

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

JACQUELINE DUPREY,

Petitioner,

CASE NO.: SC07-396

vs.

Lwr Tribunal: 1D05-3340

LA PETITE ACADEMY and
GALLAGHER BASSETT,

Respondent.

_____ /

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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This is an Initial Brief on Jurisdiction seeking to invoke discretionary jurisdiction to review a decision of the First District Court of Appeal, Tallahassee, Florida, opinion rendered February 5, 2007.

TABLE OF CONTENTS

	Page
TABLE OF CITATIONSii,iii
PRELIMINARY STATEMENT	iv
STATEMENT OF THE CASE AND STATEMENT OF THE FACTS	1
POINTS ON APPEAL.	3
SUMMARY OF ARGUMENT	3
ARGUMENT	
POINT I:	5
WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT IN <u>OLIVE V. MASS</u> , 811 So.2d 644(Fla.2002), <u>MAKEMSON V. MARTIN COUNTY</u> , 491 So.2d 1109(Fla.1986), AND <u>LEE ENGINEERING AND CONSTRUCTION COMPANY V. FELLOWS</u> , 209 So.2d 454(Fla.1968), THE DECISION OF THE 5 TH DCA IN <u>MARION COUNTY V. JOHNSON</u> , 586 So.2d 1163(Fla.5 TH DCA 1991), AND THE DECISION OF THE 2 ND DCA IN <u>BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY V. SCRUGGS</u> , 545 So.2d 910(Fla.2 ND DCA 1989).	
POINT II	8
WHETHER OR NOT THIS HONORABLE COURT HAS JURISDICTION BASED ON THE GROUNDS THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY DECLARED FLORIDA STATUTE 440.34, AS AMENDED IN 2003, TO BE VALID AND CONSTITUTIONAL.	
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF TYPE FACE COMPLIANCE	12

TABLE OF CITATIONS

	Page
<u>Acton II v. Fort Lauderdale Hospital,</u> 440 So.2d 1282(Fla.1983)	9
<u>Board of County Commissioners of Hillsborough County v. Scruggs,</u> 545 So.2d 910(Fla.2 nd DCA 1989)	7
<u>Davis v. Bon Secours-Maria Manor,</u> 892 So.2d 516(Fla.1st DCA 2004)	9
<u>Davis v. Keto Inc.,</u> 463 So.2d 368(Fla.1st DCA 1985)	10
<u>De Ayala v. Florida Farm Bureau Casualty Insurance,</u> 543 So.2d 204(Fla.1989)	4,9
<u>Department of Health and Rehabilitative Services v. National Adoption Counseling Service Inc.,</u> 498 So.2d 888(Fla. 1986)	5
<u>Hardee v. State,</u> 534 So.2d 706(Fla.1988)	5
<u>Horn v. New Mexico Educators Federal Credit Union,</u> 899 P. 2 nd 234(N.M. Court of App 1994)	10
<u>Irwin v. Surdyk's Liquor,</u> 599 N.W. 132(Minn 1999)	9
<u>Joseph v. Oliphant Roofing Co.,</u> 711 A. 2 nd 805(Del.Super.1997)	10
<u>Lee Engineering and Construction Company v. Fellows,</u> 209 So.2d 454(Fla.1968)	3,6,7,10
<u>Makemson v. Martin County,</u> 491 So.2d 1109(Fla.1986)	4,7,9
<u>Marion County v. Johnson,</u> 586 So.2d 1163(Fla.5 th DCA 1991)	7
<u>Olive v. Maas,</u> 811 So.2d 644(Fla.2002)	4,7
<u>Wood v. Florida Rock Industries,</u> 929 So.2d 542(Fla.1st DCA 2006)	1,10

FLORIDA STATUTES

440.34(1)(1977)6
440.34(1)(2003)	2,3,6,7
440.34(3)(2003)	3,6,8
440.34(3)(b)(2003)2

PRELIMINARY STATEMENT

The Petitioner, JACQUELINE DUPREY, shall be referred to herein as the "Claimant" or by her separate name.

The Respondents, LA PETITE ACADEMY and GALLAGHER BASSETT, shall be referred to herein as the "Employer/Carrier" (E/C) or by their separate names.

References to the record on appeal shall be abbreviated by the letter "V" (Volume), followed by the applicable volume and page number.

The Judge of Compensation Claims shall be referred to as the JCC.

References to the appendix attached to Petitioner's Initial Brief on Jurisdiction will be referred to by the letters "AP" and followed by the applicable appendix page number. The appendix contains the opinion issued by the First District Court of Appeal on February 5, 2007.

"IIB" refers to impairment income benefits.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This is a case involving the interpretation of the Workers' Compensation attorney fee statute, F.S. 440.34(3), as amended in 2003, that may severely impair, if not eliminate, the ability of claimants to obtain the assistance of counsel, Wood v. Florida Rock Industries, 929 So.2d 542 (Fla.1st DCA 2006), Judge Barfield, concurring opinion at page 545.

