IN THE DISTRICT COURT OF APPEAL
THE FIRST DISTRICT,
STATE OF FLORIDA

Martha Miles,

Claimant/Appellant,

v.

City of Edgewater Police Department/Preferred Government Claims Solutions,

Appellees/Employer/Carrier.
_____/

DCA Case No: 1DCA-15-0165

LT Case No : 11-025158WWA

D/A: 8/3/2011, 11/29/2011

APPEAL FROM DIVISION OF ADMINISTRATIVE HEARINGS,

OFFICE OF THE JUDGE OF COMPENSATION CLAIMS

TAMPA DISTRICT, JCC HONORABLE MARK M. MASSEY

OJCC #: 11-025158WWA

REPLY BRIEF OF APPELLANT TO THE ANSWER BRIEF OF THE ATTORNEY GENERAL FOR THE STATE OF FLORIDA

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PRELIMINARY STATEMENT AND INDEX OF ABBREVIATIONS

In this Reply Brief to the Answer Brief of the Attorney General, Appellant will use the following terms and abbreviations:

Appellant will also be referred to as Officer Miles or the "Claimant."

Appellees will also be referred to as Employer/Carrier or "E/C."

The Attorney General of the State of Florida will be referred to as or Attorney General the "AG."

The Lower Tribunal will also be referred to Judge Massey or the "JCC."

The Florida Workers' Compensation Act/Chapter 440 and the legislative changes passed in 2003 will be referred to as the "Act."

In light of the new electronic record, which has dispensed with the need for multiple paper book volumes in favor of one consolidated electronic volume, Appellant will make record cites as follows: (Record. page number) e.g.- (R. 10). Per this Court's instructions, the Supplemental Record will be cited as follows: (SR. 1 (PDF 4)).

The Answer Brief of AG will be cited as follows: (AG, page number).

Appellant's Initial Brief will be cited as follows: (IB, page number).

ARGUMENT:

The Attorney General (AG) has chosen to reorganize the issues raised by Appellant, and their Answer Brief fails to comply with Florida Rule of Appellate Procedure 9.210(c). See *Rolling v. State ex rel. Butterworth*, 630 So. 2d 635, 636 n.1 (Fla. 1st DCA 1994) ("An Appellee should address the issues in the same order as they are presented in the Initial Brief so that the court can be certain which arguments are being addressed."). In spite of the AG's violation, for the sake of conformity and clarity, Appellant will respond to the points as enumerated by the AG in their Brief.

I. This Court's Decisions in *Kauffman* and *Castellanos* do not Control the Outcome of this Case.

Whereas Appellees claimed no interest in the outcome of Arguments I, II, III, and V of Appellant's Initial Brief, the AG claims an interest in preventing injured police officers having their union pay to help them obtain representation in workers' compensation cases. The AG's leading argument is that "this Court Should Affirm under *Kauffman* and *Castellanos*." (AG, 7-11) The AG fails to apprehend that the legal question decided in those cases did not concern a First Amendment challenge for which a strict scrutiny standard is applied. For example, in *Kauffman v. Cmty. Inclusions, Inc./Guarantee Ins. Co.*, 57 So.3d 919, 920-21 (Fla. 1st DCA 2011), this court concluded that the statute is constitutional, both on its face and as applied. However, the challenges rejected in *Kauffman* were limited to the claimant's "equal protection, due

process, separation of powers, and access to courts challenges." *Id.*, at 921. This Court never on ruled any First Amendment question. Further, while the AG is correct that the First Amendment was argued in the briefs in *Castellanos v. Next Door Co./Amerisure Ins. Co.*, 124 So. 3d 392 (Fla. 1st DCA 2013), this Court did not address any First Amendment issues in its opinion or in the question certified to the supreme court.[1] Thus, *Kauffman* and *Castellanos* do not control the outcome of the instant case, and the AG's assertions to the contrary reflect a profound misunderstanding of the doctrine of *stare decisis*, as no precedent was established in either case relating to the First Amendment. It is an established rule "to abide by former precedents, *stare decisis*, where *the same points come again in litigation*, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." See *State v. JP*, 907 So. 2d 1101 (Fla. 2004)(emphasis added)(internal citations omitted). Because *Kauffman* and *Castellanos* established no precedent on First Amendment issues, it naturally follows that they do not control here.

