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

GENERAL JURISDICTION DIVISION

CASE NO. 11-13661-CA 25

FLORIDA WORKERS' ADVOCATES, WORKERS' INJURY LAW & ADVOCACY GROUP, and ELSA PADGETT,

Intervenor-Petitioners,

v.

STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL,

Respondent.[1]
_____/

STATE OF FLORIDA'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE DATED JULY 24, 2014

The State of Florida, by the Attorney General, responds to the Court's order dated July 24, 2014, as requested. To be clear, neither the State of Florida nor the Attorney General is a party in this action, and submission of this memorandum should not be construed as a request to intervene or as a concession that the state or the Attorney General is a party.

INTRODUCTION

The intervenors ask this Court to do what no other court in Florida has done—declare Florida's worker compensation framework unconstitutional—and they ask this Court to do so in the form of an advisory opinion regarding a count in the amended complaint that the Court already has dismissed regarding the only defendant in the case: Velda Farms. In fact, the Court

[1] The Court ordered the caption to appear in this manner, *see Agreed Order on All Pending Motions*, dated April 1, 2013; so the State of Florida utilizes it here. However, as explained below, neither the state nor the Attorney General is a party.

already rejected the intervenors' request once in recognition of this salient point. This Court simply lacks subject matter jurisdiction to do what the intervenors once again ask it to do. There is no defendant as to count IV, and no pending cause of action. There is nothing further to be done regarding the count other than to deny the intervenors' latest summary judgment motion as moot.

This memorandum briefly lays out the relevant procedural background, demonstrates that this Court lacks jurisdiction over count IV, and shows that if the Court were to reach the merits of intervenors' arguments, they fail.

PROCEDURAL BACKGROUND

In May 2011, Julio and Nelida Cortes sued Velda Farms, LLC, alleging Mr. Cortes was injured while working for Velda Farms. The original complaint proceeded in negligence (count I) and loss of consortium (count III), and it also asserted that Velda Farms was estopped from claiming immunity under Florida's workers' compensation law (count II). Velda Farms answered in part by asserting that immunity as an affirmative defense.

The Corteses filed an amended complaint in February 2012, adding count IV. That count sought a declaration that sections 440.09(1)(b) and 440.11, Florida Statutes, were unconstitutional. The Corteses provided notice to the Attorney General regarding their new constitutional challenge, but did not try to add the Attorney General as a party.

Later in 2012, this Court allowed Workers' Injury Law & Advocacy Group ("WILG") and Florida Workers' Advocates ("FWA") to intervene as plaintiffs, limited to count IV. The intervenors did not submit their own pleading and did not seek to add claims or parties. In 2013, however, Velda Farms filed a notice that it intended to withdraw its workers' compensation immunity defense, and it accordingly moved to dismiss the estoppel count (as moot) and the

declaratory relief count (because Velda Farms was not a proper party defendant anymore and the Court lacked subject matter jurisdiction).

Around the same time, in February 2013, FWA and WILG moved to sever count IV. In that motion, both groups conceded that the withdrawal by Velda Farms of its immunity defense created a standing problem regarding count IV. Indeed, according to FWA and WILG, "[a] ruling with regard to the constitutionality of Florida Statute 440.11 will have no bearing of [sic] of the rights of [Velda Farms], either substantive or procedural. Whether the statute is Constitutional or not will have no effect on the outcome of the negligence action [pending between the Corteses and Velda Farms in counts I and III]." Nonetheless, both groups asked the Court to sever the constitutional question in count IV for a "separate trial[]." Their prayer for relief actually read as follows: "It is respectfully requested … with the consent of counsel for [the Corteses], that Count IV of the Amended Complaint be Severed [sic] and heard separately and *without the mandatory participation of Velda Farms* counsel [sic] *who no longer has standing to defend the Constitutionality of Florida Statute 440.11*." (emphasis supplied).

On April 1, 2013, the Court entered an "Agreed Order on All Pending Motions." The order stated that "[a]ll parties have agreed" to its terms; notably, the Attorney General's office did not participate in any discussions regarding the terms of that order, nor would it have, since it was not a party. The order severed count IV but "DISMISSED from Count IV" Velda Farms—the only defendant in the case. The order directed that Velda Farms "not be identified or named as a party Defendant in the severed claim (Count IV)" and provided that Velda Farms was "not permitted nor required to respond or defend against the severed claims asserted in Count IV." The Court dismissed count II as moot.

