IN THE CIRCUIT COURT OF
THE 11th JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 11-13661 CA 25

FLORIDA WORKERS'
ADVOCATES (FWA),
Intervenor/Petitioner

WORKERS' INJURY LAW &
ADVOCACY GROUP (WILG),
Intervenor/Petitioner

ELSA PADGETT
Intervenor/Petitioner

v.

STATE OF FLORIDA,
OFFICE OF THE ATTORNEY GENERAL,
Respondent
_____/

ORDER ON AMENDED MOTION FOR SUMMARY FINAL JUDGMENT

This Action for Declaratory Relief comes before this court, based upon a motion for Summary Final Judgment filed by Petitioners. The court has jurisdiction pursuant to §86 Fla. Stat.

Background

In a complaint for damages brought by an employee against an employer based upon the alleged negligence of the employer, the affirmative defense of workers' compensation immunity under §440.11, Fla. Stat. 2003, was timely raised. The complaint was amended to add Count IV

for Declaratory Relief, seeking that this court declare §440.11 (the exclusive remedy provision of the workers' compensation act) invalid, because it violates the Due Process Clause of the 14th Amendment of the U.S. Constitution, the Access to Courts provision of Article 1, §21 of the Florida Constitution, a violation of the Florida Constitution's right to trial by jury; and a violation of the Florida Constitutions right to be Rewarded for Industry. Intervenors FWA and WILG sought and were granted the right to participate as parties. Thereafter the employer/defendant in the underlying negligence case withdrew its affirmative defense of workers' compensation immunity and sought to be severed from the Declaratory Relief portion of the amended complaint. Severance was granted and this matter proceeded independently. The Attorney General of the State of Florida was timely and appropriately notified as required by law and has not sought to intervene on the part of the State of Florida to defend the constitutionality or validity of §440.11 Fla. Stat. (2003).

A motion for Summary Judgment was filed by the Petitioners which the undersigned rejected on procedural grounds. That order was vacated. The Motion for Summary Judgment was then denied on the grounds that there was no present controversy to support Declaratory Relief concluding the Petition was asking for an advisory opinion. No interlocutory appeal was taken from that order but thereafter Elsa Padgett, through counsel, moved to intervene and said motion was granted. Intervenor Elsa Padgett presents a present controversy over the validity of §440.11 Fla. Stat. 2003.

FINDINGS OF FACT

1. There are no questions of material fact. All assertions of fact in the petition are uncontested. This is a facial invalidity assertion. The Court must analyze the uncontested facts to

determine if the requirements of the federal and Florida Constitutions are not violated by the Florida Workers' Compensation Act. Petitioners rely upon supporting affidavits, the deposition of Plaintiff's expert, Prof. John Burton, Esq., and the authority provided in the case law and the Appendices filed with the Motion for Summary Judgment and referenced herein.

2. The Workers Compensation Act (the Act) Ch. 440 Fla. Stat. provided full medical care benefits and some indemnity benefit for either permanent partial disability (also known as a partial loss of wage earning capacity) as the Act existed at the time of the adoption of the 1968 Florida Constitution and the adoption of the 1968 Declaration of Rights. In 1968, injured employees received some indemnity benefit if they suffered permanent disability, i.e. partial loss of wage earning capacity or permanent impairment to the body as a whole. They got whichever benefit was greater, §440.15 (3) (u) (1968). See Amended Affidavit of Richard Berman, Esq. (Appendix A)

3. As of 10/1/2003, the effective date of the 2003 amendments to the Act, the Act no longer provided full medical care nor any compensation for partial loss of wage earning capacity, §440.15, 440.13, Fla. Stat. 2003. See Amended Affidavit of Richard Berman, Esq. (Appendix A)

4. §440.11 Fla. Stat. (2003) makes the Act the "exclusive" remedy available to injured workers, their spouses, children and their estates for injuries or death on the job. See §440.11 (2003) (Appendix B).

5. The Act was amended effective September 1, 1970 to repeal an employee's right to 'opt out' of the coverage of the workers' compensation scheme, §440.05 (1969). See statute, laws of 1970 (Appendix C).