The AG's reliance on *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So. 2d 506, 509-10 (Fla. 1st DCA 2006) is misplaced for the same reasons, as the First Amendment was not an issue. The AG

[1]The question certified by this Court was the following:
WHETHER THE AWARD OF ATTORNEY'S FEES IN THIS CASE IS ADEQUATE, AND CONSISTENT WITH THE ACCESS TO COURTS, DUE PROCESS, EQUAL PROTECTION, AND OTHER REQUIREMENTS OF THE FLORIDA AND FEDERAL CONSTITUTIONS?

is basically taking the position that because this Court previously determined that §440.34 does not violate due process, equal protection, access to courts and separation of powers, that must also mean this Court implicitly held that it also does not violate the First Amendment. This argument makes little sense and becomes even more spurious considering that *Lundy* was decided under the lenient rational basis standard, whereas the First Amendment violations in the instant case command application of a strict scrutiny level of review. *Lundy, Kauffman* and *Castellanos* are all further distinguished as they implicated fees paid by the carrier as the non prevailing party. That is not the central issue in the instant case, which instead concerns the Union's right to pay for representation for one of its members (as well as the Claimant's right to pay for advice and services for a lawyer of her choosing.)

II. The Challenged Fee Limits Violate the First Amendment

The AG next argues that, "strict scrutiny does not apply because the fee limits do not *severely* burden Miles' First Amendment Rights." This argument fails for two compelling reasons. First, as the AG notes, when regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.(quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)" (AG, 13) The AG fails to apprehend that the restrictions against Officer Miles' and the Union's right to free speech are both unreasonable and discriminatory. Section 440.34 is discriminatory because the

fee restrictions impair only claimants and not employers and carriers, who have absolutely no restrictions at all on who they can hire or what or how they can pay.

Second, the AG is incorrect because content-based restrictions are per se discriminatory and mandate a strict scrutiny analysis. The AG concedes this point, but then irreconcilably argues that rational basis applies.[2] The AG fails to apprehend that restrictions of §440.34 are discriminatory and are not content neutral because they only apply to claimants attempting to exercise their free speech rights. That was the exact holding of this court in *Jacobson v. Se. Pers. Leasing, Inc.*, 113 So. 3d 1042, 1050 (Fla. 1st DCA 2013)("We conclude that sections 440.105(3)(c) and 440.34 do not constitute reasonable time, place, or manner restrictions on Claimant's First Amendment rights to free speech, free association, and petition for redress..... The fee restrictions at issue here are not content-neutral, both because they are limited to work done on workers' compensation issues as opposed to other areas of law, and because they are imposed only on claimants arguing in defense against an E/C's motion to tax costs, rather than on both parties' arguments regarding a motion to tax costs."). The AG completely

[2]The AG agrees and cites *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) for the proposition that, "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.")(AG, 13)

ignores this, instead trying to distinguish *Jacobson* because in the instant case, "there is no *absolute* bar in effect" as there were potential benefits to be secured and a potential for fees. (AG, 15) It matters not that there was a possibility of fee recovery for a *possible* lawyer who was *possibly* willing to take Miles' case. The record showed none of these possibilities would materialize due to the fee restrictions of §440.34, such that it was an "absolute bar." But, more importantly, none of these possibilities take away from the unassailable fact that §440.34 imposes a content-based restriction that distinguishes among different speakers, allowing speech by some (employers and carriers) but not others (claimants). Thus, this Court is bound by its own precedent, one overlooked and ignored by the AG, that §440.34 is a content-based restriction.

Lest there be any doubt about the application of the strict scrutiny standard to the content-based restrictions in the instant case, Appellant cites to the binding precedent of the Supreme Court, which the AG has overlooked. For example, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000), the Court held that content-based speech restrictions can stand only if it satisfies strict scrutiny. See also *Sable Communications of Cal., Inc. v. FCC*, 492 U. S. 115, 126 (1989). Again, in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), the Court held that, "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve

that end." see also *Carey v. Brown*, 447 U. S. 455, 461 (1980). Most recently, in *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876 (2010), the Court discussed content-based restrictions, noting:

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.
>
> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.