Despite the dismissal of count IV as to the only defendant in the case, the same order provided that count IV would "go forward to be tried separately by parties intervener[]s against the State of Florida, Office of the Attorney General" even though the Attorney General was not and is not a party in this action, and even though the only parties, to this day, appearing on the face of the operative pleadings (the first amended complaint and the answer and affirmative defenses) are the Corteses and Velda Farms.[2] Finally, the order directed, as to count IV, that "parties Petitioner shall be listed as Intervener Florida Workers Advocates (FWA) and Intervener Workers Injury Law and Advocacy Group (WILG). Respondent shall be The State of Florida, Office of the Attorney General." In other words, the order provided that dismissed count IV proceed as a parallel action without the involvement of the injured worker, his wife, the employer, or any defendant at all.

Next, in an order filed July 3, 2013, the Court denied the intervenors' motion for summary judgment. The Court observed that "the original employee-plaintiff and employer-defendant are no longer involved in this severed claim. Instead, the FWA and WILG are proceeding on the general premise that there is *potentially* a class of individuals who may be impacted if this court concludes §440.11, Florida Statute is unconstitutional." Order at 2 (emphasis in original). The Court correctly observed that a declaratory judgment sought by the intervenors "would be akin to be an advisory opinion since there is not an actual, present, and practical need for the declaration." Order at 3. According to the Court: "There is no specific claimant here, since the original employee and employer are no longer involved in this declaratory action. In essence, the motion filed by FWA and WILG requests that this court deem

[2] Neither intervenor appears to have filed a pleading listed in rule 1.100(a), Florida Rules of Civil Procedure. The amended complaint does not list the Attorney General as a party and does not set out allegations to support why this claim could be brought against the Attorney General.

§440.11, Florida Statutes, to be unconstitutional for all hypothetically situated employees without first rendering a finding on a specific case." Order at 4. That, the Court again properly noted, "would be tantamount to an advisory opinion." *Id.*

In September 2013, the Court granted Elsa Padgett's motion to intervene as an additional plaintiff. On January 8, 2014, all three intervenors filed an amended motion for summary final judgment, raising the same arguments made in intervenors' prior motion. On July 24, 2014, this Court, on its own motion, issued an order for the Attorney General's office, "in its sole discretion," to "show cause why the [summary judgment motion] should not be granted as prayed." This memorandum responds to that order and shows why this Court is without authority to grant that motion, which must be denied as moot, and why the intervenors' arguments fail on the merits.

I. THERE IS NEITHER A PROPER PARTY NOR A JUSTICIABLE CONTROVERSY REGARDING NOW-DISMISSED COUNT IV, AND THIS COURT LACKS JURISDICTION TO GRANT THE SUMMARY JUDGMENT MOTION. THE MOTION IS MOOT.

A. The State of Florida and the Attorney General Are Not Parties.

The State of Florida and the Attorney General are not parties in this action. The intervenors acknowledged this point repeatedly. *See Unopp. Mot. to Quash Order for Mediation* at 2, Nov. 20, 2013 ("[T]he State of Florida is not, was not, and apparently will not be a party to this action at the trial level."); *Unopp. Mot. to Cont. Trial* at 2, Nov. 20, 2013 (noting that State of Florida has not intervened); *Mot. for Reh'g* at 7, May 10, 2013; *Unopp. Mot. of Padgett to Intervene* at 5, July 25, 2013; *Mot. to Sever Count IV* at 3, Feb. 27, 2013. The court docket makes the same point: The Attorney General is not listed as a party.

And there could not be any contention to the contrary. Service of notice on the Attorney General, pursuant to section 86.091, Florida Statutes, and rule 1.071, Florida Rules of Civil

Procedure, does not make the Attorney General a party to an action where the constitutionality of a Florida statute is challenged. *Cf. Bondi v. Tucker*, 93 So. 3d 1106, 1109-11 (Fla. 1st DCA 2012) (dismissing Attorney General's appeal because Attorney General was a non-party to litigation in trial court and did not seek to intervene, despite having notice of constitutional challenge in that court); *Watson v. Claughton*, 34 So. 2d 243, 246 (Fla. 1948) (holding that section 87.10, predecessor to 86.091, does not make Attorney General a necessary party in case challenging constitutionality of statute, and approving trial court's striking of pleadings filed by Attorney General because he was not party and same court had denied motion to intervene).

