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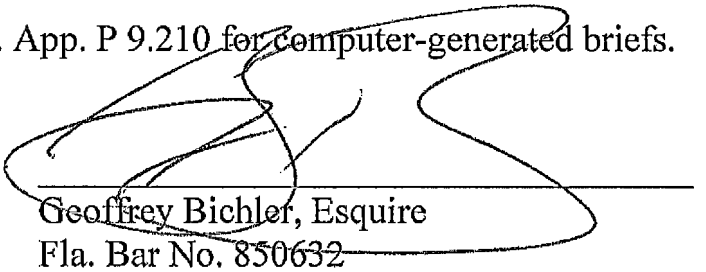

Geoffrey Bichler, Esquire
Fla. Bar No. 850632