On 11/24/04, following a 10/27/04 hearing (V2-226), the JCC entered a Final Compensation order (V1-196-100, V2-202-224) finding Claimant prevailed on all four issues in dispute and thus was entitled to a 6% PPI and ten weeks of impairment benefits (V2-209); an increase in Claimant's AWW from \$378.40 to \$425.02 (V2-211); psychological counseling (V2-214) and penalties and interest (V2-216).

The JCC also stated the following concerning each benefit:

"I conclude that the Employer/Carrier **had no reasonable grounds, nor factual or legal basis** to have denied that the Claimant sustained a 6% PPI as a result of the 11/4/04 industrial accident." (V2-209,210). (emphasis added).

"Again, I find an absence of any evidence to the contrary, and that **there was no reasonable ground** for the Employer/Carrier to not have made the adjustment at or near the time the relevant petition for benefits was filed. I find there was no factual or legal basis to continue to deny the requested benefits. ." (V2-211). (emphasis added).

"Again, I find a total absence of any evidence to the contrary on these points as the Employer/Carrier presented no medical opinion to support its position. I find that there **was no reasonable ground for** the Employer/Carrier not

to provide psychological counseling sometime ago. . . ." (V2-214). (emphasis added).

". . .I find an absence of any evidence to the contrary, that there was **no reasonable ground, or legal or factual basis**, for the Employer/Carrier to not have paid the Claimant the penalties and interest due." (V2-216). (emphasis added).

The JCC found that counsel for Claimant reasonably expended 82 hours to secure the aforesaid benefits (V2-1930,1931), with a total value of \$2,526.40 resulting in a statutory guideline fee per F.S.440.34(1)(2003) of \$505.12 or \$6.16 per hour (V10-1932,1933). Counsel for the E/C was paid \$8,189.00 (86.2 hours at \$95.00 per hour) (V4-708, V10-1933) even though he did not prevail on any issue in dispute (save an offset of 2 weeks IIB).

The JCC found that the fixed statutory percentage resulting in an attorney's fee of \$6.16 per hour could not be interpreted as a "reasonable attorney's fee" under F.S.440.34(3)(b)(2003) (V10-1932,1933), and on 6/24/05 the JCC entered an order awarding counsel for Claimant attorney's fees for 82 hours at \$250 per hour for a total \$20,050 (V10-1934,1935).

Following an appeal and a cross-appeal, the First DCA, on 2/5/07 entered an opinion reversing the JCC's 6/24/05 order.

The First DCA, in its 2/5/07 opinion stated that:

"This Court has previously considered the application of the Legislature's 2003 Amendments to Section 440.34, Florida Statutes, in a number of our recent decisions, and held in workers compensation cases, a fee award must be based on the value of the benefits actually obtained on behalf of the Claimant." (AP-2).

The First DCA in its 2/5/07 opinion also stated:

"We reject the merits of Claimant's cross-appeal because this Court has previously concluded that Section 440.34, as amended in 2003, violates neither the Florida nor the United States Constitutions." (AP-3).

POINTS ON APPEAL

POINT I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT IN OLIVE V. MASS, 811 So.2d 644(Fla.2002), MAKEMSON V. MARTIN COUNTY, 491 So.2d 1109(Fla.1986), AND LEE ENGINEERING AND CONSTRUCTION COMPANY V. FELLOWS, 209 So.2d 454(Fla.1968), THE DECISION OF THE 5TH DCA IN MARION COUNTY V. JOHNSON, 586 So.2d 1163(Fla.5TH DCA 1991), AND THE DECISION OF THE 2ND DCA IN BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY V. SCRUGGS, 545 So.2d 910(Fla.2ND DCA 1989).

POINT II

WHETHER OR NOT THIS HONORABLE COURT HAS JURISDICTION BASED ON THE GROUNDS THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY DECLARED FLORIDA STATUTE 440.34, AS AMENDED IN 2003, TO BE VALID AND CONSTITUTIONAL.

SUMMARY OF ARGUMENT

I

The opinion rendered by the First DCA conflicts with the decision of this Honorable Court in Lee Engineering and Construction Company v. Fellows, 209 So.2d 454(Fla.1968). wherein this Honorable Court held that a "reasonable attorney's fee" was to be determined by considering various factors. To the contrary, the First DCA has held that a "reasonable attorney's fee" as set forth in F.S.440.34(3)(2003), was to be determined

based strictly on the statutory guideline fee set forth in F.S.440.34(1)(2003), thereby eliminating any judicial discretion is determining a reasonable fee.