6. No additional or replacement benefit was granted to injured workers by the 1970

legislature to replace their right to 'opt out' when that right was repealed. See Amended Affidavit of Christopher Smith, Esq. (Appendix D)

7. When the Supreme Court of Florida rendered its opinion on July 10, 1973 in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), (Appendix E) changing Florida from a *contributory* negligence state to a *comparative* negligence state, the 1973 legislature failed to increase workers' compensation benefits concurrently to account for the fact that employees who previous to 1970 had the right to sue their employers now had a much greater chance of a recovery under the *comparative* negligence standard as compared to the poor chances of recovery formerly available in tort before *Hoffman.* Up until July 10, 1973 when *Hoffman* was decided, employer defendants in a tort suit by an employee enjoyed the absolute defenses of contributory negligence, fellow servant liability and acceptance of hazardous employment. These defenses made recovery in tort of damages for injury by employees far from certain at common law. See Deposition of Professor John Burton (Appendix F, pgs. 47-49).

8. As a matter of Law, effective October 1, 2003, the Act, Ch. 440.01 et seq.,

is no longer an adequate exclusive replacement remedy in place of common law tort as required by the 14th Amendment to the U. S. Constitution or by the Florida Constitution, (Deposition Professor Burton, Appendix F, pgs.60, 83),

> "Now, in the system you've got in Florida now there's no attention paid to lost wages. As far as I know, there's no other state that has eliminated benefits for all classes of permanent partial disability in which those benefits are either based on actual loss of wages or loss of earning capacity. So that Florida stands out as being the only state that has constricted its benefits to permanent impairments". The limited amount of benefits that are paid currently for permanent impairment are conservatively less than would have been available under the law in the seventies, and is markedly lower that what's paid in most other states. And certainly would have come nowhere near the standards that would be consistent with the National Commission's recommendations".

See also *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991):

> ("...the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured 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", id. at 1171, 1172)

DISCUSSION

9. The request for Declaratory Relief claims Padgett and the other Intervenor's have the right to a declaration as to whether or not workers' compensation as an injured worker's *exclusive* remedy is constitutional in exchange for a tort action, *Tavares v. Allstate Ins. Co,* 342 So.2d 551 (Fla. 3 DCA 1977), citing *May v. Holley,* 59 So. 2d 636,639 (Fla. 1952):

> "Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts; that *some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts*; that there is some person or persons who have, or reasonably may have and actual, present, adverse and antagonistic interest in the subject matter, wither in fact or law; that the antagonistic and adverse interest are all before the court by proper process or *class representation* and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts" (Appendix G) (Emphasis added).

Padgett and the other Intervenors are correct. Padgett and all similarly situated injured workers represented by Intervenors FWA and WILG may maintain a negligence suit versus a negligent employer without having to overcome the affirmative defense previously raised in the pleadings asserting that workers' compensation benefits are the exclusive remedy for an alleged on the job injury. Padgett is one of thousands of similarly situated injured workers in Florida. Even if the issue as to the original Plaintiff has become moot by the withdrawal of the

employer/defendants affirmative defense of workers' compensation immunity, the court is obligated to rule on the constitutional question presented in what was Count IV because the court is empowered to decide an issue if that issue is *capable of repetition in the future and might evade review, Times Publishing Company v. Burke*, 375 So. 2d 297 (Fla. 2 DCA 1979). The withdrawal of the original defendant's affirmative defense of workers' compensation immunity shows that other defendants may similarly seek to evade review. There is, therefore, a current bona fide actual and present practical need for the requested declaration. The existence of workers' compensation immunity is an appropriate subject for declaratory relief, *Strachan Shipping Co, v. Spigner*, 573 So. 2d 926 (Fla. 1 DCA 1991) (Appendix I). *See also, Nichols v. Nichols, 519 So.2d 620 (Fla. 1988)* (the supreme court exercised its discretion to review the issue of the standard for awarding temporary attorney's fees in a marriage dissolution proceeding, notwithstanding that the issue rendered moot because the parties had settled the case, because the issue was of general interest and importance in the administration of the law and was likely to recur). Intervenors have shown via their motions to intervene and the attached affidavits (Appendix S-Composite) that the question of the validity of the exclusive remedy in Ch. 440 is one of great importance, will recur, might evade review and requires resolution.

9. The "Exclusive Remedy" provision in Ch. 440 Fla. Stat. (2003) provides (in part):

> "440.11(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third party tortfeasor 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..." (Appendix B)

This language has been in Ch. 440 since 1935, §11, ch.17481; CGL 1936 Supp. 5966(11). 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 when ratified by the electorate on November 5, 1968. The Declaration of Rights, including the right to be rewarded for Industry (Art. I, § 2), became part of the statutory and procedural law of Florida that fixed the rights of the citizens, which rights could only be changed (not eliminated) and if changed must be replaced by a "reasonable alternative", Kluger *v. White*, 281 So. 2d 1 (Fla. 1973) (Appendix J).