Citizens United, 130 S. Ct. at 888-89. (Internal citations omitted)

In spite of the clear precedent that strict scrutiny applies to content-based restrictions, the AG persists with the argument that, "the First Amendment rights of unions and their members do not support the application of strict scrutiny here." (AG, 15) To accept the AG's position would require this Court to violate the express holdings of the Supreme Court, something it has no power to do. Further, the AG's position ignores the rights of the Union and the Claimant to associate together to petition government.

In addition, the AG's assertion that Officer Miles' rights were not "severely burdened" is absurd and completely repugnant to the record evidence. (AG, 12) Officer Miles suffered much more than

a “severe” or “significant” restriction on her exercise of her fundamental free speech rights. Instead, she suffered a total and absolute restriction on her free speech rights, leaving her with no attorney to have her “own words — given voice through his attorney — spoken or written before the court...” See *Jacobson*, at 1049. The record showed that counsel for Officer Miles asserted that "it is economically not feasible to continue to represent the Petitioner without being paid for it." (R. 105) In addition, the affidavits of several Board Certified Workers' Compensation attorneys, with over 155 years of combined experience, showed that given the limited attorney fees dictated by §440.34, it is not economically feasible to represent any employee injured by an exposure without being paid on an hourly basis. (SR. 141-142, 149-150)(PDF 152-160) And, there was the testimony of Officer Miles, who confirmed that she cannot find anyone else to represent her as, “no one else wants to put forth that type of effort without being compensated. Therefore, I need to be able to pay for representation.” (R. 169) Lastly, there is the result, which is both undeniable and speaks for itself- she had no attorney in her trial and lost her case.

Somehow, the AG has taken these undisputed facts and contorted them into an argument that, “This case does not implicate strict scrutiny because section 440.34 does not severely burden Miles’ First Amendment rights.” (AG, 14) This argument ignores both the record evidence and the outcome of the case. If the negative effect of §440.34 results in her having no attorney willing to take her

case, how is this not a severe and significant restriction on her rights? What more does it take? Section 440.34 abolished Miles' First Amendment rights, not only in the trial of her workers' compensation case, but also by forbidding her and the Union from paying for an attorney to invoke her clear right to build a constitutional record in her case. C.f. *Russ v. Brooksville Health Care Ctr.*, 109 So. 3d 1266 (Fla. 1st DCA 2013). This presents the ultimate "Catch-22"-- a claimant needs an attorney to build a constitutional record and to win her case, but §440.34 prevents a claimant and the Union from hiring an attorney to build that record. Knowing this, the AG still has the temerity to question the proffered affidavits. (AG, 17) In what other area of law does such a draconian and absurd prohibition against the right to hire an attorney exist? The obvious answer is none, because it is constitutionally intolerable to extinguish such fundamental rights.

The AG's attempt to distinguish the controlling precedents of *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 218 (1967) and *Bhd. of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5 (1964) is equally unavailing. (AG, 15-16) The AG argues that these cases do not apply because, "in those cases, the state actions at issue completely barred the exercise of First Amendment rights." (AG, 15) First, in the instant case, the effect of §440.34 resulted in the very same outcome as in *Trainmen* and *United Mine Workers*-- no attorney would take the case

resulting in a complete bar of Miles' First Amendment rights. Further, *Trainmen* and *United Mine Workers* cannot be so narrowly limited. In *Trainmen*, a plan was implemented under which workers were advised to consult specific attorneys. The restriction at issue, much like §440.34, only sought to enjoin the Brotherhood from carrying on activities which, the Bar charged, constituted the solicitation of legal business and unauthorized practice of law. Members of the Brotherhood were still free to consult and hire other attorneys, just as was Miles in the instant case. Contrary to the limited holding suggested by the AG (AG, 15), the Court held:

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. *Gideon v. Wainwright*, 372 U. S. 335, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.
>
> .....
>
> We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers.