It is left to the Attorney General's discretion whether to intervene in a case to assert the state's position regarding the constitutionality of a statute. *Cf. Martin Mem'l Med. Ctr., Inc. v. Tenet Healthsystem Hosps., Inc.*, 875 So. 2d 797, 800-01 (Fla. 1st DCA 2004) (noting that section 86.091 gives Attorney General discretion whether to seek intervention and only is "to ensure that the state (in the person of the Attorney General or appropriate state attorney) is aware of any litigation in which a plaintiff seeks a declaratory judgment that any of the enumerated forms of legislation is unconstitutional, and afforded an opportunity to present the state's position"). *Cf. State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 838 (Fla. 1973) ("Since many constitutional challenges are raised in a trial court which can be simply disposed of as obviously meritless, it would be futile for the Attorney General to defend each statute against all constitutional challenges at the trial level."). The Attorney General did not intervene in this action and is not a party.

Even if the intervenors had tried to add the State of Florida or the Attorney General as a party, neither is the appropriate party in the putative constitutional challenge to Florida's workers' compensation provisions set out in the first amended complaint. "The proper defendant

in a lawsuit challenging a statute's constitutionality is the state official designated to enforce the statute." *Atwater v. City of Weston*, 64 So. 3d 701, 703 (Fla. 1st DCA 2011); *Walker v. President of the Senate*, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995). The Attorney General has no responsibility regarding the enforcement of the worker compensation laws, and the intervenors do not and could not identify "a duty or responsibility of the State implicating specific responsibilities of the" Attorney General regarding the laws purportedly challenged. *Marcus v. State Senate*, 115 So. 3d 448, 448 (Fla. 1st DCA 2013); *Atwater*, 64 So. 3d at 704.

B. There Is No Party-Defendant or Declaratory Judgment Action Remaining, and the Summary Judgment Motion Is Moot.

That leaves the intervenors with no defendant for the declaratory judgment action asserted in count IV of the amended complaint. In fact, there is no one against whom to enter the judgment requested by the intervenors, and this Court lacks jurisdiction to enter such a judgment. *See Ervin v. Taylor*, 66 So. 2d 816, 817 (Fla. 1953) (reversing decree "addressed to no one" and directing that petition be dismissed, even though Attorney General had received notice and filed a reply, because "[t]here were no adversaries, and being none, there was no actual controversy").

There simply is no adversary to the intervenors' claim. As the intervenors acknowledged in their motion to sever, Velda Farms "no longer has standing" regarding count IV. *Mot. to Sever Count IV* at 3, 4, Feb. 26, 2014. And the "statutory authorization [of section 86.091] does not create the adverse or antagonistic interest necessary for the exercise of the court's declaratory-relief jurisdiction." *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 153 (Fla. 1st DCA 2002); *see also Ervin*, 66 So. 2d at 817 ("The complaint was a mere petition to the court to pass upon the validity of an act of the legislature. There were no adversaries, and being none, there was no actual controversy. In that situation there was no justification for adjudicating the constitutionality of the enactment."). And simply challenging the constitutionality of one of the

state's statutes does not make the State of Florida a party, either. *See Fla. Consumer Action Network*, 830 So. 2d at 153 (finding that allegation that "State of Florida is a sovereign state, obligated to follow the [constitutional] limitations on its authority" is not enough to establish a proper adversary for jurisdiction purposes).

Moreover, count IV has been dismissed, so the intervenors do not even have a claim to pursue. An intervenor takes the pleadings as it finds them when it intervenes. *See Omni Nat'l Bank v. Ga. Banking Co.*, 951 So. 2d 1006, 1007 (Fla. 3d DCA 2007). And the intervenors here only sought to intervene as plaintiffs as to the declaratory judgment count that the Corteses already had asserted. *See FWA Mot. to Intervene*, June 14, 2012; *Padgett Mot. to Intervene*, July 24, 2013; *see also Mot. to Sever Count IV* at 2, Feb. 27, 2013 (noting that intervenors "sought to intervene in the proceedings specifically to represent their members and their members' clients in connection with Count IV"). They did not seek to file a separate pleading that added additional parties or causes of action.