10. There was, however, a significant change to the rights of the Citizens of Florida in the legislative session of 1970 (Appendix C). This change *repealed* the *right* of the employee and the employer as contained in s.440.05 and s. 440.06 to "opt out" of coverage of the Act, a right which was present as of the date of the Constitutional revision in November, 1968. There was no 'reasonable alternative' or additional benefit provided by the legislature in exchange for elimination of the right to "opt out", Laws of 1970 ch.70-148. The real significance of the repeal of the right of the employee to opt out became apparent when, in 1973, the Florida Supreme Court decided *Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973) (Appendix E) and Florida forever changed from being a state that followed the contributory negligence doctrine to one that followed the rules of comparative negligence. It is obvious that working people would not have been likely to opt out of coverage under the Act knowing they had to be 100% free of their own negligence to prevail in tort against their employer. As a victim of an on the job injury a Plaintiff employee also had to be the victim of an accident that was not caused, even slightly, by a fellow servant and also be an employee who did not accept the dangers of hazardous employment. The Act became unconstitutional as an exclusive remedy in stages. By the time *Hoffman,* was decided the "Quid Pro Quo" had already been destroyed. The 1973 Legislature made no changes to the Act to account for the change in the value of the 'trade'; workers' compensation exclusively in exchange

for the value of the lost tort remedy See: Amended Affidavit of Richard Berman (Appendix A).

11. Until the repeal of the 'opt out' provisions of the statute in 1970 the exclusive remedy was not really exclusive at all. It was only exclusive for those employees who did not 'opt out' and for the employees of those employers who did not 'opt out'. The Act became the exclusive remedy in 1970, two years after the enactment of the Declaration of Rights, with no reasonable alternative benefit provided by the legislature for the loss of the right to opt out. Benefits provided by the Act should have increased substantially to account for the change in the value of the trade, i.e.: allegedly fast, sure and *adequate* payments in exchange for the tort remedy that was cumbersome, slow, costly and under which it had been legally difficult for injured workers to prevail. A valuable right to 'opt out' (for both safe employers and employees) was taken away. Remember, workers' compensation is a scheme under which employers are required to pay for injuries that may be wholly caused by the employee/victim. Employers who run a safe business should be able to 'opt out'.

12. Injured workers lost their right to 'opt out" without any concomitant benefit to take the place of that right. Injured workers also lost many more rights which were in place in 1968. One of those that plays most prominently in the case at bar, a facial infirmity in the act, is the loss of any remuneration or benefit for partial loss of wage earing capacity, also called permanent partial disability. This right which was in existence in 1968 was eroded over time until effective October 1, 2000; the right was eliminated entirely without any reasonable alternative in its place. In 1968 injured workers were compensated for their permanent impairment expressed as a percentage of the body as a whole or by a set number of weeks of benefits, §440.15 (3) (u) (1968). If the employee with a permanent impairment to the body (a percentage applied to 350 weeks, i.e.: a

25% impairment was worth 87.5 weeks of benefits at the employees full compensation rate) had, as a result of the impairment, a *loss of wage earning capacity* that exceeded in severity the permanent impairment, the employee was paid the greater benefit (i.e.: a 40% loss of wage earning capacity was worth 140 weeks of indemnity benefits). As of October 1, 2003, the legislature eliminated *all* compensation for loss of wage earning capacity that is not total in character. The last vestige of compensation for partial loss of wage earning capacity was repealed. No reasonable alternative was put in its place. Injured workers now receive permanent impairment benefits pursuant to the Florida impairment guidelines and nothing else unless the employee is permanently and totally disabled (PTD). The benefits for PTD end at age 75 or after 5 years of payments, whichever is greater. PTD was a lifetime benefit in 1968. The Supreme Court of Florida said that the purpose of a Workers' Compensation act is for the employer who benefits or profits from an employee's labor must relieve society of the consequences of a broken body, a *diminished income*, an outlay for medical and other care, *Mobile Elevator v. White*, 39 So. 2d 799 (Fla. 1949). And:

> "Where a right of access to the courts for redress for a particular injury (injury to future wage earning capacity) has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become part of the common law of the State pursuant to Fla. Stat. S.2.01, F.S.A., the Legislature is without power to abolish such right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown", *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

