

IN THE SUPREME COURT OF FLORIDA

MARVIN CASTELLANOS,

Petitioner,

CASE NO.: SC13-2082

vs.

L.T. Case Nos.:

1D12-3639

NEXT DOOR COMPANY, ET AL.,

OJCC No.: 09-027890GCC

Respondents.

**MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S
MOTION TO STRIKE BRIEF AND APPENDIX OF AMICUS
CURIAE FLORIDA JUSTICE REFORM INSTITUTE
AND THE CHAMBER OF COMMERCE, INC.**

The Florida Justice Reform Institute (the "Institute") and the Florida Chamber of Commerce, Inc. (the "Florida Chamber"), hereby respond to Petitioner's "Motion to Strike Brief and Appendix of Amicus Curiae Florida Justice Reform Institute and the Chamber of Commerce, Inc." (the "Motion"), and respectfully request that the Court deny the Motion for the reasons set forth below.

This case is an appeal from an administrative proceeding where an injured worker recovered \$822 with the assistance of counsel. The Judge of Compensation Claims ("JCC") lacked jurisdiction to address the constitutionality of the fee statute. Rule 9.220(b) of the Rules of Appellate Procedure authorizes the submission of "other authorities." The phrase "other authorities" is a broad standard that readily encompasses the documents cited in the Appendix of the

Institute and the Florida Chamber (the "Appendix"). The case cited by Petitioner is not analogous to this case and fails to provide any guidance. A broad reading of the Rule is consistent with the practice of this Court and must be preserved to ensure that appellate courts have access to information that is essential to the resolution of constitutional claims with broad and lasting implications for Florida.

A. The constitutionality of the fee statute was not reached by the JCC and is considered for the first time on appeal.

As the court below explained, "[t]he judge of compensation claims, as an executive branch adjudicator, was without authority to declare section 440.34 unconstitutional." *Castellanos v. Next Door Co.*, 124 So. 3d 392, 393 (Fla. 1st DCA 2013) (gathering cases). Therefore, "[t]he constitutional validity of a statute governing administrative proceedings is instead a question for the reviewing court. 'Accordingly, this court has jurisdiction to consider such claims in the first instance.'" *Id.* (citation omitted, emphasis added). Necessarily, the constitutionality of the fee statute was not addressed by the JCC:

The claims regarding the constitutionality of the Section 440.34 *et. seq.*, Fla. Stat. (2009) are not addressed for lack of jurisdiction.

Castellanos v. Next Door Co., OJCC No. 09-027890GCC, at 10 (July 3, 2012).

The case that Petitioner relied upon was *not* an appeal from an administrative decision challenging the constitutionality of a statute for the first time on appeal. Instead, it was a challenge to the administrative decision itself.

Hillsborough Cty. Bd. of Cty. Comm'rs. v. Pub. Employees Relations Comm'n, 424 So. 2d 132 (Fla. 1st DCA 1982). The court refused to admit *testimony* from another proceeding that related to the correctness of the administrative determination. *Id.* Here in contrast, the finding that the Petitioner is entitled to recover \$822 is not challenged on appeal. The Appendix documents do not relate to Petitioner's injuries or his entitlement to recover. Instead, the Appendix documents relate to the constitutionality of the fee statute and to the far-reaching implications of a decision to invalidate the fee caps—issues not addressed by the JCC.

B. In deciding cases with broad economic or social implications, courts routinely looks to social science, academic studies, and market analysis from private entities.

When deciding constitutional questions that necessarily extend the impact of a case from the parties before the Court to the entire State of Florida, this Court may consider market data, scholarly research, and statistical analysis for guidance. *See, e.g., Estate of McCall v. United States*, No. SC11-1148 (Fla. March 14, 2014) (relying extensively on market data and analysis that was not part of the record before the trial court). The United States Supreme Court has not infrequently relied upon social science and empirical data in important decisions, ranging from "*Brown v. Board of Education*, to *Roe v. Wade*, to *Lee v. Weisman*."¹

¹ Sylvia H. Walbolt and Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 Stetson L. Rev. 269 (2002-03) (citing Mary Murphy Schroeder, *The Brandeis Legacy*, 37 San Diego L. Rev. 711, 722 (2000)).