When this Court permitted FWA and WILG to intervene as to count IV, the order did not give either organization special leave to assert independent claims. In turn, the intervention was "in subordination to" the proceeding by the Corteses against Velda Farms. Fla. R. Civ. P. 1.230; *see Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1288 (Fla. 3d DCA 2013) (noting that unless intervenor is indispensable party (*i.e.*, a party whose absence would make full adjudication impossible), its intervention is subordinate to main proceeding); *see also E. Cnty. Water Control Dist. v. Lee Cnty.*, 884 So. 2d 93, 94 (Fla. 2d DCA 2004) (noting that intervenor "did not file a complaint or any other pleading seeking affirmative relief when it was granted intervention status" and trial court did not grant intervenor "right to plead without being

subordinate to the main action"). Ms. Padgett also did not request, and was not given leave, to add her employer, Miami-Dade County, as a defendant in this action.

Notably, the intervenors also did not try to have new process issued and served to bring in another party. The intervenors certainly did not serve process on any state officer or agency. *Cf. In re Worldwide Sys., Inc.*, 328 F.3d 1291, 1299 (11th Cir. 2003) ("Generally, where service of process is insufficient, the court has no power to render judgment and the judgment is void."); *Kelly v. Fla.*, 233 F.R.D. 632, 634 (S.D. Fla. 2005), *aff'd*, 233 F. App'x 883 (11th Cir. 2007) (noting that section 48.111, Florida Statutes, is exclusive method of service on public agency and must be strictly followed).

The intervenors' conduct in this case acknowledges the absence of any defendant besides Velda Farms, and of any claim besides the one originally asserted by the Corteses in count IV of their amended complaint. Simply put, when this Court dismissed count IV as it was pending against Velda Farms, the only defendant in the action (notably, with the intervenors' consent), *see Agreed Order* at 1-2, April 1, 2013, the Court completely lost jurisdiction to consider the intervenors' claim under count IV any further. *See E. Cnty. Water Control Dist.*, 884 So. 2d at 94-95 (holding that trial court did not have jurisdiction "to hear a new claim brought within a case that has been terminated by a dismissal," even where intervention occurred prior to dismissal, where intervenor subordinated to original claim); *Hoechst Celanese Corp. v. Fry*, 693 So. 2d 1003, 1008 (Fla. 3d DCA 1997) (holding that where order granting intervention did not grant permission for intervenors to assert independent claims for affirmative relief, and where there in fact were no such pending independent claims when original action voluntarily dismissed by the original plaintiff, the trial court "completely lost jurisdiction to entertain any

claims attempted to be asserted by" subordinate intervenors after dismissal of action on which intervention originally based).

C. There Otherwise Is No Procedural Basis to Support Declaratory Relief as a Remedy.

Finally, even if this Court had jurisdiction, intervenors have not established that declaratory relief is appropriate. For example, the individual intervenor, Ms. Padgett, has not even alleged—nor could she in this case at this point—that she has attempted to assert a cause of action against her employer and that her employer will assert workers' compensation immunity as a defense. Even if she did, it would make no difference because as already noted above, her employer is not a party to this suit. In turn, she cannot show a "present, ascertained or ascertainable state of facts or present controversy as to a state of facts"; there is not "some person or persons who have … an actual, present, adverse, and antagonistic interest in the subject matter"; and "the antagonistic and adverse interest [whoever that is] are [not] all before the court by proper process." *Williams v. Howard*, 329 So. 2d 277, 282 (Fla. 1976) (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952)). The proper avenue for Ms. Padgett at this point is to file her own suit against her employer. *See E. Cnty. Water Control Dist.*, 884 So. 2d at 95.

In its July 3, 2013, order denying the intervenors' summary judgment motion, the Court was correct that the intervenors seek nothing but an advisory opinion as to the constitutionality of section 440.11, Florida Statutes. The Court also was correct that it was without authority to render such an opinion. *See Santa Rosa Cnty. v. Admin. Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995) ("Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, and rest in the future.") (quoting *LaBella v. Food Fair, Inc.*, 406 So. 2d 1216, 1217 (Fla. 3d DCA

1981)) (internal quotations and brackets omitted). The Court's decision then was premised on the lack of a proper plaintiff, which intervenors apparently hoped to remedy by adding Ms. Padgett. But even if there is a proper plaintiff, there remains no defendant. "The effect of a decision in this case would be nothing more than [an] opinion in a non-adversary proceeding where only the plaintiff is present concerning the constitutionality of a solemn act of the Legislature." *Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said Dist. Upon Which Drainage Taxes for the Year 1952 Have Not Been Paid*, 80 So. 2d 335, 337 (Fla. 1955). "Under these circumstances the proceeding [must be] dismissed *sua sponte*." *Id.* This Court should deny the motion.[3]

II. FLORIDA'S WORKERS' COMPENSATION FRAMEWORK IS CONSTITUTIONAL.

If this Court were to reach the merits of intervenors' arguments, despite the many reasons not to, any claim would still fail because Florida's workers' compensation system is constitutional. The intervenors' motion misstates the standard of decision, misapplies the *Kluger* test, and ignores the fact that courts have consistently found the workers' compensation law constitutional after each change they cite.