The *Kluger* test is threefold: (1) The amendment to the compensation act must abolish a preexisting right of access (here, the right to be compensated for future lost earnings), (2) if so, whether a reasonable alternative exists to protect the preexisting right of access (here, no

reasonable alternative exists), and (3) if no such reasonable alternative exists, whether an overpowering public necessity exists for the amendment to the act (here, none is shown), *Eller v. Shova*, 630 So. 2d 537, 542 (Fla. 1993). The right to be Rewarded for Industry has been destroyed in violation of Art. I, § 2 "Basic Rights" of the 1968 Florida Constitution. The right to be compensated for permanent partial disability has been completely eliminated in violation of the constitution, *John v. GDG Services*, 424 So.2d 114, 116 (Fla. 1 DCA 1982).

13. In making a constitutional determination this court must decide how to approach the issue and what standards are to be used. The most recent expression of the Supreme Court of Florida in a workers' compensation related case was in *De Ayala v. Florida Farm Bureau Casualty Co.*, 543 So.2d 204 (Fla. 1989). The Florida Supreme Court held that Florida's workers have a fundamental right to workers' compensation based on the Florida Constitution, Art. I, § 2, which provides for the right "to be rewarded for industry". *De Ayala*, supra, at 206. In that case, a particular section of the statute was invalidated on two (2) grounds, the second being the fundamental right to be Rewarded for Industry. The Court held:

> "Moreover, it involves the right to be rewarded for industry. Art. I, s. 2, Fla. Const. It, therefore, is subject to *strict scrutiny* under either the Fourteenth Amendment's Equal Protection Clause or [citing authorities] under Art. 1 § 2, of the Florida Constitution".

De Ayala, supra. at 207. (Appendix K)

The same rationale was employed recently by the Florida Supreme Court in *North Florida Women's' Health v. State*, 866 So.2d 612 (Fla. 2003). Statutes are subject to strict scrutiny if they *impinge upon fundamental rights*. Even more so if the Police Power of the State was used to enact those statutes. The Act impinges on a number of fundamental rights including the inviolate Right to Trial by Jury, (Art. I, § 22) Fla. Const. Trial by jury is the one fundamental right in the

Declaration of Rights that is called "inviolate". The police power of the state had to be used to make workers' compensation acts lawful in the first place, *Johnson v. R.H. Donnelly Co.*, 402 So. 2d 518 (Fla. 1 DCA 1981). The Constitution was not amended by the legislature or by a vote of the citizenry to allow for a replacement of the tort remedy for workplace related personal injury. Fundamental rights guaranteed by the Constitution were eviscerated by merely enacting a statute and relying upon the police power of the state for validity. The test of constitutionality applicable to an act that invokes the police power of the state is variously described as proof that the act is necessary to protect public morals, health, safety or welfare. Such an act or amendment to an act based upon the police power of the state must be supported by proof of an overpowering or compelling public necessity requirement, the regulation must be necessary for the public welfare, *Johnson v. R.H. Donnelly*, 402 So. 2d 518, 521 (Fla. 1 DCA 1981). The purpose of a workers' compensation act is not for it to be used as a weapon in an economic civil war. Its purpose is to provide adequate compensation for on the job injuries in place of the tort remedy so as to relieve society from the costs of industrial injuries.

The test for 'overpowering public necessity' is whether the Act promotes public morals, health, safety and welfare of the citizens. As to safety, the Act and the rest of the Florida laws fail miserably. The legislature abolished the Florida Division of Safety and all safety rules and regulations leaving OSHA to regulate all Florida private business and no agency to regulate the safety of government employees (Appendix U). As to promoting Health, the Act fails miserably. It allows Employers to avoid and evade responsibility for injury by apportioning medical care expenses; part paid by the employer and the balance the responsibility of the injured worker. If the employee cannot afford his or her share, no medical care at all is provided. Doctors and

hospitals are not required to accept partial payment for their services. After Maximum Medical Improvement, there is an employee paid co-payment for reasonable and necessary medical care. As to welfare, the Act fails miserably. There is no replacement for wages lost due to permanent injury unless the disability is total. If total, benefits end at age 75 or after 5 years of benefits are paid out. As to Morals, the Act fails miserably. The United States Supreme Court commented:

> "One of the grounds of its concern (the workers' compensation act in question) with the continued life and earning power of the individual is its interest in the prevention of pauperism, *with its concomitants of vice and crime*. And, in our opinion laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations *"New York Central Railroad v. White*, 243 US 188, 37 S. Ct. 247, 61 L. Ed 667 (1917). (Appendix L).