Petitioner argues that the *amici curiae* should not be permitted to bring data prepared by private entities to the attention of the Court. That approach would exclude from the Court an array of trusted and scholarly information.² Four of the Appendix documents were prepared by private research organizations. One of those organizations, the National Counsel on Compensation Insurance ("NCCI"), is a private licensed rating organization that is authorized by law to submit detailed rate-filing information to the Office of Insurance Regulation (OIR). § 627.091(2), (4), Fla. Stat. (2013). OIR relies on NCCI data and analysis when setting insurance rates. For the Court to exclude reports from private entities would deprive the Court of an important source of information that is reliable, relevant, and helpful.

C. Petitioner opened the door for the submission of information bearing on the constitutionality of the fee statute.

Petitioner's constitutional challenges raise issues unrelated to the administrative proceeding below. For example, the pending Equal Protection challenge raises the question of whether the fee caps are reasonably related to a

² For example, the National Bureau of Economic Research, a private nonprofit organization, is one of the nation's leading economic research organizations that disseminate research among public policymakers. "Founded in 1920, the National Bureau of Economic Research is a private, nonprofit, nonpartisan research organization dedicated to promoting a greater understanding of how the economy works. . . . Twenty-four Nobel Prize winners in Economics and thirteen past chairs of the President's Council of Economic Advisers have been researchers at the NBER." <http://www.nber.org/info.html>. NBER reports are regularly cited by courts, including the Supreme Court. *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 588 (1967) (J. Harlan concurring).

permissible state objective. *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 333 (Fla. 1991). To respond to this argument, the parties and the *amici curiae* must be permitted to submit to the Court both arguments and supporting authorities that bear on the wide-ranging public policy considerations to show that the fee statute is reasonably related to a permissible state objective.

D. Providing the Court with information about the broader implications of the case is the essence of an effective amicus brief.

In *Neonatology Associates, PA v. CIR*, 293 F. 3d 128, 132 (3d Cir. 2002), then-Judge Alito, in a case involving whether to grant leave to file an amicus brief, noted the many ways that amicus briefs benefit the court:

Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.

Id. (quoting Luther T. Munford, *When Does the Curiae Need An Amicus?*, 1 J.App. Prac. & Process 279 (1999)). This perspective is consistent with other scholarship. For example, in "*Amicus Briefs: Friend or Foe of Florida Courts?*", the authors conducted a number of interviews to identify the characteristics of a helpful amicus brief.³ The authors concluded that "me too" amicus briefs that merely reargue legal issue are of limited value. In contrast, briefs that discuss information outside the

³ Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 Stetson L. Rev. 269 (2002-03).

immediate case and that explain the ramification of the court's decision are helpful. The authors drew upon an interview with the Hon. Justice Pariente who found that a good amicus briefs should come forward with unique information:

[A]ll too often, amicus seem to believe that filing a brief to "weigh in" will help, and it does not; just adopting the view of one party, without any special information, does not help the court. If, however, amicus come forward with "unique information" bearing on the issues, that is a "very valuable service to the court."

Id. at 278. The article stated that "[i]nformation that enables the court better to see the 'big picture' and to 'get a perspective on how the decision will impact the real world in the future' is 'more helpful than weighing in for the sake of weighing in' on an issue." *Id.* (emphasis added) (citing the Justice Pariente interview). Similarly, the Hon. Charles T. Wells indicated that amicus briefs "need to be . . . written to explain the ramifications of a decision" *Id.* at 277 (emphasis added). Further, Stephen M. Shapiro, former U.S. Deputy Solicitor General concluded from discussions with Supreme Court clerks that "to be effective, an amicus brief must bring something new and interesting to the case. This might be . . . a convincing demonstration of the impact of the case on segments of society apart from the immediate parties." *Id.* at 275 (emphasis added).

The Appendix documents provide the Court with perspective on the \$2.9 billion workers' compensation marketplace and were selected to aid the Court in the resolution of the constitutional claims presented.

E. The Appendix documents were properly submitted as "other authorities" under Rule 9.220.

Based on the foregoing, each of the Appendix documents were properly submitted as "other authorities" under Rule 9.220.