A. Standard of Decision.

A court must apply "a presumption of constitutionality," to the Legislature's enactments "and [statutes] must be construed whenever possible to effect a constitutional outcome." *Crist v.*

[3] In addition to the myriad procedural flaws and defects already identified above that require this Court simply to deny the summary judgment motion as moot, the State of Florida notes that FWA's and WILG's standing in this case is dubious. By their own admissions, FWA and WILG are associations of lawyers who *represent* individuals who may have claims. The lawyers themselves—the members of these associations—would not have standing to sue in their own right. *Cf. McCarty v. Myers*, 125 So. 3d 333, 337 (Fla. 1st DCA 2013), *reh'g denied* (Nov. 25, 2013), *review denied*, SC13-2543, 2014 WL 1661165 (Fla. 2014) ("Without a showing of an actual denial of access to courts in a specific factual context, the Provider Plaintiffs lack standing to assert this claim. The real parties in interest—injured motorists whose ability to sue tortfeasors has been impermissibly limited—are absent from this case.") (internal note omitted).

Fla. Ass'n of Criminal Def. Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2008). "To overcome the presumption, the invalidity must appear *beyond reasonable doubt*." *Id.* (quoting *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)) (emphasis supplied) (internal quotations omitted). This presumption applies in an access to courts challenge. *See State Farm Mut. Auto. Ins. v. Warren*, 805 So. 2d 1074, 1077, 1078-79 (Fla. 5th DCA 2002) *approved* 899 So. 2d 1090 (Fla. 2005).[4]

B. The Legislature's Changes to the Workers' Compensation Framework Do Not Trigger an Access to Courts Claim.

The intervenors rely on *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), which establishes a two-part test for determining an access to courts claim. But this Court need not reach the issue of whether this test is satisfied because *Kluger* applies only if a right has been abolished, and intervenors do not contend that the right to workers' compensation benefits has been abolished. *See, e.g., White v. Clayton*, 323 So. 2d 573, 575 (Fla. 1975) (declining to apply *Kluger* where "[t]he right of recovery [] has not been abolished; only the elements of damage have be[e]n changed"); *see also Lifemark Hosps. of Fla., Inc. v. Alfonso*, 4 So. 3d 764, 769 (Fla. 3d DCA 2009)*; Amorin v. Gordon*, 996 So. 2d 913, 917-18 (Fla. 4th DCA 2008); *John v. GDG Servs., Inc.*, 424 So. 2d 114, 116 (Fla. 1st DCA 1982), *approved*, 440 So. 2d 1286 (Fla. 1983) (rejecting claim where benefits were not "so reduced as to be effectively eliminated").

[4] The intervenors argue that strict scrutiny applies, and that the law must be presumed unconstitutional, relying on *De Ayala v. Florida Farm Bureau Casualty Co.*, 543 So. 2d 204, 207 (Fla. 1989) and *North Florida Women's Health v. State*, 866 So. 2d 612 (Fla. 2003). *See* Am. Mot. for Summ. J. at 12-13. But *De Ayala* involved a statute disadvantaging a suspect class, *see De Ayala*, 543 So. 2d at 207, and later cases involving a worker's right to be rewarded for industry have not applied strict scrutiny where no suspect class is involved, *see, e.g., Berman v. Dillard's*, 91 So. 3d 875, 877 (Fla. 1st DCA), *rev. denied*, 108 So. 3d 654 (Fla. 2012); *cf. Warren*, 899 So. 2d at 1097. *North Florida Women's Health* involved a right to privacy claim and is inapposite. *See Berman's*, 91 So. 3d at 877 (specifically rejecting argument that *North Florida Women's Health* requires strict scrutiny in access to courts case).