Trainmen, at 6-7. (Footnotes omitted)

In *Mine Workers*, the Union employed one attorney on a salary basis to represent members in claims under the Illinois Workmen's

Compensation Act. Members of the Union were still free to consult and hire other attorneys, as was Miles in the instant case. The restriction at issue, much like §440.34, only sought to enjoin the Mine Workers Union from engaging in certain practices alleged to constitute the unauthorized practice of law. The Court held that:

> We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.
>
> .....
>
> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider v. State*, 308 U. S. 147 (1939); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

Mine Workers, at 221-222. (Footnotes omitted)

As these cases demonstrate, it makes no difference that Miles could, in theory, find an attorney to take her case because, "there was a potential for attorney's fees to be approved." (AG, 15) Her First Amendment rights of free speech were violated along with those of the Union to speak in association with her. See *First Nat. Bank of Boston v. Bellotti*, 435 US 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.")

The AG cites *United States Department of Labor v. Triplett*, 494 U.S. 715, 717-18 (1990) for the proposition that "the Supreme Court has imposed a high evidentiary burden" on these types of claims. (AG, 16) In certain respects, *Triplett* is not even applicable to the instant case, and to the extent that it is, that decision actually supports the Appellant and defeats the AG's arguments. Foremost, the First Amendment was neither argued nor even discussed in *Triplett*. Rather, the challenge in *Triplett* solely focused on whether the fee provisions of the Black Lung Benefits Act "violate the Due Process Clause of the Fifth Amendment because it renders qualified attorneys unavailable and thereby deprives claimants of legal assistance in the prosecution of their claims." *Id*. at 717. Thus, the Court never applied strict scrutiny that challenge. Further, the Court did not rule on any First Amendment question, so *Triplett* cannot control the outcome here.

To the very limited extent that *Triplett* is persuasive, the decision actually supports the outcome urged by Officer Miles herein. The critical distinction in *Triplett* is that the litigation at issue there allowed for a reasonable fee. As the Court noted:

> .... the Act provides that when the claimant wins a contested case the employer, his insurer, or (in some cases, see 30 U. S. C. § 934 (1982 ed.)) the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's lawyer.

Triplett, at 718. (Citations omitted)

By contrast, §440.34 does not allow reasonable fees, a critical difference. Indeed, addressing the problem with the delay

in payment of contingent, reasonable fees in the Black Lung cases, the Court observed: "the contingent fees contracted for are high enough to compensate not only for the contingency but also for the delay until the contingency is resolved." *Id.*, at 725. By contrast, here, we not only have the delay in getting a fee until after the attorney prevails, but we have the more compelling problem that the contingent fee under the meager guideline is not a reasonable or sufficient one, the opposite of what transpired in *Triplett*. As the record showed, it is not feasible from an economic standpoint to represent the claimant in an exposure case such as Ms. Miles' without being paid on an hourly basis.(SR. 143-150(PDF 144-153)).

Further, the "anecdotal" evidence in *Triplett* "did not remotely establish either that black lung claimants are unable to retain qualified counsel or that the cause of such inability is the attorney's fee system..." *Id.* The exact opposite exists in this case where Miles' counsel, Miles, and several attorneys averred that no one would take this case on a contingency basis under the guideline, and payable only if are awarded. (SR. 143-4(PDF 146-7)) Miles counsel averred, "it is economically not feasible to continue to represent the Petitioner without being paid for it.[3]" (R. 105)

The AG next asserts that, "Because the State has compelling

[3]The attorney's allegations in court have the same effect as sworn testimony. See *Morrison Mgmt. Specialists/Xchanging Integrated Servs. Group, Inc. v. Pierre*, 77 So.3d 662, 666 (Fla. 1st DCA 2011) ("because the attorneys are officers of the court, their representations to the JCC were akin to sworn testimony..")

interests in regulating attorney's fees in workers' compensation cases, the challenged fee limits satisfy any level of constitutional review, including strict scrutiny." (AG, 17) The AG identifies several governmental interests in fee regulation:

1. To protect the public's welfare by ensuring that a worker is able to retain a substantial portion of awarded benefits so as to prevent the burden of support for that worker from being cast upon society. See *Lundy*, 932 So. 2d at 510. (AG, 18)
2. To limit that amount in an effort to control the systemic costs and regulate insurance premiums. (AG, 20)
3. To determine fees with reference to the rights and equities of the employer, the insurance carrier, and the claimant, *Samaha v. State*, 389 So. 2d 639, 640 (Fla. 1980)(AG, 18), and "to assure fairness to the employer, carrier." *Triplett*, 494 U.S. at 722 (AG, 20)