Appendix Exhibit 1. The NCCI filing circular was filed with OIR pursuant to a specific statutory mandate, § 627.091, Fla. Stat., and was specifically relied on in OIR's "Order on Rate Filing"⁴ that was issued in response to *Murray v. Mariner Health Care, Inc.*, 994 So. 2d 1051 (Fla. 2008). To exclude this document would limit the Court's ability to understand the factors that caused workers compensation insurance premiums to increase by 6.4 percent following *Murray*.

Appendix Exhibit 3. The NCCI PowerPoint presentation is cited for the proposition that the total annual premium volume in Florida (including self-insureds) is \$2.9 billion. Data about the size of the overall industry is an example of information that was not material to the proceeding below, but that becomes relevant in a challenge to the constitutionality of the fee statute.

Appendix Exhibit 4. The Helvacian Report analyzed actual claims data from thousands of workers' compensation cases to measure the impact of the 2003 reforms that adopted the fee caps. The Report also analyzed claims data from nearby states in order to evaluate the Florida experience as compared to other jurisdictions. This analysis will help the Court to understand the impact that

⁴ Appendix, Exhibit 2.

invalidating the fee caps would have on employment opportunities, wages growth, economic growth, and the efficiency of the workers' compensation system.

Appendix Exhibit 5. One of the allegations underlying many of Petitioner's arguments is that injured workers are (or will be) unable to secure counsel because of the fee statute. The Savych Report analyzes data from 50,000 workers' compensation claims to determine what impact fee caps have had on attorney retention. The Court should have the benefit of this scholarly analysis on matters at issue and should not be required to resort to speculation or anecdotal evidence.

Appendix Exhibit 6. This summary of workers' compensation laws is the type of information that experienced judges have found to be helpful to the Court: "Amicus briefs likewise can be helpful in bringing to the court's attention how an issue, for example, a commonly occurring insurance coverage dispute, has been handled in other states . . ." Walbolt & Lang, Jr., 32 Stetson L. Rev. at 278 (citing a June 25, 2001 interview with Hon. Charles T. Wells).

In sum, Rule 9.220(b) authorizes two types of information: the record below and "other authorities." This second category should be construed broadly to ensure that appellate courts have full access to information essential to the resolution of constitutional claims that may be raised for the first time on appeal and that have broad and lasting implications for Florida.

WHEREFORE, for the reasons set forth above, Petitioner's Motion to Strike Brief and Appendix of Amicus Curiae Florida Justice Reform Institute and the Chamber of Commerce, Inc. should be denied.

Respectfully submitted this 27th day of June, 2014.

HOLLAND & KNIGHT LLP

/s/Mark K. Delegal

Mark K. Delegal, Esq.

Fla. Bar No.: 989924

mark.delegal@hklaw.com

Matthew H. Mears, Esq.

Fla. Bar No.: 885231

matthew.mears@hklaw.com

Holland & Knight LLP

315 S. Calhoun Street, Suite 600

Tallahassee, Florida 32301

Ph. (850) 224-7000

Fax (850) 224-8832

*Attorneys for Florida Justice Reform Institute
and the Florida Chamber of Commerce, Inc.*

-and-

William W. Large

Fla. Bar No. 981273

william@fljustice.org

Florida Justice Reform Institute

210 S. Monroe Street

Tallahassee, Florida 32301

Telephone: (850) 222-0170

Facsimile: (850) 222-1098

Attorney for Florida Justice Reform Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by E-Mail on this 27th day of June, 2014, to the following:

Richard A. Sicking, Esq.
1313 Ponce De Leon Blvd, #300
Coral Gables, FL 33134
E-Mail: sickingpa@aol.com
Co-Counsel for Petitioner

Michael J. Winer, Esq.
Law Office of Michael J. Winer, P.A.
110 North 11th Street, 2nd Floor
Tampa, FL 33602
E-Mail: mike@mikewinerlaw.com
Co-Counsel for Petitioner

Mark A. Touby, Esq.
Richard E. Chait, Esq.
Touby, Grindal & Chait, P.L.
2030 South Douglas Road, Suite 217
Coral Gables, FL 33134
E-Mail: mark.touby@tgc1egal.com
Co-Counsel for Petitioner