The First DCA's recent en banc opinion in *Westphal v. City of St. Petersburg*, 122 So. 3d 440 (Fla. 1st DCA 2013), *rev. granted*, Case Nos. SC13-1930, SC13-1976, 2013 WL 6669379 (Fla. Dec. 9, 2013), highlights the flaws in the intervenors' arguments. That case involved a workers' compensation claimant who was subject to the 104-week time limit on temporary disability benefits. He argued that the act created a "gap" because he reached the end of the limit without being able to prove permanent disability, and claimed that the Legislature violated his access to court right by reducing the 350-week limit that had been in place in 1968. A panel held that the law does create a gap and found a specific statutory subsection unconstitutional. That opinion was vacated after the full court ordered rehearing en banc, ultimately construing the statute to create no gap.[5] FWA, one of the intervenors here, filed an amicus brief urging the en banc court to hold the statute unconstitutional, raising nearly identical arguments to those intervenors make in this case.[6] While the *Westphal* case generated five separate opinions, *not a single judge* on the First DCA found there was any constitutional issue. *See, e.g.*, 122 So. 3d at 451 (Benton, J., concurring in result) ("Not a single judge now maintains that either

[5] The *Westphal* case is currently before the Florida Supreme Court. *See* Docket, Fla. Supreme Court Case No. SC13-1930. Mr. Westphal's counsel of record is also counsel for Intervenor Elsa Padgett in this case. *See id.* Intervenors FWA and WILG already are participating as amici in that case as well as in *Castellanos v. Next Door Co.*, Case No. SC 13-2082. In both cases, FWA and WILG have submitted briefs making the same constitutional arguments that they assert here as part of the now-dismissed count IV. *See Castellanos v. Next Door Co.*, Case No. SC13-2082, Br. of Amicus FWA in Support of Pet., Br. of Amicus WILG in Support of Pet.; *Westphal v. City of St. Petersburg*, Case No. SC13-1930, Br. of Amicus FWA in Support of Pet., Br. of Amicus WILG in Support of Pet. The intervenors therefore apparently believe their claims can be resolved in those cases, making them unable to assert that there is a "present practical need for the declaration" they seek here. *See supra* Section I.C. (To be sure, the Attorney General does not believe that the intervenors in the pending Florida Supreme Court cases can add new issues or claims there, just as they cannot here.)

[6] *Compare, e.g.*, Am. Mot. for Summ. J. at 8-11 (arguing that changes from 1970 to 2003 cumulatively render the law unconstitutional), *with* Br. of Fla. Workers' Advocates, Amicus Curiae, In Support of Appellant, No. 1D12-3563 (Fla. 1st DCA Apr. 24, 2013), at 8-19 (same, citing changes from 1993 to 2003).

[interpretation] is unconstitutional."). Nor did any judge find it necessary to apply *Kluger* or to entertain FWA's argument.

The First DCA correctly found no constitutional issue because workers' compensation benefits have always been limited, and a change to benefits is within the Legislature's prerogative. In 1968, and well before then, the workers' compensation system was designed to "provide employees *limited* medical and wage loss benefits, without regard to fault . . . in exchange for the employee relinquishing his or her right to [sue in tort]." *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 89 (Fla. 2005) (emphasis supplied); *see also Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982), *approved,* 440 So. 2d 1282 (Fla. 1983) ("Worker's compensation is a classic example of a statute which terminated [a] common law remedy, but replaced it with a more efficient, *if not as potentially lucrative,* remedy . . . .") (emphasis supplied). The Florida Supreme Court has long recognized that, where the legislature merely changes the elements of damage that a claimant can recover, rather than eliminating the cause of action, it acts within its "legislative prerogative." *White*, 323 So. 2d at 575 (finding that right of recovery for wrongful death was not abolished, despite amendment prohibiting recovery for certain damages by heirs who are not decedent's next of kin). The intervenors provide no reason for this Court to depart from the approach the en banc First DCA took just last fall.

C. Even if Intervenors Raised a Cognizable Access to Courts Challenge, the Workers' Compensation Framework Would Remain a Reasonable Alternative.

Even if this Court were to conclude that the Legislature has abolished a right and were to apply *Kluger*, the workers' compensation framework would satisfy that case's two-part test: Under *Kluger*, an access to courts claim fails where the Legislature *either* i) "authorizes a reasonable alternative for the redress of injuries," *or* ii) "demonstrate[s] an overpowering public necessity for abolishing such a right." *Berman*, 91 So. 3d at 878 (citing *Kluger*, 281 So. 2d at 4).