14. When a statute is subject to strict scrutiny it is first presumed to be *unconstitutional*, *North Florida Women's Health v. State*, 866 So. 2d 612, Fn. 16, 19 (Fla. 2003). The presumption can be rebutted by a showing that the statute advances a *compelling state interest*; there must be no reasonable alternative; and the statute must be the least intrusive of the right involved. E.g. *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993); *De Ayala*, supra. There is no evidence rebutting the presumption. The Attorney General of the State of Florida declined to participate to defend the constitutionality of the Act.

There might have been a compelling state interest in 1935 when the Act (with the opt-out provision intact and contributory negligence as the standard of recovery in tort) was passed. The reasons given for using the police power of the state to take away the right to trial by jury and the right of access to courts were:

> "(1) to see that workers in fact were rewarded for their industry by not being deprived of reasonable *adequate* and certain payment for their workplace accidents; and (2) to replace

> an unwieldy tort system that made it virtually impossible for businesses to predict or insure for the cost of industrial accidents", *De Ayala v. Farm Bureau*, 543 So. 2d 204, 206 (Fla. 1989) (emphasis added).

But there are constitutional limits to the benefits of a compensation act; both high and low, that control:

> "This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable." Any question of that kind may be met when it arises", *New York Central Railroad, id.*

That question arises herein.

The First District Court of Appeal commented on the "minimum" requirements for a constitutionally adequate workers' compensation law. The Court said the workers' compensation law:

> "...remains a reasonable alternative to tort litigation. It provides injured workers with *full medical care and benefits for disability* (loss of wage earning capacity) and permanent impairment regardless of fault, without the delay and uncertainty of tort litigation", *Bradley v. Hurricane Restaurant*, 670 So. 2d 162,164 (Fla.1 DCA 1996)(emphasis added).

This is the same language that was used by the Supreme Court in *Martinez v. Scanlan*, 582 So.2d 1167, 1172 (Fla. 1991) 5 years earlier to set the minimum benefit requirement for a constitutional workers' compensation law. The 'solution' from *the Martinez* court was not to find the Act unconstitutional. The holding was that persons with injuries or accidents that are no longer 'compensable' due to the 1990 amendments to the act regained the power to 'opt out' after the injury took place and assert their right to sue in tort or claim compensation benefits, *Martinez*, id. Fn.4. (Appendix M). In other words, the Act was not their exclusive remedy.

The Act in effect after October 1, 2003 requires the injured worker to pay a medical co-payment after reaching MMI and allows for the apportionment of all medical costs. Judge Webster (First DCA) warned about potential constitutional concerns relating to apportionment of

medical. He wrote:

> "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", *Staffmark v. Merrill*, 43 So. 3d 792, 798 (Fla. 1 DCA 2012) (Webster, J., concurring).

The Act lacks any provision for compensating for permanent partial disability. It is easily seen that the Act in effect after October 1, 2003 fails to meet the minimum benefit requirements set by the 1st. DCA in *Bradley*, id, or the same requirements set by the Supreme Court in *Martinez,, Id.*

Two other states have adjudicated challenges to their workers' compensation laws after *Martinez,* id. In *Smothers v. Gresham Transfer*, 23 P. 3d 333(Supreme Court of Oregon 2001) (Appendix N) the Oregon court was also asked to declare the workers' compensation act unconstitutional because, in part, the legislature had enacted a provision requiring an accident on the job to be the Major Contributing Cause (MCC) of the injury or the injury was not compensable. Florida copied Oregon's MCC language in the 1994 amendments to Ch. 440.02(1) (Accident, Definition). Instead of striking the entire act, the Oregon court did what the Florida Supreme Court did in *Martinez*, id. The Oregon court held that if an employer or carrier raised MCC as a defense to a compensation claim, the injured worker had the option of a tort action. The Oregon 'exclusive remedy' provisions (the same as Florida's) do not apply if the MCC defense is raised (Appendix N - Affidavit of Oregon attorney Christopher Moore and Decision in Smothers v. Gresham Transfer)).