The accuracy of the AG's representation that these are "compelling" interests must first be addressed. Without question, each of the considerations above are "general governmental interests" as noted in *Jacobson*. However, the strict scrutiny test requires more than a *general interest.* It must be ***"a compelling governmental interest***." *See State v. J.P.*, 907 So.2d at 1109. The AG cites no case in which any of these interests have been held to be **compelling** ones. To the contrary, these have previously been analyzed under the rational basis standard, where the test is simply whether **"any** realistic and rational set of facts may be conceived to support it." e.g., *Lundy*, at 510. In *Samaha*, the court stated that "The legislature may limit the amount of fees that a claimant's attorney may charge because the state has a *legitimate*

interest in regulating attorney's fees...” However, a “legitimate” interest is a far cry from one that is “compelling.”[4] In *Jacobson*, this Court concluded that these statutes do not survive strict scrutiny because there is no “significant” governmental interest being served.[5] *Id*, at 1049. Because none of the these interests are “compelling,” they cannot justify the existence of §440.34.

Furthermore, §440.34 bears no rational or logical relationship to these interests, be they compelling or legitimate. Having the Union pay a fee of $1,500 does not “protect the public's welfare by ensuring that a worker is able to retain a substantial portion of awarded benefits so as to prevent the burden of support for that worker from being cast upon society.” *Lundy*, at 510. Further, because the Act is so complex that claimants cannot get benefits without an attorney, there are no benefits to even protect, exactly what transpired in the instant case, with the burden of taking care of Miles being cast upon society. Similarly, because the Union and Miles are paying the fee, this has no impact of the “systemic costs and regulate insurance premiums.” Lastly, the interest in determining “fees with reference to the rights and equities of the employer and the insurance carrier” is not implicated because the

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[4] Webster’s Dictionary defines “Compelling” as 1. Not able to be refuted; inspiring conviction.” Legitimate is defined as “being exactly as purposed: neither spurious nor false or accordant with law or with established legal forms and requirements.”

[5] Again, this Court was imprecise in its language: a “significant governmental interest” is not the test under strict scrutiny. The right of privacy demands the **compelling** state interest standard.

Union and the Claimant are paying the fee.[6] If these purported interests cannot sustain even under a rational basis standard, they certainly cannot sustain strict scrutiny. This Court recognized "that First Amendment rights are undoubtedly fundamental" and that "to survive strict scrutiny, a law [a] must be necessary to promote a compelling governmental interest and [b] must be narrowly tailored to advance that interest," and "[c] accomplishes its goal through the use of the least intrusive means." *Jacobson*, at 1048. Most importantly, as held in *North Fla. Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003), under strict scrutiny, legislation is presumptively unconstitutional and the **State must prove** that the legislation furthers a compelling State interest through the least intrusive means. The AG provided no proof to support its contention that fee limitations of §440.34 meet that exacting standard. Consequently, §440.34(1) abridges the right to free speech, free association, and to petition government because they create a "no claimant lawyer zone" in these types of cases (i.e. where limited benefits and procedural complexity make purely contingent fees unworkable). Using the ruse of "protecting the injured worker," the legislature has effectively eliminated a large class of these workers from being able to hire counsel to represent them in there very cases where they need the representation most.

[6]The fact that Appellees did not object to the payment of fees by the Union is the best true indication of their lack of interests as it relates to this issue.

III. Appellant re-alleges the allegations contained in the Initial Brief with Respect to Argument III, A-C and re-asserts that:

A. The Challenged Fee Limits Violate Miles' Due Process and Equal Protection Rights.

B. Florida's Workers' Compensation Act Violates Miles' Right to Access to Courts.

C. The Challenged Fee Limits Violates Separation of Powers.

CONCLUSION:

Appellant adopts her conclusion as stated in her Initial Brief.

CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Electronic Mail the 26th of September 2015 to: George A. Helm, III, Esquire and William Rogner, Esquire, Attorneys for Appellees and to ALLEN WINSOR, Solicitor General, and RACHEL NORDBY, Deputy Solicitor General, and filed with the 1st DCA.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is a computer generated brief in Courier New 12-point format and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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