Florida's workers' compensation law satisfies both prongs, either of which is independently sufficient to establish that it is constitutional.

Regarding the first prong—whether the workers' compensation framework is a reasonable alternative for the redress of injuries—intervenors cannot escape the fact that courts have consistently found the law to be a reasonable alternative to a tort suit, both before and after the 2003 amendments that take center stage in their arguments. *See* Am. Mot. for Summ. J. at 19. Indeed, the now-vacated panel decision in *Westphal* is the only decision finding a constitutional issue based on a change to benefits, and the en banc opinion made it clear less than a year ago that the statute raises no constitutional issue. The intervenors identify four main changes or studies. *See id.* at 8-9 (citing repeal of opt-out right in 1970 and switch from contributory to comparative negligence regime in 1973); *id.* at 23-24 (citing reduction of temporary disability benefits limit to 104 weeks, which occurred in 1993); *id.* at 10 (citing removal of some benefits for partial disability in 2003); *id.* at 22 (arguing that study established that workers' compensation system was inadequate as of 1972). Courts have turned aside challenges to the workers' compensation framework after every single one of these. Indeed, *Kluger* itself, which cites the workers' compensation framework as an example of a reasonable alternative, *see* 281 So. 2d at 4, was decided after all but two of these changes. *Martinez v. Scanlan*, decided in 1991, likewise post-dates most of the changes, and was only one in a string of cases where the Florida Supreme Court rejected access to courts challenges based on workers' compensation benefit reductions.[7] Courts have continued to hold the workers' compensation law constitutional after the 2003 amendments to the law.[8]

[7] 582 So. 2d 1167, 1171 (Fla. 1991) (rejecting access to courts claim because "[a]lthough [the 1990 workers' compensation amendments] undoubtedly reduce[] benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation"); *see also id.*

Even if the weight of authority were not squarely against intervenors' arguments, their constitutional challenge would still fail because the essential trade-off underlying the workers' compensation framework continues to be a reasonable alternative to preexisting rights. Just as they have since the introduction of workers' compensation, workers obtain a no-fault regime, streamlined recovery, medical care, and certainty—all in exchange for traditional tort remedies. While some individual workers may be worse off with workers' compensation in a particular instance, others benefit greatly, and the Court must consider whether workers as a whole have received a reasonable alternative to their pre-existing rights. *See, e.g.*, *Acton*, 440 So. 2d at 1284. The Florida Supreme Court, as recently as last year, stressed the need to view a statutory system as a whole in an access to courts challenge, and has emphasized the importance of a no-fault regime. *See Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 921 (Fla. 2013) ("The [Florida Birth-Related Neurological Injury Compensation] Plan as a whole—including the parental award provision—provides an alternative remedy to the uncertain and

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("This Court previously has rejected claims that workers' compensation laws violate access to courts by failing to provide a reasonable alternative to common-law tort remedies.") (citing *Newton v. McCotter Motors, Inc.*, 475 So. 2d 230 (Fla. 1985) (provision limiting death benefits); *Sasso v. Ram Prop. Mgmt.*, 52 So. 2d 932 (Fla. 1984) (cutting off benefits at age 65); *Acton*, 440 So. 2d 1282 (limiting benefits for partial disability claimants); *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981) (repealing right to bring lawsuit for coworker negligence)). The First DCA has upheld the statute many more times. *See, e.g.*, *Mahoney v. Sears, Roebuck & Co.*, 419 So. 2d 754 (Fla. 1st DCA 1982), *approved*, 440 So. 2d 1285 (Fla. 1983) (rejecting challenge even though claimant would have recovered nine times more under prior version of law).

[8] *See Berman*, 91 So. 3d 875; *cf. Westphal*, 122 So. 3d 440; *Punsky v. Clay Cnty. Bd. of Cnty. Comm'rs*, 60 So. 3d 1088, 1092 (Fla. 1st DCA 2011) (rejecting access to courts claim because of claimant's failure to develop record). An access to courts challenge to the workers' compensation framework has succeeded in only two instances, neither of which related to straightforward benefit reductions. *See De Ayala*, 543 So. 2d at 207 (invalidating provision restricting death benefits based on nonresident alien beneficiaries' national origin); *Sunspan Eng'g & Constr. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4, 7-8 (Fla. 1975) (invalidating preclusion of third-party plaintiffs/alleged tortfeasors' common law tort actions against employers).

speculative compensation parents might receive through traditional tort remedies.").[9] The intervenors attempt to downplay the significance of a no-fault regime, but they cannot deny that it provides valuable benefits to claimants, who avoid the expense, delay, and uncertainty of litigation. For decades, courts have recognized the value of this trade-off and have found the workers' compensation law is a reasonable alternative to preexisting rights. This Court should do the same.