In Missouri the Missouri Alliance for Retired Americans and a cadre of unions and other

organizations representing the rights of injured workers challenged the constitutionality of the amendments passed there in 2005. The Missouri court of last resort held, following the trend in *Martinez*, id., and *Smothers*, id., that the 2005 amendments significantly changed key components of the worker's compensation system. Those changes restricted the definition of 'accident', heightened the burden of employees to prove causation and completely denied compensation for particular injuries. The Missouri solution was to allow those injured workers whose claims were affected adversely by the amendments to take their claims into tort litigation, *Missouri Alliance for Retired Ams. v. Dep't of Labor and Indus. Relations*, 277 S.W. 3d 670, 674 (Mo. 2009) (Appendix O). None of the *Martinez, Smothers* or *Missouri* 'solutions' can 'fix' the current issues raised by the Request for Declaratory Relief. The tort remedies allowed in the three cases discussed above only work well if a compensation claim is challenged on the issue of compensability at the outset and the injured worker can elect a remedy early on. Petitioner's main complaint is that if an injured worker, after reaching maximum medical improvement has a loss of wage earning capacity that is not total in character it will go uncompensated under the 2003 Florida Act. The injured worker would have had to wait until he reached maximum medical improvement and tested the labor market before he knew that he not only had the right to be compensated for his disability but that he would not get any benefit for his loss in the workers' compensation scheme. Petitioner's pray for a judgment holding the exclusive remedy provision in § 440.11 Fla. Stat. 2003 invalid and unconstitutional so that all injured workers in Florida may have the option of either a tort or a workers' compensation recovery at the outset.

15. None of the reasons previously asserted to support the use of the Police Power to make the Act the exclusive remedy are present today. The Act was originally passed in Florida in

1935. At that time there was no Social Security system, no Supplemental Security Income, no Social Security Disability Benefit, no Medicare, no Medicaid, no food stamps, very little group medical insurance (the Affordable Care Act will make medical insurance mandatory), no AFLAC, and limited public medical facilities.

The Act may arguably have been a reasonable alternative to tort litigation up to 1968. The benefits in the Act have been so decimated since then that it no longer provides a reasonable alternative to tort litigation. The law in Florida has changed to comparative negligence. The Act is the most intrusive way to compensate citizens for injuries on the job by taking away access to courts and removing the inviolate right to trial by jury. Simply put, the Florida Supreme Court has already answered the question: What is a reasonable alternative? An act that compensates for partial disability and provides full medical care. This court must follow the dictates of the Supreme Court on the same issue of law. The Supreme Court, in an action for declaratory relief directed to the 1990 amendments to the Act said: As long as the Act continues to provide full medical care and some compensation for total or partial disability, it remains constitutional, *Martinez v. Scanlan*, 582 So. 2d 1167, Fn.4, (Fla. 1991). The court opened up tort recovery to those injured workers whose accidents were no longer *covered* by the Act, *Martinez*, id. The Act of 2003 no longer provides full medical care or any compensation for permanent partial disability. In fine, it is inadequate as an exclusive replacement remedy for all injured workers.

It is no longer possible to reach the same result reached in *Martinez*, id., i.e.: granting the right to Tort remedy in limited situations or on a case by case, "applied" basis. This approach will not work because the infirmities in the current act since 2003 strike at the heart of the exclusive remedy. Every injury is capable of producing a partial loss of wage earning capacity, so

every injured worker must have the option of accepting workers' compensation benefits or choosing to sue in tort.

The Legislature must now determine what must be included in a Florida workers' compensation law to meet the minimum threshold for it to be a constitutional exclusive remedy. The Legislature is directed to *Martinez*, and to the study by the National Commission on State Workmen's (sic workers') Compensation Laws (the Commission). The Commission was created by an act of congress known as OSHA (1970), a product of the Nixon administration. The Commission was given 2 years to report to the President and Congress on the *adequacy* of State Compensation laws. The Commission was Chaired by John Burton and consisted of members from Insurance, Industry, W.C. Boards, Labor and Academia. The commission report was issued on time and ***unanimously***. The report (Appendix Q-1) found that as of 1972, state workers compensation laws provided *inadequate* benefits. John Burton, now Prof. Emeritus at Rutgers and Cornell Universities (Deposition- Appendix F), has continued to study and report on the adequacy of state workers' compensation laws since 1972. His expert opinion is that the Florida Act as of October 1, 2003 (and even before that date) provides injured workers with an inadequate and unreasonable remedy for the tort remedy they give up (Deposition- Appendix F at page, 176). I accept the testimony of Prof. Burton. The National Commission also commented on the need for safe workplaces. Attorney Richard Sicking's affidavit (Appendix U- with attachments) attests to the fact that Florida stands alone among the 50 states as the only state to have enacted and then repealed safety laws. OSHA with limited resources oversees private employments. There is no safety oversight over Florida's largest employer, the Government!