Roberto Mendez, Esq.
The Law Group of Mendez & Mendez,
P.A.
7061 Taft Street
Hollywood, FL 33024
E-Mail: rmendez@mendezlawgroup.com
Co-Counsel for Respondents

Raoul G. Cantero, Esq.
David P. Draigh, Esq.
White & Case LLP
Southeast Financial Center
200 South Biscayne Boulevard, Suite
4900
Miami, Florida 33131-2352
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
E-mail: raoul.cantero@whitecase.com
ldominguez@whitecase.com
E-mail: ddraigh@whitecase.com
mgauling@whitecase.com
Co-Counsel for Respondents

Kimberly A. Hill, Esq.
821 SE 7th St.
Fort Lauderdale, Florida 33301
E-Mail: kimberlyhillappellatelaw@gmail.com
*Counsel for Amicus Curiae, Florida
Workers' Compensation Advocates*

Mark Lawrence Zientz, Esq.
Two Datan Ctr
9130 S Dadeland Blvd, Ste 1619
Miami, Florida 33156
E-Mail: mark.zientz@mzlaw.com
*Counsel for Amici Curiae, MP Workers'
Injury Law and Advocacy Group WILG*

Christopher Smith, Esq.
2805 W. Busch Blvd., Suite 219
Tampa, FL 33618
E-Mail: chris@cjsmithlaw.com
*Counsel for Amicus Curiae, Workers'
Compensation Section of The Florida
Bar*

William J. McCabe, Esq.
1250 S. Hwy. 17-92, Ste. 210
Longwood, FL 32750
E-Mail: billjmccabe@earthlink.net
Counsel for Amicus Curiae, Voices, Inc.

Susan W. Fox, Esq.
Fox & Loquasto, P.A.
122 East Colonial Drive, Suite 100
Orlando, FL 32801
E-Mail: susanfox@flappeal.com
*Co-Counsel for Amicus Curiae, Florida
Justice Association*

Richard W. Ervin, II
Fox & Loquasto, P.A.
1201 Hays Street, Suite 100
Tallahassee, Florida 32301
E-Mail: richardervin@flappeal.com
admin2@flappeal.com
*Co-Counsel for Amicus Curiae, Florida
Justice Association*

Geoffrey Bichler, Esq.
Bichler, Kelley, Oliver & Longo
541 South Orlando Avenue, Suite 310
Maitland, FL 42751
E-Mail: geoff@bichlerlaw.com
*Counsel for Amicus Curiae, Fraternal
Order of Police*

Rayford H. Taylor, Esq.
Casey Gilson P.C.
Suite 800
980 Hammond Drive
Atlanta, GA 30328
E-Mail: rtaylor@caseygilson.com
*Counsel for Amici Curiae, Associated
Industries of Florida, Inc.; Associated
Builders & Contractors; Florida
Electric Cooperatives Association;
Florida Retail Federation; Florida
Roofing, Sheet Metal and Air
Conditioning Contractors Association;
Florida United Businesses Association;
and Publix Supermarkets.*

Kenneth B. Schwartz, Esq.
Kenneth B. Schwartz, P.A.
1803 S. Australian Ave., Suite F West
Palm Beach, FL 33409
E-Mail: kbs@flalaw.com
*Co-Counsel for Amicus Curiae, Florida
Workers' Compensation*

Noah Scott Warman, Esq.
Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, Florida 33134
E-Mail: NWarman@sugarmansusskind.com
*Counsel for Amici Curiae, Florida
Professional Firefighters, Inc.
International Association of
Firefighters, AFL-CIO*

Amy L. Koltnow, Esq.
Maria Elena Abate, Esq.
Colodny, Fass, Talenfeld,
Karlinsky, Abate & Webb, P.A.
One Financial Plaza, 23rd Floor
100 Southeast Third Avenue
Ft. Lauderdale, FL 33394
E-Mail: AKoltnow@cftlaw.com
*Counsel for Amici Curiae, Property
Casualty Insurers Association of
America, The Florida Insurance
Council, American Insurance
Association, and National Association
of Mutual Insurance Companies*

/s/Mark K. Delegal
Attorney