D. Independently, the Amendments to the Workers Compensation Framework Would Satisfy Kluger's Compelling Need Test.

The workers' compensation framework also satisfies *Kluger*'s second, independent test because each of the most recent changes intervenors cite—occurring in 1993 and 2003—was designed to meet an overpowering public need.

The 1993 legislation, which reduced temporary disability benefits to 104 weeks, followed extensive study, and was passed during a special session to address a crisis facing the workers' compensation system. *See* ch. 93-415, Laws of Fla. The Legislature found a compelling need for reform to address skyrocketing insurance and health care costs. *Id.*, Preamble (setting forth legislative findings, including findings of a "financial crisis in the workers' compensation insurance industry," and that "the magnitude of these compelling economic problems demands immediate, dramatic, and comprehensive legislative action"). These findings are presumptively correct and entitled to great weight. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 196-97 (Fla. 1993).

[9] The fact that courts must review the statute as a whole answers any attempt by intervenors to distinguish the prior cases upholding the law, *see, e.g.*, *supra* notes 7 & 8, because they involved an individual claimant with an individual benefit at issue. Moreover, the fact that every one of these cases arose in such a posture only highlights the jurisdictional flaws in the intervenors' attempted claims. *See supra* Part I.

In 2003, the Legislature again faced an economic situation demanding comprehensive action. The Senate Staff Analysis detailed a compelling need for reform. As the analysis showed, Florida suffered from some of the highest insurance costs in the country, and premiums only continued to increase:

> In 2000, Florida had the highest premiums in the country, and in 2001, Florida was ranked second only to California. Some workers' compensation carriers have indicated that they are not issuing new policies, renewing policies, or are tightening their underwriting requirements in response to a downturn in the economy and uncertainties in the market place. Reinsurers are restricting the types of coverage they will write and have increased rates, which has adversely impacted the carriers. For 2002, the Department of Insurance (department) authorized a 2.7 percent increase in rates, and subsequently, in 2003, the Office of Insurance Regulation approved a 13.7 percent increase.

Fla. S. Comm. on Banking & Ins. SB50-A (2003) Staff Analysis 3 (May 20, 2013). The Analysis examined the drivers for these high costs, specifically identifying "[h]igh medical costs for permanent partial disability (PPD) claims—nearly two times higher than the national average." *Id.* at 7.

The intervenors have not shown that the problems these changes addressed failed to present an overwhelming public need, despite their burden to demonstrate constitutional invalidity "beyond reasonable doubt." *See Crist*, 978 So. 2d at 139. Consequently, their claim fails under *Kluger*.

E. Intervenors' Fourteenth Amendment Arguments Fail for the Same Reasons as Do Their Kluger *Arguments.*

The intervenors' argument that the workers' compensation framework violates the Fourteenth Amendment is based on an overreading of dicta in *N.Y. Central Railroad v. White*, 243 U.S. 188 (1917), and it merely restates their access to courts argument. Because the Legislature provided a reasonable alternative to a tort suit, the law would provide a "significant"

benefit, even if that were the test. *See supra* Part II.C. But it is not true that the Fourteenth Amendment requires a state's workers' compensation act to provide a "significant" alternative to a tort suit. *White*'s sole mention of the "significance" of benefits is in dicta, where the Court stated that its holding did not mean that *any* benefit framework, "however insignificant," could pass muster, and expressly stated that the adequacy of benefits was not at issue in the case. 243 U.S. at 205-06. The *White* Court did not purport to create a substantive standard for workers' compensation laws. Even if it had, the Supreme Court has long since abandoned the substantive due process approach used in *White* and does not evaluate economic legislation for its substance. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

CONCLUSION

For the reasons stated above, this Court should deny the amended summary judgment motion as moot. Alternately, on the merits, the Court should dismiss their constitutional challenge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this fourth day of August, 2014, a true copy of the foregoing response was filed electronically with the Clerk of Court through the Florida Courts eFiling Portal, which shall serve electronically a notification of said filing to counsel of record listed on the attached service list and constitute compliance with the service requirements of rule 2.516, Florida Rules of Judicial Administration.

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