Judge Van Nortwick of the 1st. DCA also opined the current Act is *inadequate*. His dissent

on the issue of cutting off all benefits after 104 weeks even if the injured worker remains totally disabled but has NOT reached Maximum Medical Improvement noted:

> "In my view, our concern with this potential "gap" (in disability benefits for injured workers who remain totally disabled on the expiration of temporary disability benefits) is not simply a humanitarian concern for particular claimants, but is based on our interest in avoiding a potential constitutional issue. The problematic nature of the cutoff of these benefits has long been recognized by Florida courts. For example, as noted by the majority, in *Thompson v. Florida Industrial Commission*, 224 So.2d 286 (Fla. 1969), the court recognized that in ceasing payment of temporary total benefits after 350 weeks even though claimant was still totally disabled, "(t)he Florida Workmen's Compensation Law is *inadequate* in failing to provide for a situation such as this." Under the current statute (2006), temporary total disability benefits have been reduced to 104 weeks, section 440.15(2)(a), Florida Statutes (2006), 246 weeks less than the 350 weeks of benefits in *Thompson*". *Matrix Employee Leasing v. Hadley*, 78 So. 3d 621 (Fla. 1 DCA 2011) (Van Nortwick, J., Dissenting)(Appendix R)(emphasis added).

In 1968 an injured worker could get 350 weeks of Temporary Total Disability benefits and after that 5 years of Temporary Partial Disability benefits, a total of 12 years versus the 2 year maximum allowed after October 1, 2003, §440.15 (1968).

Numerous affidavits have been filed in this action (Composite Appendix S) to provide the court with examples and proof that the Florida Workers Compensation Act as amended effective 10/1/ 2003 is no longer a reasonable adequate alternative to tort litigation for employees injured on the job. I find the Act should not remain the exclusive remedy.

In 2003/2004 an article was printed in the Social Security Bulletin authored by H. Allen Hunt who chaired the NASI (National Academy of Social Insurance) Study Panel on the adequacy of workers' compensation as wage replacement. The conclusion was that state workers' compensation benefits were inadequate (Appendix V). Again, I agree.

Even the Supreme Court of the United States, in the first case affirming the use of workers' compensation laws in place of tort remedies commented that the benefits of the

replacement remedy must be *significant*, *New York Central Railroad,* id. Without full medical care or any indemnity for permanent partial loss of wage earning capacity, I find the Florida act fails the *significant* benefits test.

CONCLUSION

The U. S. Supreme Court requires workers' compensation benefits to be 'significant' if the exclusive remedy is to pass muster under the 14th Amendment to the U.S. Constitution (Due Process).

Professor Burton describes the category of benefits known as permanent partial disability as the most significant benefit under a workers' compensation program.

The Florida Supreme Court opined that to be constitutional a workers' compensation act had to provide some level of permanent partial disability benefit.

The Florida Supreme Court has opined that the legislature is without the power to repeal a category of benefits available at the time of the adoption of the 1968 Constitution without providing for a reasonable replacement.

The Legislature has repealed numerous classes of benefits since 1968, including permanent partial disability without replacing any of them with equivalent benefits.

Among a multitude of other infirmities, the Florida Act, after October 1, 2003, no longer provides any benefits for permanent partial disability.

As a matter of law, Chapter 440, effective October 1, 2003 is facially unconstitutional as long as it contains §440. 11 as an exclusive replacement remedy.

I find that the Florida Workers' Compensation Act, as amended effective October 1, 2003, does not provide a reasonable alternative remedy to the tort remedy it supplanted. It therefore

cannot be the exclusive remedy. §440.11 is constitutionally infirm and invalid.

IT IS ORDERED AND ADJUDGED, that Declaratory Relief is **GRANTED**. Judgment is entered for the Petitioners/Intervenors. §440.11 Fla. Stat. 2003 is unlawful, invalid and unconstitutional.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 08/13/14.

JORGE E. CUETO
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION NUMBER 12

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Judge's Initials JEC

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

Copies provided to:
Counsel on record