The decision of the First DCA conflicts with the decisions of this Honorable Court, in Olive v. Maas, 811 So.2d 644 (Fla.2002) and Makemson v. Martin County, 491 So.2d 1109(Fla.1986), because the First DCA concluded that a "reasonable attorney's fee" to be paid by the E/C "must be based on the value of the benefits actually obtained on behalf of the Claimant" without taking into consideration the fact that extraordinary circumstances may be involved. To the contrary, in Olive v. Maas, *Supra*, and Makemson v. Martin County, *Supra*, this Honorable Court held that trial courts are authorized to award attorney fees in excess of a statutory schedule where extraordinary or unusual circumstances exist.

POINT II

The First DCA specifically concluded that F.S.440.34 as amended in 2003, violates neither the Florida nor the United States constitutions (AP-3). This Honorable Court therefore has jurisdiction to review this matter since the First DCA has upheld the constitutionality of F.S.440.34(2003), De Ayala v. Florida Farm Bureau Casualty Insurance, 543 So.2d 204(Fla.1989).

ARGUMENT

POINT I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT IN OLIVE V. MASS, 811 So.2d 644(FLA.2002), MAKEMSON V. MARTIN COUNTY, 491 So.2d 1109(Fla.1986), AND LEE ENGINEERING AND CONSTRUCTION COMPANY V. FELLOWS, 209 So.2d 454(Fla.1968), THE DECISION OF THE 5TH DCA IN MARION COUNTY V. JOHNSON, 586 So.2d 1163(Fla.5TH DCA 1991), AND THE DECISION OF THE 2ND DCA IN BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY V. SCRUGGS, 545 So.2d 910(Fla.2ND DCA 1989).

Article V, Section 3(b)(3), Fla. Const., and Fla.R.App.P.9.030(a)(2)(A)(iv) provides that the jurisdiction of this Honorable Court may be invoked to review any decision of a District Court of Appeal that: "Expressly or directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law."

Jurisdiction of this Honorable Court on a Notice to Invoke Discretionary Jurisdiction based upon a conflict depends on whether the conflict between decisions below is express and direct and not whether the conflict is inherent or implied, Department of Health and Rehabilitative Services v. National Adoption Counseling Service Inc., 498 So.2d 888(Fla. 1986). For purposes of determining conflict jurisdiction, this Honorable Court is limited to the facts which appear on the face of the opinion, Hardee v. State, 534 So.2d 706(Fla.1988).

In the case at bar, the JCC found that Claimant was entitled to recover "a reasonable attorney's fee" from the E/C per the provisions of F.S.440.34(3)(2003) (V2-216,217).

In Lee Engineering and Construction Company v. Fellows, Supra, this Honorable Court held that a "reasonable attorney's fee" in a workers compensation case was to be determined by considering various listed factors (time and labor, et al)

Effective 10/1/77, the Workers' Compensation Statute included, for the very first time, a statutory guideline attorney's fee, see F.S.440.34(1)(1977). The aforesaid statute also set forth other enumerated factors which were from this Honorable Court's decision in Lee Engineering and Construction Company v. Fellows, Supra, for the JCC to consider, and the JCC could increase or decrease the attorney's fee if in his judgment the circumstances of the particular case warranted such action. Effective 10/1/03, the Legislature amended F.S.440.34(1)(2003) by leaving in the statutory guideline fee, but by eliminating the other enumerated factors from Lee Engineering, Supra. However, the statutory language in F.S.440.34(3)(2003), which is the portion of the attorney's fee statute that allows a Claimant to recover his attorney's fees from the Employer/Carrier under certain circumstances, was unchanged. Thus, even with the 2003 amendments to F.S.440.34(1)(2003), a Claimant, per the provisions of F.S.440.34(3)(2003) is still entitled to recover a

"reasonable attorney's fee" from an E/C under certain circumstances, including the successful prosecution of a claim.

Claimant respectfully submits that the decision of the First DCA which defines a "reasonable attorney's fee" that a Claimant can recover from an Employer/Carrier, per the provisions of F.S.440.34(1)(2003) strictly to the statutory guideline fee set forth in F.S.440.34(1)(2003), conflicts with this Honorable Court's definition of a "reasonable attorney's fee" in Lee Engineering, Supra, which requires the JCC to take into consideration various factors before arriving at a reasonable attorney's fee.

