

**SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA**

**MARVIN CASTELLANOS,**

Petitioner,

vs.

**CASE NO.: SC13-2082**

**Lwr. Tribunal: 1D12-3639;  
OJCC No. 09-027890GCC**

**NEXT DOOR COMPANY and  
AMERISURE INSURANCE CO.,**

Respondents. /

**MOTION TO STRIKE BRIEF AND APPENDIX  
OF AMICUS CURIAE  
ASSOCIATED INDUSTRIES OF FLORIDA, INC., ET AL.**

**COMES NOW** the petitioner, Marvin Castellanos, by and through his undersigned attorney, and moves this Court to strike the brief and appendix of amicus curiae Associated Industries of Florida, Inc., et al., and for grounds would state:

This motion is made on authority of Fla. R. App. P. 9.220 and Fla. R. App. P. 9.300(a).

In their brief of amicus curiae, AIF relies on an Arkansas case, *Smith v. McKee Foods*, \_\_\_ S.W. 3d\_\_\_, 2000 WL 177602 (Ark. App. Feb. 9, 2000). (AIF Brief, 8). They say that an Arkansas appeal court held that a fee of \$16.20 was constitutional. (AIF Brief, 8). They quote a portion of

this opinion. (IAF Brief, 8). First of all, this case has never appeared in the Southwestern Third Reporter and never will, so the citation is wrong. It does appear in Arkansas Appellate Reports published by the State of Arkansas. 69 Arkansas Appellate Reports, page xxiv. It is included in the section entitled "Opinions Not Designated for Publication". 69 Arkansas Appellate Reports, page xxvi. So, this case is an unpublished opinion. It does appear in the Westlaw service as 2000 WL 177602 (Ark. App.), which clearly states that it is not reported in S.W. 3d.:

**NOTICE: THIS DECISION WILL NOT APPEAR  
IN THE SOUTHWESTERN REPORTER. SEE  
REVISED SUPREME COURT RULE 5-2 FOR THE  
PRECEDENTIAL VALUE OF OPINIONS.**

Id., at page 1.

Arkansas Supreme Court Rule 5-2(c) provides:

Precedential Value. Every Supreme Court and Court of Appeals opinion issued after July 1m,2009, is precedent and may be relied upon and cited by any party in any proceeding. **Opinions of the Supreme Court and Court of Appeals issued before July 1, 2009, and not designated for publication shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata collateral estoppel, or law of the case).** (Emphasis added).

As this *Smith* case was before July 1, 2009, and was not designated for publication, AIF knew or should have known that it should have not been cited, mentioned or quoted in the brief of amicus curiae.

Furthermore, AIF stated on page 8 of AIF's amicus brief that in the Arkansas case "...a claimant challenged the constitutionality of a statute which limited an attorney's fee to thirty percent (30%) of the benefits secured...". This statement is totally false. The "opinion" states near the end:

Here, appellant abandons his due process argument and returns to the statutory construction argument which he presented at the hearing and upon which the Full Commission never ruled. A question not passed upon below presents no question for decision here.

Id., at page 2.

Page 8 of the amicus brief should be stricken or alternatively, the entire brief should be stricken on account of this improper presentation.

Fla. R. App. P. 9.220(b) allows the filing of an appendix to a brief to include the order or opinion to be reviewed and "may contain any other portions of the record and other authorities". (Emphasis added).

Most of the cases that interpret this rule deal with the failure to include material that should be included in an appendix, rather than what should not be included. However, there is one case which does deal with

this issue specifically. In *Hillsborough County Board of County Commissioners v. Public Employees Relations Commission*, 424 So. 2d 132 (Fla. 1st DCA 1982), the Pinellas County Board of County Commissioners appeared as an amicus curiae and sought to have testimony in another case pending in the Second District Court of Appeal included in an appendix. Pinellas County contended that the case in the Second District Court of Appeal which involved Pinellas County was similar to the Hillsborough County case pending in the First District Court of Appeal. The First District Court of Appeal held that it could not take judicial notice of such testimony and that it was not within the meaning of "other authorities" in Florida Appellate Rule 9.220 dealing with an appendix. *Hillsborough County Board of County Commissioners*, supra, at 135. The Court also mentioned an earlier case in this regard, *Mitchell v. Gillespie*, 161 So. 2d 842 (Fla. 1st DCA 1964). The *Hillsborough County* case does indicate that "other authorities" in Rule 9.220 does not mean anything that a party cares to call "an authority" and wishes the Court to read and accept as a basis for the party's argument.

Incidentally, Federal Rule of Appellate Procedure (FRAP) 30 does not provide for "other authorities".

In the present case, Exhibit C-1 through 4 in the Appendix is not part of the record for review. For this exhibit to be now considered by the Court and any argument based upon it is prejudicial to the petitioner. The petitioner has not been afforded the opportunity to cross-examine the completeness of the exhibit, nor the accuracy of any facts contained therein, nor the meaning nor the interpretation of such facts. This would be a denial of due process of law because the proceeding would not then be fair and meaningful.

At the outset, the petitioner accepts that "other authorities" could include the decision of courts and government agencies, positive laws such as bills, committee reports, session laws, statutes, ordinances, and resolutions and staff analyses; also reports, studies, memoranda and documents of federal, state, county, municipal and district governments and recognized treatises and published law reviews. "Other authorities" does not include reports, studies, memoranda and documents of private entities, such as trade associations, insurance companies, insurance rating companies and lobbyists.

The appendix which accompanies the brief of the amicus curiae Associated Industries of Florida, Inc., et al., is referenced in the amicus curiae brief as "APPENDIX". (Brief, page iii).

Exhibit C-1 through 4 in the Appendix is an NCCI Florida State Advisory Forum 2013, which is referred to on page 15 of the amicus curiae brief. NCCI is the workers' compensation insurance industry's wholly-operated rating agency.

Exhibit C-1 through 4 of the Appendix should be stricken and pages 8 and 15 of the amicus curiae brief should be stricken.

We should not blame this amicus curiae for having done this, as they are lobbyists before the Legislature, which has no such Rule about what is said or argued.

Pursuant to Fla. R. App. P. 9.300(d)(10), the petitioner further requests that the time be tolled for the filing of the reply brief of petitioner, otherwise due to be filed on June 30, 2014, until such time as the Court rules on this motion.

WHEREFORE, the petitioner requests that the Court either:

1. Strike the brief and appendix of amicus curiae Associated Industries of Florida, Inc., et al., as requested by this motion, or;
2. Strike the brief and appendix of amicus curiae Associated Industries of Florida, Inc., et al., as requested by this motion, and allow this amicus curiae to file an amended brief and amended appendix that conforms to Fla. R. App. P. 9.220.

The petitioner further requests that the Court toll the time for the filing of the reply brief of petitioner from the date of this motion to, and including, June 30, 2014.

Respectfully submitted,

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By: Richard A. Sicking

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 19<sup>th</sup> day of June, 2014, to: Michael J. Winer, Esq. (mike@mikewinerlaw.com), Law Office of Michael J. Winer, P.A., 110 North 11th Street, 2nd Floor, Tampa, FL 33602; Raoul G. Cantero, Esq. (raoul.cantero@whitecase.com) and David P. Draigh, Esq. (ddraigh@whitecase.com), White & Case, L.L.P., Southeast Financial Center, Suite 4900, 200 South Biscayne Blvd., Miami, FL 33131;

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