Petitioner further respectfully submits that even if the First DCA was correct in concluding that "a reasonable attorney's fee" as set forth in F.S.440.34(3)(2003) is based on the statutory guideline attorney's fee as set forth in F.S.440.34(1)(2003) (even though there is nothing in F.S.440.34(3)(2003) that so indicates), the opinion of the First DCA conflicts with the decisions of this Honorable Court in Olive v. Maas, 811 So.2d 644(Fla.2002), and Makemson v. Martin County, 491 So.2d 1109(Fla.1986) and the decision of the Fifth DCA in Marion County v. Johnson, 586 So.2d 1163(Fla.5th DCA 1991) and the decision of the Second DCA in Board of County Commissioners of Hillsborough County v. Scruggs, 545 So.2d 910(Fla.2nd DCA 1989), because the Courts in the above referenced

cases have held that a trial court may exceed the statutory maximum in order to enable it to perform its essential judicial functioning of insuring adequate representation by competent counsel in cases involving extraordinary circumstances. In the case at bar, there were clearly extraordinary circumstances, in that counsel for Claimant had to expend 82 hours and advance costs of \$3,834.28 to secure \$2,526.40 in benefits in a case where the JCC found that the E/C had no reasonable grounds, nor factual or legal basis, to deny the benefits sought by the Claimant (V2-209,210,211,214,216,221). Nevertheless, the First DCA indicated that "a reasonable attorney's fee" to be paid to counsel for Claimant by the E/C per F.S.440.34(3)(2003) "must be based on the value of the benefits actually obtained on behalf of the Claimant" which results in an attorney's fee of \$6.16 per hour, and eliminates any judicial discretion.

POINT II

WHETHER OR NOT THIS HONORABLE COURT HAS JURISDICTION BASED ON THE GROUNDS THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY DECLARED FLORIDA STATUTE 440.34, AS AMENDED IN 2003, TO BE VALID AND CONSTITUTIONAL.

Article V, Section 3(b)(3), Fla. Const. and Fla.R.App.P.9.030(a)(2)(A)(i) provides that the jurisdiction of this Honorable Court may be invoked to review any decision of a District Court of Appeal that: ". . .Expressly declares valid a State statute."

In the case at bar, the opinion of the First DCA expressly declares valid F.S.440.34, as amended in 2003 (AP-3). Therefore, Petitioner respectfully submits that the jurisdiction of this Honorable Court may be invoked, De Ayala v. Florida Farm Bureau Casualty Insurance, 543 So.2d 204(Fla.1989), Acton II v. Fort Lauderdale Hospital, 440 So.2d 1282(Fla.1983)

Prior to the 10/1/03 amendments to F.S.440.34(2003), a JCC had the discretion to deviate from the statutory guideline when the presumptive fee produced by the statutory formula is "manifestly unfair", Davis v. Bon Secours-Maria Manor, 892 So.2d 516(Fla.1st DCA 2004). The decision of the First DCA herein does not allow any deviation from the statutory guideline fee.

This Honorable Court in Makemson v. Martin County, Supra, held that statutory fee maximums for court appointed counsel representing defendants in capital cases "when inflexibly imposed in cases involving unusual or extraordinary circumstances" interfere with a defendants sixth amendment right to have the assistance of counsel and are unconstitutional when applied in such a manner as to curtail the courts inherent power to ensure the adequate representation of the criminally accused. Inflexible statutory fee caps could result in a confiscation of an attorney's time, energy and talents, Makemson, supra.

The Makemson rationale has been applied by sister Courts in workers compensation attorney fee cases, Irwin v. Surdyk's

Liquor, 599 N.W. 132(Minn 1999), Joseph v. Oliphant Roofing Company, 711 A. 2nd 805(Del.Super.1997)(Makemson cited).

The necessity of enabling a Claimant to have representation of adequate counsel in a workers compensation proceeding has long been recognized by this Honorable Court, Lee Engineering, *Supra*, as well as decisions from the First DCA, see e.g. Davis v. Keto Inc., 463 So.2d 368(Fla.1st DCA 1985) (without the aid of competent counsel Claimant would have been helpless as a turtle on its back) Judge Barfield indicated in his concurring opinion in Wood, *supra* that the statute "severely impairs, if not eliminates, the ability of Claimants to obtain the assistance of counsel", Wood, *supra* at 545.

In a Workers Compensation case, a mandated, inflexible statutory cap on the amount of an attorney's fee that counsel for Claimant may receive, when there is no such restriction on the amount of an attorney's fee the E/C may pay their attorney, was held unconstitutional as a denial of the Claimant's equal protection rights, Horn v. New Mexico Educators Federal Credit Union, 899 P. 2nd 234(N.M.Ct ofApp 1994).

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that this Honorable Court grant Petitioner's Notice to Invoke Discretionary Jurisdiction and accept jurisdiction of this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this ____ day of March, 2007 to: Wayne W. Bilsky, 2431 Lee Road, Winter Park, Florida 32789, Patrick John McGinley, 2265 Lee Road, Suite 100, Winter Park, Florida 32789, Mary Ann Stiles, P. O. Box 460, Tampa, Florida 33601, Rayford H. Taylor, P. O. Box 191148, Atlanta, Georgia 31119, Thomas A. Koval, 6300 University Parkway Sarasota, Florida 34240.

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CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Initial Brief on Jurisdiction for Petitioner was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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